

Justice beyond the Bench: Comparative Study of Dispute Resolution Councils (2017) And Alternative Dispute Resolution Councils (2020) In Khyber Pakhtunkhwa



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Abstract: *This research provides a comparative study of the Dispute Resolution Council 2017 and the Alternative Dispute Resolution Act 2020. Both legislative measures aim to enhance the efficiency and effectiveness of alternative dispute resolution mechanisms in various legal systems. The basic question that this study tries to answer is, "how do Dispute Resolution Council 2017 and Alternative Dispute Resolution Act 2020 compare in optimizing dispute Resolution in Khyber Pakhtunkhwa? To answer the question, this research examines the key provisions, scope, and objectives of the two acts, analyzing their similarities, differences, and impacts on dispute resolution in different jurisdictions. Further, the study evaluates the effectiveness of the Dispute Resolution Council 2017 and the Alternative Dispute Resolution Act 2020 in achieving their intended goals and explores potential areas for improvement in both legal frameworks. The study employs a qualitative approach comparatively analysing these laws, their domain and area of operation so that the courts, judges, lawyers and academia can test their potential to lessen the burden on mainstream courts. It will help legal actors to find their role in strengthening the alternative dispute resolution regime. The findings of this study will contribute to a better understanding of the strengths and weaknesses of each legislative measure, inform policymakers on potential refinements, and provide valuable insights for practitioners engaged in dispute resolution.*

Keywords: Dispute Resolution Councils 2017, Alternative Dispute Resolution Act 2020, Khyberpakhtunkhwa, Courts, Jirga

Introduction

The adjudication of disputes through court process and well-developed adversarial litigation system is well-recognized all over the world for its highly important features: consistency, openness, accessibility,

impartiality, fairness, equality, authority and sanction, to name the most respected ones¹. However, due to increase in population However, due to increase in population² at one hand and lack of judicial resources both in terms of wo(man) power (judges, court staff, advocates, etc.) and infrastructure (courtrooms,

¹ See generally, van Caenegem, William, "Advantages and disadvantages of the adversarial system in criminal proceedings" (1999). Law Faculty Publications Paper 224. http://epublications.bond.edu.au/law_pubs/224. Last Accessed on 18 July, 2017.

² It is approximately 103m. See official website of Population Welfare Department, Government of Punjab. Data accessed from http://www.pwd.punjab.gov.pk/population_profile. Last accessed 18 July, 2017.

information technology, jails, juvenile detention facilities, residential facilities for court related persons, etc.)³ at the other coupled with less priority given by the respective governments to the law and justice sector, the courts have been obsessively over-burdened everywhere. This statement is even true for the US,⁴ Canada,⁵ Australia,⁶ India and England;⁷ Pakistan⁸ being no exception to it. The result:⁹ Justice delayed.¹⁰ The interpretation: Justice denied.¹¹ When seen in this context, we found that the judicial and legal landscape in Pakistan was not indifferent to this realization.

Beginning from 1908 when the Code of Civil Procedure was enacted in British India, the provisions of arbitration were part of this enactment. In 1940, and keeping in view the importance of the arbitration proceedings, a separate enactment with the title The Arbitration Act, 1940 was enacted and relevant provisions from the CPC were deleted. Pakistan adopted prepetition laws and in said legacy, the CPC and the Arbitration law came on its statute book. The Constitution of Pakistan 1973 also adopted ADR method for water related disputes between the provinces and federation etc. In 1984, the

Qanun-i-Shahadat Order, brought another change when it introduced the concept of decisions on the basis of special oath in civil matters. Thereafter, in the first decade of 21st Century, in response to this reality, several laws have been enacted by parliaments around the world to promote and facilitate the use of alternative civil and criminal conflict resolution methods, such as mediation and reconciliation. Dispute resolution was introduced. A wake-up call was also made by the National Judicial Policy. This paper discusses and introduces the new legal regime and landscape that requires the courts and judges to be active partners in ADR methods of judging. This paper is aims at helping the judges, advocates, law students and researchers to see if these changes have been assimilated by the legal actors while they work in their given spheres and jurisdictions or still their due notice be taken by them.

