Private Justice: The Privatisation of Dispute Resolution and the Crisis of Law

Dr Carlo V. Giabardo*

Abstract

We are experiencing a major revolution in the way in which disputes between individuals are resolved. Almost everywhere civil justice is being privatised and court adjudication is disappearing. Private conflicts are less and less decided by judges sitting in courtrooms, through a fair trial and according to law, and are more and more resolved out-of-court with the help of decision-facilitators through settlements and agreements. Despite the unquestioned importance of this global tendency, its most theoretical dimensions have woefully attracted very little attention. How does this radical and structural change affect the way we look at, and think of, the law? How is this revolution transforming, or even disarticulating, our ideas of legality and justice? This article aims to set the background for further discussion of these issues and provide a tentative answer to these questions. It does so by critically looking at some of the rhetorical arguments deployed by ADR advocates (with a focus on the English legal system) and investigating from a theoretical viewpoint how they potentially threaten our traditional views (a) on the role legal rules are expected to play in societies and (b) on the concept of formal justice and its corollaries.

Keywords

Dispute Resolution, ADR, Mediation, Rule of Law, Legal Formalism

I. INTRODUCTION

If one asked "what is the most significant event of the last decades in the field of civil dispute resolution?": one could easily answer its privatisation. We have seen an ongoing replacement of a public system of adjudication with various private Alternative Dispute Resolution ("ADR") forms as the main modality to solve conflicts between individuals. To date, this tendency is not confined to a single jurisdiction or to a single area of the world but is happening almost everywhere: the United States, England and Wales, all the major common law states, the

*Juan de la Cierva' Postdoctoral Research Fellow in Law, University of Girona, Càtedra de Cultura Juridica. ORCID ID: 0000-0002-7993-6762.

European Union and continental countries, almost without exception, are all moving towards a system in which litigation and court adjudication are a means of last resort.

More specifically, this paper looks through a critical lens at the practice of mediation and other mechanisms whose aim is to favour, in domestic legal disputes, out-of-court settlements (hereinafter, "settlement-oriented means"). The attention, in other words, will be focused upon those dispute resolution services that are commonly dubbed as "autonomous", namely in which the parties themselves are called to end the case by virtue of their agreement (emblematically, mediation and conciliation) as contrasted with the ones called "heteronomous", in the sense that they involve, unlike the former, an authoritative decision, made by a third person (hence the "heteronomy"), that is binding irrespectively of the will and/or satisfaction of the parties, and that is the result of the application of the law (such as court litigation and arbitration).[1] Therefore, the practice of arbitration, although undeniably a means alternative to court adjudication, falls outside the scope of this article. Indeed, arbitrators act like private judges.[2]

Notwithstanding the undisputed importance of mediation and other settlement-oriented means for the practice of law globally, the side-effects of this paradigmatic change on the capacity of the law effectively to orient human behaviour and people's ability to predict in advance the legal consequences of their actions in case of a controversy have been rarely put under critical scrutiny by legal philosophers. Yet the "mediation revolution", understood as the contemporary insistence upon the benefits of settlement to the detriment of court adjudication, might modify our way of understanding and thinking about law, legality, and justice.

The aim of this article is to present and analyse some of these side-effects and implications. It will do so by considering critically the dominant discourse that emphasises the advantages of private and secret settlements while ignoring the importance of an open system of civil courts and of public judicial determinations for the Rule of Law – i.e., what I call the "pro-ADR, anti-adjudication rhetoric".

This rhetoric has a profound, far-reaching theoretical dimension that is rarely fleshed out. It conveys precise ideas on the place that the law has to occupy in society and on what "doing justice" means, and it communicates them in an appealing way. The problem is that they might possibly be at odds with the way the law as we know it is to function. More specifically, I argue that the settlement rhetoric tends to push people away not only from courts, but from law as such. Settlement-oriented means, as I argue, are not only alternative to trial, but - more crucially – they are an alternative to law. Their distinctive feature is that they solve disputes not through the law, but through compromise. This loss of the centrality of law and thus formal justice, I suggest, undermines the law's capacity to orientate cogently our behaviour and even calls into question some of the basic tenets of the Rule of Law.

This article unfolds as follows: Firstly (Part II) the general global trend towards the privatisation of dispute resolution will be presented and the main arguments of the "pro-ADR

[1] This distinction is quite common in the continental scholarship. See, e.g., in the Italian legal literature, Francesco P Luiso, 'Giustizia alternativa o alternativa alla giustizia?' (2011) Il giusto processo civile 325, who qualifies the "autonomous" means of dispute resolution as an "alternative *to* justice", while arbitration as an "alternative justice".

[2] Lon L Fuller, 'Collective Bargaining and the Arbitrator' in Mark L Kahn (ed) Collective Bargaining and the Arbitrator's Role (BNA Incorporated 1962) 8: 29: 'Mediation and arbitration have distinct purposes and hence different moralities. The morality of mediation lies in the optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract'. In the case law, see *O'Callaghan v Coral Racing*, [1998] EWCA Civ 1801, where arbitration is described (Hirst LJ) as 'a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law.'

rhetoric" will be unpacked. Attention will be focused not on the institutional or normative aspects of ADR, but rather upon the most philosophically salient arguments of that rhetoric. The question tackled is: what idea of law and justice does the ADR rhetoric support? In the following part (Part III) I will briefly take a look at how this rhetoric works in practice considering the English legal landscape and case law. I will then proceed to explain (Part IV) - from a conceptual viewpoint - the relationship between a system of courts and the Rule of Law. Building on the works of Professor Hazel Genn (and specifically on her article 'Why the Privatisation of Civil Justice is a Rule of Law Issue') and of other contemporary critics of the "vanishing" of civil trials, this Part demonstrates how courts' determinations on the merits of cases contribute to a healthy functioning legal system. In an attempt to counter-balance the common wisdom according to which trials are something that should be avoided almost at all costs, while settlement is a "panacea"[3], attention will be paid to the fact that public civil processes do perform crucial functions in our ruled-by-law societies and are essential in maintaining the law effective and apace with societal changes. In the final Parts (Parts V and VI) I will argue that the crisis of court adjudication is, more profoundly, part of the larger crisis of law. The point is that in the "settlement rhetoric", which emphasises parties' autonomy and their liberation from the constraints and limitations of formalism, legal rules and their normative force are rejected. Moreover, this means an implicit rejection of the concept of general, abstract justice in favour of an individualised resolution at one end and, at the other, a rejection of the values: (1) of legal certainty (narrowly considered as the capacity to predict how a hypothetical dispute might end) and (2) equality of treatment, as embodied in the maxim "treat like cases alike".

Overall, and on a more general level, I hope to stimulate further discussion on the theoretical side of dispute resolution, understood in its broader sense.

II. THE ALTERNATIVE DISPUTE RESOLUTION REVOLUTION AND ITS "ANTI-ADJUDICATION" RHETORIC

Public discourse plays a central role in law reform initiatives. As a general matter, the language in which a certain social problem is institutionally presented and publicly discussed not only changes people's perceptions and reorients their behaviours but also serves as a justification to law and policy makers for the pursuit of their political agendas. The way in which words are used by officials to address a problem or communicate prospective solutions contributes to the identification of the relevant goals and means necessary to achieve them and to the construction of the priorities and instruments that seem to provide a suitable answer to them.

Civil justice reforms provide good examples of how this dynamic works in practice. Indeed, it is hardly deniable that over the past twenty years, at a global level, countless reforms, initiatives, projects, and proposals sought to encourage the resolution of domestic private disputes through various forms of alternative, consensual and confidential settlement-oriented mechanisms (such as, in England and Wales, mediation, negotiation, roundtable meetings, conciliations, and the like) while, at the same time, discouraging people from going to court. This tendency has affected especially the two major common law jurisdictions: Professor Hazel

[3] This word echoes the article by Harry T. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' [1986] Harvard Law Rev. 668.

