Alternative Dispute Resolution: A Road less Travelled in Pakistan

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Since the dawn of independence in 1947, Pakistan has been experiencing a substantial rise in litigation and predominantly, it has been relying on court based adversarial system of adjudication. A cursory view of the literature of the contemporary jurisdictions will add credence to the view that alternative dispute resolution mechanisms have proved to be the effective ways of relieving the litigants of unbearable costs and prolonged trials. With this view, this article explores some current strains within the litigious circles in Pakistan. After a discussion of Labour Laws, Land Laws, Family Laws, and Income Tax laws, Customs laws, Excise Laws and Code of Civil Procedure, it examines the possibilities of extending its scope to other areas as well. In case of a dispute, the litigants not only make recourse to the state sponsored methods of settlement i.e. adjudication through judicial forums but they try to solicit the help of alternatives as well i.e. mediation, conciliation, arbitration and abridged trial procedures1. Albeit, particular means of alternative dispute resolution vary from one another but still they reveal some striking similarities that a non partisan individual gets in with an acceptable opinion or keeps the combatants informed of all the developments pertaining to the issue2. Broad fields which carry a reasonable portion of litigation and on which this work will focus, are labour disputes, family disputes, taxation disputes and the disputes relating to agriculture land. Primarily this article is based on archival work and analysis of judicial paradigms, the work suggests that the reinvigoration of this system in Pakistan.

Introduction

Albeit the idea of out of court settlement of differences in Pakistan has, in some cases, been onto the statutes since the dawn of independence rather in some cases it dates back to the pre-partition era but the concept couldn't attained required voracity due to the reasons to be adumbrated in later sections of this article . As the principal urge behind the incorporation of the provisions relating to participative justice are heavy costs and lengthy trials, therefore, the use of alternative dispute resolution achieves this objective through the use of more structured, dynamic negotiating forum than in traditional out of court settlement negations and through the influence of an effective mediator trained to tease out settlements from difficult negotiations3. Being parallel to two established means of dispute resolution, i.e. litigation and arbitration, the ADR presents the best way to reduce costs and improve the reputation of the civil litigation system4. True that the ADR is riddled with numerous advantages, yet the most daunting task, in this respect, is to persuade the combatants to accept the mediation as panacea as a first step5. Especially, in an adversarial legal system which is, predominately, tainted with combative approach, disputes can become personal and the parties entrenched, the importance of ADR increases manifold6. In order to forestall a further escalation of the conflicts, the benefits of ADR in mainstream litigation, and court disapproval of refusal, have been documented and the judicial pronouncements add credence to its inevitability by holding that there has to be a good reason to refuse7. For instance in the UK, the claimant who declined to respond to settlement proposals had to attract the court's disapproval. At appellate stage, Lord Justice Longmore held that such conduct would not have mattered in pre-CPR days but now mattered very much and a claimant who made no attempt to negotiate could expect the courts to take that into account when making the appropriate order as to cost8. In another case while raising a question Lord Justice Ward asked what could the court do to prevent what, to those outside the litigation, may seem like an unseemly, or at least uncommercial, squabble? His Lordship answered his own question by holding that we could and we did encourage mediation, the earlier the better. It did possess exceptional aptness of yielding compromise9. During the course of analysis of the

Constitutional perspective of ADR

As the dispensation of justice to the people has been rendered to be the soul of good Government10, therefore, it requires the creation of an ultra-modern disseminating infrastructure and manpower; sympathetic and planned; need for new judicare technology and models; and remedy-oriented jurisprudence11.

Interestingly, no express allusion about ADR has been made in the constitution of 1973, but a reference to commercial and financial activities can be pinpointed in the constitution, which may, however, implicitly lead to a view that Pakistan practices certain methods of ADR12. Unlike its abiding popularity in contemporary jurisdictions, the movement for the flourishment of ADR couldn't assume required impetus on legislative frontiers in Pakistan. For instance, against the backlog of hundreds of thousands cases in lower judiciary it can be safely said that the ever growing steep rise in the number of cases is principally a reflection of permissive treatment of ADR by the parliament.

