

Implementing ADR in Transitioning States: Lessons Learned From Practice

Anthony Wanis-St. John†

I. INTRODUCTION

Alternate dispute resolution mechanisms play an increasingly important role in four kinds of transitioning states: i) states transitioning from military to civilian rule, ii) countries undertaking peacebuilding efforts following a civil or interstate war, iii) states converting to a market economy from a centralized economy, and iv) territories that are newly emerging as states. These “transitioning states” face numerous institutional challenges in order to ensure their survival in a complex world. Some of these include strengthening civilian rule and curbing military influence on governance, creating government institutions whose viability does not rely on personalities of individual leaders or other affiliations, developing dependable and mutually beneficial relationships with foreign governments, foreign investors and multilateral organizations, and of course, satisfying the competing needs, rights and interests of citizens and constituent groups.

One critical factor affecting such challenges to transitioning states is the strengthening of rule of law (“ROL”). Where the “rule of force” has prevailed due to civil war, foreign military occupation, military government, or other political instability, the development of a functioning legal order has often been impeded or distorted. In the developing world, this began to change with the return to democratic, civilian rule of governments in Latin America, Africa, East and Central Europe and elsewhere.

Donors such as international organizations and government development agencies have expressed an interest in assisting emerging democracies in their efforts to strengthen ROL by supporting judicial

† The author is a Graduate Research Fellow at the Program on Negotiation, Harvard Law School and a Ph.D Candidate at the Fletcher School of Law and Diplomacy. He can be contacted at <awanis@channel1.com>.

reform efforts world-wide. One aspect of ROL programs that continues to grow in importance for both donors and recipients of development assistance is alternative dispute resolution (ADR). There is nothing novel about the use of non-judicial methods to resolve disputes and almost all societies have evolved their own mechanisms to do so. The inclusion of ADR as an explicit tool of international development programs, especially judicial reforms, is a relatively new phenomenon.

This article explores the implementation of ADR programs within the broader ROL program context. It examines important aspects of implementing ADR programs in transitioning states and makes use of analyses conducted by and for the United States Agency for International Development (USAID), the World Bank and other development agencies. We employ a case study using field research and primary sources of one well-developed commercial ADR program in Bolivia supported by USAID and which served as part of the empirical research for a comprehensive guide submitted to USAID.¹

While ADR programs have proliferated on a global scale, few efforts have been made to assess such programs and discern patterns of development, innovations, and challenges. It is important to note that ADR program design, implementation and operation are in many cases, qualitatively different in the context of transitioning states.² The reasons for this include incomplete legal frameworks in which ADR functions, weak rule of law, power disparities among disputants which can affect the process and outcome of legal disputes, new frameworks for international investment in the economies of such states, the existence of strong extra-legal indigenous norms of conflict management, and finally, the variation in amount and quality of financial and human resources. While some internal evaluations exist, until recently, no systematic study has examined the design, implementation, strengths, weaknesses and uses of ADR at the global level. One major USAID study has undertaken this task, combining broad literature and primary source research with in-depth field research on five foreign ADR programs in diverse transitioning states around the globe.³ Important aspects of implementation analyzed in this article include: how ADR can support rule of law development objectives; inappropriate ADR applications; political

1. See SCOTT BROWN, CHRISTINE CERVENAK & DAVID FAIRMAN, *ALTERNATE DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR USAID* (1997) [hereinafter *GUIDE*].

2. See *id.*

3. The author conducted the Latin America literature and part of the field research for this study, which is incorporated in *GUIDE*, *supra* note 1.

conditions necessary for the success of ADR initiatives; and the organizational aspects of ADR programs. States in transition have qualitatively different capacities, needs and customs on which ADR (and indeed, any development project) will be built. Rather than assuming uniformity, this article explores such differences, and research findings provide a set of questions and guidelines useful for development professionals involved in ADR.

II. JUDICIAL REFORM ON A GLOBAL SCALE

A. *Drivers of Judicial Reform at the Global Level*

Judicial systems are the principal (but by no means the only) vehicle for the implementation of ADR programs. As noted, ADR is often a key component of judicial reform programs. Given its importance to ADR programs, it is instructive to understand the bases of judicial reform. Judicial reform is being driven by four systemic factors at the international level which reflect the typology of "transitioning states" described above: i) the transition from military to civilian rule, ii) a renewed emphasis in development as part of the peacebuilding efforts following a civil or interstate war, iii) transitions to a market economy, and iv) the emergence of independent or quasi-independent states.⁴ The categories are not mutually exclusive; some transitioning states are characterized by more than one of these factors.

