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Alternative Dispute Resolution in Family Disputes: Tradition, Statutory Framework, and Institutional Practice in Pakistan

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ABSTRACT

The article explores the processes of alternative dispute resolution (ADR) and how they are being used in family disputes in Pakistan, in a context that is both rooted in a long-standing tradition of informal adjudication, and is being shaped by developments in statute. The panchayat, the jirga and local elders were the bodies that resolved the conflicts over the land that makes up present-day Pakistan conflicts of families, divorce and property not the formal courts, for centuries. As time went on, jurists and legislatures have tried to institutionalize these consensual techniques to alleviate overburdened courts and to eliminate the time and expense of extended litigation. This article examines the main modalities of ADR in detail, and charts the reception of the same in the subcontinent from the Indian Arbitration Act 1899 up to the Arbitration Act 1940 and the recent statutory and institutional developments in Pakistan. Special focus is paid to the constitutional basis of dispute resolution, domestic and international arbitration regimes, conciliation mechanism under the Muslim Family Laws Ordinance 1961 and the Musalihat Anjuman, and the efforts of the institutions like the Karachi Centre for Dispute Resolution. The article contends that ADR has a rich cultural heritage in the region, significant merits of speed, economy and confidentiality has been present but its formalization in Pakistan has been somewhat disjointed, influenced by the obsolescence of the existing arbitration law, over-entanglement of judicial involvement and the lack of public awareness. It finds that mediation and conciliation can provide a way of maintaining the integrity of the family unit and provide accessible justice, provided that appropriate safeguards are put in place to protect the rights of vulnerable parties, particularly women, in the family context.

Keywords: Family Disputes, Mediation, Arbitration, Conciliation, Musalihat Anjuman.

1. Introduction:

In the area now part of Pakistan, the settlement of differences was conventional and centuries-old and had traditionally been left to the panchayat, the jirga, mediators and local elders. Many communities still today favor out-of-court methods of settling disputes over court proceedings. The disputes settled in this way cover family feuds, divorce, and personal grievances to property issues. Their scope and complexity in addressing the number of issues they manage, which has been developed over centuries, is significant and today could present a serious challenge for the modern state in meeting the human rights obligations as outlined in the Constitution (Hassan & Malik, 2020). This article discusses alternative dispute resolution (ADR) in relation to family disputes but the arbitration procedure outlined also applies to commercial and other civil disputes. ADR is a family of consensual processes, primarily arbitration, mediation, conciliation and negotiation, that take place outside or in parallel to traditional courtroom adjudication. The main argument purposed here is that ADR is embedded in the indigenously rich tradition of the country while the statutory framework is relatively underdeveloped, and that the family context is the most compelling cultural

explanation for consensual means of dispute resolution, as well as the most urgent demand for safeguards.

The following is a discussion about it. It first examines the academic literature and its development regarding ADR. It then explores the constitutional basis of Dispute Resolution in Pakistan and reviews the historical reception of ADR in the subcontinent. It throws light on the philosophical basis of ADR in the family and commercial sphere, the domestic and international statute and practice of arbitration and mediation, the conduct of arbitration and mediation proceedings, and the work of the main institutional centres. The article ends with an evaluation of the future of ADR in Pakistan and reform needed to make it a reality.

2. Review of the Literature:

Stone (2004) explains and examines the main programs of contemporary dispute resolution: arbitration, mediation, negotiation, and conciliation, and examines the development of these in the United States. She traces the modern beginnings of the dispute-resolution process to the Pound Conference of 1976; and analyzes the doctrinal and theoretical evolution that ensued, as well as the overall impact of the ADR movement on access to justice.

Clift (2006) notes that arbitration and mediation are the two most common types of ADR that are used in lieu of a court trial. While both are non-courtroom, they are quite different in nature and function; mediation is a relatively new process, with its own unique effectiveness. Clift outlines the underpinning concepts behind each of these two significant ADR programs and explains the conceptual difference between them.

Stipanowich and Ulrich (2014) surveyed the current status and future direction of ADR in commercial disputes in the United States, as well as the obstacles to the effectiveness of ADR and how to overcome them. Their research is directed at arbitration in the United States and the response it has received from the sophisticated commercial arbitrators.