Genn, in England and Wales, calls it a "privatisation of civil justice"[4] while Professor Marc Galanter, in the United States, calls it the "vanishing of civil trials".[5] These two expressions capture two different faces of the same phenomenon: the dismantling of a public-funded and openly-accessible system of court (the vanishing of civil trials) and the concomitant outsourcing of dispute resolution to private decision-makers or, more rightly, to settlement-facilitators (the privatisation of civil justice). This transformation, however, is not confined to these two jurisdictions. Similar trends also exist in other common law countries (such as Canada,[6] Australia,[7] Singapore[8]) favouring extra-judicial means of dispute resolution. This is now a priority of current civil justice policies at European level and domestically in continental legal systems too.[9]

The author would like to draw attention to a number of developments that have been accompanied everywhere by a quasi-official anti-adjudication and pro-ADR rhetoric. I will, hereinafter, use the word "rhetoric" without any negative connotations – by that I simply mean a set of narrative practices, words, expressions, "a way of telling things" that usually tends to represent court litigation in a negative light (i.e., negative for individuals and for society) while at the same time characterising settlement-oriented means positively (i.e., positive not only for those who embark upon them but for the legal system in its entirety).[10] The reality, however, seems much more complex than that.

This anti-adjudication narrative has, therefore, served to prepare and then justify a wave of reforms having the clear goal of diverting private disputes away from the "public realm".[11] Many scholars have pointed out that at the root of this discourse lies the pervasive ideology of neoliberalism,[12] with its emphasis on austerity and the need to save public money.[13]

Of course, criticism on how civil justice operates is neither new, nor a solely English phenomenon. It is common to find criticism of the way in which public courts function in various jurisdictions across the globe. Portrayed as time-consuming, costly, stressful, even traumatic, complex, and ultimately uncertain and unpredictable, civil adjudication seems to possess only negative features. It cannot be denied that some of its detrimental aspects are untrue or groundless. Some aspects are consequences of inefficiencies or historical contingencies, but

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[4] Dame Hazel Genn 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (19 November 2012) 36th FA Mann Lecture, <https://www.ucl.ac.uk/laws/sites/laws/files/36th-f-a-mann-lecture-19.11.12-professor-hazel-genn.pdf > ; Id., *Judging Civil Justice* (CUP 2009) 45 – 69; Id., 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2013) 24 Yale JL & the Hum 397.

[5] See the whole issue of the 'Journal of Empirical Legal Studies' (2004) titled 'The Vanishing Trial' and specifically Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' ibid 459; Id., 'The Hundred-Year Decline of Trials and the Thirty Years War' (2005) 57 Stanford L Rev 1255. More recently, Judith Resnik, 'The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75' (2014) 162 University of Pennsylvania L Rev 1793; John Langbein, 'The Disappearance of Civil Trial in the United States' (2012) 122 Yale LJ 522.

[6] Trevor CW Farrow, Civil Justice, Privatisation, and Democracy (Toronto UP 2014).

[7] Judge Wayne S Martin 'Alternative Dispute Resolution – A Misnomer?' (Perth 6 March 2018) <https://www.supremecourt.wa.gov.au/_> 3.

[8] Masood Ahmed and Dorcas Quek Anderson, 'Expanding the Scope of Dispute Resolution and Access to Justice' (2019) 38 CJQ 1 (assessing comparatively courts' encouragement of ADR between England and Wales and Singapore).

[9] See, e.g., the Directive 2013/11/UE on ADR for consumer disputes, the Regulation 2013/524/UE, on Online Dispute Resolution for consumer disputes, and the Directive 2008/52/CE/ on mediation that applies to cross-border disputes in civil and commercial matters.

[10] The existence and intensity of this anti-adjudication rhetoric as a global phenomenon is well described by Genn (n 4) 11 – 15; Id., What Is Civil Justice For (n 4) 412. On the political influence this rhetoric has had in shaping the U.S. legal system, see, very critically, Laura Nader, 'The ADR Explosion - The Implications of Rhetoric in Legal Reform' (1988) 8 Windsor Y B Access Just 269.

[11] David Luban, 'Settlements and the Erosion of the Public Realm,' (1995) 83 Georgetown LJ 2619. For a response, Carrie Menkel-Meadow, 'Whose Dispute is Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)' (1995) 83 Georgetown LJ 2663. Compare also Debbie De Girolamo, 'Sen, Justice and the Private Realm of Dispute Resolution' (2007) Journal of Law in Context (accessed online).

[12] For a general discourse on how neoliberalism impacts justice policies, in French, Antoine Garapon, *La Raison du moindre État: Le néolibéralisme et la justice* (Odile Jacob 2010).

[13] John Sorabji, 'Austerity Effect on English Civil Justice' (2015) 4 Erasmus Law Review 159. See also A Higgins, 'The Costs of Civil Justice and Who Pays?' (2017) 37 OJLS 687.

some of them are just inevitable. Going to court has never been a pleasant experience[14]. What is new today, however, is the *quality* and, so to say, the *visibility* of these compliances. Indeed, nowadays, this anti-adjudication and pro-ADR rhetoric has become, to some extent public, official and dominant. Paradoxically, this rhetoric is endorsed and supported by the legal system itself through its major exponents and is present within the public framework. Law and policymakers, leading judicial figures, governmental institutions, judges, and legal practitioners all seem to contribute to this picture.

What, then, is the appeal of a settlement-oriented means? Let us put aside budgetary considerations (which are not philosophically significant, at least for the purposes of my argument) and instead concentrate on the values that ADR promote. Specifically, this rhetoric insists on two distinctive but conceptually intertwined features that would render mediation and settlement different and better at once than court adjudication.

The first one (1) relates to the procedure and the other (2) to the content of the final outcome.

(1) Settlement-oriented services – their proponents say - unlike adjudication, are based on the principles of self-determination, self-fulfilment, and autonomy and thus foster people's empowerment[15]. What these expressions exactly mean might not always be clear but, by and large, they all emphasise the fact that in those processes the solution of the conflict is not imposed from the top-down: litigants themselves, although to different degrees, are required to become the decision makers of their own case. In doing so, parties must move closer to a shared point. One of the virtues of settlement that is often stressed is that it enables human beings to "reconnect". Lon Fuller's classic formulation of mediation is that type of process that possesses the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another" and that "enables the parties to work out their own rules".[16] In this sense, settlement-oriented means claim a sort of *moral superiority* in the way a solution is reached, compared to court proceedings.[17]

(2) As a consequence of this, settlement is said to be capable of eventually providing a better, "warmer" type of justice[18]. The quality of justice those means promise to deliver is not only different, but better than the one achieved through the application of formal rules (i.e. justice according to law, see *infra*, Part VI). Indeed, settlement enables parties to construct together their own outcome irrespective of what the substantive rules of the law might say on a certain point (if not otherwise unlawful). In settlements, formal substantive rules are nothing but one factor, albeit an important one, among many to be taken into consideration to end the

[14] It is always startling to see how the very same complaints about delay and costs were also made more than three hundred years ago: "Every man complains of the horrible delays in matters of justice (…). The remedy is worse than the disease (…). A man must spend above £ 10 to recover £ 5" (as reported by Sir Tom Bingham, *The Rule of Law* (Penguin 2011) 86 quoting John Cook, '*Unum Necessarium*: or, the Poor Man's Case' (1648) 66).

[15] Robert A Baruch Bush and Joseph P Folger, 'Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination' (2015) 16 Cardozo J Conflict Resol 741, 742: "For ourselves and the colleagues we've worked with for many years, our first premise has always been that self-determination, or what we call empowerment, is the central and supreme value of mediation"; Robert A Baruch Bush, 'Taking Self-Determination Seriously: The Centrality of Empowerment' in Joseph P Folger, Robert A Baruch Bush and Dorothy J. Della Noce (eds), *Transformative Mediation: A Sourcebook* (Belfast 2010) 51. Generally Robert A Baruch Bush and Joseph P Folger, 'The Promise of Mediation: Responding to Conflict Through Empowerment And Recognition' (Jossey – Bass 1994). See also Joshua D Rosenberg, 'In Defense of Mediation' (1991) 33 Ariz L Rev 467.

