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# Comment: Trends and Challenges in Bringing Together ADR and the Rule of Law

*Stephanie E. Smith\**

At the beginning of this conference, Professor Richard Reuben challenged us to shed light on whether and under what conditions ADR can foster or undermine the rule of law. As a number of presentations at this symposium have highlighted, formal and informal justice options already coexist in societies throughout the world. How can we improve the quality of both to improve access to justice and the rule of law? How can we help them work better together for the citizens they serve?

The goals of justice, peace, and prosperity will not be achieved overnight. Strategies that aim to achieve a perfect state in a short time frame are doomed to failure. Rule of law approaches should be individualized for local context, and be nimble enough to adapt over time to advance these ambitious goals. Success will require drawing upon expertise from many practice areas and academic fields, and coordinating activities to maximize limited resources.

This symposium has already taken a refreshing and important step forward by broadening the range of knowledge brought to bear on this complex set of questions. The discussion of these topics within the legal academy can too easily fall into a polarized and oversimplified debate between the relative merits of trials versus ADR.<sup>1</sup> By adding the perspectives of seasoned development practitioners and dispute systems design (DSD)<sup>2</sup> experts with deep local context in many countries, this event sparked a rich dialogue that is uncommon in US law school venues.

As a funder in the area of post-conflict peace-building and a consultant to courts and governments in the US and abroad,<sup>3</sup> I have come to appreciate the need to create collaboration that bridges the many relevant silos of expertise—including academia and practice; human rights, governance, development, and peace-building; and international and local knowledge—in order to develop more so-

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1. For an excellent description of these polarized stereotypes, see the excerpt from the *FORDHAM L. REV.* in Michael Moffitt, *Which is Better, Food or Water? Rule of Law or ADR?*, 16 *DISP. RESOL. MAG.* 8, 8 (2010).

2. Dispute systems design (DSD) encompasses one or more processes that are adopted to prevent, manage, or resolve a stream of disputes connected to an organization or institution. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 *HARV. NEGOT. L. REV.* 123, 126 (2009).

3. While serving as the first Director of ADR Programs for the U.S. District Court for the Northern District of California (1991-1996), I worked with lawyers and judges from the U.S., India, Egypt, Jordan, Gaza, and the West Bank, with a focus on court-connected ADR. In recent years, I have consulted and trained in Bhutan, China, Abu Dhabi, and Slovenia.

phisticated and nuanced strategies to assist societies in transition. This comment will draw on a number of the excellent presentations at this symposium and describe briefly two hopeful trends and three challenges, as we work to synthesize knowledge from all of these realms to create a more integrated, adaptive model for promoting the rule of law, peace, and prosperity.

## I. TRENDS

### A. Increasing Voice and Recognition for Citizens

Historically, rule of law projects promoted a “top-down” change model, as the US and other international donors aimed to spread a Western-derived rule of law model.<sup>4</sup> Originally focused on promoting processes that developed legal rules and courts to apply them consistently, this model has expanded to incorporate varying degrees of substance, including internationally-sanctioned human rights norms.<sup>5</sup>

The limitation of this strategy has been that it often attempts to impose a rigid template without sufficient attention or sensitivity to local history, culture, and conditions. Because this model is promoted predominantly by the United States and other developed countries, it has also been criticized as inappropriate for developing societies, and even as “imperialist” or “colonialist.”<sup>6</sup> As applied, it has too often assumed that transplantation of Western-designed institutions alone would magically transform a society. A DSD analysis would suggest that a contributor to the less than robust outcomes has been the failure of the most powerful stakeholders, international donors and organizations, to obtain meaningful input from less powerful, local stakeholders.<sup>7</sup>

A recent study of Liberians’ perspectives on formal and informal justice options provides an interesting example of the unintended consequences of the “top-down” model.<sup>8</sup> Researchers found that the formal court system failed to meet citizens’ goals of affordability, accessibility, and timeliness due to the distant

4. See, e.g., THOMAS CAROTHERS, CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION 124-25, 129 (2004) (describing a “menu” of law reform options that reflect the dominant “top-down” approach, and noting how funding has focused on reforms of substantive law and legal institutions).