ADR under the Income Tax Ordinance, 2001

Income Tax Ordinance is one of those areas which fetch a reasonable quantity of litigation in Pakistan but with a complex system of levying tax. But surprisingly, the provisions relating to the ADR could find the place onto the federal statute very lately. Section 134-A of the said Ordinance lays down the scope and parameters of making recourse to the ADR. In order to have the full comprehension of the ADR under the said law it would not be out of place to make mention of the Revenue Authorities under the said law. For the purposes of the Ordinance, following income tax authorities have been provided: namely, Central Board of Revenue, Regional Commissioner, Commissioner of Income Tax, Commissioner of Income Tax (Appeals) and Taxation Officers13. As far as the control and superintendence of these officers is concerned, the board has to exercise the general administration and the Regional Commissioners of Income Tax and the Commissioners of Income Tax (Appeals) would be subordinate to the central Board of Revenue; Commissioners of Income Tax would be subordinate to the Regional Commissioners14. All other taxation officers would be subordinate to the Commissioner of Income Tax with the condition that if a taxation officer is invested with the powers and functions of Commissioner under section 209(2), he would be subordinate to the Regional Commissioner of Income Tax15.

As the tax matters carry a reasonable magnitude of litigation and the exigency demands that the tax payers should be provided with a form which is an inexpensive, less time consuming, less cumbersome and a result oriented mode, but unfortunately, the legislative intent has been frustrated by inordinately delaying the matters. For instance, in a case, the Federal Tax Ombudsman had to recommend disciplinary proceedings against the members of Alternative Dispute resolution Committee16. But, surprisingly, instead of initiating disciplinary proceedings against the members of the committee, the Board recommended to constitute a fresh committee and the order to that extent was passed on 27-05-2007 and the ADR Committee was constituted on18-11-200817. The said Committee was required to

finalise its report within ninety days of its formation but it submitted its report on 30-09-2009 i.e. after 323 days of its constitution18. The proper course, in this situation, was the dissolution of the Committee by the Federal Board of Revenue and reconstitution thereof within 90 days of its dissolution but as per traditional paucity, the federal Board of Revenue reconstituted it on 15-12-2012 i.e. with a delay of over three years19. Albeit, before the Committee could submit its recommendations, the Appellate Tribunal had rendered its decision on the matter on a separate reference and the complainant might be satisfied with the redressal provided by the Appellate Tribunal but usual lethargic behaviour was manifest at various levels of tax officials during the complete chain of events20. As Pointed earlier that the basic logic behind the introduction of idea of ADR in tax matters was to provide facility to the tax payers of the country but that has been converted into a torture rack moving inch by inch21. Maladministration at all levels, the Ombudsman added, was rampant and the Federal Board of Revenue was needed to address the issue as systematic issue22. Moreover, the Ombudsman recommended not entrusting the task Alternative Dispute resolution to such officers who were not inclined to follow the law23.

Similarly, in another case, the recommendations of Alternative Dispute Resolution Committee were sent to the Federal Board of Revenue for approval but the Board failed in taking action24. The taxpayer, however, deposited the amount recommended by the committee but being aggrieved by the inaction of the Federal Board of Revenue, the taxpayer lodged a complaint alleging therein maladministration on the part of Federal Board of Revenue25. The complaint was sent to Revenue Division for comments and the Chief Commissioner, after scrutiny, confirmed the fact of delay in passing the order on the recommendation of the committee which amounted to maladministration in terms of s.2(30(ii0 of Establishment of the office of Federal tax Ombudsman Ordinance, 200026.

