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Status of ADR in Existing Laws of Pakistan: A Brief Study

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Abstract

This article highlights already working of Alternative Dispute Resolution (ADR) in existing laws of Pakistan and mentions the provisions in which Alternative Dispute Resolution (ADR) is already available in various federal as well as provincial laws of Pakistan, but unluckily has not been applied or followed properly and new legislations have been enacted. There is only a need to create awareness on the said topic. This article also points out the benefits of this system because it provides justice to people at their doorstep but also reduces the backlog of cases and lessens the burden on courts so that they can give genuine attention to matters serious in nature. There is a need to introduce this system at all levels, which will be beneficial not only for the legal system in particular but also for the social system in general. This article creates not only awareness but also identifies the weaknesses of the legal system in Pakistan and link them with the problems of this country; it makes some suggestions for making this system more effective.

Key Words: ADR, Existing Laws, Dispute Resolution, Amicable, Code of Civil Procedure.

Introduction

Different societies in their respective geographical boundaries have been trying to resolve their disputes through localized, indigenous and communal values and traits parallel to the official and state-sponsored legal system (Internet Source). However, multiple factors, of late, have triggered the renaissance of Alternative Dispute Resolution (ADR), where there is laser-like focus and intensity around the globe to intensify and maximize the Alternative Dispute Resolution (ADR) mechanism in the resolution of disputes. The political, social and economic undercurrents have overtly or covertly opened up the space for the Renaissance of Alternative Dispute Resolution (ADR) in their own peculiar way (Jerome T. Barret). However, the following dynamics have particularly resulted in the Renaissance of ADR, i.e. (a) drawbacks of litigation, (b) changing business scenario, (c) legislative receptiveness and responses and (d) judicial patronage and sponsorship.

The demerits of litigation and merits of the informal justice system can be seen at each level; re-adoption of informal dispute resolution, known as Alternative Dispute Resolution (ADR), is also the result of those inadequacies of the litigation system, shortage of judges and a heavy backlog of cases, delayed justice is not only enhancing the rate of offence (Jillani) but is also considered a wastage of time (Faqr 2015) if justice is not ensured at gross root level in society (Hussain). To restore the trust of people in the justice system, it is necessary to provide speedy justice and ensure the rule of law, which is the requirement of the Constitution of Pakistan, 1973, as provided in principles of policy under article 37 (Fazal Karim, 2006).

Since 21st Century, there have been discussions for the introduction of ADR in the legal system of Pakistan, but no one suggested that this informal justice system which already is in existence in various laws of Pakistan, i.e., informal dispute resolution is, in fact, Alternative Dispute Resolution (ADR) which can be seen in various laws of Pakistan, such as Code of Civil Procedure 1908, Code of Criminal Procedure 1898, Small Claims and Minor Offences 2002, Local Government Ordinance 2001, Local Government Act 2013, Arbitration Act 1940,

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Constitution of Pakistan 1973, [National Accountability Bureau Ordinance 1999](#), Probation of Offenders Ordinance 1960, and Muslim [Family Courts Act 1964](#) etc., but the term 'Alternative Dispute Resolution (ADR)' was not clearly defined in any law in Pakistan before the enactment of Alternative Dispute Resolution (ADR Act, 2017), which is applicable only in Islamabad (Capital Territory of Pakistan). Some enactments which provide for Alternative Dispute Resolution (ADR) have either mentioned the method or used the term informal dispute resolution. Therefore, solid work is required, and a comprehensive definition was necessary to include these techniques of Alternative Dispute Resolution (ADR), already available in various legislations of Pakistan.

Scope of Study

The scope of the topic under discussion, i.e. Alternative Dispute Resolution (ADR), is quite wider, which can be brought for consideration under this system at any stage of pendency of disputes under the regular regime of adjudication, appeal or judicial remedy.

Alternative Dispute Resolution (ADR) methods can be helpful for the parties to have a negotiation with each other to resolve the disputes with or without the involvement of 3rd party. Alternative Dispute Resolution (ADR) processes such as negotiation, mediation, conciliation and arbitration etc., can be made an integral part of the justice system, being less expensive, swift and long lastingly to resolve disputes. There is a need to bring the pre-tested informal dispute resolution processes at the country level, but with some amendments.

Research Methodology

Research Methodology is purely descriptive, and data was collected through primary as well as secondary sources. It is descriptive in nature which highlights and explains the laws having Alternative Dispute Resolution (ADR) provisions (amicable settlement of disputes), but the term needed a proper definition. The main focus of the research was to discuss important federal laws. The main reason for this approach (descriptive methodology) was that the survey method could not be used because such an attempt would have involved an expensive logistic process, but the researcher had no funding source from inside of University or outside of University and could not afford survey in both terms, i.e., plenty of time and resources to spend amount for the survey.