[16] Lon L Fuller, 'Mediation - Its Forms and Functions' (1971) 44 S Cal L Rev 305 – 326.

[17] Arthur Miller, 'Morality and Compromise' J Roland Pennock, John W Chapman (eds) *Compromise in Ethics, Law, and Politics* (1979) 63.

[18] David N Smith, 'A Warmer Way of Disputing: Mediation and Conciliation' (1978) 26 The Am J Comp L 205.

dispute[19]. This does not mean that parties' autonomy is absolute, in the sense that they are legally allowed to contract out of mandatory rules or, more generally, to overcome the rules that protect public order or public policy. What is meant is that, even without exiting the borders of what is legally permissible and what is not, parties can still "go beyond" what a judge would have been obliged to decide in a court of law in that very same case. This already somehow constitutes an "opting out" solution that the law has foreseen in advance in case of conflict. As Jules Coleman and Charles Silver pointed out in their critical study on 'Justice in Settlements', one of the very specificities of settlement agreements is that they "bind parties irrespective of the legal validity of a plaintiff's claim, that is, regardless of the outcome that would have been reached or ought to have been reached at trial",[20] whereas by "legal validity" it is simply meant the "meritoriousness" of the claimant's claim, considered from a purely legal viewpoint. Not to mention, on another note, the possibility - that cannot be totally excluded on a *de facto* level, as Coleman and Silver themselves warn - that parties might choose to solve a conflict through a solution that is legally forbidden, i.e. contrary to mandatory rules and public policies, and this would probably go unnoticed. It is true that such a settlement would not be enforceable in a court of law, but it is also true that, as they point out, "after a settlement is approved, the parties to it will raise the issue of its acceptability only if one of them thinks it is worthwhile to begin the trial of the dispute anew".[21]

In any case, settlement supporters insist very strongly on the fact that with the help of skilled mediators and conciliators, who are free from the shackles of rigid, black-and-white legal norms that judges would otherwise be obliged to apply, parties can discover creative and "win-win" solutions and craft party-tailored remedies.[22] The "poverty of imagination" of the law (that by its very nature offers only a single solution to a single legal issue for everyone) is often blamed and dubbed as inherently inferior. Settlement – as Lon Fuller says - liberates parties "from the encumbrances of rules" and enables them to find a mutually-acceptable solution "without the aid of formal prescription laid down in advance".[23] This is the virtue of mediation. In this lies its inherent "morality". In this sense, ADR is a way out from the injustices caused by legal formalism. It is, therefore, not surprising that a parallel is often drawn between the practice of settlement and the concept of Equity and equitable remedies as developed to soften the duress of the Common Law.[24] Settlement, as Equity was, is an expression of "the most human side of law".[25] Therefore, at a closer look, settlement-oriented services are not only means that

[19] Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LJ 950. For further discussion, Russel Korokbin, 'The Role of Law in Settlement' in Michael M Moffit, Robert C Bordone (eds) *The Handbook of Dispute Resolution* (Jossey – Bass 2005) 254.
[20] J Coleman, C Silver, 'Justice in Settlements' (1986) Soc Phil & Pol 102: 106 – 107.
[21] J Coleman, C. Silver (n 20) 113 (paragraph titled "Agreements contrary to public policy").
[22] On the legal creativity of ADR forms, and for an emphasis on the fact that courts of law have, by definition, "limited remedial imaginations", see Carrie Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?' (2001) 6 Harvard Negotiation Law Rev 97, and Id., 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) 31 University College Los Angeles L Rev 754.
[23] Fuller (n 16) 325 – 326.
[24] Thomas O Main, 'ADR: The New Equity?' (2005) University of Cincinnati L Rev 329; Jacqueline Nolan-Haley, 'Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent? (2018) 33 Ohio St J Disp Res 1: 2 according to which ADR processes 'would give parties the opportunity to create their own mosaic of justice, personalized and individualized justice, not unlike the fairness remedies that equity courts had historically provided'; Id., 'The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound' (2004) 6 Cardozo J of Disp Res 57. However, it should be clear that this parallelism is for simplicity's sake only. For, historically, Equity acted only if the remedies available at law were inadequate, while settlement contains no such limitation (for this clarification, Id., 'Court Mediation and the Search for Justice Through Law' (1996) Washington Un L Quart 47: 84, footnote 178).
[25] This point is clearly made by the Italian legal philosopher Eligio Resta in his book about 'brotherly law'; Eligio Resta, *Diritto fraterno* (Laterza 2004, 69 - 95).

contend to be alternative to adjudication but, more profoundly, that contend to be alternative *to law.*[26].

I am not concerned here in assessing whether these assumptions are empirically true or false, or impartial or biased, nor do I want to debunk them[27]. What I want to draw attention to is, rather, the fact that ADR speaks a radically different language of legality and justice that could be potentially disruptive for the way we are used to think of law so far.

III. A LOOK AT THE ENGLISH LEGAL SYSTEM

The anti-adjudication, pro-ADR rhetoric briefly sketched in the previous Part is a reality in English legal culture. To illustrate, let me take as an emblematic example of how this rhetoric works in practice - the recent Final Report on Alternative Dispute Resolution released on December 2018 by the ADR Working Group of the Civil Justice Council.[28] This Report - an official, publicly available document coming from a governmental institution - is certainly symptomatic of the rhetorical turn against civil trial described above.

By and large, the Report describes each type of settlement-promoting service available, such as mediation, roundtable meetings, negotiation, judicial and private neutral evaluation, conciliation, and ombudsmen processes. But it is hard to say that it does so in a purely descriptive manner. For instance, let us consider the brief description of mediation – the most important of settlement-oriented forms of ADR (see section 3, paragraph 3): "Mediation is flexible, massively successful and consistently surprises professionals and parties alike in its ability to achieve settlements where the parties appear implacably opposed". The language used is highly evocative. This is followed by a list of its primary characteristics (3.5.). It is highlighted, e.g., that mediation "suits the dispute and the parties" (point b) and that "parties have a genuine opportunity to participate as fully as they wish in inter-party exchanges" (point c). Not a single word is spent in stressing the drawbacks and risks of mediation or the positive aspects or functions of court litigation (and of the pronouncements made by public judges).

After all, the explicit goal of the Report is to promote and encourage as much as possible ADR services, but without making them explicitly mandatory. Indeed, at the outset (paragraph 2.6, titled "Court/Government encouragement of ADR"), the document laments that: "The Rules [i.e., the Civil Procedure Rules] and the case law have to date been too generous to those who ignore ADR and in our unanimous view under-estimate the potential benefits of ADR", and later on: "we propose earlier and more stringent encouragement of ADR in case management: there should be a *perception* that formal ADR *must* be attempted before a trial can be made available; we should explore the possibility of applying sanctions for unreasonable conduct that make sense at the interim stage".

It should be noted that English courts are not generous at all to those who refuse to engage in ADR, and it is even difficult to imagine how they could act more severely without

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[26] For this explicit conclusion, see Raúl Calvo Soler and Jordi Ferrer Beltrán, 'Gli ADR nel diritto: uno sguardo giusfilosofico' in Vincenzo Varano, *L'altra giustizia. I metodi alternativi di soluzione delle controversie nel diritto comparato* (Giuffrè 2007) 107.

[27] Professor Hazel Genn, e.g., has offered an alternative view. In fact, after considering various mediation programmes in London, she has highlighted that in the vast majority of claims people do not seek to repair their relationships, nor the vast majority of settlements involve judicial creativity, nor provide something different from what would be available in courts, since they simply involve a transfer of money. In all these, and many other, cases, settlement is simply just a discount of the initial claim; and this is, obviously, contrary to substantive justice. Hazel Genn, *Central London Pilot Evaluation Scheme, Evaluation Report* (1998) 71 (quoted and reported also in Id., What Is Civil Justice For? (n 4) 405).

