

Critical Analysis on Existing Framework of ADR in Pakistan

▪ **Pages:** 1– 9 ▪ **Vol. II, No. II** (Fall 2023) ▪ **p- ISSN:** 3078-3666 ▪ **e- ISSN:** 3078-3283

Corresponding Author: Bilal Khan (Advocate, District Bar Association/Director Coordination, Indus Mediation & Dispute Resolution Centre, Lakki Marwat, KP, Pakistan. Email address: bilalniazi972@Gmail.Com)

Doi: 10.31703/ijlss.2023(II-II).01

Link: [https://doi.org/10.70540/ijlss.2023\(II-II\).01](https://doi.org/10.70540/ijlss.2023(II-II).01)



Cite Us



Abstract: *The mechanism of resolving issues quasi-judicially has turned out to be an effective means especially in jurisdictions where backlogs are hiking. However, the current framework in Pakistan addressing Alternate Dispute Resolution faces certain shortcomings and challenges which calls in question its fairness, accessibility, and effectiveness. The paper provides a background of ADR in Pakistan, outlining the history, development, and types of ADR mechanisms used. It then delves into an in-depth analysis of the existing ADR framework, discussing the laws, regulations, and roles of various bodies involved. Through this analysis, discrepancies and weaknesses in the framework are identified, with a focus on transparency, accessibility, efficiency, and effectiveness. The impact of these discrepancies on the overall ADR system is examined, including their effects on access to justice, fairness, and public trust. Based on the findings, this paper provides recommendations for addressing the identified discrepancies, proposing policy changes, legislative reforms, and initiatives that can improve the effectiveness and fairness of ADR in Pakistan. By highlighting the discrepancies and providing recommendations for improvement, this research paper aims to contribute to the ongoing discussions regarding the enhancement of the ADR framework in Pakistan for more efficient and equitable dispute resolution. ADR Act of 2017 is the focal point of our research as an overwhelming majority of ADR Practice in Pakistan revolves around it including accreditation and notification of mediators and mediation practices.*

Keywords:

ADR, Pakistan, Arbitration, Family, Courts, Customs, Islamabad, justice, efficiency, trust, legal, framework, conciliation, arbitration, accreditation, delays

Authors:

Bilal Khan: Advocate, District Bar Association/Director Coordination, Indus Mediation & Dispute Resolution Centre, Lakki Marwat, KP, Pakistan.

Email: bilalniazi972@Gmail.Com

Javed Iqbal: LLB. MA Political Science, MA Islamyat, MA English, M Phil Political Science, Diploma in Sharia and Law.

Introduction

The Alternative Dispute Resolution (ADR) framework in Pakistan represents a significant shift towards resolving disputes outside the traditional court system. Over the years, the Lawmakers in Pakistan have enacted several laws and regulations to facilitate ADR mechanisms and promote efficient and effective dispute resolution. These laws include the Arbitration Act, 1940; the Probation of Offenders Ordinance, 1960; Sections 10 and 12 of the Family Courts Act, 1964; Section 195C of the Customs Act, 1969; and numerous others. The enactment of these laws suggests the acknowledgment of ADR as an important means

in settling disputes in various sectors, such as family disputes, taxation matters, customs issues, and local governance etc. Besides these, the provincial assemblies in Pakistan have also introduced their own legislation to regulate ADR, such as the Islamabad Alternative Dispute Resolution Act of 2017, the Punjab Alternative Dispute Resolution Act of 2019, the KPK Alternative Dispute Resolution Act of 2020, and the Baluchistan Alternative Dispute Resolution Act of 2022.

These laws aim to enhance access to justice and provide mechanisms for resolving disputes at the local level. Despite the existence of these laws and regulations, the ADR framework in Pakistan faces certain challenges and inconsistencies. This research paper aims to critically analyze the current ADR framework in Pakistan, with a focus on the identified laws and regulations. By examining the strengths and weaknesses of these laws and their implementation, the paper seeks to address the discrepancies that hinder the fairness, accessibility, and effectiveness of ADR in Pakistan. The paper will provide an in-depth analysis of the existing ADR framework, highlighting areas that require improvement. It will focus on issues such as transparency, accessibility, efficiency, and public trust. By providing insights into the existing ADR laws and regulations and their impact on the overall ADR system, this research paper aims to contribute to the ongoing discussions regarding the enhancement of the ADR framework in Pakistan. The recommendations derived from this analysis will provide valuable guidance for policymakers, legal practitioners, and stakeholders in the pursuit of a more efficient and equitable dispute resolution mechanism in Pakistan.

