

2011

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Recommended Citation

Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development*, 2011 J. Disp. Resol. (2011)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2011/iss1/9>

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Lost in Translation: Can Exporting ADR Harm Rule of Law Development?

*Cynthia Alkon**

I. INTRODUCTION

Imagine a country that is known for its natural beauty and tasty cuisine. It is also a land whose people have experience with repressive, authoritarian, and totalitarian leaders. It is a land with vast potential, but its people live with low rates of development, a struggling economy, and a government that is best known for its endemic corruption, not the services it provides its people. The international community decided years ago to provide foreign assistance in many forms, including rule of law development assistance. Yet, despite all of this help, the country still struggles. Lawyers, judges, and human rights advocates all complain that case overcrowding is a serious problem that blocks access to justice in the court system for both criminal and civil cases. There is no tradition or process to settle cases before going to trial. The question is raised “why don’t we pass a law to allow us to negotiate and settle our criminal cases through plea bargaining?” Soon a new law is passed and criminal defendants who once spent months, or years, waiting in pretrial detention for court dates now enter guilty pleas, which for many, means paying a fine and immediate release. The court system clears out, case backlogs reduce, the human rights situation improves as fewer defendants spend time in the poor pretrial detention facilities, and defendants no longer spend months waiting for trials that they have no hope of winning.

It sounds like a win-win solution. It is exactly what we would want to encourage and is a great example to show the value of alternative processes like negotiating cases. So, what is the problem? Imagine further that in this country plea bargaining is seen by the general public as state-sanctioned corruption. Newspapers and the media report that defendants are paying money to be released from jail or to have their cases dismissed. News also gets out that some defendants received better plea deals in exchange for agreeing not to file complaints about torture or ill treatment by the police. Instead of an alternative process that is supporting the formal legal system, the general public starts to look at plea bargaining as just another form of corruption and it seems to contribute to further eroding any remaining trust or confidence that the general public might have in their legal system. Unfortunately, this is not a fictional account. The situation described above is essentially what happened in the Republic of Georgia after the country introduced plea bargaining of criminal cases in 2003.¹

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1. See Section V of this article for a discussion on when promotion of ADR programs may work against the development of the rule of law. For a more in depth analysis, see generally Cynthia Alkon,

Examples such as this lead to the question, can alternative dispute resolution (ADR)² harm the development of rule of law in other countries? Rule of law assistance programs seem to think not, as they increasingly include forms of ADR in rule of law development work around the globe.³ However, as these programs increase, there is also an increasing need for better analysis of when and where to support ADR programs as part of the rule of law development assistance package in individual countries. Fighting corruption is one reason ADR and rule of law practitioners give to explain why ADR should be included in rule of law programming.⁴ At the same time, ADR scholars and practitioners recognize that corruption within ADR is a possible problem in societies with already high rates of corruption.⁵ However, there has been less attention to whether introducing an ADR process could damage or contribute to delaying the development of rule of law in countries with already highly corrupt formal legal systems and with low levels of public trust in the legal system due, in part, to the damage that endemic corruption may have already done to public attitudes. In these countries, a new ADR process or program, such as plea bargaining in Georgia, may be viewed as just another informal process operating outside the law, in the same way that corruption operates.⁶

Plea Bargaining as Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?, 19 TRANSNAT'L L. & CONTEMP. PROBS. 355, 407-11 (2010) [hereinafter *Plea Bargaining as a Legal Transplant*].

2. For the purposes of this article I am using the term alternative dispute resolution (ADR) to refer to the large variety of processes to resolve disputes that are not litigation and include negotiation, mediation, and arbitration. For an analysis of how these processes might contribute to rule of law development, see Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 329-30 (2002) [hereinafter *The Cookie Cutter Syndrome*]. This article will focus more on negotiation and mediation due to the informal nature of these processes and the narrow concern that the informality and non-public nature of these processes may negatively impact legitimacy and therefore the development of rule of law. Arbitration could also be a concern, particularly due to the private nature of the proceedings, but in developing countries, for a variety of reasons that are beyond the scope of this article to address, arbitration tends to operate without the same level of public attention and focus as mediation and negotiation programs. However, there is a concern that arbitration could pose a problem in countries "where the arbitration system and administering agency is no less corrupt than the corrupt courts it was designed to replace or supplement." Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 341 (2003) [hereinafter *Correspondences and Contradictions in International and Domestic Conflict Resolution*].

3. For example, the United States Agency for International Development (USAID) provides a long list of ADR programs in Latin America and the Caribbean. See USAID, USAID Dispute Resolution Activities in Latin American and the Caribbean, http://www.usaid.gov/locations/latin_america_caribbean/democracy/adr/dg_conflict2b.html#Colombia (last visited on Mar. 13, 2011).

4. ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE 10 (1998) [hereinafter ADR PRACTITIONERS' GUIDE], available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf.

5. See, e.g., Jean Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons From Abroad*, 56 DEPAUL L. REV. 569, 586-87 (2007) [hereinafter *Is Alternative Dispute Resolution Consistent with the Rule of Law?*]; Ewa Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute*, UNITED NATIONS DEVELOPMENT PROGRAM 20-22 (2006) (describing weaknesses in informal justice systems) [hereinafter *Doing Justice*], available at <http://www.undp.org/oslocentre/docs07/DoingJusticeEwaWojkowska130307.pdf>; see also *Correspondences and Contradictions in International and Domestic Conflict Resolution*, supra note 2, at 325-26.

6. This article will not address the situation in countries, such as Afghanistan, without even moderately functional legal systems as the analysis and concerns are necessarily different in such countries.

The question explored here is whether ADR processes introduced to aid in the development of rule of law to help build legitimacy with legal authorities and institutions could instead work against legitimacy or further undermine it.⁷ This article will question whether establishing a new ADR program is advisable in a country with endemic corruption that is struggling to keep, or maintain, a moderately functional legal system.⁸ In these countries, the general public may view informal practices that occur in private and without standard rules to be another form of corruption and promoting such practices could reinforce already existing attitudes about the lack of rule of law.⁹

This article will begin, in Section II, with a brief explanation of rule of law development work. Section III will describe the role of legitimacy in developing rule of law. Section IV will discuss some examples of how ADR programs are typically included in rule of law development work. Section V will discuss when promotion of ADR programs may work against the development of rule of law, specifically when ADR might seem more like a new form of corruption or when it might reinforce already existing bad practices. Section VI will offer some questions for ADR and rule of law development practitioners to consider in deciding whether to introduce such programs to avoid harming or reinforcing already existing poor public attitudes regarding the legitimacy of the formal legal system. These questions include: whether the dispute is private in nature and without any larger public policy concerns; whether there are serious power imbalances between the parties; whether the public is likely to be interested in the case; whether the general public is likely to think the new process is another form of corruption;

This article will also not address customary law or traditional dispute resolution practices that function outside, and without any connection to, the formal legal system. For a more complete analysis of aid to these types of dispute resolution programs and their potential contributions see generally *Doing Justice*, *supra* note 5, at 30-55.

7. USAID recognizes the importance of legitimacy and states that it is one of the five “essential elements of rule of law.” USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK, A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS 2 (2010) [hereinafter GUIDE TO RULE OF LAW COUNTRY ANALYSIS], available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Frame_work_Jan-2010_FINAL.pdf. The other elements are, “order and security, checks and balances, fairness, [and] effective application.” *Id.* at 1-2.

The perception of law as legitimate and worthy of adherence underpins the rule of law. . . . In societies where the rule of law is observed, virtually all citizens obey laws, even when doing so contravenes their personal interests. This willingness is not based solely on the threat of sanctions; it also arises from the citizens’ recognition that laws are arrived at in a manner set out in a constitutional order and subject to social input. Therefore, the laws represent the collective will.

Id. at 9.

8. For the purposes of this article, a moderately functional legal system is one in which there are courts in place nationwide; where there are enough judges and lawyers to staff those courts; and where cases are regularly heard and decided in the courts nationwide, not just in the capital and a few major cities. In a moderately functional legal system there might be problems of case backlogs, but the key concern that defines a country as a moderately functional legal system is how the general public perceives the formal legal system and whether there is a widespread public perception that cases are routinely decided due to corruption and that power imbalances will inevitably define the outcome (with the powerful prevailing).

9. Another reason to exclude informal justice from the analysis in this article is that many of these processes occur in public and often include the village and/or all interested parties. Although these processes are not immune to charges of corruption, the open nature of the process means that they often do not risk reinforcing existing societal attitudes regarding corruption in the formal legal system. See *Doing Justice*, *supra* note 5, at 22.

whether there is funding to establish the newly established process; and whether there will be adequate monitoring of the new ADR process if it is implemented.¹⁰

These are exactly the kinds of questions that policy-makers, ADR scholars, and ADR practitioners give great thought to when they design ADR programs in developed democracies.¹¹ These questions continue to be asked even after a particular type of ADR is firmly entrenched, such as mandatory mediation, and even after ADR has become the norm, not the exception, in the legal system.¹² However, it often seems that serious consideration of these issues is somehow left behind in the process of travelling abroad and implementing programs in developing countries. This article encourages ADR practitioners and rule of law assistance providers to not allow the complexities of ADR processes, as they understand them at home, to be lost in translation as ADR programs are introduced into rule of law development programs in other countries.

