

5-15-2014

Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System: A Study on the ADR Processes in Rwanda and Nicaragua

Sarah Yance

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Comparative and Foreign Law Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Sarah Yance, *Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System: A Study on the ADR Processes in Rwanda and Nicaragua*, 14 Pepp. Disp. Resol. L.J. Iss. 3 (2014)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol14/iss3/1>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System: A Study on the ADR Processes in Rwanda and Nicaragua

Sarah Yance*

I. INTRODUCTION

In many developing countries, staying alive takes conscious effort. Unlike in America, where eating and existence seem to be an absolute for most, in developing countries, the conflicts that take the greatest attention are those regarding the realities of subsistence.¹ In countries that rely on agriculture, ownership and use of land are inextricably linked to survival and livelihood.² Therefore, ownership of land means agricultural business, which feeds the family. Because women cannot own land or apply for loans, they are dependent upon men and extended family; therefore, these women cannot thrive on their own.³ Even in countries that do not rely on

* JD/M.D.R. Candidate 2014, Pepperdine University School of Law.

1. Phyllis E. Bernard, *Begginning for Justice? Or, Adaptive Jurisprudence? Initial Reflections on Mandatory ADR to Enforce Women's Rights in Rwanda*, 7 CARDOZO J. CONFLICT RESOL. 325, 328-29 (2006). Some of the conflicts that take center stage are those concerning housing, food, medical care, and education. *Id.* Although these may have been issues in the past, the Rwandan Genocide has further deteriorated the economy and culture. *See id.* Moreover, these conflicts arise in already strained family relationships, which mainly affects women, who then deal with domestic violence, and cannot survive without family support. *Id.* at 328-33.

2. *See id.* at 333. Rwanda relies primarily on agriculture, and the land is essential to basic survival. *Id.* Due to the importance of land, and the huge population in relation to the scarce arable land, families become very possessive over their land. *Id.* As a result, families are also resistant to claims brought by distant or estranged family members. *Id.* This is a classic example of vulnerable woman who would have no place to turn once abandoned by family. Most women cannot make a living on their own because of the lack of opportunities to even attempt to work for themselves or their family. The familial identity and a healthy existence are so intertwined that a woman cannot exist without both.

3. *See id.* at 333-35. Even before the Rwandan Genocide, there were restraints on women. Generally, women did not have the right to own land and did not inherit land directly. *Id.* at 334-35.

agriculture, women have historically been given an identity and existence that revolves around being a mother and a wife; thus, these women have no identity out of a familial context. This dependence on family, coupled with any number of conflicts, becomes a concern when a community that is built upon family connection collapses, and the typical roles of individuals and family are reversed or rejected.⁴ Furthermore, women have had no viable options to fight for their rights and cannot make a living on their own; instead, women resort to begging the family for help or returning to a home defined by its unhealthy relationship.⁵ Some individuals introduced mediation to confront the challenges women face in foreign countries.

Mediation is a global phenomenon which reaches from Africa to Asia.⁶ Foreign countries are adopting Western jurisprudence to address issues that are rampant in these countries, but problems arise when implementing a Western system into a country with weak or no legal infrastructure and entirely different cultures.⁷ Due to the backlog that many legal systems are

Women could only gain land rights through marriage, and could stand as a trustee to hold rights for her male children. *Id.* at 335. After the Rwandan Genocide, families were torn apart and communities were torn apart by ethnic status. *See id.* at 327-38. The civil strife left many widows, orphans, and individuals with HIV/AIDS. *Id.* at 333. Families became resistant to helping these estranged family members, leaving the women with nothing and no land to work on. *Id.* Not only could women not own land, but the women also could not apply for agricultural loans, so women were legally disabled and dependent upon their families for economic survival. *Id.* at 335.

4. *See id.* at 328-29 (stating that conflicts may arise in family relations because realities of subsistence, land, and other issues that have developed and deepened because of the Rwandan Genocide); Raquel Aldana & Leticia M. Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua*, 55 BUFF. L. REV. 1261, 1292 (2008) (arguing that women whose identities are rooted in a familial context have a hard time moving outside those roles when they approach the criminal justice system to address domestic violence issues).

5. *See* Bernard, *supra* note 1, at 333; Aldana & Saucedo, *supra* note 4, at 1291. Some studies find that domestic violence in Nicaragua “has arguably worsened as a result of the implementation of the adversarial legal system.” Aldana & Saucedo, *supra* note 4, at 1285. Moreover, many foreign countries simply do not have the manpower and time to address these issues. Therefore, women cannot use the legal system to address their issues in domestic violence, but instead those women go home and continue to live in an abusive relationship. In Rwanda, many of the vulnerable women without land or a husband cannot find work and cannot persuade their relatives by using the force of the law, so they are left with nothing. Bernard, *supra* note 1, at 333. Their families may even prolong the dispute, knowing that time is on their side because the women and children may die from HIV/AIDS. *Id.*

6. *See* Nancy Erbe, *The Global Popularity and Promise of Facilitative ADR*, 18 TEMP. INT’L & COMP. L.J. 343-, 3443 (2004). ADR is particularly popular with peace-building efforts, including countries currently or previously engaged in turbulent ethnic battles. *Id.* at 344. The concept of ADR is attractive because of its creative possibilities, pragmatic options, and empowering possibilities that support reconciliation and peace. *Id.*

7. *See id.* at 343-44; Anthony P. Greco, *ADR and a Smile: Neocolonialism and the West’s Newest Exports in Africa*, 10 PEPP. DISP. RESOL. L.J. 649, 662 (2010). Some argue that mediation cannot be successful if there is an unequal balance of power, and no legal repercussions to take outside of mediation, because then a party may not have any leverage while mediating. Aldana &

[Vol. 14: 311, 2014]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

experiencing, some foreign countries enforce mandatory Alternative Dispute Resolution (ADR). Some have even implemented mediation programs to teach young lawyers, volunteers, and respected community members about the process of mediation in order to address the concerns of the community in a timely manner and to rebuild societal values.⁸ Mediation continues to grow, and analyzing the factors that have led to the success or failure of mediation is important for future efforts to develop successful mediation programs.

It is especially important for Western countries involved in the process of introducing mediation to study past mediation attempts because they will discover that “[f]or mediation to work effectively abroad, it must build in space for cultural adaptation.”⁹ These transitional movements must not only take into account cultural adaptations, but they must also fit programs into existing political and institutional structures.¹⁰ Moreover, knowledge and

Saucedo, *supra* note 4, at 1322. In these developing countries, mediation is being used as an alternative to the legal system, and there are often no real legal repercussions that mediation participants can rely upon. This may be a problem unless the leaders implement mediation in a way that can address punishment for violating the terms of an ADR agreement.

8. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 13-14 (2006); Aldana & Saucedo, *supra* note 4, at 1267. Respected community members may be used because parties often want someone who they can trust and who is aware of certain aspects of the conflict, which may seem to greatly differ from the Western demand for confidentiality and impartiality. See Aldana & Saucedo, *supra* note 4, at 1324-27. Countries utilizing mediation may expect to rebuild societal values by bringing the community into the mediation process through implementation, and accountability afterwards. *Id.* This same goal of influencing society through ADR is seen when discussing mediation uses in the United States. One author states “[t]he ultimate goal of the mediator is to encourage individual moral development, with the expectation that such individual transformation will have positive effects on society as a whole.” ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2005).

9. Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 300 (2006); accord Lars, *supra* note 8, at 13. However, some argue that cultural adaptation is not enough and may go too far. See *id.* at 298. Cohen argues “that the global transfer of mediation to third world states can contribute to local shifts in power relations and persistent, if inconsistent, challenges to the hegemony (and injustices) of state law, depending on background social conditions and the ends to which mediation is deployed.” *Id.* at 300. Similarly, Lars argues that simply substituting Western dispute resolution with another techniques “as if the two were perfect substitutes and able to perform the same function independently of the socio-economic context in which they work” is bound to fall and likely to be extremely disruptive. Waldorf, *supra* note 8, at 13.

10. Aldana & Saucedo, *supra* note 4, at 1309. Fitting programs into foundational structures does not mean implementing strict, formal procedures that reflect the existing systems, but can mean utilizing mediation programs to address the overflowing legal system. See *id.* There may be little access to justice and legal routes, and mediation may be used as a means to bring justice locally. See

313

understanding of the need for flexibility can be useful when introducing mediation in foreign countries. Systems which utilize a community's informal mediation techniques already in place may increase the probability of success.¹¹ Regardless of vast amounts of knowledge and studies, it is important to proceed with caution, balanced with respect, to allow a nation to determine its own path.¹²

This Article discusses the adoption of ADR techniques in Nicaragua and Rwanda. In these countries, ADR is used to address issues of massive presence and duration over the years. The Rwandan Constitution envisions ADR as a means to rebuild family traditions that have deteriorated in order to repair deeper issues of women and children suffering from the repercussions of the Rwandan Genocide.¹³ Rwanda is creatively employing ADR in attempts to re-create a sense of community separate from ethnic status.¹⁴ In Nicaragua, women have been suffering from domestic abuse stemming from the cultural tradition of "machismo."¹⁵ The use of mediation in this country depends on continuing public discussion about private issues, such as domestic violence, in order to fight for the rights of women.¹⁶ In

id. Mediation can be powerful at lower levels, especially because of the weakness of the state and its legal systems. Cohen, *supra* note 9, at 350.

11. Aldana & Saucedo, *supra* note 4, at 1267; *see also* Waldorf, *supra* note 8, at 14 ("there is now increasing attention to the need to mix any imported Western ADR with local dispute resolution"). One of the concerns with simply taking one system or technique and transplanting it form one cultural context to a different one is that it may not easily translate and it could change the local practices. *Id.* This can be dangerous because it may not be sustainable in that country, or it may not work with systems in place for support and enforcement.

12. Bernard, *supra* note 1, at 326. Choices may clash with developed ADR theory and principles, and a Western mediator may not agree with certain choices, but a country's right to self-determination trumps the American ideas. *Id.*

13. *See id.* at 335-36. Rwanda made huge strides in the development of ADR—not only in developing countries, but in the ADR world overall—when it used a bold and pragmatic approach and redefined the nature of justice in its country after a physically and psychologically traumatic decade of Genocide. *Id.* at 326. The initiation of the change is seen in the Rwandan Constitution. [citation needed].

14. *See id.* at 337-38. The transition is seen in the Rwandan Constitution. The Constitution portrays its intent to protect women and children, and Rwanda adapted Western ADR to address the conflict like this in the nation. *Id.* at 338. Rwandan mediation and arbitration are largely community-based and invite individuals from the community to join in the process, even if they are not one of the individual parties involved in the specific conflict at hand. *Id.* at 349. Implementation and success depends on the community. [citation needed]

15. Aldana & Saucedo, *supra* note 4, at 1262. This may also stem from deep cultural roots and the ideal of machismo. *See id.* at 1297. Merriam-Webster dictionary defines "machismo" as "a strong sense of masculine pride," or "an exaggerated masculinity." Many people recognize the deeper reference that includes "male behavior that includes 'excessive drinking, violence against women, chronic infidelity, abdication of household duties, and a general identification with the street culture rather than with the home.'" Aldana & Saucedo, *supra* note 4, at 1297.

16. *See id.* at 1326. The mediation model in Nicaragua seeks to make the parties feel comfortable, protected, and safe. *Id.* at 1323. Instead of keeping domestic violence in the private-

both countries, there is a call to change or restore community values in the context of human rights through ADR.

ADR can be effective if countries take Western-style mediation and incorporate their own values, culture, and institutional procedures. The role of the community—families, neighbors, and church groups—is also significant for successful mediation in these countries. This Article gives a background on the conflicts in Nicaragua and Rwanda, analyzes the mediation system adopted in those countries, and proposes how mediation can be successful in those countries.

II. BACKGROUND

A. *Post Rwandan Genocide: Women Recovering Property for Survival*

The Tutsis and Hutus are two people groups from Rwanda that share a commonality of ancestry, language, culture, and geographic location; however, they have been distinguished as separate ethnicities, with Hutus comprising 85% of the population, and Tutsis making up 14%.¹⁷ During the precolonial period, those who held power in the country created an alleged arbitrary distinction between the Hutus and Tutsis in order to categorize the people—the Tutsis were the small aristocracy, and the Hutus were the masses of the population.¹⁸ After Rwandese Patriotic Front (RPF)—a group

realm, mediation is open and public, addressing the rights in a louder manner to try to create a transformative power, not just for the parties, but for the greater society. *Id.* at 1324-25. This addresses the concern that mediation will be ineffective because it does not change the laws or address issues at a higher level, because these countries hope to foster and maintain a public discussion about what were before considered private issues. *Id.*

17. Adrien K. Wing & Mark R. Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 253 (2002). According to many sources, there are no ethnic differences (only economic differences), but this polarization became the catalyst for conflict between the two people groups. David Byrne, *A History of Rwanda's Genocide: Hutu v. Tutsi*, YAHOO VOICES (Aug. 23, 2006), at [www.http://voices.yahoo.com/a-history-rwandas-genocide-hutu-vs-tutsi-66698.html?cat=37](http://voices.yahoo.com/a-history-rwandas-genocide-hutu-vs-tutsi-66698.html?cat=37). The Hutus were well-established in the area before Tutsis began around in 1400, bringing cattle and a sophisticated understanding of war. *Id.* The political system was centered on a king, with chiefs surrounding him. *Id.* Although it appeared that the Tutsis were superior to the Hutus, with the Tutsis higher in the socioeconomic arena, there was a lot of movement with the political system. *Id.* Then, Westerners arrived around the 20th century and used race for classification and colonial administration. *Id.* Here, the discrimination began and created a divide. *Id.*

18. Wing & Johnson, *supra* note 17, at 253. The Germans were the first to visit Rwanda, and showed favoritism towards the Tutsi because of their aristocratic status and physical characteristics.

formed by Tutsi refugees— attacked the Hutu-led government, the Hutus were unhappy with the prospect of the Tutsis waging war and leading the government, and this led to rules regulating relations between Tutsi and Hutu.¹⁹ A Tutsi army defeated the Hutu-dominated government, but less than a year later, the Tutsi President was killed when his plane was shot down, which ignited the 100-day genocide.²⁰ Within the hour, Hutu militiamen erected checkpoints and roadblocks and killed anyone identified as a Tutsi on hand.²¹

Unlike many other wars that only involved men, the Rwandan Genocide included women and children being killed and engaging in murder, both willingly and unwillingly.²² Weapons were forced into the hands of any and all Hutus in efforts to eradicate the entire Tutsi population.²³ The United Human Rights Council reports approximately 800,000 deaths.²⁴ The UN Commission on Human Rights found that rape was inflicted in 250,000 to 500,000 cases during the Genocide.²⁵ The women who survived the

Id. at 258. Later, the Belgians expelled the Germans, and continued to favor the Tutsis, bestowing power and authoritative positions upon them. *Id.*

19. *Id.* at 269-70. A propaganda effort published the “Hutu Ten Commandments,” which forbade Hutu from entering into any relations with Tutsi, including sexual, business, or state affairs. *Id.* at 270. Hutu became more and more afraid as they continued to hear that Tutsi were working to kill them Hutu. *Id.* This left the Hutu with the choice to either kill or be killed. *Id.*

20. *Id.* at 270-72. Although it has not been identified who assassinated the Tutsi President, many believe the Hutus were at fault. *Id.* at 272. The catalyst appears to be the assassination of the president, but Wing & Johnson argue it was simply the removal of the last roadblock. The Genocide was a combination of racialization, Tutsi-rule, forced Hutu labor, and Hutu’s defeat by the Tutsi RPF, among other tensions. *Id.* at 271. The Hutu allowed themselves to believe “the Tutsi was a racialized enemy and decided [the Hutu power] would never again be permitted to inflict both physical and spirit injuries upon the Hutu.” *Id.*

21. *Id.* at 272.

