



Study on Informal Justice System in Pakistan

Sindh Judicial Academy, Karachi, Pakistan - FUNDED PROJECT

EVALUATION REPORT



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PREFACE

P R E F A C E

This report is based on a study conducted by the Sindh Judicial Academy by associating a team of professionals having rich experience of observing and remaining part of formal and informal justice system. The study is titled as 'Informal Justice System in Pakistan'. The study is based on an extensive review of the existing literature and case laws on the subject and field research carried out by collecting information through a questionnaire and interviews. This report focuses primarily on traditional and informal justice systems in Pakistan, reflecting the views of actors of informal justice system. However, some positive models from Asia are also included.

Throughout this report the term "informal justice systems" is used to refer to non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas. During the study formal justice system was also observed and views were obtained about its effectiveness and accessibility. It was also the aim of this study to know about the linkages between formal justice systems and the informal justice systems and what are Government's initiatives to introduce structured alternate dispute resolution system throughout the country.

The purpose of this report is to make the available information on informal justice systems accessible to a wider audience. Further to suggest Government and non-government actors for playing active role in strengthening either of the systems (formal or informal) so that deprived citizens of the country may have access for a quick and inexpensive justice. Law reform agencies and donors were also targeted for playing their active role. The study on informal justice system which this report is based, is intended to contribute to and facilitate the debate on the characteristics of formal and informal justice system.

LIST OF ACRONYMS

ADR	Alternate Dispute Resolution
AGO	Attorney General's Office
AJP	Access to Justice Program
CRC	Convention of Rights of Child
CAT	Convention Against Torture
CIDA	Canadian International Development Agency
CPC	Civil Procedure Code, 1908
CrPC	Criminal Procedure Code, 1891
CEDAW	Convention on the Elimination of Discrimination against Women
DoL	Department of Law
D&SJ	District & Sessions Judge
FCR	Frontier Crimes Regulation
FHC	Federal High Court
GJTMAP	Gender Justice through Musalihat Anjuman Project
HR	Human Resource
IC	Insaf Committee
ICADR	International Centre for Alternative Dispute Resolution
ICG	International Crisis Group
ICCPR	International Covenant on Civil and Bliticate Rights
IDLO	International Development Law Organization
IFC	International Finance Corporation
IGP	Inspector General Police
KCDR	Karachi Centre for Dispute Resolution
LHC	Lahore High Court
LJCP	Law & Justice Commission of Pakistan
MAs	Masalihat Anjumans
MFCO	Muslim Family Court Ordinance
MoL	Ministry of Law, Justice & Human Rights
MoU	Memorandum of Understanding
MoWD	Ministry of Women Development
NCCWD	National Commission for Child Welfare and Development



NGO	Non-governmental organization
NWFP	North-West Frontier Province
PHC	Peshawar High Court
PLGO	Punjab Local Government Ordinance, 2001
PPC	Pakistan Penal Code, 1860
PPO	Provincial Police Officer
PCCWD	Provincial Commission for Child Welfare Department
QHC	Quetta High Court
SC	Supreme Court
SCMOCO	Small Claims and Minor Offences Courts Ordinance, 2002
SHC	Sindh High Court
SJA	Sindh Judicial Academy
SLGO	Sindh Local Government Ordinance, 2001
TOR	Terms of Reference
TOT	Training of Trainer
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNIFEM	United Nation International fund for Women
USAID	United States Agency for International Development

GLOSSARY

Badal-i-sullh

It is a term used for settling the blood dispute by exchanging of girl or woman.

Faislo

A local term used to describe meaning of Jirga in Sindh

Jirga

A local term used to define group of people/elders who sit together for resolving a dispute.

It is normally used in Balochistan, NWFP, FATA, PATA.

Karo Kari

Karo kari is a compound word. Literally *karo* means "black male" and *kari* means "black female", A metaphoric term for adulterer and adulteress. Being so labelled leads more often than not to the murder of both man and woman allegedly guilty of having an illicit affair. This is especially true in the rural areas of the southern province of Sindh. In other parts of the country, women are more likely to be accused of sexual improprieties and murdered in order to wash the sullied family honour.

Kursi

An elevated chair used by the Sardar or decision maker during Jirga proceeding.

Mahaslehat Anjuman

A committee constituted under SLGO at union council level for disposal of disputes of the people residing in a particular jurisdiction

Musheer

An advisor who participates in the *faislo* and represents one of the parties to the dispute. They also facilitate decision makers in resolving the dispute.

Naikmards

A respectable person of a village who are usually approached by the villagers for resolving their disputes.

Nikah

The legal contract between a bride and groom as part of an Islamic marriage; contract under Islamic marriage.

Otaq

A sitting place in village/rural areas of Sindh Province.

Panchayat

A local term used to describe Jirga in the Punjab.

Sakh

It is a Sindhi term denoting administration of oath either on fire or on Holy Quran.

Sardar

Head of community/tribe mostly current in Sindh Province.

Sawara

It is a traditional practice in NWFP where girls are given for settling or resolving blood disputes between families and clans.

Shahi Jirga

Shahi Jirga, means a Jirga to resolve intricate disputes between individuals and tribes.

Sharam

It is a feeling or gesture in which hesitation is disclosed/exhibited by the communicator.

Surpunch

Head of Panchayat or tribal council

Tumandar

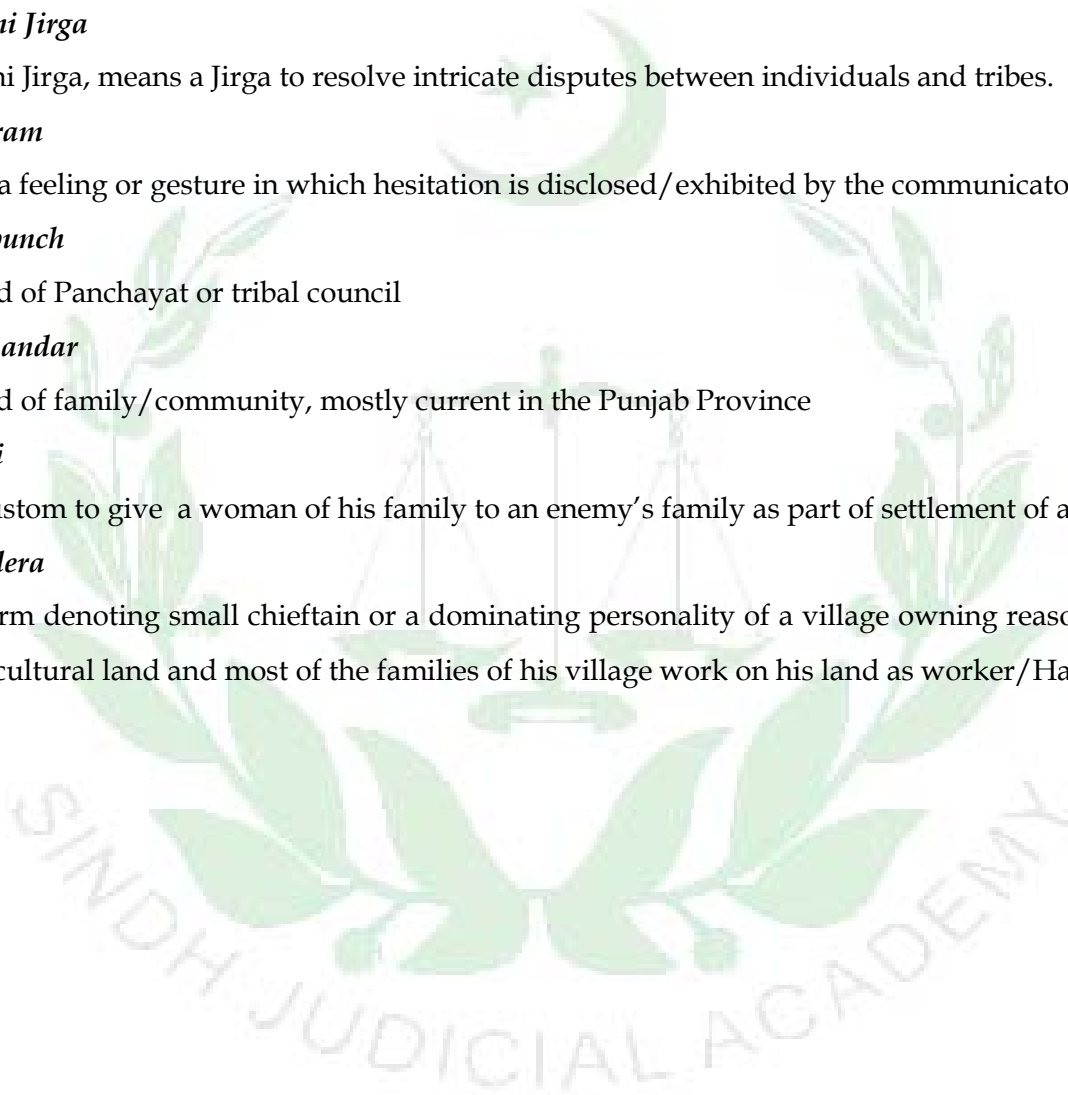
Head of family/community, mostly current in the Punjab Province

Vani

A custom to give a woman of his family to an enemy's family as part of settlement of a feud.

