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Alternative Dispute Resolution

William Davis* and Helga Turku**

I. INTRODUCTION

Rule of law and access to justice are important elements for the stability and development of states. Governments gain significant legitimacy, both domestically and internationally, when rights are respected and promulgated. Access to justice is a particularly important aspect of the rule of law in the context of development work. Indeed, access to justice has been a principal objective in many programs of international cooperation in which DPK Consulting1 participated. Academics and policymakers agree that access to justice is a social good that is enhanced through active government participation.2 As such, by providing access to justice, governments enhance their legitimacy, improve their ability to create social change, and facilitate economic development. While the concept is well-understood and accepted in the developed world, at times this is not a priority for governments in the developing world. Most states rightly recognize that in addi-

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1. DPK Consulting changed its name to Tetra Tech DPK ("Tt DPK") in October 2010. This change reflects the integration of DPK Consulting with its parent company Tetra Tech, Inc. As of October 2008, Tt DPK is an operating division of Tetra Tech ARD, which is a wholly owned subsidiary of Tetra Tech, Inc., a leading provider of consulting, engineering, and technical services worldwide, headquartered in Pasadena, California. As a division of Tetra Tech ARD, Tt DPK is able to offer its clients a full range of complementary and cross-over services. Specifically, Tt DPK provides technical, management, and advisory services to help developing and transitioning societies navigate the challenges they face. The company works around the world to help establish and strengthen productive relationships between state and society and develop sustainable government and justice systems that are responsive, transparent, accountable, fair, and efficient.

tion to being a right, access to justice is a tool for social change and economic prosperity.³

This article reviews access to justice both theoretically and in practice. Second, it highlights some of the challenges and successes of implementing access to justice projects. Finally, it discusses alternative dispute resolution (ADR) reforms in the developing world as one important element of access to justice.

A. Significance of Access to Justice

Academics and policymakers define rule of law as follows. First, it implies separation of powers, in that it is a mechanism by which political power is checked and balanced under formalized rules.⁴ Second, rule of law signifies "the existence and real application of a body of rules and rights which regulate the relationship between the state and the individuals in a society, and between individuals themselves."⁵ Finally, rule of law provides effective protection and advancement of constitutional rights and entitlements. Accordingly, rule of law is a basic requirement for any properly functioning government. The UN Secretary General believes that:

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁶

Civil rights and liberties are protected and advanced when citizens have access to and confidence in the justice system.⁷ In order to create a stable social, political, and economic environment, a state must be able to provide and protect justice services. If citizens lack confidence in the justice services provided by the state, they will take matters into their own hands. In turn, a state loses its legitimacy when it becomes incapable of monopolizing the use of force and providing security for its citizens against private violence.

A state must be capable of availing courts for dispute resolution, settlements, and enforcement of such decisions to all citizens, regardless of their class, identi-
ty, or geographical location. The existence of a properly functioning justice system increases citizens' confidence and their willingness to bring disputes to court. Strong rule of law principles and availability of judicial services facilitate proper solutions to commercial disputes and guarantee that decisions are enforced.

Rule of law loses its validity and significance if citizens are unable to access justice services. International courts such as the Court of Justice of the European Communities and the European Court of Human Rights have recognized that governments have an affirmative obligation to provide access to justice. Specifically, in Airey v. Ireland, the Court held that the European Convention on Human Rights and Fundamental Freedoms "is intended to guarantee, not rights that are theoretical or illusory, but rights that are practical and effective. This is particularly so of the right to access to the courts, in view of the prominent place held in a democratic society by the right to a fair trial." The court concluded that simply appearing in the trial court without a lawyer does not provide the applicant with effective access to justice. The justice system becomes more effective when citizens have access to legal advice. As such, states must provide equal access to justice for low-income citizens.

B. Relevance of Access to Justice

Judicial procedure affects the perceptions of judicial fairness. According to Amy Gangl, three factors affect the assessment of the legitimacy of a judicial decision. First, individuals must believe that the decision-making process takes their views into account. Second, decision-making should be neutral and all opinions must be granted equal consideration without favoritism. Third, citizens must trust the judicial system and its representatives. Parties' satisfaction with the procedural justice (i.e., their views of the neutrality of the process and their access to representation), affects their perception of legitimacy over and above their preferred outcome. Thus, citizens' favorable perception of the fairness of the process increases the likelihood that they will report satisfaction with the process of decision-making and the decision itself. They are more likely to accept outcomes when the process is perceived favorably. Implicitly, individuals accept

10. Id. at 19.
12. See generally John Thibaut & Laurens Walker, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (Hillsdale, NJ: Lawrence Erlbaum Associates 1975) (recognizing that individuals care not only about outcomes, but also about the procedures by which outcomes are derived).
14. Id.
15. Id.
16. Id.
17. Id. at 127.
that in an adversarial situation, sometimes one wins and sometimes one loses. However, such acceptance is only possible when everyone has a fair hearing in the decision-making process.