Existence of ADR in Existing Laws of Pakistan

At the social level, the system of informal dispute resolution (ADR) is well-rooted in Pakistan. As mentioned above, the legal covers for this response are Arbitration Act 1940, section 89-A of the Code of Civil Procedure 1908 and Constitution of Pakistan etc., providing a solid base to the informal dispute resolution, which has been remained in vogue up till now.

Arbitration Act 1940

The Arbitration Act, 1940, which came into existence on 1st July 1940, is valid for all the regions of Pakistan. The Arbitration Act, 1940 does not limit the rights of the parties to enter into a contract, but it is a forum for disputants to settle their disputes in an amicable way and with their own convenience; the provisions of the said Act relating to arbitration without the intervention of a Court follow the English Acts in important facts.

The process for settlement of disputes through the Arbitration Act, 1940, is adopted only if it is mentioned in the agreement between the parties. The provisions of the Code of Civil Procedure, 1908 are to be followed by the arbitrators during the proceedings of the arbitration process. The court can interfere with the proceedings held by the arbitrator; it is not out of place to mention here that the arbitrator is neither independent nor he can adopt any other process (mediation or conciliation) for settlement of disputes except to rely on the procedure specified in the said Act, An arbitrator is an authority who has powers like civil courts, and his decisions can only be rejected on the basis of strong evidence being his biased and being adverse to rules and documentation, the award of the arbitrator binds the parties to comply with the award. The arbitrator only and solely derives his jurisdiction and powers from the reference/agreement, which the parties specifically referred to him.

There are three necessary ingredients (1) the existence of an arbitration agreement, (2) existence of dispute purely under the agreement, (3) and the proceedings conducted by the arbitrator. The arbitrator can neither ignore principles of natural justice nor can act at the back of parties.

The process of arbitration can be taken as a domestic tribunal where the arbitrator is selected by parties themselves, and speedy justice is ensured by avoiding unnecessary technicalities of procedural law (SCMR 2002). So, Arbitration Act, 1940 can not be taken as informal dispute resolution as its proceedings are as formal as in the case of civil courts; it is a formal procedure for dispute resolution with the involvement of court but outside of the premises of the court.

The Cooperative Societies Act, 1925

Section 54 of the Cooperative Societies Act, 1925 also provides for arbitration (PLD 1961 SC 215). Where under any dispute touching the business of the society and the dispute is between the past or present members and the society or committee, the matter shall be referred by the Registrar for arbitration of three arbitrators who shall be Registrar or his nominee and two others who shall be each nominated by the parties. However, if the Registrar considers that the dispute involves a complicated question of law, he may refer the parties to get the issue adjudicated from a competent court of law. Such arbitration under section 54 of the Punjab Cooperative Societies Act, 1925 is also protected under section 46 and 47 of the Arbitration Act, 1940.

Code of Civil Procedure 1908

The Arbitration Act 1940 is relevant to the Code of Civil Procedure, 1908 as evidence is taken from both sides and decision (Award) is taken by the arbitrator (3rd party), but no procedure has been given in the said code under section 89-A. The court can resort to Alternative Dispute Resolution (ADR) or any other method with the consent of parties. Under section 89-A, the court can adopt an alternative to resolve the disputes in terms of mediation, conciliation or any other means, which is a broad and vast option for courts to apply according to the nature of the disputes. This is very important that Alternative Dispute Resolution (ADR), being less expensive, less time consuming, fruitful and beneficial, and ultimately an amicable method, be promoted by courts in the appropriate cases to achieve ends of justice and to prevent abuse of process of the court. It is important to mention here that presently, it is not mandatory for the court to offer Alternative Dispute Resolution (ADR) but can be made in exercise of its inherent power to reduce its burden of cases, and courts must refer the matter for settlement of disputes outside of court amicably through section 89-A, and under section 89-A, and Order X, Rule 1-A CPC, the court can apply ADR to finalize dispute. The court can use its inherent powers and to meet the ends of justice; it can refer the matter for recording of evidence to commission even without the consent of parties. ([PLD 2011 Lah. 27 DB](#)).

