

INSTITUTIONALIZING ALTERNATIVE DISPUTE RESOLUTION IN JUDICIAL SYSTEMS: COMPARATIVE AND CRITICAL ANALYSIS

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Thesis Statement

While ADR can help improve judicial systems, this is possible only if it is institutionalized, in the form of a legal system, a court referral system, trained mediators and enforceable procedures. If these institutional protections are not put in place these processes are underutilized and cannot be as effective as they could be in providing efficient and accessible justice.

ABSTRACT

Alternative Dispute Resolution (ADR) has come of age from a fringe to a front-line tool in the process of justice reform. However, in this paper, the author argues that ADR can help alleviate backlog, encourage participation and maintain social cohesion and that all of this can be achieved by legislation, training and referral when supported by such legislation, training and referral, provided that courts across the jurisdictions are experiencing increasing caseloads, delays and loss of trust. There are several such new instruments at international level (such as the UNCITRAL Model Law on International Commercial Mediation and the Singapore Convention on Mediation) that have been introduced to provide greater certainty and enforceability, and the European Union's Mediation Directive that has been introduced to promote access to mediation in civil and commercial disputes. In practice, researchers have discovered that court-connected mediation can have a positive impact on settlement rates and relieve court pressure in certain circumstances, but that the mediation process is influenced by program design, the skill of the mediator, the prevention of bias and educating participants. This paper differs significantly from many of those published to date, in treating ADR not just as a cost saving device. Rather, it proposes that ADR be considered as an institutional justice reform that must be judged based on its fairness, enforceability, inclusiveness, and trust of local communities. This is because it addresses a lacuna in the body of literature and also implementation of the legislation has been inconsistent in Pakistan.

Key Words: Saving on costs, institutional justice reform, anti-bias approach, maintaining social cohesion.

INTRODUCTION

ADR is a remedy to judicial stress: burden of court workload, delay of justice, and lack of public faith in court. Institutionalization is not only about a law, it needs to be accompanied by a set of procedures, institutions, trained mediators and arbitrators, an awareness of judges and a referral system. Confidence building and public engagement need to be engaged in to complement legislation to change practice.

It is a view of the institution which is the same as that of the world on policy thinking. UNCITRAL's Model Law on International Commercial Mediation is a tool to modernize the mediation process, by offering uniform procedural rules and greater predictability for mediation, while the Singapore Convention is intended to bring about a harmonized enforcement framework for international settlement agreements concluded through mediation. The European Union's Mediation Directive also seeks to foster the use of ADR, and promote amicable resolution, in civil and commercial cases, including cross-border cases.

In Pakistan, a context where the formal reform movement has been overshadowed by the relevance of cultural issues, there are some social challenges that were not fully considered by traditional formal reform approaches and often people mix ADR with other traditional informal forums like jirgas and panchayats, even though they are culturally familiar, but have been criticized for unequal participation and weak safeguards. ADR should be "modern" and legally structured, fairly conducted and court enforceable.

Literature Review

The literature on institutional ADR can be divided into three general categories: There are three general trends found in the literature on institutional ADR: The first strand has access to justice and legal empowerment as a focus. In Vivek Maru's review of World Bank practice 'Access to Justice' does not stand alone in the world of ADR, but is included in a larger access-to-justice agenda that includes court reform, legal aid, information dissemination, public accountability, and

research. His main work is one that aligns access to justice with agency that it provides poor people rather than efficiency of the institutions. It's important because otherwise the only use of ADR would be as a managerial tool to clear dockets.

The second piece of work explores court-connected mediation and how the mandatory and voluntary systems are connected. Shahla Ali's empirical research of practitioners in five regions revealed that practitioners were slightly more confident in the mandatory mediation programs, more efficient in the voluntary mediation programs and more fair in both types of mediation programs. The key take-away from Ali's major is that the quality of the mediation system, the skills of the mediator, protecting against a mediator's biases, educating participants about the process, and providing cultural and institutional support are more important to success than ideology. One of the most explicit arguments in the literature that the institutional design is more important than the name given to the process.

