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A General Theory on Disputes and Conflicts

*Raymond Shonholtz**

I. INTRODUCTION

In response to Carrie Menkel-Meadow's challenge to articulate and define a general theory of conflict management that is universally applicable regardless of context or domain,¹ the following General Theory and methodologies are put forth. The relational context that Menkel-Meadow offers between domestic and international is not the applicable construct for the formation of a general theory. Instead, the relevant frame is between non-democratic and democratic political systems and the difference between the concepts of conflict and dispute and their attending institutional mechanisms. Menkel-Meadow's analysis is useful in sub-defining the issues in the vast foliage of conflict resolution and dispute management, yet blocks our vision of the forest and its demarcations.

The concept of this General Theory on Disputes and Conflicts will be dismissed by many colleagues and accepted by critics as a special theory at best. However, it is offered here to highlight the political reality that the fields of change and conflict management are now of critical importance in the execution of national governmental and international policy, especially in the western or northern countries and in the structuring of democratic societies, necessitating a clear formulation that is useful to theorists and practitioners, policy and decision-makers, and funders and international donors.

The General Theory on Disputes and Conflicts assigns disputes to transitional and mature democracies and conflicts to authoritarian regimes. The First Premise of the General Theory is that there are no conflicts in democratic society, only disputes, as democracy transforms conflicts into dispute settlement mechanisms. The Second Premise is that in authoritarian regimes there are only conflicts and politicized systems of settlement, not disputes. The Third Premise is that in international relations, national states can transform conflicts into disputes. In this article, conflicts are defined as those issues that lack a legitimate, reliable, transparent, non-arbitrary forum for the peaceful settlement of differences. Disputes, conversely, are pre-described as having recognized forums for their expression and resolution that meet the above criteria. In short, conflicts lack a viable "container" for the routine management of differences.

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1. See Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319.

II. THE FIRST PREMISE: THERE ARE NO CONFLICTS IN DEMOCRATIC SOCIETY

Democratic society has a fundamental and constitutional responsibility to address contentious issues peacefully. Democracy, by its very ideology, actively promotes differences by encouraging diverse opinion, expression of ideas, formation of different political parties and groups, and the development of public policies that may be inimical to various (market or civil society) interests.² The democratic principles are now universally recognized as simply stated in the Preamble to the United States Constitution: "We the people...to insure domestic Tranquility [and] . . . promote the general Welfare. . . ."³ The people directly and through their representatives have a constitutional obligation to promote the general welfare and domestic tranquility.

Moreover, market economies, the economic engine of nearly all democracies, promote creativity, competition, individualism, and aggregation of resources that generate tensions and issues between competitors and non-market interests and local, national, and international market forces. Democracy's experience with capitalism demonstrates the need to develop, maintain, refine, and enforce a consistent regulatory regime to manage the creative and monopolistic tendencies of the market sector. In practice, the issues that the market sector generates require mechanism and regimes of dispute management and settlement.

Examples of the interface of democratic principles and the transformation of conflicts into disputes abound; two examples, resulting in powerful impacts on American society can be seen in the field of labor-management. Following the Pullman Railroad strike of 1894, new legislation creating collective bargaining laws imposed the state's enforcement of labor-management issues on the conflicting parties.⁴ In the United States today, there are labor issues but no labor con-

2. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes stated:

While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. See also *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). Judge Learned Hand further explained, "[I]nterest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Id.*

3. U.S. CONST. pmbl.

4. See Daniel W. Levy, *A Legal History of Irrational Exuberance*, 48 CASE W. RES. L. REV. 799, 842-44 (1998); DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA 29-33 (1999). Pullman Palace Railroad Company lowered workers' wages unilaterally twenty-five percent. Led by Eugene Debs and the American Railway Company, the workers boycotted Pullman causing a transportation standstill in and out of Chicago. In reaction, the President ordered 2,000 federal troops to Chicago to restore order. *Id.*; David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 183 (2002). The Attorney General sought and obtained an injunction in the federal circuit court against Debs and other union leaders to cease further interference with the mails or railroads engaged in interstate commerce. *Id.* See also H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. DET. MERCY L. REV. 1, 11 (1997) ("Congress decided to pursue arbitration as the road to further labor peace and enacted the Erdman Act in 1898" (citing 30 Stat. 424 (1898) (repealed 1909)). Congress in turn passed such acts as the Clayton Act, and the Taft-

licts leading to violence and social disruption, as the antecedents for such actions are now channeled into negotiation and settlement mechanisms. In California, farm labor conflict was rampant in the early 1960s in the fields between the United Farm Workers Union and growers.⁵ The State's passage in 1975 of the Agricultural Labor Relations Act⁶ created a "container" for farm labor disputes, non-existent before, legitimating labor grievances and providing a mechanism for dispute management.⁷ There are disputes, but not conflicts, in California farm labor-grower relationships.

