

## Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad

Jean R. Sternlight

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad*, 56 DePaul L. Rev. 569 (2007)

Available at: <https://via.library.depaul.edu/law-review/vol56/iss2/15>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# IS ALTERNATIVE DISPUTE RESOLUTION CONSISTENT WITH THE RULE OF LAW? LESSONS FROM ABROAD

*Jean R. Sternlight\**

## INTRODUCTION

What is the relationship between alternative dispute resolution (ADR) and the rule of law? In the United States, critics often argue that the informal, private nature of ADR<sup>1</sup> is hostile to the rule of law—and ultimately to justice itself. Yet over the last ten years, a broad, international array of groups has advocated including ADR in projects designed to foster the rule of law in other countries. This Article explores the paradox. Have we erred in condemning ADR domestically or in promoting it internationally? Or does the desirability of ADR depend upon the nature of the system in which it is being utilized? By studying this paradox, we can enrich our understanding of the ultimate purposes of both ADR and the rule of law, and thus assist our search for justice.

## II. THE DOMESTIC CRITIQUE OF ADR AS HOSTILE TO THE RULE OF LAW

Although disputes have been resolved through means other than litigation for thousands of years, it is well established that an ADR

---

\* Michael and Sonja Saltman Professor of Law and Director of the Saltman Center for Conflict Resolution, University of Nevada, Las Vegas. I thank Raquel Aldana, Amy Cohen, Richard Reuben, Leticia Saucedo, and participants in the Twelfth Annual Clifford Symposium for comments on an earlier draft. I thank Stephan Landsman both for inviting me to participate in the Symposium and for commenting on the draft. And I thank students Matthew Engle, Michael Hammer, Charles Rainey, and Hetty Wong for their assistance on this project.

1. Although I use the term ADR in this Article extensively, I have previously expressed, and continue to hold, many reservations about the value of the term. Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97. As I argued in that article, arbitration and mediation are extremely different from one another, and arbitration is more similar to litigation than it is to mediation or negotiation. I generally prefer the phrase "appropriate dispute resolution" because it more accurately captures the notion that litigation, arbitration, mediation, and negotiation are alternatives to one another. *Id.* at 97 n.1. Nonetheless, in this Article I will use the common definition of ADR.

boom took place in the United States beginning in the 1970s.<sup>2</sup> Inspired by concerns about efficiency, access, and justice, ADR advocates urged that disputes be resolved, not only in public trials, but also through negotiation, mediation, and arbitration.<sup>3</sup> The growth of ADR also sparked a series of significant critiques by people concerned with the privatization and informalization of dispute resolution. They argue that the privatization of dispute resolution is problematic because the elaboration of law achieved in public trials and published decisions is necessary to protect and enhance individual rights.<sup>4</sup> Similarly, some critics urge that treating disputes as matters of individual, rather than public, concern eliminates important public accountability.<sup>5</sup> Others argue that dispute resolution fails to serve an important educational function when it is privatized.<sup>6</sup> Another common criticism is that the establishment of dispute resolution processes weakens the position of less powerful members of society.<sup>7</sup> For example, when pri-

---

2. Harvard Law Professor Frank Sander's speech at the 1976 Pound Conference is often used to mark the date of the resurgence of ADR. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976); e.g., 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, 309 (1996).

3. See, e.g., Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 170–85 (2003) (discussing the community justice, court administration, and business interest strands of the ADR movement); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 6 (1991) ("In what has become a commonly recognized division in the literature and advocacy about ADR, we see two basically different justifications for processes that resolve cases short of trial—what I call quantitative-efficiency claims versus qualitative-justice claims.").

4. See, e.g., Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 675–82 (1986) (cautioning that a virtue of adjudication is its ability to ensure the proper resolution and application of public values, and that public officials, not private individuals, must interpret the values of the Constitution and statutes); Owen M. Fiss, Commentary, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (urging that by resolving disputes through settlements rather than through adjudication, justice is sacrificed for peace); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–23 (1995) (noting that private adjudications fail to produce rules or binding precedents).

5. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) [hereinafter Menkel-Meadow, *Whose Dispute Is It Anyway?*] (providing a balanced discussion of this critique and raising the question of whether it is best to approach disputes as an individual or group concern).

6. See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1661–65 (2005) (discussing the public education function of dispute resolution systems).

7. See, e.g., Hensler, *supra* note 3, at 196 ("In a democracy where many people are shut out of legislative power . . . collective litigation . . . provides an alternative strategy for group action."); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 14 (1993) (arguing that the unwritten, informal law of mediation avoids "[d]iscussion of blame or rights," and is "replaced by the rhetoric of compromise and relationship," which "thereby obscur[es] issues of unequal social power"); Judith Resnik, *Procedure's Projects*, 23 CIV. JUST. Q. 273, 276 (2004)

vate companies use form contracts to require their customers or employees to resolve disputes outside the courtroom, companies have an incentive to skew the processes in their favor.<sup>8</sup> In addition, some have criticized the informalization of dispute resolution on the ground that prejudices are more likely to manifest themselves in informal settings.<sup>9</sup> Similarly, some have argued that women—traditionally less powerful members of society—may be worse off in mediation or other ADR processes than they are in litigation, especially in family law matters.<sup>10</sup>

Together, these critiques can be seen as attacking alternative modes of dispute resolution for undermining the rule of law. Certainly, the private and informal resolution of disputes does not allow for the formal explication of rules envisioned by Lon Fuller and other rule of law advocates.<sup>11</sup> While supporters of ADR have responded to these critiques,<sup>12</sup> few commentators have defended ADR on the ground

---

(stating that while adjudication is far from perfect due to lack of access, it is relatively attractive as compared to ADR “because it is self-limited, self-conscious, and relatively transparent, whereas the alternative forms of process attend too little to their own power as well as to the effects of disputants’ power and position on strategic interaction, opportunities, knowledge, and the legitimacy of outcomes”).

8. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 674–97 (1996).

9. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375–91 (explaining that traditional adjudicatory settings with defined rules and a formal structure provide rational control, whereas informal settings encourage prejudicial behavior because majority group members are allowed a wider scope for emotional and behavioral idiosyncrasies); see also Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1398 (1997) (reiterating concerns that without a formal court proceeding to remind participants of the American values of equality and fairness, majority group members are less hesitant to express and act upon their prejudices).

10. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

11. LON L. FULLER, *THE MORALITY OF LAW* 38–39 (1964) (explaining that compliance with the rule of law demands that laws must actually be established, that such laws must be adequately publicized, that rules should apply only prospectively, that rules must be understandable, that rules shall not be contradictory, that it must be possible to conform to the rules, and that the rules must be administered in the intended manner in which they are announced); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating that judges rely, to the extent possible, on general rules, rather than on totality of the circumstances analyses).