[28] Available at https://www.judiciary.uk/announcements/new-report-on-alternative-dispute-resolution/ (last accessed, 29 April 2020).

making settlement explicitly mandatory. Judges can already impose significant costs penalties not only on the losing party who has refused to settle a claim, but even on the winning party at dispute whose consent to mediation had previously been withheld unreasonably (and thus reversing the traditional rule according to which costs follow the event, i.e. the loser party pays the winner's costs).

Fifteen years ago, in the well-known case *Halsey v Milton Keynes NHS Trust*, the Court of Appeal, while rejecting the idea of compelling parties to mediate, established six non-exclusive factors that could render a refusal to mediate, even by the subsequently successful litigant, unreasonable (so called *Halsey* criteria).[29] They are: (a) the nature of the dispute; (b) the merit of the case; (c) the extent to which other forms of ADR have been attempted; (d), whether the costs of ADR would be disproportionately high; (e) whether any delay in setting up and attending ADR would have been prejudicial, and (f) whether ADR had a reasonable prospect of success.[30]

This ruling has been furthered in the case *PGF II SA v OMFS Company 1 Limited*, in which the Court of Appeal specified that failure to reply to an offer to mediate (i.e., by simply declining to respond to the invitation) is to be considered, under normal circumstances, as unreasonable, regardless of the reasons the party might have had.[31] In short, parties have a duty to respond promptly and to engage actively with a serious invitation to participate in ADR "even if they have reasons which might justify a refusal".[32]

As Lord Briggs put is in a following ruling (*Thakkar v Patel*):

> "The message which this court sent out in *PGF II* was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed (…). If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction."[33]

Moreover, parties must seriously explore the possibility to settle the case through the entire litigation process, even though engaging in mediation might not appear to be appropriate at the time the invitation was made, as confirmed in *Shakir Ali & another v Channel 5 Broadcast Ltd.*[34]

Even from this brief, and certainly insufficient, account of the English case law on this point, it is clear that mediation is not totally voluntary in practice. Yet, the official rhetoric, at least in the English legal system, strongly affirms that ADR services are not, and will never be, legally mandatory before issuing proceedings (as they are in many other jurisdictions, such as,

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[29] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576.

[30] In reality, this ruling is said to have established a lower threshold than previous English case law (see, for instance *Dunnett v. Railtrack* [2002] EWCA (Civ.). Indeed, the reference in Halsey to 'the merit of the case' implies that that a party who has refused to mediate acts reasonably if s/he has a 'reasonable belief' to win the case.

[31] *PGF II SA v. OMFS Company 1 Limited* [2013] EWCA (Civ) 1288; [2014] 1 WLR 1386. As Lord Briggs stated, '*silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable'.* Gary Meggitt, 'PGF II SA v OMFS Co and Compulsory Mediation' (2014) 33(3) CJQ 335.

[32] *PGF v OMFS, 2013* (n 31) para 56.

[33] *Thakkar v Patel [2017] EWCA Civ 117* at [31]. In this case both the claimant and the defendant had initially expressed enthusiasm for mediation, but while the claimant had actively pursued it, the defendant had 'dragged her feet' and delayed. See, however, the divergent decision issued some months later, *Gore v Naheed and Anor* [2017] EWCA Civ 369, in which the court stated that failure to engage in mediation, even if unreasonable, will not automatically result in a costs penalty. As Lord Justice Patten said, 'speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated'. For a comprehensive view, see Masood Ahmed, 'Mediation: The Need for a United, Clear and Consistent Judicial Voice: Thakkar v Patel [2017] EWCA Civ 117: Gore v Naheed [2017] EWCA Civ 369' (2018) Civil Justice Quarterly, 1.

[34] *Shakir Ali & another v Channel 5 Broadcast Ltd* [2018] EWHC 840 (Ch). On this decision, see the comment by Masood Ahmed, *The Law Society Gazette* (15 October 2018) <https://www.lawgazette.co.uk/legal-updates/adr-dialogue-and-costs/5067940.article>.

for example, Italy)[35] and it is often stated that the court has not, and will never have, the power to force people into mediation.[36] This approach translates as a sort of hypocrisy in the fact that free consent to mediate, while valued in theory, is downplayed in practice.[37]

The Report seems to continue along this line of thought. As it has been noted before, it literally says that there should be a *perception* that ADR *must* (not simply "should") be attempted before the trial. The words used in this sentence are important: what counts, finally, is the *perception* that ADR is, *de facto*, compulsory, or quasi compulsory means. In the end, it seems that all the rhetorical means employed seek to obtain culturally what cannot be stated explicitly or achieved through more powerful coercive means[38].

IV. THE PRIVATISATION OF CIVIL JUSTICE AS A THREAT TO THE RULE OF LAW AND THE VIRTUES OF ADJUDICATION

All this has important theoretical consequences. Many legal theorists have explicitly underlined that there is a close link between a functioning system of public courts and the Rule of Law ("RoL").

For example, famously, for Joseph Raz the principles of the RoL demand that: "the independence of the judiciary must be guaranteed" (number four) and that "the courts should be easily accessible" (number seven).[39] His fourth *desideratum* of the RoL – the most relevant for our purposes – reads:

> "It is of the essence of municipal legal systems that they institute judicial bodies charged, among other things, with the duty of applying the law to cases brought before them and whose judgments and conclusions as to the legal merits of those cases are final. Since just about any matter arising under any law can be subject to a conclusive court judgment, it is obvious that it is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons. The point can be put even more strongly. Since the court's judgment establishes conclusively what is the law in the case before it, the litigants can be guided by law only if the judges apply the law correctly. Otherwise people will only be able to be guided by their guesses as to what the courts are likely to do - but these guesses will not be based on the law but on other considerations."[40]

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[35] As a consequence of the implementation of the EU Directive 2008/52/CE. See, in Italian, G. Balena, 'Mediazione obbligatoria e processo' (2011) Giusto Processo Civile 333. For completeness' sake, it should be said that mandatory mediation has been ruled as unconstitutional by the Italian Constitutional Court (Judgment n. 272, 6th December 2012) but then has been re-introduced again in its mandatory form. For a comment on mandatory mediation in Europe, in English, see Jacqueline M Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation' (2012) 37 North Carolina Journal of Law and Commercial Regulation 981.

[36] https://www.lawgazette.co.uk/law/you-cant-force-people-into-mediation-society-spells-out-adr-wishes/5064591.article (last accessed, 29 April 2020).

[37] This phenomenon is not only occurring in the English law but in many other jurisdictions, although to different degrees. For a comparative discussion, Jacqueline Nolan-Haley, 'Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?' (2018) 33 Ohio St J of Disp Res 373.

[38] Debbie De Girolamo, 'Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation Without Conviction in England and Wales' (2016) 35 (2) CJQ 162; Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31 CJQ 151.

[39] Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 L Quarterly Rev 195; 200, 201. Id., The Institutional Nature of Law, in his *The Authority of the Law*, Oxford, 1979, 103, at 105; John Gardner, The Virtue of Justice and the Character of Law, in his *Law as a Leap of Faith* (OUP 2012) 238; 257, commenting on Raz's work: 'the presence of courts turns out to be more crucial to the existence of a legal system than the presence of any other institutions. One may have a legal system with no legislature and no police force and no legal professions – that is a purely customary legal system – but one has no legal system at all until one has courts; i.e. adjudicative institutions charged with administering a system of rules by which they themselves are bound'.

[40] Raz, *The Rule of Law* (n 39) 217.

