



# Alternative Dispute Resolution and the Rule of Law in International Development Cooperation

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## Foreword

This working paper is a revised transcript of a paper delivered by the author at the *Symposium on Alternative Dispute Resolution and the Rule of Law*, held at the University of Missouri, Columbia, Missouri on October 15, 2010. We are pleased to be able to publish this analysis, which offers a valuable summation of the history of law and justice development programming as it relates to the use of alternative dispute resolution methods in justice systems across the world. The author brings to this subject the perspective of an eyewitness by reason of his personal association with that history. He also offers an up-to-date list of bibliographical references in support of his paper that is likely to be invaluable to other researchers in this field. It is expected that a version of this paper will also appear in the *Journal of Dispute Resolution*, University of Missouri, later in 2011.

## Notes about the Author

James Michel served as a legal adviser to the US Department of State and in other senior management positions in the U.S. government, including as principal deputy assistant secretary of state for inter-American affairs (1983-1987), U.S. ambassador to Guatemala (1987-1989), USAID assistant administrator for Latin America and the Caribbean (1990-1992), and acting deputy administrator and acting administrator of USAID (1992-1993). From 1994 until 1999, he chaired the Development Assistance Committee of the Organization for Economic Cooperation and Development, where he presided over the principal international forum for donor policy coordination. He returned to USAID in 1999 as counselor to that agency and retired from the US civil service at the end of 2000. He has since worked as an expert consultant on a range of programs associated with law and justice development and continues to practice in that field.



# Alternative Dispute Resolution and the Rule of Law in International Development Cooperation

James Michel

## Abstract

The role of alternative dispute resolution (ADR) in efforts to strengthen the rule of law is attracting increased interest in international development cooperation. From a development perspective, the principal interest in this question is a concern for expanding rights and opportunities for poor people who do not fully benefit from the protection of the law in their daily lives. Other interests in ADR, such as in commercial arbitration and court-annexed mediation in civil litigation, also have important positive implications for development. Facilitating commerce and expediting the disposition of lawsuits are valuable services and worthwhile undertakings. However, the principal focus for development is on the nonformal processes intended to expand access to justice. These include statutory schemes, such as the *barangay* justice system in the Philippines; state-sponsored mediation centers, such as those of the Procurador General in El Salvador; traditional systems that provide the vast majority of dispute-resolution services in many African countries; and systems of mediation and conciliation operated by public and private entities throughout the world.<sup>1</sup>

This paper briefly reviews the concept of development and related international cooperation. It then examines how the rule of law has been addressed in development programs and offers some thoughts about the contribution of ADR for advancing the rule of law and, in turn, contributing to human security, well being, and dignity.

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<sup>1</sup> See generally, on the theme of ADR and indigenous populations, Carlo Osi, "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution," *Cardozo Journal of Conflict Resolution* 10, no. 163 (2008) <http://cojcr.org/vol10no1/163-232.pdf>; and Varun Gauri, "How Do Local-Level Legal Institutions Promote Development?" Policy Research Working Paper 5108 (Washington, DC: World Bank, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1503802](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503802). Country-specific examples of informal justice systems can be found in Ewa Wojkowska, "Doing Justice: How Informal Justice Systems Can Contribute" (Oslo: UN Development Programme, Oslo Governance Centre, 2006), <http://www.undp.org/oslocentre/docs07/DoingJusticeEwaWojkowska130307.pdf>. The Institute of Developing Economies (IDE) has examined dispute-resolution systems in a number of Asian countries. See the IDE website, <http://www.ide.go.jp/English/Research/Topics/Law/Law/index.html>. Fundación Institucionalidad y Justicia (FINJUS) in the Dominican Republic has published a summary of ADR legislative norms for 19 Latin American countries. See Arelis Ricourt and Karina Elmúdesi de Ferrúa, "Estudio de Derecho Comparado sobre Resolución Alternativa de Conflictos en America Latina" (Santo Domingo: FINJUS, 2006). The Business and Society Exploring Solutions website is building profiles of dispute-resolution mechanisms in 124 countries. See <http://baseswiki.org/en/Category:Country>.

# International Cooperation to Support Development

An extensive body of literature contains many definitions of development and many theories about how development is achieved, with many different points of emphasis.<sup>2</sup> However, there is broad agreement that inclusive economic growth and good governance are the key factors in expanding opportunities, choices, and shared interests and are thus desirable development objectives.

In September 2010, U.S. President Barack Obama approved a new global development policy for the United States, following a comprehensive interagency review over the previous year. The new policy is focused on broad-based economic growth and democratic governance as central to sustainable development outcomes. It establishes an operational model of partnership that reflects greater selectivity and country ownership, and provides an interagency architecture for coordinated, coherent, and results-oriented implementation.<sup>3</sup>

In addition, the U.S. Department of State and the U.S. Agency for International Development (USAID) have completed a parallel internal review of the structure and practice of U.S. diplomacy and development, the Quadrennial Diplomacy and Development Review. This review, under the leadership of the secretary of state, will complement the president's policy by addressing how the two agencies will collaborate to adapt diplomacy, elevate development, and build peace and stability.<sup>4</sup>

Development can be defined as a process by which societies become stable, just, and prosperous, and people benefit from increased freedom, security, and rising standards of living.<sup>5</sup> This

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<sup>2</sup> A sample of modernization, dependency, corporatism, and bureaucratic authoritarianism perspectives about development in Latin America can be found in Peter Klaren and Thomas J. Bossert, eds., *Promise of Development: Theories of Change in Latin America* (Boulder, CO: Westview Press, 1986). A summary of various development theories and perspectives in a rule of law context is contained in Kevin Davis and Michael J. Trebilcock, "What Role Do Legal Institutions Play in Development?" (conference paper, International Monetary Fund Conference on Second Generation Reforms, November 8–9, 1999), <http://causaestudiantil.com.ar/bibliotecavirtual/ECONOMICOS/VARIOS/LEGAL%20INSTITUTIONS%20AND%20DEVELOPMENT.pdf>.

<sup>3</sup> See United States, Office of the Press Secretary of the White House, "Remarks by President Obama at the Millennium Development Goals Summit in New York, New York," Press release (Washington, DC: White House, September 22, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york>; and United States, Office of the Press Secretary of the White House, "Fact Sheet: US Global Development Policy," Press release (Washington, DC: White House, September 22, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy>.

<sup>4</sup> U.S. Department of State, *Leading through Civilian Power: The First Quadrennial Diplomacy and Development Review* (Washington, DC: U.S. Department of State, 2010), <http://www.state.gov/s/dmr/qddr> and <http://www.usaid.gov/qddr>. See also Hillary Rodham Clinton, "Leading Through Civilian Power: Redefining American Diplomacy and Development," *Foreign Affairs* 89, no. 6 (2010): 13–24.

<sup>5</sup> I have used this definition in a number of public forums. See, for example, U.S. Department of State, "2010 Conference on Sub-Saharan Africa" (Washington, DC: U.S. Department of State, Diplomacy Briefing Series, June 14, 2010), <http://www.state.gov/p/af/144831.htm>. It was included in the background materials for the recent U.S. Government studies of development policy and implementation structures. See generally the websites of the Department of State QDDR (<http://www.state.gov/s/dmr/qddr>) and USAID ([www.usaid.gov/qddr](http://www.usaid.gov/qddr)).



definition says that development is ultimately about results in terms of the security, well-being, and dignity of people. It also says that improving the lives of people and achieving a more stable, just, and prosperous world are intimately related objectives. This view has its roots in a basic understanding of development as something that comes from within a society through a complex process with simultaneously interacting economic, social, political, environmental, and security dimensions.<sup>6</sup>

This comprehensive view of development has largely displaced the various “silver bullet” theories that had tried to associate development results with single causes. Unsuccessful candidates for being *the* key to development have included investment in physical infrastructure, increased agricultural production, sound macroeconomic policies, positive cultural values, education, microcredit, and integration into the global economy. All are relevant, but none is sufficient in itself.

A related debate has involved questions of priorities and sequencing. Does economic growth create the need and demand for good governance, or does good governance establish an enabling environment necessary for sustained economic growth? And do good governance and economic growth begin in communities at the grass roots level, or in national policies and institutions?<sup>7</sup> As with the broader questions about the nature of development, experience is demonstrating that there are no universal answers. From many years of observation in many countries in different parts of the world, my personal view is that there is no single path to development, no formula that can claim universal application. Rather, the complex and elusive process of development is highly dependent on the particular facts of local context.