Conflicts among persons & groups are caused due to Lack of resources including money, power, land; and disparities in beliefs and ideology. Dispute results in a situation in which persons or groups presume that their resources or benefits are at risk. To protect the scanty

³ See generally, National Judicial Policy 2009 (Revised 2012), available online at <http://ljcp.gov.pk/nljcp/assets/dist/NJP/njp.pdf>. Last accessed on 18 July, 2017.

⁴ Only for immigration cases, the courts in USA are much over-burdened. See <https://www.usatoday.com/story/news/politics/2014/07/19/immigration-childrenmigrants-judges-deport/12748571/>. Last accessed on 18 July 2017.

⁵ See <http://www.cbc.ca/news/politics/justice-ministers-court-delays-1.4088358>. Last accessed on 18 July, 2017

⁶ See <https://www.theguardian.com/australia-news/2017/jan/31/courts-around-australiaface-huge-backlog-of-criminal-cases-report-finds>. Last accessed on 18 July, 2017.

⁷ See <http://indianexpress.com/article/india/district-courts-2-81-crore-cases-pending5000-judges-short-across-india-4475043/>. Last accessed on 18 July, 2017.

⁸ See <https://www.lawgazette.co.uk/news/plans-unveiled-to-tackle-backlog-and-delaysat-court-of-appeal/5055427.article>. Last accessed on 18 July, 2017.

⁹ One of the Principles of Policy in the Constitution reads: The State shall....ensure inexpensive and speedy justice. [See Chapter 2, Part I, Article 37(d) of the Constitution of Pakistan, 1973.] To access this Part of the Constitution of Pakistan, visit

¹⁰ It is a common „myth“ prevailing in our judicial and legal circles that judges do not work optimally in a given working day and hence cases remain pending for years. The factual position is otherwise: Every judicial officer is already working more than his or her capacity and is deciding much more cases per month than required by the high courts under their „unit system“. The need is to attend other circumstances like increase in number of judicial officers, better working conditions and facilities of infrastructure and incentive based competitive salary package for quality in justice delivery system. There is also a need to make lawyers more accountable for the cases they conduct so that, apart from substantial justice in terms of final judgment, procedural justice in terms of timely progress of a particular case might also be delivered to the litigants.

¹¹ <http://ljcp.gov.pk/nljcp/assets/dist/NJP/njp.pdf>. Last accessed 24 December 2017.

resources or to protect one's interest, disputes mostly conclude in subjugation and sometimes even in eradication of the opponents. Disputes are prevalent among humans resulting in crimes and violence; and therefore, jeopardize the steadiness of the society. Using strategies and mechanisms have always been part of human inheritance to resolve disputes. Historically a wide range of strategies have been adept to resolve conflict and to maintain law and order situation in different societies.

The traditional techniques of conflict resolution are based on sociocultural institutions such as "Jirga system" in Pakistan and Afghanistan Panchayat in Punjab Pakistan and India and in China there are mediation boards. In western world informal mechanisms of the conflict resolution are different from formal techniques employed to settle disputes ("Riechel, 1998"). Although Jirga and Panchayat system have been playing a crucial part in DR and peace maintenance, the practice of socially-condemnable impositions and lack of uniformity in decisions in these informal setups resulted in their notoriety.

Pakistan has generally the following laws which have elements of ADR:

1. Constitution of Pakistan, 1973 (Arts. 153-55)
2. S.89-A of the Civil Procedure Code, 1908 (as amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution methods).
3. The Small Claims and Minor Offences Courts Ordinance, 2002.
4. Sections 96–99 of the Khyber Pakhtunkhwa Local Government Act, 2013.
5. Sections 10 and 12 of the Family Courts Act, 1964.
6. ADR provisions of the Code of Criminal

Procedure, 1898.

7. Plea Bargaining (sec. 25 of NAB Ordinance, 1999)
8. The Probation of Offenders Ordinance, 1960
9. The Arbitration Act, 1940.
10. Article 163 of the Qanun-i-Shahadat Order, 1984 (decision on oath)

We see briefly, in this article, that how these provisions are working in Pakistani environment and how courts are using them for minimizing the burdens on their always rising backlogs. Further, we will also see how the courts can use these provisions using different ADR tools.

