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The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs

Cynthia Alkon*

I. INTRODUCTION

Communism ended in most parts of Eastern Europe and the former Soviet Union over ten years ago. However, the legal and judicial systems in many of these nations seemingly defy reform efforts. What I call in this article the “Cookie Cutter Syndrome” describes the standard approach Western nations developed to assist legal reform in the former Communist world.¹ Despite vastly different conditions in these countries, the model for judicial reform remains very similar, and is rooted in litigation and adversarial practices. The question of whether an adversarial-based approach is appropriate becomes even more acute as assistance efforts focus more on nations with less of a history of rule of law.² For the purposes of this paper, the

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1. Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* 168 (Carnegie Endowment for Intl. Peace 1999)(referring to the fairly uniform U.S. approach to democratization work as a “standard menu.”).

2. See Marina Ottaway & Anatol Lieven, *Rebuilding Afghanistan: Fantasy versus Reality* 5 (Carnegie Endowment Policy Brief 12, 1999) (Following the events of September 11, 2001, the United States government is increasing funding to programs in Central Asia and expanding funding to the new hot spot: Afghanistan. At the same time assistance levels are decreasing in the Balkans. Prior to September 11, 2001, United States Agency for International Development (“USAID”) already “graduated” or stopped rule of law program work in a number of more developed European states such as Estonia and the Czech Republic. Some in the aid community are expressing concern that as development efforts expand into Central Asia the United States will even try to build “modern democratic state structures” in Afghanistan. Some commentators believe that, instead, effort should focus on the “formation of a loose national mediation committee” to provide minimal government, and peace to the country.).

definition of rule of law is "a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone."³

The Cookie Cutter Syndrome describes the framework under which most legal reform efforts are organized. The Cookie Cutter Syndrome is an approach that fails to look at the individual differences of the specific countries receiving rule of law development assistance. Instead, the Cookie Cutter approach is for aid providers to treat each nation as unformed dough, onto which the Cookie Cutter of a Western legal system is applied. Legal reform is one category of democratization work. Each legal reform program includes four basic components: re-writing laws; training programs for legal professionals; technological assistance and refurbishing courthouses; and institutional development.⁴ All of these components focus on developing and improving litigation-based dispute resolution systems. Yet corruption and chronic court inefficiency continue to plague the legal systems in many post-communist nations.⁵ Foreign assistance efforts are making little impact in many of these nations because these efforts fail to get to the fundamental reason or reasons that a particular society is not making lasting and meaningful legal reform. The fundamental challenge facing these programs is to provide assistance to change legal cultures⁶ so that people expect and demand that their systems of justice deliver more, and to then make those systems deliver.⁷

It is time to move beyond the Cookie Cutter approach to legal and judicial reform and instead provide individualized assistance programs in each nation so that

3. Thomas Carothers, *The Rule of Law Revival*, 77 *Foreign Affairs* 95 (Mar. - Apr. 1998). Defining rule of law is a subject in itself; numerous authors define it in a number of ways. In the context of defining this term for use in developing democracies see e.g. Kim Ratushny, *Toward the "Independence...of Judges" in Ukraine?*, 62 *Sask. L. Rev.* 567 (1999); John V. Orth, *Exporting the Rule of Law*, 24 *N.C. J. Intl. Law & Com. Reg.* 71 (1998); Kathryn Hendley, Symposium, *The Spillover Effects of Privatization on Russian Legal Culture*, 5 *Transnatl. L. & Contemp. Politics* 39 (1995); and Csaba Varga, *Transformation to Rule of Law from No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe*, 8 *Conn. J. Intl. L.* 487 (1993).

4. See e.g. Carothers, *supra* n. 1, at 168; see also USAID website at <www.usaid.org>.

5. See e.g. Carothers, *supra* n. 1, at 173. In addition, numerous reports have been written documenting the chronic problems in many of the post-communist nations court systems. See e.g. *Courting Disaster: The Misrule of Law in Bosnia & Herzegovina*, International Crisis Group <http://www.intl-crisis-group.org/projects/Balkans/bosnia/reports/A400592_25032002-1.pdf> (accessed March 25, 2002). For more comprehensive views of the judicial systems in particular countries, see the Judicial reform indices prepared by the American Bar Association Central European and Eurasian Law Initiative, *infra* n. 63. For general information about corruption on a website run jointly by the American Bar Association Central European and Eurasian Law Initiative and Transparency International - Russia, see <www.nobribes.org>.

6. Carley H. Dodd, *Intercultural Communication & the Organizing Facets of Culture*, *Dynamics of Intercultural Comm.* 37 (1987) (published in *Cross-Cultural Negs. And Dispute Res., Readings & Materials* (Grant R. Ackerman ed., 2000)) (For the purpose of this paper, culture is defined as "the total accumulation of many beliefs, customs, activities, institutions and communication patterns of an identifiable group of people). It is well beyond the scope of this paper to attempt to give a comprehensive definition of "culture," which has been called "one of the two or three most complicated words in the English language." Kevin Avruch *Culture & Conflict Resolution* 6 (U.S. Inst. of Peace 1998) (quoting Raymond Williams).

7. I decided to write generally on the topic of legal reform in Eastern Europe and the former Soviet Union. Obviously the situation in each country is different, and no one paper can adequately explain the variety and scope of differences. Instead, what I will try to do is look to common experiences, with some specific examples.

these programs directly confront the more difficult and confounding questions of why particular nations are still failing to make progress towards rule of law. Thomas Carothers has called this the need to identify the “core syndrome” in examining the broader question of why democratization programs as a whole are not working in individual countries.⁸

The Cookie Cutter Syndrome tends to use Alternative Dispute Resolution (“ADR”) within specific categories of disputes. In the post-communist world the most common application of ADR has been in the area of commercial disputes. I propose that legal reform programs change their approach, integrating ADR fully into their programs. Various forms of ADR could usefully attack the “core syndromes” blocking reform in individual countries. Various forms of ADR can help effect change in legal cultures, and, within the context of legal development programs, could move post-communist legal cultures further on the road towards rule of law.

This article begins with a brief background of ADR, democratization programs, and legal reform programs. Section Three describes the Cookie Cutter Syndrome and examines the assumptions that shape legal reform efforts and that impact if and how ADR is used. Section Four examines how legal and judicial reform programs could look more broadly at using various forms of ADR to more effectively change the legal cultures in post-communist societies. The article concludes that legal reform assistance needs to further individualize programs for the conditions in specific countries, and that assistance programs should more fully integrate ADR. I do not recommend that all forms of ADR are always applicable in all countries or in all legal reform programs. Instead, I recommend that ADR in its various forms should be an integral part of the analysis of how to approach legal and judicial reform.

II. BACKGROUND

A. ADR

The term Alternative Dispute Resolution (“ADR”) refers to dispute resolution outside litigation. The term ADR implicitly assumes that there are litigation based dispute resolution systems. Due to the lack of viable litigation alternatives for dispute resolution in a number of post-communist countries, ADR is a misleading term. It would be better to use “non-litigation based dispute resolution,” but for purposes of simplicity, I will continue to use ADR throughout this paper. ADR does not describe a single dispute resolution process, but instead includes a variety of

8. In a recent article Thomas Carothers, the Vice President for Studies at the Carnegie Endowment for International Peace, argues that it is time for foreign aid providers in the area of democratization to move away from the assumption that nations are democratizing and following a standard three-part path towards democracy. The assumption was that a country “moving away from dictatorship” was “in transition to democracy” despite the realities in the particular nation. Carothers argues, “Democracy aid must proceed from a penetrating analysis of the particular core syndrome that defines the political life of the country in question, and how aid interventions can change that syndrome.” Thomas Carothers, *The End of the Transition Paradigm*, 13 J. Dem. 5, 14, (January 2002).

processes such as negotiation, mediation, and arbitration.⁹ Within each type of ADR there is also great variety. In Section IV, I will explain in more detail the use and potential uses of various forms of ADR in legal and judicial reform programs.

B. Democratization Programs

Western nations spend millions of dollars every year on "democratization" programs around the world.¹⁰ There are three main categories of democracy assistance: assisting in elections and political party development, developing rule of law, and building civil society.¹¹ Elections and political party work includes election observation, assistance in writing election laws, assistance in building political parties, and technical assistance in running elections, which can include printing ballots and supplying ballot boxes.¹² Building civil society generally means assisting in the development of a strong and independent media, and assisting Non-Governmental Organizations ("NGOs"). Civil society, as it existed in the West, was unknown prior to the end of communism. Building civil society includes training for the media and NGOs, and providing funding for NGO activities. Western countries and private grant giving foundations are major sources of funding for NGOs in many former Eastern Bloc countries. This paper focuses on the third category of democracy assistance: developing rule of law.

C. A Brief History of Legal Reform Assistance Programs

Legal reform programs are now a standard part of development assistance. It was not always this way. The Law and Development Movement in the 1970's and 1980's was the first concerted United States foreign legal assistance program.¹³ The "Movement" exported its vision predominantly to Latin America and focused on providing assistance in legal education.¹⁴ The overall life of the "Law and

9. Numerous other types of ADR exist, including conciliation, early neutral evaluation, mediation-arbitration, minitrial, court-based minitrial, and regulatory-negotiation.

10. Official US foreign aid budget figures for democracy programs in 1998 were \$170 million. Carol Lancaster, *Transforming Foreign Aid, United States Assistance in the 21st Century*, 33 (2000). Judicial reform and rule of law reform is a significant part of the democratization budget. Under a broader definition of democratization programs the US annual budget is \$600-700 million. Thomas Carothers, *Aiding Democracy Abroad*, *supra* n. 1 at 6. Due to different definitions of what is democratization work, and programs in a variety of government agencies within aid-giving countries, the exact budget amounts are difficult to determine. In the early 1990s many countries called their development work "democratization" when it was in fact traditional development aid which was not politically popular in many countries, so it was disguised under the more popular heading of "democratization." Peter Burnell, *Democracy Assistance: The State of the Art*, Democracy Assistance: International Co-operation for Democratization 339-340 (Peter Burnell ed., Frank Cass & Co. 2000).

11. Carothers, *Aiding Democracy Abroad*, *supra* n. 1, at 214.

12. *Id.* at 123-140.

13. For a critical history, see James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (U. Wis. Press 1980).

14. Francis F. Snyder, *The Failure of Law and Development*, 1982 Wis. L. Rev. 373, 381-383.

Development Movement” was short, and its main proponents saw it as a failed attempt.¹⁵

In 1989, the Berlin Wall fell, and a new era in legal reform assistance began. As communist governments in the Eastern Bloc were replaced with new governments and as the Soviet Union dissolved, a pressing need for new legal systems and for assistance in developing these legal systems arose.¹⁶ The first wave of assistance focused on writing new constitutions and new laws.¹⁷ Undoubtedly this was necessary, but many of the Westerners involved had little knowledge of the culture or histories of the countries they were “assisting.”¹⁸ What these “foreign experts” wanted was to write “Western Standard” constitutions, often with little understanding of the difficult road ahead in implementing these new Constitutions.¹⁹ Without exception, the legal systems enshrined in these new constitutions were litigation-based and hierarchical, grounded predominantly on Western European civil law models.²⁰ Many of the new countries adopted the model of a Supreme Court and a Constitutional Court.²¹ Some countries, like the Czech Republic and Hungary, had a history of rule of law that predated communism. Other nations, like Russia and the Central Asian Republics, had less of a history of rule of law, and the ideal of an independent judiciary enshrined in their new constitutions was far more foreign and outside their historical experience. The focus of this paper is on the legal and judicial reform programs that grew out of these early assistance efforts in the post-communist world, although many of the programs, underlying philosophies, and presumptions were the same for judicial reform efforts in Latin America and other regions.²²

15. One author argues that this categorization of the Law and Development Movement as a failure is incorrect and reflects a short-term view of results. If looked at over a longer period (twenty years) the seeds that were planted during the law and development movement rooted and are part of the change in some Latin American countries, notably Brazil. Bryant F. Garth, *Rethinking the Processes and Criteria for Success*, Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century, 11, 13 (Rudolf V. Van Puymbroeck ed., World Bank 2001).

16. See e.g. Carothers *supra* n. 1, at 40-42, discussing democratization assistance in general following the break-up of the Soviet Union. For a more historical perspective of why rule of law (and democratization) assistance was needed and the relationship to Western European institutions, see Heinrich Klebes, *The Quest for Democratic Security: The Role of the Council of Europe and U.S. Foreign Policy*, Peaceworks, No. 26, at 4-15 (January 1999).

17. See e.g. Cass R. Sunstein, Perspective: Global Affairs Experiences: *American Advice and New Constitutions*, 1 Chi. J. Intl. L. 173 (2000).

18. For a critical analysis of this period, see Jacques DeLisle, *Lex Americana?: United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist World and Beyond*, 20 U. Pa. J. Intl. Econ. L. 179 (Summer 1999) (analyzing the differences between, results of, and lessons learned from attempts to export legal models based on the United States legal system).

19. See generally *id.*

20. See e.g. Carl Sunstein, *supra* n. 17; Jacques DeLisle, *supra* n. 18; and Thomas Carothers, *supra* n. 1, at 165-67.

21. The examples of nations adopting this structure include Albania and the Czech Republic. See Czech Republic Const., art. 83-89 (1992). For an explanation of the structure of the Constitutional Court and art. 90-96 on the courts, see <<http://www.legislationline.org/data/Documents/Czconsteng.htm>> and Republic of Albania Const. (1998) <<http://www.legislationline.org/data/Documents/AlbConstEng.htm>>.

22. Judicial reform and legal reform are overused terms with little clear definition. For the purposes of this paper, the terms are used interchangeably and refer to efforts to change the legal system to bring rule of law (another overused term given some definition *supra* n. 3).

