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From Noise to Music: The Potential of the Multi-Door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America

Mariana Hernandez-Crespo

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From Noise to Music: The Potential of the Multi-Door Courthouse (*Casas de Justicia*) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America

Mariana Hernandez Crespo G.[*]

"Let us be dissatisfied until integration is not seen as a problem but as an opportunity to participate in the beauty of diversity."
Martin Luther King, Jr.[**]

"*Que el futuro no me sea indiferente* (May I not be indifferent to the future)."
Mercedes Sosa[***]

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I. INTRODUCTION

Juan was seven years old when I met him and had been living on the streets of Caracas before the authorities institutionalized him. I was volunteering in a public facility when a thin boy in a blue T-shirt motioned me aside, saying he had something to show me. He told me his name was Juan as he began to pull something out from under his shirt. At first, I was afraid he had drugs; what were revealed instead were two worn notebooks. He proudly opened the books, showing me line after line of misshapen letters and sentence fragments. Without teachers or guidance, he was trying to teach himself to write by copying notices from the lobby bulletin board.

"Help me out," he said, "I want to learn. I have two brothers who need my help."

Juan represents the large number of disenfranchised citizens in the region who want to provide for themselves and for their families. They want the ability to develop their own capacities and to seek their own personal fulfillment.[1] This socio-economic exclusion is a systemic issue that contributes to the entrenchment of poverty and instability in the region.[2] Millions of Latin American citizens are

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1. AMARTYA SEN, DEVELOPMENT AS FREEDOM 87 (Anchor, 2000) ("[P]overty must be seen as the deprivation of basic capabilities rather than merely as lowness of incomes.").

2. Exclusion forces people to engage in "economic activities and social relations that keep them poor;" social exclusion and political marginality create "logjams of disadvantage." THE CHRONIC POVERTY REPORT 2004-2005, v (2005), *available at* http://www.chronicpoverty.org/uploads /publication_files/CPR1_ReportFull.pdf (citing Arjan de Haan & Michael Lipton, *Poverty in Emerging Asia: Progress, Setbacks, and Log-jams*, 16 ASIAN DEVELOPMENT REV. 135 (1998)). In Latin Ameri-

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born, live, and ultimately die without having the opportunities to achieve their potential;[3] when these marginalized citizens find no options for a better life in Latin America, some continue their life as is. However, many create other options for themselves, most commonly through crime, revolution, or emigration to other countries.[4] Capitalizing on the recurrent instability that results, *caudillos*— political "strongmen"—have historically provided only temporary and unsustainable order based on populism or coercion.[5] Even national constitutions are subject to instability; many Latin American countries have a history of changing constitutions and writing new ones with relative frequency.[6]

International bodies have attempted to provide a more sustainable response to instability through legal reform[7] with an emphasis on rule of law,[8] access to jus-

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ca, poverty is a distributional problem enhanced by underlying "socio-economic structures [that] are deeply rooted in Latin America's colonial past." Such structures involve the concentration of power among a few, to the exclusion of majorities. In addition to socio-economic status, race and ethnicity are a strong basis for exclusion. *Id.* at 79. The poor in Latin America are excluded from both public services and broader citizenship rights. *Id.* at 82. Exclusion from services and rights may contribute to the persistence of poverty. Even though efforts have been made for inclusion among Latin Americans, they have not been properly integrated into the socio-political systems. This creates a *de facto* exclusion, where being included does not necessarily bring about the benefits of inclusion. *See* Francis Fukuyama, *The Latin American Experience*, 19 J. DEMOCRACY 69, 71-72 (2008) (discussing how although there is more inclusion in programs such as public education, weak systems do not meet the demands placed on them; this increases cynicism among the poor who "see a system controlled by elites biased against them").

3. Viviane Azevedo & César P. Bouillon, *Social Mobility in Latin America: A Review of Existing Evidence* (Inter-Am. Dev. Bank, Working Paper No. 689, 2009) (reviewing data and concluding that social mobility in Latin America is low, even relative to developed nations that have low social mobility, such as the United States and the United Kingdom).

4. *See* Magaly Sanchez R., *Insecurity and Violence as a New Power Relation in Latin America*, 606 ANNALS AM. ACAD. POL. & SOC. SCI. 178, 179 (2006) ("As the urgency of circumstances facing middle- and working-class people increased, many turned to *radical violence*, leading to successive waves of strikes, demonstrations, and insurrections throughout the region."). *See, e.g.*, David Abel, *Riots Erupt as Congress Barred from Venezuela Capital*, BOS. GLOBE, Aug. 28, 1999, at A2; Clifford Krauss, *Reeling from Riots, Argentina Declares a State of Siege*, N.Y. TIMES, Dec. 20, 2001, at A3; *Costa Rican Labor Protest Turns Violent*, MIAMI HERALD, Aug. 28, 1996, at 11A; *Emigration from Latin America: Making the Most of an Exodus*, ECONOMIST, Feb. 21, 2002 [hereinafter *Exodus*]; *World Watch—Peru: Workers Protest Nationwide over Food and Fuel Prices*, WALL ST. J., July 10, 2008, at A8; HUMAN DEVELOPMENT REPORT 2009, at 24–25 (2009), *available at* http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf [hereinafter *UN Development Report*].

5. *See* JOHN LYNCH, CAUDILLOS IN SPANISH AMERICA, 1800–1850 (1992); Symposium, *Challenges to Fragile Democracies in the Americas: Legitimacy and Accountability*, 36 TEX. INT'L L.J. 319, 324 (2001) (comparing nineteenth century *caudillos* to modern Latin American leaders); Jorge J. Pozo, *Bank Holiday: The Constitutionality of President Mahuad's Freezing of Accounts and the Closing of Equador's Banks*, 15 N.Y. INT'L L. REV. 61, 69–70 (2002); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 3 (2006); Gabriel L. Negretto & Jose Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1798 (2000) (noting that the powers of Latin American presidents are not subject to any checks).

6. Only four countries have had 20 or more constitutions, all of them in Latin America: the Dominican Republic (32), Venezuela (26), Haiti (24) and Ecuador (20); a large number of constitutions is almost always a reliable indicator of political instability. Jose Louis Cordiero, *Latin America: Constitution Crazy*, LATIN BUS. CHRON., Oct. 6, 2008, *available at* http://www.latinbusinesschronicle.com/app/article.aspx?id=2799.

7. *See also*, Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 524–25 (2009). Describing a predominant trend in law and development, Cohen notes that

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tice, and the use of alternative or appropriate[9] dispute resolution (hereafter ADR).[10] Yet, in the Latin America of yesterday and today, there is a marked gap between law on the books and law in action,[11] due in part to lack of citizen en-

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Neocultural interventionists reason that transplanted law and legal institutions stand outside culture and cannot achieve their intended effects without the 'culture' of law's ordinary users. Culture thus appears as a tool to take law—formal and a cultural—and to translate it into something that is specific, local, embedded in individual consciousness, and hence powerful.

Id.

   8. Rule of law concerns "the supremacy of legal rules with respect to the order of human affairs, and providing standards for resolving disputes that inevitably arise—quintessential public ordering." Rule of law is often used to speak of limits placed on political officials. *See* Richard C. Reuben, *ADR and the Rule of Law*, 16 DISP. RESOL. MAG. 4, 4 (2010) [hereinafter Reuben, *ADR and the Rule of Law*]; *see also* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 260 (1997) (writing that rule of law is a "phenomena requiring the political officials to respect limits on their own behavior").

   9. *See* DOUGLAS H. YARN, DICTIONARY OF CONFLICT RESOLUTION 17-26 (1999) (distinguishing between the two uses of the acronym "ADR" as "Alternative Dispute Resolution" or "Appropriate Dispute Resolution"; "alternative" generally refers to methods of dispute resolution other than the court system, while "appropriate" includes litigation and emphasizes the selection of the method to match the dispute); *see also* LEONARD L . RISKIN ET. AL., DISPUTE RESOLUTION AND LAWYERS 19-20 (4th ed. 2009) (highlighting the role of the lawyer in assisting the client selecting the appropriate method for addressing the specific dispute).

   10. Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 572-77 (2007) [hereinafter Sternlight, *ADR Consistent*] (discussing how efforts have been made by groups such as the United States Agency for International Development and the American Bar Association to promote rule of law through the international promotion of ADR). For a comprehensive review of the USAID efforts in the region, *see* U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW 1–2 (2002), *available at* http://transition.usaid.gov/our_work/democracy_ and_governance/publications/pdfs/pnacr220.pdf [hereinafter ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW].

   11. "In order to evaluate the rule of law in a given country, it is necessary to look not only at the laws as written (*de jure*), but also at how they are actually implemented in practice and experienced by those who are subject to them (*de facto*). Unlike other indices, the WJP Rule of Law Index™ methodology focuses entirely on adherence to the rule of law in practice." MARK AGRAST ET. AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2011, at 118 (2011), *available at* http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf.

Latin America presents a picture of sharp contrasts. In spite of recent movements towards openness and political freedoms that have positioned many countries at the forefront in protecting basic rights and liberties, the region's public institutions remain fragile. Corruption and a lack of government accountability are still prevalent. Accordingly, the perception of impunity remains widespread. In Argentina and Mexico, for instance, only 15 percent of the people believe that institutions will act effectively in cases of corruption. Furthermore, public institutions in Latin America are not as efficient as those of countries in other regions, and police forces struggle to provide protection from crime or to punish perpetrators of abuses. Nowadays, Latin American countries show the highest crime rates in the world . . . and the criminal investigation and adjudication systems rank among the worst in the world.

Id. at 25. Nine factors were catalogued as contributing to the Rule of Law Index: limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, access to civil justice, and effective criminal justice. *Id.* at 1. Based on these factors, Chile, followed by Brazil, are the best performers in the region, while Venezuela and Bolivia have the lowest rankings. *Id.* at 112.

gagement.[12] During colonial times, there was a saying among citizens in parts of the region, "Obedezco pero no cumplo" ("I obey but do not execute"), used to reference Spanish laws that were imposed on the indigenous populations.[13] Rather than being the result of a participatory political process, these laws were completely foreign to Latin Americans. Even today, local stakeholders have limited engagement and few opportunities for collaborative governance. For purposes of this Article, collaborative governance refers to citizen engagement in public decision-making through a policy continuum that includes deliberative democracy, collaborative public management, and alternative dispute resolution in the policy process. In this regard, Lisa Blomgren Bingham defines collaborative governance as "the integration of reasoned discussions by the citizens and other residents into the decision-making of public representatives, especially when these approaches are embedded in the workings of local governance over time."[14] To date, the lack of such collaborative governance in Latin America has resulted in poor ownership of current laws, which are in many cases still imported to the region.[15]

If we aim to foster systemic inclusion and move from revolution to collaborative governance, from riots to civic dialogue, from noise to music, *participation* is essential. Oftentimes, the *caudillo* is the only instrument allowed to play, thus leaving the "power of the orchestra" untapped.[16] Those who wish to participate, but are prevented from doing so, often create reactionary noise in the form of riots and revolutions. Latin America has yet to experience the full orchestra's capacity to produce music; it has yet to experience a higher level of "social cohesion"[17] and

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12. Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 103-04 (2003) (arguing that the disconnect between the letter of the law and how the law is carried out is caused, in part, by a lack of citizen engagement).

13. *See* Michael Knox, *Continuing Evolution of the Costa Rican Judiciary*, 32 CAL. W. INT'L L.J. 133, 137 (2001).

> Colonists recognized the value and importance of the law in theory, but they took a very practical approach to its application. They would pay lip service to the law, but felt no compunction about violating its terms when necessary. When regulations were 'impossible or inconvenient to execute' they were 'shelved with the famous Spanish formula, I obey but do not execute, and were referred back to Spain again for further consideration.

Id. See also, Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and some Strategic Considerations*, 13 AM. U. INT'L L. REV. 1267, 1276 (1998) (describing the monarchy's authority over the Indies and the hierarchical structures of authority that led up to the monarchs).

14. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 274 n.28 (2009) [hereinafter Bingham, *Collaborative Governance: Emerging Practices*] (quoting an interview with Terry Amsler, Program Director, Collaborative Governance Initiative, Inst. for Local Gov't, Sacramento, Cal. (Nov. 28, 2009)). *See also* Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67 (2011).

15. Esquirol, *supra* note 12, at 104. Esquirol notes that laws imported into Latin America from abroad fail to engage local stakeholders, thereby compromising the legitimacy of the law. *Id.* He also observes that recent reform efforts have replicated the same mistakes of importation without engagement. *Id.*

16. Pozo, *supra* note 5, at 69 (describing how *caudillos* "centralized power and shared it with no one").

17. Even though there is no single definition of social cohesion, the Economic Commission for Latin America and the Carribbean offers three fundamental elements: social integration, social capital and social ethics. Social integration refers to the capacity of citizens to participate in their country's devel-

the participation of a broader spectrum of stakeholders who are engaged in the system and therefore invested in upholding it.[18] Only when Juan and his fellow citizens have an active role in decision-making processes will they become protagonists in their own lives and builders of the Latin America *they* want.[19]

Although reforming the judiciary, providing access to justice through ADR, and having transparent elections are important measures to foster rule of law, they have proven insufficient. The focus of ADR implementation should be broadened from its current use as a means for access to justice for the poor to having an expanded role that would include fostering necessary capacities for all citizens, thus promoting systemic inclusion and participation. If rule of law is to be sustainable, citizens should have access to participatory experiences in private conflict resolution and should have the opportunity to engage in collaborative governance, which includes public conflict resolution as well as the other stages in the policy continuum—deliberative democracy and collaborative public management. These experiences could begin to challenge the *caudillo* mentality by providing opportunities for them to make choices that affect their own lives.

Expanding the role of ADR in connection to rule of law can act to establish a foundation for sustainable rule of law. In this regard, the social capital necessary for rule of law can be created by private conflict resolution consistent with procedural justice values.[20] Also, traditionally marginalized majorities, if engaged, empowered, and ultimately included in collaborative governance, will be given a greater stake in the system, thus contributing to the enhancement of rule of law.[21]

Drawing on the multi-door courthouse model's vision of the integrated delivery of dispute resolution services, Latin America has developed the specific form of *Casas de Justicia*, which mainly work at redressing small grievances in the low- income urban communities and rural areas. This Article argues that the role of *Casas de Justicia* could be expanded to go beyond the framework of access to justice for the poor. They could have a broader impact if they provide experiences of participatory private conflict resolution for citizens of all socio-economic levels. In addition, while the original multi-door courthouse model had a screener who rerouted the cases to the most appropriate forum for resolution, this position—called a conflict assessor in the proposed model of the *Casas de Justicia* —

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opment, which implies access to well-being and the possibility of self-determination. Social capital refers to the trust, networks, and social linkages that make a sense of community possible. Social ethics refers to collective values that form a foundation for social interaction. SOCIAL COHESION: INCLUSION AND A SENSE OF BELONGING IN LATIN AMERICA AND THE CARIBBEAN 17-18 (2007), *available at* http://www.eclac.org/publicaciones/xml/0/29030/2007-219-Social_Cohesion-web.pdf; Maria de Lourdes Dieck Assad, *Social Cohesion as the First Item in the Human Rights Agenda: Mexico's Performance*, 5 ST. THOMAS L.J. 639, 639 (2008) (writing that "the term 'social cohesion' refers mainly to the reduction of poverty and inequality").

18. *See generally* Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC. 5 (2001) (providing an examination of different programs designed to increase participation and the preservation of democratic vitality).

19. *See generally* Mariana Hernández Crespo, *Building the Latin America We Want: Supplementing Representative Democracies with Consensus-Building*, 10 CARDOZO J. CONFLICT RESOL. 425 (2009) [hereinafter Hernández Crespo, *Building*].

20. *See* Reuben, *ADR and the Rule of Law*, *supra* note 8, at 6 (discussing the relationship between rule of law and procedural justice).

21. *See generally* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1 [Hereinafter Blumoff & Tyler, *Procedural Justice and the Rule of Law*].

would be modified from the role of a decision-maker to that of an expert guide. This guide would help the citizens identify the root causes of systemic issues, empowering them to select the most appropriate forum for resolution of their disputes. In this way, the proposed model would foster self-determination and decision-making capacity, as well as problem solving capacity when facilitative processes are used. By adding an organizational ombuds function, the conflict assessors would be able to perform root cause analysis, which could identify systemic issues that can serve as the starting point for collaborative governance agendas. Given the strategic position of *Casas de Justicia*, which bring the community together and connect it with the government, they could help members of the community address the public issues that affect them and could craft public policy pertaining to the community through collaborative governance. The experience citizens gain through private conflict resolution can help them develop some of the capacities needed to make their participation in collaborative governance more effective.

The adapted role of qualified screeners, who act as conflict assessors in the proposed model of *Casas de Justicia*, would fulfill an essential function in empowering citizens and identifying systemic issues that could be addressed through collaborative governance. The screeners could spearhead the process of making citizens protagonists in private conflict resolution, opening to them a range of options that exist beyond passive resignation, retaliation, or litigation for those who can afford it. In addition to guiding the parties in the selection of an appropriate dispute resolution process, they could also perform root-cause analysis, which could be utilized to discover the underlying conflict, aggregate data, and identify social issues. In the ADR field, a dispute is understood as a conflict that has escalated. It is therefore possible, at times, to resolve a dispute while leaving the underlying conflict unaddressed.[22] Root cause analysis can move beyond merely resolving disputes; it can examine and potentially address the underlying conflicts. Furthermore, root cause analysis could identify systemic issues that could be addressed through public conflict resolution. It could also serve as the starting point for collaborative governance in the other stages of the policy continuum. To this end, state and national committees of conflict assessors from the *Casas de Justicia* could be formed to develop channels of communication, best practices, and accountability.

Based upon common issues among Latin American countries and the solutions implemented, this Article aims to expand the range of possibilities for discussion among stakeholders, international financial institutions (hereafter IFIs), and foreign aid organizations about ways to tap the potential of ADR beyond mere

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22. "Conflict may be defined simply as a clash of interests or aspirations, actual or perceived. Disputes are immediate manifestations of conflict, and arise when people take action based on this actual or perceived clash." RISKIN ET AL., *supra* note 9, at 3. Conflicts can be approached from a number of different perspectives and explained in different ways. James Schellenberg identifies three sets of theories to organize conflicts. The first relates to the individual characteristics of people; an example of this is need theory, which refers to a conflict arising out of an unmet need. The second set includes social process theories. These theories look beyond the individual characteristic and are based on the relationships between people, perhaps along distributional lines. The third group is social structure theories, where conflicts are viewed as arising out of institutional structures that organize society. *Id.* at 3-4 (citing JAMES A. SCHELLENBERG, CONFLICT RESOLUTION: THEORY, RESEARCH, AND PRACTICE 39-102 (1996)).

access to justice, expanding ADR to promote inclusion and participation in the Latin American context. This Article suggests this or any proposal aimed at promoting ADR in the region should be developed and owned by the stakeholders; to that end, it argues Dispute System Design (hereafter DSD) can provide a participatory framework in guiding the development and ongoing evaluation of conflict resolution systems. By engaging in local DSD efforts, stakeholders can adapt and diverge from the proposal to address their specific contextual reality. They can enhance citizen participation through private conflict management and dispute resolution as well as through experiences of collaborative governance that meet the needs of each country.

In Part II, this Article explores the current reality of exclusion and responses to exclusion, which include both *de facto* responses by citizens and *de jure* responses by international organizations, whose focus has been on advancing rule of law. Within this context, it discusses how ADR has been promoted as part of the rule of law agenda aiming to expand access to justice and further explores some of the challenges involved in its implementation. Part III suggests ADR could be used beyond access to justice by promoting systemic inclusion and citizen participation not only through private conflict resolution, but also through collaborative governance; thus, ADR could serve as a necessary foundation for a more sustainable rule of law. Specifically, it suggests this can be achieved by tapping into the potential of the multi-door courthouse model, which already exists in Latin America, by expanding the role of the *Casas de Justicia*. It examines how the scope of *Casas de Justicia* could be broadened to include not only the poor, but all citizens. In addition to resolving private disputes, the *Casas de Justicia* could be used as building blocks to develop citizens' capacity for both public and private conflict resolution. Furthermore, this section argues that some of the issues identified in the *Casas de Justicia* could be used as a starting point for collaborative governance. Part IV suggests participation is a critical element for effective implementation of ADR in Latin America and contends that DSD can provide a framework which acts to engage stakeholders in the decision-making process, allowing them to address their local needs. It also explains the need for capacity building and points out possible challenges, such as resistance to change, asymmetries of power, and other contextual obstacles.

II. WASTED POTENTIAL: THE EFFECT OF EXCLUSION IN LATIN AMERICA

This section begins by contextualizing the efforts to promote rule of law in Latin America, a region where millions of citizens are usually excluded from public decision-making. Next, it examines a variety of responses to the issues of exclusion and instability, including *de facto* responses by local citizens and *caudillos* and *de jure* responses by international bodies. In addition, in the context of *de jure* responses, it examines the specific challenges facing the promotion of ADR in the region.

A. The Context: Prevailing Exclusion

In addressing the specific challenges of the region, understanding the reality on the ground in Latin America is of critical importance if rule of law is to be

promoted. The following account describes the reality of those complexities found in the region.

1. The Invisible Majorities

Even though each country in Latin America is quite distinct, most of the countries share a common denominator: a large percentage of the population lives in the sprawling urban centers of the region.[23] Rural migrants who seek a better life and standard of living come to the city looking for jobs that often do not exist.[24] They usually live in marginal housing in the *favelas* (shanty-towns) and *barrios* (slums) without streets, sewers, or building codes. Life is most precarious for those living at the edges of the *favelas* and *barrios* in flimsy shelters of cardboard and mud brick with no access to running water or electricity. In most cases, these citizens do not own the land,[25] they do not have an address, and their communities do not exist on most official maps. Urban infrastructures tend to be overwhelmed by the thousands of new immigrants that come from the countryside each month. Government programs for health, education, and safety are at times inaccessible.[26] As economist Hernando de Soto has observed, these societies function outside of formal economic and legal systems,[27] in what he has called the informal system. This system is characterized by a lack of property rights acting to block access to credit, thus providing little opportunity for advancement.[28] This informal sector in Latin America is the invisible majority.

Making a living in the *favelas* and *barrios* usually requires hard work and does not provide the possibility of social mobility. For example, a woman who sells flowers in the streets of a large urban center in the region begins her workday long before dawn with a long trek down from the slums that cling to the hills surrounding the city. She has no car, so she stands in queue at a bus stop for a ride to the city center that can last two hours or more due to traffic. She will then sell her flowers amid the traffic stopped at the red lights, working until nightfall. At the end of the day, she repeats the journey back to the edge of the *favela* or *barrio*, making her way up the hill through the narrow lanes between the shanties, until she arrives at her own makeshift dwelling. She will do this day in and day out, yet

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23. Latin American and Caribbean countries had 78.6% of their population living in urban areas in 2008. WORLD BANK DATA CATALOG, http://data.worldbank.org/data-catalog (last visited June 18, 2011).

24. *See* Marcela Cerrutti & Rodolfo Bertoncello, *Urbanization and Internal Migration Patterns in Latin America* (June 5, 2003), http://pum.princeton.edu/pumconference/papers/1-Cerrutti.pdf (regarding rapid urbanization in Latin America).

25. HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM 17-57 (2002).

26. *See, e.g.*, Center for Global Development: Latin American Shadow Financial Regulatory Committee, *Enhancing Access to Financial Services in Latin America*, CENTER FOR GLOBAL DEVELOPMENT, *available at* http://www.cgdev.org/doc/CLAAFStatement.pdf (discussing poor citizens' lack of access to financial services); William D. Savedoff, *A Moving Target: Universal Access to Healthcare Services in Latin America and the Caribbean* 28 (Inter-Am. Dev. Bank, Working Paper No. 667, 2009), *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1834994.

27. In describing the Peruvian reality, de Soto coined the distinction between the "informal" and "formal" sectors of society. DE SOTO, *supra* note 25, at 11-12. *See also* Alejandro Portes & Kelly Hoffman, *Latin American Class Structures: Their Composition and Change During the Neoliberal Era*, 38 LATIN AM. RES. REV. 41, 74-77 (2003).

28. DE SOTO, *supra* note 25, at 11-12.

she will never make enough to get out of the *favela* or *barrio*—to cross over from the informal world at the fringe of society to the formal world of homeownership, taxes, and a car.[29] This gulf between the informal and formal sectors poses one of the biggest challenges for Latin America, which, as a region, has no hope of advancing in any area if the majorities continue to be excluded from the formal economic and political system.[30] Likewise, efforts to promote rule of law will have a limited effect if this contextual reality is not taken into account.

2. The Exclusion of the "Have-Nots"

In most Latin American countries, there is a tendency to perceive others as belonging to different socio-economic groups.[31] In broad terms, these social groups could be divided into the "haves" and the "have-nots."[32] Usually, the affluent, or the "haves," tend to believe they can function independently of the "have-nots," since they have the means to accomplish their goals on their own; thus, they usually lack an integral vision of their own society.[33] In reality, they are part of a larger whole, like pieces of a jigsaw puzzle. Yet, their interactions with the other pieces of the puzzle, the "have-nots," are limited to helping them, ignoring them, or protecting themselves from them. It is not the norm to see "haves" and "have-nots" interacting as equals to create joint gains.

Similarly, the "have-nots" also tend to have a distorted perception of their role in the social system. In this case, the pieces of the jigsaw puzzle usually believe they have little to contribute to the puzzle itself. They tend to believe they have little or nothing to contribute to the development of society as a whole. In many instances, they accept assistance[34] from the "haves" but think they cannot offer anything of substantial value in return. Despite good intentions on both sides, the dynamic of this interaction reinforces the belief that the contributions of the "have-nots" are of little significance in the creation of a thriving society.[35] Yet, the "have-nots" have usually had to develop essential skills, such as the ca-

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29. *See* Azevedo & Bouillon, *supra* note 3; Portes & Hoffman, *supra* note 27, at 74-77.

30. DE SOTO, *supra* note 25, at 11-12.

31. *See, e.g.*, WINTHROP R. WRIGHT, CAFÉ CON LECHE: RACE, CLASS, AND NATIONAL IMAGE IN VENEZUELA 125-31 (1990) (discussing how socio-economic class is a greater source of division and discrimination in Venezuela than racial diversity).

32. *See* Portes & Hoffman, *supra* note 27, at 44-50.

33. MARK GERZON, LEADING THROUGH CONFLICT: HOW SUCCESSFUL LEADERS TRANSFORM DIFFERENCES INTO OPPORTUNITIES 61-95 (2006) (arguing that an integral vision and systemic thinking allow for the resolution of conflict in a way that addresses the interests of all stakeholders).

34. When the "haves" try to address the problem of inequality by giving assistance to the disenfranchised, they end up, more often than not, disempowering the "have-nots" because their assistance does not address the structural causes of poverty and inequality. *See* THE CHRONIC POVERTY REPORT, *supra* note 2 (describing historical and structural causes of poverty). Assistance may take the form of redistrubution of wealth, but in most Latin American countries, redistribution alone is not a viable answer. Even if all of the wealthy freely gave all of their resources to the poor, it would not be enough, nor would it be sustainable over the long-term. Richard M. Bird & Eric M. Zolt, *Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1638 (2005); DE SOTO, *supra* note 25, at 19, 17-57 (observing that many poor citizens live on public land and are thus open to insecurity, not cured by minimal redistribution of wealth).

35. Mariana Hernández Crespo, *Making Rights Reality: Children's Welfare as a Cornerstone for Development* (1999) (unpublished LL.M. thesis, Harvard University) (on file with author) [hereinafter Hernández Crespo, *Making Rights Reality*].

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pacity to innovate, collaborate, and effectively use natural resources, to compensate for the lack of acquired resources.[36] It would be an enormous waste of potential if the "have-nots" were unable to practically contribute these skills to their society.

This dynamic manifests itself in both the private and public realm. In the workplace, the "haves" generally hold positions of decision-making power. The "have-nots" usually occupy lesser posts,[37] which minimize their ability to contribute to the decision-making process. Regarding the public square, the same dynamic continues despite efforts to promote greater participation.[38] Though the "have-nots" have, in some cases, been given a seat at the table, the "haves" are often better-equipped and have more resources to maneuver the decision-making process.[39] This lack of capacity for full and effective participation in problem solving and deliberation, together with lack of appropriate channels for citizen engagement, may result in the type of exclusion that provides fertile ground for instability.[40]

B. The De Facto *Responses to Exclusion: Reactions of Citizens and* Caudillos *(Political Strongmen)*

Facing these complex situations of exclusion, citizens usually react in a variety of ways that have become predictable patterns in the region. Given the level of instability, *caudillos* (political strongmen) emerge as a viable solution to promote order. The following are some observable patterns of *de facto* responses.

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36. *See* Marshall Ganz, *Ganz Organizing Notes*, HARVARD KENNEDY SCHOOL OF GOVERNMENT 13 (Fall 2009), *available at* http://annastarrrose.files.wordpress.com/2011/06/ganz-course-notes.pdf (differentiating "natural resources" such as "those [resources] we more or less came into the world with: our bodies, our minds, our spirit, our time, and our talents" from "[a]cquired resources" such as "land, skills, information, money, equipment, [and] status").

37. *See* Portes & Hoffman, *supra* note 27, at 44-50.

38. *See id.* at 75-76.

39. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984).

The disparities in resources between the parties can influence the settlement in three ways. First, the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment . . . . Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery.

Id. at 1076. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 32-33 (1974); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 57-60 (1999) (discussing various concerns such as bias and repeat players). Overprofessionalization may also benefit those with resources and experience using ADR methods.

40. *See* Richard Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 309 (2004) [hereinafter Reuben, *The Problem of Arbitration*] ("[F]rustration of expectations regarding access to the law and courts can lead to a loss of trust in the courts and rule of law, contributing to the erosion of the social capital necessary for a vibrant and effective democracy.").

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1. Citizen Responses: Riots, Immigration, Guerilla Insurrection, Drugs, Corruption, and Hopelessness

The dynamic of marginalization and exclusion of the invisible majorities results in tremendous dissatisfaction. The inability to get out of the *favelas* and *barrios,* despite hard work and determination, leads to desperate reactions from citizens who have almost nothing to lose, increasing their tendency to take high-risk actions.

This desperation often manifests itself in predictable ways. When life in the *favelas* reaches a point that is no longer bearable, such as when there is currency devaluation or when inflation spirals out of control, citizens usually react by rioting in the streets.[41] When riots fail to bring the desired long-term relief, however, as is usually the case, or when citizens no longer find opportunities in their own country, some opt to escape the situation by emigrating legally, or, if necessary, illegally, at the risk of their own lives.[42] Others respond to the exclusion by joining paramilitary groups, which they see as a way to force change.[43] Still others attempt to make enough money to get out of the *barrios* through corruption and craft, gangs and drug trafficking.[44] For those left behind in the *barrios*, the alternative to flight, corruption, or violence is resignation to the status quo and a life of poverty with little hope for better opportunities.

2. The Caudillo de Turno *(Strongman of the Moment): Wasting Social Capital and Furthering Political Instability*

The majority of Latin Americans, who lack structural channels as well as the experience of participating in political and social processes, have had limited opportunity to contribute meaningfully within those processes.[45] Thus, when protests and riots fail to bring about a desired change, citizens typically look to a political strongman—the *caudillo*—to deliver order and change, typically handing power over to him. The *caudillos* tend to present themselves as the people's saviors, and the citizens believe they will bring about a better life for them.[46] But, in

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41. *See* Portes & Hoffman, *supra* note 27, at 76 (discussing *favelas*, *villas miserias*, and other squatter settlements as the source of mobilization and protest); *see also* sources cited *supra* note 4.

42. *See* Portes & Hoffman, *supra* note 27, at 70-74; *Exodus*, *supra* note 4; and *U.N. Development Report*, *supra* note 4.

43. *See* DE SOTO, *supra* note 25.

44. *See* Portes & Hoffman, *supra* note 27 at 66-70; Sanchez, *supra* note 4, at 179 ("At the same time, the situation of the poor and the young deteriorated, and many of them turned to *criminal violence* in the form of youth gangs, criminal mafias, and drug cartels."); Jorge Correa Sutil, *Modernization, Democratization and Judicial Systems*, *in* JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 97, 102 (Edmundo Jarquin & Fernando Carrillo eds., 1998) (discussing drugs in Colombia) .

45. Jorge I. Dominguez, *The Politics of Hope: Free Politics and Free Markets in Latin America*, 5 ST. THOMAS L.J. 625, 626-37 (2008) (discussing the reign of dictators and the resulting lack of involvement by most citizens in the government).

46. *See Democracy and the Downturn: Latin Americans are Standing Up for Their Rights*, THE ECONOMIST, Nov. 13, 2008, *available at* http://www.economist.com/node/ 12607297?story_id=12607297; *see also The Return of Populism: A Much-Touted Move to the Left Masks Something Much More Complex: The Rebirth of an Influential Latin American Political Tradition*, THE ECONOMIST, Apr. 12, 2006, *available at* http://www.economist.com/node/6802448?Story_ID=E1_GRDNQQR.