C. Access to Justice and ADR Reforms in Developing Countries

The understanding of rights and accessibility to the legal system differs between and within states. For example, Mexicans differ from Americans in their beliefs regarding the strength of their judicial system. And even within Mexico, there is great disparity of perceived rights between indigenous communities of Chiapas or Oaxaca and the urban middle class in Mexico City.\(^{18}\) The different worldview of indigenous populations compared to residents of urban communities stems in part from real physical barriers to judicial services. Specifically, most courthouses are heavily concentrated in urban areas, leaving large areas of the country poorly attended.\(^{19}\) In addition, bureaucratic procedures and paperwork in justice administration are highly complex and quite incomprehensible to the layman. Thus, rural citizens have less access to courts, while the courts themselves are excessively bureaucratic, inefficient, and not transparent. The difficulties in accessing the legal system increase distrust and aversion to dealing with any kind of legal process.\(^{20}\) Therefore, rights protected through formal legal channels become highly unattractive, creating an unfavorable environment for government legitimacy.

DPK has approached the topic of access to justice and access to justice systems as complimentary approaches. It has been our methodology to suggest that there be dual strategies explored when addressing these topics. Access to justice relates to providing every citizen the opportunity to address their issues of concern outside the formalities of the state-provided justice system. By fostering a more independent, self-reliant citizenry, society has greater capacity to be creative and live in harmony. School and neighborhood mediation centers, chambers of commerce centers for dispute resolution, and entities to mediate water dispute reinforce these ideas.

Access to justice systems refers to the creation of paths to resolve conflicts that are within the purview of the formal legal structure by using differentiated strategies such as mediation, early neutral evaluation, arbitration, and the many combinations of other methodologies all designed to promote early swift resolution of conflicts. In the last few decades, the litigation process has become an end in and of itself without the litigants having a meaningful role. The rapid expansion of dispute mechanisms in the past twenty to thirty (20-30) years has evolved, in part, due to the ability of these processes to adapt to the needs of the litigants. The justice system has become more responsive by focusing on the needs and interests of the litigants and not exclusively on the process and its formalities.

\(^{18}\) Domingo, supra note 5, at 169.


\(^{20}\) See generally VONKMAR GESSNER, LOS CONFLICTOS SOCIALES Y LA ADMINISTRACION DE JUSTICIA EN MEXICO 161 (Mexico, D.F: Universidad Nacional Autonomia de Mexico 1984).
During two decades of working in implementing ADR reforms in the developing world, William Davis, one of the founders of DPK Consulting, noticed a consistent pattern of issues facing those seeking access to the justice system. Namely, the lawyers and judges were more interested in adherence to the code of civil and criminal procedure than to the outcomes. For example, in Central and Latin America, adherence to the code or mastery of its vagaries is considered the ultimate of lawyering skills. Indeed, "pulling off" a special trick against an opponent was praised and had a special name, "la chicana." More importantly, judges seemed peculiarly uninterested in the provision of greater access. While they expressed deep concern about their workload, they refused to open the door to any new litigants.21

The absence of any significant advocacy groups for access contributed to an environment where the "only" discussions about reform centered on reform of the codes. In the early 90s, the Latin American Institute for Civil Procedure based in Montevideo, Uruguay had control of the intellectual agenda for civil justice reform.22 Most of the members of the Institute were among the most prominent lawyers and judges in the region. Working closely with two of the three leaders in the Institute, Davis tried to find a way to introduce concepts of dispute resolution that were outside the single point of reference in the code of civil procedure, such as conciliation.

In order to make better arguments and support the ideas for including ADR mechanisms in the civil procedure, Davis began to attend court sessions almost always officiated by the secretary of the court, rarely by the judge. The observed procedure would proceed as follows: the secretary would ask the parties if they wanted to conciliate and when they would most frequently say no, the secretary would declare the conciliation phase closed. The setting for this conversation would generally be in a very crowded clerk's office with no place for privacy or a place to sit down.

When Davis asked the lawyers, or sometimes the litigants, if they would prefer to negotiate or reach some level of accommodation rather than pursue the litigation course, most often they would say that negotiation was preferred, but they did not want to "show" their hand by extending it to negotiate. In their opinion, such a gesture would make them appear unconvincing of their argument.23

Judges throughout Central and South America complained about their workload, citing the large number of cases pending. The numbers cited were most frequently inaccurate, because very few judges had verifiable statistics. Nonetheless, the numbers provided a veil of complexity to suggest that unless something was done with the volume of cases, progress toward judicial reform would be difficult.24

21. In the early 1990s Mr. Davis worked as a consultant to the Inter-American Development Bank on ADR programs in Chile, Ecuador, Colombia, El Salvador, Peru, and Uruguay. These are general observations he noted during his experience in the region.
23. Id.
In order to combat these arguments, DPK did case sampling exercises to find out what was really occurring within the courts. It is critical to remember that in Latin America each judge is a court unto him or herself. The concept of a corporate court did not exist where the movement of delayed cases could be managed. DPK studies showed that more than 50 percent of the cases did not move beyond the filing of the case. These statistics are substantially similar to results of studies done in other parts of the world, including the U.S. The remaining cases were largely dealt with through the litigation process. Unlike litigation in the U.S., the large majority of cases filed in Latin American commercial courts are collection cases from banks. The remaining cases originate from what might be called tort and other forms of commercial disputes.

