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## Access to Civil Justice in the United States and the Soviet Union: A Comparative Analysis

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**ACCESS TO CIVIL JUSTICE IN THE UNITED STATES  
AND THE SOVIET UNION: A COMPARATIVE  
ANALYSIS**

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## INTRODUCTION

This comment compares the civil justice systems of the United States and the Soviet Union. The civil justice systems of both societies share common objectives;<sup>1</sup> each seeks to provide quality civil justice in accordance with its social and economic values.<sup>2</sup> Quality civil justice includes speedy dispute resolution with minimal cost to society, high satisfaction for disputants, and preservation of social values.<sup>3</sup> Moreover, quality civil justice requires ready access to civil dispute resolution

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1. See *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976) (conference proceedings) (discussing the reasons for dissatisfaction with the United States justice system and possible goals for a reformed system); Johnson, *Access to Justice in the United States: the Economic Barriers and Some Promising Solutions*, in *ACCESS TO JUSTICE: A WORLD SURVEY* 915 (M. Cappelletti & B. Garth ed. 1978) (studying the reasons for failure of the United States justice system to provide ready access to dispute resolution and discussing the goals for a reformed system); Zivs & Melnikov, *The Legal Status of Parties in Soviet Civil Procedure: Rights, Duties and Guarantees*, in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION* 639 (M. Cappelletti & D. Tallon ed. 1973) [hereinafter cited as Zivs & Melnikov] (presenting a study of "rights" of parties in the Soviet civil justice system and discussing the goals of civil justice); Puchinskiy, *Access to Justice in the Soviet Union*, in *ACCESS TO JUSTICE: A WORLD SURVEY* 819 (M. Cappelletti & B. Garth ed. 1978) (presenting an overview of citizen access to the Soviet civil justice system and discussing the goals of the Soviet system).

2. See L. NADER & H. TODD, *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* 2 (1978) [hereinafter cited as L. NADER & H. TODD] (presenting a study which discusses in its survey of dispute resolution mechanisms in different societies the role of the preservation of social order in the civil dispute resolution process).

3. See Address by Chief Justice Warren E. Burger before the Twin Cities Advisory Council of the American Arbitration Association, Saint Paul, Minnesota (Aug. 21, 1985) [hereinafter cited as Burger Address] (available at the United States Supreme Court information center, Washington, D.C.) (discussing the quality of justice in the United States and goals of civil justice); Friedman, *Access to Justice: Social and Historical Context*, in *ACCESS TO JUSTICE: PROMISING INSTITUTIONS* 5 (M. Cappelletti & J. Weisner ed. 1978) (discussing the consideration in analyzing access to justice).

mechanisms for all citizens.<sup>4</sup> A comparison of whether United States and Soviet civil justice systems provide quality civil justice and, more specifically, ready access to civil justice for their citizens, will hopefully suggest ways to improve the American system.

Part I of this comment analyzes the United States civil justice model: a system which emphasizes the use of the judicial forum.<sup>5</sup> Part I also examines the trend toward the creation of non-judicial dispute resolution forums that has developed in response to maladministration of civil justice and overuse of the United States judicial structure.<sup>6</sup> Part II analyzes the civil justice system of the Soviet Union, a system that offers an abundance of well-established quasi-judicial and non-judicial forums that complement the courts and provide vehicles for the resolution of civil disputes. A comparison of the two systems then reveals that the Soviet system avoids many of the present shortcomings of the United States system.<sup>7</sup> Finally, this comment analyzes what the United States can learn from the Soviet model. The distinct social values of the Soviet Union that permit the implementation of a variety of dispute resolution techniques potentially unacceptable in the United States temper recommendations for change based solely on the Soviet experience. Nevertheless, a comparative analysis illuminates many of the causes for drawbacks in the United States system, and it prompts suggestions for future growth.

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4. See Johnson, *Thinking About Access: A Preliminary Typology of Possible Strategies*, in *PERSPECTIVES ON ACCESS TO JUSTICE* (M. Cappelletti & B. Garth ed. 1979) (presenting a comprehensive sociological study of the considerations to be made in the construction of a civil justice system with a ready access to dispute resolution).

5. This article applies certain terms in a special context. The term "judicial organ" refers to a court within the meaning of article III of the U.S. Constitution. The term "quasi-judicial organ" refers to a forum that though administered entirely by the State is not a court within the meaning of article III. A "non-judicial organ" is any dispute resolution vehicle that the State may or may not administer and that does not produce decisions that the State may inherently enforce.

6. See J. MARKS, E. JOHNSON & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA: PROCESS IN EVOLUTION* (1984) [hereinafter cited as *DISPUTE RESOLUTION*] (presenting an overview of the present crisis in the administration of civil justice in the United States and the objectives of the alternative dispute resolution movement); 1 *OHIO ST. J. ON DISPUTE RESOLUTION* (1985) (containing a number of articles on the alternative dispute resolution movement).

7. See Chechot, *Judicial Protection of Subjective Rights and Interests*, *SOVETSKOE GOSUDARSTVO I PRAVO* 4 (1967), cited in J. HAZARD, W. BUTLER & P. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980's* 126 (1984) [hereinafter cited as *SOVIET LEGAL SYSTEM*] (presenting an overview of various types of dispute resolution forums in the Soviet society).

## I. ACCESS TO CIVIL JUSTICE IN THE UNITED STATES

Our system is too costly, too painful, too destructive, too inefficient, for a truly civilized people.<sup>8</sup>

—Chief Justice Warren E. Burger

### A. GUARANTEES TO ACCESS: THE UNITED STATES CONSTITUTION AND STATUTORY PROTECTION

The United States Constitution only implicitly guarantees access to civil justice by providing for the creation of a Supreme Court and such inferior courts as Congress may establish.<sup>9</sup> The Constitution delegates judicial power to hear and rule on a wide variety of cases to those courts.<sup>10</sup> Article III of the federal Constitution further enumerates specific cases over which courts have jurisdiction and, in some cases, the nature of that jurisdiction. Complex state and federal civil codes supplement the Constitution.<sup>11</sup> Together, they define the relationships between individuals and organizations, and the reciprocal obligations arising from those relationships.<sup>12</sup> The common law also provides a large

8. Burger, *The State of Justice*, 70 A.B.A.J. 62, 66 (1984).

9. See U.S. CONST. art. III, § 1 (providing in the pertinent part that “[t]he judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress shall from time to time ordain and establish”); Smit, *Constitutional Guarantees in Civil Litigation in the United States of America*, in FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION 417, 421 (M. Cappelletti & D. Tallon ed. 1973) (noting that explicit constitutional guarantees to access to the courts do not exist in the United States). Nevertheless, the common law regards access to the courts as a necessary prerequisite for the pursuit of justice which courts have characterized as a fundamental right under the Constitution’s Due Process guarantee. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (ruling that access to the courts is a fundamental constitutional right).

10. U.S. CONST. art. III, § 2 (“The judicial power shall extend to all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”).

11. U.S. CONST. art. III, § 2. The due process clauses of the Fifth and Fourteenth Amendments, requiring that no person shall “be deprived of life, liberty, or property without due process of the law”, have been the principal Constitutional provisions interpreted under the common law as guaranteeing citizen access to the courts. U.S. CONST. amend. V. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Dreher v. Sielaff*, 636 F.2d 1141 (9th Cir. 1980); *Mitchum v. Purvis*, 650 F.2d 647 (5th Cir. 1981) (ruling that the Due Process Clauses of the Constitution guarantee the right of access to the courts); see also Smit, *Constitutional Guarantees in Civil Litigation in the United States of America*, in FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION 417, 449 (M. Cappelletti & D. Tallon ed. 1971) (presenting a general overview of citizen access to the courts under the United States Constitution).

12. See Act to Establish Judicial Courts of the United States, ch. XX, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.) (1789) (defining the Supreme Court’s function and establishing inferior federal courts). See generally D. BRODY, *THE AMERICAN LEGAL SYSTEM: CONCEPTS & PRINCIPLES* 21 (1978) (presenting a historical overview of the development of federal district and circuit courts); *Stoffel v. W.J. McCahan Sugar Ref. & Molasses Co.*, 35 F.2d 602, 603 (D.C. Pa. 1929) (dis-

body of precedent that further defines the rights and obligations of individuals.<sup>13</sup>

The civil courts provide a forum for resolution of the wide variety of disputes that arise under these laws. The breadth of the courts' jurisdiction to entertain civil disputes, however, does not guarantee access to justice. Statutes and the common law have restricted access to the courts for civil disputes.<sup>14</sup> Potential litigants, generally, must exhaust other civil dispute resolution mechanisms or fulfill statutory requirements before resorting to the courts.<sup>15</sup> A specific court, further, must have proper jurisdiction over the dispute.<sup>16</sup> Also, the court must consider the case "ripe" for adjudication.<sup>17</sup> Access to the courts for resolution of civil disputes, moreover, is not guaranteed, particularly where alternative dispute resolution forums might exist.<sup>18</sup> Despite these gen-

Discussing "law" as being defined according to these terms).

13. *Moore v. United States*, 91 U.S. (7 Wall.) 270 (1875) (noting that the common law is the basis for American legal doctrine). The United States common law system recognizes both codified laws and case precedent as existing "law." Early American colonies inherited the common law system from the British. See *Delaware Optometric Corp. v. Sherwood*, 86 Del. 222, 225, 128 A.2d 812, 816 (Del. 1957) (discussing Delaware's inheritance of the common law system). Subsequently, states that had not been British colonies adopted the common law system. See, e.g., *South Pac. Co. v. Porter*, 160 Tex. 329, 331, 331 S.W.2d 42, 44 (Tex. 1960) (discussing Texas' adoption of the common law system). See generally R. POUND, *THE SPIRIT OF THE COMMON LAW* 176 (1921); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 34 (1970) (discussing the evolution of the common law).

14. See, e.g., *Ex Parte McCordle* 74 U.S. 506 (1869) (supporting the broad powers of Congress to limit the jurisdiction of the courts), *upheld in Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938); see also *Norris La Guardia Act*, 29 U.S.C. §§ 101-15, 107 (1982) (limiting Federal jurisdiction to issue an injunction on behalf of a business involved in a labor dispute).

15. See, e.g., *In re NLRB*, 304 U.S. 486 (1938) (discussing statutory requirements imposed upon complainants as prerequisites to the court's entertaining judicial review of NLRB orders).

16. See 28 U.S.C. §§ 1251-1631 (1982) (establishing the statutory jurisdiction of the federal courts); see also *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951) (holding that even at the appellate level, a suit already tried may be dismissed for lack of jurisdiction); *Wells Fargo & Co. v. City of San Francisco*, 144 P.2d 415, 417 (Cal. 1944) (presenting a general discussion on jurisdictional authority of courts to hear a dispute).

17. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 277, 239 (1937) (discussing the article III, section 2 "Case or Controversy" requirement of the U.S. Constitution); see also Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (discussing the "Case or Controversy" requirement); Tuschnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980) (same); Brilmayer, *A Reply*, 93 HARV. L. REV. 1727 (1980) (same).

18. *Boddie v. Connecticut*, 401 U.S. 371 (1971). In *Boddie* the Supreme Court stated:

[t]his Court has seldom been asked to view access to the courts as an element of due process . . . . "The" legitimacy of the State's monopoly over the techniques of final dispute settlement, even where some are denied access to its use, stands

eral limitations, however, wide access to the courts remains. The absence of precise limitations for recourse to courts in the majority of civil disputes has created a popular feeling that anything can be litigated.

## B. THE JUDICIAL FORUM

### 1. *The Role of the Courts*

The federal Constitution grants the courts broad judicial powers to adjudicate civil disputes. A judge, panel of judges or, where provided for, a jury, hear and rule upon civil disputes.<sup>19</sup> The state and federal governments have three principal levels of courts: courts of original jurisdiction, and two appellate levels.<sup>20</sup> In the states, there is a trial court level, sometimes an intermediate appellate level, and a state supreme court.<sup>21</sup> In the federal system, there are district courts of original jurisdiction within each state (ninety-four in the nation), appellate circuit courts (thirteen in the nation), and the United States Supreme Court named in the Constitution.<sup>22</sup> Civil and criminal matters are heard in separate courts.<sup>23</sup> Potential litigants may file civil disputes at either the state trial level or at the federal district court level, depending on the nature of the controversy and the court's jurisdiction.<sup>24</sup> Certain appel-

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unimpaired where recognized, effective alternatives for the adjustment of differences remain.

We do not decide that access for all individuals to the court is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual.

*Id.*

See also Comment, *The Heirs of Boddie: Court Access for Indigents after Kras and Ortwein*, 8 HARV. C.R.-C.L.L. REV. 571 (1973) (discussing the effect of Boddie on court access for indigents).

19. See U.S. CONST. AMEND. VII (providing the right to trial by jury where the value in controversy exceeds twenty dollars); *EX PARTE QUIRIN*, 317 U.S. 1 (1942) (discussing the seventh amendment right to trial by jury and limitations on that right).

20. See 28 U.S.C. §§ 1251-1631 (1982) (providing for the organization of the federal court system); MD. CONST. art. IV (regarding the creation and organization of the Md. state court system); see also H. GRILLIOT, *INTRODUCTION TO LAW AND THE LEGAL SYSTEM* 46-137 (2d ed. 1983) (presenting an overview of the U.S. state and federal court system).

21. State court systems differ. See, e.g., MD. CONST. art. IV (regarding the creation and organization of the Maryland state court system).

22. See 28 U.S.C. §§ 1251-1631 (1982) (providing for the organization of the Federal court system).

23. See, e.g., *State v. Nast*, 209 Mo. 708, 108 S.W. 563 (1908) (discussing statutory sources of judicial authority and the distinctions between the jurisdiction over civil and criminal disputes).

