

Alternative Dispute Resolution (Adr) In Pakistan: The Role of Lawyers in Mediation Procedure

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ABSTRACT

Alternative Dispute Resolution (ADR) is becoming an important part of the legal systems of every country in the world. Especially the mediation has getting more attraction because of inexpensive, gives access to fast justice and avoids the suffering of litigation. Mediation comprises by courts and may be part of pre-action needed in various jurisdictions. The lawyers can play an important role in this regard and explore the cooperative approaches that lawyers can adopt when representing their clients in mediation. It is also necessary that the lawyers must modify their practice according to the needs of the clients in fluctuating legal environment. This paper will discuss the relevant dispute settlement laws and their development in Pakistan; especially the mediation and the role of lawyers in mediation procedure. It will help the legal actors to find out their role of mediation development and strengthening the alternative dispute resolution system.

Key words: *Alternative Dispute Resolution, Dispute Settlement, Legal System of Pakistan, Mediation, Lawyers Role.*

INTRODUCTION

In the current situation to achieve the objective of timely and inexpensive justice every country is trying to introduce new approaches which called Alternative Dispute Resolution (ADR). There are several forms of Alternative Dispute Resolution (ADR) such as negotiation, arbitration, mediation and reconciliation. Mediation is a standard feature of modern dispute settlement resolution and getting popularity across the world. Mediation discusses to a procedure of cooperation that is regulated, where a third neutral party call mediator, who assists the dispute resolution thoroughly and helps the parties to offer alternatives, isolate the issues of dispute and influence them towards the mutual agreement. Mediation acts as a form of dispute decision this is still debatable in its

beginning in Pakistan. Due to the millions of cases are pending, currently the judges, experts and legal professionals in Pakistan are wanted to encourage the use of mediation to settle disputes, rather than settling the dispute in courts. The role of the lawyers in this regards is also becoming important. As such, the function of lawyers in mediation has turn out to be an increasing number of important. Mr. Justice Sir Gavin Lightman expressed the importance of the ADR in justice system of the UK in the following words, "The spiraling costs of contentious litigation, and the delays, uncertainties and lasting acrimony which such litigation occasions, have however over the past 20 years led to the increasing recognition by the judiciary, legal advisers and the disputants themselves that contentious litigation itself should be recognized as the option of last resort, and every facility should be afforded by the legal system, and every effort should be made by legal advisers, to achieve by alternative means a resolution of disputes which both parties can accept¹." The lawyer's inspiration and approach regarding the procedure and the success of the mediation to achieve the resolution of dispute is important.

¹ Caller, Russell. (Ed.) *ADR and Commercial Disputes*, London: Sweet & Maxwell, 2002, p. v.

Legal practice culture and the attitude of the lawyers to miens the dispute is also important. Lawyers in mediation can include the underlying philosophy of lots of mediation exercise and engage in collaborative trouble-solving this is non-adversarial in orientation². Rather, lawyers might also stymie the ability for settlement of disputes through taking an opposed, rights based technique in mediation. At this time lawyers and legal professionals may need to recommend vigorously for the rights of their clients, but automatically approaching mediation with an adverse mindset can also defeat some of the capacity of mediation to meet their clients' needs.

LITERATURE REVIEW

Online legal dictionary defined the mediation as "the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. Mediation differs from arbitration, in which the third party (arbitrator) acts much like a judge in an out-of-court, less formal setting but does not actively participate in the discussion. Mediation has become very common in trying to

² Macfarlane, J. (2008). *The new lawyer: How settlement is transforming the practice of law*. UBC Press

resolve domestic relations disputes (divorce, child custody, and visitation) and is often ordered by the judge in such cases. Mediation also has become more frequent in contract and civil damage cases. There are professional mediators or lawyers who do some mediation for substantial fees, but the financial cost is less than fighting the matter out in court and may achieve early settlement and an end to anxiety. However, mediation does not always result in a settlement³.”

In Pakistan there are following laws having provisions about the Alternative Dispute Resolution (ADR) such as Constitution of Pakistan, 1973 (Arts. 153-55); ADR provisions of the Code of Criminal Procedure, 1898; S.89-A of the Civil Procedure Code (CPC), 1908 (as amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution methods); The Civil Procedure Code, 1908 (CPC) have also dispute settlement related provisions and make a contemporary theme of mediation. There are following related provision:

Section 89-A. Alternate dispute 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.”