The courts treated these collection cases much as the U.S. does with traffic cases. The most effective law firms organized their practice around filing these cases for collection, which required very little effort and almost no legal expertise. The incentives to change this process were not there from the perspective of the private lawyers. The courts invested little energy in these cases, yet they reflected a significant number of filings.

In Argentina, Davis found a more receptive audience. Working closely with the Ministry of Justice and Gladys Alvarez, an Appellate Judge, a pilot project was initiated with one group of four commercial judges who referred cases to a group of mediators. The judges were reluctant initially to submit cases, but after encouragement from the Ministry of Justice and Judge Alvarez, they gradually overcame their opposition. As the mediators gained experience and were able to resolve nearly 74 percent of the cases between the parties, the Ministry of Justice, under the leadership of a dynamic minister, took real interest in expanding the program. Argentina passed national legislation enabling mediation to be developed across the country. Religious opposition prevented it from being used in divorce cases.

In discussions with bankers in Venezuela and Colombia, Davis discovered that they only collect about seven cents on the dollar in the cases filed in court. This was the result of an incredibly inefficient court process for collecting debts. These court inefficiencies have domino effects in economies that are largely supported by small businesses. For example, in both Venezuela and Colombia, the overwhelming percentage of debtors are small business owners who live on the margins. If one of their commercial clients is late or does not pay, they cannot

27. Hammergren, supra note 24.
28. In the early 1990s, Mr. Davis worked as a consultant to the Inter-American Development Bank on ADR programs in Chile, Ecuador, Colombia, El Salvador, Peru, and Uruguay. These are general observations he noted during his experience in the region.
29. Id.
31. This is a personal observation by Mr. Davis while he worked as a consultant to USAID projects in Argentina.
32. These conversations took place while Mr. Davis served as a judicial reform consultant to the World Bank in Ecuador and Venezuela.
pay the bank, thus precipitating a whole chain reaction in commercial meltdown. If the formal commercial credit system fails them, they resort to the black market or the unofficial commercial system, evading taxes and relying on usurious loans. Given the severity of the problems caused by an inefficient court process in this region, a commercial mediation system would help to recover more funds and permit the parties to stay in business. However, there was significant opposition from the banks' lawyers who tended to use attorney friends as collection agents.

Starting a project with the aim to address these issues proved to be very difficult because of the opposition from bank lawyers and the Chambers of Commerce who had adopted a fee schedule that was prohibitively expensive for this group of commercial interest. In addition, most Chambers of Commerce with whom DPK dealt with did not see a social role to assist these particular interests.

In those countries with a history of violence, such as Colombia and El Salvador, there is a high level of frustration and fear about how to confront these issues. In a conversation with the then-Minister of Justice of Colombia, Nestor Humberto Martinez, Davis discussed the experiences of the Community Boards' peer mediation in the schools. The Minister of Justice saw this effort as a means to address the violent culture so deeply embedded in Colombia. He funded a group from the Ministry of Education to come to San Francisco for a period of time to study peer mediation and he developed a similar but culturally appropriate methodology for Colombia. Colombia became the first country in the hemisphere to aggressively extend peer mediation programs throughout the country.

Davis, who served as Senior Advisor for the National Center for State Courts, suggested that USAID should hold a series of region-wide conferences on ADR. This would promote greater understanding and create a group of supporters for the use of ADR procedures. Beginning in 1992 in Buenos Aires and subsequently two years later in Santa Cruz de la Sierra, Bolivia, and two years after that in San Jose, Costa Rica, conferences were held with nearly 200 people attending each session. These conferences highlighted the need to cultivate and in some cases reinforce existing informal processes to solve disputes, and to build enthusiasm for promoting ADR in the justice systems throughout the hemisphere. Strong advocates emerged in some countries such as Argentina and Colombia. Within five years projects had sprung up in more than ten countries, greatly accelerating the reform process. To a degree, the pace of development depended more on who was championing the reform than the external support. In some countries,

33. See generally HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM (N.Y.: Basic Books1989) (arguing that Peru’s poor were not necessarily the proletariat, but entrepreneurs that sought to join the market economy).
34. Interview with Nestor Humberto Martinez, Minister of Justice of Columbia in Bogota. Colum. (Dec. 1994).
36. USAID.gov, USAID Alternative Dispute Resolution Activities in Latin America and the Caribbean, http://www.usaid.gov/locations/latam América_caribbean/democracy/adr/dg_conflict2a.html (last visited Feb. 14, 2011) (USAID has conducted numerous ADR projects in Latin America throughout the years. These are just a few examples).
37. EDGARDO BUSCAGLIA, MARIA DAKOLIAS & WILLIAM E. RATLIFF, JUDICIAL REFORM IN LATIN AMERICA: A FRAMEWORK FOR NATIONAL DEVELOPMENT 34 (Hoover Institution Press 1995).
such as El Salvador, Costa Rica, and Uruguay, the Supreme Court opposed the initiatives. In other countries, such as Argentina and Colombia, a member of the Supreme Court or a Minister of Justice became the principal advocate for change.