22. *Id.* at 273. At first, the Hutu leaders of the massacre included military officials, politicians, and businessmen, but some many others joined, such as government soldiers and militiamen. *Rwanda: How the Genocide Happened*, BBC NEWS AFRICA (May 17, 2011), at <http://www.bbc.co.uk/news/world-africa-13431486>. Propaganda contributed to the tensions, and participants were given incentives to kill. *Id.* Participants could appropriate the land of the murdered Tutsis. *Id.* This is a reminder about how important the land is to the Rwandan people.

23. See Wing & Johnson, *supra* note 17, at 273. The extremist Hutus that took over the government believed they had to wipe out the Tutsis completely, and encouraged others to join in the massacre through radio propaganda. *Rwanda: How the Genocide Happened*, *supra* note 22. Soldiers and police officers recruited ordinary citizens to kill Tutsis—neighbors were killing neighbors and friends. *Id.* Those who participated were sometimes forced to kill, but at other times were motivated by incentives such as —money, food, and the land of the deceased Tutsis. *Id.*

24. United Human Rights Council, *Genocide in Rwanda*, UNITED HUMAN RIGHTS COUNCIL, at http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (last visited Oct. 1, 2013). This number may include up to 75% of the Tutsi population, and thousands of Hutu who refused to join in the massacre. *Id.*

25. Wing & Johnson, *supra* note 17, at 277. Despite the Hutu Ten Commandments, this study states “rape was the rule and its absence the exception.” *Id.* Rape was used as a means of killing

Genocide and possible rape were left with sexually transmitted diseases (STDs) and an “ongoing assault on the spirit.”²⁶ Surviving women took on the responsibility of providing for themselves, their children, and any other remaining members of their family.²⁷

For a woman in Rwanda, survival relies upon family cooperation because stability and sustainability depend on the ownership of land, which is usually held in family units and farmed cooperatively.²⁸ After the Genocide, scarce, valuable land was lost and many families in possession of land became resistant to claims by estranged family members.²⁹ If an individual does not have any leverage in their claims or avenues to pursue their rights, then families are especially resistant and may even prolong disputes to deter individuals from fighting.³⁰ Women cannot own land, rendering them completely handicapped in taking care of themselves and

women. Adin Thayer, *Women in Post-Genocide Rwanda: Facing the Past to Build a Future*, ISIS INTERNATIONAL, at

http://www.isiswomen.org/index.php?option=com_content&view=article&id=1413 (last visited Oct. 1, 2013). Hutu leadership encouraged men with HIV-AIDS to lead raping of Tutsi women, which led to the pregnancy and birth of children with the virus later. *Id.* Currently, we continue to see the repercussions of these actions with many Rwandan women and children living and dying with HIV/AIDS.

26. Wing & Johnson, *supra* note 17, at 277. Many women fled to escape the stigmas that were thrust upon them. *Id.* For those women who became impregnated by their rapists, they were also haunted and the women often either aborted the child, or bore their rapist’s child and struggled to accept those children. *Id.*

27. *Id.* at 277. Women did not only have to deal with the aftermath of the Genocide as victims, but also as perpetrators. *See id.* The women may have been participating in the killings and lootings, but then would have had to feign innocence to avoid persecution and prosecution. *Id.* After the Genocide, for a time women made up 70% of the surviving population for a time. *See* Thayer, *supra* note 25. The vast amount of women who were victims and perpetrators in the Genocide complicates the situation regarding land and survival because women are the most vulnerable, considering their status and the laws of owning lands in their country.

28. Bernard, *supra* note 1, at 333. As noted above, land was taken during the Genocide, and people fled. During the period of conflict, people left their own homes and others took over land that did not previously belong to them. Therefore, there was much conflict existed about over who actually owned the land.

29. *Id.* at 333. Due to Rwanda’s comparatively large population, there is not enough land for everyone. *Id.* Moreover, women cannot own land on their own, so a woman is entirely dependent upon her family for use of land. *See id.* at 336.

30. *Id.* at 333. Delaying and prolonging disputes is especially prevalent and dangerous for women with HIV/AIDS. *Id.* Families know that time is on their side because of the life span of individuals with HIV/AIDS.

their families without the help of family members.³¹ Rwanda's use of ADR made it a central goal to reconstruct the values destroyed by "re-creat[ing] a sense of communal mutuality and aid not tied to ethnic status."³²

B. Post Decades of War in Nicaragua: Women Seeking Rights from Domestic Abuse

Instability has characterized Nicaragua's history. The Nicaraguan Revolution designates the 1960s and 1970s as the beginning of Sandinista National Liberation Front (FSLN) opposition to the Somoza dictatorship, established in the 1930s.³³ The FSLN led to the ousting of the Somoza dictatorship in 1979, and led to the transitional attempts to reform the society and economy.³⁴ However, during the long reign of the Somoza dynasty, the country suffered, and the effects have been hard to reverse.³⁵ During his reign, there was international pressure demanding Somoza improve his

31. *Id.* at 334-35. Traditionally, families took care of wives and children if the husband died, but family structures were destroyed after the Genocide and many of the values were neglected. *Id.* at 336.

32. *Id.* at 337-38. Although the family claims may not be steeped in a direct question of ethnic differences between Hutus and Tutsis, there are underlying conflicts that stem from the ethnic distinctions. *See id.* at 334. The shortage of land and pressure to constantly divide and share that land compose a constant conflict in Rwanda. *Id.* While this is not a consequence of ethnic status, tension arose when Hutus and Tutsis began to intermarry and land was shared by both. *See id.* Here, it is apparent that the conflicts are more interconnected in ethnic status present before the Genocide than is readily apparent.

33. Claire Marshall, *Nicaragua: Revolution's Legacy*, (July 19, 2004), <http://news.bbc.co.uk/2/hi/americas/3907327.stm>). The Sandinistas were a Marxist-like character that formed in 1961. Ross Cheit, *The Sandinistas*, BROWN UNIVERSITY, http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/n-sandinistas.php (last visited Oct. 1, 2013). The Somoza Dynasty lasted from 1936 until 1979, but during this time, Nicaragua remained extremely poor, with a life expectancy of 50 years, and a 50% illiteracy rate. *See* Ellie Klerlein, *Environmental Effects of Nicaraguan Armed Conflicts* (2006), <http://www1.american.edu/ted/ice/nicaragua.htm>. The Sandinistas were a Marxist-like character that formed in 1961. *Id.* The Sandinistas received support from Cuba. *Id.* The Somoza family catered to elites in Nicaragua and did not care about the majority population. *See id.* Somoza held the philosophy that "[w]hat oxen need is hard work, not education." *Id.*

34. *See* John A. Booth & Patricia B. Richard, *Revolution's Legacy: Residual Effects on Nicaraguan Participation and Attitudes in Comparative Context*, 48 *LATIN AMERICAN POLITICS AND SOCIETY* 117, 118-1948 (2006). Eventually, many people opposed the revolution and the FSLN, which may have diminished any longstanding differences to the society and economy. *Id.* at 118-199.