Wadera

A term denoting small chieftain or a dominating personality of a village owning reasonable agricultural land and most of the families of his village work on his land as worker/Hari



ACKNOWLEDGEMENT

The Sindh Judicial Academy would like to thank those who participated in the process of data collection as without their views it was not possible to assess the working of informal justice system.

In particular, the Sindh Judicial Academy wishes to acknowledge the invaluable assistance of the International Finance Corporation & Karachi Centre for Dispute Resolution who helped out in drafting Mediation Act, sharing their experiences related to court annexed mediation and providing extensive comments on the study and the reports.

Mr. Sher Ali Bazwani, Chairman of the Mediation and Conciliation Board of Aga Khan Community, deserves special mention for his assistance and providing information on the structured mediation system in his community.

It would not have been possible to complete this report without the cooperation of *Sardars* and *Naikmards* who are main actors of informal justice system.

The Sindh Judicial Academy is grateful to the Law & Justice Commission of Pakistan and UNICEF for selecting the Academy to carry out the study and providing guidance.



EXECUTIVE SUMMARY

The evaluation and assessment focuses on formal and informal justice systems prevailing in Pakistan. The project was assigned by the Law & Justice Commission of Pakistan (LJCP) and funded by the United Nations Children's Fund (UNICEF). The project was awarded in the month of November 2008. The objective of the study is to contribute to LJCP's longer term programming exercise to support the Informal Justice System. The study was carried out by an independent team between November and December 2008 and aligned with a survey team who met with Mediators, Arbitrators, Saliseen, litigants, academics, Journalists, Police and Judiciary.

The people living in rural areas of Pakistan, who comprises more than half of the population of the country have not benefited from half way implemented agriculture reforms. Moreover, the provision of education and health services remained nominal and economic opportunities have been very meager resulting in poor socio-economic development. It was further compounded by corruption in formal justice system and in most cases criminal elements wield support by both rural political elites and state officials. Pendency of cases in formal courts increased day by day coupled with lack of accessibility, affordability and effectiveness at lower level. The major organs of the formal justice sector are the Higher Judiciary (Supreme Court & High Courts), District judiciary comprising courts of magistrates and sessions judges which are being supervised and controlled by the High Courts within their jurisdiction. Furthermore, they are assisted by the law officers at the Federal and the Provincial levels i.e. the Attorney General's Office (AGO), and Provincial Advocate Generals' Offices respectively. Recently Independent Prosecution Service Department has been established in each province. Institutional informal justice system is being developed in the country in various forms such as Offices of the Federal and the Provincial Ombudsman and Federal Tax Ombudsman; Alternate Dispute Resolution Committees (under Income Tax Ordinance 2001, Custom Act 1969 Sales Tax Act and Federal Excise Act 2005), Anjuman-e-Masalihat Committees at the Union Council level under Local Government Ordinance, 2001; and notified *saliseen* under Small Claims and Minor Offences Ordinance, 2002 (SCMOO). These are working under the normative standards at national and provincial levels and are facilitating public at large for dispensing justice through non-judicial mechanisms. Admittedly, Government functionaries are not adequately providing necessary infrastructure/services for resolving disputes in far flung areas and, therefore, the

people who do not have easy access to these courts and afford the cost of litigation, seek alternate venues, thus approaching the traditional/informal justice system which is prevalent/existing near their place of residence. In different areas these forums of informal justice system are termed in different denominations. The governmental and non-governmental organizations, International Organizations, funding agencies, etc., are trying to promote and strengthen informal justice system while efforts are being made to develop linkages between formal and informal justice systems. Aim of this study is two fold, one to identify the strengths and weaknesses of both the systems. Secondly, to reconcile and integrate both the systems and make compatible with the national and international human rights standards. This human rights based approach is adopted which aims at facilitating and protecting the fundamental rights in general and vulnerable and marginalized segments of the society such as children, women, minorities etc in particular.

At the first instance an inception report was prepared indicating the design of this study. This Report contained the background of the project, status of formal and informal justice system in Pakistan, project strategy and institutional arrangements, project objectives and expected output, work plan/schedule, project review, monitoring, evaluation and reporting system of the project/study.

Three research consultants were associated for desk review. They had rich experience of research on legal issues. A core group was formed to lead and guide the study. A questionnaire was designed and finalized in consultation with the core group which was used for data collection.

Data, based on questionnaire, interviews and case studies, was collected under the supervision of Principal Investigator and thereafter, it was analyzed. During desk review, the existing system and the concept of informal justice system, has been elaborated. It was also seen that how developed and developing countries termed the terminology '*Informal Justice System*'. National and provincial level practices were also observed and have been incorporated in this study. Human right perceptive in informal justice system has also been discussed. Additionally, attempts were made to inquire about the different institutional and non-institutional informal systems prevailing in different regions of Pakistan. During the course of study lacking and shortcomings of formal justice system have been highlighted .

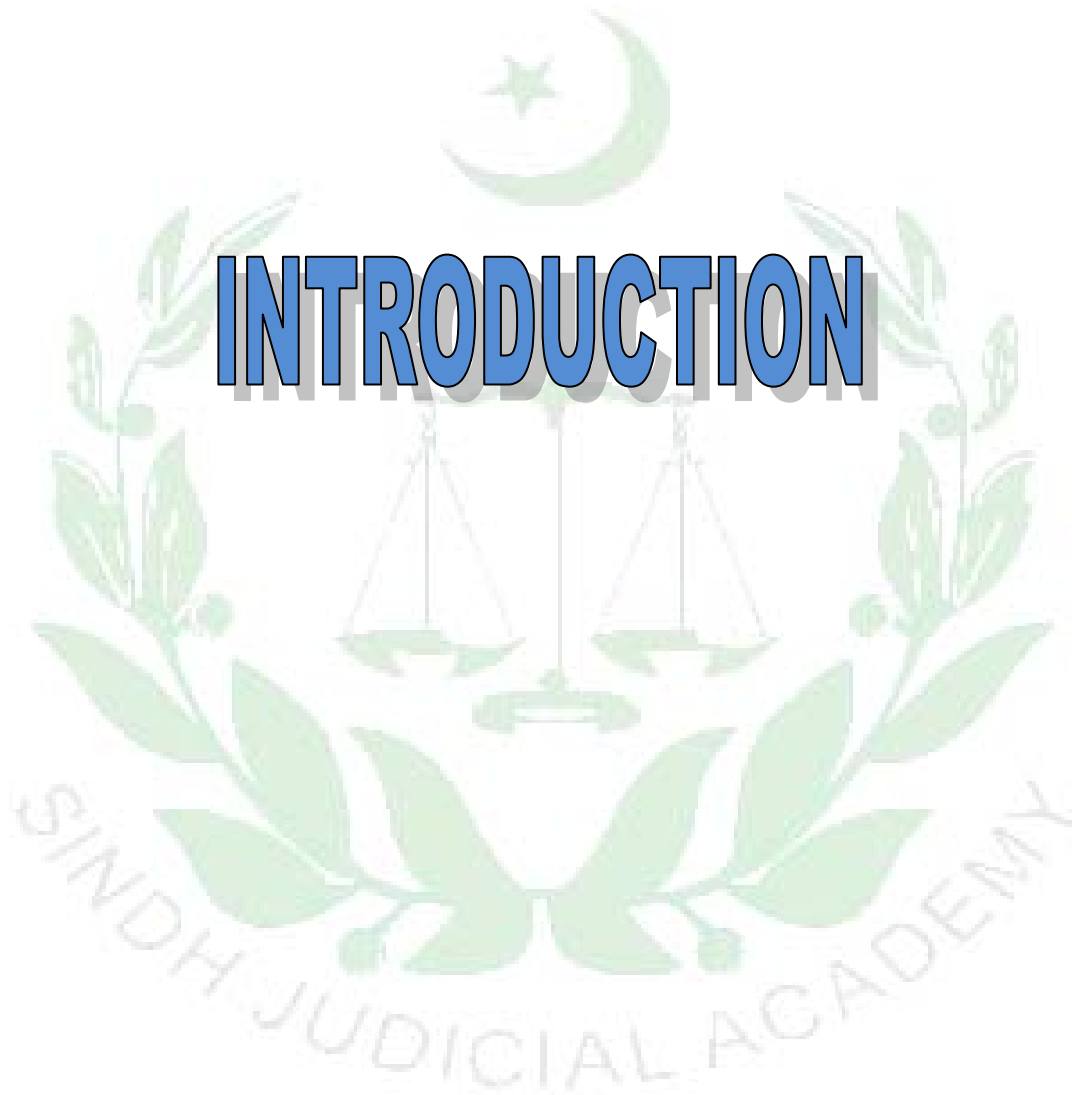
The specially designed questionnaire and the list of core group is part of this evaluation report. Numbers of professionals and traditional mediators/Arbitrators/conciliators/ academics/ journalists/ Police were interviewed. Few interviews were saved in electronically (audio tape). A number of reports prepared on national and international

