

RATIONALIZING ALTERNATE DISPUTE RESOLUTION IN PAKISTAN

Dr. Muhammad Ramzan*¹

Kashif Mahmood*²

Abstract

The judiciary has an important role to maintain the balance in the society. But the courts are bound to follow the procedural law. Sometime, it takes much time to conclude the cases. This exercise of the courts in minor or small cases, the litigant suffers and spend more money and time to help the court to conclude the case. Under alternative dispute resolution the cases of special nature have to be decided at grassroots level through arbitration, mediation, etc., it helps the aggrieved person to get justice speedily on his doorsteps. That decision under alternate dispute resolution has legal authority and treated as a decision of the lower civil court. Being not satisfied any person has a right to challenge this decision in the appeal before the appellate court. Nobody has right or ability to decide the cases, but there are special requirements and qualification to adjudicate this type of cases.

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¹ Dr. Muhammad Ramzan, Ph.D (Law), Assistant Professor, COBA, Alyamammah University, Riyadh, Saudi Arabia.

² Kashif Mahmood, Ph.D Scholar, Deputy Director (Legislation), PIPS, Islamabad, Pakistan

1. Introduction

The word Alternate Dispute Resolution or ADR is mostly used to decide the small disputes or issues out of court through arbitration, mediation or negotiations, etc. through amendment in section 89-A of the civil procedure code of Pakistan for providing the mechanism to decide the cases as alternate Dispute Resolution in Pakistan. Further, special ordinance, “Small Claims and Minor Offences Ordinance 2002” were promulgated by the President of Pakistan to facilitate these kinds of adjudication.

Every party is not bound that his case shall be decided through conciliation, arbitration and negotiation, but it depends on the parties that they are agreed to decide their case through the procedure. The decision under this procedure has legal value, equal to the decision of the civil court. Right of appeal is available in accordance with law before the appellate court.

2. A Critical Analysis of the Contemporary Judicial Business of Pakistan

Lack of contemporary legislations for consensual adjudication and administrative discretions has created such a vacuum in the administration of justice. It is creating a distress among common men to consult courts as a last resort to their disputes. The common law system with a winning or losing concept is counterproductive to pragmatic and sustainable social cohesion, which is an ultimate objective of the law. Consequently, for a vibrant concept of justice, non-conventional means for adjudication is a prerequisite of the time in a society like ours, which is already fragmented and polarized. Thus keeping in mind, the “*Permanent Lok Adalat*” experience in neighboring country India, this study is focusing on an unconventional adjudication through the experts, in the field of reconciliations, arbitrations, mediations and negotiations.

Dispensation of justice is a crux of any judicial system. Pakistan’s overburdened judiciary is facing multidimensional problems which make it inefficient; it further leads to the incapacity of courts to adjudicate complex issues at a proper pace of time.³ Inefficiency of judicial system falls into two categories. First category deals with unavailability of up to date and sophisticated training and equipment, revolutionized cyber technology, specifically focused on data based legal statutes and citations. This category primarily linked with legal and judicial infrastructure and based on availability of funds as well as transfer of technology under the wave of globalization. However second category is strategically more important to study. It deals with

³ See in Pakistan, Law and Justice Commission of. National Judicial Policy. Pakistan. 2009-2010.

implementation and the dispensation of justice, which is hindered due to complex procedures and alien jurisprudence and fragmented sociopolitical indigenous environment. Thus the Court observes, “Technicalities and legal provisions are meant to advance and not to obstruct justice.”⁴ Accordingly Maria (1999)⁵ says that inefficient judicial systems are not compatible with dynamic, conflicting as well as competing social political and economic needs of developing countries. Scott (2007)⁶ relates it with an absence of Alternative Dispute Resolution [ADR]⁷ or permanent equity courts. He thinks that such kind of situation promotes rivalry of winning or losing instead of conflict management in civil society. As a consequence undue burden of litigations leaves behind the menace of delays and backlogs causing inefficiency of the judicial system. Krishnan (2003)⁸ declares it a time consuming, costly issue as an anti-poor element of courts. Horowitz (1977)⁹ identifies such phenomena as, an incapacity of courts to adjudicate, he further and describes that diminishing capacity of the judiciary has a direct relationship with the legitimacy of the entire judicial system. Though lawyers and judicial officers are well versed with procedural technicalities and legal rules, yet the law is a dynamic field and needs compatible and harmonious changes according to the time and space.¹⁰ Hence sociological jurisprudence and restorative justice is a mean to deal with the complex changes of the society where rules are unable to dispense a pragmatic justice.¹¹ Prevailing top down authoritarian (Willsonian) model of judicial dispensation in Pakistan with an agent relative consequentialism is incompatible with its premise of tangible incentives and utility of welfare-ism. Because inadequately trained law officers, lawyers and outdated legal education cannot perform appraisal criteria of judicial policy. Financial as well as moral corruption (use of authority for personal gains) and absence of jury system has transformed the judicial branch into a semi executive

⁴ See in *Sheikh Jameel Ahmad vs Raja Khalid Hussain*, 2010 CLD 571 Lhr. LHC.

