

ACCESS TO JUSTICE: A CRITICAL ANALYSIS OF KHYBER PAKHTUNKHWA ALTERNATE DISPUTE RESOLUTION ACT 2020

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ABSTRACT

Alternate Dispute Resolution scheme is not a novel idea; rather it existed in diverse forms throughout history. These forms have been shaped by certain fundamental principles, aiming to provide socio-legal security to society in conjunction with the formal justice system. Many countries have adopted this complementary system as support to their judicial systems for needs of society. In order to assimilate this informal judicial system into, proper mechanism need to be established through legislation. However, instead of providing a comprehensive legislative framework, the Khyber Pakhtunkhwa Government has implemented an indemnified bureaucratic system, which crafted a pathway for sluggish litigation. This paper critically examines existing alternate dispute resolution mechanism of Khyber Pakhtunkhwa. Instead of supporting the existing adjudicating system, it undermines efficacy of existing legislations by ignoring role of stakeholders having experience and knowledge in the process of dispensation of justice. Therefore, it is suggested that apposite, bifurcated laws with discrete regulations be enacted for different categories of disputes. Furthermore, this mechanism should be implemented through the existing justice system to establish a dynamic framework for alternative dispute resolution. This approach will inculcate confidence in society, enabling them to embrace alternative dispute resolution without hesitation.

Keywords: Alternative Dispute Resolution (ADR), Khyber Pakhtoonkhwa ADR Act, 2020, Critical Analysis of Khyber Pakhtoonkhwa ADR Act, 2020, Comparative study of Khyber Pakhtoonkhwa ADR Mechanism, Analytical study of Khyber Pakhtoonkhwa ADR Mechanism.

I. INTRODUCTION

The term "Alternate Dispute Resolution" (ADR) generally refers to "all legally recognized methods of resolving disputes outside of litigation".ⁱ Consistent with this dictionary definition, Khyber Pakhtunkhwa Alternate Dispute Resolution Act of 2020 provides its own definition of ADR as; "a process whereby parties agree to resolve a dispute without resorting to formal Court adjudication & this process encompasses various methods, including negotiations, mediation, conciliation, and evaluation".ⁱⁱ However, upon analyzing the scope of the definition as outlined in the KP ADR Act of 2020, it becomes apparent that the Act does not adequately cater to the requirements of the informal justice system. Instead, it functions as a partially parallel or parallel judicial system, lacking effective mechanisms to alleviate the burden on the existing judicial system in the province of KP, Pakistan.

In line with Pakistan, nations worldwide are grappling with the challenge of aligning their justice systems with the needs of their societies. In June 2019, the "World Justice Project" (WJP) released a reportⁱⁱⁱ on "Access to Justice" based on a comprehensive survey conducted in 101 countries, which garnered responses from over 100,000 individuals.

Executive Director of the World Justice Project "Elizabeth Andersen" highlighted the significance of the report's findings, stating that "this new data reveals the widespread and profound legal problems that ordinary people face across the globe, encompassing issues related to employment, housing, education, health, and family life. This should be a matter of concern for all of us. The

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resolution, or lack thereof, of these issues fundamentally affects people's social, economic, and physical well-being".

Ibid details shed light on key findings, emphasizing that justice-related problems are not confined to specific regions but are universal and occur frequently. These problems have severe consequences, including mental stress and social disadvantages, significantly impacting people's lives. The majority of individuals facing these challenges do not resort to traditional litigation methods, such as seeking recourse through courts, due to various obstacles hindering their access to justice. This report served as a wakeup call to "*global legal profession and justice sector*" highlighting the struggles faced by both affluent and developing nations in their endeavors to establish effective access to justice programs, which are essential for ensuring a high quality of life for all individuals.

On the contrary, "*access to justice*" is an inherent characteristic of an effective democratic State, beginning with the establishment of a just society.^{iv} However, the precise definition of this term cannot be universally determined. Each society interprets the intertwined concept of "*justice*" in its own way.^v Some perceive it as the equitable attainment of a just outcome, while others view it as a social status that embodies justice. Nonetheless, the term "access to justice" primarily signifies the availability of dispute resolution mechanisms given by any State. Simply the selections of system by a culture illustrate its concept of "justice".