II. RULE OF LAW DEVELOPMENT ASSISTANCE

Rule of law development assistance in its broadest definition is foreign aid given to assist the development of the legal system in a given country.¹³ This type

10. These questions are regularly asked, in some form or another, by scholars, practitioners, and leaders in the ADR community in the United States when examining current ADR programs or discussing whether to introduce new ADR programs domestically. See, e.g., Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2670-71 (1995) [hereinafter *Whose Dispute is it Anyway?*] (suggesting three “key question[s]” in debating settlement and adjudication which are (1) When is it “legitimate” for parties to settle their disputes themselves; (2) When is consent “real” and when should it be allowed?; (3) When should other values win out over party consent and determine the forum for the dispute?”); see also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1547-48 (1991) (analyzing the impact of mediation and mandatory mediation in child custody and divorce cases for less empowered parties, particularly women); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391 (1985) (examining if the informal nature of ADR processes might disadvantage racial and ethnic minorities and suggesting that ADR processes are more appropriate between parties of equal status and power); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2658-59 (1995) (looking at how to better evaluate settlements and how settlements could include some of the public values of adjudication).

11. The debates for and against the use of ADR in a variety of contexts is lively, including the classic article: Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984). Among the numerous articles responding to Prof. Fiss are some with discussions that are particularly relevant to illustrate the domestic debate surrounding issues raised in this article. See, generally e.g., *Whose Dispute is it Anyway?*, *supra* note 10; Luban, *supra* note 10; Michael Moffit, *Three Things to be Against (“Settlement” Not Included)*, 78 FORD. L. REV. 1203 (2009); Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORD. L. REV. 1143 (2009).

12. See Jean Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L. J. 289, 291-94 (2003) [hereinafter *ADR is Here*] (describing concerns and criticisms of ADR and offering “five insights” into ADR that recognize it is no longer a question whether to include ADR in the legal system in the USA due to the fact that ADR is already “an important part of our existing system of dispute resolution.”).

13. This article will not attempt to define rule of law. For a good brief explanation of the definitions in the rule of law development field and the difference between a “thick” and “thin” approach to rule of law, see PER BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA: INTERNATIONAL SUPPORT TO LEGAL AND JUDICIAL REFORM IN INTERNATIONAL ADMINISTRATION, TRANSITION AND DEVELOPMENT CO-OPERATION* 14-19 (2006) [hereinafter *RULE OF LAW ON THE INTERNATIONAL AGENDA*]; see also Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE*

of assistance started with the Law and Development movement in the 1960s.¹⁴ Rule of law development assistance grew dramatically in the 1990s as the Soviet bloc ceased to exist and grew further still into the beginning of this century as it was an integral part of the post-war development packages in Iraq and Afghanistan.¹⁵ The United States, the United Nations, the European Union, the World Bank, and a growing number of other multi-lateral organizations and individual countries provide rule of law assistance as part of their overall development assistance packages. Donors provide rule of law development assistance for a variety of reasons including: to promote economic development;¹⁶ to improve human rights protections;¹⁷ to promote poverty reduction;¹⁸ to develop or strengthen democracy;¹⁹ to bring better safety and security to post-conflict countries;²⁰ and to promote peace-building and/or conflict-prevention.²¹ The primary aim of a particular rule of law program, for example, poverty reduction, will influence the type of work conducted by the program.²² Many donors do not have a singular

RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31 (Thomas Carothers ed., 2006) [hereinafter *Competing Definitions of the Rule of Law*] (criticizing how the rule of law development field defines rule of law and the negative impact this has on rule of law development assistance efforts).

14. For a critical history, see JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 31 (U. Wis. Press 1980). Some scholars state that this type of work actually began just after World War II. See, e.g., Lelia Mooney et al., *Promoting the Rule of Law Abroad: A Conversation on its Evolution, Setbacks, and Future Challenges*, 44 INT'L LAW 837, 840 (2010) [hereinafter *Promoting the Rule of Law Abroad*].

15. Because rule of law development aid can be provided in so many different ways it can be difficult to get comprehensive statistics regarding how much money is spent by donors in this area. One estimate gives a total of \$127.9 million in 2006 for "legal and judicial development." See JAN PERLIN & MICHELLE INDIA BAIRD, OPEN SOCIETY INSTITUTE, *TOWARDS A NEW CONSENSUS ON JUSTICE REFORM: MAPPING THE CRIMINAL JUSTICE SECTOR* 30 (2008) [hereinafter *Towards a New Consensus on Justice Reform*], http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/justice_20081124/justice_20081124c.pdf ("It is clear, in any case, that aid in this category has been growing. It may therefore be concluded that this area of development has become established, despite remaining questions concerning how best to implement it and what it should entail.").

16. For a more critical and recent view of whether law promotes development, see Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 937 (2008).

17. See *Promoting the Rule of Law*, *supra* note 14, at 842-43; see Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?* 36 GEO. J. INT'L L. 809, 840 (2005).

18. See, e.g., *Promoting the Rule of Law*, *supra* note 14, at 843.

19. USAID considers rule of law to be part of democratization work and organizationally places it in that category. See, e.g., USAID, *Democracy and Governance, Overview*, http://www.usaid.gov/our_work/democracy_and_governance/ (last visited Mar. 13, 2011). One question raised is whether democracy or rule of law should be aided together or whether rule of law is a necessary precursor to democracy. See Thomas Carothers, *How Democracies Emerge: The 'Sequencing' Fallacy*, 18 J. OF DEM. 12, 12-13 (2007) (arguing against taking a sequential approach).

20. See generally JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (2006) [hereinafter *CAN MIGHT MAKE RIGHTS?*] (describing how rule of law assistance can be improved after future military interventions in post conflict reconstruction).

21. *Towards a New Consensus on Justice Reform*, *supra* note 15, at 17 (discussing the rationales for criminal justice development aid).

22. However, the type of aid provided may be different although it is offered for the same general reason. For example, the World Bank's poverty reduction development assistance is focused on formal judicial institutions, while the Asian Development Bank's poverty reduction development assistance is focused on community-based institutions including non-governmental organizations. *Id.* at 18.

goal but include many, if not all, of the above reasons to explain their rule of law assistance programs.²³

Rule of law practitioners understand that building the rule of law is long term work that depends on many elements.²⁴ However, exactly how rule of law development is not well understood.²⁵ There have been few empirical studies on rule of law development and rule of law practitioners tend to operate more from a general understanding of what makes sense due to their past experience in other countries and less from clearly understood guidelines suggesting how to approach this type of development work.²⁶ This distinguishes rule of law development work from more traditional development work, such as inoculation programs and bridge building that are more easily quantified, studied, and replicated and therefore, have clear guidelines about how to approach and accomplish their goals.

Rule of law development assistance programs include assistance to write constitutions; to draft laws; to train lawyers, judges, and prosecutors; to educate future lawyers; and to build courthouses and supply other infrastructure, including technology.²⁷ For the purposes of this discussion, this article will more narrowly define rule of law development assistance to focus on assistance to formal legal institutions and not include areas such as police assistance missions or assistance to prison systems and administration.²⁸ Rule of law assistance work has historically taken a “top down” approach and focused on the formal justice institutions in a country including judges, lawyers, prosecutors, and legislation.²⁹ There has

23. *Id.* at 17-18.

24. For a brief history of the various areas that law and development scholars have focused on, including an analysis of how culture has been considered a key element in building the rule of law see Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 517-38 (2009) [hereinafter *Thinking with Culture in Law and Development*]; see also Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD 137, 141-43 (Thomas Carothers ed., 2006) [hereinafter *Lessons Not Learned About Legal Reform*].

25. See, generally e.g., Martin Krygier, *The Rule of Law and “The Three Integrations,”* 1 HAGUE J. ON RULE L. 21 (2009); Randy Peerenboom, *The Future of Rule of Law: Challenges and Prospects for the Field*, 1 HAGUE J. ON RULE L. 5 (2009); Veronica L. Taylor, *Frequently Asked Questions About Rule of Law Assistance (and Why Better Answers Matter)* 1 HAGUE J. ON RULE L. 46 (2009).

26. See generally BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erick G. Jensen & Thomas Heller eds., 2003); CAN MIGHT MAKE RIGHTS?, *supra* note 20; Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 15 (Thomas Carothers ed., 2006) [hereinafter *The Problem of Knowledge*]; Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 161 (Thomas Carothers ed., 2006) [hereinafter *Beyond Rule of Law Orthodoxy*]. For an overview of the criticism of current rule of law efforts and scholarship, including the need for better empirical work, see Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT’L L. 51 (2009).

27. Thomas Carothers has referred to this as the “rule of law assistance standard menu.” THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 168 (1999).