In democratic society, the goal is to create through democratic processes, policies, structures, and mechanisms, skilled personnel and enforcement procedures for managing those issues that without such regimes would undermine the constitutional obligation to maintain peace and tranquility.

New and evolving democracies face a more severe challenge, as the transition from authoritarian to democratic rule brings into the open the historical and political conditions that prevailed prior to the transition. In the transformation process, citizens and government officials are likely to experience all the tensions and issues suppressed during the authoritarian regime, as well as all the new issues created during the transformation to democracy.⁸

The vast complexity of the democratization enterprise in evolving democracies requires use of all the methodologies relevant to dispute management. Contrary to Menkel-Meadow's assumptions, anxieties and skepticism,⁹ experience teaches that advanced forms of dispute management do transfer well into evolving democracies and are urgently needed in some cases.

The following examples highlight the contribution of transforming conflicts into disputes and the establishment of policies and mechanisms of dispute management in evolving democracies:

Blood Feuds: Of historical dimension in Kosovo, blood feuds are now subject to mediating processes.¹⁰ This is contrary to Menkel-Meadow's assertion that mediating models "will not work to achieve 'truth and reconciliation.'"¹¹

Title Claims: Mediating and arbitrating processes are applied in Kosovo for the recognition and finalization of land title claims. Reclaiming and restitution claims on homes previously owned before communist expro-

Hartley Act, which is also called the Labor Management Relations Act, among others. Clayton Act, 15 U.S.C. §§ 12-27 (2000); Labor Management Relations Act, 29 U.S.C. § 141 *et. seq.* (2000).

5. See Maria L. Ontiveros, *New Perspectives on Labor and Gender: Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 172-75 (2003).

6. See CAL. LAB. CODE §§ 1140-1166.3 (West 2003).

7. See Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 530 (1999); Ontiveros, *supra* note 5, at 175.

8. See Raymond Shonholtz, *The Role of Minorities in Establishing Mediating Norms and Institutions in the New Democracies*, 10 MEDIATION Q. 231 (1993) [hereinafter Shonholtz, *The Role of Minorities*].

9. Menkel-Meadow, *supra* note 1, at 339.

10. Partners for Democratic Change, *Partners - Kosovo*, available at http://www.partnersglobal.org/centers/centers_kosova.html (last visited Nov. 19, 2003).

11. Menkel-Meadow, *supra* note 1, at 338.

priation are settled in Central and Eastern Europe through agencies applying mediating processes.¹²

Privatization: Issues arising from the commercial and industrial transfer of ownership from the state to new companies, owners, and individuals are arbitrated and mediated in Central and Eastern Europe.¹³

Labor Issues: Mediating processes are now applied to labor-management disputes throughout Central Europe.¹⁴

Market Promotion: Recognizing the need for dispute settlement to advance a viable market sector, the World Bank supports the creation of commercial mediation and arbitration process (most recently in Albania).¹⁵

Ethnic Conciliation: Diverse ethnic issues throughout Central and Eastern Europe are addressed increasingly through ethnic conciliation commissions, established through municipal resolutions or statutes.¹⁶

In all of these examples, Partners for Democratic Change¹⁷ and the national Partners' Center in each country have been the major designers, implementers, and trainers for the new systems of dispute management. With nearly fifteen years of experience, Partners' successful national Centers attest to the ability of mediating processes to be successfully adapted and applied to the diverse and critically important range of government, social, economic, and political issues confronting all the evolving democracies. In each case, the historical conflicts, long submerged or manipulated by authoritarian regimes, become opportunities to

12. United Nations Mission in Kosovo Administrative, UNMIK ADMINISTRATION OF TITLE CLAIMS IN KOSOVO, at <http://www.unmikonline.org> (last visited Nov. 19, 2003).

13. See, e.g., Polish Ministry of the Treasury, *Direct Privatisation*, at <http://www.mst.gov.pl> (describing the process of transferring ownership).