5. This broader definition of rule of law has been described as the “thick” definition, and can encompass issues including law and order, judicial administration, and human rights. Richard C. Reuben, *ADR and the Rule of Law: Making the Connection*, 16 DISP. RESOL. MAG. 4, 4-5 (2010); see also REPORT OF THE UN SECRETARY-GENERAL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST CONFLICT SOCIETIES 4, Aug. 2004, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (Rule of law includes accountability of all persons and the State to laws “that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”).

6. For an example of such a critique, see Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the ‘Rule of Law’*, 101 MICH. L. REV. 2275, 2283 (2003). Cf. LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 120 (2002) (critiquing export of Western ADR models as promotion of a “harmony” ideology, stemming from “a long history of continuity, in which colonial dichotomies used to control the ‘uncivilized’ are transferred to contemporary legal arenas along with the same ideologies of control.”).

7. See Smith & Martinez, *supra* note 2, at 159-61.

8. DEBORAH H. ISSER ET AL., LOOKING FOR JUSTICE: LIBERIAN EXPERIENCES WITH AND PERCEPTIONS OF LOCAL JUSTICE OPTIONS, US INSTITUTE OF PEACE (2009).

location of the courts and costs including “registration fees, gas money for police investigators, requirements that victims pay the cost of food for the detained accused, lawyers’ fees, bribes, and indirect costs such as money for transportation and time spent away from livelihoods.”<sup>9</sup> The report also faulted the system’s lack of transparency and impartiality and noted that citizens viewed the courts as a place that “wealthy, powerful, and socially connected people can assert their will.”<sup>10</sup>

The failure of rule of law initiatives to achieve all of their goals through the “top-down” strategy is leading to increased attention to local culture and context. This “bottom-up” strategy recognizes the self-determination of local citizens whose dispute resolution systems are undergoing change. The hopeful trend is that more experts and commentators are focusing on the need to bring these two strategies together in an individualized way for each local context.<sup>11</sup> As Jim Michel noted in this conference, the development community, a primary funder of rule of law initiatives, now recognizes the need for locally-owned development in order to achieve sustainable improvements in local conditions.<sup>12</sup>

Lisa Bingham’s symposium presentation on deliberative democracy and DSD can be seen as describing a somewhat analogous trend in the United States.<sup>13</sup> The substantial growth in new participatory mechanisms for US citizens expands their potential input well beyond the ballot box. Deliberative democracy, collaborative public management, and ADR across the policy continuum provide more textured “bottom-up” processes to engage US citizens and allow them to increase their policymaking contributions to governance.

### *B. Increasing Recognition of the Need for Multiple, Integrated Options*

A core tenet of dispute systems design is the desirability of multiple dispute resolution options to meet the needs of the multiple stakeholders.<sup>14</sup> Designers of rule of law and governance projects need to understand, and better integrate, a range of formal and informal dispute resolution processes, including ADR, in a manner appropriate to the local context in order to promote the rule of law. In the

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9. *Id.* at 3.

10. *Id.*

11. See Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 297-302 (2009) (arguing for the necessity of bringing together external (“top-down”) and internal (“bottom-up”) commitments, and customizing processes to the degree possible, given cost considerations).

12. James Michel, Consultant in Int’l Dev. Cooperation, Presentation at the Alternative Dispute Resolution and the Rule of Law: Making the Connection Symposium, Univ. of Mo. Law School (Oct. 15, 2010); see also OECD, THE PARIS DECLARATION ON AID EFFECTIVENESS AND THE ACCRA AGENDA FOR ACTION 1 (2005/2008), available at <http://www.oecd.org/dataoecd/30/63/43911948.pdf> (strongly emphasizing the importance of harmonizing efforts with partner countries, and their needs and capabilities). It notes that an ongoing goal is “[e]nhancing donors’ and partner countries’ respective accountability to their citizens and parliaments for their development policies, strategies and performance.” *Id.*

13. Lisa Blomgren Bingham, Keller-Runden Prof. of Public Service at the Ind. Univ. School of Public and Environmental Affairs, Bloomington, Ind. and Visiting Prof. of Law at the Boyd School of Law, Univ. of Nev., Las Vegas, Presentation at the Alternative Dispute Resolution and the Rule of Law: Making the Connection Symposium, Univ. of Mo. Law School (Oct. 15, 2010).