Emergence of ADR Act 2017

The Alternative Dispute Resolution Act 2017 was promulgated on 30th May, 2017. The procedures of mediation, conciliation, and arbitration are listed under "Alternative Dispute Resolution" in this Act. This is Pakistan's first codified special law pertaining to ADR which invests certain Power in Law and Justice Division of Ministry of Law to accredit and notify individual mediators and mediation centers. This Act stipulates that every civil dispute listed in the schedule will be reoffered to alternative dispute resolution (ADR) by the court, unless the parties refuse, the court determines that ADR is not the appropriate course of action, or there is a material question of law or fact at stake. Pakistan's legal landscape regarding Alternative Dispute Resolution (ADR) reflects a promising yet evolving framework. The state has made significant strides in recognizing the value of ADR mechanisms, notably mediation, as effective tools for resolving disputes outside the traditional court system. The existing legal framework in Pakistan demonstrates a gradual shift towards accommodating and promoting ADR methods, evident through legislative initiatives ADR Act, 2017. However, the full potential of ADR remains untapped due to various challenges, including a lack of comprehensive regulation, limited awareness, and cultural barriers. ADR Act of 2017 is the focal point of our research as an overwhelming majority of ADR Practice in Pakistan revolves around it including accreditation and notification of mediators and mediation practices. A panel

of neutrals, comprising seasoned solicitors, retired judges, retired civil servants, ulamas, jurists, technocrats and specialists, has been established under this Act and will lead ADR sessions in the ADR centres.¹ This Act establishes a 30-day limit for ADR proceedings, which can be extended by further 15 days upon the request of the neutral party. Following a successful ADR proceeding, the Neutral will record the settlement and issue the award.² It will be brought before the court having jurisdiction to hear the matter. Following the submission of the award, a decree that takes the terms of the award into consideration will be issued and judgement rendered. Additionally, it has been stated that the matter may be brought before the relevant court in the event that the Neutral's attempts to resolve it were unsuccessful.³ Any judgement or order issued by the court as a result of alternative dispute resolution (ADR) procedures will be enforceable under applicable legislation. Furthermore, for the purpose of resolution of dispute of Criminal nature, the court may designate Neutral to lead ADR proceedings for offences that are compoundable, in accordance with the Pakistan Penal code, 1860.⁴ The evaluator may be hired by the court or the neutral under the terms of this Act to provide an expert opinion on any financial matter or other matter of a technical type. No appeal or revision of the decree or any other judicial order may be maintained under this Act.⁵

Critical Analysis on current Legal Framework on ADR

The idea that courts should always invite parties to try to settle their issues through alternative dispute resolution (ADR) was explored at a national judicial conference a few years ago, but the architecture of the current ADR program has altered dramatically since then. The failure of the strategy might have been due to the threat it posed to senior lawyers.⁶ Critics have already pointed out that the current law has been handled carelessly. According to media sources, the National Assembly passed the measure with only 23 members present—less than the required quorum. The 21 members of the standing committee are listed by name, but it is not stated how many of them participated in the proposal evaluation. The committee apparently met twice, on January 9 and January 18.⁷ In any case, the committee changed the bill just three times.

¹ Section 4 of Alternate Dispute Resolution Act, 2017.

² Ibid, Section 10.

³ Ibid, Section 11.

⁴ Ibid, Section 14.

⁵ Ibid, Section 18.

