

# The Rise of Mediation and its Erosive Effect on the Rule of Law in Dispute Resolution

Sonia Anwar-Ahmed  
Martinez

*Mediation is considerably more than just a pragmatic, confidential, consensual, and alternative way of resolving intractable disputes. Through its overriding concern with efficiency, mediation undermines the democracy and justice-seeking tenets of the Rule of Law, sought through the public adjudication of the law by the courts.<sup>1</sup> For example, the privatisation of disputes rejects the value of public adjudication, denying the public important information, hampering public debate, and stunting the development of the law.<sup>2</sup> Additionally, the informalisation of dispute resolution rejects the application of the law by the courts, thereby failing to vindicate rights and dismissing the importance of due process.<sup>3</sup> This corrosive trend is accentuated in civil and family mediation. Civil mediation*

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<sup>1</sup> Tom Bingham, *The Rule of Law* (Penguin 2011) ch 1.

<sup>2</sup> Jack B Weinstein, 'Some Benefits and Risks of Privatisation of Justice Through ADR' (1996) 11 *Ohio St J on Dispute Resolution* 241.

<sup>3</sup> Owen M Fiss, 'Against Settlement' (1984) 93 *YLJ* 107.

*highlights the privatisation of points of high public impact and interest that ought to be scrutinized in the public eye.<sup>4</sup> Family mediation underlines the informalisation of sensitive issues in intra-family conflicts which ought to be properly and duly identified, assessed, and addressed.<sup>5</sup> Therefore, in prioritising expediency, dispute resolution is gradually 'losing the language of justice'.<sup>6</sup>*

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## Introduction

This paper examines the systematic erosion of the Rule of Law in the sphere of dispute resolution, as depicted by civil and family mediation. Section I will preliminarily outline the importance and aims of the Rule of Law tenets in the realm of dispute resolution, discussing the value of public adjudication, the desirability of the application of the law, and the benefits

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<sup>4</sup> Ian Mackenzie, 'Privatisation of Justice: Balancing Efficiency and Access to Justice' (Slaw, 13 November 2014) <<http://www.slaw.ca/2014/11/13/privatization-of-justice-balancing-efficiency-and-access-to-justice/>> accessed 18 March 2018.

<sup>5</sup> Liz Trinder, Alan Firth and Christopher Jenks, "'So Presumably Things Have Moved on Since Then?' The Management of Risk Allegations in Child Contact Dispute Resolution' (2010) 24 IJLPF 29.

<sup>6</sup> Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24 YJLH 397.

of courtroom procedure. Following that, Section II will examine in detail the erosion of these Rule of Law protections by studying the privatisation of dispute resolution in civil mediation and the informalisation of the same in family mediation. This section will conclude that, because the erosion of the Rule of Law in mediation is so pervasive and consequential on the attainment of democracy and justice, one must proceed carefully in replacing the formal justice system with alternative fora.<sup>7</sup> Lastly, Section III will interpret the findings, providing arguments which may contextualise and counterbalance the concern that mediation undermines the Rule of Law. It argues that the gravity of the impact of mediation, in itself, on the Rule of Law is contextualised (and diluted) by the collective and widespread move towards the privatisation of dispute resolution. Finally, it argues that mediation may support a particular aspect of the Rule of Law - access to justice - and that the panoply of benefits that it offers potentially counterbalances the erosion of the Rule of Law. That is, the dissolution of the constitutional principle in dispute resolution may not be as alarming as critics may think.<sup>8</sup> Therefore, this paper submits that mediation's concern

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<sup>7</sup> Weinstein (n 2).

<sup>8</sup> Sundaresh Menon, 'Mediation and the Rule of Law: Keynote Address by the Honourable the Chief Justice Sundaresh Menon, Supreme Court of Singapore' (The Law Society Mediation Forum, 10 March 2017) <[https://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20\(Final%20edition%20after%20delivery%20-%20090317\).pdf](https://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20(Final%20edition%20after%20delivery%20-%20090317).pdf)> accessed 9 March 2018.

with efficiency undermines the Rule of Law; however, its continued use may be justified by the advantages it offers for the realm of dispute resolution.

