Designing ADR/Mediation Program for Judges Content[i]

"An ounce of Mediation is worth a pound of Arbitration and a ton of Litigation!"

Joseph Grynbaum

Overview

Purpose of this Paper and Presentation is to review the reasons why Judicial Academies should consider establishing an academic ADR/ Mediation program for judges who will be acting as Referral Judges and doing Judicial Mediation. To develop an understanding of: what ADR/ Mediation is; what should be included in a Mediation training program; and what should be excluded from the program. Why such a program may be beneficial to judges and the institution and litigants; what the roles of the Judges and Mediator and affected parties should be. Discuss about the curriculum and training program on Mediation. The paper suggests the implementation strategy for promotion of ADR/Mediation in Pakistan. It also points out the legislative imitative and judicial policy for promotion of ADR in Pakistan. Since the Referral Judges and Mediators play an important role in Mediation. A need was felt to prepare a uniform Training Manual applicable throughout Pakistan, which can be used by the Trainers, Mediators, Referral judges, Litigants etc. The presenter describes that having got training in Mediation, Case Management & other ADR Mechanisms from (U.S.A), Mediation Skills Training & Accreditation from U.S.A and CEDR (Centre for Effective Dispute Resolution) U.K., Accreditation as Mediation Master Trainer from CEDR & IFC in collaboration with IFC (International Finance Corporation) and training by CEDR & IFC in developing ADR Curriculum and Mediation training Program for Law & Business Schools and different professionals, as Chairman of the Pakistan Mediators Association Curriculum & Training Manual design committee have completed the task of developing curriculum and methodology by preparing a uniform training manual adaptable to local situations for training of the mediators. The Committee divided the topics among its various members, who prepared individual chapters. It was a tough job to marshal all the inputs received from the experts, taking the best of various institutions and the views of various experts on the subject. The deliberation on the various topics to form a crystallized manual was an onerous task. The Committee met on several days, sat from morning till evening, discussed threadbare each topic, and after a long process of chiseling and polishing, has finally come out with a detailed, thorough and final version of the Manual. This Manual is the product of a team work and intellectual exercise of the experts. The presenter tells that this Training Manual will be used for training programs by Master Trainers and it will facilitate and help guide Mediation in growing not as an alternative dispute resolution mechanism, but as another effective mode of disputes resolution.

The presenter shares the overview of this Manual for training and training program with great sense of satisfaction for the benefit of the Trainers, Mediators, Referral Judges, Litigants and Common Man and all those who strive to achieve peace through Mediation. The paper suggests a Mediation Training program consisting of 52 hours, spreading over five days to be run by the Master Trainers at the academies.

Why ADR is Need of the Hour?

The four major reasons for the resurgence of ADR are the drawbacks of litigation, changing business scenario, legislative responses all over the World including Pakistan to promote ADR and judicial sponsorship. 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. It has been realized by the Judges, lawyers, litigants and other stakeholders that the Courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, Mediation and Negotiation. They have emphasized the desirability of disputants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. The existing regime of civil suits in Pakistan is governed by the Code of Civil Procedure enacted in 1908. Since then little change has taken place. The British adversarial system introduced in our country may be distinguished by its laissez fare emphasis on party controlled litigation process, emphasis on procedural justice and limitations on available legal remedies, confined to win or lose legal outcomes. Litigation being the primary means of resolving disputes our civil justice process has failed to administer justice in a timely manner to a larger, more diverse, faster paced, technologically and economically changing society. Outside Pakistan legal cultures in U.S.A, Singapore, Hong Kong, Australia, England, India, Sri Lanka, Bangladesh and many other countries have already introduced different Alternative Dispute Resolutions methods to settle disputes outside the court. By updating their systems they have made their judicial systems more efficient, more service oriented, to provide speedy relief to the parties. ADR has emerged as a significant movement in these countries and has not only helped reduce cost and time taken for resolution of disputes, but also in providing a congenial atmosphere and a less formal and less complicated forum for various types of disputes. Like our country there was a time when the civil justice system in those countries confronted serious crisis for lack of discipline. The examples of these countries make us aware that Pakistan is not alone in addressing the problem. Other countries including, some in the sub-continent, like Pakistan, with comparable problems have been successful in implementing reforms in similar manner.