levels on the subject were also studied. These have been incorporated in this report. Views of the majority, interviewed during the study period, have been made part of recommendations discussed below.

Overall Conclusions

The evaluation concludes that the LJCP study carried by the SJA is relevant to the national justice sector reform i.e. to search ways and means to reduce pendency of judicial workload and provide justice to all the segments of the society indiscriminately including marginalized, weaker and destitute alike. Exclusive interviews, conducted with traditional mediators/arbitrators, showed that they are very much interested in developing linkages with the formal justice system. They also proposed to develop some mechanisms for imparting knowledge on complex issues such as translating constitutional and legal obligation in common language which may assist them to resolve disputes referred to them. The study also concluded that more effective legislation is required to create linkages between formal and informal justice systems. It may focus on the mechanism of referring a dispute and the steps to be taken in case of success or failure of mediation proceedings. It was also concluded that there is a need to develop mechanism for early disposal of court referred mediation cases when they are returned by the mediator without reaching a consent agreement. Most of the respondents particularly from South Punjab were of the view that Panchayat system is becoming unpopular with the passage of time. The citizen are becoming aware with their basic human rights because of increase in education level and it active role of Media.

INTRODUCTION



INTRODUCTION

Access to Justice can not be restricted to lack of legal representation and one's ability to afford cost of litigation but it can be defined as the ability to obtain a just and timely remedy for violation of rights and entitlements and right to equal access to courts as put forth in the national and international norms and standards. Remedy can be obtained through formal or informal justice systems, also referred to in some cases as 'state' and 'non-state' systems (although these systems are in some countries formally recognised by their constitution or other pieces of legislation). Informal systems include a range of traditional, customary, religious and informal normative frameworks and mechanisms that handle and resolve disputes. In Pakistan, the *Jirga* system in NWFP and Baluchistan and the *Panchayats* in Punjab and, the *Fasilo* and *Sulh* in Sindh are well-known non-institutional mechanisms for the settlement of disputes. Two kinds of ADR have been practiced in Pakistan; traditional ADR and public bodies ADR. *Jirga/Panchayat* can be termed under traditional ADR whereas dealing dispute through *Msalehat Committee* or *SCMOCO* may be called public bodies ADR.

Inaccessibility to justice is a defining term attributable to poverty and an impediment to poverty alleviation, gender equality and cultural bias. Implicit in the concept of the rule of law, is the principle of equal access to justice and these concepts and principles are vital parts of the UN mandate to reduce poverty and fulfil human rights expectations and obligations. It includes both strengthening national justice systems (formal and informal) and developing peoples' capacity to make claims and demand accountability. Proper access to justice requires accountable, accessible prompt and effective judicial and legal systems as well as legal empowerment of all segments of society, including women and children: all should be enabled to claim their rights, through justice systems both formal and informal.

In recognition of the importance of informal justice systems for poor and disadvantaged people and legal pluralism, UNICEF in Pakistan has facilitated a study in this field, in order to better understand many facets of these systems and how they relate and interact with formal justice systems. The aim of this study is to support programme in the field of justice system reform, and how such reform processes meet the demands of legal pluralism and to strengthen informal dispute resolution mechanisms.

There is a huge backlog of pending cases in different courts of Pakistan. It is estimated that it would approximately take 15 years to clear the same even if new cases were not registered. According to the International Finance Corporation (IFC), a World Bank

organizations, publication "Doing Business Report 2009", contract enforcement in Pakistan takes estimated 957 days and involves 47 procedures. According to the reports appearing in the local press, about four million cases were pending in different courts of Pakistan as of January 1, 2003. It is despite the fact that most of the crimes specially the minor ones are not reported and the police does not register FIR (First Information Report). According to rough estimates hardly 30% crimes are registered in urban areas and not even 10% in rural areas. Crimes like theft of sewerage manhole covers, most of the traffic offenses, local brawls, thefts of less valuable articles like bicycles, dacoity of mobile phones on gunpoint are rarely reported or registered.

In order to complement the work done so far in strengthening the formal justice system, UN agencies have been increasingly working for strengthening and supporting their further alignment with international human rights standards. According to an evaluation report from the Danish Ministry of Foreign Affairs, *'the majority of the population is often not in a position to access the formal legal system for various cultural, linguistic, financial and logistical reasons. Their access to justice largely depends on the functioning of informal systems, which have been neglected in terms of external support'*¹. Studies estimate that in many developing countries, traditional or customary justice systems handle 80% of the total case load. The informal justice systems are often viewed as discriminatory, and not always adhering to international human rights standards. Despite the challenges, the informal justice system is necessary for enhancing access to justice for the poor and disadvantaged². The formal justice system in Pakistan during past years has suffered immensely on account of constitutional deviations aggravating the already stressed, overworked and under capacity judiciary.

Over 20 percent of the world's population is Muslim but there has been little research on informal justice system to resolve various forms of disputes in the light of norms and practices followed in Islam.

The Islamic justice-legal system did not generally require any lawyers since the litigants themselves pleaded their own case. Disagreements and disputes were settled within the organic society through the community as well as formal processes. Concept of mediation or conciliation is found in the *Holy Qur'an*. These included conciliation (*Solh*), mediation

¹ Danish Ministry of Foreign Affairs, Danida, Evaluation: Danish support to promotion of human rights and Democratization, volume 2: Justice, Constitution and Legislation (Copenhagen: Evaluation Secretariat, Ministry of Foreign Affairs, 2000). Cited in Stephen Golub, Beyond Rule of Law Orthodoxy: the legal empowerment alternative; Rule of Law Series, Carnegie Endowment for International Peace, Democracy and the Rule of Law Project, No. 41, October 2003.

² Doing Justice: How informal Justice systems can contribute, by Ewa Wojkowska, Dec. 2006, UNDP.

(*Wasta*) and arbitration (*Takhim*). In assessing the applicability of Western-based conflict resolution models in non-Western contexts such as the Arab-Islamic culture area, theoreticians and practitioners alike have begun to recognize the importance of indigenous ways of thinking and feeling, as well as local rituals for managing, reducing, and resolving conflicts. Formal and Informal Justice System shall also be discussed herein on religious prospectus too.

