Pathways to Sustainable Mediation: Challenges and Opportunities

Literature Review and Report

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Executive Summary

Partners for Democratic Change International (PDCI) employs mediation programming in support of larger efforts to transform conflict, strengthen democratic institutions, and achieve sustainable development. PDCI centers worldwide work with local communities to provide a variety of mediation services, from divorce mediation to commercial dispute resolution.

However, PDCI centers and international mediation practitioners encounter many challenges as they work to establish effective mediation programs and build demand for these services in their communities. In an effort to discover strategies and best practices for addressing these challenges, PDCI has partnered with the JAMS Foundation to develop a toolkit for mediation practitioners in the Weinstein International Fellowship Program. Working with PDCI, the American University research team sought to investigate the challenges, potential solutions, and best practices for institutionalizing and building demand for mediation services globally.

The research was conducted over a two-month period in the spring of 2015. This report was produced for PDCI in partial fulfillment of the requirements of the Graduate Practicum: Transformation, Peacebuilding, and Development at American University’s School of International Service. The research team consisted of graduate students Irina Balytsky, Kyle Gibson, Miles Painter, Lyndsey Romick, and Adrienne Toumayan.

The research team inquired: “What are the challenges experienced by mediation practitioners, and what strategies to combat these challenges will support newly trained JAMS Fellows to successfully institutionalize mediation services and increase demand for mediation in their home countries?”

To address the research question, the team conducted a review of academic and applied literature on mediation and alternative dispute resolution (ADR). The examination of academic studies and reports by development institutions, governments, and NGOs highlighted several key themes related to institutionalization and building demand. The themes include:
The challenges and strategies contained in each theme are critical to successfully institutionalizing and building demand for mediation services.

To understand the themes further, the research team conducted in-depth, semi-structured interviews with mediation practitioners and ADR experts in the U.S. and abroad, including field research in Warsaw, Poland. This research, organized as a report and case study, reveals a number of critical challenges, best practices, strategies, and informative practitioner experiences for each thematic subject.

**History and Context**: Careful research and analysis of a country’s history and context is critical to providing effective mediation services. Mediation services and larger intervention strategies may struggle if they conflict with a country’s conflict dynamics, history of conflict, history of mediation, pre-existing conflict resolution mechanisms, or the current status and perceptions of mediation in the country. A successful mediation program will seek to address any potential challenges and work to harmonize services with historical and context-specific factors.

See pages 24 and 49 for more information on this subject.

**Culture**: Different cultures provide both opportunities and impediments to mediation. In implementing mediation programs, mediators can draw on cultural practices and culturally relevant dispute resolution mechanisms. On the other hand, if traditional mediation-like dispute resolution mechanisms do not exist, practitioners must work to change the culture of dispute resolution in order to generate support for mediation as a method of ADR.

See pages 27 and 52 for more information on this subject.
Outreach and Mediation in the Media: Lack of awareness and misconceptions of mediation are often cited as two of the major barriers to greater use of mediation services. Creative outreach strategies are necessary to raise awareness and educate the general public and key stakeholders. To improve outreach efforts, mediation centers must target key individuals who are capable of providing mediation referrals or supporting the broader promotion of mediation.

See pages 30 and 55 for more information on this subject.

Mediator Quality and Credibility: In many cases, mediation is damaged by a reputation for poor quality and lack of credibility. Addressing these issues is critical to building greater support for mediation. Mediators can establish best practices and standards as a way to improve quality. To address credibility issues, mediators can work through existing credible institutional actors or work with communities to establish support and communal ownership of mediation practices to increase buy-in. Moreover, mediation may gain credibility through strong community ownership and through mediators who are representative of the community.

See pages 33 and 59 for more information on this subject.

Engaging the Judiciary and Legal Professionals: Members of the legal system can be effective supporters of mediation, but they can also be some of the staunchest opponents to mediation. Judges may fear a reduced caseload, and lawyers may see mediation as direct competition. Extensive outreach and training for judicial professionals is necessary to address the potential reasons for opposition and to improve cooperation with mediators.

See pages 36 and 53 for more information on this subject.

Mediator Networks: Coordination problems often make it difficult to establish networks of mediators. However, mediator networks are often well-placed to promote and advocate for mediation. Additionally, mediation networks can facilitate the transfer of best practices and strategies and can promote quality standards.

See pages 38 and 61 for more information on this subject.
Champions and Government Supporters: A number of cases reveal that champions are critical to the success of mediation programs. Passionate individuals, especially those in the judiciary or government, can propel the growth of mediation. They can also help to build buy-in among critical stakeholders and generate political will in government.

See pages 40 and 61 for more information on this subject.

Monitoring and Evaluation: Despite the costs and challenges of implementation, a monitoring and evaluation system is critical to the success of any mediation program. Monitoring and evaluation helps to gauge the effectiveness of programming, and the data from M&E can also be used to convince authorities, organizations, and the general public of the benefits of mediation.

See pages 44 and 62 for more information on this subject.

Trade-offs with Institutionalization: Depending on the type of mediation, a highly institutionalized mediation framework is not always appropriate. On the one hand, institutionalization can generate credibility, case referrals, and greater sustainability. On the other hand, vulnerable or disenfranchised groups may be wary of participating in mediation tied to institutional actors, and institutionalization may damage community ownership. Moreover, an excessively formalized mediation process may damage the flexibility and spirit of mediation. Mediators should consider these potential drawbacks and the current level of mediation infrastructure within a country when considering the process of institutionalization.

See pages 45 and 63 for more information on this subject.

Understanding the lessons contained in each of these themes will help mediators navigate the challenges of implementing mediation programs in their home countries. By applying the lessons contained in this report appropriately, mediators can make progress in institutionalizing and improving demand for mediation services.
Literature Review

Introduction

A wide range of organizations, institutions, and actors work to promote mediation services in varied environments globally. Despite the heterogeneity of their work, it is possible to use their publications to distill cross-cutting lessons and valuable practices relevant to mediation anywhere. Academic studies provide insights into mediation by examining issues such as culture, referral networks, and co-optation. The work of international organizations, national governments, and NGOs offers further insight into strategies, best practices, and methods for overcoming challenges. The literature informed our subsequent research and interviews and led to the discovery of eight specific themes used to organize our findings. These themes are: history and context, culture, outreach and mediation in the media, mediator quality and credibility, mediator networks, champions and government supporters, monitoring and evaluation, and trade-offs with institutionalization, and challenges in specific mediation domains, such as commercial.

Academic Literature

Most academic studies of mediation focus on its effectiveness in practice, rather than how it came to be adopted in the first place. According to Wall, Stark, and Standifer, for mediation to occur, disputants must want to seek mediation and mediators must want to provide it.\(^1\) The question of why people seek mediation services provides a starting point for analysis.

First, cultural factors are one prominent explanation for why mediation is popular in some societies.\(^2\) For example, the influence of Confucianism, with its emphasis on maintaining societal harmony, has been cited as a contributing factor to the acceptance and success of formalized mediation programs in countries like China and Japan. Collectivist societies – those that tend to have a communal worldview – often exhibit a preference for third-party dispute resolution instead of direct confrontation. This is largely due to cultural factors that stress the need to maintain good relationships among community members.\(^3\) Evidence for mediation as a culturally
acceptable method of conflict resolution can also be found in Malaysia, Thailand, and Turkey, among other countries.

Mediation can also thrive in places without a strong cultural predisposition toward informal dispute resolution. Some theorists suggest that disputants consider the benefits of using mediation based on a rational calculation.⁴ According to this logic, disputants choose mediation when they perceive the benefit from doing so to be higher than the status quo or an alternate method such as litigation. However, there is a dearth of academic research on how mediation practitioners could convince disputants of its benefit to them.

Factors such as the structure and effectiveness of mediation-related institutions also play a role in determining whether and how citizens use mediation services. Rosch’s analysis of the Civil Liberties Bureau (CLB) in Japan argues that formal structures put in place after World War II built upon long-standing traditions but also created a strong institution that independently shaped the demand for mediation services.⁵ The large number of cases the CLB hears—over 300,000 per year—is “proof of its effectiveness.”⁶ Interestingly, and in contrast to other institutionalized mediation programs, the CLB is not part of the formal legal system in Japan and is used by citizens on a voluntary basis.

In communities where mediation is not tied to traditional forms of dispute resolution, how do potential participants learn about the service? Social network theory provides an instructive way of analyzing how information about mediation moves throughout a given population. Both the strength of an individual’s social ties to other members of the community and the prevalence of interpersonal relations in the community as a whole are important for the flow of new information, because information is more likely to be passed to people who know each other well.⁷ ‘Opinion leaders,’ members of a community whose opinions are particularly valued in certain fields (e.g., a music teacher’s recommendation for where to get a new instrument), can help guide people to new services.⁸ Thus, those seeking to improve word-of-mouth transmission of mediation services must consider how social networks are constructed in a given community and how well-placed opinion leaders can be incorporated into the referral process. Similarly, outreach to important civic organizations, such as houses of worship, schools, business associations, and housing projects that are in a position to inform members has a positive effect on the development of awareness of mediation services.⁹
In addition to demand arising organically from the community level, mediation can be encouraged or required as part of the legal system. Mediation has been strongly encouraged for family disputes in Australia since the adoption of no-fault divorce through the Family Law Act of 1973. Mediation is seen as a less expensive, quicker alternative to adjudication, meaning that fewer public funds have to be devoted to the legal system; in the current climate of fiscal austerity, mediation is an attractive option for cash-strapped local, state, and national governments.¹⁰

In China, the so-called “grand mediation” system was instituted in 1999 as a way to address conflicts sparked by urbanization, and it built on the existing model of “people’s mediation” that is common in Chinese society.¹¹ In theory, grand mediation is meant to link the court system, government, and community-based conflict resolution into one unified system, but concerns over impartiality (especially when the government is the target of a dispute) have sometimes limited the efficacy of this system.¹² In general, institutionalized mediation is not meant to replace formal court systems but to act as a complement to them. Whereas mediation programs that originate in informal or community-based organizations often struggle to sustain themselves financially, programs that function as extensions of the legal system benefit from consistent sources of funding and a steady stream of clients.¹³

However, there are trade-offs when mediation becomes formally institutionalized. Forced compliance can undermine the voluntary spirit of mediation or deemphasize dialogue between disputants, which inhibits the development of community empowerment.¹⁴ Official status may also lead to a loss of community ownership. For example, in the United States, grassroots institutions that originated in response to the civil rights movement in the 1960s were “founded on a strong ethic of community control and ownership and…depended upon citizen participation for their viability.”¹⁵ Governments must be careful to avoid co-opting or muting citizen or community-driven mediation, because doing so can result in a loss of legitimacy, and eventually, participation. Incorporation into the legal system can be perceived as blunting an organization’s position as a champion of alternative or radical justice. Reflecting on the case of California, where pre-existing community mediation movements (particularly in San Francisco) have been “co-opted” into the legal code, the late Raymond Shonholtz writes:
“This co-optation compromises the integrity and legitimate purpose of community-justice mechanisms with the concomitant effect that most programs integrated in this fashion suffer a dramatic decrease in the participation of ethnic and minority volunteers, a significant drop in awareness of the program in the local community, and serious diminution of cases referred from the community.”

In San Francisco, community mediation boards arose out of a desire to solve small disputes before they became larger and occasionally violent. In contrast, institutionalization situated the mediation process after a case had been filed in court, as opposed to before, and resulted in a decline in community participation. Practitioners must consider these types of trade-offs when determining how best to institutionalize mediation services within a particular context.

**Applied Literature**

This section summarizes the insights gleaned from examining three major types of mediation practitioners: international organizations, government agencies, and nongovernmental organizations (NGOs). We chose to focus on organizations that work in international settings in order to gather the experiences most applicable to mediation advocates from diverse cultural backgrounds. Thus, agencies such as Federal Mediation and Conciliation Services, which provides labor or workplace dispute assistance to federal, state, and local governments within the United States, were excluded. Although not an exhaustive analysis, the organizations selected provide an understanding of major trends in the thematic areas identified in the introduction and general experiences with institutionalizing mediation services.

