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Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model

*Jose Alberto Ramirez Leon**

I. INTRODUCTION

The current trend of the Venezuelan legal system points towards the development of Alternative Dispute Resolution (ADR) procedures. In fact, since the endorsement of the new national constitution in 1999, ADR procedures have become an important part of the Venezuelan judicial system. Also, their development and promotion has been declared mandatory by the same constitution.¹

The Venezuelan constitutional framework asserts that the main objective of the legal system is to provide citizens with access to justice in a reasonable time instead of the strict observation of complicated procedural rules.²

Even though ADR procedures have existed since the early stages of civilization, their use as a means to solve disputes has not been common in Venezuelan society. The Venezuelan legal system relies heavily on court litigation as the most common dispute resolution procedure and depends on the state administered court system to solve most of the legal conflicts that confront its citizens. The recent inclusion of ADR in the Venezuelan constitution suggests that the exclusive monopoly of the state is the coercive power for the fulfillment of judgments and not the solution of all controversies.

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I want to thank Professor Len Riskin, whose support, assistance and generous dedication to the ADR field inspired me throughout the writing process of this article. Finally, I dedicate this work to my loving wife Veronica, whose unconditional love and kindness has always fed my soul.

1. Constitution of the Bolivarian Republic of Venezuela (1999) [hereinafter Venezuelan Constitution]. Art. 253 provides:

The Justice System consists of the Supreme Tribunal of Justice, such other courts as may be determined by law, the Office of Public Prosecutions, the Public Defender's Office, criminal investigation organs, judicial assistants and officials, the penitentiary system, alternative methods of dispute resolution, citizens participating in the administration of justice in accordance with law and attorneys at law admitted to practice.

Art. 258 states: "The law shall encourage arbitration, conciliation, mediation and any other alternative means for resolving conflicts."

2. *Id.* at art. 26. Art. 26 provides:

Everyone has the right to access the organs comprising the justice system for the purpose of enforcing his or her rights and interests, including those of a collective or diffuse nature to the effective protection of the aforementioned and to obtain the corresponding prompt decision. The State guarantees justice that is free of charge, accessible, impartial, suitable, transparent, autonomous, independent, responsible, equitable and expeditious, without undue delays, superfluous formalities or useless reinstating.

Id.

Although the Venezuelan constitution specifically guarantees the right of citizens to access expeditious justice without unnecessary delays, in actuality those principles are not satisfied in most cases. A common problem of the judicial system is that the procedural lapses are not fulfilled, which means citizens do not receive a timely answer to their problems. Diverse reasons contribute to this situation, including the lack of resources available in the judicial system in terms of courts and human and technical resources, lack of judicial independence due to strong political influence, vulnerability to corruption due to miserably low compensation to judges and court staff, extensive backlogs and time delays in the resolution of disputes, and critically low levels of public confidence in the judiciary, all of which undermine the capacity of the public court system to deliver effective access to justice for Venezuelans.

Given the deficient situation that affects the Venezuelan judicial system, the implementation of ADR programs seems suitable to help both the users and the dispute resolution system itself by providing citizens more effective forums to resolve their disputes and, at the same time, redirecting cases that would otherwise go to court. However, the possible advantages that ADR may provide for Venezuelan society are still to be seen since the field is far from reaching its full development.

This paper argues that Venezuelan society would benefit from further development of ADR. Part II will provide an overview of the main problems affecting the Venezuelan judiciary, part III will provide a background of ADR in the country, part IV will identify the main challenges the field has to overcome, part V will propose a different approach, and part VI will present the conclusion.

II. CRITICAL SITUATION OF THE VENEZUELAN JUDICIARY: MAIN PROBLEMS

A. *Corruption of the Judicial System*

The Venezuelan constitution guarantees free access to the judicial system, which means no administrative fees are to be paid in order to file and pursue legal claims. Unfortunately, this principle is rarely fulfilled. The reality is that corruption is an everyday occurrence. Most of the judicial officials and personnel working in the Venezuelan judicial system, ranging in hierarchy from judges to law clerks to administrative personnel, are accustomed to receiving "perks" for their services. This practice has become accepted and expected in the system to the extent that people who cannot afford it tend to refrain from using the official system. In Venezuela this kind of compensation accounts for 8 to 12% of court costs to the parties.³

Reasons for accepting and demanding this kind of payment include low salaries, bad working conditions, greed, tradition, and opportunities. This practice of private compensation is the oil that lubricates the judicial machinery. The speed and quality of the service depends directly on how generous parties and their counsel are in compensating the court staff. A colorful anecdote to illustrate this

3. Thomas Moyer & Emily Stewart, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 642 (2003).

reality comes from my own experience during my time as an intern in a Caracas law firm. During the December holidays, it was very common to see hundreds of boxes full of presents making their way through the different court rooms in the Caracas court house as a way for the law firms to compensate the court staff for their dedicated service throughout the year, and also to secure prompt responses for their cases in the year to come.

The corruption that permeates all levels of the judicial system limits access to the courts to those able to afford to play by these unwritten rules. Unfortunately, in a country where more than 50% of the population lives in poverty, most of the population cannot get access to courts. Studies have shown that lack of ADR processes offered by the government is among the reasons that increase the ability of the judiciary and judicial personnel to extract bribes from parties and counsel wishing to use the court system.⁴

Sadly, the current situation of the Venezuelan judiciary seems to justify the rather harsh statement by Professor Luz Estella Nagle when she asserts that “corruption is and will remain a refined and discreet art form in Latin America”⁵

B. Lack of Judicial Independence

The concept of “judicial independence” involves freedom from interference from other governmental bodies, from other judges within the system, and from acceding to the wishes of political parties.⁶

The Venezuelan judiciary has traditionally been submissive to external influences. A report conducted in 1996 by the Lawyer’s Committee for Human Rights⁷ about the Venezuelan justice system found that: “Rather than serving the constitutional role of defender of the rule of law and protector of the human rights of Venezuelan citizens against the government, the courts had often become highly politicized adjuncts of the parties. They were manipulated by groups of lawyers, judges, political and business actors for private economic gain. And court procedures had become so slow, cumbersome and unreliable that disputants avoided them at all costs.”⁸

The situation regarding the performance of Venezuela in terms of judicial independence is dramatic. A study published by the Center for International Development at Harvard University, called the Global Competitiveness Report 2001-2002, measures levels of judicial independence in different countries.⁹ The Report

4. Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 LAW & POL’Y INT’L BUS. 95, 95 (1999).