24. See *supra* notes 14-16 (presenting an overview of jurisdiction).

late courts have original jurisdiction over specific claims.<sup>25</sup> Most civil litigants have an automatic right to appeal adverse judgments to higher levels and litigants may also appeal some matters from the state supreme court up to the federal level.<sup>26</sup> Additionally, numerous specialized courts having original jurisdiction over specific matters have developed in both the state and federal systems.<sup>27</sup>

## 2. *The Interrelationship of Law, Justice, and the Courts*

In the United States, the importance of the *judiciary* for interpreting and administering the law has been inextricably linked to the preservation of the higher ideals of justice.<sup>28</sup> During the 18th and 19th centuries, the populace perceived the law as an immutable body of fundamental rights and freedoms that would preserve certain inherent rights of citizens enumerated in the Constitution, as well as stabilize the governmental order against transient changes in popular political philosophy.<sup>29</sup> With the populace conceiving the law as an expression of higher values, the image of the U.S. judiciary became elevated above that of the ordinary citizen.<sup>30</sup> Similarly, commentators have criticized the members of the professionalized bar for characterizing themselves as "priests at the temple of justice,"<sup>31</sup> much as religious figures characterize themselves as guardians of higher moral principles.

25. See U.S. CONST. art. III, section 2 and 28 U.S.C. § 1251 (1982) (establishing original jurisdiction of United States Supreme Court).

26. See *Stiles v. American Trust Co.*, 137 Cal. 2d 472, 290 P.2d 614 (1955); *Johnson v. Board of Zoning and Appeals of Baltimore County*, 196 Md. 400, 76 A.2d 736 (1950) (discussing generally the statutory nature of the right to appeal).

27. See 28 U.S.C. §§ 151-159 (creating courts specifically designated to adjudicate bankruptcy matters); 28 U.S.C. §§ 251-257 (1982), as amended 28 U.S.C. § 252 (Supp. III 1984); see also W. BURGER, YEAR END REPORT OF THE JUDICIARY (1982) (available at the United States Supreme Court Information Center, Washington, D.C.) (critiquing the effectiveness of specialized courts).

28. See E. Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18 (D. Kairys ed. 1982) (presenting a historical overview of the link between the judiciary and law and its perceived influence upon justice).

29. See C. CORWIN, *CORWIN ON THE CONSTITUTION* 79-139 (R. Loss ed. 1981) (discussing the background of constitutional law in the United States); Mensch, *supra* note 28, at 19-23 (noting that in the pre-classical period law was routinely described as reflecting a universal divine justice. "[T]he single most popular legal quotation, for rhetorical purposes, was taken from the Anglican theologian Hooker: 'Of law no less can be acknowledged, than that her seat is the bosom of God; her voice armony of the world'").

30. Mensch, *supra* note 28. See also J. AUERBACH, *UNEQUAL JUSTICE* (1976) (criticizing the U.S. legal profession and American Bar Association for elevating themselves above the "average" U.S. citizen).

31. Mensch, *supra* note 28, at 19.



The nature of the common law itself, however, is responsible for elevating lawyers above their clients. Because courts based their decisions on often complex manipulations of precedent, litigants were forced to rely on well-educated attorneys in order to prevail.<sup>32</sup> As a result, access to civil justice gradually became dependent upon the employment of professional practitioners.<sup>33</sup> Development of professional organizations for attorneys exacerbated this trend, further separating the guardians of the law from their clients.<sup>34</sup>

American legal thinking during the 20th century, in keeping with the dramatic changes in the social order, has taken on greater flexibility in the interpretation of fundamental legal rights and in the formation of policies that have helped to adapt the law to the needs of modern and dynamic society.<sup>35</sup> This adaptability has further contributed to the increased power of the judiciary and professional bar not only as leaders in the area of the law, but in society as a whole.<sup>36</sup> Laymen believe that courts are capable of applying magical legal reasoning to create a just remedy for all civil wrongs.<sup>37</sup> Moreover, with the developing role of the

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32. See *id.* at 21, n.8 (citing the famous statement by Lord Coke, that although "judges (including, especially, the King) had excellent natural reason, they did not have the 'artificial reason' of the law, which 'is an art which requires long study and experience, before that a man can attain the cognizance of it.'" 12 Coke's Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (K.B. 1608). Mensch, commenting on the technicality of law during the pre-classical period, asserts that Coke's theory survived. *Id.* Such technicality, of course, makes it necessary to hire the expert "artificial reason" that only a trained professional attorney could provide. *Id.*; see also J. AUERBACH, *supra* note 30, at 74-101 (discussing the rigor of legal education in the early 1900's and the consequent metamorphosis of legal doctrine into a technical morass which only lawyers could comprehend).

33. See *infra* note 36 (discussing perceptions of the role of "lawmakers" in different legal systems).

34. Mensch, *supra* note 28, at 19.

35. See M. Horowitz, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) at 253-66 (discussing the emerging importance of policy in legal decision-making and the consequent increased role of lawyers as policy-makers in the U.S. society); see also Mensch, *supra* note 28, at 29-37 (discussing the realist and post-realist periods in which judges openly considered policy and social needs in making decisions); J. AUERBACH, *supra* note 30, at 228-30 (discussing the increased and growing importance of lawyers in all aspects of politics and policy-making, a role traditionally filled by politicians).

36. See Rifkind, *Are We Asking Too Much of our Courts?* in National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 98 (1976) [hereinafter cited as Rifkind] (describing the role of the American judge as "lawmaker, a commentator, and an innovator to an extent not known in the countries which lack a legal system having roots in the common law").

37. See L. NADER & H. TODD, *supra* note 2, at 3 (discussing citizen's use of the law as a vehicle for personal protection as well as to enact social change); see also Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 811 (1971) (noting that courts have been "the most responsive and the most effective agencies of change during the past generation. As a result, highly

courts in the declaration and affirmation of the law in modern society, access to the courts has logically become an essential element for the achievement of civil justice. The judiciary's role in modern society as an institution of social authority is exemplified by the courts' intervention in numerous areas where regulation by other organs of government might appear more appropriate.<sup>38</sup> As in the 19th century, the judiciary has thus remained an institution which stands separately from the other government organs for the interpretation of the law, and, particularly in the 20th century, the implementation of civil justice.

### C. THE QUASI-JUDICIAL FORUM: THE ADMINISTRATIVE TRIBUNAL

Despite its status as the primary forum for civil disputes, the government-supported judicial system represents only one of many such forums. Consideration of large caseloads dictate that other governmental bodies be given quasi-judicial functions.<sup>39</sup> The government's provision for alternative forums of dispute resolution to judicial bodies represents not only a practical necessity, but also an important trend in this direction.<sup>40</sup>

As a complement to the judiciary, the federal government created many specialized quasi-judicial administrative tribunals within federal

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charged political and social issues, among many others, increasingly have been brought to the courts, not as a last resort, but as a first resort. The common attitude is that courts can do anything . . ."; DISPUTE RESOLUTION, *supra* note 6, at 16 ("America's court system stands as the fundamental dispute processing and resolution institution in our society, providing both a primary and an ultimate forum"); K. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981) (extensive study of the growth of the use of courts and litigiousness as a social phenomena).

38. See Rifkind, *supra* note 36 ("The American public today perceives courts as jack-of-all-trades, available to furnish the answer to whatever may trouble us: Shall we build nuclear power plants, and if so, where? Shall the Concorde fly to our shores? How do we tailor dismissal and lay-off programs during the depression, without undoing all of the progress achieved during prosperity by anti-discrimination statutes? All these are now the continuous grist of the judicial mills."). See *Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781 (D. Ala. 1971), *aff'd in part, remanded in part, decision reversed in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (placing the Alabama state mental health system under the federal court's supervision).

39. See Levi, *The Business of Courts: A Summary and a Sense of Perspective in National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 222 (1976) (discussing the need for the judiciary to break away from their traditional role as the only social dispute resolvers, and further, the need for other institutions to take on that role).

40. See Cappelletti, *Fundamental Guarantees of the Parties in Civil Proceedings*, in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION* 661, 706 (M. Cappelletti & D. Tallon ed. 1973) (discussing the increased governmental social responsibility in the 20th century that has correspondingly increased the obligation and intervention of courts).

agencies.<sup>41</sup> These tribunals enforce federal laws, promulgate regulations, and offer forums for dispute resolution on questions related to agency expertise.<sup>42</sup> A variety of such administrative forums exist, each having the distinct characteristics granted to them by statute.<sup>43</sup> Procedures for adjudication and rules of evidence vary with each administrative tribunal.<sup>44</sup> Generally, they are much less formal than a court judicial proceeding.<sup>45</sup> To this end, the federal government created administrative forums for the resolution of labor disputes related to employee claims of discrimination in the civil service. The Equal Employment Opportunity Commission (EEOC) has an office in each of the federal agencies which investigates claims of employment discrimination and attempts to resolve disputes between complainants and their employers on an informal, and later formal, basis.<sup>46</sup> Further, dissatisfied complainants must appeal to the Equal Employment Opportunity Commission<sup>47</sup> before a claim can be brought to a court.<sup>48</sup> Federal

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41. See generally G. ELDES & J. NELSON, *FEDERAL REGULATORY PROCESS AGENCY PRACTICES AND PROCEDURES* (1985) (discussing the different federal agencies, and their principal administrative and adjudicative authority).

42. *Id.*; see also K. WARREN, *ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM* 270-309 (1982) (discussing agency functions in a chapter on Order-Making: Agencies as Judicial Bodies).

43. One example of such an administrative agency is the National Labor Relations Board, created by the National Labor Relations Act (codified as amended 29 U.S.C. §§ 151-169 (1982)). The Board consists of five administrative judges who rule on claims of unfair labor practices and collective bargaining representation claims falling under the National Labor Relations Act. The Board also has a staff that performs other investigatory and enforcement functions related to federal labor laws. *Id.*; see G. ELDES & J. NELSON, *supra* note 41 (presenting a comprehensive overview of the different federal agencies).

44. See The Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. 554, 556-557 (1982 & Supp. II 1984) (setting general standards for administrative hearings). The Act provides for varying procedures and degrees of formality suggesting that administrative tribunals might be considered more adaptable forums than courts; see also *infra* notes 75-91 and accompanying text (discussing the inappropriateness of the judicial forum for the resolution of a variety of disputes); K. WARREN, *supra* note 42, at 286 (observing the trend in judicial opinions toward requiring greater formality in administrative hearings). In addition to statutory procedural requirements, the courts have imposed increasing formalities on administrative proceedings. Administrative forums now closely resemble judicial forums. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (outlining minimum due process standards for administrative hearings).

45. See *infra* note 48 and accompanying text (discussing different dispute resolution mechanisms).

46. See 29 C.F.R. § 1613 (1985) (containing the federal regulations which govern the administration of employee complaints).

47. See 42 U.S.C. § 2000e-4 (1982) (establishing the EEOC).

48. See *id.* at §§ 1613.281-1613.283 (referring to the court appeal of EEOC rulings). Such quasi-judicial dispute resolution mechanisms in the workplace have been replicated by non-judicial dispute resolution mechanisms in the private sector, particularly in organizations run by larger employers who have negotiated employment contracts through collective bargaining. See F. FOULKES, *PERSONNEL POLICIES IN LARGE*

tribunals such as these offer a quasi-judicial forum of original jurisdiction on various legal questions within their competence.<sup>49</sup> Often a court cannot review these questions without a complainant first exhausting the dispute resolution alternatives that agencies offer.<sup>50</sup> Nevertheless, provision of judicial review of many agency determinations demonstrates that the courts have ultimate superiority as mechanisms for determining justice in the United States system.<sup>51</sup>

## D. THE SUCCESS OF THE JUDICIAL AND QUASI-JUDICIAL FORUM

### 1. *An Overview*

Liberal constitutional guarantees, extensive legislative and expansive common law rights are meaningless to parties lacking access to these dispute resolution forums, i.e., access to civil justice.<sup>52</sup> The United States justice system has entered into a state of crisis in the last century,<sup>53</sup> and in the next decade necessarily faces great development.<sup>54</sup>

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NON-UNION COMPANIES (1980) (presenting an overview of such in-house dispute resolution mechanisms). Many employers have established optional and mandatory (to the extent that employees must use the in-house procedures for dispute resolution before being able to bring a claim to a court) procedures. *Id.* Other employers have complex dispute resolution mechanisms consisting of an Ombudsperson who works independently of the employer's management and investigates with an intent to resolve informally, a variety of claims, and a grievance committee with appeals to arbitration. *Id.*; see also ABA SPECIAL COMMITTEE ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, ALTERNATIVE METHODS OF DISPUTE SETTLEMENT: A SELECTED BIBLIOGRAPHY 49-50 (select bibliography of works dealing with alternative dispute resolution in the area of employment).

49. See K. WARREN, *supra* note 42, at 385 (discussing the "primary jurisdiction doctrine" that "acknowledges that public agencies should normally be permitted to settle disputes affecting their agencies first unless: (1) the agency has ruled previously on a similar question; (2) the regulation or issue in the dispute is patently unreasonable; or (3) the issue poses a question which is clearly within the jurisdiction and competence of the judiciary"); see also *Texas and Pac. R.R. Co. v. Abilene*, 204 U.S. 426 (1907) (illustrating the judicial application of this doctrine by deferring to the original jurisdiction of the Interstate Commerce Commission in a dispute over railroad rates).

50. See *supra* note 48 (describing different dispute resolution mechanisms).

51. See K. WARREN, *supra* note 42, at 288-89 (criticizing the myth that the judiciary is an inherently superior forum for the resolution of disputes); D. ROSENBLOOM, PUBLIC ADMINISTRATION AND LAW 33-60 (1983) (discussing the tension between the administrative agencies and the federal courts on matters of judicial review of administrative decisions).

52. See L. NADER & H. TODD, *supra* note 2, at 34 ("Rights without access to forums are no rights at all") (emphasis added).

53. See *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 107 (1976) (conference proceedings); W. BURGER, *supra* note 27 (discussing the sources of the crisis in the U.S. justice system); see also Rosenberg, *Devising Procedures that are Civil to Promote Civil Justice that is Civilized*, 69 MICH. L. REV. 797 (1971) (recognizing the crisis and the need for reform in the civil justice system).

Denial of access to civil justice stems from high costs associated with pursuing claims, long delays in processing claims, and the alienation of litigants due to the inappropriateness of the traditional adversary models for the resolution of many types of civil disputes. Dissatisfaction and disillusion with this lack of access has led to numerous attempts at reform.<sup>55</sup> The 1970's and the 1980's have witnessed a tension between those advocating structural reform of the courts, and those seeking more alternative quasi-judicial and non-judicial forums for civil dispute resolution.<sup>56</sup>

## 2. *The Cost*

A recurring criticism of the United States court system is that only the wealthy have access to justice.<sup>57</sup> Although court costs are involved in filing most civil actions, they are usually set at low rates with the objective that they cover only administrative fees.<sup>58</sup> The high costs for individuals in civil actions are primarily attributable to attorneys' fees.<sup>59</sup> Complexities in court procedures, in rules of evidence, and in the interpretation of laws and judicial precedent, make the assistance of a lawyer essential to the pursuit of civil claims.<sup>60</sup> The high costs of attorney representation, however, often denies the poor effective representation; a potential litigant who cannot afford a lawyer cannot afford ac-

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54. See DISPUTE RESOLUTION, *supra* note 6 (presenting a comprehensive overview of the problems of the traditional court system and the nature of present study and attempts at reform within the U.S. legal community).

