

MANDATORY MEDIATION AND THE RULE OF LAW

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Abstract

This article evaluates mediation practice against the core principles that Thomas Bingham identifies as constituting the rule of law. It identifies three forms of compulsion and discusses these in the light of Thomas Bingham's eight principles. The article examines how voluntary mediation may increase access to justice, a significant component of the rule of law, but an element of compulsion, in its strict sense, impedes the constitutional right of access to the courts and stifles the development of precedent. To comply with the rule of law, in its more substantive version, any instruction that parties attempt to settle via mediation needs to be subject to judicial scrutiny, must ensure that the cost of mediation is not disproportionate, that there is a genuine willingness of the parties to engage in the process with good faith, and that it involves no greater structural inequalities than in litigation.

Keywords: mediation, rule of law, ADR, access to justice, mandatory mediation

[A] INTRODUCTION

There have always been two contrasting processes for resolving disputes—one that may sharpen conflict between the parties, by appealing to the authority of a state-sanctioned third party to vindicate rights, and the other that encourages engagement between the parties to

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create their own resolution to a dispute (Roberts and Palmer 2005; Roebuck 2007).

Mediation has become a regular aspect of civil litigation in the United Kingdom yet there has been a dearth of analysis of the implications of this development for the rule of law. American academics have written of the dangers of informal processes for vulnerable litigants. This article examines the threat that is posed by forms of compulsion in amplifying these effects.

Mediation in the developed West, in the second half of the 20th century, began as a movement from below with the idealistic San Francisco Community Mediation Boards in the 1970s. It was given academic authority and momentum by the intervention of Frank Sander in the National Conference on the cause of Popular Dissatisfaction with the Administration of Justice (The Pound Conference) in 1976 (Levin and Wheeler 1979). It only really took off within civil procedure after the imprimatur of the US Supreme Court's Chief Justice Warren Burger after his visit to the Peoples' Republic of China (PRC) at the invitation of the Ministry of the Interior in 1981, which included an opportunity to observe a people's mediation committee at work.² Warren Burger then famously called on those involved in civil litigation in the USA to search for a 'better way' (Burger 1982).

Development in Britain came a decade later. Community mediation in England began with the setting up of community police liaison groups in Lambeth during the aftermath of the Brixton riots and the foundation of Southwark and Newham Mediation Services (1984). The imbrication of its processes into civil disputes was given support with the founding of the Centre for Effective Dispute Resolution (CEDR) in 1990, with the backing of the Confederation of British Industry and the Trades Union Congress, and the imprimatur of Lord Woolf in his 1994 Presidential Address to the Bentham Club (Woolf 1994). Lord Woolf's 'Access to Justice: Interim Report' in 1995 marked a sea-change in its acceptance of alternative dispute resolution (ADR).

In one account of ADR mythology, greedy litigation-hungry lawyers drive naïve disputants, with an exaggerated prediction of their prospects of success in litigation, to unnecessary legal combat, hell-bent on maximising fees and displaying their prowess in court. In contrast, *litigation romanticism* (Menkel-Meadow 1995: 2669) presents courts as the pre-eminent site of Kantian justice where judges uphold the rule of law

² I am indebted to Michael Palmer for this insight.

against the executive and parliament, vindicating the rights of the powerless through impartial Solomon-like wisdom (Fiss 1984). Neither view is able to provide a very accurate or comprehensive picture of mediation. This article will argue that the crucial factor for the existence of high-quality mediation existing alongside access to high-quality public justice, an intrinsic aspect of the rule of law, is the maintenance of choice between these distinct but complementary processes (Moffit 2009; Neuberger 2010).³ This article will also examine how voluntary mediation serves important values of party autonomy and self-determination that complement the objectives of the rule of law, whereas compulsory mediation subverts both the rule of law and the values that mediation claims to serve. The first part of the article defines and discusses the terms that are used and introduces the different forms of compulsion and sub-principles of the rule of law. Part 2 then considers current practice in the UK in the context of relevant case law. Part 3 analyses different forms of mediation in the light of Bingham's eight sub-principles. Part 4 concludes with an examination of the contexts where there is an irreconcilable tension between the rule of law and forms of mandatory mediation.

[B] DEFINITION OF TERMS CONSIDERED

Mediation

Mediation is in essence third-party facilitated negotiation. For CEDR this becomes a 'flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution' (CEDR 2018: s 1). While it encompasses a spectrum of interventions, from informal facilitation of settlement to the Court of Appeal mediation scheme, and a variety of styles, from the narrowly evaluative to the broadly facilitative (Riskin 1996) including transformative (Bush and Folger 1994) and narrative forms (Monk and Winslade 2000), the fact that it is voluntary is central to its identity. Crucially, the parties' retention of the decision to settle depends on the existence of a process to adjudicate the case, as a long stop, if a party does not wish to settle. The European Mediation

³ Although some critics have taken issue and refuted the centrality of the court system to the rule of law, it remains an important aspect of Bingham's analysis.

Directive incorporates voluntarism both in its preamble and definition (Directive 2008/42/EC).⁴

Compulsion

Compulsion is a complex concept. Where does the threshold of compulsion lie? Is it an *ex post facto* negative costs order for not mediating or a judicial direction to engage with the process? If the latter then what does that engagement require and at what stage in the process? Is attendance on the day sufficient or will mediators be required to certify good faith and for parties to engage with the process for a minimum period and if so for how long? Should judges go further and compel not just attendance but resolution of the dispute? Some commentators, such as Ahmed and de Girolamo, argue that the Rubicon of compulsion has already been crossed, that this need not be lamented and the need now is for mediation to be given a clearer procedural framework within the civil justice system (Ahmed 2012) or for express legislative provisions (de Girolamo 2016). A body of academic commentary has drawn attention to the way that the process of mediation may undermine the interests of the vulnerable or powerless (Nader 1979; Abel 1982; Hofrichter 1982; Auerbach 1983; Fiss 1984): compulsion arguably reinforces this process by legitimating an erosion of rights. Sander (2007) distinguishes between two types of mandatory mediation: 'discretionary' judicial referral and a self-enforcing 'categorical' referral in which all cases of a certain type are referred.⁵ Walsh (2011: 110) has referred to 'tiered' resolution clauses that require the use of mediation prior to arbitration or adjudication. Quek (2010: 488) postulates a 'continuum of mandatoriness' across five levels and argues that the higher levels are more likely to blur a distinction between 'coercion into' and 'coercion within' mediation.

For the purposes of this article, I adopt the categories of compulsion used by the Civil Justice Council (2017: s 8) in its interim report on 'ADR and Civil Justice'. Types 1 and 2 involve Sander's 'categorical' form while Type 3 requires the exercise of judicial discretion. All three categories envisage that the duty of litigants is to engage with the process rather

⁴ Paragraph 13 of the preamble states: 'The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organize it as they wish and terminate it at any time.' Article 3 defines mediation as: 'a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.'