Legislative and Policy Initiatives in Pakistan

In a developing country like Pakistan with major economic reforms under way within the framework of the rule of law, strategies for swifter resolution of disputes for lessening the burden on the courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution (ADR) by establishing facilities for providing settlement of disputes through arbitration, conciliation, Mediation and negotiation. Trade and industry also demanded drastic changes in the Arbitration Act, 1940 and thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly.

Since the inception of the economic liberalization policies in Pakistan and acceptance of law reforms world over, the legal opinion leaders have concluded that the application of rigorous Mediation mechanisms to commercial and civil litigation is a critical solution to the profound problem of arrears of cases in Civil Courts in Pakistan. The Pakistan Parliament considered a bill

for amendments in the Code of Civil Procedure which included a mandatory provision for alternate dispute resolution as a step to improve the civil and commercial justice system in Pakistan. This legislation has developed confidence among foreign parties interested to invest in Pakistan or to go for joint ventures, foreign investment, transfer of technology and foreign collaborations.

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 since the new legislation has come into force, radical changes have to be made in the way in which the courts and lawyers operate.

As a result of Legislative initiatives, amendments in Civil Justice System have taken place and relevant laws (or particular provisions) dealing with the ADR are summarized as under:

1. S.89-A of the Civil Procedure Code, 1908 (as amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution methods).
2. The Small Claims and Minor Offences Courts Ordinance, 2002.
3. Sections 102–106 of the Local Government Ordinance, 2001.
4. Sections 10 and 12 of the Family Courts Act, 1964.
5. Chapter XXII of the Code of Criminal Procedure, 1898 (Summary Trial Provisions).
6. The Arbitration Act, 1940.
7. Articles 153–154 of the Constitution of Pakistan, 1973 (Council of Common Interest).
8. Article 156 of the Constitution of Pakistan, 1973 (National Economic Council).
9. Article 160 of the Constitution of Pakistan, 1973 (National Finance Commission)
10.Article 184 of the Constitution of Pakistan, 1973 (Original Jurisdiction when Federal or Provincial governments are at dispute with one another).
11. Finance Bill introduced following ADR Tax Laws:
    Sec. 134-A of I. T Ordinance. 2001 R/w Rule 231-C of the I. T Rules-02.
    Sec. 47 of the Sales Tax Act 1990 and Ch. X of the S.T Rules-04.
    Sec. 195-C of the Customs Act 1969, Ch. XVII of Customs. Rules 2001.
    Sec. 38 of the Federal Excise Act 2005 R/w Rule 53 of FE Rules 2005.
    Section 23 of Industrial Relation Ordinance.

Why ADR has not been implemented?

Mediation is a private process of assisted negotiation which can allow that if agreement is reached it becomes fully binding. Businesses are looking for minimum business disruption and a cost effective solution to resolve commercial disputes and in this environment Mediation is thriving. In an environment where commerce has demanded high levels of efficiency and cost effectiveness, business people have been prepared to endure a system of dispute resolution which is far from efficient or cost effective. Dispute resolution takes longer now and costs more than it did ten years ago, notwithstanding that the quality of its delivery has remained high, relative to equivalent systems in other economies. Why then has there not been any real

attempt to introduce an alternative for resolution of disputes. There are many reasons but the following are suggested as being the more important:

- *Lack of awareness of the alternatives. (It seems that most people are not aware that alternative means of dispute resolution do exist outside the Courts system and arbitral process. Mediation is only one of the alternatives.)*
- *Lack of understanding of the alternatives. (Most people are unaware of the essential characteristics and potential benefits of Mediation.)*
- *The absence of an ADR (Alternative Dispute Resolution) tradition*
- *A strong tradition of common law and of adversarial litigation.*
- *The existence of a strong judicial system.*
- *A strong cultural awareness of legal rights and a desire to have those rights vindicated or defended.*
- *The existence of a strong legal professional with a primary interest in adversarial litigation and arbitration.*
- *The natural suspicion of a commercial or trading partner or opponent who is perceived as having committed a wrong.*
- *The natural human reluctance to take responsibility for finding a solution and a desire to have a solution imposed from outside.*
- *The natural human tendency to be adversarial rather than co-operative.*