International cooperation to support development has a long history. Its current manifestation can be traced to the efforts of missionaries and some colonial administrators in the late nineteenth and early twentieth centuries to bring the benefits of “modernization” to societies that

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<sup>6</sup> See OECD, “Development Partnerships in the New Global Context,” in “Shaping the 21<sup>st</sup> Century: The Role of Development Cooperation” (Paris: OECD, 1996), <http://www.oecd.org/dataoecd/23/35/2508761.pdf>, which described key elements of sustainable development as including: 1) A sound policy framework encouraging stable, growing economies with full scope for a vigorous private sector and an adequate fiscal base; 2) Investment in social development, especially education, primary health care, and population activities; 3) Enhanced participation of all people, and notably women, in economic and political life, and the reduction of social inequalities; 4) Good governance and public management, democratic accountability, and the protection of human rights and the rule of law; 5) Sustainable environmental practices; and 6) Addressing root causes of potential conflict, limiting military expenditures, and targeting reconstruction and peace-building efforts toward longer-term reconciliation and development. See also World Bank, *Toward Country-led Development: A Multi-Partner Evaluation of the Comprehensive Development Framework* (Washington, DC: World Bank, 2003), [http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/8746BD3C3A06832285256DAC005872C0/\\$file/synthesis\\_report.pdf](http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/8746BD3C3A06832285256DAC005872C0/$file/synthesis_report.pdf). This is the synthesis report on a broadly participatory evaluation of the World Bank’s Comprehensive Development Framework, which advocates development cooperation based on principles of a long-term, holistic development framework, results orientation, country ownership, and country-led partnership.

<sup>7</sup> For an example of contrasting views, see Ronald Inglehart and Christian Welzel, *Modernization, Cultural Change, and Democracy: The Human Development Sequence* (New York: Cambridge University Press, 2005); and Morton Halperin, Joseph T. Siegle, and Michael M. Weinstein, *The Democratic Advantage: How Democracies Promote Prosperity and Peace* (New York: Routledge, 2004).

were seen as “backward.” Many of these early efforts focused on China and, for Americans, the Philippines.

In the United States, experience with Depression-era programs to increase economic and social development at home, such as the Tennessee Valley Authority, were seen as potential models of integrated development for other countries. During the first half of the last century, a number of private organizations gained knowledge and experience in the field of international development. Government programs followed. An Institute of Inter-American Affairs, under the leadership of Nelson Rockefeller, pioneered a range of technical assistance programs in Latin America during World War II and was soon joined by other public entities.<sup>8</sup>

The postwar years saw the evolution of multilateral development cooperation through the United Nations (UN) and the World Bank, as well as bilateral initiatives from the Marshall Plan to President Truman’s Point Four initiative, launched in 1949.<sup>9</sup> By 1960, the United States had organized a group of ten bilateral aid donors as the Development Assistance Group, which became the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD) when that international organization came into existence the following year.<sup>10</sup> Also in 1961, President Kennedy proposed and the U.S. Congress enacted the Foreign Assistance Act of 1961, which provided the authority for USAID and continues to be the principal legislative charter for U.S. foreign assistance.<sup>11</sup> Over the years, the number and scope of bilateral, regional, and global development institutions have multiplied.

During the past half-century of development cooperation, competing theories of development have persisted,<sup>12</sup> accompanied by tensions between theory and practice. Should we support development for humanitarian reasons, to gain influence, or to advance shared interests? Can we reconcile our knowledge of what works with what we believe is necessary? For example, we know that development is a long-term process, but we often feel compelled to seek quick results

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<sup>8</sup> Highlights of the history of development cooperation since the Atlantic Charter are summarized in Joseph H. Hulse, *Sustainable Development at Risk: Ignoring the Past* (Ottawa: International Development Research Centre, 2007), [http://www.idrc.ca/en/ev-112242-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-112242-201-1-DO_TOPIC.html). For an in-depth critical analysis of the evolution of development cooperation from a U.S. perspective, see David Ekbladh, *The Great American Mission: Modernization and the Construction of an American World Order* (Princeton, NJ: Princeton University Press, 2010). See also U.S. Government, *History of the Office of the Coordinator of Inter-American Affairs: Historical Reports on War Administration* (Washington, DC: Government Printing Office, 1947).

<sup>9</sup> President Truman described, as the fourth point in his inaugural address, “a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas” as part of “a worldwide effort for the achievement of peace, plenty, and freedom.” Harry Truman, *Public Papers of the Presidents of the United States, Harry S. Truman, 1949*, (Washington, DC: Government Printing Office), 114.

<sup>10</sup> Members of the original Development Assistance Group included Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Portugal, United Kingdom, United States, and the Commission of the European Economic Community. For the history of the Development Assistance Committee see OECD, “DAC in Dates: The History of OECD’s Development Assistance Committee” (Paris: OECD, 2006), <http://www.oecd.org/dataoecd/3/38/1896808.pdf>.

<sup>11</sup> *Foreign Assistance Act of 1961*, Public Law 87-195, U.S. Code 22 (1961), sec. 2151.

<sup>12</sup> See Klaren and Bossert, eds., *Promise of Development*; and Davis and Trebilcock, “What Role Do Legal Institutions Play in Development?”

to justify our efforts. And we know that sustainable results come from local commitment, capacity, and values. Yet, we tend to rely on our developed-country models and, too often, we attempt to impose inappropriate solutions or disregard important societal conditions in the places where we work. The ten policy orientations recommended by the famous Washington Consensus—from fiscal policy discipline to legal security for property rights—are all eminently sound prescriptions.<sup>13</sup> The problem is that they have been widely viewed as *foreign* prescriptions that could not be applied without regard to local circumstances, especially the nature and degree of local commitment.

Despite these arguments and tensions, much has been learned about the development process and good practices for international development cooperation. Among these is the bold assertion in the title of a paper published in 2002 by economists Dani Rodrik, Arvind Subramanian, and Francesco Trebbi called “Institutions Rule.” The authors demonstrated how “the quality of institutions trumps everything else” in explaining why Sierra Leone has a per capita income of less than \$500 while that of Luxembourg exceeds \$50,000.<sup>14</sup> Their findings, while not free of controversy, strongly suggest that substantial weight must be given to the quality of local institutions among the many factors that are important for sustainable development.

Current worldwide fiscal pressures and budget constraints cast a shadow of uncertainty over the immediate future of development cooperation. Nevertheless, several recent trends hold promise for aligning international practice more closely with what we know to be sound approaches.

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<sup>13</sup> The ten reforms identified by John Williamson in his original Washington Consensus paper included fiscal discipline, reordering public expenditure priorities, tax reform, liberalizing interest rates, a competitive exchange rate, trade liberalization, liberalization of inward foreign direct investment, privatization, deregulation, and property rights. See John Williamson, “A Short History of the Washington Consensus” (conference paper, From the Washington Consensus towards a new Global Governance, Barcelona, September 24–25, 2004), <http://www.iie.com/publications/papers/williamson0904-2.pdf>. For a contemporary perspective, see Nancy Birdsall and Francis Fukuyama, “The Post-Washington Consensus: Development After the Crisis,” *Foreign Affairs* 90, no. 2, (2011): 45–53.

<sup>14</sup> Dani Rodrik, Arvind Subramanian, and Francesco Trebbi, “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development,” Center for International Development at Harvard University, Working Paper 97 (Cambridge, MA: Harvard University, 2002). A revised version of that article was published in 2004 by the International Institute of Economics at <http://www.iie.com/publications/papers/subramanian0204.pdf>. The revised paper was also published in the *Journal of Economic Growth* 9, no. 2 (2004): 131–65. The authors set the tone for their argument by introducing their paper with a quotation from Adam Smith’s *Wealth of Nations*, which seems especially apt for a symposium addressing the rule of law: “Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government.” Kenneth Dam, mindful of the importance of implementation that reflects an understanding of local social norms, culture, and religion, offers the following assessment: “The importance of institutions to economic development is well established. By the end of the 1990s, the theory that institutions were the most important determinant of the pace of economic development in any given country became the dominant view in much of academia and in the research departments of various international financial institutions.” See Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings Institution Press, 2006), 223.

- There are new state actors, such as Brazil, Korea, and China, that bring new ideas based on their own recent development experiences. In addition to states, there are new multilateral structures, such as the group of key industrialized and developing countries concerned with international economic development known as the G-20, new rules of governance for existing structures such as in the International Monetary Fund, and new private organizations such as the Gates Foundation, offering fresh perspectives, talent, and resources. Financing for development now includes transfers from private investors and individual and corporate philanthropists, as well as remittances from diaspora communities, which in the aggregate far exceed official development assistance.<sup>15</sup> This expanded and diversified participation broadens the development agenda and increases the space for additional relevant perspectives.<sup>16</sup>
- The broad acceptance of international standards, accompanied by mechanisms to review performance, is encouraging a shift from donor-recipient dependency to partnerships focused on shared objectives. In particular:
  - The Millennium Development Goals, adopted by the UN General Assembly in 2000, focus attention on results with respect to extreme poverty and hunger, primary education, gender equality and the empowerment of women, child and maternal health and epidemic diseases, and environmental sustainability. Global and individual country progress toward the goals is monitored annually and was the subject of special meetings of the UN in September 2005 and September 2010.<sup>17</sup>

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<sup>15</sup> For 2008 the OECD reports total flows from OECD/DAC countries of \$264.6 billion, including \$121.5 billion in official development assistance (ODA). See OECD, *Development Cooperation Report 2010* (Paris: OECD, 2010), 194. OECD statistics include private flows at market terms (which fell in volume in 2008 due to the global financial crisis) and grants by private voluntary agencies, but they do not attempt to estimate private remittances. The *Index of Global Philanthropy and Remittances* adds philanthropy and remittances to ODA to produce an estimate of \$355 billion in noncommercial flows. See Hudson Institute, *The Index of Global Philanthropy and Remittances 2010* (Washington, DC: Hudson Institute Center for Global Prosperity, 2010), 14–15, [http://www.hudson.org/files/pdf\\_upload/Index\\_of\\_Global\\_Philanthropy\\_and\\_Remittances\\_2010.pdf](http://www.hudson.org/files/pdf_upload/Index_of_Global_Philanthropy_and_Remittances_2010.pdf). For additional information on ODA long-term trends, see the OECD website, “Official development assistance over fifty years,” [http://www.oecd.org/documentprint/0,3455,en\\_2649\\_34447\\_46195625\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/documentprint/0,3455,en_2649_34447_46195625_1_1_1_1,00.html).

