

COMMUNITY PARTICIPATION, THE MISSING LINK IN PAKISTAN'S ADR SYSTEM – THE WAY FORWARD

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ABSTRACT

Alternate Dispute Resolution (ADR) plays a vital role in serving the interests of justice, especially when people start to lose faith in the formal justice system due to the slow pace and ever-increasing cost of the latter. The primary objective of ADR was to supplement the regular courts in minimizing the backlog of cases. However, its ultimate beneficiaries turned out to be the poor and the disadvantaged, as it provided them with a forum to resolve their disputes informally through mutual understanding, without hiring expensive attorneys and waiting needlessly to get their cases heard by the regular courts.

Responding to the acute need for alternate methods of dispute resolution, Pakistan adopted several ADR enabling laws. This paper will suggest that the laws in question may not bring about the desired results, as they promote state driven, instead of community-driven ADR. The reason for the success of ADR in developing countries like Bangladesh has been due to the involvement of the local community and consequently the idea of a state driven ADR goes against its true spirit.

The purpose of this paper is to address the current loopholes in ADR-related laws in the country and to suggest possible reforms.

INTRODUCTION

Pakistan adopted the Alternative Dispute Resolution Act 2017 with a view to reduce the backlog of cases pending in the courts, and to provide a second

forum to its citizens for them to obtain affordable and speedy justice. Both these factors were serious enough to necessitate positive efforts for building a credible ADR system that was based on the needs and aspirations of the people. For example, before designing such a program, a survey should have been conducted to determine what kind of alternative disputes mechanisms were most needed, keeping in mind the local requirements. In addition to this, people should have been educated and trained through awareness campaigns and workshops before the ADR system was formalized. The involvement of the community would have been beneficial to have an understanding of the system and to figure out the kind of cases that were best suited to the application of different ADR techniques. Unfortunately, these issues were left largely unaddressed while launching the system; as a result of which the present ADR system may not be deemed to be effective, nor ideal in the context of Pakistan.

There are two major flaws in the existing ADR model. First, it gives a needless supervisory role to the courts, on nearly every stage of proceedings. Secondly, the participation of the local community has not been encouraged. The first may cause further over-burdening of the courts, while the second may keep the public disinterested in ADR. This paper suggests that both of these weaknesses should be addressed in order to reduce the backlog of cases and make people trust the system, giving it preference over traditional litigation.

For convenience sake, the paper is divided into three parts. Part I considers the meaning of ADR and its different iterations. Part II examines ADR in Pakistan. Part III underscores the importance of focusing on community-based ADR in Pakistan.

PART I – WHAT IS ALTERNATE DISPUTE RESOLUTION?

Alternate Dispute Resolution (ADR) methods have emerged as a substitute to traditional litigation for a multitude of reasons. While many credit the growth in the popularity of ADR methods to the growth of commercial litigation needing speedy resolution³⁷⁷ poorer litigants remain wary of the formal justice system, preferring informal methods of resolution as the latter is thought to give unfair advantage to the rich and resourceful. According to DK Sampath, ‘the poor lose in a conflict because they have nothing, no will to fight to finish, no stamina to sustain the fight and no ability to take advantage of the system.’³⁷⁸ Powerful litigants routinely exploit the procedural complications of traditional litigation to make the system work in their favour.³⁷⁹ On the other hand, the weak and vulnerable having no knowledge of the procedure or simply lacking the will or resources to fight for such a prolonged period of time, generally do not get outcomes in their favor. Against this backdrop, alternative dispute resolution methods provide a justice delivery mechanism which is more equitable in the sense that it is non-adversarial, consent-based, and free of procedural complications.³⁸⁰ The adversarial process in common law jurisdictions such as Pakistan has been criticized for encouraging litigants to be as combatant as possible in both the civil and criminal arenas. In the United Kingdom, which can be credited for the laying for foundations of the common law legal system, the famous Woolf

³⁷⁷ Justice Tassudug Hussain Jillani, ‘Delayed Justice and the Role of ADR’ available at <http://www.uop.edu.pk/resources/1.pdf>

³⁷⁸ DK Sampath, ‘Mediation Concept & Technique in Support of Resolution of Disputes’ 45 (Bangalore: Legal Service Clinic, National Law School of India University 1991).

³⁷⁹ Raza Ullah Shah, Shadi Ullah Khan, Sumera Farid, & Aman Ullah Shah. ‘Delaying Tactics Used by Lawyers in Dispensation of Civil Justice in Lower Courts of Pakistan’ Pakistan Journal of Criminology, Volume 6, No.2, Jul - Dec 2014, pp. 113 - 122

³⁸⁰ Carrie Menekel Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 Florida State University Law Review 153 (1999) at 155.

Report noted that an uncontrolled adversarial process can lead to an environment where questions of delay, expense compromise and fairness become a rather low priority.³⁸¹ Since the goal of ADR is to effect compromises thereby protecting the essential interests of the parties contrary to strictly enforcing their legal rights, it works equally well to the advantage of both the weak and the resourceful. In addition to reducing the backlog of cases, ADR also helps alleviate the suffering of the poor by making them feel empowered in letting them decide their outstanding disputes for themselves.³⁸²

According to *Halsbury's Laws*: 'Alternative Dispute Resolution (ADR) describes the processes of resolving disputes in place of litigation and includes mediation, conciliation, expert determination, and early neutral evaluation.'³⁸³ The aforementioned techniques are deemed to be inexpensive, interest-based, non-adversarial, confidential, and procedurally less complicated.³⁸⁴ Hence, employing one of these, depending on the nature of the case, can assist the disputant to obtain the kind of equitable justice that the formal justice system lacks the capacity to deliver.