During the same time, the Inter-American Development Bank began an initiative to promote the development of commercial dispute centers in Chambers of Commerce throughout the region. Each of these would have a center for dispute resolution. Colombia was the first recipient of funds to strengthen their center and expand its activities. Soon thereafter, a number of projects were implemented in Peru, Ecuador, El Salvador, Costa Rica, Uruguay, Chile, Panama, Guatemala, and Argentina. Davis personally worked on the development of the centers in Chile and Ecuador. Subsequently, DPK evaluated the projects in Colombia, El Salvador, and Peru, and Davis served as the moderator for the Conference on Lessons Learned at the Inter-American Development Bank in Washington, DC. By the time of the conference, five years after launching the initiative, virtually all the Chambers of Commerce in the hemisphere had functioning centers for dispute resolution.

In the beginning of this effort, DPK found that there was already an active arbitration practice in most capital cities. This practice was controlled by a very small group of elite lawyers who passed cases among themselves. They were the primary obstacles to expanding the concepts of ADR in the commercial activities. The most successful presentations that motivated the businesses to engage in ADR were made to Chief Financial Officers (CFOs) and not to the lawyers. By emphasizing the ability to control costs, CFOs became advocates for change over the objection of many corporate lawyers. In addition, the introduction of ADR into the documents creating the new Trading Blocs, NAFTA, MERCOSUR, created legitimacy for the concepts that finally opened doors in law schools and with the Chambers of Commerce.

Looking back eighteen years, the effort to introduce ideas of ADR that emanated from North America has largely succeeded with significant adaptations to each country’s legal system. The ownership over these reforms is local and national. Rather robust efforts are being made in many other countries. The countries slowest to join the process, Brazil and Mexico, are rapidly catching up to their neighbors. Latin American professionals regularly attend international conferences and present their own experiences. The Justice Studies Center of the Americas sponsored an International Workshop on Lesson Learned across the entire region at the end of October 2010. Furthermore, information on the development of these processes in Latin America is regularly documented in distinguished magazines such as the AAA Dispute Journal.

38. Id.
II. STRATEGIC APPROACH TO ACCESS TO JUSTICE AND ADR

Access to justice complements the rule of law, in that it creates venues for those with economic, social, and cultural disadvantages to accede to and benefit from judicial services. According to Cappelletti, there are three main obstacles that make civil and political liberties non-accessible to so many people. First, due to economic reasons, individuals are unable to access information or adequate representation. Second, due to organizational obstacles, the isolated individual lacks sufficient motivation, power, and information to initiate and pursue litigation. Third, access to justice could be impaired because sometimes procedural processes are inadequate, that is, traditional contentious litigation in court might not be the best possible way to provide effective vindication rights. Policy makers believe that providing legal aid and advice for the poor will alleviate some of the problems. Law school clinics are a feasible way of providing help for the poor while also helping students gain valuable real world experience. Rule of law awareness campaigns also help to inform citizens about their rights and encourage their participation in the decision-making process. Second, government agencies can take a more proactive role in helping individuals. This can be achieved by simplifying the procedural process, providing continuing legal education for justice system personnel, and strengthening the administrative capacity of the judiciary. Third, access to justice must provide real alternatives to ordinary courts and litigation procedures, through ADR. DPK Consulting projects around the world have dealt with all three elements of access to justice. The following is a discussion of challenges and successes in justice systems reforms in El Salvador, West Bank/Gaza, Dominican Republic, Democratic Republic of Congo, Guatemala, and Jordan.

A. Legal Clinics and ADR Programs in Law Schools

Access to justice in the developing world can be challenging. This is especially so in rural communities given the unequal distribution of services, extreme poverty, and sometimes illiteracy. Clinical programs increase access to justice by providing a wide range of otherwise unavailable legal services. Some countries have enacted clinical programs with constitutional and legislative directives, thus acknowledging the importance of alternative means of providing access to

43. Id. at 284.
44. Id.
45. Id.
46. Id. at 285.
47. Id.
49. Id.
50. William E. Davis & Razili K. Datta, Implementing ADR Programs in Developing Justice Sectors: Case studies and Lessons Learned, DISP. RESOL. MAG., Summer 2010, at 16.
justice. However, the extent and quality of justice available to lower income and other disfavored groups of citizens varies considerably from one country and region to another.

A global clinical movement for access to justice creates new approaches to the field and assures that the new generation of clinically trained lawyers is able to provide such services. Through its work, DPK Consulting has implemented numerous programs that specifically trained students through legal clinics. The following is an example of DPK's work with law clinics.