14. Polish and Hungarian labor laws are managed through the Ministry of Labor. See Michael Albright, Note, *Poland's 1991 Labor Statutes: A Refinement of Earlier Legislation Rather than a Liberalization of Union Rights and Powers*, 25 CASE W. RES. J. INT'L L. 571, 593 (1993); Orsolya Farkas, Book Review: *New Patterns of Collective Labour Law in Central Europe, Czech and Slovak Republics, Hungary, Poland, Umberto Carabelli and Silvana Sciarra, Editors*, 19 COMP. LAB. L. & POL'Y J. 113, 114-15 (1997); Maria Okonska, *Bibliography: Labor Law and Industrial Relations in Central and Eastern Europe, 1989-1999: A Select Annotated Bibliography*, 26 BROOK. J. INT'L L. 983, 991 (2001); Jackie Ruff, *Job Security in Poland: Economic Privatization Policy and Workplace Protections*, 7 TEMP. INT'L & COMP. L.J. 1, 2 at n.7 (1993); Tiziano Treu, *General Report: Procedures and Structures of Collective Bargaining at the Enterprise and Plant Levels*, 7 COMP. LAB. L. 219, 227-28 (1987).

15. See, Press Release, World Bank, World Bank Approves Two Credits for Albania (Mar. 21, 2000), available at <http://www.worldbank.org>.

16. Ilana Shapiro, *New Approaches to Old Problems: Lessons from an Ethnic Conciliation Project*, 15 NEGOTIATION J. 149 (1999); Raymond Shonholtz, Guest Editor, *Special Issue: Developing Mediating Processes in the New Democracies*, 10 MEDIATION Q. 225 (1993).

17. Partners for Democratic Change is an international non-governmental organization of independent, sustainable Centers on change and conflict management developed in evolving democracies. See Partners for Democratic Change, *Who We Are*, at <http://www.partnersglobal.org/wwwa/wwwa.html> (last visited Nov. -19, 2003).

create new policies, structures, forums, and mechanisms for the management of disputes, furthering social tranquility and demonstrating the value and efficacy of democracy.

Ironically, in evolving democracies (as well as to a lesser degree in developed democracies), conflictual conditions present an opportunity to create new policies, institutions, mechanisms, professions, and administrations that transform such conditions into manageable disputes. Conflictual conditions identify the immediate needs of the society and pinpoint areas requiring legislative attention. In democratic society, institutions are often established to redress inequities and imbalances in the society, creating new channels for the management of disputes and a new venue for policy-making. Strides to regulate capitalism in the United States took place following the Great Depression, as the social and economic inequities were increasingly apparent, and social and political conflict were feared. The regulatory policy and scheme were initiated through the democratic governance mechanisms of the society.¹⁸

Finally, extensive practice in the field does not confirm Menkel-Meadow's many assertions that mediating processes will not work in other cultures.¹⁹ While appropriately citing many concerns that I and others have had about the "transfer of Americanized" methodologies, the creative, acculturated adaptation of methods by in-country trainers and mediators has consistently addressed these issues. It cannot be stressed enough how appropriately sensitive and successful they have been in making mediating modalities work for deep-rooted conflict,²⁰ including ethnic and national minority,²¹ blood feuds, and indigenous issues.²²

From all the work in the field, from much innovation, development and experimentation, a holistic rule of law system design incorporating significant settlement modalities can be articulated and integrated in the dispute management structure of democratic societies.²³ Partners for Democratic Change and the national Partners' independent Centers operating in eleven developing democracies²⁴ have promoted the design and its elements through seminars and training initiatives.

18. See National Labor Relations Act, 29 U.S.C. 159 (2000). See also Don Adams & Arlene Goldberg, *New Deal Cultural Programs: Experiments in Cultural Democracy*, at <http://www.wvcd.org/policy/US/newdeal.html> (last visited Nov. 19, 2003) ("The largest and most important of the New Deal cultural programs was the Works Progress Administration (WPA), a massive employment relief program" that put the unemployed back to work in jobs which would serve the public good and conserve the skills and the self-esteem of workers throughout the United States).

