

Should Alternative Dispute Resolution Mechanisms Be Mandatory? Rethinking Access to Court and Civil Adjudication in an Age of Austerity*

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In England, the civil justice system is undergoing a fundamental transformation: due to austerity policies, dispute resolution is being increasingly privatised and civil trials are “vanishing”. How can the role and functions of judicial adjudication be protected in this scenario? This brief article aims at addressing this issue. I will first proceed by identifying the purposes of the public adjudication. Then, after having considered what I call the ‘public’ element in private dispute resolution, I will advance and justify a proposal for a renewed role for courts. By considering recent developments in the English case law, I will (quite provocatively) argue that ADR should be mandatory and should be the normal modality to solve private disputes, while judges should decide cases only under certain circumstances. Overall, in this article I aim to offer some talking points for further discussion on the impact of ADR in England and to stimulate afresh theoretical debate over the rarely-evaluated implications of the privatisation of civil justice.

INTRODUCTION

This article is concerned with what I believe to be one of the most significant legal revolutions of our days, that is the ‘privatisation’ of civil justice or – as some

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scholars more colourfully say – the ‘vanishing’ of civil trials.¹ Not only disputes are increasingly resolved prior to formal adjudication through mediation, negotiation or other out-of-court mechanisms, but fewer and fewer private law cases are coming to judges’ desks. While this revolution is occurring in many jurisdictions around the world, public civil processes are mostly disappearing in common law jurisdictions, and particularly in England and Wales – especially after the so-called ‘Woolf and Jackson reforms’ (that took effect respectively in 1999 and in 2013), whose overriding objectives were avoiding litigation and promoting settlement between parties in dispute.² According to recent data, for example, from 2006 to 2011, there has been a 24 percent decline in the total number of proceedings issued by the Queen’s Bench Division of the High Court, and a 26 percent decline in the Chancery Division. County Courts as well are experiencing the same downward trend.³ Even more startlingly, in the United States during the 1930s, about 20 percent of federal civil cases went to trial, and by 2012 the number sunk to 1.2, and this decrease has affected state courts too.⁴

Although the ADR revolution has been investigated from a wide array of perspectives, it has not sufficiently been interrogated from the point of view of its implications for the legal system considered in its entirety. Yet, the privatisation of the civil justice system raises some important questions that concern every system ruled by law: could we simply get rid *harmlessly* of a public, State-run system of adjudicating private disputes? Can private settlements purely replace the authoritative statements of rights, duties and obligations by judges? What consequences, if any, are there for the law and the legal order as we know it?

Before even attempting to respond to these questions, it seems necessary to investigate what is, or are, the purpose(s) of public adjudication in ruled-by-law societies. More specifically, as I will argue, a certain amount of court litigation, and thus adjudication by judges, is not only a positive thing, but an essential one (a) to ensure the orderly and coherent development of legal rules and (b) to provide guidance for future actions (and deterring wrongful behaviour). If those are the core functions, or purposes, of legal adjudication, I think that the real issue at stake

¹ Professor Dame Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2009) and by the same scholar ‘Why The Privatisation of Civil Justice is a Rule of Law Issue.’ (2012) 36th F.A. Mann Lecture (available at <https://www.ucl.ac.uk/laws/sites/laws/files/36th-f-a-mann-lecture-19.11.12-professor-hazel-genn.pdf>). See also Robert Dingwall, Emilie Cloatre, ‘Vanishing Trials: an English Perspective’ (2006) 1 *Journal of Dispute Resolution* 51. This topic has initially been investigated by United States scholars. See e.g. the entire special issue of the *Journal of Empirical Legal Studies*, titled ‘The Vanishing Trial’, 2004. See also P L Murray, ‘Privatization of Civil Justice’ (2007) 15 *Willamette Journal of International Law and Dispute Resolution* 133.

² John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press 2014). See also David Neuberger, ‘A New Approach to Justice: From Woolf to Jackson’ in G. Meggitt (eds), *Civil Justice Reform – What has it Achieved?* (Sweet & Maxwell, 2010).

³ Genn (n 1).