5. Luz Estella Nagle, *The Cinderella of Government: Judicial reform in Latin America*, 30 CAL. W. INT’L L. J. 345, 363 (2000).

6. Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167, 172 (1995) (citing Owen M. Fiss, *The Right Degree of Independence*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF JUDICIARY 55, 55-56 (Irwin P. Stotsky ed., 1993)).

7. See Human Rights Watch, at <http://www.hrw.org> (Nov 17, 2005).

8. Human Rights Watch, “Rigging the Rule of Law: Judicial Independence Under Siege In Venezuela,” June 2004, available at http://www.hrw.org/reports/2004/venezuela0604/3.htm#_ftnref14 (Nov. 17, 2005) (citation omitted).

9. See Center for International Development, *Global Competitiveness Report 2001-2002*, <http://www.cid.harvard.edu/ci/> (last visited Nov. 17, 2005).

ranks Venezuela seventy-fifth in the world, which is extremely poor even by Latin American standards.¹⁰

Among the several factors that compromise independence, it is worth mentioning that traditionally the judiciary in Venezuela has been weaker than the legislative and executive branches of government. Unique political and historical reasons support this practice, inherited from the colonial times, when the representative of the Spanish king had unlimited power to interpret the law.¹¹

Additionally, ever since 1958, when democracy was established in Venezuela, the judiciary has been strongly influenced by politics. A weak system of appointment, tenure, removal and supervision of judges has often been used as a political weapon by the strongest branches of government.

Along with the process of institutional reform carried out by the enactment of the new constitution in 1999, the judiciary was declared in a "state of emergency." The government appointed a judicial emergency commission to administer the judiciary with authority to suspend and appoint judges. More than 80% of the judges were removed from office and replaced by temporary judges with no tenure.¹²

This situation of political interference in the judiciary reached a climax in 2004, when the government-controlled National Assembly¹³ passed a law that expanded the Supreme Court from 20 to 32 members and empowered the government party's slim majority in the legislature to obtain an overwhelming majority of seats on the Supreme Court. The law also gave the governing coalition the power to remove judges from the Court without the two-thirds majority vote required under the constitution. This process was highly questionable, but proceeded nevertheless. Since then, the governing political party consolidated uncontested power over the judiciary, compromising its necessary independence and impartiality.

A weak system of appointment and tenure along with the enormous political control over judges' opinions and dreadfully low judicial salaries that allow plenty of room for corruption, results in independent, impartial, untailed, judicial decisions becoming almost heroic acts.

C. Public Mistrust

Scholars maintain that "the purpose of the judiciary in any society is to order social relationships among private and public entities and individuals, as well as to resolve conflicts among these societal actors."¹⁴ Unfortunately, as a consequence of the problems that affect the court system, citizens perceive that the judiciary cannot fulfill these basic expectations. The level of confidence Venezuelans have in the judicial system is critically low. Research conducted in several Latin American countries in 1995 reveals that 67% of the people surveyed in Venezuela

10. *Id.*

11. See Nagle, *supra* note 5, at 347-48.

12. *Id.* at 353.

13. The National Assembly is the legislative branch of government.

14. See Nagle, *supra* note 5, at 370.

perceived the judicial sector as inaccessible and corrupt.¹⁵ Other studies published are even more critical. A survey conducted in Venezuela in 1998 by the United Nations Development Program found that “0.8% of the population had confidence in the judiciary.”¹⁶

Despite the efforts for judicial reform carried out during the last six years, this level of low public credibility has remain the same to the present time. In this sense, a survey conducted in 2004 by a Venezuelan non-governmental organization called “Consortio Desarrollo y Justicia” shows that 58% of the people interviewed have used the public-administered court system in order to submit a dispute; 44% of those people who have used the court system rated the experience as unsatisfactory, 44% rated the experience as average, 11% rated the experience as good and 0% rated the experience as excellent. When the people interviewed were asked whether or not they trusted the justice system, 100% of the respondents said they did not trust it. When they were asked about the reasons for not trusting it, 41% of the respondents said the system is corrupt, 33% said the system is politicized, 8% said the system is inefficient, 8% said the system is complicated, and 8% said the system is only for a privileged social class.¹⁷

D. Judicial Backlogs and Delays

Despite the decreasing quality of service in the judicial system over the past years, the number of legal claims that enter the courts has been increasing. This increase in the amount of work has not been accompanied by the necessary adjustments. Courts are simply unable to supply enough services to satisfy the increasing demand, resulting in extensive backlogs and time delays in most of the courts. It has become common knowledge that the time required by a typical case in court is excessive. Lawyers, litigants, judges and users are aware of this situation.

Empirical data supports these beliefs. An empirical research study published in 1997¹⁸ shows that the clearance rate¹⁹ in Venezuelan courts has steadily decreased since 1983. The same study suggests that the median time to disposition within civil jurisdiction in Venezuela by 1993 was 2.4 years.²⁰ Over the past 12 years that amount of time has probably doubled.

Inadequate budgets for the courts, limited access to information technology, bureaucratic procedures, and absence of court-connected ADR programs, are among the main factors that support the increasing backlogs and delays in response in the judicial system.