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a society of prevailing patterns of exclusion, such as Latin America, authoritarian *caudillos* often exacerbate the problem of marginalization by making decisions with little or no input from their constituents.[47] Furthermore, they are not often inclined to open space for other leaders to develop or to participate and the system has no embedded incentives encouraging them to do so. In this paradigm, the leadership of another tends to be perceived as a threat.[48]

Latin America has a long history of domination by *caudillos.*[49] They have existed on every side of the aisle and political spectrum; the structures underpinning their power remain virtually the same. From Bolivar to Pinochet to Castro, *caudillos* have kept a stalwart presence on the Latin American political stage for centuries. Some Latin Americans still believe *caudillo* rule is a workable solution, in part because of this long-established presence.[50]

The lack of broad-based engagement contributes to the creation of political instability, which scares away local and foreign investment,[51] hindering economic development and job creation. The constant changing and rewriting of a nation's constitutions is a particularly salient manifestation of the instability of *caudillo* rule.[52]

To fully understand the issue of *caudillo* domination, it is important to grasp the notion of social capital. According to Robert Putnam "social capital" describes the connections between individuals and the social networks that spring from these connections, as well as "the norms of reciprocity and trustworthiness that arise from them."[53] Norms of reciprocity reinforce the relationships between people who trust and cooperate with each other within the network and can often

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47. Joseph C. Bentley, *New Wine in Old Bottles: The Challenges of Developing Leaders in Latin America*, *in* CROSS CULTURAL APPROACHES TO LEADERSHIP DEVELOPMENT 29-48 (C. Brooklyn Derr et al. eds., 2002).

48. KENNETH E. BOULDING, THREE FACES OF POWER, 18-20 (1990).

49. *See* sources cited *supra* note 5.

50. *See* Marta Lagos, *Public Opinion*, *in* CONSRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 137, 151, table 7.4 (Jorge I. Dominguez & Michael Shifter eds., 2d ed. 2003).

51. Frank Shaw, *Reconciling Two Legal Cultures in Privatizations and Large-Scale Capital Projects in Latin America*, 30 LAW & POL'Y INT'L BUS. 147, 155-56 (1999).

52. *See, e.g.*, sources cited *supra* note 6; sources cited *infra* note 445.

53. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2001). The definitions and understanding of social capital are by no means univocal. The term "social capital" was first coined in 1916 by L.J. Hanifan, the supervisor of rural schools in West Virginia, who argued that the strengthening of social networks ultimately benefited the entire community.

> The individual is helpless socially, if left to himself . . . . If he comes into contact with his neighbors, and they with other neighbors, there will be an accumulation of social capital, which may immediately satisfy his social needs and which may bear a social potentiality sufficient to the substantial improvement of living conditions in the whole community. The community as a whole will benefit by the cooperation of all its parts, while the individual will find in his associations the advantages of the help, the sympathy, and the fellowship of his neighbors.

Id. at 19. While for Robert Putnam, trust is an essential component of social capital, and social capital is essential to the success of democracy, Theda Skocpol and Morris Fiorina evaluate and analyze democracy from a different perspective. To them, democracy is a result of centuries of historical struggle among social groups: "democracies were a product of organized conflict and distrust." They argue that civil rights institutions grew out of this struggle. Theda Skocpol & Morris P. Fiorina, *Making Sense of the Civic Engagement Debate*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 6, 13-14 (Theda Skocpol & Morris P. Fiorina eds., 1999).

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create value even for those outside the network. The networks can be small or large, formal or informal, and can promote the exchange of information, collective action, and the formation and solidification of group identity, among other benefits.[54]

Within the broad concept of social capital, networks organize themselves along two basic lines. Social networks tend to be either horizontally or vertically oriented. Putnam's study of these differences in a comparative analysis between northern and southern regions in Italy illustrates this point.[55] He found that, in the north, societies, guilds, soccer clubs, and the like formed formal, "horizontal civic bonds." This type of social capital made higher levels of economic and institutional performance possible than in the south, where civic bonds were more vertically oriented. The horizontal bonds were found more often in civic regions that had dense networks and active engagement. The less civic regions were more informal and vertically bonded, based on family or neighborhood connections. There, suspicion and corruption were considered normal, lawlessness was more widely accepted, and involvement in associations was minimal. The citizens in the less civic regions "felt powerless and exploited," while in the other regions, "the more civic the context, the better the government."[56] Thus, the organization of social capital, whether formal or informal, horizontal or vertical, deeply influences the public sphere.

Vertical social capital is primarily hierarchical and lacks the active engagement and dense networks in civic associations that are typically found in more horizontally oriented regions.[57] It concentrates decision-making power in the hands of the powerful and discourages the associative bonding required for robust civic engagement. In this regard, the hierarchical mentality reflected in *caudillo* domination could be understood as an example of vertical social capital, which stifles the participation of stakeholders and thus wastes social capital.

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54. *See Social Capital Primer*, THE SAGUARO SEMINAR: CIVIC ENGAGEMENT IN AMERICA, http://www.hks.harvard.edu/saguaro/socialcapitalprimer.htm (last visited June 17, 2011). The debate over the issue of declining social capital in the United States and what can be done about it has become more rousing amongst sociologists, political philosophers, communitarians, and others since the publication of Robert Putnam's provocative work, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY. *See* PUTNAM, *supra* note 53.

55. *See generally* ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) [hereinafter PUTNAM, MAKING DEMOCRACY WORK]. Putnam's study is especially relevant here, because the action research project conducted in Venezuela through the clinical projects drew similar results. When participants were asked to map their communities, the horizontal bonding was weak and the vertical bonding was strong, suggesting a similarity to social bonds in southern Italy. HLS Clinical Projects 2001-02 (on file with author).

56. PUTNAM, MAKING DEMOCRACY WORK, *supra* note 55, at 182.

57. Putnam conducted a comparative analysis of differences in organizing social capital between northern and southern Italy. He observed that in the north, societies, sport clubs, and the like formed "horizontal civic bonds," which increased the level of economic and institutional performance. By contrast, in the south, vertically-oriented bonding led to less civic engagement and greater lack of trust and acceptance of lawlessness. *Id.*

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C. The De Jure Responses to Instability: ADR in the Context of International Efforts to Promote Rule of Law

The instability produced by the patterns of exclusion has prompted international efforts in Latin America. Unlike the *de facto* responses, the *de jure* efforts have been long-term, strategic interventions. These efforts mainly relate to the promotion of rule of law through democratic processes, legal and procedural reform as well as judicial reform, and the use of ADR as a way to enhance access to justice.[58] This section elaborates on the framework under which ADR has been promoted and how it fits as part of this larger agenda.

1. Efforts to Promote Stability through Democratic Processes

Latin American countries began to move toward democracy in the late 1970s.[59] IFIs and foreign aid organizations have therefore made efforts to contribute to the promotion of processes that would foster democracy in the region.[60] Except for a few countries, notably Costa Rica, the judicial systems were "treated as adjuncts to the regime in power."[61] Theorists such as Jorge Dominguez have emphasized the role stable democracies play in producing stable markets, which could ultimately promote development.[62] For this reason, IFIs, foreign aid organizations, and investor nations have focused on promoting the rule of law and refining democratic institutions.[63]

One of the aims of foreign aid organization and IFI-backed legal reform has been to create more representative democratic institutions,[64] in the hope that their efforts would lead to greater social and political stability.[65] To this end, it has been assumed that the majority vote would result in widely accepted, popular outcomes. However, in the Latin American context, deeply shaped by exclusion, the majority vote runs the risk of becoming a power game of the *caudillos,*[66] especially in a region where the average citizen has usually had little influence on the political *caudillos'* agenda.[67] This is due in part to the citizens' primary focus

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58. *See generally* GABRIEL PELÁEZ GANTIER, LAS MENTIRAS DE LA REFORMA JUDICIAL (1993); Edgardo Buscaglia, *Corruption and Judicial Reform in Latin America*, 17 POL'Y STUD. 273 (1996); *see also* Thomas J. Moyer & Emily Stewart Haynes, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 657 (2003); Shaw, *supra* note 51, at 156.

59. ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW, *supra* note 10, at 1.

60. *See generally* STEPHEN E. HENDRIX, THE NEW NICARAGUA: LESSONS IN DEVELOPMENT, DEMOCRACY, AND NATION BUILDING FOR THE UNITED STATES (2009) [hereinafter HENDRIX, THE NEW NICARAGUA] (discussing the process and challenges of promoting democracy).

61. ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW, *supra* note 10, at 2.

62. Dominguez, *supra* note 45, at 631-33.

63. Shanker Satyanath & Arvind Subramanian, *What Determines Long-Run Macroeconomic Stability? Democratic Institutions* 34, (Int'l Monetary Fund, Working Paper WP/04/215, 2004) *available at* http://cdi.mecon.gov.ar/biblio/docelec/fmi/wp/wp04215.pdf.

64. HENDRIX, THE NEW NICARAGUA, *supra* note 60, at xii (stating that promoting democracy in Latin America and the Caribbean is a top priority of the U.S. Department of State).

65. *See id.* at 9-11.

66. Schor, *supra* note 5, at 15 (political elites use legitimate votes to sanction whatever actions they wish to take).

67. *See, e.g.*, HENDRIX, THE NEW NICARAGUA, *supra* note 60, at 30 (describing the repetitive interchange of power among a group of caudillos in the Venezuelan context).

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being on the leader's charisma, with little concern for the issues. An underdeveloped organization of civic society exacerbates the problem further. Even though democratic efforts attempt to redistribute power from one leader to a broader popular base, the outcomes are all too often far from satisfactory[68] and the power imbalances remain.[69]

Although the effort to promote democratic processes is a step in the right direction,[70] structures and processes alone have proven insufficient. In the Latin American context, the underlying issue of exclusion will remain unresolved unless the scope is broadened.[71] In this regard, Richard Reuben has suggested that, when evaluating the democratic nature of a system, it is important to go beyond procedural values and examine the substantive values, which include political, legal, and social capital values. Within the political category, Reuben mentions participation, accountability, transparency, and rationality. The legal values category highlights equality and due process. He suggests "social capital values are public trust, social connection and cooperation, and reciprocity."[72] Although these values are far less tangible than institutions or procedural structures, they are no less important. As standards of behavior and interaction, they shape the quality of participation and can help ensure the sustainability of rule of law. In this regard, theorists such as Robert Ackerman have suggested dispute resolution methods can contribute to the enhancement of social capital, as will be discussed later in this article.

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68. Many Latin Americans are frustrated with the inability of their governments to ensure stability and development. *See* Dominguez, *supra* note 45, at 636-37.

69. Schor, *supra* note 5 at 16 (saying that, despite efforts to implement constitutions, "social and economic inequality remains pervasive").

70. HENDRIX, THE NEW NICARAGUA, *supra* note 60, at 245-56 (quoting Ortega y Gasset, "The health of any democracy, no matter what its type or status, depends on a small technical detail: the conduct of elections. Everything else is secondary.") For the original words of Ortega y Gasset, *see* José Ortega y Gasset, *La rebelión de las masas*, *available at* http://mgarci.aas.duke.edu/cgi-bin/celestina/sp/searchcontent.cgi?conttype=text&pala=Milc%EDades&pos=312053&libroId=1560&section=%20P%20II%20--%20XIV%20--%207%20--%20&sectionid=89740&hook=n ("La salud de las democracias, cualesquiera que sean su tipo y grado, depende de un mísero detalle técnico: el procedimiento electoral. Todo lo demás es secundario . . . . Sin el apoyo de auténtico sufragio las instituciones democráticas están en el aire.").

71. In a society with prevailing patterns of exclusion, democratic processes have proven to be unable to rectify inequality and instability. Powerful disaffected minorities can still disrupt the stability of young democracies. *See generally* Schor, *supra* note 5; *see also* Larry Diamond, *Consolidating Democracy in the Americas*, 550 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 40 (1997); Luisa Blanco & Robin Grier, *Long Live Democracy: The Determinants of Political Instability in Latin America*, at 13-15, http://www.ou.edu/cas/econ/wppdf/instabilityinla%20rg.pdf (last visited June 19, 2009) (data analysis shows that while democracy reduces instability, inequality and ethnic fractionalization are related to instability). Politically disaffected groups, such as the FARC and Shining Path, operating at the fringes of Latin American society, have demonstrated a tremendous power to destabilize governments. *See also* DE SOTO, *supra* note 25, at 17-57.

72. Reuben, *The Problem of Arbitration*, *supra* note 40, at 286; *see also* Richard Reuben, *Democracy and Dispute Resolution: Systems Design and the New Work Place*, 10 HARV. NEGOT. L. REV. 11, 29-39 (2005).

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2. *Strengthening Rule of Law through Legal and Procedural Reform, and Access to Justice through ADR*

In addition to promoting democratic processes,[73] international organizations have often directed their efforts more broadly to strengthening the rule of law through ADR.[74] To better understand these efforts, it is important to place them in the Latin American context, where judicial systems are typically overburdened and undermined by backlog, congestion, and corruption.[75] The most prevalent objectives that have been pursued include improving efficiency while lowering costs and increasing access to justice for the groups that the formal system does not typically reach.[76] To accomplish these objectives, institutions such as the World Bank and USAID have invested substantial resources in advancing legal and procedural reform,[77] training judges, improving judicial infrastructure,[78] and promoting ADR.[79]

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73. *See* DEMOCRACY AND THE RULE OF LAW (José María Maravall & Adam Przeworski eds., 2003) (discussing the relationship between rule of law and democracy, with special emphasis on the rationale behind government compliance or noncompliance with the law).

74. For a general discussion of how ADR has been exported and implemented to promote rule of law internationally, *see* Sternlight, *ADR Consistent*, *supra* note 10, at 572-77. *See also* Shaw, *supra* note 51, at 155-56 (discussing how investors have sought ADR mechanisms in Latin America because of concerns about local judicial systems).

75. Alejandro Ponieman, *How Important is ADR to Latin America?*, 58 DISP. RESOL. MAG. 65, 65 (2003).

76. The authors of the USAID ADR Practitioners Guide note that their efforts toward the promotion of rule of law

> over the last decade has led to an interest in the use of . . . 'ADR.' Several reasons underlie this interest. ADR is touted as more efficient and effective than the courts in providing justice, especially in countries in which the judiciary has lost the trust and respect of the citizens. Moreover, ADR is seen as a means to increase access to justice for populations that cannot or will not use the courts system, to address conflicts in culturally appropriate ways, and to maintain social peace.

Sternlight, *ADR Consistent*, *supra* note 10, at 572 (citing Scott Brown et al., *Alternative Dispute Resolution Practitioners' Guide* 1 (USAID Ctr. For Democracy & Governance 1998), *available at* http://www.usaid.gov/policy/ads/200/200sbe.pdf); Brown et al., *supra*. The authors acknowledge that ADR "cannot be a substitute for a formal judicial system" since "[it] cannot be expected to establish legal precedent or implement changes in legal and social norms." *Id.* at 3.

77. *See USAID Promotes the Rule of Law in Latin America and Caribbean Democracies*, .DOCSTOC available at http://www.docstoc.com/docs/673300/USAID-PROMOTES-THE-RULE-OF-LAW (last visited Feb. 26, 2013) [hereinafter *USAID Promotes the Rule of Law*] (discussing efforts in Guatemala, Honduras, El Salvador, Peru, Ecuador, Colombia, Nicaragua, Venezuela, Costa Rica, and Chile).

78. David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74 (David M. Trubek & Alvaro Santos eds., 2006); Shaw, *supra* note 51, at 155-56; Sternlight, *ADR Consistent*, *supra* note 10, at 572.

79. *See generally* Mariana Hernández Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91 (2008) [hereinafter Hernández Crespo, *Shadow*].

a. Rule of Law: A Multi-Faceted Term

Since all these efforts revolve around the notion of rule of law, it is important to address what reformers mean by this term, which has developed over time into a flexible concept with many definitions.[80] Its origins can be traced to Western political thought[81] and a "vision of the 'ideal' or 'just' state," starting with Aristotle, Montesquieu, and Locke—all of whom present contrasting visions of what rule of law means and what ideals are enshrined in it. For Aristotle, the only way to ensure rule by reason and to avoid the danger of arbitrary, passionate decisions was to set up a structure that ensures rule by law instead of rule by a citizen. Montesquieu shared Aristotle's caution about the dangers of giving one citizen too much power over others. To protect the citizens from coercive rule, he proposed a system of checks and balances to limit the government's exercise of power. Locke, in turn, focused on the protection of personal property, which required three conditions: a law established by the common consent of citizens; an independent judge to settle disputes by the law; and a competent authority to execute the judiciary's decisions. These three thinkers, among others, laid the groundwork for what we understand today as "rule of law." From the start, they present three contrasting views of what rule of law entails, and there is still little research about how each of these conceptions of rule of law are interrelated.[82] This is especially relevant since it marks the beginning of a path in which the term has remained equivocal.[83]

Even though the term remains equivocal in the present day, there have been efforts to provide a theoretical framework to categorize the different interpretations. To this end, scholars have suggested the rule of law spans a continuum from thin to thick interpretations.[84] By the notion of a "thin" rule of law, theorists refer to the supremacy of the law over individual preferences. Essentially, they refer to

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80. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2005) (citing N.S. MARSH, INTERNATIONAL COMMISSION OF JURISTS - THE RULE OF LAW IN A FREE SOCIETY vii (1959))

> Notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law is an exceedingly elusive notion. Few government leaders who express support for the rule of law, few journalists who record or use the phrase, few dissidents who expose themselves to risk of reprisal in its name, and few of the multitude of citizens throughout the world who believe in it, ever articulate precisely what it means. Explicit or implicit understandings of the phrase suggest that contrasting meanings are held. Some believe that the rule of law includes protection of individual rights. Some believe that democracy is part of the rule of law. Some believe that the rule of law is purely formal in nature, requiring only that laws be set out in advance in general, clear terms, and be applied equally to all. Others assert that the rule of law encompasses the 'social, economic, educational, and cultural conditions under which man's legitimate aspirations and dignity may be realized.

Id.

81. *Id.* (exploring the history of the theory of rule of law from classical Greece until the present, and pointing out the tension between liberal and conservative interpretations).

82. Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 257 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter, Santos, *The World Bank's*].

83. *Id.* at 257.

84. William Lucy, *Abstraction and the Rule of Law*, 29 OXFORD J. LEGAL STUD. 481, 493-509 (2009); *see also* Reuben, *ADR and the Rule of Law*, *supra* note 8, at 4.

the notion of governments and citizens abiding by the law as a universal standard that defends them from arbitrary use and abuse by the most powerful. In contrast, "thick" definitions tend to go beyond the procedural aspects of rule of law, emphasizing substantive ideals and values such as the notion of human rights or law and order.[85] The fact that such widely varying interpretations are encompassed within the same term makes "rule of law" a remarkably elastic concept, which can be invoked to justify diametrically opposed policies: conservative politicians may use it to push for strong capitalist economic markets, while liberals may use it to support a human rights and equality agenda.[86]

The interpretations of the term "rule of law" given by international institutions such as the World Bank and USAID are essential, since they play a significant role in programs that foster rule of law in developing countries.[87] Even though the interpretations of rule of law by USAID and the World Bank may lack authoritativeness in academic circles, they cannot be ignored in the Latin American context given the prominent role of these institutions in rule of law projects.

USAID has referred to both the UN's definition of rule of law and the U.S. State Department's description to establish the concept of rule of law and its universality as a principle.[88] According to the UN, rule of law:

> refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights, norms and standards.[89]

Furthermore, the U.S. State Department's description makes a distinction between rule of law and rule by law, stating that rule of law protects "fundamental political, social and economic rights."[90] Despite using these definitions to assert the universality of the term rule of law, USAID also acknowledges the ambiguity of its interpretation, as circles of scholars and practitioners have yet to agree upon a uniform definition.[91]

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85. *Id.*

86. Alvaro Santos notes how this has allowed the term to be used differently by various groups to advance their agendas. Santos, *The World Bank's*, *supra* note 82, at 256. *See also* Thomas Carothers, *The Many Agendas of Rule of Law Reform in Latin America*, *in* RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 4, 4-16 (Pilar Domingo & Rachel Sieder eds., 2001); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy (Carnegie Endowment for World Peace, Democracy and Rule of Law Project)*, Working Paper No. 30, 2002), *available at* http://www.carnegieendowment.org/files/wp30.pdf.

87. TAMANAHA, *supra* note 80. Even though the notion of rule of law is well established in developed nations, developing countries tend to underestimate its importance. For a comprehensive description of how USAID has promoted rule of law in Latin America, *see USAID Promotes Rule of Law*, *supra* note 77.

88. Office of Democracy and Governance, Rule of Law Division, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* 5 (USAID 2008), *available at* http://pdf.usaid.gov/pdf_docs/PNADM700.pdf [hereinafter *USAID Guide to Rule of Law*].

89. *United Nations Rule of Law Website and Document Repository*, UNITED NATIONS (2004), http://www.un.org/en/ruleoflaw/index.shtml (last visited Aug. 24, 2011).

90. *USAID Guide to Rule of Law*, *supra* note 88, at 5 (citing U.S. Dept. of State).

91. *Id.*

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When explaining its rationale for the promotion of rule of law, USAID points to its importance for democracy, referring to it as a cornerstone. It elaborates on how rule of law can help lead to "a free and fair political system, protection of human rights, a vibrant civil society, public confidence in the police and the courts, and economic development."[92] It also discusses how rule of law can participate in the reconstruction of post-conflict societies.[93] This commitment to rule of law springs from "several vital and strategic U.S. interests."[94] In the post-Cold War era, for example, the U.S. sees the greatest threats to its foreign and domestic interests as coming "not from conquering states, but from failing ones."[95] To this end, it is essential the U.S. assists in establishing sustainable rule of law in foreign nations.

USAID emphasizes five "essential elements" of rule of law that play a critical role in fostering social and economic growth. These elements include order and security, legitimacy, checks and balances, fairness and effective application. Order and security provide a foundation for rule of law in the public sphere; legitimacy ensures that laws reflect consensus; checks and balances enables separation of governmental power to support rule of law; fairness, through the inclusion of four sub-elements—equal application, procedural fairness, protection of human rights and civil liberties, and access to justice—seeks to empower the disenfranchised; and effective application enables laws to be consistently enforced.[96] Finally, even though there is consensus about the importance of rule of law, USAID points out that the objectives donors have in supporting the program can vary substantially.[97]

Although the World Bank explains rule of law in terms of "formal characteristics," "substantive outcomes," or "functional considerations,"[98] like USAID, its interpretation remains ambiguous. "Formal" definitions of rule of law are measured against standards such as judicial review of government actions independent of the judiciary, the absence of laws that apply retroactively, and absence of laws that target particular citizens or groups of citizens. One of the most significant advantages to these definitions of rule of law is objective clarity. On the other hand, one of the main disadvantages is lack of emphasis with regard to "law in action."[99] "Substantive" definitions of rule of law focus less on making sure a judicial system abides by a set of standards and opt, instead, to focus upon end goals such as "justice" or "fairness." One of the main characteristics of these

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92. *USAID Democracy and Governance: Rule of Law*, USAID, http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency (last visited Nov. 26, 2012) [hereinafter *USAID Democracy and Governance*].

93. *Id.*

94. *USAID Promotes the Rule of Law*, *supra* note 77.

95. *Id.* (citing *Congressional Budget Justification, FY 2005* at 1, Office of Democracy and Governance, Bureau for Democracy, Conflict and Humanitarian Assistance, USAID (2004)).

96. *USAID Democracy and Governance*, *supra* note 92. *See also Strengthening the Rule of Law and Respect for Human Rights*, USAID, http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency (last visited Nov. 26, 2012).

97. *USAID Guide to Rule of Law*, *supra* note 88, at 4.

98. For more information on rule of law according to the World Bank as a goal of development policy, see Matthew Stephenson, *Rule of Law as a Goal of Development Policy*, THE WORLD BANK, http://go.worldbank.org/DZETJ85MD0 (last visited Feb. 26, 2011). For more information on rule of law and development, see *Rule of Law and Development*, THE WORLD BANK (Sept. 3, 2009), http://go.worldbank.org/9OTC3P5070 (last visited July 10, 2011).

99. Stephenson, *supra* note 98.

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definitions, which has also been a source of criticism, is the subjective nature of defining the ideal considered to be "good" government.[100] The "functional" definitions of rule of law are similar to the "substantive" definitions in that they are both outcome oriented. The difference is that the "functional" definitions, rather than attempting to create subjective normative standards, revolve around the completion or non-completion of a certain legal "function," which is usually defined as "the constraint of government discretion, the making legal decisions predictable, or some combination of both."[101] For example, determining how much or how little discretion government officials have in a given society would lead to a determination of the level of rule of law in that nation. Yet, as a criticism, it has been argued these specific factors may not necessarily be negative. Discretion, for example, may not lead to arbitrariness, but rather to flexibility which may be desirable.[102]

In the end, the World Bank leaves the definition of rule of law unresolved and calls for clarity on the part of policymakers and donors with regard to their definitions of rule of law.[103] It is interesting to note the Bank does not attempt to define rule of law, but rather makes the point that "rule of law has a number of different possible meanings . . . which one is appropriate will depend on the task at hand."[104] By providing a spectrum of definitions and articulating the positives and negatives of each approach, the World Bank leaves room for flexibility in the definition of the term, so it can be tailored to the goals of specific projects.[105] Alvaro Santos describes this state of affairs as a "conceptual hodge-podge" that "bonds under the same rubric different agendas and competing interests."[106]

In analyzing the World Bank's articulation of rule of law, Santos suggests a theoretical framework and argues that the different departments of the Bank have adopted different interpretations of rule of law at various times.[107] In this regard, Alvaro Santos identifies four competing categories of conceptions of the term "rule of law": the institutional versus the substantive[108] and the instrumental versus the intrinsic.[109] The *institutional* view of rule of law focuses on whether the rules comply with certain legal requirements that make a law efficacious. It is not concerned with passing a moral judgment on the content of the laws, but only focuses on whether they are enforceable and "legal." Thus, this view proposes that rule of law can exist even if the rules are unjust.[110] On the other hand, the

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. Stephenson, *supra* note 98.
105. *Id.*
106. Santos, *The World Bank's*, *supra* note 82, at 256.
107. *Id.* at 278. For a full analysis of the different rule of law projects and the different conceptions of rule of law that different departments have adhered to, see *id.* at 267-95.
108. *Id.* at 258 (distinguishing "the degree of autonomy of the legal order from other orders like morals and politics").
109. *Id.* (distinguishing "the degree of relative value against competing considerations").
110. *Id.* at 258-60. Santos describes the thought of Joseph Raz, an advocate of an institutional conception of rule of law, whereby what matters for law is not the content, but the "qualities and mechanisms of the rules in a legal system." Raz identifies two fundamental aspects of this conception. "First, government action should be authorized by law, and second, laws should be capable of guiding people's conduct for them to plan their life. This conception emphasizes the formal characteristics of a

substantive conception of rule of law looks more closely at the values and moral content of the law, focusing less on their technical aspects and more on whether the laws uphold certain human rights.[111] The second set of conceptions set in opposition to each other is the instrumental conception of rule of law versus the intrinsic conception.[112] As the name suggests, the instrumental conception focuses on whether rule of law is an effective means to the higher ends of providing social order, organizing government power, etc. In this conception, laws can be bent or broken when other, higher values are at stake, such as in a national emergency.[113] The intrinsic conception of rule of law takes the opposite view. Instead of viewing the law as a means to an end, it views rule of law as an end in and of itself, as the expression of society's highest values of justice, freedom, and democracy. Proponents of the intrinsic conception believe rule of law cannot be breached without damaging the very foundations of a just society.[114]

Santos posits that the classification of the different interpretations of the rule of law he provides is based on the conceptions of Max Weber, A.V. Dicey, Friedrich Hayek, and Amartya Sen.[115] Max Weber's view of rule of law, according to Santos, encompasses both the instrumental and institutional view. In other words, Weber views rule of law strictly in terms of technical viability and as a means to an end.[116] Sen takes the opposing view on both points. He states, "the legal system ought to be judged according to whether it enables peoples' capacity to exercise their rights." Thus, enhancing citizens' freedoms is not a means but an end of itself. Therefore, for Sen, rule of law is a substantive value, since the moral content of the law matters and has intrinsic value as an end in itself.[117] A.V. Dicey takes a midway approach between these two poles, asserting the institutional and intrinsic views.[118] For Dicey, the English system, in contrast to continental Europe, has the three characteristics of rule of law: lack of arbitrariness by the government; legal equality and decisions made by a judge regarding the constitution; and rights of individuals. Finally, Friedrich Hayek aligns himself with the substantive and instrumental views of rule of law.[119] For Hayek, "the rule of law as a system that articulates a free market economy"[120] allows citizens to calculate their interactions with each other and with the government.[121]

Using this framework, Santos argues the World Bank has moved gradually from an instrumental conception of rule of law, which was both institutional and

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legal system that ensure that the rules are available and that they are susceptible of being followed. What are these characteristics? There is of course no definitive list, but among the elements generally included are: 1) generality, 2) notice or publicity, 3) prospectivity, 4) clarity, 5) noncontradictoriness, 6) conformability, 7) stability, and 8) congruence." *Id.* at 259-60 (citing Joseph Raz, *The Rule of Law and its Virtue*, 93 LAW QUARTERLY REVIEW 195, 196 (1977); LON FULLER, THE MORALITY OF LAW 33-94 (1969)).

  111. *Id.* at 258.
  112. *Id.*
  113. *Id.* at 258-59.
  114. *Id.* at 259.
  115. *Id.*
  116. *Id.* at 260-61.
  117. *Id.* at 265-66.
  118. *Id.* at 261-63.
  119. *Id.* at 263-64.
  120. Id. at 263.
  121. *Id.* at 264.

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substantive, to a broader rhetoric that includes the intrinsic as well as the institutional.[122] He suggests the change in focus from instrumental to intrinsic, however, has merely been a change in rhetoric since the projects have remained the same.[123]

Thus, it seems from all the angles examined that rule of law will remain an ambiguous term. Its broad range of interpretations has allowed for a wide variety of projects to be promoted under the same agreeable goal. Yet, according to David Trubek, the fact that "social concerns"[124] are now included opens up new possibilities for rethinking development strategies.[125] He encourages those concerned with the well-being of all citizens, not just the economic elite, to join efforts in framing these new strategies.[126] As will be discussed below, this Article aims to broaden the scope of the use of ADR to include social concerns.

b. Access to Justice as an Essential Requirement for Rule of Law

Despite the ambiguity of the term "rule of law," experts seem to agree that for the rule of law to be advanced in any society, there must be widespread access to justice.[127] Furthermore, according to the United Nation Development Program (UNDP), establishing access to justice is a significant factor that could lead to more success in efforts to promote democracy and reduce poverty. The UNDP notes that, when people do not have access to justice, citizens cannot participate in the public square, processes lack transparency, and government has no accountability.[128]

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122. *Id*. at 266.

123. *Id.*

124. *See generally* Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199 (2004) (arguing that what she has called the "incorporation of the social" happens as a result of the World Bank Comprehensive Development Framework (CDF) in which this financial institution has started to encompass a social structural and human component to the development agenda, which translates into broader concerns than the merely economic, to include also human rights, poverty, democracy and access to justice, and arguing that this marks the second generation reform of law and development).

125. Trubek, *supra* note 78, at 93.

126. *Id.* at 94.

127. *See Access to Justice Is the Key to Advancing the Rule of Law, Experts at World Justice Forum Agree*, ABA NOW http://www.abanow.org/2008/07/access-to-justice-is-the-key-to-advancing-the-rule-of-law-experts-at-world-justice-forum-agree/ (last visited Aug. 24, 2011); *see also Rule of Law & Access to Justice*, UNITED NATIONS DEVELOPMENT PROGRAMME, *available at* http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice _law/legal_empowerment/focus_areas/rule_of_law_accesstojustice.html; William Davis, *Access to Justice: Lessons from the Field*, UNIVERSITY OF MISSOURI SCHOOL OF LAW, *available at* http://law.missouri.edu/csdr/symposium/rol/docs/WilliamDavis.pdf [hereinafter Davis, *Lessons*]. Willingness to comply is important for rule of law in a pluralistic democracy; lack of trust resulting from a lack of participation or access decreases this willingness to comply with the rule of law and, in turn, increases alienation from the judicial process. Reuben, *The Problem of Arbitration*, *supra* note 40, at 310-12. For an empirical study on the positive effects of increasing access to justice through formal systems of justice, see Micaela Sviatschi et al., *The Impact of Improving Access to Justice on Conflict Resolution: Evidence from Peru* (Inter-Am. Dev. Bank, Working Paper No. OVE/WP-01/10, 2010), *available at* http://idbdocs.iadb.org/WSDocs/getdocument.aspx?docnum=35586312.