⁴ John Langbein, ‘The Disappearance of Civil Trial in the United States’ (2012) 122 *Yale Law Journal* 522.

here is how to guarantee – in our age of austerity and in today's economic climate - the overall ‘sustainability’ of a system of judicial adjudication as to ensure it serves society at large. In economic terms: adjudication by courts is at once a *public good* and a *limited resource*, and as such it must be allocated properly.

This concern is deeply felt. As Lord Woolf stressed in his final report of the civil justice system, in order to “preserve access to justice for all users of the system, it is necessary to ensure that individual users do not use more of the system’s resources than their case requires. This means that the court must consider the effect of their choice on other users of the system”.⁷ Cost-benefit analysis plays then a great role in the civil justice system too.

The key question here is: how cases could (and should) be selected, as to guarantee that only the most relevant or the most “deserving” ones will reach the adjudicative stage and possess, therefore, a full precedential potential? Which ones, conversely, should be left to be decided out of courts by private decision-makers (arbitrators, mediators, and the like)? And most importantly, what does it even mean, for a legal case, to be “more deserving” to be publicly decided than another one? As Professor Carrie Menkel-Meadow put it bluntly: “the more fruitful inquiry is to ask under what circumstances adjudication is more appropriate than settlement, or vice-versa. In short, when settlement?”⁸

One way to solve this problem would be to establish some forms of monetary thresholds, as to make sure that only claims that worth more than a certain amount of money will be decided by public, full-time judges, while lower claims are left to be decided in other venues. Lord Justice Briggs’ recent proposal must be read against this ideological backdrop. In his Final Report on the Civil Courts Structure Review (27 July 2016) he proposed to create an online court for claim with an amount in controversy less than £25,000, that has conciliation and case-management by “case officers” (who are obviously not judges) as its distinctive features.⁹

Critically speaking, I am very sceptical of this line of reasoning. Indeed, even in low value civil claims there may be some important or complex legal questions

⁷ Lord Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London 1996), 24.

⁸ Carrie Menkel-Meadow, ‘For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference’ (1985) 33 University of California Los Angeles Law Review 485, 498.

⁹ Available at <https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/>. For an earlier project, see the *Online Dispute Resolution for Low Value Claims* from the Civil Justice Council Online Dispute Resolution Advisory Group, available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>. On the growing impact of technology on dispute resolution and the ODR (online dispute resolution) mechanisms, see the Birkenhead lecture delivered by Professor Hazel Genn, *Online Courts and the Future of Justice* (Gray’s Inn, 16 October 2017) available at https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_gen_n_final_version.pdf.

that merit to be discussed and resolved publicly for the benefit of the legal community, while conversely there is no guarantee that a claim involving a large amount of money possesses *per se* those features.

For my part, therefore, I believe that another solution is possible. In this article, I attempt to advance a provocative argument. By taking into account recent developments in the English case law (and distancing myself from the common view), I argue, quite paradoxically, that in order to defend and preserve the core functions of civil trials, ADR should be mandatory and the normal modality to solve private disputes. Conversely, public courts should decide cases only when *appropriate*, i.e. when the case at stake offers an opportunity (a) to revise the existing law or create a new rule or (b) to further clarify the meaning of a certain rule in a specific circumstance and thus deterring future wrongful behaviour under those specific circumstances. From a theoretical viewpoint, this view entails, among other things,¹⁰ a reconceptualisation of the notion of access to court, understood not as an unfettered right, but as a conditioned one, as long as it is permitted by the courts themselves, according to the above-mentioned criteria.

My article will unfold as follows. In the first part, I will lay down the present situation, stressing its deep significance for our legal systems. In part II, I will proceed by identifying the purposes of the public adjudicative function of judges when deciding civil cases. Then, after having considered what I call the ‘public’ element in private dispute resolution, I will advance and justify my proposal for a renewed role for courts.

Overall, I hope in this article to offer some talking points for further discussion on the impact of ADR within common law legal orders and to provoke and stimulate afresh theoretical debate over the rarely-evaluated implications of the privatisation of civil justice.