Objective & expected out comes

One of the objectives of the study is to explore possible future collaboration amongst UNICEF, UNDP and UNIFEM. The findings of the study will be shared with national partners, other UN departments, agencies, multilateral agencies such as the World Bank and bilateral aid agencies and the outcome of the study might, therefore, be of use for others as well.

The specific aims and expected outcomes of the study are to obtain clarity on:

- The nature and characteristics of informal justice systems in different regions of Pakistan.
- The systemic aspects and issues with regard to the national normative frameworks and the informal justice processes and systems.
- Human rights implications of these informal justice processes, particularly related to the rights of children, women, and vulnerable and marginalized groups, in areas like FATA and PATA (where the existence of the state institutions such as judiciary and its capacity to deliver, in relation to the functions of the law-enforcing agencies is either absent or weak).
- The scope for improving respect for human rights principles and practices in informal justice systems, including the possible control and accountability mechanisms that need to be established for such improvements.
- Key programming opportunities and challenges for supporting greater alignment of informal justice processes with formal justice system and with the requirements of human rights standards, including possible opportunities for UN joint programming.

Evaluation Management and consulting organization

The evaluation was planned and managed by the Secretary, Law & Justice Commission of Pakistan and UNICEF of Pakistan. A team, consisting of eight members, evaluated the work

of the consultants. A core group was also formed in the Sindh Judicial Academy to advise the consultants on technical issues.

Group of consultants composed of a Principal Investigator and three legal/Human rights experts. The Principal Investigator, Mr. Justice Saleem Akhtar, is a retired Judge of the Supreme Court of Pakistan, former Federal Tax Ombudsman and presently Honorary Director General, SJA. Mr. Justice Mushir Alam a Judge of the High Court of Sindh and Director, Karachi Centre for Dispute Resolution, Mr. Muhammad Shahid Shafiq, presently working as Additional District and Sessions Judge Sukkur and Mr. Iqbal Ahmed Detho, a human right consultant, were involved actively throughout the study.

Data Collection Methodology

The study was initiated in the first week of November 2008 after the assignment was awarded accordingly document review was started. To collect information/data a questionnaire was designed in which Mr. Fahim Ahmed Siddiqui, District Judge, Karachi South was also associated. The form was translated in national and local languages. Data collection officers were imparted training for collecting information. It was made them understood to collect information from all stake holders of formal and informal justice system including those who have participated and faced the proceedings either in capacity of victim or accused. The Principal Investigator conducted in-depth interviews of *Naikmards* (notables) and headman of tribes at Sukkur, Larkana, Shikarpur, Ghotki and Karachi.

Sukkur-based data collection process in Sindh began on December 1st, 2008. NWFP and Baluchistan were visited in the third week of December 2008. A preliminary briefing was held on December 6th, 2008 with all the consultants in SJA. A final briefing for data collection staff in Sindh took place in the third week of December 2008. Five data collection officers were selected. The circumstances did not allow the Principal Investigator to visit each field site particularly in NWFP and Baluchistan due to political and security situation in those areas. During study period, mix group of the communities and professionals, linked with informal justice system, were interviewed. Questionnaires were filled in at the field sites. A list of the persons approached during the study period is part of this study report. Few of the interviewees avoided disclosing their names and, therefore, their identity has not been disclosed. The interviewees were informed that their input will be used purely for academic and research purposes and they will not be quoted in any way to any authority or stakeholders of formal/informal justice systems. Few cases were studied during the study

period to understand the mechanism and effectiveness of informal justice system. Further the actors referred to in the case studies were interviewed to know the level of their satisfaction from each system.





Evaluation

&

Findings

EVALUATION & FINDINGS

Types of mechanisms, their history and normative 'mandate' and basis, and their normative/customary framework

Types of mechanisms

Traditional or informal justice system is an alternative system of dispensing justice by which the disputes are settled for individuals and between two families, communities and intra or inter tribes. In the context of Pakistan, this legal pluralism has taken the shape of tribal justice system under various forms and denominations. Prominent denomination amongst those is *Jirga* in NWFP, Tribal Area and Baluchistan, *Faislo* in Sindh and *Punchayat* in the Punjab province. The growing body of scholarly work has focused on the realm of *Jirga/Faislo/Punchayat* as customary practice which legitimizes the 'Honor' related crimes or codes. The second aspect of *Jirga/Faislo/Punchayat* includes mediation; arbitration and reconciliation which are used as other methods of alternative dispute resolution that will be the focus of this study. This aspect of *Jirga* has not been subjected to inquest proportionate to the supplemental role it can play not only to reduce the back log of cases in official judiciary but provide redressal mechanisms for the victims. Thus traditional justice system in the form of *Jirga* is not new and has been prevalent and practiced in both officially designated and non-designated areas in Pakistan. In the aftermath of development of ADR mechanisms through court-annexed and other institutional arrangements around the world has revitalized the debate in the country as well as realization in the UN specialized agencies to analyze the impact of these mechanisms and their interaction with formal justice system.

Origin and concept

The origin of word *Jirga* is traced to Turkish language by some scholars³, while others base it in Pashto⁴, a language spoken in North-West Frontier Province of Pakistan and Afghanistan having similar phonetic characteristics with Dari, a dialect of Persian language. The word

³ M. Faiz-zad, "Jirga Hai Bozorge MillieAfghanistan", 1989, p.5

⁴ Atayee, I, "A dictionary of the terminology of the pashtun tribal customary law", 1978 p.1272

Jirga is derived from the root word *Jirg*⁵ meaning a 'wrestling ring' or 'circle'. But it is widely agreed that *Jirga* means "collection of people or gathering" in Persian.⁶ While discussing the term *Jirga*, thrust of this study will be to evaluate the dynamics of *Jirga* system as a form of judicial dispensation meant to settle the disputes for the people in general and for vulnerable groups such as children in particular.

The word *faislo* has various meanings, encompassing resolution of a dispute, a settlement, a decision and a judgment. *Faislo* system can be used in an extended family system, in the village community, and in the larger *birathari* or *qaum* (tribe). *Faislo* is used not only to resolve civil matters, but increasingly used to settle matters of life and death and serial killings in tribal feuds, says Mr. Karim Dino Badani, the main *musheer* in interior of Sindh. Thus *Faislo* seeks to resolve the dispute by not fixing the individual responsibility like the criminal justice system but operates in collective setting by bringing two families or communities together.

"*Faislo* is to mediate and the objective is to end the feuds by consensus of both the tribes", says Mr. Anwer Mahar, sitting Member of Provincial Assembly (MPA) from Sukkur City in Sindh Assembly. In order to bring warring parties or tribes to a negotiating table or for agreeing to have *Faislo* (mediation) various strategies are adopted. The concept of *Mairh minth* (caravans of peace, pardon and appeal) is a foremost strategy.

History: pre-colonial, colonial, and post-colonial

Before colonization it may be the head of the tribe or group of tribal chiefs (council of elders) presiding *Jirga*; and it was largely used as a customary law in pre-colonial settings which was mandated to resolve both criminal and civil disputes amongst tribes. Thus *Jirgas*, where no procedure of law was adopted, were used as substitute for courts. The rulers of the sub-continent were having the system of *Kardars*⁷ as revenue collectors with joint responsibility of controlling crimes. Thus the concept of the *Jirga* is embedded in the custom where the heads of the tribes used to decide the disputes of their tribes but later it was redefined in the light of crime, custom and law with differential powers vested in various tribes.