28. Those types of programs often include ADR components. For example, community policing programs often include negotiation training, and prison training often includes a variety of dispute resolution skills. For an account of an international training for police in Kyrgyzstan on non-violent dispute resolution, see Nina Sughrue, *Training Police in Kyrgyzstan: The Hard Work of Peacebuilding*, ENCYCLOPAEDIA BRITANNICA BLOG, <http://www.britannica.com/blogs/2008/02/training-police-in-kyrgyzstan-the-hard-work-of-peacebuilding/> (last visited Mar. 13, 2011).

29. See *Beyond Rule of Law Orthodoxy*, *supra* note 26 (questioning the assumptions in the “top down” approach to rule of law development). For another view of “bottom-up” legal development, with examples from Nepal, see *Thinking with Culture in Law and Development*, *supra* note 24, at 517-38.

been less focus on grassroots level work.³⁰ Rule of law assistance work is delivered in a number of ways but usually includes international personnel based in the country, or visiting regularly, to oversee the implementation of the programs.³¹

The specific type of assistance provided to an individual country may vary depending on the circumstances in the country and, more importantly, the type and degree of political engagement that the donor nation or organization has with the recipient country.³² Rule of law assistance providers make frequent reference to the need to individualize assistance programs to ensure they are appropriate for the specific country.³³ In response, there are now a number of assessment tools to assist donor nations and organizations to individualize their aid packages so that they are specific to the needs and level of development for each country.³⁴ However, despite the improved resources and changes in rhetoric, the approach to providing rule of law development assistance still looks very similar in each country.³⁵

III. LEGITIMACY AND RULE OF LAW

Although rule of law development practitioners are struggling to better understand the variety of dynamics at work to develop rule of law, it seems clear that one important part of rule of law is the attitudes of ordinary citizens towards their legal system and whether they believe it is a legitimate system,³⁶ and therefore

30. See generally *Beyond Rule of Law Orthodoxy*, *supra* note 26.

31. See, e.g., RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 13, at 9.

32. See generally Larry Diamond, *Foreign Aid in the National Interest: The Importance of Democracy and Governance*, in FOREIGN AID AND FOREIGN POLICY: LESSONS FOR THE NEXT HALF-CENTURY 61 (Louis A Picard, Robert Groelsema & Terry F. Buss eds., M.E. Sharpe 2008); Steven W. Hook, *Foreign Aid in Comparative Perspective: Regime Dynamics and Donor Interests*, in FOREIGN AID AND FOREIGN POLICY: LESSONS FOR THE NEXT HALF-CENTURY 86 (Louis A Picard, Robert Groelsema & Terry F. Buss, eds., M.E. Sharpe 2008).

33. See generally GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 7; see also GUIDANCE NOTE OF THE SECRETARY-GENERAL: UN APPROACH TO RULE OF LAW ASSISTANCE 1-2, April 2008, [hereinafter GUIDANCE NOTE OF THE SECRETARY-GENERAL] http://www.unrol.org/files/RoL_Guidance_Note_UN_Approach_FINAL.pdf.

34. See e.g., GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 7, at 29-41. The American Bar Association through the Rule of Law Initiative created a number of assessment tools including the Judicial Reform Index, the Prosecutorial Reform Index, the Legal Profession Reform Index and the Legal Education Reform Index. See American Bar Assoc., Publications, <http://apps.americanbar.org/rol/publications.shtml> (last visited Mar. 13, 2010).

35. See Thomas Carothers, *The Rule of Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3 at 7-8 [hereinafter *The Rule of Law Revival*] (Thomas Carothers ed., 2006). For a more comprehensive study of current practices and approaches, see generally BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 13. For an earlier critique of the similarities in approach, see *The Cookie Cutter Syndrome*, *supra* note 2, at 327.

36. See, e.g., Denis J. Galligan, *Legal Failure: Law and Social Norms in Post-Communist Europe*, in LAW AND INFORMAL PRACTICES 22 (Denis Galligan & Marina Kurkchiyan eds., 2003) (stating that developing attitudes of respect for law "takes time and has to be developed piece by piece in different contexts, until the point may be reached at which it can be said that, by and large, a society has accepted law as a basis for social co-ordination"). Political actors also need to be engaged in the reform process. See *Promoting the Rule of Law Abroad*, *supra* note 14, at 844-45.

[T]he lack of progress in the area of rule of law is typically not simply a result of too few trained lawyers or courthouses, but is due to the fact that the most important political actors within the country have not adequately backed reform. In the end, a rule of law system is a reflection of the underlying socio-political contract that exists within a society.

follow the law.³⁷ Due to this understanding that the attitudes of ordinary citizens matter in developing rule of law, rule of law practitioners identify changing the attitudes of the population at large as a goal, usually through “public awareness campaigns” or teaching law to non-lawyers.³⁸

Legitimacy as a whole is a “key precondition” to people voluntarily complying with the laws and legal authorities.³⁹ A leading scholar in this area, Tom Tyler, concluded that if people find that a law or legal authority is legitimate, they are more likely to comply with that law or legal authority.⁴⁰ As I have discussed in a previous article, there are two aspects to whether a legal system has legitimacy.⁴¹ The first is whether people follow the law and the second is their attitudes toward the courts, law enforcement, and government in general.⁴² Members of the general public want authorities to make decisions that follow the rules and laws. The public perception regarding whether authorities are following the law will influence public opinion about the legal system.⁴³ This means that legitimacy looks at both whether the law itself is perceived as legitimate and whether individual legal authorities or institutions are perceived as legitimate.⁴⁴ It is this second part of legitimacy that is most relevant for the discussion in this article.

Id. at 845; see also Gillian K. Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Economies*, 56 DEPAUL L. REV. 401, 404-05 (2007) (discussing the importance of lawyers in implementing new laws in the context of economic development); Carothers, *The Problem with Knowledge* in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 15 at 20 (Thomas Carothers ed., 2006) (“[C]learly law is not just the sum of courts, legislatures, police, prosecutors and other formal institutions with some direct connection to law. Law is also a normative system that resides in the minds of the citizens of a society.”).

37. Connected to this is the idea that people will follow the law if they believe everyone else. Marina Kurkchian, *Judicial Corruption in the Context of Legal Culture*, in GLOBAL CORRUPTION REPORT 2007 99, 103, available at www.transparency.org/publications/publications/gcr_2001 (last visited Mar. 13, 2011). Tom Tyler states that “the rule of law is based upon a willingness to defer to legal authorities.” Tom Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 668 (2007) [hereinafter *Does the American Public Accept the Rule of Law?*]. One theory of why people follow the law is “social control,” meaning that they follow the law to avoid punishment or to reap rewards. See, e.g., TOM TYLER, *WHY PEOPLE OBEY THE LAW* 19-23 (1990).

38. For a critical and more in-depth description of these types of programs and the underlying reasons for them see Brent T. White, *Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies*, 43 CORNELL INT’L L. J. 307, 344-56 [hereinafter *Putting Aside the Rule of Law Myth*]. The term “legal culture” is often used, and projects often have the goal of a change in the legal culture. For a critical view of this approach see generally *Thinking with Culture in Law and Development*, *supra* note 24 at 518; see also, CAN MIGHT MAKE RIGHTS?, *supra* note 20, at 310-46 (arguing that “[I]nterveners must seek to create a rule of law culture [in post-conflict societies].”); see generally ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001).

39. TOM TYLER, *WHY PEOPLE OBEY THE LAW* 5 (1990) [hereinafter *WHY PEOPLE OBEY THE LAW*].

40. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* xiv-xvi (2002) [hereinafter *TRUST IN THE LAW*].

41. *Plea Bargaining as Legal Transplant*, *supra* note 1, at 378-80.

42. See generally *WHY PEOPLE OBEY THE LAW*, *supra* note 39; Tom Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC’Y REV. 809 (1994) [hereinafter *Governing Amid Diversity*].

43. People are more inclined to use corruption or other extralegal means to resolve cases when they do not believe the legal system will treat them fairly based solely on the merits of their case. Kurkchian, *Judicial Corruption in the Context of Legal Culture*, *supra* note 37, at 103.