ADR in Federal Excise Act

Like other fiscal statues in Pakistan, the Federal Excise Act also makes provision for the settlement of disputes through the help of Alternative Dispute Resolution methods. As per law, any registered person may make a formal request to the Federal Board of Revenue for the redressal of his grievance pertaining to; liability of excise duty or entitlement of refund; penalty and extent of waiver of default surcharge; confiscation of his goods; concession in terms of any procedural or technical irregularities; blinking at delay or some other specific relief27. It is relevant to mention that the matter can be referred to ADR either after its adjudication or during its pendency before any of the relevant forums. The issues relating to interpretation of law, past and closed transactions and criminal matters

have been declared to be out of bound for the committee. The applicant is obliged to make a request for the constitution of a committee for the settlement of any such dispute and the Federal Board of revenue has to satisfy itself as to the exigency demanding the appointment of such Committee28. If however, the Board is satisfied, it has to appoint a committee comprising of Commissioner Inland Revenue, two person not the below the rank of retired sessions Judges, charted or cost accountants, representative of the elected bodies or another well reputed tax payers who are supposed to be from amongst the notified panel29. The committee has to put down its findings within ninety days of the referral of the issue if, however, the committee is of the opinion that the issue needs further deliberations, it may conduct an inquiry; solicit the opinion of an expert or direct any officer of the sale department to conduct an audit. In case of its failure to make the recommendations within prescribed period, the Board may break down it and reconstitute a fresh one which has to make recommendations with ninety days. If, unfortunately, the issue remains unresolved within said period it may be entrusted to some suitable forum. In case, the committee makes its recommendations, the Board has to consider them for making such as orders as it deems fit within ninety days of their submission. In case, however, the Board fails to make appropriate orders within prescribed period, the recommendations made by the committee shall be deemed to be the orders of the Board.

As the Alternative Dispute Resolution is the concomitant phenomenon of the attributes which are made to the traditional adversarial system of adjudication, therefore, the success of any legislative arrangements pertaining to Alternative Dispute Resolution would be an elusive effort unless it draws the universally recognized principles up. The legislature has introduced an arena under the title of Alternative Dispute Resolution in a masquerading fashion as the same seems to be imbued with a lot of lacunae. For instance, it is uncertain as if the issue is to be referred by way of negotiations, mediation, conciliation or arbitration. It is the Federal Board of Revenue which has to decide, after receiving application from the aggrieved person, whether recourse is to be made to the ADR or not. Indeed, formation of the Committee, under the law, is the sole prerogative of the Board and applicant has not been given any chance to choose the members of the Committee. As the basic urge behind the introduction of Alternative Dispute Resolution was, inter alia, to get rid of protracted trial which not only consume the national exchequer but also leaves deleterious effects on the efficacy of justice, but under the extant law, there is likely of delays. For instance, in case the Board agrees to form a committee, the committee has to submit its recommendations within ninety days and incase the committee fails in bogging down the recommendation with in prescribed period, the Board may constitute fresh committee which will have to give its recommendations within ninety days. In case the committee submits its recommendation, the Board has to consider them and render its decision within

ninety days. So, in this way, the final outcome is likely to come within nine months and if, unfortunately, the issue remains unresolved, it may be taken up by some other appropriate forum. The term 'appropriate forum' is another telling controversy as the term ahs neither been defined under the Federal Excise Act, 2005 nor under the rules made thereunder. So, the off-shoot of the analysis reveals that the Alternative Dispute Resolution under this law is an illusive arrangement as the same doesn't come true on any standard of the concept of ADR.

Alternative Dispute Resolution under the Customs Act, 1969

The concept of Alternative dispute Resolution do sounds under the Customs Act, 1969 and rules made thereunder but it has been facsimiled as such from the Federal excise Act, 2005 with the variation that the word 'customs' has been used in place of 'excise'. So, like ADR under the Federal Excise Act, 2005, the concept has not been incorporated in its traditional context in Customs Act, 196930.

