

THE IMPLEMENTATION STRATEGY FOR SUCCESSFUL FUNCTIONING OF MUSALIHAT ANJUMAN

Introduction

The system of dispensing justice in Pakistan has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In Pakistan, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. ADR or 'Alternative Dispute Resolution' is basically a reference to all the 'other' processes that are available for the resolution of disputes other than the adjudicatory/litigation process. The basic feature of adjudication/litigation is that it is 'adversarial' in nature. Alternatives are necessarily more 'settlement' oriented

Our legal system may very well be theoretically described as admirable but at the same time slow and costly which entails an immense sacrifice of time, money and talent. The judicial system in our country may be distinguished by its laissez faire emphasis on party controlled litigation process, emphasis on procedural justice and limitations on available legal remedies, confined to win or lose legal outcomes.

The advantage of ADR is that it is more flexible and avoids seeking recourse to the courts. In conciliation/mediation, parties are free to withdraw at any stage of time. It has been seen that resolution of disputes is quicker and cheaper through ADR. The parties involved in ADR do not develop strained relations; rather they maintain the continued relationship between themselves. It is realized that ADR is able to produce better outcomes than the traditional courts because firstly different kinds of disputes may require different kinds of approaches which may not perhaps be available in the courts and secondly there is a direct involvement and intensive participation by the parties in the negotiations under the ADR system to arrive at a settlement. The alternative dispute resolution system has to be introduced and developed in our country beside the formal justice system in order to eliminate the endless sufferings of the poor litigants. This new device can be developed by practicing dispensation of justice in traditional methods like mediation, conciliation, and arbitration for a long period of time. Here role of individual is less significant and group/community gets emphasis in such system. Thus violation of an individual's right is violation of the right of the community/group to which he belongs. The prime aim of alternative dispute resolution system in civil justice delivery system is closing the hostility between the disputing parties and restoration of harmony. In this system a high degree of public participation and co-ordination is badly needed. A general sense of satisfaction develops which helps in enforcement of the decision, when people's participation is ensured as to tending evidence, asking questions and making opinions. Thus the reconciliation can be eased, which is the fundamental objective of ADR system. Combat and conciliation are two most inherent human virtues. Combat leads to conflict, fight and litigation whereas conciliation promotes negotiation, compromise, mediation and consensual settlement. There have been efforts in almost all legal systems to tap the afore-referred virtues of conciliation in settlement of disputes among people. The institution of "Punnchayat" is perhaps the oldest recognition of this virtue and existed in almost all countries of the World in one form or the other. In modern times, this

institution has been made more comprehensive and has assumed many forms. In legal parlance these forms may be called " Alternative Dispute Resolution (ADR)) Mechanisms. Responding to the challenges of backlog and an ever-increasing workload on courts many countries have introduced reforms and have adapted ADR Techniques with impressive results.

Traditional mechanisms of dispute resolution have long been practiced in our societies and reluctantly recognized by our legal system at some level from time to time. However, rarely have they been given adequate space and opportunity by the more contemporary legal system and structure in order for them to develop and catch up with the new and dynamic changes that have taken place internationally in the world of alternative methods of dispute resolution.

