

POLICY PAPER

on Use of
Alternative Dispute Resolution
in Sindh

Policy Paper on Use of Alternative Dispute Resolution in Sindh¹

LEGAL AID SOCIETY – ADR PROJECT

¹ Author: Ms. Maliha Zia Lari, Advocate

Policy Paper on Use of Alternative Dispute Resolution in Sindh

Year of Publication: 2017

This publication is part of Legal Aid Society's Research Products.

The contents of this publication are the exclusive Intellectual Property of the Legal Aid Society, and any unauthorized reproduction, distribution, modification, use, or transmission of this work in any form or by any means, including photocopying or through any other electronic or mechanical methods is illegal and will constitute infringement of such Intellectual Property Rights.

Legal Aid Society shall be identified as the copyright owner on any authorized reproduction, distribution, use or transmission of this work.

For more copies and other related queries, please contact Legal Aid Society at: hr@lao.org.pk

Legal Aid Society
Spanish Homes Apartment, Mezzanine Floor
Plot A-13, Phase – 1, D.H.A.,
Karachi, Pakistan
Tel: (92) 021 – 35390132 – 33
Fax: (92) 021 – 99266015
Email:
Website: <http://www.las.org.pk>
Facebook: LegalAidSocietyPakistan

Legal Aid Society is registered under the Societies Registration Act, 1860 on November 19, 2013 (Registration No. KAR 058 of 2013 – 14) and operates under the chairpersonship of Justice Nasir Aslam Zahid.

Policy Paper on Use of Alternative Dispute Resolution in Sindh

Table of Contents

Introduction	1
Gaps in ADR Legal Framework	3
Basic Standards of Arbitrators/Mediators/Conciliators etc.	4
Training and Basic Qualifications of Person Resolving Dispute	5
Standardised Procedures	6
Protection of Evidence and Persons Resolving Disputes	6
Amplified Publicity and Initiatives to Increase Public Usage of ADR.....	7
Need for Promulgation of a Holistic ADR Legal Framework	7
Creation of Neutral ADR Centres	8
Increased ADR at Local Government Tier	8
Increased ADR in Public Administration	9

Introduction

Despite the ‘formal’ standards in the Constitution, Pakistan is currently placed at 106 out of 113² of the World Justice Project’s Rule of Law Index, with particularly low rankings in key areas that ensure equity i.e. Fundamental Rights, Regulatory Enforcement, Civil Justice and Criminal Justice. Pakistan’s ranking on Regulatory Enforcement on the Index is 109 out of 113³ countries. Its criminal justice ranking was 81 and civil justice ranking was 106 out of 113⁴ countries. Within the access to justice paradigm, there are some clear reasons that are indicative of contributing to this embarrassingly low placement. Some of the primary issues with status of law and justice in Pakistan are high level of pendency in cases⁵, insufficient judicial staff and judges⁶, high adjournment rate of cases⁷ and increased cost of litigation⁸. Analysis of civil cases in targeted districts in Sindh reveal the processes and procedures of civil cases in Sindh also contribute greatly to the delays in courts and thus exacerbating the lack of access to justice for the people⁹.

Alternative Dispute Resolution (ADR) mechanisms have been recognised internationally and nationally as viable methods to not only reduce the burden on the courts, but also to enhance access to justice and to improve the justice sector experience for people.

A distinction must be made between formal ADR mechanisms which take root in legislation (primary or secondary) and is given State sanction; and informal ADR mechanisms such as

² World Justice Project (WJP) Rule of Law Index 2016

³ Ibid

⁴ Ibid

⁵ As of March 2016, the total number of pending cases before district judiciary in Sindh was 127,986. [Data retrieved from Consolidated Statement Showing Institutions, Disposal & Balance of All (Criminal, Civil, Family) Cases before the District Judiciary in Sindh, For the Month of March 2016. Available at http://www.sindhhighcourt.gov.pk/reports/District_March_16.pdf]

⁶ As of January 2017, there are 69 vacant courts at district level in Sindh alone. [Number retrieved from District & Court Wise Postings List of Judicial Officers in Sindh, available at http://www.sindhhighcourt.gov.pk/district_courts_sindh/dw.pdf]

⁷ Shah, Raza Ullah, Shadi Ullah Khan, and Sumera Farid. "Causes for Delay in Civil Justice in Lower Courts of Pakistan: A Review." *Pakistan Journal of Criminology* 6.1 (2014): 47.