Order X Rule 1A: 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.

The ADR terms have used are conciliation and mediation but not lemmatized because there is another word used is “any other method” so that its means it is an open ended provision⁴. The Arbitration Act, 1940; the Probation of Offenders Ordinance, 1960; Sections 10 and 12 of the Family Courts Act, 1964; Section 195C of Customs Act, 1969 and Chapter XVII of the Customs Rules, 2001. Income Tax; Article 163 of the Qanun-i-

³ Online legal dictionary, <https://dictionary.law.com/Default.aspx?selected=1233>

⁴ <http://www.zklawassociates.com/wp-content/uploads/2012/03/PACKAGE-OF-AMENDMENTS-TO-CIVIL-PROCEDURE-CODE-1908-.pdf>

Shahadat Order, 1984 (decision on oath); Plea Bargaining (sec. 25 of NAB Ordinance, 1999); Section 134A of the Income Tax Ordinance, 2001 and Rule 231 C of the Income Tax Rules, 2002. Sales Tax; The Small Claims and Minor Offences Courts Ordinance, 2002; Section 47A of the Sales Tax Act, 1990 and Chapter X of the Sales Tax Rules, 2004; Section 38 of the Federal Excise Act, 2005 and Rule 53 of the Federal Excise Rules, 2005 Customs and Sections 96–99 of the Local Government Act, 2013. For the use of ADR laws in the country and to provide the guidance to the courts and judicial officers to apply the ADR laws wherever possible. The National Judiciary (Policy Making) Committee formulated the National Judiciary Policy, 2009. It expressed in the following words, “The Small Claims and Minor Offences Courts Ordinance 2002 should be applied in earnest.

Pakistan Mediators Association⁵ (PMA) is Pakistan’s first organization representing foreign trained and accredited mediators as well as other professionals who have joined the Association to further the cause of the Association. The Association was formed in 2013 and has taken

over number of activities which were earlier implemented by IFC/World Bank Group’s Alternative Dispute Resolution (ADR) Pakistan Project Phase 1 & 2. PMA decides to support and lead to solve the disputes between the parties amicably and by using the mediation procedure. PMA is working with the following objectives and aims⁶:

1. Promotion of mediation process for resolution of disputes.
2. Support to government, semi-government and non-governmental organizations in law reforms pertaining to ADR and mediation.
3. Awareness rising among various groups, professionals and entities on mediation.
4. Provision of capacity building opportunities for professionals in field of mediation.
5. Network and develop and maintain linkages with likeminded local and foreign based organizations in field of mediation.
6. Hold conferences, workshops and other forums in field of mediation in Pakistan.

⁵ Pakistan Mediation Association (PMA) <http://www.pma.org.pk/about-pma/>

⁶ Objectives of Pakistan Mediation Association (PMA), <http://www.pma.org.pk/objective/>

The High Courts should designate civil judges cum Magistrates to try exclusively cases under said law. Such judicial officers are 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 provinces⁷.” To promote and aware the lawyers about the ADR, The Supreme Court Bar Association⁸ and Sindh Judicial Academy organizes various programs to education and train the lawyers in ADR.

Development of Mediation Law in Pakistan

Pakistan adopted pre-partition law. In 1908 the code of Civil Procedure (CPC) were enacted in the British India⁹, the provision of arbitration was also the part of this law. After enacted the Arbitration Act 1940, the related provision of arbitration were deleted from the code of Civil Procedure (CPC) 1908¹⁰. The ADR

also have rooted in the Constitution of the Islamic Republic of the Pakistan, 1973 as the (Arts. 153-155) adopted the Alternative dispute settlement method to solve the water associated disputed between the provinces and the State¹¹. For the settlement of disputes establishment of a Council of Common Interest (CCI), to solve the disputes between State and provinces related to water issues and the Art. 155(6) referred as “No proceeding shall lie before any court at the instance of any party to a matter which is or has been in issue before the Council or of any person whatsoever, in respect of a matter which is actually or has been or might or ought to have been a proper subject of complaint to the Council under this Article”. The constitution also provided the following provision to access the justice to people “the State shall ensure the inexpensive and expeditious justice” in Article 37(d)¹². Article 163, of the Qanun-i-Shahadat Order, 1984 described the provision for the settlement of the dispute between or among the parties decided by

⁷ National Judicial Policy, Expeditious Disposal of Cases- Part II (Civil Cases, 13) http://ljcp.gov.pk/nljcp/_as_sets/_dist/_NJP/_njp.pdf

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<http://www.sja.gos.pk/Publicaiton/MrFahimSiddiqui/ADR%20and%20Mediation.pdf>.