I. West Bank/Gaza

Through the implementation of Netham, a five-year rule of law program, DPK was able to work with Al-Quds University School of Law (AQU) in developing legal clinics. This was the first time that this type of legal assistance was provided in Palestine. The program introduced the “Street Law” program, which trained law students to teach law in high schools in the West Bank. In cooperation with a local NGO, called Human Rights Center, the existing moot court program at AQU was strengthened and formalized as part of the formal curriculum. Formalizing the moot court program helped create the street law program and provide free legal advice.

B. Creating Accessible Justice Systems

Justice systems in developing countries have significant case backlogs on the dockets. Sometimes formal court infrastructures do not properly serve the needs of transient, scattered, rural communities. Proper adherence to the relevant rules of procedure, and correct application of such rules to all cases, increases state legitimacy. Procedural fairness requires the existence of rules that are consistently applied to all individuals.

Procedures that minimize opportunities for favoritism diminish corrupt treatment of litigants. At times, discretion to assign a case to a particular judge can be problematic because of increased risk of corruption. A successful reform in many multi-judge courts (most common in major urban centers) has been the installation of a system for random assignment of cases among judges.

Weak control over official files that constitute the record of the case creates opportunities for corruption. Keeping case files in unsecure environments in-

53. See generally Bloch, supra note 51, at 119.
54. Id. at 139.
57. See generally BRIAN BARRY, POLITICAL ARGUMENT (Harvester 1990) (exploring the concept of political values having trade-off relations and analyses the notion of public interest); T. D. Cambell, Formal Justice and Rule-Change, 33 ANALYSIS 113, 113-18 (1973).
creases the risk that documents, or even entire files, might disappear. This problem is eliminated through the establishment of a records center, where records management experts maintain accurate and up-to-date case files. This reform increases efficiency, conserves space, and it eliminates a potential source of corrupt manipulation of judicial records.

Often, efforts to delay proceedings are made at the stage of enforcing a judgment. Delay may provide an opportunity to conceal or transfer assets. A judicial system’s failure to enforce its judgments is a denial of meaningful access to justice. There are a multitude of weaknesses that can provide opportunities for delay in the enforcement of judgments. For example, inadequate procedures can lend themselves to corrupt manipulation through complex rules, broad discretion of enforcement personnel, excessive opportunities for dilatory appeals, and inadequate access to information. Corrective measures include simplification of required procedures, disclosure and surrender of debtor assets, expansion of available options for seizing and liquidating assets and, most importantly, diligent judicial oversight of the execution process and timely rejection of frivolous appeals.

The desire of judiciaries to automate processes, records systems, and statistical databases before they adequately review and improve existing practices can be risky. The efficiency of procedures and the quality of data should be assured before proceeding to automate systems that, absent such review, are likely to prove inadequate. The following projects implemented in the Democratic Republic of Congo, Guatemala, and Jordan helped foster access to justice through mobile courts, create opportunities for women to be part of the justice system, and establish procedures that citizens can understand.

1. Democratic Republic of Congo

The DPK project in the Democratic Republic of the Congo was designed to provide more effective, transparent, and accessible court operations in pilot jurisdictions of Bandundu, South Kivu, Maniema, and Katanga Provinces. Studies show that mobile courts are the most effective means of reducing judicial delay and allowing more vulnerable populations to access the justice system in countries where courts are centralized in the capitals and remote areas are not well connected by roads. Many cases in remote areas go unheard because people cannot access the courts and witnesses cannot be called. The project supported successful mobile court sessions to increase access to justice for vulnerable populations. Due to the very poor infrastructure in some parts of DR Congo, the project provided motorcycles for one regional office because it is impossible for cars to


access some sites where mobile courts are located. In order to increase awareness of these services, the project awarded over $100,000 in grants to local NGOs.62

2. Guatemala

The 1993 Criminal Code in Guatemala was one of the first of its kind in Latin America because it did away with the inquisitorial system.63 The new code transitioned the Guatemalan justice system from a document-based system originally based on French law, toward an oral process and a new adversarial system.64 Major features of the new code were shortened pretrial detentions, plea bargaining, the presumption of innocence and a right to defense, a right to use one’s native language, and changes in appeal processes.65 The reform in the criminal justice procedure, which created new rules of oral process, allowed citizens to better understand and participate in the judicial process.66

3. Jordan

In Jordan, DPK implemented the Judicial Upgrading Strategy (JUST 2004-2006). The project trained all judges and court staff in new, specialized areas of the law, such as intellectual property rights, international trade, commerce, and ADR.67 The project worked with the Jordanian Ministry of Justice to strengthen its operating capacity, continuing legal education, and jumpstart its Judicial Studies Diploma program—a new preparatory program for judges in training.

In 2004, DPK worked with the Judicial Institute of Jordan (JIJ) (a postgraduate institution for future lawyers) to strengthen its academic program and create a merit-based admissions process. At the start of the project, the number of female students enrolled in the Judicial Studies Diploma Program was about 10 percent.68 However, by 2007 women comprised almost 50 percent of the class. The recruitment changes have had a strong impact on the number of women judges. In time, better gender representation will help make the judicial system more accessible to women.