*World Bank Group: International Bank for Reconstruction and Development and International Development Association*

Practitioners sometimes frame mediation as a way to relieve the burden of overstretched judicial systems. The International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) provide assistance to support low- and middle-
income countries in judicial reforms; the goal of these reforms is to end poverty and promote shared prosperity by increasing access to justice and strengthening protections for vulnerable groups. IBRD and IDA programs frequently target reductions in court backlogs, which in some cases entails the use of ADR methods including mediation. In addition to reducing court backlogs, the World Bank argues low-cost ADR services can facilitate greater access to justice for vulnerable groups, including poor women and children. For instance, in Colombia, the World Bank applied this methodology to reduce backlogs by promoting conciliation services in independent centers approved and supervised by the Ministry of Justice and Law. In Ecuador, the World Bank also sought to reduce backlogs but chose to support mediation centers within the court system as part of a broader judicial reform package. Finally, in Guatemala, judicial reforms included the use of mediation to provide greater access to justice for indigenous peoples, particularly women.

The World Bank has provided assistance directly for out-of-court mediation and community-level conflict resolution. A grant to the Dispute Resolution Office in Thailand promoted out-of-court mediation for financial disputes. The grant supported trainings, the development of best practices, and the implementation of an awareness campaign. At the community level in Indonesia, the World Bank provided a grant to a working group comprised of members of civil society, the judiciary, and local government to develop informal dispute resolution. The grant included funding for research, training of mediators, and outreach efforts to promote a more supportive regulatory environment. In both cases, funding was directed to government judicial ministries.

In terms of building demand, IBRD and IDA recommend a number of strategies. Some cases outline public relations campaigns and support for the creation of media materials and websites. Other outreach campaigns include stakeholder workshops, roundtables, public radio ads, television ads, print media, and internet programs. Also, judicial ministries have been identified as crucial to building demand for mediation. After implementing a project in Ecuador, the World Bank found that demand at new ADR centers grew through official judiciary backing as more people gained trust in the decisions.
The International Finance Corporation (IFC) focuses many of its efforts on commercial mediation to improve a country’s business environment. IFC found that compared to litigation, mediation can reduce the cost and length of time needed to achieve a resolution. Furthermore, mediation helps companies avoid bankruptcy and preserves important business relationships by allowing for creative agreements. IFC experiences also reveal that mediation can help unlock millions in frozen assets while maintaining a higher level of client satisfaction than litigation. For the larger legal system, mediation can have important side effects, such as improving trust in the system and reducing court backlogs. Internationally, investors look favorably on nations with ADR options, and the presence of ADR may improve overall perceptions of the quality and fairness of the justice system.

IFC began promoting commercial mediation in the Balkans through a series of pilot programs and later expanded efforts to other countries such as Bangladesh, Burkina Faso, Cambodia, Morocco, Pakistan, Tonga, and Ukraine. The pilot projects led IFC to establish a model for the creation of commercial mediation centers. Broadly, this model involves seven key elements: (1) development of partnerships with key stakeholders, such as bar associations and civil society organizations; (2) outreach to involve judges and lawyers in mediation; (3) establishment of a supportive legal framework; (4) coordination with the courts to establish appropriate venues; (5) training of professional mediators; (6) ensuring sustainability by building the capacity of local stakeholders; and (7) raising awareness of commercial mediation within the business community.

As their strategy demonstrates, IFC takes a comprehensive approach to institutionalization. IFC first works to develop relationships with key stakeholders, such as bar associations, the Ministry of Justice, and business groups. These relationships are used to advocate for supportive legislative reforms. Relationships with civil society, the private sector, and organizations such the Chamber of Commerce also help to tie new centers into existing institutional frameworks. Later, IFC focuses on building the physical infrastructure, ensuring locations are convenient and professional.
To build demand, IFC works with the public and private sector to run informational conferences, roundtables, workshops, lectures, and seminars. At these events, IFC provides information on mediation. This step is crucial, as a European Commission business survey found that a lack of awareness was one of the leading impediments to the use ADR. Additionally, during outreach events, IFC stresses the advantages of mediation in three specific ways, “(1) mediation is cheaper and more efficient than the court procedure, (2) mediation agreements are reached by the disputing parties themselves — and are enforceable, and (3) mediation preserves the business relationship between the parties in dispute.”

**Inter-American Development Bank: Multilateral Investment Fund**

Like the IFC, the Multilateral Investment Fund (MIF) at the Inter-American Development Bank supports ADR methods and mediation centers in an effort to improve the business environment and strengthen the private sector. MIF has also worked to establish a network of ADR centers to share knowledge, information, and experiences to further the spread of mediation. Following pilot projects in Colombia and Peru in the early 1990s, MIF worked to build or support mediation and arbitration centers through chambers of commerce. MIF’s model included assistance for training of arbitrators and mediators, creating a supportive legal framework for mediation and ADR, building management capacity, and intensive promotion of services. On a regional scale, MIF helped to establish a network of ten mediation centers. The goal of the network is to promote the benefits of mediation in the business sector and to share potential innovative services that can broaden the market if adopted by other centers.

Though MIF approaches the institutionalization problem mainly by working through a chamber of commerce, MIF also works to modernize legal frameworks to support ADR methods and partnered with the Inter-American Commercial Arbitration Commission to create a uniform set of operating principles and procedures.

MIF acknowledges that the centers struggle to build demand, and they find that businesses do not routinely use mediation services. MIF cites a lack of information, judicial pushback, and cultures that traditionally do not use arbitration and mediation as key impediments. Survey results indicate businesses are most likely to use mediation based on the advice of an attorney, which
shows that buy-in from lawyers is necessary. To improve information campaigns and build demand, MIF recommends further outreach targeting the judicial branch and other professionals to overcome resistance and greater tailoring of outreach materials to a company’s size and sector context. Additionally, survey results indicate that businesses are most likely to learn about ADR services through specialized publications and promotional campaigns carried out by a chamber of commerce.40

**European Union**

The European Union considers access to justice a fundamental right enshrined in Article 6 of the European Convention on Human Rights.41 However, according to the EU, cost, the length of proceedings, and court backlogs challenge access to justice.42 The EU has increasingly viewed ADR in conjunction with the court system as a valuable tool to address these challenges.43

At a high level, the EU is working to create a supportive environment for ADR. Starting with a Green Paper on ADR in 2002, the European Commission (EC) has promoted ADR.44 The EC launched a voluntary Code of Conduct for Mediators in 2004 and published an extensive survey on commercial mediation in 2012.45 In 2008, the European Parliament passed a directive instructing member states to implement reforms "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."46

In January 2014, the EU published a report which used survey and national experience data to try and understand the slow uptake of mediation services since the passage of the directive. While many jurisdictions struggled, the authors of the report cited the success of the Italian system, where mediation has grown substantially. In Italy, parties are only required to attend a preliminary meeting on mediation before they are offered the option to opt-out of the mediation process for litigation.47 The authors argue that the data strongly supports the establishment of ‘mandatory mediation with opt-out’ and recommend the adoption of this strategy broadly based on its proven ability to generate positive results.48
The report also discusses promotional strategies and finds survey respondents looked most favorably on strategies that involve the creation of pilot projects and mediation advocacy education programs at law schools and other education facilities. Annex Two of this report offers additional awareness-raising strategies, such as the creation of a promotional ‘Mediation Day’ or mediation competitions.\textsuperscript{49}

\textit{United States Agency for International Development}

The United States Agency for International Development (USAID) argues that ADR increases access to justice for populations who do not use the court system, addresses conflicts in a culturally appropriate manner, helps to maintain social peace, and is an efficient and effective method to provide justice.\textsuperscript{50} Specifically, in El Salvador, Nepal, and Ukraine, USAID supported ADR to address community and civil disputes, such as youth violence and land-access conflict.\textsuperscript{51} In other cases, such as Mexico and Bolivia, USAID used ADR to reduce court backlogs, freeing up the courts to focus more on drug trafficking and narco-crime.\textsuperscript{52}

As USAID supports ADR in a broad range of environments under varied local conditions, the strategies for institutionalization and building demand can vary considerably. For instance, in El Salvador, the project worked to pass new legislation on mediation and established a national mediation day for outreach.\textsuperscript{53} In Guyana, USAID supported the creation of a five-part television series to promote mediation.\textsuperscript{54} Local intricacies aside, USAID prescribes six broad steps for the effective implementation of ADR: “(1) establish effective procedures for selection, training, and oversight of mediators and arbitrators, (2) find or create a sustainable source of financial support, (3) create an effective outreach and education program to reach users, (4) create support services to overcome user barriers, (5) establish effective procedures for case selection and management, and (6) establish effective procedures for program evaluation.”\textsuperscript{55}

\textit{United States Department of State: Bureau of Conflict Stabilization Operations}

In seeking to institutionalize mediation services, it is important to work with local partners and elicit support from government actors. In Belize, the Bureau of Conflict and Stabilization
Operations (CSO) worked with a local partner, RESTORE Belize, to implement youth and gang mediation programs. The Prime Minister was a key champion of the project, and his office worked to persuade key stakeholders to support the project. Project leaders built demand by focusing outreach efforts on key centers, such as schools and prisons that are areas of high youth violence. CSO addressed institutionalization and sustainability problems by working with an established NGO and working through existing institutions.\textsuperscript{56}

**Non-Governmental Organizations**

Nongovernmental organizations (NGOs) play a unique and important role in conflict management and resolution. As described by the Mediation Support Project, these organizations have local knowledge and understanding, as well as the capacity to work with higher level officials in their areas.\textsuperscript{57} They can also serve as neutral bodies to mediate conflict when governments and international organizations cannot due to political or strategic constraints. Generally speaking, although there are exceptional cases, NGOs are trusted by the local community, which contributes to their effectiveness. Additionally, local organizations and NGOs can “facilitate informal processes that feed into or run parallel to official mediation processes.”\textsuperscript{58}

NGO experiences with mediation mirror many of the same themes evidenced in the experiences of international organizations and government agencies but with facets unique to their role in communities. These factors uniquely position NGOs to expand mediation services and include: being an influential organization; enabling local participation and understanding; facilitating partnerships and networks; promoting education and dialogue; creating necessary community infrastructures; and building local capacity.

The Carter Center serves as an example of an influential organization that works both at grassroots and official levels and has conducted successful mediation projects globally.\textsuperscript{59} Constant monitoring of the in-country environment and conflict resolution activities add to the success of Carter Center mediation projects.

Partnerships and networks between NGOs and local community actors are very important for the expansion of mediation services. For instance, international networks can provide lessons
learned and best practices for each other and for local actors and organizations. NGOs help facilitate the development of these partnerships and networks. There are many examples of partnerships between NGOs, local community networks, and larger outside organizations. In Pakistan, a local non-profit called the Sustainable Peace and Development Organization (SPADO) partnered with the United States Institute of Peace (USIP) for training and other activities. Through this partnership, they created local networks connecting mediators from different sectors so they could share ideas and knowledge. The networks also provided a sense of common purpose. One participant in the Pakistani training explained, “There is a strong need for a peacebuilders' network in Pakistan. Different people are working on this in different capacities, but they are not connected. It is important for them to have a common platform. USIP and SPADO provided this platform for us.”

Another way to increase demand for mediation services is through awareness-raising and education. Practitioners in the field suggest including dialogue, negotiation, and mediation in local education systems. One of the major problems with mediation, particularly related to

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**Spotlight on Sustainable Mediation: USIP in Pakistan**

In Pakistan, USIP has trained many “peace facilitators” who are equipped with the proper knowledge and expertise to manage and prevent conflict and facilitate dialogue between two conflicting parties. These facilitators are successful because they are well-established members of their communities. They also come from diverse backgrounds, which allows them to intervene in many different types of cases.

One example is of a middle-aged Pakistani man who was asked by a fellow villager to intervene in a serious matter because he was known to have mediation experience. A rumor of infidelity created a conflict between two families that could have resulted in the death of both the young man and the woman. The violence could have escalated, creating instability in the whole village. The USIP-trained mediator went to a village elder for assistance in mediating the process, knowing that this man would be trusted by both families. After over a month of facilitation by both the USIP-trained Pakistani and the village leader, the dispute was resolved and violence was prevented. This example evidences the utility of trainings, particularly when they are geared towards non-specialists who will return to their communities and use their new skills when the need arises.

demand for the service, is that it is misunderstood and may have a stigma attached to it. Teaching the general population about mediation in school will make people more comfortable with the idea and may make it a normal part of everyday life.

