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THE LEGAL POSITION OF COMMUNITY MEDIATION IN KHYBER PAKHTUNKHWA: A CRITICAL ANALYSIS

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Resolving neighbourhood disputes in the community through amicable settlements has been in practice in different provinces of Pakistan in various forms such as Panchayat, Jirga, Faislo. Nevertheless, these traditional dispute settlement mechanisms do not exactly resemble the contemporary community mediation practices. Accordingly, this paper aims to discover the legal status of community mediation in the Pakistani legal system. It can be observed that there is no specific legal framework governing the community mediation, the training and qualifications of community mediators, and the community mediation centres in Khyber Pakhtunkhwa. Thus, this paper proposes that there is a need to legislate a comprehensive legal framework which covers mediation from all dimensions - including community mediation - at the federal level by giving importance to the traditional dispute resolution methods in place in various provinces of Pakistan and also learning experiences from other suitable jurisdictions.

INTRODUCTION

Community mediation is a method in which neighbourhood disputes are resolved in an amicable manner by adopting mediation process with the intention to maintain good relationships among the neighbours. In other words, community mediation is a

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mediation procedure adopted by the disputants to resolve their neighbourhood disputes within their community.¹ Neighbourhood disputes may arise from following conducts such as “nuisance in the neighbourhood, trespass, family feuds, landlord and tenant issues, neighbourhood squabbles involving children, pets and animals, use and maintenance of driveways, cars, bright lights, party walls and trash disposal;² noisy neighbours, boundary disputes, trees and gardens maintenance with near boundary, installing CCTV cameras that straight neighbours house;³ parking in an uncooperative way, doing renovation work which damaged neighbouring property;”⁴ and so forth. Sometimes, neighbourhood disputes may escalate further and can become more serious problems if it is not well taken care of.⁵

According to the National Association for Community Mediation (NAFCM) in the United States (US), “community mediation offers constructive processes in resolving differences and conflicts between individuals, groups, and organisations. It is an alternative to avoid destructive confrontation, prolonged litigation or violence. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute and control of the outcome. Community mediation is designed to preserve individual interests while strengthening relationships and building connections between people and groups, and to create processes that make communities work for all”.⁶ Usually, in community mediation, both disputant parties sit together in the presences of a community mediator or mediators who are neutral to the parties and they assist them to clarify the issues as well as problems, know about their opinions, and find out a settlement to the problems.

The practice of settling disputes outside the courts has been part of the culture in different provinces of Pakistan in various forms. Punjabis resolve their disputes in the community through *Panchayat*;⁷ Pushtoons resolve conflicts by *Jirga*;⁸ Sindhis resolve disputes through *Faislo*; and Balochis resolve conflicts by *Balochi Jirga*.^{9,10} Albeit these traditional dispute settlement mechanisms do not exactly resemble the contemporary mediation practices, these may perhaps lay foundation for the community mediation.

In Khyber Pakhtunkhwa (KP), currently, there is no specific legal framework governing the community mediation, the training and qualifications of community mediators, and the community mediation centres. Accordingly, this paper explores and analyses the relevant legal provisions under various types of laws in order to discover the legal status of community mediation in KP.

LAWS RELATING TO ALTERNATIVE DISPUTE RESOLUTION IN KHYBER PAKHTUNKHWA

There are various relevant general and special laws that have provisions for alternative dispute resolution (ADR) mechanisms under which mediation can find a prominent place.¹¹ The general laws that have provisions to opt for ADR include the Constitution of Islamic Republic of Pakistan 1973, the Civil Procedure Code 1908, the Family Courts Act 1964, the Shariah Nizam-E-Adl Regulation 2009, Khyber Pakhtunkhwa Police Order (Amendment) Act 2015. The specific law governing ADR is the recently introduced Alternative Dispute Resolution Act 2017.¹²

Council of Common Interest under the Constitution of Pakistan

The Constitution of Islamic Republic of Pakistan 1973 establishes the Council of Common Interest (CCI) in order to resolve disputes among the Federation and the provinces or between the provinces. The CCI deals with disputes on economic, natural resources, petroleum exploration, public debt management, privatisation, energy, investment, special economic zones, disaster relief and reconstruction, population census, water, etc.