14. See Smith & Martinez, *supra* note 2, at 128.

transitional justice arena, such efforts have created national systems including international and local courts, customary justice options, and varying forms of truth and reconciliation commissions.<sup>15</sup> Rwanda established one of the more elaborate multi-tiered sets of processes, including international courts, national courts, and a reinvention of a traditional justice process. These processes were created to give different types of attention to different levels of criminal offenses, and allowed the lowest level perpetrators to be addressed at the community level, with the possibility of reconciliation, through the *gacaca* process. Andrea Kupfer Schneider concluded that this multi-level system with “its perceived messy overlap” of processes, “may ironically be the success story of managing the peace and justice tensions.”<sup>16</sup>

## II. CHALLENGES

### A. Resources

Public and private funds devoted to rule of law, governance reform, and related issues are currently insufficient to address the critical needs of transitioning societies around the world. Although the Obama Administration is committed to strengthening development and diplomacy,<sup>17</sup> its recent successes in slightly increasing funding in some areas are likely to fall back in the face of deficit reduction efforts and hostility to foreign assistance by many in Congress.<sup>18</sup> While European governments have devoted a higher percentage of their resources to international development needs, the world economic crisis may put substantial pressure on these sources as well.<sup>19</sup>

15. Even countries geographically adjacent may develop different systems in response to local needs and priorities. Carrie Menkel-Meadow compared the responses of two neighboring countries to years of human rights violations: “Chile and Argentina, speaking the same language, separated by a mountain range, have widely different cultures . . . one culture [Argentina] continues to mine their memory and to seek justice; the other [Chile] seeks to move forward with economic growth and plans for the future.” Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons Learned from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 225 (2009) (footnote omitted).

16. Schneider, *supra* note 11, at 296.

17. U.S. STATE DEPARTMENT, LEADING THROUGH CIVILIAN POWER, THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW (2010), available at <http://www.state.gov/documents/organization/153142.pdf>; THE WHITE HOUSE, PRESIDENTIAL POLICY DIRECTIVE ON GLOBAL DEVELOPMENT (2010), fact sheet and sections, available at <http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy>.

18. In January 2011, a Republican study committee even proposed eliminating the USAID budget altogether. See Lawrence McDonald in Rethinking US Foreign Assistance Tags: Connie Veillette, USAID, USAID Modernization Efforts Amid Budget Cut Fever: Connie Veillette, Jan. 24, 2011, available at [http://blogs.cgdev.org/global\\_prosperity\\_wonkcast/2011/01/24/usa-id-modernization-efforts-amid-budget-cut-fever-connie-veillette/](http://blogs.cgdev.org/global_prosperity_wonkcast/2011/01/24/usa-id-modernization-efforts-amid-budget-cut-fever-connie-veillette/).

19. Although the United States is the largest contributor to foreign aid in dollar amounts, it devotes the smallest percentage of gross national income among the major donor countries. See CURT TARNOFF & LARRY NOWELS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICIES 30-31 (2004), available at <http://fpc.state.gov/documents/organization/31987.pdf>. While the European Union was “the largest aid donor, providing approximately 60% of global aid flows in 2008,” the European Commission predicted that there would be “a USD 22 billion shortfall on Official Development Assistance (ODA) commitments in 2009 . . . .” See Official Journal of the European Union, *The Effects of the Global*

Private funding is similarly limited. U.S. philanthropists give only a small percentage of their grants to support international projects, and only a small fraction of that amount appears to be devoted to rule of law and ADR issues, with human rights funding the most prominent identified subcategory.<sup>20</sup> While human rights funders address a critical component of the broader rule of law agenda, they have traditionally focused on a “top-down” model, prioritizing international tribunals and pressing governments to adhere to the precepts of the Universal Declaration of Human Rights and subsequent treaties and laws.<sup>21</sup> Such funders could contribute more, and perhaps more wisely, by supporting broader, integrated rule of law strategies that include ADR, as well as courts, as part of a more “bottom-up” approach.

