LESSONS LEARNED: EXPERIENCES WITH ALTERNATIVE DISPUTE RESOLUTION

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Lessons Learned: Experiences with Alternative Dispute Resolution

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I. ADR AND THE RULE OF LAW

Social conflict is the defining characteristic of modern society. If left unresolved, it becomes a significant obstacle to peaceful interaction among individuals, the state and individual organizations and, thus, to sustainable development.

Worldwide, the primary emphasis on methods for resolving conflict in recent times has been to strengthen the institutions of justice and justice and the formal systems of the state[1]. Such an approach is being re-assessed, however, because of the recognition that the formal systems are not always those best suited for resolving all complaints. In the 1980s, the United States and, to a lesser extent, Great Britain, Australia and New Zealand, have witnessed a proliferation of dispute resolution programs as alternatives to courts and other institutional processes. In Latin America, for the past ten years, justice reformers have advocated the use of ADR to help increase access to justice, as means toward reducing court delays, or both. ADR, and more broadly conflict resolution, are being tested to address regional unrest (South Africa, Middle East for example), create alternate fora (Western and Eastern Europe), or streamline dispute resolution processes (within international treaties, such as GATT). These trends are not without their critics, however, who challenge the net accomplishments of ADR, or raise such questions as the possible development of second class justice to the detriment of rights acquired over the years.

A. Formal and Informal Justice

Legal systems are created to provide for the application of law to a set of circumstances and give force to the values embodied in constitutions and statutes. In an attempt to identify all nuances and possible variations in a problem area, prescriptive procedures are developed to help implement statutory provisions, and deal with every imagined circumstance covered by law. Further, during the past 40-50 years, there has been a marked growth in the number of new laws to address the perceived needs of a modern society.

Increased expectations that the state should resolve ever expanding numbers of cases coincide with a decline in status, if not in real capacity, of informal means of conflict resolution. In most societies, these processes preceded the establishment of formal justice. For example, the traditional figure in Central America of the "amigable componedor" (friendly arranger) was relied upon to settle neighbor dissensions and intra-family disputes; in some cases the local clergy has similar functions. In Valencia (Spain), water disputes are still handled through ADR processes that date back to 500 years.

While the loss of prestige of traditional, informal mechanisms stemmed from a belief in the superior value of formal institutions, the shift from the informal to the formal arena contributes, ironically, to a crisis in justice systems throughout the hemisphere.

The movement towards more regulation, greater formality and, often, towards an ever increasing role for the state has resulted in severe stress on all the legal institutions charged with providing timely and costs effective responses to all types of disputes and conflicts. Judicial officials are presented with novel questions, and with volumes of cases that would stagger their predecessors who lived and worked in more contemplative times. These judges must address thousands of conflicts legitimated by a regulatory society.

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[1] Néstor Humberto Martínez, then Assessor of the Inter-American Development Bank, at the 1993 First Inter-American Conference on Alternative Dispute Resolution, cited these reasons as justifying the need to look for alternatives to the legal system: 1) failures of constitutional reforms; 2) limitations on availability of funds; 3) increased litigation; 4) inadequate response to the demand for resolution of conflicts; 5) a more rational use of resources.

Also, the Rule of Law strategies developed by USAID in 1994 contemplate the use of ADR mechanisms to promote greater access to justice including increased access to justice systems (*Weighing in on the Scales of Justice, Strategic Approaches for Donor-Supported Rule of Law Reform Program*, USAID Program and Operations Assessment Report No 7, Office of Evaluation, Center for Development Information and Evaluation, February, 1994).

In the US, for example, the federal and state justice systems are under constant pressure to respond to increasing volumes of case filings, and to provide timely justice. In an attempt to understand what happens to cases, research shows[2] that nearly 50% of cases are settled and do not progress past the initial filing stage. And, in the US, less than 10% of all cases proceed to trial.

More research is needed to understand the reasons and consequences of these numbers. Yet, such findings raise these questions: should an ever increasing number of judges be appointed to deal with an ever increasing number of cases? Are there limits on financial support to formal justice in a fiscal environment that says we must do more with less, or in countries that are resource poor?

B. Formal System in Crisis

The historic role of the state as the omnipotent provider of all services in Latin America and, to some extent in the US, is changing. The state is shrinking is size and attempting to restructure itself into a less dominating influence in the lives of its citizens. In turn, citizenry is asked to be more self sufficient, less dependent on state services, particularly in capitol cities that are growing exponentially.

Throughout the hemisphere, legal systems are confronting unprecedented levels of challenges, a situation exacerbated by the low level of citizen confidence in their justice system.

In Latin America, the eradication of dictatorial regimes followed by a return to democracy in the late 1980's led to efforts at restructuring economies, rapid promotion of free trade between and among neighboring countries, and down-sizing of the state apparatus. Simultaneously, throughout the hemisphere, the public has begun to look more critically at the justice sector. Contributing factors include:

- media scrutiny that chronicles the flaws and inadequacies of the system and stories about corruption of justice officials;

- ineffective law enforcement and prosecution, coupled with judicial systems that take years to process even the simplest of causes; and,

- the physical insecurity (physical threat) surrounding the life of every urban dweller which has become a principal concern and a topic of public discourse.