12. See, e.g., Robert C. Bordone et al., *The Next Thirty Years: Directions and Challenges in Dispute Resolution*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 507, 510 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (suggesting that while concerns about ADR may be valid, critics often overstate their arguments and depict an oversimplified understanding of dispute resolution); Menkel-Meadow, *Whose Dispute Is It Anyway*, *supra* note 5, at 2669–70 (responding to criticisms voiced by Professor Owen Fiss and others, and urging that settlement promotes such values as “consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice”).

that it enhances the rule of law. The strength and appeal of the rule of law critique should not be underestimated. In the United States, even many of ADR's staunchest advocates recognize that there are circumstances in which disputes are better resolved publicly, through litigation, rather than through negotiation, mediation, arbitration, or some other private means.<sup>13</sup>

### III. THE INTERNATIONAL EXPORT OF ADR IN RULE OF LAW PROJECTS

The relationship between ADR and the rule of law is seen quite differently in the context of international law reform efforts. Internationally, the rule of law has been converted from a philosophical construct into a series of aid projects involving significant funding. One commentator notes that since 1990 the World Bank alone has sponsored 330 rule of law projects totaling \$2.9 billion.<sup>14</sup>

Traditional rule of law programs have been designed to train judges, build courthouses, publicize judicial decisions, and computerize and organize court files. But beginning in the mid-1990s, international aid organizations began to urge foreign countries to adopt ADR as a means to modernize their legal systems and instill greater respect for the rule of law. Recent international ADR projects often include efforts to train mediators and arbitrators, revise laws to make them more supportive of mediation and arbitration, inform judges about the benefits of ADR, and provide technical support and training materials.

The United States Agency for International Development (USAID) has been one of the leading organizations sponsoring the use of ADR as part of rule of law projects. In March 1998, USAID's Center for Democracy and Governance published an extensive manual entitled *Alternative Dispute Resolution Practitioners' Guide (ADR Practitioners' Guide)*, which explained the nature and benefits of ADR and provided numerous examples of ADR throughout the

---

13. See, e.g., Menkel-Meadow, *Whose Dispute Is It Anyway*, *supra* note 5, at 2695 (recognizing that certain settlements, such as mass tort actions, have such a significant impact on our justice system that "public exposure of such cases may be a necessary part of our democratic process" (internal quotation marks omitted)).

14. 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, 74 (David M. Trubek & Alvaro Santos eds., 2006).

world.<sup>15</sup> The introduction to the *ADR Practitioners' Guide* explains the purported link between ADR and the rule of law:

USAID's work in promoting the rule of law in developing and transitional societies 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 court system, to address conflicts in culturally appropriate ways, and to maintain social peace.<sup>16</sup>

While recognizing that ADR programs "cannot be a substitute for a formal judicial system," the *ADR Practitioners' Guide* urges that ADR can decrease the cost and length of dispute resolution, increase access to justice for disempowered groups, and "increase disputants' satisfaction with outcomes."<sup>17</sup> Nonetheless, it explains that ADR is not always appropriate; programs must be properly designed to suit the unique circumstances of the particular country.<sup>18</sup>

USAID backs its philosophy that ADR is an important component of the rule of law by funding ADR projects in various countries. For example, in El Salvador, where USAID seeks to increase access to justice, transparency, and accountability, the agency plans to strengthen and expand mediation centers throughout the country.<sup>19</sup> In Guyana, USAID has created a mediation center to resolve civil disputes and reduce case backlogs.<sup>20</sup> In Honduras, it has sponsored the development of ADR systems as a means of improving "access to

---

15. CTR. FOR DEMOCRACY & GOVERNANCE, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE (1998), available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacb895.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf) [hereinafter ADR PRACTITIONERS' GUIDE].

16. *Id.* at 1. The *ADR Practitioners' Guide* also spells out how ADR can serve rule of law objectives in more detail. See *id.* at 7–17. It urges that "ADR programs can support not only rule of law objectives, but also other development objectives, such as economic development, development of a civil society, and support for disadvantaged groups, by facilitating the resolution of disputes that are impeding progress toward these objectives." *Id.* at 3.

17. *Id.* (emphasis omitted).

18. See *id.* In its appendix, the *ADR Practitioners' Guide* provides case studies of ADR programs used in Bangladesh, Bolivia, South Africa, Sri Lanka, and the Ukraine as a means to examine when ADR is and is not effective in developing and transitioning countries. ADR PRACTITIONERS' GUIDE, *supra* note 15, app. B.

19. USAID, Budget: El Salvador (2006), <http://www.usaid.gov/policy/budget/cbj2006/lac/sv.html>; USAID, Data Sheet: El Salvador (2005), available at <http://www.usaid.gov/policy/budget/cbj2005/lac/pdf/519-002.pdf>.

20. USAID, Budget: Guyana (2006), <http://www.usaid.gov/policy/budget/cbj2006/lac/gy.html>; USAID, Data Sheet: Guyana (2005), available at <http://www.usaid.gov/policy/budget/cbj2005/lac/pdf/504-006.pdf>.

justice for marginalized groups, including women and the poor.”<sup>21</sup> On the other side of the world, USAID is supporting Nepalese community mediation as a way to resolve disputes locally and promote community solidarity.<sup>22</sup> In Africa, it has supported the Rwandan Gacaca, an indigenous mediation program promoting truth and reconciliation.<sup>23</sup> Finally, in Yemen, USAID has sought to formalize conflict resolution solutions initiated by local council members and integrate traditional means of conflict resolution into more modern techniques.<sup>24</sup>

The American Bar Association (ABA) has been another leader in the movement to encourage greater reliance on ADR as part of its international rule of law projects. The most active arm of the ABA has been its Central European and Eurasian Law Institute (CEELI).<sup>25</sup> The organization’s website explains that “CEELI is a public service project of the American Bar Association that advances the rule of law in the world by supporting the legal reform process in Central and Eastern Europe, Eurasia and the Middle East.”<sup>26</sup> Since the mid-1990s, CEELI has engaged in projects including training mediators in Armenia,<sup>27</sup> fostering the development of small businesses in Azerbaijan by providing ADR assistance,<sup>28</sup> promoting ADR in Bosnia,<sup>29</sup> assisting in the drafting of a new Bulgarian Mediation Act, providing mediation training to Bulgaria’s judges, attorneys, and citizens,<sup>30</sup> and producing a mediation bench book for Serbian trial judges and a training video to inform the general public about the potential advantages of mediation.<sup>31</sup>

---

21. USAID, Data Sheet: Honduras (2005), available at <http://www.usaid.gov/policy/budget/cbj2005/lac/pdf/522-021.pdf>.

22. USAID, Data Sheet: Nepal (2005), available at <http://www.usaid.gov/policy/budget/cbj2005/ane/pdf/367-007.pdf>.

23. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355, 357 n.6 (2002).

24. USAID, Data Sheet: Yemen (2005), available at <http://www.usaid.gov/policy/budget/cbj2005/ane/pdf/279-zzz.pdf>.

25. For general background on CEELI, see Central European and Eurasian Law Initiative, <http://www.abanet.org/ceeli> (last visited Jan. 17, 2007).

26. *Id.*

27. CEELI: Armenia, <http://www.abanet.org/ceeli/countries/armenia/program.html> (last visited Jan. 17, 2007).

28. CEELI: Azerbaijan, <http://www.abanet.org/ceeli/countries/azerbaijan/program.html> (last visited Jan. 17, 2007).

29. CEELI: Bosnia & Herzegovina, <http://www.abanet.org/ceeli/countries/bosnia/program.html> (last visited Jan. 17, 2007).

30. CEELI Programs: Bulgaria, <http://www.abanet.org/ceeli/countries/bulgaria/program.html> (last visited Jan. 17, 2007).