As colonial masters opted for strategic compromises to secure indirect rule through a class of local middlemen, predominantly feudal lords and tribal chiefs, that led to the merging of

⁵Definition of *Jirga* in Dictionary 'Ghyathul-lughat', 1871, p.119

⁶ Dictionary of Persian and Urdu Jamia, 'Feroz-ul-lughat', 1980, p.320
2004 P cr L J 1523

⁷Nafisa shah, "Mediations in the frontiers" in her Ph. D. dissertation, notes available on file with writer.

tribal arbitration with English laws (common laws). As the then first Judicial and advocate-general of Sindh, Captain Keith Young wrote⁸, “The only significant difference between the tribal and colonial legal system was that the law went from being oral to written and later it was used as semi-judicial body through which the local administration controlled the law and order situations by calming down the warring tribes in the frontiers of the British Empire.” It is observed by many commentators that *Jirga* councils were constituted by the British as a political way to strengthen their borders by winning the loyalties of tribal chiefs. However, bureaucracy had the final say, as the chief officer in the area, called Political Agent, or then Deputy Commissioner, coordinated such *Jirgas* and had the last word.⁹ *Jirga* members were *sardars* (chiefs, also called *Tumandar*) of the tribes and each *Sardar* in his capacity as a member of the *Jirga* had special administrative and punitive powers. Rather than rationalizing and making the formal system stronger, the British colonizing powers have left justice in the hands of the tribal judiciary. The legislative history of *Jirga* has been discussed by Superior court in various judgments¹⁰.

From earlier days of colonization to independence and thereafter, a nexus existed between Tribal chiefs and the colonial British administrators, including the present civil bureaucracy (local Police); which is still going on. The judiciary as an institution has never been developed in Pakistan and particularly in tribal or semi-tribal areas largely because of the colonial administrative system itself; and moreover the mechanism of parallel judicial authorities of tribal chiefs arbitrating local customs was kept intact. The executive district magistrate, who was primarily a revenue collector, had judicial jurisdiction over criminal matters as well.

In post-colonial societies where the formal modern judicial institutions have not been developed and strengthened properly, the informal and the traditional justice systems are still widely in practice particularly in Africa and South Asia. In Pakistan, nowadays *Jirga* is not only used as a customary practice to legitimize honor crimes or harmful traditional practices like *Vani*, a system in which girls are given as compensation to settle the disputes, which is not the primary thrust of this study whereas it is also used as a mode of reconciliation, mediation or arbitration mainly for perceived communal harmony known as *Restorative Justice*. Local feudal lords or tribal chiefs in most cases are the members of

⁸Amilie Baras, The mechanics of honor in Pakistan, Journal article 2, Vol.3, No. 5 October 2004, by AHRC.

⁹ Prominent laws which conferred widespread powers on colonizing administrators were Frontier Crimes Regulation enacted in 1901 and other laws during colonization period.

¹⁰ PLD 1957 Quetta 1, PLD 1957 Peshawar 100, PLD 1991 Quetta 5 (Confirmed in PLD 1993 SC 341), 2004 P.Cr.L.J 1523 (Karachi)

parliament and sitting ministers in both the provincial and the federal governments¹¹ they are the linchpin of this system. Jirga is practiced under various denominations in Pakistan which are called *Fasilo* in Sindh, *Panchayat* in Punjab, *Jirga* in Balouchistan, North West Frontier Province and FATA. However, through subsequent amendments in the Frontier Crimes Regulation (FCR), *Jirga* by law has been only confined to the Federal and Provincial Administered Tribal areas in NWFP and some areas in Balouchistan¹²; but *Jirgas* are running *defacto* in other areas, through passive and active support of elements involved in criminal justice system of the state. Interestingly, under article 247(7) of Constitution of Pakistan¹³ which specifies that the jurisdiction of the higher judiciary (High Court and Supreme Court) does not extend to the designated Federal and Provincial Administered Tribal Areas, which have their own legal and judicial regime based on tribal adjudication.¹⁴ Despite the legislation of banning the System of Sardari (Abolition) Act, 1976, that prohibited the *Jirga* outside the designated areas, they were taking place as an alternate avenue. There are various types of Jirgas that exist in the contemporary tribes. Most notable among these are:

Sarkari Jirga

Established under the Frontier Crimes Regulation (FCR) 1901, the magistrate, the political agent or his assistant can designate a group of elders to try a criminal or a civil case. The FCR authorizes settlement of quarrels by this Jirga that arise out of blood-feuds, relating to zan, zar, zamin (women, wealth and land) and all other questions affecting the Pakhtoon honor and way of life. This Jirga can inflict a maximum penalty of up to fourteen-year imprisonment.

¹¹ Prominent being the sitting Chief Minister of Balochistan, Mir Hazar Khan Bijarani, the Federal Minister for Education and Senator Israrullah Zehri, the Federal Minister for Postal Services are tribal Chief of their respective tribes.

¹² Zafar Hussain, 'Manual of Jirga laws in Pakistan', 2005, p.6

¹³ The constitution of Islamic Republic of Pakistan was adopted in 1973. Since then it has undergone seventeen amendments. Up till now none of rulers, either military or civilian, has abolished the FCR in designated areas. The recently elected Prime Minister, in the wake of 18th February 2008 elections, in his maiden speech in the National Assembly on 30th March, 2008 called for the repeal of the FCR.

¹⁴ Under Article 246 of the Constitution of Pakistan, 1973 the FATA includes seven districts or Agencies i.e South Waziristan Agency, North Waziristan Agency, Khurram Agency, Arakzai Agency, Khyber Agency, Mohmand Agency and Bajur Agency, For detail discussion see also the case of Government of NWFP Through Chief Secretary and another v Muhammad Isrshad and 3 others PLD 1995 SC 281.

Qaumi or Ulusi Jirga

The Ulasi Jirga is an assembly of the elders comprising each household of a certain village or community. It is convened to discuss matters such as collective property, rights and distribution of irrigation water, or common concerns, like selection of a site for a school, etc.

Shakhsi Jirga

This Jirga is formulated in case a dispute arises between two individuals or families. The Jirga members are chosen from both the parties to arrive at a just settlement acceptable to both sides¹⁵.

System of Panchayat had taken birth as a statutory and elected body that enjoyed the mandate of village development at the rural level. This statutory recognition was extended by the colonial rulers in early 1888 in the presidency of Madras, when the Village Counts Act of 1888 was passed.

1907 was the year when The Royal Commission on Decentralisation recommended the setting up of panchayats in the backdrop of its useful functions in settling criminal and civil cases of petty nature at the village level. Eventually, the Panchayat Act of 1912 was passed, extending civil powers to the panchayats, which had earlier been performing only as arbitration committees. Since the jurisdiction of this Act was limited to suits where both parties agreed to take their cases to the panchayats, it virtually proved ineffective. This situation led to the passing of another Act called the Punjab Village Panchayat Act of 1922 (Punjab Act III of 1922) to restore the old authority of the panchayat. This Act was further amended in 1939 with a threefold strategy including a) to act as a judicial body for the decision of petty civil and criminal cases; b) to act as an administrative body for the performance of certain duties with regard to sanitation; and c) to act as a legislative body, and was given the right to impose taxes and to pass general orders, requiring the inhabitants

¹⁵ An article 'Jirga: Speedy Justice of Elders' written by Dr Mumtaz Bangas (www.khyber.org/culture/jirga/jirgas.shtml)

of the area to abide by certain rules to improve the general standard of life within the jurisdiction of the panchayat¹⁶.

The panchayat at the village level meets as and when required in order to settle disputes or attend to communal issues. The disputes and communal issues range from disagreements over water, women, boundaries, and the division of crops with labourers during harvest, to campaigns to secure electricity supply for the village.

Furthermore, with the active role played by the media in highlighting the curse of the panchayat system, especially against womenfolk and children, serves to drive the last nail in the coffin of the century-old panchayat system. Masses are not in favour of any further continuity in a system that perpetuates class distinctions/discrimination. Easy money, changing social mores, and higher mobility of population are other factors that have contributed to the loss of credibility of the panchayat system.

Today, the trend of approaching the regular courts instead of trying one's luck at the panchayat is becoming popular. The panchayats, as a matter of fact, are considered to be the hub of oppressors, and cases like Mukhtaran Mai have enough evidence to prove that women are most vulnerable to the situation at the rural level. Factors such as class disparity and keeping women at a disadvantage have put the panchayat system on the verge of collapse, and both the media and the human rights activists have established the point that panchayats cannot act as substitutes for judicial forums.

Women, interestingly, were total strangers to the panchayat composition and they seldom impress upon the panchayat decisions by virtue of their powers of persuasion and influence.