Professor Jeremy Waldron has also stressed the importance of courts and formal procedures as essential elements for any legal system that aims to comply with the ideal of the RoL. For him, without courts and the rules of civil procedure, it would be impossible to speak of a "legal system" in the fullest sense. In his own words:

> "For my part, I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts, I mean institutions which apply norms and directives established in the name of the whole society to individual cases and which settle disputes about the application of those norms. And I mean institutions which do that through the medium of hearings, formal events which are tightly structured procedurally in order to enable an impartial to determine the rights and responsibilities of particular persons fairly and effectively after hearing evidence and argument from both sides."[41]

Rightly, it is often underlined that, for the RoL, it is not sufficient that a system of courts is established (and is accessible, efficient, etc.) but also that it dispenses justice publicly and openly – which is a feature ADR services, of course, do not possess. Lord Neuberger, President of the UK Supreme Court, has emphasised this point:

> "The rule of law requires that any persons with a bona fide reasonable legal claim must have an effective means of having that claim considered, and, if it is justified, being satisfied, and that any persons facing a claim must have an effective means of defending themselves. And the rule of law also requires that, save to the extent that it would involve a denial of justice, the determination of any such claim is carried out in public. So citizens must have access to the courts to have their claims, and their defences, determined by judges in public according to the law (…). Courts exist to resolve disputes, and also to vindicate rights – and to do so in public."[42]

This very same argument about publicity and open justice is also made, among others, by William Twining, in England,[43] and Judith Resnik, in the United States.[44]

There is, therefore, little doubt, at least from a conceptual viewpoint, that for the RoL to exist there must be an accessible and public system of courts, which decides publicly rights and obligations according to law and through a fair trial. It would, therefore, follow that a legal system, or even a part of it, where dispute resolution is nearly completely privatised, that is where controversies are *almost entirely* solved through settlement-oriented procedures and not through the court's determinations on the merits – a "world without trials" as Professor Marc

[41] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E Fleming (ed) Getting to the Rule of Law (NYUP 2011) 3; see also Id., 'The Concept and the Rule of Law' (2008) 43 Georgia L Rev 1; 6, 'courts hearings, and arguments are aspects of law which are not optional extras; they are integral part of how law works'.

[42] Lord Neuberger, 'Justice in an Age of Austerity' (2013) Tom Sargant Memorial Lecture available at https://www.supremecourt.uk/docs/speech-131015.pdf.

[43] See William L Twining, 'Theories of Litigation, Procedure and Dispute Settlement' (1993) 56 Modern L Rev 384: "Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial".

[44] Professor Judith Resnik has since long explored this concept, basing her ideas upon the work of Jeremy Bentham (and particularly on his *Rationale of Judicial Evidence*, 1827). See Judith Resnik, The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain), in Burkhard Hess, Ana Koprivica Harvey (eds.), *Open Justice. The Role of Courts in a Democratic Society*, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Nomos, 2019, 177; Id., 'Bring Back Bentham: Open Courts, Terror Trials and Public Spheres' (2011) 5 Law & Ethics of Human Rights 226; Id., 'The Democracy in Courts: Jeremy Bentham, 'Publicity', and the Privatization of Process in the Twenty-First Century' (2013) 10 No Foundations: An Interdisciplinary Journal of Law & Justice 77 <http://www.helsinki.fi/nofo/NoFo10RESNIK.pdf>.

Galanter says[45] - is arguably at odds with RoL basic requirements. But in what sense? What exactly would be lost, in such a world?[46] This is surely a large question and it can be tackled from various perspectives.

Some opponents of the anti-adjudication rhetoric criticise the privatisation of justice indirectly, by underlining instead what good functions public adjudication performs in democratic societies (the virtues of adjudication). This is the approach adopted, for instance, by Professor Alexandra Lahav in her book provocatively entitled *In Praise of Litigation*, where she characterises (and with many good reasons) litigation and adjudication by courts as democracy-promoting institutions.[47] For example, she argues that public legal processes foster transparency by revealing relevant information and enabling public scrutiny over certain controversies that may be of public interest[48] (so, in a world without trials, many important facts would be simply out of public sight and not critically discussed).[49] Furthermore, by permitting people to take part directly in the law making and law enforcement processes (both as parties and as jurors, as happens in the United States, where civil juries still persist), the ritual of adjudication enables public participation in the administration of justice[50]. Presumably, in a world without trials public confidence in justice would be eroded and the distance between citizens and the law would grow bigger.

Of course, those are all important social functions of adjudication, but nonetheless I am not concerned with them here. As I see it, those are purposes that, while certainly valuable *per se*, are, so to say, *extrinsic* to the legal order strictly considered. The exigencies to guarantee public oversight over justice and public matters, or to implement judicial democracy or - we may add - to facilitate economic activities, and so on, are broader political goals that for sure are part of the RoL, but do not regard directly the legal system considered *per se* and its content. Rather, the contributions of civil adjudication to the RoL that interest me most are those that operate, so to say, inside the legal system and whose beneficial effects irradiate *within* and *for* the legal system. How does the existence of public processes serve the healthy functioning of the law?

Professor Hazel Genn has explicitly argued that the privatisation of civil dispute resolution poses a threat to the RoL[51]. Among her many arguments, I want to emphasise specifically the ones related to the values and functions of precedents, and how the loss of them could undermine our ability to predict the legal consequences of our future behaviour, and thus the capacity of law to provide an effective guidance – which is indisputably a basic pillar of the RoL.[52] As she points out:

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[45] Marc Galanter, 'A World Without Trials' (2006) 7 Journal of Dispute Resolution 7.

[46] Robert P Burns, 'What Will We Lose if Trial Vanishes?' (2011) 37 Ohio Northern Un L Review 575.

[47] Alexandra Lahav, *In Praise of Litigation* (OUP 2017). The aim of her analysis is to render explicit «the contribution of litigation to democracy» (at 6). Compare Id., 'The Role of Litigation in American Democracy' (2016) 65 Emory LJ 1657.

[48] Lahav, *In Praise* (n 47) 56 (Chapter titled 'The Power of Information').

[49] Judith Resnik, 'Courts: In and Out of Sight, Site, and Cite' (2008) Villanova L Rev 771. For a general philosophical foundation of the publicity principle in democracies, see David Luban (not surprisingly himself a harsh critic of the privatisation of dispute resolution), 'The Publicity Principle' in Robert E Goodin (ed) *The Theory of Institutional Design* (CUP1998) 154.

[50] Lahav, In Praise (n 47) 84 (chapter entitled 'Participation in Self-Government').

[51] Genn (n 4). For a similar stance, compare the 'classic' article by Owen Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073. I say 'classic' because this article has fostered a huge debate in and outside the United States academia over the pros and cons of ADR. See the collection of essays for the Seminar, held in 2009 at Fordham University, titled 'Against Settlement, Twenty-Five Years Later', (2009) 78 Fordham LR (all publicly available at <http://fordhamlawreview.org/symposiumcategory/emagainst-settlement-em-twenty-five-years-later/>. See also Judith Resnik, 'For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication' (2003) 58 University Miami L Rev 173.

[52] This argument has been recently made, in relation to arbitration and international commercial law, also by Lord Thomas of Cwmgiedd, 'Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration', The Bailii Lecture 2016 (9 March 2016), available at https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf (last accessed, 30 April 2020). In his speech it is stated (p. 9, par. 22): 'The effect of the diminishing number of appeals compounds the problem that arises from the diversion of more claims from the courts to arbitration. It reduces the

> "Trials provide the opportunity for the courts to articulate the law, which is valuable for its own sake… But equally importantly, in efficiency terms, trials can reduce the number of future lawsuits by clarifying the law".[53]

She continues:

> "It is inevitable that increasing privatisation will lead to fewer precedents and the gradual erosion of the common law… In this respect private law, and particularly commercial law, are especially vulnerable… So while public law precedent continues to thrive and develop, private law may weaken or wither. An elaborated granular body of rules in common law system offers guidance on how to ascertain legal risks."[54]

From these excerpts we understand that, especially in domestic litigation, public judicial determinations on the merits of cases perform two functions which are crucial for the RoL: they contribute to the clarification of existing legal norms in particular cases (so that future litigants, by reading previous decisions, will know in advance how to behave in similar situations) and they contribute to the development of the law, when required, through the judicial public creation of new rules that fit new situations and facts before them, so as to meet the changing expectations of society.[55]