The impact of ineffective law enforcement cannot be underestimated. Three public opinion surveys[3] regarding the justice system indicated that most people base their perceptions of the justice system in their contact with the police - a powerful argument in support of community based justice strategies, including citizens' access to justice.

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[2] *Justice Delayed - The Pace of Litigation in Urban Trial Courts*, National Center for State Courts, 1978; *Managing to Reduce Delay*, National Center for State Courts, 1980. These percentages coincide with those found in court systems in Argentina (*La Demora Judicial en Argentina*, CEJURA, Fundación la Ley, 1993), Costa Rica (*Estadisticas Judiciales*, Poder Judicial de Costa Rica, 1995) and El Salvador (*Encuestas Nacional de Estadisticas Judiciales*, Poder Judicial, 1993)

[3] *Dispute Resolution: Quantitative Benchmark Study*, prepared by the Wirthlin Group for the National Institute for Dispute Resolution, June 1992 - *Estudio de Opinion Acerca de la Judicia en Argentina*, Instituto Gallup, Marzo 1994 - Encuesta Popular - CID Gallup, San Jose, Costa Rica, 1994 (Contrato con la Suprema Corte de Justicia)

These problems have existed for a long time. What is new is the public demand for better performance of the system, and a growing recognition of the link between sustained democratic development and strong systems of justice.

II. COMPARATIVE EXPERIENCES IN LATIN AMERICA AND THE UNITED STATES

Conflict resolution, taken broadly, covers actions and procedures that range from avoiding conflicts, to negotiation, conciliation, mediation, arbitration, judgment, violence, and many other hybrids. Settings within which these processes are used, and subject matters that they cover occur at all levels of human interactions and their ensuing possibility for differences and disputes. For purpose of this discussion paper, experiences below review principally community based and court related initiatives - grouped as "Alternatives to Dispute Resolution" (ADR)

A. What Research Shows

In Latin America, as well as in the United States, research findings tend to be inconclusive on the merits or weaknesses of ADR. The reasons are many and, while they vary from one country to the next, some general trends can be identified:

- There is a lack of common terminology for there various ADR processes, and of uniform understanding of their purposes and goals. For example, in the US, a process presumed to be mediation in a particular study might actually be another ADR process such as case evaluation, or some mix of mediation and arbitration.

- Databases for evaluative purposes, and research that studies ADR programs through rigorous methodology, are wanting. Few studies have used randomly assigned experimental and control groups to examine differences in cases using ADR and those that follow traditional formal processes. As a contributing factor, most courts do not wish to withhold promising new processes for litigants, nor do they want to limit potentially positive effects on the courts workload by holding some cases out of the program.

- Rules, procedures, and jurisdictional contexts vary, leading to discrepancies in finding and masking possible benefits or drawbacks of a particular ADR technique.

Nonetheless, research tends to show some saving (time and money) to litigants and, to a lesser extent, to the courts if ADR is tightly integrated within a well run system. In Latin America and in the US, ADR can help improve access to justice for minorities and poor defendants who otherwise would have nowhere to turn for solution of their disputes.

Further, opinion surveys in the US, Argentina, Bolivia and Costa Rica[4] point to similar findings. Such surveys clarify the level of awareness about ADR, and highlight areas where the introduction of ADR would be most responsive to interests expressed by the public. In Argentina, these surveys were instrumental in the design of public information programs sponsored by Fundación Libra and the Ministry of Justice; in Costa Rica, they helped identify family dispute as a priority concern area which the Costa Rica Supreme Court responded to by initiating family ADR pilot programs; in Bolivia, public response was instrumental in shaping program initiatives in La Paz. And, in the US, the 1992 survey commissioned by the National Institute of Dispute Resolution provided a comprehensive understanding of how litigation and ADR are viewed by the

[4] *supra* at 3

public, and where or why the citizenry supports ADR initiatives (family/child custody or divorce predominated, and preference was expressed for mediation over arbitration, along with concerns about time and delays).

While they differ on specifics, these surveys can help guide decision makers as they formulate programs responsive to public perceptions and needs. They reveal a generally uniform, negative response to the formal system of justice. Concerns exist about impartiality, bureaucracy, costs and delays. ADR *per se* is not familiar nor well understood but, when it is explained, respondents tend to favor ADR- to save money and time, or to participate actively in a fair and just conclusion of their dispute. Many of those interviewed show preferences for conciliation mediation over arbitration (because it is more judgmental).

B. Experiences in Latin America

Initiatives described below have been supported variously by Supreme Courts and Governments within the country, the Agency for International Development (AID), the Inter-American Development Bank (IDB), the World Bank (WB), or the Inter-American Bar Foundation (IABF).