⁵ For a more recent discussion which adduces a further category of quasi-compulsion, see Hanks (2012).

than to settle. In a stricter type, adopted in commercial contexts in the PRC, in certain cases judges effectively mandate settlement.⁶

- ◇ Type 1: a requirement that parties in all cases engage in or attempt ADR as a pre-condition of access to the court, with the claimant unable to issue proceedings until evidence of the appropriate efforts is produced.⁷
- ◇ Type 2: a requirement that the parties have in all cases engaged in or attempted ADR at some later stage such as any case management hearing.⁸
- ◇ Type 3: power of the court to require unwilling parties in a particular case to engage in ADR on an ad hoc basis in the course of case management.⁹

Mandated mediation has many forms. It can be provided by private mediators, at the choice of the parties, accredited mediators annexed to a court, or even by a judge who then recuses him or herself from hearing a case. What all forms have in common is that the option of mediation is no longer freely chosen by the parties as an alternative to adjudication but compelled, whether procedurally or judicially with an implicit or explicit sanction for non-compliance.

⁶ While not currently a prospect in the Anglo-American common law systems, in the PRC a highly evaluative form of mediation is integrated into the civil justice system. Guidance of the Supreme Court compels inferior courts to consider cases for mediation even where parties are reluctant. The same judge will hear evidence in mediation that may subsequently be admissible in court adjudication. Chinese judge-mediators 'show a way to cross the line of self-determination and make encouragement become coercion' (Fei 2015: 398). Judge mediators consult the law: to anticipate the losing party; to identify negative effects that might ensue from adjudication; and to propose a mediation scheme and create bargaining chips to induce settlement. There is, however, a complex interplay between adjudication and mediation in the cross-current of the relationship between the judiciary and the executive. Article 9 of the Civil Procedure Law of the PRC provides that when hearing a case 'the People's Courts shall conduct mediation in accordance with the principles of voluntariness and lawfulness'. This form of mediation illustrates the dangers of 'MedArb' or judicial mediation where the same judge mediates and tries a case. See, for example, Fu and Palmer (2017) on this complex and evolving issue.

⁷ See for instance: Hanks (2012), who cites New South Wales farm debt recovery scheme and Italian procedure as discussed in the *Rosalba Allassini* case, C-1317/08 and C 320/08. In a UK context examples would be a MIAM certificate in family cases or a C100 in employment tribunals confirming ACAS conciliation.

⁸ Under the Ontario Mandatory Mediation programme (CPR r 24.1) all civil (non-family) cases are assigned to a three-hour mediation session, to take place within 90 days of filing the defence unless the court orders otherwise (Prince 2007).

⁹ Arguably the court already has this power under r 26.4(2)(b) to direct mediation and to apply sanctions where it is refused. See, for instance, Ward LJ in *Wright v Michael Wright Supplies Ltd* (2013).

Rule of Law

The concept of the rule of law is both an ‘elusive and protean concept’ and a ‘criterion of civilization’ (Sedley 2015: 280).¹⁰ In the context of English law it was first defined and identified by A V Dicey in his 1885 *Lectures Introductory to the Study of the Law of the Constitution*, where he linked it uncritically with the ‘omnipotence or undisputed supremacy’ of Parliament and government (Dicey 2013: 95). It is a pivot of the constitution in its linkage between legal values and political morality,¹¹ now given express statutory recognition.¹² In its contemporary common law English form it has evolved from Dicey’s limited principles of: no punishment without law; resistance to discretionary powers; equality before the law; and the origin of these principles in the decision of the courts rather than the fixed constitution, to address the abuses of executive power in the 20th century which nevertheless followed a form of law.

In Thomas Bingham’s developed, substantive (or ‘thick’) form it includes equality and human rights and, implicitly, an ideal of justice, a democratic polity and separation of powers (Bingham 2010). While some jurists, such as Joseph Raz (1977), offer an account of a more limited formal (or thin) version, stripped of political morality, this article adopts the analysis of Bingham as most relevant to the present context, given his experience at the apex of the English legal system—as Lord Chief Justice, Master of the Rolls and senior Law Lord (2000 to 2008)—on account of its clarity, and for its engagement with the 21st-century legal values of substantive equality and fundamental human rights. Bingham’s analysis accepts the Diceyan account of the centrality of the judiciary in controlling arbitrary power; its formulation takes account of the development of administrative and corporate power in the second half of the 20th century and the need to ensure the integrity of an increasingly significant body of administrative decisions that has developed since Victorian England. The rule of law is not solely the creation of the courts. As Bingham (2010: 174) makes clear in his discussion of Ambrogio Lorenzetti’s fresco of *An Allegory of Good Government*, the rule of law is not only a criterion of individual justice but of the integrity of governance. Access to justice becomes a necessary

¹⁰ Its roots are in the Athenian philosophy that ‘it is more proper that the law should govern than any one of its citizens’ and that equality of access to the courts is a precondition of democracy (Aristotle 2010: 89).

¹¹ See, for instance: Edward Thompson’s identification of the rule of law as an ‘unqualified human good’ (Thompson 1975: 260).

¹² Constitutional Reform Act 2005, s 1, declares that it does not affect the ‘the existing constitutional principle of the rule of law’ in the context of reforms to the role of the Lord Chancellor.

precondition for social harmony and peace and the capacity of individuals to operate effectively within stable social structures.

In Bingham's account of the rule of law, set out in the Sir David Williams Lecture (2006) and subsequently published in *The Rule of Law* (2010), he identifies eight principles. These points can be characterised as follows:

1. The law must be accessible, intelligible, clear and predictable.
2. Questions of legal right and liability should be resolved by law not discretion.
3. Laws should apply equally to all.
4. Ministers and public officers must exercise their powers in good faith, and for their intended purpose.
5. The law must adequately protect human rights.
6. Means must be provided for resolving, without prohibitive cost or inordinate delay, civil disputes which the parties themselves are unable to resolve.
7. Adjudicative procedures provided by the state should be fair.
8. The state must comply with its obligations in international and national law.

[C] CASE LAW REGARDING CURRENT PRACTICE

Civil justice reforms in the 1990s sought to simplify civil procedures within the context of the most restrictive access to legal aid since its inception in 1949. The Heilbron-Hodge Report in 1993 concentrated on moving the litigation culture towards early settlement of disputes. Following this, Lord Woolf was commissioned to conduct a formal review of the civil justice system. His 1995 'Access to Justice: Interim Report' was a watershed moment in the development of ADR, striking a balance between the active encouragement of ADR and opposition to compulsion as an 'alternative or preliminary to litigation' (Woolf 1995: cxxxvi, paras 3-4).¹³ In his 'Access to Justice: Final Report' he remains 'of the view, though with less certainty than before, that it would not be right for the court to compel parties to use ADR' (Woolf 1996: lxi, para 18) and recommends:

Where a party has refused unreasonably a proposal by the court that ADR should be attempted, or has acted unco-operatively in the course of ADR, the court should be able to take that into account in deciding what order to make as to costs' (Woolf 1996: ccii para 41).

¹³ He attributes the prevalence of compulsory mediation in USA jurisdictions to the lack of court resources for civil trials.

Although Lord Woolf maintains the importance of preserving the citizen's common law constitutional right of access to the court (*R v Lord Chancellor ex p Witham* 1997; *R v Home Secretary ex p Leech* 1994), where active encouragement is buttressed with costs penalties for refusing to contemplate mediation this moves towards a Type 2 compulsion. The boundaries of this encouragement remain contested and unclear.