³⁸¹ Lord Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (1996) available at <https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm>

³⁸² Duncan Green & Sophie King, 'What Can Governments Do to Empower Poor People' Oxfam Discussion Paper (2013) available at <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/305513/dp-governments-can-empower-poor-people-181113-en.pdf;jsessionid=E271537412B99438329FE1BFD7E04451?sequence=1> [Date accessed 02.04.19].

³⁸³ Lord Mackay of Clashfern, '*Halbury's Laws of England*' 5 (4th Ed. vol. 2(3), Butterworths 2003)

³⁸⁴ DK Sampath, 'Mediation Concept & Technique in Support of Resolution of Disputes' 71 (Bangalore: Legal Service Clinic, National Law School of India University 1991).

Moreover, the format of various ADR techniques reinforces the belief that ADR stands for justice by the people and for the people in a non-adversarial, inexpensive, and friendly setting. This argument draws support from the work of Professor Riskin and Westbrook who outline five points of justification for ADR:

‘Five motives, often intermingled, five most of the current interest in alternatives to traditional litigation: (1) Saving time and money, and possibly rescuing judicial system from an overload; (2) Having “better” processes, more open, flexible and responsive to the unique needs of the participants... (3) Achieving ‘better’ result-outcomes that serve the real needs of the participants or society; (4) Enhancing community involvement in the dispute resolution process; and (5) Broadening access to “justice.”³⁸⁵

The resolution of disputes through ADR has also been advocated by scholars of social behavior. For instance, Lee has emphasized the need to bring about harmony in society by settling conflicts through community participation.³⁸⁶ Similarly, Laura Nader elaborated the meditational practices of the Zapotec Indians and concluded that disputes are inevitable in human interactions, and the best way to resolve them is through community support.³⁸⁷ In the shape of ADR, poor and disadvantaged members of the society are given a choice

³⁸⁵ Leonard Riskin and James Westbrook et al. ‘Dispute Resolution and Lawyers’ 31 (5th Ed. West Academic Publishing 2014).

³⁸⁶ Chia Kuang Lee, *Predicting Intention to Use Alternate Dispute Resolution (ADR): an Empirical Test of Theory of Planned Behavior (TPB) Model*, International Journal of Construction Management, DOI: 10.1080/15623599.2018.1505026.

³⁸⁷ Laura Nader cited in Jan Hoffman French, *Personal Encounters with the Works of Laura Nader*, 39 Law and Society Review 957 (2005) at 957.

to protect their essential interests by engaging in dialogue with their adversary to secure a mutually satisfactory compromise.

The most frequently used ADR methods have been briefly discussed below.

1.1. Various Methods of ADR

The ADR method of negotiation facilitates disputants to settle their dispute voluntarily, through an informal discussion between the rival parties trying to reach a mutual settlement.³⁸⁸ Consequently, this creates a win-win situation for both sides and achieves the objective of protecting their essential interests.³⁸⁹ However, when negotiation does not bear fruit, the intervention of a neutral third party may facilitate the resolution of the dispute. This neutral party will be able to convey the interests and demands of the parties to each other and may also recommend solutions with reference to the dispute. This procedure of dispute resolution is known as conciliation and this ancient method was introduced in the sub-continent through the institution of *panchayats*, which are gatherings of community members headed by a respectable elder called *Sarpanch* or *Mukhia*. Disputes in *panchayats* were largely determined and settled on the basis of prevailing social norms and customs.³⁹⁰

Another method of dispute resolution is that of mediation; a non-binding dispute resolution mechanism that also involves a neutral third party who

³⁸⁸Mairi Robinson & George W. Davidson (ed.) *Chamber's 21st Century Dictionary*(1997) p. 916.

³⁸⁹Guy Boye, *Skills and Values: Alternative Dispute Resolution: Negotiation, Mediation, Collaborative Law, and Arbitration*, 6 Y.B Arb & Mediation 467(2014) at 470.

³⁹⁰ Dr. Lalu P. Thomas, *Dispute Resolution in Rural India: An overview*, 2 Journal of Legal Studies & Research 96 (2016) at 101.

tries to help the disputants reach a mutually-agreeable solution.³⁹¹ A Mediator may require the parties to spell out their differences in order to identify the issues between them and to further discuss their options; however, he cannot impose a settlement on them. As is apparent, the definition of mediation is quite similar to that of conciliation, which is why these two terms are frequently used interchangeably.³⁹² However, it is important to note that while the two techniques involve identical procedures, there does remain a slight distinction; conciliation is mostly used as a statutory term, whereas mediation is largely considered to be a synonym for a non-statutory conciliation.³⁹³

Lastly, arbitration is a method of ADR, which is closest to litigation because of its binding nature. It is mainly used for the resolution of disputes involving commercial, contractual, employment-related and labor management issues, although mediation, conciliation, adjudication, negotiation, expert determination are all widely used in these areas as well. In arbitration, the disputing parties refer their dispute to a third party chosen by them to make a binding settlement.³⁹⁴ The arbitration proceedings are kept confidential and in many jurisdictions including Pakistan, courts have a supervisory role in arbitral proceedings.³⁹⁵

PART II – DISPUTE RESOLUTION IN PAKISTAN: AN ANALYSIS

³⁹¹ Tony Bennett, *The Role of Mediation: A Critical Analysis of the Changing Nature of the Dispute Resolution in Workplace*, 41 *Industrial Law Journal* 479 (2012) 480.

³⁹² Claire Baylis, *Reviewing Statutory Models of Mediation/ Conciliation in New Zealand*, 30 *Victoria University of Wellington Law Review* 279 (1999) at 281.

³⁹³ Alfred W. Meyer, *To Adjudicate or Mediate: That is the Question*, 27 *Valparaiso University Law Review* 357 (1993) at 373.

³⁹⁴ The Arbitration Act 1940.

³⁹⁵ RIAA Barker Gillette, *A study of the Arbitration Law Regime in Pakistan* available at <https://www.riabarkergillette.com/usa/wp-content/uploads/Insight-Article-A-Study-of-the-Arbitration-Law-in-Pakistan.pdf> [Date accessed: 04.02.19].