44. See, e.g., *WHY PEOPLE OBEY THE LAW*, *supra* note 39, at 27-30, 45-50.

Countries with high rates of corruption tend to suffer from low rates of trust or confidence in their formal legal system.⁴⁵ One scholar who has looked at these issues has categorized countries as either being countries with “positive myths of law” or “negative myths of law.”⁴⁶ Individuals in societies with a “positive myth of law” tend to think that other people usually follow the law; that the law is a good thing and provides a fair way to resolve disputes; and that to break the law is “socially disgraceful.”⁴⁷ In contrast, individuals in societies with a “negative myth of law” tend to think that everyone else is regularly ignoring or breaking the law.⁴⁸ “Negative myth” countries also have high levels of distrust in officials and government bureaucracy.⁴⁹

Examples of “negative myth” countries include Russia, Armenia, and Ukraine.⁵⁰ In negative myth countries, not only do people assume that everyone is regularly violating the law, they also put a negative spin on positive examples of courts or government officials following the law.⁵¹ They do not believe, for example, that judicial decisions are “ever made according to the official principles.”⁵² The challenge in negative rule of law myth countries is that people tend to see law as simply a game, and as something to work around or over, not to simply follow.⁵³ Within these deeply rooted understandings of how law works people will interpret their observations about how the legal system works to conform to these “pre-existing beliefs.”⁵⁴ This means that even if there is change in the formal justice system, people are likely to view these changes, at least initially, with great skepticism and cynicism.⁵⁵

In positive rule of law myth countries, scholars have found that procedural justice contributes to legitimacy. The studies on procedural justice have found that, for purposes of legitimacy, the process is more important to people than the

45. See, e.g., Marina Kurkchiyan, *The Illegitimacy of Law in Post-Soviet Societies*, in LAW AND INFORMAL PRACTICES 25, at 31 (Denis Galligan & Marina Kurkchiyan eds., 2003) [hereinafter *The Illegitimacy of Law in Post-Soviet Societies*] (citing studies of Russian distrust of the police and prosecutors).

46. *Id.* at 29-34.

47. *Id.* at 28. This is not to suggest that serious criticism and questions are not regularly raised in positive rule of law myth countries about the legitimacy and functioning of their legal systems. See, e.g., Nancy A. Welsh, *The Place of Court Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RES. 117, 121-24 (2004) [hereinafter *The Place of Court Connected Mediation*].

48. *The Illegitimacy of Law in Post-Soviet Societies*, *supra* note 45, at 29.

49. *Id.* at 31.

50. *Id.* (explaining that a nationwide survey in Russia reported that “83 percent of Russians regard the police as corrupt, 79 percent assume the law courts and the prosecutor’s offices are corrupt, and 71 percent believe that the high educational institutions are corrupt.”). Public opinion surveys in Armenia and Ukraine show similar levels of distrust. *Id.*

51. *Id.* at 33. This is consistent with egocentric biases, specifically confirmation traps and self-fulfilling prophecies. See, e.g., Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP RESOL. 683, 713-17 (2005).

52. *Id.* at 33.

53. *The Illegitimacy of Law in Post-Soviet Societies*, *supra* note 45, at 43.

54. *Id.* at 45.

55. *Putting Aside the Rule of Law Myth*, *supra* note 38, at 335-36 (describing an example from Mongolia of the negative rule of law myth).

outcome.⁵⁶ If people find the process was fair or just, then they are more satisfied with the system than if they do not.⁵⁷ Procedural justice scholarship examined underlying attitudes and views about the legal process and concluded that people think that a dispute resolution process was fair if the following key factors were present: that they were able to speak and be heard; that they were treated with dignity; and that the authority or decision-maker was neutral and fair.⁵⁸ Within positive rule of law myth countries, scholars have concluded that dispute resolution processes should include these basic components of procedural justice so that the process itself is viewed as legitimate and so the dispute resolution process does not undermine legitimacy for the legal system as a whole.⁵⁹ Planners should examine how to include these components into proposed ADR projects under rule of law development programs.⁶⁰

IV. ADR IN RULE OF LAW DEVELOPMENT ASSISTANCE

There are two basic categories under which practitioners implement donor-funded ADR programs. The first category is when ADR programs are closely tied to efforts to assist or support the formal legal system and to support specific rule of law development goals. This article will focus on the programs that fall into this first category. This article will not discuss the second category of ADR programs, often referred to as customary justice or informal justice, that donors fund to support other goals, not directly tied to the formal legal system, such as peace-making and customary dispute resolution processes.⁶¹

56. TRUST IN THE LAW, *supra* note 40, at 196 (2002); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) [hereinafter *Procedural Justice, Legitimacy*].

57. See, e.g., TRUST IN THE LAW, *supra* note 40, at 206; *Procedural Justice, Legitimacy*, *supra* note 56, at 286; Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 420-21 (2008).

58. See, e.g., Tom Tyler, *Does the American Public Accept the Rule of Law?*, 56 DEPAUL L. REV. 661, 664 (2007).

59. See, e.g., Richard Reuben, *ADR and the Rule of Law: Making the Connection*, 16 DISP. RESOL. MAG. 4, 4; see generally WHY PEOPLE OBEY THE LAW, *supra* note 39; TRUST IN THE LAW, *supra* note 40; *Procedural Justice, Legitimacy*, *supra* note 57.

60. For an example of how to consider these factors in the context of plea bargaining, see *Plea Bargaining and Procedural Justice*, *supra* note 57, at 431. For a discussion of how to adopt procedural justice concepts into plea bargaining as part of a rule of law development program see *Plea Bargaining as Legal Transplant*, *supra* note 1, at 383-84, 416-17. The suggestion is that these components should be given serious consideration, not that each element of procedural justice should always be transported, in full, to every other culture where some factors, such as neutrality, may be less important. Clearly, every culture, or individual within every culture, will not necessarily agree that all of these components are important, just as the standard western style of mediation may not transfer easily to other cultures. See, e.g., *Correspondences and Contradictions in International and Domestic Conflict Resolution*, *supra* note 2, at 338 (discussing how mediation may not transfer well, particularly in countries and with disputes that may be better suited to looking back and less appropriate to the "forward thinking," problem solving approach of mediation). For a more detailed discussion of the theories, effects, and characteristics of procedural justice in the context of mediation, see Nancy A. Welsh, *Making deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 814-16 (2001).

61. Undoubtedly many of the projects under this second category could, if viewed broadly enough, be considered under the first category. But, under this second category implementers are not drawing a direct connection to developing rule of law but instead have other more immediate goals, such as addressing inter-ethnic conflict or providing dispute resolution processes in areas where courts are

ADR assistance is included in rule of law development programs in a variety of ways. One type of assistance is legislative assistance, which often includes direct involvement in writing or rewriting mediation or arbitration laws.⁶² ADR is also included in training programs for lawyers with negotiation and/or mediation skills training. Some assistance programs support training for community mediation programs established to complement the formal legal system, although perhaps not directly court-connected.⁶³ Some programs provide more systematic support to court-connected mediation programs, including funding mediator salaries. Some ADR assistance programs focus on adding negotiated settlements as an accepted part of the legal process.⁶⁴ In many countries negotiated settlement of a case, whether directly between the parties or through a facilitated process like mediation, was not allowed.⁶⁵ The process was that every case that came into the

absent. Afghanistan provides an example under this category. Some donors assist customary law projects to provide better access to dispute resolution processes around the country. Afghanistan is a nation whose formal legal system is largely absent; there are few trained lawyers, few judges, and large parts of the country are without functioning formal courts. This lack of a formal legal system mirrors the largely absent government and is related to the on-going armed conflict in the country. Traditionally, Afghans have relied on customary law to resolve disputes. Supporting customary law in this context is unlikely to delegitimize the formal legal system given the low level of the formal legal system's development in the country. See Noah Coburn & John Dempsey, *Informal Dispute Resolution in Afghanistan* (U.S. Institute of Peace, August 2010); see also U.S. Institute for Peace, Special Report, *Establishing the Rule of Law in Afghanistan*, 117 (Mar. 2004), available at <http://www.usip.org/pubs/specialreports/sr117.pdf>; see also J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan*, 9 (Ctr. on Democracy, Dev. & the Rule of Law, Stan. Inst. for Int'l Studies, Nov. 1, 2004), available at http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf; AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007: BRIDGING MODERNITY AND TRADITION: RULE OF LAW AND THE SEARCH FOR JUSTICE 53-66 (Center for Policy and Human Development, United Nations Development Program, 2007).

62. One example is the mediation law in Kosovo that was passed in 2008. Law No. 03/L-057 On Mediation, Republic of Kosovo (2008), available at https://www.assembly-kosova.org/common/docs/ligjet/2009_3-L057_en.pdf (last visited Feb. 9, 2011).

63. For an example of this type of program in El Salvador see generally William E. Davis, Razili K. Datta & Sergio I. Zegarra, *Implementing ADR Programs in Developing Justice Sectors: Case Studies and Lessons Learned*, 16 DISP. RESOL. MAG 16 (2010).

64. A common example is assistance to develop plea bargaining for criminal cases. Alkon, *Plea Bargaining as a Legal Transplant* at 398-403 (describing rule of law assistance providers active in providing assistance to introduce plea bargaining).