35. *See* Klerlein, *supra* note 34. Some allege that the Somozas intentionally kept many of the Nicaraguan people illiterate. *Id.* The Somozas stole the land from the poor and sold it to agricultural elitists who would use the land for coffee plantation, to increase the Somozas' wealth. *Id.* The people were not only left without land to make a living, but the lack of land also meant a lack of domestic food production. *Id.* At the time, there were also environmental issues, such as an earthquake that destroyed the land. *Id.*

human rights record.³⁶ However, Nicaragua has undergone some changes. Three major changes after the Nicaraguan Revolution were to economics, culture, and military.³⁷ Despite the developments in the country, the adopted adversarial legal mode is still inefficient in addressing pervasive issues throughout the country.³⁸ One conflict that has been avoided is domestic abuse.

Domestic abuse is one of the many issues rampant throughout Nicaragua, with up to 60% of women reporting physical abuse or sexual abuse by a partner or another family member.³⁹ Researchers found that efforts to reduce violence are lacking because of poverty, unstable institutions with little funds, and corruption in the judicial system.⁴⁰ With an unemployment rate of 50%, many women are still unable to find jobs; more surprising, the women who find jobs use 1 out of every 5 workdays for sick days due to the domestic abuse.⁴¹ As seen in other countries, this continues because of the belief that domestic violence is a regular, normal occurrence.⁴² Some Nicaraguan women blame the excessive domestic abuse

36. See John Otis, *A New Somoza in Nicaragua*, PUBLIC RADIO INTERNATIONAL (November 9, 2011), <http://www.theworld.org/2011/11/somoza-nicaragua/>.

37. See Booth & Richard, *supra* note 350, at 118-19.

38. See Aldana & Saucedo, *supra* note 4, at 1262. The revival of the Sandinista leader to the government initiated changes in the government and judicial system. *Id.* at 1261. The changes occurring allowed feminist, religious, and community organizations to reconsider the direction of their movements. *Id.* at 1262. The call for personal and societal transformation after conflict was extremely appealing after constant internal strife. *Id.* Many desired to challenge the ineffectiveness of the adversarial model in addressing certain issues, including domestic violence. *Id.*

39. Immigration and Refugee Board of Canada, *Nicaragua: Domestic Violence, Including Legislation and Availability of State Protection and Support Services (2007-July 2010)*, (December 24, 2012), <http://www.unhcr.org/refworld/publisher,IRBC,,NIC,4e437d1c2,0.html>. At least one third/3 of Nicaraguan women have been subject to violence or sexual abuse while living with a man. *Id.* There are reports of women who were even killed in Nicaragua as a result of domestic violence. *Id.*

40. *Id.* There were programs established to create easier access for women in the justice system, but there is no evidence establishing whether those attempts have been successful. *See id.* The corruption in the government instigated international concern. *Id.* The Committee Against Torture questioned the irregularities in the appointment of those who are supposed to be administering justice in Nicaragua. *See id.*

41. Gigi Guerra, *Beating Women is a Way of Life Here*, JANE MAGAZINE (Feb. 2001), available at <http://web.unfpa.org/focus/nicaragua/msmagazine.htm>. (Jane Magazine February 2001).

42. *Id.* One-third of Nicaraguan women believe that a man may can beat his wife if he has a suspicion of infidelity on her part. *Id.* One study found that fifty-two percent of women who were married had been physically abused by someone they slept with. Aldana & Saucedo, *supra* note 4, at 1283. Thirty-one percent were beaten during pregnancy. *Id.* Twenty-one percent suffered not only physical abuse, but also emotional abuse and sexual violence. *Id.* Some reasons for the high

in the country on *machismo*.⁴³ *Machismo* decrees women as the property of their husbands.⁴⁴

The socialization of the people in Nicaragua influenced the acceptance of *machismo*, which exaggerates the differences between men and women, praising the men as superior to women—morally, economically, and socially.⁴⁵ On the other hand, women are instructed to be submissive, which often keeps women in abusive relationships instead of changing violent home situations.⁴⁶ The most respected women are those strong enough to keep the family together through any situation.⁴⁷ If a woman leaves, she sheds the identity that has defined her in a culture that values family—she is no longer just a woman and a mother—but she takes on the identity of an autonomous woman protected by the State.⁴⁸ Instead of maintaining this new and unfamiliar identity, women often return to their husbands.⁴⁹

After the Nicaraguan Revolution, academic and employment opportunities greatly increased for women, but *machismo* was never struck down and the laws did not reflect anti-discriminatory policies to challenge the cultural norms in place.⁵⁰ Regardless, women experiencing domestic violence are condemned whether they stay in their relationships or report the abuse to some authority.⁵¹ Women who leave failed as mothers and as wives because they could not develop some agreement in their homes. Those

rate of abuse have been attributed to the ongoing poverty, a high teen birth rate, and a fast-growing population. Guerra, *supra* note 42.

43. *Id.* The concept of *machismo* decrees that husband's claim women as their property. *Id.* Moreover, violence is a normal part of life and marriage. *Id.*

44. *Id.* Embracing *machismo* means that violence is encouraged and a part of daily life. *See id.* Furthermore, some women think that violence is an expression of a partner's love and caring. *Id.*

45. Mary Ellsberg et al., *Candies in Hell: Women's Experiences of Violence in Nicaragua*, 51 SOCIAL SCIENCE & MEDICINE 51, 1595, 1-1660610 (2000), available at http://www.caresci.gu.se/infoglueCalendar/digitalAssets/1760631588_BifogadFil_artiklar070228.pdf. This is further encouraged by the women's concept of *Marianismo*, which refers to spiritual devotion to the Virgin Mary, and further advocates that women embody maternity and chastity. *Id.* at 1606. Women must be dependent and submissive. *Id.*

46. *Id.* A popular Nicaraguan saying is "[i]f he loves you he'll beat you." *Id.* at 1606-07. Women may even feel more secure in their relationships when they are beaten. *Id.* at 1607.

47. *Id.*

48. *See* Aldana & Saucedo, *supra* note 4, at 1292.

49. *See id.* at 1291. Women may return because they could not maintain a living to support themselves and children without the help of the husband. *Id.*

50. Ellsberg, *supra* note 461, at 1606. Although the government provided certain opportunities for women, changing laws and policies were brushed off as feminist concerns that were not relevant to the Nicaraguan government and most Nicaraguan women. *See id.*

51. *Id.* at 1606. If women a woman stays in the relationship, she may be blamed for her partner's violent tendencies, or may be accused of taking some pleasure from his abuse, but if she leaves her husband, she is subject to social stigma as a failed mother and wife. *Id.*

trying to help abused women recognize that domestic abuse was expansive, and the best resolution would not be simply to send all these men to jail.⁵²

Both of these countries suffer from vastly different histories. While Rwanda is recovering from Genocide, Nicaragua is restoring its country in the aftermath of war and attempting to improve the harsh conditions from its past. Despite their differences, both countries struggle with addressing women's rights issues in the legal system. Widowed Rwandan women with children are left abandoned with no land for subsistence. Nicaraguan women are dependent upon abusive men who envelope the *machismo* tradition that has defined Nicaragua throughout its years. Both countries have implemented ADR as an instrument to address these issues.