<sup>16</sup> See Jean-Michel Severino and Olivier Ray, “The End of ODA: Death and Rebirth of Global Public Policy,” Working Paper 167 (Washington, DC: Center for Global Development, 2009), <http://www.cgdev.org/content/publications/detail/1421419>.

<sup>17</sup> The eight Millennium Development Goals (MDG) call for specific achievements based on widely accepted recommendations from UN conferences and earlier work by the OECD. The goals are: 1) eradicate extreme poverty and hunger; 2) achieve universal primary education; 3) promote gender equality and empower women; 4) reduce child mortality; 5) improve maternal health; 6) combat HIV/AIDS, malaria, and other diseases; 7) ensure environmental sustainability; and 8) develop a global partnership for development. These goals are supported by 21 specific targets and 60 indicators. For basic information about the MDG, see the UNDP’s website: <http://www.undp.org/mdg/basics.shtml>. For recent reviews of progress, see ODI, *Millennium Development Goals Report Card: Measuring Progress across Countries* (London: Overseas Development Institute, 2010), <http://www.odi.org.uk/resources/download/5027.pdf>; and United Nations, “The Millennium Development Goals Report 2010” (New York: United Nations, 2010), [http://unstats.un.org/unsd/mdg/Resources/Static/Products/Progress2010/MDG\\_Report\\_2010\\_En.pdf](http://unstats.un.org/unsd/mdg/Resources/Static/Products/Progress2010/MDG_Report_2010_En.pdf). For the U.S. strategy for meeting the MDG, see USAID, “Celebrate, Innovate & Sustain: Toward 2015 and Beyond”



- Agreed principles of aid effectiveness were adopted in Paris in 2005, were refined in Accra in 2008, and will be reviewed in Busan in 2011. These principles call for measures to increase impact through local ownership of the development process, alignment of international programs with local priorities, harmonization among international actors, managing for results, and mutual accountability.<sup>18</sup>
- The United States is exercising renewed leadership. President Obama and Secretary of State Hillary Clinton have been outspoken in the view that “development, diplomacy and defense are components of a comprehensive, integrated approach to the challenges we face today.”<sup>19</sup> The president’s National Security Strategy, issued in May 2010, describes development as “a strategic, economic, and moral imperative” and endorses a global development agenda that, among other things, calls for a focus on “strengthening the ability of governments and communities to manage development challenges and investing in strong institutions that foster democratic accountability.”<sup>20</sup> President Obama invoked that strategy in presenting the new U.S. global development policy at the UN in September 2010, where he affirmed that the United States “will do our part” and “will be a global leader in international development in the 21<sup>st</sup> century.”<sup>21</sup>

## The Rule of Law in Development Cooperation

Views about the importance of the rule of law in development and priorities for international cooperation in this field are as varied as the opinions expressed in the broader debate about development. The predominant view is reflected in the publications and Web pages—and in the budgets—of the major development agencies.<sup>22</sup> Their generally enthusiastic attitude is illustrated by the following representative quotation from the World Bank’s flagship *World Development Report* for 2006:

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(Washington, DC: U.S. Agency for International Development, 2010),

[http://www.usaid.gov/our\\_work/mdg/USMDGStrategy.pdf](http://www.usaid.gov/our_work/mdg/USMDGStrategy.pdf). The outcome of the September 2010 MDG summit was approved by the UN General Assembly as Resolution A/65/L.1 on September 22, 2010, and published at <http://www.un.org/en/mdg/summit2010/pdf/mdg%20outcome%20document.pdf>.

<sup>18</sup> For information about the aid effectiveness principles, see the OECD website on this subject:

[http://www.oecd.org/department/0,3355,en\\_2649\\_3236398\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_3236398_1_1_1_1_1,00.html).

<sup>19</sup> United States, Office of the Press Secretary of the White House, “A New Approach to Advancing Development,” Press release (Washington, DC: White House, June 25, 2010), <http://www.whitehouse.gov/the-press-office/a-new-approach-advancing-development>. See also Hillary Rodham Clinton, “Remarks on Development in the 21<sup>st</sup> Century” (Washington, DC: U.S. Department of State, January 6, 2010), <http://www.state.gov/secretary/rm/2010/01/134838.htm>.

<sup>20</sup> United States, Office of the President, “National Security Strategy” (Washington, DC: The White House, May 2010) 15, 33–34, [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf). See also Hillary Rodham Clinton, “Remarks on the Obama Administration’s National Security Strategy” (Washington, DC: U.S. Department of state, May 27, 2010), <http://www.state.gov/secretary/rm/2010/05/142312.htm>.

<sup>21</sup> United States, Office of the Press Secretary of the White House, “Remarks by President Obama at the Millennium Development Goals Summit.”

<sup>22</sup> A number of approaches of donor organizations are summarized by the Governance and Social Development Resource Center at <http://www.gsdrc.org/go/topic-guides/justice/donor-approaches-to-justice>. See also the extensive resources available on the World Bank’s Law and Justice Institutions webpage, <http://www.worldbank.org/ljr>.

Legal institutions play a key role in the distribution of power and rights. They also underpin the forms and functions of other institutions that deliver public services and regulate market practices. Justice systems can provide a vehicle to mediate conflict, resolve disputes, and sustain social order....Equitable justice systems are thus crucial to sustained equitable development.<sup>23</sup>

Similarly positive expressions are found in the academic literature.<sup>24</sup> At the same time, a body of critical analysis has emerged, questioning both the centrality of legal institutions and justice systems for development and the effectiveness of existing practices in international support for the justice sector. The insightful and probing questions raised by Thomas Carothers are probably the best known in the community of practitioners,<sup>25</sup> though criticisms and doubts also emanate from other experts in the field.<sup>26</sup> Some of the debate appears to be a continuation of differences that date back to the law and development movement of the 1960s. That effort, primarily a U.S.-based undertaking, sought to influence legal education and judicial roles in developing countries. The law and development movement is often associated with an approach to modernization in development that is seen by many as overly ethnocentric (that is, development is achieved by modernization, which means becoming more like us).<sup>27</sup>

The current emphasis on the rule of law in development cooperation has its roots in concerns during the 1980s about the slow progress of development. Even as the academic debate about law and development continued, the principal development agencies came to embrace good governance as an essential factor in development and to recognize the administration of justice and adherence to the rule of law as essential components of good governance.

In the United States, impetus was provided by the political transition that was sweeping through Latin America from military to elected civilian governments. In the absence of economic and social progress, the sustainability of this political transition was uncertain, and the region was

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<sup>23</sup> World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank, 2005), 156.

<sup>24</sup> See, for example, Livingston Armytage and Lorenz Metzner, eds., *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience* (Oxford: Oxford University Press, 2009). Examples are included in Kevin Davis and Michael J. Trebilcock, "The Relationship between Law and Development: Optimists Versus Skeptics," Public Law Research Paper 08-14 (New York: New York University School of Law, 2008), <http://ssrn.com/abstract=1124045>.

<sup>25</sup> See, for example, Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, DC: Carnegie Endowment for International Peace, 1999); and Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006).

<sup>26</sup> See, for example, David M. Trubek and Alvaro Santos, *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2006).

<sup>27</sup> The modernization theory is described in Klaren and Bossert, eds., *Promise of Development*; and Davis and Trebilcock, "What Role Do Legal Institutions Play in Development?" For a detailed critique of the current emphasis on good governance and the rule of law as a "revival" of the law and development movement, see Chantal Thomas, "Re-Reading Weber in Law and Development: A Critical Intellectual History of 'Good Governance' Reform," Cornell Legal Studies Research Paper 08-034 (Ithaca, NY: Cornell Law School, 2008), <http://ssrn.com/abstract=1313718>. On the Law and Development movement, see James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison, WI: University of Wisconsin Press, 1981); and David Trubek and Marc Galanter, "Scholars in Self-Estrangement," *Wisconsin Law Review* 4 (1974): 1062-1102.

experiencing a period of economic stagnation. At the World Bank, a parallel concern was focused on the limited progress of development in postcolonial Africa. These concerns came to center on the role of governance.

