Expeditious Dispute Resolution Mechanism within Formal Judicial System of Pakistan

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by

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Abstract

This paper provides the first comprehensive insight on Expeditious dispute resolution mechanism within Formal Judicial System of Pakistan, which is an important aspect of the current ever-expanding debate on the issue of delay and legal efficacy. Delay in justice system is a chronic phenomenon that is inherent in almost every judicial system, but the situation in Pakistan is particularly alarming.

Delay is one of the major concerns that force people to settle their disputes out of the courts through other alternative dispute resolution mechanisms. Another reason could be related to the complexity of procedure. People in general are afraid of mishandling

cases by police, exploitation of lawyers and the complex court procedures. Litigation, therefore, is never the first choice of parties in Pakistan. They tend to opt for other informal dispute resolution mechanisms, such as jirga or panchayet. Despite their inadequacy in most of the legal matters. I would like to add from the Pakistani perspective that we have raised legions of individuals who are not attuned to their rights and would rather cave and settle over fighting it out in court.

And this is one of the reasons why ADR has been introduced in many legal systems around the globe including Pakistan. The term Alternate Dispute Resolution' implies the use of amicable, informal and conclusive strategies like mediation, arbitration , negotiation and conciliation to resolve disputes of varying nature outside the ambit of formal justice system[1]. This paper refers to the word ADR as an amicable dispute resolution and argues that the same can be utilised within the existing formal judicial system of Pakistan. As initiated and presented by Professor Frank E.A. Sander in USA, the existing courts can work as a Multi Door House for efficient delivery of justice through employing multiple dispute resolution mechanisms or programs including litigation, conciliation, mediation, arbitration and other social and governmental services[2]. Backing the same patronage, this paper would like to urge the Lawyers, judges and other stakeholders to visualize the civil courts as an offertory of dispute resolution procedures tailored to fit the variety of disputes that parties bring to the justice system.

Introduction

Alternative dispute resolution is a growing and valuable global phenomenon to resolve disputes outside the court and in that sense, ADR is usually misinterpreted as a replacement to litigation, which is not the case. ADR mechanisms have not displaced the traditional litigation; hundreds of thousands of lawsuits are filed everyday in courts

[1] Hensler, Deborah R. "Our courts, ourselves: How the alternative dispute resolution movement is re-shaping our legal system." *Penn St. L. Rev.* 108 (2003): 165.
[2] Sander, Frank EA. "The multi-door courthouse." *Barrister* 3 (1976): 18.

around the globe[3]. However, there are some reasons to believe that the ADR mechanism has some success over the past few decades in changing business and legal decision makers views of how best to resolve legal disputes.[4] Even in Pakistan, there have been instances where the significance of ADR has been recognized, either by establishing dispute resolution centers or in a sense that courts have tended to anticipate the changes or interpret the existing rules in way which is compatible with the essence of ADR[5].

In this context, Pakistan, being a common law country, followed the suit after Lord Woolf introduced his reforms to the civil justice system of England[6]. The main planks of the reforms were pre-trial conferencing and trial scheduling with a vision of less adversarial, faster, cheaper and more affordable justice system. The Woolf report proved to be a catalyst in the U.K and led to drastic amendments i.e. Civil procedure Act 1997 and Rules of Civil procedure 1998. Objectives of these reforms are firstly, the establishment of a new fast track for straightforward and simple cases saving expense and time of the litigants.

Secondly, more Active management of larger cases by judges while dealing with cases proportionally. Judges are required to play a pro Active role in case management through pre trial conferencing to plan the litigation, narrow down the issues, encourage settlement and if necessary organise the trial[7]. A particularly important role for the judges at these conferences will be to "***level the playing field***" or ensuring that parties are on Equal footing when they have very different amounts of resources[8].

Thirdly, a range of measures to encourage openness, co-operation, and earlier settlements, including protocols of steps to be taken before proceedings are issued, positive encouragement by the courts to use mediation and other methods in

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[3] Hensler, Deborah R. "Our courts, ourselves: How the alternative dispute resolution movement is re-shaping our legal system." *Penn St. L. Rev.* 108 (2003): 165.
[4] ibid
[5] Won, Sung-Kwon. "Overview of Alternate Dispute Resolution with Special Reference to Arbitration Laws in Pakistan." *J. Arb. Stud.*23 (2013): 149.
[6] Zuckerman, Adrian AS. "Lord Woolf's Access to Justice: Plus ça change…." *The modern law review* 59, no. 6 (1996): 773-796.
[7] De Smet, P. A., and Willem A. Nolen. "St John's wort as an antidepressant." *BMJ: British Medical Journal* 313, no. 7052 (1996): 241.
[8] ibid