Family Courts Act 1964

The Muslim Family Laws Ordinance, 1961, had a great influence and suggested certain recommendations of the Commission on Marriage and Family Laws (Preamble). The law mentions that there is an obligation on family courts to make efforts for conciliation between husband and wife at the pre-trial and trial stage; section 10 and 12 of the Act are relevant to the provision of amicable settlement of disputes, and these provisions are mandatory to be availed by the parties even if they do not agree for settlement, but courts have to ask the parties for meeting and conciliating upon the matter before the trial to be concluded.

Arbitration Councils have been established under this Ordinance which is consisting of one chairman as well as representatives from each side of the party. The Council has powers to resolve matters relating to family issues such as Talaq (Pronouncement of divorce by husband) and Khula (dissolution of marriage by women).

Constitution of Pakistan 1973

Apart from this, the principle of policy regarding the provision of expeditious and inexpensive justice is noteworthy as regards the obligation of the state for making, inter alia, ADR legislation. The state is responsible

for protecting and guaranteeing the economic status of citizens and providing speedy justice to people (Article-37). From the time of insertion of Article 2-A in the Constitution of Pakistan, Supreme Court stated the procedures in detail and said that all the matters be settled on priority ([2004 CLC 1266](#)). Due to technicalities, the justice should not aggravate, and the scheme established by Chief Justice had great influence to ensure and secure the basic as provided in Holy Quran and Sunnah ([2004 YLR 2209](#)).

The concept of amicable settlement of disputes (ADR) is preferred, and the Council of Common Interest was established with this point of view which states that if any matter is pending before any Council or any other authority, then no proceedings will be started by any court of law. The water disputes between the Federation and Provinces or between Provinces have also been referred for Alternative Dispute Resolution (Sections 153, 155).

Small Claims and Minor Offences Courts Ordinance 2002

Alternative Dispute Resolution (ADR) in the form and term of amicable settlement of disputes is in existence in Small Claims and Minors Offences Courts Ordinance 2002, which was enacted in 2002. The special object of this Ordinance was to provide speedy, inexpensive and expeditious justice to people. It not only mentions the techniques, i.e. mediation, conciliation or other procedures of Alternative Dispute Resolution (ADR), which can be adopted if parties agree to these procedures, but also provides the procedure for appointment of a neutral person. The law provides that the court may resort to an amicable settlement of the dispute, if it is possible, at any stage (**Section 2**). This law allows amicable settlement of disputes for both civil (disputes valuing 1 million or less than 1 million) as well as criminal (compoundable offences mentioned in Pakistan Penal Code 1860) matters.

Code of Criminal Procedure 1898

Section 263 and 264 of the Code are relevant to summary trials where courts record evidence and start the trial, but this procedure is allowed only in specific matters, not for all the offences. Another provision in the Code of Criminal Procedure, 1898 (Cr. PC), expediting the process of justice, is the confession of an accused person, which is available under section 243 Code of Criminal Procedure, 1898 (Cr. PC). On the confession of the accused person, the magistrate shall convict him, which not only saves the time of the court, prosecution and party but also saves costs/ expenses of all.

Sections 249-A and 265-K of the Code of Criminal Procedure, 1898 (Cr. PC) empowers magistrate and session courts respectively to acquit the accused person at any stage of trial if courts consider that charge is groundless or there is no probability of conviction after issuing notice to prosecution (SCMR 1985). The court can acquit the accused person on his own or on the application of the parties, and such action of court can be taken as a compromise for the welfare of society and protection of fundamental rights of the offender ([PLJ 2004](#)).

Some specific offences mentioned in Pakistan Penal Code 1860 (PPC), are compoundable which can be a good source for the end of enmity between/among the disputants and peace in society. The code also provided that the offences relating to the human body are also compounded by the victim or his/her legal heirs (Criminal Law 1990, [Munir 2009](#)).

Another provision relating to Alternative Dispute Resolution (ADR) is Diyat (compensation to be determined by the court) and Arsh (Compensation mentioned in law), the value of diyat is fixed by the government every year, and law also specifies the minimum value of diyat so that parties can not exploit the benefit given by law (Section. 299). This is a justified approach to benefit both victims as well as accused toward a peaceful settlement of the dispute.

National Accountability Bureau Ordinance 1999

The concept of a plea bargain in the National Accounting Bureau ordinance, 1999, is another form of Alternative Dispute Resolution (ADR) which provides for the voluntary offer to return the property gained by him/her (section 25) by making an application to the chairman of NAB, but the chairman has discretionary power to accept

such offer subject to some conditions ([subsection 25\(a\)](#)). The NAB law can recover the number of loans from banks defaulters who intentionally declare themselves as defaulters for payment of loans ([section-25-A](#)).