ADR in Family Cases

Albeit, laws were enacted in the subcontinent to galvanize the fragile situation of the women and in this respect, the Muslim Family Laws Ordinance may be reckoned as the most benevolent piece of legislation in post independence era. The said law, beside purging the society of the menace of Talaq al Bidah, and recommending the registration of marriage encompassed three areas of reformation; firstly, restriction of poly gammy, secondly, discouragement of hasty divorce and thirdly, settlement of maintenance disputes31. As to the dissolution of marriage, it is relevant to mention that there emerges an impression of ADR under the provisions of MFLO.1961 at a couple of stages of the case: - firstly, at pre-trial stage and secondly, after the closure of the evidence32. As the principal urge behind the incorporation of sections 10 and 12 is to bring the tensed spouses to conciliation or compromise, therefore, non-observance thereof, in a case in which court grants a decree for the dissolution of marriage is considered to be a serious irregularity33. But, in case the Family Court declines to issue a decision of dissolution of wedlock, the irregularity might not be so grave as to entail setting aside of decision of the court in exercise of writ jurisdiction34. It is interesting to note that at both stages the provisions ordering the conciliation seem to be callous as to the true spirit of conciliation/ mediation. It fails to prescribe procedure or strategy for embarking upon conciliation/mediation. It has been left to the discretion of the Family Judge to do so keeping in view the peculiar circumstances of each case35. For instance, in a case; it has been held that the words reconciliation / compromise would postulate adoption of such measures which could be proved as a factor for harmonious union between the spouses after redressal of grievances between them which had led to have recourse to litigation36. The goal would have been served in a better way if the task would have been referred to an independent conciliator/ mediator. An attempt

by a presiding officer of Family Court to bring about conciliation/ compromise will not be able to glean the true outcome.

ADR under Land Laws

Agrarian terrain is one of the areas which share a reasonable portion of litigation in Punjab. In this field, two laws are of paramount importance i.e. Land Revenue Act, 1967 and the Punjab Tenancy Act, 1887. It is pertinent to mention that nature of litigation under both of the statutes is entirely different. Under the former, a dispute remains between the government and the land owner or between the land owner and the landowner whereas the later purely deals with the issues which spring between the land lord and the tenant. Under the land Revenue Act, 1967, Village headmanship, preparation of record-of-rights, periodical record-of- rights and revision thereof; mutation of land; recovery of sums as arrears of land revenue; fixation/ determination of boundary line as a result of survey; partition of joint holding; ascertainment of encroachments and eviction of the encroachers, are the major areas which are prone to litigation. As far as the Punjab Tenancy Act, 1887 is concerned; there may be controversy between the land lord and the tenant as to the establishment of occupancy rights and produce of the tenancy where the rent is to be paid by dividing the produce thereof. Furthermore, commutation of rent from one form to another form; succession to occupancy rights; ejectment from tenancy; award of compensation; conversion of occupancy tenancies into absolute ownership and limit of personal holding as a result of enforcement of Punjab Tenancy (Amendment) Act, 1952 may be the potential areas of litigation between the land lord and the tenant.

Albeit, under the provisions of the Land Revenue Act, 1967, existing arrangement partially alludes to an institutional mechanism for the speedy disposal of revenue matters through arbitration, but that falls far short of establishing a convincing arrangement. So, a cursory review of the legal provisions encompassing the arbitration under the Land revenue Act, 1967 reveals that obscure nature of the exiting legislative and institutional arrangements has rendered the arbitration to be a figment of bad arrangement. For instance, in response to the question as to what can be referred, the statute says that any revenue officer can refer any matter under the land revenue Act, 1967, with the consent of the parties, to arbitration37. However, the Collector and the Assistant Collector of the First Class are not bound to solicit the consent of the parties in case of an issue relating to an entry to be made in the revenue record under the provisions of chapter IV of the Act; spread over of the assessed land revenue over several holdings; determination of boundary from an estate to any portion in an estate or division of property as a result of partition or mode of making partition38. Stage of referral is another areas of statutory callousness which prima facie whittles down the efficacy of the arbitration as an alternative instrument for speedy dispensation of justice. Who can make a request for making recourse to arbitration is another inflexible aspect which Boggs down the