appropriate cases. This concept of amicable dispute resolution through case management is not in a contrast with the essence of ADR in anyway, rather it considers adopting the same approaches within the existing formal legal setup. We need to understand that ADR is not and cannot be an outright and exclusive substitute to formal justice system. The problems of backlog and delayed justice cannot be tackled purely through employing ADR, unless there is an institutional and attitude change in the main Actors of the judicial process i.e. the Bench, the Bar and the litigant public[9]. And as rightly pointed by His Lordship Mr. Justice (Retd.) Tassaduq Hussain Jillani "***this process of dispute resolution through case management has to commence at the basic level i.e. at the subordinate judiciary level. The subordinate courts are the back-bone of the entire judicial hierarchy. It is here that the concept of rule of law confronts the first trial; it is here that more than 95 % of cases are filed and pending; it is here that the impressions and perceptions about the judiciary take shape; it is here that people in litigation suffer for months, years and decades and spend the best part of their lives waiting for that elusive Justice which at times is delayed, at times denied, and at times is bitter with expense it entails***."

ADR within the formal Judicial System

The Concept of dispute resolution has multiple strands, which have been woven together in a complex fashion giving each strand a different meaning and shape depending on the mode and forum of its application. Nonetheless, at the core, all of them aim at providing the prompt and fair resolution of a dispute. Keeping this view, I would like to express that courts can be the best forum for expeditious dispute resolution within Pakistan for a number of reasons. Firstly and Most importantly, According to the constitution of Pakistan, 1973 dispute resolution is the domain of judiciary. Judiciary has expertise and legal background of law and is mandated by the constitution for dispute resolution.

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[9] Jillani, Tassaduq Hussain. "Delayed justice and the role of ADR." *Pakistan Law Journal* (2012).

Secondly despite all the lacunas, the element of transparency and public faith is attached to the judiciary. It might not be the same with other modes of dispute resolutions.

Thirdly, courts always leave the door open for appeal. In other alternative resolution mechanisms the theme is optional, until the parties are satisfied. for example in ADR or jirga there is usually no right of appeal. More importantly dispute resolution through the courts is more or less negotiating or mediating peacefully under the umbrella of law. Lord Woolf, the Chief Justice of England and Wales, in his report on ***"Judicial Reforms in U.K." argued that . Without effective judicial control, however, the adversarial process is likely to encourage an adversarial culture and to generate an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable. This situation arises precisely because the conduct, pace and extent of litigation are left almost completely to the parties. There is no effective control of their worst excesses. Indeed, the complexity of the present rules facilitates the use of adversarial tactics and is considered by many to require it."***

Various Modes of ADR Within The Formal Judicial System

Various modes of Dispute resolution within the formal judicial system developed over a period of time in different jurisdictions. Reforms in Procedural law of civil courts started after a good deal of criticism by Dean Roscoe Pound's 1906 speech on The Causes of Popular Dissatisfaction with the Administration of Justice[10]. He contended that the system of the court was "***archaic and our procedure behind the times.***"' resulting in the "[u]ncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice[11]. And due to these drawbacks " ***there is "a deep-seated desire to***

[10] Sherman, Edward F. "Dean Pound's DissatisfAction with the Sporting Theory of Justice: Where Are We a Hundred Years Later." *S. Tex. L. Rev.* 48 (2006): 983.
[11] Roscoe Pound, The Causes of Popular DissatisfAction with the Administration of Justice, 40 AM. L. REV. 729, 742 (1906)

keep out of court, right or wrong, on the part of every sensible man in the community." The solution that he came up with was case management. The procedural revolution Pound commenced was the most thoroughly successful one in twentieth-century American law resulting into amendments of CPC USA in 1938. and rule 16 A was included.

In England the credit of further development goes to sir Raymond Evershed for his recommendations on the more Active role of judiciary in dispute resolution in 1953[12]. He came up with the suggestion of pre trail conferencing and pre trial scheduling based on the concept that judges should pursue a more Active and dominant course in the interest of litigants.

Another milestone in this regard was the recommendations of Morrine Solomon in 1970 with the objective to streamline the judicial proceedings. On his recommendation American bar association constituted a commission on standards of judicial administration. His recommendations were published, under the title, case flow management in trail courts, 1973[13].

Australian federal court adopted docket system in 1987, whereby judges started direct monitoring of cases from initial filing to final resolution whether by settlement or by trial[14]. Lord Woolf 's vision of access to justice in 1996 contributed a great deal and All this work on court delay appears to have made a real impact on policies and programs in a number of courts globally and the modes now in practice for dispute resolution are following.

(i) Case Management
(ii) Judicial Settlement
(iii) Early Neutral Evaluation

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[12] Evershed, Francis Raymond. "Our Common Heritage of Law." *NYUL Rev.* 27 (1952): 32.
[13] Mashaw, Jerry L. "Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy Fairness and Timeliness in the Adjudication of Social Welfare Claims." *Cornell L. Rev.* 59 (1973): 772.
[14] Von Nessen, Paul E. "The Use of American Precedents by the High Court of Australia, 1901-1987." *Adel. L. Rev.* 14 (1992): 181.