1. Argentina

a. *Community mediation*: begun in 1988 through the office of the Secretary of Justice (later the Ministry of Justice), it sponsored initiatives in Buenos Aires (4 centers) and eventually integrated legal services and ADR -- to promote democratic values through larger civil participation and emphasis on human rights, and to increase access to justice. Buenos Aires now counts 7 neighborhood centers. Reviews/research are mixed regarding the number of cases reaching successful resolution, project management and follow through.

b. *Court System:* in 1991, a group of judges, lawyers and social workers/psychologists established Fundación Libra, an NGO designed to promote ADR through training, with special emphasis on mediation. Libra also developed a project annexed to civil courts in Buenos Aires, which helped create an environment in support of ADR initiatives and access to justice. In 1994 the Ministry of Justice sponsored pilot programs annexed to civil courts, using 10 of 100 judges to refer cases (Buenos Aires). These new programs showed that the ADR process could be integrated within the court system, and that participant satisfaction was high. These efforts have led to a new law (adopted late '95, effective April '96) that requires mediation for certain legal conflicts prior to civil lawsuits. Also, provincial courts have requested ADR training (2/3 of 23 provinces, with assistance from Libra and the Ministry of Justice).

c. *other:* projects are underway in the business community, with assistance from some US firms (American Arbitration Association, Conflict Management Group); at the community level, Libra, in collaboration with the US Community Boards and the Archdiocese of Buenos Aires is developing comprehensive community based programs in the city's most populous sections. Similar initiatives are taking place in schools, churches and neighborhood centers, with attendant consequences on legal culture.

In brief, the legal framework has been altered by the ADR initiatives described above.

2. Bolivia

a. *Community:* a study of 4 neighborhoods in El Alto helped identify informal ADR mechanisms being used by citizens -- 90% of whom had relocated in search of employment. The study showed that most were receptive to ADR in light of allegations of corruption in the judiciary, delays and other

operational problems. Disputes of most concern included: family, housing, property encroachment and robbery/fraud. A pilot program surfaced positive results (low cost, swifter disposition, confidence and respect), some concerns (enforceability, "morality" aspect, need to coordinate with neighborhood association), and suggested that the Ministry of Justice should incorporate informal systems into its operations.

b. *Legal system:* a new Bolivian constitutional provision requires that the government validate and incorporate traditional justice systems, and make them compatible with the formal system. This was echoed in parallel workshops in Cochabamba. As a result, the MOJ is financing a multi-disciplinary communal justice system, to identify indigenous conflict resolution initiatives in rural and marginalized urban areas, and toward establishing pilot programs.

c. *Chambers of Commerce:* Centers have been created to provide conciliation and other ADR forums to the business community, with technical assistance from the Inter-American Bar Foundation.

3. Brazil

a. *Courts of Small Claim:* drawing on positive results in a pilot program in Rio Grande do Sur, the Brazilian Congress approved a law requiring courts to develop and implement a new system of processing civil and certain limited criminal cases, using volunteer lawyers as conciliators. Judges are to review agreements to ensure fairness and compliance with the law. Pilot programs have begun in Brasilia and Sao Paulo, and planning is underway in other states. Results from Rio Grande do Sur indicate that 150,000 cases per year are resolved using this process.

b. *Other:* a March 1996 seminar in the Tribunal Superior in Brasilia demonstrated that high ranking justice officials are committed to pursuing ADR strategies within the legal system; notably this endorsement was based on an acknowledgment that early roman law supported ADR concept). Other initiatives include: Casa de Justicia in Sao Paulo, to facilitate early resolution of cases, with favorable results; Cámara de Arbitración and Mediación, for ADR in civil cases, just beginning; and Instituto Nacional de Mediación and Arbitración (INAMA) that promotes and trains individuals in ADR, with special focus on labor cases.

4. Chile

a. *Community:* legal assistance offices, sponsored by the Ministry of Justice in low income areas of Santiago, offered first level contact for citizens in the area. Initially, the goal was to increase access to justice locally, with assistance from social workers (first line), and legal counsel to help resolve disputes. More recently, the MOJ-with assistance from the Corporación de Promoción Universitaria (CPU) and from Fundación Libra (Argentina) has offered training toward developing a nucleus of support services, adapted to the Chilean environment, and toward inclusion of ADR in law school curriculum. The neighborhood mediations Centers will open in May 1996.

b. *Other:* the Chamber of Commerce in Santiago has created an ADR center, involving lawyers and business leaders, modeled on other similar efforts in the region. The project is just starting.

5. Colombia

The first country to adopt ADR as part of a national strategy to make justice more accessible, Colombia's Ministry of Justice created conciliation centers nationwide in the early 90's. At that time, the first fully active center for conciliation and arbitration. Thus, Colombia has the longest, and most informative, ADR history in the region.

a. *Community:* the MOJ launched Casas de Justicia in 1994, beginning with pilots in Ciudad Bolivar and Aguablanca. The objectives were to increase access, with particular focus on densely populated areas, decentralize use of resources, address lack of confidence in justice system, promote use of ADR along with dialogue between state and needs of citizenry, and offer alternatives to violence--the most common form of handling conflicts. The effort, an ambitious one, had to confront issues of institutional culture and staff resistance (including resistance to training), inter-organizational conflicts, community distrust, and operational issues (ability to gather statistics and follow up on implementation of agreements). The projects are "a work in progress", and draw upon the results of the first two centers (Ciudad Bolivar and Aguablanca), which show a 2 to 3 fold expansion of cases and a 70-80% resolution rate.

b. *Other:* i) There are 103 Centers of Conciliation and Arbitration, which vary widely in terms of operational levels. The most active are sponsored by the Chamber of Commerce (Bogota - with 600 + cases/month), followed by the North and Atlantic areas. Most were developed in the mid 1990's, but remain somewhat marginal, due to lack of research, and community acceptance or support up. ii) Colombia has created the only program in the region for conciliation of administrative conflicts. During its first year, the center helped settle conflicts for a demand value of $50M.