⁸ Khan, S., Saqib, H., Noor, T., & Bakhtiar, U. (2012). *Voices of the unheard: Legal empowerment of the poor in Pakistan*. UNDP. Pg. 72. (Available at <http://bit.ly/2khF9H2>)

⁹ “Delays in Delivery of Justice in Civil Cases: A Look at Four Districts in Sindh”, Summaiya Zaidi, Legal Aid Society, 2017

traditional forms of dispute resolution including *jirgas*¹⁰, *faislos*¹¹ etc. This policy paper focuses only on formal ADR mechanisms, particularly as many of these traditional systems are considered illegal parallel systems, deemed as such specifically by the Sindh High Court¹².

Over time, a series of laws and measures have been promulgated in Pakistan to include a variety of different ADR mechanisms into the formal justice system for the purposes mentioned above.

There are essentially four different types of ADR mechanisms being used in and by the courts currently in Pakistan. The list provided below gives an overview of the types of ADR mechanisms currently in use in Sindh. It is important to note that while this list identifies the main laws, which specifically cover ADR mechanisms; it is not exhaustive of other pieces of legislation which may include reliance on one of these forms for conflict resolution.

- **Arbitration:** Arbitration Act 1940
- **Mediation:** Section 89-A Civil Procedure Code 1908, Small Claims and Minor Offences Ordinance 2002
- **Conciliation:** Section 89-A Civil Procedure Code 1908, Family Courts Act 1964. Muslim Family Laws Ordinance 1961
- **Other types of ADR (unspecified):** Section 89-A Civil Procedure Code 1908, Federal & Provincial Mohtasib (Ombudsman), Compounding of Offences under Code of Criminal Procedures 1898.

While a number of these measures, particularly Arbitration is in use, specifically with regards to large contracts, financial disputes etc.; it is unfortunate that these mechanisms have failed to operationalise at the grass root level. Thus, they have failed to provide people viable options of attaining justice instead of accessing the formal litigation process, or an alternative to the informal traditional dispute resolution mechanisms such as *Jirgas*, *Faislos* etc.

There are several reasons for this failure, which include:

¹⁰ A traditional customary practice whereby male tribal elders adjudicate upon disputes within their community and mete out judgments and punishments (in many cases extremely controversial and anti-women).

¹¹ A Sindh term for 'jirgas' but may be extended to include dispute resolution by extended family system, tribes and communities etc.

¹² SBLR 2004 Sindh, 918

- Lack of systems allowing ADR mechanisms to operationalise at the grassroots.
- Lack of buy-in from State institutions, including the Courts, for the existing law and systems, resulting in lack of ownership and initiatives of use of ADR mechanisms or publicising them.
- Lack of knowledge among the people, including Bar Associations and other groups, of these systems, how to access them and their positive impacts, resulting in lack of buy in and lack of access and use.

This policy paper relies upon key documentation researched and authored in 2017. These include a desk research conducted to map the legislative framework of ADR mechanisms with a focus on Sindh¹³; a pilot research conducted in 4 target districts of Sindh on civil cases, identifying specific causes and points of delay¹⁴; and a mapping study conducted in targeted districts in Sindh with a focus on identifying the existence of the grassroots understanding, response and knowledge of ADR mechanisms on the ground¹⁵. It also leans upon a 2016 PILDAT discussion paper on ADR¹⁶.

Gaps in ADR Legal Framework

In the current legal framework, there remains a complete disconnect between the substantive law and its actualisation on the ground. For example, for the operationalisation of conciliation or mediation under Section 89A of the CPC, specific rules must be made in the High Court and District Court Rules to lay out a full-fledged system and process to allow the mechanisms to operationalise. Laws such as the Small Claims and Minor Offences Ordinance 2002 remain under-utilised where it is only Sindh where the “Salis” i.e. mediators have been appointed by the High Court¹⁷. However, neither the courts nor the Salis are aware of the law or understand how the system works. Thus very few, if any referrals have been made to the

¹³ “Background Paper on ADR Legislative Framework in Sindh”, Firasat Siddiqui, Legal Aid Society, 2017

¹⁴ “Delays in Delivery of Justice in Civil Cases: A Look at Four Districts in Sindh”, Summaiya Zaidi, Legal Aid Society, 2017

¹⁵ Alternative Dispute Resolution Mechanisms, Access in Community and Public Administrative Bodies: A Mapping of Select Districts in Sindh

¹⁶ “Discussion Paper. Alternative Dispute Resolution”, Shahid Hamid, PILDAT, July 2016

¹⁷ The High Court of Sindh has nominated 268 numbers of people as Salis in 2015 as per the notification of High Court of Sindh. [Notification of Sindh High Court No. GIZ/Misc. – 2004(8)]

Salis by the Court, neither the public has approached the court for mediation by Salis due to complete lack of awareness of the law.