55. Interview with Larry Ray, Director of the American Bar Association Special Committee on Dispute Resolution, Washington, D.C. (Nov. 19, 1985).

56. *Id.*

57. See Jolowicz, *Fundamental Guarantees in Civil Litigation: England*, in FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION 121, 153 (M. Cappelletti & D. Tallon eds. 1973) ("Justice is open to all, like the Ritz Hotel"); see also R. SMITH, JUSTICE AND THE POOR 8 (1919), cited in Carlin & Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381 (1965) [hereinafter cited as Carlin & Howard]. ("The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.").

58. See Johnson, *supra* note 1, at 919-20 (reproducing court costs in litigation). Although court costs may be low, some argue they still deny justice to indigents. See Comment, *The Heirs of Boddie: Court Access for Indigents After Kras and Ortwiem* 8 HARV. C.R.-C.L. L. REV. 571 (1973) (exploring fifth and fourteenth amendment approaches to challenging required court costs for indigents in light of *Boddie* and subsequent case law).

59. See Johnson, *supra* note 1, at 921 (arguing the primary source of civil litigation costs is attorneys' fees); Carlin & Howard, *supra* note 57 (discussing the legal problems of the poor and the high cost of attorneys).

60. Carlin & Howard, *supra* note 57, at 381 (discussing the essential role of attorneys, their high cost, and the subsequent denial of justice to the poor).

cess to justice.<sup>61</sup> Even for an individual who can spare enough money to hire an attorney, opportunity costs may exceed the amount in controversy.<sup>62</sup> Finally, where free legal aid through a public service organization is available, the poor often receive second-class legal representation in comparison to individuals able to hire private attorneys.<sup>63</sup>

The pursuit of a claim before an administrative tribunal entails the same high costs attributable to the courts.<sup>64</sup> Costly legal assistance is essential even in a claim's early pre-hearing stages.<sup>65</sup> As in the courts, statutes, complex regulations, and precedent define the parties' rights.<sup>66</sup> Thus, even in quasi-judicial forums, success depends upon hiring professional counsel. Parties seeking administrative remedies through quasi-judicial forums, moreover, need to protect their rights at every stage of the proceedings in the event they need to appeal the administrative decision.<sup>67</sup>

### 3. *The Delay*

A civil action, from filing to enforcement of judgment, may stretch over several months or years.<sup>68</sup> Reasons for court delay include the

61. See Pipkin, *Legal and Elitism in the American Legal Profession*, in R. SMITH, *JUSTICE AND THE POOR* xi (1972) ("The inability of poor persons to enforce the rights afforded them by law have [sic] promoted their own exploitation: it having perverted the American Dream").

62. See Johnson, *supra* note 1, at 923 (discussing opportunity costs as a deterrent to bringing suits).

63. See Carlin & Howard, *supra* note 57, at 384 (1965) (discussing the allegation that individuals in the economic lower-class are "stuck" with second-rate services); see also B. Christensen, *Delivery of Legal Services to Persons of Low and Modest Income: In the Shade of the Old Atrophy*, in *QUEST FOR JUSTICE 1973 A.B.A. COMM'N NAT'L INSR. JUST.* 100 (depicting justice for the rich as an Olympian and justice for low and moderate income people as a dwarf).

64. See K. WARREN, *supra* note 42, at 300-301 (discussing the constitutional right to counsel and the problem of counsel's expense for litigants before the administrative proceedings).

65. Courts have acknowledged the right to and importance of counsel before administrative hearings. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (noting that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel"). Though courts have recognized a right to counsel, they have not recognized a corresponding duty on behalf of the government to appoint free counsel for indigents. K. WARREN *supra* note 42, at 300. *But see* Administrative Procedure Act, 5 U.S.C. § 555 (as amended by 5 U.S.C. § 555 (1984 & Supp. II 1976)) (establishing statutory right to counsel in a compelled federal agency hearing).

66. See generally S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 1 (1979) (discussing the law-making process in administrative agencies).

67. See K. WARREN, *supra* note 42, at 373-402 (discussing the nature of judicial review of administrative actions).

68. Higginbotham, *The Priority of Human Rights in Court Reform*, in *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 152-53 (1976) (discussing the potential for long delays in

complexity of actions<sup>69</sup> and abuse of complex procedures.<sup>70</sup> Most significant, however, is case overload.<sup>71</sup> Courts and commentators have advanced numerous reasons for this problem, including the use of the courts to resolve all types of disputes whether appropriate or not for the court mechanism,<sup>72</sup> the litigious pre-disposition of American society,<sup>73</sup> and the growth of the urban population with its attendant increased likelihood of civil conflict.<sup>74</sup>

Large caseloads also overextend administrative agencies. The National Labor Relations Board, for example, has over 900 unfair labor practice cases and almost 300 representation cases pending on its dockets.<sup>75</sup> The median time for the processing of a single claim is five months.<sup>76</sup> Delayed justice, however, frequently leads to denied justice.

#### 4. *The Inappropriateness of the Judicial Forum*

Commentators also criticize the courts for not always providing an appropriate forum for the resolution of many types of disputes.<sup>77</sup> At

litigation).

69. In *United States v. IBM*, No. 69 Civ. 200 (S.D.N.Y. Dec. 30, 1977), the government has planned to bring forward one hundred witnesses and IBM has planned to bring forward four hundred. After the first nine months of the trial, only twenty five government witnesses had yet been called.

70. Rifkind, *supra* note 36, at 107 (stating that the discovery process is a "sporting match" and a "game of skill"); see also Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, in *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 91 (1976) (noting the widespread feeling that judges tolerate lawyer abuse of the process).

71. See DISPUTE RESOLUTION, *supra* note 6 (concise overview of the causes of court delay and the problems of the court system in general); see also Johnson, *supra* note 1 (anticipating over eight million new case filings and three hundred new judgeships per year if current trends continue).

72. See *infra* notes 75-91 and accompanying text (discussing the inappropriateness of litigation in the United States).

73. See *supra* note 39 and accompanying text (discussing the litigious predisposition of the U.S. society).

74. See Bork, *Dealing with Overload in Article III Courts*, in *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 233 (1976) (discussing the growing burden on courts in a "welfare state"); see also DISPUTE RESOLUTION, *supra* note 6 (presenting a concise overview of the causes of court delay and the problems of the court system in general).

75. Telephone interview with the Executive Secretary's Office of the National Labor Relations Board, Washington, D.C. (Dec. 16, 1985). See NATIONAL LABOR RELATIONS BOARD, ANNUAL REPORT (1985) (annual publication containing caseload statistics).

76. Telephone interview with the Executive Secretary's Office of the National Labor Relations Board, Washington, D.C. (Dec. 16, 1985).

77. See Rosenberg, note 53, at 809 (1971) (discussing the complexity of court litigation); see also C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 99 (1967) (stating that "a comprehensive reinvestigation of the question which human disputes belong in the courts and which ones do not is long over-

court, complex emotion-packed and human issues are often reduced to an adversarial assertion of specific legal rights.<sup>78</sup> A third-party, either the judge or jury, then proclaims a judgment to be imposed on the litigants. Although this traditional model may successfully resolve many disputes, it often remains an inappropriate model where personal relationships such as family matters, ongoing personal and business relationships, and moral questions are involved.<sup>79</sup>

Non-judicial civil dispute resolution alternatives do exist and are promoted on a community level.<sup>80</sup> To this end, some larger cities are now creating government and community organizational networks to provide specialized legal and quasi-legal dispute resolution, counselling and assistance.<sup>81</sup> In the District of Columbia, for example, many organizations provide quasi-legal services, such as consumer protection,<sup>82</sup> financial counselling and mediation for creditors and debtors,<sup>83</sup> family mediation,<sup>84</sup> counselling on tenants' rights,<sup>85</sup> and lawyer referral.<sup>86</sup> Nu-

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due"); Bork, *supra* note 74, at 97 (arguing that "the courts are being asked to solve problems for which they are not institutionally equipped"). The judicial forum is of course thought to be an appropriate forum for the resolution of many civil disputes, particularly in cases in which serious legal rights of a party have been violated, and in which there is a grave power disparity between disputants; *see also* S. LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984) (defending of the usefulness of the judicial forum).

78. Interview with Linda Singer, Director of the Washington, D.C. Center for Community Justice, Washington, D.C. (Feb. 3, 1986).

79. *Id.* *See* Sander, *Alternative Methods of Dispute Settlement: A Selected Bibliography*, A.B.A. COMM. RESOLUTION OF MINOR DISPUTES 16 (1982) (providing a select bibliography on "The Adversary Process: Its Roles and Limitations").

80. *See* AMERICAN BAR ASSOCIATION, *DISPUTE RESOLUTION PROGRAM DIRECTORY* (1985) (information on over 300 nation-wide community dispute resolution programs); *see also* THE WASHINGTON, D.C. MULTI-DOOR DISPUTE RESOLUTION PROGRAM INTAKE CENTER, *REFERRAL MANUAL* (1985) (listing hundreds of alternative dispute resolution, legal aid, and social service referrals in the Washington, D.C. area).

81. *See* AMERICAN BAR ASSOCIATION, *DISPUTE RESOLUTION PROGRAM DIRECTORY* (1985) (information on over 300 nation-wide community dispute resolution programs); Johnson, *supra* note 1, at 961-79 (discussing "the cost effectiveness of dispute resolution outside the courts"); R. COOK, J. ROEHL & D. SHEPPARD, *NEIGHBORHOOD JUSTICE CENTERS: FIELD TEST, FINAL EVALUATION REPORT* (1980) (available at the U.S. National Institute of Justice Office of Program Evaluation) (comprehensive evaluation of the work of three Neighborhood Justice Centers).

82. *See* AUTOCAP, *PAMPHLET* (1985) (providing an example of an automotive buyer's protection group, the Automotive Consumer Action Program (AUTOCAP)). AUTOCAP provides consumers with free professional dispute resolution services.

83. *See* THE CONSUMER CREDIT COUNSELLING AND EDUCATIONAL SERVICE OF WASHINGTON, D.C., *PAMPHLET* (1985) (describing the Consumer Credit Counseling and Educational Service of Greater Washington, Inc. which offers free financial counselling and negotiation assistance for individuals and creditors).

84. *See* THE WASHINGTON, D.C. CENTER FOR COMMUNITY JUSTICE, *WHAT IS MEDIATION? PAMPHLET* (1985) and THE WASHINGTON, D.C. CENTER FOR COMMUNITY JUSTICE, *PAMPHLET* (1985) (describing the Washington, D.C. Center for Community Justice which offers a variety of dispute resolution assistance from mediation to general



merous others provide citizen complaint screening and referral.<sup>87</sup>

Despite their importance, these organizations also suffer from numerous shortcomings. Scarce funding<sup>88</sup> and a lack of coordination<sup>89</sup> often limit their effectiveness. Moreover, social services organizations and governmental offices are frequently overburdened.<sup>90</sup> Large case loads lead to impersonal service even in these "people centered" organizations.<sup>91</sup> An individual going into a community complaint center might have to wait a number of hours before being able to meet with a counselor, only to be referred to another community-service organization.<sup>92</sup> Many neighborhood legal aid programs have a great backlog of cases during the course of a year, so that frequently they must accept only the most serious emergency cases.<sup>93</sup>

## E. THE NON-JUDICIAL FORUM AND THE MOVEMENT FROM LITIGATION

### 1. *An Overview*

Lack of full access to both judicial and quasi-judicial forums has led

counselling and referral).

85. DISTRICT OF COLUMBIA LAWYER REFERRAL AND INFORMATION SERVICE, PAMPHLET (1985) (describing the District of Columbia Bar Association's sponsorship of the District of Columbia Lawyer Referral and Information Service).

86. *See infra* notes 125-32 and accompanying text (discussing the work of the Multi-Door Dispute Resolution Program).

87. Telephone interview with William Martin, Assistant Director of Legal Operations, Neighborhood Legal Services Program of Washington, D.C. (Feb. 6, 1985).

88. *Id.* Mr. Martin noted that the public funding for the Washington, D.C. Neighborhood Legal Services Program, like other community social service organizations relying on public funding, is faced with continual cuts in its resources. *Id.* Local governments have implemented various means of raising funds for community programs which offer alternate resolution techniques. *See* Minnesota Law, Ch. 489, S.F. 1666 (1982), which applied a 15% surcharge to filing fees in civil cases, the proceeds of which would be available for legal service programs within the community.

89. Telephone interview with Janice Roehl, Vice President of the Institute for Social Analysis (Sept. 19, 1985). The Institute for Social Analysis is the research center studying the implementation of the Multi-Door Dispute Resolution Program at the various experimental sites on behalf of the American Bar Association. *Id.* It is among the objectives of the Multi-Door Dispute Resolution Program to stimulate networking in the community of social service organizations. *See infra* notes 125-32 and accompanying text (discussing the Multi-Door Courthouse).

90. Telephone interview with Janice Roehl, Vice President of the Institute for Social Analysis (Sept. 19, 1985).

91. *Id.*

92. *Id.*

93. Telephone interview with William Martin, Assistant Director of Legal Operations, Neighborhood Legal Services Program of Washington, D.C. (Feb. 6, 1985). The Neighborhood Legal Services Program of Washington, D.C. had four offices (reduced from seven), and twenty attorneys to service the 113,000 people eligible in the community to receive its services. *Id.*

to the present crisis in the justice system.<sup>94</sup> Critics consider the judicial system an unresponsive "monopoly".<sup>95</sup> According to these critics, the costs and delay involved in civil litigation, as well as the court's over-expansion into inappropriate areas for the traditional adversarial system, amount to an actual denial of justice to civil litigants.<sup>96</sup>

As a result of this disenchantment with the traditional model, an explosion of research and experimentation has occurred with the goal of improving access to dispute resolution forums.<sup>97</sup> The large number of organizations involved in this movement include national and local bar associations, judges' associations, the United States Department of Justice, the National Association of Dispute Resolution, individual courts, universities, and schools.<sup>98</sup> Their principal objectives are to improve the present system through addressing problems of high court costs and long delays for court hearings, and to develop new civil dispute resolution alternatives to the traditional system without the traditional flaws and more appropriately designed for the social and moral disputes now being handled by the courts.<sup>99</sup> In the spirit of the traditional civil justice reform movement, numerous governmental bodies (primarily state legislatures) are enacting reformist measures.<sup>100</sup> Court reform includes

94. See *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 246 (1976) (conference proceedings) (recognizing the crisis in the U.S. justice system and citing areas for reform).