D. An Overview of Assistance Providers

The main players in the field of legal reform are the United States (US), the European Union (EU), the Council of Europe, the World Bank, and intergovernmental organizations such as the United Nations (UN) and the Organization for Security and Co-operation in Europe (OSCE). A number of private organizations, such as the Ford Foundation and the Soros Foundation, also actively fund this field. Although all of these organizations are involved in legal and judicial reform, not all are involved in the broader work of democratization. For instance, the World Bank does not focus efforts on building civil society or media.²³ Different organizations use different methods to fund and create programs. For example, the World Bank structures many of its programs as loans or credits to a particular country.²⁴ In contrast, US and EU funding is commonly given in the form of grants. The use of long-term foreign experts, who live in the country, as opposed to short-term consultants, who visit for weeks at a time, also varies by aid provider.²⁵ However, as will be discussed later, the vision of the end result and many of the program approaches are stunningly similar.

Most international and inter-governmental organizations now see legal reform as an integral part of economic development programs. This represents a fundamental shift in policy. In the 1970's and through the 1980's, the World Bank did not see legal reform as an area for their involvement, believing instead that economic reform functioned in a world apart from legal reform. The World Bank no longer takes that approach, and legal reform now constitutes an integral and integrated part of its development efforts in most countries.²⁶

The Council of Europe provides significant legal reform assistance to its member states.²⁷ The membership of the Council of Europe expanded dramatically after the fall of the Soviet Union, and now includes members in both Eastern and Western Europe. In contrast with the European Union, the Council of Europe opened membership essentially to any of the newly post-communist governments who sought it.²⁸

23. See the Project Themes on the World Bank website <<http://www4.worldbank.org/projects/Browse.asp?cat=theme>>.

24. See e.g. *Project Appraisal Document on Proposed Learning and Innovation Lending Credit in the Amount of SDR 4.0 Million (US\$5.0 Million Equivalent) to Mongolia for a Legal and Judicial Reform Project*, rpt. n. 23286-MOG (World Bank Nov. 19, 2001).

25. The Council of Europe, the main EU provider of judicial reform assistance, runs the majority of its programs from its Strasbourg office, sending in short term consultants for specific programs. See generally <www.coe.int>. In contrast, the United States Agency for International Development contracts most of its judicial reform programs with organizations like the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI) that maintain offices in the country and have resident Americans running the programs. See generally <www.abanet.org/ceeli>.

26. See generally World Bank <<http://www.worldbank.org>>; Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 Harv. Negot. L. Rev. 339, 344-345 (2000).

27. See generally the Council of Europe website <www.coe.int> and Heinrich Klebes, *supra* n. 16.

28. The Eastern European members of the Council of Europe include Russia, Ukraine, Albania, Poland, Latvia, Lithuania, Slovenia, the Czech Republic, Slovakia, Romania, Moldova, and Croatia. Heinrich Klebes, *The Quest for Democratic Security: The Role of the Council of Europe and U.S. Foreign Policy*, Peaceworks 43 (U.S. Inst. of Peace 1999). European Union membership requirements

The United Nations works in legal reform through the United Nations Development Program ("UNDP").²⁹ On more specialized legal reform issues, the United Nations works through its more specialized agencies. For example, on issues of reform to provide legal protection for refugees in specific countries, the United Nations High Commissioner for Refugees plays a role. The United Nations High Commissioner for Human Rights also funds specific human rights projects falling generally into the category of legal and judicial reform.³⁰ The involvement of various United Nations agencies in legal or judicial reform varies greatly from country to country.³¹

E. The Existing Legal Culture and Dispute Resolution

The legacy of communism creates unique challenges to creating democracy and rule of law. Each post-communist country has a different history and different culture. Despite these differences, communist governments and communist ideology had very similar ideas of how to deal with conflict. In the immediate post-communist era many of these countries face very similar attitudes, obstacles, and challenges.

After generations of communism, people learned that *not* following the law was necessary for survival. Buying goods on the black market was common. The Communist governments did not inspire trust or confidence. People learned that their governments lied to them and withheld information. When communism ended, corruption replaced party ideology in the new governments, which were often led by former communists.³²

Communist countries were generally very good at containing disputes within their societies. The systems that they created and used worked well to keep order under totalitarian rule, but did not protect individual rights or prepare their societies for economic investment from the West. Communist systems also did not teach people how to manage and deal with conflict. People learned under these systems that disputes were bad, potentially dangerous, and should be avoided. They also learned that when there was a dispute, those in power won. Power and position were the decisive factors in resolving disputes, rather than justice and law. People did not learn how to negotiate or how to handle an open dispute. Instead "conflict became associated with negative psychological responses that equated dialogue with dissent,

are far more stringent in large part because membership brings with it tangible economic benefits such as economic assistance and the removal of trade barriers.

29. See generally <<http://www.undp.org/governance/index.htm>>.

30. See generally <<http://www.unhcr.org>>.

31. See generally United Nations Development Programme <<http://www.undp.org>>; Office of the United Nations High Commissioner of Refugees <<http://www.unhcr.ch>>.

32. Arguably the communist party was thoroughly corrupt in most Eastern Bloc countries. For a general discussion of the culture of illegality under communism, and organized crime after the end of the USSR, see Stephen Handelman, *Comrade Criminal: Russia's New Mafia* (Yale U. Press 1995).

and compromise with unprincipled acquiescence to an enemy."³³ Conflict was "regarded as unnecessary and contrary to the principles of Soviet society."³⁴

An essential ingredient of democratic societies is dealing peacefully with disputes. Citizen involvement in government and decision-making means that open debate and resolution of differences are part of the process. In Poland, the Solidarity Movement fought the Communist government through strikes and refusal to compromise. These tactics did not work as well when Solidarity found itself governing Poland.³⁵ Some of the post-communist nations, notably those with a pre-communist history of democracy, have made a smoother transition to democracy and democratic decision-making. But many are making slower progress because greater cultural changes are required. As Raymond Shonholtz noted, "Central and Eastern Europeans must learn how to govern themselves using not only acquiescence and dissent, but compromise."³⁶

The lack of democratic involvement impacts judicial reform. In many of the post-communist countries people do not expect the legal system to be responsive, to follow the law, to not be corrupt, or to be a fair and impartial dispute resolver.³⁷ Due to this common lack of expectations, many legal reform programs include projects aimed at "citizen involvement."³⁸ ADR projects, including negotiation and mediation may, if built with respect for local cultures, help to address these problems by building faith and confidence in the legal systems. ADR holds tremendous potential to transform legal cultures in countries struggling with widespread judicial corruption and popular distrust of the legal system. ADR possesses the potential to foster respect for rule of law so that people expect different behavior from their legal systems.³⁹

33. Raymond Shonholtz, *Conflict Management Training: A Transformative Vehicle for Transitional Democracies* 21 (1999) (published in 2 Intl. Negot. J. 21 (1997) (Issue 3)). Shonholtz believes that "these learned conditions can only be addressed through systematic educational efforts, skill training programs, and mediating structures that allow citizens to assert their democratic right to express and resolve differences" at 21. These responses to conflict go well beyond how the legal and judicial systems deal with conflict.

34. Elena Nosyreva, *Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation*, 7 Annual Survey of Intl. & Comp. L. 7, 16 (Golden Gate U. 2001).

35. Emily Stewart Haynes, Student Author, *Mediation as an Alternative to Emerging Post-Socialist Legal Institutions in Central and Eastern Europe*, 14 Ohio St. J. on Dis. Res. 257, 276 (1997). See also, Shonholtz, *Conflict Management Training*, *supra* n. 33 at 6 (describing the training of members of the Solidarity government in negotiation and mediation in 1990, and the transition from no compromise positions).

36. Haynes, *supra* n. 35, at 277.

37. Encouraging people to trust the law and to get involved in creating laws or reforming the legal system is not an easy task because it goes against previous experience. As one observer noted, "ex-Soviets have had a bitter, to say the least, experience with the rule of law in a totalitarian society where there was no public participation in creating those laws." Natalia Mirimanova, *Democratization and Conflicts in Russian and the Newly Independent States*, 552 Annals of the Am. Acad. of Pol. & Soc. Sci. 86, 91 (July 1997).

38. See U.S. Agency for International Development <<http://www.usaid.gov>>.

39. There has been very virtually no study of the impact of ADR in developing democracies and specifically, on whether introduction of negotiation, mediation and arbitration can change the legal culture both of the legal community and the larger population. See Raymond Shonholtz, *supra* n. 33 at 3; Haynes, *supra* n. 35 at 266. See generally Raymond Shonholtz, *The Role of Minorities in Establishing Mediating Norms and Institutions in the New Democracies*, 10 Mediation. Q. 231 (Spring 1993); Joseph B. Stulberg, *Cultural Diversity and Democratic Institutions: What Role for Negotiations?*,

III. THE "COOKIE CUTTER" APPROACH

The Cookie Cutter Approach refers to the standard approach to legal reform in democratization programs funded by the U.S. and Western Europe. The programs focus on creating litigation-based systems of justice. There are some differences between countries, but each program includes these basic elements: re-writing laws; education/training for judges, court staff, and lawyers; technological assistance and refurbishing courthouses; and institutional development. Many aspects of the Cookie Cutter Syndrome make sense and should be continued; however, as a whole, the Cookie Cutter Syndrome approach is inadequate.

A fundamental reason for its inadequacy is that the Cookie Cutter Approach makes a number of assumptions that limit and narrow the thinking and creativity of aid providers. The aid bureaucracies build these assumptions into their programmatic frameworks, making it difficult for individual aid professionals who recognize the fallacies of these assumptions to structure programs differently. These assumptions also impact directly on how these programs view ADR, and explain to a certain extent the reason that ADR is not fully integrated into legal and judicial reform programs, but rather seen as an afterthought or add-on.

A. Writing New Laws and Constitutions

Writing new laws and new constitutions generally was the first phase of foreign legal reform assistance in the newly post-communist countries.⁴⁰ Foreign assistance providers jumped on the bandwagon (or some would say the gravy train) of legislative reform for two key reasons. The first was the assumption of the power of law. In Western legal culture the assumption is that once a law is passed, or a new constitution comes into effect, the law will be followed.⁴¹ This assumption is far from true in most of the post-communist world, where the legacy of communism left, at best, a cynical attitude towards law, and at worst, outright disregard.⁴² The second reason for the emphasis on legislative drafting is that this type of legal reform is finite and easy to quantify. Most foreign assistance providers need to justify their work to decision-makers back home.⁴³ Judicial reform and rule of law development

10 Mediation. Q. 249 (Spring 1999); Susan T. Wildau, Christopher W. Moore, & Bernard S. Mayer, *Developing Democratic Decision-Making and Dispute Resolution Procedures Abroad*, 10 Mediation. Q. 303 (Spring 1993).

40. For an analysis of the different attitudes towards constitutions between the United States and Eastern Europe, see Cass R. Sunstein, *American Advice and New Constitutions*, 1 Chi. J. Intl. L. 173 (2000); DeLisle, *supra* n. 18, at 179 (providing critical analysis of the legislative and constitutional drafting assistance efforts, and criticizing the tendency to use US models regardless of the local conditions).

41. For a general explanation of this attitude and some of the legislative and constitutional drafting work that went on in Eastern Europe, see e.g. Rett Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 Ga. J. Intl. & Comp. L. 1 (2000).

42. As one author described it, in the Soviet Union "a gap became virtually institutionalized" between what laws said in writing and what they actually meant in practice." Ratushny, *supra* n. 3, at 574; for an interesting analysis of the attitude toward laws and crime in the Soviet Union, see Handleman, *supra* n. 32.

43. For example, USAID must justify its budget to the US Congress annually.

work requires years, if not generations, to see results. This reality does not translate well into the political budgetary process.⁴⁴ The funders want to see results, and passage of new laws and new constitutions are easy results to show.

B. *Teaching the Gospel of Rule of Law*

After the mania of legislative drafting, the next phase was (and remains) training. Training ranges from one-time seminars for a particular group (like judges or prosecutors) to assistance in curriculum development for law schools and judicial training institutes, to "study tours" in Western nations. Cynical observers note that one reason for the popularity of these programs is that they are also easy to quantify.⁴⁵ Aid providers can give numbers of people trained, thereby showing the success of their programs. However, I believe that the reason training programs are so popular is the sincere belief by those organizing training programs that they achieve change. What underlies this belief is the assumption that *if only* the participants were *taught* the correct way of using the law, their behaviors would change.⁴⁶ Rule of law "missionaries" share the zeal of their religious counterparts, and believe that once people hear "the word," they will realize the truth of it, and be born again, behaving like Western lawyers and judges.⁴⁷

The obvious problem is that in many countries and with many groups, the problem is not merely a lack of exposure to ideas and to knowledge. There are powerful interests preventing change. The reason a judge may choose to rule for a particular party, and not follow the law may be because of a pay-off or threat by that party, rather than a lack of understanding of the new civil code. Presuming that focusing aid efforts or training on judges will bring rule of law ignores the reality

44. For an example of short term thinking see Jess T. Ford, Dir. of Intl. Affairs & Trade, Testimony, *Former Soviet Union: U.S. Rule of Law Assistance Has Had Limited Impact and Sustainability* (U.S. H. Comm. on Government Reform, Subcomm. on Natl. Sec., Veterans Affairs, & Intl. Rel., May 17, 2001) (transcript available at World Bank <<http://www1.worldbank.org/publicsector/legal/EvaluationofUSRussiaRoLPrograms.pdf>>). In a sweeping analysis of the twelve states of the former Soviet Union, Mr. Ford cites Freedom House statistics showing worsening rule of law ratings from 1997 and 2000. Mr. Ford's main criticism seems to be the failure of USAID rule of law programs to have "explicitly designed and carried out (programs) to achieve verifiably sustainable results." *Id.* What this means is that the programs should be designed with something to measure, so that it can be measured, and success can be shown. It is exactly this approach by USAID that encourages aid providers to focus on easier projects like legislative drafting, because it is quantifiable, and discourages approaching the much tougher questions of substantive legal and judicial reform.