During the second half of the 1980s, USAID launched a program for Latin America known as “Democratic Initiatives” that emphasized the rule of law but also addressed issues of electoral processes and institutions, political parties, legislatures, government integrity and accountability, municipal governance, civilian control of the military, and pluralism and citizen participation.<sup>28</sup>

For its part, by the early 1990s the World Bank had overcome its historical reluctance to deal with governance issues, including rule of law issues, that previously might have been seen as “political” and therefore beyond the Bank’s competence under its Articles of Agreement. A memorandum by the Bank’s General Counsel, Ibrahim Shihata, in December 1990 opened the door by describing areas of governance that were appropriate for Bank financing.<sup>29</sup> This opening was immediately followed by a remarkable memorandum by Pierre Landell-Mills and Ismail Serageldin, senior officials of the Bank’s Africa Technical Department, that the authors presented at the World Bank’s 1991 annual conference on development economics. Their paper set forth a suggested definition of governance, described characteristics of good governance, and made a compelling case for external support by donors to “contribute significantly to fostering good governance in those countries seeking their assistance.”<sup>30</sup>

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<sup>28</sup> USAID made a presentation of the program to the OECD Development Assistance Committee in 1990. See “Strengthening Democracy in Latin America and the Caribbean: USAID’s Experience to Date and Plans for the Future,” November 1990, DCD/DAC (90) 27 (unpublished, but a copy is held by the author). For a critical view of this undertaking, see Thomas Carothers, “The Rediscovery of Political Development Assistance,” in *In the Name of Democracy: U.S. Policy toward Latin America in the Reagan Years* (Berkeley: University of California Press, 1991), 196–236. For a description of the rule of law dimension of USAID’s governance activities during this period, see Maximo Langer, “Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery,” *American Journal of Comparative Law* 55 (2007): 646–651. See also USAID, “Regional Syntheses: Latin America and the Caribbean,” in *Achievements in Building and Maintaining the Rule of Law* (Washington, DC: USAID, 2002), 1–11, [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnac220.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnac220.pdf).

<sup>29</sup> World Bank, “Issues of ‘Governance’ in Borrowing Members: The Extent of their Relevance under the Bank’s Articles of Agreement” (December 21, 1990), in *The World Bank Legal Papers*, ed. Ibrahim Shihata (Leiden: Martinus Nijhoff Publishers, 2000), 245–281. The concern about the permissibility of governance programs arose from the provisions of Article IV, Section 10, of the World Bank’s Articles of Agreement: “The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.” See <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>.

<sup>30</sup> Pierre Landell-Mills and Ismail Serageldin, “Governance and the External Factors” (Washington, DC: World Bank, 1991): [http://imagebank.worldbank.org/servlet/WDSContentServer/IW3P/IB/2011/04/07/000386194\\_20110407045913/Rendered/PDF/607930WP0Mills1BOX358330B001PUBLIC1.pdf](http://imagebank.worldbank.org/servlet/WDSContentServer/IW3P/IB/2011/04/07/000386194_20110407045913/Rendered/PDF/607930WP0Mills1BOX358330B001PUBLIC1.pdf) Accounts of the World Bank’s experience in introducing governance in its programs of development cooperation are set out in Howard Stein, “The World Bank and the Making of the Governance Agenda,” ASSR Staff Seminar Series (Leiden: University of Amsterdam, 2009), <http://www.trackingdevelopment.net/resources/docs/PaperASSR-Amsterdam-October-09--Stein-Final2.pdf>; and in Carlos Santiso, “Good Governance and Aid Effectiveness: The World Bank and Conditionality,” *Georgetown Public Policy Review* 7, no. 1 (2001): 1–22, available at [http://www.swisstph.ch/fileadmin/user\\_upload/Pdfs/swap/swap108.pdf](http://www.swisstph.ch/fileadmin/user_upload/Pdfs/swap/swap108.pdf). See also Klaus Decker, “World Bank Rule-

When I attended a November 1990 meeting of the OECD Development Assistance Committee to describe what USAID was doing to support good governance and the rule of law, I encountered widespread skepticism—and even some incredulity—from representatives of the major donors about the inclusion of this subject matter in development programs. Yet, within four years, the World Bank had launched major initiatives and the DAC had adopted by consensus new orientations for development cooperation on participatory development and good governance.<sup>31</sup> In addition, The DAC created a working group to identify best practices and lessons from experience.<sup>32</sup> As perceived needs in Latin America had stimulated USAID and concerns about Africa had inspired the World Bank, the dramatic political transition in Eastern Europe and the former Soviet Union was an important motivation for the entire international community to give priority attention to support for good governance and the rule of law in the early 1990s.

By 2005, the heads of state and government from around the world who were assembled at the World Summit declared “that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.”<sup>33</sup> Looking back, it seems strange that consideration of governance as a factor in development was once controversial. Today, it is unexceptional that the broad range of political, economic, social, environmental, and security factors that represent the relevant dimensions of the development process should be examined together or that such an examination should be identified as a study of democratic governance.<sup>34</sup>

The principal debates among practitioners are no longer about whether good governance and the rule of law are integral to development. Rather, the issues are about how international actors can engage in ways that are most productive to fostering sustainable development progress. All major donors and multilateral development agencies have programs to support good governance; indeed, the once reluctant World Bank has become a leader and its worldwide governance

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of-Law Assistance in Fragile States: Developments and Perspectives,” in *Law in the Pursuit of Development: Principles into Practice*, ed. Amanda Perry Kessaris (New York: Routledge, 2010), 224–253.

<sup>31</sup> See the introduction in World Bank, “Initiatives in Legal and Judicial Reform 2004” (Washington, DC: World Bank, 2005), <http://go.worldbank.org/RXE6AGR0Q0> (editions for 2002 and 2003 can be found at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20813070~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>); and OECD, “Participatory Development and Good Governance,” Development Co-operation Guidelines Series (Paris: OECD, 1995), <http://www.oecd.org/dataoecd/27/13/31857685.pdf>.

<sup>32</sup> The working group submitted its final report in 1997. Work within the OECD Development Assistance Committee on this subject is now primarily the responsibility of the DAC Network on Governance, [http://www.oecd.org/department/0,3355,en\\_2649\\_34565\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_34565_1_1_1_1_1,00.html).

<sup>33</sup> UN General Assembly, Sixtieth Session, “2005 World Summit Outcome,” Resolution A/60/1, October 24, 2005.

<sup>34</sup> See Scott Mainwaring and Timothy R. Scully, eds., *Democratic Governance in Latin America* (Stanford: Stanford University Press, 2010), which examines the following nine dimensions of democratic governance that “citizens, social scientists, international institutions, politicians, and policy makers widely view...as very important”: the level of democracy, rule of law, control of corruption, economic growth, inflation, job creation, poverty, education, and citizen security. Compare these identified dimensions of democratic governance with the key elements of sustainable development listed in note 6.



“Indicators” have become the global standard.<sup>35</sup> Of course, there is unceasing analysis and criticism of the Bank’s presence and approach in this area.<sup>36</sup>

President Obama emphasized the importance of democratic governance and the rule of law in his September 2010 announcement of the U.S. global development policy at the UN:

The United States will focus our development efforts on countries like Tanzania that promote good governance and democracy; the rule of law and equal administration of justice; transparent institutions with strong civil societies; and respect for human rights. Because over the long run, democracy and economic growth go hand in hand.<sup>37</sup>

Thus, at present, international support for the rule of law falls within a conceptual framework of good governance and inclusive economic growth widely believed to be necessary to accelerate and sustain development progress. In this framework, development progress is measured by reference to agreed international goals of poverty reduction, improved education and health, gender equality, and environmental sustainability. These goals (Millennium Development Goals) are to be pursued through partnerships characterized by the agreed effectiveness principles of local ownership, alignment, harmonization, managing for results, and mutual accountability (Paris Declaration principles).

**Governance** consists of the “traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.”

*Source: World Bank Institute, “Governance Matters 2009” (Washington, DC: World Bank, 2009), [http://info.worldbank.org/governance/wgi/pdf/WBI\\_GovInd.pdf](http://info.worldbank.org/governance/wgi/pdf/WBI_GovInd.pdf).*

This conceptual approach to development cooperation calls for judgments about priorities. While recognizing the comprehensive nature of the development process (no silver bullets), developing-country policy makers need to engage their civil society representatives and international partners about the most important and most immediate needs, determine the resources that are available, and assure the capacities that will achieve sustainable results. The practice has developed of conducting assessments about these questions and integrating the resulting judgments into country plans. Of course, there is a large gulf between the theory of

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<sup>35</sup> The indicators measure performance with respect to voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption. See <http://info.worldbank.org/governance/wgi/index.asp>.