Implementation Stratagem for ADR in Pakistan

Presently we do not have a specific law for Mediation in Pakistan. Unless there is a special law enacted on or a detailed clause on Mediation is inserted in existing procedural law on Mediation, it is difficult to see positive development of Mediation. Although Section 89-A of Civil Procedure Code 1908 contains clause for referral of a dispute pending adjudication for Mediation/conciliation but the same is not comprehensive. The Law Reform Act 2007 contained amendment to Section 89-A of CPC 1908 but unfortunately it was not approved by Senate of Pakistan resultantly it lapsed. The Mediation clauses have recently been started to be drafted in commercial contracts. It is suggested that the business-sector should be encouraged to include following model clause in all business agreements:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to Mediation in accordance with the [……] Mediation Rules. The place of Mediation shall be (…..). The language to be used in the Mediation shall be (English or Urdu)"

In my experience many clients with long-term contracts understand the intrinsic value of creating, at the outset of the relationship, a roadmap to follow when disputes arise. Importantly, the client shares the same roadmap with the other party–rather than creating separate roadmaps when the dispute is upon them. Clients, who have experienced conflicts in long-term contracts, where the preservation of the relationship may have more value than in a short-term contract, often view these clauses as an insurance policy when a dispute arises.

Amendments in Existing Laws

The Financial Institutions (Recovery of Finances) Ordinance, 2001, The Companies Ordinance, 1984, The Modaraba Companies and Modaraba (Flotation and Control) Ordinance,1980, The HBFC Act, 1952, The Industrial Relations Ordinance, 2002, The Punjab Consumers Protection Act, 2005,The Drugs Act, 1976, The Income Tax Ordinance, 2001, The Sales Tax Act, 1990. The Customs Act, 1969,The Copy Rights Ordinance, 1962, The Registered Designs Ordinance, 2000, The Patents Ordinance 2000,The Registered Layout-Designs of Integrated Circuits Ordinance, 2000, The Pakistan Environmental Protection Act, 1997, The Insurance Ordinance, 2000, The Privatization Commission Ordinance, 2000, The Electronic Transitions Ordinance, 2002, The Imports and Exports (Control) Act, 1950, The Oil and Gas Regulatory Authority Ordinance, Rent Restriction Laws of all the provinces, are the areas where ADR should be introduced on a priority basis, amending the special legislations.

Implementation strategy for ADR in Pakistan

We should adopt a **National Action Plan** for promoting and instituting the ADR. A program of Legal and Judicial Capacity Building should be prepared which should include with other things, Law Reform, Judicial Reform, Judicial Training and Legal Education, Court Automation and Infrastructure, Access to Justice, ADR and Legal Aid, Legal Literacy and Public awareness and Gender Sensitivity. The Pakistan Law Commission should issue a policy statement on court governance for making ADR successful. It should consist of three elements; **The Justice Statement**, which identifies universal justice values common to civilized nations, **The Framework of Core Competencies**, which provides the knowledge capital needed to make the courts response to the challenges of the present century, and **The Strategic Framework**, which provides benchmark through which the court's performance can be assessed. The **Pakistan Law Commission** should prepare & issue a comprehensive instructional code for introducing ADR at the District level. **ADR Center** at the Principal Seat of every High Court should be established and it should be entrusted with the task of promoting, assisting and monitoring the practice of ADR in courts. A **'Pilot Project Design/ Convening Committee'** should be formed headed by a judge of High court at the High court level. Every High Court should **Amend the Rules** to give effect to Section 89-A of the Civil Procedure Code. The Pakistan Government will have to make a major investment in training, by utilizing a portion of the ADB loan available for **Access to Justice Program** to create a group of judges well-versed in the intricacies of ADR. The implementation of the Pilot Project should include a comprehensive training program of judges in case management, Mediation and conciliation prior to its beginning. The **Judicial Academies** in Pakistan should establish a program that would concentrate on ADR and Case Management. The initial training should be imparted by a group of **Trained /Accredited Master Mediation Trainers** available in Pakistan, it should be an intensive **Five Days Training Course** on Mediation. The participants in the training program should be judges selected from different districts, legal practitioners including representatives from non-government organizations. From time to time a new district should be selected for imparting training to judges and lawyers who have not yet received training in Mediation. 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 candor and he/she must also know