### B. Evaluation

Rule of law and ADR projects are notoriously difficult to evaluate.<sup>22</sup> These projects seek to change not just rules and structures, but culture and societal behaviors. The timelines are long. As the Liberia study noted, “it is quite likely that the meaningful metric for significance in change will actually be generational.”<sup>23</sup> Few, if any, funders have the vision, commitment, and resources for such long-term, complex studies.

An additional challenge is posed by the ambiguity and multiplicity of goals of rule of law projects.<sup>24</sup> Colleen Duggan, editor of a special issue of the *International Journal of Transitional Justice* on evaluation, noted that the absence of clearly defined goals in transitional justice projects makes evaluation even more difficult.<sup>25</sup> Goals in this setting could include preventing violence (including

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*Financial and Economic Crisis on Developing Countries and on Development Cooperation*, 3, Mar. 25, 2010, available at <http://cur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:004E:0034:0043:EN:PDF>.

20. According to the Foundation Center’s 2009 data from larger U.S. foundations, 8.8 percent of grants were international, making up 23.7 percent of the money given. FOUNDATION CENTER, FC STATS: THE FOUNDATION CENTER’S STATISTICAL INFORMATION SERVICE, SUMMARY OF DOMESTIC AND INTERNATIONAL GRANT DOLLARS (2009), available at [http://foundationcenter.org/findfunders/statistics/pdf/03\\_fund\\_geo/2009/09\\_09.pdf](http://foundationcenter.org/findfunders/statistics/pdf/03_fund_geo/2009/09_09.pdf). It is very difficult to tease out the rule of law and ADR projects within these statistical categories, though the Foundation Center notes that the dollar value spent on human rights and civil liberties was 3.4 percent of international grants, while peace and security amounted to 1.7 percent. Social science grants related to “international law/law” constituted .3 percent. *Id.* at [http://foundationcenter.org/findfunders/statistics/pdf/03\\_fund\\_geo/2009/int\\_sub\\_021.pdf](http://foundationcenter.org/findfunders/statistics/pdf/03_fund_geo/2009/int_sub_021.pdf).

21. GENERAL ASSEMBLY OF THE UNITED NATIONS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948); FUNDING HUMAN RIGHTS: AN INVITATION, A BOOKLET ISSUED BY THE INTERNATIONAL HUMAN RIGHTS FUNDERS GROUP, 7 (2010), available at <http://www.ihrfg.org/sites/default/files/ihrfgBooklet10.2010.pdf>. (“Human rights help ensure that governments meet international standards and comply with laws to protect people throughout the world.”).

22. See, e.g., BEYOND COMMON KNOWLEDGE- EMPIRICAL APPROACHES TO THE RULE OF LAW, STANFORD LAW AND POLITICS 3-4 (Erik Jensen & Thomas Heller, eds., 2003).

23. ISSER ET AL., *supra* note 8, at 6.

24. Colleen Duggan, Special Issue: Transitional Justice on Trial – Evaluating Its Impact, *Editorial Note*, 4 INT’L J. TRANSITIONAL JUST. 315, 320 (2010) [hereinafter *Editorial Note*].

25. Goals of the local community and the various international donors may not always be the same. See, e.g., ISSER ET AL., *supra* note 8, at 3-4 (Liberian citizens prefer the goals of restorative justice and social reconciliation, rather than individual rights, adversarialism, and punitive sanctions. For an

war), avoiding recidivism by human rights violators, promoting reconciliation, repairing the economy, and punishing criminals, among others.<sup>26</sup> As Duggan noted, the failure to clearly define goals at the beginning of a project means that “it is often the evaluator who must articulate or reconstruct the theory of change (often *ex post*) prior to beginning work.”<sup>27</sup>