III. IMPLEMENTING MEDIATION

A. *The Rwandan Constitution Calls for ADR to Address Women's Property Rights*

The Rwandan Constitution recognizes the loss of social structures that protected individuals—such as women, children, the elderly, and the disabled—and attempts to recreate protection by encouraging society to rebuild values and recreate a sense of communal mutuality and aid apart from ethnicity.⁵³ As opposed to U.S.-style mediation, the Rwandan government adopted a mediation statute that looks more similar to a civil-

52. Aldana & Saucedo, *supra* note 4, at 1291. Other organization—feminist groups, religious groups, and reformers—attempted to help, and none found jail sentencing as the best possible means of resolution. *Id.* at 1266. The answer would rely on deeper, cultural changes and a system that fits into the existing structures. *See id.* at 1309. Due to the Rwandan culture, “decentralised legal forums and state mandate dispute resolution rituals are considered as ‘sites for social healing’ due to their repetitive, symbolic and stylized nature.” Martha Mutisi, *Local Conflict Resolution in Rwanda: The Case of Abunzi Mediators*, in INTEGRATING TRADITIONAL AND MODERN CONFLICT RESOLUTION at 5341, 53 (2012), available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=146651>.

53. Bernard, *supra* note 1, at 337-38. The Rwandan Constitution of 2003 replaced the older Constitution from 1991. *See The Fear of Majority Rule: Rwandans Vote for the Ruling Party's So-So Idea of Democracy*, THE ECONOMIST (Sept. 26, 2003), available at <http://www.economist.com/node/1817766>. The purpose of the Rwandan Constitution was to encourage democracy and discourage another genocide by balancing the two ethnic groups, the Hutus and Tutsis. *Id.* The Rwandan Constitution sought to revive commonly shared values to unify the state. Bernard, *supra* note 1, at 336. Although the Constitution does not specifically define all the values, it gives general statements about sacredness of family and children, thereby attempting to once again develop those values after a period of strife when even families were turning violently against each other. *Id.* at 367.

commercial arbitration or a public mini-trial; because the Mediation Act operates as a gatekeeper to civil and criminal courts with the mediators serving in lieu of courts.⁵⁴ Due to its expansive scope, the Mediation Committee Act functions with greater procedural protections, enforcing the provisions of the Constitution.⁵⁵ The statute for Rwandan mediation echoes the language built into the Constitution.⁵⁶

Every region of Rwanda was required to have a Mediation Committee, and theirits Committee was in charge of mediating cases between parties before anything was filed in court.⁵⁷ The statute does not specifically define mediation—therefore, it must assume that either mediation is a skill-set discernible by Rwandans or that the different Committees will adopt their

54. *Id.* at 339-40. These Mediation Committees are “an organ meant for providing a framework of obligatory mediation prior to submission of a case before the first degree courts.” *Mutisi, supra* note 53, at 47. The title of the statute is the “Mediation Committee Act” and it covers an expansive scope, which explains the combined mediation-, arbitration structure. Bernard, *supra* note 1, at 339-40. The law remains silent about the exact process for determining which specific cases belong before the Mediation Committee, but left it to the mediators to resolve questions. *Id.* at 341. The author believes this void in the law is significant because all cases must be submitted to the Mediation Committee and, therefore, the ADR model needs to have processes that are fair and consistent. *Id.* Mediation Committees do not only relieve the backlog of cases in courts, but also promote peaceful co-existence within society and participation in the judicial system. THE NEW TIMES, *Rwanda: Mediation Committees Should Promote Restorative Justice*, (Jan. 18, 2011), <http://allafrica.com/stories/201101180212.html>. Instead of citizens resolving disputes on their own, the Mediation Committee Act hopes that Rwandan citizens will learn and understand the law through mediation, and consequently, there will be less violations. *Id.* Moreover, the reason for a public trial is for accountability. See *Mutisi, supra* note 53, at 57. The government believed that transparency would enhance accountability, which would assist to restore order and enhance security. *Id.*

55. Bernard, *supra* note 1, at 340. Mediation is used to address many issues that appear small, but affect its people on a daily basis, such as cases relating to housing, property, contracts, land, and family inheritance. *Id.* These types of issues are those that the Constitution seeks to address; and, the Constitution uses mediators and communities, using the values emphasized values, to erect these problems and bring justice to the people. *Id.* at 330-31. The structure of the trials looks more like arbitration. *Id.* at 340. Formal minutes are taken, parties present arguments, and witnesses offer testimony. *Id.* Each party selects neutrals separately, and the two neutrals selected by each party then choose a third neutral to complete the panel of three. *Id.* at 340-41.

56. *Id.* at 339. Each part of the nation is assigned a mediation committee, and the committee is responsible for mediating before a case is filed in court. *Id.* The scope of the statute is wide, and that may be to allow mediators to evolve and create a system to works for the community according to its needs. *Id.* at 340.

57. *Id.* at 339. Some argue that for these Committees to work in the different regions, local enforcement has to play a role. *Rwanda: Mediation Committees Should Promote Restorative Justice, supra* note 55. Local authorities can emphasize the importance of the Mediation Committees in the different regions, endorse the programs by referral, and suggest to locals that they get involved and attend hearings. *Id.* Another purpose of local Mediation Committees is to attempt to ensure that disputes can be resolved at a local level instead of allowing them to escalate to a national level, supporting the larger national peace agenda. *Mutisi, supra* note 53, at 57.

own processes to meet the needs of their specific cases.⁵⁸ The types of cases to be observed by the Mediation Committee and the procedures are not entirely specified, but one provision demands that mediators seek first to reconcile the parties.⁵⁹ Mediators are neutrals selected from areas other than the specific village where the dispute is being handled.⁶⁰ The government encourages the use of ADR “to ‘strengthen and promote national unity and reconciliation’ by appealing to a Rwandan sense of family values transcending tribal boundaries.”⁶¹

The Mediation Committees received mixed responses—some women were unable to confront the perpetrators, but others fiercely approached with the belief that there was nothing left to lose and desired to tell their stories, regardless of the outcome.⁶² Women also had to deal with the consequences

58. Bernard, *supra* note 1, at 339-40. By not setting strict rules, the government suggests that “[t]he objective of decentralization was to allow citizens to ‘participate in the planning and management of their development process.’” Mutisi, *supra* note 53, at 55. Processes that resemble mediation have been used in Rwanda since before prior to the colonial era, and have now evolved. *Id.* at 53. These processes helped shape practices and social interactions that result in mending broken relations, establishing new bonds, and bridging social divisions. *Id.* These practices have been used in the past and the government continues to expand on these existing procedures. *Id.*

59. Bernard, *supra* note 1, at 339-40. This again points to the assumption that the statute leaves flexibility for the Mediation Committees in separate regions to adapt according to the evolving cases instead of implementing rigid rules in the beginning. *See id.* at 339-40. The statute does designate some guidance for the types of cases to be reviewed. *See id.* at 340. Before going to court, mediators are “the gatekeeper[s] for any civil cases relating to land, housing, cattle, non-performance [of] a contract[], family cases, and inheritance [cases].” *Id.* The only limits set are a financial cap and no criminal cases. *Id.*

60. *Id.* at 340-41. Although the mediators are neutrals, the Rwandan population accepts them because they are people who live among the community impacted by where the conflicts impacted, and so they understand the dynamics of the situation better. Mutisi, *supra* note 53, at 58. Mediators are not simply ones who listen; but they are active in the adjudication process. *Id.* at 60. Before gathering to hear cases, mediators collect information by conducting investigations and consulting with community members about the dispute. *Id.*

61. Bernard, *supra* note 1, at 343. The government acknowledges the toll of the genocide and the impact on relationships, and as a result, one of its main objectives is “‘bridging the rifts within society and healing the wounds of those afflicted by genocide.’” Mutisi, *supra* note 53, at 52 (citation omitted).