how to foster compromise. Mediation involves a thorough training for a few days. The first implementation task will be to train up a large number of trainers in Mediation and Conciliation. These trainers will then spread out throughout the nook and corner of the country to train up Judges, Lawyers and other interested persons in the art and science of Mediation and conciliation. Without such intensive training, it will be a folly to introduce A.D.R. wholesale in our lower courts. India tried to introduce A.D.R. in 1999 by an amendment to the Code of Civil Procedure, known as the Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999). It ended in a fiasco. There was widespread resistance to it by lawyers that forced the Government of India to postpone its implementation. The lesson is that when you introduce any matter of legal reform or innovation, do not try to impose it from above. Do some intensive work at the grassroots level, build up a large following, try the reform on a trial and error basis by setting up pilot courts and then proceed with caution by examining its results. **Learn from the Pilot Courts** and the lawyers involved in Mediation and other methods what practical problems they are encountering with, adjust and re-adjust your program accordingly, so that what finally emerges is not a foreign model but an **Indigenous Pakistani Model**, suited to the legal culture, ethos and traditions of this country.

Mediation and Judicial Reform

Mediation is an innovative way of dispute resolution and directly connected with judicial reforms. The **Judicial officers** with **Judicial Education** should be trained in different aspects of Mediation and also become a good **Referral Judge**. If the judicial officers are trained in mediation then they can develop various attributes such as communication with the parties, active listening, handling of sensitive disputes and writing of good judgments. Judicial officers will be able to select the cases which are fit for mediation and not fit for mediation. The cases which are not fit for mediation can be disposed of by framing preliminary issues, rejection of plaint and Judicial officer will be able to fix the schedule of the trial of the cases. A Judicial officer will also be able to identify the core issues between the parties and ascertain the causes of dispute. It will also develop the case management. A judicial officer will also be able to develop his quality as a responsible judge and will be more responsive to the category of cases which required urgent attention. The second implementation task will be to continue the training for all times to come for the new entrants to the Judicial Service through the **Judicial Academies**, for which we have developed a **Curriculum** & **Universal Training Manual** for A.D.R[1] which should be adopted and the Judicial Academies also will have to keep and maintain

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one or more **Regular Instructor** on their pay roll to teach the mechanisms of A.D.R. to the trainee-Judges. Outsiders interested to pursue a career of Mediation and Arbitration may also receive instructions and **Certificate** from Judicial Academies, on payment of fees and charges, as and when Judicial Academies are ready enough to render this service. Answerable to both the Chief Justice and District Judges, the ADR specialists will resolve new cases referred to them by the Courts. Conciliators and Mediators will be drawn from among retired judges, senior advocates, other respected individuals in the professional legal community, and accountants ,architects, engineers , bankers, doctors, university professors, and chambers of commerce & industry. However preference should be given to **Accredited Mediators**.

The Alternative Dispute Resolution has not been enthusiastically embraced by the entire legal community in all the countries where it has been introduced. Majority of the lawyers all over the World in the beginning oppose the introduction of ADR as they believe that by introduction of these mechanisms the reformers are trying to put them out of business. ADR programs the world over experience varying degrees of support from local legal communities. This cross-current likely will not stem the rising tide of ADR programs across the globe. But it is becoming increasingly clear that the success of such programs will depend upon assessing and addressing the legal community's attitudes toward ADR in each country, as well as ADR users' attitudes toward the formal legal establishment. A few of the many critical issues facing any community deciding whether and how to implement an ADR program are: (1) Why and to what degree will the lawyers and Judges oppose or fail to support ADR? (2) How should this opposition or lack of support be addressed? (3) How do potential users of ADR view the Judiciary and rest of the legal establishment? and (4) How should the ADR project deal with their views?