65. This is not to suggest that a legal system can prevent informal settlement of cases before they are filed. But, once a case was filed there were, and in many countries still are, no formal processes that allowed for settlement of the case by the parties without a judicial decision. For an overview of the Soviet legacy in criminal procedure, see Stephen C. Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea Bargaining and the Inquisitorial Legacy*, CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA (John Jackson, Maximo Langer & Peter Tillers eds. 2008) (describing the formalistic and hierarchical model of the Soviet system and attempts by the fifteen successor states of the USSR to institute reforms, including negotiated settlement of cases). For an interesting view of how workplace disputes were resolved in the USSR and the pressure to use formal processes, see LOUISE I. SHELLEY, *LAWYERS IN SOVIET WORK LIFE* (1984). Shelley interviewed Jewish/Soviet émigré lawyers regarding their work practices in the Soviet Union. Informal resolution of workplace disputes, including injuries to workers, were common, but not formally acknowledged. In one account a lawyer "cited a few examples of directors who had chosen to settle questions of inadequate deliveries through the illegal method of private conversations rather than the institutional structure of arbitration." *Id.* at 76.

court system went to trial and a judge or panel of judges ruled on it, sometimes after receiving specific instructions about how to decide the case.⁶⁶

ADR is now commonly included as part of the analysis of how to approach rule of law development. In 2008, the United Nations (UN) published the UN Approach to Rule of Law Assistance, in which it stated its eight “Guiding Principles” for UN rule of law assistance and gave six factors under its “Framework for Strengthening the Rule of Law.”⁶⁷ One of the “Guiding Principles” is that rule of law assistance should be based on the “unique country context,” which “must consider carefully” a country’s “rule of law system,” and should also include looking at both formal and informal dispute resolution systems.⁶⁸ One of the categories under the UN “Framework” includes “effective and accessible mechanisms” for dispute resolution, “. . . including alternative or traditional dispute resolution mechanisms.”⁶⁹

The stated reasons to incorporate ADR in rule of law programming include: to increase access to justice for the poor and disadvantaged; to decrease costs and time needed to resolve disputes; and to increase satisfaction in the dispute resolution process.⁷⁰ In addition, perhaps the most often stated reason for including ADR in rule of law assistance programming is to help ease case backlogs.⁷¹ The United States Agency for International Development (USAID) states that efficiency “underpins all essential elements” in the rule of law.⁷² ADR programs are regularly praised for helping to relieve court backlogs. For example, in the Republic of Georgia, U.S. officials credit plea bargaining with relieving court backlogs.⁷³ However, using reduced court backlogs as a metric of success is often without any analysis of the potential impact that the ADR program might have on larger attitudes within the country towards the formal legal system.⁷⁴ This focus on efficiency is also often done without critical thinking about the possible impact it might have on how the formal legal system operates and public attitudes.⁷⁵

66. In the Soviet Union this was referred to as “telephone justice” as judges would get telephone calls from the Communist Party, or other governmental institutions, instructing them how to decide particular cases. See e.g., Kathryn Hendley, *‘Telephone Law’ and the ‘Rule of Law’: The Russian Case*, 1 HAGUE J. ON RULE L. 241-42 (2009).

67. GUIDANCE NOTE OF THE SECRETARY-GENERAL, *supra* note 33, at 1-2.

68. *Id.* at 3.

69. *Id.* at 6-7.

70. ADR PRACTITIONERS’ GUIDE, *supra* note 4, at 7. Interestingly, party control over the dispute resolution process is less often a stated reason to support the introduction of ADR, perhaps because party control is often not an existing value in many other legal systems, see *infra* note 82.

71. See, e.g., GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 7, at 37.

72. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 7, at 14.

73. U.S. DOJ INTERNAL REPORT: U.S.-STYLE PLEA BARGAINING IN GEORGIA I (2007) (on file with the author).

74. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 7, at 37-38 (describing a mediation program in El Salvador that “has seen impressive results” due to mediating 40,000 cases and “84% have reached a resolution.”). No further information is given regarding what is impressive other than the sheer number of cases resolved.

75. For an example of those questions raised in the context of developing ADR programs in the U.S. see generally Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 94 (2002).

[T]hose who would insist on using only efficiency criteria to assess the value of ADR programs jeopardize the courts’ most precious and only necessary assets: public confidence in the integrity of the processes the courts sponsor and public faith in the motives that underlie the courts’ actions. We must take great care not to make program design decisions that invite parties to infer

Although USAID recognizes the importance of legitimacy as part of rule of law, it does not specifically recommend ADR programs to help build legitimacy.⁷⁶ Moreover, the focus on efficiency often occurs at the expense of more nuanced thinking about how ADR might contribute to other goals, such as to improve or repair the relationship between disputants or creating interest based solutions that are not limited by the narrow options of a legal opinion or adjudicatory process.

There is, however, conflicting advice about whether ADR should be included in rule of law programs when there are problems of endemic corruption.⁷⁷ Within the same USAID guide, ADR is recommended to “by-pass ineffective or discredited courts” as an “alternative forum” when the “civil court system has so many institutional weaknesses and failures . . . that there is no near-term prospect of successful court reform.”⁷⁸ Conversely, the same guide recommends that “ADR can support and complement court reform” although ADR should not be used for this purpose if “[t]he courts reputation is sufficiently tainted to suggest that independent programs may enjoy more popular support.”⁷⁹ The idea seems to be that the only question is whether the ADR program should be closely connected to the court, or entirely separate. Either way, ADR programs are recommended to help meet these other goals.

V. WHEN ADR PROGRAMS MAY IMPEDE THE DEVELOPMENT OF RULE OF LAW

Negative rule of law myth countries could be at particular risk for new ADR programs to harm or impede the development of rule of law. ADR programs could undermine the legitimacy of the formal justice system in two main ways. The first is that, due to the informal nature of ADR, these processes can seem more like a new form of corruption and less like a process operating under the law. Second, ADR processes can help to entrench bad practices, including corruption, precisely because they operate outside the formal legal system and therefore may not be subject to oversight or monitoring.

that the courts care less about doing justice and offering valued service than about looking out for themselves as institutions (e.g., by reducing their workload, or off-loading kinds of cases that especially taxing or emotionally difficult or that are deemed ‘unimportant.’

Id. at 124.

76. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 7, at 41.

77. One reason for the confusion seems to be different views of whether ADR programs can help to support a poorly functioning legal system, or whether it is better to include ADR programs only as an addition to the already existing firm foundation of a well-functioning legal system. See *Correspondences and Contradictions in International and Domestic Conflict Resolution*, *supra* note 2, at 340 n.104; *The Cookie Cutter Syndrome*, *supra* note 2, at 334. This article is not focusing on this program design question, but simply the question of public perceptions of ADR programs and the impact this might have on legitimacy for the formal legal system.

78. ADR PRACTITIONERS’ GUIDE, *supra* note 4, at 10.

79. *Id.* at 9.

A. ADR as Corruption?

One of the potential advantages of ADR is its informality.⁸⁰ Negotiations and mediations can take place outside of the narrow constraints of legal remedies and allow parties to be more creative and potentially arrive at solutions that better meet their underlying interests.⁸¹ However, it is this very informality that can be suspect, particularly in legal cultures where party control is not traditionally strong and where the judiciary has instead tended to take a more active role.⁸² Negotiations and mediations take place behind closed doors and often include a guarantee of confidentiality. In countries with high levels of corruption, and a tradition of the powerful taking care of themselves in private, these processes can seem like more of the same.⁸³ Creativity can seem like another word for corruption in such societies known more for rigidity than creativity.⁸⁴ For example, if the only possible punishment for crimes has been prison or jail time, a negotiated plea deal that includes simply paying a fine, but no jail time, can look more like corruption and less like creativity.

As the introduction to this article stated, The Republic of Georgia provides one example of this problem when they introduced American-style plea bargaining of criminal cases.⁸⁵ Plea bargaining is negotiation of a criminal case, usually between the prosecutor and the defense lawyer.⁸⁶ If the parties reach an agreement the defendant will give up his right to trial and enter a plea of guilty.⁸⁷ In Georgia, as in the United States, these plea negotiations tend to take place behind closed doors.⁸⁸ Georgia first introduced American-style plea bargaining into its criminal justice system as part of a more general package of anti-corruption legislation in 2003.⁸⁹ Prior to this legislation, all criminal cases went to trial.⁹⁰ While the trial procedures were not as long or as cumbersome as in the United States, there were serious case backlogs as the courts were unable to efficiently handle

80. See, e.g., *id.* at 6.

81. *Id.*

82. *The Place of Court Connected Mediation*, *supra* note 47, at 118 & n.8 (“In many other countries, meanwhile, parties’ control over their cases is much more restricted. Judges, not litigants or their attorneys, determine the issues that will be explored, the discovery that will be conducted, the witnesses who will be called, and the questions that witnesses will answer.”).

83. Formal court processes in many countries that fit into the “moderately functional legal system” definition do not open all court proceedings to the general public. The fact that the formal justice system is also not always open to the public can contribute to poor public perceptions of the legal system. This article does not intend to suggest that ADR processes are alone in being conducted in private and away from public view. See, e.g., Geoffrey Robertson, *The Media and Judicial Corruption*, in GLOBAL CORRUPTION REPORT 2007 108, 109 (Transparency International), available at http://www.transparency.org/publications/gcr/gcr_2007.

84. For a brief discussion of this in the context of plea bargaining, see *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 405.

85. *Id.* at 362-68.