More important than the simple proliferation of states is the fact that some are undergoing democratic transition and others economic transitions. Some experience both upheavals simultaneously.⁵ For the purpose of this study, we refer to all of these collectively as countries or states "in transition" without regard to the political or economic nature of the transition or the development status of the states being analyzed.

States that are transition economies and emerging democracies face the challenge of adopting and implementing their conception of participatory governance and then building new governing institutions or strengthening existing ones. This is no easy task. The World Bank warns that "the clamor for greater government effectiveness has reached crisis proportions in many developing countries where the state has failed to deliver even such fundamental public goods as

4. Examples include Palestine, East Timor and Kosovo.

5. See WORLD BANK, FROM PLAN TO MARKET: WORLD DEVELOPMENT REPORT (1996). The 1996 edition is dedicated to the realities facing transition economies in the NIS, CEE and other groupings.

property rights, roads, and basic health and education. At the limit, as in Afghanistan, Liberia and Somalia, the state has sometimes crumbled entirely, leaving individuals and international agencies to pick up the pieces.⁶

B. *Internal and External Dimensions of Transition*

The challenge of transition has both an internal and an external dimension. In the former, states must provide adequate mechanisms for the resolution of disputes and determination of rights and responsibilities for individuals and organizations that live and operate within the jurisdiction of that state. As to the external dimension, states participate in multilateral organizations and subject themselves to international legal regimes that have far-reaching consequences for the treatment of nationals and foreigners, as well as for interaction with other states and international organizations. Participation in organizations such as the World Trade Organization, the European Union, or arrangements such as the North America Free Trade Area ("NAFTA") for the purpose of furthering economic development and liberalizing international commerce requires that states meet minimum standards of governance and can safeguard economic rights of foreign investors.

In terms of the internal dimension, the transitional quality of governance in emerging democracies and developing countries tends to mean that the institutions and practices that define, safeguard and interpret rights, as well as resolve conflicting rights, are distorted, weak or sometimes even non-existent. In a republic, these tasks are the primary responsibility of the judiciary. However, well-known problems plague the development of functioning judiciaries: bribery of judicial personnel and judges, non-enforcement of judgments, insufficient legal frameworks to adjudicate disputes or set forth rights, politicization of choice of judges and inefficiencies regarding case management and case load are just some of the obstacles. Other important obstacles to justice include prohibitive attorney and court fees, labyrinthine and archaic judicial procedures, and the inability to insulate judges from threats.

Regarding Latin America, the Lawyers Committee for Human Rights writes that "many Latin American legal systems . . . are institutionally weak, heavily politicized and corroded by corruption, and

6. WORLD BANK, *THE STATE IN A CHANGING WORLD: WORLD DEVELOPMENT REPORT* (1997). This edition focuses on strengthening states undergoing transition and reform by "reinvigorating state institutions."

thus unable, absent significant reforms, to serve as independent and effective guarantors of political and economic rights."⁷ This observation could be accurately generalized to numerous regions of the world without requiring significant modification.

The demands of global interaction, coupled with the inadequacies of internal institutions have helped fuel the search for alternative mechanisms of conflict management. Some of these alternatives are found outside the judicial systems. In numerous cases, Chambers of Commerce, trade associations, and private NGOs have begun offering services that permit disputants of all kinds to circumvent the expense, inefficiency and adversarial context of the courts. Several of these alternatives are to be found in the present case study and are examined in detail here. Where judicial reforms and institution-building efforts are taking place, model ADR programs are often a small though integral program component. In this sense, a judicial system, by employing ADR efforts, seeks to create experimental but functional *internal* institutions that demonstrate new techniques in conflict management and at the same time help to alleviate bureaucratic problems such as case backlog.

C. *Development Assistance*

In order to implement reforms of the justice sector, transitional states need assistance. Development assistance is provided by donors who range from regional and global multilateral banks, such as the Inter-American Development Bank ("IDB"), the World Bank, donor states' own development agencies such as USAID, and private philanthropic foundations. Traditional international development assistance has been predominantly, although by no means exclusively, of a technological and material nature, characterized by the provision of funds to be used for purchases from the donor's home industries, or direct provisions of agricultural technology, food, housing, potable water technology and other "hardware" provided directly to the recipient state by the donor agency.