Article 155(6) provides that: “No proceeding shall lie before any court at the instance of any party to a matter which is or has been in issue before the Council or of any person whatsoever, in respect of a matter which is actually or has been or might or ought to have been a proper subject of complaint to the Council under this Article”. Therefore, it is a constitutional requirement that any dispute comes under the jurisdiction of the CCI has to be submitted first to the CCI - before filing the case before any court of law – in order to settle the disputes amicably among the

Federation and the Provinces. In this way, the Federation and Provinces can function in harmony and complimentary with one another.

In the case of *Khalid Malik and Others v. Federation of Pakistan and Others* PLD [1991] Karachi 1, Per Saleem Akhtar, J, the Court expressed the objectives of CCI as: “[T]o strengthen and integrate Federation and Provinces, iron out their differences and provide Constitutional justice to the provinces”.¹³ Indeed, this kind of institution is essential in any federal structure in maintaining peaceful and harmonious relationship among different states and provinces.

Mediation and Conciliation under the Civil Procedure Code

In 2002, the Civil Procedure Code 1908 (CPC) has been amended and added section 89(A) which provides that: “The court may, where it considers it necessary having regard to the fact and circumstances of the case, with object of securing the expeditious disposal of a case in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method including mediation and conciliation or any such other means”.¹⁴ The amended Order X, Rule 1(A)(III) of the CPC also has a similar provision which provides as: “The Court may adopt, with the consent of the parties, any alternative method of dispute resolution including mediation, conciliation or any such other means”.¹⁵ These two provisions encourage a court, as it deems fit and with the consent of the parties, refer a civil case to any ADR mechanism which includes ‘mediation’ and ‘conciliation’ or any other means as such.

Furthermore, Order XXIII, Rule 3 of the CPC provides that: “Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit”. Hence, when a case is referred to mediation,

the court will wait for a mutual settlement and act in accordance with that settlement agreement between the parties if they managed to reach to a settlement. The court may further grant, on such terms as it thinks fit, the plaintiff permission to withdraw from such suit or abandon.¹⁶

In the case of *Messrs Alstom Power Generation through Ashfaq Ahmad v. Pakistan Water and Power Development Authority through Chairman and Another* PLD [2007] Lahore 581, the Court observed that: “[S]ettlements through mediation and other informal modes is now universally accepted method being followed as a less expensive, less time consuming, less cumbersome, beneficial and fruitful. Courts are also expected to encourage the parties to adopt such modes in view of provisions of section 89(A) and Order X1(a)(iii), of the Code of Civil Procedure 1908 “. Similarly, in the case of *Dr. Mrs. Yasmin Abbas v. Rana Muhammad Hanif and Others* PLD [2005] Lahore 742, Sayyed Zahid Hussain, J, expressed that: “Since settlement of disputes through compromise and amicable means is one of the recognised modes, there is no factual or legal impediment in disposing of the matter in such a way”. It can be seen from these cases that the role of ADR mechanisms, including mediation, in the civil justice system of Pakistan has become quite significant after the amendment of the CPC in 2002.

Compromise or Reconciliation in the Family Courts

The Family Courts Act 1964 also has provisions allowing the court to refer a case to ADR mechanisms. Section 10 requires the Court to fix an early date for a pre-trial hearing of the case once the written statement is filed accordingly.¹⁷ At the pre-trial, the Court may ascertain the precise points of controversy between the parties and attempt to effect compromise between the parties.¹⁸ Only when the compromise is not possible between the parties, the Court may proceed with the trial and record evidence of the parties.¹⁹ If reconciliation fails in a suit for dissolution of marriage, the Court will immediately pass the judgement for the dissolution of marriage.²⁰ In addition, even after recording evidences of the parties, section 12 requires the Court to make another effort for a

compromise or reconciliation between the parties within a period not exceeding fifteen days.²¹ Only when the compromise is not possible between the parties, the Court will immediately pass the judgement.²² Under the concept of 'compromise' stated in this section, 'mediation' may be used to resolve family matters despite the fact that it does not specifically mention the word mediation. Again, the term 'reconciliation' used in this section signifies that the process should rebuild peace and maintain the marriage bond between the parties. The reconciliation may be obtained by way of mediation by an experience mediator between the parties.