Sourdin and Zeleznikow (2020) focus on how the COVID-19 pandemic has impacted the functioning of courts and ADR mechanisms. They report on the rapid technological acceptance by courts and practitioners and provide analyses of the aspects of technology being adapted or accepted in some or all parts of the different jurisdictions. Their work shows how flexible and adaptable dispute-resolution systems are to outside influences and the increasing influence of technology on dispute resolution.

Sternlight (2007) considers the relationship between ADR and the rule of law, making the questions: is ADR consistent with the rule of law, or is it at odds with it, and how can the two be brought together in the service of justice? These studies form the basis of the questions of efficiency, legitimacy and access which are explored in the context of Pakistan in the following sections.

3. ADR and the Constitution of Pakistan, 1973:

The Constitution of the Islamic Republic of Pakistan, 1973 contains no specific provisions or mechanism to resolve issues through the process of ADR nor does it mention the term "ADR" or give it a definition. The Constitution, however, in an indirect way suggests the way to settle conflicts through mediation and conciliation. One such indirect mechanism was the Council of Common Interests under Article 153 and 154 for resolving differences at the federal level which was primarily meant to settle differences amicably between the provinces. The National Economic Council is provided for in Article 156, which deals with disputes of a commercial and economic character, and formulates plans and advises the governments on the conduct of economic activity. The National Finance Commission is established under Article 160, and the federal government or the provincial governments have original

jurisdiction in case of any conflict between them and the federal government under Article 184 (Constitution of the Islamic Republic of Pakistan, 1973).

Although not explicitly in the words of ADR, these provisions do demonstrate a constitutional inclination toward negotiated and institutional resolution of intergovernmental conflicts. They provide an underpinning at the design level of constitution at the level of the statute and institutions examined below of consensual dispute resolution.

4. The Tradition of Alternative Dispute Resolution in the Region:

The concept of alternative dispute resolution is not new in the sub continent. It is a part of the culture of the region and has a rich heritage on different platforms in various regions. This has been a tradition of the area of resolving conflicts by consensus (like going to the panchayat or the jirga), as opposed to going to court and letting them judge. This idea might sound new to many people around the world, but it was a fundamental part of the subcontinent's operations, where any sort of dispute—whether it concerned criminal, financial, civil, family or other issues—was resolved through these alternative forums. In such circumstances, where formal witnesses were not needed, this framework proved to be very successful in comparison to the normal requirements of the courts. When the British rule came into existence in the subcontinent, the use of alternative dispute settlement was also accepted by the colonial legal system. The first legislative effort in the field of arbitration had been made in the form of the Indian Arbitration Act 1899 in British India. It was limited in scope and applicability, only to apply to the Presidency towns of Madras, Bombay, and Calcutta, but it was a welcome step toward recognition of arbitration during the British Raj. In 1908 it was enacted the Code of Civil Procedure, in which arbitration was recorded in the second schedule, but with a limited role. This was applicable only to suits before the Courts, and also to the whole of British India. This was the first written evidence of the concept of wider reach in the legal history of the subcontinent but still piecemeal in nature. To eliminate this anomaly, in 1925 the Civil Justice Committee recommended that a comprehensive law on arbitration be formulated, which would have a wider scope than the existing law, and afford speedy relief, set out a scheme for consolidating the law, would have reduced the litigation in the courts, would have enforced arbitration agreements and which would have extended to all of British India.

It is noteworthy that in 1927, Bombay High Court stated that the reference of matters to a panchayat is one of the common methods of deciding a dispute in India. In 1940, the Arbitration Act was passed by the Indian Legislative Assembly. This Act continues to exist and is binding in Pakistan today with some revisions. (Representing the State of Pakistan) The concept of alternative dispute resolution is thus firmly captured by the region's own society: as it is often put, the achievements, practices and traditions of the region's own heritage tend to be undervalued at home until they are acknowledged or recognized in the West.