5.1. The Formal Justice System in Pakistan and the Role of ADR

The principles of justice emerge from social norms. As said by John Rawls: 'Justice is the first virtue of social institutions, as truth is of systems of thought.'³⁹⁶

It has been suggested that the formal justice system, in particular that of developing countries, lacks the capacity to deliver justice on its own.³⁹⁷ Several factors are responsible for this, such as the overburdening of courts, the cost of proceedings, the delay in the disposal of cases, and procedural complications.³⁹⁸ Due to this overburdening, even personal disputes of petty nature are often dragged on for years, leading to mistrust in the judicial system and its effectiveness. Additionally, women endure severe distress during the entire process of trying to get justice through the formal justice system given that they are denied a level playing field in Pakistan's predominantly patriarchal culture.³⁹⁹ Similarly, minorities are often at a disadvantage in a typical adversarial setting where public support of the majority's viewpoint could virtually dictate court decisions.⁴⁰⁰

³⁹⁶ John Rawls, 'A Theory of Justice'3 (3rd ed. Harvard University Press 1971, Indian Reprint 2008).

³⁹⁷ VR Krishna Iyer, Processual Justice to the People, Report of the Indian Expert Committee on Legal Aid, May 1973 available at <https://www.worldcat.org/title/processual-justice-to-the-people-report-of-the-expert-committee-on-legal-aid-may-1973/oclc/3512991> [Date accessed: 04.02.19].

³⁹⁸ Id.

³⁹⁹ Sanchita Bhattacharya, *Status of Women in Pakistan* 51 J.R.S.P179 (2014) 186.

⁴⁰⁰ Mauro Cappelletti, *Alternative Dispute Resolution Process within the Framework of the Worldwide Access-to-Justice Moment* 56 *The Modern Law Review* 282 (1993) 294.

Pakistan has been struggling to enhance the capacity of its judicial system since its birth as a sovereign state. As a result of the current procedural technicalities⁴⁰¹ and the slow pace of proceedings, millions of cases remain pending in the courts of Pakistan.⁴⁰² Instead of disputes being resolved, further frustration is caused to the litigant public.⁴⁰³ In 2016, Punjab lawyers went on a strike in order to express their discontent over the ineffectiveness of the court system.⁴⁰⁴ The high pendency of cases mostly impacts the less privileged who consequently have to incur heavy financial costs till the time their cases are finally decided. Despite the cost barrier, even if they somehow manage to approach the courts, procedural mechanisms are likely to work against them if their adversary is financially strong.⁴⁰⁵ Therefore, access to justice is greatly hampered due to these factors.

Considering the multifarious problems associated with Pakistan's formal justice system, ADR can allow for an alternative path for the resolution of disputes. Access to justice is a fundamental right of all citizens of the country. The concept entails that people should have the ability to seek and attain not

⁴⁰¹ C.M.A No. 10314/2018 in Constitution Petition No. 05/2018 titled Umer Ijaz Gillanin v. Law and Justice Commission of Pakistan. Available at <http://ljcp.gov.pk/tg/order.pdf>. This report recognized that the Code of Civil Procedure Amendment Act 2018 had a number of amendments to the current Code that could address delays in resolution of civil disputes such as process of summons, strict time limits in providing written statements, and the recording of evidence through commissions.

⁴⁰² Malik Asad (Jan 21, 2018) The Dawn 'Over 1.8 million cases pending in Pakistan's courts'. Available at <https://www.dawn.com/news/1384319> [Date accessed: 02.04.19].

⁴⁰³ Zeeshan Ali, Alternative Dispute Resolution: A Paradigm Shift in Pakistan's Justice System? 26 July 2017. Available at <https://asiafoundation.org/2017/07/26/alternative-dispute-resolution-paradigm-shift-pakistans-justice-system> [Date accessed: 14.10.19]

⁴⁰⁴ Id.

⁴⁰⁵ DK Sampath, 'Mediation Concept & Technique in Support of Resolution of Disputes' 45 (Bangalore: Legal Service Clinic, National Law School of India University 1991) Raza Ullah Shah, Shadi Ullah Khan, Sumera Farid, & Aman Ullah Shah. 'Delaying Tactics Used by Lawyers in Dispensation of Civil Justice in Lower Courts of Pakistan' Pakistan Journal of Criminology, Volume 6, No.2, Jul - Dec 2014, pp. 113 - 122

just a remedy but a solution to disputes which is speedy, fair, and equitable. Consequently, it can be stated that inaccessibility to justice is a violation of this right. In such a situation, ADR can offer a viable solution.⁴⁰⁶

Following other countries, Pakistan introduced ADR mechanisms through multiple enactments. So far, this step has not yielded the desired results as there seems to be reluctance on the part of Courts to utilize these mechanisms.⁴⁰⁷ As most of these mechanisms rely on the adoption of a state-driven method of dispute resolution instead of a community-centric one, when institutions are reluctant or unable to utilize them, fewer litigants will have cause to turn to them either. The country may need to reform its ADR system to win the confidence of people so that it may serve as a true complement to regular courts.⁴⁰⁸

5.2. Reliance on the Informal Justice System in Pakistan

As mentioned earlier in Part I of this article, the most common form of informal justice systems in Pakistan is that of a *panchayat* or a *jirga*. These are traditional community-based councils usually comprising of a “council of elders headed by a respectable elder called *Sarpanch* or *Mukhia*”. Disputes in *panchayats* are largely determined and settled on the basis of prevailing social norms and customs.