I. THE PRIVATISATION OF CIVIL JUSTICE AND ITS SIGNIFICANCE

The reasons for the astonishing growth of ADR devices and the consequent decline of public adjudication in civil matters have been the subject of intense academic debate. The origins of this paradigmatic shift are well-rooted in the ground of dominant, ideological discourses. Since the mid-end of 1980s public trials have been commonly said to be costly, time-consuming, emotionally stressful and ultimately unsatisfactory, while ADR mechanisms (arbitration, mediation, negotiation, collaborative law, and the like) have been promoted and encouraged as a cure, or “panacea”, for whatever disease the court system was suffering

¹⁰ The de-formalisation of justice through private processes inevitably changes not only the *quantity*, but also the *quality* and the nature of justice that is provided. See Debbie De Girolamo, ‘Sen, Justice and the Private Realm of Dispute Resolution’ (2017) International Journal of Law in Context (accessed online). Before, David Luban, ‘Quality of Justice’ (1988) 66 Denver University Law Review 381, 402.

from.¹¹ The narrative according to which out-of-court instruments are more desirable than authoritative judicial determinations has been readily endorsed by policy-makers and governments. Thus, mediation, negotiation and collaborative practices more generally have been promoted through various waves of legal reforms having the clear (although often unsaid) purpose of diverting disputes away from courtrooms and placing them outside the public sphere.¹²

Moreover, effective from the austerity-induced public spending cuts in our post-crisis world, this narrative is vital more than ever.¹³

From a purely empirical viewpoint, I am persuaded that this phenomenon should be contextualised in a broader framework, and should be understood as the product of the current ‘failing faith’ not only in legal procedures in solving our problems, but also in the law more generally, and even in the State as an institution. As the Italian legal scholar Nicola Picardi pointed out, the ongoing crisis of the State’s monopoly in resolving disputes is first and foremost a consequence of the larger crisis of the State itself.¹⁴ It reflects a much profound turn from, or even *against*, law and formal legality towards more informal, flexible and participative devices. It is, thus, no coincidence that the legal thinkers who have dealt with the “vanishing trial” phenomenon link it to the end of “legal centralism”¹⁵ and speak of an “erosion” of substantive law,¹⁶ “erasure” of rights¹⁷ and, in rather apocalyptic terms, of the “end” of law.¹⁸

This change seems hardly reversible. The outsourcing of the resolution of private disputes is nothing but another instance of the numerous devolutions of State responsibility to private actors, caused by the adoption of neoliberal policies, and there are no signs that the trend towards further privatisation of services will move backwards.¹⁹ Legal thinkers and lawmakers should then understand this

¹¹ I steal this word from Harry T Edwards, ‘Alternative Dispute Resolution: Panacea or Anathema?’ (1986) 99 *Harvard Law Review* 668.

¹² David Luban, ‘Settlement and the Erosion of Public Realm’ (1995) 83 *Georgetown Law Journal* 2619.

¹³ John Sorabji, ‘Austerity’s Effect on English Civil Justice’ (2015) *Erasmus Law Review* (accessed online). For a more general discourse, see Husnain Nasim, ‘Economic Austerity, Human Rights and Judicial Deference: A Case for a More Rigorous Judicial Role’ (2016) 1 *London School of Economics Law Review* 32.

¹⁴ Nicola Picardi, *La giurisdizione all’alba del terzo millennio* (Milan 2007). For wider considerations on this issue, see also F Carpi, ‘La metamorfosi del monopolio statale sulla giurisdizione’ (2016) *Rivista Trimestrale di Diritto e Procedura Civile* 811.

¹⁵ Marc Galanter, ‘The Turn Against Law: The Recoil Against Expanding Accountability’ (2002) 81 *Texas Law Review* 285.

¹⁶ J Maria Glover, ‘Disappearing Claims and the Erosion of Substantive Law’ (2015) 124 *The Yale Law Journal* 3052.

¹⁷ Judith Resnick, ‘Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights’ (2015) 124 *The Yale Law Journal* 2804.

¹⁸ Debra Lyn Bassett, R Perschbacher, ‘The End of Law’ (2004) 84 *Boston University Law Review* 1.

¹⁹ For a discussion see John Gardner, ‘The Evil of Privatization’, unpublished, but available on www.ssrn.com. See also A J Cohen, ‘Dispute Systems Design, Neoliberalism, and the Problem of Scale’, (2009) 14 *Harvard Negotiation Law Review* 51.

state of affairs, its implications and try to understand how to overcome and fix, if possible, its main pitfalls and unintended negative consequences.