Amicable Settlement for the Small Claims and Minor Offences

In Pakistan, the Small Claims and Minor Offences Courts Ordinance 2002 was enacted for the purpose of providing inexpensive and expeditious disposal of small claims and minor offences. Under section 14(1), the Court - at any stage of the proceedings - may conciliate, arbitrate, mediate or resolve the claim or offence through '*Salis*' or any other person either on the application of any party or otherwise and also there is a possibility of 'amicable settlement' between the parties with their consent. The 'amicable settlement' referred in this Ordinance includes settlement through arbitration, mediation, conciliation or any other lawful means mutually agreed upon by the parties.²³ However, the Court cannot opt for amicable settlement for offences that are non-compoundable and if such settlement to be either against the public policy or interest of the State.

The term '*Salis*' mentioned in this Ordinance means the person acting as a conciliator, a mediator or an arbitrator.²⁴ *Salis* is mainly responsible to "facilitate negotiations between the parties and steer the direction of discussion with the aim of finding a mutually acceptable solution; and assist the parties in reaching an agreement".²⁵ Under section 15, the Chief Justice of High Court is obliged to prepare a list of persons to act as *Salis* for the amicable settlement and the list will be maintained in the Court. The *Salis* has to disclose to the court if there is any circumstance that may likely create an impression of a bias; arise a question on conflict of

interest, or prevent him from acting in an appropriate manner. In this case, the court will direct the parties to nominate another *Salis*.²⁶

After the appointment, the *Salis* will invite the parties to a venue and on a day and at a time specified by him via any appropriate mode of communication such as registered post, telegram, fax, telephone, etc.²⁷ The parties may appear in person or through their representatives before the *Salis*. Parties or the representatives will have to submit their written claim or defence, pleadings or complaint, and all other necessary documents as required by the *Salis*.²⁸ The *Salis* is required to make efforts to settle the dispute or complaint amicable and submit his report within the time fixed by the court.²⁹ In cases where the parties fail to appear before the *Salis* or pay prescribed fees as determined by the Court, the *Salis* may terminate the amicable settlement proceedings and has to inform the Court accordingly.³⁰ In cases where the parties do not reach to a settlement, the *Salis* has to record the statement of the fact duly signed by the parties and submit it to the court.³¹

Once a settlement of a suit or complaint is reached between the parties, the *Salis* has to prepare a deed of settlement containing terms of such settlement duly signed by the parties and submit it to the court together with a certificate that the settlement between the parties was voluntary.³² Then, the court will prepare a statement of compromise on the basis of such deed of settlement signed by the parties and pass the judgement accordingly for the claim or the offence.³³

Before passing a decree based on such award, the court will call objections of the parties to it within fifteen days of the receipt of award and settle such objections (if any) within fifteen days³⁴ as the Ordinance does not allow a party to challenge the validity of such award in a separate proceeding before any other court on any ground.³⁵ Similarly, the party who wishes to challenge the validity of the decree - on the plea of fraud, misrepresentation on involuntary nature of the settlement or any other ground - will have to apply to the court within thirty days of passing the decree and no separate suit shall lie for it.³⁶

Musleh (Peace-Maker) in Civil or Criminal Cases

The Shariah Nizam-E-Adl Regulation 2009 was enacted to be applicable to the Provincially Administered Tribal Areas (PATA) of the North-West Frontier Province, except the Tribal Areas adjoining Mansehra district and the former State of Amb. Although these areas have already been integrated into Khyber Pakhtunkhwa (KP) under the 31st Amendment of the Constitution of Islamic Republic of Pakistan 1973, the KP government decided to promulgate an ordinance to maintain this Regulation for those areas.³⁷