62. Bernard, *supra* note 1, at 345. There are also other reasons that women are hesitant to come forth with claims, such as lack of confidence in fighting for one’s rights due to lack of knowledge of rights and a limited education, or even shame because of poverty. *Experiences of Women in Asserting Their Land Rights: The Case of Bugesera District Rwanda* 10, in RWANDA WOMEN’S NETWORK, 13-14 (March 2011), available at http://www.landcoalition.org/sites/default/files/publication/956/WLR_5_RWN.pdf. Mediators are also aware of the sensitivity of the subjects at hand, so there is a pre-mediation conference conducted in private, for a woman-to-woman conversation. Bernard, *supra* note 1, at 350. An older woman is used to provide help as a symbol of comfort and guidance. *Id.* Moreover, the use of the older

of pursuing their rights.⁶³ Everyone continued to live in close proximity, and most people were aware of everyone else's stories, so privacy and protection—from perpetrators, victim's feelings, and the community's opinions and judgments—were absent.⁶⁴ However, the success of Rwandan ADR lies in the community's voluntary commitment to pressure participants to adhere to agreements and ensure that the defendants' conduct is morally and legally acceptable, thereby providing security for women who pursue their property rights.⁶⁵ The concept of using the community as private security is in accordance with the government's hope to build community values and to mend relationships in society. Mediators must be sensitive to the fact that women and children need to be provided for and that the community is crucial in the success and aftermath of mediation.⁶⁶ The government asks that mediators focus on the underlying problems in the community and seek to establish creative resolutions that not only provide for physical and financial stability but also emotional security for the future.⁶⁷

woman acts as a veil before going in front of the public to tell a story, therefore hoping to reduce re-victimization. *Id.* Similar to the United States, Rwanda implemented certain procedures to address the issues so as to not re-victimize parties. *See* Renée L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 98-99(2001).

63. Bernard, *supra* note 1, at 345. Some people may retaliate against women who sought to pursue their rights. *Id.* However, the Mediation Committee encouraged the community to provide security for the women using mediation. *Id.*

64. *Id.* at 345. While privacy and neutrality is foundational for U.S.-style mediation, many Rwandans want a mediator who is a respected member of the community who is aware of the situation and the impact of the Genocide. *See* Mutisi, *supra* note 53, at 58.

65. Bernard, *supra* note 1, at 345. If the government is used and people are threatened to participate in mediation, then the benefit of mediation to empower people to participate in building the land is lost. *See* Mutisi, *supra* note 53, at 65. People will not participate because they believe in the mediation process, but because of compulsion. *Id.* at 66. Furthermore, individuals may feel that they are sacrificing their rights for the community. *Id.* There must be a balance because people who come to mediation need leverage in their claims, and therefore, must have another avenue to fight for their rights, but at the same time, the community must be empowered to fulfill the government's goals in implementing mediation.

66. Bernard, *supra* note 1, at 346.

67. *Id.* at 346. The process and outcome of mediation are intended to support the goal of conciliation and restoration instead of retribution. *See* Mutisi, *supra* note 53, at 60. The parties compromise and come to an arrangement. *Id.* The use of mediation allows parties to address issues and emotions instead of simply granting one party a verdict and punishing another party.

B. Nicaragua Includes U.S.-Style Mediation to Address Domestic Violence Cases

Early in the Sandinista period, a women's organization began to gain legal rights for women and even took on leadership roles, which allowed women to empower themselves even in their private lives.⁶⁸ Despite the growing presence of women in significant leadership roles, the effects of *machismo* on the culture were untouched and deeply embedded.⁶⁹ However, the standstill may have been due to the fact that women's organizations were not independent and autonomous forces until the post-Sandinista period despite their involvement in more powerful positions.⁷⁰ Once they became more independent, women channeled their efforts towards eliminating discriminatory and sexist policies and legislation.⁷¹ Changes were made, and eventually, laws were introduced that criminalized behavior that was often considered a societal norm.⁷² The hurdle of truly addressing domestic violence in the adversarial legal system remains.⁷³ Mediation is a technique to address deep-seated challenges and establish lasting change. There are currently three major transnational movements that are the principal

68. Aldana & Saucedo, *supra* note 4, at 1275. This began the trajectory of reforms toward equality of the sexes. *Id.* at 1276. Overall, community movements were growing because of the government's "[f]aith in the power of the collective to resolve societal problems." *Id.* Sandinistas allowed women leadership roles in political, civic, and economic arenas. *Id.*

69. *Id.* at 1276. No efforts were put forth to change the laws and policies, or to challenge cultural norms that condoned violence against women. *Id.* (citation omitted). Women's rights were considered feminist concerns and therefore, were never a priority. *Id.*

70. *Id.* at 1278. More recently, women's movements became independent and autonomous, moving to an independent set of organizations that could fight for change. *See id.* Earlier, women's movements did not have a voice in matters such as health, family, and economic rights. *See id.*

71. *Id.* at 1278. Part of the reason for the rise of feminism was the President's anti-feminist policies. *Id.* at 1279. The government attempted to retract progress and re-introduce traditional roles for women by reducing employment for women and venturing to send women back into homes by emphasizing traditional family values and marriage. *Id.*

72. *Id.* at 1283-84. Finally, the government introduced laws against domestic violence. *Id.* at 1284. Women could petition for protective orders, and law enforcement could take action against abusers. *Id.* Moreover, psychological violence was also considered a crime. *Id.*

73. *Id.* at 1285. Like many other foreign countries, the adversarial system lacked governmental resources. *Id.* Whereas before judges previously could take charge of investigations, under the new system, victims had to rely on police and prosecutors to do the investigations instead. *Id.* However, prosecutors focused on evidentiary standards and often were unwilling to pursue cases that had no immediate evidence beyond a woman's allegation of abuse. *Id.* at 1286.

participants in shaping mediation in Nicaragua: global feminism, global evangelism, and rule-of-law reformers.⁷⁴

The Maria Luisa Ortiz Women's Cooperative opened a health center and immediately began to treat many symptoms that were a result of intra-family violence.⁷⁵ The Cooperative resorted to citizen's arrests, public shaming, and prosecutions, and the Cooperative assisted women through the entire process of filing a criminal complaint.⁷⁶ The Cooperative recognized that its legal services were not enough—social and psychological needs were still not addressed—and that the solution was not to send the men to jail.⁷⁷

A Mediation Center was created in Nicaragua in 2005.⁷⁸ The Mediation Center asked for volunteers—specifically community leaders from different fields—to participate in forty to sixty hours of training.⁷⁹ The Mediation Center studied the tactics of the Cooperative along with the role of religion in the Nicaraguan community in order to build its own structure.⁸⁰ Religious doctrine suggested that resolution lies in the transformation of violent men into responsible providers, husbands, and fathers.⁸¹ One belief that both the churches and the Cooperative share is a rejection of the neutral decision-maker aspect in the mediation process.⁸² The Mediation Center would attempt to translate transitional movements into a program that would fit into the existing political and institutional structures.⁸³

The Mediation Program in Nicaragua centered on mediation to satisfy the needs of the parties and to address and protect women from any harm in

74. *Id.* at 1269–72. Transnational movements demonstrate how communities are handling social issues, such as domestic violence. *Id.* at 1269. Global feminism is increasing throughout developing countries, and fighting for domestic violence to be considered a crime that requires state intervention. *Id.* This rights-based approach brings previously considered private affairs in the public arena for government awareness and regulation in order to address women's overall subordination. *Id.* at 1269-70. Global evangelism is especially important because it is one of the largest movements in the world and in this specific case, because of the religiosity of the Nicaraguan people. *See id.* at 1271. The churches do not approve of domestic violence, but respond to it using a transformative process. *Id.* Rule-of-law reformers desire to use the nations' justice systems. *Id.* at 1272. These reformers desire the use of U.S.-style mediation to develop foreign nations' legal systems. *Id.*

75. *Id.* at 1290. Cases were often severe, and included anything from incest, spousal rape, and kidnapping for sexual exploitation, to physical and emotional abuse. *Id.* The Cooperative established a support system for women. *Id.*

76. *Id.* at 1290.