15. Edgardo Buscaglia & Thomas Ulen, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America*, 17 INT'L REV. L. & ECON. 275, 277-78 (1997).

16. See Human Rights Watch Website, *supra* note 8.

17. See *Consortio Desarrollo y Justicia*, Asociaion Civil, available at <http://www.consortiojusticia.org/resultados.php?id=2> (last visited Nov. 17, 2005).

18. Buscaglia & Ulen, *supra* note 15, at 278.

19. The clearance rate is defined as cases disposed of as a percentage of cases received by a court within a given period of time. A decrease in the clearance rate represents deterioration in the quality of court services. An increase represents an improvement in the quality of court services.

20. Buscaglia & Ulen, *supra* note 15, 277-78.

III. BACKGROUND OF ADR IN VENEZUELA

A. *Judicial Reform and the ADR Movement*

The critical state of the judiciary has been a topic of political discussion for years and several attempts have been made to address the problem. Perhaps the most comprehensive effort started in 1999, when a process of institutional reform led to the appointment of the "National Constituent Assembly," the main task of which was to rewrite the national constitution. Elements of judicial reform²¹ were included in the new constitution. The inclusion of alternative methods of dispute resolution (ADR) stands out among these efforts.

Article 253 of the new constitution includes ADR as a component of the justice system. Article 258 establishes that "the law shall encourage arbitration, conciliation, mediation and any other alternative means for resolving conflicts."²²

For purposes of conceptual clarity ADR should be described as "a wide variety of dispute resolution mechanisms that are alternative to court litigation and therefore seek to decrease transaction costs associated with litigation (financial, time and opportunity costs), increase the transparency of the process, preserve the relationships among the parties, and provide speedy solutions."²³ The term ADR embraces a diversity of binding and non-binding procedures that are alternatives to court litigation. The Venezuelan framework mainly recognizes mediation, conciliation and binding arbitration as ADR.

The introduction of ADR in the legal framework is intended to achieve a wide range of social, legal, commercial and political goals. Mindful of the potential advantages of ADR, legislators set the starting point of their development in Venezuela by elevating them to the constitutional level.

B. *How ADR Would Help Improve the Performance of the Venezuelan Judiciary*

Successful experiences in different developed and developing countries suggest that ADR programs can:

support and complement court reform, by-pass ineffective and discredited courts, increase popular satisfaction with dispute resolution, increase access to justice for disadvantaged groups, reduce delay in the resolution of disputes, reduce the cost of resolving disputes, increase civic engagement and create public processes to facilitate economic restructuring and other social change, help reduce the level of tension and conflict in a

21. Scholars have stated that implementation of ADR programs is a significant aspect of judicial reform. See Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339 (2000).

22. Venezuelan Constitution, *supra* note 1, at art. 258.

23. Wanis-St. John, *supra* note 21, at 346.

community and manage disputes and conflicts that may directly impair development initiatives.²⁴

1. ADR Can Support and Complement Court Reform

As was described in Section II, Venezuelan courts suffer from extensive backlogs and time delays. ADR programs can be created as an option within the judicial system, either associated with the courts as a way of managing existing caseloads, or separate from the courts to provide dispute resolution for conflicts not well served by the courts. "Alleviation of backlogs is itself an absolute benefit. The interaction between ADR and courts, however, must be explicitly designed."²⁵ ADR programs can provide streamlined procedures to accelerate case disposition.²⁶

2. ADR Can Help Bypass Discredited Courts

When corruption, lack of independence and ineffectiveness combine to place the public administered court system on the lowest levels of trust, the implementation of ADR programs offer alternative forums for the resolution of disputes. In addition, complex or technical disputes can be handled more effectively by specialized private ADR systems.

3. ADR Can Increase Satisfaction of Disputants With Outcomes

Foreign experiences show that when high costs, long delays, and limited access to justice undermine satisfaction with existing judicial processes, the accessibility, low cost, and party control of the process that ADR programs offer generally lead to high satisfaction.²⁷

4. ADR Programs Can Increase Access to Justice for Disadvantaged Groups

Wanis-St. John asserts that "[e]conomic marginalization and illiteracy often prevent people from using court systems."²⁸ In a country where more than 50% of the population lives in poverty, it is not surprising that a high percentage of the population has no access to the court system whatsoever. Scholars suggest that "three-fourths of Venezuela's inmates have never had their day in court."²⁹ ADR programs can help improve this critical situation by reducing both the cost to parties and the formality of the legal process, which may intimidate and discourage access to the court system for the lower class of the population.

24. Scott Brown, Christine Cervenak & David Fairman, *Alternative Dispute Resolution Practitioners Guide 7* (1998) [hereinafter the Guide].

25. Wanis-St. John, *supra* note 21, at 373.

26. BROWN, *supra* note 24, at 9.

27. USAID funded case studies in Sri Lanka and Bangladesh.

28. Wanis-St. John, *supra* note 21, at 362.

29. Nagle, *supra* note 5, at 362.

5. *ADR Programs Can Reduce Delay in the Resolution of Disputes*

Judicial procedures are complex, elaborate and full of formal rules. This, added to the courts' insufficient resources to keep up with case backlogs, results in extensive delays for the resolution of disputes in the public administered court system. The relative informality and simplicity of ADR procedures can significantly reduce dispute resolution delay, and indirectly reduce court backlog by redirecting cases that would otherwise go to court.³⁰

6. *ADR Programs Can Reduce the Cost of Resolving Disputes*

The requirement of legal representation, the time delays in resolution, and the implicit cost that corruption adds to the judicial process makes litigation highly expensive for parties in Venezuela. ADR programs administered in foreign jurisdictions have reduced the cost of resolving disputes for both the disputants and the public administered court system.³¹ ADR programs do not necessarily require representation by lawyers, are usually time effective and are less vulnerable to corruption than the court system. These factors contribute to decreasing costs, in terms of both time and money, of resolving disputes.