In England, the present ADR movement is result of Lord Woolf Reforms of 1999 wherein “a clear signal has been given to litigants and their advisers that the settling of disputes in court should be a last resort and that mediation should be used at the earliest opportunity (Callar, 2002).¹² The trend was followed immediately in Pakistan when in 2002, reforms were introduced in civil law and ADR was properly introduced in the Code of Civil Procedure, 1908 (hereinafter CPC)¹³. But it is also important to remember that ADR itself is not a „brand new“ procedural concept for Pakistani jurisprudence. Instead, we have a pre-partition arbitration law of 1940 that allows parties either to settle dispute before coming to court or if they have opted to fight legal battle in courtroom, still they can go for alternative means of dispute resolution but with express permission of the court¹⁴. The basic guidelines have been provided in the Constitution of Pakistan, 1973. Under the Chapter of “Principles of Policy” that “the State Shall ensure inexpensive and expeditious justice”. Although the Principles of Policy are not, in stricto sensu, justiciable before courts of law,¹⁵ but in the constitutional scheme of things, the State institutions are required to follow these

¹² (Callar, 2002)

¹³ Section 89-A read with Order 10 Rule 1-A of CPC.

¹⁴ The Arbitration Act, 1940. [It is pertinent to mention that before the enactment of the Arbitration Act, the relevant provision in the CPC was its original section 89. However, after

enactment of 1940 Act, section 89 was omitted. See s.49 of the Arbitration Act, 1940 and its Third Schedule.]

¹⁵ Lahore Development Authority v Imrana Tiwana, 2015 SCMR 1739.

principles and hence are enforceable indirectly as aid in interpretation of other provisions of the Constitution and of legislation.¹⁶ From this interpretation, it is clear that the State is duty bound to provide means for „inexpensive and expeditious justice“ to its subjects. Traditional judiciary is always there but what further institutions have been created by the State to fulfill its constitutional obligation is to be seen in the light of the developments in law. There is a movement in Pakistan to seek fundamental changes in arbitration law for its system of dispute resolution that has reached near to the procedural law.¹⁷ There are less options and rigid requirements for arbitrator and parties to settle their dispute and hence this system is unable to cope with the latest ADR techniques. This has taken all to consider that until the law of arbitration is not substantially made compatible with modern ADR methods, the new amendments in CPC coupled with incorporation of other ADR related laws/provisions in different statutes are available as an „option“ for litigants to use ADR tools before they opt for legal battles in a formal courtroom setting.

THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN

An interesting fact reveals when we study the Constitution with ADR lens. It has few articles that endorse the concept of alternative methods of dispute resolution. To quote, we find that Articles 153-155 of the Constitution provide for establishment of a Council of Common Interest (CCI). It has to deal with, inter alia, disputes relating to water between Federation and provinces or inter se the provinces etc. Art. 155(6) is reproduced for ready reference:

Thus, the basic law in Pakistan has roots of ADR enshrined for certain matters. The obvious logic may be to avoid laws-delays and court-delays with respect to water related issues between the State and provinces. It is only the constitutional body (CCI) that can take up the disputes for their

resolution in this regard and to the exclusion of any other court in Pakistan.

THE CIVIL PROCEDURE CODE, 1908 (CPC):

It is important to reproduce relevant provisions of CPC to establish that the modern concepts of mediation and conciliation have been made an integral part of procedural law in Pakistan. The relevant provision, s.89-A of CPC¹⁸, reads:

“89-A. Alternate Disputes Resolution. The Court may, where it considers necessary, having regard to the facts and circumstances of the case with the object of securing expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation.

It is supplemented by Rule 1-A of Order X of CPC¹⁹ which reads: “

1-A. The Court may, adopt any lawful procedure not inconsistent with the provisions of this Code to:

- (i) Conduct preliminary proceedings and issue order for expeditious processing the case.
- (ii) Issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purpose of trial;
- (iii) Adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means. Here, the terms “alternative dispute resolution”, “mediation” and “conciliation” have expressly been used. However, above quoted provisions are not limited only to these methods of ADR but by using words “or any other method”, vast discretionary powers have been vested in courts while the litigants have been

concluding day of the First National Judicial Conference of Pakistan.