31. CEELI Programs: Serbia, <http://www.abanet.org/ceeli/countries/serbia/program.html> (last visited Jan. 17, 2007).

In addition, ABA law reform groups around the world have advocated the use of ADR as part of rule of law projects. For example, the ABA Latin American Legal Initiatives Council has been operating a mediation project in Mexico that promotes “court-annexed mediation in twenty-two states” and has now trained over 200 mediators.<sup>32</sup> Similarly, the ABA Africa Law Initiative Council has done extensive training of Rwandan community mediators,<sup>33</sup> and the ABA Asia Law Initiative has sought to ensure that the Emergency Loya Jirga, essentially an indigenous Afghan ADR system, operates fairly and transparently.<sup>34</sup>

Other international aid organizations are also sponsoring ADR projects to foster the rule of law. For example, the World Bank is promoting ADR in Bangladesh, Peru, and Sri Lanka to improve access to justice, as well as efficiency, transparency, and responsiveness.<sup>35</sup> Similarly, the High Level Commission on Legal Empowerment of the Poor (HLCLEP) sponsored a conference in May 2006 to consider whether and how ADR might be used to “expand access to legal protection and the rule of law” and to “contribute most effectively to poverty reduction.”<sup>36</sup>

In the international context, ADR is said to foster the rule of law in several ways: (1) it may increase access to justice by making it easier for people who are poor, illiterate, or geographically dispersed to bring or respond to a claim;<sup>37</sup> (2) it may reduce the amount of money and time needed to resolve disputes;<sup>38</sup> (3) it may provide an alterna-

---

32. ABA-LALIC: Mediation Project in Mexico, <http://www.abanet.org/lalic/mediationprojectmexico.html> (last visited Jan. 17, 2007).

33. ABA Africa Law Initiative: Access to Justice, <http://www.abanet.org/aba-africa/projects/accessjustice.shtml> (last visited Jan. 17, 2007).

34. INT’L RES. GROUP ET AL., FILLING THE VACUUM: PREREQUISITES TO SECURITY IN AFGHANISTAN 1, 10, 31–33 (2002), available at <http://www.ifes.org/publication/0f5d46d1bd36b7b79c03116bc523cc72/CRAFT.pdf>.

35. See The World Bank, Legal and Judicial Capacity Building Project: Bangladesh (2001), <http://web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&&Projectid=P044810>; The World Bank, Judicial Reform Project: Peru (1997), <http://web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&Projectid=P040107>; The World Bank, Legal and Judicial Reforms Project: Sri Lanka (2000), <http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P044809>.

36. HLCLEP, UK DFID/UNEC E Regional Conference on Alternative Dispute Resolution, Mediation and Third Party Arbitration (TPAC) (May 23–24, 2006) (on file with author).

37. ADR PRACTITIONERS’ GUIDE, *supra* note 15, at 13; Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. L. 715, 786 (2004).

38. ADR PRACTITIONERS’ GUIDE, *supra* note 15, at 16; Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167, 201 n.144 (1995).



tive to corrupt or biased court systems;<sup>39</sup> (4) it may promote foreign investment opportunities;<sup>40</sup> (5) it may provide justice to groups, such as women and minorities, whose interests are not well served by the formal legal system;<sup>41</sup> (6) it may bring community members together and establish greater social harmony;<sup>42</sup> (7) it may bring about political reform;<sup>43</sup> and (8) it may help community members work together to better protect their individual rights.<sup>44</sup>

Some doubt whether ADR actually serves these admirable purposes.<sup>45</sup> Furthermore, some argue that the exportation of ADR may be imperialistic.<sup>46</sup> However, rather than focus on the practical ques-

39. ADR PRACTITIONERS' GUIDE, *supra* note 15, at 10; Dakolias, *supra* note 38, at 200; Thomas J. Moyer & Emily Stewart Haynes, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 621 (2003).

40. Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339, 345 (2000); *see also* ADR PRACTITIONERS' GUIDE, *supra* note 15, at 17.

41. ADR PRACTITIONERS' GUIDE, *supra* note 15, at 10; Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 299 (2006). *See generally* Christopher Gibson & Michael Woolcock, *Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy* (World Bank Policy Research Working Paper 3713, Sept. 2005), available at <http://ssrn.com/abstract=806225> (arguing that deploying mediation in Indonesian communities can empower local populations and ultimately promote equality).

42. ADR PRACTITIONERS' GUIDE, *supra* note 15, at 11, 19; Moyer & Haynes, *supra* note 39, at 654 (“[M]ediation can act as a unifying process by bringing disparate groups together to work collectively to establish peace in war torn societies.”); Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L.J. 569, 641 (2004) (urging that ADR can play an important role in reestablishing social harmony, and focusing specifically on the example of Nigeria).

43. ADR PRACTITIONERS' GUIDE, *supra* note 15, at 7, 18 (asserting that ADR programs can increase civic engagement and improve the skills and abilities of local political leaders); Moyer & Haynes, *supra* note 39, at 667 (arguing that mediation promotes participation in government by engendering trust in governmental institutions).

44. ADR PRACTITIONERS' GUIDE, *supra* note 15, at 14 (stating that Bangladeshi women who participate in ADR “believe that they receive better protection and more compensation . . . than from the formal court system”); Cohen, *supra* note 41, at 337–40 (exploring the use of “rights-based” mediation in Nepal); *see also* C.J. Larkin & Pamela A. DeVoe, *Community Mediation in the Shadow of Revolution: The Nepal Experience*, ACRRESOLUTION, Summer 2006, at 20 (describing the use of rights-based community mediation in Nepal).

45. *See, e.g.*, Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 346–47, 365 (cautioning that ADR is “no magic pill” that can solve every country’s legal system ills); Douglas H. Yarn, *Transnational Conflict Resolution Practice: A Brief Introduction to the Context, Issues, and Search for Best Practice in Exporting Conflict Resolution*, 19 CONFLICT RESOL. Q. 303, 304 (2002) (suggesting that external mediators may sometimes, particularly in Africa, impede the progress toward peace).

46. *See, e.g.*, Laura Nader & Elisabetta Grande, *Current Illusions and Delusions About Conflict Management—In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573, 591 (2002) (“U.S.-style alternative dispute resolution is being imposed on many unwilling recipients in foreign countries as a requirement for development aid . . . .”); Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored “Rule of Law” Reform*

tion of whether or when ADR actually fulfills its espoused goals, this Article examines the more theoretical question of whether ADR is consistent with the rule of law in the international context. Many commentators have questioned whether ADR can actually achieve its goals, but few, if any, have challenged this fundamental premise.

#### IV. RECONCILING THE DOMESTIC AND INTERNATIONAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN ADR AND THE RULE OF LAW

If ADR is seen as an important component of international rule of law efforts, why do critics in the United States think it is inconsistent with the rule of law? I see three ways to resolve this apparent conflict. First, one of the perspectives may simply be wrong. Perhaps either the domestic critics of ADR or the international advocates of ADR have missed the boat and need to learn more from the writings or experiences of the other side. Many who criticize ADR domestically would also criticize ADR internationally, and many who defend ADR domestically would also defend it internationally. Second, perhaps the domestic and international contexts are distinguishable, so that ADR might be hostile to the rule of law domestically and yet supportive of it internationally. This explanation has some attractive aspects. However, after exploring these two theories, I offer a third, which I believe is more useful and enriches our full understanding of the relationship between ADR and the rule of law, and how both relate to justice. Specifically, I urge that those who advocate the use of ADR as part of international rule of law projects have instinctively and intuitively recognized that both ADR, and more traditional litigation-based rule of law projects, can be useful under certain circumstances. Yet more work needs to be done to determine how litigation and ADR properly relate to one another.