7. *ADR Programs Can Increase Civic Engagement and Facilitate Other Social Change*

The development of community-based programs is particularly helpful for this goal. Included in this category are the justice of the peace programs that have successfully been implemented in the past years by several municipalities. With these programs communities elect their own justices who decide the issues presented before them based on equity. Community mediation programs are particularly helpful in building skills for consensual approaches to problem-solving and local policy development.

8. *ADR Programs Can Reduce the Level of Tension and Prevent Conflict in a Community*

The atmosphere of social conflict and political intolerance that has led to bloody confrontations during the last few years in Venezuela can be addressed through the implementation of ADR programs. Successful efforts to manage social tension through ADR, including ethnic and class conflict, can be seen in several other countries. These efforts include projects in Estonia (Carter Center), Hungary, Slovakia, (Project on Ethnic Relations), and the former Yugoslavia (MercyCorps, Balkans Peace Project).³² Venezuela has also experienced the benefits of international help based on ADR programs through the Organization of American States (OAS) facilitation efforts in the political crisis of 2003.

30. BROWN, *supra* note 24, at 15.

31. E.g., the United States of America.

32. BROWN, *supra* note 24, at 19.

C. Current Situation

However, the potential benefits of ADR remain to be seen in Venezuela. Unfortunately, very little progress has been achieved in the development of the field since it was constitutionally established. This leads to the question of why, if ADR seems to be so promising, it has experienced such a weak development in Venezuela? What is impeding ADR from reaching its full potential? In order to analyze these questions it is first necessary to look at what has been done.

ADR programs in Latin America evolve along three categories of service providers: (i) Chambers of Commerce conciliation and arbitration centers, (ii) court-annexed programs, and (iii) extrajudicial community programs for marginalized communities, which are typically provided by civil society organizations, law school clinics and other NGOs. Every category is targeted to a particular type of potential user. Private enterprises would resort to commercial ADR provided by Chambers of Commerce, if affordable; court-annexed programs would mainly be used by middle class litigants; and extrajudicial community programs would primarily satisfy the needs of lower income parties with a variety of case characteristics.³³

In Venezuela, perhaps the only institutionalized efforts in the promotion of ADR are those conducted by Chambers of Commerce. The Arbitration and Conciliation Center of the Caracas Chamber of Commerce (CACCC)³⁴ and the Conciliation and Arbitration Center sponsored by the Venezuelan-American Chamber of Commerce (CEDCA)³⁵ monopolize the provision of institutional services of alternative dispute resolution. Both institutions are private entities that target their services to large domestic and international companies facing commercial disputes.

It would be unfair to deny the enormous contributions that these two organizations have made in favor of the development of the field of ADR, particularly in terms of commercial arbitration. They are pioneers in the difficult task of spreading the knowledge about mediation and arbitration in Venezuela and provide an active forum for efficient, speedy and relatively inexpensive resolution of commercial disputes. These institutions have also helped to place Venezuela in an internationally competitive position for economic development by promoting stable conditions for private investment. The CACCC serves as the Venezuelan chapter of the International Chamber of Commerce's (ICC) arbitration center and also serves as the vehicle through which the Inter American Development Bank is investing \$1.5 million in order to "improve the climate for business and private investment in Venezuela by providing alternative forms of commercial dispute resolution."³⁶

Nonetheless, the population reached by the services provided by these two organizations is quite limited. One reason for this might be fear of change. Buscaglia and Ulen suggest that "although the general public may benefit in the long

33. Wanis-St. John, *supra* note 21, at 348.

34. See Centro de Arbitraje (CACCC), at <http://www.arbitrajeccc.org> (last visited Nov. 20, 2005).

35. Centro Empresarial de Conciliación y Arbitraje (CEDCA), at <http://www.cedca.org.ve> (last visited Nov. 20, 2005).

36. International Monetary Fund Project in Caracas. All references to monetary amounts are in US currency unless otherwise indicated.

run from the use of more efficient private sector-provided arbitration, mediation, and conciliation mechanisms, experience shows that the public does not immediately trust new mechanisms for the supply of justice.”³⁷ The authors also assert that, according to the Inter American Development Bank, the ADR services recently introduced throughout Latin America have experienced a very weak demand.³⁸ This has been the case in Venezuela. According to the CACCC,³⁹ since the reestablishment of the arbitration center in 1998, only 64 cases have been presented before the center.

Besides the work being done by the Chambers of Commerce, ADR programs offered by other categories of providers (i.e., court-connected ADR, and extrajudicial community programs) are extremely weak in comparison with other Latin American countries. In fact, court-connected ADR programs are nonexistent, and community programs are in the early stages of development.

As a result of this situation, the actual percentage of the population with access to ADR services is remarkably low. Basically, only an elite number of private corporations, which have access to the services provided by the Chambers of Commerce, are benefiting from the provision of ADR programs.

With no intention to underestimate the work that is being done by the Chambers of Commerce, experience shows that if ADR is to be fully developed so its benefits can permeate to broader parts of society, it is mandatory that the other two categories of providers (court-annexed programs and community based programs) start playing a leading role.

IV. MAIN OBSTACLES FOR DEVELOPMENT OF ADR IN VENEZUELA

A. *Lack of Education, Training, and Scholarship in the Field*

ADR’s development as a particular field within the practice of law in Venezuelan is very recent. In 1998 the modern era of ADR in Venezuela began with the enactment of the Commercial Arbitration Law.⁴⁰ This was soon followed by the enactment of the new constitution in 1999.⁴¹

Despite the legal efforts for promoting the use and development of ADR, the efforts were not followed by the necessary inclusion of ADR education in the Venezuelan law schools’ curricula. As Professor Len Riskin asserted in 1982 in reference to U.S lawyers, one of the reasons that “few lawyers understand [ADR]... is that they have never been educated about it...”⁴²

Almost all the current members of the Venezuelan Bar, which includes judges and practicing attorneys, have had no exposure to ADR whatsoever while in law school. The reason is simple—before the year 2000 there were no ADR courses offered at any law school. Today, the situation remains virtually unchanged.