45. These types of programs "are relatively simple and clear" so they can be easily explained to funders. Thomas Carothers, *Taking Stock of Democracy Assistance*, in *American Democracy Promotion: Impulses, Strategies, and Impacts* 193 (Michael Cox, John Ikenberry & Takashi Inoguchi eds., Oxford Univ. Press 2000)

46. This does not mean that training programs use lecture style formats. Many of the programs teach using highly interactive techniques and USAID and other aid providers support and actively encourage the use of interactive training techniques. See Streetlaw Inc. <<http://www.streetlaw.org>> (demonstrating one example of high quality interactive human rights training).

47. For a critical analysis of the benefits of training programs in China, see Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, 18 UCLA P. Basin L.J. 64 (2000).

that in many societies, judges are not powerful, and are not in a position to be agents of change.⁴⁸

C. *Computers and Courthouses*

The assistance falling under this category includes computerization and renovating or building new courts. Throughout Eastern Europe and the former Soviet Union, courts were not well-funded.⁴⁹ The result was that at the end of the Communist era, courthouses were in poor repair and the administrative system was not computerized. If a litigant goes into a courtroom with a leaking roof, broken chairs and dented tables, s/he is likely to view the court as an institution not deserving of respect. It is human nature to think that if it were an important institution, it would be treated as such by the government. This understanding that decent and maintained courthouses are needed to foster respect of the institution itself justifies the spending for court refurbishment.⁵⁰

Assistance in computerizing court administration intends to change the inefficient handling of caseloads, and therefore speed access to justice. Clearly, one impediment to the smooth handling of cases is the lack of technology. When the judge must laboriously write out the record by hand for each case, it delays the case. If the judge could just check off a few boxes indicating what s/he did, it would (potentially) speed up the case.

D. *Institutional Development*

Institutional development refers to the training and capacity building of the various professions within the legal system.⁵¹ In some countries, like Albania, this means assisting to create new departments, like the Bailiff's office that aids in the enforcement of judicial decisions. Institutional development also involves importing Western approaches in planning and administration, such as assisting the Ministry of Justice to develop a strategic plan. Under communism, the Communist Party developed and mandated five-year plans.⁵² However, most of the people bound by the five-year plan had no say in the plan's development. Therefore, training on how to approach strategic planning for a given institution is a common type of

48. One author argues in favor of focusing US assistance efforts on judges and judicial opinions, operating under the assumption that judges are tools for change in these societies as they can be in the United States. John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. Intl. Law & Com. Reg. 71 (1998). For a more culturally sensitive analysis of the problems of judicial reform and competing powerful interests against reform, see Ratushny, *supra* n. 3, at 567.

49. See e.g. Scott P. Boylan, *The Status of Judicial Reform in Russia*, 13 Am. U. Intl. L. Rev. 1327, 1329 (1998).

50. One author referred to this as "rule of law architecture," stating that, "by enhancing the physical condition of Russian court buildings, reformers will demonstrate to all Russians that the law is central to the new Russia". *Id.* at 1335.

51. See e.g. explanations of Regional Institution Building Advisor for ABA/CEELI <www.abanet.org/ceeli>.

52. Five year plans were standard under the Soviet Union, and were predominantly used for economic planning, for example, factories used five year plans to set their production quotas.

institutional development.⁵³ Much of the institutional development work also qualifies under the category of training.

E. All Reform Occurs From the Top Down

The Cookie Cutter approach assumes that legal reform should occur from the top down. Due to this assumption, most foreign assistance starts at the national level with the drafting of new laws, and attempts to build up a national court system. The prevailing wisdom is that successful programs must have the support of the government to make the top-down approach work.⁵⁴ However, in many of the countries receiving legal reform assistance, there is no support from the national government, or the support means little in practical terms. Approaching reform from the top down means that little attention is given to the underlying attitudes and cultural and societal factors that may block or slow efforts at legal and judicial reform. Instead, the top-down approach assumes that creating new institutions and new laws and training the professionals in the system, will create a new approach and a new legal culture.⁵⁵

F. All Legal Cultures Are the Same

The Cookie Cutter approach also assumes that all legal cultures are basically the same, so it works to import U.S. or Western European models.⁵⁶ Often foreign aid providers and programs do not recognize that this assumption underlies their analysis of both the problems in the existing system and the proposed solutions.⁵⁷ One common and often incorrect assumption is that judges and lawyers are respected or are powerful players in an individual society.⁵⁸

53. ABA/CEELI created the position of Regional Institutional Building Advisor to assist in institutional development. For a more complete explanation of the ABA/CEELI approach to institutional development see *CEELI Primer on Institutional Development* <<http://www.abanet.org/ceeli>> (accessed October 10, 2002).

54. See e.g. Stephen Holmes, *Can Foreign Aid Promote the Rule of Law?* 8 E. Eur. Const. Rev. 68 (Fall 1999); Carothers, *The Rule of Law Revival*, *supra* n. 3 at 95. It is also assumed that support from civil society, including NGOs is a necessary element.

55. Many human rights NGOs and professionals argue that the focus of U.S. assistance should be on bottom-up approaches, and that these approaches "should not be merely supplements to top-down methods but the main thrust of rule of law aid. In historically unjust societies, they argue, justice will not be handed down by reformed state institutions; it must be won by people asserting their rights and demanding their due." Thomas Carothers, *Aiding Democracy Abroad*, *supra* n. 1 at 169.

56. Garth, *supra* n. 15, at 24. This assumption does not mean that a distinction is not made between civil and common-law systems. That distinction is commonly made, but in my mind is not the fundamental issue, despite a common refrain from lawyers from civil law countries that American and British lawyers are trying to "import the common law." The fundamental problem is that both civil and common-law lawyers assume certain attitudes and ways of doing things, beyond the simple civil-common law distinction. These assumptions include the assumption of the power of law and the assumption that lawyers and judges can be important agents of change in a particular society.

57. *Id.* at 24-25.

58. Delisle, *supra* n. 18, at 264. In many of the post-Soviet states the majority of judges are women, an indication not of the equality that women have achieved in the country, but rather of the low status of the job of judge. In the 1960s under communism in Albania, lawyers as a profession were outlawed. Although the profession is back, as a group in Albanian society, lawyers are not highly regarded.

Another incorrect assumption is that all people prefer formal legal systems as a means of resolving conflicts. While foreign investors and some businesses may prefer the stability of a formal legal system, this may not be the case for all local business people (particularly those who are well placed and know how to “work” the system as it exists) or for individuals in non-business disputes.⁵⁹ If two people are having a dispute about where a property line is drawn, they may prefer a less formal and more traditional way of resolving the dispute (like a village council). Clearly, those in positions of power who know how to wield that power to their advantage do not see a reason to change the system in a way that will put them at a disadvantage, or perceived disadvantage.

G. Everything Must Change

The Cookie Cutter Approach also fails to analyze what forms of dispute resolution already work in a particular society. This is an outgrowth of the top-down approach. Foreign aid providers in the early 1990s in the former communist world did not go in and analyze what was good about the existing dispute resolution systems and seek to build onto that which worked.⁶⁰ The assumption was that *everything* must be changed because human rights were not protected, and capitalism could not thrive under communist era restrictions, and under the old system.⁶¹

It is basic human nature that people resist change. Thus, the efforts by many new governments, supported by foreign assistance programs, to change everything led people in many countries to resist that change. Part of that resistance may be tied to the fact that the new systems did not look back to what existed before communism, and did not use elements of previously existing and accepted ways of doing things.⁶²

The failure to analyze what existed within a legal and judicial system when a program began, and to build the program or programs onto existing understandings

59. As Carothers states, “resistance to reform often surfaces at different levels.” *Supra* n. 1, at 175.

60. For a good analysis of the culturally insensitive and sometimes heavy-handed approach of foreign aid providers in the early 1990s, and the reaction of Eastern Europeans, see generally Janine R. Wedel, *Collision and Collusion: The Strange Case of Western Aid to Eastern Europe: 1989-1998* (1998).

61. Cultural or historical analysis, or “mapping,” of existing conflict resolution methods were not a standard part of the approach. USAID repeated the mantra that its programs were “sensitive to local conditions,” but because of inadequate personnel, or inadequately trained personnel, this mantra did not translate into in-depth studies of the societies, or their approaches to conflict. One reason for this may be the lack of an interdisciplinary approach. Lawyers, entering with their assumptions and preconceived ideas of what a legal system should look like, did not consult social scientists to determine what was already working, or existing in the society. One author argues that this analysis, or “mapping” should be a first step. See Ilana Shapiro, *Beyond Modernization: Conflict Resolution in Central and Eastern Europe*, 552 *Annals Am. Acad. Pol. & Soc. Sci.* 14, 26-27 (1997).

62. There are some interesting exceptions to this. In Russia, for instance, the United States supported efforts to revive jury trials, which existed under the Czars, but ceased under the Bolsheviks. In the post-communist period, nine regions of Russia adopted jury trials, although they were not popular. See generally James Diehm et al., *Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union*, 27 *Syracuse J. Intl L. & Com.* 1, 68-76 (2000); Boylan, *supra* n. 49, at 1327. Under the new Russian Criminal Code adopted on July 1, 2002, jury trials should expand nationwide for all serious crimes, although how implementation will work under the new code is as yet unknown. For general information about the new criminal code see Steven Lee Myers, *Russia Glances to the West for Its New Legal Code*, 152 *N.Y. Times A1* (July 1, 2002).

and frameworks within the particular country is changing as the numbers of professionals involved in this type of work expands, and as their understanding of different approaches expands.⁶³ However, analyzing the different current circumstances within different countries is only part of the analysis. Judicial reform programs also need to analyze what has historically worked in a particular country, and more creatively analyze what could work to change the societal attitudes towards law and the institutions of law in a country.

Albania is a good example of a country in which legal reform assistance providers failed to analyze the existing system, and failed to build rule of law development programs onto existing cultural understandings of how disputes can be resolved. Albania's brand of communism was isolationist and severe.⁶⁴ The Albanian dictator, Enver Hoxha, led Albania for over forty years, and was comparable to Stalin in his approach to civil liberties and freedom.⁶⁵ Several years after Hoxha's death, the communist government ended, leaving a country ill prepared for transition.⁶⁶ Albania's post-communist years have been rocky and marked by periods of violent civil unrest.⁶⁷ In 1997, the country dissolved into violent civil disorder after a pyramid scheme collapsed, depriving many Albanians of their life savings.⁶⁸ In the period after the collapse, the international community provided aid and assistance to rebuild Albania and to bring peace and stability.⁶⁹ Both before and after 1997, the Albanian judicial system was in disarray.⁷⁰ Albanians expect the judicial system to be corrupt and inefficient, and the judicial system rarely fails to deliver on those expectations.⁷¹ Prior to communism, there was weak rule by the Ottoman Empire, and a brief Italian Colonial period with weak leadership by King Zog, followed by Italian and German occupation during World

63. One example of this is the Judicial Reform Index ("JRI"), an analytical instrument developed by the ABA/CEELI. The JRI looks at a number of factors in a judicial system to analyze the level of judicial reform in a particular country. The obvious problem is that judicial reform is not quantifiable, so the JRI provides by its nature a subjective analysis. However, the JRI is a good starting point for looking at each country individually and shaping the judicial reform efforts based on the specifically identified weaknesses. See ABA/CEELI, Judicial Reform Index <www.abanet.org/ceeli/publications/jri/home.html> (accessed October 10, 2002). ABA/CEELI has completed JRIs for Albania, Bosnia & Herzegovina, Croatia, Kosovo, Macedonia, Romania and Serbia. See *infra* Section V.

64. For a history of Enver Hoxha and his consolidation of power, see Miranda Vickers, *The Albanians: A Modern History*, 141-209 (2d ed., St. Martin's Press 1999).

65. *Id.*

66. For a good history of the turbulent post-communist period, see Miranda Vickers and James Pettifer, *Albania: From Anarchy to a Balkan Identity* (2d ed., New York University Press 1999).

67. *Id.* at 1-9, 55-74, and 266-290.

68. Vickers, *supra* n. 64, at 244-252.

69. For information on OSCE involvement in Albania, see <<http://www.osce.org/albania/>>. For information on U.S. Assistance to Albania, see <http://www.usaid.gov/regions/europe_eurasia/countries/al/index.html>.

70. For a good overview of the Albanian Judicial system, see Judicial Reform Index for Albania, American Bar Association Central and East European Law Initiative <www.abanet.org/ceeli/> (accessed Dec. 2001).

71. *Id.* at 21, stating that "Judicial corruption is rampant and seriously undermines public confidence in the courts." One respondent reported that "a so-called 'good' judge is one who never asks for bribes, but who might accept money or a gift if offered. A 'bad' judge is one who approaches litigants to ask them for bribes or who is extravagant in the amount of money gained through corrupt practices." The JRI goes on to state that "judicial corruption remains one of the biggest obstacles to the democratic development of Albania." *Id.* at 22.

