

# A SYSTEMIC PERSPECTIVE OF ADR IN LATIN AMERICA: ENHANCING THE SHADOW OF THE LAW THROUGH CITIZEN PARTICIPATION

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INTRODUCTION

In the United States, ADR generally works as an alternative to the judiciary<sup>1</sup> within the framework of the legal system, operating under what has been described as “the shadow of the law.”<sup>2</sup> This concept has become a general assumption in the U.S. ADR field.<sup>3</sup> However, this assumption does not hold in most Latin American countries.<sup>4</sup> In Latin America, there is a marked gap be-

<sup>1</sup> Kritzer notes that roughly ten percent of civil cases are decided in court, while only five percent are resolved through some form of ADR. Herbert Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986). See also STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (5th ed. 2007) [hereinafter GOLDBERG, DISPUTE RESOLUTION].

<sup>2</sup> There has been a long-standing discussion about the shadow of the law, and the role of ADR in the U.S. Latin America could benefit greatly by adopting and transforming American knowledge and experience. In 1979, the Yale Law Journal dedicated an entire volume to the then-budding field of alternative dispute resolution at a time when people and institutions from Chief Justice Warren Burger to the Department of Justice to the Ford Foundation, and even the media were pressing for broader and less traditional options to the courtroom. Note, *Dispute Resolution*, 88 YALE L.J. 905, 907 (1979) [hereinafter Note, YALE L.J.]. See also Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979) [hereinafter Mnookin, *Bargaining*].

<sup>3</sup> The term “the shadow of the law” has become firmly rooted in the American legal field since Mnookin and Kornhauser first described it. For examples of different applications of the term in different fields, see William Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (June 2004); Valerie Sanchez, *A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under the Wagner Act*, 20 OHIO ST. J. ON DISP. RESOL. 621 (2005); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107 (Fall 1995).

<sup>4</sup> There is no equivalent commonplace in Latin America for this notion. Rather, what is commonplace is to emphasize the gap between law and reality. See Jorge Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 76–77 (2008) [hereinafter Esquirol, *Failed*]. I first examined this issue in 1999 in my L.L.M. thesis, Mariana Hernandez Crespo, *Making Rights Reality: Venezuelan Child Welfare Policy, A Cornerstone for Development* (May 1999) (unpublished L.L.M. thesis, Harvard Law School) (on file with Harvard Library, Harvard University) [hereinafter Crespo, *Rights*]. This paper explored the limitation or inability of the law to effect change in the Venezuelan reality. It suggested the need for a more participatory method for the creation of truly effective and responsive law. Finally, it concluded that a participatory process is not enough to guarantee fair outcomes if the cultural norms that promote exclusion are not challenged. See also Mariana Hernandez Crespo, *Civic Networks Leading Democratic Innovation: Social Capital for Value Creation* (2003) (unpublished Third Year Paper, Harvard Law School) (on file with Harvard Library, Harvard University) [hereinafter Civic Networks] (propos-

tween the laws on the books and laws in action. Although most Latin American constitutions and laws guarantee the protection of citizens' rights, more specifically the right of access to justice, by and large these rights are simply aspirational for most Latin Americans because enforcement mechanisms are weak. Thus, dispute resolution in Latin America operates under a pale shadow of the law.<sup>5</sup> This can lead to agreements that are less than just:<sup>6</sup> that is,

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ing a new mindset of inclusion and interdependence that values diversity). This new way of thinking and acting requires creating new social linkages based on differences, not similarities, in order to form strategic partnerships and create value. This process of collaboration moves citizens from merely tolerating diversity to actually using diversity for the common good. *Id.* See also Mariana Hernandez Crespo, *Building the Latin America We Want: ADR and Public Participation*, 6 ST. THOMAS L. REV. (forthcoming Fall 2008) [hereinafter Crespo, *Building*], for a description of the research project carried out in Brazil, which aimed to raise civic awareness through education, and established a participatory system in order to address the gap between law and reality.

<sup>5</sup> For the purposes of this Article, the shadow of the law is the influence that law exercises over the daily interactions and transactions of citizens. The enhancement of the shadow of the law ensures a minimum of justice and acts as a benchmark to ensure fair and just agreements. Without it, fair and just agreements cannot be guaranteed. It also provides a BATNA (Better Alternative To a Negotiated Agreement) in the bargaining process, thus guaranteeing fair agreements. It is also the possibility of recourse, in the event of a failed negotiation process, or the possibility of enforcement, in the event of a failure to uphold a negotiated agreement. By contrast, when there is no shadow of the law, or when the shadow is light, parties do not possess judicial recourse as a BATNA, nor are they assured of recourse to, or enforcement of, a failed ADR process. The result is an increase in the likelihood of unfair or unjust agreements. Referring to unequal bargaining in negotiated divorce settlements, Mnookin and Kornhauser argue that the possibility of judicial review of settlements according to a predetermined standard of fairness can decrease the likelihood of unfair settlements. Mnookin, *Bargaining*, *supra* note 2, at 993. Furthermore, they note:

[i]f parties know that they will have to present their agreement to a judge, they may deal with each other in a fairer way and may be more likely to reach an agreement reflecting appropriate social norms. Behavioral scientists have suggested that the presence of an 'audience' can affect bargaining. In out-of-court negotiations, the judge represents both an 'actual' and an 'abstract' audience.

*Id.* at 994.

<sup>6</sup> See Corinne Davis Rodrigues, *It's All in the Claiming: Seriousness and the Origins of Disputes in a Brazilian Shantytown* (2005) (unpublished paper delivered to the Annual Conference of the Association of Law and Society, Las Vegas, USA) (on file with the author) [hereinafter Rodrigues, *Claiming*]. Without a well-defined shadow of the law, drug traffickers in the *favelas*, or slums, act as a *de facto* criminal justice and enforcement system. In addition, in civil disputes, traffickers are the shadow under which agreements are reached because parties threaten to resort to them. For in-depth discussion of the consequences of a light shadow of the law on dispute resolution in Latin America, see Corinne Davis Rodrigues & Enrique Desmond Arias, *The Myth of Personal Security: Criminal 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 (Jane Holder & Carolyn Harrison eds., Oxford University Press 2003); Enrique Desmond Arias & Corinne Davis Rodrigues, *The Role of Criminals in Crime Management and Dispute Resolution: Understanding Drug Trafficker Control in Rio's*

without the guarantee of fairness.<sup>7</sup> I call this state of affairs Latin American Dispute Resolution (LDR), because it is missing the essential ‘A,’ or its “alternative” nature. That is, in Latin America, ADR is not a true “alternative” because it operates without a practical judicial option.<sup>8</sup> Latin America needs LADR, its own dispute resolution system, in which ADR operates as a true alternative.<sup>9</sup>

This issue requires a systemic solution, one that takes into account the entire dispute resolution system<sup>10</sup> within its cultural con-

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Favelas (Sept. 2001) (unpublished paper delivered to the Latin American Studies Association, Washington, DC).

<sup>7</sup> See Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons From Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004); Richard C. Reuben, *Public Justice: Toward A State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997) [hereinafter Reuben, *Public Justice*]; Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. REV. 12 (2000); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000) [hereinafter Reuben, *Constitutional Gravity*].

<sup>8</sup> Because there is no practical recourse to an effective judiciary, there is, in fact, no BATNA. In practical terms, this is effectively “justice delayed, justice denied.” Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean*, WORLD BANK TECHNICAL PAPER NO. 319 (June 1996) [hereinafter Dakolias, WORLD BANK TECHNICAL PAPER NO. 319]. In order for ADR to function effectively, there must be recourse in order to ensure a minimum of justice in negotiated agreements. Any effort to export ADR to Latin America must take into account that there is no practical recourse for negotiating parties. For this reason, I suggest *infra* that there must be an effort to enhance the shadow of the law, which would be part of a larger holistic approach to optimize dispute resolution systems. See Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339 (2000).

<sup>9</sup> Jorge Esquirol, *The Fictions of Latin American Law*, 1997 UTAH L. REV. 425, 432–33 (1997); Jorge Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 110–11 (2003) [hereinafter *Continuing Fictions*]. Jose Alberto Ramirez Leon, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model*, 2005 J. DISP. RESOL. 399 (2005); Alejandro Ponienman, *How Important is ADR to Latin America?*, 58 DISP. RESOL. J. 65 (2003). Latin America needs to develop and tailor a dispute resolution system that reflects its own unique situation, rather than merely import and impose reforms from abroad.

<sup>10</sup> See generally WILLIAM URY, JEANNE M. BRETT, & STEPHAN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGN SYSTEMS TO CUT THE COSTS OF CONFLICT* (PON Books 1993); CATHY COSTANTINO & CHRISTINA SICKLES-MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (Jossey-Bass 1996). See also Audio tape: *The Second Generation of Dispute System Design: Reoccurring Problems and Potential Solutions*, Dispute Resolution Symposium, held by the 2008 Ohio State Journal on Dispute Resolution (Jan. 24, 2008), available at <http://moritzlaw.osu.edu/jdr/symposium.html>. See also Audio archives and blog of the Dispute Systems Design Symposium, Mar. 7–8, 2008, <http://blogs.law.harvard.edu/hnmcp/ADR/alternative-dispute-resolution/dispute-systems-design-symposium> (last visited Aug. 11, 2008). See ROBERT BORDONE, *INTRODUCTION TO DISPUTE SYSTEMS DESIGN*, <http://blogs.law.harvard.edu/hnmcp/files/2008/03/dsdintroduction3-7-08.pdf>, for a brief overview of the field. See also Amy Cohen & Ellen Deason, *Comparative Considerations: Toward the Global Transfer of Ideas about Dispute Systems Design*, 12 NO. 3 DISP. RESOL. MAG. 23 (2006), for an explanation of the difficulties in

text, which provides an understanding of how the parts interact. A systemic approach must begin with an inclusive perspective<sup>11</sup> that acknowledges all stakeholders<sup>12</sup> in the task of optimizing dispute resolution. By optimizing, I mean that each dispute would be directed to the most appropriate forum for that dispute. Furthermore, in order to optimize dispute resolution systems, it is necessary to supplement representative democratic processes at a preliminary consultative stage through a method such as consensus-building, by taking into account how stakeholders frame the issues and articulate their different perspectives. In addition, this process should encourage stakeholder participation in the creation and evaluation of options, as well as in the development of strategies for implementation. This adds a step to the existing legislative processes in the region in order to produce more sustainable legislative decisions.

Participation is essential to the enhancement of the shadow of the law in Latin America. I argue that the current codes in Latin America, largely imported from Europe, lack the participatory en-

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transferring dispute system design abroad. John Reitz explains that assessments of foreign systems should go beyond observing similarities and differences to understanding what he calls “functional equivalence.” John Reitz, *How to do Comparative Law*, 46 AM. J. COMP. L. 620 (1998). I argue that it is critical to involve local actors in order to identify and understand “functional equivalence.” Hiram Chodosh contends that a systemic approach to justice reform can reduce local resistance to reform because a systemic solution, by its nature, is bottom-up rather than “externally determined or hierarchically imposed.” Hiram E. Chodosh, *Emergence from the Dilemmas of Justice Reform*, 38 TEX. INT’L L.J. 589 (2003).

<sup>11</sup> A well-defined and effective shadow of the law cannot function adequately without inclusion. As discussed *infra*, participation is critical to the creation of sustainable domestic law, without which the shadow cannot be enhanced. Inclusion and participation require a change in mindset. The current zero-sum approach leads to dominant parties that exclude minority voices. In fact, Susskind points out that an inclusive paradigm advocates a “win-win” approach in which all stakeholders participate in the creation of the final outcome. See generally LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT’S RULES* 18 (Oxford University Press 2006) at 3–16 [hereinafter SUSSKIND, *BREAKING ROBERT’S RULES*]. For a compendium on this approach, see CARRIE MENKEL-MEADOW, LELA LOVE, ANDREA SCHNEIDER & JEAN STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (Aspen 2005). This text is a particularly useful introduction to those countries where access to U.S. databases and legal literature is difficult. See also ROGER FISHER ET AL., *GETTING TO YES* 85 (Houghton Mifflin 1991), for the seminal articulation of the concept of zero-sum vs. win-win. See also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). However, Susskind expands the win-win concept to argue that consensus-building maximizes joint gains by allowing parties to reach agreements that go beyond their BATNA. See also THE CONSENSUS-BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 102 (Lawrence Susskind, Sarah McKearnan, & Jennifer Thompson-Larmer, eds., Sage Publications 1999) [hereinafter HANDBOOK].