37. Buscaglia & Ulen, *supra* note 15, at 278.

38. *Id.*

39. See Centro de Arbitraje, at http://www.arbitrajeccc.org/info_general.html (last visited Nov. 20, 2005).

40. Venezuelan Commercial Arbitration Law (1998), available at <http://www.cedca.org.ve/cedca-ingles/law.htm> (last visited Nov. 20, 2005).

41. See Venezuelan Constitution, *supra* note 1.

42. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 49 (1982).

Having researched the current curricula at the top three law schools in Caracas, I have found that none of them includes required courses in ADR. Two of them offer one elective seminar about ADR,⁴³ and one of them actually does not have any ADR offering whatsoever.⁴⁴ The situation in law schools located in cities other than Caracas is even more critical. Research of five law schools located in different regions of the country shows that none of them have any offerings on ADR.⁴⁵

In 1982 Professor Len Riskin, referring to the U.S., stated that “mediation education for many more lawyers is required if our society is to make optimum use of mediation.”⁴⁶ The statement is perfectly applicable to the current Venezuelan situation. The inclusion of required ADR courses in legal curricula is essential if Venezuelan society is to make optimum use and development of ADR.

In terms of training opportunities available for judges and practicing attorneys, the situation is somewhat similar. The Venezuelan judiciary lacks judicial training centers to undertake the task of training judges and lawyers in current issues in the law profession. Therefore, there are few, if any, opportunities for the stakeholders in the judicial system to have access to ADR training.

However, some private initiatives are starting to take place in Caracas, primarily organized by the Chambers of Commerce arbitration and mediation centers (CACCC⁴⁷ and CEDCA).⁴⁸ Once again, the population with access to these training opportunities is quite limited as is the scope of the services offered by these two centers.

Finally, a problem affecting the development of the ADR field is the lack of legal scholarship. The Venezuelan legal education system is weak in terms of research. The reason is basically economic. In Venezuela, being a professor of law is not a full time occupation. Professors of law combine teaching with the practice of law. Law professors in Venezuela devote time to teaching for two main reasons, vocation and because it usually leads to professional prestige. An interview conducted with a Venezuelan law professor reveals that economic compensation for professors with 10 years of teaching experience and a graduate degree, ranges around \$7.00 per hour.⁴⁹ Thus, there is little economic incentive for law professors to do research. The case of low compensation for law professors and its incidence in lack of research and scholarship in the legal field is also present in other Latin American countries.⁵⁰

43. Universidad Catolica Andres Bello, *available at* <http://www.ucab.edu.ve/ucabnuevo/index.php?pagina=70> (last visited Nov. 17, 2005); Universidad Metropolitana, *available at* <http://www.unimet.edu.ve/escuelas/derecho-programas.html> (last visited Nov. 17, 2005).

44. Universidad Central de Venezuela, *available at* <http://www.ucv.ve> (last visited Nov. 13, 2005).

45. Universidad de Carabobo, *available at* <http://www.uc.edu.ve/pregrado/derecho/index.html> (last visited Nov. 13, 2005); Universidad Fermin Toro, *available at* <http://www.uft.edu.ve> (last visited Nov. 13, 2005); Universidad del Zulia, *available at* <http://www.luz.ve> (last visited Nov. 13, 2005); Universidad Bicentenario de Aragua, *available at* <http://www.uba.edu.ve/esc-derecho.htm> (last visited Nov. 13, 2005); Universidad Yacambu, *available at* <http://yacambu.edu.ve/> (last visited Nov. 13, 2005).

46. Riskin, *supra* note 42.

47. *See* CACCC, *supra* note 34.

48. *See* CEDCA, *supra* note 35.

49. Interview with Dr. Julio Ramirez Rojas, Professor of Law, Universidad Fermin Toro, in Barquisimeto, Venez. (May 5, 2005).

50. *See* Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 Va. J. Int'l L. 167, 218 (1995).

A weak system of economic compensation for legal educators discourages law professors from devoting time to produce new scholarship. Instead, professionals involved in legal academia devote most of their time to their practice, which is their main source of income.

If the field of ADR in Venezuela is to develop, it is necessary to increase the educational and training opportunities available for the stakeholders of the justice system. As asserted by Dakolias, "Legal education and training for students, continuing legal education for practicing lawyers, judicial training for judges and legal awareness education for the public in particular should be emphasized."⁵¹

B. Lack of Court-Connected Programs

Court-connected ADR programs are those offered or authorized by the courts. They can be voluntary when the parties themselves agree to participate or mandatory when the parties are compelled by the courts. In Venezuela, court-connected ADR programs are nonexistent.

For the purpose of this paper I have categorized dispute resolution providers in three categories, (i) Chambers of Commerce, (ii) courts, and (iii) community programs. Among the three, only courts have the capacity to reach most of the population. After all, despite the problems affecting the Venezuelan judiciary, court litigation remains the primary source of dispute resolution services. Therefore, the court system is the only dispute resolution provider capable of serving most potential users.