<sup>36</sup> See, for example, Julio Faundez, “Rule of Law or Washington Consensus: The Evolution of the World Bank’s Approach to Legal and Judicial Reform,” in *Law in the Pursuit of Development*, ed. Amanda Perry Kessarar, 180–201; Christiane Arndt and Charles Oman, *Uses and Abuses of Governance Indicators* (Paris: OECD, 2006); Matthew Andrews, “Good Government Means Different Things in Different Countries,” Faculty Research Working Paper 08-068 (Cambridge, MA: Harvard University, 2008), <http://web.hks.harvard.edu/publications/getFile.aspx?Id=324>.

<sup>37</sup> United States, Office of the Press Secretary of the White House, “Remarks by President Obama at the Millennium Development Goals Summit.”

locally owned development supported by partnership and the actual practice of development cooperation. There is still a lot of improvisation and much uncertainty, including in the data on which judgments are based and in the predictability of available resources.

Just as increased emphasis on governance and the rule of law was motivated by dissatisfaction with the results of development cooperation efforts, there are significant indications today of dissatisfaction with the results being achieved in programs to improve governance and strengthen the rule of law. Nevertheless, the basic elements of the framework are in place and the performance of developing countries and the international community is being monitored with a view to judging the results of this approach for achieving effectiveness in development.<sup>38</sup>

With specific regard to the rule of law, as with the broad themes of development and governance, there is a multitude of definitions and approaches. Many of these are summarized in the work by Michael Trebilcock and Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, and in sources cited on the World Bank's Law and Justice Reform webpage.<sup>39</sup> USAID and a number of other development organizations have accepted the definition set out in the box, one proposed by the UN Secretary General in 2004.

**“The rule of law...refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”**

**Source: United Nations, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” Report of the Secretary-General (New York: United Nations, 2004), <http://www.unrol.org/doc.aspx?n=2004+report.pdf>.**

Unease about what rule of law programs are achieving has given rise to research to encourage better measurement of results and more innovative approaches.<sup>40</sup> Much of this research is collected in volume 2 of the *World Bank Legal Review*,<sup>41</sup> which explores alternatives

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<sup>38</sup> A third round of monitoring under OECD auspices of the 2005 Paris Declaration on Aid Effectiveness was launched in October 2010, in preparation for the November 2011 High Level Forum in Busan, South Korea. See the monitoring survey website, [http://www.oecd.org/site/0,3407,en\\_21571361\\_39494699\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/site/0,3407,en_21571361_39494699_1_1_1_1_1,00.html). For good entry points into the extensive literature and ongoing activity on monitoring and evaluating aid effectiveness, see the related websites of the OECD DAC Working Party on Aid Effectiveness and the Directorate on Development Cooperation,

[http://www.oecd.org/document/35/0,3343,en\\_2649\\_3236398\\_43382307\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/35/0,3343,en_2649_3236398_43382307_1_1_1_1,00.html) and

[http://www.oecd.org/department/0,3355,en\\_2649\\_3236398\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_3236398_1_1_1_1_1,00.html).

<sup>39</sup> Michael Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar Publishing, 2008). The World Bank site, <http://www.worldbank/ljr>, includes a page entitled “Rule of Law and Development.”

<sup>40</sup> See “Impediments to Rule of Law Reform” in Trebilcock and Daniels, *Rule of Law Reform and Development*, 37–57; and Davis and Trebilcock, “The Relationship Between Law and Development.” See also Victoria Harris, “Consolidating Ideology in Law? Legal and Judicial Reform Programmes at the World Bank” (London: Bretton Woods Project, July 2007), <http://brettonwoodsproject.org/art.shtml?x=554671>. Within the World Bank, extensive research in recent years has been premised on “a near-universal consensus that most previous approaches to judicial

to investments in formal justice systems that often seem remote to the poor and disadvantaged. Additional research along similar lines (including by some of the same authors) is discussed in *Promoting the Rule of Law Abroad: In Search of Knowledge*, edited by Thomas Carothers.<sup>42</sup>

This line of inquiry was pursued in depth in 2007 and 2008 by the Commission on Legal Empowerment of the Poor, headed by former U.S. Secretary of State Madeleine Albright and noted Peruvian economist Hernando De Soto. The Commission undertook “to highlight how giving the world’s poor women and men access to justice, and underpinning and enabling property, labour, and business rights – the legal rights that most people in rich countries take for granted – can empower them to change their lives for the better.”<sup>43</sup>

A principal theme of the Commission was the need for increased access to justice. Elements in its recommended four-part agenda for change included:

- Assured legal identity for poor people;
- A broadened scope of legal services;
- Improved court management; and
- Customary dispute resolution.

In this regard, the Commission characterized as imperative “that the alternative dispute resolution mechanisms are recognized as legitimate and linked to formal enforcement, and that they do not operate totally outside the realm of the legal system.”<sup>44</sup>

The UN carried forward the policies advocated by the Commission in a report by the Secretary-General and a resolution of the General Assembly in 2009. In particular, the Secretary-General’s report endorsed the use of assessments to analyze local conditions and identify priorities. It also recommended consideration of “innovative, non-formal dispute resolution mechanisms that are

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reform in developing countries have not yielded hoped-for results.” See Caroline Mary Sage and Michael Woolcock eds., *World Bank Legal Review: Law, Equity and Development*, Law, Justice and Development Series 2 (Washington, DC: World Bank, 2006), 4. See also Caroline Sage and Michael Woolcock, “Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries,” in *Inclusive States: Social Policy and Structural Inequalities*, ed. Anis Dani and Arjan de Haan (Washington, DC: World Bank, 2008), 369–393.

<sup>41</sup> Sage and Woolcock, *World Bank Legal Review*.

<sup>42</sup> Carothers, *Promoting the Rule of Law Abroad*.

<sup>43</sup> UNDP, “Making the Law Work for Everyone,” Report of the Commission on Legal Empowerment of the Poor, vol. 1 (New York: Commission on Legal Empowerment of the Poor and UNDP, 2008), 15, [http://www.undp.org/publications/Making\\_the\\_Law\\_Work\\_for\\_Everyone%20\(final%20rpt\).pdf](http://www.undp.org/publications/Making_the_Law_Work_for_Everyone%20(final%20rpt).pdf).

<sup>44</sup> *Ibid.*, 61–64. This call for linkage necessarily implies that the rule of law can and should extend to people who live and work in the informal economy and that this can be achieved through a combination of formal and informal legal institutions.

of good quality, accessible to the poor, and consistent with all relevant human rights standards and principles.”<sup>45</sup>

It is true that the vast majority of international programs to support the rule of law in developing countries and transitioning economies have focused on the formal justice system—especially the reform of laws and the operation of the courts.<sup>46</sup> Some critics have suggested that donors tend to follow a standard menu without sufficient regard to local conditions and that this practice tends to perpetuate top-down approaches.<sup>47</sup> However, an emphasis on the formal institutions of the justice system is understandable, given the broad acceptance of the centrality of those institutions for economic growth and democratic governance. And while there surely have been disappointments,<sup>48</sup> there have certainly also been successes.<sup>49</sup>

Alternative dispute resolution (ADR), administrative law, and customary or traditional justice systems have been a part (albeit a limited part) of the rule of law development agenda for some time. Donor support for ADR programs has been expanding since the 1990s.<sup>50</sup> USAID published its initial *ADR Practitioners’ Guide* in 1998;<sup>51</sup> a companion guide on administrative law was published in February 2008.<sup>52</sup> The World Bank published an ADR manual focused on commercial mediation in 2006.<sup>53</sup> However, some in the development community have seen alternatives to litigation more as efforts to relieve congestion in the courts (by diverting cases that could be settled informally) than as integral to the development objective of extending access to justice to more people and thereby fostering more inclusive societies and a climate of lawfulness.

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<sup>45</sup> United Nations, “Legal Empowerment of the Poor and Eradication of Poverty,” Report of the Secretary-General A/64/133, July 2009, <http://www.unhcr.org/refworld/publisher,UNGA,,,4a9e2c150,0.html>; UN General Assembly, Sixty-fourth Session, Resolution A/C.2/64/L.4/Rev.2, December 3, 2009, available at <http://www.undp.org/legalempowerment>.

<sup>46</sup> Brief summaries of World Bank programs, comprising approximately 2,500 activities, are contained in World Bank, “Initiatives in Justice Reform 2009” (Washington, DC: World Bank, 2009), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JRInitiativestext2009.pdf>.

<sup>47</sup> See Stephen Golub, “Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative,” Carnegie Paper 41 (Washington, DC: Carnegie Endowment for International Peace, 2003), <http://carnegieendowment.org/publications/index.cfm?fa=view&id=1367>; and Carothers, *Aiding Democracy Abroad*, 163–177.

<sup>48</sup> As Trebilcock and Daniels point out, World Bank data show a deterioration in rule of law performance in many developing countries. See Trebilcock and Daniels, *Rule of Law Reform and Development*. See also William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (New York: Praeger, 2000).

<sup>49</sup> See USAID, *Achievements in Building and Maintaining the Rule of Law*; and Barry Walsh, *In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa* (Washington, DC: World Bank, 2010).