efficacy of arbitration. It is the Revenue Officer who has the sole discretion to decide whether a particular revenue matter is to be referred to arbitration or not. Autonomy of the parties is of paramount importance especially in terms of arbitration. For instance, Redfern and Hunter calculate that autonomy of the parties to arbitration is, as far as determination of procedure is concerned, guiding principle39. This principle has not only found place in indigenous legislation of various jurisdictions but in international institutions and organizations as well40. In this context, the existing legal matrix as to the autonomy of the litigants to the extent of referral of the issue seems to be not in line with the established norms. Similarly, the appointment of the arbitrators is intimately connected with the principle of autonomy and the existing statutory arrangements leave enough space for the parties to appoint arbitrators of their own choice. Each party can, maximally, appoint two arbitrators and minimally one41. At the same time, however, the law also equips the Revenue Officer to turn down the nominations made by the parties on the premises not mentioned in the statute and remedy has been provided against such order of the revenue Officer42. So, apparently, the tenor of provision smacks of discretion which turns out to be a desisting factor in the way of flourishment of arbitration as an alternative dispute resolution mechanism.

Added to the above is the absence of the law pertaining to the qualification of the arbitrators. No formal credentials have been prescribed by the law. Despite such utterly bemused arrangements, the existing law provides the parties an opportunity to reappoint the arbitrators in the case of following eventualities; firstly, in case of death of the arbitrator; secondly, in case of inability of the arbitrator to arbitrate due to illness or other disability; and thirdly, the arbitrator refuses to arbitrate43. Authority of the arbitrator is another area of acute controversy. Under the existing arrangements, the arbitrators have no authority to summon any person for the purpose of deposition or production of any document. For this purpose, they have to seek the help of Referring Officer, which turns out to be a tardy arrangement44. Be that as it may, arbitration in its existing form will remain an elusive idea and be less prone to yield positive results unless, inter alia, more teeth are added to the authority of the arbitrators.

The arbitrators have to render their award within prescribed period and submit it to the Referring Officer either by hand, through special messenger or by postal services45. The Revenue Officer thereafter has to fix a day for its hearing, all the parties get a chance to venture upon any aspect of the arbitration proceedings and finally, the Revenue Officer may confirm the award; may amend the award or may reject the award46. The tenor of provision relating to award demonstrates the legislative motive behind the incorporation of the provisions pertaining to arbitration i.e. a facilitative process for the convenience of the Revenue Officers. But, it is submitted that no pragmatic effort has ever been made to harvest the talent of

arbitration as an alternative to court proceedings. It is high time to make paradigm shift i.e. from a naive endeavour to result oriented effort.

ADR and Labour Laws

Since the dawn of its inception in 1947, relations between the employer and the worker have a terrain of acute controversy. For last more than seven decades, a plethora of labour laws has been promulgated to lessen the grievances of the industrial combatants but, unfortunately, could not get the required results. In the arena of work, the disputes may be either; individual or industrial. As to the former, redressal can only be sought from the formal forums i.e. by filing a regular suit in the Labour Court and in case of dissatisfaction; the aggrieved party can make recourse to the labour Appellate Tribunal by filing an appeal. Thus, an economically depressed worker gets entangled in the web of traditional adversarial system which is replete with formalism, exorbitant cost and protracted delays. However, in case of later, the issue is to be resolved in two phases i.e. as first step the dispute is to be settled with the help of negotiations, conciliation and arbitration. But in case of failure, as a second step, recourse is to be made to judicial forums by instituting a regular suit/appeal in Labour Court and the Labour Appellate Tribunal respectively. Admittedly, the provisions pertaining to ADR have been sounding in Pakistani labour jurisprudence since the dawn of independence but the legislative infrastructure has been so feeble that it miserably failed in providing pragmatic solution to the litigants. Resultantly, the successive governments have been experimenting as to the non-judicial mechanisms for the settlement of industrial disputes in Pakistan. For instance, in the first decade of its independence, the conciliation remained onto the statutes as a compulsory device for the settlement of industrial disputes in Pakistan but no inclination could ever be demonstrated as to the inclusion of arbitration in the list of informal fora, in that decade. The countervailing disadvantage of such omission has been that the conciliation had to be an over reliant device for the settlement of industrial disputes and the industrial litigants could not harvest the talent of other informal mechanisms prevalent in contemporary circles. So, we see that it was not until 1969, in line with the second labour policy, that the arbitration as a tool for the settlement of industrial dispute could emerge on the industrial horizons in Pakistan.