Lastly, one of the strongest themes is the building of local capacity and the importance of allowing a program to grow naturally from within a community. There is a delicate balance between leaving too soon and overstaying one’s welcome. NGO presence can create an unsustainable model when an outside organization provides so much support that a community becomes dependent on this organization. But some organizations have been unsuccessful in sustaining their mediation programs because they transitioned out before the program was firmly established in the community. Striking the appropriate balance between leaving too soon and staying too long is important for the sustainability of a mediation program.

With this in mind, many organizations stress the importance of building local capacity, relying heavily on a local invitation to work there, and creating the community infrastructure necessary for the mediation service to continue to thrive. Mediators Beyond Borders (MBB) is one such organization that seeks to provide the tools communities need to establish sustainable mediation services without coopting the process. This strategy is only effective if executed in a manner that allows the local community to take what they have learned and knit it into their culture. In Colombia, for example, the community has successfully “integrated [MBB’s] trainings and continues to practice peaceful conflict resolution methods.” An organization must also be highly conscious of the local or regional context in order for their programs to be sustained in communities. For example, in working to establish mediation services for and by refugees in camps in Liberia, MBB must be conscious of issues surrounding the reintegration of ex-combatants into society and the transition from a state of war to a state of stability. All of these things must be taken into account when attempting to establish mediation in a community.

Another example of building local ownership for mediation programs is the Mediators Beyond Borders International Kenyan Initiative (MBB-KI). Here, MBB partnered with the Kenyan Pastoralist Network (KPN) to train community leaders in mediation. These leaders then took their new knowledge and skills back to their respective communities. As the website explains:
The National Coordinator, Lantano Nabaala, was a fierce warrior in his own right. Lantano put down his own weapons and started KPN to demonstrate his commitment to peace and facilitate a non-violent way of life in pastoralist communities. He is now known... as the 'man of peace'. He has asked MBB-KI to consult to extend KPN’s effective peacemaking to effective long-term peacebuilding among more pastoralist communities.62

**Conclusion**

The literature on mediation provides many valuable lessons and several important themes which are echoed across the different sources. The research team found that in many cases, the success of mediation is tied to a critical champion. The champion can help to spread the service by building support and developing partnerships with important actors. Additionally, promotional campaigns can be successful when used to target key individuals such as those in the judiciary or individuals in key referral networks. Local capacity is also crucial to sustainability, and mediation centers should be staffed by competent local actors invested in using mediation to improve the community. These trends and more helped to inform our research and organize the findings into the following categories: history and context, culture, outreach and mediation in the media, mediator quality and credibility, mediator networks, champions and government supporters, monitoring and evaluation, trade-offs with institutionalization, and domain-specific challenges and opportunities. The following report will explore these areas and offer concrete examples and practical tips for practitioners.
Report

Introduction

Mediation as a form of alternative dispute resolution is utilized in many cultures across the globe. Partners for Democratic Change International (PDCI) is one organization that helps establish mediation centers globally, employing mediation programming in support of larger efforts to transform conflict, strengthen democratic institutions, and achieve sustainable development. The examination of academic studies and reports by development institutions, governments, and NGOs highlighted several key themes related to institutionalization and building demand for mediation. Using these themes as a guide, the research team asked PDCI centers and international mediation practitioners about the challenges they encounter while working to establish effective mediation programs and build demand for these services in their communities and what types of strategies they use to address them. Understanding the lessons contained in each of these themes will help mediators navigate the challenges of implementing mediation programs in their home countries. By applying the lessons covered in this report appropriately, mediators can make progress in institutionalizing and improving demand for mediation services.

Methodology

The research team conducted research for this project with a variety of mediation experts and practitioners in the U.S. and abroad. The team employed a qualitative approach, utilizing in-depth, semi-structured interviews to gain insight and find answers to the research question: “What processes and best practices should be utilized by newly trained mediation practitioners in seeking to institutionalize and create demand for mediation services?” The team used purposive sampling in order to select knowledgeable and experienced practitioners and experts to gain insight into the subject. Upon completion of the interviews, the researchers conducted an intensive thematic analysis to triangulate key themes and information to be included in the report. This report is the culmination of interviews with mediation experts and practitioners from
over 30 countries. Based on the information learned from interviewees, the team made several recommendations on the institutionalization and creation of demand for mediation.

**History and Context**

Careful and critical analysis of context is essential for practitioners who seek to implement mediation services in a new environment. In determining whether or not mediation will be useful and beneficial to a particular community, it is necessary to carefully research the conflict dynamics, important stakeholders, and current mechanisms for handling conflict in that community. Bob Bordone, Thaddeus R. Beal Clinical Professor of Law and Director of the Harvard Negotiation and Mediation Clinic, asserts:

> If we are going to land in a different community where we don’t know so much about what kinds of disputes occur, how they come up, what are the processes for dealing with these disputes, are these processes being used, and how robust these processes are, [we will not create an effective system to address them]. Once these factors are assessed, we can then begin to decide if we can design a system for either replacing what’s there, building upon it, or improving it.  

In preparing to intervene in a particular setting, whether a workplace or a community, Bordone suggests an in-depth process of research to determine how mediation might be helpful or detrimental. Bordone states, “I have to figure out what is the felt problem of this organization or community. Just coming in with my product isn’t going to work.” He adds that it is important to identify “Where is the hurt here and how do they speak about this hurt? It could be in monetary terms; it could be in relationship terms, or [both]. I am going to be much better able to offer something if I am meeting [the conflicting parties] where they are.”

Bordone suggests using the “circle chart” developed by the late Harvard negotiation and mediation expert Roger Fisher in his book, *Getting to Yes.* The chart presents an analytical framework for addressing problems of any kind (see Chart One). He asserts, “I always want to start with the symptoms and then…be very systematic in my thinking. People are often in quadrant three, where mediation is located. However, mediation is not always good…” Therefore, he argues that following all the steps in the chart while paying careful attention to the symptoms and diagnosis is essential to determine whether or not mediation *should* be used.
Lynn Cole, a mediation expert and President of Mediators Without Borders, echoes Bordone’s outlook. She asserts that understanding the history and context of an environment is essential for building any new system or intervening into existent mechanisms for resolving disputes. Cole articulates that such mechanisms can be used as a model for a new system of mediation in a particular country. Dianne C. Lipsey, the President of ADR Advantage, asserts that practitioners must step back from “constantly pitching” mediation as the solution and step toward the bigger picture of what they are trying to sell, “which is – a more conciliatory approach to conflict resolution.” Lipsey believes that the key to creating and institutionalizing mediation services is to “engage people in terms of what they are trying to accomplish” and determine what problem they are attempting to tackle, “who cares about [this problem]”, and how your product – mediation – can be translated into something useful to help achieve individuals’ or a community’s goals. At times, mediation will not be feasible or be the best approach. Lipsey cites a one-on-one conflict resolution technique called “conflict coaching” as one example of an alternative approach that is gaining traction in government and the private
sector in the United States.\textsuperscript{71} It is important to assess one’s environment and determine whether or not mediation is the appropriate tool to use.

Understanding the legal context in which a mediation practitioner seeks to operate is an important area for analysis. In 2011, the International Finance Corporation, part of the World Bank Group, commissioned a report on alternative dispute resolution that describes the importance of the legal system in supporting mediation. The report states that “while the extent varies, all types of ADR rely on a legal framework to support them. At a minimum, laws need to allow for the enforcement of settlements or awards reached in ADR processes.”\textsuperscript{72} Knowing how the existing legal code in a specific context may help or hinder mediation efforts allows practitioners to anticipate challenges and employ corresponding strategies to implement mediation services.

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\textit{Spotlight on Mediation and Legislation}

The research is inconclusive about the timing and steps of introducing mediation into the legal system. Rachel Wohl, Executive Director at the Mediation and Conflict Resolution Office in Maryland, states, “It is very important for countries that don’t have a history of mediation to give it credibility – through the courts, schools, or community. It may need legislation. But legislation may be restrictive and could limit mediation to lawyers only. No research shows that a professional degree correlates with better professional mediation.”

Rachel Wohl (Executive Director at the Mediation and Conflict Resolution Office), interview by Miles Painter, March 23, 2015.
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The presence or absence of violent conflict within a given context is a key factor that impacts the implementation of mediation. When asked about mediation in conflict settings, Lisa Inks, a Program Officer at Mercy Corps Nigeria, notes, “Lots of other activities need to be paired with mediation – security sector reform, strengthening of civil society, institutional development, economic development, etc.”\textsuperscript{73} Mediation is only a tool in broader development efforts to address conflicts within a society. Reflecting on his work in Iraq, Sa’ad Al-Khalidy, Executive Manager of the Iraqi Center for Negotiation Skills and Conflict Management, observes that special methods are needed to properly assess the context, especially the drivers of the conflict, to decide whether mediation is a suitable approach.\textsuperscript{74}
In El Salvador, Eva Rodriguez, Director of Partners El Salvador, spoke about the challenge of conducting mediation in a society with high rates of violence. In such an environment, when a person has a conflict, they prefer to avoid it because of fear that the offending party may have relations with organized crime or a gang. Therefore, “it is hard to actually promote mediation” and encourage people to “reach a reasonable agreement” via third party.75

**Spotlight on Overcoming Misconceptions of Mediation in Brazil**

“Being a first-comer has its beauty and its challenges. When I started talking about mediation in 2000, people looked at me and thought I was talking about meditation. That was common. And when they understood that it was not meditation, they asked me if I was a psychologist. There’s a lot of prejudice to overcome… Everybody [lawyers and judges] fears what they don’t know. Mediation has this ‘marketing problem’ because the name mediation [has many interpretations]. So until they understand that when we are talking about mediation, we are talking about a specific process of conflict resolution that has some special characteristics – the mediator has to be neutral and has to be trained and so on—...they believe that they [understand it], and they act according to what they know.”

Gabriela Asmar (Director of Partners Brazil), interview by Lyndsey Romick, March 19, 2015.

An effort to deeply understand the context is a prerequisite for introducing or expanding mediation in a society. The Circle Chart (see page 26) is one example of how practitioners might analyze conflict dynamics, determine possible solutions, construct mediation interventions, and evaluate these interventions. This framework creates a continuous feedback loop of analysis, diagnosis, and action.

**Culture**

Practitioners identify several ways in which culture could be an asset or an impediment to the adoption of mediation services in a country. Societies with limited or no history of mediation-like dispute resolution mechanisms present a greater challenge to aspiring mediators because of general unfamiliarity with the idea. Understanding the culture of a location and its history allows practitioners to be thoughtful and thus, potentially more successful in institutionalizing mediation services.
Cole asserts that practitioners seeking to build mediation services must first “understand the country’s culture and traditions.” For example, India in the 1600s had mediation laws. In Jordan, Cole’s practice assisted in developing court-related mediation programs and used the Hashemite principle of *waasta*, a type of mediation that has been conducted by tribal elders for centuries and the dynamics of which are very similar to modern mediation. Cole believes it is essential to fully understand and integrate local conceptions of conflict resolution in creating new mediation systems or instituting new methodologies within a particular context. 76

History and tradition can be drawn upon and used to inform construction of more modern-day mediation systems. 77 Culture and history can have unquantifiable and potentially unforeseen impact on mediation depending on the values, traditions, and beliefs in a particular society. For example, Cole says the “Japanese [mediation] model of pursuing explanation and [contrition] rather than compensation tracks more closely with their cultural expectation of honesty and apology.” 78 This approach is gaining traction in Japan as a result of being culturally relevant. 79 Recognition of these cultural factors allows the practitioner to adapt methods to increase potential buy-in and gain trust and credibility in a community.

### Spotlight on Mediation and Cambodian Culture

“Cambodian culture has a long history in traditional mediation – people handling their issues at the local level with elders in their communities – called the *mang*. Now, we have village and community chiefs [who handle most of the disputes, so] few go to the *mang*. Mediation is not new, but modern approaches to mediation are new to Cambodians. Because of this long history in traditional mediation, Cambodians are more likely to trust mediators over government authorities, who they perceive as corrupt due to Cambodia’s history of government abuse.

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Savath Meas (President and Board Director of Cambodian Centre for Mediation), interview by Irina Balytsky, March 23, 2015.