<sup>50</sup> See Jean R. Sternlight, “Is Alternative Dispute Resolution Consistent with the Rule of Law?” *DePaul Law Review* 56 (2006).

<sup>51</sup> USAID, “Alternative Dispute Resolution Practitioners Guide” (Washington, DC: USAID, Center for Democracy and Governance, 1998), [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacb895.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf).

<sup>52</sup> USAID, “Using Administrative Law Tools and Concepts to Strengthen USAID Programming” (Washington, DC: USAID, 2008), [http://pdf.usaid.gov/pdf\\_docs/PNADK999.pdf](http://pdf.usaid.gov/pdf_docs/PNADK999.pdf).

<sup>53</sup> IFC, “Alternative Dispute Resolution Manual: Commercial Mediation” (Washington, DC: International Finance Corporation, 2006), [http://rru.worldbank.org/Documents/Toolkits/adr/adr\\_fulltoolkit.pdf](http://rru.worldbank.org/Documents/Toolkits/adr/adr_fulltoolkit.pdf).

The World Bank's *Handbook on Justice Sector Assessments* invites attention to three common complaints about justice systems: inadequate access (due to factors such as distance, cost, and complexity), delay, and corruption. The handbook suggests an outline for data collection and analysis that includes both formal and informal (nonstate and traditional) institutions.<sup>54</sup> USAID has developed a *Guide to Rule of Law Country Analysis* that prescribes a strategic framework for examining essential elements of the rule of law: order and security, legitimacy, checks and balances, fairness, and effective application of the law.<sup>55</sup> The guide calls for an approach that considers options outside of as well as within the justice sector. In addition, USAID has addressed ADR in many assessments of business climate-related legal and institutional reform.<sup>56</sup> Other donors and multilateral agencies are likewise examining ADR in the course of their justice system assessments and have prescribed guidance to facilitate this work.<sup>57</sup>

Assessments of justice systems have found major deficiencies in many countries. Indeed, those deficiencies have often been the focus of international programs to support justice sector reform. A growing body of assessments, including several based on the World Bank handbook and the USAID guide, is showing increased attention to ADR and traditional dispute-resolution systems.

In addition, the World Justice Project's *Rule of Law Index* establishes a structure for analyzing justice systems by reference to 16 factors that are considered to represent universal principles that constitute the rule of law. The fourth principle is concerned with access to justice, and the related factors in the index address standards for ADR mechanisms to provide independent, impartial, fair, and efficient access to justice.<sup>58</sup> The index was used to assess 35 countries through 2009 and the World Justice Project target is to complete 100 country assessments by the end of 2012.<sup>59</sup> While generally consistent, USAID's five "essential elements" and the World Justice Project's four "universal principles" of the rule of law, summarized below, nevertheless reflect differences of emphasis.

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<sup>54</sup> Dory Reiling, Linn Hammergren, and Adrian Di Giovanni, "Justice Sector Assessments: A Handbook" (Washington, DC: World Bank, 2007), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:21257843~pagePK:148956~piPK:216618~theSitePK:1974062,00.html>. An earlier World Bank handbook included specific questions about ADR mechanisms. See World Bank, "Legal and Judicial Sector Assessment Manual" (Washington, DC: World Bank, 2002), 62–63, <http://go.worldbank.org/4NDQH5UY20>.

<sup>55</sup> USAID, "Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework: A Guide for USAID Democracy and Governance Officers" (Washington, DC: USAID, 2010), [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/ROL\\_Strategic\\_Framework\\_Jan-2010\\_FINAL.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Jan-2010_FINAL.pdf).

<sup>56</sup> Examples are available at the USAID BIZCLIR website, <http://www.bizclir.com>.

<sup>57</sup> See for example, DFID, "Safety, Security and Accessible Justice: Putting Policy into Practice" (London: Department for International Development, 2002), <http://www.gsdc.org/docs/open/SSAJ23.pdf>; UNDP, "Access to Justice Practice Note" (New York: UN Development Programme, 2004), [http://www.undp.org/governance/docs/Justice\\_PN\\_English.pdf](http://www.undp.org/governance/docs/Justice_PN_English.pdf); and SDC, "Rule of Law, Justice Sector Reforms and Development Cooperation – an SDC Concept Paper" (Berne: Swiss Agency for Development and Cooperation, 2008), available at [http://www.sdc.admin.ch/en/Home/Themes/Rule\\_of\\_Law\\_Democracy](http://www.sdc.admin.ch/en/Home/Themes/Rule_of_Law_Democracy).

<sup>58</sup> See the Rule of Law Index materials on the World Justice Project website, <http://www.worldjusticeproject.org/rule-of-law-index>.

<sup>59</sup> See *ibid.* for summaries of the 35 completed assessments.



<b>ELEMENTS OF THE RULE OF LAW</b>	
<b>USAID</b>	<b>WORLD JUSTICE PROJECT</b>
<b>Order and security:</b> The law should protect the exercise of rights, including rights to personal security and property.	The government and its officials and agents are accountable under the law.
<b>Legitimacy:</b> The law should represent the collective will of the people and approximate the common good and, therefore, merit respect.	The laws are clear, publicized, stable and fair, and protect fundamental rights, including security of persons and property.
<b>Checks and balances:</b> There should be separation of governmental powers that prevents the concentration and abusive exercise of power.	The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
<b>Fairness:</b> Equal application – laws are applied equally to all persons; Procedural fairness – procedures by which law is applied conform to accepted standards; Protection of human rights and civil liberties – national legal systems meet minimum international human rights standards; Access to justice – citizens have reasonable opportunities to hold governments and others responsible under the law.	Access to justice is provided, by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.
<b>Effective application:</b> The laws are consistently enforced and applied.	

These two models are among several that have been suggested.<sup>60</sup> Whatever the model, the trend is to look beyond the limited scope of formal justice institutions in examining access to justice as an element of the rule of law.

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<sup>60</sup> See, for example, “key elements of the rule of law” in SDC, “Rule of Law, Justice Sector Reforms and Development Cooperation”; “ingredients of the general principle of the rule of law” in Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010); and “necessary elements to institute the rule of law” in Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

# Alternative Dispute Resolution to Advance the Rule of Law

Poor countries have generally been slow to shift budget priorities in order to expand access to the formal justice system. Research into the causes of inadequate access to courts has produced specific data consistent with numerous assessment findings on the common complaints about justice systems. Inadequate information, excessive costs, delay, corruption and abuse of authority, and geographic remoteness all play significant parts.<sup>61</sup> Research also finds that poor people who try to make use of the formal system rather than available informal mechanisms can experience detriment to their economic well-being.<sup>62</sup> These findings, which confirm my observations in a variety of developing countries, indicate both a lack of access and often, when access is achieved, a lack of benefit from the formal justice system.

Studies on access to justice in developing countries indicate that most dispute-resolution proceedings take place outside the courts. When formal justice institutions do not meet societal needs, it is not surprising that people rely on alternative mechanisms. If the rule of law is important for development but formal justice institutions are performing poorly, and if the poor majority in many countries relies on informal alternatives, it would seem necessary to consider those alternatives along with the formal institutions of justice in development strategies relating to the rule of law. This is especially the case if the goals of development cooperation are those set out in the Millennium Development Goals, with their emphasis on poverty reduction and human development.<sup>63</sup>

The common complaints about existing justice systems and the various efforts to identify basic qualities that justice systems should reflect can be useful in considering alternative institutions. At the same time, a strategy for increasing attention to informal alternatives to the courts needs to proceed with caution. Formal justice systems have received attention in development cooperation because they are seen to be important to inclusive growth and good governance, which, in turn, are seen to be necessary to achieve sustained development progress. The current international interest in governance arose largely from dissatisfaction with the slow pace of development in many countries. Yet, governance institutions, including in the justice sector, have

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<sup>61</sup> See Edgardo Buscaglia, “Justice and the Poor – Formal vs. Informal Dispute Resolution Mechanisms: A Governance-Based Approach” (Washington, DC: World Bank, 2002), <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/JusticeandthePoorFormalandInformal.pdf>; Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (London: Penal Reform International, 2000),

<http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/AccessToJusticeInSubSaharanAfrica.pdf>; and Roberto Gargarella, “Too Far Removed From the People – Access to Justice for the Poor: The Case of Latin America” (New York: UNDP, 2002), [http://www.undp.org/oslocentre/PAR\\_Bergen\\_2002/latin-america.pdf](http://www.undp.org/oslocentre/PAR_Bergen_2002/latin-america.pdf).

<sup>62</sup> Buscaglia, “Justice and the Poor.” See also Kevin J. Fandl, “The Role of Informal Legal Institutions in Economic Development,” *Fordham International Law Journal* 32, no. 1 (2008), abstract available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1144643](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144643), which describes a relationship between poor economic and social conditions and poor performance of justice systems.