In November 2008, Sir Anthony Clarke, as Master of the Rolls, appointed Sir Rupert Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. He published a preliminary report in May 2009 and a final report in December 2009 (Jackson 2010a; 2010b). Following this review, the costs of seeking settlement or negotiation, including those of an unsuccessful mediation, are recoverable as 'work done in connection with negotiations with a view to settlement' (Civil Procedure Rules PD 47, 5.12(8)).

In the 'Civil Courts Structure Review' (2015; 2016), Briggs LJ, noting that small claims mediation was effective but underused, identified the relationship between the civil courts and the providers of ADR as 'semi-detached' but stopped short of recommending compulsion:

The courts penalize with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years to make any form of ADR compulsory. This is in many ways, both understandable and as it should be (Briggs 2015: para 2.86).

He considers early settlement by mediation or conciliation an 'essential element in a new court designed for navigation by litigants without lawyers' (Briggs 2016: para 6.73), and that 'the choice of the most suitable conciliation process for each case should be a matter for the experienced, judicially trained and supervised, Case Officer in conjunction with the litigants themselves' (Briggs 2016: para 113).

The rhetoric of simplification and the reality of cost-savings have pulled in different directions. Ahmed (2012: 151-75) has argued that there is already an 'implied compulsory mediation' in the English jurisdiction. Compulsory Mediation Information and Assessment Meetings (MIAMs) in family law (Type 1 compulsion), Civil Procedure Rules exhorting mediation, and judgments prescribing cost penalties for not mediating have introduced an element of implicit coercion into mediation.

Case law has oscillated between reticence towards mediation and an enthusiastic endorsement of mediation with a willingness to embrace compulsion. The primary sanction to date for not mediating remains an

adverse costs order departing from the ordinary principle that ‘costs follow the event’. In *Burchell v Bullard* (2005) a party that ignored an offer to mediate at a pre-action stage was deemed to have unreasonably refused to mediate. In *R (Cowl) and Others v Plymouth City Council* (2001), Lord Woolf held that parties must consider mediation before starting legal proceedings, particularly where public money is involved, and in *Dunnet v Railtrack* (2002) the Court dismissed Mrs Dunnet’s appeal against Railtrack, refusing to order costs against her on account of Railtrack’s refusal to contemplate mediation prior to appeal. In this case of clear precedential value, Brooke LJ offered a vigorous exhortation of the importance of mediation and of the reality of a costs sanction:

It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when it is suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences (*Dunnet v Railtrack* 2002: para 15).

In *Hurst v Leeming* (2002), Lightman J marked a move towards incorporating ADR as a part of, rather than complement to, the justice system, holding that it was for a judge to determine whether a refusal to mediate was justified, arguing that ‘mediation is not in law compulsory, but alternative dispute resolution is at the heart of today’s civil justice system’ (para 9).

In *Halsey v Milton Keynes NHS Trust* (2004: para 9), Dyson LJ, in the Court of Appeal, went some way to redressing the balance in identifying six factors that needed to be considered regarding the reasonableness of a refusal to mediate and opined that ‘to oblige truly unwilling parties to refer their disputes to mediation would be to impose unacceptable obstruction on their access to the court’ and considered that compulsory mediation could infringe Article 6 of the European Convention on Human Rights (ECHR) 1950.¹⁴

In *Chantrey Vellacot v The Convergence Group plc* (2007: paras 218, 226), a case involving a counterclaim for professional negligence against a firm of chartered accountants which had initiated proceedings for non-payment of fees, Rimer LJ followed *Eagleson v Liddell* (2001) in ordering the recovery of costs, on an indemnity basis, against the director of the

¹⁴ The nature of the dispute; the merits of the case; the extent to which other settlements have been attempted; whether the costs of mediation would have been disproportionately high; whether any delay in setting up or attending mediation would have been prejudicial; whether the mediation had a reasonable prospect of success (*Halsey v Milton Keynes NHS Trust* 2004: para 16).

company, who was not a direct party to the proceedings as a witness who was found to be 'evasive and untruthful'. This included a failed post-proceeding mediation that was considered to fall within an expansive definition of section 51 of the Supreme Court Act 1981 as 'the costs ... incidental to the proceedings'.

In *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence* (2003: para 9), where the Ministry of Defence rejected mediation in a case concerning the interpretation of a lease of property on the grounds that involved a point of law, Lewison J relied on the government's mediation pledge in determining that this did not make the case unsuitable for mediation.

The pendulum appeared to swing back towards compulsion in *PGF v OMFS Company 1 Ltd* in 2012. The court affirmed the role of ADR in civil justice and the view expressed by Jackson that to ignore a good faith invitation to mediate could justify a costs sanction. The Court of Appeal decided the case:

sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation (*PGF v OMFS Company 1 Ltd* 2013: para 56).

However, in the more recent case of *Gore v Naheed* (2017: para 49), Patton LJ, in the Court of Appeal, refused to interfere with the cost decision of the first instance judge and 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.

The current state of case law represents an uneasy truce between Dyson LJ's indicia for a test of reasonableness in refusing mediation and the courts' jurisdiction to compel parties to enter into a mediation. There is a precarious judicial consensus that compulsion could be viewed as a violation of a litigant's constitutional right of access to the court, but an adverse costs order does not amount to a fetter in a strict legal sense. Lord Phillips, as Master of the Rolls, while shrinking from compulsion, was favourable to court-annexed mediation, arguing that 'there should be built into the process a stage at which the court can require them to attempt mediation' (Phillips 2008). Lord Clarke, speaking extrajudicially, has criticised Lord Dyson's *Halsey* judgment and argued that mediation and ADR are 'not simply ancillary to court proceedings but part of them'

and the power exists to make them ‘an integral part of the litigation process’ (Clarke 2008: paras 14, 16). The logic of this, however, appears defective. As Lord Neuberger has reflected extrajudicially, requiring all individuals to mediate before gaining access to the court will have a disproportionate impact on different classes of litigants. Some will have the resources to afford mediation and litigation, and others will not.¹⁵ Neuberger anchors his analysis in the constitutional principle of the equal right of access to the courts (as a third branch of government) and the Ancient Greek concept of ‘equal participation in government’ (Neuberger 2010: 5). Financially based fetters therefore ‘run the risk of depriving all citizens of an equal right of participation in government’ (Neuberger 2010: 7). The commitment of the executive branch of government to make civil justice self-financing,¹⁶ coupled with the identification of mediation as a way of reducing costs and dockets, undermines this principle. This reflects a distinction between those judges such as Lord Clarke, Ward J and Lightman J who conceptualise ADR as integral to the litigation process, and those such as Lord Neuberger and Dyson LJ who prefer to consider it as more properly an adjunct or complementary.

[D] MEDIATION CONSIDERED IN THE CONTEXT OF BINGHAM’S EIGHT PRINCIPLES

One: The Law must be Accessible, Intelligible, Clear and Predictable

Accessibility to justice is a *raison d’etre* of mediation. It is, however, neither, strictly speaking, access to the courts, nor is it necessarily justice according to law. It is frequently argued that mediation costs less than litigation and its informality makes it more understandable to the non-lawyer. Parties to a mediation can explore the issues that they want to pursue rather than being constrained by the legal theory brought to a case by judge and counsel. The compromise of a case can be on terms that go beyond the context of the legal dispute. Mediation may not provide strict access to law but to a quality of justice that is distinct and reconcilable with legal structures.