War II.⁷² None of the ruling forces in Albania brought with them, or established, a system of rule of law.⁷³

However, a lack of democracy or rule of law does not mean an absence of culturally accepted and valued ways of resolving disputes. Historically Albania was ruled by a traditional set of laws, called the Kanun, which is best known outside Albania as the rules surrounding blood feuds.⁷⁴ However, the Kanun was a fairly complete legal code, also regulating most aspects of life beyond the blood feuds, including marriage, property, crimes, and damages.⁷⁵

What is important about the Kanun, for purposes of this discussion, is that it includes provisions relating to mediation. The Kanun specifies who can be a mediator, what types of disputes can be mediated, and the process of the mediation.⁷⁶ For instance, under the Kanun, if a family member is murdered, honor requires a member of the family to “avenge the blood” and kill an adult male member of the murderer’s family (preferably the murderer himself).⁷⁷ The cycle of murders can go on indefinitely. However, the Kanun specifically allows a mediator to assist in resolving the dispute, by speaking to each side. If a resolution is agreed to, the mediator arranges a public ceremony to conclude the agreement.⁷⁸ In modern Albania, most Albanians are not engaged in blood feuds, nor do they live their daily lives by the Kanun.⁷⁹ But, in the absence of a reliable judicial system, the Kanun

72. See generally Vickers, *supra* n. 64, at 1-141.

73. *Id.*

74. Also called the Kanun of Lek, or the Code of Leke Dukagjini.

75. Shtjefën Gjeçov, *The Code of Lekë Dukagjini* (Leonard Fox trans., Gjonlekaj Pub. Co. 1989), [hereinafter Kanun]. For most of its history, the Kanun was oral law. This was the first of the various versions of the customary law that was written down. It was collected by a Franciscan priest, Father Shtefen Gjeçov, in the late 19th and early 20th centuries, and published in book form posthumously in 1933, under the editorship of the Albanian poet and author, Father Gjergj Fishta.

76. *Id.* at Book Eight, Chapter Eighteen, XCIX, at 138-140.

77. *Id.* at 173-74. Under the Kanun, “blood is never unavenged,” Section 917, Chapter CXXVIII, *Id.* at 174. The Kanun specifies that if the murderer is killed then it is “in accordance with the rule of ‘head for a head’ and avenges the murder.” Section 904, Chapter CXXVI. *Id.* at 174. “The later Kanun extends the blood-feud to all males in the family of the murderer.” Section 900, Chapter CXXV. *Id.* at 173.

78. Under the Kanun, “reconciliation of blood” happens after an agreement is reached with the family of the victim through “blood money” then the two families, the mediator, and friends eat a “meal of the blood” to “observe” the reconciliation. After paying the blood money and eating the meal, the “owner of the blood” (the head of the victim’s family) places a cross on the door of the murderer’s house “as a sign of the reconciled blood.” *Id.* at 183-84.

79. Reliable statistics are difficult to find in Albania, but of the nine murders committed in the first two months of 2001 in Shkodra, a Northern town of some 100,000 inhabitants, four were allegedly blood feud related (Figures from the OSCE Field office in Shkodra). Beyond that figure, it is impossible to speculate as to the number of blood feud related killings, since the Albanian police do not keep murder records with these categories. Under the Kanun, only adult men are acceptable targets of the blood feud. However, due partly to ignorance of the relevant provisions of the Kanun, women and children have been killed in blood feud related attacks, or are in hiding to protect themselves. Under the Kanun, the way to avoid being murdered is “self-imprisonment;” the presumption is that the home is absolutely inviolate, and despite being under threat of death, confinement to the home will ensure safety. This self-imprisonment can go on for years. The numbers of people in this kind of hiding is also difficult to verify. But, it is consistently reported that entire families are forced into hiding, and that children stop attending school, due to fear of revenge attacks. The various Albanian NGOs that have an interest in this area report that the numbers in hiding range from hundreds to thousands. The Human Rights Ombudsman in Albania, known as the People’s Advocate, has given a figure of 1,000 families in blood

holds an important influence as many people turn back to traditions that they consider tried and tested.⁸⁰ Albanians would likely view agreeably a system of mediation that linked itself to the tradition of the Kanun. A Kanun-based mediation program would have credibility and immediate cultural familiarity, which current litigation-based dispute resolution systems do not. However, none of the foreign judicial assistance programs have yet made the connection between the Kanun and modern-day dispute resolution.⁸¹

H. *The Approach Will Bring Democracy*

The Cookie Cutter Syndrome assumes that countries desire reform and that they are in the process of democratizing. The Cookie Cutter Syndrome takes the simplistic and formulaic approach of assuming that if its basic formula is followed, rule of law and democracy will inevitably result. Under the Cookie Cutter Syndrome, democratization programs assume that all former Communist countries are democratizing; although, many are, by all definitions, authoritarian dictatorships.⁸² Under this assumption, there are three categories of countries: "pre-transition," those "in process," and those that are "backsliding into authoritarianism."⁸³ Most of the former Eastern Bloc countries are either "in process" or "backsliding into authoritarianism;" however, within these categories there can be tremendous differences. Under these definitions it is difficult to find a country anywhere in the world that is not considered to be in some stage of democratization.⁸⁴ Albania and Poland both fit generally into the category of "in process," yet the differences between the state of development of these two countries is profound. Poland recently joined the North Atlantic Treaty Organization ("NATO"), and is expected

feuds. Each family includes many people, so if one thousand families are affected, the raw number of people caught in these circumstances would climb into the many thousands.

80. Many of the blood feuds seem to arise out of the lack of legal resolutions of disputes, or enforcement of legal judgments. Many of the feuds started as land disputes, which due to a chronically corrupt or inept judicial system were not solved, so one party to the dispute turns to "self-help." Once blood has been shed the rules relating to honor become applicable and the cycle begins. Land is at root in many of these disputes because the legal system of Albania inadequately deals with the complexities of making and enforcing the difficult decisions of ownership. As in all post-communist states, questions of land ownership in Albania can be complex, with multiple claims of ownership from before, during, and after the Communist period. The complexity is only enhanced by the lack of a strong judiciary and enforcement of decisions. The unfortunate outcome in some of these cases is that some individuals turn to violence to do what they think the state is failing to do.

81. This is due in part to the attitude and resistance of the Albanian government. Albania is anxious to join the European Union, so the government discourages anything that makes them look like they are not a part of modern Europe. In 2001, under Prime Minister Meta, the national government was very concerned about work going on in Shkodra regarding the blood feuds, and tried to pressure international organizations not to participate because "blood feud is not a problem in Albania." This was the position of the Albanian government in conversations with the OSCE.

82. See e.g. Thomas Carothers, *The End of the Transition Paradigm*, supra n. 8.

83. *Id.* at 90-101; see Thomas Carothers, *Struggling with Semi Authoritarians*, Democracy Assistance: International Co-operation for Democratization, at 210-212. Note the assumption that is present in the terminology: democratization is the norm and a country is either on the path or backsliding away from it.

84. Burma, Cuba and China are categorized as "pre-transition" nations, Carothers, *Aiding Democracy Abroad*, supra n. 1, at 95.

to be among the first of the Eastern European countries to be admitted to the European Union (along with Hungary and the Czech Republic).⁸⁵ Albania suffered a complete breakdown in civil order in 1997, and European Union membership, although deeply desired by most Albanians, is unlikely in the foreseeable future.⁸⁶ Examples of countries that are “backsliding” include Belarus and Tajikistan.⁸⁷ The differences between these nations in terms of the levels of violence and the potential for stability are tremendous. Belarus is stable, with a low crime rate, and little political unrest. Tajikistan, by contrast, fought a civil war after independence, and has very little infrastructure to build on.⁸⁸

Thomas Carothers recently wrote about the need to reevaluate this approach of using what he calls the “transition paradigm.”⁸⁹ Carothers’ analysis divides countries into three categories; nations in transition to democracy, authoritarian nations, and those in a “gray zone.”⁹⁰ The gray zone nations “suffer from serious democratic deficits, often including . . . low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions, and persistently poor institutional performance by the state.”⁹¹ Carothers divides the gray zone into two groups: “feckless pluralism” and “dominant power politics.”⁹² In feckless pluralism, “politics is widely seen as a stale, corrupt, elite-dominated domain that delivers little good to the country and commands equally little respect. The state remains persistently weak.”⁹³ The nations that fall into this category include Albania, Bosnia, Moldova, and Ukraine.⁹⁴

The second category of “dominant-power politics” are those countries where one group “dominates the system in such a way that there appears to be little prospect of alteration of power in the foreseeable future.”⁹⁵ The problem in these countries is a “blurring of the line between the state and the ruling party . . . the

85. For an explanation of the EU expansion process, see e.g. Milada Anna Vachudova, *EU Enlargement: An Overview*, 9 E. Eur. Const. Rev. No. 4, at 64-69.

86. Albania has not yet reached the stage of a candidate country for EU membership and will likely have great difficulty reaching the criteria for candidacy in the near future. See <http://europa.eu.int/comm/enlargement/index_en.html>.

87. See e.g. Thomas Carothers, *End of Transition Paradigm*, *supra* n. 8, at 210 (struggling with semi-authoritarians).

88. For an interesting analysis of the current situation in Central Asia, see Martha Brill Olcott, *Revisiting the Twelve Myths of Central Asia*, Working Paper, Carnegie Endowment for Intl. Peace at 23 (September 2001).

89. This assumption is a natural outgrowth of the “Transition Paradigm” as described by Thomas Carothers, *The End of the Transition Paradigm*, *supra* n. 8. This assumption, that following the model will bring change “encourages aid providers to ignore the underlying relationships and structures of power at work in any particular sector they are trying to change. They assume that it will be possible to help change the basic key political institutions without actually grappling with the entrenched interests dominating them, that some modest amounts of technocratic training and technical assistance will fix fundamental problems.” Carothers, *Taking Stock of Democracy Assistance*, *supra* n. 45, at 194.

90. Carothers, *The End of the Transition Paradigm*, *supra* n. 8, at 9.

91. *Id.* at 9-10.

92. *Id.* at 9-12.

93. *Id.* at 10.

94. *Id.* at 11.

95. *Id.* at 12.

judiciary . . . is typically cowed, as part of the one-sided grip on power."⁹⁶ Post-communist nations falling into this category include Armenia, Azerbaijan, Georgia, Kyrgyzstan, and Kazakhstan.⁹⁷ Nations in the gray zone pose the greatest challenge to aid providers, as they appear unresponsive to aid efforts, yet aid efforts remain focused in these nations.⁹⁸ Aid providers tend to have higher expectations for change in the gray zone nations than they do with authoritarian nations.⁹⁹ Perhaps due to these higher expectations, gray zone nations receive a significant percentage of aid funding.¹⁰⁰

I. Success Will Be Quick and Linear

Finally, the Cookie Cutter Approach assumes short-term success is possible and linear. The Cookie Cutter Approach further assumes that by using the approach, meaningful judicial reform will follow. Professionals working in this field know that judicial reform takes time, and that it will not be quick or linear. The funders and bureaucracies do not realize this, and often do not accept that this work will, and should, continue over decades and generations.¹⁰¹ USAID initially estimated that its assistance would be needed for five years in Eastern Europe, with the European Union estimating ten years. Needless to say, both underestimated.¹⁰²

In addition to taking time, legal reform rarely travels a straight road. Many nations made real progress in the early 1990s, but then stopped, or went backwards. Belarus is an example of a country that slid backwards after a good start.¹⁰³ Other countries, notably many in Central Asia, never made any significant moves forward.¹⁰⁴ The problem is that when a country falls back, the aid givers often quickly categorize it as a failure since it is not on the straight road to democracy. Often the result is that funding is stopped or dramatically decreased.¹⁰⁵ This destroys consistency and long-term vision, and inevitably links the long-term process of

96. *Id.*

97. *Id.* at 13.

98. *Id.* at 11-14.

99. Tajikistan, Turkmenistan, and Belarus all fall into the authoritarian category. The post-communist countries that are making solid progress towards democracy include Poland, Hungary, Estonia and Slovenia. *Id.* at 9, 13.

100. *Id.* at 9.

101. Legal reform is always a slow process. It is beyond the scope of this paper to do a comprehensive comparison to U.S. legal history, but a quick look at the history of rights for women and minorities in the U.S. shows that reform progressed slowly over many generations, and is still in process.

102. Janine R. Wedel, *supra* n. 60, at 22.

103. Thomas Carothers, *The End of the Transition Paradigm*, *supra* n. 8, at 9.

104. See e.g. Marta Brill Olcott, *Revisiting the 12 Myths of Central Asia*, Working Paper No. 23, Carnegie Endowment for Intl. Peace, 2001.

105. The approach of giving aid only to "reforming nations" stems from a World Bank study that aid works best in nations that are reforming, not avoiding reform. However, political reasons often predominate, allowing aid to continue to non-reforming nations like Uzbekistan and Pakistan. For a critical commentary on the approach of either continuing aid only to reforming nations, or allowing political concerns to dictate development aid decisions see Thomas Carothers, *The New Aid*, 125 Wash. Post A19 (Apr. 16, 2002).

judicial reform to very short-term politics, both in the view of the aid programs, and the recipient country.

IV. ADR IN LEGAL AND JUDICIAL REFORM PROGRAMS

Legal reform is always a part of democratization programs.¹⁰⁶ However, ADR is not always a part of either the larger democratization programs, or the rule of law development programs. Commonly, foreign aid providers assume that the best time to introduce non-litigation forms of dispute resolution into the legal system is once the system is basically functional, or to address specific needs (like commercial disputes). Aid providers view ADR as one element added onto legal and judicial reform programs, not as an integral part of the analysis in planning legal and judicial reform programs.¹⁰⁷ In a sense this approach follows the model of ADR development in the United States. ADR in the United States is fairly new, and is not fully integrated into the legal system.¹⁰⁸ In most Western European nations, ADR is still in its formative stages.¹⁰⁹ In some post-communist nations, democratization programs conduct dispute resolution work entirely under the category of civil society development, and not under the category of rule of law development.¹¹⁰ In practice, this means that local government officials, NGO leaders and other members of civil society receive conflict management training. This approach generally fails to target and reach lawyers and judges, because aid providers place them in the separate category of rule of law and not in the civil society category.