6. Costa Rica

Costa Rica has used a distinct approach. Beginning with a public opinion survey, commissioned by the Supreme Court, the court identified court delay as a principal problem facing the justice system, and found that changes in civil code had NOT achieved desired results (accelerating resolution of cases). As a result, the Supreme Court adopted 3 strategies: 1) identify public opinion concerning ADR; 2) determine legal framework for possible use of ADR in family, labor, civil and criminal cases; 3) assesses experience from other countries. The study helped highlight these concerns:

- the citizenry believed that the court system was in crisis due to excessive volume of work--therefore too slow--, limited capacity of judges, bureaucracy, and corruption;
- less than 6% knew what ADR meant (such as mediation, conciliation and arbitration) but many thought that family disputes were suitable to mediation; however, less than 50% were comfortable in having their case handles by someone other than a judge;
- conciliation (or mediation) inspired more confidence than arbitration.

The Supreme Court decided to support for 18 months a nationwide program to increase awareness of ADR through articles, seminars, and regional plans throughout the country, 10 regional conferences considered how ADR concepts should be applied to community and justice systems. A national conference helped identify a broad consensus on the issues; and the President of Costa Rica announced that ADR was of national interest, and that it must be promoted in all aspects of Costa Rica society. Since then, a national committee has been appointed to pursue application of ADR in all sectors of society.

7. Ecuador

a. *Community Mediation:* the project was designed to improve the capacity of community based groups (including low income urban and rural areas, with emphasis on indigenous communities) to manage disputes using their own notions of fairness and justice, and with a focus on improving access to justice. 53 leaders from 40 communities were trained as mediators, to serve neighbors and members of their community.

An evaluation by the National Endowment of Democracy (NED) showed that older mediators were preferred over younger ones, and that few women were called upon, particularly young women. Also, expressed preferences were influenced by the level of education and experience of mediators. A decision was made to educate future generations of leaders and to reinforce latent, traditional conflict resolution skills.

b. *Urban projects:* centers in Quito, Guayaquil, Ibarra are to help resolve issues of access to justice for marginal urban populations. Community groups nominated mediator candidates who were trained by community leaders. The Centro de Investigaciones Sobre Derecho y Sociedad (CIDES) sponsored public education efforts (such as posters and community meetings), and assumed responsibility for management and follow up training. Typically, disputes brought to the centers in Guayaquil, Quito and Ibarra, involved family and community conflict or fights in addition to labor/thievery (Quito), or drugs/assaults (Ibarra). Inadequate comparative statistical studies exist on the effectiveness of the programs, but anecdotal reports show that the community views the projects positions, and sees them as means toward the unification of neighborhoods; on the other hand some criticisms are leveled at the availability of mediators.

A climate now exists in support of expansion of ADR with support from AID, along with the emergence of new pilots annexed to the Court (World Bank), or Chambers of Commerce (IDB).

8. El Salvador

a. *Community mediation:* Conflict resolution processes were used to help return and integrate citizens form the village of Tenancingo who had been displaced during the civil war. The program included attempts at creating a "model" community, and established a Community Council representing all interest groups with the village. The council did not replace existing political bodies, but acted as a parallel institution charged with the resolution of community conflicts. While has gone through several iterations and difficulties, the Council offer a viable approach by segmenting conflicts into manageable dimensions and providing a neutral forum that helps recreate a civil framework of coexistence.

b. *Legal system:* following the regional 1993 ADR conference (AID/NCSC), a Minister of the Supreme Court helped draft ADR legislation for El Salvador. This effort was supported and expanded by another member of the Supreme Court after the 1995 ADR conference (AID/NCSC). The draft legislation is designed to provide alternatives to the formal system given the system's inability to handle all conflicts brought to the court, and to keep pace with scientific, technological and social changes in society. Goals of the draft legislation are to increase access to justice for people with low income, help re-establish confidence in the justice and legal system, speed resolution of disputes, and provide for dialogue and familiarity with new methods. A week long ADR training conference was held in Spring 1996 in El Salvador.

9. Peru

The commission on Alternative Systems of Administration of Justice, Conciliation, Mediation and Arbitration (Ministerio de Justicia, United Nations Development Program, Lima, Peru 1994) has issued a report and concluded that a traditional, centralized and rigid system is unable to respond to the needs of modern society (social and economic changes). Other criticisms include delays in processing or preparing for cases of those charged, inflexibility of procedures, and lawyers' abusive practices. Further, state institutions do not reflect the multiethnic diversity of Peru.

The report notes the historic use of ADR by indigenous communities, its re-introduction in some neighborhoods and small commercial establishments, and its inclusion in procedures used by justices of the peace, juvenile justice judges or the Ministry of Labor. Further, the report recommends expanded use of ADR in the justice system (civil and criminal procedures and programs, JPs, juveniles and labor courts), and in the private sector (to provide a more responsive and fluid environment for dealing with conflict, and to encourage pilot demonstrations).