⁵ See in Dakolias, Maria, “A Comparative Perspective of the Court Performance around the World”, *World Bank Technical Papers* 430 (1999),

⁶ See in Scott Shackelford, “In The Name of Efficiency ; The Role of Permanent Lok Adalats in The Indian Justice System and Power Infrastructure” . New Delhi : *National Security Education Program Boren Fellowship*(2007) <http://www.ssrn.com>

⁷ Alternative Dispute Resolution / Arbitration

⁸ See in Kirshnan Jayanth, “The Role of the Court and Social Policy Advocacy in India”, *American Asian Review*: (2003), 91-124.

⁹ See in Donald Horowitz, “The Courts and Social Policy”. Washington : *The Brooking Institution* (1977)

¹⁰ See in Balakrishnan Rajagopal , *International Law from Below: Development, Social Movements and Thired World Resistanc* (New Delhi: Foundation Books Pvt. Ltd. Cambridge House, 2005), 30-100; Roscoe Pound, *The Ideal Element in Law* (Calcutta: Calcutta University Press, 1958), 15-30, 40-75, 115-150.

¹¹ See in Roscoe Poind, *An Introduction to the Philosophy of Law* (Delhi, India: Universal Law Publishing Co Pvt Ltd under special arrangment with Yale University Press ,U.K., 2006), 15-60.

organ, this semi- executive transitional tilt had turned dispensation of justice into a politics of judicial bureaucracy.¹²

Under such “*execo- judicial attitude*,” the major cause of an inefficient judicial system is a “costly and orthodox nexuses among procedural oriented judges under strict legal positivism, well connected lawyers and influential litigants. Such nexuses and vicious triangle had transformed the basic unit of dispensation of justice; the office of civil judge cum judicial magistrate into a most vulnerable forum of judicial business in Pakistan.¹³ Unnecessary adjournments, undue review and revision appeals, lawyer’s strikes on petty issues along with coercive bar politics, delaying tactics to prolong unjustified status quo through temporary injunctions and noncompliance by prosecution branch engender this vulnerability. Regrettably, it remained unnoticed in the National Judicial Policy of Pakistan (NJP).¹⁴ Though it is a well narrated work based on foreign funded project¹⁵ (Access to Justice Program of Asian Development Bank). Yet an unsighted replication and dumping of concepts and laws of the developed world has its own negative externalities.¹⁶ Consequently, it lacks indigenous support and identification of actual stakeholders and target groups. It is mainly reactive, established on conservative pattern of routinization so it has nothing to do with capacity building of the judicial system because the goals and objectives of NJP are mainly focusing on the elimination of corruption, occurrence of pendency, the issue of backlogs and inefficiency of the prosecution branch. However, it is not dealing with the time consuming procedural difficulties, with an absolute ignorance of indigenous socio-political and economic system. Thus systematic attempts to inject foreign concepts and philosophies in an outdated traditional judicial system would be a futile exercise.

Therefore, ADR as well as Public Interest Litigation can remove the legal antinomies between status quo and change. The former is known in different jurisdiction of the world as under; Admission before Court, Alternative Sentencing, Arbitration, Arbitration Association, Bottom up

¹² See in B. Guy Peters, *The Politics of Bureaucracy* (New York: Longman, 1995), 20-50, 70-120.

¹³ It is writer’s deduction about the prevailing judicial business in Pakistan.

¹⁴ See in National Judicial Policy of Pakistan, 2009/10.

¹⁵ See in Ercelawn and Nauman, “Asian Development Bank in Pakistan, A Case Study of Access to Justice Program”, *Economic and Political Weekly* Vol. 37 No.44/45 (2002), 4561-4564; Armytage Livingston, “Access to Justice Program,” *Centre for Judicial Studies: Asian Development Bank* (2002) ; Silanes Florencio, “The Politics of Legal Reform”, *G-24 Discussion Paper Series, United Nations Publication* (2002).