There remain numerous gaps in the substantive laws as well. For example, the lack of clarity about mediation in criminal cases under the Small Claims and Minor Offences Ordinance 2002 results in confusion as to how to apply it to such cases. While the law allows mediation in criminal offences, specific categories of offences where mediation can be approached is vaguely defined, also no detailed procedure is provided as it is for civil cases. Furthermore, the lack of ownership of the process by the judiciary and the lawyers has resulted in poor implementation¹⁸. In the Arbitration Act 1940, the awards made by retired Judges of the Superior Court can be objected, and stays based on the objections filed before a Civil Judge, which may take years in court. The grounds for objections of awards in Arbitration cases should be on limited grounds¹⁹.

1.

2.

Basic Standards of Arbitrators/Mediators/Conciliators etc.

Except for the Arbitration Act 1940, there is no discussion in any of the laws relating to the quality, standards or monitoring of the arbitrators/mediators etc., thus leaving a huge gap related to the administration of justice in the country. For example, Small Claims and Minor Offences Ordinance 2002 provides about the nomination of Salis (Mediators) that they shall be nominated through Chief Justice of the High Court with the consultation with District Judges, the President, or Bar Association and those Salis can be retired Judges or Lawyers.²⁰ This raises accusations of politicization of the Salis Committees within the communities.²¹ The

¹⁸ Alternative Dispute Resolution Mechanisms, Access in Community and Public Administrative Bodies: A Mapping of Select Districts in Sindh

¹⁹ "Discussion Paper. Alternative Dispute Resolution", Shahid Hamid, PILDAT, July 2016

²⁰ Section 15 of the Small Claims and Minor Offences Ordinance 2002

²¹ Alternative Dispute Resolution Mechanisms, Access in Community and Public Administrative Bodies: A Mapping of Select Districts in Sindh

Ordinance fails to discuss the particulars in terms of the experience, expertise or any such criteria for a person to be nominated as Salis.

This is particularly dangerous with the presumption of increased use of ADR, which will result in the increased need for arbitrators/mediators/conciliators. Lack of basic standards and monitoring mechanism may open a Pandora's Box where disputes would be resolved according to personal biases of those resolving the dispute as opposed to the best interests of the parties. The risks associated with ADR, including power imbalance, personal bias etc. are prone to increase without basic standard settings and monitoring procedures. For example, Muslim Family Law Ordinance 1965 provides the power to the union councillor to conciliate the various family disputes. The councillor of UC is elected official and often connected with the influential elites or feuds of the community. The councillors are not generally sensitized or trained for the mediation/conciliation processes.

A pool of those who fulfil the basic standards and qualifications must be identified by the High Courts. The panel may include lawyers, retired Judges of the Superior Courts and subordinate judiciary, retired civil servants, social workers, jurists, technocrats, experts in various fields and persons of recognized repute and integrity, having such qualifications. Representation must be present from different societal groups including women, religious minorities, transgender, disabled persons, persons from different castes etc.

Training and Basic Qualifications of Person Resolving Dispute

While arbitration follows more stringent processes and procedures, other forms of ADR remain flexible and currently lack the procedures or any SOPs regarding the ADR process itself. While it is necessary to establish basic standards for appointment of those who are involved in dispute resolution, it should be mandatory for them to receive a minimal amount of training as well. This is especially important for mediators, conciliators etc., who are not following the strict confines of the law as with arbitrators, but has to remain an unbiased third party working to bring both sides of a dispute towards an agreement. The need for a basic level of training and certification is utmost important to ensure just and fair processes and outcomes from ADR mechanisms.

1

2

Standardised Procedures

While the core of ADR remains in flexibility with regards to the actual dispute resolution process, the standard procedures in terms of accessing and approaching the ADR system is essential. The lack of such procedures leave each institution/body/person free to constitute its own processes and procedures and standards, which results in an ad hoc application of ADR as opposed to a systematic and authentic process. A certain amount of consistency is also important for purposes of public buy-in and trust. The processes and procedures for accessing any of the ADR mechanisms must be explicit to make it more 'user-friendly' and accessible to the public. Currently the community remains unaware of these systems, and have even less information about how to access the process²².

These processes may include a time limit for the entire ADR process (for e.g. 30 days with day-to-day hearings) to ensure that it is not being used as delaying tactic.