19. Menkel-Meadow, *supra* note 1, at (around footnote 98). See generally Shonholtz, *The Role of Minorities*, *supra* note 8; Joseph B. Stulberg, *Cultural Diversity and Democratic Institutions: What Role for Negotiations?*, 10 MEDIATION Q. 249 (1999); Susan T. Wildau et al., *Developing Democratic Decision-Making and Dispute Resolution Procedures Abroad*, 10 MEDIATION Q. 303 (1993).

20. Randa Slim & Harold H. Saunders, *Dialogue to Change Conflictual Relationships*, in HIGHER EDUCATION EXCHANGE 43 (1994).

21. Partners for Democratic Change, Report to USAID on Bulgaria (unpublished report) (on file with author).

22. Partners-Argentina, Report to the William and Flora Hewlett Foundation, 2002 (unpublished report) (on file with author).

23. See *infra*, at Appendix.

24. Partners for Democratic Change have centers located in Argentina, Albania, Bulgaria, Czech Republic, Georgia, Hungary, Kosovo, Lithuania, Poland, Romania, and Slovakia. Partners for Democratic Change, *Centers*, <http://www.partnersglobal.org/centers/centers.html> (last visited Nov. 19, 2003).

Even when there are no immediate or clear institutionalized processes or forums to bring people together to define and address issues or to take action, the tension that may emerge is generally sporadic and channeled into new or established forums, especially if violence occurs.²⁵ Accordingly, in democratic society there are no conflicts, only issues awaiting policies and forums for the management of disputes.

III. THE SECOND PREMISE: THERE ARE ONLY CONFLICTS AND POLITICIZED SYSTEMS OF SETTLEMENT IN AUTHORITARIAN REGIMES

Under authoritarian regimes, issues are treated as conflicts because they are managed through forms of repression, violence, avoidance, or ideology. Moreover, existing settlement mechanisms are always subject to political influence and accordingly politicized depending on the parties, issues, and regime's interests. While democratic forums are designed to resolve differences peacefully, systems established by authoritarian regimes are, by design, subject to external influence, manipulation, and suppression of issues.

Authoritarian regimes are sensitive to all issues that relate to their power and control. For these reasons they intervene, and thereby politicize, settlement processes, recognizing that the expression of issues and methods of resolution are inherently political and have regime consequences. Lacking forums for open dialogue or "open space" for the exchange of political ideas, nearly every critical comment is a perceived threat to an authoritarian regime and the society it creates. While, in democratic rule of law systems, some disputes may have a political dimension, rarely does an issue threaten the efficacy of the foundation of government.²⁶

This distinction in the management of issues and differences needs to be taken into account when designing rule of law systems. In the transformation to democracy, it becomes apparent that during the authoritarian regime there has been distortion, corruption, and atrophy in the judicial mechanisms for the management of issues and a corresponding psychological mistrust within the citizenry in state instruments of resolution.

When embracing the issues of repression and the new conditions raised during the transformation to democracy (acceptable discourse, privatization, property title, employment security, unionism, etc.), democratic governance is forced to immediately establish public policies and corresponding systems that can address the previously suppressed issues of social and economic justice, as well as create systems that transform the state from one political and economic entity into another. This is an overwhelming challenge during the transformation process, as citizens and government officials are likely to experience all the tensions and is-

25. See Robert Ricigliano et al., *Problems Without A Process: Using an Action Dialogue to Manage Racial Tensions*, 4 HARV. NEGOT. L. REV. 83 (1999).

26. *Contra* Scott v. Sandford. 60 U.S. 393 (1856), *superceded by* U.S. CONST. AMEND. XIII, XIV. The infamous Dred Scott decision is an exception to this rule. States, disinclined to implement the Supreme Court's decision, challenged the federal government's enforcement mechanism. "Dred Scott, in retrospect, demonstrated how much the tacit legitimacy of the principle of judicial supremacy rested on a prudent exercise of the principle of departmental discretion." G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1510 (2003).

sues suppressed during the authoritarian regime, as well as all the new issues that are created during the transformation to democracy.

Thus development of policies, systems, and processes for the management of disputes requires not only new mechanisms in democratic society but also the psychological transformation of how citizens and government officials embrace the difference between conflicts and disputes.