##### A. *Is One Side or the Other Flat Wrong?*

While some would argue that one group or the other is just wrong, this explanation does not seem to be the most likely or desirable way to resolve the paradox. As I have noted, although some may view the domestic ADR critics or the international ADR advocates as extremists, few commentators would go so far as to say there is no tension

---

*Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 89 (2000) (suggesting that rule of law projects being undertaken in China are eroding native ADR techniques, thereby adversely affecting access to dispute resolution for the poor); Wanis-St. John, *supra* note 40, at 345-46 (questioning the efficacy of ADR programs and noting that problems of asymmetry may arise when mediation is used to resolve disputes between parties of disparate power).

between ADR and the rule of law domestically. At least in some situations, such as the oft-cited *Brown v. Board of Education*,<sup>47</sup> virtually all ADR advocates admit that litigation serves important public purposes that should be protected and preserved.<sup>48</sup>

Similarly, while the international export of ADR has been criticized in particular situations, and while the specific content of the export can be problematic, it is hard to deny that some forms of ADR can, on occasion, serve laudable rule of law purposes. For example, USAID and the Inter-American Development Bank are sponsoring mediation training in Nicaragua to provide disputants with greater access to justice.<sup>49</sup> Interestingly, the Nicaraguan model permits the mediation of domestic violence claims, even though mediating these claims is typically frowned upon in the United States.<sup>50</sup> Although program observers Raquel Aldana and Leticia Saucedo criticize the way mediation is being implemented in Mulukukú, they find it preferable to retain a mediation program and to continue to apply it to certain domestic violence cases, rather than rely purely on a litigation model.<sup>51</sup> They conclude that, in some cases, mediation could be more successful than litigation in addressing the root causes of domestic violence, and that mediation has the advantage of “relatively easy access to justice and

---

47. 347 U.S. 483 (1954).

48. See, e.g., Bordone et al., *supra* note 12, at 510 (rejecting the idea that all disputes should be resolved consensually, rather than through litigation); Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29, 29–30 (2000) (emphasizing the public’s interest in litigation given its openness, impartiality, and opportunity for appellate review); Menkel-Meadow, *Whose Dispute Is It Anyway*, *supra* note 5, at 2670 (advocating the value of settlement in dispute resolution, but acknowledging that the public’s interest in litigation may sometimes outweigh that value).

49. Raquel Aldana & Leticia Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua* (undated manuscript) (draft on file with author) (describing a project known as Caminos, which includes work with six pilot communities).

50. The Maria Luisa Ortiz Center, a feminist cooperative, “convinced the Nicaraguan Supreme Court to establish a mediation center in Mulukukú,” and urged that domestic violence claims should be mediated. *Id.* at 1, 21–22. Yet feminists and others in the United States are often staunchly opposed to the mediation of domestic violence claims. See, e.g., Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993); Scott H. Hughes, *Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 569–70 (1995).

51. In particular, they are skeptical that mediation can truly transform disputants, particularly where the mode of mediation being used is not that proposed by the advocates of “transformative” mediation. Aldana & Saucedo, *supra* note 49, at 2. They are also concerned that the emphasis on harmony and procedural informality may aggravate victimization caused by domestic violence, and that by emphasizing individual over collective approaches, mediation may undercut group political efforts. *Id.* Aldana and Saucedo rely substantially on the work of anthropologist Sally Engle Merry in structuring their critiques. See generally SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO JUSTICE (2006); Sally Engle Merry, *Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization*, 35 LAW & SOC’Y REV. 39 (2001).

its relative avoidance of re-victimization issues in the domestic violence context.”<sup>52</sup> By contrast, they concluded that the litigation approach is severely impeded by a lack of access to justice—particularly in rural areas where roads are virtually nonexistent—as well as by the criminal justice system’s inability to fundamentally address the root causes of domestic violence.<sup>53</sup> Thus, they propose retaining and refining the mediation program so that it becomes an adjunct to litigation, rather than its replacement.<sup>54</sup> They further propose that the mediation model should be adjusted in order to “be able to reclaim the ‘political’ in the personal, and . . . incorporate and capitalize on the local strengths of Mulukukú, including their own cultural notions of conflict resolution.”<sup>55</sup>

Similarly, Professor Amy Cohen describes a mediation project in rural Nepal and finds that “mediation,” at least as defined and implemented there,<sup>56</sup> is being used to enforce and support human rights.<sup>57</sup> In particular, Cohen describes a donor-sponsored “mediation” training session:

The facilitator in Nepal . . . began his training . . . by lighting three candles: the first dedicated to the “martyrs of democracy,” the second to “fighters for human rights,” and the third to “victims of [state] torture.” Voice rising, he continued to describe the desperate state of human rights in Nepal: “When will this end? We don’t know. Even the government does not obey the Constitution. We must protect the human rights guaranteed in our Constitution, especially women’s rights. . . . *This* is what this training is for.” And by *this* he meant using the dialogic practices of mediation to work towards the non-violent resolution of disputes—a classic ADR aspiration—yet, in so doing, deploying a range of interventionist

---

52. Aldana & Saucedo, *supra* note 49, at 25.

53. *Id.* at 2–3, 6–7. Aldana and Saucedo note, for example, that most government services are administered in Siuna, the region’s governmental seat, which is approximately seventy kilometers away from Mulukukú. *Id.* at 7. While that might not seem terribly far on a highway, traveling seventy kilometers on a washed out road can take hours and hours. Even phone service is minimal in rural areas like Mulukukú. Additionally, the Nicaraguan legal system requires women who file private claims against their batterers “to bear the costs of the investigation, an attorney, and the prosecution of the claim.” *Id.* at 27.

54. *Id.* at 3.

55. *Id.*

56. I put “mediation” in quotes because some would disagree that the dispute resolution tool that Professor Cohen described was appropriately labeled “mediation.” She explained that the Nepalese process “is often public and coercive,” and purposely enunciates the political demands of members of the society. Cohen, *supra* note 41, at 298.

57. *Id.* at 297; *see also* Larkin & DeVoe, *supra* note 44 (explaining that Nepalese mediation is special because mediators use their powers to protect human rights, the mediation is a substitute for, rather than an alternative to, litigation, and mediation programs seek to remedy power imbalances by affording legal counsel to less powerful disputants).

strategies to push forward a substantive—and classically non-ADR—human rights project.<sup>58</sup>

The reports on the uses of ADR in Nicaragua, Nepal, and elsewhere cast doubt on the idea that ADR cannot be supportive of law and rights.

### *B. Distinguishing the Domestic and International Contexts*

One way to reconcile the two alternative perspectives on ADR is to view ADR as a second-best means of achieving justice. Specifically, one could argue that while an efficient, fair, independent, and accessible judicial system is essential to the rule of law, ADR can be superior from a rule of law perspective when a litigation system is inefficient, corrupt, biased, or inaccessible. This argument has significant appeal, and is consistent with our ADR export practices. The organizations that have urged the export of ADR have focused on developing and transitioning countries that have problematic litigation systems. Efforts to encourage countries with better respected litigation systems to adopt ADR have not occurred with the same frequency.