The Probation of Offenders Ordinance 1960

This law provides that the court may send an accused person on probation at any time, but before passing the order of conviction (sections 4 & 5), This is again an early settlement of the dispute, and the court can pass an order for payment of some amount to the victim as compensation (section 11). This is an important law that can be utilized by courts in most cases for meaningful purposes, but due to lack of knowledge or training, this law has not been applied by the courts, and fruitful results could not be achieved.

Wafaqi Mohtasib 1983 (Federal Ombudsmen)

The department of the Ombudsman is serving for resolving disputes of people very usefully. No payment of court fee is involved, nor there is the necessity of engaging a lawyer even. There is apparently a good framework of Ombudsmen in Pakistan, and at the Federal level, there are five ombudsmen, one with general and four with specific jurisdiction. There are Provincial Ombudsmen in each province as well, with general jurisdiction relating to provincial administrative disputes.

Recommendations

Some suggestions for supporting the informal justice system (ADR) of fairness through negotiation, conciliation, mediation, or any other mode are as under:

1. Despite legislative and executive efforts, courts are not so much serious about using section 89-A of the Code of Civil Procedure, 1908. Institutional support is necessary to be made so that the burden on courts can be reduced and the provisions can be made more effective with a positive response from courts, lawyers and disputants etc.
2. Each High Court should amend the rules to give proper influence to section 89-A of the Code of Civil Procedure 1908 because just section 89-A is not sufficient, which creates ambiguity in the mind of the courts. A complete procedure such as the appointment of a neutral person and the time limit should be given to the parties as well as neutral persons to resolve the matter within the prescribed time, and in case of failure, the recommendation made by a neutral person to the parties should be considered during trial proceedings.
3. The lack of interest on the part of judges is due to the reason that they are not given proper training and if any, then that is not given by keeping in view the circumstances of our own country but highlighting international practices only while both are necessary to be explained, judges are not much aware of the techniques or methods of section 89-A of Code of Civil Procedure, 1908 which they can not apply properly. So, there is also a need to establish training institutions where not only judges but lawyers and even common educated people interested in the said field should be encouraged to take long term trainings instead of arranging short term trainings which is not so much useful, and the targeted result is not achievable.
4. As from the study, it is very much clear that the newly introduced informal justice system (Alternative Dispute Resolution) is already in existence in various laws of Pakistan, and there is no need to waste time or spend a heavy amount on new and separate legislation or establishing and managing new infrastructure, but only a comprehensive instructional code of procedure is required to be prepared instead separate at the federal level to guide the judges and lawyers and to check their working for the promotion of this speedy and amicable process of the dispute resolution process.

5. As mentioned above, the provisions of informal dispute resolution, already existing in various laws of Pakistan, need proper definition and recognition through amendments with the title of Alternative Dispute Resolution (ADR) along with all procedural aspects and clarities.
6. At district and division levels, the offices of union councils should be made more active to adopt and follow the processes of Alternative Dispute Resolution (ADR), i.e., mediation and conciliation etc., so that the purpose of introducing these institutions, of facilitating the people, who are away from the court system or don't trust or rely on courts, can be obtained.
7. District Bars of each province in petty matters and Pakistan Bar Council in specific matters can play a vital role in the development of Alternative Dispute Resolution (ADR), office bearers of Bar Councils should nominate mediators and conciliators etc. from the lawyers/academia having experience and skills in the said field to ensure speedy and amicable settlement of disputes.
8. The ADR Act, 2017 (Applicable for Islamabad Territory only) also lacks many procedural aspects which need to be amended and improved for making it more effective so that the main objectives of the Act can be obtained.
9. Family courts are adopting the procedure just as a formality which is required by the family law but is not working in a way to settle the disputes of families and play their role as mediator or conciliator in a real sense. The result is that thousands of women are getting Khula (Dissolution of marriage by women), and they don't meet their husbands for reconciliation just come to the courts and refuse to live with their husbands. So, there is a need to improve this system to save the families from breaking their relationships which have a negative effect on the growth of their children, who are the future of any nation.

Conclusion

From the above discussion, it can be concluded that the Alternate Dispute Resolution (ADR) system is already present in the legal system of Pakistan, which needs proper definition and appropriate legislation with explained procedural contents to make it more clear, effective and easy for working on regular basis. Alternate Dispute Resolution (ADR) is an amicable settlement of disputes and is not only an alternative to litigation but also a support to the legal system or collateral system working side by side with litigation. So, there is no reason why we cannot make Alternative Dispute Resolution (ADR) processes popular and successful in Pakistan.

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