95. See Associate Justice William H. Rehnquist, Address at the dedication of the University of Florida Law School (Sept. 15, 1984) (available at the United States Supreme Court Information Service) ("Surely a government that insists on a monopoly of the legal process, as our governments do, should be expected to provide a system of dispute adjudication that is tailored to the needs of most potential litigants who will, voluntarily or involuntarily, make use of the system.").

96. See *supra* notes 50-91 and accompanying text (discussing the lack of citizen access to civil justice through the courts and the administrative tribunal).

97. See 1970 A.B.A. TASK FORCE STANDARDS JUD. AD. 3, noted in Rosenberg, *supra* note 51, at 799 (1971) ("The greatest need and opportunity for fresh effort in judicial administration concerns the quality of justice itself. Standards and techniques concerning court organization, procedure and management are not enough, for they do not deal directly with the quality of justice as it reaches each individual citizen who becomes involved with the courts as a litigant"); see also 1 OHIO ST. J. ON DISPUTE RESOLUTION (1985) (containing a number of articles on the alternative dispute resolution movement); American Bar Association Special Committee on Dispute Resolution, 17 DISPUTE RESOLUTION (1985) (providing quarterly information on experimentation in the alternative dispute resolution movement).

98. Interview with Larry Ray, Director of American Bar Association Special Committee on Dispute Resolution, Washington, D.C. (Nov. 17, 1985). See also American Bar Association Special Committee on Dispute Resolution, 14 DISPUTE RESOLUTION (1984) (Quarterly Information Update) (indicating the diverse organizations and type of work involved in the alternative dispute resolution movement).

99. See Address by Chief Justice Warren E. Burger, 1982 A.B.A.J. 274 (discussing generally the need for and nature of the alternative dispute resolution movement).

100. See American Bar Association Special Committee on Dispute Resolution, 14

anything from adding additional judges in order to deal with the large number of disputes,<sup>101</sup> to passing legislation in order to streamline the substantive law.<sup>102</sup> Many legislatures also are implementing alternatives within the local courts of original jurisdiction that provide litigants with an option to adjudicate their claims in a traditional court, before an arbitrator, or among themselves with a mediator's assistance.<sup>103</sup> Arbitration offers a dispute resolution mechanism similar to traditional court litigation, except that procedures are much more informal.<sup>104</sup> In this proceeding, the arbitrator/judge may or may not be more active in questioning witnesses and parties, and traditional rules of evidence which often formalize and lengthen litigation of claims are not necessarily observed.<sup>105</sup> Employment of attorneys in arbitration, however, frequently is necessary.<sup>106</sup>

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DISPUTE RESOLUTION (1984) (providing an overview of current legislation on dispute resolution in each of the fifty states).

101. See Chief Justice Warren E. Burger, Remarks at the Opening Session of the American Law Institute, Washington, D.C. (May 16, 1972), reprinted in *QUEST FOR JUSTICE* 1973 A.B.A. COMM'N NAT. INST. JUST. 207 (commenting on some measures taken in recent decades for the expansion of the court system through increasing the number of judges).

102. See Johnson, *supra* note 1, at 980-84 (noting that such legislation appears to take away the force of common law precedent in many cases, and limits issues in a dispute to what may be articulated on the face of a statute); see also *supra* note 34 and accompanying text (discussing the importance of the U.S. attorney in litigation). The trend of legislating away the common law suggests a movement toward a civil law approach to handling some disputes that appears less costly and more efficient. See *infra* notes 206-209 and accompanying text (discussing the role of attorneys in the civil law system of the Soviet Union).

103. See American Bar Association Special Committee on Dispute Resolution, 14 *DISPUTE RESOLUTION* (1984) (presenting an overview of legislation on dispute resolution in each of the 50 states); McIssac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke* 19(2) *CONCILIATION COURTS REV.* 73-81 (1981) (discussing California's mediation requirement of all custody and visitation matters).

104. H. GRILLIOT, *supra* note 20, at 78-84; see also Johnson, *supra* note 1, at 961-79 (presenting a concise overview of arbitration).

105. *Id.*

106. See AMERICAN ARBITRATION ASSOCIATION, *THE LAWYER AND ARBITRATION* (1984) (noting that despite arbitration proceedings being typically less-formal than court litigation, there is nevertheless the necessity for legal counsel to ensure proper presentation of legal claims). A variation on the theme of arbitration gaining in popularity in economic disputes between large companies is the Mini-Trial. AMERICAN ARBITRATION ASSOCIATION *MINI-TRIAL PROCEDURES* (1985). The Mini-Trial involves negotiation, mediation, and adjudication. *Id.* The adjudication is characterized by having a panel comprised of executives of the disputants who hear claims of attorneys from both sides, and receive counsel from an advisor who has variable levels of authority. *Id.* With this sharing of information in a trial-like setting, the executives attempt to negotiate settlement. *Id.*

## 2. Mediation

Mediation is becoming such a popular alternative to litigation that it merits special attention.<sup>107</sup> Mediation is a means of dispute resolution by which disputants meet with a neutral third party who, rather than imposing a judgment after hearing the facts and evidence in accordance with 'the law,' helps the parties to work out a mutually acceptable solution to their own problem.<sup>108</sup> A prerequisite to the success of mediation is that the parties are willing to communicate, reason, and work toward a resolution of their own problem.<sup>109</sup> The mediator, to a large extent, functions only to facilitate communication.<sup>110</sup>

Frequently, potential disputants find mediation programs attractive in a way that litigation is not. Further, some government sponsored mediation programs use the services of government employees and volunteer mediators, so that the parties incur no cost.<sup>111</sup> No complex rules of procedure or evidence exist in such programs as in the court system which can hinder laymen from pursuing their own representation.<sup>112</sup> Moreover, without attorney involvement, laymen can avoid expensive counsel fees. Clients can generally mediate their disputes at a mutually convenient time; they have the freedom to compromise and negotiate their own solutions, and to explore emotional non-legal issues particularly important in on-going personal relationships. It is precisely these qualities of mediation that make mediation an attractive alternative to court litigation in situations involving interpersonal relations in which the parties must live with the resolution of the dispute.<sup>113</sup> Many jurisdictions are implementing court rules that foster mediation.<sup>114</sup> Media-

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107. There are volumes of publications now available on mediation and its growing importance in the alternative dispute resolution movement. See F. SANDER, *Mediation: A Select Annotated Bibliography* (1984); see also Roehl & Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. Soc. ISSUES 161 (1985) [hereinafter cited as Roehl & Cook] (providing a critical analysis of mediation with a historical perspective on its role in the alternative dispute resolution movement).

108. Interview with Linda Singer, Director of the Washington, D.C. Center for Community Justice (Feb. 3, 1986).

109. *Id.*

110. *Id.* (emphasizing that the mediator's role is to help the parties to create an agreement on their own terms and not to impose a resolution upon the parties as in the courts).

111. *Id.* (noting the Washington, D.C. Center for Community Justice, for example, has comprehensive training programs to certify community volunteer mediators to work in the D.C. Mediation Service).

112. *Id.*

113. *Id.* These types of disputes include conflicts between family members, employers and employees, neighbors, and students and teachers. *Id.*

114. See 42 U.S.C. § 2996 (1982) (creating the Legal Service's Corporation). The Legal Service's Corporation, like its predecessor the Office of Economic Opportunity

tion is particularly well-suited where interpersonal relations, such as family matters are involved, or in cases dealing with small amounts of money where costs do not justify recourse to the courts. In such situations, either law or the discretion of a judge may require parties to attempt mediation of their dispute as a prerequisite to bringing a claim before a court.<sup>115</sup>

Other legislators are looking to improve access to the traditional court system by increasing the accessibility of the courts particularly for the poor by providing subsidized legal services. For example, as a result of the Legal Services Corporation, legal services exist for needy individuals. Among the philosophical goals of these programs is the ideal that providing legal services to the poor is the responsibility for the entire community, and that lawyers themselves are obligated to participate in *pro bono* service programs as evidence of the professional bar's community conscience.<sup>116</sup> These programs however, like many other community legal aid centers, are underfinanced and overburdened.<sup>117</sup> Other less conservative reformists are attempting to promote a long-term change in the entire nature of dispute resolution in American society.<sup>118</sup> It is thought by many that the image and role of lawyers in the justice system must change; rather than holding legal positions in a courtroom and arguing complex rules of law, lawyers must focus on solutions to problems much as would a mediator.<sup>119</sup> Re-

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(OEO) Legal Services Programs exemplifies an attempt to bring legal assistance to the poor who could not otherwise afford it. See Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964) (repealed)). Both Acts have provided funding and organizational support for the establishment of neighborhood legal aid programs throughout the country. See M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 523 (1975) (noting that statistics indicate that at the time of the adoption of the OEO Act, there only had been one legal aid program in 2,900 of the 3,100 U.S. counties); Christensen, *supra* note 63, at 101 "[T]he advent of OEO Legal Services, with its infusion of money, lawyers, and new methods into the system by which legal services were delivered to the poor, demonstrated that previous estimates of need and prior efforts at service have been hopelessly inadequate. In fact, OEO Legal Services has uncovered a demand for legal services far in excess of even the system's new delivery capacity.").

115. See *supra* note 79 (providing numerous examples of legislation incorporating mediation programs into traditional dispute resolution forums).

116. See Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438 (1965) (discussing the role of the social responsibility of the lawyer); Johnson, *supra* note 1, at 1021 (discussing the role of the professional bar in providing pro bono legal services).

117. Interview with Larry Ray, Director of the American Bar Association Special Committee on Dispute Resolution, Washington, D.C. (Nov. 19, 1985).

118. See *infra* notes 117 and 120 (discussing the need for lawyers to change their approach to dispute resolution).

119. Interview with Linda Singer, Director of the Washington, D.C. Center for Community Justice, Washington, D.C. (Feb. 3, 1986). See D. Brink, Comments at a

lated to this change, the accountability of the judicial system and the professionalized bar must become more attuned to the need of society as a whole.<sup>120</sup> The judicial system cannot function independently and above the common layperson, but must become more integrated into the lives of and accessible to all citizens.<sup>121</sup> United States attorneys are beginning to recognize the demise of their own elite system of professionalized civil justice.<sup>122</sup> Most importantly, however, to advance all of these changes, the attitudes of the general public must change.<sup>123</sup> In an effort to address many of these concerns, the American Bar Association has designed the Multi-Door Dispute Resolution Program.

### 3. *The Multi-Door Courthouse*

The Multi-Door Dispute Resolution Program is an experimental project first envisioned by Professor Frank Sander of Harvard University Law School.<sup>124</sup> Professor Sander advocated the development of a community dispute resolution center within local courthouses that would help individuals assess their legal disputes as well as determine the appropriate forum within the community. Within this structure, litigation would be only one of many alternatives.<sup>125</sup> In 1981, the American Bar Association Special Committee on Dispute Resolution began the pro-

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Workshop of the ABA Young Lawyers Division and the ABA Special Committee of Dispute Resolution, *reprinted in Alternative Dispute Resolution: Bane or Boon to Attorneys?* 1982 A.B.A. SPECIAL COMM. DISPUTE RESOLUTION 13 (envisioning the "day when attorneys will be viewed as counsellors, problem solvers, and deliverers of prompt, appropriate, and affordable justice.").

120. See J. AUERBACH, *supra* note 30 (analysis of the history of the professionalized bar as an elite organization elevated above service of the needs of the common citizen).

121. *Id.*

122. See A. Williams Cox, Comments made at a Workshop of the ABA Young Lawyers Division and the ABA Special Committee of Dispute Resolution (1982), *reprinted in Alternative Dispute Resolution: Bane or Boon to Attorneys?* 1982 A.B.A. SPECIAL COMM. DISPUTE RESOLUTION 70 (arguing that attorneys will lose business if they do not adopt changes that satisfy consumers); see also J. AUERBACH, *supra* note 30, at 263-306 (1976) (discussing the disintegration of legal authority of the professionalized bar).

123. See Ronald L. Olson, Comments made at a Workshop of the ABA Young Lawyers Division and the ABA Special Committee of Dispute Resolution (1982), *reprinted in Alternative Dispute Resolution: Bane or Boon to Attorneys?* 1982 A.B.A. SPECIAL COMM. DISPUTE RESOLUTION 3 (stating that alternative dispute resolution's success depends on an informed public); see also J. AUERBACH, *supra* note 30, at 263-306 (discussing the disintegration of legal authority of the professionalized bar).

124. See *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976); Sander, *The Multi-Door Courthouse: Settling Disputes in the year 2000*, 3(3) THE BARRISTER 18 (1976) (presenting Sander's conception of the Multi-Door Courthouse of the future).

125. Sander, *supra* note 124.

ject of implementing programs in different cities to initiate the study and development of what has become known as the "Multi-Door Courthouse."<sup>126</sup> During 1984 and 1985, experimental community programs in the spirit of the Multi-Door Courthouse began work in Tulsa, Oklahoma, Houston, Texas, and the District of Columbia, each having different sponsorship, funding, and design.<sup>127</sup>

Generally, the program seeks to address many of the criticisms of the court system; the program hopes to divert disputes away from the courts and to promote use (and development) of the least costly, most time-efficient and appropriate means available for resolving disputes.<sup>128</sup> Hopefully, the program will help unburden the court system, foster the use and development of dispute resolution alternatives to litigation, and encourage individuals to work toward independent resolution of problems without depending on (and paying for) the services of an advocate or judge.<sup>129</sup>

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126. Telephone interview with Janice Roehl, Vice President of the Institute for Social Analysis, Washington, D.C. (Sept. 19, 1985); see also Sander, *supra* note 124 (presenting his conception of the Multi-Door Courthouse).