The need to create a stable investing environment was the paramount goal of many of the foreign aid programs in the former Eastern bloc in the 1990s.¹¹¹

106. The USAID website conceptualizes rule of law as a "building block of democracy." The "building blocks of democracy" include rule of law, civil society, and media. If any of the building blocks fall, then presumably so would the wall of democracy. See <www.usaid.gov/democracy/office/programs.html>.

107. The most comprehensive guide on ADR and judicial reform is Scott Brown, Christine Cervenak & David Fairman, *Alternative Dispute Resolution Practitioners Guide*, 1 <http://www.dec.org/pdf_docs/PNACB895.pdf> (Conflict Management Group) [hereinafter ADR Guide]. The authors analyze various types of ADR and ADR projects supported by USAID in various countries. The authors point out that "this guide is a first step in understanding the strengths and limitations of introducing ADR within rule of law programs More analysis is needed on the range of possible strategies for using ADR to support judicial reform." *Id.* at 48.

108. The state of ADR development in the United States varies greatly between jurisdictions and fields.

109. For a summary of the status of ADR in Western Europe see "*Why Hasn't Mediation Taken Off in Continental Europe (yet)?*" Program Book for the ABA Dispute Resolution Conference, New Vistas in Dispute Resolution, April 4-6, 2002, (on file with author).

110. Partners for Democratic Change is probably the leading U.S. based organization devoted to development of conflict management in the post-communist world. Their focus is in the civil society sector, not in rule of law, although some of their programs do overlap. For instance, in Slovakia, Partners is involved in mediation training for judges and consults with the Ministry of Justice. Partners has also established commercial mediation centers in many Eastern European countries. Partners focuses on training for the civil sector, and emphasizes the need for training local trainers. See <www.partners-intl.org>.

111. Many former Eastern Bloc countries were equally anxious for foreign investment, and they saw capitalism as the great savior. In reality, the standard of living has fallen in many former Eastern Bloc nations, and those that have created a good investment environment have not necessarily seen it live up to the high and unrealistic expectations that many Eastern Europeans held at the end of communism.

Business needed a reliable means of resolving disputes and a reliable legal structure. As a direct outgrowth of this need, many countries in Eastern Europe have new or developing commercial alternative dispute resolution systems, including arbitration and mediation.¹¹²

Different organizations support ADR programs for different reasons. USAID sees the development of ADR as an important component of building rule of law.¹¹³ The World Bank supports ADR as an "element of rule of law that facilitates economic transition efforts,"¹¹⁴ while USAID views ADR "as an element of rule of law that supports democratization."¹¹⁵ Internationally funded ADR projects include court-connected mediation and mediation run entirely by private entities outside the court system.¹¹⁶

Proponents of ADR projects in democratization programs often share the same view of the value or potential value of ADR as ADR proponents in the United States: lowered costs, increased efficiency, and increased satisfaction.¹¹⁷ This is in spite of the fact that in many of the post-communist nations, high cost and inefficiency are not the primary problems facing the judicial system. Instead, the discussion of ADR in the context of legal reform programs in post-communist nations usually centers on it being an "alternative to the delays and corruption that characterizes the formal judicial system."¹¹⁸ This focus fails to look at the larger picture. In Eastern Europe, mediation should "emphasize the importance of needs assessment and empowerment of parties in creating social change."¹¹⁹

When parties reach agreement through mediation or negotiation, or when an arbitrator makes an award, the failure of the court system to enforce the agreement works against the development of ADR. This failure of enforceability is one of the main arguments by those who caution against looking too optimistically at the promise of ADR in developing democracies.¹²⁰ For instance, in Russia, foreign

See generally, Wedel, *supra* n. 60; The World Bank, *Transition: The First Ten Years, Analysis and Lessons for Eastern Europe and the Former Soviet Union*, at 6 (World Bank 2002), stating that poverty increased "sharply" in many of the post-Soviet states.

112. For a limited listing of commercial arbitration centers, *see* the World Bank website <<http://www4.worldbank.org/sprojects>>.

113. ADR cannot be expected to act as a substitute for a legal system that is not working, but ADR can save time and money, increase access to justice and increase disputants' satisfaction with the outcome. ADR Guide, *supra* n. 107, at 21.

114. Wanis-St. John, *supra* n. 26, at 345.

115. *Id.*

116. For some examples of this, *see* ADR Guide, *supra* n. 107.

117. Numerous authors have written about the advantages of mediation in the United States. *See e.g.* Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L. J. 29, 34 (1982) stating that "[m]ediation offers some clear advantages over adversary processing: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants. It can educate the parties about each other's needs and those of their community. Thus, it can help them learn to work together and to see that through cooperation both can make positive gains. One reason for these advantages is that mediation is less hemmed-in by rules of procedure or substantive law and certain assumptions that dominate the adversary process."

118. Maria Dakolias, *A Strategy for Judicial Reform: The Experience of Latin America*, 36 Va. J. Int'l L. 167, 200 (1995). Whether ADR does or can prevent or reduce corruption is unknown.

119. Shapiro, *supra* n. 61 at 14, 24.

120. *See e.g.* ADR Guide, Appendix B, Bolivia Case Study 2-7, *supra* n. 107 at 24-27, discussing the need for "adequate political support" in starting ADR programs.

businesses should expect uncertain and variable enforcement of mediation agreements or arbitration awards by Russian courts.¹²¹ In some countries, enacting new laws that allow for the use of ADR can address this concern.¹²² In other nations, the problem goes much deeper than new legislation can address. Aid providers must do individualized assessments to determine if the absence of court enforcement will prevent the meaningful use of ADR. In some countries, it may be worthwhile to proceed even without court enforcement. For example, the courts in Albania routinely fail to enforce awards; yet, if an agreement is reached to end a blood feud, and both families sign the agreement in a public ceremony, the agreement acts as a powerful societal enforcement mechanism.¹²³ No court will enforce such a mediation agreement, but the loss of honor in the society if the agreement is broken acts as an informal enforcement mechanism.¹²⁴ Aid providers must recognize what informal mechanisms of enforcement will work in a particular country.

In this section, I will examine various forms of ADR, looking at how they are currently implemented in legal reform programs. Within each section I will also analyze some of the challenges, limitations, and potential benefits of the use of these forms of ADR. The concerns expressed below regarding limitations and challenges could impact more on program design than on the ultimate question of whether to design an ADR program. The fact that challenges exist does not mean that programs cannot or should not be designed that either work around the challenges, or work to confront them more directly.

A. Negotiation

1. Definition

Negotiation is “the process by which parties voluntarily seek a mutually acceptable agreement to resolve their common dispute.”¹²⁵ Negotiation occurs directly between the parties or their agents. Negotiation techniques and methods can vary greatly. Some negotiation styles are categorized as “win-lose” meaning that one party is the winner, and the other the loser. Interest based negotiation is a process by which each party determines what their interests are in a particular

121. See generally, Ethan S. Burger et al., *Resolution of Commercial Disputes in Russia and Ukraine: Is Mediation a Viable Option?* 8 East/West Executive Guide 2 (February 1998); Ethan S. Burger, *Mediation in Ukraine and Russia: Hype or a Potentially Valuable Tool?*, paper presented at ABA Conference, New Vistas in Dispute Resolution, April 4-6, 2002 (on file with author).

122. For example, until the Arbitration and Conciliation law was passed in Bolivia in 1997, there was no legal framework through which arbitral awards could be enforced. ADR Guide, *supra* n. 107, at 351.

123. See discussion *supra* nn. 76-81 and accompanying text with regard to the public nature of the agreement. Failure to abide by the agreement constitutes a serious loss of honor. Book Eight of the Kanun, Chapter Seventeen, Section 601 lays out the ways in which a man is dishonored and includes “if someone reneges on his promise of mediation or on his pledged word.” *Supra* n. 75, at 130.

124. Albanian law enforcement agencies do not always zealously investigate and prosecute cases of blood feud killings. This is one reason for the increase in blood feuds in recent years, as Albanians have lost confidence in the judicial system to punish those responsible for murders, and have therefore chosen to take matters into their own hands.

125. ADR Guide, *supra* n. 107, Appendix A, 2.

dispute, and then they try to reach an agreement that meets each party's interests as much as possible.¹²⁶

2. *Current Use in Legal and Judicial Reform Programs*

Negotiation as a form of ADR receives relatively little attention in the field of legal reform. In part that is because the existing legal cultures and/or laws make settlements of cases rare. Traditionally the parties have very little control over the case once it is filed in a court. This is common in civil law countries.¹²⁷ In post-communist countries the dynamic became even more entrenched because of the legacies of communism. Parties tend to view negotiation as "an opportunity to lessen the power of the opponent, not as a vehicle for mutual gain and understanding."¹²⁸

Democratization programs more commonly teach negotiation skills under the category of civil society, not rule of law. Partners for Democratic Change is one of the leading U.S. funded organizations teaching negotiation skills, as well as other conflict management skills, in the civil society sector.¹²⁹ Many of their programs focus on community mediation centers that may be completely separate from the courts and handle disputes that have not gone to court.¹³⁰ They also focus on teaching negotiation skills to community leaders and NGOs.¹³¹ Most of the Partners programs do not focus on lawyers and the legal community.¹³² Within the legal reform context, the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI)¹³³ has taught negotiation skills in its workshops in some countries.¹³⁴

3. *Challenges of Implementation in Post-Communist Countries*

Many international aid providers misunderstand or underestimate the value of negotiation skills in dispute resolution, and it is due to this misunderstanding or underestimating that negotiation rarely appears in legal and judicial reform programs. Teaching interest-based negotiation,¹³⁵ and moving societies away from

126. See generally, Roger Fisher et. al., *Getting to Yes: Negotiating Agreement without Giving In* (Bruce Patton ed., 2d. ed., Houghton Mifflin 1991).

127. Although the laws do not generally prohibit settling cases after they are filed in court, the practice against settlement is strong in many civil law countries. In many post-communist nations, once a case is filed, the relationship between the parties has broken down substantially, and the parties expect the judge to make the decision. In more corrupt legal systems, the filing of the case may mark the beginning of expected pay-offs and influence peddling to ensure the outcome the more powerful party wants.

128. Rumen Valchev, *An Examination of Industrial Conflict in a Post-Communist Society*, 10 *Mediation Q.* 265, 266 (Spring 1993).

129. See generally <www.partners-intl.org> and *supra* n. 110.

130. *Id.*

131. *Id.*

132. See *supra* n. 110.

133. American Bar Association Central European and Eurasian Law Initiative, *supra* n. 70.

134. See generally, ABA/CEELI website at <<http://www.abanet.org/ceeli>>.

135. See generally, Fisher et. al. *supra*, n. 126.

positional bargaining, could substantially change how people view conflict in a particular country. Admittedly, cultural differences make interest-based negotiation difficult to introduce into some societies.¹³⁶ However, negotiation is a basic conflict resolution skill, and one that should be considered in at least the same category as advocacy skills, which are now more routinely part of legal reform programs. Teaching negotiation skills does not necessarily mean replicating the *Getting to Yes* approach.¹³⁷ It could mean adapting, as appropriate, some form of interest-based negotiation into the local context. As Russian law professor Elena Nosyreva observed, "it is necessary to develop a Russian negotiation theory," while taking into account Russian attitudes towards compromise and conflict resolution.¹³⁸ The fact that a particular legal system does not have procedures for case settlement does not mean that negotiation is not an important skill. It does mean that the aid provider will need to gain familiarity with the local culture to ensure the teaching of negotiation in a meaningful way within the context of the society and legal culture.¹³⁹

4. *Potential Benefits*

Negotiation skills are obviously important for democratic decision-making. This belief motivates much of the work of organizations like Partners for Democratic Change. However, negotiation skills are also potentially important to developing rule of law. The more that lawyers and judges can learn informal dispute resolution skills, like negotiation, the better equipped they are to move away from traditional approaches that emphasize power and a lack of compromise. Some form of interest-based negotiation carries the greatest chance of bringing these benefits to the legal community, since it changes the approach. This could fundamentally change the way that lawyers and judges in a particular society view conflict, and that change in viewpoint could impact greatly on the development of both a rule of law culture and a democratic culture.

Increased use of negotiation could also impact on how individual parties view disputes, and their experience with the legal system. If an individual brings a case to a lawyer, and that lawyer is able to negotiate a settlement with the other party prior to going to court, or once the case is filed, that individual may leave the dispute with a more favorable view of handling matters through the legal system. This could result in changes in attitude towards law and the legal system, with at least that one individual leaving with the opinion that getting a favorable result from within the legal system is not always dependent on power and position.

B. *Mediation*

1. *Definition*

136. Avruch, *supra* n. 6 at 77-80. Avruch argues that *Getting to Yes*, *supra* n. 126, approaches negotiation from a North American male white middle-class culture and that the techniques may not translate well into other cultures.

137. *Supra* n. 126. The "Getting to Yes Approach" is discussed briefly, *infra*, Section IV.A.1.

138. Nosyreva, *supra* n. 34, at 16.

139. See generally Kevin Avruch, *Culture and Conflict Resolution*, *supra* n. 6.

Mediation is a "a process in which an impartial intervener assists two or more negotiating parties to identify matters of concern and then develop mutually acceptable proposals to deal with the concerns."¹⁴⁰ As with negotiation, mediations can be as different as the disputes involved.¹⁴¹ Some mediations involve face-to-face meetings with all the parties to the dispute present at one time. Some mediations resemble shuttle diplomacy, with the mediator meeting separately with each party, and the disputing parties not meeting directly with each other. Mediations also differ in terms of the role the mediator plays, from actively helping to fashion an agreement between the parties, to a less directive approach.