DKP is also in the process of implementing the Rule of Law Program (ROLP), which, among other tasks, is conducting court administration training programs. In 2010, court administrators and Chiefs of Diwan69 completed six months of foundation level court administration training. In 2011, the project will

64. Id.
68. Id.
69. In Jordan, the King is advised by officials in the Royal Hashimite Court, or Diwan, which is comprised of members of the extended Hashemite dynasty, notable families, and tribal leaders.
hold intermediate level training that will focus on advanced case flow management, records management, and strategic planning. The goal of this training is to foster better management of courts and cooperation between chief judges and court administrators. This will allow for more efficient, effective, and transparent services, enabling a heightened sense of public confidence in the justice sector from the Jordanian public.\(^{70}\)

**C. Implementing ADR**

At times, formal mechanisms of conflict resolution do not provide the best solution for conflicting parties, especially when they are poorly represented and informed. ADR can be more effective and acceptable as they form part of the traditional community forms of conflict resolution. For example, conciliatory justice allows the parties to resolve their issues while maintaining a complex relationship. This form of conflict resolution has the potential to preserve the relationship, treating the episode as a temporary disruption rather than a break of the relationship. Conciliatory justice is the better choice in litigation among neighbors, schools, offices, and villages where people are in daily contact with each other. Due to their proximity and lifestyle it would be too difficult for the parties to avoid their environment because that would involve changing jobs or home. A formal adversarial dispute of grievances would lead to exacerbation of conflicts, whereas conciliation works to the advantage of all parties involved. This partially accounts for the traditional preference for conciliatory solutions in some communities,\(^{71}\) where avoidance could mean loss of village solidarity, which in some societies is essential for survival. The following are examples of DPK's challenges and successes in implementing ADR reforms in the Dominican Republic, El Salvador, Jordan, and West Bank/Gaza.

**1. Dominican Republic**

In the Dominican Republic, DPK implemented a rule of law program that encompassed both formal and informal workshops to familiarize justice system actors with mediation. Technical assistance was provided to the Commission for the Drafting of the Family Code, in order to introduce family mediation into the code. The project was highly successful, in that it formally introduced alternative methods of conflict resolution within the justice sector. The Supreme Court of Justice of Dominican Republic passed a plenary resolution that established the application of ADR by all courts.\(^{72}\)

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2. El Salvador

From 2000 to 2005 DPK implemented two USAID-funded projects in El Salvador. Both projects aimed to promote the development of ADR mechanisms by targeting rural legal centers designed to improve access to justice. In partnership with the local government, the projects set up ten casas de justicia (rural justice centers) in rural communities and fourteen centros de mediación (mediation centers). The casa program was separate from the formal court structure and it focused on community-based means to resolve disputes. The casas were able to significantly reduce the volume of cases in the court, especially family and neighborhood disputes.

The more interesting result of these two programs in El Salvador was the strong participation of women. In six communities where the fourteen centros were located, women requested 70-75 percent of the mediations conducted.\(^73\) The overwhelming majority of the women requested mediations regarding family matters.\(^74\) Furthermore, women were the largest audience in the ADR presentations conducted by casa staff.\(^75\)

In 2007, DPK implemented a USAID-funded Mediation Program, which built on previous work toward harmonizing the legal framework for ADR in El Salvador and disseminated information about available mediation services. The project targeted youth by conducting school-based mediation programs. Through outreach campaigns with local partners, the program was able to educate youth on peaceful means to resolve conflicts and utilize ADR services. Through TV and radio coverage, articles in major publications, and essay writing competitions, the public outreach campaign promoted the use of mediation.\(^76\) A study conducted as part of the Mediation Program found that mediation allows for access to justice “free of obstacles based on gender, educational background, or type of dispute.”\(^77\) The study revealed that 78 percent of the cases that went to mediation centers were successfully resolved. Furthermore, 92 percent of service users stated that they would use ADR again.\(^78\)

In the other principal legal reform in Latin America in the past twenty years (criminal procedural reform), we now see the adaptation of reformative justice concepts being introduced. Specifically, DPK Consulting implemented an El Salvador Mediation Project that introduced the use of mediation into the new Criminal Code that came into effect in June 2010.\(^79\) Initially, the project implemented an ADR pilot mediation project for criminal cases and subsequently institutionalized it at the Office of the Attorney General. The project supported expanding mediation for criminal matters as an innovative and creative effort to reach agreements between parties affected by minor criminal acts such as threats, bodily harm, traffic accidents, misappropriations, damages, fraud, robbery, or

\(^{73}\) William E. Davis & Razili K. Datta, Implementing ADR Programs in Developing Justice Sectors: Case studies and Lessons Learned, DISP. RESOL. MAG., Summer 2010, at 16, 17.
\(^{74}\) Id.
\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) Id.
\(^{78}\) Id.
\(^{79}\) DPK Consulting, El Salvador Mediation Project ii (report on file with USAID).
unlawful seizure.\textsuperscript{80} DPK supported a strategic alliance between the Office of the Attorney General and the Office of the Public Defender, which fostered the continuity of mediation as a permanent alternative for public defenders as well as prosecutors.