128. MICHAEL J. TREBILCOCK & RONALD J. DANIELS, RULE OF LAW REFORM & DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS 236-40 (2008) [hereinafter TREBILCOCK & DANIELS, RULE OF LAW REFORM]. The authors suggest three normative justifications: "The importance of equal access to the justice system from the point of view of liberal values and social solidarity; the necessity of access for the survival of the rule of law itself; and the role that the justice system plays in establish-

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However, as noted by Mauro Cappelletti and Bryant Garth in the "Florence Access to Justice Project," published in 1978, ensuring access to justice presents many obstacles. In this work, the authors address some of the hurdles faced by the Access to Justice Movement to promote methods to make the rights of citizens "effective and enforceable." Utilizing a metaphor of "three waves," Cappelletti and Garth outline the three stages of addressing the issue of lack of access to justice: the first wave addresses economic obstacles, which keep citizens from either accessing information or obtaining representation; the second wave touches on organizational obstacles, which include the vindication of rights when interests are collective and diffused; the third wave responds to procedural obstacles, where the judicial system might not be the best forum for the vindication of rights. They also point out that these issues take place both in developed and developing countries, though they are more acute in the less-developed world.[129] Additionally, Michael Anderson has noted that members of low-income communities generally show resistance to the justice system, avoiding it due to negative stigmas associated with engaging the legal system, the incomprehensibility of legal language, and the inability of citizens to represent themselves in legal proceedings.[130]

Similarly, the World Bank has identified some of the challenges of providing access to justice, including social and institutional exclusion, inadequate record keeping, lack of access to information, the cost of justice, corruption, and organizational deficiencies; also noted is a lack of awareness on the part of decision-makers about the importance of the good maintenance of court facilities, which generally have run-down conditions and lack space.[131]

Even though there is consensus about the need for access to justice, there is no consensus about how access to justice should be provided, especially given the unique circumstances of each country. Nonetheless, best practices, which provide some guidance, have been developed. Legal aid has been a significant option for addressing economic difficulties. To surpass organizational obstacles, a series of options have been developed by governments to enforce collective rights. To overcome lack of knowledge, efforts have been directed to educate citizens about their rights and how to obtain redress. Regarding procedural issues, ADR has emerged as a viable solution.[132] However, despite ADR's promise, its implementation has not been without controversy.[133]

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ing and maintaining patterns of resource distribution." *Id.* at 236 (citing RONALD J. DANIELS & MICHAEL J. TREBILCOCK, RETHINKING THE WELFARE STATE: THE PROSPECTS FOR GOVERNMENT BY VOUCHER 76-77 (2005)).

129. *Id.* at 242. *See also* Kim Economides, *2002: A Justice Odyssey*, 34 VICTORIA U. WELLINGTON L. REV. 1, 11 (2002) (discussing MAURO CAPPELLETTI & BRYAN GARTH, ACCESS TO JUSTICE (1978)).

130. TREBILCOCK & DANIELS, RULE OF LAW REFORM, *supra* note 128, at 242-43.

131. Waleed H. Malik, *Access to Justice: Approaches for Bringing Services Closer to the People at the Justice Reform 101 Course* (Nov. 11, 2010), *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/AccesstoJustice_101_Malik_Nov2010.pptx (Power Point presentation); *see* Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 118 (2010) (stating access may be prevented when an injured party fails to perceive an injury, fails to attribute an injury to a human agency, remains ignorant of his or her options or intimidated away from pursuing justice, cannot afford to seek resolution, or lacks resources and staying power).

132. TREBILCOCK & DANIELS, RULE OF LAW REFORM, *supra* note 128, at 247-49.

133. *See, e.g.*, Mattei, *infra* note 143.

c. ADR in Relation to Rule of Law: An Ongoing Debate

Even though ADR has been utilized extensively as a means to give citizens greater access to justice within the context of rule of law efforts, especially in the international setting, its relationship to the rule of law remains contentious. Academic debate about whether, or in which circumstances, ADR truly supports rule of law continues. For decades, some ADR theorists have expressed concerns that the privatization and informalization of dispute resolution processes could inhibit the courts' ability to protect and enforce rights, given the lack of accountability[134] and lack of public outcomes.[135] For example, Marc Galanter[136] and David Luban[137] have commented on the risk that private ADR settlements could result in fewer judicial statements, thus weakening the law's power to clarify specific legislative acts and to guide practical behavior.

Similarly, others have posited that the privatization of justice is detrimental to those who have less power and fails to establish public norms.[138] In this regard, the classic piece "Against Settlement" by Owen Fiss saw ADR as being at odds with public value resulting from due legal processes,[139] noting ADR's potential to be influenced by disparities of power and wealth.[140] He also raised the issue of authoritative consent, in which a person's consent may be coerced, and the agreement may be sealed by someone lacking legitimate authority.[141] Laura Nader,[142]

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134. *See generally* Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

135. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-23 (1995).

136. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMP. LEG. STUD. 459 (2004). Galanter concludes his extensive empirical study on the decreasing number of trials in the United States and observes that judicial pronouncements have indeed decreased. However, the overall body of law is still growing, as are commentaries and analyses of the law; although we have a "shrinking number of trials," we also have a "profusion of legal information." Galanter also points out how the "shadow" under which bargaining happens is much broader than just a shadow cast by the substantive law; it includes contingencies such as the cost of litigation, attractiveness of certain witnesses, etc. Galanter concludes that the consequences of these changes in the legal system "remain hidden from us." *Id.* at 522-31.

137. David Luban argues that private settlements can undermine the public goods of adjudication. Adjudication sets rules and precedents and keeps the advocacy skills of lawyers tuned. With each settlement, the authority of the courts is eroded. Settlement allows for questionable conduct, such as a lawyer buyout, and may prevent useful information discovered from being used in future cases by potential litigants. Luban, *supra* note 135, at 2622-26.

138. LON L. FULLER, THE MORALITY OF LAW 38-39 (1964).

139. Owen Fiss argues that courts, which have the legal authority to interpret and enforce public values expressed in the Constitution and statutes, are deprived of the opportunity to pronounce judgments when parties settle. Society pays for this because, while resolution and peace is reached, justice may be left undone. For example, the settlement of a school suit may bring peace but not racial equality. Fiss, *Against Settlement*, *supra* note 39, at 1085-86; *but see generally* Michael Moffit, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203 (2009). Moffitt acknowledges several possible nuanced readings of Fiss's *Against Settlement*, but says that the language chosen by Fiss makes it hard to read *Against Settlement* as anything but urging a choice between settlement and litigation. Moffitt does not view settlement and litigation as opposed to each other, but as necessary in light of each other.

140. Fiss, *Against Settlement*, *supra* note 39, at 1076.

141. *Id.* at 1078 (observing that those acting on behalf of parties, such as lawyers, insurance agencies, etc., may seek self-interested settlements that the parties would not have accepted if the choice were

Ugo Mattei,[143] and Richard Delgado,[144] among others, echo Fiss's concern that ADR would simply play into the hands of the most powerful, reinforcing class disparities—a concern that is especially legitimized in places where the rule of law is already weak or vitiated by corruption and violence.[145]

Other theorists, however, when examining the tensions between ADR and rule of law, have brought different interpretations into the discussion. In this regard, Carrie Menkel-Meadow has argued that even though private disputes can have public repercussions in some cases, it should be up to the parties to select what they consider the most appropriate dispute resolution forum for their case.[146] Moreover, Menkel-Meadow writes, " . . . some offer hopes that 'the rule of law' can be universalized as a principled way to resolve conflicts, domestically and internationally. Others of us see law as often conflictual, indeterminate and politically contested or manipulable, or so focused on the need for regulation of the aggregate that it cannot always do justice "justice" in particular cases. "Legal justice is not always actual justice.""[147]

Jean Sternlight has pointed out that the domestic concern that ADR practices undermine the rule of law does not apply in the same way to the international sphere, where ADR seems to be widely accepted as an effective means for advancing the task at hand.[148] Furthermore, Sternlight proposes viewing the rela-

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entirely theirs, and that when a party is a group, it is difficult to discern who actually holds the authority to settle).

142. *See generally* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO S. J. ON DISP. RESOL. 1 (1993) (arguing that the ADR movement would rather "trade justice for harmony" and that the movement is utilized to control populations through pacification).

143. *See* Ugo Mattei, *Emergency-Based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development*, *in* CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS 89 (Didier Fassin & Mariella Pandolfi, eds., 2010) (arguing that ADR essentially gives those with enough resources the ability to set their own rules and follow their own processes; it is especially dangerous in an individualistic culture because the outcomes tend to favor the strong, and like "rule of law," ADR is a concept that both the political right and left support, even though it has a tendency to simply protect existing social structures and inequalities).

144. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388-89 (citing studies, which show that formalities and procedures in adversarial adjudication counteract bias and strengthen the resolve of minorities to pursue legal rights).

145. Fiss, *Against Settlement*, *supra* note 39, at 1077-78 (observing that judges can take steps to lessen the impact of distributional equalities; steps that, although small, should not be ignored).

146. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2689-91 (1995) (arguing that allowing *informed* parties to decide which dispute process is more appropriate is far more democratic than adjudication or coerced "public" settlement). *See also* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution*, 10 PSYCHOL. PUB. POL'Y & L. 211, 228 (2001). Procedural preference may give advantage to lower status parties. Manipulation of lower status parties can be avoided by: a) allowing the lower status party to have veto power over a third-party's decision as to the outcome; b) process control that allows disputants to present evidence on their own behalf or with help from a representative; and c) party control over the rules. *Id.*

147. Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 8 (2004) [hereinafter Menkel-Meadow, *From Legal Disputes*].

148. Jean Sternlight proposes three possible paths to resolution of this contradiction: first, that domestic critics of ADR would remain critics in the international context, and advocates would remain supportive. Pointing to *Brown v. Bd. of Ed.*, these groups acknowledge some tensions. Yet in the interna-

tionship between ADR and rule of law in a different light. Instead of simply being used to resolve the inadequacies of court systems, ADR should be understood in light of social norms. It should be considered as a supporting element for rule of law, as part of a larger vision of justice that has more to do with promoting social harmony than strict adherence to rules. "By labeling ADR projects as rule of law projects and using them to achieve or work toward peace, perhaps we are beginning to recognize that our definition of justice ought to be broadened to include harmony and social equality as well as individual rights," she writes, noting Roscoe Pound's observation that "while law may serve justice, justice is broader than law."[149] This broader view of justice allows rule of law and ADR to be conceived as complementary means toward the same goal.

Furthering the discussion, theorists such as Richard Reuben have argued that the issue should be reframed from whether or not ADR supports the rule of law, to the circumstances under which it does so. He contends that, although it may appear ADR could subvert rule of law by diverting dispute resolution to the private sphere, it can actually uphold it when implemented consistently with procedural justice values.[150] In this regard, Reuben refers to some of the ways in which ADR supports the rule of law, including using ADR for smaller cases, which frees the judiciary to handle cases that interpret constitutions or statutes or otherwise establish important precedents. This would also help to cut back on the problem of backlog and inefficiency and would foster methods more in accordance with particular cultures. Yet, he emphasized that only when ADR is implemented in accordance with procedural justice values can it create greater investment and confidence in rule of law.[151] He further notes that procedural justice research shows that, when rule-making processes and dispute resolution are carried out in a way that citizens perceive as fair and in which their voice and dignity are respected, they are more likely to be compliant and invested in upholding them.[152] Moreo-

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tional arena, pointing to specific examples in Nicaragua and Nepal, Sternlight observes that ADR can promote rule of law. A second way would argue for ADR as a "second-best" alternative to dysfunctional judiciaries, which Sternlight finds problematic because it fails to differentiate the significant differences between ADR and the courts. If access to justice is the rationale behind the application of ADR to international rule-of-law efforts, why is this same rationale unacceptable in the domestic context? Sternlight, *ADR Consistent*, *supra* note 10, at 569-72, 577-90.

149. *Id.* at 592.

150. Reuben, *ADR and the Rule of Law*, *supra* note 8, at 6-7.

151. *Id.*

152. Reuben, *The Problem of Arbitration*, *supra* note 40, at 312. For more on the procedural justice, see Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH U. L.Q. 787, 817 (2001) (citing Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, *in* THE HANDBOOK OF CONFLICT RESOLUTION 41-42 (Morton Deutsch & Peter T. Coleman eds., 2000) ("Procedural Justice is concerned with the fairness of the procedures or processes that are used to arrive at outcomes.")); *see also id.* at 820 (citing ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 101-04, 214, 263 (1988); JANE ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 65 (1983)). Four factors lead to the experience of procedural justice:

First, perceptions of procedural justice are enhanced to the extent that disputants perceive that they had the opportunity to present their views, concerns, and evidence to a third party and had control over this presentation ("opportunity for voice"). Second, disputants are more likely to perceive procedural justice if they perceive that the third party considered their views, concerns, and evidence. Third, disputants' judgments about procedural justice are affected by the perception that the third party treated them in a dignified, respectful manner and that the procedure itself was

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ver, he states that "the rule of law in a democracy derives its greatest source from citizens' willingness to voluntarily comply."[153] Reuben further suggests that, if governance is understood as the "process of societal conflict management," consensual ADR processes, given their participatory nature, could foster rule of law more effectively than traditional, top-down rule of law processes such as litigation.[154]

When examining use of ADR as a means of promoting rule of law efforts in the international context, significant attention should be given to the implementation methods and the degree to which they are consistent with procedural justice values. Furthermore, the extent of citizen engagement also seems to be of critical importance since increased participation can lead to high levels of ownership and sustainability of rule of law.

d. Efforts to Promote Rule of Law through ADR in Latin America

Promotion of the rule of law began to be advanced as an essential component for democracy in Latin America in the 1980s.[155] In the preceding decades, U.S. assistance to the region was carried out through law and development, focusing on legal education at the university level and public safety. These efforts were deemed to be of little effectiveness.[156] In 1983, the U.S. State Department began to develop the role of rule of law in promoting democracy in the region.[157] The next year, a report by the U.S. National Bipartisan Commission on Central America encouraged the promotion of "strong judicial systems to enhance the capacity to redress grievances concerning personal security, property rights and free speech."[158] Before the end of 1984, the U.S. Congress passed legislation that

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dignified. Although it seems that a disputants' [sic] perceptions regarding a fourth factor--the impartiality of the third party decision maker--also ought to affect procedural justice judgments, it appears that disputants are influenced more strongly by their observations regarding the third party's even-handedness and attempts at fairness.

Id. See also Tom R. Tyler & Rebecca Hollander-Blumoff, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008) (writing that psychological research shows that individuals place high value on the fairness of processes, independent of the value placed on outcomes and distributive justice); Nancy Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187-91 (2002) (arguing that procedural justice, although typically arising out of a Constitutional obligation in non-consensual criminal proceedings, should be just as much part of a consensual process). A system should not only involve procedural justice, but also involve the appearance of procedural justice to build social capital. *See* Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 167-68 [hereinafter Ackerman, *Vanishing*] (arguing that the public needs to *perceive* procedural fairness and access to justice if it will participate and build social capital).

153. Reuben, *The Problem of Arbitration*, *supra* note 40, at 311-12. Reuben argues that compliance must be voluntary, since the power to enforce the law is limited, and the cost of individualized deterrence is too high. *Id.*

154. *See generally* Richard Reuben, *ADR and the Rule of Law: Paradox and Potential*, J. DISP. RESOL. (forthcoming) (on file with author).

155. ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW, *supra* note 10, at 1-2.

156. *Id.* at 1.

157. *Id.*

158. *Id.* at 2.

provided for a justice program in El Salvador, and in 1985, for the entire Latin American region.[159]

USAID was the government agency charged with carrying out the legislative mandates. To this end, the organization has engaged local experts and provided training, equipment, and technical assistance with the collaboration of the U.N.-affiliated Latin American Institute for the Prevention of Crime and Treatment of the Offender (ILANUD).[160] USAID has also been involved in reforming laws and legal procedures and has placed special emphasis on the criminal procedural codes. The strengthening and reform of the judicial system to promote transparency and accountability, as well as to provide training and court management, has been of central importance to the reform process.[161] USAID has contributed to the promotion of access to justice in the region, primarily through *Casas de Justicia*.[162] They have established *Casas de Justicia* in Colombia, Guatemala, and Peru, with the goal of making the rule of law "more real for many who previously lacked practical access to the courts."[163] Other USAID efforts to promote access to justice have encompassed strengthening legal education, with an emphasis on non-traditional issues including professional ethics and ADR.[164] Regarding ADR efforts, the emphasis has been on striving "to increase transparency, improve good governance and reduce corruption in government activity."[165] The agency has carried out projects in 15 countries: Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, and Uruguay.[166]

The international firm DPK Consulting, among others, has played a significant role in the design and implementation of ADR programs in the region: in the business sector, through the Chamber of Commerce in Chile and Ecuador; in the public sector, through the judicial system in Argentina, Costa Rica, the Dominican Republic, Ecuador, and El Salvador; and in the community sector, as part of community-based organizations in Ecuador, Guatemala, El Salvador, Peru, and the Dominican Republic.[167] One of the main strategies has been to develop a pilot project and engage local leaders. DPK's projects include a variety of programs that range from increasing the efficiency of the judiciary in Peru, Ecuador, Guatemala, and Bolivia to anti-corruption programs in Argentina. DPK also provides standards regarding the design and maintenance of judicial infrastructure.[168]

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159. *Id.*

160. *Id.*

161. *Id.* at 5-6.

162. *Id.* at 7.

163. *Id.*

164. *Id.*

165. *USAID Supports Alternative Dispute Resolution in Latin America and the Caribbean*, USAID (2004), *available at* http://pdf.usaid.gov/pdf_docs/PDACA631.pdf [hereinafter *USAID Supports ADR*].

166. ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW, *supra* note 10, at 1.

167. *See, e.g.*, William E. Davis & Razili K. Datta, *Implementing ADR Programs in Developing Justice Sectors: Case Studies and Lessons Learned*, 16 DISP. RESOL. MAG. 16 (discussing DPK's involvement in El Salvador).

168. *See Use of Pilot Programs in Rule of Law Projects* 1, DPK CONSULTING (2002), *available at* http://www.dpkconsulting.com/core/uploaded//newsletterfeb02.pdf (discussing DPK involvement in the judicial infrastructure of Bolivia, Ecuador, Honduras, and El Salvador, as well as various other locations around the world) [hereinafter DPK Consulting, *Use of Pilot Programs*].

In addition to USAID, the World Bank has played a significant role in the promotion of rule of law and access to justice in the region as well.[169] As part of their efforts, the World Bank has emphasized: the promotion of citizens' education regarding legal norms; the expansion of the budget for the judicial system, as well as reduction of cost proceedings; the improvement of incentive for judges and court personnel; the promotion of judicial services closer to the people; and the modernization of court buildings and processes. In this context, ADR efforts have also been carried out in the region.[170]

The promotion of ADR in Latin America has focused specifically on arbitration, mediation, *Casas de Justicia* (justice centers)*,* and justices of peace. Even though there has been some development in domestic arbitration in Latin America, the main focus of ADR efforts has been in the area of commercial arbitration.[171] In particular, international treaties in the region, such as MERCOSUR (Common Market of the South), have spawned a rise in the use of arbitration to settle business disputes.[172] Among other reasons, the business sector opts for arbitration primarily because it provides a more effective and efficient method for settling their disputes; it also acts as an alternative to the backlogged judicial systems. [173] In addition, foreign investors in international commercial arbitration often have concerns regarding local court bias.[174] However, if either party—domestic or foreign—wants to enforce the arbitration award, it has to turn to the local courts, which have the necessary authority to do so. As a result, the local judicial backlog can hamper the enforceability of arbitration awards.[175]

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169. Some of these efforts have been quite innovative. For example, in attempting to address the problem of corruption, the Bank has used the Internet as a way to promote transparency and accessibility. Similarly, in order to bring citizens closer to the judicial system, the World Bank has promoted *Casas de Justicia* as "one-stop-shop justice centers," e-justice, and mobile courts. Malik, *supra* note 131.

170. *Id.*

171. For an overview of arbitration in Argentina *see* JULIO CESAR RIVERA, ARBITRAJE COMERCIAL INTERNACIONAL Y DOMESTICO (2007); JORGE ALBERTO ROBIOLO, DERECHO ARBITRAL (2007). *See also* Marcos Van Rafelghem, *International Arbitration in South America*, ASIA PACIFIC REGIONAL ARBITRATION GROUP, www.aprag.org/downloads/Arbitration_in_South_America_2_1.doc (last visited June 18, 2011); Julio Cesar Rivera, *El Arbitraje en Argentina*, http://www.rivera.com.ar/archivos/File/publicaciones/Rivera_El%20arbitraje%20en%20Argentina2.pdf (last visited Aug. 7, 2010) (citing Fernando Aguilar, *¿Para qué sirve una ley nacional de arbitraje?*, REVISTA JURIDICA LA LEY (Jan. 19-20, 2005)); Jose Maria Abascal, *Mexico*, LATIN LAWYER 2010, (forthcoming) www.latinlawyer.com (on file with the author).

172. Welber Barral, *Evolução Recente da Arbitragem no Brasil*, *in* ARBITRAJE Y MEDIACION EN LAS AMERICAS 67 (Juan Enrique Vargas Viancos & Francisco Javier Gorjón Gómez eds., 2006).

173. Gustabo Parodi, *Arbitration—Argentina*, LATIN LAWYER, http://www.latinlawyer.com/reference/article/40656/argentina/ (last visited June 18, 2011) (citing case backlog as a reason that companies choose arbitration).

174. "[B]usinesses typically do not choose arbitration in international settings because it is faster, less expensive, or more private than litigation. They choose arbitration because they see no real litigation alternative." Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT'L L. 1251, 1261 (2008); *see also* Jill A. Pietroski, *Enforcing International Commercial Arbitration Agreements—Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57, 57-58 (1986) (stating arbitration in international disputes can be a response to party distrust of foreign courts).

175. Cristian Conejero Roos, *National Constitutions and International Arbitration in Latin America: A Dangerous Liaison*, ARB. REV. AMERICAS 10 (2010).

The promotion of mediation in Latin America has been used, for the most part, as a way to provide access to justice for low-income communities[176] and to reduce the cost of dispute resolution.[177] Although mediation has been promoted through court-connected efforts in some countries,[178] various mediation projects operate outside the judicial system.[179] Yet, when parties from low-income communities are unsatisfied with the results of their mediation processes, financial and, in many cases, geographical limitations can make it difficult for them to seek justice through adjudication.[180] Furthermore, as with arbitration awards, a congested judicial system can undermine the enforceability of the mediation agreement.[181]

Casas de Justicia have also been promoted in several countries of the region as part of efforts to expand access to justice, with the aim of advancing *pro se*, legal education, human rights, and the de-judicialization of dispute resolution.[182] The concept of the *Casas de Justicia* is a variation of the multi-door courthouse model, which has been developed to a lesser degree as *oficinas multi-puertas* (multi-door offices).[183] The *Casas de Justicia* are generally located in marginalized areas,[184] whereas the *oficinas multi-puertas* are located in urban areas as part

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176. *See* Maria Dakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 FORDHAM INT'L L.J. S26, S39 (2000).

177. *See generally* ELENA I. HIGHTON & GLADYS S. ALVAREZ, MEDIACIÓN PARA RESOLVER CONFLICTOS (1995); GLADYS S. ALVAREZ, MEDIACIÓN Y JUSTICIA (1996); GLADYS S. ALVAREZ, LA MEDIACION Y EL ACCESO A JUSTICIA, (2004).

178. Gladys Stella Álvarez, *Hacia un Cambio de Paradigma Cultural en Resolución Alternative de Disputas. El Modelo de la "Mediación Prejudicial Obligatoria, Anexa o Conectada con Tribunales Civiles y Comerciales en Argentina": Diez Años de Experiencia*, *in* ARBITRAJE Y MEDIACIÓN EN LAS AMERICAS 29-37 (Juan Enrique Vargas Viancos & Francisco Javier Gorjon Gomez eds., 2006), http://www.scribd.com/doc/75278781/Arbitrage-y-Mediacion-en-las-Americas.

179. *See, e.g.*, *USAID Supports ADR*, *supra* note 165 (discussing community mediation centers in Mexico and El Salvador).

180. Hernández Crespo, *Shadow*, *supra* note 79, at 98-100.

181. *Id.*

182. Lisa L. Bhansali, *Access to Justice: Elements of Judicial Reform* at the Core Course on Legal and Judicial Reform (Jan. 11-14, 2005), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CB8QFjAA&url=http%3A%2F%2Fsiteresources.worldbank.org%2FINTLAWJUSTINST%2FResources%2FAccesstoJustice(Bhansali).ppt&ei=L1tjUPHXLoexyQG_1IGYCg&usg=AFQjCNEhaY3q0HPBIV3fFp_WlMDqlBVViA&sig2=E8GX45WefA3ieWSUYw8-XQ (Power Point presentation) [hereinafter *Access to Justice Powerpoint*].

183. In Argentina, *oficina multi-puerta* are available at the national level. *See Multipuertas*, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN: REPÚBLICA ARGENTINA, http://www.csjn.gov.ar/accjust/docs/nacional.jsp#06 (last visited June 18, 2011); Neuquén, *Oficina Multipuertas*, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN: REPÚBLICA ARGENTINA, http://www.csjn.gov.ar/accjust/docs/neuquen.jsp#multi (last visited June 18, 2011); Rio Negro, *Oficina Multipuertas*, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN: REPÚBLICA ARGENTINA, http://www.csjn.gov.ar/accjust/docs/rionegro.jsp#multi (last visited June 18, 2011).

184. *Casa de justicia* in Argentina are available in Buenos Aires, Rio Negro, Santiago de Estero, and Tierra del Fuego. *See, e.g.*, Buenos Aires Casa de Justicia, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN: REPÚBLICA ARGENTINA, http://www.csjn.gov.ar/accjust/docs/buenosaires.jsp#02 (last visited June 18, 2011); *Rio Negro Casa de Justicia*, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN: REPÚBLICA ARGENTINA, http://www.csjn.gov.ar/accjust/docs/rionegro.jsp#08 (last visited June 18, 2011); *Santiago de Estero Casa de Justicia*, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN: REPÚBLICA ARGENTINA, http://www.csjn.gov.ar/accjust/docs/santiagodelestero.jsp#casas (last visited June 18, 2011); *Tierra del Fuego Casa de Justicia*, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN: REPÚBLICA ARGENTINA, http://www.csjn.gov.ar/accjust/docs/tierradelfuego.jsp#08 (last visited June 18, 2011).

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of the court system. *Casas de Justicia* are one-stop shops, generally established in remote areas that have limited access to the court system. They provide a variety of administrative and legal services, including ADR,[185] aimed at addressing family, labor, juvenile, and criminal issues, as well as community disputes. The *Casas de Justicia* tailor these services to the specific population, such as the indigenous population and other ethnic groups.[186]

The basic model of *Casas de Justicia* in the region usually seeks to decentralize justice and to integrate government services, making them more accessible to the community.[187] Nonetheless, the implementation and functions of *Casas de Justicia* can sometimes be perceived as a deliberate effort of the government to impose itself on the communities.[188] In addition, with regard to the implementation of justice through *Casas de Justicia,* citizens sometimes find the local norms and practices, which at times could controversially affect their individual well-being, imbue some processes in the *Casas de Justicia*, such as the mediation process (*conciliadores en equidad*).[189] However, since the model of *Casas de Justicia* varies from country to country, not all *casas* face the same difficulties. As will be discussed at greater length below, *Casas de Justicia* are a flexible model that can be used as one of the promising building blocks to promote citizens' participa-

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185. For example, the Department of San Pedro, Paraguay has one of these systems. *Proyecto 'Abriendo Puertas, Justicia y Equidad Social'… hacia un modelo de Casa de Justicia en el Departmento de San Pedro*, CENTRO DE ESTUDIOS JUDICIALES (Nov. 26, 2008), http://www.cej.org.py/index.php?option=com_content&view=article&id=185:proyecto-abriendo-puertas-justicia-y-equidad-social-hacia-un-modelo-de-casa-de-justicia-en-el-departamento-de-san-pedro&catid=52:justicia-y-redes-en-la-democracia&Itemid=78 (last visited Aug. 21, 2011).

186. Colombia is a good example of tailoring services to local populations and conditions. *Casas de Justicia*, MINISTERIO DEL INTERIOR Y DE JUSTICIA, http://www.mij.gov.co/eContent/newsdetailmore.asp?id=2976&idcompany=2&idmenucategory=226 (last visited June 18, 2011).

187. *Access to Justice Powerpoint*, *supra* note 182.

188. International Council on Human Rights Policy, *When Legal Worlds Overlap, Human Rights, State and Non-State Law* (2009), http://www.scribd.com/doc/61924941/When-Legal-Worlds-Overlap-Human-Rights-State-and-Non-State-Law (last visited August 9, 2011).

> Similarly, the *Casas de Justicia* legal service centers in Colombia are sometimes perceived by shantytown dwellers as a device for smuggling the repressive arm of the state into their communities. This was the case in Ciudad Bolívar, barrio Jerusalén, where a *Casa de Justicia* was established with no proper analysis, and without consulting the community. Reflecting the main objective of its promoters—to control outbreaks of violence—the two most prominent officials of the 'non-state' mechanism were the local Police Inspector and Public Prosecutor.

Id. at 125.

189. For example:

> [W]omen in two barrios of Bogota, Colombia, especially resent the ideology of conciliation promoted by *Casas de Justicia* because they reaffirmed patriarchal patterns of domination. They claim, for example, that *Casas de Justicia* generally encourage female victims of domestic violence to continue living with their male partners who, for the sake of promoting harmony, are never punished.

Id. at n.80. However, USAID has made significant efforts to protect the legal rights of women in Latin America and the Caribbean. For example, *Casas de Justicia* in Colombia have been used as a community based effort in which women can lead other women through the justice process. WOMEN AND FAMILIES PROGRAM & PARTNERS OF THE AMERICAS, PROTECTING WOMEN'S LEGAL RIGHTS IN MEXICO, COLOMBIA AND DOMINICAN REPUBLIC: FINAL REPORT 7, http://pdf.usaid.gov/pdf_docs/PDABZ729.pdf.

tion through ADR in Latin America and to contribute to establishing a foundation for a more sustainable rule of law.

Justices of peace, or lay magistrates, have existed in Latin American since the 1800s, but only began to play a central role in access to justice efforts in the last few decades.[190] Present mainly in poorer suburbs of the cities, small towns and rural areas, justices of peace usually work *pro bono*[191] and act as conciliators with limited jurisdiction that, in almost all cases, covers small claims and family matters.[192] Justices are often selected from members of the community who are highly respected, but rarely have legal knowledge.[193] They apply customary practice, as opposed to the law, and, given the informality of their role, can at times overstep the bounds of their jurisdiction.[194] Because of their cost effectiveness, justices of peace have been promoted extensively throughout the region.[195] Currently, many justices of peace are found in *Casas de Justicia*, though some operate as the sole source of justice in underserved areas that have limited access to the judiciary.[196] The same arguments sometimes addressed at *Casas de Justicia,* regarding the controversial use of local practices, also apply to the justices of peace.

Despite great efforts that have been made to use ADR as a significant means to advance rule of law through access to justice in the Latin American context, ADR has not yet reached its full potential and could be more effective if a more systemic approach to its implementation were adopted. I have argued elsewhere that the lack of a systemic approach and inclusion has produced unintended consequences.[197] Although the term "shadow of the law" originally referred specifically to the influence law has during the negotiation process, [198] I have used it in a broader sense to refer to the legal frame of reference that affects facilitative processes—where there is effective access to the judicial system. In the Latin American context, there is a pale shadow of the law, meaning there is no practical re-

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190. Peru has been effective in the establishment of the Justices of Peace and its model has been used to establish similar programs in Colombia, Ecuador, Bolivia, and Venezuela with the financial support of the European Union. *See* Julio Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia* 35-38, THE WORLD BANK (2003), *available at* http://siteresources.worldbank.org/ INTLAWJUSTINST/Resources/Faundez.pdf.

191. In Colombia, for example, justices of peace can be compensated for some administrative expenses. Interview with Annette Pearson de Gonzalez, International Consultant for the USAID Justice Program in El Salvador: Improving the Administration of Justice Program, Checchi/USAID (Aug. 3, 2011) (on file with author) [hereinafter Interview with Pearson de Gonzalez].

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*; *see, e.g.*, Steven E. Hendrix, *Guatemalan "Justice Centers": The Centerpiece for Advancing Transparency, Efficiency, Due Process, and Access to Justice*, 15 AM. U. INT'L L. REV. 813, 823 (2000) [hereinafter Hendrix, *Guatemalan Justice Centers*].