77. *Id.* at 1291.

78. *Id.* at 1292-93.

79. *Id.* at 1293.

80. *See id.* at 1294.

81. *Id.* at 1297.

82. *Id.* at 1298.

83. *Id.* at 1309.

[Vol. 14: 311, 2014]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the most informal and efficient way possible.⁸⁴ A collective mediation effort was also used to empower individuals to seek self-help with the support of a community with common interests.⁸⁵ The mediators are trained to empower parties and help individuals recognize their positions, which allows parties greater self-confidence and self-realization, hoping to transform the conflict to strengthen both parties and their society.⁸⁶ This mediation process is also informal and consensual and is used as an inexpensive and expedient alternative to formal legal processes.⁸⁷ A flexible, efficient, and cheap system characterizes the Nicaraguan mediation process used to help women address issues of domestic violence that have yet to be adequately addressed by the legal system currently in place.⁸⁸

IV. RESULTS OF MEDIATION

A. *Common Challenges*

As ADR grows throughout foreign nations, those at the forefront have to learn to recognize common challenges in order to respond to basic community needs in places of introduction.⁸⁹ In the aftermath of conflict, an important step is to rebuild local neighborhoods so that some form of dispute resolution can take place in order to address needs that courthouses may not be able to undertake.⁹⁰ Some researchers are concerned about using

84. *Id.* at 1311. Although laws were implemented, enforcement became a problem because of a lack of the government's resources. *Id.* Some argue that mediation is harmful to women because this method of discussing rights leads to alienation and passivity. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1565-68 (1991).

85. Aldana & Saucedo, *supra* note 4, at 1312. This especially appealed to the Cooperative's collective spirit. *Id.* The mediation would also work as a continuation of the Cooperative's agenda by encouraging community discourse of the issues. *Id.*

86. *Id.* at 1313-14.

87. *Id.* at 1314-15.

88. *Id.* at 1311.

89. *See* Erbe, *supra* note 6, at 373. Many people groups are not addressing their most dire needs, so people are coming in to help. *See id.* Despite their desire to help with local problems, peace builders have to deal with widespread apathy and unresponsiveness. *Id.* Hence, they have to figure out how to motivate these communities and how to use facilitative practices to illuminate transcendent possibilities. *Id.*

90. Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 65 (2001). Local forums can assist while courthouses are being rebuilt, and lawyers and judges are being trained in the aftermath of conflict. *Id.* Even in a stable country like the United States, community courts are an important aspect of society and a working legal system. *Id.*

mediation—especially U.S.-style mediation—in foreign countries because of its disregard for existing cultural traditions and a State’s weak legal infrastructure. Many researchers are uneasy about the marrying of formal national systems and informal local systems due to the potential for state coercion instead of voluntary community participation.⁹¹

Another concern with local justice is the handling of novel crimes, which are likely to occur in the aftermath of conflict.⁹² One researcher states that local justice systems should only focus on “ordinary subject matter,” which may include property, restitution, and community issues.⁹³ On a broader note, some appear to be opposed to mediation in foreign countries because they believe it may detract from building stable national justice systems.⁹⁴ ADR cannot replace the rule of law, and some suggest that ADR is being “born [out] of a contempt for law,” and cannot help the legal system in addressing issues that are foundational to its development.⁹⁵ Individuals

91. Waldorf, *supra* note 8, at 13. This author states that linking an informal local system with a formal State system is detrimental because the positive attributes of an informal system deteriorate when the process is not voluntary, but instead a product of State coercion. *Id.* If the system is flooded with procedural requirements, then there may be competition rather than cooperation between the systems and individuals in the community may suffer. *Id.* Another person made a critique about informal methods, alleging that informal methods for resolving conflicts would collide with the need for broader structural changes that would protect those without power. *See* Aldana & Saucedo, *supra* note 4, at 1316-21.

92. *See* Waldorf, *supra* note 8, at 85-86. Some of the local systems and mediation have never had jurisdiction over crimes of genocide, or other criminal offenses, and therefore may have problems in handling these. *Id.* In some cases, countries do not allow the local systems to handle criminal cases.

93. *Id.* at 86. This author believes that the local systems should only deal with civil cases, which we see in Rwanda. However, Rwanda may allow some mediators to investigate into abuse or rape cases. *See* Mutisi, *supra* note 53, at 60. Waldorf does not undermine the importance of these issues by calling them “ordinary subject matter,” because he realizes that these issues at hand are often the center of tension or inducement of violence in intrastate conflicts. Waldorf, *supra* note 8, at 86.

94. *See generally* Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management—In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573, 582 (2002) (asking “[i]f the spread of ADR is born of a contempt for law and if the International Court is to be replaced by international negotiation, using justifications of efficiency or stability, then what hope is there for the justice issues that should be foundational here?”); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 196 (2003). Some argue that mediation cannot replace a just rule of law. *See* Nader & Grande, *supra* note 95, at 582. Citizens will not be able to use the justice system to achieve social change. *See* Hensler, *supra* note 95, at 196.

95. Nader & Grande, *supra* note 95, at 582. In certain situations, foreign organization will be accountable to no one, and this may lead to an abandonment of “the just rule of law in exchange for international negotiation based on economic efficiency of feel-good principles of psychology, rather than focusing on principles of law.” *Id.* at 583. This author specifically notes the mentions to ADR, stating that “ADR specialists have defined their domain in too limited a frame. They need to enlarge the scope. And when they do, they will also realize that it is not possible to have a universal paradigm for conflict management.” *Id.*

[Vol. 14: 311, 2014]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

who seek ADR are leaving their group protection in order to solve conflicts through ADR, but some concern arises as people are shepherded outside the courthouse into a private mediation because “citizens’ abilities to use the justice system effectively to achieve social change will diminish markedly . . . [and] citizens’ tendencies to turn to the court as a vehicle for social transformation will diminish as well.”⁹⁶ However, it appears that the mediation attempts in both Rwanda and Nicaragua took many of these considerations into account, and worked to create a system in which the community could feel comfortable and trust the model as their own.

B. *Creating an Effective ADR System*

Rwanda used its limited resources to employ local systems for ADR in order to blend statutory rights, personal needs, and traditional values in a flexible way to create an effective system for Rwandan law and society.⁹⁷ The Mediation Committee in Rwanda took U.S.-style ADR and applied it to African local cultures, but focused on maintaining statutory and constitutional objectives while implementing mediation in a way that invoked traditional values shared by Rwandans.⁹⁸ In both Nicaragua and Rwanda, the neutrals were not fully neutral, but people from within close communities that were often aware of the situation.

Unlike ADR in the United States, Rwandans followed the healing metaphor of the *umwunzi*—a trusted person who healed broken relationships—to choose people to assist throughout the process in order to build trust, comfort, and adhere to the needs of the people and its culture.⁹⁹ Moreover, actual sessions were held in public and were open to the community for accountability.¹⁰⁰ Rwandans ignored the U.S. definition of neutrals, but instead blended the needs of the people, cultural traditions, and the goals of the Rwandan Constitution to create an ADR practice.