## **I. The Importance and Aims of The Rule of Law in Dispute Resolution**

A system of dispute resolution which comports with the Rule of Law, in principle, gains in constitutionality, legitimacy, and acceptability.<sup>9</sup> The Rule of Law, articulated by Tom Bingham, is a principle underpinning global legal society which provides a framework for the resolution of disputes that works to achieve an aim.<sup>10</sup> Originally, the aim of the Rule of Law was to prevent abuses of power by the executive branch.<sup>11</sup> Contemporary literature, however, interprets the aim in a changing socio-economic context as being one to deliver justice in a democratic state: i.e. achieving fair outcome, due process, and equal accessibility in an open and transparent manner.<sup>12</sup> To this end, the Rule of Law heavily relies on the

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<sup>9</sup> James Michel, 'Alternative Dispute Resolution and the Rule of Law in International Development Cooperation' (2011) 2011 J. Disp. Resol.

<sup>10</sup> Bingham (n 1).

<sup>11</sup> Hazel Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th F A Mann Lecture at Lincoln's Inn, 18 November 2012) <[http://www.cnmd.ac.uk/laws/judicial-institute/layout-components/36th\\_F\\_A\\_Mann\\_Lecture\\_19.11.12\\_Professor\\_Hazel\\_Genn.pdf](http://www.cnmd.ac.uk/laws/judicial-institute/layout-components/36th_F_A_Mann_Lecture_19.11.12_Professor_Hazel_Genn.pdf)> accessed 9 March 2018.

<sup>12</sup> Charlie Irvine, 'Mind the Gap: Mediation and Justice' (Kluwer Mediation Blog, 12 May 2014)

value of public adjudication, the desirability of the application of the law, and the benefits of courtroom procedure.

### *1.1 The Value of Public Adjudication*

The public adjudication of disputes is critical for a democratic state.<sup>13</sup> First, it benefits the courts: by entitling any person to witness trials, the judiciary is considered transparent, reliable, and law-abiding.<sup>14</sup> Through public hearings, the courts are also able to clarify contentious points of law to reduce the number of future claims.<sup>15</sup> Second, it benefits the individual: by entitling anyone to view any file in a proceeding, the court recognizes that not all citizens have access to court proceedings and that through publicity, individuals can access statements of their legal rights.<sup>16</sup> In this way, to the extent that one understands what laws apply to them, they are able to predict the outcomes of their behaviour or amend it accordingly.<sup>17</sup> Third, Bentham argues public scrutiny ensures that outcomes are fair.<sup>18</sup> He adds, '[publicity] is the keenest spur to exertion and the surest of all guards against

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<<http://mediationblog.kluwerarbitration.com/2014/05/12/mind-the-gap-mediation-and-justice/>>.

<sup>13</sup> Weinstein (n 2).

<sup>14</sup> *ibid.*

<sup>15</sup> Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (n 11).

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

improbability'.<sup>19</sup> Fourth, public adjudication contributes to the development of contextually attuned legislation.<sup>20</sup> It allows the courts to 'make new leaps' with every novel point of law that emerges in disputes.<sup>21</sup> A well-developed and detailed body of law in a precedent system provides 'guidance on how to ascertain legal risk'.<sup>22</sup>

### *1.2 The Desirability of the Application of the Law*

Applying the law in the resolution of disputes promises to attain democracy and a fair outcome. First, the application of legal rules serves the Rule of Law's democratic pursuit because the law is nearly always politically curated. Second, it achieves fairness by ensuring consistency and that all subjects of the state are indiscriminately treated by the same transparent, certain, and non-retrospective norms.<sup>23</sup> Third, it vindicates rights, which according to Locke, is 'no less than punishment for wrongs against society' and 'is an essential part of the social compact'.<sup>24</sup> Fourth, the law provides the state with standards of enforcement such that it can form the

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<sup>19</sup> William Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 MLR 380.