<sup>12</sup> Costantino defines stakeholders as those who have an interest in the issue at hand and its resolution. COSTANTINO & SICKLES-MERCHANT, *supra* note 10, at 49–66.

agement of the stakeholders interested in their enforcement. I contend that the creation of “sustainable domestic law”<sup>13</sup> — and by this term, I mean laws that are not imported and are inclusively created — is the first element required for the enhancement of the shadow of the law. Laws created in an inclusive, participatory manner would be more sustainable and stable. “Sustainable domestic laws” could be produced by adding a consensus-building process to supplement traditional representative democratic processes. An increase in the level of participation in a preliminary consultative stage could help to make the laws more easily enforceable, thereby making the laws more sustainable or stable over the long term.<sup>14</sup> Consensus-building is a method that can allow a group to come to nearly unanimous agreement and achieve satisfactory implementation of that agreement. It goes beyond simple up/down voting, reaching for optimal solutions that aim to address each stakeholder’s concerns.<sup>15</sup> The addition of a consensus-building process at the front-end of the legislative process could not only

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<sup>13</sup> Some have argued that autochthonous social laws will entrench and legitimize dominant local tradition, disfavoring minorities and the vulnerable, and reinforcing the imbalance of the status quo. See Esquirol, *Continuing Fictions*, *supra* note 9, 99–101. I argue *infra*, following Susskind, that the stakeholders themselves understand best the issues they face. Furthermore, they have a vested interest in the outcome, since they are the ones that must live with the outcome. Thus, the consensus-building process protects the interests and values of all stakeholders. This allows for the creation of social agreements that are better than the status quo for all involved, thereby making the social agreements more sustainable. It is the role of the facilitator to guide the process of creating knowledge. See SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 83–113. See also COSTANTINO & SICKLES-MERCHANT, *supra* note 10, at 49. See generally PAULO FREIRE & MYRA BERGMAN RAMOS, *PEDAGOGY OF THE OPPRESSED* (Continuum 1970) for a critique for the assumption that the academy is the sole locus of knowledge and that those outside of it are incapable of contributing to knowledge.

<sup>14</sup> See SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 133–53 (referring to such agreements as “nearly self-enforcing”). See also Dwight Golann & Eric E. Van Loon, *Legal Issues in Consensus-Building*, in *HANDBOOK*, *supra* note 10, at 517. See William R. Potapchuk & Jarle Crocker, *Implementing Consensus-Based Agreements*, in *HANDBOOK*, *supra* note 10, at 527–53, for a general discussion of implementation. Agreements reached by the representatives of the stake-holding groups take the agreement back to their constituents for ratification. It is ratification by the groups that makes the agreements more easily enforceable. Ratification also ensures that the representatives are truly acting on behalf of their constituents. See SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 136–38.

<sup>15</sup> See SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11 at 3–4. Arthur Domike sees consensus-building as essential to the creation of stable agreements in Latin America between contentious movements and the government. Arthur Domike, *Citizen Engagement and Democracy in the Age of Social Movements*, in *CIVIL SOCIETY AND SOCIAL MOVEMENTS: BUILDING SUSTAINABLE DEMOCRACIES IN LATIN AMERICA* (Inter-American Development Bank, Special Publications on Development No. 5), 373 [hereinafter Domike, Engagement]. I will discuss the use of consensus-building to maximize dispute resolution systems in Latin America in a forthcoming article, to be published by The Benjamin N. Cardozo School of Law in Spring 2009.

work to preclude any discontent as a result of unpopular legislation, but could also strengthen the legislation itself by bringing citizens' interests, concerns and creativity into the process.

In addition to sustainable domestic laws, a participatory mechanism such as the Multi-Door Courthouse can improve the enforcement of agreements and transform cultural attitudes and norms toward the law in Latin America. By giving citizens the skills to engage in meaningful participation in dispute resolution in the private sphere, they can gain the skills necessary for participating in both private and public dispute resolution. In addition, by bringing citizens into closer, more meaningful contact with the judicial process, their attitudes toward the law can be shifted from dismissive to supportive.

The present article addresses the need to enhance the shadow of the law in Latin America through greater citizen participation in the legislative and judicial processes. The enhancement of the shadow of the law could be effected through the engagement of citizens in the design and implementation of law and enforcement processes that will ultimately affect the way they manage their own conflicts. Furthermore, increased citizen participation can help make legal reform more effective and sustainable.<sup>16</sup>

Part I of this article addresses the issue of a pale shadow of the law in Latin America. Part II reviews the disjointed legal reform efforts in Latin America, and suggests that a systemic perspective could effectively link and strengthen judicial reform efforts and the promotion of ADR.<sup>17</sup> Part III describes the three elements of a systemic reform framework for the enhancement of the shadow of the law in Latin America: sustainable domestic laws, a functional enforcement mechanism, and supportive social norms. This article concludes that enhancing the shadow of the law through citizen participation is essential to optimize dispute resolution systems in Latin America.

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<sup>16</sup> See Edgardo Buscaglia & Maria Dakolias, *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador*, WORLD BANK TECHNICAL PAPER NO. 350 (Oct. 1996) [hereinafter WORLD BANK TECHNICAL PAPER NO. 350]; Linn A. Hammergren, *Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress*, U.S. Agency for International Development Global Center for Democracy and Governance, (Mar. 2002) 20–21, available at <http://www.pogar.org/publications/judiciary/linn2/latin.pdf>.

<sup>17</sup> A forthcoming article will use the lens of social capital to examine the Multi-Door Courthouse as a way to optimize Latin American dispute resolution systems.

## I. A PALE SHADOW OF THE LAW IN LATIN AMERICA

## a. The Effects of Lawlessness

Historically, Latin America's laws have been imported with little citizen involvement. There is a long tradition of imported law from Europe, beginning with the establishment of most Latin American codes.<sup>18</sup> From the beginning,<sup>19</sup> Latin American colonists paid lip service to Spanish attempts to transfer Spanish legal and cultural norms to the colonies. Knox notes that “[w]hen regulations were ‘impossible or inconvenient to execute’ they were ‘shelved with the famous Spanish formula, I obey but I do not execute, and were referred back to Spain again for further consideration.’ It was a very pragmatic response, which allowed colonists to honor the law in theory, but avoid its restrictions in application.”<sup>20</sup>

In a certain way, Latin Americans still hold on to a dichotomous attitude toward the law, ignoring it while at the same time “possess[ing] a basic faith, an idealistic belief in the legislative paradigm, that legislation can solve all problems.”<sup>21</sup> This attitude toward law is coupled with a general mistrust and belief that the legal system is corrupt.<sup>22</sup> The outcome of all this is a climate of lawlessness, endemic to much of Latin America, in which laws are ignored if they are inconvenient, and enforcement is uneven at best and corrupt at worst. Lawlessness or manifest disregard for the law reinforces power imbalances, generally benefiting powerful parties

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<sup>18</sup> See generally John C. Reitz, *Export of the Rule of Law*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 429 (2003), for a general overview of traditional approaches to exporting law. See Esquirol, *Continuing Fictions*, *supra* note 9, at 46. Esquirol notes that laws imported into Latin America from abroad fail to engage local stakeholders, thereby compromising the legitimacy of the law. He also observes that recent reform efforts have simply replicated the same mistakes of importation without engagement.

<sup>19</sup> See Michael Knox, *Continuing Evolution of the Costa Rican Judiciary*, 32 *CAL. W. INT'L L.J.* 133, 137 (2001).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Thomas J. Moyer, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 *OHIO ST. J. ON DISP. RESOL.* 619, 640 (2003) [hereinafter Moyer, *Mediation*] (noting that “surveys in Argentina, Brazil, Ecuador, and Peru found that ‘between 55 percent and 75 percent of the public manifest a very low opinion of the judicial sector.’”). Kossick and Bergman also note that a low perception of the judiciary is held by the majority of Mexicans. Robert Kossick and Marcelo Bergman, *The Enforcement of Local Judgments in Mexico: An Analysis of the Quantitative and Qualitative Perceptions of the Judiciary and the Legal Profession*, 34 *U. MIAMI INTER-AM. L. REV.* 435, 457 (Summer 2003) [hereinafter Kossick, *Enforcement*].

when conflict arises and exacerbating the oppression of powerless parties.<sup>23</sup>

In this situation, the pale shadow of the law produces less-than-just agreements that affect every sector of Latin American society.<sup>24</sup> Even though “extra-judicial agreements” are reached between parties (represented or unrepresented) outside the court system,<sup>25</sup> the current backlogs of ten years or more<sup>26</sup> mean that courts are unable to offer practical or effective recourse.<sup>27</sup> In order to circumvent judicial backlogs, there has been a general trend towards the use of arbitration for international and domestic business disputes, and mediation for low-income communities, with little practical recourse to a functioning judiciary for review or enforce-

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<sup>23</sup> Samantha Power, Keynote Address at Celebration 55: The Women’s Leadership Summit, Harvard Law School (September 19, 2008) [hereinafter Power]. In the address, Power, a scholar on genocide, argued that law is essential to the protection of the rights of the powerless and poor. She contends that lawlessness is one of the greatest threats to the powerless, and one of the greatest assets to the powerful.

<sup>24</sup> Rodrigues, Claiming, *supra* note 6. There are many situations in Latin American society where power imbalances influence agreements. The clearest example of this is the power that drug traffickers exert over mediations in the Brazilian *favelas*, or slums. In addition, the wide gap between rich and poor and the concomitant power imbalances establish the context in which ADR must operate.

<sup>25</sup> See JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA (Edmundo Jarquín & Fernando Carrillo eds., 1998); LA ECONOMÍA POLÍTICA DE LA REFORMA JUDICIAL (Edmundo Jarquín & Fernando Carrillo eds., 1997).

<sup>26</sup> See Dakolias, *supra* note 8. In Colombia, it can take from seven to ten years to push a complex commercial dispute through the judicial system. See Paul Constance: Reconcilable Differences, <http://www.iadb.org/idbamerica/Archive/stories/1998/eng/e998ee.htm> (last visited Aug. 14, 2008). As recently as May 2008, the World Bank noted, “it takes 686 days to solve a simple commercial dispute in court in Panama, in line with the backlog observed in the Latin America & Caribbean region.” See Posting of Cesar Chaparro, *Panama: Modernizing the Judicial System*, The World Bank’s Doing Business Blog, [http://blog.doingbusiness.org/latin\\_america](http://blog.doingbusiness.org/latin_america) (May 6, 2008). In fact, the judiciaries of most Latin American countries suffer from a high rate of negative perception among their own citizens. According to some studies, 92% of Peruvians, 87% of Argentines, 85% of Venezuelans and 73% of Brazilians have a negative opinion of their justice systems. Sebastian Rotella, *A New Breed of Justice Reshaping Latin America*, L.A. TIMES, Oct. 11, 1999, available at <http://articles.latimes.com/1999/oct/11/news/mn-21124>.

<sup>27</sup> Transparency International’s 2007 Global Report on Corruption notes that while gains have been made in certain areas, corruption in Latin America’s judicial systems still remains a significant problem. Linn A. Hammergren, *Lessons Learned About Fighting Judicial Corruption*, in GLOBAL CORRUPTION REPORT NO. 138 (2007) [hereinafter GLOBAL CORRUPTION REPORT]. See also Transparencia Paraguay, *Politics and Nepotism Plague Paraguay’s Courts*, in GLOBAL CORRUPTION REPORT NO. 255 (2007); Angélica Maytín Justiniani, *Control of the Judiciary Ensures Impunity for Panama’s Elite*, in GLOBAL CORRUPTION REPORT 252 (2007); Miguel Carbonell, *Judicial Corruption and Impunity in Mexico*, in GLOBAL CORRUPTION REPORT 225 (2007).

ment.<sup>28</sup> Nonetheless, backlogs still remain because the judiciary is the only institution with the power of enforcement.

This state of affairs falls hardest on the disenfranchised majorities.<sup>29</sup> These citizens live in the *favelas*, or slums, that encircle the large cities of Latin America.<sup>30</sup> Most of the residents are immigrants from rural areas or small cities,<sup>31</sup> many earning less than one dollar a day.<sup>32</sup> They lack licit channels or connections — in other words, power — that would allow them to advance economically or socially. They have inadequate access to government social services,<sup>33</sup> including dispute resolution. Juan Mendez suggests that alternative dispute resolution methods that operate without an

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<sup>28</sup> For a general discussion of World Bank arbitration efforts, see Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L., 167, 200–04 (1995) [hereinafter Dakolias, *Strategy*]; Karyn S. Weinberg, *Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoria Amiable Composition*, 12 BU. INT'L L.J. 227 (1994). For mediation efforts, see MOYER, *Mediation*, *supra* note 22; see also Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56 MODERN L. REV. 295 (1993) (discussing the third wave of the access to justice movement and its emphasis on representation and information for the poor). For a discussion on the problems with judicial enforcement, see Kossick, *Enforcement*, *supra* note 22.

<sup>29</sup> By “disenfranchised,” I mean that, other than voting, they generally lack the channels to participate or influence the broader political agenda, except through political unrest. Juan Mendez, *Institutional Reform, Including Access to Justice: Introduction*, in THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 225 (Juan Mendez, Guillermo O'Donnell, & Paulo Sergio Pinheiro eds., 1999). For an introductory discussion of the situation, see generally *id.* at 221–26. See also Rodrigues, *Claiming*, *supra* note 6, for specific examples of the *favelas* in which a majority of citizens reside. The better-established residents of the *favelas* are at the bottom of the mountains, and the poorest are at the top. A similar situation exists in Venezuela, where brick multi-floor homes with better access to utilities, even TV are near the bottom of the mountains, and the metal shacks with dirt floors are near the top.