According to scholar Ayinla Lukman, traditional Nigerian cultures used a form of mediation until colonial authorities introduced litigation. She writes that today, “Acceptance of the traditional methods of dispute resolution remains deep-rooted, and mediation by chiefs, elders, and religious authorities plays a significant role in the resolution of disputes at the communal level… In this way, mediation is part of the culture, and customary ADR is recognized by legal
Noufal Abboud, the Morocco County Director for Search for Common Ground, believes that the link between introducing new mediation practices in a country and its potential for success is very closely related to the history of that country. In Morocco, the influence of mediation grew out of human rights work and conversations among civil society organizations about how to approach gross human rights violations that transpired during the previous regime. This process helped to raise awareness and support for mediation in Morocco, especially because the governing powers after transition continued to pursue alternative dispute resolution.  

When asked about the challenges of increasing public support for mediation, Lorig Charkoudian, Executive Director of Community Mediation Maryland, responds with an inquiry: “What kept you from taking your last conflict to mediation?” Charkoudian raises this point to articulate that in contexts all over the world, even in the United States where mediation systems are well-developed, there are still hurdles in changing the culture of dispute resolution.
Outreach and Media tion in the Media

Outreach is a key component of efforts to increase the use of mediation services. Many practitioners cite low awareness among the public as a major impediment to greater utilization of mediation. In some cases, the general public may not have any familiarity with mediation, especially in countries where there is no prior history or culture of alternative dispute resolution. In other cases, individuals may have a general understanding of mediation but are unaware of the benefits or how to use mediation services. Practitioners also find that individuals hold false or misinformed preconceptions of mediation, which discourage the use of the service. Outreach campaigns are crucial to raise awareness and educate the public on mediation and should lead to greater use of these services. This section highlights various outreach strategies and their effectiveness in different contexts.

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Spotlight on Mediation in the Chinese Healthcare Sector

In China, mediation has grown in the healthcare industry in response to increased unrest, tension, and violence around medical disputes triggered by systemic corruption, malpractice, and frequent patient deaths. The Chinese government is “seeking a viable way to address the violence…and mediation is an attempt to garner trust from the people in the government and the healthcare system.”

In an effort to address the violence around medical disputes, the People’s Mediation Committee, yi tiao wei, was established in 2006 in Shanxi. In Shandong, from April 2005 to October 2009, the People’s Mediation Committee successfully mediated 536 of 644 cases – a mediation success rate of 85.07%. By April 2011, a total of 1139 yi tiao wei had been established across 30 provinces and 283 cities and counties in China.


Carole Houk (Mediation Consultant and President/Founder of CHI Resolutions), interview by Irina Balytsky, March 5, 2015.


Radio and television campaigns represent one avenue for outreach activities. Partners Slovakia found that a television series showing a fictional mediation session was particularly successful in shaping public opinion on mediation. The hour-and-a-half long series, run bi-weekly on a private television station, depicted various types of mediation sessions from the start of a case to the end, when the case was successfully resolved. In Slovakia, where the public had little prior experience with mediation, this television series helped to accurately display mediation services and demonstrate how mediation could successfully be used in different types of disputes.

But television advertising may not always be appropriate, especially when targeting impoverished or isolated communities. In Guatemala, Mercy Corps found that radio advertisements in local languages are the best way to reach individuals in rural communities. Savath Meas, President of the Cambodian Centre for Mediation, reports strong positive feedback when he speaks about mediation on public radio. He says the country’s Justice Service Center also broadcasts public radio announcements about mediation, and many individuals call in to ask about mediation.

An advertising campaign by the Mediation and Conflict Resolution Office in Maryland demonstrates another way to efficiently advertise via print materials. The Office publishes a number of high-resolution advertisements on their website. These ads use the slogan “Mediation: It’s Your Solution,” and the individuals depicted in the ads are customized for different types of disputes, such as tenant/landlord or divorce disputes (see Image One). These ads can be downloaded by centers across the state and distributed as flyers or brochures. The Mediation and Conflict Resolution Office also reports strong response to its bus advertising and generally sees an uptick in inquiries after bus ad campaigns.

Many countries hold Mediation Weeks or have a National Day for mediation in order to raise awareness of mediation services. During these promotional periods, mediation supporters and practitioners make a concerted effort to promote mediation services through advertising.
presentations, and seminars. In some cases, centers will offer mediation services at reduced or no cost during these periods, which is an effective way to encourage individuals to try mediation.\textsuperscript{89}

Targeting key referral networks, regardless of the method employed, can increase the effectiveness of any outreach campaign. Certain individuals, such as policemen or social service workers, may be the first point of contact for parties in dispute. Other individuals, such as community elders or counselors, may be respected by one of the disputing parties, so their suggestions are influential. If these individuals learn about and support mediation through targeted outreach campaigns, they can provide a reliable stream of referrals to mediation centers (see “Spotlight on Outreach for Youth Violence Mediation in Belize” below).

\textit{Spotlight on Outreach for Youth Violence Mediation in Belize}

At the request of the Prime Minister’s Office, the U.S. Department of State worked with a local NGO, RESTORE Belize, to combat youth violence through mediation programs. While the mediation team was able to train competent mediators, they struggled to establish a steady stream of cases. The team started by identifying areas of high youth violence, in this case, schools and prisons. Team members then met with key counselors in the institutions to discuss mediation and its benefits. The counselors were often the first party in contact with youth disputes; therefore, they could easily direct cases to mediation. By targeting and educating select individuals in contact with a high number of disputes, the mediation team was able to ensure a steady stream of referrals for their mediation program.

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Julie Walton (Mediator & Conflict Management Consultant at Communities in Transition), interview by Miles Painter, March 18, 2015.

Peace Links Liberia trains local commissioners, religious leaders, and local authorities because their opinions and advocacy for mediation are respected and followed by disputing parties.\textsuperscript{90} Rachel Wohl, Executive Director of Maryland’s Mediation and Conflict Resolution Office, stresses that in general, the referral process needs to be simple and quick, as potential referrers are more likely to refer cases if the process is not burdensome and time consuming.\textsuperscript{91}
Mediator Quality and Credibility

The quality and credibility of mediation services and of mediators themselves are important aspects of any mediation service, particularly when attempting to garner acceptance within a certain community. This section elaborates upon the challenges encountered and strategies employed in building the quality and credibility of mediation practice.

One of the challenges in this area is that mediation does not yet stand on its own in many places. It seems that mediation as a practice must receive official recognition and support from established institutions in order for people to believe it is effective and credible, particularly if there is no history of mediation in a community. Sevdalina Aleksandrova, Vice President of the Center for Dispute Resolution in Sofia, Bulgaria, explains that mediation is credible if the court or a lawyer makes referrals, because people trust what the court suggests. Mediation by itself, however, is not credible enough in many places.  

While some rely on legal institutions for credibility, others try to establish credibility through quality assurance standards and other best practices. This can be a good path for those who are unable to gain credibility through institutions or in places where there is little trust and faith in government institutions due to failed projects or unmet promises. Community Mediation Maryland (CMM) has taken a progressive approach to establishing best practices for mediator quality and credibility. They work to build credibility by recruiting and training mediators who are representatives of the communities they serve (see “Spotlight on Mediator Diversity” below). Charkoudian explains: “Part of what we’ve built is very high standards in terms of training and skills, and holding the line on not having non-mediator-related standards as requirements.”

CMM assures quality in their training programs through the application of several standards, but these standards do not extend to centers outside of their network. The certification process to become a mediator includes apprenticeships, and strategy sessions among other exercises and culminates in a day-long program that involves six hours of observed mediation role-playing. Potential candidates are scored on a scale of 1-6. If they receive a score of 4-6, they become certified; if they receive a score of 1-3, they do not pass. The certification process is voluntary for now, but over time, it may become required. CMM has also helped to set standards for the state of Maryland that define the requirements to become a mediation center and receive
referrals. But CMM cannot actually enforce regulations beyond their immediate network. Charkoudian explains: “CMM is a statewide non-profit, not a government agency, [so] we’re not in a position to do any kind of licensing…But we do set standards with best practices. In order to be a community mediation program, you have to meet the ten points of the community mediation model, quality assurance standards, training standards, and more.” While CMM’s standards are influential and respected, other mediation centers are not legally mandated to abide by them.

**Spotlight on Mediator Diversity**

Community Mediation Maryland (CMM) is a central hub for mediation centers in Maryland. CMM developed a system for recruiting mediators with diverse backgrounds who are representative of the community the center serves. This is a strongly held, core value of CMM.

In order to recruit representative mediators, CMM removed some of the academic and education requirements for volunteer mediators. Instead, Charkoudian says, “We want quality assurance to be based on actual skills...that are very directly tied to the skills of mediating, not on college degrees or anything else.” For instance, CMM has mediators who are ex-convicts with little formal education and others from a wide variety of backgrounds. CMM believes that education does not always dictate skill.

Another way to create credibility and local support is through ownership. It is important to provide the tools but allow the local community to grow the program on its own. Julie Walton, mediator with Communities in Transition, explains: “The community has to own the program. You need to start backing out, and then you can transition out. You are empowering them and working with them to build their community center. It should be theirs.” Facilitating community ownership may also help in creating trust and credibility, as it builds legitimacy from within the community, not just from external support.

Interviewees expressed concern that lawyers often believe they can be mediators with little or no specialized training, not recognizing the unique skills required to mediate may be completely different from the skills used to practice traditional law. As Constantin-Adi Gavrila (“Adi”) from Craiova Mediation Center in Romania explains, “[People] think just because they’re
psychologists or lawyers and they work in a conflict environment, that they’re [automatically] mediators, but it takes specialized training to be a mediator. Mediators work with both parties, and it [differs from these other professions].”

Janos Wagner of Partners Hungary also shares this concern. He explains that there was an attempt to pass a law stating that all lawyers can be mediators, “but of course our colleagues were running to the parliament and wanting to take it out,” because it did not make sense. Many decision-makers and lawmakers are lawyers, so they do not necessarily understand all the components of mediation practice. According to Wagner, one of the main challenges in establishing mediation in Hungary was that high-level officials did not understand the existence of a special set of skills necessary to be a mediator, and that this reality should be protected through quality assurance mechanisms.

Some proposed strategies to deal with this question of quality and credibility include improving training guidelines and creating a system based on public confidence in mediation. In dealing with the former, Gavrila suggests more intense training standards for mediators. “We are failing at offering good quality,” he explains, because the requirements for maintaining membership in the Romanian Mediation Council are not strict enough.

Additionally, Gavrila suggests that mediators “provide services with transparency” so that users know a mediator’s style and quality of mediation and so that they can hear feedback from other users who share their experiences. He also notes the many countries where mediation is not considered a profession, which he finds to be detrimental to its growth. “When mediation is not seen as a profession worldwide,” Gavrila explains, “it affects everyone locally; it hurts us. A change in this perception will help.”

While many mediators and practitioners believe that treating mediation as a profession with guidelines and quality assurance is a positive thing, some, like Chris Thompson, an ADR consultant, are more hesitant. Thompson does not “take a strong position on mediator certification or quality control.” He is indecisive because, he says, it can lead to the creation of mediator monopolies, which can turn into “good ol’ boys clubs” that become restrictive to other professionals.

Wohl offers an example of the contention around establishing quality assurance standards for mediation. In her experience, “Some wanted [mediators to be licensed], and others said ‘Over my dead body,’ [because they felt that it would ruin the informal feel of mediation]. We could not bridge that gap.”
The issue of formalizing mediation is difficult, because too much formalization may limit or degrade the service in some ways. On the other hand, establishing guidelines for quality assurance is important, especially for those who believe that professionalizing mediation in this way would greatly assist in establishing credibility. As Wohl reminds us, “A bad mediator can ruin people’s impressions.” Ultimately, practitioners will have to decide what degree of professionalization makes sense for mediators given their specific environment.

**Engaging the Judiciary and Legal Professionals**

Members of the judicial profession are often the first point of contact in many disputes, and they are important gatekeepers who can guide cases to mediation. While judicial professionals can be influential and effective promoters of mediation, they can also present strong resistance to mediation. Judicial professionals may be skeptical of mediation for a number of reasons. Poor experiences with mediation or mediators may fuel a reluctance to send cases to mediation. Judges may also have incentives to keep cases instead of sending them to mediation. In many instances, lawyers view mediation as direct competition and want to prevent mediation from possibly decreasing their income. Finally, judicial professionals might be misinformed about mediation and may not understand its benefits. Given these challenges, there are several strategies that can be used to sway judicial professionals from staunch oppositionists to meaningful supporters of mediation. This section will elaborate upon these strategies.