127. Telephone interview with Janice Roehl, Vice President of the Institute for Social Analysis, Washington, D.C. (Sept. 19, 1985).

128. See Ray & Clare, *The Multi-Door Courthouse Idea: Building the Courthouse Idea: Building the Courthouse of the Future . . . Today*, 1 OHIO ST. J. ON DISPUTE RESOLUTION 7 (1985) [hereinafter cited as Ray] (comprehensive).

129. *Id.* The Washington, D.C. Multi-Door Program presently has three principal components: an Intake and Referral Center located in the D.C. Superior Courthouse, a Small Claims mediation program, and a Domestic Relations mediation program. At the Intake and Referral Center, walk-in clients meet with Intake Specialists who discuss and evaluate each client's dispute, and in appropriate cases, counsel the client on dispute resolution alternatives within the court or the community. See Ray & Clare, *supra* note 128 (presenting a comprehensive overview of the work and objectives of the Multi-Door Program Intake and Referral Centers). The work of the Multi-Door Intake Center is largely directed to helping people involved in disputes find alternatives to litigation, and on a large scale, educating District of Columbia citizens about dispute resolution alternatives. Interview with Linda Finkelstein, Director of the Washington, D.C. Multi-Door Dispute Resolution Program. As noted, the Program also has trained mediators who offer mediation without cost to individuals who have Small Claims disputes. *Id.* Also, the Center has mediators specially trained to mediate most Domestic Relations disputes. *Id.* The Intake and Referral Center is the focal point of the early study and development of the project known as the '18-month Phase I' period. Telephone Interview with Janice Roehl, Vice President of the Institute for Social Analysis, Washington, D.C. (Sept. 19, 1985); see also Ray & Clare, *supra* note 128 (presenting a comprehensive overview of the work and objectives of the Multi-Door Program Intake and Referral Centers). The primary goals of the work of the Phase I period as defined by the ABA are to study client referral, increase community awareness of dispute resolution alternatives to litigation, and examine the effectiveness of community dispute resolution alternatives within the respective communities. Telephone Interview with Janice Roehl, Vice President of the Institute for Social Analysis, Washington, D.C. (Sept. 19, 1985). Information gained by this preliminary study will enable the Program sponsors to decide which type of disputes ought to be left for resolution in the courts and which type of disputes might be better resolved in another way, and to

Although the D.C. Multi-Door Program is still in its early stages, it has already had notable success. The work of the Intake Center promotes the use of programs in the D.C. Superior Court and in the community offer alternatives to litigation.<sup>130</sup> It may be inferred that the counsellors in this program must confront both the litigious pre-disposition of many clients and the blind faith in the ready justice of the legal system of many others. Depending on the specific client, the Program specialist might have to illuminate realities (disadvantages) of litigation, the uncertainty of the law on numerous matters, and dispel myths about the nature of the legal system. Participating in the Multi-Door Program is a broadening, educational experience on dispute resolution activities.<sup>131</sup>

#### 4. *Some Criticisms of the Alternative Dispute Resolution Movement*

Many social critics who are resistant to the change consider alternative dispute resolution second class justice.<sup>132</sup> Critics contend that non-lawyer mediators are "amateur [legal] practitioners,"<sup>133</sup> and are incapable of providing the same quality justice as traditional courts.<sup>134</sup> Other critics note that mediation, sometimes imposed upon the disputants by legislation or policy,<sup>135</sup> forces disputants having a relative power disparity to resolve disputes without the protection of due process preserved by court proceedings for the weaker party,<sup>136</sup> especially when the mediator might also pressure the parties to reach agreement.<sup>137</sup> Despite mediation's increasing popularity, even its defenders

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develop other alternative methods of dispute resolution for problems in which the communities presently lack sufficient dispute resolution support. *Id.*

130. Linda Finkelstein, Director of the Washington, D.C. Multi-Door Dispute Resolution Program.

131. *Id.*

132. See Roehl & Cook, *supra* note 107, at 171-75 (exploring the thesis that mediation provides a second-class justice with reference to numerous authorities).

133. See H. BELLMAN, DISPUTE RESOLUTION FORUM 3 (1983), cited in C. Schweber & J. Peter, Who are the Neutrals? An Examination of the C.D.R. and Arbitration Volunteer at the Dispute Settlement Center in Buffalo, N.Y. (Paper presented at the National Conference on Peace Making and Conflict Resolution, St. Louis, Mo.) (Sept. 21, 1984).

134. *Id.*

135. See *supra* note 101 and accompanying text (discussing legislation requiring mediation attempts for certain disputes in the various state jurisdictions).

136. See SINGER, THE GROWTH OF NON-JUDICIAL DISPUTE RESOLUTION: SPECULATIONS ON THE EFFECTS OF JUSTICE FOR THE POOR AND ON THE ROLE OF LEGAL SERVICES (1979), cited in Roehl & Cook, *supra* note 107 (noting the problems of power disparities in mediation).

137. See Roehl & Cook, *supra* note 107, at 174 (suggesting that if mediators do exercise undue influence upon the parties to settle their dispute, it would be an error in their training rather than a flaw in the process itself).



concede that it is not a universal solution to the legal system's problems.<sup>138</sup> Moreover, some fear that alternative dispute resolution forums will provoke the wealthy to desert the courts, and eventually lower the quality of the judicial system.<sup>139</sup> Others fear that the alternative dispute resolution movement will result in consensual but lawless justice.<sup>140</sup> Ironically, popular dependency on the traditional adversary system serves as a spring-board bringing many of the clients to the D.C. Superior Courthouse's Multi-Door Intake Center, yet it is exactly this fundamental dependency which the work of the Intake Center strives to dispel.

#### F. SUMMARY OF THE U.S. SYSTEM

Part I of this study has focused upon access to civil justice in the United States. The United States government guarantees access to civil justice only implicitly through constitutional and legislative guarantees. The judicial forum remains the primary alternative for civil dispute resolution. High litigation costs, delays in processing claims, and the system's inappropriateness for many types of civil disputes diminish access to this forum. Delays stem from court overload, traceable to over-reliance on courts as dispute resolution forums, and the litigious nature of the American society. The litigation model's inappropriateness for the resolution of many civil disputes primarily rests with the legal/adversarial nature of the system. Many civil disputes, particularly those involving complex issues of ongoing personal relations, require a more human, flexible, person-oriented form of dispute resolution. Moreover, the formal court proceedings are not always necessary to resolve more minor disputes. Although quasi-judicial forums exist in administrative agencies, they suffer from the same problems of high cost and delay.

As a result of these criticisms, a revolution in dispute resolution has begun. This revolution focuses on a search for new forms of non-judicial dispute resolution methods lacking the faults of the existing system. Reforms include implementation of arbitration and mediation programs which represent less-formal, less-costly, and more consensual forms of dispute resolution. Reforms also include the search for full

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138. See A. Davis, *Justice without Judges: Law in the 1980's* (available at the American Bar Association Special Committee on Dispute Resolution, Washington, D.C. 1983) (defending the court's "historic role in applying public norms, setting precedents, protection and extending rights and acting as deterrents").

139. See DISPUTE RESOLUTION, *supra* note 6, at 51-55 (1984) (suggesting the possibility of the wealthy creating their own private high class dispute resolution forums).

140. See *id.* (suggesting the possibility of consensual dispute resolution without deference to law).

utilization, study, and renovation of available community dispute resolution alternatives as well as the development of new alternatives. The Multi-Door Program exemplifies not only an attempt to encourage full utilization of existing community alternatives through client referral, but also an attempt to educate the ordinary citizen and to dispel the social predisposition to rely on the judicial forum for the resolution of disputes.

## II. ACCESS TO CIVIL JUSTICE IN THE SOVIET UNION

### A. GUARANTEES TO ACCESS: THE SOVIET CONSTITUTION AND LEGISLATION

The 1977 Constitution of the Soviet Union<sup>141</sup> guarantees access to civil justice in some matters but, like the United States Constitution, does not define the Government's duty to provide an effective civil justice system.<sup>142</sup> The Constitution, however, recognizes the courts' role in Soviet society to effectively administer justice and guarantee access for citizens.<sup>143</sup> Further, to preserve the integrity of the justice system, Article 156 of the Constitution provides that "justice is administered in the U.S.S.R. on the principle of the equality of citizens before the law and the court."<sup>144</sup> Article 159 guarantees the right to "the services of an interpreter" in judicial proceedings.<sup>145</sup> Importantly, unlike in the United States Constitution, Article 161 explicitly guarantees the availability of legal assistance, and in certain cases free legal representa-

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141. See U.S.S.R. CONST., reprinted in CONSTITUTIONS OF THE WORLD (A. Blau-stein & G. Flanz trans. 1971) (translation into English).

142. *Id.* See generally Zivs & Melnikov, *supra* note 1 (discussing constitutional and legislative guarantees for Soviet citizen access to civil justice).

143. See U.S.S.R. CONST., *supra* note 141, at art. 151 (stating that justice is administered only by the courts). An assumption of this study is that "civil justice" has a broader definition than the enforcement of civil law in the courts. This study assumes that the achievement of civil justice, a "just" and satisfactory resolution of civil disputes, may be realized through utilization not only of the courts but also government agencies, social organizations and consensual methods of private resolution between disputants.

Article 151 of the Soviet Constitution, however, appears to contradict this assumption which places the power of justice solely within the judicial structure. Article 163 appears to contradict article 151, however, which places resolution of economic disputes between enterprises (which are in fact civil disputes) within the jurisdiction of state arbitration bodies. See Chechot, *Judicial Protection of Subjective Rights and Interests*, 8 SOVETSKOE GOSUDARSTVO I PRAVO 4 (1967), cited in SOVIET LEGAL SYSTEM, *supra* note 7, at 126 (discussing the various types of dispute resolution forums in the Soviet society).

144. U.S.S.R. CONST., *supra* note 141, at art. 156

145. *Id.* at art. 159.

tion.<sup>146</sup> Unlike the Soviet Constitution, the Soviet civil procedure code explicitly obligates the Soviet State to provide an effective system of civil justice.<sup>147</sup> Like the Constitution, the civil procedure code also guarantees equal protection of the rights of all parties under the civil law.<sup>148</sup>

## B. THE JUDICIAL FORUM

### 1. *The Role of the Courts*

The Soviet Constitution, unlike the United States Constitution, explicitly provides for the establishment of numerous types of courts.<sup>149</sup> This constitutional provision for various types of courts, however, is somewhat ironic given Communist dogma that courts represent a bourgeois vehicle of class oppression which should wither away with the state.<sup>150</sup> Nevertheless, the Soviet society has accepted the judicial structure as a necessary instrument of social order.<sup>151</sup>

The Soviet Constitution of 1936 established the guiding principles of the present-day judiciary.<sup>152</sup> The Judiciary Act of 1938 complemented these principles with the structure of a developed court system.<sup>153</sup> The Soviet court system's organization reflects, to a large extent, that of the judicial system in the United States. There are two similar bodies of courts; one for the U.S.S.R. and the other for each of the autonomous regions.<sup>154</sup> Each body of courts has essentially three levels: courts of

146. *Id.* at art. 161 ("[c]olleges of advocates are available to give legal assistance to citizens and organizations. In cases provided for by legislation citizens shall be given legal assistance free of charge").

147. *See Zivs & Melnikov, supra* note 1, at 644 (stating that the aim of the civil code is to guarantee that Soviet civil procedure settles civil cases rapidly and correctly). The Soviet civil procedure code further charges the courts with the obligation to exercise measures which would prevent the occurrence of civil disputes through the education of Soviet citizens on the "strict observance of Soviet laws and the rules of the socialist communal life." *Id.* at 653.

148. *Id.*

149. U.S.S.R. CONST., *supra* note 141, at art. 151 (providing for the Supreme Court of the U.S.S.R., the Supreme Courts of Union Republics, the Supreme Courts of Autonomous Republics, Territorial, Regional, and city courts, courts of Autonomous Regions, courts of Autonomous Areas, district (city) people's courts, and military tribunals in the armed forces).

150. Zivs & Melnikov, *supra* note 1, at 653 (reproducing relevant text of art. 151 of the U.S.S.R. Const.). *See* J. HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY* 481 (1978) (discussing the Soviet observation of the class nature of court administered justice).

151. *Id.*

152. *See* G. GUINS, *SOVIET LAW AND SOVIET SOCIETY* 315 (1954) (presenting historical background on the Soviet judiciary).

153. *Id.*

154. Interview with Louise I. Shelly, Professor of Soviet Law at the Washington

original jurisdiction, an intermediate court level having both appellate and some original jurisdiction, and a supervisory or superior level.<sup>155</sup> The function of the appellate forums, however, differs from United States' practice. Appeals are rarely granted except under specific circumstances defined by statute, at the discretion of the state attorneys (procurators), or the courts themselves.<sup>156</sup> The Supreme Court of the U.S.S.R. accepts final appeals and is the supreme federal court.

## 2. *The Interrelationship of Law, Justice, and the Courts*

Despite the explicit power that the Soviet Constitution grants to the Soviet courts to administer justice, and its similar structure to the United States judiciary, their relationship to the role of *law* in Soviet society and to the actual administration of *justice* is very different than those relationships in the United States.<sup>157</sup>

These differences may be partly explained by the distinction between the capitalist and socialist systems and between the common and civil law. Philosophically, Soviet law does not have an independent moral or political force of its own.<sup>158</sup> Law in the U.S.S.R. does not define immutable individual rights nor express lasting moral doctrine.<sup>159</sup> The law, rather, is a social tool of the executive and legislative governing bodies used to fulfill the Communist Party objectives.<sup>160</sup>

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College of Law, The American University, Washington, D.C. (Dec. 18, 1985).

155. *Id.*

156. *Id.* See Zivs & Melnikov, *supra* note 1 (presenting a general discussion of civil appeals of judgments).

157. See *supra* notes 30-40 and accompanying text (discussing the role of the interrelationship of law, justice, and the United States).

158. See V. GSOVSKI, SOVIET CIVIL LAW, PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME 163 (1948) (noting that "[m]istrust of the law as an independent social force was deeply rooted in Marxian philosophy as it was originally understood by many Soviet jurists").