Ethnic issues in Central and Eastern Europe provide a good example of authoritarian regime repression and the complexity of change during the transformation to democratic rule. In the course of developing Ethnic Conciliation Commissions in Bulgaria, Czech Republic, Hungary, and Slovakia, Partners for Democratic Change encountered substantial unease at the municipal and national levels, within the leadership of the new democratic parties, and academic circles when addressing ethnic issues.²⁷ Finding no political advantage, few governmental officials, institutions, or prominent individuals wanted to create policies or forums to address Roma, Pomak [Moslemized Bulgarians], Jewish, or other minority interests and long standing social justice issues. During the authoritarian period, manipulation and repression were the operative tools for managing minority group issues; the authenticity and expression of minority concerns had no forum.

Conciliation Commissions operating as new public forums supported by municipal public policy challenged authoritarian methods and provided a unique opportunity for municipalities to better understand and address issues. Moreover, conciliating-designed commissions are new structures that frame the forum-of-dialogue, strengthening the voice of minorities and creating policy-based structures on on-going dialogue. However, it was not until many of the Central European governments realized that structurally addressing minority issues was critical to the European Union's accession process that Partners' Conciliation Commissions became more accepted. Seeking inclusion in a democratic venue, the European Union served as a catalyst for new municipal democratic structures and norms.

To survive, authoritarian regimes must suppress issues that challenge the state. When the state declines to provide potential challengers a negotiating table or an institutional structure for dialogue and open exchange on policy,²⁸ the corruption of institutional mechanisms for the management of differences may be an effect. Regardless of the professionalization of the magistrates, the education of the professionals, or the expectations of external entities (e.g. EU), authoritarian regimes will corrupt justice structures because they are integral to the maintenance of regime control. This was true in colonial periods, as a primary factor in colonial governance was the imposition of colonial justice over indigenous systems.²⁹

27. I interviewed political leaders in Central Europe in 1992-1993 in the course of seeking support for implementing local ethnic conciliation commissions. This was part of an effort to implement the Conference on Security and Cooperation in Europe's 1992 Geneva Recommendations on the rights and status of minorities. I served as a member of the official US delegation to the Conference. 33 I.L.M. 1625 (1994).

28. In the Soviet Union such challengers were labeled "dissidents" and sent to the Gulags, or "crazy" and sent to the asylums.

29. See Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123 (2002); Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255 (1996).

Conflict management is a governance issue, but few regimes delegate this function to independent judiciaries.

In the transition to democracy, it is difficult to create a wholly credible justice system “out of the head of Zeus,” even when there are adequate funds. Creating a modern justice system requires more than money, it also requires time. This is the one factor that is most lacking in establishing a democratic- and market-based society. Accordingly, rule of law systems need to be conceptually designed in a holistic manner. This can be accomplished by incorporating direct negotiation, conciliation, mediation, and arbitration, along with a judicial settlement process, as the former mechanisms are easier to establish, acculturate, and apply. Merely waiting for the creation and operation of judicial settlement processes thwarts the development of local dispute mechanisms and atrophies the opportunity to create specific forums [e.g., labor-management, ethnic commissions, environmental collaboratives, etc.] that are needed to move conflicts to disputes and advance settlement methodologies. For example, recognizing that viable market systems need dispute settlement mechanisms to function, the World Bank supported the development of a commercial mediation and arbitration system in Albania in 2000, along with funding magistrate schools to train judges to address the corruption of the state’s judicial system.³⁰ I concur with Menkel-Meadow that “‘exogenously’ created institutions” lack institutional roots and can float like lotus plants in evolving democracies. Nonetheless, with close attention to culture, national needs, and structural design, it is very possible to achieve successful mediating modalities while more formal rule of law systems are being developed. We see this in labor-management collective bargaining, as well as in the commercial and family law sectors, throughout Central and Eastern Europe.³¹ In Latin America, and especially Argentina, mediating and change management³² (citizen participation processes) have taken root and are applied to a broad range of civil and environmental issues even while the country is in a dire political and economic condition. Ironically, many of Menkel-Meadow critiques are Americanized “exports” on processes that have been acculturated and adapted in foreign lands.³³ Nonetheless, adapted models do not necessarily overcome concerns inherent in the nature of informal and formal settlement processes [power imbalance, gender inequality,

30. See *supra* note 15.

31. For a general discussion of ADR programs in Europe, see Ilano Shapiro, *Beyond Modernization: Conflict Resolution in Central and Eastern Europe*, 552 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 24 (1997). See also Martin Wright, *Key Questions on Victim-Offender Mediation*, in JUVENILE OFFENDER-VICTIM MEDIATION 125 (Beata Czamecka-Dzialuk & Dobroncha Wojcik eds., 2002), available at <http://www.restorativejustice.org/asp/listingSummary.asp?ID=2721> (last visited Nov. 19, 2003). Prior to 1989, there were no labor, commercial, family or criminal justice mediators and arbitrators. In 1997, Poland enacted legislation to mediate juvenile justice cases. *Id.* Poland, in 1991, and Hungary, in 1993, enacted labor mediation legislation. Furthermore, school mediation is not a part of the Czech Republic’s educational system. Polish law governing the resolution of collective bargaining disputes can be found at <http://www.prawo.org.pl/prawo/clcf/statutes/stat40.html> (last visited Nov. 19, 2003).