⁴⁰⁶ Mary Anne Noone, ‘Public Interest Law and Access to Justice: The Need for Vigilance’ 37 Monash U. L. Rev. 57 (2011)

⁴⁰⁷ Justice Tassuduq Hussain Jilani, ‘Delayed Justice and the Role of ADR’ available at <http://www.uop.edu.pk/resources/1.pdf>

⁴⁰⁸ Chaudry Hassan Nawaz, ‘Delay Reduction with Effective Court Management’ available at www.fja.gov.pk/.../DELAY%20REDUCTION%20WITH%20EFFECTIVE%20COUR [Date Accessed 02.04.19].

A study by Community Appraisal and Motivation Programme (CAMP) in 2015 showed that there was more reliance on such informal justice systems than the formal court system in civil matters.⁴⁰⁹ Additionally, the majority of *Pakhtuns* were of the opinion that the informal justice system provided a speedy resolution.⁴¹⁰

However, it is important to recognize that these systems are not without their own shortcomings, which create another barrier to access to justice in the country. When people are forced to take the law into their own hands, they tend to retreat to such methods of dispute resolution that have no set of rules or directives, resulting in decisions which are blatantly discriminatory towards minorities and women.⁴¹¹ *Wani*, for example, where a minor girl is given or married off in compensation to a member of the victim's family, is a common way of resolving disputes. Perhaps for this reason, it was interesting to note that despite the reliance on such informal justice systems, the majority of the respondents in the study by CAMP also felt that the informal justice system in Pakistan did not have the proper authority to implement its decisions⁴¹², and voiced their general mistrust in the *panchayat* and the *jirga* system.⁴¹³ It was further observed that the majority of disputes were being taken to these forums by members of the extended family and those in the neighborhood,

⁴⁰⁹ Naveed Ahmad Shinwari, Understanding the informal justice system: opportunities and possibilities for legal pluralism in Pakistan, Community Appraisal and Motivation Programme (CAMP) 2015, Page 04.

⁴¹⁰ Id, Page 05.

⁴¹¹ Declan Walsh, 'She was gang-raped on the orders of village elders. Yesterday, Mukhtaran Bibi's nightmare began again' 4 March 2005.

<https://www.theguardian.com/world/2005/mar/04/pakistan.declanwalsh> [accessed 14.10.2019]

⁴¹² FN 26, Page 70.

⁴¹³ Id, Page 85.

which meant that the respondents preferred to resort to those informal institutions which were accessible to them.⁴¹⁴ The results of these responses are interesting as even as they conveyed their dissatisfaction with the informal system of *panchayat* and *jirga*, this did not convince the participants to turn to the formal justice system for relief. Instead, participants seemed to rely even more heavily on close and trusted members of their families and community members for resolution of their disputes. This clearly conveys that the common public relies extensively on the participation of its close family and community in resolving their disputes. This seems to suggest that in order for any ADR mechanism to be successful it must be based on community participation in which members of the community are directly involved as mediators, arbitrators, and conciliators as opposed to being a process that is controlled by the formal justice system.

5.3. Community Participation and State Controlled or Mandated ADR

Court controlled or mandated ADR often refers to dispute resolution where the court directs or recommends alternative dispute resolution after the parties have filed the case. Community participation in ADR on the other hand, while not capable of one specific definition, is usually described as the ability of community members to appropriate the ability to resolve conflicts in order to restore relations among community members. In this regard community members are also at times provided with some basic training in conflict resolution.⁴¹⁵ While court-controlled ADR is often presented as a

⁴¹⁴ Id, Page 06.

⁴¹⁵ Almeida, H. N. 'A theoretical Approach on social and community mediation'. Community Mediation in Europe: Experiences and Models. Coimbra : University of Coimbra. Faculty of Psychology and Education Sciences, (2014).

process where the courts are helping the parties to negotiate an interest-based solution, it has been seen that ADR that is focused on involving and empowering local communities to take the lead in deciding how to settle their own conflicts as opposed to court connected dispute resolution, has proven to be a much more effective way of ensuring equitable and speedy resolution of disputes.⁴¹⁶

The reasons for this are that community-based processes can serve to address conflict resolution rather than strictly dispute resolution. This means that the conflict does not have to be defined in legal terms and the parties do not need to engage lawyers or restrict the case to the limitations of the legal system by excluding issues of a more personal nature or by restricting participants in conflict resolution to those defined as parties by law.⁴¹⁷ The results, therefore, could be more satisfactory as a broader range of remedies and solutions could be found. However, as in the court-controlled process, the Court decides the issues to be resolved by the parties, it returns them to the adversarial arena forcing parties to reach a conclusion that is based solely on the legal process and the law. It has been observed that community participation serves to provide greater chances of meaningful participation for disadvantaged groups in the process of the resolution of a dispute.⁴¹⁸

The engagement of community members carries significance because people generally feel comfortable in presenting their cases to those living around

⁴¹⁶ Anna Nyland, 'Access to Justice: Is ADR a Help or a Hindrance?' Springer, Cham 2014, p. 325-344.

⁴¹⁷ Ibid

⁴¹⁸ Linda Mulcahy, 'The Devil and the Deep Blue Sea? A Critique of the Ability of Community Mediation to Suppress and Facilitate Participation in Civil Life', *Journal of Law and Society*. Vol. 27, No. 1, Voices, Spaces, and Processes in Constitutionalism (Mar., 2000), pp. 133-150

them.⁴¹⁹ Also, the settlement reached through community participation is mostly honored because people tend to respect undertakings given amidst community gatherings.⁴²⁰

Regrettably, as mentioned above, Pakistan's ADR laws are heavily subject to court or state control, while the experiences of other developing countries like Nepal and Bangladesh suggest that the key to success of any ADR model is its segregation from regular courts. Also, the system must be community focused and community driven.⁴²¹ Although Pakistan has adopted a multitude of ADR enabling laws, people are more interested in getting their disputes resolved through litigation as they see little or no participation of the local community in resolving their disputes through ADR. Instead, ADR appears to them as another forum organized, managed, and controlled by the state or judicial bureaucracy.