The pilot program began in December 2007 and ended in April 2009. The success and impact on access to justice, as well as the reduction in violence among parties in conflict and subsequent streamlining of the judicial system, led the Office of the Attorney General to create five Prosecutor Units for ADR in Criminal Matters. One of the most encouraging milestones was the introduction of mediation into criminal matters and its insertion into the new Criminal Procedure Code in October 2008.\textsuperscript{81}

These achievements are especially important in the context of a long history of violence in El Salvador. El Salvador remains one of the most violent countries in the Western Hemisphere with an average of nine murders a day.\textsuperscript{82} Hence, the introduction of mediation as an ADR in the criminal system will foster a more peaceful society and indirectly a more democratic state.

3. Jordan

Through its ROLP in Jordan, DPK assisted the Ministry of Justice in creating mediation centers in courts and train judge mediators. Through this initiative, DPK intended to expand awareness of the availability of mediation as an ADR option and reduce the demand on courts and increase public satisfaction with the justice system. A temporary mediation law was passed in 2003, (this law was amended in 2006) but there were difficulties in its implementation.\textsuperscript{83} The Ministry of Justice requested donor assistance and initial support was provided through the USAID funded American Bar Association (ABA) Rule of Law Initiative. The ABA initiated an ADR project in Jordan in 2004, but there was resistance from the judges. They believed that their superiors would find mediation referrals inappropriate. In order to expedite the implementation of the mediation law, USAID transferred the project to DPK. DPK pursued a different strategy by focusing on two essential tasks. It first trained a small group of judges (4) as mediators. Second, it held sessions with other judges to explain how referring of cases would be seen in the evaluation of their performance. As a result, in 2008, DPK began to see a gradual flow of cases for referral and the judges gained expertise in the mediation process. Although, the legitimacy of ADR is gradually gaining credibility among the judges, its acceptance among litigants has been challenging.

To facilitate the acceptance of mediation, the ROLP has created mediation centers in eight courts, providing environments conducive to confidentially, informality, and problem solving. The project has also developed and delivered training to judges assigned as mediators in the court. In cooperation with the Min-

\textsuperscript{80} Id.
\textsuperscript{81} Id. at 8.
istry of Justice, the Project held training sessions with Chief Judges and hearing judges of the pilot courts to inform and encourage them to refer cases to mediation.84

Between 2008 and 2009 mediation use and settlement success increased in the Conciliation (limited jurisdiction) Courts.85 The number of cases referred to mediation increased by 107 percent, from 499 cases sent to the mediation department in 2008, to 1,034 cases in 2009.86 However, results in the First Instance (general jurisdiction) Courts have been less successful. The Jordanian Ministry of Justice recognizes that mediation does reduce the demand on courts and increases public satisfaction with the justice system. Therefore, it has established a department to manage the mediation program and encourage the use of mediation through expanded awareness, training, and possible legal framework amendments.87

The following tables reflect the number of cases that were referred to mediation and settled in the mediation department. For example, 35 percent and 53 percent relate to the increase in number of cases referred to mediation settled in mediation.88 This means that out of 499 cases that were sent to mediation in 2008, 35 percent of those cases were settled.89 In 2009, 53 percent of the 1034 cases sent to mediation were settled.90

<table>
<thead>
<tr>
<th>Number of Cases Resolved through Mediation in Conciliation &amp; First Instance Courts91</th>
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<tr>
<td>Performance Data and Rating92</td>
</tr>
<tr>
<td>December 2008 Baseline</td>
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<tr>
<td>Percent of Cases Referred to Mediation Settled in Mediation</td>
</tr>
<tr>
<td>Conciliation: 35%</td>
</tr>
<tr>
<td>First Instance: &lt;49%</td>
</tr>
<tr>
<td>Percent of All Cases Filed Settled in Mediation</td>
</tr>
<tr>
<td>Conciliation: 1%</td>
</tr>
<tr>
<td>First Instance: 2%</td>
</tr>
<tr>
<td>December 2008 to September 2010 (1st through 8th Quarter) Quarterly Performance Results</td>
</tr>
<tr>
<td>Percent of Cases Referred to Mediation Settled in Mediation</td>
</tr>
<tr>
<td>Conciliation: 53%</td>
</tr>
<tr>
<td>First Instance: 60%</td>
</tr>
<tr>
<td>Percent of All Cases Filed Settled in Mediation</td>
</tr>
<tr>
<td>Conciliation: 1%</td>
</tr>
<tr>
<td>First Instance: 2%</td>
</tr>
</tbody>
</table>

85. Id.
86. Id.
88. E-mail Correspondence with the ROLP Chief of Party, Walter Kuencer, on Nov. 07, 2010.
89. Id.
90. Id.
91. The Courts of First Instance have general jurisdiction in all criminal and civil matters, whereas the Conciliation Courts have limited jurisdiction for civil claims of 7000 Dinar (JD) or less.
Although there is a significant increase (107 percent) on the numbers referred to mediation, and 18 percent (from 35 percent to 53 percent) increase on the number of cases settled there, the overall number of all cases settled through mediation does not show significant improvement. Specifically, in 2008 less than 1 percent of all cases filed were settled in mediation. In 2010, about 1 percent of all cases filed in the conciliation courts were settled in mediation. In other words, about 99 percent of all litigants/cases do not choose mediation as an option to settle their cases. For this reason, in 2010, the Minister of Justice decided to suspend the Project’s effort on mediation activities, because the only way to increase the use of mediation as a form of ADR is to change the law to require an attempt at a mediated solution to all civil cases before assignment to a trial judge.