32. Partners-Argentina was organized to promote citizen participation and change management processes in Argentina and in Latin America. The Center has pioneered the practice in environmental, land use, crime prevention, and decentralization of the judicial system. See Partners for Democratic Change – Partners-Argentina, at http://www.partnersglobal.org/centers/centers_argentina.html (last visited Nov. 19, 2003).

33. Menkel-Meadow, *supra* note 1, at 339.

class and ethnicity issues, etc.] and require the close attention of practitioners and policy makers in each country.

Evolving democracies have the heavy burden of undoing the pervasive corruption sponsored by an authoritarian regime's practice of suppressing issues and manipulating conflict. Substantial time and innovation are required to establish authentic dispute settlement policies, forums, and mechanisms, as well as to garner the support of the citizenry. The incorporation of learning from distant shores does not, of itself, de-legitimize the contribution, provided that in-country professionals are experimenting and learning how to acculturate the processes to best meet local needs. Partners' Centers have created a new profession of mediators, negotiators, facilitators, and trainers, many of whom have adapted processes, influenced legislation, built firms, and expanded the application of the methodologies well beyond the learning that came from another country.³⁴ In each case, practitioners and policy makers relate the work to the context of the country's political history, seeking to use transparent and more empowering methodologies to overcome a legacy of conflict politicalization, institutional corruption, and citizen weariness.³⁵

IV. THE THIRD PREMISE: THERE ARE ONLY CONFLICTS IN INTER-STATE RELATIONS AWAITING DISPUTE SETTLEMENT MECHANISMS

Nation states live in a "Hobbesian world"³⁶ and to many, this is more true today than anytime in the last fifty years. Nation states are always in a state of inter-state conflict unless they create policies (treaties) that transform all or components of a conflict into a dispute management system.³⁷ Conflicts create the opportunity to "democratize" issues by limiting state power to an international regime or agreement prescribing how future matters will be settled.³⁸ Creating "third" mechanisms outside the full control of the parties, serves to limit state unilateralism and independence and fosters an international dispute settlement

34. Partners for Democratic Change, *Case Studies*, at <http://www.partnersglobal.org/www/impactLaw.html> (last visited Nov. 19, 2003).

35. Raymond Shonholtz, *Strengthening Transitional Democracies Through Conflict Resolution: Conflict Resolution Education, Training, and Global Development: The Mediating Future* 552 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 141 (1997) [hereinafter Shonholtz, *Strengthening Transitional Democracies*]. Emerging democracies' perspectives will be useful in designing "similar modalities" for use at international level. *Id.*

36. As defined by Blake D. Morant, "A Hobbesian view of natural law dictated that individuals will employ any means, including violence, to attain and defend power, possessions, and reputation." Blake Morant, *Teaching of Dr. Martin Luther King, Jr. and Conflict Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 86 (1998).

37. The World Trade Organization has an arbitrating methodology for trade disputes placed before it by member states called the International Centre for the Settlement of Investment Disputes (ICSID). ICSID, at <http://www.worldbank.org/icsid/> (last visited Nov. 22, 2003).

38. As described in an earlier article:

All conflicts in a democracy are acceptable provided that they are peacefully expressed and resolved. Democracy circumscribes a large acceptable boundary around conflict, recognizing that conflict is one of its most constructive engines for organizing; unifying opinion; crating opposition; and expressing value, truth, and understanding. In the context of Western democracies, conflict has positive value. Democracy's perennial mission is the creation of acceptable, fair, and neutral venues and forums for the peaceful expression of conflict.