In the words of Sir Ernest Ryder:

“Austerity, the product of the 2007-2008 financial crisis, provides a basis upon which we have had to scrutinise the ways in which we secure the rule of law and the citizen’s access to justice as part of that. It provides the spur to rethink our approach from first principles. As such we should not see austerity as the driver of reform. It is not a question of cutting our cloth. It is a question of austerity forcing us to do what it took fifty years of failure in the 1800s to do: look at our systems, our procedures, our courts and tribunals, and ask whether they are the best they can be, and if not how they can be improved.”²⁰

II. THE FUNCTIONS OF CIVIL ADJUDICATION

A. Adjudication and Legal Evolution

Before turning to this issue, I start by briefly examining what are, from a theoretical viewpoint, the general purposes of a system of public adjudication of civil disputes.

As I argued elsewhere,²¹ as a matter of general fact, two closely-linked, essential functions of civil courts can be identified. Firstly, the pronouncements of judges enable the law not only to evolve, but to do so in a coherent and consistent manner. Secondly, previously-issued judicial determinations allow potential claimants to fully understand in advance (that is before going before a court of law) the current state of the law and therefore their rights and obligations.

My first argument – which I associate, for example, with Professor Hazel Genn in England,²² and Professors Owen Fiss²³ and Judith Resnick²⁴ in the United States – is that a legal system in which every private dispute would be resolved by

²⁰ The Rt. Hon. Sir Ernest Ryder, ‘The Modernisation of Access to Justice in Times of Austerity’, 5th Annual Ryder Lecture: the University of Bolton (3 March 2016) available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf>, point 5.

²¹ Carlo Vittorio Giabardo, ‘Private Law in the Age of the Vanishing Trial’ in K Barker, K. Fairweather and R. Grantham (eds) *Private Law in the 21st Century* (Hart Publisher, Oxford 2017) 547, 551.

²² Genn (n 1) 18. See also Hazel Genn, ‘What Is Civil Justice For? Reform, ADR and Access to Justice’ (2012) 24 Yale Journal of Law and Humanities 397.

²³ Owen Fiss, ‘Against Settlement’ (1984) 93 The Yale Law Journal 1073. For a more balanced assessment of those views, cfr. A J Cohen, ‘Against Settlement: Twenty-Five Years Later Revisiting against Settlement: Some Reflections on Dispute Resolution and Public Values’ (2009) 78 Fordham Law Review 1143.

²⁴ Judith Resnik, ‘Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts’ (2004) 1 Journal of Empirical Legal Studies 783.

confidential settlements outside the court is prevented from evolving. Law is not a fixed system, but has to constantly evolve to match the changing needs and expectations of society. Public judicial decisions, along with acts of Parliaments, are a driving force of legal change – and this is startlingly evident in common law jurisdictions. More in detail, this rule-producing activity of the judiciary is twofold. The first one is, so to say, backward-looking. In this very first sense, the judiciary performs a law-making activity in developing private law to ensure that it responds to fast-paced social changes that have already occurred in our complex societies. The second one is forward-looking.²⁵ In this second sense, courts not only *respond* to social changes, but they also *promote* and encourage them. They have to, or ought to, recognise and accommodate new forms of interest, to create a more effective and updated range of remedies, and so on. They often do this by taking into account those “social facts” that help them to interpret “adjudicative facts”, or that set the context for the judgment. In this view, courts ought to be – as the Australian Judge Ronald Sackville dubbed them – “instigators” of social change.²⁶

Now, it is evident that legal evolution, although important, would be fruitless if occurs haphazardly. It is thus necessarily up to judges to design a coherent legal framework in which the different areas of law can develop in accordance with their most well-established principles.

What I want to draw attention to here is that only cases that proceed to litigation give judges the occasion to develop the law in the way just described – the only one that is able to safeguard the coherence of the legal order. It is a self-evident claim that courts can create, innovate, extend and reconfigure legal rules and rights only if they are given the possibility to do so, namely if civil cases reach the adjudicative stage and if judges formally decide them on their merits. As Professor Hazel Genn has provocatively asked: how would modern English tort law had been if Mrs Donoghue had settled her case out of the court?²⁷

We must then acknowledge that the (private) choice of the parties whether to settle or litigate a case has an enormous (public) impact on the whole dynamic of law, as it influences its path and can push it in new directions.