The Regulation provides some informal dispute resolution methods without referring to terms such as mediation and conciliation. It uses the term '*Musleh*' (the term has an Arabic origin and literally also means 'peace-maker' or 'reformer') to act as a mediator for the settlement of dispute. Section 13 of the Regulation provides that a court may refer any civil or criminal case to '*Musleh*' or '*Musleheen*' (plural form of '*Musleh*') before recording of evidence with the mutual consent of parties. The court maintains the list of *Musleh* or *Musleheen* and the parties have to choose the names of such *Musleh* or *Musleheen* from the list with the mutual agreement.³⁸

Once the case is referred as such, *Musleh* or *Musleheen* - after hearing the parties, their witnesses, and perusing the relevant documents as the case may be³⁹ - will have to decide the case in accordance with the *Shari'ah*⁴⁰ and submit a report which mentions their opinions together with the reasons pertaining to the dispute⁴¹ within a period of fifteen days. Nevertheless, the court may extend the time in extraordinary circumstances.

If the court is satisfied with the opinion expressed by *Musleh* or *Musleheen* in accordance with the *Shari'ah*, it will announce the judgement in accordance with the opinion of the *Musleh* or *Musleheen*. Of course, the court will provide an opportunity to the parties to submit objections to such report. In cases where there is any objection, the court will hear the parties and decide about the correctness or otherwise of the objections.⁴² If the opinion is not in accordance with the *Shari'ah*, the court will treat the

opinion as null and void and start its proceedings for decision of such dispute in accordance with the *Shari'ah* as if it were not referred for *Sul'h* (the term has an Arabic origin and literally also means 'mediation').⁴³

With regard to the services offered by the *Musleh* or *Musleheen*, the court can fix the remuneration for them to be paid by each party in such proportion determined by the court by considering actual expenses incurred.⁴⁴ If the *Musleh* or *Musleheen* refuse to resolve the dispute, fail to resolve the dispute accordingly, or cause unnecessary delay without sufficient reason; the court will commence the recording of evidence and resolve the dispute in accordance with the *Sharia'h* as if it were not referred for *Sul'h*.⁴⁵

Dispute Resolution Council in Khyber Pakhtunkhwa

The Khyber Pakhtunkhwa Police Order (Amendment) Act 2015 establishes a conflict resolution body called the 'Dispute Resolution Council' (DRC) in order to settle minor cases in an amicable manner without having to go to a court of law. Under Article 186(A) of the Act, the DRC is established at District, Sub-Division or Police Station level and consists of a Provincial Police Officer as well as individual members who possess respect and repute in the society for their honesty and impartiality. The DRC has to have at least one female member. Hence, the Act empowers the Provincial Police Officer to act as a mediator for petty cases too. The Act defines the 'petty nature case' as a small, minor, of less or inconsiderable importance and affected amity in the society or any cause pleading towards provocation which may lead to a criminal offence. According to the official report of KP police, the DRC has disposed of 5,381 cases out of a total of 7,797 in 2018 alone. These swift actions render speedy justice to the public and also cutting down the legal costs.⁴⁶ In this sense, the performance of the DRC is very impressive and notable.

Alternative Dispute Resolution in Islamabad

The most recent legislation for the application of ADR mechanisms in Pakistan is the Alternate Dispute Resolution Act 2017 (ADR

Act). The ADR Act is enacted mainly for the fast disposal of conflicts. However, the Act is applicable to Islamabad Capital Territory only. Under section 2(a), the term ADR is defined as “a process in which parties restore a method of resolving dispute other than by adjudications by courts and includes arbitration, mediation, conciliation, neutral evaluation”. Section 2(i) defines ‘mediation’ as “a process in which a mediator facilitates dispute resolution by encouraging communication and negotiation between the parties in order for them to arrive at a mutually satisfactory agreement”.