(iv) Mediation
(v) Arbitration and
(vi) Summary Judgment.

Expeditious Dispute Resolution in Pakistan within Formal Justice System; what is needed?

In Pakistan several laws do contain provisions for initiating settlement of disputes through ADR, However due to our predominant adversarial culture the practical utilisation is very limited. For instance, in family laws there is a specific provision for pre-trial and post-trial conciliation/mediation effort by the court. Similarly in 2002 Section 89 A was embedded in Pakistan Civil Procedure Code to make room for ADR. Section 89 A. if co-related with non trail centric provisions, or inquisitorial provisions Section 30 and (order 10-15 of Civil Procedure Code) can work effectively and efficiently for case management and dispute resolution at the early stages of the case. Similarly Arbitration Act 1940 provides step by step guidelines for arbitration. All these provisions are already applied individually by judges, but a systematic, organised and professional effort is required on the part of ad judicature.

Similarly on criminal side, provisions related to compoundable offences provide mandate to the judges for dispute resolution without formal trial.

There is no denial of the fact that our procedural laws are not only trial centric and mainly based upon adversarial norms of justice .However ,the present laws and rules in Pakistan do not prevent judges from calling litigants to preliminary hearing for thoroughly scrutinizing their pleading, evaluating the evidence, making attempts for resolving the disputes through ADR modes ,narrowing down the controversies and summary adjudication of the matters ,where need be . The Code of Civil Procedure, 1908 indeed provides an effective mechanism in this regard. For instance section 30 of the Code read with order X to XV obliges the judge to become fully involved and play a

more activist role at the pre trial stage. The purpose is to prevent the parties and their advocates, or even the ministerial staff of the court from taking charge of the proceeding, by indulging in or resorting to tactics, which may hamper the speedy disposition of cases. Therefore, pre trial proceedings, internationally known as pre trial conferences and scheduling orders, if properly conducted, would result in complete paradigm shift. These provisions are indeed the tool and techniques for case management and objectives aimed by legislature may be inferred as under,

1- Seeking clarification from parties with regard to nature and justification of the claim through examination.

2- Ascertainment of the nature of the process to be issued, as to whether for final disposal of the case or for settlement of the issue

3-Obtaining admissions of the facts and /or documents.

4- Evaluating and deciding admissibility of the evidence before framing the issues.

5- Discovery management system, regarding facts based upon oral assertions or documents, through interrogations.

6- Avoiding collection of unnecessary and irrelevant proof.

7- Amendment of pleading so as to include only the essential and exclude the non-essential material.

8- Scheduling miscellaneous application hearing, i.e. injunctions , impleadment, rejection etc.

9- Constituting commissions for recording evidence, carrying inspections and production of documents.

10- Summary adjudications.

11- Encouraging the parties to try and reach an out of court, amicable settlement of disputes, through any of the alternative means of dispute resolving, arbitration, conciliation or mediation.

12- Finding material for framing of issues.

13- To set time lines .i.e. case scheduling orders.

14- Restricting /limiting the number of factual and expert witnesses to the mere essential.

It may not be out of context to state here that such pre trial conference is mandatory in some jurisdictions like Fiji, Hong Kong, martial islands, Philippines and United States. The courts there are bound to apply such procedures and the parties obliged to comply. For default on the part of a party, sanctions can be imposed. Some states prescribe specific and indeed quite detailed procedures on the subject like Australia, Nigeria, Singapore and the USA

It is pertinent to mention that the two reports on our civil laws reforms, justice S.A Rehmans Laws reform commission report (1958-59) and justice Hamood-ur- Rehmans law reform commission report (1967-70) recommended the initiation of formal pre-trial hearing for expeditious resolution of preliminary issues, thereby helping to expedite the pace of trial.

It is observed that order X CPC, which mandates examination of parties, if applied properly ,is likely to result in admission of many facts, thereby reducing the necessity of recording evidence .Sec 10 of the Family courts Acts , 1964 provides the same mechanism besides statutory ADR arbitration in terms of spirit of verse 35 of Sura- e-Nisa.

Likewise the provisions of order 11 of the code , providing for discovery by interrogation , production and inspection of documents further empower the courts in curtailing unnecessary proceeding and expediting the process of adjudication. Certain enabling provisions are needed for effective implementation of this case management system, regarding hon'ble the Peshawar High Court has already taken the initiative by introducing Order 9-A and 15-A CPC, after thorough deliberation & consultation with the Provincial government & by the grace of Allah Almighty the amendment has been notified and now holds the field. The KP Judicial Academy has also so far trained 250

judges and almost 300 lawyers in this regard.