Rationale

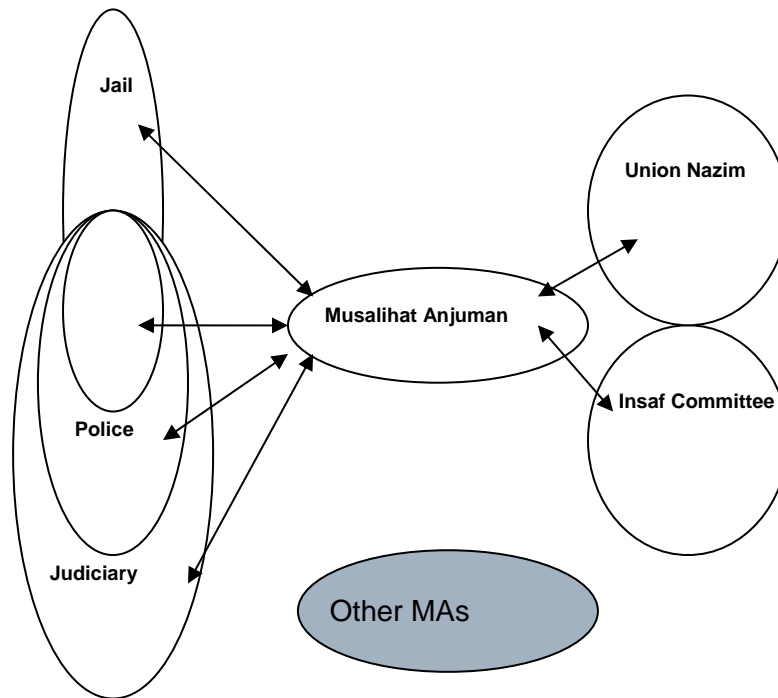
The recent initiative of the government in the form of Local Government Ordinance of 2001 has made a deliberate effort to enable grassroots participation in the process of development; particularly of dispute resolution through mechanisms, which are considered as modules of Alternate Dispute Resolution (ADR) in the international parlance. Chapter XI of the Local Government Ordinance 2001 visualizes bodies described as Musalihat Anjuman (MA) as an ADR mechanism. In other words, The Musalihat Anjumans are required to undertake dispute resolution through the processes of ADR. However the Ordinance does not explain the modalities of their working and also does not explore and detail important connections between various institutions such as the judiciary, police and the jails, in order to ensure a viable functioning of such bodies in the existing legal framework. In order to actualize the spirit of the provisions of LGO regarding Musalihat Anjumans (Musalihat Anjumans or MAs) and to ensure their effectiveness, it is imperative that the MAs are linked to external institutions in such a practical and sustainable fashion that they can fit well within the general legal framework of the country and find support, rather than opposition, from the external environment.

Objectives

The overall objective of this effort is to raise the institutional capacity of Musalihat Anjumans so that the members of Musalihat Anjumans are able to effectively associate, involve, interact and deal with other stake holders such as the parties in a dispute, concerned judicial officers, police and jail officials and neighboring Musalihat Anjumans. This is to ensure for them a more meaningful and pivotal role as dispute resolvers as well as peace builders at the community level. The settlements/decisions thus reached should not just be legally/judicially correct but equally importantly, executable, sustainable and in conformity with the legal environment of the country. An effective Musalihat Anjuman will thus undertake its tasks and perform its role in collaboration with other stakeholders, instead of doing so in isolation, so as to contribute positively towards promoting peace and justice in the society. As far as possible, the rules made hereunder are expected to be gender sensitive.

Scope

Musalihat Anjumans need to interact with a number of parties who have stakes in a typical dispute. These include, inter alia, the union administration, the actual disputing parties, the police, concerned executive/judicial office, the jail officials and the community at large. In order to enable and facilitate Musalihat Anjumans to function within this paradigm and to develop appropriate institutional linkages, there is clearly a need for appropriate rules to be promulgated by provincial authorities (under Section 191 of the LGO 2001). This in turn necessitates that the currently applicable and relevant laws and rules be closely studied and such a detailed review be followed by an engaged dialogue with all the concerned departments at the provincial level, in order to develop the appropriate framework to facilitate the working of Musalihat Anjumans. The following diagram endeavours to map the various institutional linkages that are important in the context of Musalihat Anjumans.



Official Linkages

In the context of development of institutional linkages for Musalihat Anjumans, the following areas are highly relevant as meriting special attention:

- We will have to bring in suitable amendments in the Local Government Ordinance 2001, which are very much necessary to make it practical and only framing of rules by way of sub-ordinate legislation will not serve the purpose. By

making the basic law more comprehensive we can avoid the decisions of Musalihat Anjuman to be struck down in case those are challenged before the High Court as at present the LGO 2001 is defective. Some of the problems confronting us in the present law are the role of Insaaf Committee and selection of Musalheen, Section 80(d) and section 102 of the Ordinance create an apparently contradictory situation. Section 102 seeks Insaaf Committee to select the members of Musalihat Anjuman, but section 80(d) asks Union Nazim to constitute Musalihat Anjuman, Application of Muslim Family Laws Ordinance 1961 and its jurisdiction to try family case under the old Local Council system with its Chairman who has now been designated as e Nazim in the present system, Conciliation Courts Ordinance, 1961 has not been repealed,. the LGO nowhere mentions the Conciliation Courts Ordinance or the jurisdiction of the Union Nazim in this behalf, unless the corresponding laws LGO,MFLO & CCO are amended in an appropriate manner the conflict of jurisdictions will remain a big issue which will definitely hamper the working of present set up and create confusions.