Focusing on proposed study, it is undeniable that Pakistan is also endeavoring to establish itself as a welfare State & is bound to provide its citizens with a means to access "justice".^{vi} However, it is crucial to recognize that access to justice does not solely entail access to courts for the enforcement of rights; rather it covers both Criminal and Civil justice system provided by State.

Furthermore, in addition to the aforementioned systems, there exists an informal / traditional system for the administration of justice, particularly in the Khyber Pakhtunkhwa, known as the "Jirga System." This informal system proves to be more accessible to individuals who are economically disadvantaged. While this system may offer potential for effective, affordable, and meaningful remedies, it is not always successful and should not be seen as a complete substitute for justice.^{vii}

Considering the presence of both formal and informal justice systems, the Provincial Legislature, owing the responsibility and obligation to "*ensure inexpensive and expeditious justice to its citizens*"^{viii} passed the Alternate Dispute Resolution Act of 2020 on December 8th, 2020 with intention to aid citizens in resolving their disputes without resorting to formal litigation. However, significant concern arises as to why the state opted for this Act with such a broad scope, considering that the concept of ADR already exists within the province's existing legal system. Rather than providing a genuine interpretation and amplification of ADR, introducing an optional judicial mechanism does not absolve State from its responsibility. This paper aims to re-evaluate the given ADR legislation of Khyber Pakhtunkhwa.

II. Overview of Alternate Dispute Resolution Mechanism in Khyber Pakhtunkhwa:

Considering definition of statute as provided in American Jurisprudence as; "*A statute is an Act of the Legislature as an organized body; it is the written will of the legislature, expressed according to the form necessary to constitute it a law of the State, and rendered authentic by certain prescribed form and solemnities*"^{ix} and supported by Crawford, by adding that "*it is an Act of legislature declaring, commanding or prohibiting something for which the State gives its sanctions*"^x, we can analyze Khyber Pakhtunkhwa Alternate Dispute Resolution Act, 2020 & its accompanying Rules of 2021, for comprehending its purposes, declarations, commands, prohibitions and mechanisms. In this framework, we can also ascertain the legislature's intention, necessity of Act, its impact on society and its practical applicability, all of which serve as determining factors of the effectiveness of any statute.

Certain features Khyber Pakhtunkhwa ADR Act 2020, in accordance with the aforementioned model, are outlined below;

II.I Purpose of Khyber Pakhtunkhwa ADR Act, 2020:

Home and Tribal Affairs Department Khyber Pakhtunkhwa, being department per Section 02 (f) of the KP ADR Act 2020, has shared an "Alternate Dispute Resolution Manual".^{xi} This manual serves the purpose of creating awareness among the general public about the ADR mechanism, providing an explanation of its salient features and offering guidelines for practitioners. Notably, as an official government document, it provides insights into the government's mindset behind enacting this legislation.

According to this manual, the legislative intent behind the ADR Act is solely to facilitate its citizens to achieve speedy & cost-effective justice, while aligning with local cultural traditions. The

legislative body recognized that individuals are often dissatisfied with the legal outcomes of disputes resolved through the existing complex justice system of the province.^{xii}

In essence, the legislative body views "Alternate Dispute Resolution" as repetition of early practices like the "Jirga System". ADR offers an in-formal judicial process that could be formally utilized by society as an alternative to the prevailing formal judicial system, which places greater emphasis on ensuring "due process of law"^{xiii} when adjudicating disputes between individuals.

II.II Scope & Definition of ADR:

Section 2 (a) of Act^{xiv} provides a comprehensive definition of ADR, encompassing any dispute resolution process other than formal court adjudication. This definition establishes a broad framework that recognizes negotiations, conciliations, mediations, and evaluations, along with any other available methods for settling disputes. By allowing parties to exercise their own free will, this definition facilitates a wide range of dispute settlement options.