However, this notion that ADR is a second-best rule of law fails to explain all of the justifications for sponsoring ADR in developing countries. The organizations that have urged adoption of ADR as part of rule of law efforts have not done so merely to promote access to justice where courthouses are too costly, distant, or corrupt, but also to build communities and promote conciliation.<sup>59</sup>

Thinking of ADR as a second-best rule of law is not intellectually satisfying because it fails to take into account the significant differences between litigious and nonlitigious modes of dispute resolution. Specifically, where litigation is based on an attempt to follow publicly enunciated statutes and rules, ADR often resolves disputes without referencing such rules.<sup>60</sup>

Finally, if ADR is needed as a rule of law supplement to litigation to promote access to justice in other countries, surely that rationale has some appeal in our country as well. While we may not have significant access problems due to lack of roads or even illiteracy, economic barriers prevent many, if not most, disputants in the United States from obtaining meaningful access to courts.<sup>61</sup> Thus, if lack of access

---

58. Cohen, *supra* note 41, at 297 (third alteration in original).

59. See ADR PRACTITIONERS' GUIDE, *supra* note 15.

60. This is particularly true of mediation, and less true of arbitration.

61. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004) (explaining that while we boast of our support of access to justice, in reality, millions of Americans are denied real access); Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 100–02 (2005) (urging

justifies the use of ADR as part of the rule of law abroad, that same rationale should apply domestically as well.

### *C. The Third Way: Rethinking the Relationship Between ADR and the Rule of Law*

Can ADR be supportive of the rule of law for reasons beyond the inadequacy of litigation? Or can ADR be supportive of justice, if not the rule of law, for reasons beyond the inadequacy of litigation? How do societies' laws and ADR procedures relate to societal norms? Although exporters of ADR have not put a great deal of theoretical thought into the question of whether or why ADR might be consistent with the rule of law, their projects offer some useful insights for exploring these concepts.

#### *1. The Relationship Between ADR and Litigation Systems*

Domestically, there has been a tendency to view ADR and litigation as mutually exclusive terms. Many assume that either a dispute will be resolved formally and openly through litigation, or it will be resolved informally and privately through ADR. Though experienced practitioners typically avoid this fallacy, students—and even academics—often presume that disputes will be resolved exclusively through one means or the other.

Yet by exporting ADR as part of rule of law projects that also emphasize litigation, the exporters have made clear that ADR and litigation approaches often go hand in hand. For example, court-connected mediation, arbitration, or other programs can be adjuncts to the existing litigation system, and judges can order disputes in litigation to be transferred to those regimes. It seems that ADR and litigation approaches are closely related domestically as well, as I have discussed in greater depth in other works.<sup>62</sup> Whether the ADR process originates from court orders, administrative rules, or contractual agreements, a given dispute tends to shift back and forth between the two systems over time. For example, in the United States, negotiations and mediations are conducted in the shadow of possible litigation; arbitration agreements, awards, and settlements are enforced in court, and cases that have been litigated for years may ultimately be

---

that, for the most part, the only persons or groups able to obtain access to the U.S. litigation system are commercial organizations, affluent individuals, and persons engaged in "values conflicts" of significant interest to attract pro bono or reduced-fee representation).

62. Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 690–700 (2005).

resolved through ADR.<sup>63</sup> While this relationship can be explored outside the international context, the inclusion of ADR as part of international rule of law projects may help make the connections more obvious to commentators and policymakers at home.

I believe that the relationship between ADR and litigation, both domestically and internationally, may be reflective of a more general tension between formal and informal approaches to justice. Formal and informal approaches each have their virtues and vices.<sup>64</sup> Whereas formal rule-based systems can potentially offer more certainty and transparency, such systems are frequently slower and more costly, and they often fail to distinguish individual circumstances.<sup>65</sup> Thus, throughout history and throughout the world, we have seen oscillations and tensions between formal and informal approaches.<sup>66</sup> For example, a recent book describing dispute resolution in rural China shows that these tensions exist in societies quite different from our own.<sup>67</sup>

## 2. *Relating ADR and Litigation to Norms*

An extensive and rich domestic literature has explored the link between law and norms. While scholars' perspectives differ somewhat,

---

63. *See id.*

64. *See, e.g.*, Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289 (2002–2003) (urging that a proper system of justice should resolve societal as well as individual interests, seek societal harmony, and that both litigation and ADR can serve such goals); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401 (2004) (examining tensions between using formal and informal systems to resolve employment discrimination complaints in the United States, Great Britain, and Australia).

65. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 731 (1906) (“The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. . . . Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand.”).

66. *See, e.g.*, Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 329–30 (2005) (urging that just as the British system of equity sought to relieve problems and tensions created by the strict common-law approach, ADR today is a release for pressures created by our formal litigation system); Jacqueline 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) (“Both equity and mediation offer a form of ‘individualized justice’ unavailable in the official legal system, and each allow room for mercy in an otherwise rigid, rule-bound justice system.”).

67. *See* Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 YALE L.J. 1675, 1714 (2005) (reviewing ZHU SULI, *SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA’S BASIC-LEVEL JUDICIAL SYSTEM* (2000), describing justice in rural China and urging that “[t]he solution [to the tension], therefore, may be to institutionalize the dialectic that Zhu describes between formal and informal, modern and customary, center and periphery in a manner designed to make the norms created more accessible to the public while also being respectful of local practices”).

virtually all agree that law and norms are distinct. The causal relationship between law and norms, however, is less clear. Some suggest that norms influence laws;<sup>68</sup> others think that law influences norms.<sup>69</sup> Still others believe that judges can find ways to influence norms using means other than the mere issuance of final decisions on the merits.<sup>70</sup> Another popular belief is that the norms can be at least as important as law in structuring social behavior.<sup>71</sup> Indeed, some have argued that the imposition of law can be counterproductive to social order, in that it can undermine norms that are already operating effectively.<sup>72</sup> In addition, some claim that norms are more predictable than law.<sup>73</sup>

By studying ADR in other countries, we may learn more about the relationship between ADR and norms. Domestically, it is often suggested that one of the advantages of mediation is that it allows parties to resolve disputes according to their own preferences<sup>74</sup> or according

68. See, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694–95 (1996).

69. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025–29 (1996).

70. Susan Sturm, *Law's Role in Addressing Complex Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 35, 50 (Laura Beth Nielsen & Robert L. Nelson eds., 2005). Professor Sturm explained that judges can affect norms in three ways:

1. Structuring occasions for collective norm development and problem solving in the penumbra of formal judicial process;
2. Increasing non-legal actors' capacity to conduct conflict resolution and problem solving that generates and institutionalizes efficient, fair, and workable norms; and
3. Developing the capacity of mediating actors, such as experts and administrative agencies, to connect the domains of formal and informal norms.

*Id.*

71. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (showing that a close-knit group of Shasta County cattlemen structured their fencing and other behavior based on norms rather than law); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 155 (1996) (“The importance of maintaining a good reputation and of avoiding ostracism deters improper behavior.”); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603–04 (2000) (showing the impact of informal sanctions such as shaming); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (showing the significant influence of extralegal norms on smoking, littering, and other human behaviors).

72. See, e.g., Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2057 (1996).

73. See, e.g., Haini Guo & Bradley Klein, *Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs*, 20 OHIO ST. J. ON DISP. RESOL. 825, 885–86 (2005) (stating that in China, formal law is “muddy” and more unpredictable than social norms).