<sup>30</sup> For a detailed description of a Latin American *favela* (barrio or shantytown), see Vivienne Mahieux, *Rio DeJaneiro's Favela Tourism*, REVISTA: HARV. REV. OF LATIN AMERICA 44 (Winter 2002). Mahieux wryly observes that these *favelas* do not even appear on maps, and are very much a lawless “no-man’s land” where visitors are cautioned, “*entre aqui, se for capaz*,” enter if you dare. She observes that foreigners view the *favela* and its residents as an “exotic other,” referring to Edward Said’s contention that “otherness” prevents the viewer from really seeing another. On the other hand, Latin Americans themselves have become inured to their existence. *Id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 45. According to a 2007 IADB study, the poverty rate for Latin America is at 48%. SEBASTIAN GALIANI, REPORT FOR THE COPENHAGEN CONSENSUS CENTER AND THE INTER-AMERICAN DEVELOPMENT BANK, REDUCING POVERTY IN LATIN AMERICA AND THE CARIBBEAN 4 (Sept. 15, 2007), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1186234>. For disaggregated rates by country, see *id.* at 5. The countries with the highest rates of poverty are Nicaragua (45.6), Bolivia (43.1), Venezuela, Honduras and El Salvador (38.7). *Id.*

<sup>33</sup> See Crespo, *Rights*, *supra* note 4, at 15–42. Citizens in low-income communities do have access to mediation centers and Justices of the Peace. However, they do not have recourse to the courts when bargaining breaks down. *Id.*

effective shadow could result in a “second-class justice system” for the disenfranchised.<sup>34</sup>

Nowhere are the effects of a pale shadow of the law more evident than in the *favelas* of Brazil. In the vacuum left by an inefficient judiciary and the pale shadow of the law, drug traffickers operate as *de facto* adjudicators and provide their own shadow. Sociologist Corinne Davis Rodrigues observed that although ADR resources are available in the *favelas*,<sup>35</sup> residents continue to turn to drug traffickers for dispute resolution, usually in criminal matters and occasionally for property disputes. In the *favelas*, drug traffickers are perceived as the highest authority, even superior to the traditional court system.<sup>36</sup> Even if traffickers are not actively involved in a dispute, reference to their involvement was made at least once in the course of every form of dispute resolution Rodrigues witnessed. The threat to summon them is commonly used as leverage to resolve neighborhood and small-claims disputes. From this, it is clear that in some areas the drug traffickers themselves have become the shadow of the law.<sup>37</sup>

Despite efforts to improve Latin American legal systems, the current state of affairs is unsustainable.<sup>38</sup> Not only do drug traffickers act as *de facto* adjudicators in some areas, but in others guerrilla armies and riots threaten the stability necessary for devel-

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<sup>34</sup> Mendez points out “[T]he problems of access to justice go beyond . . . inefficiency and outdatedness. Legal services for the poor are largely unavailable except through volunteerism, and even those efforts are generally discouraged, if not actually persecuted.” Mendez, *supra* note 29, at 225.

<sup>35</sup> See Rodrigues, Claiming, *supra* note 6, at 15. In a study based in Rocinha, a *favela* of Rio de Janeiro, from September 1999 to December 2001, Rodrigues followed the resolution process of multiple-neighbor property disputes in the contexts of city, community, administrative agencies, and small claims court. She observed that when mediation fails, the case is heard by the judge. This process is faster than that of the civil court, taking months rather than years.

<sup>36</sup> In her study of mediation in the Brazilian *favelas*, particularly property disputes, Rodrigues found that punishments assigned by the drug traffickers consist of either physical violence or expulsion from the *favela*. A focus group participant on July 22, 2000 referred to them as “judges,” and said that residents would turn to traffickers with legal questions. They would choose one based on the way he tended to rule, to increase their chances of success. It has also been suggested that the more serious the dispute is perceived to be, the greater the chance that the claimants will turn to a third party with a high degree of authority, most often the traffickers. Rodrigues points out that the court system’s power to resolve disputes is a “[S]ymbolic power rather than real . . . .” Rodrigues, Claiming, *supra* note 6, at 20–21, 23–24.

<sup>37</sup> Domination of the dispute resolution system is not limited to low-income communities. More broadly, dominant parties have a definite advantage at the negotiation table if there is no practical formal judicial alternative. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>38</sup> See Rodrigues, Claiming, *supra* note 6. See also Chaparro, *supra* note 26.

opment.<sup>39</sup> For instance, Rodrigues notes that the most influential source of justice in the Brazilian *favelas* is an ad hoc, arbitrary justice, dispensed by capricious strongmen, most often drug traffickers.<sup>40</sup> For the few middle class citizens outside *favelas* and outside the influence of drug traffickers or other strongmen, there is little recourse for any violation of the law or agreement. The situation in Brazil illustrates a clear consequence of a pale shadow of the law, not only for Brazil, but for much of Latin American society.<sup>41</sup>

Aside from the consequences that the current state of affairs has for Latin America, it also has very real consequences for the United States. Without the stability provided by strong Latin American legal systems, U.S. interests are affected. Economic and social instability in Latin America burdens foreign and local economic transactions and investment, increasing risk and cost to the investor.<sup>42</sup> The high level of risk deters not only foreign capital investment,<sup>43</sup> but also encourages flight of capital into stronger currencies, thereby depleting capital resources and destabilizing the economy. Even though countries such as Mexico, Argentina, Chile and Costa Rica have experienced some economic growth, volatility is a serious problem for the region as a whole.<sup>44</sup> In addition, poor

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<sup>39</sup> For a discussion of the guerrilla movements in Colombia, see Mauricio Garcia-Villegas, *Law as Hope: Constitution and Social Change in Latin America*, 20 WISC. INT'L L.J. 353, 363–66 (2002). For a discussion of the riots and instability in reaction to IMF policy, see Roman Terrill, *Symposium: Private Capital and Development: Challenges Facing International Institutions in a Globalized Economy*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 325 (1999); John Paddock, *Comment: IMF Policy and the Argentine Crisis*, 34 U. MIAMI INTER-AM. L. REV. 155 (2002).

<sup>40</sup> See Rodrigues, *Claiming*, *supra* note 6.

<sup>41</sup> See Esquirol, *Continuing Fictions*, *supra* note 9, at 46. Although this is not the case for a few Latin American countries such as Costa Rica, it is the case for the majority of Latin American countries. The efforts of the World Bank to promote rule of law and judicial reform in most of Latin America attest to this fact. Costa Rica's colonial and post-colonial experience was exceptional when compared to the rest of the region, and this has facilitated rather smooth democratic development. Knox, *Continuing Evolution of the Costa Rican Judiciary*, *supra* note 19, at 137–38.

<sup>42</sup> See generally 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). Shaw notes that foreign investors' lack of confidence in local judiciaries correlates strongly with a weakened economy.

<sup>43</sup> See generally Robert Kossick & Julian Neckelmann, *Structuring Private Equity Transactions in Mexico*, 6 NAFTA: L. & BUS. REV. AM. 105–59 (2000) (providing examples of the effects of political instability on risk). See also Development Challenge, USAID, [http://www.usaid.gov/policy/budget/cbj2004/latin\\_america\\_caribbean/](http://www.usaid.gov/policy/budget/cbj2004/latin_america_caribbean/) (last visited on Aug. 9, 2008) for an overview of the challenges Latin America poses to the U.S.

<sup>44</sup> Dieck-Assad points out that despite Mexico's high economic growth, the benefits of that growth have been limited to only a few, leaving "unacceptable levels of poor and extremely poor people." Maria de Lourdes Dieck-Assad, *Social Cohesion as the First Item in the Human Rights Agenda: Mexico's Performance*, [forthcoming, University of St. Thomas Law Journal Fall 2008].

economic and social stability also puts pressure on low-income communities to find work outside their homeland, most often in countries with stronger currencies, namely, the U.S., Canada and European nations.<sup>45</sup>

Any attempts to change the current situation must be systemic if they are to be sustainable.<sup>46</sup> Even so, it is important to acknowledge that in the system there are significant barriers to altering the status quo.<sup>47</sup> In the current Latin American circumstances, some stakeholders benefit from a culture that allows or promotes corruption, power imbalances, and exclusion, and have no incentives to make any alterations.<sup>48</sup> However, I argue that since the majority of Latin Americans generally do not benefit from the status quo, a powerful desire for a better state of affairs, together with a method and the know-how to achieve it, can provide incentives for them to work together for a better option.<sup>49</sup>

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See also Thomas H. Hill, *Symposium: Law and Economic Development in Latin America: A Comparative Approach to Legal Reform: Introduction to Law and Economic Development in Latin America: A Comparative Approach to Legal Reform*, 83 Chi.-Kent. L. Rev. 3 (2008). Hill notes the World Bank has measured economic growth for the region at an average of only 1.8% from 1980–1990; at 3.5% from 1990–2000; at –.5% from 2000–2002; and at 2% for 2003. See Rachel V. Steinwender, *Brazil and the Global Financial Crisis: An Examination of the Effect from Charlotte to Sao Paolo*, 3 N.C. BANKING INST. 411 (1999).

<sup>45</sup> They often leave in search of better employment in order to support their families back home. See Jose N. Uribe, *Impacts of Remittances from the United States on Recipient Latin American Economies*, 11 GEO. PUB. POL'Y REV. 33 (2005–2006). See also *Emigration from Latin America: Making the Most of an Exodus*, THE ECONOMIST, Feb. 21, 2002; *Monetary Lifeline: Remittances from Migrant Workers in Rich Countries are Countries Increasingly Important to Developing Countries*, THE ECONOMIST, July 29, 2004.

<sup>46</sup> See COSTANTINO & SICKLES-MERCHANT, *supra* note 10. A systemic perspective requires the commitment of all stakeholders. Therefore, the process should be inclusive in order to obtain the necessary commitment from all stakeholders. See also Note, YALE L.J., *supra* note 1, at 907; Laura Nader, *Disputing without Force of Law*, 88 YALE L.J. 998-1000 (1979). Also, for change to be sustainable, it must be gradual in order to establish and build upon accomplished objectives. There is a robust body of literature on the topic of societal change. See MALCOLM GLADWELL, *THE TIPPING POINT* (BACK BAY BOOKS 2002); PETER SENGE ET AL., *THE DANCE OF CHANGE* (DOUBLEDAY 1999); JOHN P. KOTTER, *LEADING CHANGE* (Harvard Business School Press 1996); Frank E.A. Sander, *Dispute Resolution: Raising the Bar and Enlarging the Canon*, 54 J. LEGAL EDUC. 115; Cass Sunstein, *Situationism*, THE NEW REPUBLIC, Mar. 13, 2000, at 42.

<sup>47</sup> RONALD A. HEIFETZ, *LEADERSHIP WITHOUT EASY ANSWERS* (Harvard University Press 1994) [hereinafter HEIFETZ, ANSWERS] and RONALD A. HEIFETZ & MARTY LINSKY, *LEADERSHIP ON THE LINE* (Harvard Business School Press 2002) [hereinafter HEIFETZ, LINE].

<sup>48</sup> HEIFETZ, ANSWERS, *supra* note 47; HEIFETZ, LINE, *supra* note 47. See also Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353 (2000)

<sup>49</sup> Bernardo Kliksberg, *Six Unconventional Theories about Participation*, available through the Digital Library of the Inter-American Initiative on Social Capital, Ethics and Development at [www.iadb.org/ETICA/Documentos/kli\\_seist-i.doc](http://www.iadb.org/ETICA/Documentos/kli_seist-i.doc). [hereinafter Kliksberg, Six]. See also Ber-

## II. DISJOINTED REFORM EFFORTS: ADDRESSING DISPUTE RESOLUTION SYSTEMS IN LATIN AMERICA

Reformers have recognized that an effective legal system can increase social and economic stability, which in turn bolsters political stability.<sup>50</sup> They argue that an effective legal framework provides the ground rules that govern human interactions and economic transactions in an orderly, predictable and stable manner, whether one is speaking of business development or the protection of rights.<sup>51</sup>

Nevertheless, in the past few decades, reform efforts to address the problems in Latin American dispute resolution systems

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nardo Kliksberg, *Inequality and Development in Latin America: A Procrastinated Debate*, available at [http://www.iadb.org/etica/documentos/kli\\_inequ-i.htm](http://www.iadb.org/etica/documentos/kli_inequ-i.htm) (last visited September 23, 2008); Forum on development and culture stresses role of citizen participation (Paris, March 13, 1999), available at <http://www.iadb.org/news/articledetail.cfm?language=en&artid=1593> (last visited September 23, 2008); Bernardo Kliksberg, *The Role of Social and Cultural Capital in the Development Process*, available at [http://www.iadb.org/etica/documentos/kli\\_elrol-i.doc](http://www.iadb.org/etica/documentos/kli_elrol-i.doc) (last visited September 23, 2008). For examples of citizen participation in the budgeting process (specifically in M&E systems) for World Bank initiatives in Latin America, see <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:21415913~pagePK:146736~piPK:146830~theSitePK:258554,00.html> (last visited September 23, 2008) and *Gobernabilidad, Empoderamiento Comunitario e Inclusión Social: "Auditoria Social y Mecanismos Participativos de Monitoreo y Evaluación"*, available at [http://info.worldbank.org/etools/docs/library/109646/curso\\_lac/curso\\_lac/index.html](http://info.worldbank.org/etools/docs/library/109646/curso_lac/curso_lac/index.html) (last visited September 23, 2008). One of the pillars of Susskind's methodology is the premise that stakeholders should create agreements that offer a better option to the current situation of the parties. See SUSSKIND, *BREAKING ROBERT'S RULES*, *supra* note 11, at 21. In a forthcoming article, to be published by The Benjamin N. Cardozo School of Law in spring 2009, on the potential of consensus-building in Latin America, I demonstrate how citizens can participate at a preliminary stage in a consultative body that can influence the decisions made by their democratically elected representatives.