This mechanism involves voluntary participation of the disputing parties & its applicability extends to all civil cases as atoned by Section 03 of the Act & Schedule outlined in Section 3 (1). For compoundable criminal cases permissible under Section 345 of Criminal Procedure Code 1898, Section 04 of Act makes ADR subject to voluntary participation. The authority responsible for referring cases to ADR can be District Administration or Police. This referral could be made prior to initiating the case for cognizance and there are certain provisions to temporarily halt the investigation process as well.^{xv} In essence, both the authorities and the parties involved have the autonomy to initiate the ADR process, regardless of determining factors.^{xvi}

II.III Mechanism of ADR:

Once a dispute has been referred to ADR, either by the parties themselves or by any authority, the adjudication process is carried out through "*Saliseen Committee*".^{xvii} Each District within the Province independently constitutes the "Saliseen Committee", following the criteria and qualifications outlined in Appendix-I, specified in Rule 04 of the KP ADR Rules 2021. The number of *Saliseen* members for a District shall not exceed 50, as stated in Rule 04 (2) of the aforementioned Rules. The tenure of the *Saliseen* members is set for three years, subject to extension based on satisfactory performance, as per Rule 5 (8) of the KP ADR Rules 2021. A panel comprising equal representation and a neutral member is selected by the parties for dispute resolution and the decision reached by this nominated *Saliseen Committee* is binding.

According to Sections 03 (04) & 04 (03) of the Act, "Saliseen Committee" is obligated to decide the case within a timeframe of three to six months from the referral. However, the upper limit of this timeframe can be extended by mutual agreement between the parties or with the permission of the referring authority.

In the event that *Committee* fails to resolve dispute between parties the affair is referred back to parties for legal proceedings. During the pendency of the dispute before the Saliseen Committee, the court proceedings are considered to be stayed, and the Saliseen Committee has the discretion to issue status quo orders or require sureties, as evident from Sections 03 (6) and 04 (8) of the Act.

In the event of successful agreement between parties, Saliseen Committee submits its decision to the Court per Section 15 of the Act in a format specified in Appendix-II of Rules 2021. The Court then pronounces judgment and issues a decree based on the settlement, which is executed in the same manner as a Court decree. It should be noted that such settlements cannot be appealed or revised, as they are deemed final.

II.IV Costs of ADR:

The Act mandates the payment of costs and fees associated with settlement proceedings termed as "Honoraria" for the Saliseen Committee Members involved in the dispute settlement process. This honoraria range from Rs. 20,000/- to Rs. 200,000/- depending on dispute and amounts are distributed equally among the "Saliseen" members involved in the successful settlement process. Furthermore, the "Saliseen Committee" has the authority to impose costs for adjournments on any party causing delays in the proceedings.

III. Analysis of Khyber Pakhtoonkhwa Alternate Dispute Resolution Mechanism:

In the present era, one of the effective ways to facilitate the evolution and development of any subject is through method of "*comparative analysis*." This approach is evident in the advancements made in various fields of study. Similarly, in the science of society, legislators can utilize comparative analysis as a valuable tool in the development of social organization. By studying the different approaches

adopted by various countries, nations can address numerous societal issues and discover lawful methods to effectively resolve them.^{xviii}

Dedicated scholars and legislators engaged in systematic study of laws; find pleasure in comparing ways in which same legal problems are addressed in different legal systems.^{xix} Such like comparative analysis leads to progress and improvement within existing legal systems, ensuring their efficiency. Therefore, it is important to examine the mechanism of Alternate Dispute Resolution (ADR) through comparative lens.

When compared with certain laws and its accompanying regulations, having elements of alternate dispute resolution with the ADR mechanism in Khyber Pakhtunkhwa, certain discrepancies came into sight and are detailed as below;

III.I Ambiguous Purpose and Objectives:

Primary focus of the KP government seems to be expeditious resolution of disputes outside of formal litigation, aiming to side-track society from Courts towards “Saliseen Committees”. However, it is worth noting that these committees lack specialization.^{xx}

In essence, upon examining the preamble and enabling provisions of Act & Rules of 2021 that illuminate purposes and objectives, it becomes evident that the legislature has no fundamental concept of justice, which serves as the cornerstone of every judicial system, including *alternative* or *amicable* dispute resolution mechanisms.