¹⁸ Added by the Code of Civil Procedure (Amendment) Ordinance (XXXIV of 2002).

¹⁹ Ibid

¹⁶ PLD 1996 Karachi 1.

¹⁷ See, generally, the text of speech delivered by Mr. Justice Iftikhar Muhammad Chaudhry, Hon“ble Chief Justice of Pakistan, on 11 February 2007 on

empowered to consider any other appropriate method to achieve the goal of dispute resolution. It means, an „open ended“ provision has been added into the law so as to give options to the courts and litigants to consider any lawful means of settlement of dispute by avoiding any technicality.

The above provision, being open ended, may be beneficial for the courts and parties to consider any lawful option to be used for resolution of their disputes. The important thing at the moment is that the courts and litigants are required to be trained and educated, respectively, on the dynamics of this enabling provision that it can ensure cost- and time-effective resolution of disputes.²⁰ However, to remain within the bounds of law, as a general understanding, the courts can use the following methods to bring the law into action²¹:

- 1) Judicial Settlement.
- 2) Early Neutral Evaluation.
- 3) Mediation.
- 4) Expert Determination
- 5) Summary Judgment.

These are some of the ADR techniques. The Courts in Pakistan are generally facing the resistance from the bar and the litigants to use the ADR provisions. The reason is adversarial nature of legal system. The main reasons have been described, by Mr. Justice Tassaduq Hussain Jilani, the then Hon“ble Judge Supreme Court of Pakistan, as under:²² “Notwithstanding the legislative and executive measures taken, the Courts have not made use of section 89 of the CPC very frequently. There is more than one reason for this. Firstly, for any new scheme to succeed, institutional support is a sine qua non which has been mostly lacking.

Secondly, not much has been done for training and capacity building of the judges. And thirdly, the amendments in the CPC were not followed by amendments in the rules for procedural details to invoke ADR techniques.”

ANALYSIS OF DISPUTE RESOLUTION COUNCILs UNDER POLICE ACT 2017

The Dispute Resolution councils were established under the Police Act 2017. In this Act, the processes of arbitration, conciliation and mediation are provided as Dispute Resolution. This is the first codified special law regarding ADR in Pakistan. In this Act, it has been provided that each civil dispute as enumerated in the schedule shall be reoffered by the court to ADR, except where the parties having no consent, where it is satisfied by the court that the matter cannot be resolved through ADR or where any material question of law and fact is involved. Under this Act panel of Neutrals have been provided including experienced lawyers, retired judges, retired civil servants, ulamas, jurists, technocrats and experts, whom shall conduct ADR proceedings in the ADR centers. In this Act time frame has been provided for ADR proceedings, whereby a matter shall be disposed of within 30 days, extendable by next 15 days on request of Neutral. After successful conclusion of ADR proceeding, the Neutral shall record settlement and grant award. The same will be submitted to concerned court. After submission of award, judgment shall be announced and decree shall be passed in light of terms of the award. It has also been provided that if the efforts of the Neutral failed for resolution of the dispute, the same may be referred to the court concerned. In order or decree, passed by the court in consequences of ADR proceedings shall be executable under the relevant law. In addition, the court can also appoint Neutral to conduct ADR proceedings in compoundable

²⁰ The Punjab Judicial Academy (www.pja.gov.pk) has recently arranged training programs for judicial officers nominated for ADR Centers across Punjab district courts.

²¹ Benchbook Regarding Musalihat Anjuman and Alternative Dispute Resolution, published by The Gender Justice Through Musalihat Anjuman Project,

Govt of Pakistan. www.gjtmap.gov.pk. Site visited 10 December 2011. At the time of review of this paper, the site is no more available. However, link is kept intact here to keep the track of history.

²²

<http://www.supremecourt.gov.pk/ijc/Articles/7/1.pdf>. 12 December, 2011.

offences, under the criminal law. Under the provisions of this Act the court or the Neutral may hire the evaluator for expert opinion to sort out any financial issue or other technical nature. Under this Act no appeal or revision is maintainable from the decree or any order of the court.