¹⁵ Hazel Genn (2012: 405) has estimated that an unsuccessful mediation increases the costs for parties by between £1,500 and £2,000.

¹⁶ See, for instance, comments of Lord Scott, (then head of Civil Justice) on 16 May 1997: ‘A policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who use it, profoundly and dangerously mistakes the nature of the system and its constitutional framework.’: cited in Zander (2000: 39).

The argument regarding mediation in the light of this principle is not that justice will not be done in a specific dispute but that justice is not done according to law (Gardner 2018) and that a decisive shift towards ADR would inhibit the development of precedent and the public knowledge of normative guideline that contribute to the resolution of disputes.¹⁷ By divesting cases from the courts, mediation impedes the capacity of judges to make authoritative interpretations of the law. To reduce the argument to absurdity, a mediated settlement in *Brown v Board of Education of Topeka* (1954) that provided that Linda Brown could have a daily taxi to travel to Sumner Elementary School or private education at a multicultural school of her choosing would not have been an adequate response.

The essence of what Mrs Brown wanted was a public vindication of her rights. While it is a minority of cases that litigate matters of pre-eminent public interest, such cases may arise in contexts as unpredictable as snails in ginger beer (*Donoghue v Stevenson* 1932) or borstal boys boarding private yachts (*Home Office v Dorset Yacht Co Ltd* 1970), and it would be hard to identify a fail-safe filter that would ensure that such issues were not clouded by one party's partisan interpretation. This is not as rare as it may seem. In *R (Unison) v Lord Chancellor* (2017), Lord Neuberger makes the point that this happens frequently in employment disputes and cites *Dumfries and Galloway Council v North* (2013) concerning the comparability for equal pay purposes of classroom assistants and nursery nurses with male manual workers as illustrating:

that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required (para 69).

The equation here, however, is not a simple one. It can be argued that selective mediation can concentrate judicial resources where they are most needed and thereby support the rule of law.¹⁸

At first sight, the small number of cases being mediated would seem to refute any significant effect impeding the development of precedent, but the process of erosion may be cumulative. The introduction of the Court of Appeal mediation scheme in the UK now requires consideration of mediation *after* cases have been identified as potential precedent. While

¹⁷ Gardner argues that justice being done according to law is primarily a public good, involving public guidance, and only secondarily a resolution of their dispute.

¹⁸ See, for instance, Menon (2017).

a majority of cases have always settled before trial,¹⁹ Linda Mulcahy (2013: 61) has highlighted a ‘rich stream of statistical accounts of diminishing use of public adjudication across subject matter, types of trial and jurisdiction’.²⁰ There is still a need for further statistical research and analysis regarding the impact of mediation on this diminution.²¹

CEDR estimates that the use of mediation increased by 35% in the two years following *Dunnett* (Phillips 2008) and has increased by a further 20% between 2016 and 2018, largely as a result of the growth of sectoral schemes. The market now comprises 12,000 commercial cases per year.²² Changes in civil procedure in Toronto resulted in 18,000 cases being subject to mandatory mediation in the first year, of which 40% settled outright, and a further 17% partially settled (Prince 2007: 86). This compares with CEDR’s estimate of 73% settlement rate in relation to voluntary mediation (CEDR 2005). Research in the USA estimates that the proportion of federal cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002 (Galanter 2004: 459) and to 1.7% in 2004 (Lande 2006; 217). While fewer litigated cases does not inevitably result in fewer precedents, the common law requires a significant pool of cases with precedent-setting potential. ‘Categorical’ compulsion will reduce this pool. Without some procedural filter to ensure that cases with precedent-setting value do not get strong-armed into mediation there is at the very least a risk that the vigour of the common law may atrophy. Mulcahy’s (2013: 62) research in the UK references a decline in the number of cases filed in the Court of Appeal that are disposed of by full trial from 1,756 in 1995 to 215 in 2009.

In *LaPorte & Another v the Chief Commissioner of Police of the Metropolis* (2015), for instance, the High Court reduced costs recoverable by the Metropolitan Police, where it had won on the substantive issues in the main case regarding the extent of its right to the use of anticipatory force against members of the public in excluding people from a public place to prevent a breach of the peace (*LaPorte & Another v the Chief Commissioner of Police of the Metropolis* 2014). Luban (1995: 2659, 2662) identifies the

¹⁹ Civil Justice Council extrapolates from Judicial Statistics for four quarters, ending on September 2016, that just over 145,000 out of 1.8 million issues cases of all types reaching allocation stage are defended and roughly 50,000 trials go to judgment (Civil Justice Council 2017: s 3.26).

²⁰ This study relates to a period prior to the hike in costs of initiating proceedings in the High Court, a factor that has probably reinforced the trend.

²¹ The Civil Justice Council (2017: s 4.10) notes, ‘statistics are hard to acquire, by reason of the very confidentiality that makes mediation work’.

²² CEDR in its ‘Eighth Mediation Audit’ (2018) estimates that the current mediation market amounts to 12,000 cases per annum with a total value of £11.5 billion.

United States v Microsoft Corp (1995) and *Georgine v Anchem Products Inc* (1994) cases as demonstrating the dangers of private dispute resolution in undermining the public good. In *Microsoft*, Judge Stanley Sporkin refused to ratify a proposed anti-trust settlement on the basis of its secrecy. In *Georgine*, pay-out schedules for asbestos claims provided for less generous pay-outs for future claimants than for the pre-existing clients on whose behalf the negotiating lawyers has been retained.

In Mulcahy's study of the government's Annual Pledge Reports, she refers to several cases involving important rule of law principles, including the deaths of British soldiers in non-combat situations and a group action concerning chemical weapons tests at Porton Down between 1940 and 1989 (Mulcahy 2013: 72). Hazel Genn's (2002: 71) analysis of the scheme identifies that the need to establish a precedent does not amount to a category of case unsuitable for mediation.²³ Legg and Boniface have calculated that, since the introduction of CPR, litigation in the High Court and County Court has reduced by 80% and 25% respectively (Legg and Boniface 2010: 40-41). It is notable that the greater decrease is where a disproportionate amount of precedent will be generated. For Richard Ingleby (1993: 450) the 'objective rules and the acknowledgment of opposing interests of professionalised justice' are preferable to incorporated justice. Compulsory mediation, without adequate safeguards, compromises this aspect of the rule of law.

Two: Questions of Legal Right and Liability should be Resolved by Law not Discretion

Mediation in its very essence involves the exercise of discretion, that of the parties in finding their own means of resolution. While that does not present a problem where parties retain access to the courts if a process of settlement fails, an element of compulsion can subject parties to a process where inequality of bargaining power and economic duress coerce parties to settle, leaving them with no redress except the ability of a mediator to require one party to listen to the other. Historically, critics such as Owen Fiss (1984), Jerold Auerbach (1983) and Richard Abel (1982) have identified this in relation to poorer litigants in civil mediation, and Tina Grillo (Grillo 1991) in relation to women in family mediation. In Fiss's argument, the imbalance of power in settlement negotiation flows from

²³ Lord Woolf emphasised that: 'We would hope that the guidance we have provided should enable the appeals to be settled without difficulty by the parties themselves, but if they are not we would hope that the parties would seek the assistance of ADR from the court before proceeding with the appeals. If they do not, this may be an appropriate matter to be considered when determining the order for costs which should be made.'