III.II Feeble Mechanism:

The mechanism so provided is applicable to a wide range of litigations & compoundable Criminal Cases, regardless of the severity of the punishments involved.

Upon examining the detailed litigations specified in the Schedule, as outlined in Section 03 (1) of the KP ADR Act 2020,^{xxi} it is important to acknowledge the existence of special laws and designated tribunals that govern specific forms of litigation. Many of these laws do not provide provisions for alternate dispute resolution mechanisms, as they establish proper standards for adjudicating disputes.

For instance, when resolving disputes between landlords and tenants, the procedures outlined in the Civil Procedure Code of 1908 do not apply. Similarly, in cases related to Waqf and Trusts, the jurisdiction of civil courts is specifically prohibited by law. Furthermore, certain disputes require the determination of party titles, which necessitates the application of standards specified in the Qanoon-i-Shahadat Order of 1984. Additionally, the right of pre-emption, which is governed by special laws, has distinctive features that require proof of sale and consideration of the implied title of the vendor, as demonstrated by numerous precedents set by the Apex Courts of Pakistan. However; in this mechanism, the use of such standards is explicitly prohibited.

Legislature acknowledges the voluntary nature of parties in choosing the dispute resolution process, but there remains an unaddressed aspect regarding jurisdiction. Special laws governing civil disputes do not recognize the agreement or joint choice of the parties when determining jurisdiction. This oversight undermines “*principle of voluntariness*” as jurisdiction is not based on party agreement. Consequently, enforcing results of these settlements becomes challenging in the absence of jurisdiction.

Turning to criminal cases almost all disputes are subject of this mechanism involving Saliseen panel. Referral is through District Administration or Police however; it is essential to consider the role of Prosecution who actually represents State in these disputes.

Furthermore, although numerous financial crimes and criminal breach of trust offenses are compoundable, it is crucial to recognize that these offenses not only harm the victims but also have consequences for society as a whole, impacting socio-economic growth, but introducing this mechanism ignored this flaw too.

III.III No Mechanism For Selection, Training Or Monitoring Saliseen Etc:

The mechanism outlined for the selection of Saliseen involves the Saliseen Selection Committee nominating a panel of approximately fifty individuals, including retired judges, lawyers, bureaucrats, Ulema with Sanad from the government, experts with bachelor's degrees and notable members of local community. However, it must be acknowledged that not all of these nominated individuals possess the necessary qualifications and expertise to effectively carry out alternate dispute resolutions between parties. This is primarily because the ADR process does not aim to decide the dispute itself but rather requires the expertise to bring the parties into a dialogue.

While training is provided to the Saliseen or the individuals nominated by the Committee; it is insufficient to achieve the desired results without adequate knowledge, requisite professional

qualifications and the right mindset. Training alone cannot compensate for the absence of proper qualifications. It is akin to providing medical training to an individual without the appropriate degree. In contrast to the mechanism in Khyber Pakhtunkhwa, international alternate dispute resolution mechanism employs law graduates who have undergone thorough examination and training to serve as mediators or conciliators.

An important consideration is the presence of an indemnity clause that shields the Saliseen associated in this mechanism from legal proceedings for acts performed or omitted in good faith. This provision raises concerns about the trustworthiness of the selection process. Granting the authority to settle disputes to individuals; who cannot be held accountable to public due to protection of term "*good faith*" i.e. intangible is problematic. Indemnity clause supports the argument that current mechanism is bureaucratic setup that could deviate from the principles of natural justice.

Furthermore, right of appeal or revision is barred. However, prior to this restriction, no power of examination of the settlement process is given to any forum. This raises doubts about the monitoring of this process & without proper oversight it becomes difficult to establish the trust of litigants on this process.

III.IV No Segregation of Mechanism:

It is internationally recognized that mechanism of ADR encompasses various approaches such as facilitative, advisory, preventive, determinative, collective, and court-based methods. With passage of time, this system continues to evolve and incorporate new techniques in different fields.