ANALYSIS OF KP'S ALTERNATIVE DISPUTE RESOLUTION ACT 2020

The KP ADR Act was promulgated on 28th December 2020. This Act was aimed to introduce the method of dispute resolution among parties in issue, through the alternative mode of resolving the dispute, by the system of alternative dispute resolution without indulging into formal court cases in order to ensure inexpensive and expeditious justice to the public. According to this Act, the court can refer a civil matter for ADR on the consent of parties in dispute. Similarly, a Deputy Commissioner or any other designated officer can also refer a civil dispute for ADR. The time frame for ADR proceeding is provided as 6 months in maximum. Similarly, in criminal matters, all the compoundable offences U/s 345 Cr.PC can be referred to ADR, on the consultation of parties by the Court. Moreover, the Deputy Commissioner or the Dispute Resolution Council can also refer a matter to ADR. The time frame for ADR proceeding is provided as three months in criminal matters. The Court can also record evidence during postponement. Under this Act, composition of Saliseen Selection Committee has been provided, comprising of Commissioner of the Division as Chairman, Regional Police Officer, Senior Civil Judge (Admin), an official of law enforcement agencies, Regional Director Prosecution, representative of Special Branch and Deputy Commissioner as members. The referring authority can select one or more Saliseen from the roll of Saliseen for dispute resolution through ADR. After completion of proceeding of ADR, the dispute be submitted to the Court for final adjudication. Whole of the proceeding of ADR shall be kept confidential. Where the ADR fails to resolve a dispute, the said dispute is to be resolved by the court under the law. The decree or order of the Court passed in the aftermath of ADR cannot be appealed or revised.

Under this Act, it has been provided that Saliseen shall not represent the parties to an ADR in future proceedings. It has also been provided that, proceeding under this Act to be privileged and not admissible in evidence. In consequences of this Act, Section 89-A of the Code of Civil Procedure 1908 and Section 29 (i)(iiv) and 118-A of the KP Local Government Act, 2013 are repealed.

ARBITRATION AND CONSENSUS BUILDING

As the modern justice system is faced with serious irregularities, alternative techniques are viewed critical in the current scenario and are gaining wide spread popularity.

The ADR techniques entrench the attribute of traditional mechanisms of friendly resolution of conflict based on equity among the disputants. Therefore, ADR techniques are chosen over latest formal procedures for litigation. Compromising by moderation, in conflicting interests, signifies human's natural inclination to conciliation rather than confrontation. To introduce an alternate mechanism for conflict resolution, and to revive the revered institution of Pakhtuns, the Jirga, in a refined form to settle dispute through community elders, the Dispute Resolution Council (DRC) was established by Police department of Khyber Pakhtunkhwa (KP Police, 2014).

Disputes Resolution Councils (DRCs) The Disputes Resolution Council (DRC) is a system established by Police department in Khyber Pakhtunkhwa which act as a step in right direction as far as Alternative Dispute mechanisms are concerned. At first established at Peshawar in 2014, a number of DRCs are now operational in different districts of the province. The DRC functions to resolve disputes, mostly of civil nature, between individuals and groups. It acts as an informal setup that engages society members to resolve people's conflicts and disputes according to the socio-cultural values of peace and solidarity (KP Police, 2014). It employs techniques such as mediation, conciliation and arbitration to resolve disputes in a non-confrontational manner. The disputants do not need to hire a lawyer. They speak for

themselves. The disputants are given opportunity for expressing their views and producing evidence to support their stance. The DRC resolves conflicts in the light of customary laws of Pakhtuns, and promises a quick and economical conflict resolution. KP Police department (2014) has delineated the following salient features of DRC:

STRUCTURE OF DISPUTE RESOLUTION COUNCILs

The DRC has twenty-one (21) members including;

- Honored elders of the community,
- Religious preachers,
- Professionals, journalists,
- Retired personnel.

There are also a Police-officer and two female lawyers serving as member of DRC.

All members of DRC are divided into various groups, each group consisting of three (3) members. police officer who serves as the member of DRC record the Work and decisions done by DRCs. separate room is designated within the police station for the procedure of DRC.