5.4. Framework of ADR in Pakistan

The framework of ADR in Pakistan is informed by the province or territory in which it exists. Many laws in Pakistan contain ADR enabling clauses.⁴²² In

⁴¹⁹ Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 Ohio State Journal of Dispute Resolution 1 (2012) 5.

⁴²⁰ Id at 3.

⁴²¹ Scott Brown & Christine Cervenak, 'Alternate Dispute Resolution Practitioner's Guide' 33 (Technical Publication Series, Centre for Democracy & Governance, Washington DC 1998).

⁴²² Chap. XII (Arbitration) The Punjab Land Revenue Act 1967, Land Revenue Act of 1967, Sc.24(1) Electricity Act 2013, Sc. 134-A Income Tax Ordinance 2001, Sc. 195-C Customs Act 1969, Sc. 47-A Sales Tax Act 1990, Sc. 38 The Federal Excise Tax Act 2005, Sc. 38 The Federal Excise Tax Act 2005, Sc. 10 of Family Court Act 1964 & Rule 11 OF Family Courts Rule 1965, The Institution of Banking Mohtsib was established under part VI-A of Banking Companies Ordinance 1962. Banking Mohtsib performs its functions as industry specific ombudsmen which is a hybrid type of ADR, Scs. 36, 36 & 38 of Industrial Relations Act 2012, Sc. 29 Punjab Consumer Protection Act 2005, Sc. 14 Small Claims &

addition to this the Federal Government and the Province of Punjab have adopted some new laws and made a number of amendments in its existing laws to incorporate ADR enabling clauses. For example, the Code of Civil Procedure 1908 now contains Order X, Rule 1(a) which provides that the Court may adopt, with the consent of the parties, any alternative method of dispute resolution, including mediation, conciliation or any such other means for expeditious disposal of cases.⁴²³

The country's superior courts are also in favor of promoting alternative dispute resolution mechanisms. The Lahore High Court, for example has time and again stressed the need to adopt alternate dispute resolution to prevent the wastage of time and resources of the ordinary litigants, and to reduce the burden of the courts. In fact, in 2016, the then Chief Justice of Lahore High Court, Justice Mansoor Ali Shah introduced the slogan '*muqadmabazi nahi - musalihat*', which means 'choose settlement over litigation.'⁴²⁴ Although the adoption of new laws on ADR is a welcome step in the right direction, the content of such laws need to be re-examined and refined further in order to achieve the goals of ADR. In the first place, the statutes mentioned above are all state driven as the interference of the courts can be seen at every step of the process, from referral of the case to determination of its final outcome. If the people have to go to courts first to trigger the mechanism of ADR, they are unlikely to take it as a system of justice managed and controlled by them, as it has been observed that

Minor Offences Courts Ordinance 2002, Sc. 13 The Shariah Nizam-E-Adl Regulation 2009, Sc.25 National Accountability Ordinance 1999.

⁴²³ Order X Rule 1-A Code of Civil Procedure, 1908.

⁴²⁴ Zeeshan Ali (July 26, 2017) 'Alternative Dispute Resolution: A Paradigm Shift in Pakistan's Justice System?' The Asia Foundation available at <https://asiafoundation.org/2017/07/26/alternative-dispute-resolution-paradigm-shift-pakistans-justice-system/> [date accessed 24.02.19].

involving and empowering local communities to take the lead in deciding how to settle their own conflicts as opposed to court connected alternative dispute resolution, has proven to be a much more effective way of ensuring equitable and speedy resolution of disputes.⁴²⁵ Additionally, if the disputes are referred to ADR centers instead of being referred to community representatives then people are going to perceive it as another layer of bureaucracy where the rich and resourceful are likely to be facilitated rather than the weak and vulnerable.⁴²⁶

A long-awaited and laudable step was taken by the parliament of Pakistan in 2017, when it adopted the Alternative Dispute Resolution Act, which has been passed to the extent of the Federal Capital Territory. However, the promulgation of this Act was not without controversy,⁴²⁷ because when the bill was first introduced it recognized *panchayats* to be a legitimate alternative dispute resolution mechanism. It held that where a *panchayat* or *jirga* system has been established under any law, it was to facilitate the amicable settlement of civil disputes and compounding of offences, as specified by the Act itself. As mentioned earlier, while *panchayats* are traditional community-based councils usually comprising of a “council of elders” that resolve disputes in a particular region, they have been criticized for giving decisions that are not only illegal, but in many instances inhumane and in gross violation of the fundamental rights enshrined in the Constitution.⁴²⁸ For this reason, it is

⁴²⁵ Justice Tassudug Hussain Jilani, ‘Delayed Justice and the Role of ADR’ available at <http://www.uop.edu.pk/resources/1.pdf>

⁴²⁶ Scott Brown & Christine Cervenak, ‘Alternate Dispute Resolution Practitioner’s Guide’ 65 (Technical Publication Series, Centre for Democracy & Governance, Washington DC 1998).

⁴²⁷ NA passes bill giving constitutional cover to jirga, panchayat systems (Dawn, E-Paper) available at <https://www.dawn.com/news/1312498> [Date accessed: 14.10.2019].

⁴²⁸ Society: Outsourcing Justice (Dawn, E-paper) available at <https://www.dawn.com/news/1352674> [Date accessed: 10.10.2019].

interesting to note that the final version of the Act passed in 2017 omitted all previous reference to such systems. The neglect of the legislature in recognizing the importance of community led dispute resolution, when enacting the aforementioned Act, is another glaring omission on their part.

Therefore, while the intention of the legislature in passing this Act was grounded in the admirable goal of assisting the courts in reducing the backlog of cases thereby saving time and precious resources of the state and litigants, it seems that the Act's focus on giving the court a preeminent role at every step of ADR proceedings is unlikely to produce the outcome desired.