The panchayat system has lost credibility now a days and the awareness regarding formal judicial system has increased manifold. Also, since the panchayat system still follows the old tradition of supporting the influential and the wealthy from among the community,

¹⁶ During desk review an article 'Question of Credibility', written by Hamid Waleed, published in the daily 'The News' describing the history of panchayat was reviewed. www.jang.com.pk/thenews/ar2008-weekly/nos-27-04-2008/spr.htm.

therefore, the faith of the masses is diminishing with every passing day particularly in the case of a woman either in capacity of accused or victim¹⁷.

Composition (including gender perspective)

While *Jirga* is a formal gathering as already mentioned, now incorporates civil bureaucrats and the local police chiefs due to official patronage particularly for resolving tribal feuds; so it is a more informal institution but still maintains differential treatment where women are still prohibited in all situations be it victims, witnesses or participants. In cases of compensation and evidence it interacts with the principles of criminal justice system¹⁸.

Categories of crimes, penalties and punishments

Under the formal justice system there are number of categories of crimes which are part of different legislations and accordingly their penalties and punishments have been defined in general and special laws. It would be out of scope of the instant study to discuss all of them here. However, under formal justice system warning, fine, simple imprisonment, regressive imprisonment, imprisonment for life and capital punishment are formally pronounced.

Under the informal justice system the dual forms of dispute resolution are adopted by different tribes and communities such as in Aga Khan Community disputes of criminal nature are not normally taken up in urban settings while in the Northern Areas the arbitrators/mediators try to resolve the matters of criminal nature too in their community. In urban areas petty issues which have some connection with family dispute or civil matters are considered and dealt under informal justice system.

In rural areas of Sindh, under *Faislo* or *Sulh* disputes related to crimes committed by a member of a community or a group of the community intentionally or unintentionally or due to misunderstanding or accidentally, are taken up. Following are the categories of the disputes/crimes that are dealt with under informal justice system in interior of Sindh:

¹⁷ Mr. Shoukat Dawood, Ex-Minister Punjab Bait-ul-Maal (Sadiqabad) and Ms. Rukhsana Piya, advocate Rahim Yar Khan have expressed their specific views on this point. Many others from the Province of Punjab were of the same view.

¹⁸ During field research some members of criminal justice system (Judiciary and Police) acknowledged the role of *Jirga* in reducing tensions between disputants and particularly to effect the arrest of accused and absconders support is solicited through tribal chiefs.

Table 1

Sr. No.	Nature of dispute	Penalties & Punishment
1.	Dispute on demarcation of Agriculture Land	Resolved in accordance with the revenue record and testimony of the witnesses on site.
2.	Dispute regarding distribution of water	Resolved as per due appropriation of water share in irrigation record and severity of the matter.
3.	Neighborhood disputes	Amicably resolved with the consent and representation of both parties.
4.	Matrimonial disputes	Resolved amicably - parties usually rejoin each other, in case of dissolution of marriage, maintenance is fixed and husband is liable to pay to the wife and children.
5.	Theft of goat, buffalo, standing/stored crops,	Resolved amicably - the accused or his family members resolve or pay compensation in case the property has been disposed of.
6.	<i>Karo Kari</i>	There were different opinions. Few of the <i>Sardars</i> reported that the girl if proved as <i>Kari</i> is not given to the husband and some time parents or <i>Sardar</i> arrange her second marriage with some suitable person. She normally does not reside in the same area. Few of the <i>Sardars</i> informed that earlier <i>Kari</i> had to face murder but due to judicial orders this practice has been stopped. Few informed that such girls get shelter in <i>Sardars</i> places.
7.	Injuries, attempt to Murder, murder,	Compensation is paid to the injured and the legal heirs of the deceased. In case of murder of a woman compensation amount is double to that of the murder of a man. In cases of murder usually an amount Rs.400,000/- is paid for the murder of a man whereas in case of a woman compensation would be Rs. 800,000/-. This practice vary from tribe to tribe, however female is treated differently from a man ¹⁹ .
8.	Kidnapping	Normally women are victim of this offence. During <i>Faislo</i> it is ensured that the woman is taken back and handed over to the family members of the victim.

There is a practice generally in all the areas of Pakistan that a woman is given in compensation for any kind of dispute either of civil or criminal nature. According to the

¹⁹ According to Mr. Sajjad Naqvi, a human right activist, 'there are nine big tribes in D.G. Khan and they follow different practices to compensate a woman in PUNCHYAT.'

tradition women are given in 'Nikah' to resolve different kinds of disputes. These marriages are known as 'Vani', 'Sakh', 'Sawara' and 'Sharam' with the difference of languages in different areas. National Judicial Policy Making Committee held a meeting in which they announced that 'bargain over women in the case of compromises under Vani is against Islamic values. The then Hon'ble Chief Justice of Pakistan Mr. Justice Sh. Riaz Ahmed presided over the meeting while other participants included Mr. Justice Fazal Elahi Khan, Chief Justice Federal Sharait Court, Mr. Justice Raja Fiaz Ahmed, Chief Justice Baluchistan High Court Mr. Justice Iftikhar Hussain Chudhri, Chief Justice Lahore High Court Justice Shakir ullah Jan Chief Justice Peshawar High Court, Justice Sabih ud din senior judge Sindh High Court and committee secretary Dr.Faqir Hussain participated in the Meeting. They noticed the 'Vani' and resolved it against Islamic Laws because a marriage demands the will of both sides. Committee resolved that it is prohibited under sections 310 and 338 (E) of Pakistan Panel Code to give a woman in marriage or otherwise in badal-i-sulh. It was resolved in the meeting that all the Chief Justices are bound to issue notice to all 'Trial courts' and 'Appellate Courts' to strictly notice Vani cases²⁰.

There is no difference in awarding punishment if the accused is below the age of 18 or the offence is committed by a woman. However, in such cases family members of the offender are responsible for execution of the decision taken in *Faislo* or *Sulleh*. It is also a tradition in the provinces that in case of serious dispute between the parties, a woman of the family is given to other family for developing harmony . This practice is known as *Sangchatti* in Sindh and Baluchistan. However, this practice is being discontinued due to active role of NGOs and Media as human rights activists are of the view that such practices/decisions of actors of informal justice system violate basic rights of an individual granted under the Constitution of Pakistan.

Almost similar practices are followed in other provinces; however, they are known and named in different terms. For example *Sangchatti* is termed as *Vani* in the Punjab province, and *Walwar* in NWFP. Disputes relating to murder and agricultural land are usually resolved through this mode. This practice caused involved human right issues. In most of the cases, wish of the girl is not taken into consideration. The High Courts in Pakistan have declared Jirga unlawful and observed that most of the time the *Jirga* or *Punchayet* or *Faislo* system or as envisaged in legislation like Frontier Crimes Regulation violate fundamental rights of a person and do not give opportunity of being heard to all the parties to the dispute

²⁰ Excerpts from the minutes of meeting of National Judicial Policy Making Committee dated 21-12-2002.

and, in particular, women and children. (A judgment of Sindh High Court reported in 2004 PCr.LJ 1523).

"Everyone has the right to life, liberty and security of the person". Article 3, Universal Declaration of Human Rights.

Article 16 provides: (1) "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group, unit of society and is entitled to protection by society and the State."

The principles laid down in the above articles are not observed in Pakistan in letter and spirit. Old customary practices like Karo Kari and honour killing are still followed in different rural parts of Pakistan.

Karo-kari is a compound word literally meaning "black male" and "black female," metaphoric terms for adulterer and adulteress. Being so labelled leads more often than not to the murder of both man and woman allegedly guilty of having an illicit affair. This tradition has been resisted by Human Rights activists.