<sup>63</sup> See the U.S. strategy for meeting the Millennium Development Goals in USAID, “Celebrate, Innovate, and Sustain.”

themselves become a source of frustration with regard to the pace of development. It should not be assumed that investment in alternative justice institutions will necessarily produce better or faster development results.<sup>64</sup>

It will be a challenge to avoid a replication in informal systems of the same common complaints that are made about formal justice institutions (access, delay, corruption).<sup>65</sup> In order to respond to that challenge, reform strategies need to look beyond dispute-resolution mechanisms and to consider the broad range of factors that influence access to justice for the poor and disadvantaged. For example, lack of knowledge about the law and justice institutions is often cited as an impediment. The Commission on Legal Empowerment of the Poor responded in part by recommending “education and awareness campaigns that promote evolution of the informal legal system.”<sup>66</sup> The World Bank has reviewed its practice relating to access to justice and legal empowerment in a holistic way by examining issues of court reform, legal aid and legal services, awareness building and public education, and public sector accountability along with its examination of less formal means of dispute resolution.<sup>67</sup>

An important question is whether complementary ADR mechanisms meet minimum standards of the rule of law. As discussed above, reports by the Commission on Legal Empowerment of the Poor and the UN Secretary General have suggested criteria to measure the acceptability of informal institutions. Specifically, are they recognized as legitimate, linked to formal enforcement mechanisms, operating within the realm of the legal system, of good quality, accessible to the poor, and consistent with human rights standards and principles?<sup>68</sup> If these standards are not met, there is a risk that less formal institutions may constitute only a second-class justice system for the poor rather than an instrument of societal inclusion within a rule of law that aspires to equal justice.

Efforts to improve local institutions for ADR, like other institutional reform efforts, need to respect local ownership and be responsive to local conditions. Among other threshold questions:

- Is the need for change recognized and is the society receptive to taking action? (Systemic difficulties may be recognized but tolerated.)

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<sup>64</sup> One rather pessimistic view is that resistance to good governance and the rule of law is inevitable until a state makes a fundamental transition from privilege to a continuity of equal treatment. See Barry R. Weingast, “Why Developing Countries Prove So Resistant to the Rule of Law,” in *Global Perspectives on the Rule of Law*, ed. James Heckman, Robert Nelson, and Lee Cabatingan (New York: Routledge, 2010), 28–51. For a less sequence-oriented analysis, see Thomas Carothers, “Rule of Law Temptations,” in *Global Perspectives on the Rule of Law*, 18–27.

<sup>65</sup> This issue is explored in depth in Sternlight, “Is Alternative Dispute Resolution Consistent with the Rule of Law?”

<sup>66</sup> UNDP, “Making the Law Work for Everyone,” 63. For in-depth discussions of field experience in addressing the challenges and opportunities for advancing legal empowerment, see Stephen Golub, ed., *Legal Empowerment: Practitioners’ Perspectives* (Rome: International Development Law Organization, 2010), [http://www.idlo.int/Documents/Legal\\_Empowerment\\_Practitioners\\_Perspectives\\_Book.pdf](http://www.idlo.int/Documents/Legal_Empowerment_Practitioners_Perspectives_Book.pdf).

<sup>67</sup> Vivek Maru, “Access to Justice and Legal Empowerment: A Review of World Bank Practice,” Justice and Development Working Paper 9 (Washington, DC: World Bank, 2009).

<sup>68</sup> See the description of standards for ADR mechanisms suggested by the Commission on Legal Empowerment of the Poor and by the UN Secretary General in his related report, quoted above on p. 14.



- Are local leaders sufficiently committed to invest in often underfunded informal legal services for the poor? (Higher courts tend to have larger budgets and greater influence in budget decisions.)
- What knowledge, capacities, and resources are needed for implementation, and how might they be obtained?
- How can conflicts be resolved between traditional rules for decision making in informal processes and human rights standards contained in relevant treaties, national constitutions, and legislation? (Traditional systems often tolerate discrimination against women and otherwise depart from established standards.)
- How can informal institutions link to the formal justice system, including through enforcement measures where legally binding conclusions are needed? (Judges are sometimes reluctant to endorse valid outcomes of informal processes that, in form, lack refinements typical of court documents.)
- What incentives exist, or can be created, to sustain needed support from the various stakeholders? (Institutional reform is a long-term process.)
- Can adequate measures be devised to address the concerns of those who favor the status quo and oppose change? (The absence of consideration for opponents of change can reinforce their opposition.)

In developed countries, information abounds on informal justice mechanisms. In the United States, ADR is the subject of public outreach by universities, bar associations, professional organizations, government agencies, and commercial entities.<sup>69</sup> A recent study commissioned by the European Union, reporting on performance by some 750 ADR mechanisms with regard to European Commission-recommended principles, is an example of impressive data collection and analysis.<sup>70</sup> Australia's National Alternative Dispute Resolution Advisory Council has been quite vigorous in promoting and publicizing ADR standards and principles.<sup>71</sup> Nevertheless, although many sources of information are available worldwide (including many focused on developing

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<sup>69</sup> Among the many contributions, mention should be made of those of the University of Missouri. See for example, John Lande, "Principles for Policymaking About Collaborative Law and Other ADR Processes," *Ohio State Journal on Dispute Resolution* 22 (2007), abstract available at <http://ssrn.com/abstract=979389>. See also the websites of the Association for Conflict Resolution, <http://www.acrnet.org>; Conflict Resolution Information Service, <http://www.crinfo.org>; Business and Society Exploring Solutions, <http://saseswiki.org>; American Bar Association Section on Dispute Resolution, <http://www.abanet.org/dispute>; Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov>; and International Institute for Conflict Prevention and Resolution, <http://www.cpradr.org>.

<sup>70</sup> Civic Consulting, "Study on the Use of Alternative Dispute Resolution in the European Union" (Berlin: Civic Consulting, 2009), [http://ec.europa.eu/consumers/redress\\_cons/adr\\_study.pdf](http://ec.europa.eu/consumers/redress_cons/adr_study.pdf).

<sup>71</sup> See, for example, NADRAC, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney General* (Canberra: National Alternative Dispute Resolution Advisory Council, 2009), [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_TheResolvetoResolveEmbracingADRtoimproveaccesstojusticeinthefederaljurisdiction](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_TheResolvetoResolveEmbracingADRtoimproveaccesstojusticeinthefederaljurisdiction).

countries),<sup>72</sup> popular legal education in a developing country is a very different undertaking from comparable efforts in developed countries.

Successful programs tend to place special reliance on dissemination of knowledge through clinics, paralegals, nongovernmental organizations, and the radio and other popular media.<sup>73</sup> Beyond the issue of knowledge, many factors can impede the effectiveness of ADR in improving access to justice: unclear legal mandates, limited financial support, inadequate standards and training for ADR personnel, and limited capacity for oversight of system performance. All of these issues can present especially formidable obstacles to justice in developing countries.<sup>74</sup>

In approaching the challenge of strengthening ADR mechanisms in a developing country, one possible starting point is with a very basic concept of what a dispute-resolution system should do. Maurits Barendrecht of the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO) has proposed an appealing five-step model. Its stages are:

1. Meet: centralized information processing
2. Talk: communication and negotiation
3. Share: distributing value fairly
4. Decide: a decision-making procedure
5. Stabilize: transparency and compliance.<sup>75</sup>

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<sup>72</sup> See, for example, the websites of the Microjustice Initiative, <http://www.microjusticeinitiative.org>; and Business and Society Exploring Solutions: A Dispute Resolution Community, [http://baseswiki.org/en/BASESwiki:Community\\_Portal](http://baseswiki.org/en/BASESwiki:Community_Portal).

<sup>73</sup> See examples described in Stephen Golub, "Nonlawyers as Legal Resources for Their Communities," in *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World*, ed. Mary McClymont and Stephen Golub (New York: The Ford Foundation, 2000), 297–313. See also, UNDP, "Enabling Self Help with Information and Community Organizing" in "Making the Law Work for Everyone," vol. 2, 18–36; and World Bank, "Legal Services for the Poor Best Practices Handbook" (Washington, DC: World Bank, 2003), <http://go.worldbank.org/NXGP2A93U0>. For an analysis of alternative models of legal assistance, see Robert J. Rhudy, "Expanding Access to Justice: Legal Aid Models for Latin America," in *Justice Beyond Our Borders: Judicial Reforms for Latin America and the Caribbean*, ed. Christina Biebesheimer and Francisco Mejía (Washington, DC: Inter-American Development Bank, 2000), 51–116.

<sup>74</sup> See the discussion of these issues in the context of formal and informal justice institutions in Buscaglia, "Justice and the Poor"; Penal Reform International, *Access to Justice in Sub-Saharan Africa*; and Gargarella, "Too Far Removed From the People."

<sup>75</sup> Maurits Barendrecht, "In Search of Microjustice: Five Basic Elements of a Dispute System," TISCO Working Paper on Civil Law and Conflict Resolution 002/2009 (Tilburg: Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems, 2008), <http://arno.uvt.nl/show.cgi?fid=97381>.