<sup>20</sup> Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (n 11).

<sup>21</sup> Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (n 6).

<sup>22</sup> Emanuel S Savas, 'A Taxonomy of Privatization Strategies' (1989) 18 PSJ 343.

<sup>23</sup> Bingham (n 1).

<sup>24</sup> Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (n 11).

objective basis for holding wrongdoers accountable for their behaviour.<sup>25</sup> The effect is to act as a powerful deterrent for the individual in question and for the population at large.<sup>26</sup> Moreover, the law works to influence behaviour according to established norms of what is considered to be acceptable in a social context.<sup>27</sup>

### 1.3 The Benefits of Courtroom Procedure

The Rule of Law presumes that the courts will safeguard process.<sup>28</sup> Due process is imperative in achieving justice not only in real terms (justice cannot be said to be done if parties are not treated in a fair manner), but also in the sense that it gives the appearance of justice.<sup>29</sup> As Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* said, 'not only must justice be done; it must also be seen to be done'.<sup>30</sup> Courts are entrusted with this aim partly because they treat parties equally by identifying and addressing power differentials.<sup>31</sup> They are able

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<sup>25</sup> Jean R Sternlight, 'Is Alternative Dispute Resolution Consistent with the Rule of Law?' (2006) 56 DePaul L Rev 569.

<sup>26</sup> Lisa G Lerman 'Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women' (1984) 7 Harv Women's LJ 56.

<sup>27</sup> Weinstein (n 2).

<sup>28</sup> Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) Faculty Scholarship Series Paper 4992 <[http://digitalcommons.law.yale.edu/fss\\_papers/4992](http://digitalcommons.law.yale.edu/fss_papers/4992)> accessed 8 March 2018.

<sup>29</sup> *ibid.*

<sup>30</sup> [1924] 1 KB 256 (CA).

<sup>31</sup> Tyler (n 28).

to intervene on behalf of weaker parties through their coercive powers.<sup>32</sup> Courts are also relied on to satisfy procedural justice because judges remain neutral and impartial.<sup>33</sup> By, at the very least, appearing to be fair, the formal justice system is legitimised and consequently consumers of the system are exponentially more likely to be satisfied with the outcome, regardless of whether it is favourable.<sup>34</sup>

## II. The Erosion of The Rule of Law

Having outlined the value and aims of the Rule of Law, this paper submits that mediation does not, by conscious design, comport with the 'full heft of the rule of law'.<sup>35</sup> Rather, mediation's overriding concern with efficiency undermines the Rule of Law aim to deliver democracy and justice in the number of ways explicated above.<sup>36</sup> In order to be efficient for its consumers, mediation privatises and informalises dispute resolution.<sup>37</sup> Civil and family mediation provide fitting illustrations of the way in which the privatisation and informalisation of dispute resolution attack the Rule of Law on various fronts.

### *2.1 Privatisation in Civil Mediation*

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<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> Mackenzie (n 4).

<sup>37</sup> *ibid.*



Civil mediation underlines the problems with the privatisation of points of high public impact and interest which ought to be resolved and scrutinized in the public eye.<sup>38</sup> This is because many civil matters raise issues of collective interest, some which 'require political and structural resolutions'.<sup>39</sup> The problems with out-of-court settlements are manifold, including that it denies the public important information, hampers public debate, and stunts the development of the law on issues of public concern.<sup>40</sup> To illustrate, consider the landmark English case of *Donoghue v Stevenson*, concerning the snail in the ginger beer bottle.<sup>41</sup> The public adjudication of this dispute enabled the House of Lords to establish protection for all consumers, creating a duty to take care for consumer products. Conversely, privatising this dispute would have failed to create consumer protection. Privatising disputes alike concerning defective products would fail to warn the public of their potentially detrimental effects, albeit being in the public interest to have the information revealed.<sup>42</sup> This is particularly relevant in a time of nationalising markets where the likelihood of more people over a larger territorial perimeter getting hurt if a product proves defective is greater.<sup>43</sup> Drawing

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<sup>38</sup> *ibid.*

<sup>39</sup> Hualing Fu, 'Mediation and the Rule of Law: The Chinese Landscape' in *Formalism and Flexibilisation in Dispute Resolution* (Joachim Zekoll, Moritz Bälz and Iwo Amelung eds, Brill 2014) ch 4.