5. The Philosophical Justifications for use of ADR in Family and Commercial Disputes:

Commercial trade has developed so much that parties can have a lot of freedom in controlling the terms and conditions of their contracts. They sign on to terms that they like and believe are likely to be beneficial for their subsequent interactions. In this regard, parties frequently enter into an agreement to use alternative dispute resolution procedures that are more economical, efficient and less time consuming than traditional forms of dispute resolution, which include the possibility of abnormal delay. On this perspective, the contracting parties have a better alternative to ADR. In traditional approach to litigation, delay is the general and pervasive characteristic of almost all legal systems. Legal systems worldwide accordingly offer other ways of resolving disputes using ADR, and parties may therefore choose to try some

other approach to dispute resolution. The principle behind arbitration is to provide a just, expeditious and equitable remedy to the parties. It is generally accepted that alternative dispute resolution is the most speedy, effective and confidential way of settling the conflict between the parties involved in a contract (Totaro 2008) and as such the technique has gained popularity worldwide, especially in the commercial world. The concept of the law behind it is to avoid the lengthy court process and instead have a neutral third party agree to the resolution of the dispute and make a decision based on what they see and believe in the best interests of the parties and the available evidence.

In court orders, one party gets most of the benefits and the other party gets nothing, whereas in arbitration, both parties compromise with each other on some aspects and agree to solve their problems and get some benefits from each other. Arbitration is growing in importance as an alternative to formal litigation, with a growing number of commercial disputes being settled by arbitration. The rules of evidence and procedure do not typically apply in ADR, but with the rise of various communities and the expansion of international law, complexity has been added to ADR. The parties may enter into an arbitration agreement without it being in a formal or separate manner; it could be a clause in their contract. The agreement may be enforced by either party, either in writing or based on counsel, and the signatures of the parties on the agreement are not required. An arbitration clause does not get cancelled due to a violation of the contract. Where one party wants litigation and the other party wants arbitration, the court will generally respect the arbitration clause and allow the issue to be decided on the basis of arbitration; and where there is an arbitration clause in a contract, an applicant is generally barred from attacking the same in writ jurisdiction.

Various levels of senior judges across different jurisdictions have been supportive of ADR. Judicially it has been recognised that a mediator can offer solutions that the court cannot, and that as the court has sanctioned mediation, the legal profession needs to be made fully aware of and recognise its value, or to accept reasonable requests to mediate (Slapper & Kelly, 2006). Nevertheless, the best conditions of ADR are not always met: A competent court can intervene in the due process, or the parties can go to the court to regulate the procedure, or to approve the award under the law. The formal legal order is then not replaced by ADR, but rather assisted, and although jurists and legal philosophers give their backing to ADR, it remains a secondary legal order. In the family context specifically, the Muslim Family Laws Ordinance 1961 provides for spouses to resolve their disputes through conciliation and mediation before entering upon trial and court proceedings (Muslim Family Laws Ordinance, 1961).

6. Legitimisation of ADR in Pakistan:

Conflict is a part of human society. In the modern context, the effort to resolve conflict can result in litigation in the courts, while conciliation can result in a process of negotiation, compromise and settlement. Legal advisers who promote conciliation serve to resolve conflicts in society; conciliation is a vital facet of the legal system and serves as a valuable supplement to the ordinary legal process. Historically, this is an old practice of region's culture with an institutional base of panchayat, jirga and mediation by the elders of family that provide numerous options for resolving conflicts. Over the years, the national and international emergence of organisations and the lag time characteristic of ordinary law have given rise to a number of ways to resolve problems outside the court, which have become recognised areas of practice in developed countries. But the same cannot be said about ADR in Pakistan where it has not been able to grow to the extent and has not yet found a niche as a specialisation. Thus, it is important to take into consideration the pertinent rules, along with

the amendments to them made by the legislatures and suggested by legal scholars that would elevate the status of this process in Pakistan.

6.1 The Domestic Framework:

In Pakistan, the dispute resolution mechanism has been provided by various Acts which provide an avenue for out-of-court dispute settlement. The processes are, in the main, regulated by the Arbitration Act 1940 which was passed prior to Partition and continues to be in force throughout the country. There were three situations covered in this statute for arbitration: (1) arbitration before court, (2) arbitration without suit, and (3) arbitration through court (Arbitration Act, 1940). The scope of the act's authority is wide, allowing for action at all stages of the arbitration process: before, during, and after the arbitration. For instance, the 1940 Arbitration Act provides for the court to make the appointment when there is no specification of the arbitrator in the arbitration agreement, and the parties have not appointed one. If the arbitrator is found guilty of misconduct, the court may, after investigation, remove the arbitrator. In certain circumstances the time limit for the arbitrator's decision may be extended by the court, and if a party is hesitant to arbitrate, the other party may be able to get the court's help by applying for the process to be started. The award is given legal substance and security by judicial confirmation the court has the authority to confirm the award and to judge it, to annul it, to set it aside, to remand it for reconsideration or to amend it.