196. *See* Hendrix, *Guatemalan Justice Centers*, supra note 195, at 848 (describing efforts to place a justice of the peace in Guatemalan communities that lacked other channels to access justice). However, some programs have expanded to include urban areas. For example, Justices of Peace currently serve in Chacao, part of the metropolitan area of Caracas, Venezuela. *See Chacao cuenta con 77 jueces de paz*, http://www.guia.com.ve/noticias/?id=49857 (last visited June 23, 2011).

197. *See generally* Hernández Crespo, *Shadow*, *supra* note 79.

198. *See* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979) [hereinafter Mnookin, *Bargaining*]. Even though Mnookin was referring to a very practical approach of the impact of the shadow of the law during the negotiation process, I have argued elsewhere that the concept can be utilized on a larger scale when referring to the needs of a court system to protect citizens' rights when they engage in facilitative processes.

course to the court system in many areas, which affects processes such as mediation. In this regard, when parties do not reach an agreement, they do not have the option of going to a method of adjudication through the courts. Rather, they utilize *de facto* powers, such as the drug traffickers in the Brazilian *favelas*, which act as the shadow of the law under which the mediation agreement takes place.[199] I have also argued that, even though significant efforts have been carried out in the development of arbitration, mediation, and reforms of the judicial system, one of the unintended effects has been the production of what I have called three tiers of justice: "private arbitration, for those who can afford an arbiter; the justice system, for those who can afford a lawyer; and mediation centers, for those who can afford neither."[200]

The following sections of this Article suggest ADR could be more effectively implemented in Latin America if there were greater access to the judicial system and more emphasis on systemic inclusion. Regarding greater access to justice, while ADR efforts have focused on providing access to a broader spectrum of dispute resolution methods, more attention should also be given to achieving timely adjudication through the court system when cases require judicial decision-making. This could be achieved by judicial reforms that lie beyond the scope of this Article and if the implementation of ADR through *Casas de Justicia* were to have a stronger connection to the judiciary. *Casas de Justicia* could further this endeavor by bringing the mediation process and the court system under the same roof, thus providing more direct access to the judiciary and enhancing the shadow of the law so as to alleviating the issue of enforcement. In this way, the *casas* could help address the issue of the three-tier justice system by increasing access to justice for all. Regarding the emphasis of systemic inclusion, the subsequent sections also expand on how ADR efforts could be better contextualized so as to address, rather than replicate, the prevailing patterns of exclusion. To achieve

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199. "[P]roponents of ADR in international rule of law projects may be unduly optimistic in their belief that ADR can solve problems of corruption, access to justice, and social inequality." Sternlight, *ADR Consistent*, *supra* note 10, at 586-87; *see also* Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789, 818-19 (2009) (citing Mnookin, *Bargaining*, *supra* note 198, at 968; Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22 NETH. Q. HUM. RTS. 324 (2004) (explaining that in the United States we have confidence in our use of ADR because we "bargain in the shadow of a longstanding body of law we can count on;" and that in international structures, where rule of law exists, more domestic and consensual processes may be used, but where there is a lack of rights and equality, steps must be taken to account for the missing shadow of the law)).

200. Hernández Crespo, *Shadow*, *supra* note 79, at 115. It is important to note that the three tiers of justice in Latin America occur in the context of ADR operating under a pale shadow of the law. This makes it distinct from the discussion of a two-tier justice system in the context of the United States. *See* Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986) (arguing for a two-tier civil trial system in the United States); *see also* Timothy Hedeen, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONFLICT RESOL. Q. 101, 102 (2004) (discussing the formation of "Neighborhood Justice Centers" that responded to the inadequacy of courts, as well as critiques of such community mediation efforts, describing them as more geared toward efficiency and harmony than justice, or calling community mediation second-class justice); *see generally* Thomas Christian, *Community Dispute Resolution: First-Class Process or Second-Class Justice?*, 14 N.Y.U. REV. L. & SOC. CHANGE 771 (1986) (arguing that community mediation centers provide first class process and first class justice, given the number of agreements reached and the level of party satisfaction).

this, *Casas de Justicia* will be expounded upon as one of the building blocks for implementing ADR in the region and will be expanded to including all citizens, rather than serving only low-income communities. *Casas* would assume a more prominent role in public conflict management and dispute resolution; *casas* would also take part in public policy making through collaborative governance in the policy continuum. The challenge lies in how to implement ADR, expanding its focus beyond access to justice, which is necessary but insufficient, in order to promote a more inclusive and participatory society that acts as the essential foundation for a more sustainable rule of law.

III. ADVANCING SYSTEMIC INCLUSION THROUGH PARTICIPATORY CONFLICT RESOLUTION: TAPPING INTO THE POTENTIAL OF THE MULTI-DOOR COURTHOUSE MODEL IN LATIN AMERICA

To address the prevailing issue of exclusion in Latin America and the challenges regarding the implementation of ADR, this section first argues for expanding the traditional use of ADR in the region. It suggests the focus of implementation should be broadened, from primarily being utilized as a means for access to justice for the poor, to include a more encompassing role that furthers systemic inclusion and public participation. Next, it examines the current version of multi-door efforts in the Latin American context, which will be used as the building blocks for advancing this goal. It then explores how to further develop the untapped potential of *Casas de Justicia,* one of the main multi-door models. It suggests the *casas* should be expanded to all citizens, focus on enhancing citizens' self-determination and problem solving capacity, and be further used in public dispute resolution and other experiences of collaborative governance. Finally, drawing on the early multi-door courthouse model as a vehicle for delivery of integrated dispute resolution services, it explains how the proposed model could address systemic change in the Latin American context by: increasing the number of *Casas de Justicia* and expanding their connection with the judicial system; adapting the role of the multi-door screener into a conflict assessor to strengthen citizen participation; including an organizational ombuds function that could foster public dispute resolution and other experiences of collaborative governance; linking conflict assessors through state and national forums for the identification of systemic issues and the development of best practices; and addressing the identified systemic issues through collaborative governance.

A. *Harnessing Social Capital through Participatory Conflict Resolution*

As discussed in previous sections, ADR has been promoted extensively in Latin America as a means of fostering rule of law and access to justice. However, if the ADR field were used to address the issue of exclusion by enhancing social capital[201] and developing more effective channels for citizens' participation, it

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201. Xavier Briggs warns that social capital can have positive or negative results. On the positive side, it can provide mutual support, cooperation, trust, and institutional effectiveness. It can also, however, lead to sectarianism, ethnocentrism, and corruption. In order to maximize its constructive uses and minimize its destructive effects, it is necessary to have a thorough understanding of social

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could have an even broader and more enduring effect upon the region. Now that reformers have expanded their focus from merely economic concerns to include the social dimension—what has been called the "second-generation reform" or the "post-Washington Consensus"—it seems the time is ripe to maximize the benefits that the ADR field can contribute to the promotion of inclusion in the region.

As Kerry Rittich has articulated, the "second-generation reform" entails more participation and more actors to increase ownership in the development process.[202] In this regard, a greater focus on the development of social capital, especially horizontal social capital, could hold great promise for building more inclusive societies on the foundation of rule of law. As mentioned earlier, however, there is a great deal of vertical social capital in the present day reality of Latin America, while horizontal social capital tends to be weaker, resulting in less civic engagement. The answer to this problem is to foster participation; so concludes Bernardo Kliksberg,[203] a chief advisor to the Regional Bureau for Latin America and the Caribbean of the United Nations Development Programme (UNDP). According to Kliksberg, the only way to build horizontal social capital is through genuine participation, since higher trust levels lead to increased connectivity and civic consciousness.[204] He concludes the human person "was born to participate" (*el ser humano nació para participar*)[205] and that participation should be regarded as an end in itself, not simply as a means to an economic or political goal.[206]

Harnessing social capital for increased public participation in decision-making and problem solving requires effective channels, as Latin American scholar Leonardo Avritzer has argued. Avritzer contends these channels have an important role to play in fostering greater inclusion, social cohesion, and stability in the region.[207] These channels can take different forms, depending on the type of participation and the level of citizen engagement. In some cases, the channels may be public forums, such as town halls, where citizens can come together and discuss issues or make policy recommendations to lawmakers.[208] In others, the

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capital and its twofold potential. *See* Xavier de Souza Briggs, *Ties That Bind, Bridge and Constrain: Social Capital and Segregation in the American Metropolis*, *available at* https://www.lincolninst.edu/pubs/dl/597_briggs.pdf; *see also* XAVIER DE SOUZA BRIGGS, DEMOCRACY AS PROBLEM SOLVING: CIVIC CAPACITY IN COMMUNITIES ACROSS THE GLOBE (2008) (examining the circumstances of six cities in different countries, Briggs argues that citizens can develop civic capacity, which plays an essential role in enhancing governance, and suggests that this can be done even in societies where cooperative civic action has not been the norm) [hereinafter BRIGGS, DEMOCRACY].

202. *See* Rittich, *supra* note 124.

203. Bernardo Kliksberg is advisor of the UN, UNICEF, and UNESCO, and has been director of the UN for the project of modernization of the government and social programs in Latin America, and coordinator of the Interamerican Insititute of Social Development of the IDB (the Interamerican Development Bank). He also served as general coordinator of the Interamerican Initiative about Social Capital, Ethics and Development of the IDB.

204. BERNARDO KLIKSBERG, EL CAPITAL SOCIAL 33-34 (2001). By way of example, he cites the case of the World Bank projects aimed at providing water to poor areas in Africa, Asia, and Latin America. Out of the 121 projects, the most successful of all were the participatory models, which produced "overwhelming" results. *Id.*

205. *Id.* at 33.

206. *Id.* at 37.

207. Leonardo Avritzer, DEMOCRACY AND THE PUBLIC SPACE IN LATIN AMERICA 165-70 (2002).

208. In the area of Dispute System Design this is considered "upstream processes." *See* Kirk Emerson et al., *The Challenges of Environmental Conflict Resolution*, *in* PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 3, 4 (Rosemary O'Leary & Lisa B. Bingham eds., 2003).

channels are oriented towards the resolution of disputes.[209] The field of ADR can enhance the process of creating and implementing effective channels by using the methodology developed for Dispute System Design (DSD). This process focuses on assisting a specific community, organization, or political entity in developing a system for managing its conflicts and resolving its disputes.[210] Since the goal is to ensure citizens have the opportunity to participate fully,[211] and as equal partners,[212] in rule making and dispute resolution, DSD emphasizes the active engagement of the representatives of *all* stakeholders,[213] given its participatory nature.[214]

Whichever channel is chosen must uphold and implement procedural justice values. Studies have shown that citizens invest more in rules and laws when they feel that procedural justice values such as equal participation, neutrality, and respect for participants' dignity have been upheld. Laws imposed from above without any citizen participation have a low trust quotient and are both less effective and more costly in the long run.[215] In the specific area of dispute resolution, when citizens sense the dispute resolution process is conducted in a fair and participatory manner, they are far more likely to view the decision as legitimate and comply with it. As a result, greater participation, both in the process of making laws[216]

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209. In the area of Dispute System Design this is considered "downstream processes." *See id.*

210. WILLIAM URY, JEANNE M. BRETT & STEPHEN B GOLDBERG, GETTING DISPUTES RESOLVED: DESIGN SYSTEMS TO CUT THE COSTS OF CONFLICT (1993) [hereinafter URY, GETTING DISPUTES]; CATHY COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS (1995).

211. Not all participation is equal; the degree of citizen participation can differ substantially. The International Association of Public Participation developed the "IAP2 Spectrum of Public Participation." This spectrum describes five levels at which the public can participate. The first and lowest level is "inform." This describes the effort and promise to keep the public informed with balanced and objective information to assist them in understanding problems, alternatives, opportunities and/or solutions. Informing the public may be through, for example, fact sheets, web sites, or open houses. At the second level, "consult," public feedback on analysis, alternatives, and/or decisions is obtained. Examples of "consult" in action could be public comment, public meetings, surveys and focus groups. The third level is "involve." This level describes actually working with the public while developing solutions and identifying problems; this level involves public input, not just feedback. The public is assured that its "concerns and aspirations are directly reflected in the alternatives developed" and feedback is provided detailing how public input influenced decisions. This may be done through workshops or deliberative polling. The fourth level, "collaborate," involves a graduated level of input. The public is involved in each aspect of decision-making, both the development of alternatives and the identification of preferred solutions. Input is treated as advice and incorporated to the "maximum extent possible." Manifestations include citizen advisory committees, consensus-building and participatory decision-making. Finally, the fifth stage is "empower." At this stage, the public does not provide feedback or input, but actually makes the decision and the powers that be implement the public's decision. Examples include citizen juries, ballot decisions and delegated decisions. *See* THE INTERNATIONAL ASSOCIATION OF PUBLIC PARTICIPATION, IAP2 SPECTRUM OF PUBLIC PARTICIPATION (2007), *available at* http://www.iap2.org/associations/4748/files/spectrum.pdf; *see also* Bingham, *Collaborative Governance: Emerging Practices*, *supra* note 14, at 291-92 (examining the IAP2 Spectrum of Public Participation, Arnstein's Ladder of Participation, and Archon Fung's categorization of participation).

212. *Id.*

213. *Id.*

214. *See generally* COSTANTINO & SICKLES MERCHANT, *supra* note 210.

215. *See* Ackerman, *Vanishing*, *supra* note 152, at 176-77 (discussing the value of jury participation in the trial system).

216. In a preceding article, I have argued that the creation of laws in Latin America needs to be more participative in order for them to be the most sustainable. It is necessary that the cultural norms be

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and settling disputes, tends to uphold the rule of law since citizens are more likely to abide by a law they helped to create that actually represents their interests. As a result, the network of relationships and the norms underlying those relationships are strengthened and channeled.

Even though channels are essential, they are not sufficient; it is of critical importance to also focus on enhancing social capital. As Robert Ackerman points out, the ADR field can contribute substantially to these tasks. Yet, he contends that, in order to enhance social capital, processes should be managed in a way that "allow[s] the parties to discover a common bond that is deeper than [the] process alone."[217] That "common bond," Ackerman says, can bring people together above and beyond their differences. He adds that it takes an experience of finding "in shared experience a shared history through which disputants recognize in each other common elements of the human condition."[218]

Moreover, Ackerman argues participatory dispute resolution can actually bring out the best of social capital's potential, helping transform an experience of social "noise" to the "music" of civic cooperation. "The ultimate promise for dispute resolution is that it can harness and nurture the will to play together so that society is more than the sum total of disparate notes, but rather a cohesive—albeit sometimes discordant—tune."[219] Developing living harmony of cooperation is similar to the method of creating jazz music that jazz players such as Wynton Marsalis have described: "In order for you to play jazz, you've got to listen to [the other musicians]. The music forces you at all times to address what other people are thinking and for you to interact with them with empathy and to deal with the process of working things out."[220] Yet, the best of jazz music is built on years of practice and experience. In the same way, social capital takes hard work. "In the end, social capital is the product not of spontaneous combustion," Ackerman writes, "but of history, experience, and effort."[221]

In addition, other theorists have noted the ADR field can contribute to enhancing social capital by developing citizens' capacities to assess conflict and, when appropriate, resolve disputes for themselves without necessarily having to wait for the courts to solve their problems for them. It teaches citizens that they can be effective protagonists and can create a better future for themselves.[222] As Sharon Press has said: "For too long, the metaphors have been those of 'The People's Court': 'Don't take it into your own hands, take them to court,' rather than,

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intimately related to sustainable domestic laws, which are obtained through an all-encompassing consensus building process, in order to enhance the shadow of the law. Hernández Crespo, *Shadow*, *supra* note 79, at 94-95.

217. Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL 27, 89-90 (2002) [hereinafter Ackerman, *Disputing Together*].

218. *Id.*

219. *Id.* at 91.

220. *Id.* at 89 (citing Wynton Marsalis, *in* JAZZ A FILM BY KEN BURNS: EPISODE 10-A MASTERPIECE BY MIDNIGHT (Florentine Films 2000).

221. *Id.* at 90.

222. For example, Andrea Schneider and Natalie Fleury observed an educative advantage to mediation in the foreclosure process. Homeowners left the process better understanding the foreclosure process, and the lenders and lenders' counsel learned the value of listening and developed listening skills. *See generally* Andrea K. Schneider & Natalie C. Fleury, *There's No Place Like Home: Applying Dispute System Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368 (2011).

'You have the capability of resolving your disputes yourself.'"[223] In this regard, Carrie Menkel-Meadow has noted that when people learn to be protagonists in their own lives, society is enriched with greater mutual understanding and peace. "Being able to truly participate in the decisions that affect our lives is a human necessity for legitimate societal outcomes and for peaceful coexistence of people with divergent values . . . ."[224] Yet, despite all the benefits the ADR field could produce in enhancing social capital through the development of citizens' capacities, Amartya Sen reminds us that helping people to develop their capacities and skills is a worthwhile undertaking in itself.[225]

In addition to building capacities and assisting citizens in becoming protagonists in the resolution of their own disputes, the ADR field has expanded to also include public decision-making processes. In response to representative democracies that seem to fail in the way they address public policy conflicts, citizens have demanded more participatory ways for sharing in governance,[226] thus beginning the development of what has come to be called collaborative governance.[227] One distinctive feature of collaborative governance is the use of deliberation and dialogue.[228]

Even though, to date, the fields of deliberative democracy and democratic deliberation "on the ground," have had little or no interchange, John Forester and David Kahane argue the experiences of democratic practice can "enrich" and even "reorient" deliberative democracy theory.[229] For example, even though facilitators and mediators play a critical role in the majority of "structured deliberative democratic exercises," they are "strikingly absent from most deliberative democracy theory."[230]

To foster such interactions, innovative processes that include the latest communication technology, such as e-democracy and e-government, have been used.

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223. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*, 24 FLA. ST. U. L. REV. 903, 917 (1997).

224. Menkel-Meadow, *From Legal Disputes*, *supra* note 147, at 26.

225. *See generally* SEN, *supra* note 1.

226. Leighninger notes:

> The mayor and city manager just didn't understand how taxpayers could be dissatisfied with a city administration that had won awards for efficiency and innovation. Finally, someone said it: 'Look, we know you're working hard for us, but what we've got here is a parent-child relationship between the government and the people. What we need is an adult-adult relationship.' It was the perfect summary of what I'd been watching in communities all over North America for the last ten years: a dramatic, generational shift in what people want from their democracy.

MATT LEIGHNINGER, THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE…AND WHY POLITICS WILL NEVER BE THE SAME 1 (2006) "We seem to be moving from a dispute about big government to a difficult conversation about how to achieve big governance." *Id.* at 4. "In an increasingly busy and sophisticated world, we seem to be headed toward a new form of democracy, in which public officials bring politics to the people, politics takes place in small groups, and people take active roles in problem solving." *Id.* at 22.

227. Bingham, *Collaborative Governance: Emerging Practices*, *supra* note 14, at 277.

228. *Id.* at 278.

229. *See generally* John Forester & David Kahane, *The Micropolitics of Deliberation: Beyond Argumentation to Recognition and Justice*, *in* DELIBERATIVE DEMOCRACY IN PRACTICE 209 (David Kahane et al. eds., 2010) (arguing that this may be due to the fact that deliberative democracy often remains abstract and based on propositional argumentation).

230. *See id.* at 229.

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These forms of technology could play an essential role[231] in Latin America, where most countries usually lack the infrastructure and resources necessary for systemic travel and ongoing communication. Encouraging citizens to participate in public policy processes, collaborative governance has become an "alternative to traditional command-and-control approaches" to policy making.[232]

Lisa Bingham illustrates how collaborative governance offers a variety of processes for citizen participation in designing, implementing, and enforcing public policy.[233] She utilizes the metaphor of a flowing stream to distinguish different stages throughout what she refers to as the "policy continuum."[234] Upstream forms focus on different methods of participatory policy-making that include dialogue and deliberation, such as deliberative polling, study circles, public conversations, deliberative town meeting groups, and round tables.[235] Midstream refers to implementation of the said policies, which is quasi-legislative and quasi-judicial and involves collaborative public management networks and public policy ADR. Examples include LA neighborhood[236] councils and the U.S. Institute for Environmental Conflict Resolution.[237] Downstream encompasses policy enforcement, which is judicial or quasi-judicial, and includes a broad spectrum of ADR methods as well. Court-connected ADR programs and private ADR providers are examples of downstream collaborative governance.[238] In this context, Bingham has emphasized any of these models of citizen participation and deliberation in collaborative governance should be a well-designed and well-implemented system.[239]

Even though it is currently "widely affirmed that public deliberation leads to more effective and legitimate policy making, increases public trust and social capital, cultivates citizen character and engagement, and reduces controversy

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231. It is important to note, however, that better technological infrastructure does not guarantee citizen participation. In the U.S. context, in spite of a strong infrastructure, political agents are few, and scholars have pointed to the need for researchers to "learn why so few political agents exist in the mass public and whether e-deliberation could help create such political agents." Peter Muhlberger, *Human Agency and the Revitalization of the Public Sphere*, 22 POL. COMM. 163, 176 (2005) [hereinafter Muhlberger, *Human Agency*].

232. Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 300 (2010).

233. Bingham, *Collaborative Governance: Emerging Practices*, *supra* note 14, at 273.

234. Bingham suggests 15 steps in the continuum, divided into groups that fall under each segment of the continuum. For upstream in the policy process, which entails legislative and quasi-legislative uses of dialogue and deliberation, she suggests: 1. Identifying a policy problem, 2. Identifying approaches for solving the policy problem, 3. Setting priorities among solutions to a policy problem, 4. Selecting among the priorities, 5. Drafting proposed legislation, 6. Enacting legislation, 7. Identifying policy problems for executive powers to resolve within the boundaries of the legislation, 8. Identifying approaches or tools for regulations. For midstream in the policy process, which encompasses deliberative or participatory governance, collaborative public or network management and ADR, she suggests: 9. Setting priorities for regulations, 10. Selecting from among priorities for regulations, 11. Drafting proposed regulations, 12. Enacting regulations, 13. Implementing regulations. Downstream in the policy process, which uses ADR to resolve conflict among identified disputants, entails 14. Enforcing legislation and regulations, executive administrative agencies, and 15. Enforcing legislation and regulation through judicial power. *Id.* at 291-306.

235. *Id.* at 287.

236. Terry L. Cooper et al., *Citizen-Centered Collaborative Public Management*, 66 PUB. ADMIN. REV. 76, 82 (2006).

237. *See* U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION, http://www.ecr.gov (last visited Aug. 10, 2011).

238. Bingham, *Collaborative Governance: Emerging Practices*, *supra* note 14, at 304-06.

239. *Id.* at 273.

when policies are implemented,"[240] Bettina von Lieres and David Kahane suggest that to enable marginalized groups to participate in deliberative processes, the design choices are of critical importance. In this regard, they suggest the following three key features play a significant role in achieving this goal:

> 1. The extent to which the process is *reflexive,* in the sense of giving participants a deliberative say in defining the terms of their participation, the issues they will address, and the form deliberation will take. 2. The extent to which public involvement is *recursive,* so that citizen deliberation takes place from the beginning, applying to the range of decisions made. 3. The existence of *separate spaces* in which members of marginalized groups can reflect on dynamics of power and exclusion, and negotiate questions of common agendas, strategies and identities. These separate spaces can take many forms, from parallel deliberative processes to opportunities for caucusing within heterogeneous deliberations.[241]

It is therefore possible that, through capacity building and well-designed and well-implemented experiences of collaborative governance, the ADR field could play a significant role in forging a path that harnesses social capital in the Latin American context to foster a more sustainable rule of law.

B. Participatory Conflict Resolution in Latin America: The Contribution of the Multi-Door Courthouse Model

Regarding the promotion of participation in Latin America, the multi-door courthouse model is one of the most promising concepts, which, if further adapted, could significantly contribute a foundation for a more sustainable rule of law. Since the 1990s, the multi-door courthouse model has been adapted and used in Latin America primarily in the form of *Casas de Justicia* (justice centers), which have been part of access to justice efforts in marginalized and rural communities. The multi-door courthouse model began as an idea to promote dispute resolution within the judiciary, but, in Latin America, the concept has been substantially expanded to also promote social services in marginalized communities. This model has just begun to show what it can accomplish in the area of building citizens' capacities, strengthening private and public conflict resolution, and developing other experiences of collaborative governance.

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240. Bettina von Lieres & David Kahane, *Inclusion and Representation in Democratic Deliberations: Lessons from Canada's Ramanow Commission*, *in* SPACES FOR CHANGE? 131 (Andrea Cornwall & Vera Schattan Coelho eds., 2007).

241. *Id.* at 133 (exploring how the success and shortcomings of the Romanow Commission's inclusion of Aboriginal people in the deliberative process is linked to the three features of deliberative design). The Romanow Commission took place in April 2001, addressing citizens' health care in Canada. Even though these guiding principles were developed in the context of the disenfranchised in Canada, the design elements can also help overcome similar challenges faced by the disenfranchised majority in Latin America.

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1. Origins and Development

The multi-door courthouse model originated in the early 1970s in the context of concern about judicial backlog in the United States.[242] Its founder, Frank Sander, envisioned a center for dispute resolution in which cases could be rerouted to the most appropriate forum for resolution based on the needs of the parties and specifics of the case; for example, cases could be routed to early neutral evaluation, mini-trial, mediation, or arbitration.[243] This would allow for a more tailored experience of the justice system,[244] rather than a one-size-fits-all approach.[245] In Sander's original conception, a court clerk would screen and then route the cases to the most appropriate forum. While Sander's main interest was to provide a variety of options for the resolution of disputes,[246] others saw the potential to alleviate backlogs because of its nature as a routing mechanism.[247]

Over thirty years later, the multi-door courthouse model has been implemented in varying ways in a number of jurisdictions within the U.S and abroad.[248] The implementation of the model began with an American Bar Association (ABA) task force,[249] who promoted its development and eventual adoption by the judicial system in various states.[250] Moreover, the concept has spread to foreign coun-

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242. Frank E. A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 83-84 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter Sander, *Varieties*]; Transcript, *A Dialogue Between Professors Frank Sander and Mariana Hernández Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L.J. 665, 669 (2009).

243. Sander explains that the ABA coined the term "multi-door courthouse" for an article on the concept. This image proved useful for the promotion of the concept. *Id.* at 670.

244. Jaqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 58–59 (2004) (arguing that equity and mediation can provide "individualized justice," which can introduce mercy in a process often focused mainly on rules).

245. *See* Frank E. Sander & Steven B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994) (suggesting the lawyer and client should analyze their conflict and choose from the spectrum of ADR options available) [hereinafter Sander, *Fitting*]; Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006) (suggesting that mediation should be the default choice amidst the ADR options excepting specific cases where mediation is unsuitable) [hereinafter Sander, *Matching*].

246. Sander, *Varieties*, *supra* note 242.

247. *See, e.g.*, Simon H. Rifkind, *Are We Asking too Much of Our Courts?*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 51 (A. Leo Levin & Russell R. Wheeler, eds., 1979).

248. For a brief history of the Multi-Door Courthouse in the U.S. and abroad, see Transcript, *supra* note 242, at 667.

249. AMERICAN BAR ASSOCIATION, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE, 74 F.R.D. 159, 175 (1976).

250. *See, e.g.*, *Dispute Resolution Program*, THE PHILADELPHIA COURTS, http://courts.phila.gov/municipal/civil/#drp (last visited June 18, 2011) (Pennsylvania); Thomas F. Christian, *Running Statewide Dispute Resolution Programs—The New York Experience*, 81 KY. L.J. 1093 (1993) (New York); Peter W. Agnes Jr., *A Reform Agenda for Court-Connected Dispute Resolution in Massachusetts*, 40 BOSTON B.J. 4 (1996) (Massachusetts); William H. Erickson & Cynthia A. Savage, *ADR In Colorado*, 54 DISP. RESOL. J. 60 (1999) (Colorado); ADR Staff, Superior Court of California, County of San Mateo, *Multi-Option ADR Project Evaluation Report July 2007-July 2008*, *available at* http://www.sanmateocourt.org/documents/adr/2007_2008_evaluation_report.pdf (last visited Jan 17, 2013) (California); Tara Shockley, *Two Decades of Justice: The Dispute Resolution Center and Houston Volunteer Lawyers Program Have Been Serving the Houston Community for Over*

tries.[251]   While many look to the multi-door courthouse model to improve the efficiency and effectiveness of the judiciary, the institution also has the potential to bring benefits that go beyond judicial improvements. In particular, the multi-door courthouse model could provide citizens with a new experience in dealing with disputes by empowering them to be the protagonists in their resolution.

Trends in the implementation of the multi-door courthouse model have demonstrated it to be a fairly malleable concept that can take many shapes, adapting to the needs of the users. The multi-door model in Washington, D.C., for example, has developed into a dispute resolution center that offers many doors for mediation, including family mediation, landlord-tenant mediation, tax mediation, and some social services.[252]   In Latin America, many of the doors also lead to service programs.[253]   Even though most multi-door models are oriented toward private conflict resolution, recent initiatives such as the Colombia model have also incorporated *de facto* experiences of participatory public conflict resolution. In fact, the models in most countries have taken a leading role in substantial community involvement. Neither of these trends were part of the original conception of the multi-door courthouse model, yet these innovations begin to show its potential. Perhaps one of the most interesting developments has been the use of the multi-door model as part of the Internal Dispute System Design of the World Bank and the United Nations. Where the multi-door concept will lead in another 40 years remains to be seen.

2. The Implementation of the Multi-Door Courthouse Model in Latin America: Oficinas Multi-Puertas *(Multi-door Offices)* and Casas de Justicia *(Justice Centers)*

The multi-door courthouse model in Latin American has taken the form of *Casas de Justicia* (justice centers) and, to a lesser degree, *oficinas multi-puertas* (multi-door offices). Significant efforts to establish *Casas de Justicia* have been carried out in several countries in the region, and a few have also established

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20 Years, 39 HOUSTON LAW. 18 (2002) (Texas); *Multi-Door Dispute Resolution Division*, DISTRICT OF COLUMBIA COURTS, http://www.dccourts.gov/internet/superior/org_multidoor/main.jsf (last visited June 18, 2011) (District of Colombia); Sue Darst Tate, *Alternative Dispute Resolution System 2009 Annual Report* (2009), *available at* http://www.oscn.net/static/adr/Documents/ADRSReport2009.pdf (last visited June 18, 2011) (Oklahoma); *Alternative Dispute Resolution in Superior Court of Delaware*, DELAWARE STATE COURTS, http://courts.delaware.gov/Superior/ADR/adr_choice.stm (last visited June 18, 2011) (Delaware); GEORGIA COMMISSION ON DISPUTE RESOLUTION, http://www.godr.org/ (last visited Jan. 30, 2013) (Georgia); *Mediation in the Alaska Court System*, ALASKA COURT SYSTEM, http://www.courts.alaska.gov/mediation.htm#programs (last visited June 18, 2011) (Alaska); KIMBERLY ANN KOSCH, 2005 FLORIDA MEDIATION AND ARBITRATION PROGRAMS: A COMPENDIUM, (2005) (Florida); STEVEN H. CLARKE, ELIZABETH D. ELLEN & KELLY MCCORMICK, COURT ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS (1996) (North Carolina); *Complementary Dispute Resolution*, NEW JERSEY COURTS, http://www.judiciary.state.nj.us/services/cdr.htm (last visited June 18, 2011) (New Jersey); Daniel E. Klein, Jr., *Mediation and Handbook for Maryland Lawyers*, MEDI MD-CLE I-1 (1999) (Maryland).

251. The Washington, D.C., multi-door courthouse is the one most often observed, and on which most foreign countries model their own implementations. *See* Transcript, *supra* note 242, at 273. *See also*, Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 590 (1988).

252. *Id.*

253. *See, e.g.*, information regarding *Casas de Justicia* in Colombia, *infra* note 281.

oficinas multi-puertas. To date, *casas* and *oficinas* have been adapted to satisfy the needs of individual locations and have gradually developed and progressed at varying rates in different areas. This section of the Article does not seek to provide a comprehensive report on these institutions in Latin America, but rather, to give an overview of some of the most significant developments in various countries; in so doing, this overview seeks to portray some of the actual characteristics involved and to explore the undeveloped potential of *Casas de Justicia* as a building block for a more sustainable rule of law.