What ought to be clarified is that although these arguments have been employed specifically in relation to common law countries (where the judicial development of the law is a distinctive characteristic),[56] my point is that they are equally as true and applicable to civil law jurisdictions, even if the doctrine of *stare decisis* does not apply. As a matter of general fact, indeed, the distinction based upon the binding effect of precedents, on the one side, and their mere persuasive force, on the other, has long been contested by highlighting how civilian courts, in current times, tend to follow precedents more than thought.[57] More importantly, it can be seen very clearly that also in traditional continental jurisdictions whole areas of private law have been constructed and developed *judicially*, that is through a flow of adjudicated cases over times. The instance of tort law is surely emblematic. Both in Italy and in France, for example,

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potential for the courts to develop and explain the law. This consequence provides fertile ground for transforming the common law from a living instrument into, as Lord Toulson put it in a different context, "an ossuary"' (quoting *Kennedy v The Charity Commission* [2014] 2 W.L.R. 808 at [133]). For a pragmatic response to these concerns, see however H. Bor, 'Comments on Lord Chief Justice Thomas' 2016 Bailii Lecture which promotes a greater role for the courts in international arbitration', available at http://arbitrationblog.kluwerarbitration.com/2016/04/11/comments-on-lord-chief-justice-thomas-2016-bailii-lecture-which-promotes-a-greater-role-for-the-courts-in-international-arbitration/ (last accessed, 30 April 2020), arguing that 'commercial parties tend (unfortunately) to care about one thing – namely, their own commercial advantage', with the consequence that 'few commercial parties will be interested in, or even capable of, acting altruistically in the interest of the wider industry or the development of the common law as a whole'.

[53] Genn (n4) 18.

[54] ibid 19.

[55] The distinction between these two activities - that could be labelled 'norm-clarification' and 'norm generation' - has been thoroughly explored in the analytic tradition of legal philosophy. By 'clarifying the rules' it is meant that activity by which a court, through the decision of a certain case, defines the borders of a particular legal concept. In contrast, by 'creating the law' it is meant that activity by which a court, through a reasoned judicial opinion, articulates a rule whose content (a) is different from the one of any rules belonging to the same legal order and (b) is not logically deducible from the meaning of other existing norms. See Eugenio Bulygin, 'Judicial Decision and the Creation of Law' (original edition 1966), now reprinted in Eugenio Bulygin, Carlos Bernal, Carla Huerta, Tecla Mazzarese, José J Moreso, Pablo E Navarro, and Stanley L Paulson (eds), *Essays in Legal Philosophy* (OUP 2015) chapter 4.

[56] The literature on this point is immense. However, for a recent emphasis on this characteristic, see Lord Hodge, Justice of The Supreme Court of the United Kingdom, 'The Scope of Judicial Law-making in the Common Law Tradition', speech given at the Max Planck Institute of Comparative and International Private Law, Hamburg, 28 October 2019, available at https://www.supremecourt.uk/docs/speech-191028.pdf (last accessed, 30 April 2020).

[57] See, for many comparative insights, S. Chiarloni, 'Un mito rivisitato: note comparative sull'autorità del precedente giudiziale' (2001) Rivista di Diritto Processuale, 614. For a more general discourse, N. MacCormick, Robert S. Summers (eds.) Interpreting Precedents: A Comparative Study, 1997.

tort law is the very product of "judicial activism" and one cannot understand even slightly the present state of affairs of the area without considering and studying the pronouncements of courts, i.e. the "*jurisprudence*" (in French) or the "*giurisprudenza*" (in Italian), understood in the continental sense of the word (i.e. as "case law" in English terminology).[58] The phenomenon by which a certain societal problem is addressed and solved not by legislation but rather by a *corpus* of judicial rulings that represent guidance for action - commonly known as "regulation through litigation" - is well-established in civil law jurisdictions, too.

From this it follows that without sufficient cases being decided on their merits through decisions that are promulgated publicly, private law is prevented both from being clarified and from evolving.[59]

The tasks civil adjudication is called to perform, therefore, cannot be discharged by ADR, for two simple reasons. On the one side, unlike legal judgments, the agreement reached in ADR does not constitute the result of the application of a rule to the facts of the case, so it is in no way helpful in providing guidance for future action. On the other side, unlike legal judgments, the content of the ADR process is confidential and secret and as such it does not affect future proceedings or similar cases, nor similar settlements, but it exhausts its effects only on the single case.

The real, political, problem here at stake is rather how to avoid an indiscriminate use of public resources - i.e., how to avoid *every* case needing to be decided by the courts. The challenge is, therefore, how to ensure that only the most meritorious cases (i.e., the ones that possibly provide an occasion for the court to clarify the content of a rule, or to create a new one) reach the judge's desk. But this is a different issue.[60]

On a more general level, it needs to be emphasised that a system of public resolution of private conflict is essential to keep the law, so to say, in *good shape* – and keeping the law in good shape is evidently a public goal. In dispute resolution, private and public elements merge together. The (private) choice of the parties whether to settle or litigate a case has a public impact on the whole dynamic of private law, as it influences its path and pushes it in new directions.[61] Parties, by pursuing their own interest in litigation, perform therefore a key public function in our legal systems: they give the courts the opportunity to work on the law, and thus to keep it effective. Individuals and their choices (whether to settle or to litigate) play therefore a crucial, key role in developing the legal system and in keeping it apace with social exigencies. This is not a new idea, odd as it might seem: as the American legal philosopher David Luban pointed out while arguing against the privatisation of dispute resolution, parties in litigation can be seen as "an occasion for the law to work itself" and as "stimuli" for refining the law.[62] And a surprisingly similar argument about the "instrumental" role of litigation for public purposes was

[58] S. Chiarloni, 'Ruolo della giurisprudenza e attività creative di nuovo diritto' (2002) in Rivista Trimestrale di Diritto e Procedura Civile, 1.
[59] I have argued this point at little more length in Carlo V Giabardo, 'Private Law in the Age of the Vanishing Trial' in Kit Barker, Karen Fairweather, and Ross Grantham (eds.) *Private Law in the 21st Century* (Hart Publisher 2017) 547.
[60] I explored tentatively this topic elsewhere; see Carlo V Giabardo, 'Should ADR Mechanisms Be Mandatory? Rethinking Access to Court and Civil Adjudication in an Age of Austerity' (2018) 44 Exeter LR 25. See also George L Priest, 'Private Litigants and the Court Congestion Problem' (1989) 69 B U L Rev 527, who argued for a 'market' solution to find an 'optimal equilibrium' between ADR and adjudication.
[61] Among many, Marc Galanter, 'Why the "Haves" Come out Ahead: Speculation on the Limits of Legal Change' (1974) 9 L & Society Rev 95; L. Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2013) 33 OJLS 59. For a similar conclusion, see J Maria Glover, 'The Structural Role of Private Enforcement Mechanisms in Public Law' 53 (2012) William & Mary LR 1137; Deborah R. Hensler, 'The Private in Public, the Public in Private: The Blurring Boundary Between Public and Private Dispute Resolution' in Joachim Zekoll, Moritz Bälz, and Iwo Amelung (eds.) *Formalisation and Flexibilisation in Dispute Resolution* (Brill/Nijhoff 2014) 45; 69.
[62]David Luban, Settlements and the Erosion of the Public Realm (n. 11) 2638

made a century ago by the great Italian jurist Francesco Carnelutti who, in his monumental *oeuvre* on theory of civil justice, wrote quite provocatively that «it is not adjudication that serves litigants, but rather litigants serves adjudication» (my translation).[63]
Philosophically, all this teaches us is a lesson that merits underlining: conflicts and their public process of resolution are a positive force that prevent stagnation and promotes the search for new legal solutions. Every law, and every legal system, is the very product of the solutions of conflicts, and without conflicts, without *struggle*, law would stand still - which is the important legacy of the masterpiece of the German jurist Rudolf Von Jhering *The Struggle for Law.*[64]

V. THE PRIVATISATION OF DISPUTE RESOLUTION AS A PRIVATISATION OF LAW

The privatisation of civil justice and the rhetorical insistence in favour of a resolution of disputes outside courts of law are to be seen as parts of a broader movement that has been labelled the "turn against law".[65] Seen through this lens, ADR culture is first and foremost a consequence of the wider crisis of state sovereignty that our epoch is experiencing worldwide: since courts of law are a central pillar of the modern state, it follows that the crisis of the state as a whole entails a crisis of its jurisdictional functions (and therefore of law itself, as I will argue) too. Or, put differently, the "failing faith" in public adjudicatory procedures (and in legal rules, too)[66] is a symptom of the failing faith in state institutions at large. If the state's functions are de-regulated and de-centralized, it is inevitable that so will be law and justice. Given this, it is unsurprising that the justice system has in part already become, and it is expected to become increasingly, a service that, as other services, is provided by the public and private sectors competitively.