The Act provides substantial opportunities for the parties to seek intervention in the courts, which can be very undesirable and makes arbitration appear cumbersome and unattractive. The same statute of 1890 continued to be in force in India until 1996. The same difficulty has been pointed out by the legal community, and the incisive comment of Justice D. A. Desai of the Supreme Court of India in 1981 that the procedure followed under the Arbitration Act 1940 and the doubt which is invariably cast upon it in courts, has made lawyers laugh and made legal scholars weep, exemplifies the problem. The mechanism of the 1940 Act seems to have been designed to take pressure off, and distribute the workload of, the courts rather than to promote the arbitration process and to achieve the noble goal of providing fast, cost-effective adjudication.

The grounds on which an award may be set aside are defined in s. 30 of the Arbitration Act 1940, the most significant of which is that of misconduct which is included in the first paragraph, namely "circumstances in which an arbitrator or an umpire has misconducted himself or the proceedings. 30). The statute, however, doesn't spell out what constitutes "misconduct." It was either an unfortunate oversight or a deliberate attempt to give the courts the maximum possible flexibility, but the legislature did not define the term "misconduct of an arbitrator," and it has been left to the courts to interpret the conduct of an arbitrator as an unwillingness or inability to discharge the duties of the arbitrator in a significant manner. This judicial gloss, however, may confuse the arbitrator's basic duties, and it would be better to define in the statute the meaning of the term. Furthermore, the statute doesn't explain or distinguish between the various stages of arbitration, leaving arbitral misconduct poorly explained.

There are certain statutes that regulate arbitration in specific areas. The Muslim Family Laws Ordinance 1961 provides an arbitration and conciliation process for settling marital disputes in family matters either before or during a suit and for confirmation of the outcome. The Small Claims and Minor Offences Ordinance 2002 provides for out-of-court settlement and summary trial of minor offences and small claims. The Code of Civil Procedure (Amendment) Act, 2002, had inserted Section 89-A into the Code of Civil Procedure 1908 and Rule 1-A of

Order X with the intent of adopting an ADR process to resolve the dispute and to dispose of the case, if it is found convenient by the court. Also, the Local Government Ordinance 2001 touched upon arbitration with the formation of a conciliation committee at the union-council level to bring civil, criminal, family and revenue disputes to an end through arbitration and conciliation under Section 102 of the Local Government Ordinance 2001. Additional mechanisms of consensual settlement are provided by the provisions of summary trial, in Chapter XXII of the Code of Criminal Procedure 1898, and in the constitutional institutions mentioned above, that of the Council of Common Interests, the National Economic Council, the National Finance Commission, and the original jurisdiction of Article 184.

6.2. The International Framework:

Apart from the Arbitration (Protocol and Convention) Act 1937 which has only been enacted to make foreign awards effective, Pakistan has never had an organised and properly established system to govern the process of international arbitration. Some of the rules were also enacted by the courts. The judiciary has long recognized the importance of ADR, and various landmark cases involving an international element have spoken to the issue, along with many cases where arbitration was more desirable than litigation. If Pakistan is to have a respectable place in the commercial world, then it is imperative that transnational commercial agreements are respected and the courts are not used as a tool to delay their implementation or the implementation of the decisions that follow from such agreements (*A. Meredith Janes Co. Ltd v. Crescent Board Ltd*, 1999). Court's treatment of arbitration in cases of *Conticotton S.A. v. Farooq Corporation* (1999) and *Hubco v. WAPDA* (2000) continue the trend.