Guatemala, where the need for a more sustainable rule of law became imperative as a result of the Guatemalan Civil War (1960-1996), was one of the first countries where *Casas de Justicia,* originally called justice centers, emerged.[254] USAID began its efforts to establish *Casas de Justicia* in 1995,[255] as a new model that would depart from the traditional structures of justice[256] to bring justice closer to all people and to fight violence and impunity, [257] incorporating the views of indigenous communities and other groups as well as overcoming structural issues of communication between the justice system and the citizens.[258] The *Casas de Justicia* were originally called "Focus Centers"—due to their specific connection with a geographic area—and were designed to provide training. USAID soon realized, however, that more than training was needed and expanded the concept of the *casas* to be a full institution.[259] The centers therefore became "laboratories of positive activities consisting of concepts that were introduced, tested and demonstrated."[260]

The *Casas de Justicia* differ among themselves, as the model is adapted to satisfy the needs of each geographic location. Nonetheless, they share a common essence:

> A justice center is not a physical location, but an entire concept that involves bringing together civil society and local justice sector officials to address access concerns at the local level. The purpose of the Justice Centers is to increase the quality of justice sector services, especially for historically marginalized people, such as the poor, women, indigenous people, and children. The justice center methodology calls for local participants to discuss issues and arrive at a consensus to address local problems.[261]

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254. Interview with Stephen Hendrix, Assistant Director of USAID Paraguay (July 25, 2011) (on file with author) (explaining that the original name was "Justice Centers" but, in places like Colombia, became *Casas de Justicia*, and articulating how, even though the concept varies from region to region and even country to country, the "spirit" is the same). For more on the challenges faced in Guatemala and efforts to bring about public safety through strengthening the law since the Civil War, see Milburn Line, *Seguridad Ciudadana: Guatemala y Colombia*, Joan B. Kroc Institute for Peace and Justice.

255. *See* Hendrix, *Guatemalan Justice Centers*, *supra* note 195, at 823.

256. *Id.* at 823-24.

257. *See* USAID From The American People, ASSESSMENT OF USAID/COLOMBIA'S JUSTICE REFORM AND MODERNIZATION PROGRAM 25 (2010), http://pdf.usaid.gov/pdf_docs/PDACR349.pdf [hereinafter ASSESSMENT OF JUSTICE REFORM PROGRAM].

258. *See* Hendrix, *Guatemalan Justice Centers*, *supra* note 195, at 821.

259. *Id.* at 819.

260. *Id.* at 820.

261. *Id.* at 821.

People are at the core of the *Casas de Justicia*. The centers aim to further an interchange of ideas and voluntary efforts. They foucse on bringing together various constituents, such as police, prosecutors, judges, public defenders, members of local civil society, and lawyers, to work in a collaborative manner to resolve some of the difficulties in Guatemala's justice system.[262] To this end, the *casas* have the following fundamental objectives:

> (1) organizational and administrative structures that reduce delay, minimize exposure to corruption, and create accountability; (2) improved functioning of key actors in their assigned roles and management structures and techniques that promote team approaches; (3) use of standardized, user-friendly forms; (4) user-friendly case management and records systems that reduce opportunities for corruption, improve the quality of case supervision, and generate accurate statistics; (5) interpreters and culturally-appropriate outreach and education programs in local languages to make the system truly accessible to non-native Spanish speakers; and (6) promotion of alternative dispute resolution, plea bargaining ("criterio de oportunidad"), stay of prosecution ("suspension condicional"), and other mechanisms to settle cases identified through improved case intake and diversion programs.[263]

ADR was also established as an essential component of the *Casas de Justicia* model. In this regard, mediation was promoted to advance access to justice by enabling citizens to reach "more equitable and accessible justice, while maintaining a sense of respect for local leadership and customary law."[264] The Peace Accord on indigenous rights mandated that the Guatemalan government recognize Mayan or customary law practice within the legal system, as long as such actions are not in violation of human rights. As a result, ADR, and specifically the mediation process, emerged as a way to integrate elements of local practices into the justice system.[265]

In addition, mediation was promoted as a means of increasing access to justice and reducing backlog in the courts. To this end, it "provides decentralized justice at the community level, providing more power to individuals and civic organizations in resolving their own disputes."[266] Moreover, mediation, as a significant element of *Casas de Justicia,* was intended to be a mechanism through which citizens could not only save time and money, but also gain access to justice "in their own community and language."[267]

In post-civil war Guatemala, *Casas de Justicia* were founded in various Guatemalan regions, including Nebaj, Escuintla, Quetzaltenango, San Benito (Petrn), Santa Cruz, Santa Eulalia (Huehuetenango), and Zacapa.[268] Promoters of the *casas*

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262. *Id.* at 814.
263. Hendrix, *Guatemalan Justice Centers*, *supra* note 195, at 814.
264. *Id.* at 850 (citing Cable from Embassy of Guatemala to the United States Secretary of State, USAID-Guatemala Activity Advancing Conflict Resolution).
265. *See id.*
266. *Id.* at 851.
267. *Id.*
268. *See id*. at 825.

were aware that, despite these efforts, achieving their goal of bringing about a more sustainable rule of law would require a significant amount of time. Nevertheless, they believed the *casas* would be an essential element in promoting rule of law that "is extended to all citizens."[269]

Since the Guatemalan experience, various countries have used *Casas de Justicia* for diverse purposes and have adopted differing interpretations of the multi-door model. Regarding the diverse purposes of *casas,* even though most countries follow the Guatemalan model, Paraguay has recently developed a new model of *Casas de Justicia,* with a different purpose. While the Guatemalan model was founded to increase access to justice, the Paraguay model, which is not directly connected to the judiciary, goes beyond this objective, also seeking to strengthen democracy. Regarding differing interretations, *Casas de Justicia* in most Latin American countries offer a variety of options, which include governmental services and criminal prosecution and defense as well as a strong focus on mediation. In Argentina, however, ADR options have been further developed and include, for example, arbitration services, together with mediation.

It is also important to note that, even though *casas* in most countries are public in nature and are established and ultimately run by the local government agencies, some *casas*, such as those in the Dominican Republic, result from the private initiatives of a non-profit organization in coordination with judicial and public insitutions.[270] Similarly, the number of *Casas de Justicia* and the cases they handle in each country differs substantially, based on need and resources. While Colombia efforts, which started in the 1995, have already established 76 *casas,* which have handled approximately 11 million cases,[271] Paraguay has just begun efforts in the last couple of years and has only one *casa*, which has already handled over 128 cases.[272] While most *Casas de Justicia* deal with cases that "pertain to everyday life," such as personal identity issues, family conflicts, domestic violence, and disputes between neighbors,[273] in Paraguay, they also include land disputes.[274] Although most *casas* currently focus primarily on private conflict resolution, some, such as in Argentina and Colombia, also include cases of public conflict resolution. *Casas de Justicia* in Paraguay go beyond public conflict resolution to foster other experiences of collaborative governance as well. Despite these differences, most *Casas de Justicia* throughout Latin America, except for those that use the term differently, share the goal of offering a "one-stop shop," providing multiple options for conflict resolution.

In addition to differences in the interpretation, purposes, and nature of the multi-door models, the essential understanding of the meaning of the term *"Casas de Justicia"* is not uniform within the region. A few countries, such as Nicaragua

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269. *See id.* at 815.
270. *See* Interview with Pearson de Gonzalez, *supra* note 191.
271. *See* Orlando Muñoz, Justice Houses (unpublished manuscript) (on file with author) [hereinafter Muñoz, Justice Houses].
272. Maria Victoria Rivas, CASA DE JUSTICIA SAN PEDRO Abriendo Puertas, Justicia y Equidad Social—Segunda Fase San Pedro—Paraguay Centro de Estudios Judiciales (unpublished manuscript) (on file with author) [hereinafter Rivas, CASA DE JUSTICIA].
273. *See* Interview with Pearson de Gonzalez, *supra* note 191. *See also* Luz Alba Londoña et al., *Casa Regional de Justicia del Sur del Tolima*, USAID (on file with author).
274. *See* Interview with Maria Victoria Rivas, Executive Director of the Center of Judicial Studies in Paraguay (Aug. 8, 2011) (on file with author) [hereinafter Interview with Rivas].

and Venezuela, have institutions referred to as *Casas de Justicia* that do not resemble the multi-door models found in other countries. In Nicaragua during the 1990s, over 100 "*Casas de Justicia*" were built with funds from Sweden, Italy, and Holland, administrated by the United Nations Development Programme (UNDP); it is important to note that this project aimed to improve the precarious infrastructure of the judicial system by providing physical space for the courts and additional living arrangements for the judges in the same location.[275] These *casas* were developed as a means to increase the efficiency of the judiciary, making it more impartial and accessible. In Venezuela, the political party Primero Justicia has implemented a project called "*Casas de Justicia* For Everyone."[276] However, these institutions look more like community centers than centers of conflict resolution and offer a broad range of non-legal services, such as medical and dental assistance, a community library, seminars, and community meetings.[277] Located in rural areas, the main goal of these *casas*, in addition to the non-legal services, is to empower citizens to resolve their individual and community issues.

One of the most significant programs for the establishment of *Casas de Justicia* in the region has been developed in Colombia. The 1991 Colombian Constitution played a significant role in shaping the administration of justice, ADR, and the transfer of responsibilities and resources to municipalities, thus enhancing the decentralization process. Additionally, there was a demand for the coordination of the justice system's institutions, in order to facilitate access to all citizens.[278] USAID initially invested 15 million dollars into 69 out of the 76 *Casas de Justicia*.[279] However, over time the Colombian government has assumed partial financial responsibility for the continuation of *Casas de Justicia*.

Casas de Justicia were intended to address local daily conflicts faced by the average citizen. It is important to note in the Colombian context that some of them had been established in areas with prior history of paramilitary presence.[280] Insta-

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275. Interview with Luis Ubeda, Development Project Specialist in the Democracy and Government Office, (Aug. 11, 2011) (on file with author). For a diagnostic look at the system of justice in Nicaragua and what role *Casas de Justicia* play in expanding access to justice, see Programa del Apoyo Institucional, LA JUSTICIA EN NICARAGUA: DIAGNÓSTICO DEL SISTEMA DE JUSTICIA 66, 128-29, (2003), *available at* http://www.poderjudicial.gob.ni/arc-pdf/La%20justicia%20en%20Nicaragua%20270906.pdf.

276. *See* Jose Alexander Superlano Jaimes, *Más De 20 Casas De Justicia Para Todos Fueron Inauguradas En El País*, PRIMERO JUSTICIA LIBERTADOR, (Aug. 27, 2007, 9:10AM), http://pjlibertador.blogspot.com/2007/08/ms-de-20-casas-de-justicia-para-todos.html.

277. *Id.*

278. E-mail from Annette Pearson, Colombia Community Justice Houses National Program Consultant, National Justice House Program, to author (Feb. 08, 2013, 05:04 UTC) (on file with author).

279. *See* Muñoz, Justice Houses, *supra* note 271.

280. Annette Pearson explained:

All factions of the Colombian armed conflict have a presence in the region. The insurgency operates in the area organized as the Dario Ramirez Castro Unit of the Ejercito de Liberacion Nacional (ELN) and the IV Front of the Bloque del Magdalena Medio of the FARC-EP. The paramilitary fronts known as the Northeast and Lower Cauca of Antioquia and Magdalena Medio, themselves part of the Bloque Central Bolivar, were demobilized towards the end of 2005 and the beginning of 2006. Nonetheless, members of these defunct groups remain in the urban areas of Segovia and Remedios. Attacks against the civilian population included infamous crimes against humanity such as the 'Massacre of Segovia,' which occurred on the 22nd of April of 1996, perpetrated by paramilitary groups. This massacre took place in the billiard parlors 'Flay' and 'El Paraiso,' as well as on the street of that municipality, where 14 people were killed, a further eight

bility has characterized the country due to decades of conflict arising from an-
tigovernment insubordinate factions, notably the Revolutionary Armed Forces of
Colombia (FARC).[281] The thriving Colombian drug trade had aided the insurgen-
cies, but by 2006 a significant number of groups demobilized.[282] Even though
Casas de Justicia were established in 1995,[283] they were mainly established in
large cities, and it was not until the mid-2000s when *Casas de Justicia* were estab-
lished in rural areas where the Colombian government has regained control.[284] In
this regard, one of the goals of *Casas de Justicia* in Colombia was to "[c]ombine
with other national government strategies to strengthen state presence and recover
the rule of law in areas of the country where the armed conflict diminished the
capacity of the justice agencies to deal with a growing culture of illegality."[285]

The *Casas de Justicia* in Colombia act as inter-institutional units, where citi-
zens can access information, guidance, and services to resolve their disputes
through litigation and ADR processes.[286] These *Casas* are part of an effort to de-
centralize public services and enhance cohesive citizen interaction.[287] To this end,
they aim to decentralize justice to low-income communities, offer *pro bono* legal
representation, provide "one-stop shop" locations for justice services, contribute
to local development plans, impart legal guidance and education on topics of
justice, and foster two-way dialogues between the justice center and the
community.[288] The *Casas* also promote ADR in order to solve everyday problems,

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were wounded, and two more were kidnapped. During the period from 1996 to 1997, 140 mur-
ders were committed against community and social leaders and inhabitants. On the other hand,
on Sunday the 18th of October, 1998, the Cimarrones group of the ELN dynamited the oil pipe-
line 'Oleoducto Central de Colombia,' which crosses through the Fraguas area, or Machuca,
which is part of the Segovia Municipality. This terrorist attack resulted in a fire that killed 84
peasant farmers and left another 30 gravely wounded. To date, 1200 victims of paramilitary forc-
es have been registered with the Public Prosecutor´s Office, within the terms of the Justice and
Peace Law.

Annette Pearson, Colombian National Justice House Program 3, unpublished manuscript (2009) (on
file with author) [hereinafter Pearson, Colombian National Justice House].

 281. *See* CIA World Fact Book, *Colombia*, https://www.cia.gov/library/publications/the-world-
factbook/geos/co.html (last visited Aug. 15, 2011).

 282. *Id.*

 283. USAID Colombia Administrative Justice Program (2001-2006), FINAL REPORT (2006), *availa-
ble at* http://pdf.usaid.gov/pdf_docs/PDACH987.pdf [hereinafter COLOMBIA FINAL REPORT].

 284. E-mail from Annette Pearson, Colombia Community Justice Houses National Program Consult-
ant, National Justice House Program, to author (Feb. 08, 2013, 05:04 UTC) (on file with author).

 285. *See supra* note 281.

 286. For more information regarding *Casas de Justicia* in Colombia, see El Ministerio del Interior de
Justicia, http://www.mij.gov.co/eContent/newsdetailmore.asp?id=2976&idcompany=2&idmenucate
gory=226 (last visited June 18, 2011).

 287. *See* Annette Pearson, *El Programa Nacional de* Casas de Justicia *y la Atención Integral a Vícti-
mas en Comunidades Locales de Colombia. El Caso de las Víctimas de la Violencia Intrafamiliar*,
VOL. 14 NO. 27 ILANUD AL DÍA 149, 149-50 (2006), *available at* http://www.ilanud.or.cr/A113.pdf.

 288. *See* Pearson, Colombian National Justice House, *supra* note 280, at xiv.

1. Decentralization of justice services to low-income communities located on the outskirts of cit-
ies to facilitate access to non-violent conflict resolution alternatives. 2. All services are free of
charge and do not require clients to hire their own lawyer. 3. The combination of various justice
services under a single roof avoids sending the Justice House client from one place to another for
different aspects of his or her proceedings. 4. The strategic link established with other institutions
in the same part of the city seeks to make the Community Justice House a contributor to overall
development plans. 5. Legal guidance for the client, and community education on justice topics

thus seeking to change the cultural approach to conflict. Through the modernization of the administration, management, and technology, *Casas* seek to provide better quality services.[289] To support these goals, the *Casas* have established a structure that generally includes the municipal agencies of: the House Coordinator, Reception, and Information Desk; Municipal Neighborhood Disputes Office; Municipal Family Affairs Office; Municipal Representative Charged with Protecting and Promoting Human Rights; the Community Development Office; national justice services such as the Local Office of the Public Prosecutor; the Public Defender's Office; the National Institute of Legal Medicine and Forensic Sciences; the Colombian Family Welfare Institute; and other entities, including the Ethnic Community Matters Office and Community Justice Mediation and Conciliation.[290] It is important to note that even though judges work closely with the *Casas,* they are not part of the *Casas* in the Colombian model.

By 2005, Colombia developed approximately 40 *Casas de Justicia*, mainly in urban areas, with the goal of providing integration of services, strengthening the social fabric, and fostering a better perception of the justice system through decentralization, and, when necessary, special jurisdiction for the indigenous population.[291] These *Casas* have specifically focused on both criminal procedure to prevent crime and reduce impunity[292] and on ADR efforts, which have included work with chambers of commerce, non-profit organizations, universities, and justices of peace, among others.[293] In addition, the *Casas* have provided restorative justice in appropriate cases[294] and have worked closely with the local government, specifically the mayoral offices, to further sustainability.[295] As a result of these efforts, the *Casas de Justicia* in Colombia are perceived as

> much more than a simple relocation from downtown; much more than the decentralization on an institution-by-institution basis, and far more than a means of relieving the heavy caseloads of the courts and the public prosecutor's offices. It proposes a new relationship between basic justice services and the local community and its citizens, for solving everyday problems and enhancing community life.[296]

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are fundamental functions of the Justice House. The fact that the Justice House is immersed in the neighborhood helps to make it sensitive to local problems and to focus training and advice activities appropriately. 6. Information on the particular features of the local community served by the Justice House, and a communications approach that emphasizes a two-way dialogue with the client helps to clarify the diverse dimensions of the disputes and conflicts brought to the House for attention.

Id. at xv-xvi. *See also* Annette Pearson, *Ponencia Casas de Justicia 10 Años: Retos y Logros*, unpublished manuscript (2007) (on file with author).

289. Pearson, Colombian National Justice House, *supra* note 280, at xv.

290. *Id.* at xvi; *see also* Juan Faundez, *Non-State Justice Systems in Latin America* 44-45, THE WORLD BANK, *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Faundez.pdf.

291. Pearson, Colombian National Justice House, *supra* note 280, at xvi.

292. Muñoz, Justice Houses, *supra* note 271.

293. *See, e.g.*, COLOMBIA FINAL REPORT, *supra* note 283.

294. *See* Pearson, Colombian National Justice House, *supra* note 280.

295. *See* COLOMBIA FINAL REPORT, *supra* note 283, at iii.

296. Pearson, Colombian National Justice House, *supra* note 280, at xvii.

After 2006, Colombia also began establishing regional *Casas de Justicia* to reach marginalized communities,[297] which are often characterized by lack of governmental presence and high levels of conflict. To date, the country has over 20 *Casas* that fall in this category. In addition to the common objectives shared among all Colombian *Casas,* the regional centers interconnect both rural and urban communities; strengthen the presence of the government in areas affected by armed conflict to reestablish rule of law; coordinate local development programs and justice efforts; and specifically focus on increasing access to justice within the indigenous and afrocolombian communities by linking their traditional practices to the national justice system.[298] The scope of these *Casas* only encompasses "everyday disputes"; if they were to include land disputes or drug related offenses, they would face resistance from the guerillas and drug traffickers.

Another significant model has been implemented in Argentina, which has been a pioneer in the development of the multi-door model in Latin America.[299] This model has not only taken the form of *Casas de Justicia*, but also as *oficinas multi-puertas.* Fundación Libra[300] has been one of the essential players for the implementation of the Argentinean multi-door model, which is closest to the original multi-door concept, as a means to strengthen the judiciary[301] and to promote access to justice[302] by decentralizing the judicial system and "de-judicializing" conflict resolution. *Oficinas multi-puertas* form part of the judicial system, operating at the national level and at the provincial level in Rio Negro and Neuquén.[303] While the *oficinas multi-puertas* operate in the urban areas, *Casas de Justicia* have mainly been developed in rural communities, in provinces that lack access to the court system due to geographical distance. They offer citizens access to the courts, dispute resolution processes, social services, necessary information, and

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297. For more information on *Casas de Justicia* 2006-2010, *see* USAID Justice Reform and Modernization Project, FINAL REPORT 2006-2010, http://pdf.usaid.gov/pdf_docs/PDACR351.pdf.

298. Pearson, Colombian National Justice House, *supra* note 280, iv.

299. *See* André Gomma de Azevedo, *La Mediación en Brasil*, *in* ARBITRAJE Y MEDIACIÓN EN LAS AMÉRICAS 73 (Juan Enrique Vargas Viancos & Francisco Javier Gorjón Gómez eds., 2006).

300. Gomma de Azevedo provides more background:

The Houses of Justice is the brainchild of Gladys Álvarez and Elena Highton, and implementation of the idea was proposed first in 2003 at the *La Mesa del Diálogo Argentino*, which was initiated by the president of Argentina in 2001, and coordinated by the Catholic Church and the United Nations Development Program (UNDP). In 2004 the judiciary signed a couple of agreements with the Libra Foundation for technical assistance in the implementation and monitoring of the Houses of Justice, first in Rio Negro and then in Tierra del Fuego. Currently, there are Houses of Justice in the provinces of Buenos Aires, Rio Negro, Santiago del Estero and Tierra del Fuego.

Id. at 484.

301. For more information, see *Improve the Operation of the Argentine Courts including Strengthening Use of Alternative Dispute Resolution*, DPK CONSULTING, http://www.dpkconsulting.com /index.php/en/component/content/article/85-argentina/153-improve-the-operation-of-the-argentine-courts-including-strengthening-use-of-alterative-dispute-resolution (last visited Aug. 26, 2011).

302. For more information on Iniciativa para el Acceso a la Justicia in Argentina, see *Casas de Justicia en General Pico, La Pampa*, ALIHUEN, http://www.alihuen.org.ar/index2.php?option=com_ content&do_pdf=1&id=969(last visited Aug. 3, 2011).

303. *Id.*

counsel.[304] Even though Argentina does not face challenges similar to the ones in Guatemala or Colombia, in terms of conflict and unrest, the *Casas de Justicia* in this country have developed other significant traits and functions; for example, *Casas de Justicia* have become a place where citizens convene, not just for the resolution of their disputes, but also for community building.[305]

In Brazil, individual judges have taken it upon themselves to experiment with and implement a multi-door model in their courts, similar to the *oficinas multi-puertas* in Argentina, to promote efficiency and reduce backlog.[306] This has been possible due to the fact that, under the civil procedure code in Brazil, judges have broad discretion in the promotion of ADR,[307] allowing them the flexibility to innovate and expand their role beyond adjudicating to resolving disputes. The goal of these efforts has been to produce satisfactory results for those involved and to promote "social pacification"[308] for society at large.[309] One example of this organic and innovative development has been the move to ease confidentiality requirements in home financing mediation cases; this rare gesture aided those involved in home financing mediation by allowing them to gather information regarding their options for resolving their own disputes.[310] Apart from the activity of individual judges, there has been a recent resolution to advance ADR issued by the National Council of Justice in Brazil.[311] It is important to note that before the resolution was issued representatives of various sectors of Brazilian society, in a

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304. *Casas de Justicia* have been established in the provinces of Buenos Aires, Rio Negro, Santiago del Estero and Tierra del Fuego. See *Modos de Acceso a Justicia*, COMISIÓN NACIONAL DE ACCESO A JUSTICIA, http://www.csjn.gov.ar/accjust/docs/cuadro.jsp (last visited Aug. 26, 2011). A video on *Casas de Justicia* is available online. PODER JUDICIAL PROVINCIA DE RIO NEGRO, http://www.jusrionegro.gov.ar/inicio/casajusticia/video.php (last visited Dec. 18, 2012). *See also Programa "Defensorias Decentralizadas en* Casas de Justicia," DEFENSA PÚBLICA DE LA PROVINCIA DE BUENOS AIRES, www.defensapublica.org.ar/CasadeJusticia/Res_y_PROGRAMA.doc (last visited Dec. 18, 2012) (discussing the formation of *Casas de Justicia* in Buenos Aires).

305. For a video on *Casas de Justicia* in Argentina, *see Casas de Justicia—Poder Judicial del Río Negro*, PODER JUDICIAL PROVINCIA DE RIO NEGRO, http://www.jusrionegro.gov.ar/inicio /casajusticia/video.php (last visited Aug. 20, 2011).

306. *See* Gomma de Azevedo, *supra* note 299. Examples of Brazilian systems similar to the multi-door courthouse in the United States: The Forense Mediation Service of the Tribunal of Justice of the Federal District, the Conciliation Nucleus Previous to the Process of the Tribunal of Justice of Bahia, the Mediation Service of Family of the Tribunal of Justice of Santa Catarina, the Program of Mediation of the Financial Housing System of the Regional Tribunal of Justice of Unit of Region No. 4, The Program of Community Mediation of the Tribunal of Acre, the Multi-door Courthouse in Curitiba established by the Special Justice in Curitiba by the Tribunal of Justice of Paraná. *See id*. at 78.

307. "O juiz dirigirá o processo conforme as disposições deste Código, competindo-lhe: I - assegurar às partes igualdade de tratamento; II - velar pela rápida solução do litígio; III - prevenir ou reprimir qualquer ato contrário à dignidade da Justiça; IV - tentar, a qualquer tempo, conciliar as partes." Lei No. 8.952 de 13 de Dezembro de 1994, Art. 125, *available at* http://www.jusbrasil.com.br/diarios/37942531/djpr-18-06-2012-pg-39.

308. "Social pacification" is a term broadly used in Brazilian society to refer to the need to address social violence.

309. *See* Gomma de Azevedo, *supra* note 299.

310. *Id.*

311. *See* Proposal for New Civil Procedure Code (2010), *available at* http://www.senado.gov.br/senado/novocpc/pdf/Anteprojeto.pdf (last visited June 18, 2011); *see also* Mariana D. Hernandez-Crespo, *Securing Investment: Innovative Business Strategies for Conflict Management in Latin America*, *in* ADR IN BUSINESS: PRACTICES AND ISSUES ACROSS COUNTRIES AND CULTURES 449, 496-97 (Arnold Ingen-Housz ed., 2011).

series of recent consensus building single-text documents,[312] had already expressed the potential they saw—not just to provide access to justice, but also to promote "social pacification."[313]

One of the most recent and systemic efforts to implement the multi-door model has taken place in Paraguay, where the establishment of *Casas de Justicia* has been part of an ongoing effort to strengthen democracy through citizen participation. This unusual model was developed by the Centro de Estudios Judiciales, a non-profit organization, and functions with the support of the local executive branch of state government and The National Endowment for Democracy (NED) whose financial support and collaboration was vital for the development of this model in Paraguay.[314] It departs from the USAID implemented model[315] by establishing a relationship with the executive power and intensely focusing on the inclusion of collaborative governance, in addition to private conflict resolution, given the high polarization of that society. [316] In this way, the Paraguay model most closely resembles this Article's proposal in its use of ADR for systemic inclusion and citizen participation in collaborative governance through all stages of the policy continuum—deliberative democracy, collaborative public management, and alternative dispute resolution in the policy process.

The development of the first *casa de justicia* began in 2008 in the city of San Pedro, one of the poorest regions in the country, and is a project of the government of the Department of San Pedro and the National Endowment for Democracy (NED).[317] Paraguay's project to develop *Casas de Justicia* aims to integrate the governmental, business, and civic sectors through the resolution of disputes and the prevention and management of conflict. The San Pedro *casa de justicia* seeks to address the barriers to access to justice in Paraguay, which includes a lack of access to the courts, an absence of knowledge of citizens' rights, court backlog, corruption, fear of retaliation, and lack of channels for public dispute resolution.

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312. One example of implementing a participatory and inclusive decision-making process was a consensus building project conducted by the University of St. Thomas School of Law in Brazil in 2007-2008. Through the use of mini-publics, which gather together representatives of different sectors of Brazilian society, the consensus-building project explored the potential of the multi-door courthouse in Latin America to build participatory capacity and to maximize their national dispute resolution systems. Hernández Crespo, *Building*, *supra* note 19, at 454.

313. They also noted how the multi-door courthouse could work to relieve the judicial system of cases better suited to an ADR process, thus leaving in the court system only those cases requiring public adjudication. The representatives also considered the multi-door courthouse as generally increasing the level of satisfaction with the outcome and the likelihood of compliance, therefore acting as an effective and efficient enforcement mechanism. They noted that the multi-door courthouse could act as a catalyst to bring citizens into closer contact with the legal system, which could also serve to make the judiciary more transparent. Similarly, the proximity of ordinary citizens to the judiciary could help close the gap between law on the books and law in action. *Id.*

314. Interview with Rivas, *supra* note 274.

315. *Id.*

316. Rivas, CASA DE JUSTICIA, supra note 272.

317. For more information on *Casas de Justicia* in Paraguay, see Marta Rivas et al., Modelo de Casa de Justicia en Paraguay San Pedro: Abriendo Puertas al acceso a la justicia y participación, LA REVISTA JURÍDICA LA LEY PARAGUAYA, *available at* http://www.cej.org.py/files/06-09-10-Revista%20la%20Ley-Casa%20de%20Justicia.pdf (last visited June 18, 2011); *Modelo de Casa de Justicia en Paraguay*, MEDIOS ALTERNETÍVOS DE RESOLUCIÓN DE CONFLICTOS, *available at* http://www.cej.org.py/files/06-09-10-Revista%20la%20Ley-Casa%20de%20Justicia.pdf (last visited June 18, 2011). For more information on the National Endowment for Democracy, *see* The National Endowment for Democracy, http://www.ned.org (last visited June 18, 2011).

Some of the issues addressed by the *casa* include land and environmental issues, housing, domestic violence, child support, and paternity.

This multi-door model seeks to diminish levels of social conflict by promoting methods of participatory justice, such as mediation, processes of social dialogue, and consensus building. This is especially important given the polarization and antagonism that exists among different sectors in society, and is exacerbated when dealing with marginalized communities. In this regard, the project in Paraguay attempts to foster democracy by seeking solutions for common disputes, with a strong emphasis on inclusion, especially with regard to those that have been traditionally excluded from the decision-making process. There is also an emphasis on the promotion of community mediators.[318] A network of access to justice has been developed, including the following institutions: Judicial Power, Justice of Peace, Municipality, State Governing Authorities, Prosecution, Health Center, Institution of Education, National Police, social mediators, and community leaders. These organizations work together with the *Casa* to assist citizens that are referred to their services and to guide them throughout the process until the final resolution of their cases. This is accomplished through documentation, which helps register each case and therefore enables follow up by the institutions that participate in this network. In this way, the *Casa* promotes coordination among institutions outside of the center.[319]

The first objective of the *Casa de Justicia* San Pedro is to improve access to justice, ADR, and mediation services. To this end, the *Casa* works to promote a more participatory perspective and methodology for the system of conflict resolution at the local level, where people are accustomed to top-down solutions that force citizens to assume a passive role and the government a paternalistic role. It is also important to note the involvement of women in the Paraguay *Casa*, which has empowered them to be protagonists in a participatory justice model.[320] In addition to the presence of women mediators, women have accounted for 75% of the citizens who have approached the *Casa* for assistance and 80% of the participants involved when capacity building has been offered.[321] The areas of conflict that have been resolved through mediation include child support and custody, family conflict, conflicts between neighbors, and breaches of contract.[322] The facilitators and promoters of access to justice have screened 128 cases; out of those, 21 were sent to mediation and handled by the social mediators for the *Casa.* These cases directly benefitted 40 people and indirectly helped 200 more.[323] The remaining 107 cases were directed to the following institutions: Public Defender for Children and Adolescents, Justice of Peace, Agency for Children's Rights, Public Prosecutor, National Police, Birth Registry, Institute of Rural Development, State Secretary of Social Programs, Direction of Social Welfare, Depart-

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318. Rivas, CASA DE JUSTICIA, *supra* note 272. *See also Experiencias de Accesso a Justicia en San Pedro*, http://www.cej.org.py/index.php/noticias/39-noticias-del-cej/585-jornadas-de-derecho-judicial (last visited June 18, 2011).