<sup>50</sup> Hammergren, *Judicial Reform*, *supra* note 16; Dakolias, *Strategy*, *supra* note 28. For a discussion of the relationship between law and economics, see WORLD BANK TECHNICAL PAPER No. 350, *supra* note 16; for the relationship between law and social development, see 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). There is a robust body of literature on the promotion of the rule of law that discusses these issues extensively. For a brief introduction, see Pilar Domingo & Rachel Sieder, *Rule of Law in Latin America: The International Promotion of Judicial Reform*, LAT. AM. POL. & SOC'Y 153, 2003; EDUARDO BUSCAGLIA & WILLIAM RATLIFF, *LAW AND ECONOMICS IN DEVELOPING COUNTRIES* (Hoover Institution Press 2000); LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUDICIAL REFORM IN LATIN AMERICA* (Westview 1998).

<sup>51</sup> IFI's such as the World Bank note, "Well-functioning law and justice institutions and a government bound by the rule of law are important to economic, political and social development." *Rule of Law and Development*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Aug. 15, 2008).

have been disjointed.<sup>52</sup> This is illustrated by the fact that, on the one hand, there have been significant efforts to promote the rule of law,<sup>53</sup> and the reform of the judiciary and the judicial process.<sup>54</sup> On the other hand, reformers also have promoted alternative dis-

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<sup>52</sup> Similar issues with disjointed efforts to address legal access problems and promote ADR occurred in the U.S. The editors of the Yale Law Journal in 1979 observed, “[R]eformers alternate between building institutions and taking them apart, between urging regulation and calling for deregulation. The current push for less formal methods for resolving disputes may reflect waning faith in established institutions and professions.” Note, YALE L.J., *supra* note 2, at 907. In the same volume, Laura Nader articulated the issue of lack of access to justice in the U.S. She noted that attempts to solve the problem, from small claims to public-interest movements to extralegal processes, were highly disjointed, and had not been successful to provide access. She argued that “ultimate access to the legal system is crucial if extralegal processes are ever to provide effective relief for consumer and citizen complaints.” Nader, *supra* note 46.

<sup>53</sup> There is extensive literature on the rule of law. See generally DAVID TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (Cambridge University Press 2003) [hereinafter *NEW LAW AND ECONOMIC DEVELOPMENT*]; GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant G. Garth eds., University of Michigan, 2002) for recent discussions. For current development efforts by the World Bank, see *Rule of Law as a Goal of Development Policy*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~isCURL:Y~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Aug. 15, 2008). See also Esquirol, *Continuing Fictions*, *supra* note 9. Brooks notes that rule of law efforts have been important to IFI’s and multinational corporations in order to bolster free trade with emerging economies. Human rights activists see the rule of law as a way to ensure due process and the protection of human rights. Security experts see rule of law as a way to prevent terrorism. Although their priorities differ, they all agree that rule of law is essential for a stable, democratic state. See Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the ‘Rule of Law,’* 101 MICH. L. REV. 2276–77 (2003). She observes that decision-makers in these groups need to explore more deeply the nuances of the rule of law literature in order to be more effective. See *id.* at 2283. I would further argue that scholars and local decision-makers should collaborate in order to ensure a thoughtful systemic approach. Furthermore, Anderson points out that external decision-makers need to be sensitive to the cultural and legal differences between North and South America, and even among Latin American countries themselves. Frederick Anderson, *Lawyers and the Rule of Law in the Western Hemisphere*, 643 PLI/COMM 201 (1992). Cooper contends that rule of law efforts have had only very limited success. James Cooper, *Access to Justice I.I.*, 30 CAL. W. INT’L L.J. 431 (2000). Cooper also notes that there have been extensive attempts to change laws in Latin America as part of the rule of law initiatives. *Id.* Noriega also marks the effort to alter laws and constitutions in order to further rule of law initiatives. Jorge Santistevan de Noriega, *Reform of the Latin American Judiciary*, 16 FLA. J. INT’L L. 164 (2004). Also, evoking the Helman and Ratner’s idea of the “failed state,” Esquirol argues that the “failed law discourse” about Latin America has shaped the subsequent efforts by reformers. He observes that reformers have aimed to replace the law without assessing the needs of the stakeholders. Esquirol, *Failed*, *supra* note 4, at 76–77.

<sup>54</sup> See Edgardo Buscaglia Jr., Maria Dakolias, & William Ratliff, *Judicial Reform in Latin America: A Framework for National Development*, HOOVER INSTITUTION ON WAR, REVOLUTION & PEACE STANFORD UNIVERSITY (1995); JUSTICE DELAYED, *supra* note 25; LA ECONOMÍA POLÍTICA, *supra* note 25; WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA* (2000); WORLD BANK TECHNICAL PAPER NO. 319, *supra* note 8; Edgardo Buscaglia & Thomas Ulen, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin*

pute resolution methods in the region without meaningful coordination with other judicial reform efforts in order to affect the dispute resolutions system as a whole.

The World Bank, the United States Agency for International Development (USAID)<sup>55</sup> and the Inter-American Development Bank (IADB), among others, have attempted to promote the rule of law throughout Latin America.<sup>56</sup> The emphasis of reforms has been in three main areas: improving judicial performance, introducing legislative reforms, and promoting alternative dispute resolution.<sup>57</sup>

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*America*, 17 INT'L REV. L. & ECON. 275 (1997); Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345 (2000).

<sup>55</sup> CENTER FOR DEMOCRACY AND GOVERNANCE, TECHNICAL PUBLICATIONS SERIES, NO. PN-ACP-335, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE (Mar. 1998).

<sup>56</sup> See ENRIQUE CARRASCO, THE E-BOOK ON INTERNATIONAL FINANCE AND DEVELOPMENT, THE UNIVERSITY OF IOWA CENTER FOR INTERNATIONAL FINANCE AND DEVELOPMENT, <http://www.uiowa.edu/ifdebook/ebook2/ebook.shtml> (last visited Aug. 14, 2008) (discussing the concept and competing theories of development and the involvement of IFI's in development efforts in Latin America since the 1960s). There is robust scholarship in the area of law and development. See THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 53 and generally David 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 (1974). Mendez points out that experts have embraced ADR because they have realized that it does not work to simply increase the number of courts in the judiciary which is underfinanced, inadequately structured and possesses an insufficient professional culture. Mendez, *supra* note 29, at 263. They have ignored the systemic problems in the judiciary by going in the direction of ADR; however, ADR does not work without a functional judiciary. See also JUSTICE DELAYED, *supra* note 25. There is also a robust body of LatCrit literature on rule of law and law-and-development efforts. See Enrique Carrasco, *Opposition, Justice, Structuralism, and Particularity: Intersections Between LatCrit Theory and Law and Development Studies*, 28 U. MIAMI INTER-AM. L. REV. 313 (1997) for an introduction.

<sup>57</sup> Mendez notes that the international efforts have addressed institutional access to justice, particularly with budgets, training and the credibility of the judiciary. However, they have prioritized efficiency over fairness. Mendez, *supra* note 29, at 221–24. Rodrigues contends that the promotion of ADR methods in the absence of the enhancement of what I call a “well-defined shadow of the law” further accentuates perceptions of inefficiency of the justice system for the resolution of disputes, reinforcing the use of non-legal based means of resolution (i.e. drug traffickers as de facto adjudicators and enforcers). Rodrigues, *Claiming*, *supra* note 6, at 25–26. For ADR promotion by USAID, see USAID SUPPORTS ALTERNATIVE DISPUTE RESOLUTION IN LATIN AMERICA AND THE CARRIBEAN, [http://www.usaid.gov/locations/latin\\_america\\_caribbean/pdf/dg\\_conflict.pdf](http://www.usaid.gov/locations/latin_america_caribbean/pdf/dg_conflict.pdf) (last visited Aug. 10, 2008); for USAID's rule of law efforts, see *USAID Promotes the Rule of Law in Latin America and Caribbean Democracies*, [http://www.usaid.gov/locations/latin\\_america\\_caribbean/pdf/dg\\_ruleoflaw.pdf](http://www.usaid.gov/locations/latin_america_caribbean/pdf/dg_ruleoflaw.pdf) (last visited Aug. 10, 2008). IFI's also have promoted the rule of law and ADR in Latin America in order to encourage investment and development in Latin America. For some efforts, see *From Intervention to Empowerment*, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1442025> (last visited Aug. 13, 2008). For further treatment, see Cooper, *Access to Justice 1.1*, *supra* note 53, for ADR promotion efforts in Latin America.

## a. Legal and Judicial Reform Efforts: Focusing on Enforcement

Judicial reform initiatives over the last few decades have taken many forms, including improving judicial independence through the implementation of judicial appointment, evaluation and disciplinary systems; improving judicial administration by bolstering court administration, judicial budgets and case administration; revising procedural codes; improving access to justice through the provision of ADR mechanisms, among other things; and improving legal education and training for attorneys and judges.<sup>58</sup>

## b. Promotion of ADR: Focusing on Efficiency and Access to Justice

As part of the above attempts to promote rule of law and judicial reforms, ADR has been offered as a way to improve access to justice.<sup>59</sup> Some examples of the ADR mechanisms that have been promoted include mediation and arbitration.<sup>60</sup> However, because there is no practical recourse to an effective judiciary, there is, in fact, no BATNA (better alternative to a negotiated agreement) in the bargaining process. In order for ADR to function effectively,

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<sup>58</sup> See Dakolias, *Strategy*, *supra* note 28, at 217–24. Among other things, she observes that the quality of legal education throughout the region is highly uneven and lacks standardization, with little or no continuing education for attorneys or judges. Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV. 1267 (1997). Reformers also have been attentive to the development of adequate physical and technological infrastructure for the court system. For example, in an attempt to modernize courts throughout the region, they have made significant investments in technology. They also have introduced competitive salaries in order to attract better-qualified personnel to the judiciary. The World Bank has made significant investments in courtroom technologies, such as computer-based case management systems, in order to bring more efficiency to the judicial system. *Resources Management*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAW/JUSTINST/0,,contentMDK:20754588~menuPK:2035394~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Aug. 20, 2008).

<sup>59</sup> Dakolias, *Strategy*, *supra* note 28, at 200–06. However, the World Bank has observed that ADR by itself is not sufficient to reduce judicial backlogs. “[B]inding ADR mechanisms may help alleviate some backlog if combined with other delay reduction measures.” WORLD BANK TECHNICAL PAPER No. 350, *supra* note 16, at 39–40. See also THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM (Pilar Domingo & Rachel Sieder, eds., 2001). Dakolias, *Strategy*, *supra* note 28, at 200–04 (describing the process of establishing the various ADR methods in Latin America).

<sup>60</sup> See Martha A. Field & William W. Fisher III, LEGAL REFORM IN CENTRAL AMERICA: DISPUTE RESOLUTION AND PROPERTY SYSTEMS 85–172 (2001) for an overview of ADR in Central America, as well as recommendation for implementation. See also Dakolias, *Strategy*, *supra* note 28.

there must be judicial recourse. Judicial recourse provides the parties a BATNA (the court system) at the negotiation table and thus allows parties to walk away from the negotiation table if a proposed agreement does not exceed their BATNA.

There has been extensive debate about the merits of exporting/importing ADR methods across cultural and national boundaries. Some see ADR methods as neutral mechanisms for dispute resolution, while others see them as potentially political and coercive. Contending that informal ADR processes can create a space for social transformation and, in fact, generate cultural and legal norms, Amy Cohen argues that the shadow of the law is not essential to provide justice.<sup>61</sup> Carrie Menkel-Meadow seems to agree with this contention in situations where “treaties, consent, economic and trade values may substitute for rule of law.”<sup>62</sup> Even so, she does acknowledge that cultures and communities — even local ones — are not monolithic or homogeneous, and that this needs to be taken into account in the transfer of knowledge and practice.

However, in cultures and communities where power imbalances are prevalent, these structures can be replicated in ADR processes. Thus, bargaining under the shadow of the law is absolutely essential in order to counteract manipulation of the processes by the powerful and to offer recourse to the powerless. As Rodrigues’ research in the Brazilian *favelas* clearly demonstrates, in areas where the shadow of the law is weak informal power structures directly influence and even coerce ADR processes.<sup>63</sup> In sum, in cultures and countries where lawlessness and naked power prevail, it is the poor who suffer the most.<sup>64</sup>

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<sup>61</sup> Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARVARD NEG. L. REV. 295 (2006). Cohen also provides a concise review of the American and global debates about mediation.

<sup>62</sup> Carrie Menkel-Meadow, *Exporting and Importing ADR*, DISP. RESOL. MAG., Spring 2006, at 7. Menkel-Meadow offers a brief overview of how the perception role of culture in ADR has changed over time. For an example of those arguing for the necessity of law, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1995–1996). In the middle ground of the debate is Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1361 (1985). Some scholars, such as Laura Nader, believe that ADR exacerbates problems of social justice. Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management—in Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573 (2002). See also Reuben, *Public Justice*, *supra* note 7, at 577; Reuben, *Constitutional Gravity*, *supra* note 7, at 949.

<sup>63</sup> Rodrigues, *Claiming*, *supra* note 6.

<sup>64</sup> Power, *supra*, note 23.