Although the implementation of the mediation program in Jordan has had mixed results, judges in Jordan remain optimistic. The ROLP has made significant efforts in training judges in mediation. The following table demonstrates some of the statistics to date.

<table>
<thead>
<tr>
<th>Type of Training</th>
<th># Judges trained in mediation prior to Dec 2008*</th>
<th># Judges trained in mediation during 2009</th>
<th># Judges trained in mediation during 2010</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic mediation training</td>
<td>57</td>
<td>20</td>
<td>14</td>
<td>91</td>
</tr>
<tr>
<td>Advanced mediation training</td>
<td>0</td>
<td>0</td>
<td>18</td>
<td>18</td>
</tr>
<tr>
<td>Training of Trainers Mediation</td>
<td>8</td>
<td>0</td>
<td>10</td>
<td>18</td>
</tr>
</tbody>
</table>

Judicial authorities recognize that unlike regular courts, which focus on procedure, mediation tackles the essence of a case. Judges in Jordan noted that in some cases winning is not as important as an apology, and mediation allows for a more personal solution to the problem.

93. Id.
94. Id.
95. Id.
96. Id.
98. Id.
99. See supra note 87.
4. West Bank/Gaza

Given the major cultural change involved in introducing new forms of ADR in Palestine, the DPK Netham Project coordinated numerous conferences and workshops with the Ministry of Justice’s ADR Directorate to open dialogue about ADR and mediation, and whether it is right for Palestine.100 Netham implemented Mediation Settlement Training for seven Palestinian Judges to assist the High Justice Court in reviewing mediation cases at the Conciliation and First Instance Court. Introducing settlement courts in Palestine is expected to lower the number of pending cases, and will allow for more efficient use of court resources.101

One of the major successes in West Bank and Gaza was the campaign to strengthen the rule of law in the towns of Bani Naim, Al Shyoukh, and Sa’er resulting in a formal agreement among fifty seven (57) tribal leaders to make a commitment to respect and resort to the formal justice sector in solving disputes.102 The “Thirty one Point Memorandum of Understanding” (MOU) aimed to give the public a clear picture of some of the negative practices in the tribal system. The MOU attempted to reduce tribal punishment, while documenting and incorporating the positive elements of the tribal system into the law.103

III. CONCLUSION

Implementing access to justice projects in the developing world is challenging. The most important lesson is to involve the judicial system leadership and familiarize them with the processes. Support from essential justice system stakeholders, such as judges, justice system officials, and lawyers, is essential for the successful implementation of access to justice programs. It is important to have support for the programs internally, and positive voices within the justice system can act as visionaries or champions of access to justice. Throughout its work in developing countries, DPK has found that creating pilot programs upon which successful stories can be built facilitates support from the higher ranks in the justice system. In its implementation of Netham in West Bank/Gaza, DPK learned that allocating resources to the most pressing problem and achieving visible results facilitates project implementation.104 In El Salvador, the Supreme Court changed its position to support the ADR programs nearly three years after the USAID-funded Mediation Program started.105 Similarly, the Judicial Council in Jordan initiated efforts to cooperate with the Ministry of Justice to establish an ADR center in the main courthouse in Amman.106 Thus, a strong start that is fo-

103. Id. at 5.
105. William E. Davis & Razili K. Datta, Implementing ADR Programs in Developing Justice Sectors: Case studies and Lessons Learned, DISP. RESOL. MAG., Summer 2010, at 16.
Access to Justice and Alternative Dispute Resolution

A fast impact will create favorable conditions for program implementation.

Throughout the past thirty years of implementing access to justice programs in the developing world, DPK has learned that a standard ADR system is not the answer to diverse and complex justice systems. Indeed, it is imperative that the ADR system follows a context-specific design that answers questions such as: What is the relationship between formal courts and the ADR system? Who will provide the service? What kind of fees will ADR systems charge? How will the cases be referred? What kind of regulatory framework should structure the system? And what kind of facilities will be used?

Finally, access to justice programs must be sustainable. Most of the international aid programs are funded for a specific period of time. In order for these systems to continue, local authorities must ensure the continuation of services once an international program is complete. In El Salvador, for example, DPK worked with municipalities to set up the Casa de Justicia and with the Public Defender’s Office to create mediation centers. Formal agreements between the parties established that local municipalities would provide the physical space for the program and assume responsibility after the Mediation Program is complete. This approach offers assurance that the ADR programs would continue to operate after the USAID-funded program was complete and created ownership among the local justice system authorities.