Professor John Gardner well captured this trend and its philosophical significance:

> "For those who share this ideology [the ideology of the privatisation] replacing the courts with private-sector dispute-resolvers is just like removing the old state monopoly in telecommunications and power generations, replacing them with lean new sectors rife with competition and thereby providing, so the ideological narrative goes, a better service for consumers. Law itself is the final frontier in the wider quest for deregulation in favour of the discipline of the market." [67]

In another article arguing against privatisation in general, he pointed out, depicting a perhaps not-so-far dystopian legal universe, how governments have started:

> "…to think of the court system itself as a service provided on a competitive basis to client groups, particularly multinational corporations – or in other words as a service to plutocracy. This makes governments and their investor clients think of the courts themselves on a free market basis, maybe even making a profit in the global competition for law work… The independent lawyers who traditionally served the courts and the law

[63] F Carnelutti, Lezioni di diritto processuale civile, Padova, 1920, Vol. II, 142 ('*Non il processo serve ai litiganti, ma i litiganti al processo*').
[64] Rudolf Von Jhering, *The Struggle for Law*, transl. by John J. Lalor, Chicago 1915 (*Der Kampf ums Recht*, first published 1872).See also Stuart Hampshire *Justice is Conflict* (Princeton UP 2000).
[65] The first one who has denounced this trend, linking it also to the rise of ADR, has been Marc Galanter, 'The Turn against Law: The Recoil against Expanding Accountability' (2002) 81 Texas L Rev 2825. See also Richard L Abel, *The Politics of Informal Justice*, New York Academic Press, 1982 (2 vols.).
[66] Judith Resnik, 'Failing Faith: Adjudicatory Procedure in Decline' (1986) 53 University of Chicago L Rev 494.
[67] *The Twilights of Legality* (2018) 43 Australasian Journal of Legal Philosophy 1, also available online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3109517> (Oxford Legal Studies Research Paper No. 4/2018).

should instead become service providers – I mean providers of services to their customers, the lay clients – and then they too can be absorbed into plutocracy."[68]

This, however, is not the end. I would further posit that the crisis of adjudication is a crisis of the law as such, and if dispute resolution mechanisms are privatised, then law itself becomes a private affair. What would the privatisation of substantive law in this manner entail?

Private law rules, in settlement procedures, are not something that a judge is obliged to apply in case a conflict arises, but rather something subjected to parties' negotiation, and therefore flexible, adaptable, less and less cogent. They become, in short, a matter of private concern.[69]

A current objection to this conclusion is that the rules of private law (or at least most of them) have the characteristic that they can be modified or even set aside if both parties so agree. Contracts and other forms of mutual agreements can usually alter what default rules of private law say, and this possibility is part of the larger legal phenomenon commonly known as "private ordering" – that is the fact that individuals and private actors can make, sanction and enforce privately-made determinations, which is, in turn, one of the many manifestations of autonomy and freedom of choice.[70] But while contracts are procedures that, in a certain way, internalise the will of the parties, this could be hardly said for settlements signed under the menace of significant penalties at trial. Indeed, as we have seen, ADR, at least in the English legal order, is not legally mandatory, but, at the same time, it does not need to be *entirely* voluntary either. The case law examined above seems to send out precisely this message: people should have, now and in the future, the perception that in case of conflict they *must*, not simply *should*, negotiate on their own's legal rights and entitlements, under the menace of costs penalties, unless they have some serious and good reasons not to do so, and that those reasons will be judged by the courts more and more strictly.

The message conveyed by ADR rhetoric and case law is: "settle, settle at (almost) any costs, as at the end of the day, law is not all that matters."[71]

No wonder, then, if many legal theorists link ADR culture with the "erosion" of substantive law and its capacity to guide our actions[72] or the "erasure" of statutory or common law rights[73] or, more extremely, with the ultimate "end of the law" and its impact in regulating conflicts.[74]

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[68] *The Evil of Privatization*, unpublished, but available online at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460655> 13 and 14, reviewing Alon Harel, *Why Law Matters* (OUP 2014).

[69] Referring to arbitration, but with conclusions that could be generalized for every extra-judicial means, see Seana V Shiffrin, 'Remedial Clauses: The Overprivatization of Private Law' (2016) 67 Hastings L J 407, 441.

[70] Steven L Schwarcz, 'Private Ordering' (2002) 97 Northwestern University L Rev 319. On contracts as a form of social ordering, Lon L Fuller, 'The Role of Contract in the Ordering Processes of Society Generally' in Kenneth Wiston (ed) *The Principles of Social Order, Selected Essays of Lon L. Fuller* (Hart Publishing 2001) 187. Settlement too is, *de facto*, a form of private ordering; Melvin A Eisenberg, 'Private Ordering Through Negotiation: Dispute Settlement and Rulemaking' (1976) Harvard L Rev 637.

[71] As Gardner explains in *The Evil of Privatization* (n 68) 14 and footnote 29: 'Think about it: if you have less than £ 250.000 (now 500.000) at stake you are not entitled to insist on your legal rights in court without being challenged on why you didn't waive them, with a potential penalty in costs if your reasons do not satisfy the court [in footnote: see *Faidi v Elliot Corporation* [2012] EWCA Civ. 287, for a shocking and craven judicial enforcement of this proposition, showing the rise even in the English judiciary of the plutocratic service-provider model of the legal system].'

[72] Maria Glover, 'Disappearing Claims or the Erosion of Substantive Law' (2015) 124 Yale LJ 3052.

[73] Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) Yale LJ 2804; 2836 (paragraph titled '*The Creation and the Erasure of Rights*').

[74] Specifically, Rex R Perschbacher, Debra L Bassett, 'The End of Law' (2004) 84 Boston University L Rev 1, 14 claiming that the privatisation of dispute resolution removes law's 'normative content and force, and diminishes [its] significance in ordering society', and 'reduce[s] the availability and impact of law as a normative element'. For similar arguments, made in relation to arbitration, but with much of the same effect as to mediation and other forms of ADR, compare Myriam Gilles, 'The Day Doctrine Died: Private Arbitration and the End of Law' (2016) University of Illinois L Rev 371.

VI. CONCLUSION - THE PRIVATISATION OF DISPUTE RESOLUTION AND THE CRISIS OF FORMAL JUSTICE

If the role of law in ADR is downplayed, then so inevitably is "justice according to law" or "justice through law" or "legal justice" - that is, justice that is achieved by interpreting and applying the law.[75]

Consider once again the arguments used by ADR advocates, sketched in Section II above. They are focused upon the fact that (1) settlement is able to provide a better, morally superior form of justice, as it is not imposed from above by a judge but is the final product of the parties' own interaction, and that (2) parties (with the limitations set by mandatory rules and public policies, as described above) can go beyond what the rules of private law say for that specific issue and situation, and they can choose what is best for them and not what is deemed best by the law.

It is my contention that this rhetoric might possibly have a disruptive effect on two tightly-related key ideas, or ideals, or values, which we traditionally think any legal system ruled-by-law must endorse: (1) legal certainty, narrowly understood as predictability of the legal consequences of actions, and (2) equality of treatment.