319. Rivas, CASA DE JUSTICIA, *supra* note 272.

320. Interview with Rivas, *supra* note 274.

321. Rivas, CASA DE JUSTICIA, *supra* note 272.

322. *Id.*

323. *Id.*

ment of Identification of the National Police, Ministry of Education, and the State Secretary of Health.[324]

The second objective of the San Pedro *Casa de Justicia* is the prevention and management of social conflicts. The social mediators deal with current disputes and with conflicts that have not yet escalated into disputes. Among the types of conflict that social mediators have handled are issues over land and academic scholarships as well as internal issues within community organizations. The constituents that have come to the *Casa de Justicia* for assistance regarding public conflict include teachers of public institutions, Administrators of the Local Public Health Center, the Committee of Women, an organization of farmers without land, student governments, and municipal governing authorities.[325] Through the *Casa, mesas de diálogo social* (round tables of social dialogue) have been developed to assist in the resolution of these issues among social actors by enabling trained facilitators to help using participatory techniques.[326] These *mesas* have been used not only to enhance public dispute resolution, but also to foster other experiences of democratic governance by incorporating citizen participation into the crafting of public policy.[327] It is important to note that this is a region with an extensive degree of civic organization, which has given it the leverage to bring high-level decision makers to the table, pressuring them by measures such as closing the streets. Even though these measures have been primarily reactionary, more emphasis has currently been placed on making citizens part of the decision-making process, *ex ante*.[328] To support these efforts, a new Paraguayan law has been issued to help consolidate the role of the *Casas* in the promotion of citizen participation in policy-making at the municipal level.[329]

Casas de Justicia have taken root in a number of other countries as well. Bolivia, for example, has developed a multi-door model with two institutions to provide inclusion of the formal judicial system as an option in dispute resolution for the poor and to offer alternative methods of conflict resolution and legal representation in the framework of protecting citizens' constitutional and human rights. To this end, the institutions called *Casas de Justicia* offer information to citizens regarding their rights as well as legal representation to protect and enforce their rights before the court system and any other competent authority. One of the interesting features of the *Casas de Justicia* is that they provide a broad range of services in paternity cases, including legal, psychological, medical, and social assistance. Additionally, these institutions serve as a community center where citizens can learn about their rights and civic duties.[330] Bolivia has also implemented a second institution within the multi-door model, called the Integrated Centers of Justice, which seek to provide access to justice and ADR processes through a co-participatory mechanism with the judicial system, the public defend-

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324. *Id.*

325. *Id.*

326. Interview with Rivas, *supra* note 274.

327. Rivas, CASA DE JUSTICIA, *supra* note 272.

328. Interview with Rivas, *supra* note 274.

329. SAN PEDRO ABRIENDO PUERTAS, http://www.cej.org.py/sanpedro/abriendopuertas.html (last visited Mar. 21, 2013).

330. *See also* Redacción Central, *Abren en la "Casa de Justicia"*, LOS TIEMPOS, Dec. 20, 2006, http://www.lostiempos.com/diario/actualidad/local/20061220/abren-en-la-casa-de-justicia_29394_29394.html.

er, and other governmental entities. These efforts are a part of a broader strategy to strengthen the judicial system by improving organization and court performance.[331]

Ecuador and Peru have also developed adapted models of *Casas de Justicia.* The multi-door model established in Ecuador, called "Centers of Equity and Justice," consist of a judge, prosecutor, and public defender. The goal is to promote access to justice in marginalized communities. To carry out this initiative, there is a collaborative effort with universities to contribute with *pro bono* work through legal clinics.[332] The *Casas* in Peru have been developed with the goal of increasing access to justice in marginalized communities, to whom the court system has traditionally been remote and inaccessible given its level of complexity and fragmentation.[333] The *Casas de Justicia* are an attempt to address domestic violence, especially given the affect it has on the well-being of children. There is also a strong emphasis on the promotion of social inclusion. Some of the key players have included the World Bank[334] and the Inter-American Development Bank, who have collaborated with the Minister of Justice and the Minister for Women and Social Development.

Casas de Justicia have also been established in El Salvador, a country which faced 12 years of civil war that ended with a peace accord in 1992.[335] Similar to *Casas de Justicia* in other countries, the *Casas* in El Salvador, partnering with the local government, aim to improve access to justice in rural communities. These *Casas de Justicia* have been established primarily in places facing high conflict and judicial backlog. To support this cause, the judiciary has been greatly involved in the *Casas* through committees of coordination. To date, the *Casas* in El Salvador have successfully assisted in reducing family and neighborhood cases.[336]

In the Dominican Republic, the model of *Casas de Justicia* is run, promoted, and coordinated by a non-profit organization, Participacion Ciudadana, with important support from USAID funding.[337] The UNDP report on National Human Development from 2005 indicated that "90% of the Dominican Republic citizens consider themselves as not having easy access to justice."[338] To address this challenge, Participacion Ciudadana began efforts to establish *Casas comunitarias de*

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331. For more information on Integrated Centers of Justice in Bolivia, *see* USAID, SUPPORT TO SANTA CRUZ (2008), *available at* http://pdf.usaid.gov/pdf_docs/PDACL880.pdf (last visited Oct. 15, 2012).

332. *La comunidad tendrá más acceso a la Justicia*, LA HORA (Jan. 10, 2011), http://www.lahora.com.ec/index.php/noticias/show/1101076279/-1/La_comunidad_tendrá_más_acceso _a_la_Justicia.html.

333. For more information on *Casas de Justicia* in Peru, *see, e.g.*, *Casas de la Justicia Inauguradas* MINISTERIO DE JUSTICIADE PERÚ, http://www.minjus.gob.pe/casa-de-la-justicia/casas-de-la-justicia-inauguradas/ (last visited Aug. 3, 2011).

334. *Access to Justice Powerpoint*, *supra* note 182.

335. *See El Salvador*, DPK CONSULTING NAVIGATING CHANGE IN THE PUBLIC SECTOR 3 (February 2002) (on file with author). For a comprehensive overview of the situation in El Salvador, see *Achievements in Building and Maintaining the Rule of Law*, *supra* note 10.

336. *See* William E. Davis & Razila K. Datta, *La Implementacion de Programas de RAC en Sectores de Justicia en Desarrollo*, *available at* http://www.sistemasjudiciales.org/content/jud/archivos/nota archivo/860.pdf; Davis, *Lessons*, *supra* note 127, at 9.

337. Interview with Pearson de Gonzalez, *supra* note 191.

338. Annette Pearson, Proyecto de la Casa de Justicia de Santiago, República Dominicana (2006) (unpublished manuscript) (on file with author) (citing *Resultados de la observación: "Acceso a la justicia"*, año 2 no. 2 BOLETÍN OBSERVATORIO JUDICIAL 6 (2006)).

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justicia (community justice houses) in the country. These *Casas* have been developed with the goal of disseminating knowledge regarding citizens' rights, providing access to ADR processes and legal assistance, and fostering community development.[339] As part of the services available, they offer workshops on many topics including legal knowledge, access to justice, and participatory budgeting. The jurisdiction of *Casas comunitarias de justicia* is fairly broad, ranging from criminal cases, such as theft and fraud, to landlord-tenant disputes and issues regarding domestic violence, alimony, and child protection.[340] Mediators have reported the use of mediation has helped lower the instances of violence in the settling of disputes within families and communities by strengthening those relationships.[341] When disputes are not resolved through the *Casas comunitarias de justicia*, they are referred to the district attorney, the public defender, or to the appropriate competent agency or ministry, such as the Ministry of Family and Children, the Ministry of Public Health, or the Ministry of Telecommunications.[342] Despite the recognition of the necessity of the *Casas comunitarias de justicia,* community leaders have noted the *Casas* lack the needed funds to operate and have requested further financial support from the private and public sectors.[343]

Unlike the models previously discussed, the *Casas de Justicia* in Costa Rica are merely mediation centers where every "door" leads to mediation. In Costa Rica, *Casas de Justicia* are mainly community mediation centers,[344] which offer no other dispute resolution method.[345] The centers are characterized by the central role of the mediator who, through an open dialogue, guides the parties in the resolution of their conflicts. The service is free-of-charge, and lawyers generally do not assist parties. The scope of the conflicts addressed in the *Casas de Justicia* ranges from small damages, nuisance claims, and conflicts among neighbors, to conflicts involving consumers, business, and labor.[346] Cases such as felonies, misdemeanors, and child abuse can be referred to the appropriate governmental institution.[347]

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339. *See* USAID, JUSTICE PROJECT QUARTERLY REPORT APRIL-JUNE 2009, http://pdf.usaid.gov/pdf_docs/PDACO289.pdf (last visited June 18, 2011) (discussing the USAID Justice Project in the Dominican Republic, which involved the *casas comunitarias de justicia*); *Casa Comunitaria de Justicia*, PARTICIPACIÓN CIUDADANA (Aug. 18, 2010), http://www.pciudadana.org/documentos/proyectos/11/ccj.pdf; Marcelo Peralta, *Casa Comunitaria de Justicia de Santiago asiste a 46 mil personas en dos años*, EL NUEVO DIARIO, (Oct. 10, 2008), http://www.elnuevodiario.com.do/app/article.aspx?id=127839; *Casa Comunitaria de Justicia Para Cobijar Nuestros Derechos*, *available at* http://www.pciudadana.org/documentos/proyectos/11/ccj.pdf.

340. Juan M. Ramirez, *Miles de conflictos se dirimen en Casas Comunitarias de Justicia*, HOY (Nov. 8, 2009), http://www.hoy.com.do/el-pais/2009/11/8/301142/.

341. *Id.*

342. *Id.*

343. *Id.*

344. For a discussion of community mediation centers and their benefits, *see supra* note 200.

345. Sofia Chacon, *Casas de Justicia en Costa Rica*, MINISTERIO DE JUSTICIA Y PAZ DE COSTA RICA, http://culturadepaz.mjp.go.cr/index.php?option=com_content&view=article&id=103%3Acasas-de-justicia-en-costa-rica&catid=35%3Adinarac&lang=es (last visited Aug. 6, 2011); *see also Casas de Justicia*, MINISTERIO DE JUSTICIA Y PAZ DE COSTA RICA, http://www.mjp.go.cr/index.php?option=com_content&view=article&id=76&Itemid=59 (last visited Aug. 24, 2011).

346. *Id*.

347. *See* Chacon, *supra* note 345; *see also Modernization of Judicial Branch Administration, Organization, and Procedure*s, TETRA TECH DPK, http://www.tetratechdpk.com/dpkconsulting/en/component

As can be seen through these examples, different countries have multiple and varied experiences of multi-door models. However, information about them is still scattered. Each effort seems to be, to some extent, isolated from other similar experiences in the region. If the aim is to optimize the potential of the multi-door models in each country, establishing both a consolidated source of information about *Casas de Justicia* and *oficinas multi-puertas* throughout the region as well as systemic lines of communication could be of great benefit among the developers of the multi-door model in each country. Such an exchange should be fairly effortless given modern advances in technology, as will be discussed at greater lengths below.

C. The Untapped Potential of Casas de Justicia in the Promotion of Systemic Inclusion

As discussed above, the multi-door courthouse model in Latin America is currently implemented through *Casas de Justicia* and, to a lesser degree, *oficinas multi-puertas.* The following sections of this Article will focus on the potential of the *Casas de Justicia*, since they incorporate higher levels of community engagement. Nonetheless, some of the proposal suggested could also be adapted and applied to *oficinas multi-puertas.*

While the current *Casas de Justicia* have allowed for the promotion of private and, to a limited extent, public dispute resolution—mainly in low-income communities—it seems worthwhile to explore the untapped potential of an adapted form of *Casas de Justicia* to foster inclusion and broader participation. First, it could promote inclusion by encompassing all citizens and integrating marginalized practices into mainstream practices. Second, this adapted model of the *Casas de Justicia* could contribute to the development of citizens' capacity for decision-making regarding the appropriate forum for private conflict management and dispute resolution. Rather than maintaining the administrative routing of cases that is essential to the early multi-door courthouse model, the adapted *casa de justicia* could foster individual self-determination in the process of selecting dispute resolution. Third, using facilitative processes, citizens could not only have an experience of the maximization of joint gains, but also use it as an opportunity to develop their problem-solving capacity in private conflict management and dispute resolution. Fourth, the development of citizen capacities in the resolution of the private disputes could, in turn, be transferred to interactions in the public square, thereby affecting the *caudillo* mentality. In this regard, *Casas de Justicia* could play a more systemic role by assigning an organizational ombuds function to the conflict assessor and including greater public conflict resolution and other forms of collaborative governance.

/content/article/61-costa-rica/90-modernization-of-judicial-branch-administration-organization-and-procedures-.html (last visited June 22, 2011).

1. Encompassing All Citizens and Integrating the Mainstream and Marginalized Local Practices of the Invisible Majorities

As examined earlier, there are significant structural issues preventing integration of the formal and informal sectors in Latin America. ADR is no less influenced by this reality, which results in a *de facto* segregation, due to lack of access to justice in low-income communities. While mediation has been used in an attempt to remedy this situation, it has had limited effects as a result of lack of recourse to the judiciary and the impact this has had on the mediation process as well as on the enforceability of the agreements. It is in this context that *Casas de Justicia* came into existence, addressing this issue and expanding access to justice for the poor by providing them with connections to the formal judicial system, thereby going beyond mediation to provide a fuller range of options to effectively deal with conflict.

Casas de Justicia bridge the gap between legal discourse and local practices, especially in poor or remote areas. They are singular in their creative approach when delivering governmental and legal services to marginalized populations who, whether because of cost, distance, or time, have not had access to them.[348] The creation and implementation of the infrastructure for *Casas de Justicia* have represented a significant investment in Latin America. Even though providing a fuller range of options for the poor has been a quantum leap forward, increasing access to justice, *Casas de Justicia* still have further potential to be a powerful tool in establishing a solid foundation for a more sustainable rule of law. If *Casas de Justicia* were to encompass all citizens, rather than exclusively serving the disenfranchised majority, they would be able to provide participatory experiences for all sectors of society, which could, over time, lead to further enhancing dispute resolution and conflict management capacities.

The expansion of *Casas de Justicia* to include all citizens could also provide a platform for interactions between the currently disenfranchised and the greater community. If, after this expansion, *Casas de Justicia* are connected with each other, it would be possible to integrate the marginalized local practices of the invisible majorities with mainstream practices.[349] If a conflict arises between the local practices and mainstream practices, democratic deliberation could ensue.[350] Currently, there are ongoing efforts in some countries to link *Casas de Justicia;* but, to be more effective, these efforts should be formalized. By broadening the scope of *Casas de Justicia* and interconnecting them among themselves, there could be greater communication in which the invisible majorities could have a significant role in developing a foundation for a more sustainable rule of law.

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348. The muti-door courthouse can address massive levels of social exclusion and contribute to the end of cycles of instability. This happens, in part, because the multi-door courthouse provides a way for stakeholders to become active participants and develop capacities for conflict resolution. This increased capacity could make its way into the public square and be applied to public conflicts. *See* Hernández Crespo, *Securing Investment*, *supra* note 311, at 476.

349. *See generally* Hendrix, *Guatemalan Justice Centers*, *supra* note 195 (articulating the importance of integrating local practices and traditional forms of justice, as long as they are not in violation of human rights).

350. Bingham, *Collaborative Governance: Emerging Practices*, *supra* note 14, at 277 (articulating the recent development of deliberation and dialogue).

2. Promoting Citizens' Decision-Making and Problem-Solving Capacities in Private Conflict Resolution

Second, while the adapted model would remain a vehicle for delivery of integrated dispute resolution services, it would transform the role of conflict assessors, enabling them to identify the root causes of systemic issues and empower citizens to select the most appropriate forum for the resolution of their disputes. Thus, it would foster self-determination, enhanced decision-making capacity, and, when facilitative processes are chosen, enhanced problem solving capacity as well. The root cause identification, through the inclusion of an ombuds function, could provide the starting point for setting up agendas of collaborative governance efforts to address systemic issues.

If *Casas de Justicia* are to be further utilized as an essential tool for contributing to a foundation for a more sustainable rule of law, their purpose needs to be expanded beyond managing conflicts and resolving disputes to empowering citizens. To promote citizen decision-making and problem-solving capacities in private conflict resolution, it is essential to focus not only on resolving the specific dispute or managing the specific conflict, but on deliberately emphasizing the enhancement of citizens' capacities as well, which are also referred to as "civic capacity." Xavier Souza Briggs defines "civic capacity" as:

> the extent to which the sectors that make up a community are (1) *capable* of collective action on public problems (the resource dimension), given the norms and institutional arenas for local action; and (2) *choose* to apply such capability (the dimension of effort, will and choice, or "agency").[351]

To this end, Peter Muhlberger emphasizes the need for the development of what he calls "human agency," which he considers to be of critical importance for civic engagement.[352] Muhlberger defines human agency as "the capacity to choose and execute actions consistent with a coherent and reflexively determined identity."[353]

Citizens' participation in the management of their own conflicts and resolution of their own disputes can contribute to building civic capacity and human agency.[354] Opening the spectrum of dispute resolution options for citizens, which fosters decision-making capacity, is especially important in the Latin American context because citizens generally consider their only options to be resignation to their plight, violent redress of wrongs, or, if they can afford it, recourse to the

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351. BRIGGS, DEMOCRACY, *supra* note 201, at 13.

352. *See* Muhlberger, *Human Agency*, *supra* note 231, at 174 (arguing that new research is necessary in order to explore ways to revitalize the public square. Muhlberger offers the agency theory as a theoretical framework, "which helps identify facets of social processes vital for understanding how the e-public sphere might be vitalized. The key explanations considered here—the economy of attention, psychosocial structures, and development—represent some important targets for research, and agency theory suggests interrelations between these explanations."). *See also* Peter Muhlberger, *Democratic Deliberation and Political Identity: Enhancing Citizenship* (2005) (paper prepared for the International Society of Political Psychology, 28th Annual Scientific Meeting), *available at* www.geocities.com/pmuhl78/PolIdentity.pdf.

353. *See* Muhlberger, *Human Agency*, *supra* note 231, at 164.

354. *See* Hernández Crespo, *Building*, *supra* note 19.

judiciary. In this paradigm, citizens perceive themselves as incapable of effectively working out their own private conflicts. Force, either through personal violence or through the legitimate coercive power of the judiciary, is the only option other than resignation. The middle ground between force and resignation—namely the spectrum of options for dispute resolution—is neither widely known nor considered in most countries in Latin America.

Even though the multi-door courthouse model in several countries already offers a broad spectrum of options for private dispute resolution, ranging from facilitative to adjudicative processes, the model can be altered to foster greater decision-making capacity in citizens.[355] In the original multi-door courthouse model, a screener was the one to initially receive and reroute particular cases. This rerouting of cases played an essential role in the model. If, however, the aim is to build decision-making capacity regarding the selection of the appropriate forum, [356] the position of the screener needs to be altered in the new model to become a more sophisticated position of a conflict assessor. This conflict assessor would use his or her conflict resolution expertise to guide citizens in the decision-making process[357] so that they are empowered to make an informed decision in the selection of the most appropriate dispute resolution forum.[358] This would enhance parties' self-determination,[359] which is of critical importance for the promotion of partici-

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355. "Capacity building" as discussed in this article is based on Sen's notion of development:

> Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy. Expanding the freedoms that we have reason to value not only makes our lives richer and more unfettered, but also allows us to be fuller social persons, exercising our own volitions and interacting with—and influencing—the world in which we live.

SEN, *supra* note 1, at 14-15.

356. In learning to assess a conflict, parties can learn to identify the different sources of conflict (such as perceptions, interests, needs and/or values) and other criteria for selection of the forum, such as cost, speed, the need for precedent, remedies, preservation of the relationship and confidentiality, among others. Sander, *Fitting*, *supra* note 245; Sander, *Matching*, *supra* note 245.

357. ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 72-93 (2005). As Fisher and Shapiro point out, too much autonomy can be overwhelming, but too little could have negative consequences. In order to increase the level of parties' autonomy in the selection of the forum, their expectations and concerns need to be addressed, and information about their options needs to be provided. Even though it could be argued that educating parties about their options could be time-consuming, the benefits of enhancing parties' autonomy through building their capacity to make decisions can outweigh the costs. Yet, the process of training in the basic characteristics of, and distinctions between, the various dispute resolution methods can be simplified through the use of visual media and the guidance of the screener and their lawyers. As in other areas of life, parties engage regularly in efficient information-gathering to gain confidence in their decision-making.

358. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 776 (1999) [hereinafter Nolan-Haley, *Informed Consent*]. Although Nolan-Haley is addressing informed consent in mediation, the broad principles of informed consent are applicable to the decision-making process in the selection of the appropriate forum.

359. Self-determination is defined and highly valued by the Model Standards of Conduct for Mediators:

> Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome . . . . A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressure from court personnel, program administrators, provider organizations, the media or others.

pation in conflict management and dispute resolution. It could also increase parties' sense of ownership over the conflict resolution process and over the outcome. It could also broaden their expectations of what could be achieved through a collaborative partnership within the context of conflict management and resolution.[360]

Regarding problem-solving capacity, one of the advantages of the multi-door courthouse model is that cases that are suitable to be resolved through facilitative processes can provide citizens with an experience of the maximization of joint gains,[361] which enables them to find options that will resolve their disputes and

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MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I. Nevertheless, there has been much debate about mandatory versus voluntary court-connected ADR. *See* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1891-92 (1997) (summarizing the dispute). *See, e.g.*, Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN L. REV. 1593 (2005) (arguing for voluntary court-connected ADR); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993) (arguing for voluntary court-connected ADR); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996) (arguing for mandatory court-connected ADR); Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1618 (1997) (arguing for mandatory court-connected ADR). The voluntary nature of ADR itself is also being questioned. *See* Fiss, *Against Settlement*, *supra* note 39, at 1085-90; Amy Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1147, 1160-61 (2009). Others have emphasized the principle of self-determination as a core foundational value in the mediation process. *See, e.g.*, Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) [hereinafter Welsh, *Thinning Vision*]; Joel Kurtzberg & Jaimie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53 (1997); James Alfini, *Mediation as a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators*, 49 S. TEX. L. REV. 829, 830-31 (2008) ("Party self-determination is the most fundamental principle of mediation . . . ."). Also, several scholars have argued for self-determination as a fundamental principle in ADR at large. *See, e.g.*, Lisa Blomgren Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002) [hereinafter Bingham, *Self-Determination*]. Finally, there is a connection between the experience of self-determination and the experience of procedural justice, which promotes the rule of law. For more on the connection, see *supra* note 152. *See* Welsh, *Thinning Vision*, *supra* at 7-8 (citing E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities* 2-5 (Am. B. Found. Working Paper No. 9403, 1994); Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System, 44 HASTINGS L.J. 1, 43-44 (1992); Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 18-21 (1996); Welsh, *Thinning Vision*, *supra*, at 7-8 ("Self-determination in mediation has deep significance for the parties who participate in the process because the meaning and implementation of self-determination almost certainly affects parties' judgments regarding the procedural justice furnished by the mediation process, as well as their level of commitment to the settlement they reach in mediation.").

360. *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 114 (2002) (citing Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 69 (2000)) (increased participation is a result of implementing DSD methods in decision-making, citing research showing that "people who participate in a process are more likely to comply with the resulting decisions") [hereinafter Lande, *Good-Faith*].

361. Yet, as pointed out earlier, the courts are in a unique position to encourage petitioners to explore other avenues for resolution, in which their specific needs might be better addressed.

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satisfy their interests.[362]   A facilitated participatory experience of private conflict resolution may lead citizens to learn that there are options beyond mere winning and losing.[363]   Even those that opt for an adjudicative process, and thus will not have the same exposure to participatory problem solving, will at least have gained an overview of the options and benefits of facilitative processes.

The role of a skilled facilitator could make the difference between citizens being guided as passive spectators in the resolution of their own disputes and citizens being active participants.   Given the significance of the potential experience of the maximization of joint gains to be had in the dispute resolution process, it is essential for the facilitators to focus not merely on the resolution of the specific dispute, but also on the development of the citizens' problem-solving capacity. The different facilitative processes, such as negotiation, mediation, Arb-Med, and

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362. Fisher and Ury offer the classic example of two children asking their mother to settle a dispute over an orange: when the mother adjudicated the dispute, she simply cut the orange in half. But a lot of value was wasted, because one child wanted the peel to make a pie, while the other wanted the pulp to make juice. As Fisher and Ury point out, had the mother asked the children why each one wanted the orange, thus moving discussion about the conflict from position to interests, the outcome could have gone beyond fairness to maximization of joint gains. One child would have gotten the entire peel and the other the entire pulp, with nothing wasted and with a higher level of satisfaction. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56–57 (2d ed. 1991). Facilitated participatory experience of conflict resolution can also enhance the scope of what issues are dealt with. Parties can address issues underlying the dispute that an adjudicative proceeding might overlook, and address a greater number of issues in an agreed to settlement. This can not only satisfy the interests of the parties but also prevent future disputes. *See* Andrea Schneider, *Building a Pedegogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 131 (2000) (describing how negotiation and mediation allow implementation of ideas from preventative law, by addressing issues beyond what the parties are litigating or might litigate, "so that all of the elements of the dispute are discussed, evaluated, and dealt with in a final agreement") [hereinafter Schneider, *Pedagogy*].

363. Those who opt for facilitative ADR processes, such as negotiation, mediation, Arb-Med, and mini-trial, among others, will, with the assistance of a skilled facilitator, be introduced to the distinctions between positions, interests, values and needs, the distinction between value creation and value claiming, the process of generation and evaluation of options, and the drafting of an agreement. Those who opt for an adjudicative process will not have the same exposure to participatory problem-solving, but will at least have gained an overview of the options. Insofar as the *Casas de Justicia* are similar to community mediation centers, a number of benefits, such as in increased capacity to deal with local issues and leadership, will be realized. *See* Beth Gazley et al., *Collaboration and Citizen Participation in Community Mediation Centers*, 23 REV. POL'Y RES. 843, 844 (2006) ("Community mediation describes an array of community-based services and activities aimed at resolving interparty disputes . . . community mediation has been viewed increasingly by many of its practitioners as having the potential to be something more than simply a means of keeping disputants out of the court system."); *see also id.* (citing Raymond Shonholtz, *Justice from another perspective: The Ideology and Developmental History of Community Boards Program*, in THE POSSIBILITY OF POPULAR JUSTICE, 201, 201-38 (1993)) (stating that community mediation services are first-resort settlement systems for citizens alienated from the formal legal system); *see also id.* (citing Tim Hedeen & Patrick G. Coy, *Community Mediation and the Court System: The Ties that Bind*, 17 MEDIATION Q. 351 (2000)) (observing that community mediation is an empowerment tool of local citizenry, and is used to develop "community capacity for dealing with local issues and leadership"). Bingham concludes that community mediation is increasingly viewed as able to be more than just a way to keep disputants out of the court system. She identifies two dimensions into which community mediation goals can be divided: the first is related to the "fair and efficient resolution of disputes," and the second involves giving "individuals and communities power over their lives." The first dimension goals include decreasing the caseload of courts, reducing costs, promoting efficiency, increasing accessibility, implementing more appropriate processes and providing justice that is based upon community values. The second dimension involves the decentralization of decision-making, indigenous community leadership and responsibility, and reduced community tensions. *Id.*

mini-trial, among others, can serve as an opportunity to introduce citizens to the distinctions between positions, interests, values, and needs; the distinctions between value creation and value claiming; the process of generation; the evaluation of options; and the drafting of an agreement. The process could provide citizens not only with the resolution of their private dispute, but also with a learning experience.

3. The Potential of Casas de Justicia to Include Collaborative Governance

Currently, *Casas de Justicia* primarily focus on private dispute resolution, yet they have untapped potential to also include public dispute resolution and other forms collaborative governance. While *Casas de Justicia* were founded to fulfill a significant role within the community as a whole, in addition to at the individual level, they do not yet have a formal structure in place for effective public dispute resolution. To further develop this public function, it is important for the proposed role of the conflict assessor to also include an organizational ombuds function, performing root cause analysis. This function could not only help in uncovering the underlying conflict, but also in identifying systemic issues that could serve as a starting point for public conflict resolution and other forms of collaborative governance. Public conflict resolution would help address current issues, while other forms of collaborative governance would allow citizens to participate in crafting and implementing public policies.

Even though *Casas de Justicia* are not formally set up to deal with collaborative governance, the immanent needs of the people, the success the *Casas de Justicia* have had in addressing private conflict, and lack of other viable alternatives have made them a natural option for dealing with public conflict. In Colombia, for example, several areas had a dispute over water supply in recent years. Citizens approached the mediators from the *Casas de Justicia,* who then met with community leaders from the different neighborhoods and facilitated a process upon which the parties reached a mutual agreement.[364] While this mediation successfully resolved the immediate public dispute, the proposed model of *Casas de Justicia* could go beyond this to also involve citizens in developing public policies that would implement long-term solutions. In the Colombian dispute, for example, *Casas de Justicia* could serve as a strategic point where citizens could come together to regularly discuss all pressing needs and communicate not only with the local authorities, but also with national government agencies that deal with strategic planning. In this example, additional experiences of collaborative governance, through deliberative democracy and collaborative public management, could have ensued, had these agencies learned that the neighborhoods needed a greater water supply and provided the communities with long-term solutions in addition to the immediate arrangements that were mediated by the *Casas de Justicia*.

Citizen participation in collaborative governance is becoming increasingly common.[365] The experiences range from study circles to public conversations and

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364. Interview with Orlando Muñoz, Manager of the USAID Access to Justice Program in Colombia (July 26, 2011) (on file with author) [hereinafter Interview with Muñoz].

365. *See, e.g.*, UK CITIZENS ADVICE BUREAU, http://www.citizensadvice.org.uk/index/policy.htm (last visited Aug. 3, 2011) (describing the process of affecting policy, through what they call the "Evidence Cycle," which encompasses the following: client contacts a bureau for practical advice, problem

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e-government.[366] Specifically, in the case of Latin America, citizens are becoming more involved in public decision-making. For example, Brazil's successful experiences in participatory budgeting are particularly noteworthy, since, in addition to meeting the immediate needs of the people, these experiences have been able to connect the people with the government and hold the government more accountable by establishing a more transparent decision-making process.[367] The *Casas de Justicia* could be an ideal institutional setting for these experiences. The capacities for decision-making and participatory problem solving, developed in private conflict management and dispute resolution through the *Casas de Justicia,* are building blocks for more effective engagement in collaborative governance. Nevertheless, there remain inherent asymmetries of power and information, adding layers of complexity to public collaboration; this would have to be considered when implementing these experiences.

Collaborative governance is of special significance in this context because citizens are more likely to uphold a system they are a part of. By connecting all citizens, especially the disenfranchised majorities, to the government and by promoting empowerment and public participation, *Casas de Justicia* can contribute to establishing the necessary foundation for a more sustainable rule of law. This is essential in Latin America, where the role of government needs to be strengthened and brought closer to the citizens. When this is not the case, *de facto* powers, such as guerillas, drug traffickers, and paramilitary groups, often usurp governmental roles.

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recorded in evidence database, policy team identifies a trend and prepares a case, campaigns team mobilizes support for it, policy makers lobby on proposed solutions, amended policy comes into force).

366. Lisa Blomgren Bingham provides examples of how new forms of participatory governance are being used at the "upstream" stage of the policy process:

These new forms include deliberative democracy, e-democracy, public conversations, participatory budgeting, citizen juries, study circles, collaborative policy-making, and other forms of deliberation and dialogue among groups of stakeholders or citizens. They also include focus groups, roundtables, deliberative town meeting forums, choice work dialogues, national issues forums, cooperative management bodies, and other partnership arrangements.

Bingham, *Collaborative Governance: Emerging Practices*, *supra* note 14, at 287-88. In her article, Bingham provides information on actual programs and undertakings that exemplify different forms of participatory governance. For example, at the "Identifying a Policy Problem" stage, the Public Conversations Project uses facilitated, face-to-face dialogue to foster communication and mutual understanding to reduce stereotyping, defensiveness, and polarization. The goal of this program "is not agreement, but enhanced communication." *Id.* at 292 (Public Conversations Project, *available at* http://www.publicconversations.org/project/?q=node/4 (last visited Aug. 4, 2011)). At the fourth stage, "Selecting from among the Priorities," Bingham gives the example of Choice-Dialogues, promoted by Daniel Yankelovich. Choice-Dialogues takes participants through three stages: consciousness-raising, working through a problem, and decision-making or resolution. Choice-Dialogues emphasizes the distinction between dialogue and debate with dialogue being about "respectful exchanges of information and views in which people listen to find common ground and build consensus; debate is about winning and losing, in which people listen to find weaknessess and counterarguments." *Id.* at 296 (Choice-Dialogue, *available at* http://www.viewpointlearning.com/our-approaches/choice-dialogue/ (last visited Aug. 4, 2011)).

367. *See, e.g.*, *The Experience of the Participative Budget in Porto Alegre Brazil*, UNESCO, http://www.unesco.org/most/southa13.htm (last visited Aug. 3, 2011).

D. Utilizing Latin American Building Blocks

Having established some of the untapped potential that the multi-door courthouse model could have for Latin America, some ideas of how this potential could be achieved are as follows: first, if *Casas de Justicia* would serve all citizens, not just the poor, and offer an option for public adjudication through the judiciary, they could help address the issue of the three tiers of justice; second, if the role of conflict assessors would be broadened, they could both assist citizens in developing decision-making capacity in the selection of the appropriate method for the resolution of their disputes and assist with the identification of the root cause of the conflict; third, by linking the conflict assessors through regional and national forums, they could collectively identify systemic issues and develop best practices; and finally, the issues identified could serve as a starting point for collaborative governance efforts, in which representatives of stakeholders could engage in the process of suggesting policy to legislative bodies or governmental agencies to address those systemic matters.

1. Increasing the Number of Casas de Justicia and Expanding their Connection with the Judicial System

Increasing the number and expanding the reach of the *Casas de Justicia* to include other socio-economic communities, particularly the middle class, would give the model more visibility. Furthermore, this expansion would give them greater legitimacy, preventing the stigmatization of the *Casas de Justicia* as "poor man's justice" or as a marginal service to the marginalized. If *Casas de Justicia* were to have a presence in a wide variety of communities, the inclusion would be observable in physical terms and would help halt any perception of three-tiered justice.