First, outreach and training are crucial components of any effort to engage judicial professionals. While the “Outreach” section above details strategies appropriate for the general public, there are strategies that can be used to target judicial professionals specifically. To start, many mediators argue that buy-in from judges is necessary for successful mediation. When reaching out to judges, Cole encourages advocates to make two points: 1) mediation can help reduce the backlog of cases, and 2) mediation will allow judges to focus attention on more complex cases. Judges who support mediation have the potential to be valuable champions, encouraging greater adoption and institutionalization in the courts and beyond. In order to identify progressive judges who might be open to supporting mediation, Thompson spoke with his contacts in the legal
community. This allowed him to efficiently and effectively target his outreach effort at receptive parties in the courts.

IFC, which also stresses the importance of judicial buy-in, holds workshops and trainings for judges and lawyers on topics such as: “Basics of Mediation, Case Recognition and Referral”; “The Role of Lawyers in Mediation”; “The Art of Mediation Advocacy”; “How to Support Your Client in Commercial Mediation”; and “ADR Curricula Development Seminar.” In Pakistan, where 91% of the 1,500-plus commercial cases between 2007 and 2010 were court-referred, IFC worked with local partners to educate judges by sending them to the United Kingdom to see a functioning and institutionalized mediation program.

Secondly, mediation advocates need to work with the courts to structure incentives for judges in a way that encourages mediation. For instance, judges might fear a decrease in their workload due to mediation. To address this issue, judges could receive credit for cases they refer that are settled through mediation. Additionally, IFC found that in some countries, (e.g., Serbia, Slovakia, and Uganda) judges preferred to have mediation under their control, which could mean pursuing a court-annexed mediation model.

Thirdly, mediation advocates have several options when trying to gain the support of lawyers. Outreach activities need to demonstrate that mediation does not represent competition. Instead, lawyers can play an active role in mediation by advising clients or representing clients during mediation proceedings. In Morocco, Search for Common Ground found legal professionals were worried that mediation would clash with the existing legal system. In response to this concern, Search for Common Ground worked with the Ministry of Justice to send legal professionals to the U.S. and the United Kingdom, so they could observe mediation working in conjunction with an existing legal system.

Fourthly, mediation advocates can work with bar associations to advocate for change among lawyers. In Bangladesh, the Bar Association initially presented strong opposition to mediation programs in the early 2000s. With the support of other stakeholders, mediators established three pilot family mediation programs and closely monitored the results. Within two years, officials used the results from the pilot program to show that mediation did not reduce lawyers’ income, which mitigated resistance from the legal professionals.
Lastly, to foster long-term change and support for mediation among legal professionals, many mediation organizations work with law schools and universities to provide education on mediation. Ideally, after graduation, these students will move into legal professions where they can support the use of mediation. Organizations can work with schools to provide courses on mediation and ADR and offer other opportunities such as internships and apprenticeships with mediation organizations.

Mediator Networks

Associations, coalitions, and other networks of support for mediators can be instrumental to the success of mediation and to the ambitions of mediators. Networks can take many different forms. In some cases, the network is a centralized list of mediators that shows would-be clients their options while also connecting mediators with other practitioners. In other cases, networks are much more involved with established organizations and serve as a hub to connect mediation centers from all over the country or region, thus providing mediators an opportunity to learn from each other’s experiences and improve their own services through the sharing of best practices and strategies to overcome challenges. This section will describe the various types of mediator networks, their functions, and their utility.

Mediators who do not belong to an association still seem to be supportive of the creation of networks or note the lack of organization as a challenge in implementing effective mediation services. Meas explains that there are no associations in Cambodia and not many mediation centers either. “We train a few people who then go to the provinces and work on their own,” he says.114 This model is quite common and demonstrates the differences among certain mediation organizations. Some are higher-level organizers of mediators and serve mostly as training providers, while others offer direct mediation services and may partner with the former type of organization for additional support.

In El Salvador, mediator networks are nonexistent, but Rodriguez believes they could be successful and quite helpful. She explains: “I think Partners could help and have a role [in] leading [the mediators].” She goes on to say that the creation of a network is something that she would like to help develop and see unfold in the next two years.115
When asked about how mediators are organized in the U.S., Lipsey responds that they are not organized at all. “There isn’t any real collective effort,” she says.\textsuperscript{116} Despite this lack of national organization, certain places have attempted to create networks. For example, Community Mediation Maryland serves as the central hub for about 18 mediation centers, providing training, guidance on best practices, and other types of support. Also in Maryland, the Mediator Excellence Council serves as a quality assurance program and facilitates connection for many mediators.\textsuperscript{117}

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\textbf{Spotlight on International Networking}

Janos Wagner of Partners Hungary believes in the importance of international cooperation and international learning. Wagner says: “We are doing [mediation] training in the country, but we are also trying to gain all kinds of international experience, which means we attend conferences whenever possible just to see what other countries are doing.” Partners Hungary also travels abroad to train others and teach people about mediation.

Wagner finds that international experiences are extremely beneficial for mediators. He says that traveling, networking, and telling their story of building mediation has built their own confidence and capabilities as effective mediators.

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In Bulgaria, some organizations are independent, while others work in networks. According to Aleksandrova of the Center for Dispute Resolution, there are about 1,200 mediators in Bulgaria. She explains that the active ones engage with other mediation centers by providing trainings because they have the funding to do so. Unfortunately, most of these 1,200 mediators are not active.\textsuperscript{118} In Hungary, there are two major ways that mediators are organized. First, there is a list of mediators which is regulated by the Ministry of Justice. Only those who are on the list can be officially classified as mediators. Second, mediators are organized through the National Mediation Association, created in 2000 through the support of a USAID grant for Partners Hungary and some other organizations. Wagner of Partners Hungary explains that in those years, the Association was successful in bringing mediators together on a large scale. Now, it is smaller but still operational.\textsuperscript{119} Wagner describes the challenges of organizing mediators, mostly blaming a lack of resources.
Most mediators strongly support the existence of networks, especially between different sectors, to create positive relationships. Aleksandrova observes that creating networks with other organizations, such as business groups, generates mediation cases as people build relationships and trust in mediators. Yet there is some resistance. One barrier to creating networks may be that: “In general, mediation is an informal, traditional process carried out by community leaders in communal disputes,” as Inks of Mercy Corps Nigeria suggests. Consequently, some may feel that creating networks could result in over-formalizing the mediation system. Another challenge may be setting up the right forum for information sharing and making it easy for mediators to connect and learn from each other.

Mercy Corps Nigeria has been trying to create opportunities for sharing and community support through networks, but they are still working on getting people to use the services. Inks explains, “We have been working on addressing the challenge of forming a mediation network where people are actively supporting each other. We have a database, but communication is mostly two-way (between us and our partners)...We want our partners and community leaders to send out questions to and communicate with each other and other leaders and also form their own networks. [This way], if there is a situation they can’t handle, they can call upon other leaders to help them.”

Champions and Government Supporters

One of the keys to successfully institutionalizing mediation is having community leaders and political leaders who are willing to support it. Here, there is an important distinction between the top-down and the bottom-up approaches. Mediators need the community leaders at the bottom to support the grassroots growth of mediation and encourage individuals to seek out mediation services and resolve conflicts peacefully. Mediators also need the political leaders at the top who are willing to fight to codify mediation in the legal system or set aside resources to support the growth of mediation services. Buy-in from the judiciary can also play an important role (see “Engaging the Judiciary and Legal Professionals”). This section will focus on the role of community leaders, government and political leaders, and key supporters in the legal community.
At the community level, NGOs and grassroots organizations play an important role. In Guatemala, mediators are mainly community leaders. Peter Loach of Mercy Corps notes that community leaders are brought into the organization’s training process, along with the staff of mediation offices housed within municipal governments that Mercy Corps has helped establish. With around 118 mediators across six different municipalities, they can reach many communities, and as their reach grows, they have a better ability to create a “culture of peace”. The NGOs and civil society organizations they work with are “community-based organizations… that are just facilitating a dialogue and opening doors” and “some local NGOs that emerged from this process” and have received sub-grants from Mercy Corps.\textsuperscript{123} Loach explains that it is critically important to work with these community-based organizations, as they do much of “the on-the-ground work”. Mercy Corps’ investment, therefore, helps build local capacity.\textsuperscript{124}

In addition to community leaders, government and political leaders can play a very important role in institutionalizing mediation. They have the power and influence to convince others that mediation is a priority, and they can help by allocating resources for mediation services (see Spotlight below). However, politicians’ capabilities in furthering mediation are dependent upon context, and success may require a well-connected or influential individual to make a difference.

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**Spotlight on Mediation Champions in Government**

Eva Rodriguez of Partners El Salvador believes that finding a champion, particularly one in the government, can be a successful strategy for institutionalizing mediation. She explains that El Salvador had such a leader in 2000-2010 who adopted mediation as his project, campaigned for it, and advocated for it in the Congress. As a result, Congress granted funding for permanent mediator slots so the government could hire and pay mediators. Once this happened, mediation was institutionalized and became sustainable. “It was the leadership of [a] political appointee that was key to this,” she says.

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Eva Rodriguez (Director of Partners El Salvador), interview by Adrienne Toumayan, March 17, 2015

In the United States, Charkoudian of Community Mediation Maryland (CMM) talks of the importance of political leadership, particularly at the local level. She explains that local political leaders and religious leaders who are strong advocates can be very successful change-makers and proponents of mediation. In Maryland, the key political leader was Chief Judge Robert M. Bell
of Baltimore. During his tenure, the state was looking into what could be done to enhance ADR. The courts wanted to improve access to justice through all possible means – not just through the courts. So, Judge Bell and the courts built a funding model for mediation which provided funding for CMM and other centers, which has been crucial to their sustainability. “[Judge Bell’s] vision was really a key piece of it,” Charkoudian explains. The combination of grassroots organization and an influential official with an ambitious vision has carried mediation in Maryland into the present day.

In smaller countries, like Belize, there may be more focus on the local municipalities and local governments rather than on the central government. Walton of Communities in Transition argues that engaging with local government is a good strategy “because they have connection.” She adds that support from the City Council or the Mayor is also good for building mediation services and creating sustainability through buy-in from these institutions that are significant in the community.\(^{125}\) Mercy Corps’ strategy in Guatemala involves setting up mediation centers within municipal government offices to create institutional support.\(^{126}\) In Hungary, mediation benefitted from a key political leader. When criminal mediation was required by the European Union in 2005, Hungary could have passed a very basic law to meet minimum requirements. Instead, the person in charge in the Ministry of Justice at the time favored the idea of mediation and strongly supported the adoption of more robust mediation legislation.\(^{127}\)

In other countries, the mediators themselves are considered the most important supporters. Specifically, Gavrila of Craiova Mediation Centre Association in Romania posits that mediators want “to change the world.”\(^{128}\) Without passionate mediators who truly believe in their work and are willing to volunteer their time to growing and improving mediation services, mediation cannot succeed.

In Morocco, the legal community was extremely supportive and helpful in furthering the reach of mediation. Nina Mocheva, Financial Specialist at IFC, says a respected lawyer was one of the most active center directors they ever had. “He devoted 100% of his time to develop links with the business community, approaching [banks] and inviting them to use the center,” she says. Through his efforts, the banks signed an agreement to exclusively use the center for all disputes. Having an influential leader who will proactively make connections for a mediation practice and reach out to the community is very beneficial for institutionalization.\(^{129}\)
Indicating that it takes cooperation from multiple sectors at the bottom and the top to institutionalize mediation, Inks of Mercy Corps Nigeria says that the important players are “Certain state-level leaders and security leaders who feel mediation should be institutionalized” and, “on a local level, community and religious leaders.” This sentiment was repeated often among the many practitioners interviewed – there are many key players involved, both at the official and grassroots levels.

Many practitioners, like Gabriela Asmar of Partners Brazil, believe that the courts and the Ministry of Justice are some of the most important and most powerful players. However, Asmar explains that while all groups are important, none of them are successful in moving mediation forward completely on their own; partnerships among champions are vital.