<sup>40</sup> Weinstein (n 2).

<sup>41</sup> [1932] AC 562 (HL).

<sup>42</sup> Weinstein (n 2).

<sup>43</sup> *ibid.*

a parallel with the United States, the case of *Brown v Board of Education* was a landmark case where the Supreme Court's decision ended racial segregation in schools, thereby extending schoolchildren's access to a better education.<sup>44</sup> Taken together, the two cases demonstrate how resolving civil disputes in mediation risks de-aggregating and depoliticising issues that concern the population at large.<sup>45</sup>

Having illustrated that civil mediation often involves issues of public concern, it follows that civil disputes are very often potentially valuable to the development of the law. In spite of this, the privatisation of justice in mediation risks stunting the growth of the common law, resulting in an inevitable decrease in public guidance on issues of public concern, and contributing to a 'thinning' of the law.<sup>46</sup> Where the court's ability to create, update, or fine-tune rules that affect public rights is hampered, a potential consequence, in the civil context, is commercial uncertainty.<sup>47</sup> Uncertainty in the law means economic opportunities will not be optimised in fear of subjecting oneself to potential risk.<sup>48</sup> Uncertainty also may be 'fertile ground for disputes to escalate'.<sup>49</sup> In summary, the privatisation of justice in civil mediation exemplifies the erosion of the democratic value of public adjudication, a critical Rule of Law tenet.

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<sup>44</sup> [1954] 346 USSC 483.

<sup>45</sup> Fu (n 39).

<sup>46</sup> Savas (n 22).

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

## 2.2 Informalisation in Family Mediation

Family mediation highlights how informalising sensitive issues like violence in intra-family conflicts is problematic for the pursuit of justice.<sup>50</sup> First, the informalisation of dispute resolution rejects the application of the law, thereby failing to vindicate hard-won legal rights.<sup>51</sup> After all, for the process of mediation to operate, it is necessary that parties 'relinquish ideas of legal rights and focus, instead, on problem-solving'.<sup>52</sup> Nader sees this nickelling-and-diming into a deal that foregoes legal rights as an attack to substantive justice (ie reaching a fair outcome based on the protection of legal rights).<sup>53</sup> It becomes apparent that mediation risks trivialising serious issues that require the vindication of rights, and that consequently, there is a lack of accountability. This is because mediation encourages parties to share responsibility for the behaviour of one party in order to reach a compromise.<sup>54</sup> In domestic violence cases, by partially relieving the assailant of responsibility for his own wrongdoing, mediation 'grants abusive men tacit permission to continue their violent behaviour'.<sup>55</sup> In other words, impunity in mediation

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<sup>50</sup> Trinder, Firth and Jenks (n 5).

<sup>51</sup> Trevor CW Farrow, *Civil Justice, Privatisation, and Democracy* (University of Toronto Press 2014) 43.

<sup>52</sup> Hazel Genn, *Judging Civil Justice* (CUP 2010) 116.

<sup>53</sup> Laura Nader, 'Disputing Without the Force of Law' (1979) 88 YLJ 998.

<sup>54</sup> Lerman (n 26).