Protection of Evidence and Persons Resolving Disputes

ADR processes require strict confidentiality of evidences during the ADR processes and restricts third party sharing of information. Thus, matters proceeding in ADR should not be allowed to be submitted in court as evidence without consent of the parties. In cases of ADR in public administration bodies, clear processes and procedures must be established which require clear understanding and consent of the parties involved with regards to sharing of information during the process²³. Persons resolving the dispute may not be called as witnesses, nor may they represent either party in any subsequent action on the same matter. Any documentation or information shared during the ADR mechanism must remain confidential and can't be used as evidence in a court case. The person resolving the dispute

²² Alternative Dispute Resolution Mechanisms, Access in Community and Public Administrative Bodies: A Mapping of Select Districts in Sindh

²³ Ibid

must be given legal protection for any act done in good faith in performance of their functions.

Amplified Publicity and Initiatives to Increase Public Usage of ADR.

To increase public buy in, resulting in amplified use and increased trust and confidence in the legal system, the State needs to take a proactive role in creating greater awareness of these processes and their uses and risks amongst all stakeholders. Discussion with the community reveals a lack of community awareness and buy in of these processes and lack of ownership by the judiciary or State beyond the legislation.²⁴ Justice sector actors such as public prosecutors, judges and the Bar Council must be encouraged to play an active role in advocating the pros and benefits of ADR with the public for increased use of ADR mechanisms. Huge campaigning on the State level is required to develop a pro-ADR culture among all the practitioners, beneficiaries and all other concerned. If one of the goals of the ADR program is to increase access to justice for a particular target population, the program design must include adequate means for reaching that population.

Need for Promulgation of a Holistic ADR Legal Framework

It is essential to develop an entire ADR framework as opposed to one of amendments or changes in the law. The entire framework must fill in the gaps identified above. This should include a mixture of primary and secondary legislation with well-defined categories of ADR, clear identification of types of cases able to be resolved under ADR mechanisms and clear processes as to how to access these mechanisms and how these should function. There must also be set standards and qualifications for those who may be appointed as Arbitrators, mediators, conciliators etc. Rosters of those who may qualify must be kept, which may be revised based on performance.

There should also be a regulatory body under this holistic legal framework to regulate, monitor and administer ADR policies of the state; maintain, manage, accredit and enrol the pool of ADR staff; and to advise the State and Judicial actors on the needs of amendments and improvements of the legal framework as per the need of time.

²⁴ Ibid

Creation of Neutral ADR Centres

Neutral ADR Centres must be set up across the country. These may include space within the Courts, in public administration or other Government institutions, or any other neutral places as nominated by the High Court. In special circumstances, parties may be allowed to request the court to allow for ADR to take place in some other specific location for a justifiable and valid reason. The establishment of such Centres may allow for advocating the neutrality of the system and process whilst giving it legal protection and cover. This will also increase monitoring of the system and access for the people, who will know exactly where to go to for resolution of a dispute through ADR.

Increased ADR at Local Government Tier

The Local Government (set up in each province under their respective legislations) must play a more active role in conflict resolution at the district and village level. While the other provinces have included dispute resolution mechanisms in their local government, Sindh has not done it so far. It does have however retain it as an optional function of the District Councils. As the tier of Government at the grassroots level, the role of local government must be enhanced. However, any such dispute resolution mechanism must be with consent of both parties.

Furthermore, any such system must coordinate with the High Court, particularly with regards to setting standards and qualifications of persons who may resolve the disputes, their monitoring, training and identification. The system must run in coordination with existing systems under the justice sector.

Representation of persons from all groups and tiers are essential including women, religious minorities and other groups. The panel must be trained as per the standards set by the High Court and must also be revolving.

Lessons learnt from the previous attempts of institutionalisation of such mechanisms at the Local Government level must be addressed and incorporated to ensure more effective and sustainable processes and bodies.

Increased ADR in Public Administration

Public administration bodies must also initiate ADR mechanisms into their systems for public complaints against them for provision of sub-standard services within established and clear framework and structures. It is believed encouraging the use of mediation and other ADR mechanisms in resolving administrative matters is the increase in the efficiency and effectiveness of the administrative procedure and administrative-judicial decision making, which ultimately leads to reducing the number of administrative disputes and increases public confidence. There are several ways in which this can be explored, which may include increased powers and resources of the Ombudsman or increased use and powers of a dispute resolution mechanism at the Local Government level or a set-up within the public administration body itself.