86. NICHOLAS G. HERMAN, *PLEA BARGAINING I* (2004). For a more detailed analysis of how plea bargaining works in the U.S. with a focus on issues that might be relevant in developing countries, see *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 390-97.

87. HERMAN, *PLEA BARGAINING*, *supra* note 86, at 1.

88. *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 362-68.

89. For a more detailed description and analysis of plea bargaining in Georgia, see *Plea Bargaining as Legal Transplant*, *supra* note 1, at 363-368.

90. *Id.* at 363-64.

the relatively large number of criminal cases.⁹¹ However, in the period just after the plea bargaining law was adopted, the only cases to use this new process were corruption cases.⁹² The standard deal for these cases was that the defendant would pay a fine and the case would be dismissed.⁹³ This was in a country with a long-standing practice of paying bribes to police officers and other officials to get cases dismissed.⁹⁴ Perhaps not surprisingly, the general public in Georgia viewed plea bargaining with suspicion and there was much criticism that it was simply a new form of state-sanctioned corruption.⁹⁵ The lack of transparency, combined with the fact that the outcomes looked very similar to pay-offs for case dismissals, seemed to harm the general public's views of the formal legal system.⁹⁶

Another form of ADR that is regularly included in rule of law programs is court-connected mediation for civil cases. In countries that have not previously had court-connected mediation programs, these new processes can raise questions that suggest the already existing high level of distrust in the formal legal system. For example, if a country adopts court-connected mediation, and the judges appoint mediators, the parties may question the integrity of the mediator as they are closely linked to an institution that has limited legitimacy in the eyes of the general public.⁹⁷ Related to the appointment issues could be issues regarding whether the parties themselves trust the mediator to treat all the parties fairly and to not try to exert pressure on one party, or the other, to accept a proposed agreement. Parties may be concerned about mediators accepting bribes or otherwise engaging in acts of corruption. Mediator styles can affect attitudes towards mediation.⁹⁸ Highly directive or evaluative styles of mediation may reinforce attitudes that the parties have little control over the dispute.⁹⁹ This could cause parties to question the neutrality of the mediator and whether the mediator has been influenced by

91. *Id.* at 367.

92. *Id.* at 365.

93. *Id.* at 365-66.

94. *Id.* at 363 & n.28, 365-66; see also Christoph H. Stefcs, *Clash of Institutions: Clientelism and Corruption vs. Rule of Law*, in *THE STATE OF LAW IN THE SOUTH CAUCASUS*, 3, 10-17 (Christopher P.M. Waters, ed., Palgrave MacMillian 2005).

95. *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 365-66.

96. *Id.*

97. This is reportedly an issue with some of the court connected mediation programs in Albania. Telephone Interview with Teresa Cannady, Rule of Law Consultant (Feb. 9, 2011) (on file with author).

98. Roselle L. Wissler, *To Evaluate or Facilitate? Parties' Perceptions of Mediation Affected by Mediator Style*, 7 NO. 2 DISP. RESOL. MAG. 35 (2001)[hereinafter *To Evaluate or Facilitate?*] (reporting a study of the effect of mediator style on party perceptions of the process in the United States and finding that parties have more favorable perceptions of mediation if the mediators evaluate the case and give suggestions for possible settlement "as long as the mediators did not recommend a specific settlement." *Id.* In those instances "... parties were less likely to say that the mediation process was fair and the mediator was neutral." *Id.*)

99. Professor Riskin's "Grid for the Perplexed" discussed mediator styles in four broad categories: Evaluative-Narrow; Facilitative-Narrow; Evaluative-Broad; and Facilitative-Broad. Leonard L. Riskin, *Understanding Mediator's Orientations, Strategies, and Techniques: a Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996). Professor Riskin revised his approach and introduced the terms "directive and elicitive" to explain mediator orientations see Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and The New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

power, corruption, or both, in pushing for a particular settlement.¹⁰⁰ If a mediation program is started and suffers from these problems, it would at least impact the attitudes of the parties towards the legal system, and if the news of problems spread or were reported in the media, the negative attitudes could spread to the general public.

B. ADR can reinforce bad practices

The private nature of ADR processes means that there is often little oversight and the process itself is often difficult to monitor. In countries with poor human rights records and where abusive behavior by government and law enforcement is still commonplace, the informality of these processes may prevent exposing and punishing bad practices.¹⁰¹ As mentioned earlier in this article, when Georgia first introduced plea bargaining, there was widespread criticism that many defendants got more lenient sentences when their guilty pleas were conditioned on their agreement to not file complaints that they had been tortured or ill treated while in custody.¹⁰²

ADR can also provide a way to easily dispose of cases that professionals in the formal justice system do not want to handle. In Central Asia, this has happened with sexual assault cases.¹⁰³ Sexual assault and domestic violence cases are not aggressively prosecuted in Kazakhstan, Uzbekistan, Tajikistan, and Kyrgyzstan.¹⁰⁴ Legal professionals regularly refer these cases to an informal ADR process referred to as "reconciliation."¹⁰⁵ Some cases are referred before they are brought to court and others are referred by the court system. The reconciliation process brings the victim and offender together to discuss resolution of the case.¹⁰⁶ The "neutral" who is responsible for assisting the parties to arrive at an agreement is often a police officer with little or no mediation training, and is often the arresting officer.¹⁰⁷ A common agreement is for the offender to pay the victim money and the case is dismissed.¹⁰⁸ Sometimes the cases are referred directly to these informal processes and never brought to court.¹⁰⁹ Although legal professionals throughout Central Asia praise this process for helping to clear court dockets, the impact on victims and the general public is far less positive.¹¹⁰ This process does not encourage victims to come forward and report crimes and it does not encour-

100. For a discussion of how mediator styles can influence party attitudes towards the neutrality of the mediation process see Wissler, *supra* note 98, *To Evaluate or Facilitate?*

101. See discussion *infra* Section VI(C).

102. *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 365.

103. For a more detailed discussion, see generally Cynthia Alkon, *The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?*, 8 PEPP. DISP. RESOL. L.J. 41 (2007) [hereinafter *Reconciliation of Criminal Cases in Central Asia*].

104. *Id.* at 104-06.

105. *Id.*

106. *Id.* at 79-100 (describing the individual processes and practices in Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan).

107. *Id.* at 109-10.

108. On occasion more disturbing outcomes were reported, such as rape victims agreeing to marry their attackers. *Id.* at 41, 113-14.

109. *Id.* at 104-07.

110. See *id.*

age trust in the formal legal system.¹¹¹ And, in societies that suffer from endemic corruption, these processes, with their monetary payments, can look like one more form of corruption.¹¹²

VI. QUESTIONS TO CONSIDER IN DECIDING WHETHER TO INTRODUCE AN ADR PROGRAM

If ADR practitioners and rule of law assistance providers are considering supporting an ADR program in a country whose legal system suffers from poor legitimacy due to high public perceptions of corruption, serious consideration should be given to whether such a program will delay or harm the development of rule of law by reinforcing already existing poor public attitudes regarding the formal legal system and its legitimacy. Clearly, the challenge with this stage of the analysis is the problem with the continuing “lack of knowledge” regarding how rule of law develops and, related to that, how legitimacy develops.¹¹³

Nevertheless, there are a few key questions that might aid rule of law and ADR practitioners in this analysis that are questions regularly asked in the context of developing ADR programs in developed democracies.¹¹⁴ The first is what type of dispute would go to this process?¹¹⁵ The second is who are the parties? The third question is how likely is it that it is, or should be, a matter of public interest? The fourth question is what is the public attitude towards the proposed ADR project? A fifth question is whether there is funding to establish the newly envisioned process? And, the final question, if the ADR program is in process or will be implemented, how will it be monitored?

A. What type of dispute?

Private civil disputes that have few, if any, public policy or larger political concerns might be disputes that would make sense to design an alternative dispute resolution program for, even in moderately functional legal systems with endemic corruption. It is unlikely that public policy cases, administrative cases, or even criminal cases, would generally fit into this category. However, family cases might fall under this category. The caution is whether it is a country with serious

111. *Id.* at 104-07.

112. *Id.* at 103 (discussing how corruption may impact the decision to send cases to reconciliation).

113. The studies of legitimacy define legitimacy, identify when it exists, and identify what may cause it to erode. These studies are less helpful in providing suggestions of how to build legitimacy. See, e.g., David J. Smith, *The Foundations of Legitimacy*, in LEGITIMACY AND CRIMINAL JUSTICE-INTERNATIONAL PERSPECTIVES 30, 54-56 (Tom Tyler, ed., Russell Sage Foundation 2007).

114. See, e.g., *supra* note 10 and accompanying text. There are clearly other questions that could be relevant regarding program design issues, such as whether parties should be provided legal representation. These questions are beyond the scope of this article. For an analysis of the issue of unrepresented litigants in ADR processes in the U.S., see Jean Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381 (2010) (criticizing the assumption that litigants always need lawyers more in litigation than in ADR processes, particularly as ADR may be “the only form of dispute resolution many disputants get.” *Id.* at 383).