The empirical perspective is more programmatic with Sarah Vidal and co-authors. Their research of the court-run civil mediation process found that 77.5% of the cases, which were handled within a mediation track, were settled, 17% were ruled upon and only 5.5% achieved a trial-related result. The importance of this result is that mediation provided by the court can significantly transform case flow if the referral track is utilized and when the court's infrastructure is geared towards the referral track.

A more conservative thought on the scholarship states that institutionalization can turn into an "overriding and/or repetitive" process. A group of Odd Tjersland and others, who are running mandatory mediation off the bench in Norway, determined that many of the high-conflict cases that they mediated did not produce a resolution after just a few sessions. Vicki Waye also claims that compulsory mediation in Australia has taken over, but doubts its effectiveness in facilitating access to justice or only serves to create a quick deal. These studies combined demonstrate that mediation can have some success in certain cases, but can be a complete disaster in high conflict

cases or when greater substantive and/or procedural protections are needed.

Comparative literature also indicates that mediation is most effective when it is a part of legal systems and not a part of them. Timothy Kuhner's comparative analysis of court-connected mediation in Argentina and the United States reveals that institutional transplant impacts the results of the mediation, and Oksana Melenko's comparative-legal analysis brings to light some of the elements that make ADR effective: its accessibility, its flexibility in allowing for entry and exit, its public/private nature, its cost and time-saving nature, its neutrality, its lack of judicial recourse when not enforced. The evidence from these studies suggests the following critical finding: ADR is a class of institutional options and not a single model.

While Pakistan has introduced the concept of ADR into the legal system, it is still plagued by difficulties in the slow assimilation and implementation of the concept in practice. Earlier research on Pakistani ADR and its compatibility also highlights that the country has enacted various laws pertaining to ADR but the laws and their implementation need to be improved more for the judiciary to alleviate their burden. Recent Pakistani scholarship on court-annexed mediation concludes that the results are inconsistent, there is a delay in referring cases to mediation, judges are resistant to mediation, lawyers are resistant to mediation, and mediation will not be transformative until there is an improvement in referral policies, mediator training and precautions for fairness in the process.

In an important respect, this paper is distinctive of this literature. It brings together these distinct strands in an argument for the judiciary-institutional approach: that the extent of it that can be assessed by settlement rates or by the existence of statutes is not the whole story; that it should be embedded within judicial culture, so as to ensure equality, predictability and enforceability. The gap is significant in Pakistan due to the fact that the country already has legal and institutional pathways (such as the Alternative Dispute Resolution Act 2017, IMAC framework

and court-annexed mediation initiatives), which are not being used as effectively as they could be.

Methodology

The research method used in this research is qualitative doctrinal supported by comparison law analysis and library research methodology in studying the institutionalization of Alternative Dispute Resolution (ADR) in judicial system. The research is descriptive, analytical and comparative research. It provides information on the development and institutionalization of ADR, critically assesses its benefits in improving the efficiency and access to justice of judges and reviews its performance in that respect. This method allows the study to identify the factors under both the legal, institutional and procedural framework that helps to facilitate successful integration of ADR into formal justice systems.

The research is a doctrinal law approach, without the need to carry out field research and primary data collection. This is complemented with books, peer-reviewed journal articles, national legislation, such as Pakistan's Alternative Dispute Resolution Act, 2017 as well as other relevant legislation. The research does not involve interviews or surveys, but is doctrinal and library based, and it offers a high-level framework of laws and policies that can be used to evaluate the effectiveness of ADR and offer recommendations for bolstering the function of ADR as a part of the modern judicial system.

Analysis

ADR is not just a "procedure" but also a "system" of governance. To be institutionalized, the procedures must be transparent, ADR facilities must be available, neutrals are needed to be trained, judicial referral should be established and a continuous public awareness building must be implemented. In law, ADR is still a part of the practice but not in practice. The experience of other countries backs that up. The purpose of the Model Law is to promote uniformity and predictability of mediation rules and the Singapore Convention is to minimize uncertainty in enforcing cross-border settlement agreements. Both instruments point towards the enforcement

as much as informality as being pivotal to ADR as effective change requires enforcement.