A number of ADR activities are currently underway, managed by APENAC, an IDB sponsored program. Separately, USAID is pursuing a training program, involving NGOs, who provide legal services to a variety of groups and populations.

10. Uruguay

The Uruguayan Constitution mandates that conciliation be a first step, prior to litigation, for all civil cases. The new civil code calls for the use of oral procedures, and incorporates a conciliation phase. These reforms are supported by the creation of 100 additional judgeships, and aim at swifter case disposition and delay reduction.

Other related reforms include the integration of ADR training by the judicial school (CEJU), collaboration between the Supreme Court and the National University toward the training of law and other students in conciliation, and a well received pilot project in greater Montevideo.

C. Experiences in the United States

Tools of negotiation and dispute resolution, such as mediation and arbitration, have long been known in the fields of international diplomacy and labor relations. Historically, US courts in some states favored a conciliation step for certain cases (divorce, for example); judges or justices of the peace acted informally as mediators to encourage settlement; and voluntary, binding arbitration is often incorporated in contracts.

A systematic introduction of alternatives to courts and within other institutions or settings is a relatively recent phenomenon, however. In the 1970s, community activists with support from private foundations advocated the direct involvement of the community in resolving local disputes (grassroots mediation or conciliation centers). Separately, judicial leaders including Warren E. Burger, then Chief Justice of the United States, looked to ADR as a way to divert a substantial number of cases ("minor disputes") from the court docket and, thus, reduce delay. The Dispute Resolution Act of 1979 was voted by the US Congress to provide financial support and accelerate the development of pilot ADR programs and research, but funds were never appropriated. Instead, a consortium of private foundations created the National Institute for Dispute Resolution (NIDR), which seeded over a ten year period (early 80s - early 90s) the development and expansion of ADR within and outside the US courts.

By the mid 1990s, some form of dispute resolution program existed in each of the 50 US states, and more than half of the states had adopted or were exploring comprehensive court annexed ADR programs using a variety of procedures (facilitation, early neutral evaluation, mediation, conciliation, arbitration, mediation-arbitration or mini-trials). Developments in state courts were echoed at the federal level. Further, federal agencies have been using collaborative and inclusive processes to craft regulations; local and state agencies routinely turn to statewide mediation centers to solve complex, multiparty disputes; a number of individuals, and private, local or national centers offer "private judging" for cases that often involve commercial or corporate interests; ADR is taught in most law schools, and schools of business and planning/public policy, and mediation is used and taught in elementary and secondary schools. Experimental programs as varied as dealing with homeless persons, providing alternatives to placement hearings for foster care, facilitating the development of medical ethics guidelines, or handling disputes in nursing home facilities, are underway. ADR and conflict resolution are a part of virtually every facet of the private and public sectors in the US.

In the US, two of the better known, and most widely used programs function as complements to the justice system: court-annexed arbitration and community mediation. While research and evaluation findings remain somewhat tentative[5], the literature does provide information helpful to policy makers and administrators in charge of ADR programs. As a key finding concerning state courts, ".. in most ADR processes, litigants believe they are treated fairly and they are satisfied with the manner in which their disputes were resolved. In the face of open questions such as whether ADR saves time and money for courts and litigants, this seemingly modest conclusion is perhaps the most significant to date. If people like ADR even though it may not save them time and money, then why should courts not try ADR?"[6]

Separately, in the US federal system, following adoption of the federal administrative Dispute Resolution Act of 1990, 56% of federal judges indicated that ADR produces fairer outcomes than litigation; and 86% thought federal courts should assist parties to resolve disputes through whatever procedure is best suited to the case.[7]

1. Court-Annexed Arbitration

A quasi adjudicatory process, court annexed arbitration is used for routine civil cases, typically up to $50,000, to speed up their resolution through a process that is fair and satisfactory to litigants and their attorneys. Program design and procedures vary[8], but all provide for the possibility of a trial *de novo* if one of the parties rejects or wishes to appeal the arbitrator's decision (award).

Courts play an important role through oversight and control of the program, to ensure against delay of arbitration hearings and final decision. Further, less than half of the cases referred to arbitration proceed to a hearing - a finding which affects program design (number of arbitrators and caseload projections). Program effectiveness is not affected by the number of arbitrators assigned (one or three), nor by arbitrators' payment (by the court or the parties).

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[5] Reasons include: lack of common terminology for ADR processes and uniform understanding of their purposes and goals; differences in rules, procedures and jurisdictional contexts; difficulty in applying rigorous research methodologies, such as random assignment - for more information, refer to *National Symposium on Court Connected Dispute Resolution Research, A Report on Current Research Findings - Implications for Courts and Future Research Needs*, National Center for State Courts and State Justice Institute, 1994

[6] *Síntesis de los Resultados de la Investigación sobre Programas de Resolución de Disputas Anexos a tribunales en Los Estados Unidos*, Presentation by Susan Keilitz at the Second Interamerican Conference on ADR in Santa Cruz de la Sierra, Bolivia, March 1995

[7] *Survey of Federal Judges*, Federal Judicial Center, cited in FJC Directory, Issue No 7, December 1994, p. 2

[8] For example, number of arbitrators (1-3), their selection, qualification and compensation; jurisdictional limits; nature and timing of the hearings

Integration of the arbitration program into the case management system helps ensure that all cases targeted for arbitration actually are referred to the program. And, when resources are limited, referrals should take place **after** a decision has been filed, to avoid expending resources on cases that will result in default judgments anyway. Either way, arbitration has little or no impact on the processing time of the remaining court caseload.