Over 4,000 people have been killed by this practice in Pakistan over the period of six years (1998-2004). Of the victims, almost 2,700 were women and just over 1,300 were men. 3,451 cases came before the courts. The highest rate of the practice of Karo-kari were in Punjab, followed by the Sindh province. Lesser number of cases have also been reported in North-West Frontier Province (NWFP) and Balochistan.²¹

In Pakistan honor killings are known locally as karo-kari. Amnesty International's report noted "the failure of the authorities to prevent these killings by investigating and punishing the perpetrators." Recent cases include that of three teenage girls who were buried alive after refusing arranged marriages. Another case was that of Taslim Khatoon Solangi, 17, of Hajna Shah village in Khairpur district, which became widely reported after the graphic account of her father 57-year-old Gul Sher Solangi, who allegedly tortured and murdered his eight

²¹ Felix, Qaiser (2004-07-22). "Honour killing and "karo kari" in Pakistan". www.asianews.it/view.php?I=1187

months' pregnant daughter on the orders of her father-in-law, who accused her of carrying a child not conceived out of wedlock. Statistically, honor killings enjoy high level of support in Pakistani rural society, despite widespread condemnation from human rights groups. Recently (2005), the average annual number of honor killings for the whole country ran up to more than 10,000 per year. According to women rights advocates, the concept of treating women as property and honor is deeply entrenched in the social, political and economic fabric of Pakistan. The government normally ignores the daily occurrences of women killing on account of Karo Kari and family honours. Frequently, women murdered in "honour" killings are recorded as having committed suicide or died in accident.²² According to DPO Sukkur rate of murder cases on account of Honour Killing is high in district Sukkur, Larkana, Shikarpur and Khairpur. Property and land, self interest and the plan to get a specific woman as compensation are some of the causes for honour killing.

In a petition filed by the Human Safety Foundation (HSF) the Division Bench of High Court of Sindh comprising of the then Chief Justice Anwar Zaheer Jamali and Ghulam Dastagir J issued notice to the jirga members involved in declaring a married couple as karo-kari and directed them to appear before the court.

The HSF had filed the petition for protection of life of the victimized couple Saira Jatoi and her husband Ismail Somroo, declared as Karo-Kari in Jirga by Sardar Abid Hussain Jatoi and members the Jirga.

The court had asked Home Secretary, Sindh and IGP to submit report about rulings of different jirgas in the province. The petitioner had expressed concerns for not taking any action against the culprits who were threatening the couple.²³

The penalties and punishments awarded during *Jirga/Faisla/Sullah* are different from the punishments prescribed in formal justice system. The informal justice system basically emphasizes on compensation rather than imprisonment or detention. The standards of compensation may vary from jurisdiction to jurisdiction and tribe to tribe.

Social monitoring system linking up with informal diversion system

No social monitoring system linking up with informal diversion system exist, however, in different communities/tribes, headman of the tribe wields influence on his people and

²² http://en.wikipedia.org/wiki/Honor_killing

²³ Constitution Petition No. 1571 of 2008 filed by Human Safety Foundation (HSF)

commands respect. Since the parties to the dispute respect the headman of their tribe, they obey his verdict given either in shape of *Faislo* as arbitrator or *Suleh* as mediator. They motivate the parties to reach a conclusion or face sanction.

The followers of *Pir Sahib Pagara* are located throughout interior of Sindh. Pir Sahib manages and supervises a very strong system for redressal of grievances of his followers. People of different communities also approach him to resolve their disputes. If a decision is made usually the parties obey and in case of non-compliance the defiant faces social boycott and sanction. This practice is called "*Hat Bandh*" (hands tie down).

Sometimes a party to the dispute happens to be employed on the land of decision-maker, therefore, there are some bindings on them to follow the decision/*faislo*. Poor living condition, low social status, inaccessibility to justice and high cost of formal judicial apparatus are key factors which leave little or no option but to obey the verdict of headman of the tribe irrespective how biased or unjust it may be.

Most of the headmen of the tribe have aligned with political forces and wield support of administrative and state machinery. They contest elections of a provincial and National Assemblies and become members of legislative houses. Such personalities sometime use coercive measures to implement their verdict by abusing their political, administrative and executive clout and machinery, like office of the Nazim and the local police. In some cases the involvement of criminal gangs is also reported.

Some of the headmen of a tribe maintain private jails or detention centre at their *Otaks* and in case of disobedience or repeating the crime or non-payment of compensation, the person is kept there for a certain period. This practice is diminishing due to the active role of NGOs and Media. However, where the writ of law is weak, isolated incidents do surface from time to time usually when raids are conducted under order of courts in *habeas-corpus* petition.

Interaction and relationship between formal and informal justice systems and impact.

The Government of Pakistan has made attempts to integrate and develop relationship between the formal and informal justice systems. A number of legislations have been promulgated at the Federal and Provincial levels. The Local Government has also initiated to strengthen informal justice system. The Local Government Ordinance, 2001 (LGO) is the best example. It provides a basic framework for resolution of disputes amicably through *Musalihat Anjuman* (MA). The MA is envisaged under the LGO at the provincial levels which

selects panel of non-elected persons from the community through Insaf Committees (ICs) at union council level, who are publicly known as persons of integrity, good judgment and command respect. Moreover, under section 104 of the LGO, cases may be referred to MA by any court where proceedings are pending. Earlier conciliation Committees were constituted for redressal of petty issues at the union council level. This study informs that police and courts in interior of Sindh refer cases of criminal nature (compoundable) to the decision-maker of informal justice system where heinous offences like murder, injuries and theft, pending in formal courts are usually privately resolved through mediation by decision-makers of informal justice system and the parties simply file compromise application in courts. Some times in non-compoundable offences the prosecution witnesses do not support the prosecution case, which results in acquittal of accused from the charge. In urban areas tenancy/rent matters and family matters are normally resolved in the courts without considering legal intricacies involved in the case as the legislations in family courts permit the presiding officer to make attempt to reconcile the dispute during pre and post trial. Similarly in rent matters the appellate court has been given powers under the Sindh Rented Premises Ordinance, 1979 to mediate the dispute between the parties and motivate them to reach a settlement. It is a common practice in dispute of civil nature that the parties during pendency of the action continue to explore settlement through informal justice system and on settlement file either a compromise or withdrawal application.

Present security situation in Pakistan – its impact on informal mechanisms

It is a two way process. If analyzed in the present situation of the worsening of the law and order situation and weakening of writ of law in certain areas, it can be deduced that informal justice system may be the best available opportunity to provide redressal mechanism for victims in those areas where formal justice system is dysfunctional or absent. But on the other hand if informal justice system is legitimized without regulating it then official mechanism will be undermined and the whole edifice of security and justice will depend on non-state actors and they would have capacity to weaken the formal system.

Decision by consensus or third party decision

In the interior of Sindh the informal system is known as *Faislo* or *Sulah*. Each party nominates two or more *Musheers* (Advisors). They are also *Naikmards* (Notables) of their vicinity or tribe. Each party explains their case to them. The *Faislo* is arranged at the *Otaq*

(*place*) of another Notable known as *Sarpench/Ameen* who is selected by the parties with their consent. If *Sarpench/Ameen* is not agreed by consensus, the victims have an edge in opting for the *Sarpench/Ameen*. The *Musheers* of each party discuss the case of their parties with each other and endeavor to reach at some conclusion acceptable to both the parties. Sometimes both the *Musheers* succeed in winning the consensus which is normally called *Sullah* (settlement) and in case they fail to reach at some conclusion the fifth man who is headman of *Faislo* (decision) intervenes and takes decision after hearing the parties and their *Musheers*. There is no mechanism for appeal.

The Shi'a Imami Ismaili Muslims, generally known as the Ismailis, belong to the Shi'a branch of Islam of which the Sunnis comprise the other. The Ismailis live in over 30 countries of the world, mainly in South and Central Asia, Africa, Europe and North America.

Islam, like Judaism and Christianity, is a monotheistic faith whose most fundamental principle is the belief in the Supreme Being - God, or Allah in Arabic - who is unique and without equal or partners. His Highness Aga Khan IV, who from the 1970s extended the practice to other regions including the United States, Canada and several European countries as well as East and South Asia, the Gulf, Syria, Iran and Afghanistan after a process of consultations within each respective constituency. In 1986, he promulgated a single constitution that, for the first time, brought under one aegis, the social governance of the worldwide Ismaili community, with built-in flexibility to account for the diverse circumstances of different regions. While the Constitution serves primarily the social governance needs of the Ismaili Community, its provisions for encouraging amicable resolution of disputes, through impartial conciliation, mediation and arbitration, are being increasingly used.