⁹ Code of Civil Procedure (India), [https://en.wikipedia.org/wiki/Code_of_Civil_Procedure_\(India\)](https://en.wikipedia.org/wiki/Code_of_Civil_Procedure_(India))

¹⁰ The Arbitration Act of India : The unfinished Business, <https://blog.ipleaders.in/the-arbitration-act-of-india-the-unfinished-business/>

¹¹ The Constitution of the Islamic Republic of Pakistan, 1973. Articles 153-55 http://na.gov.pk/uploads/documents/_1333523681_951.pdf

¹² The Constitution of the Islamic Republic of Pakistan, 1973. Article 37(d) http://www.na.gov.pk/uploads/documents/_13_3_3_5_23681_951.pdf

taking oath¹³. A special law “The Small Claims and Minor Offences Courts Ordinance, 2002”, was passed with purpose “to consolidate and enact the law relating to small claims and minor offences WHEREAS it is expedient and necessary to consolidate and enact the law relating to small claims and minors offences and matters incidental thereto or connected therewith for providing inexpensive and expeditious disposal of such claims and offences;”¹⁴. The small claims and minors offences courts ordinance defined the term “amicable settlement”¹⁵ in this law “includes settlement through arbitration process, other than arbitration under the Arbitration Act, 1940 (X of 1940), mediation, conciliation or any other lawful means mutually agreed upon by the parties”. There is clearly defined the term mediation used for the settlement of the disputes and also any other legal method in which parties shall be agreed and this law has provided the full ADR system with courts provided procedure.

¹³ Qanun-i-Shahadat Order, 1984,
<http://www.lawsfpakistan.com/wp-content/uploads/2014/07/qanun-e-ShahadatOrder1984.pdf>.

¹⁴ Preamble to the Small Claims and Minor Offences Courts Ordinance, 2002.
<http://www.ahmedandqazi.com/actsandregulations/litigationLaws/smallClaimsMinorOffencesCourtsOrdinance2002.pdf>

¹⁵The Small Claims and Minor Offences Courts Ordinance, 2002. Amicable settlement <http://www.ahmedandqazi.com/actsandregulations/litigationLaws/smallClaimsMinorOffencesCourtsOrdinance2002.pdf>

Qanun-i-Shahadat Order, 1984 (decision on Oath), also provides the settlement of civil disputes between the parties by taking oath at Holy Quran. . Only civil cases can be solved, if the petitioner is willing to take oath and defendant will be asked to deny the claim on oath. Art.163¹⁶, provides a following provision for the dispute settlement between the parties for taking oath. “Acceptance or denial of claim on oath:

1. “When the plaintiff takes oath in support of his claim, the Court shall, on the application of the plaintiff, call upon the defendant to deny the claim on oath.”
2. “The Court may pass such orders as to costs and other matters as it may deem fit.”
3. “Nothing in this Article applies to laws relating to the enforcement of Hudood or other criminal cases.”

In Pakistan Central Excise Act, 1944 (Section 36-D), Customs Act, 1969 (Section 195-C), Sales Tax Act, 1990 (Section 47-A) and Income Tax Ordinance, 2001(Section 134-A) have ADR provisions.