The other merit of the paper is that it is quite realistic. It does not presume that the process of ADR is necessarily the same in all situations. Rather, it refers to the United Kingdom, Singapore, Turkey, Malaysia, Bangladesh and Australia as countries with a successful track record of embedding mediation or alternative dispute resolution. It is not the fact that one foreign model should be replicated verbatim, but rather the fact that there is a need for a coherent ecosystem – referral rules, professional training, and public trust – of the judicial systems. The lesson is consistent with research that program results are related to the strength of the litigation system, the mediator's skills, preventing bias, educating participants and providing cultural support.

A particular aspect of the chapter is of significance from the Pakistani perspective. It demonstrates that formal application of ADR is already in existence in Pakistan in the form of legislative acts, institutions like the Alternative Dispute Resolution Act, 2017, and court Annexed Mediation Centers (CACM), like the mediation center of Sindh High Court.

The Sindh amendment to the Code of Civil Procedure, therefore, empowers the courts to refer civil and commercial cases for mediation, and that mediation proceedings could be confirmed to be a judgment and decree, with the communication of mediation process being confidential, thus it cannot be used as a tool to cause prejudice to the parties if the matters are not settled. This is a very important institutional change, as the private alternative to mediation becomes a judicially-related process.

However, the same materials show the gap and show how implementation would take place. Mediations in the Sindh mediation center have been reported to have brought settlements but it has also received a number of matters which have returned without a settlement or at the initial stage have been refused. The mixed outcome is similar to the overall literature, which suggests that mediation can be effective but if referrals are done timely, parties are aware of what is happening, and

the institutions are conducive to participation. The paper thus gives its recommendations on awareness campaigns, legal-aid initiatives, training, mediation centers and monitoring and evaluation as 'must-have' infrastructure of legitimacy rather than an optional extra.

The chapter's message, however, is a normative one that is convincing. It acknowledges that if not carefully managed, it can be the same inequities that beset informal systems of dispute resolution. This is a very well documented concern. In Ali's article, she emphasizes the importance of protections and instruction, rather than a requirement that mediation be mandatory or voluntary, for fairness. The adverse performance of high-conflict cases, as found by Tjersland, suggests that mandatory systems may not be suitable for high-conflict cases. The mandatory mediation may turn into a "settlement pressure tool" instead of a true "justice tool," cautions Wey. All the studies referred to above indicate that institutionalization should be accompanied by the principle of neutrality and procedural protection. Besides, this paper rightly observes that if there is no enforceability in the result of the ADR process, then it is of very little use. That's why with modern changes in the field of ADR; it has shifted toward conventions and model laws. There seems to be a common theme that agreements reached internationally should be enforced in a harmonized manner via a settlement process, as is the Singapore Convention, and agreements reached in the EU region should be enforced in the same manner, as is the EU Mediation Directive. Pakistan's problem is to reflect that in the country: Mediation settlements must be predictable, documented, if they are to be trusted. The question is not whether there is ADR in the law, but whether there is ADR in judicial culture, with trained professionals, in processes that are protected and in an accessible language and form for litigants. That is what is referred to as symbolic reform, as opposed to structural reform.

Conclusion

ADR is integral with the present-day reform of justice and the success of its operation is greatly affected by the way in which it is institutionalized.

The study reveals that four components of a credible ADR system are: trust, enforcement, training and rules of reference, and courts. The broader literature supports this notion that mediation can increase settlement rates, decrease delay and expand access to justice, but only in the context of program which is designed to be fair, enforceable, the same for all, and context-sensitive. A policy message is clear for Pakistan. There are already laws, institutions and pilot mechanisms in place in the country, which need to be linked up with more robust referral mechanisms, trained mediators, gender-responsive safeguards, public education and robust monitoring systems. Otherwise, in practice ADR will be a patchwork solution that isn't always available. Thus, ADR can play a vital role in the judicial reform and access to justice Movement.

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