- Quite apart from taking cognizance of crimes under the law, the Police officials at the Police Station level maintain a relationship with organized groups like the market associations, peace committees etc; as well as local leaders/ influential individuals. The Police Order 2002 (Section 3b & 4) states that the attitude of Police towards public should be aimed at promoting amity and public peace. Similarly Chapter IV dealing with the functions of District Public Safety Commissions advises encouragement of police-public cooperation. The Provincial and National Public Safety Commissions and Criminal Justice Coordination Committees at the District level are also designed to be responsible for the review and improvement of the operation of the criminal justice system and for promotion of understanding, co-operation and coordination in the administration of the criminal justice system.
- Various Prison Rules such as Rules 538, 539, 543,544, 545, 551, 552, 554, 556, 558, 460, 561, 564, 566, 567, 568 & 570 relate to the processes of granting permission to people to meet inmates of various categories. Members of Musalihat Anjumans will be expected to visit jails for dispute resolution and peace building in cases where one of the disputing parties is detained in jail.
- The Ordinance is silent about cases where the disputants belong to different Union Administrations. Thus, there needs to be a formal linkage between various Musalihat Anjumans so that it is possible for MAs to intervene in disputes where parties live in different geographical locations.
- Section 104 of LGO 2001 describes a scenario where a case can be referred by a court to a Musalihat Anjuman for settlement. The Musalihat Anjumans are responsible for undertaking arbitration between the parties under the Arbitration Act of 1940. In addition, the conciliation clause in the family laws, the “Small Claims and Minor Offences Courts Ordinance 2002”, the latest insertion of Section 89A in the Civil Procedure Code regarding the application of ADR and other similar provisions in law need to be properly reviewed to develop an enabling framework for the Musalihat Anjumans to work effectively. Furthermore, since their role necessitates intervention in disputes, the members of

Musalihat Anjumans may, at times receive privileged information by the disputing parties, in strict confidence. This necessitates a review as to whether the members of Musalihat Anjumans need special protection from certain clauses of the Qannon-e-Shahdat Ordinance and other such laws, in order to protect the confidentiality of information shared with them as well as to ensure their smooth and unhindered functioning.

Recommendations

The main objectives of this paper are to suggest the implementation strategy to propagate, promote and popularize the settlement of disputes by different modes of ADR successful in Pakistan through Musalihat Anjuman: This paper also intends to make recommendation to establish facilities and provide administrative and other support services for holding conciliation, mediation and arbitration proceedings alongwith promoting reform in the system of settlement of disputes and its healthy development within the framework of the social and economic needs of the community, which are as follows:

- We should adopt a National Action Plan for promoting and instituting the ADR. A programme of Musalahaen Capacity Building should be prepared which should include with other things, Training and Legal Education, Automation and Infrastructure, Access to Justice, ADR and Legal Aid, Legal Literacy and Public Awareness and Gender Sensitivity.
- We should prepare & issue a comprehensive instructional code for introducing Musalihat Anjuman concept at the Union Council level.
- ADR centre at the Provincial headquarter of every Province should be established and it should be entrusted with the task of promoting, assisting and monitoring the practice of Musalihat/Conciliation in Musalihat Anjuman.
- A 'Pilot Project Design/ Convening Committee' should be formed at the national level.
- Every Province should frame the rules to give effect to Musalihat Anjuman .
- We should initiate immediately a pilot program, in some Districts and a class of disputes, and then to expand it to other districts in order to ensure speedy alternative dispute settlement process.
- A.D.R. will have a smooth transition if it is introduced on a pilot basis. The performances, results, reactions among pilot Musalihat Anjumans, Union Council Members, community and other stake holders should be carefully monitored and recorded and suitable adjustments in the project should be made at each stage of extension after an exhaustive study of the experiences gained.