While having a champion can be extremely beneficial, sometimes having one political leader or institution that supports mediation services can actually make institutionalization more challenging, as it can become hard to separate mediation from that person or organization. For example, in the event of leadership change and the loss of a champion, mediation may suffer. Mocheva of IFC explains that in one case, “The former Minister of Law, [who was a champion]… was replaced. The new minister did not consider mediation a priority.” Mediation may also suffer when its champion exerts too much control over the process. An example of an overbearing champion is the Procuraduría General (Public Defender’s office) in El Salvador. Rodriguez of Partners El Salvador argues that the Head of the Procuraduría General has been so overbearing that mediation can no longer be separated from the office. She explains: “Now it’s their baby and they think they own mediation…since they have invested so much into [it].” To reinforce her argument, she references a report written by the previous Director of Training at Partners, Janet Murdock, in which Murdock argues that the countries where mediation got stuck are the same countries where institutions monopolized mediation. In El Salvador today, “Mediation equals the Procuraduría General, and the Procuraduría General equals mediation.”
Monitoring and Evaluation

Monitoring and evaluating mediation programs is crucial, despite the challenges of doing so. Proper M&E and data collection systems provide important proof of the utility, benefits, and results of mediation that can be strategically used by practitioners and advocates to further the reach of mediation services. This section will highlight the benefits of M&E and data collection.

In terms of institutionalization and building demand, monitoring and evaluation helps mediators and mediation advocates by providing them with data to use in the promotion of mediation services. Any outreach strategy is more effective when mediators can demonstrate the concrete and quantifiable benefits of mediation. For instance, statistical data or client satisfaction surveys can demonstrate the positive impact of mediation, and some members of the target audience may respond more favorably to quantitative arguments than emotional appeals. To use this type of information in outreach campaigns, mediation centers need to collect data on their services. For example, the IFC, which has significant experience in implementing commercial mediation, recommends collecting: the number of cases mediated, the number of disputes successfully resolved, the level of client satisfaction, the reduction in court backlog due to mediation, the total value of assets released by mediation, and the average cost of mediation. The IFC explains that this data can be collected using program records, court records, company surveys, and client satisfaction surveys.

Lipsey of ADR Advantage also argues that in regards to instituting new services, it is important to focus on data and impact. “Pay attention to metrics,” she says. “If there’s a pilot program, collect the data people care about – usage, resolution rates, and satisfaction areas. Track all these standards and publicize this information.”

Houk of CHI Resolutions found that hospitals and insurers supplied the strongest resistance to mediation in the healthcare sector. But when she demonstrated proven cost savings in legal fees and payouts based on data from other pilot programs, insurers and hospitals were more likely to support mediation. Systematically compiling this type of data will help mediation advocates convince skeptics that mediation is a worthwhile pursuit.
Trade-offs with Institutionalization

There is no one-size-fits-all approach to mediation, and in some cases, a strongly institutionalized environment may not be appropriate. Institutionalized mediation may bring credibility, a steady stream of cases, and long-term sustainability. But vulnerable groups with a history of oppression may be wary of working with institutionalized actors, and community mediation in particular may be hurt by co-option by institutionalized actors. Additionally, the formalization of mediation procedures or requirements may make the mediation process overly burdensome and detract from the flexibility of this process.

Individuals may be wary of engaging the court system because of issues such as corruption, language barriers, and high costs. For example, in Guatemala, Loach found that indigenous communities were hesitant to bring land disputes with large landowners to the courts. The legal system is Spanish-based, which not all indigenous community members speak, and a history of court favoritism toward large landowners has led to perceived disenfranchisement of the indigenous community. In this case, community mediation provided a strong alternative forum to settle disputes without violence. In San Francisco, one author found that incorporating community mediation into the legal code compromised the local integrity of the community mediation movement. As a result, the number of community referrals dropped, and the number of minority volunteers participating in the program decreased.

The formalization of mediation through institutionalization is another possible problem particularly relevant when legal professionals become involved. One of the benefits of mediation is that it can be very informal, and an unofficial process may make people more comfortable reaching an agreement. Involving the judiciary and legal professionals who live in a world of bureaucracy carries the risk of making services too official, to the point where they are no longer effective or attractive to many consumers. The laws in some countries outline the rules around mediation very specifically: who can be a mediator, who can provide mediation services, who can refer to mediation, etc. Though this provides an outline for quality assurance and credibility, it may also be restrictive in some ways. As Dušan Ondrušek, Director of Partners Slovakia, explains, “... the law was changed to start mediation. If it is official, the mediator has to go to a notary to officially register before the procedure can [commence]. Then all the steps need to be
documented on paper, and then a final agreement is signed. This does not allow for informal procedures.”

**Domain-Specific Examination: Commercial Mediation**

As with the judicial community, special strategies should be employed when trying to build greater use of commercial mediation. First, businesses may not be aware of mediation or its benefits. One EU survey found that the leading reason businesses did not choose ADR methods was a lack of awareness of such options. Secondly, businesses may have preferences that are different from other types of mediation users. Like others, businesses may be wary of taking cases to the court system out of concern about time, costs, and corruption. However, businesses may also be concerned about being assigned to a judge who has no expertise in their specific sector. Additionally, businesses may avoid courts because they fear negative publicity or that litigation will damage business relationships. Finally, many businesses may be particularly concerned with the enforcement of disputes, which may make it harder to establish private or free-standing mediation in areas with no supportive legislation or history of private ADR.

To address the lack of awareness in the business community, mediation centers can conduct targeted outreach campaigns. For instance, IFC’s commercial mediation outreach in the Balkans includes many events, workshops, and seminars at key business organizations (see “Spotlight on IFC Business Engagement in the Balkans” below).

Mediation centers can also target certain businesses or sectors where disputes that are more suitable for mediation occur. In Serbia, the President of the Higher Commercial Court in Belgrade called for greater use of mediation in the construction sector. He explained mediation would be valuable here “due to the nature of construction industry disputes. Both economic and construction court experts are required to conduct lengthy and complex assessments of an often very voluminous evidentiary body. Additional and subsequent inquiries make construction disputes among the most time-consuming and long-lasting, resulting in high dismissal and retrial rates.” Mediation would thus be a more timely and cost-effective way of resolving these types of disputes.
In Morocco, one mediation center had particular success working with the banking sector and helping to resolve disputes between banks and debtors.\textsuperscript{145} Banks were worried about negative publicity from aggressive litigation, and because they had to cover the costs of cases under Moroccan law, they found that mediation provided appealing savings.\textsuperscript{146} While mediation was mandatory for small claims, the center convinced banks to refer large claims and negotiated exclusivity contracts, which secured a steady flow of cases.\textsuperscript{147} The Karachi Center for Dispute Resolution in Pakistan also targeted the banking sector and saw all 136 of its privately referred cases between 2007 and 2010 come from this sector.\textsuperscript{148} Additionally, mediators may find it helpful to target in-house counsels for outreach strategies, as many companies will follow their advice and recommendations.\textsuperscript{149}

### Spotlight on IFC Business Engagement in the Balkans

“In partnership with the respective economic chambers, businesses, and professional associations, [IFC] project teams organized seminars, lectures, and presentations to inform and educate the participants about the mediation process and its advantages. The three-part message to participants was simple: i) mediation is cheaper and more efficient than the court procedure, ii) mediation agreements are reached by the disputing parties themselves — and are enforceable, and iii) mediation preserves the business relationship between the parties in dispute.

This message was repeated many, many times during 285 events. These events consisted of 67 conferences, workshops, and seminars; 44 roundtables; 15 direct marketing presentations; 14 academic lectures; 48 press conferences; and countless presentations to economic chambers and the members of the business community, including major corporations from the energy, insurance, and construction sectors. Altogether, the events were attended by more than 6,100 participants and mentioned more than 450 times in the national media.”

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IFC Advisory Services in ECA. “Alternative Dispute Resolution Program (ADR) in the Western Balkans: Giving Mediation a Chance.” \textit{World Bank Group}. 2010.

In some cases, mediation centers are established within a chamber of commerce. Working with a chamber allows mediators to efficiently disseminate information and contact potential clients. Moreover, the reputation of the chamber may serve to boost trust in mediation in chamber-connected models. However, the case flow may not be steady in this model without any type of
court-referral mechanism, and support for ADR may not be a top priority on a chamber’s agenda.\textsuperscript{150}

Finally, to increase the use of commercial mediation, advocates can encourage businesses to add mediation clauses to contracts. Such a clause would require parties to mediate or attempt to mediate before litigation, and because mediation is a non-binding process, parties still retain the option to settle.\textsuperscript{151}
From Solidarity to the 21st Century: Challenges and Opportunities Facing Mediation in Poland

Introduction

Mediation practice in Poland underwent significant changes in the post-communist era. As mediation stakeholders continue efforts to improve mediation services, they face many of the same challenges as the cases discussed in the previous section. By exploring mediation in Poland and the country-specific challenges related to each thematic topic, this report hopes to offer further insights into institutionalization and building demand.

History and Context

In the words of social psychologist and first director of Partners Poland, Zbigniew Czwartosz, “the development of mediation in Poland is a product of several fortunate coincidences.”152 The first “coincidence” is a 1989 visit by the late Raymond Shonholtz, founder of Partners for Democratic Change, at the height of the Polish Solidarity movement. Together, Czwartosz and Shonholtz established the Centre for Negotiation and Conflict Resolution at the University of Warsaw's Institute of Applied Social Sciences and began providing mediation training for the leaders of the nascent Polish democracy. A three-year master’s course in negotiation and mediation was launched at the university and produced 900 graduates between the years 1990-2011.153 Partners Poland emerged out of this center, and Maciej Tański took over leadership in 1994.

The internment experience of political dissidents and opposition activists during the Communist regime in the 1980s was another catalyst for mediation. These groups of people, disillusioned with the traditional administration of justice that lacked restorative elements, sought to change the judicial system and the practices of penal institutions during the socio-political
transformation of Poland in 1989.\textsuperscript{154} Their efforts led to the establishment of several mediation centers in support of mediation in criminal cases.\textsuperscript{155}

In this political climate, mediation was also propelled by the need to more effectively cope with an increasing number of strikes that were overwhelming Poland in the early 1990s. In 1991, the Collective Labour Disputes Resolution Act – one of the first mediation acts in Europe – became law. Termed collective bargaining, it provided a framework to better resolve disputes between labor unions and employers.\textsuperscript{156} Prior to the codification of mediation into Polish law, mediation in this domain was operationalized mostly as social missionary work, where charismatic authority figures would venture to the sites of strikes and assist in the brokering of settlements. Due to such activities, mediation was conceptualized as a free-of-charge social service. The Act of 1991 changed this “flavor and aura.”\textsuperscript{157} The Act spotlighted mediation and rendered it a necessary, required step preceding any recourse to arbitration or strike.\textsuperscript{158}

Following collective disputes, the second domain of mediation to be regulated by Polish law was victim offender reconciliation (VOR), also called penal mediation, which occurred in 1998.\textsuperscript{159} This was introduced through a group of government officials, academics, and community activists who had visited German and Austrian criminal mediation centers in the mid-1990s. This task force established the Mediation Committee under the Ministry of Justice, with financial assistance from the German Heinrich Böll Foundation.\textsuperscript{160} In 1996, the Mediation Committee initiated trainings in criminal mediation, a regulatory framework for criminal mediation, and experimental programs targeting juveniles. The results of evaluations demonstrated that mediation was “exceptionally effective,” with:

- 83% of juveniles agreeing to mediation
- 93% of them reaching agreements
• 95% of the agreements being enforced
• 90% of the aggrieved satisfied with the mediation process
• 14% offender recidivism within two years of mediation

In 2001, juvenile offender mediation became law. High standards for mediators in these cases were created, and this remains the only domain of mediation where requirements for mediator qualifications and training are mandated by law. This is likely due to the sensitive, fragile nature of criminal cases involving juveniles.

In 2004, Poland became a member of the European Union. Since the EU had been promoting alternative dispute resolution since the 1990s, membership had positive effects for furthering mediation in Poland. For example, the Directive of the European Parliament on adopting mediation into certain aspects of civil and commercial matters was published in May 2008, obligating Poland to make some relevant changes to legislation that advanced the institutionalization of mediation.