159. See A. VYSHINSKII, TEORIA SUDEBNYKH DOKAZATELSTV V SOVETSKOM PRAVE 125-127 (1946), cited in G. GUINS, *supra* note 152, at 326 ("We . . . reject every attempt, grounded on the idea that the moral world has its permanent principles standing above history and national differences, to press on us any moral dogma in the form of eternal, final, immutable moral law").

160. See K. HULICKA & I. HULICKA, SOVIET INSTITUTIONS: THE INDIVIDUAL AND SOCIETY 278 (1967) [hereinafter cited as K. HULICKA & I. HULICKA] (stating that Soviet law is an instrument of the Party); see also *Principles of Civil Legislation of the U.S.S.R. and the Union Republics*, IZVESTIA, Dec. 10, 1961, at 3-6, 20, cited in K. HULICKA & I. HULICKA, at 326; H. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 379 (1982) (presenting a general discussion on the role of law in the Soviet society).

### 3. The "Democratization" of the Soviet Courts

Unlike their American counterparts, Soviet courts retain no monopoly over dispute resolution. Despite Article 151 of the Soviet Constitution which states that courts administer justice, in reality all social organizations play a role.<sup>161</sup> The Soviet bar contributes to this people-centered approach. In the Soviet Union, litigants most often represent themselves,<sup>162</sup> but even where an individual seeks an attorney, litigation does not necessarily result. An individual who has a legal problem goes to the community bar office to discuss the matter with a lawyer.<sup>163</sup> Requests for counsel may occur if an individual has a professional relationship with a specific attorney.<sup>164</sup> Otherwise, the bar office manager will appoint an attorney.<sup>165</sup> After discussion of the legal problem, the attorney will advise the individual whether a violation of the law at issue appears to exist, and whether it would be advisable to file a suit.<sup>166</sup> Although the attorney and client might decide that a suit would be advisable, the parties may conclude that an alternative form of dispute resolution is more appropriate.<sup>167</sup> In sum, the Soviet local bar offices function much like the screening center at the Multi-Door Program would if it were staffed by attorneys rather than neutral referral counsellors.<sup>168</sup>

One practical reason for the need for individuals to represent themselves in court is the shortage of attorneys. In the Soviet Union, there is

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161. See Rules of the Communist Party of the Soviet Union, as adopted by the Twenty-second Communist Party Congress (Oct. 31, 1961), reprinted in *IZVESTIA*, Nov. 3, 1961, cited in *SOVIET LEGAL SYSTEM*, *supra* note 7, at 11 ("[t]he law of all the people is characterized by the expansion and deepening of the process of democratization. It is manifest in the fact that all classes and social groups of Soviet society have exactly the same status in law.").

162. One practical reason individuals represent themselves in court is the shortage of attorneys. See Huskey, *The Limits to Institutional Autonomy in the Soviet Union: The Case of the Advocatura*, 34 *SOVIET STUDIES* 200 (1982) (presenting an overview of the professional bar). According to Huskey, there is only one trained advocate for every 13,000 citizens. *Id.*

163. Interview with former Soviet citizen who requested to remain anonymous (Dec. 15, 1985).

164. *Id.*

165. *Id.*

166. *Id.* (noting that suits will be brought to court (generally the Peoples' Court) if the attorney advises the client that there is an alleged violation of a specific code; otherwise, the client might be referred to an alternative quasi-judicial or non-judicial dispute resolution forum); see *infra* notes 241-62 (discussing the Comrades' Courts and non-judicial dispute resolution alternatives).

167. Interview with former Soviet citizen, *supra* note 163.

168. See *supra* notes 124-31 and accompanying text (discussing the Multi-Door Dispute Resolution Program).

only one trained lawyer for every 13,000 citizens.<sup>169</sup> Attorneys in the Soviet Union, play a much less important role in assisting individuals in following correct court procedures and presenting proper evidence and arguments to the judge than in the United States.<sup>170</sup> Because of their civil law system, Soviet courts do not consider complex precedent in a given matter.<sup>171</sup> Procedures for numerous "routine" types of social disputes, moreover, are streamlined for efficient application.<sup>172</sup> Common civil cases, for example, such as suits for divorce, alimony and inheritance do not result in complex controversy nor require a sophisticated legal analysis.<sup>173</sup>

To compensate for the lack of counsel for many civil litigants, Soviet courts have much less formal rules of civil procedure, and judges are authorized to play a much more active role in the investigation of facts and in the settlement of claims than in the United States.<sup>174</sup> The court also has the discretion to summon parties or to remove a plaintiff or defendant and replace them with another party without interrupting the suit.<sup>175</sup>

Concepts of legality that appellate courts enforce in certain instances, however, limit a judge's discretion.<sup>176</sup> Further, a judge's con-

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169. Huskey, *The Limits to Institutional Autonomy in the Soviet Union: The case of the Advocatura*, 34 SOVIET STUDIES 200, 201 (1982).

170. Interview with Louise I. Shelley, Professor of Soviet Law, Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985); Interview with former Soviet citizen, *supra* note 163. The former Soviet citizen noted that attorneys were superfluous in many simpler civil actions and that the preliminary advice offered on points of law and court procedure by attorneys at community bar offices sufficed to prepare a layperson to carry forward their own claim. See Puchinskiy, *supra* note 1, at 825 (discussing the inexpensiveness of civil litigation in the Soviet Union, particularly in light of the near absence of attorneys' fees); L. SHELLEY, *LAWYERS IN SOVIET WORK LIFE* 30 (1984) (discussing the types of enterprise, legal assistants, and their level of legal education).

171. *Id.* (discussing the inexpensiveness of civil litigation in the Soviet Union).

172. Interview with Louise I. Shelley, Professor of Soviet Law at the Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985).

173. See G. GUINS, *supra* note 152, at 316 (presenting an overview of judicial administration in the Soviet system with specific reference to the simplicity of civil actions).

174. See The RFSFR Fundamentals of Civil Procedure, art. 16 ("A court is required, without limiting itself to the evidence and explanations that have been introduced to take all measures provided by law to clarify from all sides, completely and objectively the real circumstances of a case, the rights and duties, warning them of the consequences of committing or not committing procedural acts and must provide them assistance in defending their rights").

175. See Zivs & Melnikov, *supra* note 1, at 648 (discussing the judges' broad discretion in managing a suit).

176. See Zivs & Melnikov, *supra* note 1, at 649 (defining the role of the procurator in a civil action). RFSFR Fundamentals of Civil Procedure, art. 12 notes that "[i]n a civil trial, the procurator sees to it that the court precludes the infringement of a sub-

duct is subject to review by a government attorney (the procurator).<sup>177</sup> For example, Article 15 empowers the procurator to remedy violations of law.<sup>178</sup>

Even where a dispute ends in litigation, the role of the layperson in the Soviet court helps to democratize the system. The majority of civil cases, primarily property disputes and family matters, come under the jurisdiction of the People's Courts.<sup>179</sup> The People's Courts have one State-appointed judge, and two people's assessors elected on the basis of universal suffrage.<sup>180</sup> At court, people's assessors have all the rights of a judge.<sup>181</sup> Although people's assessors may be compared to the jury in the United States,<sup>182</sup> the people's assessors' role differs greatly from that of the American style jury. People's assessors are entitled to full participation in the trial,<sup>183</sup> interact directly with the litigants,<sup>184</sup> and are generally not shielded from the dispute by the theatrics of the attorneys and the formalities of the courtroom.<sup>185</sup>

### C. THE SUCCESS OF THE JUDICIAL FORUM

#### 1. *An Overview*

Unlike the United States judicial system, therefore, civil justice and the law in the Soviet Union are brought down to the level of the layperson not only by their philosophical role of law in society, but also by the nature of the court process which is conceived as a social vehicle

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jective right, that the laws are strictly observed in the activities of the parties and of the other participants in the legal procedure, and that the court's judgment is lawful and well-grounded, *i.e.*, that it is made in conformity with the factual circumstances of the case and the rules of procedure, and is based on the facts established before the court during the proceedings."

177. *Id.*

178. *See id.* at 649 (discussing the affirmative duties of a procurator).

179. *See* K. HULICKA & I. HULICKA, *supra* note 160, at 291 (stating that People's Courts are courts of original jurisdiction).

180. U.S.S.R. CONST., *supra* note 141, at art. 152; *see also* K. HULICKA & I. HULICKA, *supra* note 160, at 293 (stating that cases of original jurisdiction in the intermediate courts are also heard by a judge and two people's assessors, though appeals in the intermediate courts are heard by three judge panels).

181. U.S.S.R. CONST., *supra* note 141, at art. 154.

182. *Id.* at amend. VII.

183. *Id.* at art. 152.

184. *Id.* (discussing the role of the People's Assessor in Soviet civil litigation).

185. *See supra* notes 167-72 and accompanying text (discussing the lack of use of attorneys in the Soviet Union for the resolution of civil disputes). *But see* Los, *The Myth of Popular Justice Under Communism: A Comparative View of the U.S.S.R. and Poland*, 2 JUST. Q. 442, 449-54 (1985) (depicting the Peoples' Assessors' role in the justice system as active in theory but passive in practice especially during political trials).

whereby civil justice is achieved.<sup>186</sup> Further, unlike its American counterpart, the Soviet civil justice system functions well.<sup>187</sup> Access to civil justice is not prevented by costly legal fees, nor by court overload and delay.<sup>188</sup> Moreover, the Soviet system often promises a more "appropriate" forum for the resolution of civil disputes,<sup>189</sup> than in the United States.<sup>190</sup>

## 2. *The Lack of Cost*

Court costs in the Soviet Union are minimal.<sup>191</sup> Similarly, the costs of an attorney are far less than in the United States.<sup>192</sup> There are four classes of attorneys in the Soviet Union: the notary, the *advokatura* (private attorney), the *iuriskonsult* (in-house counsel to an enterprise) and the procuracy (government attorney).<sup>193</sup> The government pays the *advokatura* a salary and generally the *advokatura* does not earn income from individual civil cases.<sup>194</sup> The fees for their services are paid directly to the counselling office.<sup>195</sup>

The *iuriskonsult* also performs an important function in providing low cost legal consultation to business enterprises, and free legal assis-

186. See *supra* note 140 and accompanying text (discussing the question whether art. 51 of the U.S.S.R. Const. demands that Soviet justice be administered only by the courts).

187. See Zivs & Melnikov, *supra* note 1, at 645 (commenting on the Soviet system's ability to provide quality civil justice to its citizens).

188. See *infra* notes 187-200 and accompanying text (discussing the "accessibility" of the Soviet courts).

189. See *infra* notes 200-09 and accompanying text (discussing the appropriateness of the Soviet forum).

190. See *supra* notes 75-91 and accompanying text (discussing the inappropriateness of the American system in some instances).

191. Interview with former Soviet citizen, *supra* note 161; Interview with Louise I. Shelley, Professor of Soviet Law, Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985); see also Puchinskiy, *supra* note 1, at 819-20 (discussing the low court costs involved in litigation in the Soviet Union); Zivs & Melnikov, *supra* note 1, at 648 (discussing the low costs associated with the civil action).

192. Compare Puchinskiy *supra* note 1, at 825 (discussing the low cost of attorneys) with notes 65-77 *supra* and accompanying text (discussing costs involved in the United States system).

193. Louise I. Shelley, "Soviet Law" course lecture at the Washington College of Law, The American University, Washington, D.C. (Fall, 1985).

194. Interview with former Soviet citizen, *supra* note 163; Interview with Louise I. Shelley, Professor of Soviet Law, Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985). See Puchinskiy, *supra* note 1, at 825-27 (noting that two-thirds of those seeking legal advice in the Russian Soviet Federated Socialist Republic (R.S.F.S.R.) received it without charge).

195. Interview with Louise I. Shelley, Professor of Soviet Law, Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985).



tance to individual employees.<sup>196</sup> The iuriskonsult provides effective free legal advice to employees similar to the function of the advocatura in community legal offices.<sup>197</sup> Their presence not only improves the life of individual employees, but also provides preventive legal counsel to an enterprise.<sup>198</sup> It must be noted, however, that the civil dispute resolution role of the iuriskonsult has not realized its full potential because of the low supply of attorneys in the Soviet Union.<sup>199</sup>

### 3. *The Lack of Delay*

Soviet courts seek to minimize delay.<sup>200</sup> Procedural rules call for informality and simplicity.<sup>201</sup> Article II of the Russian Soviet Federated Socialist Republic (R.S.F.S.R.) Fundamentals of Civil Procedure states that Soviet courts must "[examine correctly and rapidly] and settle civil cases so as to protect the citizens' political, labor, housing and other personal property rights and vested interests."<sup>202</sup> Eighty to ninety per cent of the civil cases are "completed" within thirty days after filing of a suit.<sup>203</sup> Procedures for the enforcement of judgments in the Soviet Union are similar to those in the United States, and generally

196. See L. SHELLEY, *LAWYERS IN SOVIET WORK LIFE* (1984) (noting that "[b]ecause Soviet workplaces are more than simply places of employment but are also institutions that often provide for the housing, medical, and recreational needs of their employees, it is only natural that their workers will look to the staff of the workplace organization for the resolution of many of their problems").

197. *Id.* (presenting a comprehensive overview of the role of the iuriskonsult).

198. *Id.*

199. See *Iuridicheskaja sluzhba prepriatii*, 1 *Pravda* (Moscow) (July 29, 1982), cited in L. SHELLEY, *LAWYERS IN SOVIET WORK LIFE* 37 (1984) (stating that more than half the enterprises and organizations have only a part-time iuriskonsult).

200. Although Soviet procedural rules require that civil suits be processed quickly, no data exists testing their success.

201. See *SOVIET LEGAL SYSTEM*, *supra* note 7, at 29 (discussing the rules of civil procedure).

202. See The R.S.F.S.R. Fundamentals of Civil Procedure, art. 99, cited in Melnikov & Zivs, *supra* note 1, at 655. Zivs and Melnikov note:

Besides the general time-limit, the codes have shorter time-limits for the trial of some cases which concern the citizens' most important interests. For instance, cases on the deduction of an allowance, compensation for damage caused by an injury or other harm to the health or by a breadwinner's death, and cases arising out of labor relations, must be examined by the courts of first instance within ten days if the parties concerned are in the same city or district, and within twenty days, in other instances, from the day the claim was submitted.