The Government will have to make a major investment in training, create a group of trainers well-versed in the intricacies of ADR. The implementation of the Pilot Project should include a comprehensive training program of Musalahaen in mediation and conciliation prior to its beginning. The initial training should be imparted to the trainers by Mediators trained from abroad, it should be an intensive five days training course on conciliation. The participants in the training program should be Musalahaen, Nazims, Police Officials, selected from different

Districts, Legal Practitioners including representatives from Non-Government Organizations.

- After that the training should be given by Trained/Accredited Conciliators. From time to time a new District should be selected for imparting training. Such training programs should be organized at respective District head quarters.
- The trainee Muslaheen should particularly be trained how to win the confidence and trust of the disputing parties as a neutral person and should be told that all their efforts should be directed for consensual settlement without taking any sides.
- Learning on the job by the Musalaheen in the present environment without peers to fall back upon for advice and support will make the task immensely more difficult. They should discuss their problems with the convening committee from time to time and the convening committee should try to find solutions and to work out practical details to modify the Musalihat Anjuman process.
- The greatest challenge of the pilot district Musalihat Anjumans will be changing of mental attitudes of the judges, lawyers, police, litigants and general public who are sceptical about ADR. Initially, there will be feelings of opposition and suspicion by some in the legal profession for this entirely differently based discipline but it will gradually be changing.
- Mediation or Conciliation does not come easily to anyone, whatever height he/she attains in legal knowledge and experience. Mediation especially involves the use of a facilitator trained in conflict resolution. The mediator must know the techniques of encouraging the parties to discuss their positions with greater candour and he/she must also know how to foster compromise. Mediation involves a thorough training for a few days. We have to few trainers available in Pakistan. The first implementation task will be to train up a large number of trainers in conciliation. These trainers will then spread out throughout the nook and corner of the country to train up Musalheen, Nazims lawyers, policemen and other interested persons in the art and science of conciliation. Without such intensive training, it will be a folly to introduce Musalihat Anjuman, wholesale in Union Councils in Pakistan.

Although ADR comprised various levels of informality, the skills required to maintain that system might be difficult to find. In the United States, with its vast pool of learning Institution, non-profit organizations, and community service groups, it is not difficult to find skilled volunteers. However, even those volunteers need to be trained to sit down with disputing parties, invite them to tell their stories, encourage the parties to listen to one another, and help them reach an amicable solution. In the U.S, it is estimated that a minimum of thirty hours of “hands-on” training in mediation theory and skills are required. These skills include putting the disputants at ease, describing the mediation process, coaxing the full story and context from the disputants asking procedure questions, helping the parties invent and consider options, slumping agreements, maintaining confidentially, and adhering the ethical stands.

- Law schools should be encouraged to recruit and train doctors, lawyers, university professors, and accountants to serve as potential recruits. These individuals will be accredited as neutrals after satisfying both theoretical requirements. In addition, these institutions should pay special attention to the recruitment of

women. Apart from enlarging the base of neutrals, this practice will be useful in situation where women are involved in a dispute. The presence of a female neutral will assist in creating an atmosphere congenial to a successful conciliation.

- We will have to prepare training modules and training videos for Musalheen and secretary union council, printed brochures and awareness programmes for the users in Urdu and other local languages.
- In performing their functions, Musalheen should be immune from civil damages for statements, actions, omissions, or decisions made in the course of ADR proceedings (unless that statement, action, omission, or decision is made fraudulently), At the same time, neutrals should be subjected to ethical standards including the standards of probity and confidentiality that are expected by the litigants. Musalheen who egregiously violate certain ethical norms (e.g., taking bribes or misusing information disclosed during the conciliation process) should be liable to criminal sanctions.
- Musalheen should be selected from a pool of persons who have a reputation for integrity and some knowledge of the law. These conciliators could provide pro bono services.