ACCESSING DISPUTE RESOLUTION COUNCILs FOR CONFLICT RESOLUTION

There are two ways to access DRC, one is to submit a complaint to the Police station which thereafter forwarded to DRC and other way to access the DRC is to approach directly the members of DRCs. Disputes having civil nature are mostly referred by police station to DRCs, and also some other kind of disputes are also referred by police station to DRC. Convening the meetings

Meetings are scheduled on the dates convenient to the disputing parties to resolve the matter which are mostly held within the Police-station in the room designated for DRC's operations

and sometime meetings are held in other places like Hujra and Mosque. Before holding the scheduled meeting, DRC ensures to collect information and evidence about the case. Holy Quran is recited firstly for commencement of meeting. All the disputants are given opportunity for expressing their views and producing evidence to support their stance. The DRC's members serve an arbitrating or mediating role. Members of DRC hear all the disputants with attention to come up at a mutually consented decision by considering the importance of fairness and impartiality. The members ensure to remain neutral and free from any external influences while making the decision. To ensure speedy justice, attempts are made to resolve cases in as minimum time as possible. In contrast to the formal-courts, which primarily focus on punishing the offenders, the DRCs primarily focus on the wellbeing of the victims. The process of decision making is based majorly on compensating the loss of aggrieved party rather than punishing the offenders.

CONCLUSION:

From the above discussion of legal landscape relating to ADR laws, it is found that there are number of laws that cater for ADR needs of the justice system. The requirement of the time is that the legal actors, including judges, magistrates, lawyers and court personnel be trained in ADR methods for effective use of the system. Sensitization of the litigant public is also relevant so that the „consent“ of parties to adopt for the ADR methods can be obtained. Although Pakistan has no mandatory requirement for pre-trial use of ADR in civil cases, but the „open-ended“ provisions of the civil procedure code give ample opportunity to the courts and parties to consider discussing the option of using ADR methods prior to start of formal trial.²³ The National Judicial Policy, 2009 formulated by the National Judicial (Policy Making) Committee provides guidance for courts to use ADR laws in the words: 123 13) *The Small Claims and Minor Offences Courts Ordinance 2002 should be*

²³ See, for example, Ministry of Law, Justice and Human Rights, Selected Proceedings of TA 3433-Pak: Strengthening of Institutional Capacity for

Judicial and Legal Reform (Technical Assistance Provided by Asian Development Bank to the Government of Pakistan), pp. 201-223 (January, 2003).

applied in earnest. The High Courts should designate civil judges cum Magistrates to try exclusively cases under said law. Such judicial officers should be imparted training in ADR. For this purpose, a Committee of judges of the High Courts headed by a judge of the Supreme Court would arrange training in ADR for master trainers who would later on train the remaining judges in province.

This encouragement and sensitization of judicial officers on part of the judicial policy making body is also a step where the judicial officers and courts will consider applying the relevant laws wherever possible. If new amendments for mandatory mediation are introduced into the law, as is the case of Bangladesh,²⁴ it may be said that many cases may be resolved prior to the formal trial. Parliament has to play a role in this regard as also the Law and Justice Commission to highlight the issue.

RECOMMENDATION

Following are the recommendations for effective legislation and implementation of ADR laws in Pakistan;

- All the ADR laws prevailing in different provinces of the country may be codified in uniform structure as to avoid contradiction.
- Proper ADR Centers may be established under the supervision and control of judiciary.
- The ADR service providers must have legal knowledge, experience and qualification.
- The time frame for ADR proceedings may be reduced.
- Penal provisions may be inserted in ADR laws for default of ADR services providers, as to strengthen the element of efficiency and accountability.
- Regular ministerial staff may be hired for ADR centers.

²⁴ An interesting study is available at the World Bank website about Bangladesh and others experience in this regard. This paper is written by Mustafa Kamal, former Chief Justice of Bangladesh and can be accessed at

- Special training sessions may be arranged for the ADR service providers and its supporting staff as to equip them with maximum skills and techniques.

- Proper budget may be granted to the ADR Centers and all other relevant stakeholders to smoothen and expand the working of ADR across the country.

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