As suggested by Dakolias, the potential for ADR in Venezuela will be lost if court officers do not start acting as driving forces in the implementation of ADR for settlement of disputes.⁵² This means that courts must adopt ADR as part of the dispute resolution services they offer, in order to foster the use and development of ADR as mandated by the Venezuelan Constitution.⁵³

Research studies conducted in the United States reveal that litigants are unlikely to request ADR and are initially reluctant to use ADR voluntarily. Reasons for this vary from unfamiliarity with the processes to lack of interest in speedy resolutions.⁵⁴ However, it does not necessarily indicate aversion to the use of ADR. Experience shows that litigants' willingness to use ADR depends on the recommendation and encouragement of judges and/or their counsel.⁵⁵ "The fact that litigants are unlikely to propose the use of alternative processes but often are willing to use them suggests that, in order to increase voluntary ADR use, the discussion of ADR needs to be initiated by the court or by the litigants' attorney."⁵⁶

Experiences in other Latin American countries reveal that the presence of court-connected ADR programs positively influence the development of the field

51. *Id.* at 217.

52. *Id.* at 200.

53. See Venezuelan Constitution, *supra* note 1, at art. 258.

54. Roselle Wissler, *When does familiarity breed content?: A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199, 201 (2002).

55. *Id.* at 202-03.

56. *Id.* at 204-05.

and the attitude of judges, practitioners, and users towards ADR.⁵⁷ The experience in Argentina, where mediation is required by law as a requisite before filing a civil or commercial lawsuit, reveals that the presence of court-connected ADR programs positively influence the development of the field and the attitude of judges, practitioners, and users towards ADR.⁵⁸

C. Not Enough Legislation

Like the rest of Latin American countries, Venezuela belongs to the “Civil Law System,” which is characterized by the preeminence of the written law. In Venezuela, as in the rest of Latin America, the tendency is to believe that everything needs a law.⁵⁹

ADR is certainly not new to the Venezuelan legal framework. The Civil Procedural Code of 1916 included a section that regulated the use of arbitration. More recently, different laws have included at least some reference to different types of ADR, mainly using the term “conciliation”⁶⁰ (i.e. Organic Labor Law, Criminal Procedural Code, Consumer Rights Protection Law). However, it was not until the enactment of the 1999 constitution that the field of ADR became significant to the Venezuelan society.⁶¹

In terms of arbitration, Venezuela is ahead in the region with one of the most modern arbitration laws.⁶² However, regarding mediation, there are no laws to regulate its use. Despite the inclusion of the term mediation in several recent laws, including the national constitution, critical issues such as confidentiality, ethics, enforceability of mediation agreements, and mediators’ qualifications, remain unregulated. Among them, enforceability is the most critical.

If the field of mediation is to be developed in Venezuela, users need to trust that the agreement they make is going to be as enforceable through a judicial decision or an arbitration award. Additionally, the enactment of a mediation law would give the opportunity to implement the legal requirements needed to fully integrate mediation into the courts’ procedures. Finally, a mediation law would help enormously in the task of promoting knowledge about mediation in Venezuelan society.

Given the particular characteristics of the Venezuelan legal system, the enactment of a mediation law is required to further develop its use and ensure its integration into the dispute resolution system.

57. See Alejandro Poniaman, *How Important is ADR to Latin America?*, 58 APR DISP. RESOL. J. 65 (2003).

58. *Id.* at 65.

59. Interview with Diana Droulers, General Manager of CACCC, *Does Venezuela Need a Mediation Law?*, available at <http://adr.com/camara/venezuela.htm> (last visited Nov. 20, 2005).

60. There is no clear definition in the Venezuelan legal framework for the term “conciliation.” It is usually used alternatively to describe mediation.

61. See Venezuelan Constitution. *supra* note 1.

62. See Centro de Arbitraje, *supra* note 40.

D. Lack of Motivation to Use ADR

The inclusion of ADR in the Venezuelan legal system may be threatening to the status quo of current stakeholders. Although the current judicial system has proven incapable of satisfying the majority's needs, a minority of judges, lawyers, businessmen, and politicians are more than comfortable with the current state of the system. An inefficient and corrupt judiciary has become, over the years, a vast source of power for certain players within the system. Moyer and Stewart assert that "the judiciary may feel that implementation of ADR programs threatens their power and influence over the system, and may even be concerned that those programs may divert possible opportunities for rent seeking."⁶³

Additionally, practitioners usually do not have a strong interest in using ADR for different kinds of reasons. As suggested by Riskin, the way most lawyers look at the world, economics, and the lack of ADR training for lawyers play an important role in this situation.⁶⁴

What Riskin calls the "lawyer's standard philosophical map" refers to two assumptions most lawyers make in their practice: "(i) that disputants are adversaries, and (ii) that disputes may be resolved through application, by a third party, of some general rule of law."⁶⁵ These assumptions deter lawyers' involvement in ADR, particularly mediation.

Lawyers' assumption of adversariness is particularly true in the Venezuelan situation. The legal instruction that Venezuelan lawyers receive in law school is oriented to litigation with little, if any, consideration of ADR. There is almost no mediation training available for Venezuelan lawyers. This situation prejudices proper involvement of lawyers in mediation because it is against their orientation to litigate and their desire of winning at the expense of the opposing party. Because of their adversarial orientation, lawyers are usually not concerned about the importance of preserving relationships between the parties or the monetary and emotional costs that litigation represents.

Economic reasons also affect lawyers' interest in ADR. The speed of ADR compared to litigation usually means less billable time for lawyers who are devoted to this practice instead of traditional litigation. For example, a lawyer who mediates a case instead of litigating it would take less economic compensation for that case because most likely would devote less time to it.⁶⁶

Finally, lack of education and training for lawyers affects their willingness to be involved in ADR. Lawyers are unlikely to recommend something in which they do not have expertise. Only those who are willing to be pioneers in this developing field of law and accept the challenge of building the foundations of what could be a promising field of practice, possibly sacrificing legal fees for the satisfaction that comes from making the practice of law a little bit more humane, will realize that "lawyers who understand the mediation process and integrate this

63. Moyer & Stewart, *supra* note 3, at 633.

64. Riskin, *supra* note 42, at 38.

65. *Id.* at 43-44.