(a) unequal ability to assess the likely trial outcome, (b) a poor claimant's cashflow needs and (c) unequal ability to finance litigation. But all three factors primarily infect litigation and only derivatively do they impact on out-of-court settlement processes. Where mediation is voluntary, the choice may be an empowerment for the poorer parties in which timely non-court resolution can lead to earlier outcomes at lower cost.

While it is true that structural inequalities are inherent in bilateral negotiation, the compulsory nature of mediation fuels inequality in increasing costs. It promises a form of resolution but cannot provide the redress of a state-backed determination that can overturn imbalances of power, in the case of intransigence.

More recently Genn has encapsulated the spirit of these critics and highlighted the dangers of civil justice reform in the context of cuts to legal aid, opining 'the outcome of mediation, therefore, is not about *just* settlement it is *just about settlement*' (2012: 411; original emphasis). Informality masks power differentials that are brought into sharper focus with the more formal procedural requirements of adjudication (Winkleman 2011: 17-18). It is in the very nature of this informality that the distinction between a coercion *into* mediation by a judge and *within* mediation by a mediator, who in the case of compulsion derives her authority from a judicial or court order, can be eroded. While a party may be theoretically free to leave a mediation, few mediators relish the prospect of a failed mediation, and a judicial direction to mediate reinforced by the fear of an adverse costs order may make parties 'feel that they have little choice' (Genn 2012: 402).

Contemporary categories of cases that present this problem include litigants in person who in being delayed access to the courts may be pressured to settle without legal advice. There is equally a danger of injustice in actions for the enforcement of a debt where there is no substantive issue to be tried or where a spurious defence is pleaded for tactical reasons without any intention of seeking to substantiate it at trial. Both Types 1 and 2, especially in the case of lower-value claims, can impede access to the courts. In higher-value claims the additional costs of mediation are more likely to be proportionate to the amount in issue. Asymmetries of power, whether of resources, knowledge or contacts, however, pervade litigation as much as mediation. Neither can be accurately portrayed as a panacea of justice.

Mediation operates in the shadow of the law in that it depends on an informed prediction of how the law *might* apply in guiding the resolution of cases (Mnookin and Kornhauser 1979). No less obviously, it operates

in the shadow of the market. Where mediation replaces litigation as the dominant mode of resolving disputes the principle of the uniform application of the law is eroded by a process of bargaining in which the litigant cannot rely on an authoritative determination of his/her rights.

Three: Laws should Apply Equally to All

Mediation offers the opportunity for differentiation between cases and aspires to process equality rather than substantive equality before the law. Indeed, if mediation is only going to be compulsory in some disputes—i.e., consumer disputes—it undermines any principle of equality by offering twin standards of justice. In consumer disputes, the customer may seek public vindication of their rights, whereas the merchant craves confidentiality and management of reputational risk. In comparison with the ‘small claims court’, mediated consumer settlements tilt the balance away from the customer. Many consumer mediation schemes offer the advantage of free facilitation for the claimant as a *quid pro quo* for confidentiality for the merchant. Where consumers lack adequate resources to initiate litigation, mediation may at least provide a partial vindication of their rights and in doing so can be seen as providing access to a form of justice that furthers equality before the law.

Mediation encourages settlement of cases on a commercial basis rather than the rigorous and public application of legal principle to a factual context. It offers the suspension of strict law to enable the creative resolution of conflict. In civil mediation between two companies, it provides a pragmatic business outcome that both parties choose over court adjudication. However, in other cases, for instance employment, the relative strength of bargaining power of the parties may depend more on issues such as the management of reputational risks than legally objective differences.

Four: Ministers and Public Officers must Exercise their Powers in Good Faith and for the Intended Purpose

The role of the ombudsman system in public law, although not strictly mediation, can strengthen and complement a system of court-based justice. The crucial guarantor of the rule of law is that the decisions of an ombudsman, where they depart from the law, are required to give reasons for doing so and decisions are subject to judicial review at the instance of either party (*R (on the application of Aviva) v Financial Ombudsman Service* 2013).

In public law cases, the court is of necessity concerned not just with private rights but also with the rights and interests of third parties. The Public Law Project, in a research study by Varda Bondy and Others (2009), highlights some of the dilemmas involved in public law mediation and points out that principled objections raised by practitioners do not invariably prevent the use of mediation. Mediation in judicial review cases is less common than in private practice. Some 60% of cases resolve through dialogue after pre-action letter and the issue of proceedings, and some 60% are refused permission. When considered in conjunction with the filter provided by an application for leave, only 5% of initiated cases proceed to a substantive hearing.²⁴ The study highlights the risks of compulsory mediation, finding that many ‘arguments in favour of using mediation over adjudication cannot be justified and that the promotion of mediation by policy makers is based on little evidence’ and concludes that ‘the choice of redress mechanism must be made by practitioners together with their clients, and no one else’ (Bondy and Others 2009).

While there is scope for a form of mediation in public procurement disputes, the public body that is being reviewed has a responsibility not only to the party reviewing the decision but also to other parties potentially affected by a procurement decision and to the public purse. The rule of law here depends on the quality and integrity of lawyers in insisting that public law duties are adhered to, a duty which can be, but should not be allowed to be, vitiated by the existence of a confidentiality clause in mediation.

Five: The Law must Adequately Protect Human Rights

Since Dicey, the Universal Declaration of Human Rights 1948, the ECHR 1950 and its quasi-incorporation via the Human Rights Act 1998 have contributed to a metamorphosis of the rule of law. This aspect of Bingham’s theory marks the most radical departure from Dicey’s conception, for whom there was an unproblematic equation between the rule of law and the legislative supremacy of Parliament. The political experience of the 20th century with the Nuremburg Decrees and apartheid South Africa has demonstrated that the democratic will is impotent in restraining the tyranny of government.²⁵ Human rights, by infusing legal value with moral content, have attempted to reconcile this

²⁴ See [Judicial and Court Statistics](#).

²⁵ Although the ‘Velvet Revolution’ (1989) and ‘Arab Spring’ (2010) provide a more optimistic contrast.

tension.²⁶ Mediation, with the centrality of the doctrine of ‘mediator neutrality’, cannot afford protection of human rights. The privacy of mediation occludes human rights issues from the public eye. The confidentiality of the process of mediation, where compulsory, is a fetter on freedom of expression. The existence of a potential remedy in the European Court of Human Rights is often too distant and costly to cast a sufficiently deep shadow to influence mediation. Dyson LJ asserted *obiter* in *Halsey* (2004: 3007 E) that ‘*compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6’ (original emphasis). Despite an abundance of extrajudicial mutterings, no decided case has challenged this principle.