Mediation initiatives in Latin America illustrate this point. Generally targeted at low-income communities, the mediation centers in these communities function under the dominant influence of the prevalent cultural norms, usually reflecting the interests of the powerful (i.e. drug traffickers, guerillas, etc). In theory, if the playing field were level, meaning that parties shared equal resources, skills and power, then ADR could be truly transformative. However, the reality is far different from the theory.<sup>65</sup> Although some scholars have argued that mediation can increase access to justice,<sup>66</sup> mediation is not the forum for protecting rights. Mediation is about negotiating interests, not about asserting rights, and there is no adjudicator to assert the rights of the less powerful. Thus, mediation is particularly unsuited to protecting the rights of less-powerful parties in a dispute, particularly in Latin America, where power imbalances have a tendency to spill over into ADR processes.

Other initiatives to establish Justices of the Peace in rural and low-income areas have faced similar cultural challenges. The Justices of Peace are people from the neighborhood with credibility; some are appointed by the judiciary and receive salaries, and some are unpaid volunteers who do this work in addition to their regular jobs.<sup>67</sup> Generally, many do not have a deep grasp of the law, nor is there a way to enforce their judgments.<sup>68</sup> Also, because these Justices of the Peace are established within low-income communities, they are subject to the dominant cultural norms, which in some cases do not reflect the legal norms, as is the case with mediation centers.<sup>69</sup>

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<sup>65</sup> See generally Rodrigues, Claiming, *supra* note 6. With regard to the disconnect between cultural and legal norms: it is well known that it is the norm in Latin America to ignore the law. This becomes evident as soon as one drives on the roads. A flagrant disregard for traffic laws is the norm. Another example of disregard for the law is the level of corruption in Latin America. See Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Cause of Corruption in the Judiciary*, 30 LAW & POL'Y INT'L BUS. 95 (1999); Gerardo D. Berthin, *Transparency and Developing Legal Frameworks to Combat Corruption in Latin America*, 10 SW. J. L. & TRADE AM. 243 (2004); Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT'L L.J. 1649 (2003); Robert E. Lutz, *On Combating the Culture of Corruption*, 10 SW. J. L. & TRADE AM. 263 (2004); GLOBAL CORRUPTION REPORT, *supra* note 21.

<sup>66</sup> See Moyer, *Mediation*, *supra* note 22 (arguing that mediation can help parties circumvent the corruption and inefficiencies that are endemic to Latin American judicial systems).

<sup>67</sup> *Id.* at 664–65. See also Dakolias, *Strategy*, *supra* note 28, at 204–05.

<sup>68</sup> Dakolias, WORLD BANK TECHNICAL PAPER NO. 319, *supra* note 8.

<sup>69</sup> Rodrigues, Claiming, *supra* note 6, at 145. See also Moyer, *Mediation*, *supra*, note 22, at 664–65.

Arbitration, together with collective bargaining, has a long history in Latin America, especially in labor law.<sup>70</sup> More recently, it has been promoted mainly to the domestic and international business sectors as a more efficient and effective method for conflict resolution.<sup>71</sup> The business sector often uses arbitration to circumvent backlogged courts.<sup>72</sup> Arbitration has generally been effective in this arena. The problem, however, is that in civil law, issues of private law (e.g., commercial and contract law) can be resolved privately by the parties, but issues of public law and policy (e.g. family and labor law) should be resolved or supervised by a court. Thus, the lack of government or civic oversight of some commercial arbitration processes can harm the public interest, as in the case of oil companies causing environmental destruction in the Amazon River Basin.<sup>73</sup>

Moreover, besides the promotion of private ADR, there has been a recent trend to connect ADR to the Latin American courts. Specifically, there have been efforts to pass mediation laws or to include them in the civil procedure code, following reformer's recommendations.<sup>74</sup> However, efforts to pass mediation and arbitration laws, as well as efforts to connect ADR to the courts, are not based on any broad, wide-ranging discussion among the majority of Latin American citizens as to the pros and cons of court-connected ADR.<sup>75</sup>

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<sup>70</sup> Arbitration is one of the oldest methods of conflict resolution, dating back to the commercial dealings of the Phoenicians. Frank D. Emerson, *History of Arbitration Practice and Law* 19 CLEV. ST. L. REV. 155, 156 (1970).

<sup>71</sup> Reformers in the 1980's and 1990's promoted arbitration in concert with a broader promotion of foreign investment and trade with the region, i.e., the UNCITRAL convention and the harmonization of local law with regard to the enforcement of arbitration awards. Donald Donovan, *International Commercial Arbitration and Public Policy*, 27 N.Y.U. J. INT'L L. & POL. 650 (1995).

<sup>72</sup> *Id.* at 649–50. Although commercial arbitration proceedings are generally effective, there are still problems in some instances with an inability to enforce awards. Buscaglia notes that when larger businesses must use the public courts, their lobbyists are able to get special, expedited treatment from local governments. Buscaglia, *A Quantitative Assessment*, *supra* note 54.

<sup>73</sup> Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J. L. & TRADE AM. 293, 326, 384 (1995).

<sup>74</sup> It should be noted that reformers have advocated for court-connection without much reference to the ongoing scholarly debate in the U.S. regarding court-connected ADR. *See infra* note 75. Florence Peterson observed that ADR methods, particularly arbitration and mediation, have become widely accepted in corporate circles in Latin America. James Henry, Harry N. Mazadoorian, Florence Peterson, & Steve Price, *Looking Ahead: E-Commerce*, *International Work Mark Corporate ADR's Cutting Edge*, 6 NO. 4 DISP. RESOL. MAG. 8 (2000).

<sup>75</sup> Although not discussed in Latin America, the relative opportunities and challenges to court-connected ADR are a subject of debate within U.S. scholarly and practitioner circles, as evidenced in Frank E.A. Sander et al., *Judicial (Mis)Use of ADR? A Debate*, 27 U. TOL. L. REV.

The Multi-Door Courthouse has also been promoted in parts Latin America. It is a relatively new institution that has yet to be well-established in the region.<sup>76</sup> The Multi-Door Courthouse is a mechanism for routing disputes to the most appropriate forum for resolution.<sup>77</sup> Although an attempt to establish a Multi-Door

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885 (1996). Judith Resnik first marked concern that if judges were focused on managing disputes, they may overlook their adjudicative responsibilities. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). In a seminal article, Owen Fiss argued that settlement renders less-than-satisfactory agreements that may not serve justice adequately and create problems for judges when one or more of the parties seek redress from the courts. However, this is not fully applicable to the Latin American context because *stare decisis* has a less prominent role in civil law, limiting the reach of court decisions to the parties involved. See Fiss, *Against Settlement*, *supra* note 37. Fiss worried about the public policy implications of ADR, while Menkel-Meadow was concerned that tying ADR to the courts would restrict its scope and strip it of its transformative capacity. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted, or 'The Law of ADR,'* 19 FLA L. REV 1 (1991). Nancy Welsh has maintained that the increasing use of mediation would decrease its effectiveness and quality. See Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation*, 6 HARV. NEG. L. REV. 1 (2001). Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008). Although some have voiced concern, others have noted the promise of court-connected ADR. See WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* (Prentice Hall 1988); Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002); Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, DISP. RESOL. MAG., (2003); Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L. Q. 787 (2001); and EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS (Frank E.A. Sander ed., 1991). However, some have argued that court-connected ADR amounts to little more than government co-optation of local community mediation. See Patrick Coy & Timothy Hedeem, *A Stage Model of Social Movement Co-optation: Community Mediation in the United States*, 46 SOC. Q. 405–35 (2005) (describing the four stages of co-optation as 1) inception/engagement; 2) appropriation of language, technique/ appropriation via inclusion, participation; 3) assimilation of the leaders, members and participants of the challenging movement/ transformation of program goals; and 4) regulation and response). This entire debate, however, presupposes a strong and effective judiciary in which ADR operates under the shadow of the law. Latin America could greatly benefit from having similar discussions. See also THE ADR HANDBOOK FOR JUDGES (Donna Stienstra & Susan Yates eds., American Bar Ass'n 2004) (adapting to their context and culture).

<sup>76</sup> For a brief history of the Multi-Door Courthouse in the U.S. and abroad, see Frank Sander & Mariana Hernandez Crespo, *A Dialogue between Prof. Frank Sander and Prof. Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 6 ST. THOMAS L. REV. (forthcoming Fall 2008) [hereinafter Sander & Crespo]; Goldberg, *DISPUTE RESOLUTION*, *supra* note 1. The Multi-Door Courthouse has been exported to Singapore, Nigeria and Argentina and has been assessed by German scholars for its appropriateness to the German legal system.

<sup>77</sup> Some may argue that judicial reforms like the implementation of the Multi-Door Courthouse are not a priority for the poor when other things have higher priority, such as food and shelter. I contend that unjust socio-political structures and corruption exacerbates poverty. Inclusive structures like the Multi-Door Courthouse can promote a participatory justice system, to be discussed further in a forthcoming article. Mills points out that, “[A] just society depends

Courthouse in connection with the courts in Argentina was short-lived,<sup>78</sup> the mechanism shows much promise for the Latin American situation if implemented as part of a systemic participatory approach.<sup>79</sup>

### c. The Effect of Disjointed Efforts

The above-described efforts have been helpful in moving the region toward a broader system of dispute resolution. These have been moves in the right direction; however, to date, most of these efforts have been rather unsuccessful. This is largely due to a disjointed,<sup>80</sup> buckshot approach to reform; that is, the efforts have been uncoordinated, inconsistent, costly, offering relatively poor returns on investment;<sup>81</sup> and they have not been truly participatory by extending involvement to those outside of government or NGOs.<sup>82</sup> I argue that the lack of cross-communication has led to a tendency to reinvent the wheel, wasting valuable time and financial resources. Hammergren points to an equally wasteful tendency to

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upon judicial institutions . . . .” Jon Mills, *Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FLA. J. INT’L L. 117 (2004). Furthermore, Dakolias argues that economic growth is intimately tied to an effective judicial system. Dakolias, *Strategy*, *supra* note 28, at 231. See also Goldberg, *DISPUTE RESOLUTION*, *supra* note 1, at 396–402.

<sup>78</sup> It lasted only six months before it was taken over by the Argentinian Bar Association. Since the Argentinian Bar is a civic association without enforcement power, and is not the natural place for people to go to resolve disputes (i.e. it is not part of the court system), the current Multi-Door Courthouse lacks effectiveness. The Argentinian experience implementing the Multi-Door Courthouse will be explored in a forthcoming article on the potential of the Multi-Door Courthouse in Latin America. See generally *DISP. RESOL. MAG.*, Spring 2006 (discussing the use of ADR abroad).

<sup>79</sup> I will discuss the use of the Multi-Door Courthouse to optimize dispute resolution processes in Latin America in a forthcoming article to be published by The Benjamin N. Cardozo School of Law in Spring 2009.

<sup>80</sup> See Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*, WORLD BANK SOCIAL DEVELOPMENT PAPER IN CONFLICT PREVENTION AND RECONSTRUCTION No. 37, Oct. 2006.

<sup>81</sup> In 2004, the World Bank invested \$270 million in rule of law efforts in Latin America; in 2006, it invested \$108 million. See Annual Report, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTANNREP/EXTANNREP2K6/0,,contentMDK:21049172~pagePK:64168445~piPK:64168309~theSitePK:2838572,00.html> (last visited Aug. 13, 2008). See also Dakolias, *Strategy*, *supra* note 28, at 225. Some of the efforts have been either partial or short-lived, limited by funding or other concerns. Hammergren notes that judicial reform efforts have been excessively “slow, complicated and conflictual.” See Hammergren, *supra* note 16. Furthermore, Hammergren points out that “institutional change is not only slow; it is also inherently unpredictable and messy. Anyone who thought they could design a comprehensive reform program to be implemented in five years was not living in the real world.” *Id.* at 11.

<sup>82</sup> Kliksberg, Six, *supra* note 49.

slavishly imitate the successes of other projects without tailoring the model to the specific context.<sup>83</sup> Moreover, I argue that even with better coordination and knowledge-sharing, reforms cannot be optimized or be sustainable without greater community participation in the reform efforts.<sup>84</sup>

Thus, the impacts of these reforms have not been as significant as expected. I argue, as have others, that one reason for this, in addition to the lack of coordination, is that the reform process has not been sufficiently participatory.<sup>85</sup> Most citizens have not been involved in building the reforms, and their knowledge and interests regarding the issues have not been used to create an optimized reform solution; rather others have introduced and designed the reforms.<sup>86</sup> Because of this, the resulting reforms are not “owned” by the citizenry.<sup>87</sup> Because they are not owned, they have been easily ignored or bypassed.

Bernardo Kliksberg, a Latin American sociologist and coordinator of the Inter-American Development Bank’s Inter-American Institute for Social Development, points out that citizen participation is critical to the success of civic reforms in Latin America, citing the success of community-based water projects, the transformation of Villa El Salvador in Peru, family consumer markets in Latin America, and the well-known participatory municipal

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<sup>83</sup> Hammergren, *supra* note 16 (referring to specific areas for further attention in order to improve reform outcomes).

<sup>84</sup> Domike, Engagement, *supra* note 15, at 375.

<sup>85</sup> WORLD BANK TECHNICAL PAPER NO. 350, *supra* note 16; Hammergren, *supra* note 16. Even though recent efforts are increasingly participatory with the inclusion of NGOs, yet more remains to be done in order to make the processes truly inclusive. Mendez observes that weak Latin American democracies and ineffective reforms have led “to the exclusion of vast sectors from the benefits of democracy.” See Mendez, *supra* note 29, at 224. He notes in particular that there has been a failure to provide a forum for dispute resolution to these citizens. See Mendez, *supra* note 29, at 221, 224.