*Id.*

203. See *Summary Discussions of Florence Conference on Fundamental Guarantees of the Parties in Civil Litigation*, 2d Sess. (comments of Prof. Ziv), in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION* 781, 794 (M. Cappelletti & D. Tallon eds. 1973) (noting the lack of delay in the Soviet civil system). *But see* Zivs & Melnikov, *supra* note 1, at 655 (stating that the Turkmen Code requires resolution of general civil disputes within twenty days).

provide for expeditious collection.<sup>204</sup> Violations of time limits result in disciplinary action taken by higher courts against tardy judges.<sup>205</sup>

#### 4. *The Appropriateness of the Judicial Forum*

Lastly, the Soviet courts lack the 'inhuman' and alienating atmosphere sometimes noted in the United States courts;<sup>206</sup> procedures and rules of evidence are not complex,<sup>207</sup> and lawyers are not essential.<sup>208</sup> The local community elects the people's assessors. Both assessors and judges are considered to be active and sympathetic.<sup>209</sup> The Soviet courts, therefore, though not always necessary for the resolution of numerous disputes of a moral and personal nature (often because of the existence of other social organizations for the resolution of such disputes),<sup>210</sup> are nevertheless better adapted to settle such disputes than courts in the United States.

Alternative forums for dispute resolution within the court system include the possible referral of litigants before the People's Courts to a third party umpire,<sup>211</sup> similar to trial before an arbitrator in the United States.<sup>212</sup> Use of the umpire is optional for the litigants.<sup>213</sup> An umpire has jurisdiction to hear a claim regardless of amounts in controversy and will make a public ruling.<sup>214</sup> The umpire is selected by the parties, and their decision is binding and final unless both parties agree to sub-

204. See Zivs & Melnikov, *supra* note 1, at 651 (referencing collection of judgments).

205. See 5 BULLETIN OF THE U.S.S.R. SUPREME COURT 1011 (1967), cited in Zivs & Melnikov, *supra* note 1, at 657 (discussing enforcement of time limitations against lower court judges).

206. See *supra* notes 55-91 and accompanying text (discussing alienation in the United States system).

207. See G. GUINS, *supra* note 152, at 316 (discussing the atmosphere of the Soviet courts).

208. See *supra* notes 161-73 and accompanying text (discussing the lack of necessity for lawyers in the Soviet civil justice system).

209. See GORSHENIN, THE NEW SOVIET LAW ON THE JUDICIAL SYSTEM (1982), in FUNDAMENTALS OF SOVIET CRIMINAL LEGISLATION 55-56, cited in K. HULICKA & I. HULICKA, *supra* note 160, at 292 ("[s]ince the people's assessors come from the people and have their confidence, they are able to introduce the wisdom of the people, experiences gained in life, into the work of the court, and are also able to delve deeply and understandingly into the bewildering complexity of human relations, into the circumstances attending any criminal or civil case").

210. See *infra* notes 242-46 and accompanying text (discussing non-judicial forums for civil dispute resolution in the Soviet Union).

211. Volozhanin, *More Attention to Third Party Umpires*, in 5 SOVIETSKAIA IUSTITSIYA 11 (1981), cited in SOVIET LEGAL SYSTEM, *supra* note 7, at 25 (presenting an overview of the role of the third-party umpire).

212. *Id.* See *supra* notes 101-04 (discussing arbitration in the United States).

213. Volozhanin, *supra* note 211.

214. *Id.*

mit the case for later review before a People's Court.<sup>215</sup>

These virtues of the Soviet judiciary would alone indicate the superiority of the Soviet civil justice system over the United States system, but the Soviet Union, like the United States, also has numerous well-established quasi-judicial and non-judicial organs designed for the resolution of disputes.

#### D. THE QUASI-JUDICIAL FORUM

##### 1. *The Administrative Tribunal*

Article 163 of the Soviet Constitution provides for the establishment of state arbitration tribunals for economic disputes between enterprises, institutions and organizations.<sup>216</sup> There are two principal arbitration boards,<sup>217</sup> each having their own areas of jurisdiction. State arbitration tribunals have jurisdiction over property and contract disputes between enterprises of different regional economic councils and different ministries.<sup>218</sup> Departmental arbitration tribunals have jurisdiction over such disputes between enterprises of the same regional economic council or ministry.<sup>219</sup>

The Tribunal's decisions are made both in accordance with the law and the economic plan,<sup>220</sup> which are in turn formulated with the intent

215. SOVIET LEGAL SYSTEM, *supra* note 7, at 26 (presenting an overview of the role of the third-party umpire).

216. U.S.S.R. CONST., *supra* note 141, at art. 163; *see* Decree of May 3, 1931, *Coll. Laws, U.S.S.R.* No. 26, art. 203 (1931), *cited in* Berman, *Commercial Contracts in Soviet Law*, 35 CAL. L. REV. 191, 202 (1947) (discussing the decree law which first established the arbitration tribunals).

217. Soviet economic arbitration boards differ from those in the United States to the extent that their jurisdiction is mandatory over a class of disputes, rather than voluntary. Also, the arbitrator is governed strictly by the civil law in his decisions, having less freedom to impose equitable and creative solutions to resolve the parties' dispute. They are more comparable in form and function to, though somewhat more formal than, the United States administrative tribunals. Decree of May 3, 1931, *Coll. Laws, U.S.S.R.* No. 26, art. 203 (1931), *cited in* Berman, *Commercial Contracts in Soviet Law*, 35 CAL. L. REV. 191, 202 (1947).

218. *See* H. BERMAN, *supra* note 160, at 124 (presenting an overview of the work of the Arbitration Tribunals).

219. *Mozhaiko*, 6 'O pravovoi prirode sovetskogo gosudarstvennogo arbitrasha,' *Sovetskoe gosudarstvo i pravo* (1947), *cited in* G. GUINS, *supra* note 152, at note 119 (presenting an overview of the work of the Arbitration Tribunals).

220. *See* H. BERMAN, *supra* note 157, at 127 (discussing the relationship of the civil law to the economic plan). The economic plan is drawn by the Soviet State to insure "the maximum utilization of institutions and resources from the point of view of economic development." *Id.* at 101. On the relationship of the civil law and the economic plan in the role of Tribunal decisions, Berman notes: "[w]hereas economic expediency was previously hailed as the ultimate criterion for the decision of disputes, it is now stated as the judicial protection of property."

of maximizing the interests of the state.<sup>221</sup> Although the majority of disputes are for breach of contract,<sup>222</sup> the Tribunals also have competence to hear claims related to the parties' inability to resolve disagreements on the terms of performance as well as penalties which arise over the contractual negotiations.<sup>223</sup> The arbitrator is generally a lawyer, or a layperson assisted by lawyers,<sup>224</sup> and has broad powers, similar to those of a judge.<sup>225</sup> Unlike United States administrative tribunals, but similar to the Soviet courts, the Soviet arbitration tribunals have an affirmative obligation to inform the state planning organs of defects in planning and operation of the economy so as to contribute to a "preventive law" function.<sup>226</sup>

## 2. *The Comrades' Courts*

Another quasi-judicial organ, the Comrades' Court, is organized to hear minor criminal and civil<sup>227</sup> offenses and to resolve a wide variety of minor disputes among citizens.<sup>228</sup> Comrades' Courts are established in nearly all larger community organizations.<sup>229</sup> The courts are compe-

221. *Id.* at 101 (discussing the objectives of the economic plan).

222. *Id.* at 130 (discussing the nature of disputes before the state arbitration tribunal).

223. *Id.* at 130-32; see also G. GUINS, *supra* note 152, at 117-20 (noting that procurators also may be called upon to help mediate disputes at early stages, to prevent the necessity of going before a tribunal). In this role, the Procurator provides a function very similar to that of the U.S. Federal Mediation and Conciliation Service. *Id.*

224. H. BERMAN, *supra* note 161, at 191 (presenting a concise overview of the work of the arbitration tribunals).

225. *Id.*

226. See Mozhaiko, 6 'O pravovoi prirode sovetskogo gosudarstvennogo arbitraza,' *Sovetskoe gosudarstvo i pravo* (1947), cited in G. GUINS, *supra* note 160, at 119 (discussing the preventive law function of the planning organs).

227. Comrades' Courts exemplify the collectivist mentality found not only in the Soviet Union, but also in close, primitive communities. See D. BLACK, *THE BEHAVIOR OF LAW 105-21* (1976) (discussing the relationship of different forms of social control to the legal system); see also L. NADER & H. TODD, *supra* note 2 (presenting a study of dispute resolution in relatively primitive societies).

Khrushchev, in his enthusiasm to promote the role of each citizen in the administration of justice, considered Comrades' Courts, and other similar bodies, as essential for the smooth operation of Soviet society. Khrushchev, *Pravda*, Jan. 29, 1959, cited in K. HULICKA & I. HULICKA, *supra* note 160, at 299.

228. See Gorkin, *The Tasks Facing Soviet Justice Under Present Conditions*, *IZVESTIA*, June 2, 1963, at 5; Mironob, *Main Thing Is Prevention and Upbringing Work*, *IZVESTIA*, June 2, 1963 at 2-4, cited in K. HULICKA & I. HULICKA, *supra* note 160, at 300 (noting that during the early 1960's, there were more than two-hundred thousand Comrades' Courts hearing up to four million cases annually); see also Los, *supra* note 185, at 456-57 (presenting a concise history of the Comrades' Courts).

229. See G. SMITH, *PUBLIC POLICY AND ADMINISTRATION IN THE SOVIET UNION 135* (1980) (stating that Comrades' Courts are located at "enterprises, institutions, organizations, higher and specialized secondary schools, collective farms, apartment

tent to hear not only violations of specific laws, but more importantly, disputes regarding the general behavior of community members.<sup>230</sup>

Comrades' Court judges may impose a wide variety of remedies.<sup>231</sup> The penalties provided for in the statute relate largely to social embarrassment and publicity.<sup>232</sup> These rulings are not subject to review in the Peoples' Courts.<sup>233</sup> Because community morals, rather than codified law,<sup>234</sup> form the basis of Comrades' Court decisions, Comrades' Courts organize and institutionalize social control through social coercion.<sup>235</sup>

buildings, and rural collectives of at least fifty people").

230. See Khrushchev, *Problems of Theory: Report to the XXI Extraordinary Congress of the Communist Party of the Soviet Union*, Pravda, Jan. 28, 1959, cited in SOVIET LEGAL SYSTEM, *supra* note 7, at 17 (discussing the relationship of the work of the Comrades' Courts to the enforcement of social norms); see also *Statute on Comrades' Courts*, July 3, 1961 (amended Mar. 3, 1962, Oct. 23, 1963 and Jan. 16, 1965), reprinted in *Polozhenie O Tovarishchikh Sudakh* (1967), cited in SOVIET LEGAL SYSTEM, *supra* note 7, at 19. The *Statute on Comrades' Courts* provides:

Comrades' courts are elected public organs charged with actively contributing to the rearing of citizens in the spirit of a communist attitude toward work, toward socialist prosperity, toward preservation of the rules of socialist society, toward the development in soviet people of a sense of collectivism and comradesly mutual assistance, toward respect for the dignity and honor of citizens. Of primary importance in the work of Comrades' courts is the prevention of violation of law and of misdemeanors, detrimental to society, rearing of people through conviction and social influence, creating conditions of intolerance to any antisocial acts. Comrades' courts are invested with the trust of the collective, express its will and are responsible to it.

*Id.* (emphasis added). Offenses within the jurisdiction of the Comrades' Courts include: "appearance in an intoxicated condition or other unworthy conduct in public place or at work; . . . unworthy behavior toward women, failure to perform duties related to the rearing of children, unworthy behavior toward parents; abusive language, . . . the damaging of trees and other greenery"). *Id.*

231. See SOVIET LEGAL SYSTEM, *supra* note 7, at 15 (discussing the work of the Comrades' Courts generally); *Statute on Comrades' Courts*, July 3, 1961 (amended Mar. 3, 1962, Oct. 23, 1963 and Jan. 16, 1965), reprinted in *POLOZHENIE O TOVARISHCHIKH SUDAKH* (1967), cited in SOVIET LEGAL SYSTEM, *supra* note 7, at 19. For example, *Statute of the Comrades' Courts*, article 15 notes that "A comrades' court may apply to the accused the following measures of influence: 1) require the offender to apologize publicly to the victim or the collective; 2) announce a comradesly warning; 3) announce a public censure; 4) announce a public reprimand with or without publication in the press; . . . and may impose fines." *Id.*

232. *Id.*

233. See SOVIET LEGAL SYSTEM, *supra* note 7, at 23 (discussing the Comrades' Courts and the doctrine of judicial review).

234. Interview with former Soviet citizen, *supra* note 163. See *Model Act of Comradesly Courts*, in 2 *IZVESTIA*, Oct. 24, 1959, cited in K. HULICKA & I. HULICKA, *supra* note 160, at 299 ("Comradesly courts are clad in the confidence of the collective and express its will . . . [their] duties include educating Soviet citizens in the spirit of communist attitude toward work, socialist prosperity, observance of the rules of socialist co-existence, promoting within the Soviet people the spirit of collectivism, comradesly help, respect for the dignity and honor of the citizens").

235. See *Tovarishcheskie sudy kollktivnyi pedagog*, *IZVESTIA*, Oct. 21, 1959, at 2, cited in G. SMITH, *supra* note 229, at 135 (quoting a woman's expression of the humili-

Social organizations prosecute members of their own community to enforce norms of proper social behavior.<sup>236</sup> Attorneys, as a general rule, do not participate.<sup>237</sup> Other members of the community, family, and friends may provide support for the complainant or defendant.<sup>238</sup>

The Comrades' Courts exemplify a phenomena that is unique to the Soviet Union and other single-party states, as well as in close, primitive communities.<sup>239</sup> Social pressures act not only to promote early resolution of disputes, but also to prevent disputes entirely.<sup>240</sup>

#### E. THE NON-JUDICIAL FORUM

In addition to judicial and quasi-judicial forums for dispute resolution, other forms of informal, non-judicial dispute resolution exist through various social organizations.<sup>241</sup> In the Soviet Union, as in most societies, where one citizen has a dispute with another, perhaps over use of space in an apartment building, or treatment of children in a playground, the complainant can freely confront the individual. If the respondent party is not disposed to dealing directly with the complainant, however, and the degree of conflict in the dispute escalates because of lack of successful negotiation, the complainant has the option of seeking counsel from Party Committee leaders of social organizations to which the respondent belongs,<sup>242</sup> or from supervisors at the respon-

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tion she felt when appearing before a Comrades' Court: "I am ashamed to appear before the comrades with whom I work . . . [r]eally, it is easier to endure a stricter punishment than the stern court of the collective."