Reconciliation, Case Administration, Case Management, Collaborative Litigation, Community Justice, Conciliation, Community Owned Justice Through Monitoring and Evaluation, Confession, Conflict Resolution, Court Connected ADR, Court Connected Mediation, Court Integrated Alternate Resolution, Court Referral, Court Related ADR, Dispute Avoidance, Early Dispute Resolution, Early Resolution of Disputes, Facilitative Judging, Judicial Confession, Judicial Dispute Resolution (JDR), Jirga, Lok Adalat, Mediation, Mediation Association, Mini Trial, Negotiation, Neutral Evaluation, Non-Adversarial Litigation, Ombudsman, Online Conflict Resolution, Online Dispute Resolution, Private Dispute Resolution, Probation, Participative Justice, Panchaet, Pre Litigation Conciliation and Settlement Restorative Justice, Third Party Resolution, Top Down Mediation.¹⁷ Such consensus based adjudication in international law with regards to trade dispute. Moreover, it is important to mention here some of the ADR related legislations prevailing in Pakistan and other common law countries. These are as follows; Arbitration Act 1940, Pakistan, The Conciliation Courts Ordinance 1961, Civil Procedure Code 1908, Section 89-A, Customs Act 1969, Section 195-C, Income Tax Ordinance 2001, Section 134-A, Federal Excise Act 2005, Section 38, Sales Tax Act 1990, Section 47-A, Pakistan Muslim Family Law Ordinance 1962, The Small Claims and Minor Offences Courts Ordinance of 2002, Alternative Dispute Resolution Act of 1998, USA, Mediation Act 1997, Australia, The Truth and Reconciliation Commission Act 2000, The Truth, Justice and Reconciliation Bill, 2008 Kenya, Permanent Lok Adalat of India Rules, 2003, Singapore International Arbitration Centre “SIAC.”

3. Legal Modes of ADR in Pakistan

There are a number of ways to resolve a dispute outside the court, however, more commonly practiced are Arbitration,¹⁸ Reconciliation¹⁹ and Mediation.²⁰ Henceforth, such a non-conventional, consensual dispute resolution mechanism is further divided into three parts,

¹⁷ See in Robert F. Cochiran, JR, “ADR, The ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Client”, *South Texas Law Review*, Vol. 41 (2010), 183; Jack B. Weinstein, “Some Benefits and Risks of Privatization of Justice through ADR”, *the OHIO State Journal of Dispute Resolution*, Vol. 11 2 (2010).

¹⁸ See in Bryan A. Garner, et al., ed. *Black’s Law Dictionary*, eds., Bryan A. Garner, et al., 8th ed. (Boston: West Publishing Company, 2004), 147: “ A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding”.

¹⁹ Ibid. 1414: “Resolve the issues or conflicts on the basis of Arbitration between the parties.”

²⁰ Ibid.,1098-99: “ A procedure of nonbinding issues has to be decided through involvement of third party, who agreed both the parties.”

covering each of the above mentioned concepts. As for as, the arbitration is concerned, it is formally practiced in Pakistan. It is quasi-judicial process, in which an arbitrator, nominated by the parties, or an umpire, nominated by the arbitrators thereto, gives an award to dispose of the dispute. This award, however, is to be submitted in the court to be declared as 'rule of court', but the party against whom the award is given can always object before the court prior to such declaration. Conciliation, also being a quasi-judicial procedure, is being practiced in Pakistan up to a certain level. In spite of the already existing legislation in this regard i.e. the Reconciliation Courts Ordinance 1961 that provides for the resolution of minor civil and criminal offences through the reconciliation, the use of this tool is not optimal. Finally, the mediation which has not been exclusively provided by some legislation, however, section 89-A of the Civil Procedure Code 1908, inserted through an amendment in 2002, substantively provides to avail such a tool for an expeditious disposal. This is a fact that due to arguable reasons mediation still needs to be realized and promoted the judges and lawyers equally.²¹

4. Induction of Permanent Lok Adalat [P.L.A.] In India for “Justice at grassroots level”

In Authorities Act, 1987 the amendment has been made by the parliament and introduced the Pre Litigation Conciliation and Settlement, which gave a rationale to establish Permanent Lok Adalat to facilitate the aggrieved persons on their doorsteps. It includes all kinds of transport services are those working in the public interest.²² The establishment of PLA is a try to resolve the issues through arbitration and if fails to settle an issue, it has a jurisdiction to decide the case on merit. These cases have to be decided on the basis of natural justice and fair play without applying the Civil Procedure Code and Evidence Act. This statutory ADR body is an evolutionary and transformational form of the traditional Panchayats, it has a statutory authority and its injunctions and decisions are binding. The Indian Supreme Court has also reaffirmed the awards of PLA in many writ petitions;²³ nonetheless the legal system of India recognizes the judgments and settlements of PLA as to be a decision of the lower civil court. Ex-post analysis and evaluation of

²¹ Justice Sarmad Jalal Osmani, “Role of Judge in Alternate Dispute Resolution”; Justice Tassadaq Hussain Jeilani, “Delayed Justice and the Role of ADR,” *National Judicial Conference, Law and Justice Commission of Pakistan* (2011).