Indeed, traditionally, the law as we know it has been operating as a way to guide human behaviour by subjecting it to more or less detailed rules that are, normally, *general* and *abstract* at once – i.e. rules that, ideally, are equally applicable to everyone or to a general category of individuals (generality), and that apply uniformly, i.e., in the same manner, to different cases, all of them falling within the same range of application (abstractness). These are the two components that form part of what has been called "the law's abstract judgment", a historical and political feature of law as it has developed in the Western legal tradition.[76]

This means that, in the legal world as we know it, private controversies are never seen in their specificities and singularities, but always as a part of a larger group, or class, or category, defined by a common element that has to be generalisable. As such, justice requires that every controversy included in the same class needs to be solved through the same solution, which is provided by the law once for all.[77]

This way of operating of the law is based on two precise closely-connected goals, one of a political kind, and the other of moral order: ensuring legal predictability (political goal), understood as the capacity to foresee the legal consequences of one's own actions, and ensuring, as much as possible, equality *under* and *before* the law for all individuals (moral goal).[78] Intuitively, only if one is able to know in advance in what legal category one's own behaviour will fall, will one be able to modify one's own actions accordingly (political goal). Only if one's perception is not to have been treated by the law differently than other people in similar circumstances, will one consider one's treatment just (moral goal).

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[75] See HLA Hart, *The Concept of Law* (Clarendon Law Series 1961) 155. For simplicity's sake, I consider all these expressions equivalent. However, for a subtle (and convincing) argument that 'doing justice according to the law' and 'applying the law' are not the same thing, see Gardner, *The Twilight* (n 67) 18 from the Working Paper online (discussing and endorsing David Lyons, 'On Formal Justice' (1973) Cornell L Rev 833); see also John Gardner, 'The Virtue of Justice and the Character of Law' in *Law as a Leap of Faith* (n 39) 238; 258 (text and note 28).

[76] William Lucy, *Law's Abstract Judgment* (Hart Publisher 2017); Id., 'Abstraction and Equality' (2009) 62 CLP 22 and Id., 'Abstraction and the Rule of Law' (2009) 29 OJLS 481 (linking this feature to bourgeois legal thinking). For early discussion on rules as generalisations, Frederick Schauer, *Playing by the Rules* (OUP 1991) 23.

[77] HLA Hart, Positivism and the Separation of Morals (in HLA Hart *Essays in Jurisprudence and Philosophy* OUP 1983) 49; 81; see also Calvo Soler and Ferrer Beltrán (n 26) 113.

[78] The principle of equality *under* the law requires that all law's addressees are governed by the same laws, while the principle of equality *before* the law regards all the law's addressees as abstract human beings (see Lucy, *Abstraction and Equality* (n 65) 38).

To this extent, legal rules are nothing but an exemplification of a hypothetical case whose scheme is to be found in many concrete instances in the real world. For this to be possible, rules have to take unavoidably into consideration some factual elements – for example, those that might occur more frequently, or simply those that are deemed relevant by law-makers – and ignore others. It is this common factual element that renders two real-life cases similar to one another.[79] Even though in a strict *naturalistic* sense every case is different, in the eyes of the law this is not true. Similar cases do exist and should be treated similarly. "Treat like cases alike" – the fundamental command of the principle of equality under the law – presupposes that it is indeed possible to identify the likeness between two or more cases. In doing so, a high degree of generalisation is required – and, of course, every generalisation entails a loss, but a necessary one, that could not be avoided if the legal system is to live up to the ideals of equality of treatment and legal certainty.

The law's abstract judgment has a fundamental implication in adjudication: in case of a controversy, the judge, when applying the law, must take into account and assess only the facts and circumstances expressly and explicitly considered by the applicable legal rule. The judge is thus normally prevented from evaluating, for example, the peculiar characteristics of the claimant and defendant, or their wills, desires, exigencies, interests, reasons, expectancies and the like (unless, of course, explicitly recognised by the law), or from relying upon the totality of factual circumstances of the particular context of the dispute, no matter how important or relevant they are considered to be. It is, however, precisely the fact that the judge is prevented from considering all these circumstances that renders the decision reached *just*, in the sense of *just according to the law*, or – differently put - *formally* just.[80]

This view, that characterises the current functioning of the law, is completely at odds with the idea of a *particularistic*, *individualised* type of justice argued and promised by ADR.[81] Indeed, in the ADR view, the controversy to be solved *here and now* is not treated as belonging to a broader class of cases but as a single, unique, unrepeatable phenomenon. Justice, in ADR, is not a universal concept, but is defined by those who are directly engaged. Things being so, it follows that it is possible to find a suitable solution for this immediate conflict only after the parties themselves have identified what factual elements are relevant for them, and what are not, and what personal characteristics, desires, needs, motivations merit to be considered, and which do not. To this end, previous determinations (i.e. previous settlements) cannot provide any helpful guidance for the solution of this or future cases. "Treat like cases alike" is a principle that is patently rejected in settlements, for the simple reason that two cases alike do not exist, and so it would do more harm than good to treat them in the same way. Every case "has its own terms".[82] The message that ADR rhetoric sends out is this: there is no such thing as formal justice, merely individual justice, or justice *ad hoc*. In this view, law understood as a system of general and abstract rules is unhelpful.[83] Should we be worried about this transformation?

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[79] Some call this factual element as 'operative facts' (Neil McCormick, *Legal Reasoning and Legal Theory* (Clarendon 1978) 43). Others 'factual predicate' (Schauer (n 75) 23).
[80] In the very general sense that the decisionmaker's choice has been, at least to some degree, limited or relatively constrained by the operation of a certain rule; see, for an argument in favour of this version of formalism, Frederick Schauer, 'Formalism' (1988) 97 Yale LJ 509.
[81] Calvo Soler, Ferrer Beltrán (n 26) 124; Jacqueline Nolan-Haley, 'Court Mediation and the Search for Justice (n 24) 83 – 99.
[82] Robert A B Bush, 'Mediation and Social Justice. Risks and Opportunities' (2012) 27 Ohio J Disp Res 1;4.
[83] Calvo Soler, Ferrer Beltrán (n 26) 126.

Forty years ago, the English jurist Patrick Atiyah observed and described a tendency in the common law world that he dubbed “from principles to pragmatism”.[84] This tendency was, and still is, characterised by a preference in the legal order for the concrete over the abstract, the pragmatic over the theoretic, the exception over the general, and by a form of legislation expressly creating spaces for judicial discretion and a greater use of guidelines. The motive underpinning this shift was the desire to achieve, in a pragmatic way, particular justice in specific cases before the courts. He lamented that the underlying philosophical assumption of that kind of legal pragmatism was that “justice can only be done by the individualized, ad hoc approach, by examining the facts of the particular case in great detail and determining what appears to be fair, having regard to what has happened” and irrespective of the possible impact of the decision in the future[85]. What Professor Atiyah had in mind was a transformation that was occurring *within* the judiciary and the legislation, but the same could be argued as to the ADR revolution here briefly examined. But – as he warned – “it is of course an old theme that this tendency makes the law less certain and predictable”.[86]

Similarly, then, we should carefully consider these often-evaded consequences in ADR. The more we refuse formalism, the less we will pursue predictability and equality under the law. This is, as I see it, one of the “dark sides” of the privatisation of dispute resolution, i.e. that it entails an unequal treatment of similar situations and that therefore, in the long run, undermines people’s capacity to foresee how their future controversies will probably end. I believe this is something that deserves all our attention.

[84] Patrick Atiyah, ‘From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law’ (1980) 65 Iowa L Rev 1249; see also Id., *Pragmatism and Theory in English Law* (The Hamlyn Lecture, Stevens & Sons 1987).
[85] Atiyah, *From Principles* (n 84) 1259.
[86] Atiyah, *Pragmatism and Theory* (n 84) 126. On the link between legal formalism and predictability, compare also Id., ‘*Justice and Predictability in the Common Law (the 7th Wallace Wurth Memorial Lecture)*’ (1992) U of New South Wales LJ 448; 451 – 456 (also available online at <http://www.austlii.edu.au/au/journals/UNSWLJ/1992/19.pdf>.)