However, it is important to note that each of above mechanisms has certain fundamental principles and may not be suitable for all forms of litigation. For example, Turkish law recommends domestic arbitration and mediation for family and civil disputes, while restorative justice conciliation is preferred for criminal cases. In commercial disputes, arbitration is often considered as an effective method.

In the context of Khyber Pakhtunkhwa, the mechanism remains open for parties to choose alternatives to litigation. Considering the use of mediation or negotiation to resolve criminal disputes, one must seize with the dilemma of defending an outcome where the acknowledgment of the offense and the offender's apparent connection to the crime are already on record. Negotiating or mediating such offenses to achieve a lawful resolution raises questions about the integrity of the criminal dispute resolution mechanism.

Similarly, when evaluating the use of ADR in family disputes, the process may reinforce one party's stance and strengthen their belief in the other party's fault. However, the purpose of mediation is to bring the parties together and guide them towards a decision that considers their own future as well as the future of their siblings.

In essence, without a proper framework for alternate dispute resolution, parties may not be in a position to engage in a meaningful dialogue and arrive at a logical and fair outcome.

III.V Undue Expenses:

The Council of Europe has recommended its member states to provide free legal aid for indigent individuals, not as charity but as obligation of democratic community towards its members.^{xxii} In Turkey, State Treasury & Ministry of Justice cover expenses associated with legal aid. Unlike in this process, parties are required to bear costs.

These payments are referred to as honoraria and are intended to compensate the panel involved in the dispute resolution process for their services. The legislature expresses gratitude for the panel's voluntary contribution. However, it is important to note that parties engaging in the process are also free to seek the assistance of legal professionals, experts, and attend panel proceedings for approximately six months.

Virtually; in regular legal action, suchlike expenses are also seen and borne by community, except for the honoraria. Conversely, members of the existing judicial system, who are appointed through a competitive process similar to other civil servants, receive salaries from the State for the services they provide.

IV. CONCLUSION

Sir Ernest Gower states, "*the duty of a draftsman of legal text is to try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that may be put on them, and to take precautions accordingly*".^{xxiii} Even with utmost care, certain

loopholes, suspicions and ambiguity may persist in every statute due to unpredictable nature of future applications.^{xxiv}

Khyber Pakhtunkhwa Alternate Dispute Resolution Act of 2020 & its accompanying Rules of 2021, establishes mechanism for expeditious and cost-effective resolution of disputes without resorting to formal litigation. However, it lacks the fundamental principles found in the legislation. This mechanism lacks specialized individuals and instead involves bureaucratic control; lacking legal expertise. It is important to recognize that the “*resolution of disputes*” falls solely within the domain of the “*Judiciary*”, as mandated by the Constitution of Islamic Republic of Pakistan 1973. The mechanism's reliance on indemnification raises concerns about required standards of competence, legal understanding, neutrality, impartiality and efficiency of the suggested *Saliseen*.

Article 37 (d) of the Constitution of Pakistan binds State to: “*ensure inexpensive and expeditious justice*”. However, provincial legislature in Khyber Pakhtunkhwa misinterpreted these words in devising this mechanism. In essence, these words merely pertain to the cost and time involved in the justice process. Costs can be minimized through various means of providing legal aid, while time can be reduced by allocating the necessary resources to sector constitutionally responsible for dispensing justice. This Article in no way authorizes State to create separate forums to exercise judicial functions.

Mechanism provided mirrors the day-to-day business of the Courts, indicating a lack of thorough research. Even the existing alternate dispute resolution methods within the judicial system have not been carefully examined, despite their use in Court proceedings. Via this mechanism, Section 89-A of the Civil Procedure Code of 1908 empowering Courts to facilitate mediation and conciliation in an organized, supervised, and authentic manner, was also repealed.

Precisely; without adhering to the basic principles of alternate dispute resolution, which involve “*bringing parties together in a dialogue to settle disputes in a manner that ensures neither party considers it a compromise of their rights but rather an effort to end the rivalry in a safe and controlled environment*”, this system will likely face resistance from society & remains in Statute books or appear functional only in reports of dispute resolution councils; followed by subsequent litigations.