B. Adjudication and the Meaning of Law

A further argument also needs to be considered. Judicial adjudication has also the function to improve the ability of citizens to understand their rights and obligations, and thus to make them able to orient their behaviour. From this viewpoint, the judicial dispute resolution activity carried out by public judges

²⁵ On this topic, see Thomas Bingham, ‘The Judge as Lawmaker: An English Perspective’ in *The Business of Judging: Selected Essays and Speeches* (Oxford, Oxford University Press, 2002). See also M Arder (eds), *Common Law and Modern Society: Keeping Pace with Change* (Oxford, Oxford University Press, 2015).

²⁶ Ronald Sackville ‘Courts and Social Change’ (2005) *Federal Law Review* 373.

²⁷ Genn (n 1) 22, referring to the path-breaking decision *Donoghue v Stevenson* [1932] AC 562 (HL) that has for the first time set out a general common law duty of care.

should be understood as an endless process of clarification of legal materials. Interpretations of rules made by previous judges must be seen as part of a larger pattern, from which other judges can reason and interpret in order to refine, revise and, why not, change them.²⁸ As Ronald Dworkin beautifully described, law resembles a never-ending, constantly refined book composed by several co-authors taking turns one after another.²⁹

Ernest Weinrib, the well-known private law theorist, recently stressed this function of the civil process:

“The adjudication [of liability] manifests both publicness and systematicity. First, a court exercises its authority in a public manner by exhibiting justifications for liability that are accessible to public reason. Juridical concepts, such as property and contract, form the basis for a process of reasoning that is open to all and that is applied to factual evidence which, on reasonable investigation, can be openly produced and made patent to all. Opacity or secrecy at any point is a legitimate ground for criticism [...]. Second, the court’s decision partakes of the systematicity of the entire legal order.”³⁰

And later he went on,

“Within the institutional context of the court, those rights and duties as well as the principles that are used to articulate their meaning in particular circumstances constitute a domain of public reason.”³¹

In this perspective, court-based adjudication is to be understood as the process by which judges express authoritatively in the open air and in the light of day the meaning of legal texts, and what the law requires, especially in those areas of the law where the meaning of principles and rules is vague, dubious or discussed. By delivering publicly their judgments, judges produce outcomes that belong to the public debate, and can therefore be used by other judges, lawyers and scholars to construct a coherent corpus of legal doctrine.

III. THE PUBLIC ELEMENT IN PRIVATE DISPUTE RESOLUTION

That said, we might well conclude that courts bear a public responsibility to develop the law (when they consider just it to do so) and to clarify, for the benefit

²⁸ Peter Jaffey, ‘Authority in the Common Law’ (2011) 36 Australian Journal of Legal Philosophy 1.

²⁹ Ronald Dworkin, ‘Law as Interpretation’ (1982) 60 Texas Law Review 527.

³⁰ Ernest J Weinrib, ‘Private Law and Public Right’ (2011) 61 University of Toronto Law Journal, 191, 197.

³¹ *ibid* 198.

of the community, the meaning of certain legal rules in particular circumstances, that is when they reckon that this might have a certain utility in guiding future people's actions and/or deterring wrongful behaviour. Such an activity clearly goes well beyond the interests of the parties, and it has public value.³²

This concept has been stressed jointly by Australian judges Gleeson CJ, Gummow, Hayne and Heydon JJ in the case *D'Orta-Ekenaike v Victoria Legal Aid*:

“Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, concerns of the particular parties to the controversy in question, be they private persons, corporations, polities or the community as personified in the Crown [...]. No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And, that is why reference to the "judicial branch of government" is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed.”³³

This aspect is what I consider to be the “public” element in private dispute resolution. Ancient Roman law scholars expressed this idea by articulating the dichotomy between ‘*ius litigatoris*’ and ‘*ius constitutionis*’, that it is still widely used (in Italy, for example) to describe the powers and functions of Supreme Courts, or courts of last instance more generally. ‘*Ius litigatoris*’ (literally, ‘the right of the party at dispute’) refers to the protection of individual rights in courts, while ‘*ius constitutionis*’ refers to the protection of the legal system considered in its entirety, regardless of the interests involved – and this should be the function of Supreme Courts. By adopting this language, I would say that, in my view, the whole judicial adjudication system is called to protect the ‘*ius constitutionis*’, and only indirectly the ‘*ius litigatoris*’. The civil process is something more than the procedure through which individuals’ rights and obligations are established. It is something different from merely affirming who is right and who is wrong, or just a means to keep social peace. It is *primarily* an occasion for the law to develop itself.