In European Court of Justice case law, *Rosalba Alassini v Telecom Italia SpA* (Joined Cases C-317/08 to C-320/08), a compulsory mediation process did not constitute a breach of EU Law. The decision related to the implementation of the Universal Service Directive.²⁷ The scheme introduced by the Italian government obliged a customer to go through a process of mediation before bringing a claim against a service provider. The decision involved a process that did not entail costs to the parties and where any resultant delay to litigation was likely to be no more than 60 days during which the limitation period is suspended. Advocate General Kokott concluded that the Italian compulsory out-of-court dispute resolution provisions were pursuing:

legitimate objectives in the general interest (i.e: a quicker, less expensive method of dispute settlement which also lightened the burden on the court system and was likely to produce a more satisfactory long term solution to the dispute) (Joined Cases C-317/08 to C-320/08: para 45).

The decision has not proved popular with ADR providers in Italy. Subsequent to *Alassini*, mediation in Italy has become a condition precedent for litigation involving a wider range of disputes. Where agreements cannot be reached, mediators may make recommendations which may have far-reaching costs penalties if not accepted (Nolan-Haley 2011: 1005).

²⁶ Thomas Bingham, however, elides the analysis of what happens in the theoretical problem of a clash between the unstoppable force of the supremacy of Parliament and the immovable object of fundamental human rights declining, in *R (Jackson) v Attorney General* (2005), to follow the conjectures of Lord Steyn, Baroness Hale and Lord Hope and instead putting faith in the ‘ties that bind’ of parliamentary process.

²⁷ Directive 2002/22/EC—a directive on universal service and users’ rights relating to electronic communications networks.

Six: Means must be Provided for Resolving, without Prohibitive Cost or Inordinate Delay, *Bona Fide* Civil Disputes which the Parties Themselves are Unable to Resolve

The right of access to the courts has become a well-recognised constitutional principle²⁸ in common law and protected by the ECHR.

For many proponents of the rule of law, Bingham's means for resolving civil disputes is synonymous with the courts. Sedley (2015: 273) paraphrases this principle as 'there must be accessible courts for the resolution of disputes'. In his discussion of this principle, Bingham (2010: 86), however, clearly states the value of mediation, both psychologically in 'avoiding the distress and humiliation of losing completely and the unpleasantness of antagonistic litigation' and, pragmatically, in recognising that a consensual settlement is more likely to be honoured. While mediation may save both cost and delay by providing a speedier and more economic resolution to a case, it may be that even with mediation parties are unable to resolve a case, and there is therefore a need for an 'authoritative ruling of the court'. In that case, costs may be increased by what becomes an additional stage of civil procedure.²⁹ Compulsion by interpolating an adjunct or additional stage to civil procedure potentially increases both cost and delay without the consent of the parties. This is particularly so with Types 1 and 2 compulsion where mediation is not free at point of use,³⁰ and there is no test regarding the proportionality of the additional cost of mediation to the financial value of the dispute.

While Type 1 compulsion does not necessitate that a case settle, without the safeguard of a judicial override it creates a fetter on the right of access to the courts, just as disproportionate court fees for employment tribunals impeded access in the *Unison* case (*R (Unison) v Lord Chancellor* 2017). Types 2 and 3 compulsion may be less problematic, where a case does not settle, they may nevertheless, (a) incur a costs penalty for parties refusing to mediate and (b) increase the overall costs of litigation.

²⁸ See, for instance, *R v Secretary of State for the Home Department ex p Leech* (1994: 201); *R v Lord Chancellor ex p Witham* (1998) and *R (on the application of Anufrijeva) v Secretary of State for the Home Department* (2003).

²⁹ Costs for CEDR's fixed price Panel Mediation amount to £1,250 per party for cases worth up to £250,000. These costs do not include attendance of lawyers or mediation advocates. See [CEDR Fixed Price Mediation](#).

³⁰ However, in the USA court-annexed mandatory mediation scheme, mediators often offer at least part of their services on a *pro bono* basis.

A stricter type of compulsory mediation, where parties are coerced into settlement as an alternative to state-backed determination of rights and responsibilities, clearly violates this principle. With other types probably what matters is the extent to which parties are not only compelled to try mediation but to persevere with it. Coercion into mediation does not necessarily translate into coercion within mediation. The crux here is civil disputes which the parties are unable to resolve themselves. While there may be a case for requiring two reasonable litigants to at least seek a facilitated resolution to their conflict via Type 3 mediation, there are inevitably many cases where one (or more) litigants are unreasonable and in these circumstances to induce a litigant to go through a charade of negotiation with an adversary who has no genuine intention of making a reasonable settlement becomes a travesty of justice.

The trend away from adjudication, identified in discussion of principle 2, is part of a wider international trend within common law jurisdictions, perhaps fuelled by a cultural shift away from the provision of legal aid. Many jurisdictions already have mandatory mediation.

In the United States, the Alternative Dispute Resolution Act 1998 empowered United States Districts to set up mandatory mediation schemes. Florida has undertaken mandatory court-directed mediation since 1987. Under the Florida Civil Procedure Rules, parties are able to request that mediation be dispensed with, but such applications are comparatively rare and around 100,000 cases are diverted from court adjudication to mediation every year (Quek 2010: 505). Australia has adopted a number of categorical mandatory schemes, frequently uses discretionary referral and has experimented with court-mandated mediation (Hanks 2012: 952). In Queensland parties to civil litigation may be required to attend a mediation orientation session (District Court of Queensland Act 1967, s 97). In New South Wales, Australian courts have the power to order parties to undertake compulsory mediation (Civil Procedure Act 2005). In Victoria, Australia, the courts may exercise a power to refer parties to mediation without their consent and such mediations may be taken by an associate judge (Supreme Court General Civil Procedure Rules 2005: 50.07.01) or judicial registrar (Supreme Court General Civil Procedure Rules 2005: 50.07.04). Canada has moved towards a presumption of mandating ADR as an ordinary step in litigation (Billingsley and Ahmed 2016: 207). This may take the form, according to jurisdiction, of (a) expressly requiring all litigants to participate in ADR before trial, (b) authorising the courts to mandate mediation in appropriate circumstances or (c) remaining silent as to whether parties can be compelled to participate in ADR (Billingsley and Ahmed 2016: 203).

In Ontario, a court-mandated mediation programme concluded that compulsory mediation speeded up cases, reduced costs, led to earlier settlement and led to greater litigant and lawyer satisfaction with a high proportion of cases (40%) being settled earlier in the litigation process (Hann and Barr 2001: 2). In Central London County Court (2004), an experiment conducted by the Department for Constitutional Affairs in which mediation became the default option was less successful. One or both litigants in 81% of cases objected to the referral (Genn and Others 2007: ii).

Seven: Adjudicative Procedures Provided by the State should be Fair

The fairness of mediation has been debated *ad nauseam*. Arguably, mediation safeguards the process rather than the substantive outcome. While a judge has an obligation to ensure *substantive* fairness, ADR replaces that with a negotiation between equals where the best that an experienced mediator can provide is *procedural* fairness. The guarantor of fairness is the maintenance of court determination as a fall-back position.

Mediation as a genuine alternative to adjudication augments fairness, but compulsion erodes it, not just in denying the opportunity of an authoritative outcome, but also in undermining the primary purpose of adjudicative justice in providing public guidance to pre-empt future disputes and the principle that justice should not only be done but ‘seen to be done’ (*R v Sussex Justices, ex p McCarthy* 1924: Hewart CJ).