As far as our criminal justice system is concerned, though no such exhaustive legal framework is available for case management in the Code of Criminal Procedure, 1898 yet there is no impediment for the judges to take the support & invoke certain enabling provisions in this regard. For example, scrutiny of the prosecution case can be made upon submission of final report (challan) if sec 190 and sec 204 of the code are properly applied. The process is not to be issued mechanically for procuring attendance of the accused unless and until a prima facie case is made out from the record submitted. Yet another stage is that of framing of charge, whereby the court is again empowered to assess the case, as to whether there is any probability of conviction of the accused, if the answer is otherwise then the matter can be buried then and there as far as the accused nominated is concerned. Sec 345 of the code provides list of compoundable cases, meaning thereby that the court can play Active role in resorting to ADR modes. The relatively new concept of 'Nolo contendere[15]' (plea of no contest) ,which has already been endorsed by our precedent law[16] in 2009, is also an effective mode for expeditions dispute resolution. However , there is a dire need for legislation regarding management of the criminal cases and for that matter we need not to amend or disturb main scheme of the code but the objective can be accomplished by framing of the rules by honourable high court in consultation with the respective provincial governments under sec 554 of the code . The KPJA again took the lead in this regard by drafting the rules of Criminal case management, which have been circulated to the stakeholders for their feedback. Moreover , the KPJA after examining international best practices of many common law jurisdiction i.e. UK ,USA , south Africa , Australia , new Zealand , Singapore , Malaysia etc. on case management, has adopted this as its flagship programme. Not only the judges but also the lawyers are being trained in this respect focusing on their skill development. The Academy has also held a national level seminar, a month ago, for orientation of the stakeholders.

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[15] Lenvin, Nathan B., and Ernest S. Meyers. "Nolo Contendere: Its Nature and Implications." *The Yale Law Journal* 51, no. 8 (1942): 1255-1268.
[16] (PLD 2009 LHR 312)

Conclusion

The term ADR has seen an extraordinary growth in the last few decades owing to the public complaints about the inefficiency and complexity of our formal judicial system[17]. Unfortunately our legal system is trail based. Law has provisions as how to decide the petty cases, with the name summary and judges are empowered to decide the cases summarily in petty issues. But in practice, every claim be it minor or major is being routed through regular trail. Moreover, perhaps because of scheme of our procedural laws, rules premised on adversarial and advocacy systems, with legal decision-makers, simply do not respond to the cases as they were intended to[18]. Given the analytical approach towards dispute resolution in both stages, (i) pre-trial conferencing and (ii) during trial court referral to ADR, we must consider to highlight the utilisation and importance of existing rules and enforcement mechanism within formal judicial system. That is to say, even if we don't have any new legislation on ADR, the existing laws can be utilised to a certain extent whereby the speedy dispute resolution is made possible. There are many relevant enabling provisions, for expeditious dispute resolution such as Section 89 A of CPC, Section 190, 204, 242, 265 (d), 345 and chapter 22 of CrPC, section 10 of Family Courts Act 1964 if read with Verse 35 of ch4. Of Holy Quran, and local government rules and ADR Act 2017. Two chapters are in pipe line for amendments in Civil & Criminal Procedure Code in this regard. However there is a dire need to utilise the available legal framework for speedy disputes resolution. Technical adjudication is not the spirit of law. it's basically the speedy delivery of justice. Courts must play their part to make the process more transparent through proper documentation and framing stepwise rules or SOPs.

This forum can recommend the adjudicator to frame rules, under section 554 CrPC, whereby high courts are empowered to make rules. Also the role of Bar and lawyers is less clear but more important in this regard. Lawyers should be sensitised about their

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[17] Edwards, Harry T. "Alternative dispute resolution: Panacea or anathema?." *Harvard Law Review* 99, no. 3 (1986): 668-684.

[18] Menkel-Meadow, Carrie. "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities." *S. Tex. L. Rev.* 38 (1997): 407.

role in relation to dispute resolution whether it is within the formal judicial system or ADR. Globally, Lawyers play more Active role in ADR and they are expected to be familiar with the various forms of ADR, explain them to clients, as to which method to select for any given case, and represent clients effectively using the chosen method[19]. This trend should be encouraged in Pakistan as well and lawyers must perform their role for the speedy delivery of justice, through counselling and advising, developing strategy, understanding the law and ethics, advocating and representing their clients well and concluding the mediation, negotiation or any other mode of dispute resolution[20].

As an end note, I would also like to recommend legal education and training about ADR and expeditious dispute resolution within the formal judicial system both for judges and lawyers. I expect that such initiative will help, not only the judges to understand how to utilise the existing mechanisms for speedy justice but will also encourage and engage lawyers to learn the practical skills of representing clients in pre trail conferences, mediation, negotiation and other dispute resolution processes.

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