An example of this can be seen in Section 3 of the Act, which provides that the court shall refer every civil matter (mentioned in the Schedule) for ADR except where the court is satisfied that the matter could not be settled through ADR, or where an intricate question of fact or law is involved. The court may even frame issues for resolution of the dispute before referring the case to ADR. Clearly, as per this scheme, the road to ADR passes through the court system, which works against the objective of lessening the burden of courts and allowing the people to settle their disputes by themselves. This also indicates that even in matters of procedure, the courts, rather than the parties themselves, are in charge.

Likewise, Section 10(5) of the Act provides that if the disputants reach an agreement they will have to satisfy the court as to its voluntariness in order to get a decree in terms of the compromise. This clause could potentially be abused by a party which considers itself a loser in the bargain in order to delay

execution. Section 12 provides that where the parties have directly approached an ADR center before initiating the matter in the court, and such a center has failed to bring about a settlement, no legal proceedings shall be initiated in respect of the matter in question, unless the parties concerned have brought the failure of settlement into the notice of the court. Correspondingly, section 13 provides that execution of an order or decree following ADR shall be made in the manner prescribed by the Act or in the manner prescribed by the relevant law. All of the above sections demonstrate that the legislature failed to consider that voluntary settlements reached through alternative dispute mechanisms are honored because they are made in the presence of community members.

The ADR Act 2017 does not include any such provision that utilizes community participation in the dispute resolution process and nearly all stages of the ADR process are accorded to court control and approval. The earlier proposed Bill contained provisions relating to *panchayats*, providing that where a *panchayat* is established, the same shall facilitate settlement of civil disputes and compounding of offences as per the provisions of this Act. However, the problem with these provisions was two-fold. First, it was confined to a small geographical area, where the system of *panchayat* was already in place. Secondly, even these scanty *panchayats* were subjected to state control, as the final order was to be issued by the court after satisfying itself as to voluntariness of the agreement. Unfortunately, even these scanty allusions to the principle of community participation were altogether dispensed within the Act that was ultimately promulgated.

More recently, however, Punjab passed the Punjab Alternative Dispute Resolution Act, 2019. This Act has mostly followed along the lines of its

federal counterpart; it has left more room for there to be community participation in the process.

Nevertheless, the ADR system in Pakistan is seen to make its way through the formal justice system and is to a very large extent still controlled by the courts. This does not bode well for the future of ADR in Pakistan, as its judicial system is considered to be expensive, cumbersome, adversarial, procedurally complicated, and extremely slow-paced.⁴²⁹ Thus, designing an ADR model that was initiated and controlled by the Courts was not expected to win public confidence. The way out of the impasse was to explore alternative methods of dispute resolution which focus on community participation, however, the current scheme of ADR disregards the fact that out of court settlement means 'beyond the court' by the parties themselves or 'through their community representatives'.⁴³⁰ Perhaps the resistance of the legislature in accepting, adopting and utilizing community-based dispute resolution systems is that they remain suspicious of informal ADR mechanisms. Even the Supreme Court of Pakistan, in a judgment⁴³¹ passed as recently as this year has ruled on the legality of such mechanisms and found these systems to be in violation of Articles 4, 8, 10-A, 25 and 175(3) of the Constitution. It held that *panchayats* do not operate under the Constitution or any other law to the extent that they attempt to adjudicate on civil or criminal matters. However, it also clarified that the *panchayats* may operate within the

⁴²⁹ Restoring Faith in the Judiciary (The Nation, E-paper) available at <https://nation.com.pk/06-Feb-2017/restoring-faith-in-the-judiciary> [Date accessed: 02.04.19].

⁴³⁰ Marta Blanco Carrasco, *Community Mediation: A Tool for Citizen Participation in Public Policy* 14 Social work and Society International Online Journal (2018) available at <https://www.socwork.net/sws/article/view/465/860> [Date accessed 02.04.19].

⁴³¹ National Commission on Status of Women through Chairperson and others v. Government of Pakistan through Secretary Law and Justice and others, PLD 2019 Supreme Court 218.

permissible limits of the law to the extent of acting as arbitration, mediation, negotiation or reconciliation forums.

This is not to say that there is no support for court-controlled ADR in scholarly writing. In fact, it has been suggested that in the context of developing countries, supervisory control over ADR should essentially rest with the court to make the parties keep their promises or to assure enforcement of settlement agreements.⁴³² However, this line of argument, nonetheless discounts the fact that the reason that decisions made through ADR are enforceable, is because such settlements are mutually beneficial to both parties in the dispute. ADR, especially mediation, aims at a win-win situation for both parties, contrary to one party defeating another in a typical adversarial setting. Therefore, when people enter into voluntary bargains they rarely apprehend non-fulfillment of promises by their adversary because both parties surrender something with a view to gain something in return, and to continue their relationship. The argument can also be countered by giving examples of successful ADR models in place in developing countries like Bangladesh and Nepal; they all have community centric ADR designs disconnected from the courts.⁴³³

⁴³² ENCJ Report on ADR & Judicial Domain 2016-17 adopted GA Paris, 9 June 2017 'Alternative Dispute Resolution & Judicial Domain' p. 16 available at https://www.encj.eu/images/stories/pdf/workinggroups/encj_report_adr_2016_2017_adopted_ga_paris.pdf [Date accessed 02.04.19]. See also Zafar Iqbal Kalanauri, 'Implementation Strategy for ADR in Pakistan' P.3 available at <http://pgil.pk/wp-content/uploads/2017/08/Implementation-strategy-for-ADR-in-Pakistan.pdf> [Date accessed: 02.04.19].

⁴³³ Scott Brown & Christine Cervenak, 'Alternate Dispute Resolution Practitioner's Guide' 33, 65 (Technical Publication Series, Centre for Democracy & Governance, Washington DC 1998).