As David Luban put it, from this public viewpoint, “litigants” are “a stimulus for refining the law” and this is “a legitimate public interest”.³⁴

The point I want to emphasise here is that not every private conflict is a driving force for legal change or an opportunity to clarify existing laws. Not every dispute between individuals has this potential. I endorse here the concept of “process pluralism”. According to this doctrine, different types of conflict require

³² Linda Mulcahy, ‘The Collective Interest in Private Dispute Resolution’ (2013) 33 Oxford Journal of Legal Studies 59.

³³ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 16.

³⁴ Luban (n 10) 2638.

different types of solutions and even different types of justice (redistributive vs. retributive, compensatory vs. punitive, and so on). Not every dispute should be handled in the same way. Procedures should be adapted to the circumstances of the particular case at stake. In this view, championed, for example, among others, by Professor Carrie Menkel-Meadow, in the ADR formula the “A” does not stand for “alternative” but rather for “appropriate” dispute resolution.³⁵

Accordingly, only disputes that possess a ‘public significance’ (see *infra*) should be decided by public courts, while others should be left to out-of-court resolutions. As Michael Moffitt points out: “litigation fulfils its public function best if it is not called upon as the method of resolving every kind of dispute”.³⁶

This consideration leads me to my conclusion.

IV. SHOULD ADR BE MANDATORY? RETHINKING THE ROLE OF COURTS

Is there possibly a criterion, or a set of criteria, that might be employed in order to decide whether a case possesses a ‘public significance’ and should be decided by a public court or should be left to private decision-makers?

I advance here a provocative (and debatable) solution. First of all, as I see it, the relationship between ADR schemes and judicial litigation should be *inverted*. Settlement must be the default dispute resolution process, while litigation the alternative. ADR should be the rule, and judicial adjudication the exception. More precisely, in this view, ADR should be mandatory unless the dispute at stake (regardless of its monetary value) would offer the court the opportunity (a) to improve, refine or update an existing legal rule or principle, or even to create a new one (if allowed by the considered legal system), or (b) to further clarify the meaning of the legal rule or standard as applied to certain specific circumstances that, for their high social significance, might be helpful in order to provide guidance in the future or deterring wrongful behaviour (for instance, when a similar case has never arisen before). In both cases, these judgments should have a strong precedent-setting potential. Besides, for the public function they are vested with, courts must always have the possibility to decide afresh the case when (c) the settlement reached is grossly unfair or unjust (upon request of the losing party). Conversely, parties have a right to bring their own case to court only if they believe their claim possesses one of the above-mentioned features. But they do not have a full right to have their case heard and decided on their merit if the court thinks differently. Courts, in other words, should retain the discretion to dismiss

³⁵ Carrie Menkel-Meadow (n. 6) 485: “When an authoritative ruling is necessary, I believe Fiss is right—the courts must adjudicate and provide clear guidance for all.” See also Matthew Brunsdon-Tully, *There is an A in ADR but does anyone know what it means any more?* (2009) 28 Civil Justice Quarterly 218.

³⁶ Michael Moffitt, ‘Three Things to Be Against (“Settlement” Not Included)’ (2009) 78 Fordham Law Review 1203, 1212.

a case where, in their own opinion, the claim does not offer any sufficient *public* reasons to be judicially decided.

Two theoretical consequences of the idea here briefly outlined are worth considering.