<sup>55</sup> *ibid.*

decriminalises domestic abuse and may go as far as impliedly encouraging the repetition of reprehensible behaviour.<sup>56</sup>

Second, the informalisation of dispute resolution means there are less safeguards for due process.<sup>57</sup> For example, as it stands, in English family mediation, there is a growing concern with the marginalisation of concerns which ought to be identified, assessed, and addressed, like domestic violence.<sup>58</sup> In a number of reports conducted by Greatbatch, he found the systematic marginalisation of reports or threats of violence for the purpose of reaching an expedient agreement.<sup>59</sup> In addition to the failure to identify important violations, mediators cannot guarantee equality between the parties.<sup>60</sup> This is partly because they often assume or expect, by virtue of it being a voluntary process, that parties are bargaining on equal footing.<sup>61</sup> While it may largely be the case among corporations, in family mediation, power imbalances are highly prevalent regardless of whether the choice to mediate was voluntary.<sup>62</sup> For example, more often than not, a wife is in a weaker and more precarious position and may consequently be precluded from

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<sup>56</sup> *ibid.*

<sup>57</sup> Neuberger, 'Keynote Address: A View from On High' (Civil Mediation Conference, 12 May 2015) <<https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf>> accessed 13 March 2018.

<sup>58</sup> Trinder, Firth and Jenks (n 5).

<sup>59</sup> *ibid.*

<sup>60</sup> Sternlight (n 25).

<sup>61</sup> Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (2nd edn, John Wiley & Sons 2005).

<sup>62</sup> Lerman (n 26).

making independent decisions that will benefit her interests where she is frightened of the other.<sup>63</sup> Alternatively, one party may not have the leverage, stamina, time, or economic ability to empower themselves and reach a just agreement.<sup>64</sup> Therefore, family mediation may be said to weaken the position of less powerful members of society.<sup>65</sup>

Even if mediators were to proactively recognise power imbalances, mediators, by conscious design, are unable to intervene on behalf of the weaker party.<sup>66</sup> For example, party autonomy, central to mediation, shifts the decisive powers to the parties.<sup>67</sup> The job of the mediator is merely 'to support, and never supplant, party deliberation and decision-making' to the extent that they are precluded from making interventions which oppose or substitute the interests of the parties, or shape or steer the conversation.<sup>68</sup> Therefore, if the intention of the disputants is to quickly reach a settlement, mediators, as facilitators of party interests (and not of procedural justice), are constrained to do just that even if it means compromising the fairness of the settlement achieved.<sup>69</sup> To the same effect, mediators, by virtue of having no coercive power, cannot rely on the comprehensiveness or accuracy of the information

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<sup>63</sup> *ibid.*

<sup>64</sup> Tyler (n 28).

<sup>65</sup> John M Haynes, 'Power Balancing in Divorce Mediation' in *Divorce Mediation: Theory and Practice* (Anne Milne and Jay Folberg eds, Guilford Press 1988).

<sup>66</sup> Mackenzie (n 4).

<sup>67</sup> *ibid.*

<sup>68</sup> Bush and Folger, *The Promise of Mediation* (n 61).

<sup>69</sup> *ibid.*

provided by the parties.<sup>70</sup> Nor are mediators able to request to authenticate the information.<sup>71</sup> If a resolution is reached on the premise of partial or concealed information, the result is 'very likely to lack substantive fairness' and is likely to favour the stronger party with the control over the information.<sup>72</sup> For the above reasons, in family contexts where power imbalances are highly accentuated, it is a widely held view that cases of serious violence should stay clear of mediation.<sup>73</sup>

Due process is additionally hindered because mediators are often partial. In fact, Wang argues that neutrality is a mirage in mediation. While mediators are expected to be neutral, for critics Abel and Tomasic, the absence of an enforcement mechanism and formal rules in mediation means that mediators, through class bias, can guide or pressure one party into an unfavourable settlement.<sup>74</sup> Most mediators are educated, middle-class, non-minority individuals who might have a subconscious bias towards parties with similar attributes to them.<sup>75</sup> Inadvertent advocacy for one party risks obviating the trust of the disadvantaged party.<sup>76</sup> This is particularly problematic for the attainment of procedural

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<sup>70</sup> Robert A Baruch Bush and Joseph P Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 *Ohio St J on Disp Resol* 1.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> Patricia Winks, 'Divorce Mediation: A Non-Adversary Procedure for the No-Fault Divorce' (1980) 19 *J Fam L* 615.