PART III – NEED FOR COMMUNITY-BASED ADR AND THE BANGLADESH MODEL

One of the purposes of adopting community-driven ADR is to help vulnerable segments of society get access to justice, who would otherwise be unable to approach the courts due to financial hardship or would be discriminated against on the basis of gender or social status.⁴³⁴

To establish an effective ADR program, it is necessary to reflect upon the needs and aspirations of the people of the area where the program is sought to be launched.⁴³⁵ Moreover, the program must take into account the strength of potential political opposition to ADR; the sophistication of its constituents; and the knowledge and sensitivity of the experts who might otherwise design the program as per their whims.⁴³⁶ In simple terms, the functions and interests of the program must be made abundantly clear to avoid future resistance. Setting up the ADR program becomes easier when all the aforementioned factors are addressed.

It has been suggested that community centric ADR programs can be more successful in developing countries.⁴³⁷ In such a design, more than one mediator from the same community, as that of the disputants can be appointed. These mediators should be well-trained by an ADR professional.

⁴³⁴ Id.

⁴³⁵ Id.

⁴³⁶ Cappelletti M and Garth B, 'Access to Justice – A World Survey' p6 (Sijthoff and Noordhoff, 1978).

⁴³⁷ NACLC, Why Community Legal Centers are Good Value, http://www.nacclc.org.au/multiattachments/2287/DocumentName/NACLC_value_web.pdf [Date accessed: 02.04.19].

This enables the disputants to relate to the mediators and the former would be more at ease while presenting their issue.

A model example of such a community driven-ADR system has been established and is running successfully in Bangladesh. The country faces problems similar to Pakistan with its formal justice system.⁴³⁸ Community mediation in Bangladesh stems from the traditional informal justice system of *shalish* which is similar to the *jirga* system in Pakistan. Rulings by *shalish* were mostly issued by village elders, comprising of an all-male committee. This system reflected their traditional way of settling disputes, in which the local mediators were approached by aggrieved persons for redressal of their grievances. The mediators in turn delivered notice of mediation upon the opposite party, and if they agreed, mediation took place under the auspices of local elders. As in the case of *jirgas*, *shalish* has also been criticized for issuing rulings that discriminate against women and minorities and therefore, in time, this system lost credibility.⁴³⁹

In order to counter the situation where the locals in Bangladesh were either forced to approach the courts for justice or to let go of their disputes entirely, a legal aid organization by the name of Madaripur Legal Aid Association (MLAA) was formed. This was an NGO devoted to the promotion of ADR in the region.⁴⁴⁰ The MLAA of Bangladesh launched several public awareness campaigns before it actually began its operations on the ground.⁴⁴¹ It reached

⁴³⁸ Dr. Sumaiya Khair, *Alternative Dispute Resolution: How it works in Bangladesh*, The Dhaka University Studies, Part-F ol, XV (1), June 2004, Page 59.

⁴³⁹ *Ibid*, Page 65.

⁴⁴⁰ *Ibid*, Page 6.

⁴⁴¹ Scott Brown & Christine Cervenak, 'Alternate Dispute Resolution Practitioner's Guide' (Technical Publication Series, Centre for Democracy & Governance, Washington DC 1998).

out to the masses and educated them about the advantages of the system of alternative dispute resolution and its existence in their country. This allowed people to understand and appreciate the merits of ADR. As many were disillusioned with a corrupt and sluggish justice system, they readily accepted the program.

Unlike, the traditional *shalish* system, the new system attempted to ensure that everyone was provided with equal opportunities to plead their case and that discrimination on the basis of gender and caste was limited. It did so by training members of the committees in courses related to human rights and the law, as well as ensuring the representation of women in the committees themselves.⁴⁴²

In order to break through the traditional *shalish* system, whose committee had exclusively male members and whose decisions were in gross violation of human rights, training sessions are held every year for the members of the mediation committees. These sessions revolve around training mediators on the applicable laws and carrying out the entire mediation process. This in turn ensures that there are no human rights violations during this process. The MLAA has also established a training center that arranges for workshops which raise awareness regarding rights of women and children.⁴⁴³ Additionally, when women form part of the mediation committee it ensures that the decisions are not discriminatory. Women, as mediators, dispel the

⁴⁴² Id, Page no 6.

⁴⁴³ Id, Page 7.

impression of gender discrimination; this makes the female disputants comfortable in presenting their case.⁴⁴⁴

The ADR design in Bangladesh is multi-tiered. In this design, the disputants first approach the specially trained mediator at the village level. The mediator helps the disputant to fill essential forms and notify the rival party of his/her intention to attempt an out-of-the-court settlement. If mediation does not succeed at village level, the case is referred to the central union, then to the 'thana', after that to the district, and finally to the head office. If the case is of a complex nature and cannot be resolved through mediation, then the MLAA itself refers the same to an appropriate court and the cost is borne by the association.⁴⁴⁵

The model of community mediation is extensively relied on by the local population; over 5000 disputes are resolved each year through this process. It allows the parties to successfully resolve their disputes in a peaceful manner without incurring a substantial loss of earning. This design became so popular that when some decades later the government tried to establish its control over the program, the people of Bangladesh showed strong disapproval. In addition to this, the success of the Bangladeshi model led to other countries adopting their own community-based mediation system, similar to the ones found in Bangladesh. Nepal for example, with the aid of The Asia Foundation, established their own models with a view to counter the problems of the formal justice system. By 2014, 4,200 community mediators

⁴⁴⁴ Scott Brown & Christine Cervenak, 'Alternate Dispute Resolution Practitioner's Guide' (Technical Publication Series, Centre for Democracy & Governance, Washington DC 1998).