From a rule of law standpoint these criticisms highlight the need for adequate legal aid for parties to ensure equality of arms as a component of the rule of law. Only Type 3 can match, this incorporating the safety net of judicial discretion and which needs to be exercised within the spirit of the other principles.

Eight: The Rule of Law Requires Compliance by the State with its Obligations in International as in National Law

Questions of international law are beyond the scope of this article, but arguably the very absence of a binding, compulsory, international court of universal jurisdiction illustrates the problem with the domestic proposals for compulsory mediation. The rule of law *is* too important to be delegated to belligerents or legal litigants and requires the protection of judges.

[E] DIFFERENT TYPES OF COMPULSION CONSIDERED

Whether on the basis of Bingham's seminal understanding of the rule of law, or indeed a thinner version, mandating parties to settle would be a clear breach of the rule of law, but what about the types of compulsion that are canvassed by the Civil Justice Council?

Voluntary mediation as an alternative to litigation augments the quality of, and access to, justice in dispute resolution. The back-stop of court adjudication remains. It is inimical to neither 'thick' or 'thin' versions of the rule of law, except in so far as third parties are denied a determination of rights as a guiding legal precedent. Proponents of mandatory mediation such as Sander (2007: 16) argue for it as a 'kind of temporary expedient, à la affirmative action' where it is combined with (a) judicial oversight and (b) the maintenance of a pathway to adjudication without disproportionate costs penalties. But the parallel is an uneasy one in that the objectives of the two address very different purposes. Affirmative action in relation to race is designed to redress deep-seated structural inequalities, whereas mediation is designed to provide a different form of dispute resolution and to deal with defects in the present justice system.

Ahmed (2012) contention that the cost-sanctioning of mediation refusers is a form of implied compulsion overstates the case, particularly post *Gore v Naheed* (2017), but illuminates an inconsistency in a precarious consensus on compulsory mediation. In *Halsey*, Dyson LJ suggested that a court-directed mediation would be a denial of the ECHR Article 6 right to a fair trial. Yet a party who has the temerity to exercise that right runs the risk of being punished for doing so. Why should a direction to attempt to settle by mediation (Type 3) be any more objectionable than a direction that experts should meet to attempt to reach agreement? Neither blocks access to a rights-based adjudication. Both are an interpolation of an additional step that may, or may not, avoid the need for trial, reduce the scope of the issues for trial or streamline the trial. A judge who, at one point in a case management conference, declines on Article 6 grounds to direct the parties to attempt to settle the dispute by mediation may at a later point direct that the experts should meet to attempt to reach agreement.

The distinction is that the direction regarding a meeting of experts addresses a necessary aspect of the evidence that courts will inevitably need to consider to reach a just determination by applying legal principle to the facts, whereas a direction to mediate creates an ancillary stage of

proceedings which, if unsuccessful, will increase costs and is properly speaking in parallel to litigation.³¹ The extent to which it fetters access to the courts will depend on the proportionality of the costs and the degree to which it becomes embedded in civil procedure.

Advocates of mandatory mediation argue that, although coercion within mediation may violate the rule of law, coercion into mediation does not. Quek considers that, while ‘categorical’ referral is ‘synonymous with arbitrariness’, ‘discretionary’ referral may retain a clear distinction between coercion ‘into’ and ‘within’ mediation. In practice, however, the distinction is less clear. In judicial mediation the fact that a judge has ‘directed’ mediation may be perceived by the party bringing a case as an ‘indication’ of his or her opinion of its weakness, and a litigant, especially when unrepresented, may feel undue pressure into settling. Parties may experience coercion from a judge into the process with a wider loss of autonomy and self-determination. The scrutiny necessary to ensure compliance within mediation may itself undermine a sense of voluntariness of the process. Quek finds research demonstrating a nexus between mandatory mediation and coercion is equivocal. She considers that ‘there could be a very faint distinction between coercion to enter mediation and coercion within mediation’, concluding ‘there may well be an acute danger that mandatory mediation could undermine the essence of mediation’ (Quek 2010: 488, 509). While a liberty to opt out at any time may appear to counter some of the arguments against mandatory mediation, for an impecunious litigant the right may be more illusory than substantial. Ingleby’s research demonstrates the impact of a constellation of factors in creating an environment in which ‘third parties who enjoy the authority of the court and are accorded expertise as settlement professionals in fact exercise quasi-adjudicative authority’ (Ingleby 1993: 448).

Mandatory mediation has been used to describe a variety of different forms of coercion from ‘soft’ costs penalties to ‘hard’, fettering access to the courts in what Ahmed and Quek Anderson (2019: 7) characterise as a ‘continuum of mandatoriness’. A mandatory direction to parties to settle a case (Type 3) will always breach principles and values inherent in the rule of law. Whether Types 1, 2 and 3 will breach these principles (discussed above) is more complex. A categorical directive to mediate as a condition of access to the court (Type 1) will breach rule of law principles where there is a charge for the service, if it causes undue delay, or if it bars access to the courts or where limitation periods have not been suspended for the duration of the time allowed for mediation. A categorical

³¹ I am indebted to Rabah Kherbane for this distinction.

requirement to mediate at an interlocutory stage (Type 2) will undermine the rule of law *except* where there is judicial scrutiny combined with a discretion to waive the requirement where appropriate. A judicial discretion to order mediation (Type 3) need not undermine the values of the rule of law, and indeed may augment access to justice, unless the increase in costs becomes disproportionate, or there is coercion within the mediation or undue delay is caused to an aggrieved party in its access to justice.

While Type 1 and Type 2 may be reconcilable with a ‘thin’ version of the rule of law, the problems with both types of compulsion in relation to a ‘thick’ version are that they fail to distinguish cases such as action for repayment of a debt and those of significant precedential value. They would therefore, in their general application, undermine the rule of law, in relation to Bingham’s first three principles. While a tiny minority of cases that are filed result in judgments with precedential value, it is not always easy to identify those that will. Litigants in person present a further obstacle, in that whereas a judge has a responsibility to safeguard their rights and interests, a mediator, under the present understanding of the role, is unable to offer legal advice. A mediation potentially presents an opportunity for a legally represented party to brow-beat or coerce an unrepresented party to settle on terms less favourable than those offered by a court adjudication where an effective mediation advocate could persuade a litigant that their claim is effectively discounted to nuisance value. Here, although voluntary mediation might help to find a swift and just resolution, Types 1 and 2 forms of compulsion would offend against Bingham’s sixth principle both in terms of adding additional cost and delay where a legally represented party does not wish to settle and in the potential for manipulation of ADR processes as a form of discovery against an unrepresented party.

Type 3 compulsion is less problematic as it retains a safeguard of judicial oversight and is not, in any sense, an absolute bar to the courts. Judges already have the power (CPR, rule 1E) to actively manage cases by ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure’ under the over-riding objective of ‘enabling the court to deal with cases justly and at proportionate cost’ (CPR, rule 1.1). Dyson LJ has described the form of an ADR order in the Admiralty and Commercial Court as requiring:

the parties to exchange lists of neutral individuals who are available to conduct ‘ADR procedures’, to endeavour in good faith to agree a neutral individual or panel and to take ‘such serious steps as they may be

advised to resolve the disputes by ADR procedures before the neutral individual or panel chosen' (*Halsey v Milton Keynes* 2004: para 30).