74. In mediation lingo, disputants are encouraged to engage in self-determination. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n., Am. Bar Ass'n & Ass'n for Conflict Resolution 2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf> (“A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary,



to relevant social norms, rather than strictly according to law.<sup>75</sup> Thus, in societies such as ours where law plays a central role, mediation offers disputants an opportunity to resolve their disputes in a manner different than the law might require. In societies in which formal law does not play a central role, mediation or conciliation is conducted in accordance with societal traditions or norms.<sup>76</sup> While many American ADR advocates think a mediator should be a completely neutral party, other societies believe that a mediator may help to infuse social norms into the resolution of the dispute.<sup>77</sup> Similarly, arbitration is often praised because it permits disputants to use their own selected norms, which may be different from those chosen by the society at large.<sup>78</sup>

Just as litigation and ADR can go hand in hand, a society can blend reliance on norms and reliance on law. While we tend to assume that law must be applied through formal government structures and that norms can be applied only through informal nongovernment struc-

---

uncoerced decision in which each party makes free and informed choices as to process and outcome.”); see also Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 270 (2006) (“If there is one mantra that dominates mediation theory, it is party self-determination.”). But see James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 70–72 (2004) (arguing that while self-determination is said to be mediation’s “prime directive,” it is appropriate to question “the underlying legitimacy of a disputing process committed to self-determination and neutrality of intervention in a society plagued by asymmetric distribution of power”); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787 (2001) (contrasting the aspiration of party self-determination with the realities of court-connected mediation, and expressing concern that many court mediation programs do not serve disputants’ interests in procedural justice).

75. See generally Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997) (suggesting that mediation can be a means for disputants to enforce the community’s norms that they deem most relevant); Clark Freshman, *The Promise and Perils of “Our” Justice: Psychological, Critical and Economic Perspectives on Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1 (2004) (examining the extent to which mediation may promote justice by permitting social subgroups to base decisions on their own norms).

76. See, e.g., James A. Wall, Jr. & Ronda Roberts Callister, *Ho’oponopono: Some Lessons from Hawaiian Mediation*, 11 NEGOTIATION J. 45 (1995) (describing the traditional Hawaiian and Polynesian dispute resolution method, Ho’oponopono); Robert Yazzie, “Life Comes from It”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180–87 (1994) (describing the Navajo peacemaking process).

77. Yazzie, *supra* note 76, at 181–82; see also Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 35 (1999) (describing the role played by tribal “peacemakers” in Navajo peacemaking procedures and noting “[t]he peacemaker, usually chosen by his or her chapter, is a respected person with a demonstrated knowledge of traditional Navajo stories” (citation omitted)).

78. Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 135–43 (1992) (discussing the shortcomings of the American legal system as it relates to the diamond industry and how the industry has adapted to enforce extralegal agreements).

tures, a fascinating recent study of dispute resolution in rural China shows that this assumption can be wrong. It demonstrates that residents of Beijing neighborhoods called “hutongs” relied primarily on informal social norms to resolve their disputes,<sup>79</sup> although these norms were applied with the assistance of committees of local residents and the neighborhood police.<sup>80</sup> Similarly, Professor Susan Sturm has recently urged that we rethink our core assumptions about ADR. She argues that nonlitigation dispute resolution need not always be private, and that conciliatory approaches can enforce disputants’ legal rights and inculcate social norms.<sup>81</sup>

### 3. *What Can We Realistically Expect from ADR or Litigation Alone?*

Given the links between ADR and litigation, and the important role played by societal norms, advocates of both ADR and litigation have a tendency to be unrealistically optimistic regarding the possible benefits of either approach. By examining the international blending of ADR and rule of law efforts, we can better understand the cultural, economic, and social limits that potentially constrain progress when either approach is used alone. We may also begin to understand how blending ADR and the rule of law yields a more just dispute resolution system than either single approach can.

#### a. *Limits to the Traditional Rule of Law Approach*

As has been thoroughly discussed in the academic rule of law literature, there seem to be limits on the extent to which traditional rule of law projects, particularly those imported from other countries, can fundamentally change a country’s approach to law.<sup>82</sup> Whether the goal is to eliminate corruption, increase access to justice, promote transparency, or protect individual rights, it is clear that providing judicial training and modernizing courthouses may not be sufficient to change a legal culture. For example, it is well recognized that the ex-

---

79. Guo & Klein, *supra* note 73, at 827 (commenting that more formal channels were typically “viewed as too costly, socially disruptive, and unpredictable to be an efficient option in all but the most serious disputes”).

80. *Id.* at 827–28.

81. Sturm, *supra* note 70, at 54–56 (explaining that although current critiques that ADR is private, unaccountable, and does not generate norms are often well founded, we must consider the possibility that judicial involvement can be used to ensure ADR is “norm generating, transparent, and accountable, at least at the systemic level”).

82. To some extent rule of law and other development projects can be counterproductive. See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 3–35 (2004) (detailing numerous problems with using a human rights-based approach to assist other countries’ development).

tensive, traditional Latin American rule of law projects in the 1970s made few fundamental advances.<sup>83</sup> Professor Rosa Ehrenreich Brooks and others have analyzed how entrenched legal norms impede rule of law efforts.<sup>84</sup> A number of scholars have emphasized that the rule of law is an inherently Western construct and that persons in countries with different cultures and histories, such as China, may not share the perspective that increasing the role of formal law is the best way to create a just society.<sup>85</sup> Further, countries may be unable to provide effective access to litigation due to their limited resources. The well-developed domestic literature on problems of access to justice shows that, even in a rich country like the United States, we have grave problems assuring that the average person can obtain justice.<sup>86</sup> Moreover, Professor Marc Galanter's work shows that even an ostensibly fair litigation system can prove ineffective in eliminating economic and social inequalities.<sup>87</sup>

#### b. Limits to the ADR-Only Approach

The limitations of ADR, at least in the international context, have not been as thoroughly analyzed. Yet it seems that the proponents of ADR in international rule of law projects may be unduly optimistic in

---

83. Such projects were called democratization, but their content was similar to what we now call rule of law projects. See, e.g., JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980) (voicing regrets of a former Ford Foundation official regarding 1970s rule of law projects in Latin America); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (critiquing development approaches used in the early 1970s); see also THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999) (setting out mixed views of democratization projects from the 1960s through the 1990s); *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (Thomas Carothers ed., 2006) (collecting essays on democratization efforts).

84. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275, 2283–89 (2003).

85. See, e.g., Lan Cao, *Introduction to Symposium, The "Rule of Law" in China*, 11 WM. & MARY BILL RTS. J. 539, 542 (2003) (noting that the Chinese may have a very different attitude toward the rule of law than Americans do, and that "rule of law" translates into Chinese as "rule by law," which implies a more authoritarian approach); Pat K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 OHIO ST. J. ON DISP. RESOL. 43, 48–54 (2005) (discussing China's ongoing tension between the Western rule of law approach and the traditional Chinese preference for rule of people); Stephenson, *supra* note 46, at 76 (discussing the Chinese government's resistance to the phrase "rule of law"); Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes*, 26 NW. J. INT'L L. & BUS. 225 (2006). But see RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002) (presenting a more optimistic view on Chinese enthusiasm for the rule of law).