<sup>86</sup> In reference to creating interest-based conflict management systems, Costantino observes that “if you build it, [stakeholders] may or may not use it. On the other hand, if they build it, they will use it, refine it, tell their friends about it, and make it their own.” COSTANTINO & SICKLES-MERCHANT, *supra* note 10, at 49. I argue that a similar dynamic is at work in the judicial reform efforts in Latin America.

<sup>87</sup> To date, reform has focused primarily on strengthening democratic institutions, not on broadening opportunities for participation in those institutions. Amartya Sen observes that while democratic institutions are important, “they cannot be viewed as mechanical devices for development. Their use is conditioned by our values and priorities, and by the use we make of the available opportunities of articulation and participation. The role of organized opposition groups is important in this context.” AMARTYA SEN, DEVELOPMENT AS FREEDOM 158 (Anchor Books 2000).

budget process in Porto Alegre, Brazil.<sup>88</sup> If the same participatory models were applied to judicial reform, I argue that we would see much improved outcomes in the reform process.

Furthermore, because these reform efforts have not been sufficiently participatory, nor have they taken into account the relationship and attitudes of the various stakeholder groups to the government,<sup>89</sup> they have instead led to greater social and political fragmentation. A clear illustration of the fragmentation is that affluent sectors of society are accustomed to providing for themselves many basic services provided by governments, such as health, safety and education,<sup>90</sup> but the low-income citizens have no choice but to rely on governmental or pro-bono services. In matters of justice, the affluent stakeholders now have a private justice arbitration or mediation option to circumvent the judicial system.<sup>91</sup> Government and donor-funded mediation services have become the primary method used to resolve conflict in low-income communities, particularly neighborhood and small-claims disputes.<sup>92</sup> However, justice is an intrinsic function of the government, and donor-funded mediation centers cannot be the sole means for

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<sup>88</sup> Kliksberg, Six, *supra* note 49. Kliksberg, Inequality and Development in Latin America, *supra* note 49; Forum on development and culture stresses role of citizen participation (Paris, March 13, 1999); available at <http://www.iadb.org/news/articledetail.cfm?language=en&artid=1593> (last visited Sept. 23, 2008); Kliksberg, The Role of Social and Cultural Capital in the Development Process, *supra* note 49).

<sup>89</sup> Chodosh notes:

[t]he failure to look at systems from the bottom-up or the inside-out carries significant peril in attempted reforms. For example, court reformers may focus only on new processes of court or case management or alternative dispute resolution, and may not think about the likely behavior of lawyers in response to these innovations. . . . More affirmatively, the bottom-up perspective has incalculable value in generating new perspectives on age-old issues. Take, for example, the work of Hernando de Soto on access to property rights: had he never taken to the street to hear the barking dogs, he would not have appreciated the property systems of the poor, albeit outside the shadow of the law.

Chodosh, *supra* note 10, at 593. See also HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (Basic Books 2000).

<sup>90</sup> Noting the expansion of private health care in Latin America, see John L. Fiedler, *The Privatization of HEALTH CARE in Three LATIN AMERICAN Social Security Systems*, 11 *HEALTH Pol'y & Planning* 406, 406–17 (1996); see also Crespo, Rights, *supra* note 4.

<sup>91</sup> See generally Donovan, *supra* note 71, at 649–50; see also WORLD BANK TECHNICAL PAPER NO. 319, *supra* note 8, at 38.

<sup>92</sup> Dakolias, *Strategy*, *supra* note 28, at 200. See also WORLD BANK TECHNICAL PAPER NO. 319, *supra* note 8, at 39.

resolving disputes, particularly if there is little recourse in the event of an unfair agreement.<sup>93</sup>

In sum, the introduction of ADR into dispute resolution systems that lack functional and effective courts, which is the case for most Latin American countries, has had the unintended effect of exacerbating problems of access to justice by creating 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, mainly for those in low-income communities who can afford neither.

### III. A SYSTEMIC PERSPECTIVE: ENHANCING THE SHADOW OF THE LAW THROUGH CITIZENS PARTICIPATION

#### a. The Need for a Systemic Approach

In light of the weaknesses in Latin American dispute resolution systems and the effects of disjointed reform efforts, a systemic approach to dispute resolution is essential.<sup>94</sup> A systemic solution would take reform efforts a step further by addressing the broader underlying issues that affect all stakeholders in dispute resolution systems. In a 2000 speech to the World Bank, Amartya Sen argued that legal reform is part of development as a whole, interconnected with social, political, and economic realities. According to Sen, legal development is not just a matter of the judicial system formally defining the law. It must also promote the enhancement of people's freedom to exercise their rights, and increase their awareness and use of legal entitlements. He makes the case for a comprehensive or systemic approach by pointing to the causal interdependence and conceptual integrity of the different areas necessary for development. Causal interdependence is "the causal interconnections between the different domains that can be fruitfully seen together, whereas the latter relates to the possibility that the divided

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<sup>93</sup> See Mendez, *supra* note 29, at 225. Rodrigues, *Claiming*, *supra* note 6, at 4, 11–16. That this often results in less-than-just agreements is corroborated by Rodrigues' study of the *favelas* of Brazil.

<sup>94</sup> Dakolias, *Strategy*, *supra* note 28, at 170. See also Bryant Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002). Linn Hammergren points out that judicial reforms "must be more systematic as well as systemic in their focus and that it may be time for a third generation approach." Hammergren, *supra* note 16, at 11.

concerns are conceptually incomplete, so that they could not really be considered independently at all.”<sup>95</sup> For Sen, judicial reform cannot be decoupled from broader development initiatives aimed at improving the human condition.

While Amartya Sen makes a compelling argument for law and development at the macro-level, I contend that, on a micro-level, the promotion of judicial reform, mediation and arbitration needs to be viewed comprehensively. That is, on a practical level, such an approach would take into account and incorporate the perspectives, interests and values of the affected stakeholders, from the primary participants in the judicial system — judges, clerks, lawyers, et cetera — to those who use and depend upon the system — the citizens themselves.<sup>96</sup>

b. The Importance of the Enhancing the Shadow of the Law:  
Providing True Alternatives

A systemic approach to judicial reform prompts a focus on enhancing the shadow of the law. As noted earlier, in the absence of a well-defined shadow of the law, the power imbalances that are endemic to Latin American society creep into ADR mechanisms, rendering agreements that are unfair to the less powerful parties. Without effective recourse to the judiciary, justice is effectively denied to the powerless.

Some may argue that the shadow of the law is not critical to guarantee fairness.<sup>97</sup> Indeed, some have argued that certain com-

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<sup>95</sup> In order to move beyond a disjointed approach to improve dispute resolution systems in Latin America, it is necessary to embrace a systemic perspective that takes into account not only the weaknesses in the current dispute resolution system, but the culture in which it operates. Amartya Sen, *What is the Role of Legal and Judicial Reform in the Development Process?* 5 (June 5, 2000) (unpublished paper for the World Bank Legal Conference, The World Bank), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf> (last visited Aug. 9, 2008). He argues that legal and judicial reform is critical for development as whole, viewing the constitutive elements of development as “a thickly woven textile.” *Id.* at 13. *See also* Dakolias, *Strategy*, *supra* note 28, at 225 (suggesting that judicial reform “[R]equires a systematic change in the delivery of justice” but contends that achievement of such change could take generations).

<sup>96</sup> Dakolias, *Strategy*, *supra* note 28, at 170.

<sup>97</sup> *See* ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (Harvard Univ. Press 1991). Brooks observes that even though legal scholars know little about how cultures evolve and change, there are experts who do. *See also* Brooks, *supra* note 53, at 2326. As will be argued later, supportive cultural norms must work in concert with law to ensure order. Current cultural norms in Latin America conflict with law, as in the case of attitudes

munities do not require formal adjudication because the social norms of the community are strong enough to ensure order.<sup>98</sup> However, the ability of shared cultural norms to guarantee fairness is limited<sup>99</sup> to small, relatively homogenous groups.<sup>100</sup> Cultural norms in themselves cannot guarantee fairness in large, pluralistic and diverse societies.<sup>101</sup> Ellickson notes that this sort of norm-enforcement “depends on group members” having “continuing reciprocal power over one another,”<sup>102</sup> and it is this reciprocity that is difficult to maintain beyond a small, tightly-knit group. In this case, substantive law and its shadow provide a guarantee of fairness when cultural norms cannot — particularly in a society where power imbalances are so stark, as in Latin America. Nonetheless, culture does play a critical role in the provision of communal order by offering support to the legal system, particularly in the case of

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toward corruption. See generally Angel Ricardo Oquendo, *Corruption and Legitimation Crises in Latin America*, 14 CONN. J. INT'L L. 475 (1999).

<sup>98</sup> See ELLICKSON, *supra* note 97, at 184–206, 258–64, for a discussion on how close-knit groups resolve dispute and exercise control over social norms. See also Ellen Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997) (discussing the role of social norms in various mediation models). Waldman suggests that mediation has three separate sub-categories: “norm-generating,” “norm-educating” and “norm-advocating.” *Id.* In addition, there is historical precedence for social order without legal enforcement. See WILLIAM I. MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW AND SOCIETY IN SAGA ICELAND* (Univ. of Chicago Press 1990); JESSE L. BYOCK, *MEDIEVAL ICELAND: SOCIETY, SAGAS AND POWER* (Univ. of Cal. Press 1988).

<sup>99</sup> In Latin America, cultural norms are limited in their ability to guarantee fairness, as is very well illustrated by the aforementioned case of adjudicating drug traffickers who enforce cultural norms in opposition to legal norms.

<sup>100</sup> See generally ELLICKSON, *supra* note 97. Cultural norms in a small group are determined by powerful majorities. No group is completely homogenous, and cultural norms force assimilation, leaving little room for diversity. It should be noted that even if a group were to have diversity as a cultural norm, some members would still be marginalized, namely those that may not be comfortable the notion of diversity.

<sup>101</sup> There is much debate about the role of law in America. This debate is about the cultural values that underlie the legal norms. Auerbach notes that in a pluralistic society with a wide variety of cultural values, “the concept of justice loses the clarity it possesses in a communal context. Justice becomes a compromise that gives least offense to the most people.” JERALD AUERBACH, *JUSTICE WITHOUT LAW?* 11 (Oxford Univ. Press 1983). The focus turns to the process rather than the result. Without a shared definition of justice, the judge renders decisions from on high, with no opportunity for parties to engage in the process other than as observers. Auerbach also offers a detailed description of how ethnic communities have historically settled disputes. Chinese and Jewish immigrant communities initially preferred to solve conflict internally within the community rather than going to the courts. However, if there was an external conflict with another community, they would use the court system because of differences in cultural norms between communities made it difficult to solve themselves. *Id.*

<sup>102</sup> See ELLICKSON, *supra* note 97, at 238.

sustainable domestic law created through a participatory process.<sup>103</sup>

An enhanced shadow of the law offers the substantive law as a guarantee of fairness and ensures a minimum of justice. It would do so by providing the parties a BATNA (the court system) at the negotiation table. It allows parties to walk away from the negotiation table if a proposed agreement is not better than their BATNA.

In addition, an enhanced shadow of the law could help to bolster the value-creation process. The option of the court system reduces the risk to the parties in terms of mitigating the level of vulnerability from disclosure. However, parties are more willing to engage in a productive value-creation process<sup>104</sup> when they know that they have recourse to the courts in the event that the proposed agreement is less than fair, or the information disclosed is used to their detriment in the bargaining process.<sup>105</sup> Even though information disclosed in the bargaining process could be used in the court system, it can only be used within the limits of the legal system. If the court system is not a viable or practical option, disclosure is detrimental to the parties' interests because there is no limit to how it could be used. This, in turn, severely curtails the value-creation process at the bargaining table.

### c. Elements of a Systemic Reform to Enhance the Shadow of the Law

There are three elements that are essential to the enhancement of the shadow of the law: sustainable domestic laws, in the creation of which citizens are engaged in a preliminary consultation process; a functional, participatory, and efficient enforcement mechanism; and cultural norms that are supportive of the sustainable domestic laws. Each of these elements is a critical component

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<sup>103</sup> See Waldman, *supra* note 98 (discussing the relationship between social norms within the legal system).

<sup>104</sup> In order to create options for joint gain, it is necessary to identify interests; therefore, the degree of disclosure determines the ability to create value in the negotiation process. The greater the disclosure, the greater the possibility for value-creation. However, the challenge is that greater disclosure translates into greater vulnerability. See FISHER, *supra* note 11, at 40–55 (discussing interests). See *id.* at, 57–80 (discussing joint gains deriving from disclosure).

<sup>105</sup> See Mnookin, *Bargaining*, *supra* note 2. Some have pointed out that disclosure in a failed negotiation or mediation may later harm the parties if the issue goes to trial. However, in order to reach an agreement that has the potential to be better than a court judgment, disclosure is necessary.

for enhancing the shadow of the law, without which stability cannot be achieved in Latin America. The disconnection between law and reality<sup>106</sup> will continue unless citizens become active participants in the legislative and judicial processes.