The introduction of mediation into civil matters in 2005 was significant and served to bolster the scope of mediation services in Poland. It was largely the initiative of legal companies who joined forces with Poland's largest employers' association, Lewiatan. Any mediation center recognized as such could now send lists of its mediators to districts’ chief justices. Furthermore, mediation settlements no longer needed to be taken to notary publics for validation; they could now be taken directly to judges to be validated as legally binding. This enabled a symbiotic relationship between courts and mediation practitioners to begin developing.

In the same year, the Civic Council for Alternative Dispute Resolution at the Ministry of Justice was established. The non-profit leaders, judicial authorities, academics, and researchers who constitute the Council spend “a large portion of [their] professional lives on activities aimed at the...promotion of alternative methods of dispute resolution”. The Council worked (and continues to work) to establish standards and requirements for the training of mediators and operation of mediation.

Experts in the Ministry of Justice and the Ministry of the Economy are currently revising the mediation regulatory system based on the Code of Civil Procedure of 2005. Proposed changes include: the inclusion of a mandatory informational meeting about mediation before cases go to
trial (disputants must attend the meeting but would be free to forgo mediation); the creation of a national register of court-approved mediators; and the creation of greater financial incentives for settling a case via mediation.

As mediation has developed in Poland, Partners Poland has been at the forefront of a number of important efforts, including the establishment of peer mediation and ADR programs in schools and universities. Under the leadership of Tański, Partners Poland established the first professional family mediation center in Warsaw, which has successfully mediated hundreds of family disputes involving property, divorce, child custody and care, alimony, and habitation issues. Partners Poland is also a strong supporter of current efforts to reform mediation laws; Tański serves on the Civic Council at the Ministry of Justice.

**Challenges to Mediation – Culture**

Great strides have been made over the years to institutionalize mediation into the Polish legal system. However, the institutionalization of mediation has not achieved the substantial growth in the knowledge and use of this service that was hoped for, though a steady increase in the utilization of mediation services can be observed over time. The growth in cases of civil mediation (pictured at right) and commercial mediation (pictured on p.58) shows that despite the challenges facing mediation in Poland, progress is being made. Similar trends can be observed across other types of mediation, including family and criminal.

The main challenge to increasing interest in mediation in Poland, according to Tański, is culture. Tański believes that Poles have a very low tolerance for uncertainty, as posited by the findings of
Dutch social psychologist Geert Hofstede. He developed a theory of national cultures according to five main criteria, one of which is ‘uncertainty avoidance.’ Hofstede found that tolerance for uncertainty “differs strikingly” in Anglo-Saxon versus Polish cultures. Since mediation inherently entails uncertainty, Hofstede’s findings may partially explain the difficulty in broadening interest in the practice in Poland.\(^{167}\)

Culture is a particularly difficult challenge to overcome because of the length of time required to do so. Mediation advocates like Tański publish articles and books about the benefits of mediation in attempt to generate public awareness and change perceptions that mediation does not fit into Polish society.\(^{168}\) Changing culture will also come as a by-product of other efforts, particularly those aimed at increasing public knowledge about mediation, convincing judicial professionals to use it, and building awareness in schools and universities.

### Engaging the Judiciary and Legal Professionals

#### The Judiciary

Lack of communication, lack of understanding, and lack of trust are among the key reasons cited for the negative attitude of judges and lawyers toward mediation.\(^{169}\) According to Joanna Sauter-Kunach, judge and mediation expert, the greatest barrier to mediation is an obstacle of perception.\(^{170}\) There is much misunderstanding between judges and mediators, because these groups generally do not interact or collaborate in professional capacities. As a result, mistrust and lack of knowledge about each other’s motives and expectations are common. Additionally, this lack of communication impedes attitudinal change, and negative attitudes consequently inhibit communication.\(^{171}\) It is a vicious cycle.

In the same light, judges do not understand the concept, utility, and outworking of mediation. In general, the mediation process often uncovers auxiliary issues that are connected to the core dispute at hand. Judges do not necessarily comprehend the usefulness and benefits of such an exposure, namely, the provision of an opportunity for the parties to deal with deeper-rooted tensions.\(^{172}\) Therefore, a written agreement reached in mediation often does not make sense to
judges because it references and discusses issues supplemental to the core dispute. Judges do not always understand the utility of resolving disputes in this manner.

There are several initiatives to address the lack of communication, mistrust, and misunderstanding among judges and mediators. The Ministry of Justice, as well as private organizations, set up meetings and conferences for judges, lawyers, and mediators to meet and form relationships. The hope is that if judges personally know and trust a mediator, they will be more likely to refer cases to mediation. This was the experience of Judge Sauter-Kunach, who became a stalwart supporter of mediation upon forming relationships with mediators. The Centre for Mediation at the National Bar Association in Warsaw has been active in promoting cooperation between judges, lawyers, and mediators at the grassroots level. The Centre has found that the most important factor in convincing skeptical or disinterested parties is the strength of personal connections between judges, lawyers, mediators, and other legal professionals at the local level. Katarzyna Przyluska-Ciszewska, founder of the Centre, says: “We try to convince the representatives of the local bars and mediators from regions [outside of Warsaw] to spread the idea [of mediation] there. We can’t do it because we don’t know the judges in those areas. It should be locally owned and initiated.” The development of these personal relationships at a local level is crucial to improving communication channels.

**Lawyers**

Interest in training on the concept, utility, and benefits of mediation among legal professionals is difficult to generate. Over half of the districts surveyed in Poland report judges as uninterested in mediation training. The Centre for Mediation at the National Bar Association organizes such trainings in civil mediation. Most of them are conducted by mediators from England, the U.S. and Poland (those with international experience). Though the Centre has trained 500 mediators over its three years of operation, it persistently struggles to generate new interest in mediation training.

One of the factors that affects support for mediation among lawyers is the Polish approach to the study of law. Legal education mostly consists of rote memorization of codes, cases, and procedures. Students are not necessarily prepared for practical work, and the socio-psychological
elements fundamental to mediation are altogether absent from legal education. This impedes lawyers from inherently comprehending the idea of mediation. The fact that lawyers' salaries are contingent upon the length of the litigation process also makes it difficult to convince lawyers to utilize mediation. (One of the key components of mediation is that it shortens dispute proceedings, effectively reducing lawyers' income).

Despite these challenges, progress is being made. The Ministry of Justice currently has a legal education program in secondary schools that includes mediation. The thought behind this is to inculcate in young people the idea that mediation is normal, so that should they become lawyers, they will either encourage others to use it or use it themselves. Including mediation education in law school and primary and secondary school curricula also facilitates public familiarization with the practice. Introducing courses on mediation and ADR at the university level, in departments such as law, psychology, sociology, and management, builds awareness among the emerging professional class. As a result of such efforts in Poland, the perception of mediation is slowly changing among students of law. Today, greater numbers of law students at least have an understanding of the concept and tenets of mediation, whereas ten years ago, very few considered mediation a credible alternative to the court system at all.

**Outreach and Mediation in the Media**

**Informing the Public**

The Polish public is largely unaware of the availability of mediation services. To overcome this, greater education and outreach efforts are necessary. The Ministry of Justice is actively promoting mediation by sponsoring “week of mediation” and “International Day of Mediation” events, as well as organizing conferences and meetings and training judges and prosecutors. With a grant from the Norwegian government, the Ministry of Justice embarked on an advertising campaign from 2009-2011 to raise awareness of mediation through brochures, posters, billboards, and radio and television ads. One mediation advocate convinced a colleague,
who was the editor of a free magazine, to distribute about 10,000 pro-mediation leaflets and brochures to people on their way to work.\textsuperscript{185}

Unfortunately, efforts like these have to overcome engrained negative perceptions of mediation that are also perpetuated by media outlets. The news has largely done a disservice to the perception of mediation in the general public. In the 1990s, one of Czwartosz’s students wrote a thesis on the language of news in Poland and discovered that words such as “conflict,” “resolution”, and “strike” are limited to specific contexts the majority of the time. The media does not write about negotiations unless they failed, creating a negative association with the practice; the media reports on strikes if they succeeded, creating a positive association. This embeds the notion into public consciousness that mediation is arduous and ultimately fruitless.\textsuperscript{186}

Beata Czarnecka-Dzialuk, a researcher at the Institute of Justice, comments that when mediation was first instituted in Poland, it was “trendy”, as it was promoted by political dissidents who were blazing forth a new path post-communism. But the idea has since lost its original appeal. A renewal of the concept of mediation – the manner in which it is framed, conceptualized, discussed – is needed for mediation to regain public appeal.\textsuperscript{187} One possible solution is to incorporate mediation scenes into popular television programs to “show the practical face of mediation.”\textsuperscript{188} Not only would this correct negative perceptions, it would also increase general familiarity with and awareness of mediation, making Poles more likely to request it in the event of a dispute.
Domain-Specific Challenges: Juvenile Offender Mediation

Some domains of mediation carry their own unique challenges. A specific difficulty in juvenile mediation is that the courts are not greatly interested in utilizing it; there are approximately 300 cases per year that are referred by the courts.\textsuperscript{189} Though evaluation data of the experimental programs conducted by the Ministry of Justice in 1996 (discussed in the “History and Context” section on p.50) shows such mediation to be successful and beneficial, juvenile offender mediation has not gained traction.\textsuperscript{190} One potential explanation is that public prosecutors and probation officers are quite entrenched in the conventional way of handling such cases and are not open to innovation. Furthermore, the judiciary prefers and has more trust in well-established mechanisms in handling juvenile offenders.\textsuperscript{191} Finally, given that criminal mediation is more complex and requires greater comfort with the law, training these mediators requires greater knowledge, expertise, and experience, and it is a challenge to find trainers who possess the skills to teach criminal mediation.\textsuperscript{192}

Domain-Specific Challenges: Collective Bargaining Mediation

The laws which regulate mediation in collective disputes are criticized by labor unions as being partial against them. Unions also decry the objective scope of these laws as being too narrow. Another complaint is that the mechanism for resolving collective disputes is highly convoluted, and the process is too time-consuming.\textsuperscript{193} Collective bargaining also encounters resistance from employers. It is very common for employers to not inform the Ministry of Labor or the inspectors of labor commissions about a dispute that arises in their work place, as they are mandated to do by law. Many of these employers reason that a particular dispute does not qualify under the Act of 1991 as necessitating mediation. Because there is no institution that decides whether an issue qualifies or not, employers can get away with not reporting their disputes.\textsuperscript{194}
Domain-Specific Challenges: Commercial Mediation

The Ministry of the Economy is actively promoting commercial mediation to the business community. According to Undersecretary Mariusz Haladyj, the Ministry supports mediation because it gives business owners in conflict a way to smoothly resolve disputes and preserve relationships.\(^{195}\) The Ministry is also concerned with the cost of commercial litigation. Prolonged disputes are “costly both for the businesses themselves and the Polish economy as a whole.”\(^{196}\)

Because of the length of time it takes for a case to be resolved in court, the Ministry is using the cost-saving qualities of mediation as a selling point to motivate businesses to use it. According to Ministry estimates, commercial litigation costs the Polish economy several billion zloty annually in court fees, legal fees, and lost productivity.\(^{197}\)

In order to convince businesses of the benefits of mediation, the Ministry plans to “promote concrete cases” where mediation was beneficial and draw parallels for particular situations in which businesses find themselves.\(^{198}\) Examples include: showcasing how mediation allows businesses to focus on their operations and not become distracted by long-term disputes; showing how mediation is more private than a trial; and demonstrating how mediation is less costly than litigation.\(^{199}\)

To encourage hesitant businesses, the Ministry is using a court-referral process to “show that the authority of the judge supports the mediation procedure” and to build incremental support for mediation.\(^{200}\)
Mediator Quality and Credibility

Currently, most mediators in Poland are not properly qualified or trained. Except for juvenile offender mediation, where training is mandatory and rigorous, an accreditation system is non-existent, and training is not required to mediate in civil or other criminal cases. Other than being 18 years of age, few to no other requirements are imposed upon mediators in civil cases. As a result, people's first contact with the mediation process is not necessarily positive. Also, poorly trained mediators are a product of poor trainers. Some mediation centers feel that instructors are not knowledgeable or experienced enough in mediation and do not know how to teach well enough to be able to properly educate mediators.

Several agents in the Ministry of Justice and mediation practitioners like Tański have attempted to insert mediator training into law as a necessary component of mediation practice, but the Polish Parliament has struck down such efforts, positing that mediation is “not a profession”, so training and official requirements are unnecessary.