86. See Rubinson, *supra* note 61, at 100–02. See generally RHODE, *supra* note 61.

87. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 119–22 (1974).

their belief that ADR can solve problems of corruption, access to justice, and social inequality.

First, while advocates suggest that replacing or supplementing litigation with ADR could reduce corruption, it is not obvious why this would be so. To the extent that a culture of corruption exists, mediators and arbitrators could fall prey to the same temptations as judges. Even though mediation does not result in resolution unless all of the disputants come to an agreement, a corrupt or biased mediator could still have a significant impact on that resolution. The private setting of ADR may also enhance existing corruption problems. Proponents urge that transparency and public access are important ways to fight corruption and bias, yet ADR is typically conducted privately.

Second, although it is often true that ADR is less expensive than litigation, this does not necessarily mean that providing ADR solves problems of access to justice. Depending on the type of ADR and the quality of the results, ADR may not provide access to justice. If the ADR process is biased and unfair, there may be no justice at all.

Third, to the extent that rule of law projects establish significant ADR programs in the absence of effective accessible litigation, whether such programs can truly provide justice is unclear. In the United States, ADR typically works because it operates in the shadow of an effective litigation system.<sup>88</sup> Disputes are often resolved in negotiation or mediation because parties know that if they do not resolve the disputes informally, they will have to resort to litigation. Similarly, parties contract to take disputes to arbitration because they know that courts exist to ensure that the arbitration clause and arbitral award are enforced. It is also unclear whether ADR can work without the threat of litigation. This issue is critically important to contemplating the effectiveness of ADR in some of the countries to which it is currently being exported.

There is no doubt that societies can effectively resolve disputes independently of the litigation system. Comparative and historical legal research shows that many societies, including our own, have used means other than litigation to resolve disputes.<sup>89</sup> Absent court en-

---

88. See Raymond Shonholtz, *The Mediating Future*, 552 ANNALS AM. ACAD. POL. & SOC. SCI., July 1997, at 139, 141 (recognizing that the Western conception of mediation depends on the existence of a background formal legal structure).

89. See SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY 26-27 (1979) ("[E]ven where judicial institutions are found they do not always enjoy the unchallenged pre-eminence in the business of dispute settlement which our courts claim and manage to exercise. Fighting and other forms of self-help, resort to supernatural agencies, the use of shaming and ridicule, or the unilateral withdrawal of essential forms of cooperation may all constitute equally approved and effective means of handling conflict."). See generally JER-

forcement, arbitration can work to the extent that the society's respect for the status of the arbitrator and the process of arbitration is sufficient to ensure compliance with arbitral agreements or awards. Similarly, conciliatory forms of dispute resolution, such as negotiation and mediation, can be effective, absent litigation, to the degree that social norms and bonds pressure parties into resolving their disputes and abiding by their agreements. In short, what we might call peer pressure can take the place of an effective litigation system, and allow ADR mechanisms to function without a backdrop of litigation.<sup>90</sup>

However, to the extent that the effectiveness of ADR relies on the existence of such social norms and pressures, it is unclear whether ADR alone can ensure justice or resolve social inequalities. ADR programs have been implemented abroad for many reasons. Some of these programs use ADR to empower the powerless or wrest control from the elite. For example, recall the Nepalese "mediation" program described by Cohen, which was geared toward protecting human rights,<sup>91</sup> and the Nicaraguan mediation program designed to protect women from domestic violence.<sup>92</sup> To the extent that ADR programs like these are not linked to a functioning litigation system, established social interests may have little incentive to relinquish any of their power in mediation. Idealists might believe that once the powerful elite are eye to eye with the powerless, they will decide to share their

OLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (examining informal and nonadversarial forms of justice throughout American history); Laura Nader, *Harmony Models and the Construction of Law, in CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES* 41 (Kevin Avruch et al. eds., 1991) (considering cultural aspects of alternative dispute resolution models and discussing modern anthropologists' frequent biases in favor of harmony models).

90. Nepalese mediation apparently relies on community pressure. Professors C.J. Larkin and Pamela DeVoe explain that mediation sessions include villagers as well as disputants and mediators, and that the villagers are "both audience and participants." Larkin & DeVoe, *supra* note 44, at 23. They also report that failure to reach an agreement "appears to be rare," and that at least one study showed "a decline in the level of violence and prejudice against women in areas where there were women's community mediation groups." *Id.*; cf. Richard L. Abel, *Introduction, in 2 THE POLITICS OF INFORMAL JUSTICE* 1 (Richard L. Abel ed., 1982). Professor Abel explains that the informal justice that works well in precapitalist societies "cannot be recreated under Western capitalism":

Precapitalist legal informalism is embedded in and contingent upon a social structure in which: relationships are multiplex and continuous, the supporters of one disputant are bound to the other by crosscutting ties, there is little residential mobility, and reputation in the face-to-face community is highly valued and easily lost in the absence of privacy. Western capitalism not only lacks these qualities but also actively rejects them. . . . It is not surprising, therefore, that when informal legal institutions are introduced into Western capitalist societies they do not help to preserve relationships . . . but rather serve to celebrate their termination.

*Id.* at 2-3.

91. Cohen, *supra* note 41.

92. Aldana & Saucedo, *supra* note 49.

power and wealth.<sup>93</sup> This may occur. But it seems more likely that such mechanisms will be successful in redistributing power only to the extent that the weaker members of the society can use political, physical, or economic influence to demand such redistribution.<sup>94</sup>

Empirical investigations may teach us how to blend formal and informal justice systems. While a full study is beyond the scope of this Article, India and Japan offer intriguing possibilities. In India, substantial efforts have been made to informalize the justice system to provide greater access to justice. A number of analysts have criticized these attempts, urging that they ultimately do not serve the purposes for which they were designed.<sup>95</sup> But at least one analyst suggests that Japan's concerted effort to rely more extensively on conciliation and other informal means of dispute resolution has been effective. Professor Frank Upham explains that, although it is widely assumed that Japan has always been an antilitigious country, Japan's preference for conciliatory approaches has been instilled deliberately by political forces.<sup>96</sup> Upham notes that while in the early 1970s litigation was common in Japan, thereafter the government, courts, bar associations, and others reduced the number of lawyers and lawsuits, and replaced them with an array of administrative and ADR processes.<sup>97</sup> Given the great economic success of the Japanese while using a substantially conciliatory system, Upham urges that developing countries may not necessarily want to adopt a formal rule of law system.<sup>98</sup>

---

93. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 261–84 (1994) (arguing that when disputants come face to face in mediation, there is at least the potential that they will develop a better understanding of, and empathy for, their fellow disputants' perspectives, and become empowered to resolve the disputes in ways that are mutually beneficial).

94. Aldana and Saucedo have reached a similar conclusion, and thus, urge that mediation must be linked to rather than replace litigation. Aldana & Saucedo, *supra* note 49, at 3.

95. See, e.g., Marc Galanter & Jayanth K. Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 96, 126 (Erik G. Jensen & Thomas C. Heller eds., 2003) (urging that lok adalats, established in the 1980s, "hold little promise for delivering effective legal services to those most in need"); see also Sarah Leah Whitson, "Neither Fish, nor Flesh, nor Good Red Herring" Lok Adalats: *An Experiment in Informal Dispute Resolution in India*, 15 *HASTINGS INT'L & COMP. L. REV.* 391, 392 (1992) (claiming that the lok adalats have become yet another "moribund institution" that subverts the rights of the poor).

96. Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 83, at 75, 91–98; see also John Owen Haley, *The Politics of Informal Justice: The Japanese Experience, 1922–1942*, in 2 *THE POLITICS OF INFORMAL JUSTICE*, *supra* note 90, at 125 (providing another account of the Japanese attempt to replace litigation with conciliation).

97. Upham, *supra* note 96, at 91, 97.

98. *Id.* at 98–101.

V. IS THE RULE OF LAW AN END IN ITSELF OR A  
MEANS TO AN END?

The relationship between ADR and the rule of law and how countries might structure their legal systems is now clearer. As Professor Carrie Menkel-Meadow has explained, one of the real virtues of the American export of ADR is that it offers the United States the opportunity to *import* additional knowledge about ADR.<sup>99</sup> The comparison of the domestic and international discussions of the relationship between ADR and the rule of law offers several key insights.

First, attempting to build dispute resolution systems that are either exclusively formal or exclusively informal can be problematic. Exclusively formal systems are often expensive, inaccessible, and unable to serve all of the conciliatory interests that can be served by an informal system. Purely informal systems can also be problematic, unless the community is small enough that the informal mechanism will be sufficiently transparent and enforceable. We must also consider norms, as well as formally adopted laws, in determining how societies' disputes are and ought to be resolved.

Second, the question of whether ADR and the rule of law are consistent is semantic. If the rule of law is narrowly defined only to include litigation-oriented approaches, then most ADR processes are inconsistent with the rule of law. If, on the other hand, the rule of law is more broadly defined, as it sometimes has been in the international context, then rule of law projects may include ADR elements. To the extent the discussion remains on this purely semantic level, it is not particularly interesting.

Third, a far more interesting and substantive question is whether we should favor the rule of law as an end in and of itself, or whether we should treat the rule of law as a means to an end. In my view, comparing the domestic and international treatments of ADR and the rule of law shows that we ought to consider how the rule of law is or can be part of a larger vision of justice.<sup>100</sup> Interestingly, this fundamental issue is not typically explored in any depth. While commentators often examine the virtues of the rule of law (transparency, fairness, equality, etc.), they rarely consider whether a rule of law approach is essential to protect those values, or whether other systems of dispute resolution might be as good as, or even better than, the rule of law. Whereas

---

99. Carrie Menkel-Meadow, *Exporting and Importing ADR: "I've Looked at Life from Both Sides Now,"* DISP. RESOL. MAG., Spring 2006, at 5.

100. Cf. *id.* (explaining that ADR's legitimacy can be established by values other than the rule of law, such as treaties, consent, and economic and trade values).

Westerners typically place great value on the rule of law for fostering individual rights and protecting the individual from the state, not all societies share this vision. Some Chinese, for example, see the rule of law as a tool of state oppression, and favor reliance on informal norms and personal relationships over reliance on formal law.<sup>101</sup> Similarly, ADR may operate differently in societies, such as China, that are more communitarian and less individualistic than our own. The goal of mediation in many societies is to preserve or create harmonious social relationships, and not merely to maximize individual self-interest. For example, mediation in China focuses more on preserving relationships, status, and social ties, and less on protecting individual rights.<sup>102</sup>

Fourth, examining the links between ADR, the rule of law, and justice requires us to rethink the meaning of these terms. Creating a harmonious society is not part of the traditional definition of the rule of law, and yet some would say that learning to live together harmoniously, as a community, is a critical aspect of justice. For example, Aristotle's and Plato's definitions of justice emphasized the importance of all components of the society joining together to do a job well.<sup>103</sup> A variety of non-Western societies also rely on their systems of justice to provide harmony, balance, or reconciliation.<sup>104</sup> At the same time, some might advocate using dispute resolution processes to effectuate social change and eliminate inequalities. But while American commentators who adopt this belief tend to assume that rights-based litigation is the best dispute resolution technique for achieving social change, perhaps it is not. For example, Professors Amy Cohen and Ellen Deason write that "[c]ommunity mediation boards in Nepal and Bangladesh combine individual dispute settlement with attention to remedying some of the cultural and class inequalities affecting women and other marginalized groups."<sup>105</sup>

In short, the efforts to include ADR as part of the rule of law projects intuitively recognize the importance of harmony, reconciliation, balance, and equality as parts of a fundamental vision of jus-

---

101. See Chew, *supra* note 85, at 51–52.

102. See GOH BEE CHEN, *LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION* 15–18 (2002).

103. Sternlight, *supra* note 64, at 302.

104. *Id.* at 301; see also MERRY, *supra* note 51, at 113–33 (discussing the traditional Fijian process of “bulubulu,” during which “a person apologizes for an offense and offers a whale’s tooth (*tabua*) and a gift and asks forgiveness,” and also describing this process as a traditional means for achieving reconciliation within the society, but one which sometimes creates problems, particularly in modern settings, like rape crime proceedings).

105. Amy J. Cohen & Ellen E. Deason, *Comparative Considerations: Toward the Global Transfer of Ideas About Dispute System Design*, *DISP. RESOL. MAG.*, Spring 2006, at 23.



tice.<sup>106</sup> 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.<sup>107</sup> As Roscoe Pound explained a century ago, while law may serve justice, justice is broader than law.<sup>108</sup>

Those who have included ADR as part of rule of law projects may not have consciously focused on the meaning of justice or where ADR and the rule of law might fit into a definition of justice. Nonetheless, the intuition that led to the expansion of rule of law projects may help us to broaden our inquiries into the nature of justice—both here and abroad.

---

106. See Richard L. Abel, *The Contradictions of Informal Justice*, in 1 *THE POLITICS OF INFORMAL JUSTICE* 267 (Richard L. Abel ed., 1982). Abel approaches some of the issues discussed in this Article from a somewhat different perspective, focusing on the contradictions of informal justice. He concludes that informal processes can both ameliorate and aggravate existing inequalities, and can stimulate and prevent popular participation. See *id.* While clearly recognizing flaws of informal justice, he also sees potential virtues:

Yet, if the goals of informal justice are contradictory, and if it is incapable of realizing them because of contradictions inherent in advanced capitalism, informalism should not simplistically be repudiated as merely an evil to be resisted, or be dismissed as a marginal phenomenon that can safely be ignored. It is advocated by reformers and embraced by disputants precisely because it expresses values that deservedly elicit broad allegiance: the preference for harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all citizens to participate in decision making rather than limiting authority to “professionals,” that are familiar rather than esoteric, and that strive for and achieve substantive justice rather than frustrating it in the name of form. Those ideals must, and will, continue to inspire the struggle to create the institutions—and the society—that can realize them.

*Id.* at 310.

107. See Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 *OHIO ST. J. ON DISP. RESOL.* 27, 91 (2002) (“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.”); Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 *NW. J. INT’L L. & BUS.* 383, 388 (2000) (observing that much of China’s pro-mediation philosophy stems from Mao’s insistence that unlike litigation, mediation will serve to bring the community together rather than push it apart). See generally Oko, *supra* note 42 (asserting that for some countries, development of the rule of law may not be the ultimate end, and that, instead, the ultimate end sought ought to be peaceful resolution of disputes); Shonholtz, *supra* note 88.

108. Pound, *supra* note 65, at 732–33 (“Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society.”).