The Arbitration Act 1940 covered only domestic disputes and ignored international arbitration altogether and therefore it was essential to have a separate international arbitration scheme in place in Pakistan, if the commercial relations of Pakistan with other foreign states were to be enhanced. Pakistan was a member of the Convention, 1958, on the Recognition and Enforcement of Foreign Awards (Henceforth, the Convention), as signatory but the Convention was not given domestic effect until 2005 with the enactment of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005. The passage of the Arbitration (International Investment Disputes) Act, 2011 by the National Assembly, aimed to encourage foreign investment and better relations with other States, deals with the implementation of international arbitration and enforcement of foreign awards in Pakistan.

Under the 2011 Act, the High Court now has the power to recognise and enforce awards and to execute them as if they were its own judgments (*Arbitration (International Investment Disputes) Act*, 2011). The Arbitration Act 1940 is limited to domestic arbitration – only this Act applies to international arbitration. An arbitration institute has been established in Lahore in 2009, which was called Alternate Dispute Resolution Centre (ADRC), however, due to the lack of public interest it was closed (Bhandari, Naqvi, & Riaz, 2011). This is a sign of early failure that highlights the difference between the recognition by the statute and the social acceptance of ADR, which shall be returned to in the discussion of mediation institutions.

7. Conduct of Arbitration Proceedings in Pakistan

Arbitration is an informal, collaborative, voluntary process for resolving disputes without going to court. One of its advantages is its binding nature: both parties agree to submit their dispute to a neutral third party, the arbitrator, who then decides the dispute and issues an award that must be abided by by both parties. The benefits of this approach are significant and include flexibility, low cost, speed, informality, confidentiality and privacy. The parties

have the discretion to establish the rules that will be followed by the parties — including the number of arbitrators and whether the formal rules of evidence will apply.

Throughout the process, an evidentiary hearing is held before the arbitrator or the parties submit written submissions to the arbitrator. At this hearing, all parties, their lawyers, their witnesses and the arbitrator appear before the hearing, and the general process is similar to that in a court hearing; each party presents evidence, questions witnesses, and cross-examines opposing witnesses, with the formal rules of evidence generally not enforced. After the evidence is presented and heard, and the arbitrator considers it, the arbitrator issues an award, which is binding on the parties and has the same effect as a court judgment, and may be enforced by the courts if necessary. The expenses of the proceedings are usually shared between the parties.

8. Mediation in the Pakistani Courts:

With the support of the International Finance Corporation (IFC) and the High Court of Sindh, a dispute resolution body was set up in the province of Sindh. The Centre was founded in February 2007, and operates as the Karachi Centre for Dispute Resolution (KCDR) with financial assistance from the International Finance Corporation (IFC) of the World Bank Group. The High Court of Sindh approved its establishment due to rapid growth in its burden on the judiciary with the surge in the number of cases. The Centre's fundamental aim was to alleviate that burden so that cases may be disposed of more efficiently and to offer justice in a time-saving, cost effective, less formal, more flexible and strictly confidential manner, with the ultimate goal of all parties resolving their disputes amicably. The Centre is led under the Charter of the Court and can be summoned by courts in its early days, a former Chief Justice of Pakistan (Karachi Centre for Dispute Resolution, 2015) was the chief executive officer.

The development of ADR is a major step toward a harmonious community, a positive social climate and a healthy economy. The KCDR's served as the principal mediation centre in Pakistan with years of experience and having trained others in mediation. Applies international standards and a code of ethics for mediations to resolve disputes involving family and labour, landlord–tenant, and contractual relations. The process of mediation is both rapid and efficient. The Centre's mediators have settled a significant number of cases, with an overall success rate of approximately 73 per cent and approximately 82 per cent in one district of interior Sindh where the mediators provided pro bono mediation services to women litigants. The Centre has reportedly helped release tens of millions of dollars in contested value through dispute resolution via mediation. It is a member of the Asia Pacific Regional Arbitration Group and has signed Memorandum of Understanding with various forums such as the Securities and Exchange Commission of Pakistan, Trade Development Authority, SAARC Arbitration Council, Karachi Chamber of Commerce and Industry, Istanbul Chamber of Commerce Arbitration Centre, Institute of Chartered Accountants of Pakistan and High Court of Sindh. The Centre is a step forward in a country which has traditionally paid little attention to other modes of dispute resolution and faced resistance from them. It provides a forum to parties to settle their differences in a civil and professional way and provides for flexible, convenient, quick and low-cost processes, which do not involve court litigation and are not delayed.