Resistance to ADR

To be sure, there are plenty of valid reasons for opposing ADR programs with inappropriate goals or improper design. ADR cannot replace formal judicial systems necessary to further the rule of law, redress fundamental social injustice, provide governmental sanction, or provide a "court of last resort" for disputes that cannot be resolved by voluntary, informal systems. Also, it is hard for ADR to deal well with extreme power imbalances between disputants. I have talked to a number of lawyers of all ages all over the country. Contrary to reformers belief, Lawyers do not like their piled-up cases to rot in their chamber for years and decades together. They admire and desire a quick resolution of disputes and they dispute the proposition that the quicker a case goes out of their chamber the lesser is their income. On the contrary, the earlier a case goes out of their chamber by way of final disposal, the more it is replenished by new cases. The more the litigant Public comes to know that the Legal and Judicial system delivers justice speedily and with less expense, the more the public knowledge inspires confidence in the system itself and the more the potential litigant who would not have come near the court premises would flock to the courts for results of a similar nature. The success of ADR in other countries has shown that it is the lawyers who become the best admirers of A.D.R. after practicing A.D.R. The lawyers practicing in the pilot courts will be best pillars of strength in spreading ADR. The trainee lawyers and representatives of non-government organizations should be selected taking stock of their interest, participation and direct involvement in the ADR matters. Training should be imparted to the lawyers as they

are the ones on whose advice litigants rely most. It is believed that without their co-operation introduction of Mediation in the civil courts will not be successful. The aim should be to dispel their fear of loss of cases, financial hardship and above all suspicion of a new method of dispute resolution and to give assurance that Mediation will not adversely affect them financially but will open up new horizons for them. They should be persuaded by the prospect of receiving lump sum amount by way of fees for being lawyers in Mediations which provide an opportunity to resolve the disputes rapidly and efficiently; whereas trials take years and in our country usually fees are paid part by part throughout the trials till they end. Further they should be made to understand that successful Mediation lawyers will always attract new clients wanting to try Mediation who would otherwise have shunned the court. There is a scarcity of skilled and professional mediators. There an urgent need for training on Mediation and motivation of the lawyers for the use and promotion of the alternative system.

"Let the lawyer to become mediator, rather than mere pleader,"

The Bar and other Institutional Partnerships

Apart from Pilot court judges, the administrative support staff, and the ADR specialists, support and cooperation from others will be critical. These include the bar and international institutions that will cooperate with the **Pilot Courts**. In formulating a code of ethics applicable to its members, **Provincial Bars** should include a chapter on the use of ADR, adopting guidelines similar to those of the US **Model Rules of Professional Conduct**, which note that "there will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning representation". Together with the bar, the Pilot Courts must have access to externally operated programs via partnerships that deliver high quality ADR services to litigants. Some organizations that have formal successful partnerships with the courts include institution of higher learning e.g. IFC,CEDR, ISDLS, ADB, LCCI Mediation Center, KCDR, Pakistan Mediators Association, Harvard Mediation Program at Harvard Law School and the Boston Mediation Clinic, Bar councils and related groups and dispute resolution centers.

Mediation & Conciliation in Commercial disputes

Accredited Mediators should act as conciliators in the Pilot Court. An ADR Centre which should be developed at the principal seat of High Court to supervise, control and evaluate the performance of pilot courts. A **Management Consultant**, under the supervision of the Chief Justice, should develop an annual operational work plan and timelines for the disposition of cases. The consultant would also help the Pilot Court to absorb current technology, such as allowing the electronic filing of documents and the use of electronic bench books. Finally, s/he would be charged with the duty of auditing the performance of the court by assessing whether or not there was a timely rendering of decisions and judgments, an estimation of legal and other costs that were increased as a result of poor case management, and a sampling of decisions to ensure that the quality of justice has not been compromised. This audit should be a public document and should be considered when taking into account the salary and promotion prospects not only or the Judges of such courts but the entire support staff so that the latter will also have a stake in the success of the venture.

Pilot Court Mediators, Neutrals, and Conciliators

Although ADR comprised various levels of informality, the skills required to maintain that system might be difficult to find. In countries like 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 and Business Schools and Judicial Academies 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 Mediation. In performing their functions, neutrals 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), and no action should be allowed against a neutral without a clearance certificate issued by the chief judge of the High Court. At the same time, neutrals should be subjected to the same **Ethical Standards** as High Court Judges, including the standards of probity and confidentially that are expected by the litigants. Neutrals who egregiously violate certain ethical norms (e.g., taking bribes or misusing information disclosed during the Mediation process) should be liable to criminal sanctions. Conciliators should be selected from a pool of accredited mediators, retired judges, senior advocates and others in the legal profession who have a reputation for integrity and a deep knowledge of the law. These conciliators could provide pro-bono services, or, depending on the complexity of the matter charge fee.