66. *See* Riskin, *supra* note 42, at 42.

understanding with the traditional practice of law do have a valuable service to offer clients."⁶⁷

V. PROPOSED APPROACH

In order to overcome the challenges that are impeding the full potential of ADR's development in Venezuela, I propose to focus on three areas: (a) diversifying the provision of ADR services (i.e. developing court-connected programs and community programs), (b) promoting education and training in ADR, and (c) establishing a network with other countries in the region, and perhaps in other areas of the world with less cultural affinity, to benefit from their positive experiences and developments in the implementation of ADR programs.

A. *Diversifying the Provision of ADR Services*

As mentioned in section III, my argument is that, if ADR is to be fully developed so its benefits can permeate to broader parts of society, it is mandatory that court-annexed programs and community based programs start playing a leading role. In this sense, my proposal is to design and implement a pilot plan for a court-connected ADR program in Caracas, Venezuela. A court-connected program would promote the spread of ADR by addressing its services to a target population that currently is not well served by the Chambers of Commerce-sponsored centers. This pilot program would be available for all the current users of the court system, many of whom may not have access to CEDCA and CACCC simply because they cannot afford the cost of such centers.

In order to start the design process for the pilot program, dispute systems design (DSD) techniques should be used so that effective policies can be applied to satisfy the needs of the potential users. The use of a DSD approach suggests conducting "an explicit assessment of problems and stakeholders' interest, participation by diverse stakeholder groups, group facilitation techniques, and systematic procedures for implementing and evaluating new policies."⁶⁸

The design process should take into consideration the recommendations sketched out in the ADR Practitioner's Guide.⁶⁹ The analysis used in the Guide divides design considerations into two subsections: (i) planning and preparation, and (ii) operations and implementation.⁷⁰

Planning and preparation starts with an assessment of dispute resolution needs, requiring the designers to define the goals and to understand the background conditions in which the program will operate.⁷¹ The needs assessment may be conducted in a variety of ways. The experience in Costa Rica reveals that conducting surveys of those who use the court system is an effective way to pro-

67. Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165 (1993) (discussing Professor Leonard Riskin).

68. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 114 (2002).

69. BROWN, *supra* note 24, at 33.

70. *Id.*

71. Wanis-St. John, *supra* note 21, at 365.

ceed.⁷² “Surveys of users of the existing formal legal system may provide insights on user satisfaction, systemic bias, or corruption that will be important for ADR system design.”⁷³

Wanis-St. John suggests that, in this initial stage of the design process, judges, lawyers, and users should be equally involved, as all will participate in and be challenged by ADR mechanisms.⁷⁴

The operations and implementation subsection relates to six particular stages:

(1) establishing effective procedures for selection, training, and oversight of mediators and arbitrators; (2) finding or creating a sustainable source of financial support; (3) developing an effective outreach and education program to reach users; (4) creating support services to overcome user barriers; (5) establishing effective procedures for case selection and management; (6) developing effective procedures for program evaluation.⁷⁵

Nancy Welsh and Barbara McAdoo suggest that there are several elements that program designers should consider for a program of dispute resolution to be successful: “1) identification of the reasons to use ADR; 2) adequate authorization for ADR; 3) informed attorneys; 4) informed judges; and 5) adequate number of well-trained ADR neutrals.”⁷⁶

The main reasons for the potential users to choose ADR are: a) to avoid the use of the court system when possible, given the low levels of public credibility, b) to speed up case resolutions, and c) to reduce costs. The use of ADR can be less expensive than traditional litigation because it tends to reach quicker resolutions.

Adequate authorization for the use of ADR is derived from the constitution, the Commercial Arbitration Law, and the Code of Civil Procedure, which recognizes “conciliation”⁷⁷ as a valid method of settling disputes. However, the enactment of a mediation law would better serve this purpose because it could regulate the relation between courts and the court-annexed programs. The eventual success of this pilot program would positively contribute to gaining political support for the enactment of a mediation law, in which case the pilot program could be implemented nationwide in all courts of the system.

The pilot program will make efforts to promote educational programming. These efforts will include workshops and seminars among the local practicing lawyers to inform them about ADR and the services provided by the pilot center. This should enable them to assist their clients in making informed decisions about whether or not to use ADR.

The Venezuelan legal framework permits ADR only as a “voluntary process,” meaning no judge can compel parties to use ADR. Instead, the role of judges should be more informative, letting users know that such options are available.

72. *Id.*

73. See BROWN, *supra* note 24.

74. See Wanis-St. John, *supra* note 21.

75. See BROWN, *supra* note 24.

76. Nancy Welsh & Barbara Mcadoo, *The ABC for ADR: Making ADR Work in Your Court System*, 37, No.1, *Judge's J.* 11, 11 (1998).

77. See *supra* note 57.

Judges can encourage litigants to use ADR methods when a case suitable for ADR is presented before them in courts, but they cannot order the use of ADR if the parties choose to use court litigation. Informed judges are necessary to the program because, as they are authoritative figures in the judicial process, parties will pay attention to their suggestions to use ADR.

Finally, it is important to address the issue of obtaining an adequate number of ADR neutrals. According to the Guide, "choice and training of mediators and arbitrators are probably the most crucial factors in the success of any ADR program because their credibility affects the confidence of the users."⁷⁸ Experiences in Sri Lanka, China and Taiwan, reveal that choosing highly respected local citizens to be neutrals leads to high levels of success.⁷⁹ Experience in South Africa suggests that effective training opportunities for third parties lead to high levels of public credibility. This may or may not be applicable for the Venezuelan case; only its own experience will reveal the most adequate way of choosing neutrals.