One the one hand, this view challenges the dogma of the voluntary nature of ADR. Albeit quite radical, this is not a totally novel approach. In many jurisdictions, free consent of ADR – although rhetorically valued in theory – is downplayed in practice.³⁷ For example, in England and Wales mediation is often delivered under the threat of the court's power to penalise the party who unreasonably resists the invitation to mediate. Costs may be imposed even on the winning party whose consent to mediation is considered to have been withheld unreasonably (according to criteria such as the nature of the dispute, the merit of the case, the extent to which other settlement methods have been attempted, whether the costs of the ADR process would have been disproportionately high, whether the ADR process had a reasonable prospect of success, and so on, see *Halsey v Milton Keynes General NHS Trust*³⁸). In a landmark decision,³⁹ the Court of Appeal has ruled that the defendant's silence in the face of two offers to mediate amounted to an unreasonable refusal to mediate, deserving a monetary sanction. In this view, silence in the face of an invitation to participate in ADR is *per se* unreasonable, regardless whether this refusal might have been justified on other reasonable grounds. In the words of Lord Justice Briggs "...this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation". If the winning party has unreasonably refused to mediate, then the court can make an appropriate reduction in its award of costs. If the losing party has unreasonably failed to mediate, the court could order her to pay a sum of money as indemnity costs (*Reid v Buckinghamshire Healthcare NHS Trust*⁴⁰). More recently, the Court of Appeal took a step further. In *Thakker v Patel*⁴¹ the Court required the parties' constructive engagement, which means that both parties should mandatorily cooperate and be proactive in the arrangement of the mediation. It seems to be that all these claims are somehow "deceitful" in the sense that they fail to state openly what they really mean. As it has been recently said, the voluntariness of mediation is often nothing but a "façade", backed by

³⁷ Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31 Civil Justice Quarterly 151; S Shipman, 'Compulsory Mediation: the Elephant in the Room' (2011) 30 Civil Justice Quarterly 163.

³⁸ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

³⁹ *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 WLR 1386. See G Meggitt, 'PGF II SA v OMFS Co and Compulsory Mediation' (2014) 33(3) Civil Justice Quarterly 335. See also R (*on application of Paul Crawford*) v The University of Newcastle Upon Tyne, [2014] EWHC 1197.

⁴⁰ [2015] EWHC B21.

⁴¹ [2017] EWCA Civ 117.

rhetorical means.⁴² It is clear that when both parties are pushed to (unwillingly) mediate to avoid possible costs penalties, mediation can *already* be easily considered a quasi-compulsory means.

On the other hand, the idea of rendering ADR mandatory constraints the right of access to court in order to ensure that only *right* and *appropriate* cases are judicially decided on their merit. This could count as a breach of art. 6(1) of the European Convention of Human Rights (ECHR), that provides: “[I]n the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.⁴³ Regardless of the hotly-discussed question whether the ECHR should remain applicable in England after Brexit, this does not seem too big an obstacle. Indeed, the right to access to a court is never unfettered. There are always procedural rules or legal and/or empirical restrictions that limits the possibility of bringing potential claim to court. As the European Court of Human Rights has since long expressly recognised, the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of the individuals”, and “in laying down such regulation, the Contracting States enjoy a certain margin of appreciation”.⁴⁴ What matters is that the limitations do not restrict the access to court in such a way that the very essence of the right would be impaired. The private interest to access courts should always be balanced with the public interest of the correct and proper functioning of state institutions. Therefore, this potential violation would be balanced by the fact that only by setting a limited and rationally-justified number of circumstances that legitimise a public decision it would be realistically possible to safeguard the functions of adjudication in our age of austerity. In this view, access to court is not denied, but limited to those cases in which there may be a public interest in the development and clarification of the law.

⁴² Debbie De Girolamo, ‘Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation Without Conviction in England and Wales’ (2016) 35 *Civil Justice Quarterly* 162 “There seems to be a desire by the English courts and government to continue under a façade which holds to the view that compulsory mediation is not appropriate for England and Wales. However, the rules and pre-action protocols of their civil justice system, the statements made by the judiciary in cases and speeches, and the actions of government all point to a regime that seeks to do indirectly what it feels it should not do directly.”

⁴³ Lorna McGregor, ‘Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach Through the ECHR’ (2015) 26 *European Journal of International Law*, 607.

⁴⁴ *Ashingdane v United Kingdom* (1985) Series A no 93, para. 57.