⁶ Reforming the Alternative Mechanisms of Dispute Resolution in Pakistan by Ahsan Iqbal, 2016

⁷ THE CRITICAL ANALYSIS OF PROCEDURAL ASPECTS IN APPLICABILITY OF ALTERNATE DISPUTE RESOLUTION ACT- 2017 Sami Ur Rahman Assistant Professor of Law National University of Sciences and Technology Islamabad - Pakistan Same.s3h@s3h.nust.edu.pk Ms. Sadia Tanveer Advocate, District Courts Islamabad LLM Scholar, Bahria University Islamabad - Pakistan sadiatanveer812@gmail.com Amjad Hilal Assistant Professor Department of Law & Sharia University of Swat amjadhilalpsp@yahoo.com

Quorum of National Assembly and Legislative Process

First and foremost shortcoming which might be termed as foundation for such more drawbacks is not undergoing through the due legislative process. The fact that the National Assembly passed the measure with only 23 members present, which is less than the required quorum i.e. one fourth of total membership (342 members of the house)⁸, raises serious procedural questions. A quorum is typically essential to ensure that decisions are made with adequate representation. Passing the measure without the requisite quorum suggests that the decision-making process may not have involved the participation of a significant portion of the National Assembly members. This lack of broad participation can undermine the democratic principles of representation and may lead to concerns about the validity of the legislative action taken. The committee met only twice, on January 9 and January 18, before passing the bill. Such a limited number of meetings may raise concerns about the thoroughness of the evaluation and discussion process. Furthermore, the committee changed the bill just three times. While the number of changes alone doesn't necessarily indicate a problem, it might be worth exploring whether there was sufficient deliberation and consideration of different perspectives.

Delay in implementation of Legislative Framework

The delay of approximately six years between the passing of the Act and the formulation of rules may indicate a lag in the implementation of the legislative framework. Such delays can impact the timely establishment and functioning of the ADR system, potentially affecting its intended impact on dispute resolution. While the delay might contribute to a more refined set of rules, it could also pose challenges in terms of awareness and compliance. Stakeholders within the legal system, including ADR practitioners, may need time to familiarize themselves with the rules and adapt their practices accordingly.

Provisions of Accreditation

ADR Mediation Accreditation (Eligibility) Rules, 2023⁹ provide provisions for eligibility and process of seeking accreditation from Ministry of Law. The ADR Centres or individual mediators shall be only considered for accreditation if they adhere to an end-to-end mediation process framework which can either be administered or recommended by organizations listed in the Annex to the rules or developed by the ADR Centre or mediator themselves.¹⁰ The annex provides 3 institutes namely International Mediation Institute, Centre for Effective Dispute Resolution and Civil Mediation Council of United Kingdom. Mediators associated with an ADR Centre are also required to be trained and certified by such institutions by trainers

⁸ Article 55 of the Constitution of 1973.

⁹ Islamabad, the 21st February, 2023 S.R.O. 210 (I)/2023

¹⁰ See Rule 2(1)(a) and (b) of ADR Mediation Accreditation (Eligibility) Rules, 2023.

certified by such institutions.¹¹ Such provision i.e. featuring only three institutes may be perceived as restrictive and lacking diversity. This limited representation may inadvertently exclude other reputable institutions that could contribute to the development and standardization of mediation practices. Relying on a small number of institutes might create barriers for aspiring ADR Centres and individual mediators associated with organizations not included in the annex. This could hinder the growth of a more inclusive and diverse ADR community.

The ADR Act should define clear and transparent criteria for the inclusion of organizations in the annex. This would ensure that the accreditation process is objective, fair, and based on established standards of excellence in mediation training and certification. Inclusivity facilitates broader access to accreditation opportunities, fostering a more diverse pool of trained mediators and ADR Centres. This, in turn, contributes to the growth and effectiveness of the ADR framework.

Silence of Law on pre-requisites for empanelment with High Court

The landscape of Alternative Dispute Resolution (ADR) in many jurisdictions is marked by the presence of court-annexed ADR centers, providing parties with an alternative route to resolve disputes outside traditional litigation. However, a notable gap often exists in legal frameworks, particularly in their silence on the pre-requisites for these court-annexed ADR centers. This silence gives rise to both opportunities and challenges, creating an unexplored terrain within the realm of dispute resolution. The ACT and rules thereto provide that ADR Centres and mediators seeking empanelment with the High Court for court-referred mediations must meet additional requirements specified by the High Court through circulars issued for this purpose.