A consequence of the lack of training is the failure of mediators to perform certain necessary duties. For example, not all mediators send their settlements to a judge for validation, though they are obliged to do so by law, simply because they are uninformed of this legal requirement.

Yet there are some mediation practitioners who feel that mediation should not be more strictly regulated and that higher standards and levels of qualification for mediators should not be mandated. These practitioners point out that higher standards would necessitate better trainings and more qualified trainers, which are not easily found in Poland (and precisely the reason why Przyłuska-Ciszewska of the National Bar Association only allows British and American mediators or Polish mediators with international experience, to train her mediation students). Furthermore, formal standards would require the establishment of a regulatory apparatus. As a result, Przyłuska-Ciszewska is not sure standards for mediators would help Poland, because accountability would remain an issue.

A possible solution to these challenges is to vary the level of professionalism required of mediators according to the type of mediation. For court-referred mediation, “when the state stands behind the mediator, a certain level of training should be required…maybe even formal
licenses.” By contrast, in private mediation, if the parties involved want to use a certain mediator, it may not be necessary for that person to have extensive credentials. He or she should have some basic training in mediation essentials and should be informed of all relevant laws but may not need to be subject to the same types of regulations as criminal or court-referred mediators. Because standards and mediator training can only be addressed by the legislature, due to the patchwork nature of mediation regulations in Poland, political will is necessary for change to take place. The lack of ubiquitous, visible political will in the Polish parliament poses a challenge, as will be discussed further on pages 61-62.

An important way to build credibility in mediation is to charge a fee for these services. Mediator income is low, and it is not possible to sustain a livelihood on a mediation career alone. This reality prevents a person from investing their full capacity into mediation, which certainly inhibits the growth of mediation services in the country. Providing mediation for free is an attractive benefit for low-income or cost-conscious disputants, but it does not build confidence in mediation as a legitimate, professional service and may discourage participants from taking the process seriously. As a result, people should be required to pay at least a small fee for mediation, in order to build credibility and generate investment in the outcome of the process.

**Availability of Mediators**

The availability of mediators in certain districts to respond to cases poses a challenge. Not every district court possesses a substantial number of mediators on retainer. So, even with “an army of people who are trained,” if these mediators are not being dispersed to cover the territory of all district courts, then court referrals to mediation and the use of mediation services by disputants will be compromised. If the parties to a conflict must travel long distances to find mediators, broadening the scope of mediation and encouraging more court referrals is impeded. Ensuring that there are mediators available in every district court can help solve this problem.
Mediator Networks

Though there are many mediation organizations in Poland, coordination among them is lacking; in its place is tension and competition. The largest mediation organization is the Polish Mediation Center, which is perceived as somewhat imperialist by smaller mediation organizations. The Mediators’ Club was founded as an alternative to some of the major organizations with the express intent of fostering cooperation among groups. The National Bar Association trainings mentioned earlier create networks among the mediators themselves where they can meet, exchange ideas, and receive access to literature and other mediation resources. These networks are crucial to sustaining momentum, building upon past successes, and fostering collaborative and cooperative environments.

Champions and Government Supporters

Supporters of mediation at the Ministry of Justice meet with judges to inform them of the benefits of mediation. According to Sauter-Kunach, “when judges believe that mediation is valuable, they can convince parties to engage in mediation.” So, identifying and engaging particular judges who could become champions of mediation is crucial to building overall support. Judges and other legal professionals also tend to trust research and the opinions of other experts. In its promotion of commercial mediation, the Ministry of the Economy has used groups of experts—judges, lawyers, academics, and practitioners of mediation—as well as survey results and research to build initial support. For instance, a particularly active judge has championed peer mediation programs and mediation in juvenile cases in the city of Lublin and has enabled the use of mediation in these domains to increase. Pinpointing influential figures, such as one judge who embraced mediation and began asking other judges why they had not referred cases to mediation, are crucial to creating the support systems necessary for mediation to thrive. Other influential figures, like the head of a district court or a prominent politician, are necessary to advance mediation advocacy.
**Political Will**

The absence of political will poses a great challenge to mediation becoming more widely promoted and used by judges. Polish politicians have not, in general, displayed the type of commitment to mediation that is needed to convince judges of mediation's benefits and utility.\(^{219}\) One reason behind this is the mindset of many politicians that mediation is a volunteer's occupation and that mediators are unqualified to handle actual cases.\(^{220}\) Effort needs to be exerted to alter such negative perceptions.

The historical context and personal experiences of legislators influenced the ability of early mediation advocates to get support from the government. Because many members of the new Polish parliament at independence were dissidents who had spent time in Soviet prisons, they were enthusiastic about mediation and ADR. But as the government changed, support for mediation waned.\(^{221}\) Now, a more strategically targeted campaign to garner political support may be necessary. Mediation experts currently pushing for mediation reform and changes to the Code of Civil Procedure could try to identify specific members of parliament whose personal background might make them receptive to the idea of mediation and encourage them to become a champion of mediation. More visible support from Polish politicians would also help persuade judges that mediation is useful by showing that there is institutional backing for the practice.\(^{222}\)

**Monitoring and Evaluation**

In general, institutional mechanisms for managing mediation, reporting, and collecting data are lacking. The courts do better to collect data and statistics on mediation than do mediation centers and individual mediators, but all in all, data collection is inadequate. The courts have not created a mechanism for feedback on mediation, so judges do not know if their mediators are effective or not.\(^{223}\) In this sense, there is no accountability on mediators, and data on the effectiveness of mediation across all domains is hard to come by. There are situations when mediators discuss a mediation procedure, but this originates from the need of a mediator to report, not the requirement of obligatory reporting. Disputes often go unregistered, particularly in collective bargaining cases, making it difficult to monitor and track the number resolved by mediation and the outcomes of these resolutions.\(^{224}\) Monitoring and evaluation mechanisms are also important
in convincing judges, who tend to trust research, of the benefits of mediation. Undersecretary of the Ministry of the Economy Haladyj notes that some judges are waiting to see what the actual outcomes are before they endorse mediation. Many interviewees point out the importance of research on the outcomes of mediation and how this information can be instrumental in convincing skeptical judges about mediation's utility.

Institutional development of uniform practices for assessing mediator performance, tracking cases, collecting data on mediation results, and collecting participant feedback could help alleviate some of these issues. Partners Poland administers questionnaires to mediation participants to help with internal evaluation of their services, but this practice is not as widespread throughout Poland as would be desirable. Creating and implementing methods for tracking case outcomes would also help to professionalize mediation and increase its credibility in the eyes of the public and among legal professionals.

**Trade-offs with Institutionalization**

Though institutionalization is generally considered an important step to building the credibility and utilization of mediation services, some Polish practitioners feel that institutionalization has not significantly facilitated the use of certain mediation services among the Polish population. The initial idea on the part of the government officials, academics, and nonprofit organizations that labored to institutionalize mediation into Polish law was that if mediation is grounded in the legal system, it will generate a market outside of that system. In other words, in order for mediation to be sought out by the public, it must go through a rite of passage as a predominantly court-annexed process. Though this may be true of commercial mediation, since businesses require the stability in an environment produced by institutionalization, this does not have to be the progression of the process for every type of mediation. Family (community) mediation did not require court referrals in order to be utilized extensively; individuals came and continue to come of their own accord in pursuit of these services. Therefore, institutionalization may not be a necessary step for every type of mediation to be pursued by the public.

One of the consequences of institutionalization, in Tański's opinion, is that it has caused mediation centers to morph into subcontractors to the courts. As mediation has “juridicized,” the
bulk of cases handled by mediation centers are court-referred. This has caused some centers, such as Partners Poland, to feel overburdened by court referrals and to lack the capacity to pursue commercial cases. For this reason, some practitioners have deliberately decided to stop receiving cases from the courts.

Because the first official act establishing mediation referenced collective bargaining, mediation incurred a reconciliatory flavor. This connotation remains today and makes it difficult to institute or encourage other uses for mediation, as a non-court-referred or non-reconciliation-oriented process. In Tański's opinion, the manner in which mediation is initially implemented in a country and the way it is framed greatly affects who utilizes it and how as the practice evolves going forward.226

Conclusion

Despite the challenges discussed above, the future of mediation in Poland is bright. Mediation advocates in Poland are passionate and firmly committed to developing strong mediation institutions in both court-annexed and private settings. As more resources are devoted to making mediation promotion a priority, mediation as an institution will thrive. If current efforts to amend the Code of Civil Procedure are successful in clarifying mediator quality and credibility, some of the uncertainty surrounding mediation will dissipate. The proposed mandatory informational meeting prior to litigation could generate a significant increase in civil cases going to mediation. Some mandatory or court-annexed processes may be necessary to generate sufficient demand for mediation services initially, but as more people become exposed to mediation or hear about it from their peers, organic demand for mediation could arise. Building on recent successes in outreach, engagement, and court-referred caseloads will require a concerted, coordinated effort among mediation advocates such as Partners Poland, the Mediation Centre at the National Bar Association, and the Ministries of Justice, Labor, and the Economy. Better monitoring and evaluation processes will equip champions with the information they need to address potential barriers and to recognize and share best practices with the larger Polish mediation community. Only then can the true potential of mediation be realized.
Recommendations

Based on the team’s research and the challenges and guidance presented above, we recommend a number of key strategies to institutionalize mediation and build demand.

I. **Context**
   1. Context is everything. Do your homework and understand the conflicts and the current mechanisms for resolving them in a particular environment.
   2. Determine if mediation can work to improve the existent mechanisms for resolving conflicts.
   3. There is no such thing as a one-size-fits-all strategy. Research and adapt best practices to implement in a new environment.
   4. Work to understand the people and the problems, and create strategies to intervene productively and mitigate harm.
   5. In many contexts, mediation is only one tool that must be accompanied with other institution-building and development work to be effective.

II. **Culture**
   1. Understand the culture and history related to conflicts and conflict resolution mechanisms.
   2. In attempting to build support for new types of mediation services, look for footholds and local examples to build on.
   3. Incorporate culturally relevant ideas and themes into mediation methodologies and work in creating awareness and support for mediation.
   4. Work to adapt and change the culture around resolving conflicts.

III. **Outreach**
   1. Educate and train key individuals who are in contact with a high number of relevant disputes, such as social service workers, to build a stronger referral network.
   2. Collect strong data on mediation programs to construct effective outreach messaging, showing the concrete, positive impact of mediation.

IV. **Mediator Quality and Credibility**
   1. Use existing institutions to increase the credibility of mediation.
   2. Establish universal mediation standards and best practices.
3. Treat mediation as a profession.
4. Mediators should reflect the diversity of the community they service.

V. Engaging the Judiciary and Legal Professionals
1. Conduct training to educate judicial professionals.
2. Identify and gain the support of individual judges and lawyers who are receptive to mediation and can advocate for change from inside of the system.
3. For long-term change, work with universities and law schools to provide courses and instruction on mediation.
4. Work to expose judicial professionals to institutionalized mediation in other settings or countries.

VI. Mediator Networks
1. Establish networks and forums for information sharing between mediators

VII. Champions
1. Champions are a crucial asset, but avoid overdependence on a single champion in the long-term.

VIII. Monitoring and Evaluation
1. Collect data on mediation programming and use that information to enhance outreach

IX. Trade-off with Institutionalization
1. Consider the potential drawbacks of an institutionalized model before settling on an institutionalization plan

X. Meeting the Needs of Businesses
1. Work to build relationships with business sectors that handle disputes that are more suitable for mediation.
2. Tailor commercial mediation outreach based on the sector and size of the business.
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## Annex I

### List of Interviewees

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<tr>
<th>Name</th>
<th>Title/Position</th>
<th>Organization/Location</th>
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<td>Bob Bordone</td>
<td>Thaddeus R. Beal Clinical Professor of Law and Director</td>
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<td>Carole Houk</td>
<td>Conflict Management Consultant, Attorney, and President and Founder</td>
<td>CHI Resolutions</td>
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<td>Gabriela Asmar</td>
<td>Director</td>
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<td>Janos Wagner</td>
<td>Former Director</td>
<td>Partners Hungary</td>
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<td>Joanna Sauter-Kunach</td>
<td>Judge</td>
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