If the court is of the opinion that there is the possibility of resolving the dispute through ADR, it may refer any civil matter mentioned in the Schedule to an ADR mechanism with the consent of the parties as long as it does not involve question of law or fact.⁴⁷ After consultation with the High Court, the Government forms a panel of Neutrals for each district consisting of lawyers with not less than seven years of practising experience, retired judges and civil servants, jurists, *Ulema* (Islamic religious scholars), technocrats, experts and any other person who possesses reputation and integrity in the society.⁴⁸ The ADR Act confers the power to the Government to arrange training and courses as necessary for such appointed Neutrals with the view to ensure the efficient ADR services.⁴⁹

With the consent of the parties, the court may refer the dispute to an ADR Centre or appoint a Neutral. In cases where the parties could not agree on the appointment of a Neutral, the court can appoint as such in its own discretion.⁵⁰ Then, the court will direct the parties to appear before the ADR Centre or the Neutral on the date and the time fixed accordingly.⁵¹ Either the parties to the dispute or their representatives can appear in person for the ADR proceedings.⁵²

An ADR Centre or a Neutral will have to dispose the matter within thirty days subject to further extension of fifteen days with sufficient excuse.⁵³ Once the settlement is reached between the parties, the Neutral has to record such settlement agreement duly witnessed as well as signed by him and by the parties or their

representatives; and submit it to the court in order to be pronounced such settlement as the decree.⁵⁴ If the Neutral fails to settle the dispute, the court will proceed with the adjudication of the case accordingly.⁵⁵

ANALYSIS ON THE LEGAL POSITION OF COMMUNITY MEDIATION

After careful analysis of the abovementioned relevant general and special laws that have provisions for ADR mechanisms in Pakistan, it can be observed that there is no specific legal framework governing the community mediation, the training and qualifications of community mediators, and the community mediation centres in KP. The CCI established under the Constitution of Islamic Republic of Pakistan 1973 only settles some categories of disputes which come under its purview among the Federation and the Provinces, and thus it has so far nothing to do with the neighbourhood disputes in the community.

Despite the introduction of the court-annexed mediation under the CPC, there are no details rules which govern the conducts of mediation, the training and qualifications of mediators, and the mediation centres. In this regard, one of the Judges of the Supreme Court of Pakistan, Justice Tassaduq Hussain Jilani, mentions that: “Notwithstanding the legislative and executive measures taken, the Courts have not made use of section 89 of the CPC very frequently. There is more than one reason for this. Firstly, for any new scheme to succeed, institutional support is a *sine qua non* which has been mostly lacking. Secondly, not much has been done for training and capacity building of the judges. And thirdly, the amendments in the CPC were not followed by amendments in the rules for procedural details to invoke ADR techniques”.⁵⁶

As in the case of the CPC, the Family Courts Act 1964 does not mention in detail how the compromise or reconciliation should be conducted between the disputing spouses. Therefore, in practice, the judge sometimes leaves the parties alone in his chamber to discuss the matter on their own. For example, in the case of *Mst. Ajminah Bibi v. Bakhtyab R/o* [2008] Wari Dir Upper KP

(Civil Suit no. 26/3FC), the parties were advised to avoid traditional advocacy. Then, they opted for direct communications and the reconciliation was successful after two or three hearings.⁵⁷ This may be fine for some peace loving couples but things may also go wrong if the parties are hostile against one another.

The Small Claims and Minor Offences Courts Ordinance 2002 encourages the court to refer the case for the amicable settlement which includes ADR mechanisms such as arbitration, mediation, conciliation or even any other lawful means as long as it is mutually agreed upon by the parties. Although it provides some detail guidelines such as preparing the list of arbitrators, mediators, or conciliators and their responsibilities; conducting such amicable settlement; and challenging an award or a decree on any ground; these are not enough to have an efficient arbitration, mediation, conciliation service as each of these ADR process needs detail rules on its conducts, trainings of personnel, and the venues to conduct such processes.