One of the merits of such absence of specific pre-requisites in law is that it will allow court-annexed ADR centers to be flexible and adaptable to changing circumstances. This flexibility enables these centers to tailor their operations to the unique needs of the legal community and the parties involved in disputes. Without rigid statutory pre-requisites, ADR centers affiliated with courts have the freedom to innovate and experiment with various ADR mechanisms. This innovation can lead to the development of more effective and tailored dispute resolution processes.

However silence of Law on this matter may also lead to a lack of standardization in the establishment and operation of court-annexed ADR centers. This can result in variations in quality, training, and practices, potentially impacting the overall credibility of ADR as a dispute resolution mechanism. Without explicit legal guidelines, there is a risk of abuse or misuse of ADR processes within court-annexed centers. This

¹¹ See Rule 2(1)(a) and (b) of ADR Mediation Accreditation (Eligibility) Rules, 2023.

could involve insufficient training of mediators, inadequate safeguards for parties, or a lack of transparency in the ADR proceedings.

Matter of notification and accreditation of Retired Supreme Court Judges

The provision in the ADR Act that establishes an accreditation committee comprising the Registrar of the High Court, the Secretary of the Law and Justice Division, and one member nominated by the Federation of Pakistan Chambers of Commerce and Industry raises several points to be addressed in this paper, particularly in the context of the notification of retired Supreme Court judges and their certification requirements.

Matter of insubordination

The process of notifying retired Supreme Court judges by their juniors might be viewed as diminishing the professional dignity and stature these judges have earned throughout their illustrious careers. Being informed about ADR opportunities by those in junior positions could be seen as a departure from the traditional norms of professional hierarchy. Retired Supreme Court judges have attained the highest echelons of the legal profession. The process of juniors notifying them may be perceived as disrespectful, as it seemingly places these seasoned jurists in a position where they are informed by individuals who are junior in both professional experience and judicial hierarchy.

Another angle of this debate is that Retired Supreme Court judges might perceive the notification process as a form of tokenism, where their seniority and expertise are acknowledged merely symbolically. This could diminish the perceived seriousness and sincerity of the ADR framework in recognizing and utilizing the experience of retired judges.

Requirement of Certification

Moreover the requirement for retired Supreme Court judges to undergo training and certification by organizations listed in the annex of the ADR Act, while potentially well-intentioned, may face criticism based on several considerations. Firstly, requiring retired Supreme Court judges to undergo training and certification might be viewed as questioning their judicial expertise. These judges have had extensive legal careers, and the presumption that they need certification may be seen as undermining the knowledge and skills they have acquired over the years. Secondly, Introducing a mandatory training and certification process for retired Supreme Court judges might serve as a disincentive for them to engage in ADR. Given their distinguished legal careers, they may perceive such requirements as unnecessary hurdles, potentially discouraging their participation in ADR initiatives. Mandatory certification might be perceived as a form of tokenism, where the process emphasizes formalities over the actual contributions and capabilities of

retired Supreme Court judges. This could undermine the sincerity and authenticity of their participation in ADR.

The author completely understands the fact that the act was actually enacted for Islamabad territory which comes under Islamabad high court and hence Registrar of that very Court was supposed to be a member of the accreditation committee and not any Judicial Officer of Supreme Court, given their too hectic schedule to engage them in matters limited to Islamabad Capital Territory. But the Retired Supreme Court judges often leave a lasting legacy due to their significant contributions to the legal field. Acknowledging and respecting this legacy is crucial, and any requirements or notifications should be implemented in a manner that reflects the unique position these judges hold in the legal community. Instead of imposing formal notification processes, the ADR Act could focus on encouraging retired Supreme Court judges to voluntarily participate in ADR initiatives. Providing incentives, recognition, or creating a supportive environment for their engagement might be more conducive to leveraging their expertise.