⁴⁴⁵ Id.

were offering their services and till September 2013, 22,400 cases of mediation had already been received by the mediators.⁴⁴⁶

3.1. Implementation of Community Mediation within Pakistan

It can safely be concluded that both formal and informal mechanisms of dispensing justice in Pakistan are ineffective in resolving disputes. This leads to the question as to why there exists a general disinclination towards the system of ADR, despite the inherent problems of the court system. Litigants, on the other hand, appear to be suspicious of the efficacy of the informal system.⁴⁴⁷ Likewise, lawyers are unwilling to implement informal mechanisms as, from their perspective, it casts doubt on their professional competence and has a detrimental impact on their earnings.⁴⁴⁸

The examples of Bangladesh and Nepal both suggest that such community-driven dispute resolution mechanisms can be successful if properly adopted in Pakistan. This is due to the fact that prevailing traditional dispute resolution mechanisms that the initiatives in Nepal and Bangladesh have expanded upon, are strikingly similar to those that operate in Pakistan. In fact, we have seen that when efforts are made to enhance community participation in informal dispute resolution mechanisms within Pakistan itself, they have had a largely positive impact. For example, a project by the UN Development Program (UNDP) was introduced in Pakistan in 2006, based on utilizing the

⁴⁴⁶ The Asia Foundation, Community Mediation in Nepal, 01/2014, Page 2.

⁴⁴⁷ Qazi Attaullah and Lutfullah Saqib, What Goes Wrong with the Meaning, Legislation, and Functioning of Mediation in Pakistan? (Pointation and solutions), Journal of Pakistan Vision, 31.

Dec. 2017, Page 78.

⁴⁴⁸ Id.

jiirga system to provide justice to victims of violence through the principles of community participation.⁴⁴⁹ The program unfortunately came to a stop when the local government system became dysfunctional,⁴⁵⁰ however, as per the report of the Asia Foundation on the *Muslabathi* Committees built under this program, these committees were preferred over the traditional informal justice systems. The report further suggested that it was crucial to distinguish between the two, as the former was a platform for the vulnerable, women, and minorities, while the later benefited largely the rich and resourceful.⁴⁵¹ Therefore, community participation in any ADR system seems to be imperative as it not only offers an alternative path from courts, but also looking at the manner in which Bangladesh sought to overcome the shortcomings of their *shalish* system, also demonstrates that the problems that have come to be associated with traditional *panchayat* and *jiirga* systems are capable of being tackled.

In addition to the above, while budgetary constraints are a common concern when introducing any new program, by working in conjunction with organizations who have already successfully implemented such programs, these concerns can also be addressed. For example, in Nepal, this program was introduced with the support of its Ministry of Local Development and was funded by the Hewlett Foundation and The Asia Foundation in three districts.⁴⁵² It was later expanded to eight districts with further funding from the USAID, while in Bangladesh, MLAA was able to eventually expand and begin training other NGOs as well. 33% of the budget of the project in

⁴⁴⁹ John Braithwaite; Ali Gohar, *Restorative Justice, Policing and Insurgency: Learning from Pakistan*, 48 Law & Soc'y Rev. 531 (2014) Page 544.

⁴⁵⁰ Id.

⁴⁵¹ Id.

⁴⁵² Id, Page 1.

Bangladesh came from The Asia Foundation and USAID and 60% from the Ford Foundation.⁴⁵³ From 1996-1997 the budget of the project was \$70,000 and it was later increased to \$94,315 for the subsequent year.⁴⁵⁴

The above discussion reveals that the situation in Pakistan is similar to that of Bangladesh, prior to the introduction of MLAA sponsored mediation. Sadly, Pakistan has failed to counter the problems of the formal justice system and unlike Bangladesh, has not implemented a parallel system which can substantially reduce the case load on the courts. No awareness campaign was launched by the government before or after the adoption of ADR laws in Pakistan. The NGO initiative, as adopted in Bangladesh, was obviously out of question because Pakistan's model was court supervised in lieu of community-based ADR. Even if some awareness raising was attempted, it remained confined to the training of lawyers and judges, disregarding the general public who was to be the intended beneficiary.⁴⁵⁵

3.2. Conclusion

Considering the foregoing, it is desirable that community mediation be experimented in Pakistan instead of placing too much emphasis on court controlled or mandated ADR as this design is more likely to resolve the disputes more efficiently. Even developed states have embraced community mediation to resolve certain types of disputes. As an illustration, matters like child custody, maintenance, and the distribution of assets amongst spouses

⁴⁵³ Scott Brown & Christine Cervenak, 'Alternate Dispute Resolution Practitioner's Guide' (Technical Publication Series, Centre for Democracy & Governance, Washington DC 1998), Page 1.

⁴⁵⁴ Id.

⁴⁵⁵ Sc. 4, The Alternative Dispute Resolution Act 2017.

can now be resolved through mediation centers in the UK. For this reason, it is essential to launch a nationwide awareness campaign to publicize that the poor and disadvantaged people of society have an alternative forum to get justice, where they shall be attended to by the community members whose aim will be to strike a bargain between the parties on voluntary basis and where both parties would come out as winners.

Unfortunately, the current design of ADR in Pakistan brings us back to the court system and downplays the importance of community participation in resolution of disputes. This is unfortunate as community participation would allow people to feel empowered as stakeholders in the system.⁴⁵⁶

3.3. Recommendations and Key Points

In the light of above, the alternative dispute resolution mechanism must be re-assessed and revisited:

1. To incorporate community participation into it.
2. To enable and encourage people to choose mediators, conciliators, and arbitrators from amongst members of the local community.
3. To minimize the role of courts in determining the procedure of the ADR, considering the voluntariness of agreements, and execution of settlements.

⁴⁵⁶ DK Sampath, 'Mediation Concept & Technique in Support of Resolution of Disputes' 45 (Bangalore: Legal Service Clinic, National Law School of India University 1991).

4. To make it compulsory for the government to provide ADR training to respectable and elder members of the local communities.
5. To oblige the government to launch awareness campaigns with respect to ADR.
6. To abandon the system of notifying mediators from amongst judges and lawyers.