At the beginning of the 1980s, numerous developing countries experienced an intense "crisis of the state"⁸ that manifested itself in explosive external debt and bloating of state bureaucracies, which set

7. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM* 1 (1996).

8. S. Shahid Husain, *Civil Service Reform and Economic Development* in *CIVIL SERVICE REFORM IN LATIN AMERICA AND THE CARIBBEAN*, WORLD BANK TECHNICAL PAPER NUMBER 259, 9, 10 (S. Chaudry et al. eds., 1994) [hereinafter *CIVIL SERVICE REFORM IN LATIN AMERICA*].

off a stream of connected phenomena: over-regulation, hyperinflation, closed economies, stagnant growth and isolation from international trade. In combination with the domestic and international transitional pressures described above, many countries began a process of downsizing of government, privatization of industry and private provision of public services, bureaucratic decentralization and revision of regulatory frameworks.⁹ This crisis of the state led to a realization on the part of many donors that provision of material assistance is insufficient to facilitate equitable economic growth and improve standards of living for the population in recipient countries.

A qualitative change in donor assistance programs began, as institutions such as the World Bank, IDB, and USAID instituted programs to finance institutional reforms of the state itself (even where their mandates proscribe financing political reform) especially of the judicial sector, in order to explicitly support economic reform efforts. As recently as 1994, the Vice-President and General Counsel of the World Bank stated that "we are beginning to realize that without effective government administration, structural adjustment programs and other economic reform initiatives are seriously handicapped."¹⁰

Judicial reforms in transitioning states are also the embodiment of efforts to solidify ROL. The goals of judicial reform programs include "strengthening the independence of the judiciary, simplifying and updating legal procedures and laws, improving administration of courts, providing alternative mechanisms for dispute resolution, expanding access to justice, improving legal education and training . . . and building user confidence."¹¹ One practitioner sums up: "Judicial reforms benefit all sectors. The private sector benefits when commercial transactions become more predictable, thus lowering costs. The public sector benefits through the establishment of better regulations and responsibilities; and the general public benefits by increased access to programs and legal assistance services. The public's confidence in civil society is thereby increased."¹²

9. *See id.*

10. Ibrahim F. I. Shihata, *Civil Service Reform in Developing Countries*, in *CIVIL SERVICE REFORM IN LATIN AMERICA* *supra* note 8, at 11, 14. Shihata continued: "Support for judicial reform is not mentioned in the Bank's charter . . . Judicial reform [is] often a prerequisite for the facilitation of investment . . . I advised the Bank in 1990 that [such] assistance might readily fall within the Bank's mandate if requested by an interested borrowing member country." *Id.*

11. Waleed H. Malik, *Overview* in *JUDICIAL REFORM IN LATIN AMERICAN AND THE CARIBBEAN: PROCEEDINGS OF A WORLD BANK CONFERENCE, TECHNICAL PAPER NUMBER 280* (M. Rowat et al. eds., 1995).

12. Waleed H. Malik, *El Desarrollo Económico y la Reforma Judicial*, *REVISTA DE DERECHO INTERNACIONAL ECONOMICO* (1996).

The importance of ROL for countries in transition came gradually for USAID, which evolved through various phases of support for judicial systems since the 1960s, beginning with ill-fated "law and development" initiatives that sought to train lawyers in developing countries to use Western legal concepts in the hope that they would "spearhead" modernization.¹³ The progressive broadening of USAID's vision regarding the judicial sector led it to abandon the "Administration of Justice" label for such activities and to adopt the terminology "Rule of Law."¹⁴ USAID's ROL activities are conceived of as supporting the objectives of its democracy programs, although in practice, USAID justifies much of its ROL activities on grounds that they facilitate foreign investment and, therefore, economic growth.¹⁵

Both the World Bank and USAID have emphasized the use of ADR from the beginning of their ROL initiatives. The link between ADR and larger strategic goals has differed slightly for both, with USAID stating that ADR is an element of ROL that supports democratization and the World Bank seeing ADR as an element of ROL that facilitates economic transition efforts. Nevertheless, in practice, both the Bank and USAID recognize the need to support judicial institutions in order to create the conditions for economic growth.