ROLE OF LAWYERS IN DISPUTE SETTLEMENT

¹⁶ Qanun-i-Shahadat Order, 1984,
<https://punjabpolice.gov.pk/system/files/qanun-e-shahadat-order-1984.pdf>



Bakar (2011) expressed that the involvement of the lawyers in the mediation process is common. A collective pattern of negotiation includes litigants trying to persuade the other party that they are in danger due to nonsuccess in the proceedings in a try to peruse that party to do away from the proceedings. Barnes (2007) suggested that the proper knowledge is essential for lawyers to have the process of mediation. Because mediation not only decreases the expenditures and the length of the court cases but also overcome the emotional toil of the litigation procedure. Specifically on the bases of the mutual agreement the mediation yield protects the parties' legal rights. Menkel-Meadow (1991) expressed nervousness of the lawyers to involve in the ADR would result in accusatorial ADR procedures. And the modern research endorses that the lawyers participation in court-connected mediation may decrease the control which parties have above results in mediation, limiting the benefits of mediation above the lawsuit. King (2014) defined that as relation to the ADR, pre-action techniques are important because they change the situation of ADR within the civil justice system from court-connected towards pre-trial ADR services offered by non-court providers or undertaken informally.

Poitras (2010) expressed that the lawyers can encourage the methods that mediation is assumed in relation to the model used and the methodology taken. Relis (2009) concluded that the in mediation often clients are controlled by their lawyers and the lawyers suggested their clients what is best and the other point is during the process of the mediation the lawyers ignored the needs of the clients. He also expressed that the approach of the lawyers regarding the mediation varied from gender to gender and in relationship focus the female lawyers are more collaborated than the male lawyers. The benefit of facilitative mediation¹⁷ is that because it is party-led, the result is likely to be more edible and durable for the parties. Brown (2004) expressed the mediation style employs collaborative problem-solving and integrative negotiating methods between the parties. Douglas and Batagol (2014) have expressed that the lawyers' participation in mediation procedure played a fundamental role in the failure and success of dispute settlement in the civil justice system. They also found that the lawyers in the mediation procedure can adopt the variety of rules related to the ADR and also give the legal

¹⁷ Mediation Styles, <https://www.keepoutofcourt.com/mediation-styles/>



protection by direct participation and representation to empowerment their clients. Hazel (2013) Explained the privacy in the procedures permits in ADR, the misuse of the inequalities in the power between the parties in case of a party is stronger than the other party. Few observers discussed against the presence of mediation in the court-connected perspective due to the abdication of the state in dispute resolution that mediation represents. Tyler (1989) has also expressed the hidden pressure ever-present in the ADR and the Laura (1994) has named this pressure due to the imbalance in the ADR environment “soft violence” and the Fiss, Resnik, Abel, Relis and Genn; also agrees with this.

CONCLUSION

The lawyers’ participation in mediation procedure played a fundamental role in the failure and success of dispute settlement in the civil justice system. It is also founded from above material that the lawyers in the mediation procedure can adopt the variety of approaches related to the ADR and also give the legal protection by direct participation and representation to empowerment their clients. The role of the lawyers in the mediation procedure requires further attention and should

be aware how they should involve them in mediation. For that the continues and updated professional education may help them to do so. It is also needed to identify the methods or ways which lawyers could adopt and s play constructive roles in and court connected mediation. There are many moral needs are required, as the legal experts conduct rules that affect lawyers’ conduct in mediation, containing the responsibilities owed to clients of honesty, diligence, loyalty and confidentiality, competence and courtesy,. It is a duty of the lawyers to guide and support their clients in filing of the genuine steps statements and also guide them before, during and post mediation procedure. Howieson (2011) expressed an important issues that the failure in the may cause that the lawyers to be subjected personally to costs orders. Parker and Evans (2006) described that it is essential for lawyers to adjust their legal practice according to the changing legal environment and make efforts to serve their clients in better way¹⁸. Lawyers with a robust stance on mediation will eventually be tasked with addressing the inadequacies of the present

¹⁸ Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2006), <http://the-eye.eu/public/World/Tracker.org/College%20Books/Cambridge%20University%20Press/0521546648.Cambridge.University.Press.Inside.Lawyers.Ethics.Oct.2007.pdf>

day felony system. Moreover, lawyers with mediation will also be prepared with the necessary skills and talents to resolve the emerging issues resolution. Its highly needed that to educate, train, and enhances the skills of the judges, lawyers, court personnel in Pakistan to promote the settlement of disputes through mediation and other dispute settlement provisions available in the related laws for the benefits of the whole justice system and help to reduce the burden of cases in the country. The Supreme Court Bar Association and regional Judicial Academies have highly needed to promote the training programs to aware judges, lawyers and judicial officers to use the mediation provisions to solve the disputes among the parties.

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