2. Current Use in Legal and Judicial Reform Programs

Mediation is not generally a part of legal and judicial reform programs. When foreign funding supports mediation, it is usually under the guise of civil society programs (commonly community mediation centers), or as a stand-alone center to handle commercial disputes.¹⁴² Mediation is most commonly used in commercial cases in the post-communist world. Court-connected mediation is still rare, with most mediation occurring through private mediation centers or NGOs. Some of these mediation centers focus on family, employment, commercial, and small claims cases.¹⁴³

Although rare, some court-connected mediation exists. One example of court-connected mediation is a pilot project in the Ljubljana District Court in Slovenia. In this program the goal was to deal with high caseloads.¹⁴⁴ Another example of court-connected mediation is in the Ukraine where Search for Common Ground, a U.S. based NGO, developed a court connected mediation program with the Donetsk and Odessa Regional Courts.¹⁴⁵ This program intended both to manage caseloads better (increasing settlements), and to improve the attitude of people towards the judicial system by better meeting their needs.¹⁴⁶

3. Challenges of Implementation in Post-Communist Countries

140. Alfini, et. al., *Mediation Theory and Practice*, 1 (2001). For a more broad definition of mediation see Mark Bennett and Michelle Hermann, *The Art of Mediation* 6-8 (National Institute for Trial Advocacy 1999); See also ADR guide, *supra* n. 107, Appendix A, 2-3.

141. For a general discussion of the history and uses of mediation in the U.S. see, James Alfini, *supra* n. 140, at 1-33.

142. For examples of this, see generally ADR Guide, *supra* n. 107.

143. In addition to Partners for Democratic Change, other U.S. funded NGOs, such as Search for Common Ground and ABA/CEELI have played a role in development of these centers.

144. Letter from Ales Zalar, District Judge, President of the Ljubljana District Court, posted on a World Bank Discussion board in 2002 <<http://vxworldbank.org/cgi-bin/lyris.pl?visit=legal-2002&id=179306049>> (currently on file with the author).

145. See <<http://www.sfcg.org>>. Search for Common Ground has programs in twelve countries, including Ukraine and Macedonia.

146. Search for Common Ground states that "[j]ustice needs to be found through tailored mechanisms provided by the State, rather than through an unresponsive, one size fits all approach. While people will be more likely to trust the outcomes in this way, individuals and communities have also to be empowered to better be involved in the Justice System in Ukraine." <<http://www.sfcg.org/locdetail.cfm?locus=Ukraine&name=programs&programid=221>>.

Programs that try to establish mediation in the post-communist world face a number of challenges. There are three main categories: cultural attitudes towards conflict, a preference for the existing system, and circumstances when mediation is inappropriate.

a. Cultural Attitudes Towards Conflict

Mediation often relies on open exchanges of information. This does not come easily to people in post-communist countries who learned that information was a valuable and potentially dangerous commodity. People learned to not be too direct, because a clear statement that they like or dislike something, or someone, could later be used against them. This tendency towards secrecy and indirect responses can cause problems in the context of mediation, because if a party does not feel comfortable saying why something is important to them, the mediator may never understand their underlying interests, and may not be able to work towards an interest-based conclusion. However, a mediation program that resembles shuttle diplomacy and does not involve face-to-face meetings between the parties could address this hesitancy. In some societies it might also be better to not limit the participants to just the parties and their lawyers, but also include, for example, extended family, who might be more open with information.¹⁴⁷

Western-based mediation traditionally requires finding a third-party neutral to act as the mediator. The commonly understood Western definition of neutrality is someone who is not related to, and has no previous or current relationship with either party, because only someone who has no prior knowledge of the dispute is not predisposed to favor one side over another.¹⁴⁸ Neutrality does not come naturally in all societies, and in some societies is neither expected nor valued. In some post-communist nations, clan structures are still intact and loyalty to the clan is expected.¹⁴⁹ In other nations ethnic or national group loyalties predominate.¹⁵⁰ In some cultures, the parties expect a mediator to have prior knowledge of the events.¹⁵¹ In designing a mediation system it may be impossible or culturally ill-advised to insist on neutrality according to Western understandings. Aid providers must

147. Depending on the specific culture, there are a number of techniques that mediators could adopt to deal with the tendency to not share information. For instance, mediators may also want to spread the mediation out over several days, and plan informal breaks. During informal breaks, parties or their extended family may feel more comfortable sharing information that they will not want to share directly during a mediation session.

148. One definition of a neutral third party is one who "has no inclination one way or another regarding the dispute or the disputants." The definition of impartiality is a third party who "has no personal stake or interest (financial or otherwise) in the situation." ADR Guide, *supra* n. 107, at Appendix A, 2.

149. Albania and Tajikistan are examples.

150. The former Yugoslavia is an example.

151. For example, under the Kanun, a mediator could be virtually any member of the community, including a "man or woman, boy or girl, or even a Priest." Kanun, *supra* n. 75, at 138. For an interesting collection of essays regarding conflict resolution in many different societies, see *The Conflict and Culture Reader*, Pat Chew, ed. (2001).

evaluate the existing cultural understandings of who should be a mediator, and design programs accordingly.

Another difficulty is that people want experts. In the context of mediation, this means that people will want a mediator who they perceive as an expert in the field and not merely an expert in the mediation process.¹⁵² The status or position of the mediator also matters.¹⁵³ Societies in the former communist world remain very attuned to social status.¹⁵⁴ A highly skilled mediator who is young or without any authority will not be as accepted by the parties. However, merely having status or authority does not guarantee acceptance, since many with such status and authority will be seen as partial to a particular side.¹⁵⁵

Another cultural resistance to mediation consists of the win-lose attitude, specifically the idea that there is only "one, true answer."¹⁵⁶ This goes to the heart of how conflict is viewed in the post-communist world. Conflict is not a disagreement between two individuals with different interests. Rather, conflict is a battle between the "right side" and the "wrong side" that may have only one winner.¹⁵⁷

b. Preference for the Existing System

A party may prefer litigation for a number of reasons, even if they understand and know about mediation. In the post-communist world a party may want to postpone the resolution of the case. Litigation fits in well with the general tendency to avoid conflict, since litigation is time consuming and will not bring a quick resolution to the problem.¹⁵⁸

The lack of litigation as a credible threat creates another barrier to the introduction of mediation in most of the post-communist world. Because courts are widely viewed as ineffective or easily manipulated, often at least one party has less of an incentive to want to actually deal with the dispute in a way that will resolve it. Another reason a party may prefer litigation is that they do not want to have control. In the United States, proponents of mediation state that one of mediation's primary advantages is that it gives the parties control over the outcome.¹⁶⁰ Communism did not value individual control and responsibility. Litigation in the post-communist

152. Justyna Olszanska, Robert Olszanski, Jacek Wozniak, *Do Peaceful Conflict Management Methods Pose Problems in Post-totalitarian Poland?* 10 *Mediation Q.* 291, 296 (Spring 1993).

153. See e.g. John P. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures in The Conflict and Culture Reader* 17-22 (New York University Press 2001); Paul E. Salem, *A Critique of Western Conflict Resolution from a Non-Western Perspective in The Conflict and Culture Reader* 220-229 (New York University Press 2001); Mohammed Abu-Nimer, *Conflict Resolution Approaches Western and Middle Eastern Lessons and Possibilities in The Conflict and Culture Reader* 230-235 (New York University Press 2001).

154. From my experiences in a number of post-communist countries, social status derives from education levels, professional status (for instance, teachers in Albania enjoy virtually universal respect), and family background (particularly in places like Albania where clan membership is still highly influential).

155. Justyna Olszanska, Robert Olszanski, Jacek Wozniak, *supra* n. 152 at 296.

156. *Id.* at 298.

157. *Id.*

158. *Id.* at 297.

160. See e.g. Alfani et al, *supra* n. 140.

world allows parties who are not comfortable taking individual responsibility or making a decision put that burden on someone else, namely the judge.¹⁶¹ This fits in well with the cultural desire to “shift individual responsibility to an omnipotent patriarchal social father.”¹⁶²

Mediation can exist entirely outside the legal system. It can be informal and done through community mediation centers or NGOs that are not connected to courts or the government. Mediation agreements are usually voluntary, so the need for court enforcement of them is much less than it might be for arbitration. However, the lack of a credible court system can create barriers to the growth of mediation. Unlike in the United States, the expense of litigation is unlikely to motivate a trend towards mediation in the post-communist world. For all practical purposes, fears of the expense of litigation and large awards do not exist in most of the post-communist countries. This can create a challenge for aid programs trying to develop incentives for parties to use mediation programs. These programs need to identify what types of conflicts in a particular society would most likely be amenable to mediation, and what factors will motivate parties to use mediation. Aid programs cannot rely on the existence of the same motivations that fuel the growth of mediation in the United States.

c. Circumstances When Mediation Is Not Appropriate

Sometimes, even if both parties agree to mediation, it should not be used. In situations of unequal power between the parties, mediation may fail to protect the weaker party. In the context of developing democracies, “when power asymmetries are embedded in the social policy, laws, customs, or other normative framework of a society, there is little reason to believe that an ADR program within that society will be immune from them.”¹⁶³ In some situations in the post-communist world, power imbalances are acute and potentially volatile.¹⁶⁴ Many post-communist nations faced violent ethnic conflict after the end of communism.¹⁶⁵ In some of these nations, the power imbalances are so deep that mediation of specific disputes would be difficult. The difficulties include finding mediators that are trusted by all parties, and ensuring that the mediation process is fair to all parties. However, the mere fact of an ethnic conflict should not make aid providers steer clear of ADR. If the litigation system is widely believed to have institutionalized prejudice or favoritism, then mediation could represent a preferable alternative system.¹⁶⁶ Aid providers need to understand the nature of power imbalances in the particular society, and look

161. Justyna Olszanska, Robert Olszanski, Jacek Wozniak, *supra* n. 152 at 297.

162. Dusan Ondrusek, *The Mediator's Role in National Conflicts in Post-Communist Central Europe*, 10 *Mediation Q.* 243, 247 (1993).

163. Wanis-St. John, *supra* n. 26, at 346.

164. Kosovo, and Bosnia and Herzegovina, are both good examples of this situation.

165. The former Yugoslavia is an example, dissolving into a violent war as the state divided along ethnic lines. Numerous books and articles have been written about the wars and violent conflicts in the former Yugoslavia. See e.g. Noel Malcom, *Bosnia: A Short History* (New York University Press 1996) and Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* (Viking Penguin 1996).

166. This is a topic that has not yet been studied in any depth; however, the ADR Guide advocates the advantages of using mediation in situations of ethnic conflict because it might help parties gain a better understanding of each other. ADR Guide, *supra* n. 107, at 11, 14.

critically at how those imbalances could impact designing a mediation program for particular kinds of disputes within that society.

4. *Potential Benefits*

Mediation can be a powerful tool for change. Parties that engage in successful mediations learn that they can take control of their own problems and solve them. They learn that they do not need an authority figure to solve their problems. This lesson can be particularly powerful in the post-communist world, where people have less experience with actively solving and taking charge of their own problems. Many mediation and democracy promoters therefore see mediation as a powerful tool for promoting democratic change.¹⁶⁷

Mediation can also change the legal culture because it emphasizes party control over the outcome. By emphasizing the role of the parties, mediation works fundamentally differently from both the established legal systems and the aid program's assumption of top-down change. When parties exercise control, they potentially leave the process more satisfied. This satisfaction could, as with negotiation, result in more favorable attitudes towards the legal system, and begin changing the widespread belief that power and position are always the decisive factors in resolving disputes.

Mediation could also increase access to justice.¹⁶⁸ Many people choose not to use the legal system for a number of reasons, including expense and convenience. Mediation, as a more informal system, could cost less than formal litigation. Mediation programs can operate in rural areas, making this form of dispute resolution more accessible. Mediation may also seem less intimidating to people who view the government, and everything associated with it (including the courts), negatively.

C. *Arbitration*

1. *Definition*

Arbitration is a "dispute resolution process in which one or more arbitrators issues a judgment on the merits . . . after an adversarial hearing."¹⁶⁹ Arbitration differs from mediation and negotiation in that the parties do not have to agree on the outcome because the arbitrator issues the decision. For this reason, of all the forms of ADR, arbitration is the most similar to litigation. As with mediation and negotiation, arbitrations vary greatly. In some arbitrations, one single arbitrator makes the decision, while in others a panel of arbitrators conducts the arbitration and makes the decision. Some arbitration decisions are binding, while some are non-binding.

167. See e.g., Shonholtz, *supra* n. 39; Haynes, *supra* n. 35; Stulberg, *supra* n. 39; Wildau, *et. al.*, *supra* n. 39.

168. ADR Guide, *supra* n. 107, at 13-14.

169. ADR Guide, *supra* n. 107, at Appendix A, 3.

2. Current Use in Legal and Judicial Reform Programs

Arbitration of commercial disputes exists in many, if not most, of the post-communist states. Foreign economic investment requires reliable dispute resolution. This need has been the driving force behind the development of commercial ADR in general, and specifically arbitration. The World Bank provides much support for the development of these programs.¹⁷⁰ Arbitration provides a useful alternative forum to corrupt or chronically inefficient courts.