As stated earlier, inconsistency in policy is, inter alia, one of the reasons for inhibited growth of the informal mechanism in Pakistan. For instance, hitherto, the arbitration had been utilized as an optional step but in 2002, the concept of compulsory arbitration was introduced in case of an industrial dispute relating to any of those services in Pakistan. At this stage, it is appropriate to say a few words about public utility services. The term has been defined as the services as have been mentioned in the schedule to the Industrial Relations Ordinance, 2002. In the said schedule, eight services which fetched maximum number of workers were mentioned. The acrimonious aspect of the legislation was that in case of non-public

utility service, the arbitration was purely an optional step and the parties were autonomous in selecting arbitrator of their own choice but in case of public utility services, the parties had to appear before a panel of arbitrators to be constituted by the respective government. In this way, under the new arrangements, the autonomy of the parties as to the selection of arbitrator had been confiscated. As the idea of compulsory arbitration through panel of arbitration was, in respect of public utility service, not likely to yield pragmatic results, it had to be discarded while promulgating Industrial Relations Act, 2008. The year 2010 can be reckoned as phenomenal in the constitutional history of Pakistan due to a couple of facts: firstly, as a result of parliamentary consensus, 18th Constitutional Amendment which, inter alia, dispensed with the concurrent legislative list and secondly: as a result of such abolishment, the subject of labour, which hitherto was included in concurrent legislative list and was predominately the domain of the Federal Legislature, was devolved to the provinces. Under the extant legislative arrangements, the previous arrangements pertaining to negotiation, conciliation and arbitration have been facsimiled as such in the new statute with the only deviation that the matters pertaining to the transprovincial union and the unions within the federal territory of Islamabad have been stated to be the domain of Federal Legislature and rest of the issue have been entrusted to the provinces. The encouraging aspect of the episode is that besides retaining the negotiation and conciliation as tools for the settlement of industrial disputes, arbitration has also been brought onto new statutes as a resort for the settlement of such disputes.

Conclusion

As a first step, it is essential to introduce legislation whereby compulsory clause should be introduced for making recourse to the ADR. It is refreshing to recommend that the court should ask the parties if their dispute could be resolved by way of medication or conciliation. In some cases, especially in family matters, the court may come across a situation in which emotions and legal issue may amalgamate and it becomes too difficult for a judge to decide the same in formal way. In such situation, ADR may prove a panacea in bringing the parties to an amicable settlement. It is, basically, the state which has been instrumental in perpetuating the legislative stagnation especially in the matter of arbitration. Especially, in the context of emerging global trends, it needs to be given serious thought by the power corridors. As to the ADR under the Land Revenue Act, 1967, it is suffice to say that the statute is devoid of situation as has been incorporated under section 89-A of the Civil Procedure Code, 1908. The graph of litigation may be reduced, if not eliminated, by giving the ADR due space by incorporating its all facets. Even, under the exiting arrangements, the talent of arbitration is not being harvested fully. As far as the concept of ADR under the taxation laws is concerned, it is submitted that the terrain is far behind the global trends. The concept of ADR, as has been incorporated in all such statutes, cannot be said to be ADR by any stretch of mind. It

can be of great help to the taxation departments as well as the customers if the ADR is incorporated in its traditional context.

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