Conclusion

An ongoing government initiative to institute an alternative dispute resolution system through Musalihat Anjuman at gross root level appears significant to reduce the burden of millions of cases pending with the courts. Amendments to several laws have been made and some more are on their way to facilitate to institute mediation, conciliation, arbitration and other alternative dispute resolution systems, as the result of the efforts was `tremendously encouraging. We will have to bring in suitable amendments all the corresponding laws including the Local Government Ordinance, Muslim Family Laws Ordinance and Conciliation Courts Ordinance to avoid the conflict of jurisdictions before implementation of the project to avoid confusions. Under a pilot project, alternative dispute resolution system should be initiated in the selected Districts and in a class of disputes, under the supervision and control of Steering Committees at provincial level, which can eventually be extended to the all the Districts. And when such Musalihat Anjumans are established, that would truly bring ADR to the centre-stage – no dispute about that. Every case, settled out of the formal courts, will save an average court time of seven to ten years. The ADR-related legislative reforms, when viewed in conjunction with other governments imitative give an excellent opportunity to any group, body or institution seeking to establish themselves as service providers for ADR. There are several established entities actively engaged in providing ADR services and who are already well-positioned to fill the space suddenly created by this healthy juxtaposition of the several legislative provisions. What is lacking is not only awareness of this opportunity but also the proficiency/expertise necessary to implement ADR as a truly viable (and a much healthier) alternative mechanism to litigating in a court of law. Considering the pool of talent available, it is only a question of showing the way. And this is the task that Government, NGO's, Police, Judiciary and Bar should take upon themselves – of introducing to the nation, and educating them about, ADR and it's inherent benefits with the help of UNDP sponsored "Gender Justice Through Musalihat

Anjuman Project". Pakistan stands to benefit greatly from this effort simply because not only does it probably have the highest backlog of cases pending in its courts of law, but also because it's litigious population does not take too many days off. Yes, many especially women and poor segments of society have been shying away from the courts looking at the prolonged delays, expenses involved and social constraints, but once they have an alternative and convenient mode like Musalihat Anjuman for resolution of disputes, they are certainly not going to shy away from opting for it to settle their disputes. Musalihat Anjuman can mitigate sufferings of poor litigants as it is cheaper and speedier than the existing legal system. Increasing expenses of litigation, delay in disposal of cases and huge backlogs in the existing legal system have shaken people's confidence in the judiciary. Against this backdrop we cannot but ponder about a device like the ADR, which is potentially useful for reducing the backlogs and delay in some cases of our courts. We recognise traditional, informal and indigenous forms of dispute resolution, like Panchayat, there were handicaps such as dominance of social elite, lack of legal awareness, superstitions and biased mindset. The purpose of the ADR was not to substitute consensual disposal for adversarial disposal or to abolish informal mediation outside courts but to make it part and parcel of the legal system, preserving the trial court's statutory authority and jurisdiction to try the case should the ADR fail.

A major focus should be on training for developing professional Musalahaen and sensitising judges, lawyers, police, jail authorities, district government representatives policymakers, litigants and the masses. It is stressed on creation of a regular corps of trained and efficient master trainers for Musalahaen. The recommendations include networking and sharing at national, regional and international level, developing curricula for incorporating the ADR in education and continued monitoring, evaluation and improvement of ADR processes in use.

Alternative facility in Pakistan is yet to take a meaningful uplift. But this newly enacted provisions facilitating the ADR system in our justice delivery process is highly appreciable which will open a new horizon in our legal firmament. For meaningful expansion of ADR in Pakistan legal resource has to be developed among the rural poor by providing them with alternative institutions like Musalihat Anjuman. The next step would be for the society to come forward to accept change of traditional legal procedure. Only reformative thinking, new values, new projection and positive outlook with determined action can achieve this

The proposed reforms to Civil Justice have been under discussion for some years and usage of ADR have had a significant influence on the way in which litigation is conducted in Pakistan, in the sense that courts have tended to anticipate the changes to some extent, or to interpret existing rules in a way which is compatible with ADR philosophy. Nevertheless when the new legislation has come into force, radical changes are needed in the way in which the courts and lawyers operate.

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