2 illustrative matters illustrate the scope of the Centre's activities. In the first, a dispute between a Dubai-based commodities trader and a private limited company in Karachi arose as to who was responsible for the shipment of goods from Pakistan. In the first, a dispute arose between a Dubai-based commodities trader and a private limited company in Karachi that agreed to export goods from Pakistan. With a few consignments, the timing, management

and arrangements, brought on the disputes between the two which resulted in the filing of several suits in the High Court of Sindh for non-performance and damage to reputations, the claims and counter claims of the two parties were mixed in the amount of some thirteen million United States dollars. The Karachi Centre for Dispute Resolution settled the case in two sessions of about 12 hours before a mediator which was then filed in the High Court and disposed off, which might have taken 8-10 years to settle in normal litigations.

The second issue involved a family feud. A Khula suit was filed by a wife and the court called for mediation. Dispute was found to be serious as the wife claimed that her husband had mistreated and behaved badly towards her and she was to get khula. In mediation, however, the parties have been able to reach a resolution to their differences, and the wife has opted to remain married to her husband. In this way mediation saved a marriage that otherwise would have broken up, and showed the unique nature of consensual processes in the family sphere where the preservation of the relationship is often as significant as the resolution of the present dispute.

There is also a mediation centre in the Lahore Chamber of Commerce, which is not formally affiliated with the Lahore High Court, but may be referred to by courts. Many law firms offer mediation services, and the Government of Pakistan's Musalihat Anjuman project is another way to resolve disputes to which courts may refer them. Alternative dispute-resolution (ADR) centres have been set up in various districts of Punjab to promote mediation in the court. In a single period (Hassan & Malik, 2020), over eleven thousand disputes were settled in these centres through mediation following a trial run and its success. The disposal of some eleven thousand cases means that it is the work of about eleven courts in a year as each civil judge disposes one case in a day.

There are other institutions such as the Pakistan Mediators Association that organize conferences and the workshops to promote mediation and sensitize the public in this regard and another ADR centre established by Khyber Pakhtunkhwa Judicial Academy for handling mediations referred by courts. The latter cleared up some of the problems, but is said to have "gone off his rocker". The mixed fortunes of these institutions in some provinces and the lack of development in others reflect the unevenness of the overall development of ADR in Pakistan.

9. Conclusion:

The alternative dispute resolution movement is making great strides in the legal field, as evidenced by its success in resolving disputes. In particular, arbitration and mediation have earned their niche in the legal field because of their flexibility. New legislation has been introduced and other changes are proposed to aid in the settlement of disputes at national and international levels and mediation centres are being set up throughout the country to resolve disputes effectively. However, the potential of ADR in Pakistan is just partial. The statutory definition of arbitration for the purposes of the government is still from 1940 and provides for a great deal of judicial intervention, which defeats the very purpose of arbitration for speed and economy; terms like "misconduct" are not defined; and public awareness and confidence in the formal ADR institutions is still weak as is evidenced by the shutting down of the arbitration centre in Lahore and the inactivity of the arbitration centre in KPK. Much of the revival of the proper role of ADR could be achieved in a novel reform of the arbitration law that curtails undue judicial involvement, spells out and clarifies some of its central concepts, and draws a clear line between its various stages. Well-designed conciliation and mediation is particularly a compelling case in family environment. The practice of consensual process can maintain the relationship, minimise trauma of adversarial proceedings and

provide access to justice and affordability, as evidenced by the consensual processes under Muslim Family Laws Ordinance 1961 and the work of the mediation centres. Concurrently, family environment requires a special degree of attention: it has been seen that in some cases, discussions in informal settings like panchayats and jirgas have resulted in outcomes that are at odds with constitutional rights of citizens, especially rights of women. The challenge now is to institutionalize ADR in a responsible manner; to build it into a new statutory system; to subject it to proper judicial control; and to ensure that protections afforded to the weaker party are robust and secure, that is, within a reformed statutory framework, subject to appropriate judicial control, and with robust protections afforded the weaker party, so that the ancient tradition of consensual settlement may serve the ends of justice in a modern constitutional order.

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