236. See G. SMITH, *supra* note 229, at 135 (social organizations prosecute members of their own community "to uncover the violator [of social order], not only when he has committed a misdeed or offense, but also when he demonstrates variation in acceptable norms of behavior which may lead to anti-social deeds. People can, by timely measures influence them, suppress their bad inclinations").

237. Interviews with former Soviet citizen, *supra* note 163. Interview with Louise I. Shelley, Professor of Soviet Law, Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985).

238. Interview with Louise I. Shelley, Professor of Soviet Law, Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985).

239. See D. BLACK, *THE BEHAVIOR OF LAW* 105-121 (1976) (discussing the relationship of different forms of social control to the legal system); L. NADER & H. TODD, *supra* note 2 (presenting a study of dispute resolution in relatively primitive cultures).

240. Interview with former Soviet citizen, *supra* note 163.

241. *Id.*

242. *Rules of the Communist Party of the Soviet Union, as adopted by the Twenty-Second Communist Party Congress* (Oct. 31, 1961), reprinted in *IZVESTIA*, Nov. 3, 1961, cited in *SOVIET LEGAL SYSTEM*, *supra* note 7, at 10 ("At congresses, conferences, and meetings called by soviet, labor union, cooperative and other mass organizations where there are not less than three Party members, Party groups shall be formed. The task of these groups is to strengthen the influence of the Party in every way and to carry out its policy among the non-party people, to strengthen Party and state discipline, to combat bureaucracy, and to verify fulfillment of Party and Soviet

dent's place of employment, to coerce the respondent to make efforts to resolve a dispute.<sup>243</sup> Every citizen has the authority, if not the duty, to keep a watchful eye on the activities of the other<sup>244</sup> and public opinion is a powerful influence on social behavior.<sup>245</sup> The existence of these other informal, yet powerful, socially coercive mechanisms provide another distinction between the civil dispute resolution mechanisms of the United States and the Soviet Union.

#### F. SUMMARY OF THE SOVIET SYSTEM

Part II of this study has surveyed the Soviet civil justice system with a focus on access to civil justice. The Soviet system guarantees citizen access to civil justice implicitly through constitutional guarantees, and explicitly through legislative guarantees. The judicial system remains the center for civil dispute resolution. In contrast to the United States judicial forum, however, high costs, delays, and inappropriateness of the forum do not bar access to Soviet justice. Court costs are minimal. Attorneys' fees are low. Self-representation in court is common. Where legal counsel is necessary, parties can obtain it free of charge or at low cost in community bar offices or in the workplace. Legislative requirements for the processing of claims and flexible court mechanisms, moreover, provide for expeditious treatment of complaints.

In addition, numerous quasi-judicial and non-judicial civil dispute resolution alternatives complement the efficiency of the judiciary. The administrative tribunals handle a large body of economic disputes through adjudication. The Comrades' Courts are an integral part of community organizations and exemplify the socialist character of much of the quasi-judicial and non-judicial civil dispute resolution in the Soviet Union. Community members adjudicate the claims of their peers in a flexible informal setting and impose judgments and punishments in accordance with social values.

Informal non-judicial civil dispute resolution mechanisms using social pressure to resolve disputes supplement the Comrades' Courts. Citizens' ability to solicit advice from employers and Party committees and support from otherwise neutral third-parties on an entirely informal basis functions to both solve and prevent civil disputes.

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directives").

243. Interview with former Soviet citizen, *supra* note 161.

244. *Id.*

245. *Id.*

## III. A COMPARATIVE SUMMARY

Both the United States and the Soviet Union have many complex and specialized mechanisms for civil dispute resolution. Both civil justice systems primarily rely upon a government-administered court system. Other quasi-judicial and non-judicial structures exist which provide additional compulsory and consensual forums for civil dispute resolution. Despite these general similarities, however, United States citizens have far less access to the civil justice system than their Soviet counterparts. The United States system remains inefficient and now faces a period of great experimentation and evolution in an effort to remedy these concerns. On the other hand, the Soviet civil justice system already provides quality civil justice.<sup>246</sup> What then might be learned from the Soviet system?

The Soviet system's success stems primarily from the philosophical relationship of law to justice in that society.<sup>247</sup> Civil justice is accessible to the Soviet citizen because of the "democratization" of the law.<sup>248</sup> The United States elevates its civil justice system above the layperson. Individuals who have studied the law oversee an overrated court system which, despite its high price for the common individual, has maintained a monopoly over professional civil dispute resolution and has become an overly influential participant in the society.<sup>249</sup> Only in recent decades has citizens' faith in the traditional court system faced popular chal-

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246. It is important to note, however, that an analysis of the Soviet civil justice system and its relationship with other institutions in the social fabric suggest that the Soviet civil justice system creates less than the ideal picture presented by this study. As indicated in the introduction of this study, one factor in assessing the total "quality" of civil justice is citizen satisfaction with the resolution of disputes. Other extra-legal realities of the Soviet society diminish the actual virtue of Soviet justice. For example, although a citizen might be able to obtain a quick, inexpensive divorce, spouses might not be able to acquire separate housing. See J. BATER, *THE SOVIET CITY* 97-111 (1980); *THE CONTEMPORARY SOVIET CITY* (H. Morton & R. Stuart eds. 1984) (discussing generally the problems of allocation of housing in the Soviet city with a historical overview). Although workers may have at their disposal numerous vehicles for the resolution of disputes in the workplace, they may be inhibited to pursue claims, particularly against their employer or supervisor, for fear of injuring their long-term relationship with their employer. Interview with Louise I. Shelley, Professor of Soviet Law, Washington College of Law, The American University, Washington, D.C. (Dec. 18, 1985). The limited availability of research tools on the Soviet legal system makes many considerations of the effect of extra-legal influences on the quality of legal results speculative, and many conclusions on the performance of the civil justice system somewhat qualified. *Id.*

247. See *supra* notes 154-57 and accompanying text (discussing the interrelationship of law, justice, and the courts in the Soviet civil justice system).

248. See *supra* notes 158-71 and accompanying text (discussing the factors which contribute to the "democratization" of law in the Soviet society).

249. See J. AUERBACH, *supra* note 30 (providing a social history of the professional elite).



lenge stemming from the professionalization of law and an exaltation of the ideal of "the law." This illusion of the superiority of a court-preserved, lawyer-advocated 'just' justice has helped to prevent effective reform in the United States.<sup>250</sup> Despite these criticisms, many complainants, considering the courts the only recourse for the protection of their legal rights, will wait for up to five years for the privilege of having their claims heard before a judge.<sup>251</sup>

The increased need in the twentieth century for the individual citizen to resort to the courts for the effective enforcement of individual rights is largely created by the disintegration of other mechanisms of dispute resolution and general social control in the society.<sup>252</sup> The lack of other social forces that contribute to a private resolution of civil disputes where they often arise, in the home and in the community, leaves no other vehicle for justice other than the courts.<sup>253</sup>

In the Soviet Union, on the other hand, the civil law does not represent the ideals of a higher doctrine, rather it is flexible to fulfill the needs of the State and of the individual citizen.<sup>254</sup> Soviet civil law rests in the hands of all of the people. The civil justice system is administered by professionals but the entire system is not professionalized out

250. These criticisms of the U.S. civil justice system have been virtually unchallenged. See Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, in *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 92 (1976) (commenting that delays and high costs have long affected the United States system). The delays and high costs in resolving disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by fees and expenses. "There is nothing incompatible between efficiency and justice. Inefficient courts cause delay and expense, and diminish the value of the judgement . . . Inefficiency drains the value of even a just result either by delay or excessive cost, or both." See also R. SMITH, *supra* note 57 (presenting an early (1919) comprehensive study of the disparity between the justice offered through law to the rich and that offered to the poor).

251. See Higginbotham, *The Priority of Human Rights in Court Reform*, in *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 153 (1976) (discussing generally the length of delays in the civil action).

252. See D. BLACK, *supra* note 227, at 105-121 (discussing the relationship of different forms of social control to the legal system).

253. See *id.* at 105-121 (discussing the relationship of different forms of social control to the legal system); see also DISPUTE RESOLUTION, *supra* note 6, at 20 (1984) ("The decreasing importance of the family, church and the political process as dispute resolution forums adds pressure upon the formal judicial dispute resolution system. Courts are increasingly perceived as the first line of redress for many grievances, rather than as a forum of last resort").

254. See L. SHELLEY, *supra* note 170, at 149 ("The force of law rests not on a written code but on the ability of individuals to personalize authority. An old Russian saying, 'It is not what you say but how you say it to me,' summarizes this approach to the law. The manner in which it is conveyed is more important than the specific legal provisions").

of the reach of the layperson. Attorneys are regulated to provide affordable and convenient services to the community. Expedient processing of claims is guaranteed. Most importantly, the society as a whole, not just the professionalized bar, accepts responsibility for the prevention and resolution of civil disputes.<sup>255</sup> The participation of the general society in the administration of civil justice is best exemplified by the Comrades' Courts which have no counterpart in the United States. For almost all social organizations, legislation provides for the creation of a mechanism to enforce the civil and criminal law in the name of the individual citizens' right and duty to use coercive social control devices such as economic penalty and public humiliation to influence fellow citizens. Such a means of civil dispute resolution as the Comrades' Courts, however, might not be desirable in the United States given the value placed on individuality in United States society.<sup>256</sup>

Although it might be both difficult and undesirable to replicate the Soviet's system of social control, other aspects of the Soviet system deserve admiration. The Soviet system excels in providing inexpensive and accessible legal counsel. Lawyers use the courts as one of many potential alternatives for the resolution of disputes and often encourage citizens to settle their own problems.<sup>257</sup> As a result, the civil dispute resolution mechanisms in the Soviet Union represent a human social service rather than a highly professionalized business. In societies in which the professionalization of law has decreased and dispute resolution is brought closer to the layperson, access to justice is increased.

Given the litigious nature of the American society, a remedy prescribing less-expensive legal services and streamlined adjudication, even

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255. See SOVIET LEGAL SYSTEM, *supra* note 7, at 49 (stating that an objective of the Russian Revolution was that "[t]he instruments of public order in Soviet society were to be restored to a simplicity mindful of tribunals in tribal society, and when conditions of abundance and wide-spread education in social duties had created the prerequisites for communism, even these primitive tribunals were to wither away. In their stead would rise the citizen's inner voice of social conscience, prompted when necessary by a reminder from neighbors and friends who sensed that guidance was needed to develop attitudes appropriate to the communist society") (emphasis added).

256. Telephone interview with William Martin, Assistant Director of Legal Operations, Neighborhood Legal Services Program of Washington, D.C. (Feb. 6, 1985). Mr. Martin stated that American courts are beginning to resort to general social humiliation and coercion to force criminal offenders to conform to social norms. *Id.* For example, he noted that he was aware of one jurisdiction in which offenders of drunk driving laws, among other penalties, are sentenced to affixing a bumper sticker on their car announcing to the public their offense. *Id.*

257. See L. NADER & H. TODD, *supra* note 2, at 2 (1978) (discussing the relationship of layperson involvement in the civil justice system to increased access to justice). The professionalization of law separates legal systems from the lower social classes.

if practicable, might only exacerbate existing problems. Instead, Americans must change fundamental social attitudes toward the law in order to reform the system. Reinforcement of citizens' reliance on new dispute resolution forums and consensual dispute resolution, such as mediation, may remove a burden from the courts and may increase citizen access to and satisfaction with justice.

There is a belief that the professionalized bar and the courts will eventually lose their monopoly over civil dispute resolution not only because of their inability to keep up with the demands of the consumers of the system, but also because the attitudes of those consumers are changing: citizens are no longer willing to play the justice game according to the rules of the established system and are beginning to look for means to take the law into their own hands. The Multi-Door Program Intake Center retains many of the virtues of the community legal clinics in the Soviet Union. Although the Center does not offer the assistance of lawyers, specialists screen complaints hoping to channel them into different dispute resolution forums. This screening encourages the de-professionalization, popularization and humanization of the law the American system of civil justice sorely needs.

### CONCLUSION

Numerous similarities between the civil justice systems of the United States and the Soviet Union exist. Both have government-operated court systems founded on constitutional guarantees and legislation. Both also have quasi-judicial and non-judicial civil dispute resolution mechanisms that provide a variety of general and specialized dispute resolution support.

Nevertheless, these two systems function very differently. Whereas American citizens are denied access to civil justice through the courts because of high costs, delays and the inappropriateness of the adversarial model for the resolution of many disputes, their Soviet counterparts are provided with ready access to an inexpensive, efficient system. The principal reason for this difference is the professionalization of the law in the United States versus the democratization of the law in the Soviet Union.

The philosophical distinction in the accessibility of the law to the citizens of the two systems is reflected in the accessibility of the civil dispute resolution mechanisms. The American system is inaccessible to the common layperson because of the high level of the professionalization of dispute resolution forums and the dependency upon determination of a 'just' legal ruling. The court systems have, until recent years,

maintained a near monopoly of civil dispute resolution and they are designed to operate with expensive, well-educated professionals who have mastered complex rules and procedures. In the Soviet Union, there are a greater number of well-developed quasi-judicial and non-judicial dispute resolution mechanisms which function with little input from the professionalized bar and which resolve millions of civil disputes each year on an informal basis. These quasi-judicial and non-judicial dispute resolution mechanisms in the Soviet Union draw their authority not from the law, but rather from the norms of behavior of the social order. The Comrades' Courts exemplify a relatively less-formal, quasi-judicial forum in the Soviet Union that is well-utilized and which resolves civil disputes primarily in accordance with social norms.

The principal virtue of the Soviet system which might be transferred to the American system is that the Soviet civil justice system has a democratic flavor. Although the Soviet Union does have a professionalized bar and a court system that entertains complex suits with complex procedures, it is still designed for use by the layperson. Legal counsel, if necessary, is available with little or no cost. The general feeling is that justice is in the hands of the social organizations and in the people rather than in the hands of a government figure, judge or 'law-giver.' The alternative dispute resolution movement in the United States will continue to grow if citizens challenge the courts' assumed superiority as a dispute resolution forum and create community dispute resolution forums which will provide accessible, consensual, and "democratic" civil justice to all.

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