<sup>74</sup> Bush and Folger, 'Mediation and Social Justice' (n 70).

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

justice which considers 'trust' as one of its key components.<sup>77</sup> The above examples illustrate how mediation is unwilling or incapable of achieving the procedural justice required by the Rule of Law.

Wang argues that neutrality is particularly illusive in contexts where culture is extremely pervasive and influential.<sup>78</sup> For example, in China, in regards to divorce, mediators will make 'every effort to discourage couples from divorce, and the mediation process is doomed to be a process of the mediators to exert power and to carry out their values.'<sup>79</sup> Clearly, the Chinese culture accrues a significant amount of importance to the family sphere, understanding it as an integral aspect of a state. In its view, if a couples severs their relationship, the family will perish and as a result the nation will 'suffer from instability, violence, and their misfortunes'.<sup>80</sup> Therefore, mediators inevitably adopt, represent, and advocate the standpoint of the party who objects to a divorce.<sup>81</sup> In regards to gender roles, bias is highly pervasive too.<sup>82</sup> In one excerpt provided in Wang's article titled 'To Divorce or not to Divorce', the mediator is seen to mediate from the point of view that it is the duty of the female to assume a subordinate role, stipulating that 'as a woman, you should do more

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<sup>77</sup> Tyler (n 28).

<sup>78</sup> Jian Wang, 'To Divorce or not to Divorce: A Critical Discourse Analysis of Court-ordered Divorce Mediation in China' (2013) 27 *IJLF* 74.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

housework'.<sup>83</sup> Because Chinese society is patriarchal, mediators may, similarly to divorce cases, adopt the viewpoint of the elder or the male, shifting the power to the party with whom the mediators concurs with, disadvantaging the other party.<sup>84</sup> The English and Chinese examples serve to demonstrate that the informalisation of dispute resolution facilitates the circumvention of the vindication of rights and due process to the detriment of the protection sought after by the Rule of Law.

### III. Interpreting the Findings

#### 3.1 *Contextualising the Erosion*

Thus far, this paper has illustrated the ways in which the privatisation and informalisation of dispute resolution erodes the Rule of Law, with a particular focus on civil and family mediation. That being said, the understanding that mediation undermines the constitutional principle can be contextualised. The widespread and collective move towards the privatisation of disputes suggests that the impact of mediation, in itself, is less significant than one may think. Firstly, the courts are contributing to the privatisation of justice, diverting an increasing number of cases to mediation.<sup>85</sup> In *Cowl v Plymouth*

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<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> Chris Carr and Michael R Jencks, 'The Privatisation of Business and Commercial Dispute Resolution: A Misguided Policy Decision' (2000) 88 KLJ 183.



*City Council*<sup>86</sup> and *Dunnett v Railtrack*,<sup>87</sup> parties were advised that they are required to contemplate mediation before commencing court proceedings even if a point of law was at issue. Relatedly, the courts themselves are increasingly invoking doctrines of vacatur, publicising a select number of decisions, employing no-citation rules, making filings under seal, and imposing confidential protective orders.<sup>88</sup> While this trend does not necessarily diminish the role mediation plays in eroding the public realm, the widespread privatisation of disputes certainly puts our paper's thesis into perspective. That is, as part of a greater collective move towards the privatisation of justice, the privatisation in mediation is not as alarming as if it privatised disputes in isolation.

### 3.2 Counterbalancing the Erosion

While it is submitted that mediation's concern with efficiency erodes the democracy and justice-based tenets of the Rule of Law, the very same feature arguably plays a critical role in supporting one particular aspect of the Rule of Law - accessibility to justice.<sup>89</sup> Access is an 'absolutely fundamental ingredient of the Rule of Law'.<sup>90</sup> Also referred to as social justice, it alludes to the absence of structural injustice and inequality.<sup>91</sup> Where a dispute resolution mechanism adopts successful measures to remedy that injustice and inequality,

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<sup>86</sup> [2001] EWCA Civ 1935, [2002] 1 WLR 803.