Its principal value lies in participant satisfaction by providing them with a third party review of a dispute that otherwise would settle without intervention. Programs that show a greater proportion of cases actually handled through an arbitration hearing tend to have greater support from litigants and attorneys.

The key to program success lies, then, in establishing a proper balance between ".. encouraging settlement before an arbitration hearing is held, and promising an expeditious forum in which the litigants can air their disputes."[9]

2. Civil Case Mediation

In mediation, parties reach a binding, or non binding, agreement to settle their dispute, through a consensual process and assisted by a neutral mediation. The mediator might help frame issues in new ways, and make suggestions, but the ultimate agreement is reached by the parties themselves.

The use of mediation in civil litigation has grown rapidly in the past few years, with varying results: for instance, settlement rates for medical malpractice and product liability is low (less than one in ten), higher for automobile injury and breach of contract cases, and viewed as particularly suitable for family and child custody cases. Concerns specific to civil mediation include whether the parties have equivalent bargaining power, how mediation -- an intensive process -- compares with others such as early neutral evaluation, and whether subtle pressures are placed to encourage parties to settle and thus detract from a truly consensual process.

Features associated with successful programs are: program and process rules are well described to the disputants, and are applied uniformly and consistently; deadlines are enforced; a balance is established between reducing extensive discovery, and providing some limited, informal discovery useful to resolution; the program has a capacity for training, supervision and monitoring of the mediators, who are often community volunteers. It is desirable also to integrate the program within the court's case management system, for purposes of tracking, while letting the mediation program handle screening of cases and scheduling of appointments.

Of these, the selection, training and retention of neutrals (mediators) is perhaps the most crucial feature to ensure program success and quality. The mediation model, by providing a forum where disputants attempt to reach an agreement, differs considerably from an adjudicatory model. The parties have to assess their respective needs, interests and options, rather than accept or reject someone else's proposal. The mediator must be skilled, strive for uniformity of the process and rules, be familiar with legal and ethical considerations that may surface in the mediation, and maintain flexibility for the particular needs of individual cases.

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[9] *Supra*, Keilitz

Mediation's greatest asset, or potential, is to produce lasting agreements, likely to be respected and implemented by the parties, for they crafted such agreement themselves. The process can be time and labor intensive; its results are questionable when parties are urged to settle through what may appear, in their view, "assembly line" justice.

In summary, dispute resolution has become an integral part of the system of justice in the US[10] but it requires further documentation and research. In a special edition of the Federal Judicial Center (FJC) publication on ADR, former FJC Director William Schwarzer summarizes these policy questions:

- Does ADR lead to a speedier, more satisfactory and less expensive outcome, or does it create another layer of litigation?

- Does ADR improve access to justice for those who are not well off and cannot afford the cost of litigation, or is it second class justice?

- What are the trade offs between advantages of ADR, such as privacy, speed, and reduced adversarial process, and the advantages of traditional litigation? and,

- Does ADR lighten the burden on the courts or does it divert judicial court staff resources?

D. Comparative Analysis

Historically, and throughout the hemisphere, communities have turned to various options (individuals or organizational structures) for resolution of their conflicts. Such options often are flexible and responsive to the unique features of the community, in contrast with formal structures that process legal conflicts through a series of linear steps.

It is not surprising, then, that court and formal systems of justice tend to favor ADR techniques, such as arbitration and similar hybrid processes, that incorporate some degree of formality, or function under control of courts and related institutions, or both.

By contrast, community based mediation often operates outside the institutional mainstream. Its processes are fluid and client based, and its results are less easily controlled by formal institutions. Community based mediation strategies offer access to persons who, otherwise, would find no forum for resolution of their conflicts-- for reasons of cost, fees, time, and difficulty for the lay person to understand the complexities and language of the formal process. They help respond to the public's demand for alternative to the existing system, as documented in opinion surveys (US, Argentina, Chile, Cost Rica - cite above). And they are consistent with modern organizational development practice that promotes user-based design and provision of services.

Notwithstanding these positive features, the use of mediation raises a parallel set of concerns. These were discussed at two ADR conferences (1993 in Argentina and 1995 in Bolivia, sponsored by the AID in collaboration with the NCSC), which seeded the development of country specific initiatives described above . They also helped sharpen the analysis of ADR and mediation,, and their potential and constraints. Attendees at the 1995 conference reached conclusions, echoing similar analyses made in the United States:

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[10] As stated by current Chief Justice of the US, William H. Rehnquist ".. the future may require dramatic changes in the way disputes are resolved.... (many litigants) may have a greater need for an inexpensive and prompt resolution of their disputes, however rough and ready, than an unaffordable tardy one, however close to perfection."