Centralization of Authority

The Ministry's being the only platform responsible for mediator notification suggests an opportunity to establish standardized qualifications and criteria for individuals serving as mediators across various committees. This can contribute to maintaining a certain level of professionalism and competence in ADR practices. However, such standardization could also be criticized for potentially overlooking the unique requirements for constitution of ADR committees for different purposes. Concerns may arise regarding the Ministry's depth of knowledge in specific sectors. Mediation processes in areas like taxation often require sector-specific expertise. If the Ministry lacks this knowledge, it might result in the appointment of mediators who are not well-versed in the intricacies of the subject matter.

For instance, Ministry is required to notify panel of mediators comprising of a retired judge of not below the High Court for the head of the ADR Committees, as stipulated in Article 134A of the Income Tax Ordinance, 2001. The Ministry of Law has been unresponsive, particularly concerning the accreditation requirements such as certifications. The Federal Board of Revenue has forwarded 3 letters reminding Ministry of Law to notify the Panel on August 29, 2023, October 16, 2023 and December 4, 2023. The lack of an adequate response from the Ministry of Law raises concerns about the timely establishment and functioning of the ADR Committees. A lack of communication or responsiveness can hinder the effective implementation of Article 134A and delay the resolution of tax-related disputes through ADR. One of the obstacles faced by Ministry of Law is probably the requirement of certification of Training as mandated by

ADR Act, 2017. As so far only one retired judge of High Court¹² is generally notified by Ministry of law as a mediator.

Conclusion

In this research paper, a critical analysis of the existing framework of Alternative Dispute Resolution (ADR) in Pakistan, with a specific focus on the ADR Act of 2017, has been undertaken. The study delved into the procedural aspects, challenges, and dynamics surrounding the implementation of ADR mechanisms, particularly within the context of Islamabad territory and its impact on tax-related disputes. The examination of the ADR Act of 2017 revealed both commendable aspects and areas of concern. While the legislative intent to streamline dispute resolution processes and reduce litigation backlog is evident, practical challenges have surfaced in the implementation, notably in the nomination and accreditation of mediators, and the notification of ADR Committees. The requirement for retired Supreme Court judges to undergo training and certification, along with the involvement of juniors in notifying their seniors, has raised valid concerns regarding the respect, independence, and efficiency of the ADR framework. Moreover, the Ministry of Law's responsiveness, or lack thereof, in the notification process for ADR Committees emerged as a significant hurdle. The recurring reminders from the Federal Board of Revenue underscored an administrative bottleneck that requires urgent attention. These issues collectively pose potential impediments to the smooth functioning and credibility of the ADR mechanisms established by the ADR Act of 2017.

Recommendations

Flexibility in Accreditation for Retired Judges:

Propose amendments to the ADR Act to introduce flexibility in the accreditation process for retired judges, recognizing their wealth of experience and expertise. Tailored training programs, acknowledging their seniority, could address concerns related to unnecessary hurdles.

Transparency and Collaboration

Advocate for enhanced transparency in the nomination and accreditation processes, ensuring that the criteria and decisions are communicated clearly. Collaborate with judicial training institutes to align certification programs with the specific needs of retired judges transitioning into ADR roles.

Inclusive Decision-Making

¹² Justice (Retd) Arif Hussain Khilji

Promote inclusivity in decision-making by involving external experts or professionals from the legal community, especially when decisions involve retired Supreme Court judges. This can contribute to a more objective and impartial selection process.

Strengthen Communication Channels

Strengthen communication channels between the Federal Board of Revenue and the Ministry of Law. Establish regular dialogue to address any bureaucratic delays or challenges faced by the Ministry, fostering a collaborative approach to resolve issues promptly.

Review and Streamline Internal Processes

Conduct internal reviews within relevant agencies, such as the Federal Board of Revenue, to identify and streamline internal processes that may contribute to delays. Addressing bottlenecks internally can expedite the overall implementation of ADR mechanisms.

Engage Stakeholders

Actively engage with stakeholders, including legal associations, retired judges, and professional bodies, to build consensus and support for the ADR framework. A collective and informed voice can influence policy changes and promote a conducive environment for ADR. Legislative

Amendments for Timely Notifications

Propose legislative amendments, if necessary, to establish clear timelines and mechanisms for timely notifications of ADR Committees. This can ensure the effective functioning of the committees and adherence to the legislative intent.