96. Hensler, *supra* note 95, at 196; *see also* Nader & Grande, *supra* note 95, at 589. While some organization have worked for years to get once ignored issues at the forefront of the government’s door, the mediation process may push these issues back into a private realm, which is counterproductive to the work that has been built over the years. *See* Aldana & Saucedo, *supra* note 4, at 1316-21.

97. Bernard, *supra* note 1, at 352.

98. *Id.* at 347.

99. *See id.* at 348-49. Using an “*umwunzi*” also helped to reduce re-victimization for women because of the comfort and guidance that these women found through these interactions. *See id.* at 351.

100. *Id.* at 349.

The Nicaraguan ADR attempts also reflect a divergent view on neutrality.¹⁰¹ In Nicaragua, the Mediation Committee incorporated the experience of those who went before them—religious sectors and the Women’s Cooperative.¹⁰² These groups suggested a more activist, insider approach, which would involve advocacy and room for a partial insider who can monitor the family to avoid re-victimization.¹⁰³ Furthermore, these organizations asked for mediation to allow for transformation.¹⁰⁴ Transformation suits the need of the society and of women who want to be with their husbands, maintaining their home and family without submitting to abuse.

Rwanda hoped the transformation of the community would re-instill lost values, while Nicaragua asked for transformation of the community in regards to its acceptance of certain detrimental cultural beliefs. Still, the mediation process can only be an adequate tool for transformation if the parties reflect, believe, and act upon its transformative power.¹⁰⁵ In a societal context, mediation does not have to be a threat that will shove conflicts back into a private realm. Instead, mediation can stimulate public discussion about these issues with individual circumstances and women’s rights as the backdrop.¹⁰⁶ Nonetheless, this process will require the existence of national laws that will punish the behavior at issue.¹⁰⁷ The mediation process not only solves individual conflicts, but also becomes a forum for a human rights project.¹⁰⁸

The outcome of ADR cannot depend on a Western definition of success in mediation, but instead must consider “how well—and to what ends—[transnational ADR] function[s] in the lives of disputants who use them.”¹⁰⁹ Mediation in developing countries has the ability to shift power and challenge injustices of the national legal system depending on how

101. Aldana & Saucedo, *supra* note 4, at 1323. The authors reference Amy Cohen, another researcher from Nepal comparing the similar development in Nicaragua. *See id.* Cohen states that their use of mediation is less neutral because it incorporates traditional mediation procedures, which are is more open, public, and rights-based than Western-style mediation. *Id.*

102. *Id.* at 1324.

103. *Id.*

104. *Id.* at 1324-25.

105. *Id.* at 1325.

106. *See id.* at 1325-27. In Nicaragua’s situation, the Cooperative suggests incorporating public shaming of perpetrators. *Id.* Moreover, Nicaragua calls for strong laws against domestic abuse so that women will trust in the system because they know that they are safe to take legal approaches to fight their claims. *Id.*

107. *See id.* One threat to mediation is that parties do not believe they are “operating on a level playing field,” which interferes with a successful negotiation because they cannot fully fight without the belief that they can walk away from a mediation and go elsewhere to enforce their rights. *Id.*

108. Cohen, *supra* note 9, at 295.

109. *Id.* at 298.

[Vol. 14: 311, 2014]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

mediation is utilized.¹¹⁰ In many foreign countries, an individual is defined by—in terms of protection and legal rights—the group that he is ascribed to, so testing individual rights in mediation can affect the rights of the group as a whole.¹¹¹ In another country, Nigeria found success in its mediation system because it embraced the cultural concept of the individual as one within a community context.¹¹²

Community mediation is used throughout many foreign countries.¹¹³ Many of these countries realize that while U.S.-style mediation is private and depoliticizes the conflict, foreign conflict may demand an ADR practice that allows for a broader access to justice and the assertion of human rights.¹¹⁴ The use of community mediation requires structure and practices that fight injustice driven by a process that collectivizes and socializes conflict, utilizes dispute resolution procedures already in place, and enforces fundamental human rights.¹¹⁵ This use of ADR as a mixture of accessing justice, considering cultural traditions, and asserting human rights, “has the potential to bridge the gap between the kind of law needed to operate in a global marketplace and the type of grass roots justice that works [best] on the ground.”¹¹⁶

The situation in Rwanda is unique because women have been abandoned and alienated, leaving them with no community. The goal of ADR here has been to restore the communal values. In Nicaragua and other countries, even in the midst of conflict, individuals have access to some group that provides some protection. Regardless, these groups have not

110. *Id.* at 300.

111. *See* Nader & Grande, *supra* note 95, at 589. Social structure is important in developing countries. *Id.* An individual receives protection from within his group, and he gains more protection if his group is more powerful. *Id.* Due to its communal perspective, an individual’s rights and duties are ascribed to him according to the group with which he is associated that he is associated with. *Id.*

112. Phyllis E. Bernard, *The Administrative Law Judge as a Bridge Between Law and Culture*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 40 (2003). In Nigeria, the mediation committee asked those working to resolve conflicts “with the involvement of the largest number of relevant persons, not the smallest...[b]ecause almost any ostensibly legal conflict may be less about the law than about the people involved, and people . . . do not live without a social context.” *Id.*

113. *See* Eduardo R. C. Capulong, *Mediation and the Neocolonialism Legal Order: Access to Justice and Self-Determination in the Philippines*, 27 OHIO ST. J. ON DISP. RESOL. 641, 641 (2012).

114. *See id.* at 641-42.

115. *Id.* at 641.

116. *Id.* at 648. Access to justice is the ability to use the rule of law. *Id.* at 664. This contrasts with the view that justice only comes through the courtroom, because individuals can seek to resolve issues without using the courthouse, but can still have the leverage of the rule of law. *See id.*

been enough and cannot offer legal protection. Consistent in both Rwanda and Nicaragua, ADR is implemented to fight complacency in society—either by questioning cultural norms or through the breaking down of cultural values in the midst of conflict—in a way that attempts to induce larger, public change for women and their society in general.

V. CONCLUSION

This Article looks at the implementation of ADR in two separate countries with two separate issues. In Rwanda, ADR is mainly used to address post-genocide concerns of women who are left to take care of themselves and their family. In Nicaragua, mediation is used to resolve disputes that involve domestic abuse and women's rights. In both of these countries, ADR is a means of addressing certain issues that stem from deeply embedded cultural norms that affect the lives of women. The legal systems in place have not found the necessary means to address the issues that plague a great part of their population. The introduction of ADR was a possible alternative to address these issues.

While scholars may argue that adopting ADR to address these issues stifles the government and does not allow for changes in the law of these countries, instead forcing victims to beg for justice through any means, this may not be the case. From another perspective, mediation can be viewed as a bold movement by the people made toward creating a system that is efficient and effective, blending statutory rights, personal needs, and traditional values to address issues plaguing the population. The key may be to capitalize the strengths within that community to adopt a system that addresses the pervasive issues and whatever underlies those issues.

Women can be empowered because they negotiate their rights and power to come to an agreement that will allow them to survive and thrive in the community. This process of negotiation is legitimized when the people in the community and the proper public authorities support the ADR system and stand behind the people involved. The development and growth of ADR as a valid process for addressing issues can only happen if there is also research and follow-up so that those using the process can discover what is working and how it is affecting those involved, from political figures and those in the legal system, to those who are victims using the system. Assessments should be taken to adjust the process so that it can be most useful for the countries using ADR. From what is seen in Rwanda and Nicaragua, the legal system may not be better than ADR, especially considering the cultural and traditional workings within those countries. It can be helpful for other countries to study the implementation of ADR in

[Vol. 14: 311, 2014]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

places such as Rwanda and Nicaragua in order to adopt a process suitable to that country to address rampant issues in those countries.