### i. Sustainable Domestic Laws

As noted earlier, much of the codes in Latin America have traditionally been imported from Europe. Most recently, the World Bank, USAID, the International Institution for Conflict Prevention and Resolution (CPR),<sup>107</sup> and the Inter-American Development Bank (IADB), among others, have continued to promote institutional reform and legislation<sup>108</sup> adapted from U.S. or European models. They have sought some input from domestic NGOs, but the process needs to be more inclusive at the preliminary stages, as a supplement to representative, democratic decision-making.<sup>109</sup>

Laws that are the product of participatory, adaptive processes are, by far, the most sustainable.<sup>110</sup> When laws are imposed or

<sup>106</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. U. L. REV. 12, 24 (1910). Esquirol summarizes the legal discourse of the law and development efforts of the 1960's and 1970's and the effects those efforts have had on the present discourse in and regarding Latin America. See generally Esquirol, *Continuing Fictions*, *supra* note 9, at 46.

<sup>107</sup> See Lucasz Rozdeiczner, *Lessons Learned: Challenges in the Export of ADR*, DISP. RESOL. MAG., Spring 2006, at 27.

<sup>108</sup> E.g., criminal procedure codes and children's welfare laws.

<sup>109</sup> At present, local citizens are involved only at the information-gathering and implementing stages, but not at any of the decision-making and option-creation phases. Mendez contends that "international donors have invested large amounts of money without appropriate consultation with users of judicial services or with beneficiary communities." Mendez, *supra* note 29, at 224.

<sup>110</sup> Bernardo Kliksberg, *The Role of Social and Cultural Capital in the Development Process*, available at the Digital Library of the Inter-American Initiative on Social Capital, Ethics and Development—[www.iadb.org/etica/ingles/index-i.htm](http://www.iadb.org/etica/ingles/index-i.htm). Kliksberg argues that one of the basic issues in Latin America is social exclusion, "which makes it extremely difficult for people to gain access to job and consumer markets and impossible to participate in society as a whole."). Kliksberg, *supra* note 49. Kliksberg further contends that participation builds sustainable outcomes, citing the World Bank's water projects, Villa El Salvador in Peru, Family Consumer Markets in Venezuela, and the Participatory Municipal Budget in Porto Alegre. Kliksberg argues that these participatory approaches must be implemented in every sector in order to bring about greater development. *Id.* For general theory on participation, see generally ARCHON FUNG ET AL., *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* (Archon Fung & Erik Olin Wright eds., Verso 2003) [hereinafter *DEEPENING DEMOCRACY*]. Fung explains that there are two basic types of governance, top-down or participatory; and two different ways of decision-making, adversarial or collaborative. A top-down governance model can be adversarial (competing interest groups with a zero-sum *modus operandi*) or collaborative (experts or elites do the problem-solving). A participatory governance structure could be adversarial (town meetings) or collaborative (empowered participatory governance). *Id.* at 262. Empowered participatory governance is based upon the pre-

reached by the forceful persuasion of a powerful majority or strongman, they are not as effective as they could be.<sup>111</sup> Imposed laws are the least stable;<sup>112</sup> those laws reached through forceful persuasion are more stable; and participatory laws are the strongest and most stable.<sup>113</sup> Consensus-building is a methodology that lends itself well to participatory decision-making because its nature is inclusive and adaptive.<sup>114</sup> Consensus-building can be used to bring citizens into the legislative process, particularly at a preliminary stage, in a consultative manner, and allows them to supplement the traditional democratic legislative processes. Citizens can

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mise that committed citizens are capable of making informed decisions in a deliberative process and have the power to have an impact on the political decision making process. *Id.* at 5. See Archon Fung, *Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338, 340 (2003) (discussing institutional design options). As Susskind points out, the greater the inclusion throughout the decision-making process, the more sustainable the outcomes. See Videotape: Negotiation and Mediation Practice in Public Decision Making (Program on Negotiation at Harvard Law School 2004).

<sup>111</sup> In general, Latin Americans are unhappy with representative democracy. Free markets and democracy have not been able to deliver the economic benefits that they desire. Jorge Dominguez contends that “Latin America as a whole is the Olympic champion of income inequality.” Nonetheless, only a handful support a return to authoritarian rule. Powerful, disaffected minorities have undermined the credibility of democratically elected governments in Latin America. Political scientists have suggested that perhaps simple majorities of fifty one are not sufficient for unstable democracies, and that super-majorities are necessary for effective and credible governance. Jorge Dominguez, *The Politics of Hope: Free Politics and Free Markets in Latin America*, 6 ST. THOMAS L. REV. (forthcoming Fall 2008).

<sup>112</sup> Chodosh, *supra* note 10, at 588–89.

<sup>113</sup> David Fairman points out that public conflicts with many actors with legitimate interests require a process that is participatory so that the needs of all stakeholders can be addressed. I argue that outcomes that address the needs of all parties increase levels of sustainability. See David Fairman, *Resolving Public Conflicts in Developing Countries*, DISP. RESOL. MAG., Spring 2006, at 9. Lucasz Rozdeiczer, describing his experience as a consultant to the World Bank, points out that projects that involve stakeholders and build their capacity are more sustainable. Rozdeiczer, *supra* note 107, at 27.

<sup>114</sup> Robert’s Rules is the prevailing mainstream method of decision-making. It is reliable procedure for arriving at decisions in an orderly and efficient manner. However, as Lawrence Susskind notes, there are significant disadvantages built into Robert’s Rules. First, by promoting decision-making through majority rule, Robert’s Rules inevitably creates unhappy minorities, thereby making the outcomes inherently unstable. Second, orderly and efficient decisions are not always optimal for all involved. It offers little opportunity to reframe questions and negotiate trade-offs, leading to all-or-nothing outcomes. It sacrifices quality decisions for efficiency. Third, the legitimacy of the decisions is significantly reduced because Robert’s Rules does not promote the involvement of all members in the final decision. Finally, Robert’s Rules favor those members who are experts in the process. It gives unfair advantage to those who are skilled parliamentarians, and disadvantages those who are not experts. Robert’s Rules favor the powerful and the expert. For further discussion, see SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 3–16. Robert’s Rules are inherently exclusive and impose the ground rules on participants. Consensus-building, on the other hand, allows participants to create and define the rules of their decision-making process. Thus, consensus-building is inclusive from the very beginning.

frame the issues, create options for solutions, make recommendations for selecting an option, and suggest methods for implementation to legislators.<sup>115</sup> This can lead to the creation of laws that are more widely accepted and easily enforceable, because citizens have been involved in the process.

Consensus-building is a preferable methodology for the production of “sustainable domestic law” because it builds “solidarity and agreement broadly” in order for a group to achieve a shared solution that “everybody, or most everybody, can live with.”<sup>116</sup> Consensus-building is inclusive,<sup>117</sup> bringing representatives of every group of stakeholders to the table and allowing them to participate at every phase of the process. It is adaptive,<sup>118</sup> allowing

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<sup>115</sup> See Videotape, *supra* note 110.

<sup>116</sup> Consensus-building is not about persuading unanimous agreements. See SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 18–19. Rather than seeking unanimity from the start, the process seeks to build consensus “one brick at a time.” *Id.* at 19, 181. See generally HANDBOOK, *supra* note 11 for a detailed introduction to the methodology. In Chapter One, Susan Carpenter discusses the various techniques and strategies for consensus-building. SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 26; see also SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 169–87, and LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (Basic Books 1987) [hereinafter SUSSKIND, *APPROACHES*]. In the first stage, called the “convening” stage, the facilitator identifies the key stakeholders, assesses their concerns, and gathers information. In the second phase, the roles, responsibilities, ground rules, scope, budgets, and timetables are clarified. It is in the third phase when the difficult work of group problem-solving is done, and the goal is to “generate packages, proposals, and ideas that can help all the parties do better than they would in the absence of an agreement.” *Id.* at 26. This is done in steps in order to keep all possible options on the table so that the full range of combinations can be considered. The fourth stage is when the agreements are negotiated and drafted, ensuring that all parties leave with a satisfactory agreement. The final phase is the implementation phase, where everyone is held to the commitments as spelled out in the agreement.

<sup>117</sup> See Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, in HANDBOOK, *supra* note 11, at 121–22. It is the responsibility of the assessor (convener) to identify and include every group of stakeholders in the process. Each group should have equal representation throughout the process. In Chapter Six, David Laws discusses representation of stake-holding interests, particularly at the ratification stage. See also SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 41–60. In the first step of the process, called the convening stage, the convener identifies the representatives of the stakeholder groups. The first “circle” to be identified are those who are “movers and shakers,” those who have direct interest in the issue and who cannot be overlooked. The second “circle” is comprised of those people identified by the first group as people who should be included but may not have been obvious initially. *Id.* at 49. Finally, the third “circle” to be identified is comprised of those who are indirectly affected by the outcome. *Id.* at 50. This group is often overlooked until consequences of their exclusion from the process become clear.

<sup>118</sup> See SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 148–51, 187. Susskind suggests that stakeholders should periodically review the agreement, and if necessary, reconvene. This can help to guarantee implementation. Consensus-building takes into account that the environment is dynamic and changing, as are the participants. Therefore, an effective agreement must include monitoring mechanisms such as a “dispute resolution clause” in which participants

adjustments to agreements based on the changing circumstances affecting the stakeholders. The inclusive and adaptive qualities of a supplementary consensus-building process, and the resulting increase in the level of stakeholder engagement, make it conducive to the creation of sustainable domestic laws, which are critical for the stability of the region.<sup>119</sup>

Some may argue that challenges to citizen involvement in the creation of domestic laws make a participatory process impractical and inefficient.<sup>120</sup> Problems of apathy, corruption, time, cost, and the inability to make informed decisions, among other things, preclude an effective and efficient participatory process.<sup>121</sup> However, citizen participation at least at the preliminary, consultative decision-making phase, is critical to the creation of stable and sustainable laws in Latin America.<sup>122</sup> Domike argues that, based on the

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agree on how to address changing environments and needs, as well as any issues of noncompliance. This is a move toward a more responsive reform process. *Id.*

<sup>119</sup> See generally Crespo, *Building*, *supra* note 4 for an empirical example of a consensus-building project carried out in Brazil.

<sup>120</sup> Susskind identifies internal and external barriers to reaching agreement. Internal “perceptual barriers,” include concerns about the unknown, the risk of failure, concerns about time and cost, and fear of leaders losing control. SUSSKIND, *BREAKING ROBERT’S RULES*, *supra* note 11, at 155–58. External barriers include obstructionist participants (those who are insecure about group decision-making, are disruptive, or desire to undermine the process) (*Id.* at 159–60); interference and contentiousness from the media, (*Id.* at 161–62); and legal issues (*Id.* at 164–65).

<sup>121</sup> There is extensive literature on the problem of citizen involvement in the democratic process. For a recent contribution, see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (Princeton University Press 2007).

<sup>122</sup> Hammergren notes that “[a]ll reforms have winners and losers. Although some self-perceived losers will accept their sacrifices in the interest of a common or long term good, most will either resist proposed changes or attempt to divert those they believe to be most harmful.” See Hammergren, *supra* note 16. MacLean notes that without key participants in judicial reform, such as the judges, reform has not moved forward. ROBERTO G. MACLEAN, *JUDICIAL SYSTEMS FOR A GLOBAL COMMUNITY* (2004), available at <http://www.aals.org/international2004/Papers/MacLean.pdf>. See also Chodosh, *supra* note 10, at 619–20. A focus on individual abilities and choices should be the core of judicial system reform. No individual can represent the entire range of community values and interests; attempting to do so may endanger the interests that are not represented. Even if someone possessed the knowledge of the entire community, participation of the community would still be necessary to utilize that knowledge in the implementation of judicial reform. Only as a group may participants overcome their individual obstacles, so “collaborative peer-to-peer communication” is essential to have all interests and values represented. It is also important to acknowledge the existing power structures and those who have no interest in reforming the judicial system. They may resist participation; however, if they do not, their interests will not be reflected in the final agreement. Engagement with some of the power groups requires great care. Ingrid Betancourt’s attempt to bring both the guerrillas and the government to the table ended with her kidnapping. Nonetheless, Betancourt remains firmly convinced that Latin America’s problems will not be solved through revenge and violence. See *Former Hostage Asks for End to ‘Language of Hate,’* <http://www.ihf.com/articles/2008/07/07/>

IADB's experience in Latin America, new reform projects should aim to develop a more robust deliberative political culture that is more participatory and less "top-down" in its decision-making.<sup>123</sup> Indeed, empirical evidence has shown that citizens are committed participants when given an opportunity to actively participate in addressing issues that immediately affect them.<sup>124</sup> Citizens are experts on issues that affect them, and they have strong incentives to participate in the creation of laws that have a direct impact on their daily lives. Domike also points out that "individuals and groups must present and defend their proposals *within* the political realm,"<sup>125</sup> and that the social and political costs for not allowing greater participation in the political processes are high — social unrest from marches, all the way to outright acts of violence and terrorism.<sup>126</sup>

Indeed, experts at the Inter-American Development Bank have called for greater participation in public conflict resolution in order to move away from adversarial democracies. Domike has argued for "a different view of public life in which the public interest is not finite and therefore zero sum, but a collective good that increases as a community learns to create it."<sup>127</sup> In the context of conflict between contentious movements and governments, he suggests that any successful public conflict resolution must include stakeholders in a collaborative process that does not tolerate violence and has a neutral third party to guide the process in order to reach agreements that are monitored and enforced.<sup>128</sup> Consensus-building meets all of the criteria necessary to fulfill these desiderata. Creating the channels for greater participation in the political

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europa/betancourt.5-299306.php (last visited Aug. 19, 2008); *Betancourt to Larry King: FARC Captivity was 'Hell,'* <http://www.cnn.com/2008/WORLD/americas/07/09/king.betancourt.intw/index.html?iref=newssearch> (last visited Aug. 19, 2008).