Shonholtz, *Strengthening Transitional Democracies*, *supra* note 35, at 140.

construct that contains the conflict, transfers authority, and promotes conflict prevention through agreed upon dispute settlement procedures. These are often small, but critical steps in democratizing conflicts by creating new independent governance structures around their settlement beyond the full control of the parties. As the management of inter-nation conflict is a state governance issue, so is the delegation of settlement processes.

In the post-World War II era, an innovative range of institutions and mechanisms was created to contain and define potential disputes and to create judicial and mediating modalities to address them.³⁹ In short, anticipating conflict, nation states have created bilateral (trade), regional (security, trade, and finance), and international (finance, trade, security, environmental, etc.) forums and mechanisms, generally sector specific, to channel issues into settlement proceedings. Many of the settlement processes have inherent problems (power imbalances, resource unevenness, political influence, etc.) that arise in the process. Nonetheless, it is better to have a process that manages conflicts as disputes, as such mechanisms through experience and practice can correct, refine, and improve. Lacking such mechanisms entirely reduces all issues to conflicts and ad hoc settlement processes, which are more dangerous, costly and time consuming.

While the exception may be the European Union, International Criminal Court, and World Trade Organization, which can initiate as well as resolve issues defined as international, historically and generally today, there are no "international" conflicts or disputes, only nation-states that have issues with one another. While international policy bodies (UN, OAS, etc.) or non-government organizations (Greenpeace, Amnesty International, etc.) may spotlight issues, decision-makers most often are nation-state leaders (UN may debate, but in the end, national actors decide). Decision-makers may decline internationalizing a dispute settlement regime (United States as regards the International Criminal Court) or they may endorse a global regime (as with the WTO for trade), but what makes an issue "international" are nation-state actors.

Menkel-Meadow uses international conflicts and disputes without significant distinction in her paper.⁴⁰ This confuses the matter. There are only conflicts within the international sphere that nation-state actors agree to transform into disputes for their orderly management and settlement. Lacking this mature development, conflicts are subject to ad hoc negotiation and settlement processes. Without the introduction of ad hoc processes, conflict is open to violence and settlement methods by force or power persuasion.

In making order within the international sphere, nation-states have recognized the importance of creating and maintaining institutions and protocols for issues they anticipate requiring settlement. Proactive dispute settlement institution building has been a great hallmark of the past fifty years and can be seen in nearly every subject sector [health, environment, commerce, trafficking, human rights, war crimes, drug enforcement, etc.]. The progressive position would be to "out-

39. Examples include the United Nations, Federal Mediation and Conciliation Service, and the United States Institute of Peace. See generally Andrea Leahy, *United Nations Mediation of Regional Crises*, 80 AM. SOC'Y INT'L L. PROCEEDINGS 135 (1986); Andrea Strimling, *The Federal Mediation and Conciliation Service: A Partner in International Conflict Prevention*, 2 PEPP. DISP. RESOL. L.J. 417 (2002).

40. See generally Menkel-Meadow, *supra* note 1.

law” conflict and allow for only the peaceful expression and resolution of differences through dispute settlement mechanisms. Whether the United States, as the world’s most powerful country, will subscribe to the concept that the forced settlement of conflict is unacceptable and “illegal” and that permanent or ad hoc dispute settlement processes must be employed will, to a significant degree, decide the pace and development of the global banning of conflict and the internationalization and democratization of dispute settlement forums and mechanisms. Interestingly, both the Atlantic Charter of 1941⁴¹ and the UN Charter⁴² underscore these principles.

In the past fifty years, there has been an evolution in thinking about transnational issues, finding commonality in democratic values, security, finance, population movement, and commerce, as well as many others, across national borders. The increased democratization of conflict through institutionalized dispute settlement mechanisms reduces the propensity for international conflict and violence. Each time national state actors delegate to an international regime authority to manage disputes, the arena for conflict diminishes. Accordingly, we want to identify conflict early, define its perimeters and create forums and mechanisms for its management. The International Criminal Court⁴³ is a good example of this process, removing the obligation to create ad hoc “war crimes” courts or tribunals and making it possible to establish a body of international criminal law based on treaties, protocols, and case law, known *a priori* to would-be war crimes violators.

The increased intersection of nation-state actors in delegating authority to international forums to corral conflict through dispute settlement mechanisms builds stronger relationships between the states on common issues, decreasing the likelihood of violent conflict or war between them. The normative statement of this position is that “democracies do not war with one another.”