115. Numerous scholars have expressed concerns about bringing certain types of disputes to informal dispute resolution processes, such as domestic violence cases, cases with racial or ethnic disputes, and cases that raise larger public policy interests. See, e.g., Grillo, *supra* note 10; Delgado et. al., *supra* note 10; Luban, *supra* note 10.

inequality for women and whether mediating these cases could exacerbate those inequalities.¹¹⁶ Land disputes might also be cases to bring to this type of process,¹¹⁷ but if the origin of the dispute is ethnic conflict or land seized during war, this might not be appropriate.¹¹⁸ However, in many countries the civil dockets are full of cases that would be appropriate to bring to an ADR process and that are overwhelming judicial resources.

This goal of easing case backlogs is, as stated above, a key reason for the development of many ADR programs as part of a larger rule of law development assistance package. Clearly, if the courts are so overcrowded that cases languish for years, or decades, this will also create, or exacerbate problems for legitimacy of the formal justice system. In these contexts, adding processes that can help move cases through the formal legal system more quickly could be a goal that enhances legitimacy and therefore rule of law. However, careful consideration should be given to whether there are other, more serious concerns, such as serious inequities between the parties, that might mean that an informal process, such as mediation, will not support the larger goals of improving legitimacy for the formal legal system. If dispute resolution programs are designed to help handle disputes that are filling the formal courtrooms, and if these disputes do not tend to have larger public policy or political concerns, then an ADR process might be appropriate, pending the answers to the next questions.

B. Who are the parties?

ADR practitioners generally advise caution and often advise against an ADR process when there are serious power imbalances between the parties.¹¹⁹ The challenge in many countries is for outsiders to determine if there are power imbalances and whether they are so serious that ADR processes are not advisable.¹²⁰ In

116. See, e.g., Grillo, *supra* note 10; Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). For an alternative view suggesting the use of restorative justice processes for domestic violence, see generally Laurie S. Kohn, *What's So Funny About Peace, Love and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517 (2010).

117. Robert Mitchell, *Land Rights Legal Aid*, ONE BILLION RISING: LAW, LAND AND THE ALLEVIATION OF GLOBAL POVERTY 377 at 376-379 (Roy L. Prosterman, Robert Mitchell and Tim Hanstad eds. 2007) [hereinafter *Land Rights Legal Aid*](explaining how it is preferable to resolved land dispute cases outside of court if there are not serious power imbalances as it is a more efficient use of legal aid resources, provides quicker relief to the client, creates "less friction between the client and the opposing party, with whom the client will continue to live and work in the same community" and "may allow all parties to save face." *Id.* at 378)

118. USAID seems to recommend using alternative processes with land disputes with few stated reservations. See USAID, *LAND AND CONFLICT: A TOOLKIT FOR INTERVENTION 10* (2005), available at http://www.usaid.gov/our_work/cross-cutting_programs/conflict/publications/docs/CMM_Land_and_Conflict_Toolkit_April_2005.pdf

("[E]xperience has also shown that many types of land disputes are best managed outside the courts. Limited court capacity to process land claims efficiently and transparently is a serious constraint in many places. Thus, alternative dispute resolution processes, especially mediation and arbitration, can be useful . . .").

119. One reason for this is the assumption that a formal legal process will better protect the less powerful. See, e.g., Fiss, *supra* note 11, at 1076-78. Clearly this assumption may not be as accurate in a moderately functioning legal system.

120. One interesting study about postwar Japan criticized the use of mediation as it "reinforces the power structure of local society." FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 12

most of the types of countries that this article is discussing, if one of the parties is the government or a governmental agency, ADR processes are not appropriate.¹²¹ In societies where women or minorities suffer from regular mistreatment, their cases are probably not best served by informal ADR processes, particularly if their gender or ethnicity is, or could be, a factor in the case, including how the mediator might view or treat them.¹²² A related issue to who the parties are is determining whether they would prefer to resolve their dispute, through an informal or formal process.¹²³ Answering this question is not simple, and gaining a better understanding of how litigants prefer to settle their disputes within established legal systems, such as in the United States, is still an area scholars are researching and debating.¹²⁴ However, in establishing new ADR programs in moderately functional legal systems, the question of who the parties are should look both to whether they might be disadvantaged by an informal process and whether they might prefer, and be more comfortable, resolving their dispute in an informal process.

C. Is it, or should it be, a matter of public interest?

It can be difficult to define what is a matter of “public interest,” although certain categories of cases, like corruption cases against public officials and cases alleging police misconduct or torture, are the types of cases that are likely to fall within the definition.¹²⁵ And, corruption and police misconduct cases are precisely the kind of cases that can help to build, or erode, legitimacy in the formal legal

(Harvard 1987) (Unlike litigation, which would “not only bypass the current power structure but would destroy it whenever . . . the formal norms of the legal system were substantially at variance with those of the elite.”).

121. This is not to suggest that the formal justice system is not also subject to concerns regarding inappropriate use of governmental power such as exercising undue influence and lack of judicial independence. But, at least in the formal justice system the dispute is likely to be heard publicly and in a way that could, at least theoretically, be appealed. One example of this is the formal criminal justice system in Central Asia, including the lack of judicial independence, see *Reconciliation of Criminal Cases in Central Asia*, *supra* note 103, at 59-66.

122. Mitchell, *Land Rights Legal Aid*, *supra* note 117 at 388. (“Mediation and other ‘neutral’ processes are often decidedly not neutral in cases involving [land] disputes between the poor and the non-poor (or between the poor and government officials) since such processes inevitably reinforce unequal relations that precede the dispute.”).

123. In countries where international actors provide development assistance focused on particular types of disputes, such as land disputes, a related factor is what impact the international actor, by their mere presence, may have on the process itself, thereby influencing which process the parties might prefer. In land disputes involving serious power imbalances one development professional observed that the process, whether it is mediation, arbitration, or litigation, is less important than the fact of international involvement. “Once an international actor is involved, rules are more closely scrutinized and respected, procedures are more closely followed. The international factor changes the fairness dynamic and rebalances the power equation . . . [i]t gives the weaker party a better chance than they otherwise would have had.” Email (February 16, 2011) from Eric Roman Filipink (on file with author).

124. See, e.g., *ADR is Here*, *supra* note 12, at 296-300.

125. In discussing whether disputes of public interest within the U.S. should be resolved publicly or privately, Carrie Menkel-Meadow suggests that the question is less about whether the process is public or private and more about the entirety of the process, and whether it considers the interests of both the parties and those “likely to be affected by the outcome, including in some cases, the whole polity.” *Whose Dispute is it Anyway?*, *supra* note 10, at 2686.

system and government. If those cases are decided in private, it could influence other potential litigants and perhaps impede them from bringing cases (and thereby addressing these issues).¹²⁶ Using informal processes could also negatively influence the development of formal legal protections and ultimately slow, or stop, political or social change that a formal court process might stimulate.¹²⁷ In countries whose formal legal systems already suffer from problems of legitimacy, a process that regularly resolves these cases in informal and private settings could reinforce the general public's view that power and corruption decide cases, instead of a law that is applied fairly to all. As discussed above, this was a problem in Georgia as plea bargaining negotiations were used with corruption cases and with cases alleging police misconduct and the general public viewed these case settlements as payments for favorable outcomes.¹²⁸

Related to the concern about whether the case itself is one of public interest, is the public interest in how cases are resolved. Within the United States mediation was "inspired by the principles of democracy."¹²⁹ This meant that early mediation proponents looked to the role that individual citizens could have in resolving their disputes directly while being able to control the outcomes.¹³⁰ However, if an ADR program is designed primarily with the goal of efficient case resolution, it may miss out on other goals, such as greater democratic participation of citizens in their justice system. Ultimately this could negatively impact how the general public views the new ADR program and that negative view could extend to the formal legal system that is implementing it.¹³¹ These concerns have been raised within the context of mandatory mediation programs in the United States.¹³²

D. What is the public attitude toward the proposed ADR project?

Before starting a new ADR project there should be a clear understanding of what the general public's attitude might be towards the project.¹³³ Is it likely to be greeted with skepticism and cynicism? It seems likely that if those questions were asked in Georgia it would have been clear that the public would greet the intro-

126. For a discussion of the potential problem of "secret settlements" of dispute with wider public interest in the U.S., see, e.g., Luban, *supra* note 10, 2648-58.

127. For a study of how disputes going to informal dispute resolution processes might have slowed change in Japan, see generally UPHAM, *supra* note 120 (examining disputes in specific case studies including environmental, women's employment discrimination, and industrial policy). See also ADR *is Here*, *supra* note 12, at 296 (discussing the ability of dispute resolution to impact society).

128. *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 365-66.

129. *The Place of Court Connected Mediation*, *supra* note 47, at 135.

130. *Id.* at 135-36.

131. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67-SPG LAW & CONTEMP. PROBS. 279 at 314-18(2004).

132. See, e.g., *The Place of Court Connected Mediation*, *supra* note 47, at 136-43. "Yet, change should be tempered by context, and even as the judicial system changes, it should reflect the values of our democracy. Our courts draw their legitimacy from their accountability to, and the responding support of, a democratic people." *Id.* at 143.