3. Challenges of Implementation in Post-Communist Countries

Arbitration does not work entirely outside the existing legal frameworks. Arbitration depends on the existing judicial system enforcing arbitral awards. This fact alone should not and does not stop the development of arbitration in countries without reliable judicial systems, but it can limit the effectiveness of arbitration. Arbitration suffers less from the challenges of implementation in the post-communist world than other ADR forms like mediation. Arbitration as a system relies less on individual party control, and therefore does not confront the cultural barriers that mediation does. For instance, the cultural tendency towards secrecy creates less of a problem in arbitration than in mediation, because the arbitrator does not necessarily need to understand the underlying interests. An arbitrator can look at the surface dispute and decide the dispute according to the relevant contracts. The parties can specify the choice of law that the arbitrator should apply. The arbitrator does not necessarily need to understand the underlying interests, and the arbitrator does not seek to bring the parties to a mutually acceptable solution. However, arbitration can also suffer from the difficulty of finding neutrals that both parties will accept.

4. Potential Benefits

The potential impact of arbitration on the larger society is more limited than the impact of mediation or negotiation. A good system of arbitration can provide a substitute forum for corrupt and ineffectual judicial systems for individual disputes. Because arbitration involves a much lower level of party control than other forms of ADR, it arguably has the lowest possibility of influencing change in the dispute resolution culture in a particular country.

Despite its limited impact, arbitration does make a difference in individual disputes, providing a credible forum for resolution that might not otherwise exist. Also, it is possible that a reliable, trustworthy arbitration system could, over the long run, influence the legal culture. Such a possibility may exist in Belarus. Belarus is an authoritarian nation without rule of law and with an unreliable judiciary.¹⁷¹ In

170. See generally World Bank, <<http://www.worldbank.org>>.

171. See e.g. Data Param Cumaraswamy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mission to Belarus*, U.N. Doc. E/CN.4/2001/65/Add.1/2001, para. 77; Human Rights Watch Report, *Republic of Belarus: Crushing Civil Society*, <<http://www.hrw.org>> (1997); Amnesty International Report, *In the Spotlight of the State: Human Rights Defenders in Belarus*, <<http://www.web.amnesty.org/ai.nsf/recent/EUR49052001?OpenDocument>> (2001).

the midst of this atmosphere, the Belarusian Chamber of Commerce created the Commercial Court of Arbitration, the only rule of law institution in the country.¹⁷² The Belarusian government severely restricts commercial activities in Belarus, and the economy is still largely state run and state owned.¹⁷³ Despite this atmosphere, the Belarusian Arbitration Court receives cases from Belarus and neighboring countries.¹⁷⁴ By all accounts, Belarusian arbitrators decide their cases under the contracts and not by favoritism or corruption.¹⁷⁵ The parties who bring their cases to arbitration see disputes resolved in a fair and impartial manner. The lawyers working on these cases see cases handled differently than in court. The arbitrators themselves have the experience of following the rules. Over time these experiences can change cultural attitudes and favorably impact the development of the legal culture in Belarus.

D. Ombudsperson

1. Definition

Ombudspersons are "third parties appointed . . . to investigate complaints . . . and prevent disputes or facilitate their resolution."¹⁷⁶ In the United States, Ombudspersons are most commonly in organizations or private companies. In Europe, both Eastern and Western, Ombudspersons are public officials.¹⁷⁷ Many Eastern European nations adopted the model of a Human Rights Ombudsperson who typically does not have authority to adjudicate complaints.¹⁷⁸ An Ombudsperson does have authority to investigate and to exert political pressure to change a particular situation. An Ombudsperson can act as a mediator in a particular dispute as a means of resolving the dispute. The powers and duties differ from country to country and organization to organization.

172. As is so often the case in the post-communist world, there is a strong individual behind the development of this institution, Professor Alexander Yurkevich. For a general explanation of the Arbitration Court, see William Heekin, *ADR and the Countries of Central and Eastern Europe*, 1 J. Alternative Dispute Res. in Emp. 22 (1999).

173. See U.S. State Department country profile of Belarus <<http://www.state.gov/r/pa/ei/bgn/5371.htm>>.

174. William Heekin, *supra* n. 172 (ADR and the countries of Central and Eastern Europe).

175. This conclusion is based on my experience in Belarus and numerous conversations with lawyers involved with the Commercial Court of Arbitration, as well as conversations with Mr. William Heekin, a U.S. based arbitrator who provided technical assistance through ABA/CEELI to the Arbitration Court over a period of many years.

176. ADR Guide, *supra* n. 107, at 5.

177. For a collection of Ombudsmen laws (in both Western Europe and the former communist world) see, *National Ombudsmen: Collection of Legislation from 27 Countries* (Commissioner for Civil Rights Protection of Poland 1998). In each nation listed the Ombudsman is a public institution. See also, *The Work and Practice of Ombudsman and National Human Rights Institutions*, The Danish Centre for Human Rights (2001) (a collection of articles published following the Conference on the Work and Co-operation of Ombudsman and National Human Rights Institutions 23-25 Sept. 2001). The main international document relating to the institution of the Ombudsman is the *Principles Relating to the Status and Functioning of National Institutions* ("Paris Principles"), U.N. Commission on Human Rights Resolution 1992/54 of March 3 1992; General Assembly Resolution A/RES48/134 of December 20, 1993.

178. *Id.*

2. *Current Use in Legal and Judicial Reform Programs*

Ombudspersons' offices are another form of ADR, although they are rarely categorized as such by legal reform programs.¹⁷⁹ Newly developed Ombudspersons' offices in Eastern Europe receive substantial foreign assistance.¹⁸⁰ The type of assistance provided includes financial assistance to establish the office and provide training.¹⁸¹ Travel is a standard part of the package intended to show new Ombudspersons how more established offices in Western Europe operate.¹⁸² Although an Ombudsperson should be expected to use a variety of ADR techniques, such as negotiation and mediation, skills-based training in these techniques are rarely the focus of the training programs. Instead the programs focus on the laws and institutional development.¹⁸³

3. *Potential Benefits*

Ombudspersons can effectively solve individual problems and change attitudes towards how to deal with conflict. If an individual brings a complaint to the ombudsperson, and that complaint is resolved in a way that is favorable to the individual, it can teach that individual (and their friends and family) that they can take charge of their problems. The experience teaches the lesson that action, not passive acceptance, can have positive results. However, Ombudspersons also tend to reinforce the paternal approach. All the person needs to do is bring the problem to the authority figure--despite the fact that most Ombudspersons have very little actual authority--and the authority figure will solve the problem. Ombudspersons' offices can be very important in assisting individual countries with the development of a culture of human rights, and in resolving individual problems. However, they have a lower impact in terms of directly teaching conflict management skills than an ADR system such as mediation, which relies more heavily on active involvement by all the parties.

E. *Facilitation*

1. *Definition*

179. Following the model of Sweden, many Eastern European nations created human rights Ombudsmen. The responsibilities and powers of the Ombudsman vary from country to country, but all receive complaints from citizens against their governments, which the Ombudsman investigates and acts on.

180. For an example of the assistance given by just one organization, see the projects on the website of the Office of Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE-ODIHR) <<http://www.osce.org/odihhr>> and the projects through individual missions (particularly in the Balkans) <www.osce.org>.

181. *Id.*

182. *Id.*

183. The largest providers of assistance to new Ombudspersons offices in the former communist world are the Council of Europe and the Organization for Security and Cooperation in Europe. For more detailed descriptions of their assistance programs, see generally <<http://coe.int/portalT.asp>>; <<http://www.osce.org>>; <<http://www.osce.org/odihhr>>

Facilitation “is a process in which a person who is acceptable to all members of the group, substantively neutral, and [who] has no decision-making authority intervenes to help a group improve the way it identifies and solves problems and makes decisions.”¹⁸⁴

2. *Current use in Legal and Judicial Reform Programs*

Facilitation is another ADR technique that is rarely discussed in the context of legal reform programs, although it is commonly used in a variety of contexts (such as in training and institutional development). ABA/CEELI, through its Environmental Program, actively encouraged public participation in environmental decision-making.¹⁸⁵ Raymond Shonholtz believes that facilitation is growing faster than mediation in the developing democracies in Eastern Europe because it “seems less threatening to formal entities in the new democracies than ‘mediation,’ which is associated with compromise, power imbalances, and third party power tactics.”¹⁸⁶ This observation may not be true in countries, like Albania, with a positive history of mediation.

3. *Challenges of Implementation in Post-Communist Countries*

A cultural attitude favoring authoritarian decision-making models can make facilitation difficult to use in some post-communist countries. It can take time and practice before participants agree to fully participate. The problems discussed above regarding hesitancy to share information, and not wanting to take individual responsibility for decision-making can create difficulties. However, in my experience, most groups are open to facilitation. It is frequently used in a variety of settings, and usually with great success.

4. *Potential Benefits*

Facilitation teaches democratic involvement. It teaches that everyone should participate and that better results happen by working together. Facilitation aids in rule of law development by moving individuals away from the authoritarian model, and by encouraging individual involvement. It can help improve institutional development in legal institutions.

184. Roger M. Schwarz, *The Skilled Facilitator: Practical Wisdom for Developing Effective Groups*, 4 (1994).

185. See <www.abaceeli.org/ceeli/programs>

186. Shonholtz, *Conflict Management Training*, *supra* n. 33, at 8.

F. Plea Bargaining

1. Definition

Some criminal reform programs include ADR through programs to introduce plea-bargaining.¹⁸⁷ Plea-bargaining is generally negotiation directly between the defense and the prosecution. In exchange for a plea of guilty to a particular charge, the defendant gives up the right to trial and accepts the negotiated deal. Plea-bargaining was unheard of during communism. If a person was arrested, they were tried and convicted.¹⁸⁸ There were no discussions prior to trial about the sentence.

2. Potential Benefits

Plea-bargaining can save time, decreasing both the amount of time that defendants wait in pre-trial detention, and the time for trial for those who decide to exercise their right to trial. Arguably, plea-bargaining can contribute to developing a rule of law culture, because it can increase the efficiency of courts thereby decreasing the often Kafka-like nature of criminal proceedings in many post-communist nations.¹⁸⁹ However, it is equally arguable that plea-bargaining, when over-used, can detract from a rule of law culture.¹⁹⁰

V. PROPOSED APPROACH

The Cookie Cutter Syndrome does not routinely include ADR. When, if, or how ADR is currently used depends more on the individuals working in a particular country, their identification of the country's needs, and their awareness of ADR. The need to find a reliable method of resolving business disputes fuels much of the development of ADR in legal reform programs in the post-communist world.¹⁹¹

187. The United States Department of Justice is active in this area, with resident legal advisors in many countries. The DOJ and ABA/CEELI assisted in writing draft plea bargaining laws in the former Soviet Union, and Eastern Europe. See generally ABA/CEELI at <www.abaceeli.org>.

188. Conviction rates can still be quite high. Various prosecutors in both Albania and Belarus told me with pride that their conviction rates are "over 99%." In Albania this may be due to more selectivity in arrests and prosecutions. In Belarus, it is probably due to the advantages enjoyed by the prosecutor under the current legal system.

189. Pre-trial detention facilities in countries like Belarus, Russia, and Ukraine are notoriously poor, and the criminal codes in many post-communist countries allow prosecutors multiple extensions of time to prepare their cases. The new criminal code in Russia addresses some of the concerns of extensive pre-trial detention, although the code alone does nothing to improve pre-trial detention facilities. See *supra* n. 62.

190. Most criminal cases are handled by plea-bargaining in the United States. In my experience in Los Angeles County, a defendant who chose to exercise his right to trial and lost inevitably received a higher sentence than he would have gotten had he accepted the plea bargain. This does not increase confidence in the system, although unquestionably it encourages plea bargains, and therefore decreases the number of trials.

191. Statistics and complete listings of ADR programs are difficult to find. This statement is based on the number of commercial ADR projects financed through the World Bank, see generally <<http://www.worldbank.org>> and the lack of a comparable group of non-commercial ADR projects funded by any other international organization.

Many commercial disputes, especially with foreign companies, involve large sums of money (especially relative to the local economies). Powerful interests often work hard to exert influence or take appropriate (even illegal) steps to ensure that they win the case. Rarely do legal reform programs do a more detailed analysis of the use or potential use of ADR in other settings. Arbitration of commercial disputes exists in many, if not most, of the post-communist states.¹⁹² ADR is less often used in family disputes, employment or labor disputes, and land disputes.

The factors that legal development programs should consider in deciding how and when to implement ADR programs in the post-communist world are numerous, and go beyond the single goal of resolving business disputes. One example is in the area of family disputes, which are less likely to involve powerful parties with a powerful interest to resist change.¹⁹³ Powerful individuals who benefit from corruption and the lack of rule of law create chronic problems by blocking meaningful reform in the post-communist world. If development programs focus on ADR programs for disputes that do not confront or unsettle the main power brokers in a particular society, then the potential impact of ADR on the larger legal culture increases; eventually, the amount of resistance to the ADR program decreases. Commercial disputes may also not be a recommended type of dispute to focus on, even in countries that have embraced capitalism, as such disputes are not the kinds of disputes that reach most "ordinary citizens." If one goal is to change peoples' views about how to resolve disputes, then it makes sense to focus on disputes that affect more people, like family or employment disputes.¹⁹⁴

The basic difficulties with the approach towards ADR by legal and judicial reform programs are that ADR is not fully integrated into legal reform programs, and that legal reform programs often conduct their work under a series of inaccurate assumptions. I propose that legal reform programs change their approach by focusing on individualizing their efforts to fit particular countries, and integrating ADR more fully into those countries.

A. Conduct Thorough Assessments of the Current Situation

As I stated earlier, most legal and judicial reform programs are premised on little information about the particular situation in the particular country. Part of the reason for this is resources. It costs money and time to conduct thorough assessments of the

192. See e.g. the World Bank website <www.worldbank.org>.

193. Of course family disputes often involve power imbalances between the parties, but this problem is different from the power of corruption, which predominates in some business cases in some countries. Due to the generally low levels of awareness of domestic violence throughout the post-communist world, caution should be exercised in planning and implementing a divorce mediation program. For a good explanation of the scope of domestic violence in Russia and one program to confront the problem see Dianne Post, *Women's Rights in Russia: Training Non-Lawyers to Represent Victims of Domestic Violence*, 4 Yale H.R. & Dev. L. J. 35 (2001).