<sup>87</sup> [2002] EWCA Civ 303, [2002] 1 WLR 2434.

<sup>88</sup> Carr and Jencks (n 85).

<sup>89</sup> Mackenzie (n 4).

<sup>90</sup> Neuberger (n 57).

<sup>91</sup> Bush and Folger, 'Mediation and Social Justice' (n 70).

then social justice is achieved.<sup>92</sup> Scholars argue that mediation promises to offer greater social justice by addressing issues relating to the distribution of wealth, opportunities, and privileges within any given society that hamper access to the courts.<sup>93</sup> For example, access is severely restricted where the judiciary is plagued with corruption and abuse of authority.<sup>94</sup> Professor Irvine argues that in 'fractious and normatively contested societies' of the like, mediation is particularly conducive to social justice because it provides disputants with a cleaner alternative.<sup>95</sup> However, insofar as these characteristics pervade the country or society, there is no reason why mediators could not, just as much as judges, 'fall prey to the same temptations'.<sup>96</sup> That is, mediation is not particularly immune to corruption. To the contrary, mediation risks being perceived as an alternative form of corruption in itself. The public may consider that private practices which are devoid of standard rules, oversight, and monitoring easily allow abuses to take place.<sup>97</sup>

Nevertheless, in many democratic or mature legal systems, mediation is conducive to social justice. For example, it is able to address chief factors contributing to the injustice and

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<sup>92</sup> *ibid.*

<sup>93</sup> Ellen Kandell, 'Mediation vs Justice? Social Justice Through Process' (Alternative Resolutions, 10 December 2014) <<http://www.alternativeresolutions.net/mediation-and-social-justice/>> accessed 10 March 2018.

<sup>94</sup> Michel (n 9).

<sup>95</sup> Irvine (n 12).

<sup>96</sup> Sternlight (n 25).

<sup>97</sup> Cynthia Alkon, 'Lost in Translation: Can Exporting ADR Harm Rule of Law Development' (2011) *J Disp Resol* 165.

inequality of access to the courts, including delays, costly proceedings, geographical distance from certain populations, and overly formalistic requirements.<sup>98</sup> A delay risks favouring those who are in power (i.e. those who are able to withstand the financial strain of the stretched process).<sup>99</sup> To alleviate this issue, mediation offers access to a more expedient mechanism of dispute resolution.<sup>100</sup> This is especially important for those who do not have financial backing and where the dispute itself concerns structural injustice (e.g. dispute involving employer-employee) where it is clear one party will suffer more than the other. Additionally, costly proceedings excludes an entire portion of the population from pursuing relief in court simply because they cannot afford it.<sup>101</sup> Mediation, on the other hand, offers a cheaper alternative altogether.<sup>102</sup> Moreover, geographical distance can also inhibit individuals from seeking justice.<sup>103</sup> For example, in Nicaragua, roads in rural areas are nearly non-existent, thereby handicapping or altogether precluding certain populations from reaching the courts.<sup>104</sup> In contrast, mediation offers flexibility in physical

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<sup>98</sup> Lola Akin Ojelabi, 'Improving Access to Justice Through Alternative Dispute Resolution: The Role of Community Legal Centres in Victoria, Australia' (Research Report, Faculty of Law and Management, La Trobe University, September 2010) <[https://c.ymcdn.com/sites/naefcm.site-ym.com/resource/resmgr/Research/Improving\\_Access\\_to\\_Justice.pdf](https://c.ymcdn.com/sites/naefcm.site-ym.com/resource/resmgr/Research/Improving_Access_to_Justice.pdf)> accessed 6 March 2018.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> Menon (n 8).

<sup>102</sup> *ibid.*

<sup>103</sup> Sternlight (n 25).