The pilot program should make available for the users a list of the pool of neutrals, including their qualifications and areas of expertise. The procedure for the appointment of neutrals should be controlled by the parties, in which case a "market" approach will be applicable. This approach assumes that users will make the choice that is in their best interest.

Finally, effective procedures for program evaluation should be implemented, as evaluation is critically important for building users' confidence in the system. Also, evaluation is necessary to justify to the authorities the reasons for the existence of the program and to persuade financial sources to keep investing in its development.⁸⁰ Program designers should be creative in choosing a way to approach evaluation. Evaluations can include written questionnaires submitted to program users, personal interviews, and phone surveys.

Gathering data about the number of cases of various types processed each year, the target constituencies involved in each type of case, the average time between case filing and disposition for a variety of types of cases, the average cost of litigation, and the users' perception of fairness of outcome, is necessary for evaluation purposes both prior to and during implementation of the ADR program.⁸¹

Besides the development of court-connected programs, further development of community-based programs is also necessary if broader parts of society are to benefit from ADR. Community-based programs have the ability to reach disenfranchised levels of society that are deprived of access to the court system for diverse reasons such as illiteracy, extreme poverty, and physical impossibility of attending courts.

This task may be successfully accomplished by law schools' clinical programs. As a matter of fact, these kinds of groups already exist in most Venezuelan law schools. These groups are mostly oriented to providing free legal services to residents of low income neighborhoods who have little or no access to the court system.

78. BROWN, *supra* note 24, at 42.

79. *Id.* at 40.

80. *Id.* at 46.

81. *Id.*

Because of the lack of ADR education and training available in most Venezuelan law schools, these clinical programs mainly devote their time to providing free legal advice on diverse matters. From my personal experience as a former member of one of those clinical groups, I can tell that the adversary approach that law students receive at school is the basis of the advice they give users.

With educational support from the law schools in the field of ADR, these clinical groups could shift from the current adversarial approach to a more collaborative approach. For example, students with previous exposure to mediation skills and its potential benefits could encourage users to approach conflict in a more conciliatory or mediative way.

By reducing the cost to users, reducing the formality of legal processes, and overcoming the barrier of illiteracy, community-based ADR programs can provide disenfranchised populations with greater access to justice than the current court system.

B. Promoting Education and Training in ADR

As noted in section IV, lack of education and training in ADR is one of the obstacles preventing its further development in Venezuela. Therefore, education and training in ADR is essential in order to develop the field and reap its benefits. While this may sound like an obvious statement, its implications are more profound.

Education, not only for law students, but for the whole citizenry is necessary. Conflict is inevitable, but improvement in citizens' quality of life can be observed with a shift in the way conflicts are approached. This shift is only achievable through education. ADR courses are necessary in every law school throughout the country. Furthermore, it is also necessary to spread the word in neighborhood associations, high schools, universities, chambers of commerce, and political organizations that the confrontational approach that currently governs society is not the only way to look at conflicts. As stated by Professor Len Riskin, "the spread of mediation could do much to improve the quality of life in our society, not only because of the savings it brings, but because it fosters interaction among people and empowers them to control their own lives."⁸² This process may take years, if not decades, to pay off, but I am confident that it is worth the effort.

Training opportunities for more lawyers is also critically important, as lawyers are the driving force of the legal profession and key players in the judicial system. Workshops, seminars, conferences, and practical skills training should be disseminated across the country in order to prepare lawyers for the challenges brought by the new Constitution and its mandate to foster the use of ADR mechanisms.⁸³

Certainly, these recommendations present new challenges. Human resources for such programs are the most critical. Finding enough talent to meet the demand will not be an easy task. As with any other field of knowledge, it will take time to develop. It requires pioneers who truly believe in the potential for social change

82. Riskin, *supra* note 42, at 57.

83. See Venezuelan Constitution, *supra* note 1.

that ADR represents and who devote themselves to study and research and, eventually, to teach and train new generations of ADR practitioners.

C. Establishing a Network

Certainly ADR is a regional movement in Latin America. However, not every country is at the same stage of development. Some countries such as Bolivia and Ecuador have benefited from ADR programs provided by international development organizations like the United States Agency for International Development (USAID) and the World Bank.⁸⁴ These agencies have invested millions of dollars in order to establish different kinds of ADR programs in those countries, including education and training opportunities for locals.⁸⁵

Other countries, such as Argentina and Colombia, have enacted modern ADR legislation that allows implementation of court-connected and community-based programs.⁸⁶ Such legislation has fostered the practice of ADR by promoting academic discussion and providing the education and training opportunities necessary to implement the widespread use of ADR.⁸⁷

However, other countries such as Venezuela and Brazil are at an earlier stage of development in this field. My recommendation is that academics and practitioners in the region put greater emphasis on networking so those individuals who have benefited from better access to knowledge in the ADR field can spread their wisdom to those who are less experienced in this relatively new field of practice.

VI. CONCLUSION

The explosion of globalization is pushing the development of ADR throughout Latin America. Economic and social factors play an important role in the increase of ADR interest in the region. Economic reasons include the efficiency and effectiveness of ADR in fostering business relationships. Social reasons include values like access to justice, reduction of judicial backlogs, and civic empowerment.⁸⁸ Nonetheless, there are several forces that, if not addressed, will jeopardize or retard such development.

Even though this paper focuses on the analysis of the Venezuelan situation, the problems presented and the recommendations suggested are applicable to almost every country in the region. The seed of ADR development is already planted in Latin America, now it only needs to be nurtured so its benefits can be reaped in the future.

84. Wanis-St. John, *supra* note 21, at 341.

85. *Id.*

86. Moyer & Stewart, *supra* note 3.

87. *Id.*

88. NIGEL BLACKABY ET AL., INTERNATIONAL ARBITRATION IN LATIN AMERICA 423 (2002).