Training for ADR mediators and neutrals

As recommended above, training for those who would serve as ADR Mediators and neutrals in the Pilot Courts should be handled by learning institutions that are able to put together specialized courses. The learning institutions should bear the cost of preparing the courses and training materials, while the potential ADR specialists would pay fees to attend the court. The technique of ADR is an effort to design a workable and fair alternative. Conciliators, mediators, arbitrators and other ADR neutrals will be appointed when requested by the parties from among a panel of qualified and experienced ADR neutrals. The Institutes/law schools in the country should undertake training/teaching in ADR and related matters and award diplomas, certificates and other academic or professional distinctions. Besides, the Institutes should plan to develop infrastructure for higher education and research in the field of ADR and arrange for fellowships, scholarships and stipends for developing professionalism in ADR.A major focus should be on training for developing professional mediators and sensitizing judges, lawyers, policymakers,

litigants and the masses. I stress on creation of a regular corps of trained and efficient mediators or neutrals, relying on whom judges or parties in a dispute can comfortably go for consensual process of the ADR methods.

It will be prudent, at least at this stage, to keep in the statute a wide option of Mediators and Arbitrators to avoid the vagary of availability or no non-availability of senior lawyers. Presiding Judges of the disputes in question and other available judges of co-equal jurisdiction not seizing of the disputes in question should be kept as options for the choice of mediator or conciliators. Retired Judges, senior lawyers as per list maintained and constantly updated by the District Judge should be available for Mediation and Conciliation. Private Mediation firms, having experienced judges or retired judges and/or qualified non-practicing lawyers on their staff, recommended by the District Judge and approved by the Chief Justice of High Court, may also be included for Mediation, Conciliation or non-binding Arbitration on payment of equal fees by the parties. Gradually, as the idea spreads and the A.D.R. procedure gains ground, sitting Judges may be eliminated from the list altogether. This may take some time, but nothing can be achieved without **patience** and **perseverance**. U.S.A., Australia, U.K and Canada have not achieved their present position without sustained efforts for three or four decades. In these countries 85 to 90 percent of cases filed are now disposed of by A.D.R. methods and only 10 to 15 percent cases filed are disposed of by trial now in those countries. **But Rome was not built in a day, but was built alright.**

Amend the Code of Civil Procedure giving the trial court an enabling and discretionary power to refer a case or part of a case for only Mediation, conciliation or non- binding arbitration **at any stage of the suit**. Although the proper stage to do so is after receiving the written statement, I would suggest 'at any stage of the suit' to cover backlogs. When the amendment comes into force, the judges will be trained to refer a case for Mediation, Conciliation or Non-binding arbitration after receiving the written statement in all suitable cases, but they will be further trained to refer pending cases for Mediation, Conciliation or Non-Binding Arbitration when both parties agree or according to the Judge's own discretion, the stage of the suit not being very important. It is necessary to define Mediation, conciliation and non-binding arbitration correctly and precisely in the amendment to avoid unnecessary dispute about their nature and character. Mediation, Conciliation or Non-binding Arbitration, in my opinion, may not be a suitable form of A.D.R. in big commercial cases involving heavy amounts and insolvency cases under the Insolvency Act. I suggest **Early Neutral Evaluation** or **Settlement Conference** as the proper result-yielding method of A.D.R. in such cases. I would advise an amendment to the special legislations covering these types of cases enabling trial judges to refer a case or part of a case at any stage of the suit for application of **Early Neutral Evaluation (ENE)** or **Settlement Conference**, although the ideal time to start this process is after receiving the written statement. I am in favor of adding 'at any stage of the suit or application' to cover the backlogs. Also ENE and Settlement Conference should be suitably defined to avoid any conflicting interpretation of these concepts.