V. RECOMMENDATIONS

Above discourse led to following recommendations;

- a. Scope of this mechanism may be specifically defined for diverse litigation in relevant laws, rather than through General Schedule.
- b. This mechanism may be facilitated through the Courts as it is the general perception of society that Courts are the ultimate institutions where fair justice can be obtained. Beside this, Courts possess the legal expertise and acumen necessary to deal with such matters effectively.
- c. Proper ADR Courts may be established at the District and Tehsil levels. These courts would be responsible for conducting pre-trial proceedings and facilitating mediation or conciliation attempts with the consent of the parties involved.
- d. Direct recommendation of criminal cases by Police may be ceased as their role is to ensure investigation and law enforcement, while the responsibility of representing the State and overseeing the ADR process should rest with the Prosecution Department. This approach safeguards the fundamental rights of victims and offenders as guaranteed by the constitution until the initiation of a trial, if required.
- e. Instead of relying on retired judges, bureaucrats, ulema, or notable individuals from society, a proper mechanism could be developed for the selection of mediators, facilitators, negotiators, or conciliators. These individuals should possess mandatory legal knowledge and psychological skills, and they should undergo compulsory training and examination. Resolving disputes between parties is not a part-time or retirement job; it requires dedicated professionals. To ensure this, the universities of Khyber Pakhtunkhwa should be involved in including compulsory subjects in their courses and providing sufficient resources for those subjects.
- f. Essential trainings followed by examinations for mediators, conciliators, and arbitrators should be conducted.
- g. Role of the District Administration should be restricted for necessary resources and all judicial functions should be removed from their purview. Their responsibilities should focus solely on administrative matters.

- h. A proper mechanism may be established to monitor the ADR courts, mediators, conciliators, or facilitators, with oversight and control. No indemnity should be granted to ensure transparency in this mechanism at all. This approach will allow the collection of empirical data and enable the utilization of results for the improvement and development of mechanism.
- i. Society views litigation expenses as remuneration paid to Counsels, professionals and general expenses incurred during legal proceedings. Therefore, a proper mechanism may be implemented to provide free legal aid with facilities to parties in vulnerable conditions.

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ⁱ A.Garner, Bryan. Black's Law Dictionary 10th Ed: (2014), p.95

ⁱⁱ Section 2 (a) of Khyber Pakhtunkhwa ADR Act 2020 (KP Act No. XLVIII of 2020)

ⁱⁱⁱ The complete report of June 27 having countries profile, data visualization, methodology, and download option is available at: <http://worldjusticeproject.org/our-work/research-and-data/globalinsights-access-justice>

^{iv} Connellan, Gregory: Access to Justice, Legal date, 2001, Vol. 13, N.3, pp.5-8;

^v Rawl, J., A Theory of Justice, Cambridge University Press, Ed: 1997, at page 11.

- vi Preamble of Constitution of Islamic Republic of Pakistan 1973 that seeks to secure the social, economic & political justice for all its citizens
- vii PLD 2019 SC 218 (C.P NO. 24 of 2012 decided on 16th January 2019)
- viii Article 37 (d) of the Constitution highlighting the responsibility of the State “to ensure the inexpensive and expeditious justice” to all its citizens
- ix American Jurisprudence Vol, 50 P. 15
- x Crawford’s The construction of Statutes P.1
- xi Alternate Dispute Resolution Manual available at: www.hd.kp.gov.pk
- xii Foreword of ibid Manual
- xiii It is the intention of the Government per manual of department given role in terms of Section 2 (f) of KP Alternate Dispute Resolution Act, 2020
- xiv Khyber Pakhtunkhwa Alternate Dispute Resolution Act, 2020
- xv Sections 03 (05) & 04 (03) of KP Alternate Dispute Resolution Act, 2020
- xvi Sections 03 & 04 of ibid referred Act of 2020.
- xvii See Section 08 of ibid referred Act of 2020.
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