Additional conceptual guidance is offered by the World Justice Project *Rule of Law Index*. The factor relating to “informal justice,” which was developed on the basis of broad consultations, states as follows:

**Factor 10: Informal Justice**

- 10.1 Informal justice systems are timely and effective.
- 10.2 Informal justice systems are impartial and free of improper influence.
- 10.3 Informal justice systems respect and protect fundamental rights.<sup>76</sup>

There is, of course, a wealth of detailed and specific lists of principles, standards, and handbooks, many of which have been developed with particular countries, communities, or other subject matter in mind.<sup>77</sup> These may provide useful references for issue identification. However, it is important, as in any development effort, to balance reliance on international best practices with reliance on locally owned institutions. It is almost always preferable to examine how existing systems in developing countries function, at least initially, by reference to only general notions of what is considered good international practice. The principal focus should be on considering how existing justice institutions, including ADR institutions, contribute to a country’s development objectives and the framework of the Millennium Development Goals. As codified in the Paris Declaration on Aid Effectiveness,<sup>78</sup> experience has demonstrated that working on the basis of an existing system, one rooted in local needs, values, and customs, is the most likely way to achieve a sustainable desirable result. The alternative of trying to introduce an alien system, no matter how well designed from a developed-country perspective, is rarely a path to success.

Examination of the local ADR system should take into account the three common complaints about formal justice institutions (access, delay, corruption) and the basic characteristics that any informal system should possess, as described above. Within that context, such an examination of a local dispute-resolution system might explore questions such as the following:

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<sup>76</sup> “Rule of Law Index,” Factor 10, World Justice Project, 2010, [http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010\\_2\\_0.pdf](http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010_2_0.pdf).

<sup>77</sup> With respect to informal justice systems in developing countries, see, for example, Wojkowska, “Doing Justice”; and Maurits Barendrecht, “Best Practices for an Affordable and Sustainable Dispute System: A Toolbox for Microjustice,” TISCO Working Paper on Civil Law and Conflict Resolution 003/2009 (Tilburg: Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems, 2009), <http://arno.uvt.nl/show.cgi?fid=97383>.

<sup>78</sup> For information, see the OECD website: [http://www.oecd.org/department/0,3355,en\\_2649\\_3236398\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_3236398_1_1_1_1_1,00.html). Indeed, the local ownership and accountability principles of the Paris Declaration have long been recognized, even if not consistently observed in practice. See, for example, the oft-quoted guidance by T.E. Lawrence to British officers advising Arab forces in his 27 Articles of August 1917, reported as follows in B. H. L. Hart, *Lawrence of Arabia* (Cambridge, MA: Da Capo Press, 1989), 111: “Do not try to do too much with your own hands. Better the Arabs do it tolerably than that you do it perfectly....Actually, under the very odd conditions of Arabia, your practical work will not be as good as, perhaps, you think it is.”

- What is the legal and institutional framework for the system? What is its basis in law?
- Who are the system’s operators? How are they selected, trained, compensated, monitored, and disciplined with respect to standards of ethical and efficient performance? Do the system operators have popular credibility?
- Who are the users of the system, and what do they seek from it? Is the system responsive to their needs?
- What is the role of civil society in the system’s implementation and oversight? Is there sufficient transparency?
- What are the links between informal and formal institutions in the justice system, including with respect to enforcement, appeals, and consistency with fundamental rights? Does the system produce legally significant results?
- How well informed are people about their rights, duties, and choices under the system? Is the system accessible?
- What support for the informal system exists within the judiciary and the government? Is it accepted by those in leadership positions?
- What has been the role of the international community in supporting the system? Is the system sustainable without a continuing flow of external financing?
- What correlation can be shown between access to justice under the system and the well-being of the system’s users? Is the system results oriented?
- What are the most significant elements of praise and criticism of the system by stakeholders, including with respect to access, cost, fairness, timeliness, and integrity? Is it seen as legitimate?

The design and implementation of specific programmatic measures, and the monitoring and evaluation of those measures, should also be undertaken in a manner consistent with the aid effectiveness principles discussed above, and with emphasis on local context, broad local participation, local responsibility, and relevance to local development objectives. While the principal focus must be on development from within, a supporting international role, integrated into the broad scope of international development cooperation with the country concerned, can make a critical difference.<sup>79</sup>

It should be noted that development experts regard local ownership, participation, and accountability as good practices that have particular application to assessment, program design,

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<sup>79</sup> See William E. Davis and Razili Datta, “Implementing ADR Programs in Developing Justice Sectors: Case Studies and Lessons Learned,” *Dispute Resolution Magazine*, American Bar Association, Summer 2010, 16–18, which, in presenting lessons learned in project implementation, demonstrates consistency in practice with the considerations set out in the foregoing analysis.

implementation, and evaluation in development cooperation. However, a substantial body of social policy research demonstrates that participatory and collaborative measures (such as those recommended in aid effectiveness principles) also are important factors in achieving better governance and enhancing the legitimacy of dispute-resolution systems in developed countries.<sup>80</sup> This suggests that additional international and interdisciplinary interactions reflecting those principles and values should be mutually beneficial, both in development cooperation and in other contexts. In particular, by fostering the integration of informal dispute resolution into efforts to expand access to justice, such interactions can contribute to a strengthened and more inclusive rule of law in many different environments.

## Conclusion

The experience of the past quarter-century has confirmed the importance of justice for the security, well-being, and dignity of poor and disadvantaged people around the world.<sup>81</sup> This paper has sought to place within the context of development and international development cooperation the use of ADR as a way to increase access to justice and extend more widely the protections and benefits of the rule of law.

Experience has confirmed the limitations of formal justice institutions and, likewise, the limitations of international cooperation that is focused heavily on those formal institutions. Access to justice does not only mean access to a court. ADR holds promise for increasing the development effectiveness of justice systems, not as a new silver bullet, but as a practical measure to reduce injustice and expand opportunity by complementing formal justice institutions within a broad framework of justice system reform. Therefore, it merits the increased attention it is receiving in international development cooperation.

The approach suggested here, while very much concerned with institutions, reflects an appreciation of the view advanced by Amartya Sen, who has argued persuasively for an idea of justice that draws on multiple perspectives to find ways to reduce societal injustice, rather than on constructing a perfect model of justice to which we should all aspire.<sup>82</sup> That philosophical

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<sup>80</sup> The papers presented at the “Symposium on Alternative Dispute Resolution and the Rule of Law” at the University of Missouri on October 15, 2010 will be published in the *Journal of Dispute Resolution*, University of Missouri in 2011. They address issues of procedural justice, collaborative governance, and deliberative democracy. See also, Lisa Blomgren Bingham, “Collaborative Governance: Emerging Practices and Incomplete Legal Framework for Citizen and Stakeholder Voice,” *Missouri Journal of Dispute Resolution* 2 (2009): 269, [http://papers.ssrn.com/sol3papers.cfm?abstract\\_id=1162409](http://papers.ssrn.com/sol3papers.cfm?abstract_id=1162409); and Lawrence Solum, “Procedural Justice,” Public Law Research Paper 04-02 (San Diego: University of San Diego, 2004), <http://ssrn.com/abstract=508282>.

<sup>81</sup> The Commission on Legal Empowerment of the Poor estimates that “around four billion people, the majority of the world’s population, are excluded from the rule of law.” UNDP, “Making the Law Work for Everyone,” 19.

<sup>82</sup> Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press, 2009). In his preface, at page xii, Sen acknowledges: “Even though in the approach presented here principles of justice will not be defined in terms of institutions, but rather in terms of the lives and freedoms of the people involved, institutions cannot but play a significant instrumental role in the pursuit of justice. Together with the determinants of individual and social behavior, an appropriate choice of institutions has a critically important place in the enterprise of enhancing justice.”

approach seems entirely compatible with a country-specific approach to advancing the rule of law that emphasizes local context and practical measures to expand access to justice.

There are enormous differences between countries as to priority needs, institutional capacities, political commitment, and popular expectations and demands. Priorities for dispute resolution might be peace and reconciliation, access and legal title to land or other economic assets, family relations and status, crime control, or commercial relationships, all of which engage questions of history, societal values, incentives, and political sensitivities.

These differences place a premium on local knowledge. They therefore impose a duty on external partners to exercise caution (to resist the temptation to propose imported solutions for complex problems of how societies resolve disputes), to maintain patience (to nurture local ownership and commitment and allow time for local actors to build capacity), and to act with humility (to see external support as just one of many factors in improving the formal and informal aspects of justice institutions, and the justice system as just one of many factors in development).

In that spirit, increased attention to the role of informal institutions in complementing the formal justice system can strengthen and extend the reach of the rule of law, and thereby enhance the contribution of the rule of law toward advancing human security, well-being, and dignity.

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See also Amartya Sen, *Development As Freedom* (New York: Alfred A. Knopf, Inc., 1999), in which the author discusses some of the same considerations about “the idea of justice” in the context of his view of development “as a process of expanding the real freedom that people enjoy.”



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