²² Legal Service Authorities Act of India ,CHAPTER VI ,SECTION 22-B,22C[1], Amendment Number, 37, 2002.

²³ *S.N Pandey V union of India*, Civil Writ no 543/2002, Supreme Court Of India.

PLA indicate that with less costs and short lengths of court sessions there is an approximately 70-75 % dispute resolution ratio. This institution with participatory, bottom up approach is more efficient as per the benefit cost analysis is concerned.

5. Rationale of ADR in the Tribal Area of FATA/PATA for Sustainable Peace

The Hobbesian concept of state as political community is compatible as such with the Austin's notion of legal positivism where law is a "command of sovereign". Such vertical model with permanent structures of legislature, executive and judiciary works on the legal premise of certainty and obligation to obedience.²⁴ In this conventional scheme of law, rule contains, prescriptions, authorization and sanctions, the last element deals with the nonconformists to pay a rational price in the case of disobedience. However, such models seem not practical in the case of a horizontal structure of a tribal society or during a transitional security paradigm like in the tribal belt of the Federally Administered Tribal Area of Pakistan (FATA), where court structure is not present as such. Barkun(1968)²⁵ in this context says, "It is impossible to organize segmentary lineage systems in terms of opinions [binding judicial decisions], courts and police."²⁶ For a national integration of such area into the mainstream political community, he suggests a concept of "Jural community" for an effective social control, based upon consensual justice derive from customs. It mainly deals with arbitration, mediation and reconciliation (core elements of ADR) through an authoritative body of elders, which derives its powers from traditions and natural justice. In the contemporary wave of law and order crisis and internal disturbance which prevails in the FATA and its adjacent areas, supra concept of journal community would be an effective tool to bring a sustainable peace.²⁷

6. Practical Measures for ADR

As has been discussed above, the term ADR consists of three main subcategories, which are Mediation, Arbitration and Reconciliation. These alternative means of administration of justice has a potential to increase the culture of tolerance in the overall simmering society of

²⁴ See in W Friedmann, *Law in a changing Society* (London: Stevens& Sons Ltd., 1972).

²⁵ Michael Barkun, *Law without Sanction: order in Primitive Societies and the world community* (New York: Yale University Press, 1968), 1-13, 36-58, 72-80.

²⁶ Ibid, 165.

²⁷ See in Jason Franks, *Rethinking the Roots of Terrorism* (Hampshire, England: Palgrave Macmillan, Macmillan Distribution Ltd., 2006).

Pakistan.²⁸ This vibrant concept is called Restorative Justice.²⁹ ADR is not limited to civil felonies but it also has a potential to cater criminology and victimology to reduce socio-political frictions from the civil society.³⁰ The community owned bottom up approach of mediation and reconciliation is an innovative approach, where judges ought to perform not only as a facilitator but they are also bound to monitor the whole process of voluntary Reconciliation through monitoring and evaluation techniques³¹ of PRA approach (Participatory Rural Appraisal). Institutionalization of the traditional Panchayat system through the induction of young lawyers under the constant monitoring of existing judicial officers is a pragmatic approach to integrate ADR in the mainstream legal System of Pakistan. This contextual and behavioural legal approach are a viable solution of a vital issue of delays and backlog mentioned in NJP2009/2010. Nevertheless, through a proactive Restorative Judicial Approach, Lower courts can even reduce the caseload of high courts and Apex Courts, which comes through direct constitutional jurisdiction under the constitution of Pakistan 1973.

7. Conclusion

Alternative dispute resolution is very effective to provide justice in lower level because this type of proceeding initiated speedily to accommodate the common people. While deciding the case under ADR all the legal measures has to be followed.. But there is another legal aspect, “Early justice is burnt the justice and delay justice is denied the justice.” Ever thing has positive and negative effects, but ADR has so many positive aspects to conclude the cases and there are some negative aspect also. As an example, if arbitrator would be from the locality, may be he has not fully knowledge on the legal issue, neither he has proper specific qualification like a judge and maybe he has some affiliations that could be affecting the decision of the case. Due to these reasons many of the decisions of the arbitrator have been set aside or remanded by the appellant courts. Under this procedure not much time spent to decide the case, other than trial or not expensive and also provides the opportunity for the parties to resolve their issues.

²⁸ Declaration of International Judicial Conference held in 13-15 April, 2012 in Supreme Court of Pakistan, Islamabad.

²⁹ Centre for Justice & Reconciliation, “Restorative Justice” *briefing paper – 1 centre for justice & reconciliation, washington, dc* (2007).

³⁰ Ibid

³¹ Strang Sherman Dorothy, Newbury, Birch “Restorative Justice”. *Youth Justice Board, United Kingdom* (2008)