The mere presence of the *Casas de Justicia* sends an unmistakable message that justice goes beyond adjudication. By resolving specific cases in ways other than adjudication, they are already shaping public values because the criteria for resolving those particular disputes are sometimes extra-legal. Even though this is of fundamental importance, it is equally essential that *Casas de Justicia* include an option for judicial adjudication to guarantee citizens' rights. Currently, *Casas de Justicia* in some countries include one door or option that leads to adjudication through the judicial system. Adding this option to all *Casas de Justicia* in the region is of critical importance, since facilitative processes cannot guarantee the resolution of all cases.

2. Adapting the Role of the Multi-Door Screener into a Conflict Assessor to Strengthen Citizen Participation

Drawing on the multi-door courthouse models vision of the integrated delivery of dispute resolution services, *Casas de Justicia* can have a broader and more systemic influence, going beyond private conflict management, private dispute resolution community services, and governmental services to include community conflict management, public dispute resolution, and other experiences of collaborative governance. To this end, the role of the conflict assessors would be trans-

formed to include an organizational ombuds function that uncovers underlying conflicts and identifies systemic issues.

Conflict assessors could become a more qualified version of the original multi-door screener. While in the original multi-door courthouse model, the screener was in charge of rerouting the cases to the appropriate forum for resolution, but the conflict assessors could take on an expanded version of this role. To achieve this, the role of the conflict assessors could be transformed to include leading root cause identification and offering guidance to citizens in the decision-making process of selecting the most appropriate forum for dispute resolution. Providing this guidance could be the key to strengthening citizen participation by encouraging citizens to become protagonists in the decision-making process for resolving their own disputes. Identifying the root cause of the conflict could be used to manage the underlying conflict of the particular disputes, as well as to uncover systemic issues. These systemic issues could be addressed through public dispute resolution. They could also serve as the starting point for developing an agenda for exercising other forms of collaborative governance.

Conflict assessors could assist in performing root cause analysis by asking questions to understand why the conflict arose and, ultimately, uncover the underlying root of the problem through persistent questioning.[368] Asking "why" first generates immediate and superficial reasons, but persistently asking "why" gradually reveals deeper reasons underlying an issue.[369] Along with the identification of root causes of conflict, "critical reframing"[370] is also essential in identifying systemic issues. Critical reframing helps to uncover the nature of the issue and possible interaction strategies based on critical questioning, continually revisiting the scale and objective of any such interactions. This process would help the parties examine possible solutions and evaluate the outcomes, allowing for greater knowledge of the conflict's different dimensions and potentially leading to a more effective resolution.

In addition, conflict assessors could significantly contribute to enhancing the parties' decision-making capacity with regard to choosing the most appropriate forum for the resolution of their dispute. Even though it could be argued citizens already make choices about everyday life, Jacqueline Nolan-Haley stresses lack of informed decisions in the mediation process can lead to undesirable results.[371] Citizens could therefore benefit from learning a process that emphasizes the steps to making informed decisions, including identifying the goal in terms of interests, needs, and values; gathering information about the options available for dispute resolution and the consequences of each; analyzing the comparative differences between the options in terms of articulated goal; and selecting the option that best satisfies the stated goal or criterion. Equipping citizens with an understanding and experience of this decision-making process could lead to the selection of more satisfactory choices.

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368. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 43 (2007) [hereinafter Sturm & Gadlin, *Systemic*].

369. *Id.* at 39-42; *see also* John Paul MacDuffie, *The Road to "Root Cause": Shop-Floor Problem-Solving at Three Auto Assembly Plants*, 43 MGMT. SCI. 479, 494 (1997).

370. Sturm & Gadlin, *Systemic*, *supra* note 368, at 45.

371. *See generally* Nolan-Haley, *Informed Consent*, *supra* note 358.

Given the essential role that the conflict assessors fill, they will need adequate training, which will be discussed below. Moreover, greater accountability must be built into the system to ensure quality performance from the conflict assessors. To achieve this, ongoing evaluations by community members who use the *Casas de Justicia* could be performed. Those involved in designing the system would need to determine the most appropriate form of evaluation.

3. Linking Conflict Assessors through State and National Forums for the Identification of Systemic Issues and the Development of Best Practices

It is important to note *Casas de Justicia* could function as "institutional intermediaries" in the communities where they have been established, given their strategic location as the principal place where citizens bring their disputes. Susan Sturm and Howard Gadlin define an "institutional intermediary" as being "located at the intersection of multiple, interrelated systems." These "boundary-spanning institutional intermediaries" are "embedded and independent," and their systemic perspective allows them to link issues, data, and people. Their position "affords access and knowledge concerning the range of problems that arise within that overall system," and puts the intermediary "in a position to generate norms, processes, and remedies that have an impact beyond a particular case."[372]

For this reason, to capitalize on the systemic role that these "institutional intermediaries" could play, state and national committees of conflict assessors within each nation could be created. The conflict assessors from individual *Casas de Justicia* would form the state committee, and representatives from each state committee would constitute the national committee.[373] In this way, the conflict

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372. Sturm & Gadlin, *Systemic*, *supra* note 368, at 39-40. An institutional intermediary is

location at the intersection of multiple, interrelated systems." They have the capacity to "address problems arising within defined systems that involve repeat players whose conduct affects those within the system, even if they do not regularly and directly interact. Their boundary-spanning position affords access and knowledge concerning the range of problems that arise within that overall system. Because they operate within defined practice domains, over time they confront problems that recur within that domain. Institutional intermediaries also interact with and have an opportunity to observe repeat players over time. They operate at the intersection of multiple governance systems, seeing the relationships among those systems. By working with these 'communities of practice,' they are in a position to generate norms, processes, and remedies that have an impact beyond a particular case. They also cultivate communities of practice as learning systems.

Id. These "boundary-spanning institutional intermediaries" are "embedded and independent" and their strategic location allows them to link issues, data, and people. It enables them to have a systemic perspective, which can be beneficial in the solution of individual conflicts by transcending the particularities of the conflict. *Id.*

373. *See* Hernández Crespo, *Making Rights Reality*, *supra* note 35 (arguing that regional and national committees need to be comprised of representatives from lower committees, rather than appointed individuals with no connection to those committees, in order to enhance horizontal and vertical communication and participation). Colombia, for example, has already taken steps in this direction. Currently, various *Casas de Justicia* in Colombia already have some form of a intermunicipal structure, based on small towns sharing limited resources. Interview with Pearson de Gonzalez, *supra* note 191. Those structures could share their experiences so other *Casas de Justicia* can benefit from their knowledge when forming regional committees that, while not sharing resources, could share information and policies. It is also important to note that Colombia has formed a national committee, and

assessors' systemic perspective that link issues, data, and people could be expanded throughout local regions and the entire nation. Moreover, these committees would act as a peer community for the exchange of experience, ideas, and best practices for a group of individuals that, at present, work without formal forums for synergy. In addition, these committees could aggregate data gathered from the state and national levels for the identification of root causes of recurring systemic conflict that could have a national impact. A national committee would also be a good avenue for providing capacity building and ongoing evaluation of the role of the conflict assessors.

4. Addressing the Identified Systemic Issues through Collaborative Governance

While *Casas de Justicia* and both regional and national committees could provide the necessary structure for the assessment and resolution of individual disputes, as well as the identification of the root causes of conflict in its broader context, they are currently limited in their capacity to address systemic conflict. Based on their objectives, *Casas de Justicia* are expected to assume a public role. Some already have a form of public dispute resolution, which is still in its early stages, but lack the development of necessary capacities to maximize their potential.[374] Furthermore, they are usually unaware of the broad variety of other options encompassed by collaborative governance.[375] Nonetheless, Partners for Democratic Change have made significant efforts to advance capacity building and participatory experiences in the region, gradually increasing awareness about these options. [376]

Casas de Justicia are strategically located to go beyond their current downstream functions by including some forms of upstream and midstream collaborative governance. As previously discussed, there are a number of processes that could be used to promote citizen participation in the different stages of design and implementation in the policy continuum. Some important considerations in the

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made some efforts to connect *Casas de Justicia*. Interview with Muñoz, *supra* note 364. However, the Colombian model could be more effective if it were to include conflict assessors and the representative structure suggested.

374. The Colombian model, for example, has dealt with several experiences of public dispute resolution. Interview with Muñoz, *supra* note 364; Interview with Pearson de Gonzalez, *supra* note 191.

375. For a brief overview of collaborative governance, see COLLABORATIVE GOVERNANCE: A GUIDE FOR GRANTMAKERS (2005), *available at* http://www.hewlett.org/uploads/files/HewlettCollaborative Governance.pdf.

376. Partners for Democratic Change (hereafter PDC) promotes conflict management and resolution, participation and consensus building, and leadership and change management techniques across the globe.   For   more   information,   see   PARTNERS   FOR   DEMOCRATIC   CHANGE, http://www.partnersglobal.org/ (last visited Aug. 6, 2011). In Argentina, PDC has been involved with local casas de justica through training in techniques to resolve disputes for the underprivileged in areas of   domestic   violence,   property   disputes,   etc.   *See*   PARTNERS   ARGENTINA, http://www.partnersglobal.org/network/argentina (last visited Aug. 7, 2011). In Peru, PDC seeks to help build consensus around contentious development issues, PDC facilitators seek to move contentious "economic and social issues beyond dialogue into long-term sustainable agreements for change." *See* PARTNERS PERU, http://www.partnersglobal.org/network/peru (last visited Aug. 7, 2011). In Brazil, PDC is focused on corporate conflict resolution involving "business mediation, work-place mediation,   governance   and   muti-stakeholder   process."   *See*   PARTNERS   BRAZIL, http://www.partnersglobal.org/network/brazil (last visited August 7, 2011).

Latin American context include the need to ensure transparency, accountability, and inclusiveness in order to effectively address the systemic conflict identified. The consensus-building method developed by Lawrence Susskind, for example, meets these criteria as an inclusionary process aimed at unity through steps of integration, which include the interests of all participants.[377]   As a method for managing public decision-making and public disputes, consensus building is highly participatory, guaranteeing full and accurate representation of the interests of all stakeholders.[378]   It is important to note that this method, despite its name, marks a radical departure from the traditional understanding of consensus, which aims for the adoption of a single, uniform view brought about through a process of assimilation, eschewing alternative views and thus preventing inclusion.

When using forms of collaborative governance, such as consensus building, the issues identified at the state and national levels by the committees of conflict assessors can become the starting point for deliberation by the representatives of all stakeholders.[379] In addition to the processes explained by Bingham, it is also important to take into account the structures pertaining to collaborative governance, as highlighted by Matt Leighninger, who classifies these structures in terms of permanency; thus, Leighninger distinguishes between two types of democratic governance:[380] "temporary organizing efforts" and "permanent neighborhood structures."   Both of these forms utilize the same "four successful principles": recruiting from previously existing groups and organizations with the goal of bringing together a broad range of citizens from various sectors of society; engaging these citizens in small, facilitated dialogues and large groups with the goal of information sharing and action planning; comparing points of view and alternative policies; and implementing change through incorporating public opinion into policy decision-making, advocating institutional change, promoting action through teams, and developing volunteer networks.   The "organizing efforts," which have been referred to as "democratic organizing" since the 1990s, have engaged hundreds, indeed thousands, of people in a variety of issues, including, but not limited to race, immigration, youth development, community-police relations, and public finance. "Permanent neighborhood structures," such as "neighborhood councils," "priority boards," or "neighbor action committees," have provided an official

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377. *See generally* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS (2006) [hereinafter SUSSKIND, BREAKING ROBERT'S RULES]. *See also*, LAWRENCE SUSSKIND ET AL., THE CONSENSUS BUILDING HANDBOOK (1999) [hereinafter SUSSKIND, HANDBOOK].

378. Consensus building is not just about reaching agreement; it is necessary for all parties to walk away "not just clear about what's been promised to them but also clear about what they've promised to others."   The goal is "*informed* consensus." SUSSKIND, BREAKING ROBERT'S RULES, *supra* note 377, at 19. "Nearly self-enforcing agreement[s]" are the ultimate goal of consensus building. *Id.* at 29-30. In consensus building, stakeholders should be better off with the final consensus than with no agreement at all. *Id.* at 21.

379. For a complete description of the identification of stakeholders and legitimate representatives and "getting the right people to the table," *see id.* at 41-60; *see also* SUSSKIND, HANDBOOK, *supra* note 377; *see also* Bingham, *Collaborative Governance: Emerging Practices*, *supra* note 14, at 273-77; Carrie Menkel-Meadow, *Getting to "Let's Talk": Comments on Collaborative Environmental Dispute Resolution Processes*, 8 NEV. L.J. 835, 842 (2008) [hereinafter Menkel-Meadow, *Let's Talk*] (identifying evidence that suggests the success of "bottom up" collaborative processes in varying issues and levels of government).

380. LEIGHNINGER, *supra* note 226, at 3 (defining democratic governance: "the art of governing communities in participatory, deliberative and collaborative ways").

forum for neighborhood decision-making.[381] Despite the weaknesses of this model, which include poor attendance and overworked representatives, it has great capacity to facilitate change.[382]

In addition to being catalysts for temporary organizing efforts, *Casas de Justicia,* when dealing with the identified issue, could also provide permanent neighborhood structures that go beyond private and public conflict resolution. They could engage local stakeholders beyond downstream enforcement, to also include design and implementation, by advising state legislative bodies and/or governmental agencies.[383] Representatives could be selected from the state forums to participate in national forums that would similarly advise national legislative bodies and/or governmental agencies about policies addressing the identified issues.[384] In this way, both forums could use the data aggregated by the state and national conflict assessors' committees as a starting point for deliberation, and to the development of alternatives to address the root causes of systemic conflict, and to suggest policies at their respective levels. While it could be argued most countries in Latin America lack the infrastructure and resources necessary for such committees to operate effectively, new technology that makes virtual communication possible has proven to be accessible and within reach of most stakeholders. Even remote and poverty stricken areas can obtain access to these virtual platforms, with a moderate level of investment.[385] This only paints what could be done in broad strokes so as to raise awareness about the potential collaborative governance has for the region. There are many options and directions in which each country could proceed concerning the numerous decisions that would have to be made, depending on local circumstances and the needs and interests of the particular stakeholders. This is a broad area that deserves further exploration to further promote a more sustainable rule of law.

IV. CRITICAL CONSIDERATIONS FOR EFFECTIVE IMPLEMENTATION IN THE LATIN AMERICAN CONTEXT

To advance systemic inclusion through participatory conflict resolution, it would be advisable to engage local stakeholders in a national Dispute System Design effort to evaluate the current system and explore ideas such as the proposal made in this Article. It would also be essential to provide the necessary capacity building for those who take part in the implementation process, including the par-

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381. *Id.* at 3.

382. *Id.*

383. LAWRENCE SUSSKIND, BREAKING THE IMPASSE 130 (1987) (arguing for the need to link informal decision making processes to the formal system of government).

384. *See* SUSSKIND, BREAKING ROBERT'S RULES, *supra* note 377, at 186-87; *see also* SUSSKIND, HANDBOOK, *supra* note 377.

385. Internet access is relatively widespread in Latin America, and free online voice, video and screen sharing software, such as Skype, can be used to facilitate regular communication among committee members. The University of St. Thomas International ADR Research Network, for example, has utilized similar technology to develop and maintain lines of communication among citizens who, even if from the same country, lack the resources to convene in person. The consensus building process carried out in Brazil illustrates how this can be carried out. Hernández Crespo, *Building*, *supra* note 19, at 438.

ties, lawyers, mediators, and conflict assessors. Finally, attention should be paid to possible obstacles in the implementation process.

A. National Dispute System Design: Engaging Local Stakeholders in the Decision-Making Process

As mentioned earlier, Dispute System Design (DSD) is an inclusive[386] process that gathers stakeholder representatives from particular organizations, communities, or political entities to create a goal-oriented system for managing their conflicts and resolving their disputes.[387] In this case, the aim is to engage local stakeholders in each Latin American country to initiate in a process of national DSD. Throughout the process, local stakeholders would participate fully in what Janet Martinez and Stephanie Smith identify as the three main phases: analyzing the system's development, performance, and effectiveness; proposing revisions or an entirely new design for the system; and creating the system itself.[388]

Some may argue ADR reform in the region should follow traditional rule-making and that there is no need for DSD. Traditional rule-making typically functions top-down, with experts designing a plan and enforcing its implementation. This gives stakeholders little say in the process, which may or may not represent their interests to their satisfaction. The problem with this approach is that some parties may not feel their interests were adequately represented. As a result, they may not comply with the ensuing decisions, and in some cases may even sabotage them.[389] Research shows that people are more likely to abide by rules when they have had a hand in creating them.[390] In this regard, as John Lande has pointed out, a highly participatory DSD process can give stronger results than traditional rule-making because it involves gaining a detailed understanding of the stakeholders' problems and interests, engaging all stakeholders in the decision-making process via facilitation techniques, and creating and evaluating new policies according to systematic procedures.[391]

DSD has been criticized for being expensive, time-consuming, and complicated to implement. Yet, as theorists such as Susan Franck have pointed out, DSD

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386. The DSD process fosters stronger relationships, problem-solving skills, and dispute resolution skills among all stakeholders. The more participatory the process, the more people will follow through on its resolutions. *See also* Peter Robinson, Arthur Pearlstein & Bernard Mayer, *DyADS: Encouraging "Dynamic Adaptive Dispute Systems" in the Organized Workplace*, 10 HARV. NEGOT. L. REV. 339, 353 (2005) [hereinafter Robinson et al., *DyADS*]. Although the authors are writing in the context of organized workplaces, the principles of DSD can also be applied in the Latin American context.

387. *See generally*, as two foundational pieces in the Dispute System Design field, URY, GETTING DISPUTES, *supra* note 210; COSTANTINO & SICKLES MERCHANT, *supra* note 210.

388. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 124 (2009). Every Dispute System Design has three constitutive elements: interests, rights, and power. Disputes resolved by mediation on the basis of interests (the parties' values and concerns) tend to give the best results, although they can take longer. Rights-based dispute resolution score high on procedural justice but may not satisfy all stakeholder interests. Finally, power-based dispute resolution works for the party with the most money and means, but can be unjust and even destructive to the losing side. All three elements are necessary, with emphasis placed on interest-based negotiation. *Id.* at 126-27 (citing URY, GETTING DISPUTES, *supra* note 210, at 3-9).

389. Lande, *Good-Faith*, *supra* note 360, at 113.

390. *Id.* at 114 (citing Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 69, 124-27, 130-32 (2000)).

391. *Id.* at 112-17.

can save time and money by foreseeing possible conflicts and setting up channels to manage them before they escalate into expensive, time-consuming disputes.[392] In addition, the method's emphasis on stakeholder involvement has been shown to result in increased public trust,[393] higher levels of self-determination,[394] and a greater sense of procedural justice.[395] In this regard, Lisa Bingham has pointed out the need to distinguish between self-determination at the design level and self-determination in the actual use of the system during the specific case. She explains DSD, at the design level, refers to control over the structure and process; at the case level, it refers to process and outcome.[396] Among these positive outcomes, the sense of procedural justice is particularly important. When a dispute resolution process respectfully and thoroughly addresses stakeholders' true interests and is perceived as fair, impartial, and truly participatory,[397] it tends to bring manifold benefits, such as greater perception of institutional legitimacy and heightened compliance with decisions and the law.[398] However, Amy Cohen has pointed out DSD also faces challenges posed by issues of scale, which need to be taken into consideration.[399] Nevertheless, scholars such as David Kahane and Bettina von Lieres have worked to protect the interests of the disenfranchised, suggesting structural measures be considered in the design and implementation process.[400]

Even though DSD may not be preferable in all cases, its preliminary organizational assessment can still be useful, since it allows us to gain a large scale perspective on issues such as power and culture from the viewpoint of the diverse

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392. Susan Franck, *Integrating Investment Treaty Conflict and Dispute System Design*, 92 MINN. L. REV. 161, 208-12 (2007). Although Franck is writing in the context of disputes arising out of bilateral investment treaties, the principles of DSD used can also be applied in the Latin American context.

393. *Id.* at 217 (arguing that the "systemic analysis" of DSD that leads to a recommendation can result in enhanced trust); *id.* at 216 (saying that the DSD process involves input from involved parties).

394. Bingham, *Self-Determination*, *supra* note 361, at 882-83 (citing Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 VAL. U. L. REV. 403 (2000); Robert A. Baruch Bush, *"What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 34 (1996); Nancy A. Welsh, *The Thinning Veil of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 93 (2001)).

395. Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 555 (2008).

396. Bingham, *Self-Determination*, *supra* note 359, at 882-83.

397. *See* Lande, *Good-Faith*, *supra* note 360, at 119.

398. Franck, *supra* note 392, at 214-15.

399. *See* Amy J. Cohen, *Dispute System Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 69 (2009) (citing DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 166-67 (2005)).

> The dangers I am envisioning arise simply when we *forget* that the idea of equivalence across scale is fictitious. Dispute system designers may reasonably find this fiction convenient, even necessary: configuring the organization, the city, the NGO, and the business as each like an individual greatly facilitates our ability to design horizontal dispute processing systems that can encompass a multitude of public and private entities in parsimonious, representative and cohering fashion. But it is a fiction nonetheless, and one that can cause human suffering when it masks the 'complex realities behind [it].

Id.

400. *See generally* von Lieres & David Kahane, *supra* note 240.

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range of stakeholders.[401] In the Latin American context, given the fact that participation is the goal, DSD seems to be an ideal framework for assessing, redesigning, and implementing procedures for conflict management and dispute resolution, especially since the process is tailored to address the needs and goals of the stakeholders in each particular country.

In the first stage of implementing DSD, the facilitator[402] pinpoints which stakeholders[403] should be represented and selects the members of a design team to supervise the process.[404] Since the results of the system depend greatly on the design team, it is important to evaluate who they are, what they want to achieve, and how they have used their power and influence in the past.[405]

Next, the facilitator and the design team assess[406] the interests and goals of the main stakeholders, the strengths and weaknesses of the current system, and factors that can be catalysts for change.[407] The facilitator and design team then use this information to make a plan to meet the stakeholders' interests.[408] When crafting the plan,[409] the design team should consider what values the DSD will foster and what kinds of remedies it will give.[410] It should also reflect on which

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401. *See* Cohen, *supra* note 399, at 53-54. Cohen suggests:

> that when viewed through an analytic of scale, both neoliberal ideologies and the methods of DSD can appear insensitive to distinctions in social organization in analogous ways. I suggest further that to the extent projects of DSD are unfolding against a backdrop of neoliberal ideas and practices, this structural similarity stands to strengthen some of these ideas and practices, and with them attendant forms of social inequality.

Id. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 96-116 (arguing that the organizational assessment allows for a comprehensive outlook of the system).

402. Smith & Martinez, *supra* note 388, at 167.

403. *Id.* at 131.

404. Lande, *Good-Faith*, *supra* note 360, at 115.

405. Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 5 (2009). Although Bingham is writing in the context of employment disputes, the principles of DSD can also be applied in the Latin American context.

406. *See* COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 96-116.

407. Robinson et al., *DyADS*, *supra* note 386, at 356-57.

408. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 117-33; Lande, *Good-Faith*, *supra* note 360, at 115-16.

409. Robinson et al., *DyADS*, *supra* note 386. Robinson lists seven key factors to consider when designing a system:

> (a) an understanding of how an existing system works, its strengths and weaknesses, and the forces that promote and hinder change in the system; (b) clarity about the goals of change and rationale for expending resources on a change effort; (c) focus placed on one or two key changes that can be catalysts or focal points around which the overall system can reorganize; (d) a built-in process for ongoing reflection, adaptation, revision, and evaluation; (e) continual involvement of key players and groups in this reflection process; (f) modesty about the ability to control how a new system will adapt to new inputs and willingness to learn from what is happening in a non-defensive and open-minded way; (g) attention to how parts of a system interact as much as to what occurs within any given process.

Id.

410. Andrea Schneider, *The Intersection of Dispute System Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 290-91 (2009) [hereinafter Schneider, *Transitional*]. Although Schneider is writing in the context of transitional justice, the principles of DSD can also be applied in the Latin American context.

methods would be most effective in light of past best practices, such as making the entry points accessible and giving stakeholders clear options to choose from.[411]

Another essential component in DSD is capacity building. Since the implementation of the process will require specific skills, it is necessary to invest in training for all participants.[412] Recommendations for capacity building measures are discussed further in the next section of this Article.

Once a design is drawn up and the training is in place, it is highly recommended to launch a pilot program to test and evaluate the system before applying it on a more widespread basis.[413] Since the transformation of a dispute culture is necessarily gradual and takes place from within, the DSD pilot, and later the full system, must be implemented in a gradual, incremental way to ensure it takes lasting root.[414]

After the actual system is implemented, there must be ongoing observation, evaluation, and attention to the way it works as a whole.[415] In this regard, evaluation is particularly important in three respects: it allows implementers to know whether the system is working; it allows for constant improvements; and it makes the system more credible, thus inviting greater participation and feedback.[416]

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411. Robinson et al., *DyADS*, *supra* note 386, at 364.

412. It is important to note the distinction between training and education. While they seem to be synonymous, training is more skill-based, while education is more knowledge-based. In this regard, it is important to have both. *See* COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 134-50; Lande, *Good-Faith*, *supra* note 360, at 115.

413. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 150-65; Lande, *Good-Faith*, *supra* note 360, at 115-16.

414. Robinson et al., *DyADS*, *supra* note 386, at 356-57. Robinson explains:

   [I]t is almost always wiser to begin with an incremental approach to DSD and to focus on a few key areas that will lead to change in the overall system. As new procedures or approaches take root within an existing system, other modifications and initiatives may need to be considered. Therefore, an incremental approach to design is more likely to be effective than an attempt to impose entirely new systems and procedures all at once.

Id. However, Robinson notes that, as an exception, major overhaul may be appropriate when a whole new system is required, when disruptions have made the existing system unworkable, or when major stakeholders have indicated a desire and commitment to go through a large-scale change. *Id.* at n.39. Ideally, however, what is being proposed by this Article will build on already existing systems (e.g. *oficinas multi-puertas*, and *Casas de Justicia*), so incremental change will usually be preferable. This may not be the case in countries lacking a proper foundation.

415. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 168-86 (discussing the evaluation cycle, the criteria for measurement of ADR's effectiveness and impact, and measurement of ADR administration and operation).

416. Smith & Martinez, *supra* note 388, at 132-33; *see also* Bingham, *Self-Determination*, *supra* note 359, at 908 ("Transparency and accountability are powerful tools through which to shed light on our evolving private justice systems."). Evaluation will, therefore, not only enhance the effectiveness of the *Casas de Justicia*, but also, in itself, increase the trust that is necessary for the rule of law; the evaluative system must assure that the values inherent to ADR are being pursued. *See* Robert Ackerman & Nancy Welsh, *Interdisciplinary Collaboration and the Beauty of Surprise: A Symposium Introduction*, 108 PENN. ST. L. REV. 1, 1-2 (2003) (observing that, over time, mediators have become routinized and more concerned with "marketing to attorneys and getting agreements than [with] fostering self-determination"). Over time, an accessible system may become un-accessible through over-complication and over-professionalization; ongoing evaluation can hedge against this risk. *See* Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1766 (2002) [hereinafter Menkel-Meadow, *Peace as Justice*]

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Initial levels of evaluation should include internal supervision, using surveys, data, and focus groups, to find out what stakeholders think. External review is an even more effective means of evaluation, but can also be more costly.[417] These measures both require and foster greater accountability and transparency.[418] On-going evaluation and adaptation does not necessarily mean there will be constant, major overhauls; rather, a dynamic and adaptive approach to system design focuses on making small changes that could have a significant impact.[419]

Regarding DSD efforts in specific countries and regions, it seems important to consider how to strike the right balance between standardization and customization. Some theorists, such as Nancy Welsh and Bobbi McAdoo, have noted that developing a statewide ADR program is "very difficult and time-consuming work." Moreover, planning the design is only half the battle; implementation requires significant attention to a host of details, especially given the complexities of the system, coupled with "competing demands on time and resources."[420] Given this reality, it could be tempting to opt for standardized methods, which are faster, cheaper, and easier to implement. However, as Andrea Schneider has argued, there are many cases when "one size fits all" justice does not suit the situation at hand. Customized systems tend to be more effective, although slower and more costly. They may even be the only valid option when there are significant cultural differences that make it impossible to copy-and-paste the same methods from one country to another.[421] Therefore, even though the implementation process using DSD methodology could be lengthy and expensive, if the goal is to encourage citizen engagement as a necessary component of efforts to foster sustainable rule of law, the participatory nature of DSD could play an essential role in incorporating citizen involvement from the design stage forward.

(discussing how the pursuit of justice can become "over-professionalized" and inaccessible "arcane principles" or "processes").

417. Smith & Martinez, *supra* note 388, at 132-33.

418. *See id.*

419. Robinson et al., *DyADS*, *supra* note 386, at 349 (citing *Nonlinear Dynamics*, *in* THE COLUMBIA ENCYCLOPEDIA 2029 (6th ed. 2000) (referencing the theory of nonlinear dynamics, Robinson notes that "small variations [in a dispute system] can lead to vastly different results").

420. Barbara McAdoo & Nancy A. Welsh, *System Implementation Means Difficult Choices*, 14 ALTERNATIVES TO HIGH COST LITIG. 135, 135 (1996).

421. The East Timorese people are a case in point:

A revealing story told by Professor Jane Stromseth from the establishment of the East Timorese tribunal reflects this concern. When setting up the tribunal for East Timor, UN experts found themselves in a quandary. In Timorese culture, defendants were expected to confess to the crimes truthfully with the expectation that sentences would be determined with compassion. In order to train the Timorese in the adversarial, Western model that is typical for criminal law, 'the UN experts had to train the Timorese to lie.' In setting up the Khmer Rouge tribunal, commentators have worried that the tribunal does not match the values of the Buddhist Cambodian population.

Schneider, *Transitional*, *supra* note 410, at 305-06 (citing Kingsley Chiedo Moghalu, GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS 152-53 (2006); *Panel: The Impending Extraordinary Chambers of Cambodia to Prosecute the Khmer Rogue*, 5 SANTA CLARA J. INT'L L. 326, 332 (2007)).

B. Essential Capacity Building for Stakeholders

While developing expert capacities in conflict assessors is indispensable to achieve the full potential of *Casas de Justicia*, it is also important for other actors in the system to develop some capacities for effective participation. First, parties should be equipped with basic information about the different forums for dispute resolution and should have knowledge about problem-solving prior to beginning the process. Second, lawyers should understand and appreciate the different roles they play in the selection of the forum for the resolution of the dispute, including the facilitative process when it is chosen, to ensure they do not impinge upon their clients' self-determination. Third, mediators should be experts in the value-creation process in order to lead in citizens' capacity building for participatory problem solving. Finally, conflict assessors must develop the necessary capacities to guide the parties in the selection of the forum as well as the identification of the underlying root causes of the conflict.

1. Parties: Capacity Building for Decision Making and Participation in Problem Solving

It seems of critical importance to develop materials explaining the various available alternatives for conflict management and dispute resolution to the general public. To this end, simple pamphlets and videos articulating the essential characteristics and fundamental differences between these methods could be produced. The goal is not only to assist the parties in the selection of the forum for the specific dispute, but also to build decision-making capacity more broadly.

In addition, to build problem-solving capacity, parties in the Latin American context can benefit from understanding the difference between position-based and interest-based problem solving. Even though these notions are to some degree widespread, the disenfranchised majorities in the region have had little access to this knowledge. If parties were exposed to the basic notions of interest-based problem solving, they would have the ability to better create a wider variety of options that could satisfy the interests of both parties in the dispute, resulting in a more durable resolution and possibly influencing the way they address future disputes.[422] Concepts such as value creation (the integrative stage) and value claiming (the distributive stage)[423] could ensure the process is not reduced to an exercise in compromise, in which the final agreement simply reflects the power (im)balance at the table or the differences in the parties' best alternatives to a negotiated agreement—known as a BATNAs.[424] To this end, simple materials could also be developed.

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422. Training parties need not be costly or time-consuming, and can be done through the implementation of a variety of visual and printed media.

423. FISHER & URY, *supra* note 362, at 56-80.

424. *Id.* at 97-128.

2. Lawyers: Greater Appreciation for Parties' Self-Determination and the Knowledge of the Spectrum of ADR Options

Most lawyers in Latin America have not been significantly involved in the promotion of facilitative ADR methods as a means to promote access to justice. This may be due, in part, to the fact that most of the efforts have been directed towards low-income communities, which usually cannot afford legal representation. In addition, ADR courses are not yet broadly taught in Latin American law schools. As a result, the majority of those working in the legal profession are still unfamiliar with the spectrum of dispute resolution options existing beyond litigation. They are even less familiar with the notion that their clients could play a more active role in choosing the appropriate method for the resolution of their own disputes.