The near equivalent of this value can be seen in the complex forms of relationship building between nations in security (NATO), union formation (United States; European Union; OSCE), broad economic alliances (WTO; European monetary system), and regional trade mechanisms (NAFTA; Mercosur). All of these arrangements generate disputes, not conflicts, and are resolved through agreed upon mechanisms.

While authoritarian states exist in the twenty-first century and their people need the values that an acculturated democracy can bring, the most critical development for the reduction of conflict lies in the international sphere. The more nation states devolve to international forums the governance of conflict, the more authoritarian regimes, as well as democratic, will experience the pressure domestically and internationally to acquiesce to international dispute settlement norms, forums, and processes.

41. ATLANTIC CHARTER, Aug. 14, 1941, 3 Bevens 686.

42. U.N. CHARTER, June 26, 1945, 3 Bevens 1153.

43. The International Criminal Court is a prospective institution designed to define the rules and procedures and create the institution for the criminal prosecution of those charged with genocide and other crimes against humanity. See generally THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND THE INTERNATIONAL LAW (Sarah B. Sewall & Carl Kayser eds., 2000). See also The Coalition for the International Criminal Court, at <http://www.iccnw.org/> (last visited Nov. 19, 2003).

It is within these forums that many of Menkel-Meadow's concerns about BATNAs, enforcement mechanisms, power, contextual issues, etc., will have an operative sphere within which to be effectively addressed and improved upon over time.

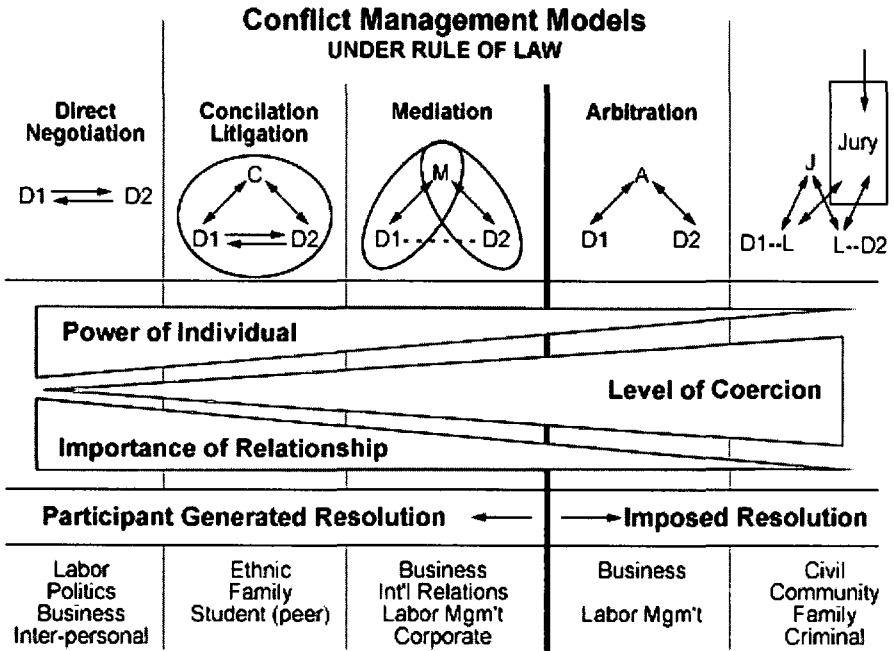
V. CONCLUSION

While everyday realities offer exceptions to the General Theory, in its theoretical form, the goal in democratic society is to transform all conflicts into manageable disputes; conflicts, especially those that are potentially violent, lacking a container for their management, manifest in democratic society a domain of activity requiring the formation of new policies, institutions, and dispute management systems and mechanisms.

No authoritarian society can consistently and successfully contain and repress conflict. Like weeds through concrete, human issues will surface; if the state will not offer a credible forum, the state will not survive, so powerful are human conflicts, especially those relating to freedom.

In the international sphere, nation states need to take on the obligation of diminishing conflict through institutionalized mechanisms in order to create a world that is more just, fair and sensitive to the great diversity of humankind and the demands of the environmental world that we live in. In promoting this international perspective of conflict, practitioners and theorists in the field of change and dispute management need to build a domestic constituency for this international obligation, educating and pressing national policy makers to appreciate the global responsibilities that they have to make conflict the engine of peaceful dispute settlement.

VI. APPENDIX



SOURCE: PARTNERS FOR DEMOCRATIC CHANGE