In the same vein, the Shariah Nizam-E-Adl Regulation 2009 also encourages a court to refer any civil or criminal case to *Sul'h* (mediation) lead by either '*Musleh*' or '*Musleheen*'. Besides, it also provides that the *Musleh* or *Musleheen* will have to decide the case in accordance with the *Shari'ah*. The irony here is that, in some cases, the *Shari'ah* itself is subjected to various interpretations by numerous scholars. Accordingly, it would be difficult to apply a particular ruling if there are two or more views but somehow contradictory in relation to a particular issue. Although it obliges the court to maintain a list of *Musleheen*, there is no mention of the qualifications of a *Musleh*. In addition, the place and the conducts of mediation as to where and how the *Musleh* or *Musleheen* should settle the dispute are not well covered under the Regulation. In addition, this is only applicable to a few selected areas in KP.

The ADR Act in Islamabad also introduces a wide range of ADR mechanisms such as arbitration, mediation, conciliation, and neutral evaluation for a court to consider referring a case to one of those methods if there is any possibility of resolving the dispute through such method. This legislation seems too ambitious

to cover such wide range of ADR mechanisms under few provisions whereas each of these ADR process needs detail rules on its conducts, trainings of personnel, and the venues to conduct such processes. Again, it is only applicable to the Islamabad Capital Territory only and not nationwide.

Moreover, all of these relevant laws that have provisions for ADR mechanisms, i.e., the CPC, the Family Courts Act 1964, the Small Claims and Minor Offences Courts Ordinance 2002, the Shariah Nizam-E-Adl Regulation 2009 and the ADR Act, are court-annexed ADR in nature. Thus, it does not directly deal with the neighbourhood disputes in the community unless the dispute is brought before the court and the court refer it to a mediation process prescribed under such relevant laws.

On the other hand, the DRCs established under the Khyber Pakhtunkhwa Police Order (Amendment) Act 2015 Act can be a good example for the community mediation in settling neighbourhood disputes in an amicable manner without having to go to a court of law. Nonetheless, it does mention clearly whether the DRC has the jurisdiction to deal with civil cases only, or both civil and criminal cases. In the same vein, it fails to limit the monetary value of a dispute for civil cases and also the sentence for criminal cases if it is found that it has jurisdiction to handle criminal cases.⁵⁸ There are no detail rules governing the conducts of mediation, and the training as well as qualifications of mediators.

CONCLUSION

In fact, resolving neighbourhood disputes through the process of mediation is not something new to the Pakistani communities across the nation. It has been in practice and part of the culture in different provinces of Pakistan in various forms such as *Panchayat*, *Jirga*, and *Faislo*. However, these traditional dispute settlement mechanisms do not exactly resemble the contemporary mediation practices, although these may perhaps lay foundation for the community mediation. On the other hand in KP, there is no specific legal framework governing the community mediation, the training and qualifications of community mediators, and the community mediation centres.

Accordingly, this paper - after exploring and analysing the various types of laws that have provisions for ADR mechanisms with the intention to discover the legal status of community mediation in the Pakistani federal legal system as well as in provisional laws of KP - proposes that it is necessary to legislate a comprehensive legal framework which covers mediation from all dimensions - including community mediation - with the intention to make use of this ADR mechanism for the expeditious disposal of neighbourhood disputes with less cost and more amicable manner without having to go to a court of law. Many countries have devolved legal frameworks to this effect, i.e., Australia, Malaysia, Singapore, and the US as they have introduced the community mediation into their formal legal system. Furthermore, the proposed mediation legal framework has to be enacted at the federal level so that all the provinces in Pakistan unanimously can give legal effect to that law respectively. Of course, the federal law to that effect should be carefully crafted by giving importance to the traditional dispute resolution methods in place in various provinces of Pakistan such as *Panchayat*, *Jirga*, as well as *Faislo*; and also learning experiences from other suitable jurisdictions.

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