<sup>104</sup> *ibid.*

space: dispute resolution can be carried out anywhere.<sup>105</sup> Lastly, highly demanding formalistic requirements can equally discourage the illiterate or inexperienced from seeking judicial relief.<sup>106</sup> The informalisation of dispute resolution in mediation relaxes the formalistic, technical and legalistic demands, providing a 'much less alienating experience'.<sup>107</sup> While the panoply of benefits to social justice is accepted, Professor Genn raises an interesting argument, positing that mediation merely provides access to *settlement*, not access to *justice*.<sup>108</sup> Therefore, the question remains whether, if social justice is narrowly interpreted, it can still be said that mediation supports this particular Rule of Law tenet.

Notwithstanding, mediation is 'highly effective in generating important social benefits' *other than* justice.<sup>109</sup> These include encouraging party self-determination and enhancing inter-party understanding, which according to Bush and Folger are not only particularly desirable but also particularly critical in contemporary society.<sup>110</sup> They argue that civic weakness growing from the increasing dependency on experts and formal institutions 'threatens the very fabric of our society'.<sup>111</sup>

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<sup>105</sup> Linda Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System* (2nd edn, Routledge 2018).

<sup>106</sup> Sternlight (n 25).

<sup>107</sup> Laurence Boulle, *Mediation: principles, process, practice* (3rd edn, Chatswood 1949).

<sup>108</sup> Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (n 11).

<sup>109</sup> Bush and Folger, *The Promise of Mediation* (n 61).

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

Fortunately, mediation 'serves the public value of civic education in self-determination and respect for others'.<sup>112</sup> It moves away from an overly litigious society into one where parties take responsibility for their acts.<sup>113</sup> It encourages a collaborative approach where, in order to address social problems, people accept differences and diversity, increasing the social cohesion within a given society.<sup>114</sup> While these goals do not attain the Rule of Law aim, they do attain other civility-related public advantages.<sup>115</sup> Ultimately, what matters at this point is the valuation and prioritisation of the goals against the backdrop of the Rule of Law: do the advantages of mediation outweigh, offset, and justify its disadvantages vis-a-vis the Rule of Law?<sup>116</sup> Where the goals of mediation are considered 'equally or more important' than the goal of the Rule of Law in contemporary society, then its continued use may be justified.<sup>117</sup>

#### **IV. Conclusion**

The Rule of Law in dispute resolution is considerably eroded by mediation's overriding concern with efficiency.<sup>118</sup> Through the privatisation and informalisation of dispute resolution, mediation rejects the value of public adjudication, dismisses the desirability of the application of the law, and ignores the

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<sup>112</sup> Menon (n 8).

<sup>113</sup> Bush and Folger, *The Promise of Mediation* (n 61).

<sup>114</sup> Bush and Folger, 'Mediation and Social Justice' (n 70).

<sup>115</sup> *ibid.*

<sup>116</sup> Bush and Folger, *The Promise of Mediation* (n 61).

<sup>117</sup> *ibid.*

<sup>118</sup> Mackenzie (n 4).

benefits of procedural justice. Specifically, in privatising points of high public impact in civil mediation, the alternative forum denies the public important information, hampers public debate, and stunts the development of the law. In treating sensitive issues like violence in intra-family mediation so informally, the alternative mechanism fails to vindicate rights and additionally nurtures inter-party inequality. This paper has noted that the informalisation of dispute resolution, over its privatisation, plays a larger role in undermining the Rule of Law.

With all that being said, the tension between the Rule of Law and mediation may be reconciled with the advantages the latter offers for the sphere of dispute resolution. In interpreting the findings, this paper has fore mostly attempted to contextualise the erosion, arguing that mediation is not alone in undermining the Rule of Law such that one should query the gravity of the impact of mediation in a time where there is a collective move towards the privatisation of justice. Lastly, this paper has argued that mediation serves to support one particular aspect of the Rule of Law - accessibility to justice - although this argument is tempered by several scholars. Finally, it has outlined a number of benefits offered by mediation with the intent to potentially counterbalance the erosion of the Rule of Law, concluding that if they are considered as important as the Rule of Law aims, mediation's continued use may be justified.<sup>119</sup>

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<sup>119</sup> Bush and Folger, *The Promise of Mediation* (n 61).

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