III. ADR AS AN ASPECT OF JUDICIAL REFORM

A. *ADR under Conditions of Power Asymmetry*

While the benefits of ADR to businesses, courts and governments are much-publicized, there are some calls for caution: in situations where there are litigants without representation, Professor Russell Engler finds that such parties are "vulnerable to the waiver of important rights in mediation."¹⁶ Engler warns that mediation is a forum that "produces systematically unfavorable results to unrepresented litigants when measured in terms of outcome."¹⁷ He reminds us that "[p]roviding justice, rather than clearing the court's docket, must remain the primary goal of the mediation process."¹⁸ Engler's note of

13. See HARRY BLAIR & GARY HANSEN, *WEIGHING IN ON THE SCALES OF JUSTICE: USAID PROGRAMS AND OPERATIONS ASSESSMENT REPORT NO. 7*, 3 (1994).

14. See *id.* at 4.

15. See the Bolivia case study in GUIDE, *supra* note 1.

16. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2032 (1999).

17. *Id.*

18. *Id.* at 2033.

caution is important to consider in the context of using ADR in transitioning states because there are often even greater disparities of power between the common citizen and state organs, and between businesses and other parties, including foreign corporations and international organizations, who may use ADR services where the courts fail to perform their functions efficiently. When power asymmetries are embedded in the social policy, laws, customs or other normative framework of a society, there is little reason to believe that an ADR program within that society will be immune from them. ADR services may thus perpetuate asymmetries, discrimination and other social dynamics. On the other hand, to the extent that an ADR program is well-designed, results in enforceable agreements that are linked to courts, protects the rights of parties and helps weak parties efficiently resolve disputes, it may help traditionally marginalized or weak parties.

B. *Definitions*

Alternate dispute resolution mechanisms should be at least briefly described here for conceptual clarity. Typical definitions include the activities of negotiation, conciliation, mediation, arbitration, early neutral evaluation, and mini-trials.¹⁹ These activities and their variations are also usually divided between those that are conducted through and overseen by institutions of the judiciary and are therefore regarded as "court-annexed," and those that are carried out by private organizations, individuals and service providers. All of these activities are "alternatives" to court litigation and therefore seek to decrease transaction costs associated with litigation (financial, time and opportunity costs), increase the transparency of process, preserve the relationships among the parties, and provide speedy solutions.²⁰ In the developing world, these models are sometimes adopted as-is or combined with indigenous methods of dispute resolution.

IV. USAID'S FIELD WORK ON ADR

The widespread adoption of ADR practices in the U.S., both private and court-annexed, has not in itself answered the question of whether ADR is actually effective (and if so, how effective) in meeting its goals. The information and infrastructure requirements needed

19. See generally GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION MEDIATION AND OTHER PROCESSES* (1992).

20. See *id.* at 8.

in order to take measurements of this sort are significant. One would need to know, for example, how many cases were resolved or settled by ADR mechanisms, estimate time and money savings, survey the parties in order to determine satisfaction with the process and outcome, and ask if the adversarial relationships remained so or if they had improved. These are just some of the data required. In the transitioning states, such information resources are often simply absent, and there is inadequate infrastructure in place to capture or seek out such data. Nevertheless, where donors such as USAID focus their efforts, there is programmatic monitoring (by NGOs or government oversight or self-monitoring) and some internal studies do exist. In the late 1990s, USAID set out to evaluate the impact of its investments in ADR and wished to ascertain whether and how to best promote ADR programs. There continues to be an ongoing need for empirical research on the savings of time, money, increase in user satisfaction, problems of power asymmetry, reduction of delay, and access to services.

In 1997, the Conflict Management Group (CMG) was subcontracted by USAID in order to conduct such empirical research on the incorporation of ADR programs in ROL initiatives.²¹ CMG formed a team of prominent ADR practitioners and scholars to advise their efforts, assembled a group of researchers whose task was to perform an exhaustive literature review on global implementation and evaluation of ADR, and undertook five international research missions to both gather actual data from the field and to examine the development hypotheses about ADR. The missions were to Bangladesh, Bolivia, South Africa, Sri Lanka and Ukraine.²² Findings from the Bolivia study are detailed below.

V. BOLIVIA

Alternative dispute resolution mechanisms in Bolivia are characterized by several paradoxes: they are both ancient and new, they are ambitious and humble, they seek to facilitate flows of business capital and resolve the social problems of society's most disenfranchised

21. CMG is a non-profit organization centered in Cambridge, Massachusetts and whose mission is to train people and organizations in negotiation skills and otherwise facilitate the management of local, national and international conflicts. It grew out of the Harvard Negotiation Project that was started by Roger Fisher, Samuel Williston professor *emeritus* at Harvard Law School.

22. The author conducted the Bolivia field mission. The Bolivia case's findings are used extensively in this article.