194. Just because a certain kind of dispute is common does not mean it will be a good choice for ADR. For example, land ownership disputes are common throughout the communist world. See *supra* n. 80 discussing land disputes in Albania. In many countries, deciding ownership of a particular parcel of land is highly complicated, with competing claims from pre-communist, communist, and post-communist times. In some countries these disputes may be too complicated, or too politically sensitive, to resolve through a form of ADR.

current situation in each country. In the long run, the money and time is well spent if the assessments help to narrow the focus of the work to areas where the work will be most productive.

A number of aid providers recognize this need. ABA/CEELI has taken the lead in developing two diagnostic instruments to help in making these assessments: the Judicial Reform Index (JRI) and the CEDAW Assessment Tool.¹⁹⁵ These instruments both represent a good step towards increasing understanding of the current environment in particular countries. These assessment instruments take different approaches, and have slightly different goals.

The JRI attempts to measure the current state of judicial reform in a particular country.¹⁹⁶ The JRI is divided into six categories.¹⁹⁷ The Assessment team for the JRI consists of local staff of ABA/CEELI and an outside consultant who should be a lawyer with experience in judicial reform and the region. The Assessment team conducts a series of interviews with a cross section of the legal and NGO community. In the end, the Assessment team evaluates whether the particular country is positive, neutral, or negative in each area and then gives an overall assessment. The JRI should assist ABA/CEELI, "its funders, and the emerging democracies themselves [to better] target judicial reform programs and monitor progress towards establishing more accountable, effective, and independent judiciaries."¹⁹⁸ ABA/CEELI intends that the JRI will help in planning future programs and in evaluating the effectiveness of previous programs.

The goal of the CEDAW Assessment Tool is to measure the status of women. The CEDAW Tool intends to "identify and draw attention to the most critical deficiencies" so technical assistance can target those deficiencies.¹⁹⁹ The CEDAW tool uses similar methodology to the JRI. An assessment team conducts individual interviews with a cross-section of the population, including NGOs, focusing on women, government representatives, social scientists, and women living in both urban and rural areas.²⁰⁰ The CEDAW tool divides the assessment into two broad categories: de jure compliance and de facto compliance. The CEDAW tool should assess both the laws and how those laws are used (or not used). The CEDAW tool does assign a numerical value to each category.

ABA/CEELI and its panel of experts spent several years developing these assessment instruments and just began using them in 2002. These instruments will

195. CEDAW is the Convention on the Elimination of All Forms of Discrimination Against Women. For a complete copy of the CEDAW Assessment Tool see <<http://www.rightsconsortium.org/resources/assessment/CEDAWtool.pdf>> (Mar. 20, 2002); <<http://www.abanet.org/ceeli/publications/CEDAWtool.pdf>>. The Judicial Reform Index is available on the ABA/CEELI website: <http://www.abanet.org/ceeli/publications/jri/home.html>. ABA/CEELI has completed JRIs for Albania, Bosnia & Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro, Romania, and Serbia. See *supra*, n. 63.

196. See <www.abanet.org/ceeli/publications/jri/home.html>.

197. Quality, Education and Diversity of Judges; Judicial Powers; Financial Resources; Structural Safeguards; Accountability and Transparency; Efficiency. Each category is discussed in the JRI Indices completed for Ukraine, Albania, Bosnia, and Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro, Romania, and Serbia. See <<http://www.abanet.org/ceeli/publications/jri/home.html>>.

198. *Id.* at 4.

199. CEDAW Tool, *supra* n. 195, at 2.

200. The CEDAW tool includes a larger and more varied group for interviews than the JRI, which limits the interviewees to the legal community, the media, and NGOs.

be useful, and will contribute to changing one of the fundamental flaws of the Cookie Cutter Syndrome: a failure to fully assess the situation in a particular country. These instruments deal with two specific categories of legal reform and are not intended to answer the fundamental and larger question of why legal and judicial reform is not working in a particular country.

I therefore propose the development of a Dispute Resolution Cultural Assessment (DRCA) instrument. This suggestion is based on the need first expressed by Thomas Carothers to "identify the syndrome" that is preventing democratization in a particular country.²⁰¹ The idea is to develop an instrument that can identify what the syndrome is that is blocking legal reform in a particular country.²⁰²

The DRCA should analyze the dispute resolution systems, both formal and informal, that exist in a particular country. These assessments should include analysis of the current dispute resolution culture, the legal culture, the barriers to change, and the opportunities for change. The assessment should be developed with input from lawyers, dispute resolution professionals, and social scientists, to ensure the inclusion of appropriate questions and categories so that it will provide a full picture of the dispute resolution environment in each particular country. As with the JRI and the CEDAW, I suggest using a methodology that includes interviews of a cross-section of the population within the country. Exactly who those people will be should be determined through the process of developing the DRCA, with the goal being that as large a cross section as practical and useful be included. The goal of the DRCA should be to identify the reason or reasons impeding the development of legal and judicial reform. Clearly some or all of those reasons may not be problems that foreign assistance can effectively address. However, only after those reasons are clearly identified can the process begin of deciding how to address or not address them.

The DRCA should assist in identifying the types of disputes that provide the greatest opportunities to affect these underlying barriers to legal reform. This is obviously the most difficult part of the analysis. For instance, the DRCA would analyze whether commercial disputes are an area to focus attention on to get to the "core syndrome" blocking legal reform, or whether it might make more sense to focus on another type of dispute. Essentially the DRCA will approach these questions from an ADR viewpoint, doing an interest-based analysis of whose interests are best served by continuing without meaningful legal reform, and then analyzing what else might be done to meet those interests. Obviously, foreign assistance providers cannot address all of those interests. For instance, if the reason a judge decides a case in favor of the party that pays him more is because he makes only \$100 a month, foreign assistance programs will not raise his salary.²⁰³

The goal should be to produce an assessment that can be easily understood by legal reform professionals who are predominately not experts in dispute resolution, and that provides them with an accurate picture of the current level of dispute

201. See generally, Carothers, *The End of the Transition Paradigm*, *supra* n. 8.

202. *Id.*

203. Low judicial salaries are a common problem throughout the post-communist world. Most foreign assistance programs refuse to pay salaries due to the belief that doing so only builds dependency.

resolution in the particular country, so they can integrate that information into the development of their legal reform programs.²⁰⁴

B. Make ADR an Integral Part of Legal Reform Programs

Legal reform programs should make ADR an integral part of the program planning process. This does not mean that every country should have court-connected mediation or any other specific form of ADR. ADR is a broad field that encompasses a variety of approaches to dispute resolution other than litigation. Every legal reform program should recognize that non-litigation forms of dispute resolution are important to developing a working legal system. In some countries, integrating ADR may mean only that negotiation skills are taught to lawyers and law students. In other countries it may mean focusing on commercial mediation and arbitration centers. Integrating ADR should not mean adding one more Cookie Cutter component to legal reform programs. Instead, it should mean evaluating how best to incorporate that category into legal and judicial reform in a specific country. One area where there is great scope for improvement and inclusion is in the area of legal education and training. Legal reform programs, as stated earlier, focus heavily on training. Legal reform programs assist in curriculum development in judicial training centers and in law schools. This is an easy place to start introducing new ideas of how to deal with disputes. Aid programs could fairly easily integrate negotiation and mediation courses, adapted to local conditions, into existing curricula. As stated above, there are many barriers to implementing ADR in the post-communist world, and introducing ADR into the law school and judicial institute curriculum will not make those barriers disappear. However, most legal professionals in the post-communist world know little to nothing about the various forms of ADR. Introducing them to ADR may plant a seed that will someday grow (even if that someday is in several decades). A necessary part of integrating ADR into legal reform programs is training legal reform professionals in ADR. Currently, most lawyers working in this field are not experts in ADR. I suspect, from my experiences, that most know very little about ADR. Therefore, if ADR is to become an integrated component of legal reform programs, the people administering these programs need to understand what ADR is and what it means to integrate ADR into legal and judicial reform.

The goal of including ADR in legal reform is not to replace litigation. For many disputes, in many circumstances, litigation is the best form of dispute resolution. Instead, the goal is to increase the use of ADR in ways that complement the development and growth of rule of law in a particular society.

204. One problem that blocks the development of better analysis of legal reform programs is that there are few academics studying this field and no one institute devoted to legal development. In 1999, NYU Law Professor Stephen Holmes suggested that the U.S. and E.U. jointly open a "Legal Reform Strategy Center" based at a law school or public policy school. Establishing such a center could do much to advance the study of legal reform and to build jointly on U.S. and European experiences. The idea was to initially have it focus on Russia and then expand to other countries (I suspect that if the U.S. and the E.U. agreed to joint funding, Russia would not be the priority post-September 11, 2001). Holmes, *supra* n. 54, at 5.

C. Obstacles to Implementation

There are two main obstacles to implementing my suggestions: lack of resources and lack of the political will to implement. Creating the DRCA will require many hours of work by many people. Once the DRCA is created, it will take even more time and resources to conduct a thorough assessment in each country. I believe that in the long run, the creation and use of an assessment instrument like the DRCA will save time and money because it will assist aid providers in planning projects that will more effectively target areas for change. This belief does not lessen the short-term difficulty of finding funding and human resources to take on this project.

The main obstacle to the full integration of ADR into legal reform programs is the lack of education and awareness among aid professionals about ADR. Targeted training programs for lawyers working in legal development would lessen this problem dramatically. However, currently there is no institute or single training center that could take on this type of training.²⁰⁵

Finally, political will and attitudes by aid funders may prevent implementation. Some in the aid community believe that the last thing aid programs need is another "evaluation."²⁰⁶ Although the DRCA and integration of ADR are not evaluations, many in the aid community will see these suggestions as a continuation of an unproductive process. Some critics will view these suggestions as one more proposal to spend millions of dollars on consultant salaries and trips to various countries.²⁰⁷ I do not disagree with the view that millions of dollars have been wasted over the years through aid programs.²⁰⁸ However, the DRCA, if properly developed, would not be a waste of money, but would instead help to direct resources to assist in making real legal reform.

One critic, John Hewko, advocates that foreign funding should focus on training for young professionals, and sending thousands to the West for one and two year graduate programs.²⁰⁹ I agree that focusing on training in the West and on the younger generation makes sense.²¹⁰ However, to focus aid programs around training alone makes for a single-dimension aid program, and not a multi-dimensional

205. As stated previously, there is no one institute that focuses on legal development work. Individual organizations, like ABA/CEELI and the OSCE conduct training programs for their personnel.

206. USAID routinely conducts "evaluations" (USAID terminology) of their programs. These evaluations are written to justify either continuing or discontinuing a particular program. I am not suggesting that the DRCA be used as an evaluation instrument but as an assessment or diagnostic instrument.

207. For more detailed accounts of some of the more outrageous consultant behavior *see generally* Wedel, *supra* n. 60.

208. *See e.g.* Janine Wedel, *supra* n. 60.

209. John Hewko, *Foreign Direct Investment: Does Rule of Law Matter?* 26 Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for Intl. Peace 25 (April 2002).

210. A fairly small percentage of lawyers from the post-communist world, particularly the former Soviet Union, have the necessary language skills to be able to study in a Western university. Also, despite program requirements to return to their native countries, a significant percentage of students will fail to return, so these programs must accept that a certain percentage of the students who leave will get training to help them re-establish themselves in Western nations, not to help change the legal systems in their home countries. I am not arguing against increasing funding dramatically for these programs, but these programs alone do not provide *the* answer anymore than any other single suggestion.

approach. The idea of focusing exclusively on legal education was why many believe the law and development movement was a failure. Clearly, aid programs have increased in number and in funding since those early days. The question is whether they have increased in sophistication. The goal should be to develop a multi-dimensional approach to legal and judicial reform, and to develop that approach based on as thorough and as specific information as possible about the particular nation. The DRCA and full integration of ADR into legal reform programs contributes to developing this multi-dimensional approach.

VI. CONCLUSION

There is no magic pill or quick road to legal and judicial reform in the post-communist world. Bringing change to these societies, as to any society, will take time, patience, and consistency. The challenge for the professionals devoting themselves to this field is to improve their approach to this work. Legal and judicial reform programs must strive to understand the differences in each country including both the different factors blocking reform, and the different opportunities to make reform. Although numerous professionals working in the field understand the need to structure their programs in light of local circumstances, that understanding is not generally a part of the bureaucratic process in most of the funding organizations devoted to legal and judicial reform.

My first recommendation is that legal reform programs build their foundations on more thorough assessments of the current situations in particular countries. The dispute resolution field can assist by developing a comprehensive diagnostic instrument to analyze the dispute resolution atmosphere in a particular country.

Second, aid providers should fully integrate ADR into all legal reform programs. Professionals working in the field need to educate themselves about ADR and analyze how best to include ADR in their programs. Once again, I am not advocating that all forms of ADR be used in all countries, or even that one form (such as mediation) is always appropriate. Instead, the particular situation in a particular country needs to be determined. My suggestion is that those designing legal and judicial reform programs should consider ADR as an integral part of the analysis of how to approach legal and judicial reform in a particular country.

Foreign assistance can contribute towards real and lasting change in the post-communist world. However, assistance providers need to focus on the particular situation in particular countries and determine how to best affect change. The initial euphoria surrounding the fall of the Berlin Wall and the Soviet Union dissipated long ago. As our understanding of the complexities of life after communism grows, so must our response. It is time to move beyond the Cookie Cutter Syndrome, and towards a more sophisticated and multi-dimensional approach to legal reform assistance.