In medical negligence cases, an Ungley order³² pre-shadows Type 3 compulsion, in taking the form that:

The parties shall ... consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the trial judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement, without prejudice save as to costs, giving the reasons upon which they rely for saying that the case was unsuitable (*Halsey v Milton Keynes* 2004: para 32).

A form of mediation where a court were to direct parties to settle, by proceeding with mediation where there is an obvious and settled lack of willingness to do so, would amount to a rule against litigation and conflict directly with the principles of the rule of law in 'thick' and 'thin' versions. The analogy that is sometimes made with an arbitration clause is specious in that whereas an arbitration agreement has a determinative outcome (the arbitration award), mediation does not. This type of compulsion falls foul of the principle articulated by Lord Ackner in *Walford v Miles* (1992: 138) that an agreement to agree is unenforceable, where he opined, 'the concept of a duty to carry out negotiations in good faith is inherently repugnant to the adversarial position of the [negotiating] parties'.

[F] CONCLUSION

While some of the arguments against mandatory mediation could be construed as litigation romanticism, the obverse of a naïve ADR idealism, there is a more persuasive reason why mediation should not be compulsory: the identity and integrity of the mediation process itself depends on mediation being voluntary and complementary to litigation. Once mediation becomes compulsory—whether *de facto* or *de jure*—it inevitably becomes an aspect of civil procedure and no longer an alternative. Mediation ceases to be a subtle process of cooperation within an adversarial process and instead becomes a judge-mandated settlement conference subject to judicial oversight. Mandatory mediation undermines the principles of both party autonomy and self-determination. It 'privatises a dispute at the behest of the public system' (Hughes 2001: 202).

³² Named after Queen's Bench Master Ungley who first gave an order in this form.

Compulsion would compromise confidentiality, since it is only by piercing the veil of trust that judges would be able to determine questions of unreasonableness during the course of mediation or reasons for refusal to mediate (Bartlett 2015). While mediators can give legal information, they cannot currently give legal advice. In the case of compulsion this rule would unfairly prejudice the interests of litigants in person who would no longer have the long-stop of judicial determination of rights.

Compulsion would therefore require a change in the nature of mediation, to safeguard the interests of litigants in person and not unfairly prejudice the right of an impecunious litigant to bring a case to court. Compulsion would inevitably require a greater degree of judicial oversight of the process of mediation that would in turn increase the dominance of the role of lawyers within mediation and require a form of regulation and registration that could sit uncomfortably with the skills of non-legally qualified mediators.

Compulsion favours the more narrowly ‘evaluative’ as opposed to the ‘broader’ and ‘facilitative’ styles of mediation that enhance party empowerment (Riskin 1996; Akin Ojelabi 2019: 69). Since parties in a common law system are at liberty to conduct settlement conferences at any time, compulsion offers little more than an interim evaluation that might be better achieved by a process of judicial early neutral evaluation.

There are persuasive arguments for mediation as a distinct process from adjudication, building on engagement between the parties, restoring party autonomy and empowering parties to take control of the boundaries of the dispute. It is unclear, in the light of the growing prevalence of mediation, why these arguments need to be buttressed by affirmative action. While Types 1, 2 and 3 may be reconcilable with the rule of law in its ‘thin’ version, only Type 3, a judicial direction that parties *attempt* to settle, can fully comply with Bingham’s more substantive version. Costs of doing so need to be disproportionate, there must be a genuine willingness of the parties to engage in the process with good faith and the structural inequalities must be no greater than in litigation.

This article has concentrated on civil mediation. While in some ways family mediation is distinct from other forms of civil mediation,³³ many of the same arguments apply equally forcefully. MIAMS—properly an assessment of whether mediation is suitable—are already compulsory with certain exceptions. To go beyond this point and to compel truly

³³ Financial data revealed for the purpose of an Open Financial Statement is not protected by without prejudice privilege; mediation is not ordinarily conducted in the presence of lawyers; agreements generally require the imprimatur of a court to be binding.

unwilling parties to engage with mediation would require victims to engage with erstwhile abusers in a uniquely intimate relationship without the safeguard of judicial oversight. The process dangers are not only for women (Grillo 1991). Here, a facilitative style could re-enforce abuses of power in a process that could not be vitiated by judicial oversight whether by court or consent order.

Some commentators have sought to recalibrate the rule of law to accommodate ADR by seeking to redefine the concept in the context of two complementary dispute resolution processes, but such a redefinition represents a fundamental misconception as to the nature of and difference between the two processes. It is no longer sufficient, as Menon CJ, contends to conceptualise the rule of law as rooted in an exclusively adjudicatory setting, but to characterise the ‘ideals’ of a modern system for the resolution of disputes as ‘Affordability, Efficiency, Accessibility, Flexibility and Effectiveness’ represents a dilution of the rule of law in its developed form. The inconsistency between forms of mandatory mediation and the rule of law is more than a ‘semantic issue’ (Menon 2017: 9).

Mediation serves both as a complement (Winkleman 2011) and at times competitor to adjudication. Justice, however, is a multivalent concept. The rule of law is intrinsic to an institutional or ‘transcendental’ form of justice, which, as Sen (2010) has argued, is only one aspect that may be in tension with a realisation focused or ‘comparative’ justice that prioritises social outcomes.³⁴ Mediation at its best is more concerned with the latter pragmatic sense and its quest for the minimising of injustice rather than a perfect outcome. Where mediation is voluntary, the tension between these two aspects can be a creative one. Its voluntarism is the guarantor that it will not replace the constitutional right of access to the courts. While mediation augments access to a form of justice, it can only do so provided it is voluntary and the right of access to the courts remains. Rather than making mediation mandatory, a more appropriate form of compulsion might be to ensure that mediators remind the litigants of their liberty to discontinue the process of mediation at any time.

The rule of law and the provision of public justice is a public good that needs, especially in times of austerity, to be robustly defended. The argument, however, is stronger in that the courts are not just a public service but, as Lord Neuberger (2010) points out, an aspect of government itself. To refer cases compulsorily from the courts to mediation is to

³⁴ Sen relates these two aspects to the distinct concepts of *niti* and *nyaya* justice in early Indian jurisprudence.

transmute a plea for individual justice, to be decided by an independent judge, into a matter of negotiated or distributional justice, a matter of private ordering that is not the province of the judiciary. In delegating what is a non-delegable duty, it crosses the line of the separation of powers. Mandatory mediation cannot be a substitute for the adequate provision of civil legal aid or the right of unrepresented access to judicial decision-making, however uncomfortable that may be.

Compulsory mediation, in its harder forms, should be resisted in equal measure to protect the rule of law and to defend the integrity of a potentially transformative process³⁵ (Bush and Folger 1994: 1) that does something very different from litigation in returning autonomy to the parties and suspending strict law as an alternative to court-based adjudication. Where compulsion in mediation is not subject to judicial discretion, it is no longer an alternative and instead becomes a threat to the rule of law.

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³⁵ For Bush and Folger transformation is served by a shift from self-centredness to responsiveness in a process of empowerment and recognition (Bush and Folger 1994: 54–56).

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