Advantages of ADR:

Helps reduce pressures on the formal system
Increases and eases access to justice
Saves cost and time
Preserves confidentiality
Fosters an open, non-adversarial, dialogue between the parties and the development of realistic solutions
Is a voluntary process
Promotes, because it is informal, flexibility and allows for more freedom than that provided by traditional methods
Enables the parties to participate actively and decide the outcome
Allows the parties to continue relationships

Disadvantages of ADR:

Lack of:
- Legal formality
- Norms -- ADR does not yield norms
- Objective power
- Disbursement of information/knowledge
- Qualified ADR professional and training
- Centralized control/corrective measures over ADR processes
- Sanction of mediation by justice system (as opposed to conciliation and arbitration)

Danger of privatization of justice
Uncertainty about qualifications of neutrals (mediators)
Lawyers' opposition to privatization of justice
No recourse to mandated system

III. LESSONS LEARNED

Experimentation with ADR throughout the hemisphere provides a lore of information -- through some rigorous studies and, more often, anecdotal evidence. It also surfaces questions that should be addressed to inform and nurture future reforms, and their likelihood of success.

A. Design Strategies

In a legal environment where there is very limited exposure to concept of ADR, considerable effort should be invested in **orientation and training** , to create the environment needed for this kind of reform. The legal community is traditionally skeptical about new ideas, such as ADR, particularly if it is perceived as a threat to the law by legal scholars[11]. Others see ADR as a way for people to negotiate away their rights, if

[11] *Resolución Alternativa de Conflictos*, Cuadernos para el Sector Justicia, Comisión Nacional para el Mejoramiento de la Administración de Justicia, 1995

ADR closes off the court as an independent forum[12]. Further, skeptics tend to overlook ADR as integral to concepts of creating greater access to justice and to justice systems.

In Argentina, initial orientation and training was directed at the neighborhood centers. In Bolivia, this approach was used by the Chambers of Commerce in La Paz, Cochabamba and Santa Cruz de la Sierra; in Santa Fe de Bogota, Colombia, it was applied by both the Chamber of Commerce and community centers and, in San Jose, Cost Rica, by the family mediation center. The key ingredients here were common responses to two factors: 1) a need was identified, and 2) there was political support for the initiative.

Since then, each of the project listed above has reached a second phase of its activities, diversified, and responded to new clients and types of conflicts. All have done so, in large part, by broadening their base of support, and by eliciting information and tailoring conflict resolution systems to other constituencies through orientation and training.

A number of steps should be considered when ADR systems are presented to a new environment:

1. Build a base of Support

Each new program needs to build a foundation of understanding among a number of individuals and organizations that, in turn, become principal supporters of ADR, and crucial, if it is to avoid the wholesale importation of foreign experiences unsuited to local circumstances. The availability of a well trained core of individual provides for a capacity to evaluate experience in other jurisdictions, and to make the needed adjustments in the design of the new program.

2. Identify the area or clientele with the greatest needs

The introduction of new ADR techniques needs to overcome a) the lack of familiarity with conflict resolution alternatives, and b) opposition from those invested in maintaining the *status quo*. Eliciting support from individuals and organizations with the greatest need can help reduce objections, and increase prospects for success. Increased access to justice is one of the most commonly identified need. By focusing on community based activity, there is no question of need and less likelihood of opposition.[13]

3. Develop in Stages

The design strategy should contemplate a series of steps that build on incremental understanding of, and initiative using ADR. The rapid expansion goal[14] pursued in Colombia helps explain some of the difficulties encountered by this comprehensive program. Reformers are in a better position to succeed , if they promote ADR services in areas that combine the factors of greatest receptivity and lowest risks of failure.

4. Account for Leadership Role

Any strategy should include and identify institutional leaders willing to champion ADR programs. These leaders help open doors and overcome a natural resistance to change - whether the program is

[12] *The Disputing Process - Law in Ten Societies*, Laura Nader, New York, Columbia Press, 1979

[13] *Evaluation of Mediation Center*, DPK Consulting, San Jose, Costa Rica, Dec. 1995

[14] *Evaluation of Conciliation Centers*, Ministry of Justice, Colombia, 1995

institutional or community based. In Argentina, Colombia and Chile[15], the Minister of Justice played a key role in promoting ADR related reforms. In Cost Rica[16] and El Salvador, such leadership came from the Supreme Court.

B. Assistance Models[17]

In addition to strategic designs, tactical ones help inform the development of ADR. Who are the potential leaders, and what functions do they hold currently? How much time is available, including that needed to forge consensus?

1. Consciousness raising initiatives

They include speeches, conferences, discussion groups -- all toward educating the public about concepts and ideas. The focus is on changing attitudes (though it rarely leads to changes in behavior).

2. Skill based workshops

Through these workshops, a core group develops skills in negotiations and conflict management, with an average from a few hours to a week. Attendees become agents of change, i.e. responsible for implementing and applying the information to their organization or institution.

3. Institution focused workshops

These workshops involve individuals who are members of existing organizations or groups. Most have a particular substantive and institutional interest. Such workshops seek change in attitudes, and development of skills and procedures. Examples include Chile and Peru.