The Government is the major litigant in this country, either as a plaintiff or as a defendant. In most cases the Government does not make any appearance, because the Government do not find, at any rate for the time being, any interest of the Government involved in the case. Yet when the parties in dispute compromise the matter, even without Mediation, the option remains for the Government to challenge the compromise at a belated stage, claiming an interest in the subject

matter of litigation. The Government is thus responsible in many cases to prolong the litigation. To make the A.D.R. successful, law should be amended providing that where the Government do not enter appearance or after entering appearance do not file any written statement, or after filing a written statement do not contest the case, any resolution of the dispute through A.D.R. or otherwise by the other parties to the dispute would be binding on the Government.

Conclusion

An ongoing judiciary initiative to institute an alternative dispute resolution (ADR) system through **"National Judicial Policy, 2009"** 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 mechanisms, as the result of the efforts was 'tremendously encouraging. Under a pilot project, alternative dispute resolution system should be initiated in the selected Districts and in a class of cases, under the supervision and control of High Courts, which can eventually be extended to the all the Districts. And when such courts are established, that would truly bring ADR to the center-stage. 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 imitatives 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, Judiciary** and **Bar** should take upon themselves – of introducing to the nation, and educating them about, ADR and its' inherent benefits with the help of **ADB** sponsored **Access to Justice Program,** 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. The **IFC** Commercial Mediation program which was initiated in partnership with Ministry of Law, Sindh High Court and IFC in 2005, whereby referral and Enforcement system at Sindh High Court was developed with reference to institutionalized Mediations at Karachi Centre for Dispute Resolution (KCDR), resulted in adoption of ADR rules of Sindh High Court Section 89-A of Civil Procedure Code was being used for referral of disputes to KCDR for Mediation. Commercial Mediation has taken off but a sustained awareness program is required for greater buy in of Mediation and referral of disputes. Because IFC's ADR/Mediation initiatives in form of a pilot Project in Karachi has been successful, it has reciprocated the same at Lahore by developing LCCI Mediation Center at Lahore Chamber of Commerce and Industry. However, experience suggests that ADR and Mediation require support of stakeholders for it to be institutionalized at national level. In order to promote the use of ADR and Mediation among practitioners and end-users, there has been a strong need to debate its current status, future development and challenges. In view of the National Judicial Policy 2009 and with these objectives in mind, the present Conference Punjab Judicial Academy, Lahore is a step in the right direction keeping in view the **section 4 (b)** of **The Punjab Judicial Academy Act 2007** which requires the academy to develop skills and techniques for court management, case management, delay reduction, alternate dispute

resolution (ADR) and judgment writing.The business-sector should be encouraged to include following model clause in all business agreements, Mediation is a wonderful tool to help counsel obtain a fair and reasonable settlement for his client. I hope that the ideas set forth in this paper will help the academies to adopt curriculum and Mediation training program for judges and create a crop of trained Mediation Referral Judges and Judicial Mediators: which will provide a good alternative to litigants for resolution of disputes in a swift manner. Yes, many litigants have been shying away from the courts looking at the prolonged delays, but once they have alternative and convenient modes like ADR for resolution of disputes, they are certainly not going to shy away from opting for them to settle their disputes.

The ADR can also be an effective means to deal with the cases involving **Default Bank Loans**, now pending with the banking courts, and in other commercial cases through amendment to the relevant laws to make way for ADR, the banks could recover billions default loans in a very short time. It is hoped that the ADR can clear up the entire bulk of pending cases within three to four years, if properly used. Alternative dispute resolution 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 recognize traditional, informal and indigenous forms of dispute resolution, like ***Punchayat***, 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 mediators and sensitizing judges, lawyers, policymakers, litigants and the masses. It is stressed on creation of a regular corps of trained and efficient mediators or neutrals, relying on whom judges or parties in a dispute can comfortably go for consensual process of the ADR methods. 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 the newly enacted provisions facilitating the ADR system in our justice delivery process are 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 lawyers and judge. 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

have come into force, radical changes are needed in the way in which the courts and lawyers operate. As the **Chief Justice** is a very **powerful person** in our system the Pakistan reform effort suffered setbacks and delays caused by the shifting role of Chief Justice as happened in India with the retirement of Chief Justice Ahmadi, yet the present Chief Justice of Pakistan, along with many other judges and the government are great supporters of these innovations. We certainly need a **Champion** to make this matter a success in Pakistan.

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