Even when the goals are clear, the multiple parties, multiple strategies, and long time frames are challenging. As Peter Muhlberger noted at this conference, existing social science theories are not adequate for understanding ADR and complex rule of law projects.<sup>28</sup> More research and exchange of ideas on social science and applied research methodologies are clearly needed.<sup>29</sup>

The difficulty of evaluating projects in this field is also a substantial barrier to generating increased funding, whether from governmental or private sources. As noted above, private and public funds are severely constrained, and donors in both sectors are increasingly demanding proof that the likely benefits justify the substantial costs.<sup>30</sup>

### C. Perpetuation of Injustice

A risk of giving more priority to local culture and history is that the new systems created will simply replicate the weakness and limitations of the old system, which may include discrimination and marginalization of women or certain ethnic

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identification and discussion of the many forms of justice, see generally Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008).

27. *Editorial Note*, *supra* note 25, at 320.

28. Peter Muhlberger, Tex. Tech Univ., Ctr. for Comm’n Research; College of Mass Comm’n, Presentation at the Alternative Dispute Resolution and the Rule of Law: Making the Connection Symposium, Univ. of Mo. Law School (Oct. 15, 2010).

29. See generally Special Issue: Transitional Justice on Trial – Evaluating Its Impact, 4 INT’L J. TRANSITIONAL JUST. 315 (2010), including *Editorial Note*, *supra* note 25, at 315-28, for discussion of multiple methodologies, including applied research and development evaluation.

30. For a perspective on the importance of impact evaluation to philanthropic funders, see PAUL BREST & HAL HARVEY, MONEY WELL SPENT: A STRATEGIC PLAN FOR SMART PHILANTHROPY xiii (2008) (“Effective grantmaking requires strategies based on clear goals, sound evidence, diligent care in selecting which organizations to fund, and provisions for assessing the results—good or bad.”). On January 19, 2011, USAID issued a new policy instituting “more demanding evaluation requirements” for its projects. USAID EVALUATION POLICY- BUREAU FOR POLICY, PLANNING AND LEARNING 2; available at <http://www.usaid.gov/evaluation/>.

31. See, e.g., ISSER ET AL., *supra* note 8, at 5-6 (noting certain Liberian customary justice elements, including multiple forms of trial by ordeal.).

or religious groups, as well as perhaps power imbalances and corruption.<sup>31</sup> The challenge is to design and improve formal and informal mechanisms, and effectively link these multiple options to maximize justice opportunities in a given context in order to set that country on a path to further progress.<sup>32</sup>

While pressing to bring about improvements in justice as quickly as is feasible, designers may need to acknowledge that change will often have to be incremental and that efforts to bring about radical changes may not succeed and in fact may be counterproductive. As the Liberia report recommended: “[R]ather than set standards at an unattainable level, it would be wise to consider transitional policies aimed at providing the best possible justice under the circumstance, and at creating an environment of openness and trust between the customary and formal systems that seeks to bridge the gaps and move toward full realization of Liberia’s goals for its justice system.”<sup>33</sup>

As I write this comment, we are watching potentially peaceful revolutions and perhaps civil wars unfold in North Africa and the Middle East as totalitarian regimes are challenged by their citizens. The world community desperately needs a better understanding of how to assist countries transitioning from war to peace, and totalitarianism to democracy, to create more just, equitable, and productive societies without violence. I hope that this symposium launches an ongoing dialogue and a strengthened commitment to summon the necessary will and resources to develop and adapt the full range of dispute resolution options in order to make a positive difference.

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32. See, e.g., JANE STROMSETH, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 53 (2006)

Local cultural mores and traditions that enjoy strong popular legitimacy may at times be in tension with international human rights principles and objectives. This raises hard questions: how much transformative change can realistically be “imprinted” upon a post-conflict society by outsiders? And where gaps do appear – especially in the areas surrounding the rule of law (e.g., governance, minority protections, women’s rights) – how can the seeds of reform be planted and sustained so that when change does occur it will enjoy domestic legitimacy?

*Id.*

33. ISSER ET AL., *supra* note 8, at 6.