4. Issue focused workshops

Substantive areas of concerns are at the core of these workshops. While participants come from a variety of organizations, they share a common focus, for instance environmental or educational concerns.

5. University based initiatives

This tactical element focuses on creating a capacity within local universities or academic circles for teaching or developing ADR programs. A number of universities in Latin America (University of Buenos Aires in Argentina, Los Andes in Colombia, Catolica in Peru, ITAM in Mexico, and other universities in Santafe de Bogota and in La Paz) are all pursuing this avenue. Abilities to advocate for and educate, as well as assess implementation of ADR are built in as a result.

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[15] *Evaluation of Neighborhood Centers for Ministry of Justice, Argentina*, Hilda Baldaquin, Convenio DPK and Community Board Program of San Francisco, 1995 - *Evaluation of Conciliation Centers*, Ministry of Justice, Colombia

[16] *supra* at 13

[17] *Developing Democratic Decision Making Procedures Abroad*, Wildau, Moore and Mayor, Mediation Quarterly, Vol. 10, No 3, Spring 1993, pp 303-320.

6. Issue specific interventions

In this case, the issue(s) has been defined, and a constituency already exists. Experience build upon intervention and , when successful, resolution of the dispute. This approach can be helpful in fostering training and advocacy/public education.

7. Dispute systems design interventions

This is the most comprehensive approach, for it includes planning, training, and implementation of new systems. It calls for the development of an infrastructure to handle recurring conflicts, rather than addressing each dispute in isolation. Good examples are the Casas de Justicia in Colombia, and the national law of mediation in Argentina.

8. Capacity building in existing institutions

This tactic calls for an outreach to institutions and organizations, helping them develop an internal capacity to anticipate or handle differences and conflicts, and teach democratic and collaborative decision making. In Argentina, Poder Ciudadano has used conflict resolution skills development to train young people with leadership potential; and Conciencia has developed a similar program to train women political leaders.

9. Free standing institutional building

Training and information sharing can be helpful to individuals or groups who initiate independent centers, in such maters as democratic decision making, conflict management intervention, and toward creating or informing constituencies. Examples include initiatives with indigenous communities in Ecuador, and provincial judiciaries in Argentina.

The decision to adopt one or several approaches, such as those listed above, should be tailored to specifics and the local context. Key variables include the level and awareness of ADR, likely opposition to such initiative (and its source), existence of supportive leadership or constituencies, windows of opportunities, legal contexts that favor or discourage alternative programs, and the availability of financial or other resources.

C. Statistics and Other Points

There has been a paucity of investment in building the statistical foundation to evaluate ADR initiatives and programs -- with the exception of the Costa Rican project, the pilot court annexed project in Argentina, and a few individual and national studies in the US. As further impediments, comparative data on the operation of justice systems are seldom reliable, and ADR terms are often used interchangeably so that comparisons cannot be made.

It is clear that ADR is promoted throughout the hemisphere as an alternative to the court system, and that it responds to perceived and real needs in legal systems. Too often, however, justice systems are not held accountable systematically: few publish statistics on the performance of judges and justice system institutions or groups; or, when the will exists, resources and capacity are insufficient to the task. While AID sponsored projects have encouraged the development of statistical information bases -- a practice pursued by others donors --, reliable data remain scant.

This argues for support of small incremental projects encouraging them to build a sound foundation of information. In turn, this data will be helpful to future reforms.

IV. CONCLUSION

A monopoly by the formal judicial system of all enforceable remedies has weakened informal processes used historically to resolve conflicts. This, coupled with public expressions of discontent (about delays, excessively expensive processes, and inadequate procedures to solve disputes), explains why ADR has come full circle. ADR methodologies can serve the purpose of integrating a balanced approach to the provision of access to justice.

The issue is not WHETHER to reinforce the legal system, or to create ADR mechanisms, but rather HOW to design strategies that are complementary. Two concerns -- how to increase access to justice, and how to improve access to justice systems -- should inform such strategies and draw upon experiences in North, Central and South America.

Neighborhood mediation centers and the training of mediators in indigenous communities in Ecuador, a dozen neighborhood centers in cities such as Buenos Aires, Quito, La Paz, the training of lawyers and social worker in Chile's legal assistance program, the family mediation center in Cost Rica -- all are activities that respond to the need for building stable democracies by improving access to justice. Court annexed ADR programs in Argentina and Colombia serve to demonstrate the viability of this strategy inside the legal system. Independent, private sector ADR efforts through chambers of Commerce, for instance, help open private centers for dispute resolution in a variety of areas, such as the commercial arena.

While it may be too soon to pronounce success with these efforts, likewise it is too early to reach negative conclusions.

In brief, Rule of Law strategies should integrate ADR as means toward access to justice and structural reforms, and should include systematic assessments. Strategies should foster local mediator programs, school initiatives, associations, the private sector, and be placed within the justice system --all multiple avenues that complement the formal legal system.

A combination of broad vision, courageous experiments, patient and sustained suppose, and rigorous evaluations are needed, if we are to understand where and how ADR can improve access to justice, systems of justice, and institutions that provide justice in our societies.