Similarly, most lawyers in the region are not aware of how prominent the client's role becomes in facilitative ADR processes, in which disputes are not circumscribed solely by the legal issue or by precedent.[425] Yet, as Carrie Menkel-Meadow has pointed out, lawyers can be "ideal process leaders" in the promotion of ADR, given their "process consciousness."[426] She has argued lawyers have awareness of procedural rules and have concern for "voice" and procedural fairness, but advocates for additional training in a broader set of collaborative skills that is quite different than argumentation.[427] Thus, in order to promote ADR as a means for participation and inclusion in Latin America, it is essential to develop lawyers' ADR capacities.

In this regard, Latin American ADR capacity building for lawyers needs to include not only an understanding of the different types of dispute resolution processes available, but also an awareness that the role of the lawyer in facilitative processes varies significantly from the one played in the conventional adjudicative court-based process. While in the court system, lawyers are experts in the substantive matter and procedural aspects; in facilitative ADR methods, such as mediation, the lawyer's role shifts to that of an advisor, who can provide clients with the legal implications of their decisions and the alternatives available.[428] Given

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425. Clients are in a strategic position to frame the issue, and generate and select the best possible options to satisfy their interest. Lawyers should advise parties on the legal implications of the various options, but should allow the parties to decide their level of involvement in the process. *See* Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 458 (2000); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 299 (2002). The American Bar Association has developed a competition on representation in mediation to train future lawyers on the different roles a lawyer plays in a mediation process. *See ABA Mediation Competition*, AMERICAN BAR ASSOCIATION, http://www.abanet.org/dispute/mediationcomp.html (last visited June 18, 2011).

426. Menkel-Meadow, *Peace as Justice*, *supra* note 416, at 1765, 1773.

427. Menkel-Meadow suggests that there is a need for an expanded vision of justice in pursuit of peace that utilizes a variety of "appropriate" dispute resolution processes and methods. Lawyers "may be particularly well suited" for these new processes because they have "process consciousness." Lawyers are "[a]ware of procedural rules and concerned about 'voice' and procedural fairness, with proper training (facilitation is quite different from argumentation), lawyers may make ideal process leaders of these new processes and institutions." *Id.* at 1773.

428. *See* Ackerman, *Disputing Together*, *supra* note 217, at 60–61; *see also* Schneider, *Pedagogy*, *supra* note 362, at 117 (observing that lawyers often have a hierarchical relationship with their clients that can harm the flow of information).

the centrality of the self-determinative aspect of facilitative ADR as opposed to litigation, lawyers need to acquire a different set of skills to effectively interact with their clients in these processes.[429] The issue of self-determination is of particular importance, since it has a direct effect on the level of the parties' satisfaction; addressing parties' interests ensures the sustainability of the agreement.[430]

3. Mediators: Enabling Citizens to Develop Problem Solving Capacity

It is critical to ensure the competency of the mediators currently working in *Casas de Justicia* and the *oficinas multi-puertas* in order to maximize citizens' capacity for participatory problem solving. To this end, mediators need to develop skills enabling them to shape the parties' expectations about what could be achieved in the process by helping the parties gain a clear understanding of the goals and of the process itself.[431] A skillful mediator can also model collaborative behaviors and attitudes, which could potentially lead to either the maximization of

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429. Carrie Menkel-Meadow argues that lawyers need more training in question asking to identify values and interests. This will help lawyers solve problems and promote the self-determination of their clients. Menkel-Meadow observes that, "[l]egal analysis is a necessary, but not sufficient, condition of good problem solving." Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L.REV. 905, 912 (2000) [hereinafter Menkel-Meadow, *Winning*].

430. *See generally*, SUSSKIND, BREAKING ROBERT'S RULES, *supra* note 377.

431. Training and regulation of mediators is uneven in the region, and there are no uniform guidelines for mediator education and evaluation. Basic education and regulations govern the number of hours, rules of confidentiality, and processes of collaboration. Value creation, however, is not a prominent feature in most regulations regarding training and evaluation. Incorporating value creation language into legislation governing mediation could send a strong message to educational institutions and practitioners. Mediators can have tremendous influence over the process, so there should be adequate training and standards for mediators. *See* James Coben, *Gollum, Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 11 CARDOZO J. CONFLICT RESOL. 65, 74-75 (2004) (mediators have control over aspects of the process such as the agenda, location, information exchange, etc.); *see also* John Lande, *Doing the Best Mediation You Can*, 14 DISP. RESOL. MAG. 43, 46 (2008) [hereinafter Lande, *Doing the Best*]. Lande explains:

> Mediation is a difficult craft, and virtually all mediators would benefit from continuing to learn about it. Many mediators attend continuing education programs to learn about mediation theory and practice skills, legal issues, and new developments in the field. Mediators may benefit from additional ways to develop their professional skills, such as routinely debriefing mediations by writing what went well, where the mediation seemed at a halt, and how they might handle similar situations differently in future mediations. Mediators can also routinely ask lawyers and parties to complete confidential feedback forms after mediation.

Id. Sharon Press identifies several requirements that should be discussed when setting mediator qualification standards. Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1036-37 (1993) (arguing that mediators should typically "meet some combination of the following requirements to be qualified: attend mediation training, take part in apprenticeships or mentorships, meet a specified educational background, and have previous experience in related fields."). Professionalization may also improve the quality of mediation by giving legitimacy to the field, attracting qualified individuals and promoting self-regulation. *See* Kimberlee K. Kovach, *Musings on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education*, 21 OHIO ST. J. ON DISP. RESOL. 123, 142-43 (2005) (observing that mediators are concerned with professionalism to obtain recognition for their work through adequate compensation, public recognition, and respect as members of a profession); *see also* Nancy Welsh & Bobbi McAdoo, *Eyes on the Prize*, 11 DISP. RESOL. MAG. 13, 13 (2005) (arguing that professionalization must mean something more than recognition and compensation in themselves; it must be directed toward improving the standards, methods, and qualifications of mediators).

joint gains[432] in facilitative mediation or to better achieve the parties' goals in transformative mediation.[433] Either way, the experience of a successful and highly satisfactory problem-solving process could influence the way parties approach disputes and their resolution in the future.[434]

Furthermore, if the ultimate goal is to develop citizens' capacity to manage their own conflicts and resolve their own disputes, skillful mediators in both facilitative and transformative mediation have to be able to not just model, but also explain, each stage of the process and the rationale behind the process. In sum, skillful mediators need to go beyond satisfactory experience of dispute resolution to enable citizens to develop problem-solving capacity.

4. Conflict Assessors: Capacity Building for Root Cause Analysis and Selection of Appropriate Forums

It is imperative for conflict assessors to develop the necessary capacities in conflict resolution in order to identify the underlying root causes of the issue and to guide the parties in selecting the forum that best suits their specific dispute. To develop capacity in these two areas, organizational ombudsmen could be called upon to assist the conflict assessors. Organizational ombudsmen are conflict management experts who handle a broad range of intra-organizational conflicts in

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432. *See* Robert Bordone, *Taming Hard Bargainers*, NEGOT. NEWSLETTER HARV. PROGRAM ON NEGOT., Sept. 2008, at 8 (collaborative approach is a bargaining stance in which issues are jointly identified and parties work together to address them; it is not a personal style or necessarily equivalent to "being nice").

433. Harold Abramson describes a transformative mediator:

A transformative mediator engages in a mediation practice based on communication and relational theory. Instead of promoting the goal of settlement for the parties, the transformative mediator allows the parties to determine their own direction and supports the parties' own opportunities for perspective-taking, de-liberation, and decision-making. The mediator focuses on the parties' interactions and supports their shifts from destructive and alienating interactions to more constructive and open interactions (referred to as empowerment and recognition shifts). In this model, parties are likely to be able to make positive changes in their interactions with each other and, consequently, find acceptable resolution for themselves, where such terms genuinely exist.

Harold Abramson, *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 CARDOZO J. CONFLICT RESOL 253, 263 (2006). Menkel-Meadow, *Winning*, *supra* note 429, at 919 (stating that mediators can also benefit from training in questioning and active listening); *see also* Carrie Menkel-Meadow, *W.M. Keck Foundation Forum on the Teaching of Legal Ethics: The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 37 (1996) (stating that mediators need training to prevent adversarial values from corrupting collaborative dispute resolution processes); *see also* Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L.REV. 103, 113 (2005) [hereinafter Abramson, *Problem-Solving*] (writing that effective problem solving requires a collaborative relationship and is likely to produce endearing, nuanced and inventive solutions that are agreeable to all sides). Mediators need training in more than process and structure. *See also* Ackerman, *Disputing Together*, *supra* note 217, at 27, 89-90 (arguing that implementing a process alone is not sufficient to create community; participants need to find a common bond that transcends the process).

434. Mediators should also be cognizant of party self-determination in the process. *See* Lande, *Doing the Best*, *supra* note 431, at 45 (suggesting that mediators should elicit procedural preferences from the parties and follow them if appropriate; imposing a process without considering the parties' preferences may damage rapport and participant confidence).

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the private sector.[435] They are not to be confused with the well-established institution of the traditional public ombudsmen, who are public advocates and *defensores del pueblo* in most countries in Latin America. Since organizational ombudsmen are still a relatively new development in the region, foreign ombuds organizations[436] could establish an ongoing partnership with local groups, sharing resources and tailoring them for the specific needs and context. The main skills to be developed would be root cause analysis and an understanding of how to select the most appropriate forums for resolution. Although launching training programs would require an initial investment, the benefits could be significant and lasting. An initial group of local ADR professionals, preferably mediators, could be selected to gain the necessary capacities and then train the local conflict assessors.

Even though current conflict assessors in rural areas usually lack a formal education, such a plan would be feasible. Their deep understanding of their communities and their practical knowledge of how to handle real-life cases could serve as a suitable foundation for further capacity building.

Within the capacity-building program, written and audio-visual materials could be developed as part of a collaborative enterprise between locals and foreign experts. The purpose of these materials would be to give the conflict assessors a sense of how to conduct root cause analysis as well as how to discern which process, whether facilitative, adjudicative, or hybrid, fits each case. These materials could also serve as educational resources for the public in *Casas de Justicia.*

C. Foreseeing Possible Obstacles

In the area of Dispute System Design (DSD), the question is not *if* obstacles will arise, but *when*.[437] In *Designing Conflict Management Systems*, Cathy Costantino and Christina Sickles Merchant address implementation issues in the organizational context, grouping them into two main categories: resistance and constraints.[438] This section will adopt their framework in order to examine some forms of resistance and constraint that may arise when implementing Dispute System Design in Latin America.

1. Overcoming Resistance

In this framework, resistance is defined as a "mostly unconscious, social, cultural, and personality-driven phenomenon"[439] which may arise from fear, culture, power, personality preferences, and corporate symbols and images.[440] One of the most challenging hurdles in Latin America comes from the current structures of power, which will be explored below.

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435. For a more complete overview of the evolution of the term, *see* CHARLES L. HOWARD, THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS—A LEGAL GUIDE 1-78 (2010).
436. For the development of organizational ombudsmen in Argentina, *see* Guillermo Ceballos Serra, *¿Ombudsman Corporativo?*, BLOG DE GUILLERMO CEBALLOS SERRA Y SUS INVITADOS (Oct. 19, 2008), http://ceballosserra.blogspot.com/2008/10/ombudsman-corporativo.html.
437. *See generally* COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 199-217.
438. *See id.* at 199.
439. *Id.*
440. *Id.* at 201-09.

a. Reactions to Change: Fear, Culture, Personality Preferences, Symbols and Images

No matter what kind of change happens, there is nearly always resistance to it. When organizations or individuals face change, the lack of predictability produces fear of the unknown and fear of losing control.[441] Even for those who have a higher tolerance for risk, there is still the challenge of adjusting to new circumstances, which requires greater effort and engagement. What helps the most in these circumstances is to set up processes enabling individuals to state their fear in a safe environment, since identifying it is half the battle.[442] In the Latin American context, however, change often results from crisis[443]—a very different set of circumstances that occur in the midst of relative stability. Therefore, change is often sought and welcomed rather than avoided, as it represents the hope for an alternative better than the status quo.[444]

Deeply rooted attitudes, practices, and beliefs can be hard to change. When facing this resistance factor, Costantino and Sickles recommend customizing the system for the local culture, so it is not rejected on the basis of a clashing of values.[445] In Latin America, each country and region can have a value system that reflects different priorities. It will take time for widespread implementation of the innovation to take root and lead to more participatory problem-solving practices.[446] The last resistance factors are personality preferences and their reactions to ADR[447] and symbols and images, which have to do with the outward expressions of the system's culture.[448] Even though they are more specific to the context, these last two factors, if overlooked, could pose significant challenges.

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441. *Id.* at 201-02.

442. *Id.*

443. *See e.g.*, Fred Rosen & Jo-Marie Burt, *Hugo Chávez Venezuela's Redeemer?*, 33 NACLA REPORT ON THE AMERICAS 15, 16 (2000) (observing that at the time of the Chávez election, 80% of Venezuelans were living below poverty; and that Chávez promised "revolution" and instituted many popularly supported reforms to consolidate power).

444. *Id.*

445. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 203.

446. *See generally* DPK Consulting, *Use of Pilot Programs*, *supra* note 168.

447. Rational, left-brain people may respond differently to ADR than the more intuitive right-brain types. These differences can be incorporated into the system. Engaging in team building activities and teaching participants about the main personality types in advance may encourage greater mutual understanding and acceptance. When utilizing this framework in an international context, it would be of critical importance to raise awareness among cultures, taking into consideration, for example, the distinction between direct and indirect communication, and its effects on conflict resolution. *See* Harold Abramson, *Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers*, 9 PEPP. DISP. RESOL. L.J. 437, 444 (2009). Cultures that tend more toward direct communication could be perceived as more confrontational, while those tending toward indirect communication could be misinterpreted as conflict avoiders, when in fact they simply handle it differently. A deeper understanding of the cultural dimension could go a long way to avoid misunderstandings. *See, e.g.*, *id.* at 454-55 (observing that U.S. parties who communicate directly might not perceive a "no" conveyed by Chinese parties, who are likely to convey a "no" without actually saying "no").

448. Symbols and images have to do with the outward expressions of the system's culture. In some cases, these symbols may become a restraint, if ADR fails to harmonize with the imagery different players within the system use to describe its mission and identity. In cases where a strong metaphor sets the tone for a group, it is essential to try to adapt ADR to the existing imagery beforehand. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 207-08. Assessing the identities of the stakeholders and the history of their relationship becomes of critical importance before starting the imple-

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b. The Intricacies of Power

In some cases, power is the resistance factor: people who have power are re-luctant to lose it and may feel the Dispute System Design would make them too vulnerable.[449] Costantino and Sickles Merchant recommend addressing these concerns head on, educating participants about the disadvantages of not changing the current system, and pulling together a "visible and committed critical mass of leadership" to support the new system so others will follow.[450]

In Latin America, the prevailing structure of power has been what theorists describe as a "power-over" paradigm, an adversarial binary paradigm of con-flict[451] based on a zero-sum mindset that encourages domination.[452] The region's history shows that Latin Americans tend to resolve disputes either by passively resigning themselves to the will of others or by using violence and coercive force to impose their own will on others.[453] Similar to Nieztsche's articulation of pow-er, this mindset views power as necessarily oppressive; the power of one must come at the expense of the power of another.[454] This suggests a predominant di-

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mentation process. After years of civil war, various groups in some Latin American countries have defined their identity in terms of conflict. In El Salvador, for example, the popularly elected president, Mauricio Funes, belongs to the left wing Farabundo Martí National Liberation Front (FMLN), which still strongly identifies with Marxist and revolutionary imagery and its historical involvement with the bloody 12-year Salvadoran Civil War. *See e.g.*, *Banderas De Las Fuerzas Populares De Liberacion Farabundo Marti (FPL-FM)*, GUERILLA LATINOAMERICA ARMADOS, http://perso.wanadoo.es/guerrillas/simboloselsalvador.htm. (last visited June 16, 2011). This could pose difficulties for an ADR system built on negotiation and mutual understanding. In El Salvador, for example, where labor unions and management groups have a longstanding adversarial relationship, ADR cannot adopt the image of clasped hands because it would be jarring for the stakeholders. In-stead, it would have to opt for an image that represents the two sides working together for a shared goal, such as building up the country together.

449. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 204.

450. *Id.* at 205.

451. *See* Corinne Davis Rodrigues & Enrique Desmond Arias, *The Myth of Personal Security: Crimi-nal Gangs Dispute Resolution, Security and Identity in Rio de Janeiro's Favelas*, 48 LAT. AM. POL. & SOC'Y 53 (2006); *see also* Corinne Davis Rodrigues, *Property Rights, Urban Policy and the Law: Negotiating Neighbor Disputes in a Brazilian Shantytown*, *in* 5 LAW AND GEOGRAPHY 259 (Jane Holder & Carolyn Harrison eds., 2003). The dichotomy between the powerful and unpowerful creates an environment for "spoilers" to disrupt the process. *See* Abramson, *Problem-Solving*, *supra* note 433 at 121 (observing that participants who are deeply upset with each other and harboring misperceptions and stereotypes may become more concerned with hurling threats, rather than seeking solutions); *see generally* Robert C. Bordone, *Dealing with a Spoiler? Negotiate Around the Problem*, NEGOT. NEWSLETTER HARV. PROGRAM ON NEGOT., Jan. 2010, at 4.

452. *See* BOULDING, *supra* note 48, at 55–58 (1990) (refers to power-over as destructive power); *see also* Jean Baker Miller, *Women and Power*, *in* WOMEN'S GROWTH IN CONNECTION: WRITINGS FROM THE STONE CENTER 197, 199–203 (1991); Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 8 (2000) ("Most observers agree that the critical element of power is the ability to have one's way, either by influencing others to do one's bidding or by gaining their acquiescence to one's action.").

453. Hernández Crespo, *Building*, *supra* note 19, at 431.

454. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 203 (Walter Kaufmann trans., Random House 1989) (1886) ("'Exploitation' does not belong to a corrupt or imperfect and primitive society: it be-longs to the essence of what lives, as a basic organic function; it is a consequence of the will to power, which is after all the will of life."); *see also* ANDREW C. BACEVICH, THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM (2008); NICCOLÒ MACHIAVELLI, THE PRINCE (George Bull trans., Penguin Books, 1999) (1532) ("it is far better to be feared than loved if you cannot be both."). One party dominates and the other must be the dominated, which creates a zero-sum game where only one

chotomy of winners and losers, of "I" versus "you," in which there is little room for the development of the unity of "us."[455] In this scenario, the interaction between parties runs the risk of slipping into a series of power games,[456] which at worst could lead to complete domination. At best, both can arrive at a partially satisfying compromise, but without the possibility of an optimal agreement in which the interests of both parties are fully satisfied.[457] An outstanding manifestation of the "power-over" mindset in the Latin American context is the powerful *caudillo,* who unilaterally decides the collective goals of society and the means by which to achieve those goals. Since the current paradigm favors the *caudillos* in power, they are more likely to see any proposed change to the status quo as a threat to be resisted at all costs.[458]

In contrast, a "power-with" paradigm requires participation of both parties involved and an understanding of the underlying reasons behind each party's position.[459] Only then can options be generated with a goal of fulfilling each party's interests, thus maximizing joint gains.[460] To do so, it is critical to have the support of the marginalized majority for the participatory efforts. If power is going to be distributed more equally, those who are going to exercise their decision-making abilities should be aware of the reactions of the power holders. In addition, rather than excluding the stakeholders resistant to changes, it would be necessary to look for ways to include them.[461] It will not do to talk about participation and then shut out certain groups in order to impose a participatory system.[462] Authentic dialogue must involve representatives of all stakeholders with the goal of understanding the concerns, interests, needs, and values of each, and how the proposed system can address them.[463] Nonetheless, even if a participatory system is designed to include all stakeholders in the decision making and implementation of the proposed change, some may choose to opt out. It is still important, however, to save them a seat at the table to send a strong message that the option to participate remains open.

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party is able to hold the power. *See* MORTON D. DAVIS, GAME THEORY: A NONTECHNICAL INTRODUCTION 14 (1997) ("The term 'zero-sum' . . . means the players have diametrically opposed interests. The term comes from parlor games like poker where there is a fixed amount of money around the table. If you want to win some money, others have to lose an equivalent amount.").

455. Adler & Silverstein, *supra* note 452, at 17-19.

456. DAVID LAX & JAMES SEBENIUS, MANAGER AS NEGOTIATOR 30-33 (1986) (contrasting value creators to value claimers: value creators focus on cooperation in an effort to better both parties, whereas value claimers emphasize competition).

457. FISHER & URY, *supra* note 362, at 56-57; DAVIS, *supra* note 454 at 14.

458. Not only can a single powerful "hold-out" disrupt collaboration, but a coalition can also "gang up" or "exclude others" and have a similarly disruptive effect. *See* Menkel-Meadow, *Let's Talk*, *supra* note 379, at 847.

459. LAX & SEBENIUS, *supra* note 456, at 143 (describing power tactics in negotiation); FISHER & URY, *supra* note 362, at 56-80.

460. LAX & SEBENIUS, *supra* note 456, at 88-117; FISHER & URY, *supra*, note 362, at 56-80.

461. Carrie Menkel-Meadow suggests finding "linkages in issues that might bring parties to a table" that will give parties of unequal power "an interest in looking for solutions and trading and bargaining." Menkel-Meadow, *Let's Talk*, *supra* note 379, at 848.

462. "If the goal of the oppressed is to become fully human, they will not achieve their goal by merely reversing the terms of contradiction, but by changing poles." PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED 56 (2000).

463. I suggest an implementation process similar to one carried out by the UST International ADR Research Network in Brazil in 2007. For a description of the system design, goals, and process, see Hernández Crespo, *Building*, *supra* note 19.

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Participatory processes also pose some risks of possible retaliation from reactionary movements that pose a significant challenge in some areas of Latin America, where the history of disenfranchisement has produced groups such as the FARC in Colombia. These groups have not only refused to participate, but have taken strong actions against those who have invited them to the table.[464] In this regard, perhaps the best strategy would be to start with places less polarized by violent conflict, building up a strong base of support and successful implementation that can serve as a reference point for further expansion throughout the rest of the region, including the more volatile areas.

In the final analysis, despite the high risks involved, the alternative to keeping the status quo unchallenged may be too costly since political and social instability drive away investors, hindering advancement toward greater social cohesion and economic development. Therefore, the challenge ahead lies in how to promote participatory systems while minimizing the risks for citizens. An organized civic society would also contribute to minimizing the risk that comes with a participatory system in a region currently dominated by *caudillos* and insurgency.

2. Dealing with Constraints

Along with the aforementioned resistance factors, Costantino and Sickles Merchant identify a second category of obstacles: constraints, which they define as the "instrumental aspects of architecture, resource and systemic impediments."[465] These constraints include the challenge posed by possible lack of leadership support for the new system,[466] systemic complexities, corruption, and financial considerations.

Regarding lack of leadership, when top or middle leadership does not support a new system, Costantino and Sickles Merchant recommend starting with particular leaders who need it and expanding from there.[467] Leadership support in Latin America could be found in collaboration with promoters of ADR, such as USAID and the World Bank, which have launched their efforts primarily in low-income communities, and with the Chambers of Commerce.[468] Support could also be found through the legal community by encouraging law professors to teach ADR as a complement to litigation, so that the next generation of lawyers can develop the capacities to support upcoming ADR efforts in the region. In cases when ADR may be perceived as too complicated due to the high degree of coordination required,[469] one solution would be to stack the design teams with representative stakeholders from across the organization who can provide accurate feedback and

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464. For example, Ingrid Betancourt, was kidnapped by the FARC while attempting to bring them to the negotiating table. *Colombia Hostage Betancort Freed*, BBC NEWS (July 3, 2008), http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7486552.stm.

465. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 199.

466. *Id.* at 212.

467. *Id.* at 212-13.

468. *See* Jose Alberto Ramirez Leon, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model*, WORLD SERVICES GROUP, http://www.worldservicesgroup.com/publications.asp?action=article&artid=1294 (last visited Aug. 21, 2011); *see also USAID Supports ADR*, *supra* note 165 (summarizing USAID efforts to promote ADR in Latin America, many of which involve local Chambers of Commerce).

469. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 213-14.

keep track of logistics and dynamics.[470] While international bodies do not necessarily have experience engaging a wide swath of stakeholders, a two-year national consensus building effort ending in 2008—comprised of Brazilian mediators and representatives from various sectors of society and led by the University of St. Thomas International ADR Research Network—showed it is possible to bring diverse people together for a shared goal, to reflect together and draft a realistic plan for the implementation of ADR in their country.[471]

Systemic complexities, in some cases, present certain constraints if the systems design is not well tailored to the disputes. For example, perhaps the entry points to the system are not easy to access, or some systems may speed up or intensify disputes.[472] In these cases, Costantino and Sickles Merchant suggest the best response is to carefully assess the right methods for the each case before designing the system.[473] As mentioned earlier, pilot projects are extremely useful in this regard.[474]

Aside from the constraints mentioned in the framework of Costantino and Sickles Merchant, the additional constraints of corruption and the lack of credibility of the court system in Latin America could affect the implementation process. There is a long history of inefficiency, bureaucratic obstacles, and corruption in the court system in the region. In fact, a 2008 Gallup Poll found only 37% of Latin Americans had confidence in the court system.[475] In order to address this issue, corruption expert Luis Moreno-Ocampo has argued issues of corruption go beyond corrupt individuals and further argued emphasis should be placed on creating a system of controls[476] that would lend greater transparency.[477] In this regard, engaging stakeholders in Dispute System Design could promote greater ownership and accountability, since performance, outcomes, and citizen satisfaction can be measured through ongoing evaluation. In this way, lower citizen satisfaction levels and poorer outcomes can indicate aspects of the system needing further assistance.[478] Likewise, such levels can indicate where the system is working well and can provide opportunities for rewards and developing best practices.

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470. *Id.* at 214.

471. *See* Hernández Crespo, *Building*, *supra* note 19.

472. COSTANTINO & SICKLES MERCHANT, *supra* note 210, at 209.

473. *Id.* at 210.

474. *Id.*

475. Julie Ray, *Mexico's Citizens Ready for Improved Justice System*, GALLUP, http://www.gallup.com/poll/104455/Mexicos-Citizens-Ready-Improved-Justice-System.aspx (last visited Aug. 26, 2011).

476. LUIS MORENO OCAMPO, EN DEFENSA PROPIA: CÓMO SALIR DE LA CORRUPCIÓN 300-314 (3d ed. 1993).

477. *Id.* at 315-333.

478. Corruption can take a variety of forms in the judicial system, from forces outside the court influencing outcomes to bribery of judges and court clerks. In the late 1980s and early 1990s in Venezuela, chronic backlog and a lack of control over cases left some defendants in prison for decades as they awaited judgment of their case. Some government officials led an effort to introduce greater accountability for judges regarding the backlog and control of criminal cases in their courts. Through periodic measurements, officials were able to see which local courts were struggling with chronic backlog. Rather than punishing these courts, they were given more resources to address the issue. Furthermore, the measurements provided an incentive for courts to eliminate backlog in order to achieve judicial recognition among their peers. These efforts resulted in a substantial decrease in backlog and increased control over caseloads. VENEZUELAN JUDICIAL COUNCIL REPORTS (on file with the author).

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Finally, pertaining to financial considerations, the framework of Costantino and Sickles Merchant suggests that one obstacle is a real or perceived lack of the resources—such as personnel, time, money or material goods—needed to launch a system of dispute resolution.[479] One recommendation they offer to address this obstacle is to use marketing strategies to highlight the benefits of using ADR and to conduct a worst-case analysis to explore the disadvantages of leaving it aside.[480] Broadening the role of existing structures like the *Casas de Justicia* and *oficinas multi-puertas* and enhancing the capacities of everyone involved, from conflict assessors to mediators, lawyers and parties, would require less investment than building an entirely new model. While the judiciary would need to allocate funds to coordinate committees of conflict assessors as well as forms of collaborative governance, the IFIs and foreign aid organizations have allocated significant funds for reforms in the region over the last decades;[481] thus, if inclusion were advanced through a participatory model, some of the available funding could be directed to that end.

V. Conclusion

Historically, Latin America has fluctuated from *caudillo* rule, which is like the sound of a single dominant instrument, to riots and revolution, which would be like the noise produced when all the instruments are playing at the same time in discord. If we are to see Latin America fulfill its potential, *inclusion* and *participation* are essential. Maximizing the potential of the *Casas de Justicia* is one possible way in which citizens could begin unlocking their capacity for decision-making and collaborative problem solving, moving from merely producing noise in the public square to participating in collectively created music through public dispute resolution and other forms of collaborative governance in the stages of the policy continuum—deliberative democracy and collaborative public management. We have not yet seen what Latin America can accomplish when the invisible majority of its citizens act as protagonists in crafting a new future for their countries, nor do we know the affect this can have in laying a foundation for a more sustainable rule of law.

To establish this foundation, it is not sufficient to utilize ADR mainly as a means of providing access to justice for the poor. The implementation of ADR would have to be broadened to foster conflict resolution capacities for all citizens and to promote systemic inclusion and participation. If citizens have access to participatory experiences in private conflict resolution, as well as collaborative governance, they can contribute to dismantling the *caudillo* mentality by making choices that affect their lives. If private conflict resolution were consistent with procedural justice values, it could create the social capital necessary for rule of law.[482] If public conflict resolution and other experiences collaborative governance were to empower, engage, and ultimately include the traditionally marginal-

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479. Costantino & Sickles Merchant, *supra* note 210, at 210.
480. *Id.* at 211-12.
481. *See* Sternlight, *ADR Consistent*, *supra* note 10, at 572-74.
482. Reuben, *ADR and the Rule of Law*, *supra* note 8.

ized, this majority would have a greater stake in the system and would therefore be more likely to uphold it.[483]

Tapping into the potential of the multi-door courthouse model, in the form of *Casas de Justicia,* could be one of the necessary steps to unleash the potential of citizens, promoting systemic inclusion and participation in several ways. First, the expanded *Casas de Justicia* could offer a framework that would encompass all citizens, making the invisible marginalized communities and practices visible; integrating them into best mainstream practices. Also, by extending the reach of the judicial system, the enforcement of rights could be strengthened. Second, while the adapted model would remain a vehicle for delivery of integrated dispute resolution services, it would transform the role of multi-door screeners in the *Casas de Justicia* into conflict assessors, enabling them to identify the root causes of systemic issues and empowering citizens to select the most appropriate forum for the resolution of their disputes. This would foster self-determination, enhanced decision-making capacity, and, when facilitative processes are chosen, enhanced problem solving capacity as well. The root cause identification, through the inclusion of an organizational ombuds function, could provide the starting point for setting up agendas of collaborative governance efforts to address systemic issues. Third, *Casas de Justicia* are strategically located to bring members of the community together and to address the public issues that affect them as well as to participate in the development of public policy that impacts the community. In this regard, the capacities citizens develop in the context of private conflict resolution could eventually be applied to interactions in the public realm, making their participation in collaborative governance more effective.

The proposal presented above explores ideas that aim to spark dialogue about tapping the potential of ADR to expand it beyond access to justice, in order to promote inclusion and participation in the Latin American context. To this end, I have proposed that local stakeholders should engage in national Dispute System Design efforts to channel and facilitate citizen participation in private conflict management and dispute resolution as well as collaborative governance in each particular country. A system aimed at promoting citizen participation must be developed and owned by the stakeholders. This proposal is offered as material for the stakeholders, IFIs, and foreign aid organizations to reflect upon and to expand the range of possibilities at their disposal. It is only one piece, among others, of a whole civic participatory framework that should include the educational system and international mechanisms for conflict management and dispute resolution. Rather than being a strictly academic proposal, the goal of this work is to open up the realm of possible options to address the systemic plight brought on by the exclusion of the disenfranchised majorities.

When I first met Juan, he was seven years old; today, Juan may be in his thirties. Yet, as an adult, his options most likely remain the same as they were back then, providing little opportunity for his development. Martin Luther King once said, "Injustice anywhere is a threat to justice everywhere."[484] The high levels of exclusion and instability in Latin America pose a challenge not just to the region,

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483. *See generally* Blumoff & Tyler, *Procedural Justice and the Rule of Law*, *supra* note 21.

484. Martin Luther King, Jr., Letter from Birmingham City Jail (April 16, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289 (James M. Washington ed., HarperOne 1986).

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but to the world. If rule of law efforts aim to be effective and sustainable, they need to broaden their scope to address the prevailing *caudillo* mentality that produces exclusion and instability. Unless the focus shifts to creating room for Juan and those like him to develop and participate, the invisible majorities of which he is a part will continue to resort to the familiar options of the *caudillos* and revolution. The ADR field can be used to develop citizens' capacities and to provide the framework that promotes inclusion and participation. Understanding the systemic dimensions of the challenge is only the first step; translating it into targeted action comes next. It is ultimately up to the IFIs, foreign aid organizations, and local stakeholders to achieve the potential Latin America could have if everyone were allowed to participate.