<sup>123</sup> Domike, *supra* note 15, at 375.

<sup>124</sup> See Civic Networks, *supra* note 4. In addition, the World Bank has been active in identifying and measuring social networks and institutions in order to maximize their development efforts through increased local participation. For a brief overview of their Social Capital Initiatives, see Social Capital Initiative Working Paper Series, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTSOCIALCAPITAL/0,,contentMDK:20194767~isCURL:Y~menuPK:401035~pagePK:148956~piPK:216618~theSitePK:401015,00.html>. See also Robert Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27 (2002).

<sup>125</sup> Domike, *supra* note 15, at 375.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 377.

process can go a long way toward bringing greater stability in the region.

Despite the fact that a preliminary, consultative, consensus-building process may be participatory and can be potentially more sustainable, some may argue that challenges to the implementation of the group's recommendations make such a process impractical.<sup>129</sup> Some scholars in the ADR field have shown how participation in the mediation context does not ensure the fulfillment of obligations undertaken in the agreement.<sup>130</sup> Similar concerns could arise in regard to the implementation of laws created through consensus-building. However, if the recommendations for law crafted in a participatory process are better than the status quo for most or all stakeholders, thus maximizing joint gains, then there will be an incentive for legislatures to enact and implement the recommendation.<sup>131</sup> The time and resources invested by citizen-participants in a consultative process are also powerful incentives for legislators to consider the recommendations for passage and implementation.<sup>132</sup> Thus, moving an agreement from recommendation to law requires highly creative partnerships between the informal consultative group and the formal legislative bodies.<sup>133</sup>

Furthermore, the adaptive nature of a participatory process such as consensus-building can lead to a greater likelihood that a consultative group's recommendations will be implemented.<sup>134</sup> Consensus-building takes into account the fact that the environment is dynamic and changing, as are the participants.<sup>135</sup> Thus, effective agreements or recommendations must include monitoring mechanisms such as a "dispute resolution clause" in which participants agree on how to address changing environments and needs,

<sup>129</sup> See *supra* note 102.

<sup>130</sup> See James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

<sup>131</sup> SUSSKIND *supra* note 11, at 112–13. See also HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (Harvard University Press 1982).

<sup>132</sup> See SUSSKIND, *supra* note 11, at 134–53; HANDBOOK, *supra* note 10, at 527–53.

<sup>133</sup> The UST International ADR Research Network's Brazil Project is one example of how groups need to be creative about formal-informal partnerships. Our consultative group included two highly respected drafters of mediation law in Brazil, which added legitimacy and weight to the group's recommendations when presented to the Congress. In addition, the agreements and recommendations obtained through the consensus-building process will be published through Brazil's pre-eminent law school, thus taking the recommendations to the broader public. The entire consensus-building process will be discussed in a forthcoming article to be published by The Benjamin N. Cardozo School of Law in Spring 2009.

<sup>134</sup> SUSSKIND, *supra* note 11, at 148–151, 187. See also HANDBOOK, *supra* note 10, at 547.

<sup>135</sup> SUSSKIND, *supra* note 11, at 148.

such as non-ratification of the recommendations by the legislature.<sup>136</sup> This is a move in a different direction, away from static legal reforms and toward a more responsive reform process.

## ii. Functional, Participatory and Efficient Enforcement

A second element necessary for the enhancement of the shadow of the law is an enforcement mechanism that is functional, participatory and efficient. For this reason, many previous reform efforts have focused, at least in part, on improving the situation of the judiciary in order to guarantee enforcement of laws and agreements. I suggest that the Multi-Door Courthouse can fulfill these necessary criteria. In the United States the Multi-Door Courthouse is a top-down institution that reroutes cases to the most appropriate forum instead of assuming that court adjudication is the appropriate process for all cases.<sup>137</sup> It brings parties into the judicial system and then matches their conflict to an appropriate dispute resolution method.<sup>138</sup> It also provides a link by allowing the law and the cultural norms of the parties to be integrated through an ADR process, thus aligning law and social norms.<sup>139</sup> The Multi-Door Courthouse is efficient because it allows parties to arrive at a solution relatively cheaply and quickly. It is effective because it directs parties to the most appropriate forum for the resolution of their conflict, thereby generally increasing the level of satisfaction with the outcome and increasing the likelihood of compliance. It is

<sup>136</sup> *Id.*, at 151.

<sup>137</sup> Sander & Crespo, *supra* note 76.

<sup>138</sup> For a specific example of enforcement issues and recommendations, see Kossick, *supra* note 22. For a brief introduction to the origin and development of the Multi-Door Courthouse, see Sander & Crespo, *supra* note 76; Michael Moffitt, *Frank Sander and His Legacy as an ADR Pioneer*, 22 NEGOT. J. 437 (2006); 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) (providing a detailed analysis of how the Multi-Door Courthouse functions). See also 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); Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future. . . Today*, 1 OHIO ST. J. ON DISP. RESOL. 7 (1985–1986); Jeffrey Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 1 OHIO ST. J. ON DISP. RESOL. 297 (1996).

<sup>139</sup> See Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 1 J. DISP. RESOL. 1 (2007). Sturm argues that small-scale, individual conflict resolution can produce large-scale, systemic transformation. *Id.* I argue that the Multi-Door Courthouse can help to achieve systemic change. A forthcoming article, to be published by The Benjamin N. Cardozo School of Law in Spring 2009, will discuss the linkages between the Multi-Door Courthouse, law and culture. In theory, satisfactory agreements arrived at through a win-win ADR process are less likely to require judicial enforcement.

functional because it has the potential to relieve the judiciary of cases better suited to an ADR process and leaves only those cases requiring public adjudication.

In the Latin American context, the Multi-Door Courthouse could be part of creating a systemic solution for a better future. Citizens need to participate in public decision-making, but in order to do so they must acquire the skills necessary for meaningful participation. The Multi-Door Courthouse has the capacity to begin developing these skills by facilitating meaningful participation on a smaller scale, in the resolution of private conflict. As it currently functions in the U.S., the Multi-Door Courthouse relies on a screener to route the cases by assisting parties in choosing an ADR process. However, in the Latin American context, the Multi-Door Courthouse can acquire a socially transformative dimension by training the parties and providing an experience of resolving conflict constructively, without resorting to violence or passivity.

The skills and experience acquired through the Multi-Door Courthouse could have wide-reaching effects for the entire dispute resolution system. If, after learning about dispute resolution options available to them, the parties, together with the screener, choose the process, not only would the spectrum of options outside of violence or passivity be opened to them, but their ability to make informed decisions would be improved. By including the conflicting parties in the decision-making processes leading to the resolution of their conflict, parties can gain a sense of ownership over the process and the agreement and build a sense of achievement. This could change citizens' expectations of what is possible through collaboration in the conflict resolution context, both in the private and public spheres. By training each individual who enters the Multi-Door Courthouse to deal with conflict effectively, these skills could pass from the private sphere to the public square. I will be discussing the transformative potential of the Multi-Door Courthouse in Latin American context in a forthcoming article.

### iii. Supportive Cultural Norms

Even so, as noted earlier, some may argue that enforcement mechanisms are not essential because a sufficient degree of enforceability can be achieved through strong cultural norms.<sup>140</sup> As

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<sup>140</sup> See ELLICKSON, *supra* note 97. Ellickson notes that cattlemen solve their disputes according to their own internal norms. *Id.* Similarly, in the academic community, copyright laws are rarely enforced through the court system. Instead, normative codes regarding plagiarism replace the function of the courts.

noted earlier, this is limited to small, relatively homogeneous and tightly-knit groups.<sup>141</sup> Strong cultural norms are insufficient in themselves to guarantee recourse when a member of the group does not abide by them.<sup>142</sup> Ellickson notes that informal “welfare-maximizing norms” offer no reasonable expectation that norms will provide corrective or distributive justice, which legislators and policymakers think essential to civil order. Nor is there any expectation, Ellickson observes, that a specific group’s “norm-making process will give weight to the interests of those outside the group,”<sup>143</sup> to say nothing of the interests of future generations. However, while cultural norms in and of themselves are not enough for the enforcement of law, they are nonetheless essential for the support of law.

While laws and enforcement mechanisms go a long way toward enhancing the shadow of the law, culture is an essential element that cannot be underestimated.<sup>144</sup> This point is clearly illustrated in the history of anti-discrimination laws in the U.S.<sup>145</sup> Susan Sturm points out that, in spite of the civil rights struggle and the anti-discrimination laws and enforcement mechanisms that resulted from it, laws and enforcement have not been enough to prevent discrimination in the workplace.<sup>146</sup> This demonstrates that culture is an essential component to the enforcement of law. Without cultural norms that are supportive of the laws, enforcement becomes difficult.

In the Latin American context, most initiatives have focused on the rule of law, judicial reform and the promotion of ADR. While these are efforts in the right direction, more attention needs

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<sup>141</sup> *Id.*

<sup>142</sup> The “order without law” argument is based on the premise that communities are homogeneous. It assumes that all members of a given community share the same interests and values. See ELLICKSON, *supra* note 97. However, the argument ignores power imbalances that shape the dominant culture. Likewise, it is difficult to resolve disputes among members of different communities who do not share the same cultural norms. AUERBACH, *supra* note 101. In addition, it is difficult to challenge cultural norms of a community without recourse.

<sup>143</sup> ELLICKSON, *supra* note 97, at 284.

<sup>144</sup> Rozdeiczer observes that exporters of ADR must take into account the legal needs and cultural context into which they are exporting, and that a “copy-paste” approach to exportation is insufficient. Rozdeiczer, *supra* note 107, at 27.

<sup>145</sup> See Sturm & Gadlin, *supra* note 139.

<sup>146</sup> See *id.* There is a close interdependence between law and culture. Culture shapes perceptions, our patterns of behavior and interaction, and can support or undermine laws. Social pressures have more immediate impacts on individual citizens than remote legal structures. Therefore, creating supportive cultural norms is essential to the enhancement of a well-defined shadow of the law. Reitz notes that supportive cultural norms are essential to any effective and efficient reform. Reitz, *supra* note 18, at 468.

to be given to the role of cultural norms and contexts. Specifically, reforms need to take into account prevalent cultural norms such as corruption, manifest disregard for the law, and entrenched power structures, et cetera, in order to maximize outcomes and enhance the shadow of the law.<sup>147</sup>

The Multi-Door Courthouse is one possible mechanism that has the possibility of shaping cultural norms that can support or gradually change laws. I contend that the Multi-Door Courthouse can provide a participatory and inclusive experience, which in turn can be a catalyst to alter the patterns of exclusion and lawlessness that are endemic to Latin American society. In addition, such an experience also has the potential to create, over time, new cultural norms about how conflict and differences should be resolved. The Multi-Door Courthouse, together with the creation of sustainable domestic law through a participatory consensus-building process, has the capacity to shift cultural norms away from paradigms of exclusion and disregard for the law toward more inclusive, harmonious patterns of social interaction.

#### CONCLUSION

Only under when the shadow of the law has been enhanced can LDR become LADR — a TRUE alternative dispute resolution in Latin America. The enhancement of the shadow of the law requires a systemic approach in order to the maximize dispute resolution systems in Latin America. Sustainable domestic law is the first requirement toward enhancing the shadow of the law.<sup>148</sup>

Three main factors, if aligned, could encourage a shift from LDR to LADR. First, and foremost, the current situation is unbearable for the majority of Latin American citizens. Second, the level of instability affects not only Latin America, but the entire hemisphere, including the United States. Third, there are already a significant amount of financial resources deployed by IFI's and

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<sup>147</sup> See Susan P. Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Rosa Brooks contends that "the rule of law is not something that exists 'beyond culture' and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a culture, yet the human-rights-law and foreign-policy communities know very little — and manifest little curiosity — about the complex processes by which cultures are created and changed." See Brooks, *supra* note 53, at 2285.

<sup>148</sup> The additional requirements of an effective and efficient enforcement mechanism and supportive cultural norms will be addressed in a forthcoming article.

governmental organizations toward the region that could be redirected in a more systemic fashion toward the enhancement of the shadow of the law through methods that promote citizen participation.

It is an urgent task to engage Latin American citizens in the political decision-making process. The status quo of drug traffickers or other powerful players acting as the *de facto* shadow of the law is unacceptable and unbearable for so many in Latin America. To wait is to continue to waste human lives, time and value. Since the majority is affected, participation is the key to any kind of reform in Latin America. "To work for participation" says Bernardo Kliksberg, "is, without question, to do so in order to restore a fundamental human right to the disadvantaged of Latin America, one which frequently had been silently trampled."<sup>149</sup>

It is up to the decision-makers in positions of power to take the risk of charting a new, inclusive direction. The proposed model or another systemic approach with a participatory methodology can help Latin American write their own future, their own history. "Community participation is a potent instrument," Kliksberg goes on to say, "but this should not obscure the fact that it is also an end in itself. Participation is part of human nature."<sup>150</sup> The question remains, however, of who will lead the path to develop the participatory institutions needed to produce the stability that Latin America desires.

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<sup>149</sup> Kliksberg, *supra* note 49.

<sup>150</sup> *Id.*