133. However, it is not enough to merely ask questions. Part of the project planning phase should include a clear way to incorporate what is learned about public opinion into how the project is implemented. Unfortunately, Nepal provides an example of a country where USAID arranged for a poll to gain a better understanding of how the general public viewed their human and legal rights, and then did not incorporate those findings into any of the programmatic work. *Thinking with Culture in Law and Development*, *supra* note 24, at 549-50.

duction of plea bargaining with distrust. That knowledge could have helped to change how the law was structured and prevented the need for the later reforms.¹³⁴ Connected to this is the need to understand, in general, what the public attitudes are towards the legal system, including the levels of trust and perceptions of corruption. This should be a standard part of the rule of law assessment process.

Although there is better formal acknowledgement of the need to design rule of law assistance programs in a way that is appropriate to the actual level of development in the country, there is still insufficient information gathered before programs are designed.¹³⁵ The standard assessment process involves an assessor flying into the country and spending a few days or weeks interviewing a standard group of nationals and internationals.¹³⁶ Then the report or project proposal is prepared, and based on those documents projects are started.¹³⁷ While many of the people conducting these assessments are highly experienced in rule of law development work, they are not necessarily highly experienced in the particular country. And, often the only information gathered is anecdotal. If there is likely to be a poor public reaction to the new ADR program, and if the program design has already addressed those concerns, then a public education campaign to explain how the new program would work could help to counteract the poor public perception. However, public education campaigns cannot substitute for poor project design or lack of rule of law.¹³⁸

E. Is there funding to establish the new ADR process?

If a new program is put into place, but is not funded, it invites the participants to “self-fund” or look to corruption to make it “work.” When international assistance providers encourage countries to adopt legislation providing for new processes, they often do not include adequate, or any, funding provisions. One example of this is in Kosovo. Kosovo passed a Mediation Law in 2008.¹³⁹ The international community, including the European Union, the World Bank, and the United States, all supported adopting the law to allow Kosovo to introduce media-

134. The law was changed so that payment of fines alone would not terminate criminal prosecutions. Also, the law was changed to not allow plea agreements that prevent a defendant from requesting criminal prosecution against anyone involved in torture, inhuman, or degrading treatment. *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 365-66.

135. For a general description of assessment tools and processes see RULE OF LAW ON THE INTERNATIONAL AGENDA, *supra* note 13, at 48-53.

136. For USAID’s view of how to conduct a rule of law assessment see GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 7, at 21-26. See also, Appendix A, with a listing of “assessment Questions,” *id* at 42-52.

137. Thomas Carothers describes this as an “externality” and is critical of the lack of local ownership built into the process. Thomas Carothers, *Revitalizing Democracy Assistance, The Challenge of USAID*, at 25-26, Carnegie Endowment for Peace, 2009, available at: http://www.carnegieendowment.org/files/revitalizing_democracy_assistance.pdf (last visited April 10, 2011). USAID is typical among international organizations and aid agencies in that they routinely rely on external assessments as part of the project and program planning process.

138. For descriptions of when this has been attempted and the potential problems, with examples from Mongolia, Kyrgyzstan, and Qatar, see *Putting Aside the Rule of Law Myth*, *supra* note 38, at 346-56.

139. Law No. 03/L-057 On Mediation, Republic of Kosovo (2008), *supra* note 62.

tion into its court system to handle civil cases, primarily commercial disputes.¹⁴⁰ The Mediation Law did not give a clear timeline for implementation, and did not provide details for mediator training, certification, and selection.¹⁴¹ The failure to work out these details at the time the legislation was passed has led to implementation delays.¹⁴² It has also required rule of law development assistance providers to fund mediation training.¹⁴³ In the immediate future it is unclear who will pay the mediators once they are trained, certified, and licensed, and it is also unclear how much they will get paid.¹⁴⁴ In a society with serious corruption problems, the failure to sort out how much mediators will get paid, and who will pay them, invites public skepticism about the legitimacy of mediation and questions about whether the mediators are corrupt.¹⁴⁵

F. Will the ADR program be measured or monitored?

One of the challenges in many moderately functioning legal systems is the lack of information at all levels of society, including in the formal court system. This information void creates problems on a number of levels.¹⁴⁶ Therefore, if an ADR program is introduced, monitoring should be part of the design of the program and the results should be publicly available.¹⁴⁷ Currently there are ADR programs funded by USAID, such as a family mediation program in Egypt, that do not include monitoring, and that do not even gather basic statistics about their work.¹⁴⁸ It might be that these programs are a stunning success on all levels, but without clear monitoring it is impossible to know if they are helping or impeding the development of rule of law. Monitoring should gather basic information including: the types of cases and whether they are settled; what the participants think of the process, including whether the process met basic procedural justice

140. Skype Interview (February 16, 2011) with Marilyn Zelin, Senior Legal Advisor, ADR, SEAD Program in Kosovo (notes on file with author).

141. SYSTEMS FOR ENFORCING AGREEMENTS AND DECISIONS (SEAD) IN KOSOVO, REPORT AND RECOMMENDATIONS FOR DEVELOPING AND IMPLEMENTING AN APPROPRIATE AND EFFECTIVE ALTERNATIVE DISPUTE RESOLUTION SYSTEM 28-43 (April 30, 2010) http://seadprogram.com/repository/docs/ADR_Final_Assessment_english_June_8_2010-mz_2_.pdf.

142. Skype Interview with Marilyn Zelin, *supra* note 140.

143. *Id.*

144. *Id.*

145. The SEAD Program in Kosovo includes a public outreach component to educate the public about mediation and as of this writing it is still at too early a stage to evaluate current public attitudes towards mediation and how seriously corruption concerns are a factor. *Id.*

146. Due to the persistent difficulty in gathering information in many developing countries, I have previously suggested that monitoring should be built into rule of law development programs when introducing new procedures, such as plea bargaining. See *Plea Bargaining as a Legal Transplant*, *supra* note 1, at 414-15.

147. Better monitoring of mediation programs in the U.S. is a frequent recommendation for a variety of reasons, including: to improve the program's functioning, to better assess mediator performance, and to better understand party satisfaction rates. See, e.g., *The Place of Court Connected Mediation*, *supra* note 47, at 142-43 n.134.

148. It is unknown how many cases are mediated through the program, the issues mediated (divorce, child custody, etc.), or the outcomes. Skype Interview with GERALYN BUSNARDO, Chief of Party, USAID/Egypt's Family Justice Project (Feb. 3, 2011) (on file with author). Despite the lack of information about how many cases have settled or party satisfaction rates, USAID declares the program a "success story." See USAID, *Success Story: Facilitating Peace Within Families*, available at http://www.usaid.gov/stories/cgypt/ss_cgy_mediation.html (last visited Feb. 2, 2011).

standards; and whether there are concerns about corruption by those using the process.

Gathering this information would help with future program planning, and if the results are made public they could help to address potential problems of public perception with the program. Releasing information that shows high satisfaction rates among participants, high rates of trust in the process, and low rates of complaints of corruption, could help to counter-act the tendency in negative rule of law myth countries to dismiss positive developments as aberrations. Greater monitoring and publicly releasing this information could play a role in developing greater trust by the general public in the ADR process.

If, however, the monitoring results show that the ADR program is not working, for example due to high dissatisfaction rates among participants or concerns about corruption, then it would give the ADR implementer an opportunity to either address these concerns or, ultimately, to stop the program before it does more damage.

VII. CONCLUSION

This article has focused on the question of whether introducing ADR into a moderately functional legal system, in the context of a country struggling with endemic corruption, could harm the overall development of rule of law by damaging or further eroding legitimacy in the formal legal system. The intention of this article is not to suggest that ADR has extraordinary powers to cause harm, but rather to encourage greater analysis and thought before introducing new processes. As this article has discussed, the informal and private nature of ADR can appear to be another form of corruption in societies already struggling with serious and endemic corruption. Rule of law assistance providers and ADR professionals who are responsible for planning projects that include ADR as part of a rule of law development program should not overlook this possibility or oversimplify the process.

The reasons ADR is introduced into rule of law programs are important. Increasing access to justice, decreasing costs and time for litigation, increasing satisfaction with the court system, and decreasing case backlogs are all admirable goals. However, as we know from experience in the United States, ADR processes are not without potential problems. ADR professionals and scholars in the United States continue to ask questions and study how ADR processes are impacting the legal system, litigants, and the wider society. These questions are equally, or perhaps more important to ask when considering introducing a new ADR program into a moderately functional legal system. Rule of law assistance providers should not assume that the reason for introducing the ADR process is strong enough to avoid taking the time to consider these factors as part of a process of trying to determine whether introducing the proposed ADR program will contribute to building the rule of law. Programs that are introduced without considering public opinion, and without regard to legitimacy and current public attitudes towards the legal system, run the risk of working against the goal of developing rule of law.