These bodies, known as the Conciliation and Arbitration Boards (CABs), operate today in Afghanistan, Canada, France, India, Iran, Kenya, Madagascar, Pakistan, Portugal, Syria, Tanzania, Uganda, the United Kingdom and the USA and are recognised as having jurisdiction over matters of Ismaili personal law²⁴.

²⁴“Arbitration and Mediation in the Shi'a Imami Ismaili Muslim Community”

Paper presented at the 4th International Conference of the World Mediation Forum
Mohamed M. Keshavjee, LL.M (London); (A Barrister-at-Law from Gray's Inn, London and an Advocate of the High Court of Kenya) May 10, 2003, Sheraton Hotel & Convention Centre, Buenos Aires, Argentina.

In Aga Khan Community there is a structured mechanism of Arbitration and Mediation. The mediators/arbitrators are appointed by His Highness The Aga Khan. The mediators/arbitrators after being selected have to undergo training program to be able to mediate and arbitrate proceedings. A person is appointed in a particular territory for resolving the disputes. Normally 75% disputes are mutually resolved in the forum. There is no forum of appeal. The parties, who do not agree or reach at consent decision, opt for formal justice system prevailing in a particular jurisdiction. The arbitrators/mediators acts voluntarily and the facility is free for the parties.

In NWFP a number of studies have been carried out on restorative system, particularly Jirga system. There are different type of assemblies known as *Jirga* (assembly) for a localized dispute and for larger dispute or inter tribe dispute *loya Jirga* (grand assembly) are held. The parties opt for the relevant one keeping in view the nature of dispute. Normally in NWFP the parties reach at decisions with consensus.

Types of decisions or outcome of these processes

Under the informal justice system decisions are made by awarding compensation to the aggrieved person. According to practitioners of the informal justice system, punitive measures in the form of imprisonment or detention are not awarded. However, such claim is not substantiated by the judiciary as large number of habeas corpus petitions are filed in the courts²⁵. Women are given due importance, for example in Sindh compensation for murder of a female is fixed at Rs. 8,00,000/- which is double the amount as compared to the compensation for the murder of a male person. A juvenile offender is dealt in different manner. Though he is also given the same punishment in shape of compensation but the amount is paid by his family members and in case they cannot pay (the amount of compensation), co-villagers or caste fellow contribute and pay to the victim. Sometimes minor offenders are dealt with leniently. According to Faiz Rasool *"In urban areas where Panchayat system effectively works, wrong doer/accused is not convicted but different types of punishment are awarded which include payment of fine, transfer of land, hand of a girl (BAZZO) ²⁶ from family and in case the accused is from very low social status and there is no female in his family*

²⁵38 number of *heabus corpus* Petitions were filed in District & Sessions Court Karachi-South in six months period.

²⁶ Under this practice a girl of accused family is given to victim party and her Nikah is solemnized with a male member of victim. Normally a young girls is given.

than the accused is asked to undertake for giving hand of baby girl which is yet to be born and for this they use the words 'PAIT DAINA'."

Procedural aspects of informal justice systems

Who/how to bring complaints

Most of the times, both the parties approach the *Sardar*/Notable to resolve their dispute and some time one of the parties approach a *Sardar*/Notable who subsequently calls the other party. Sometimes, in Sindh, the courts also refer the parties to the Notables/Saliseens/Sardars/Wadero/Pirs/Syed or Shah for amicable settlement of the dispute. In Sindh, dispute between two tribes are also referred by a police officer to *Sardars* of third tribe. During the course of the study, the District Police Officer, Khairpur²⁷ informed that a dispute between two tribes involving murder of 17 persons was referred to a *Sardar* which was resolved in one day. The *Sardars* took about 8 hours to bring the parties to agree. In NWFP and Baluchistan other organs of civil administration refer the disputes to non-institutionalized informal justice system. Due to pronouncement of judicial verdicts on Jirgas and negative propaganda of Media, the officials who commonly refer a dispute to a Jirga/Faislo, avoid disclosing their names. They even do not name the noteables/Sardars to whom, the disputes are referred to. During judicial proceedings the parties normally make adjournment applications mentioning reason that their compromise talks are going on and mutual decision is expected.

Gender issues

While discussing and deciding a dispute wherein a woman is a party in any capacity, she is given special treatment. She is normally not called in *Jirga/Faislo* however her *Musheers* and family members represent her and plead on her behalf. In case she is a victim and during dispute received injury, the offender shall pay double amount of compensation to her as compared to compensation paid for the injury to a man. Similarly, if in any

²⁷ Muhammad Peer Shah, District Police Officer, Khairpur.

circumstances the life of a woman is in danger, she is given shelter by a Notable of the community. This sometimes causes defamation to the *Sardar*, however, due to the role of human rights activist, NGOs and media this practice has been stopped. Now, in rare cases where a woman seeks shelter from her *Sardar*, she is allowed to stay in the *Haveli* with her fellow tribe female. Most of the persons interviewed during study expressed that 'women are not allowed to attend the Panchayat to defend them or to express their view point relating to dispute'²⁸. However under formal justice system women cases are proceeded on priority basis and they are given opportunity to be heard.²⁹

Hearings

Parties to the disputes are given proper opportunity of hearing. Most of the times, they are allowed to bring their *Musheers*. Usually each party brings two *Musheers* and their statements are sometimes recorded in writing. The *Musheers* asks the history of the incident from the relevant party. In disputes relating to Land, the *Notable/Sardar* personally visits the place of dispute and decides the matter. In matters such as land and property they usually seek assistance from the concerned government officers for verification of the record. However, in case the victim or the offender is a woman, she is not required to attend the *Jirga/Faislo*. Her family members usually represent her and plead the matter on her behalf. Majority (about 80%) of the respondents disclosed that in one or two hearing the issue is resolved in all denomination of informal justice system including punchayt/jirga/faislo. One of the respondents (victim/complainant) shared his personal experience of informal justice system. His case (murder case) was pending in the court of law for the last 4 years for decision but could not be decided. Both parties opted informal justice system. He said, "*Faislo consumed only one day (six hours) to resolve the differences between us and during hearing Nek Mard heard both the parties at length*³⁰". This reflects that aggrieved party gets quick and expeditious

²⁸ According to Mr. Faiz Rasool, a human rights activist from D.G. Khan Punjab.

²⁹ Mr. Abdul Razzak, Additional District & Sessions Judge, Sukkur informed that high court has issued specific directions for disposal of women cases on priority basis. Mr. Sharjil, District Police Officer, Sukkur also informed that in case of woman accused, investigation is completed in a shortest time period even before 14 days which are provided under section 173 of Cr.PC.

³⁰ Complainant of crime No. 24 of 2004 registered at Police Stantion Biji Shareef, District Sukkur.

decision on their dispute which could be a strong reason to opt for informal justice system.

Claimant's participation and expectations

As discussed above the parties fully participate in the process and they are also permitted to bring their *Musheers*. They are given full opportunity to participate and spell out their view points before the *Faislo/Jirga*. The parties to dispute expect that they will be provided justice in a shorter period of time. They do have expectation of cooperation from the community in case compensation is awarded. Parties to the *Jirga/Faislo* normally expect that they will not have to bear cost of the proceeding. Most of the Sardars, interviewed during the study period, stated that they do not charge from the parties; however sometimes the parties to the dispute bear traveling cost of the decision maker and some time food expenditure incurred on the day of decision. In the formal justice system the parties bear court fee and other expenses as well as advocate's fee and party losing, usually go in appeal.

Role of witness(es)

Almost all the respondents said that the witnesses play very effective role in the Panchayat/*Jirga/Faislo*. The *Notable/Sardar* while conducting the *Jirga/Faislo* may call and ask as many persons as they like to state the facts on oath. Sometimes witnesses or the parties are asked to take special oath on the Holy Quran. In Sindh, it is known as *Sakh* and in NWFP known as *Qassam*. Most of the respondents stated that witnesses play an active role during the proceeding and also at the end act as witness of the decision by signing the written decision. Decision is based on their evidence and facts disclosed by them.

Decision-making, both in terms of process and identity of decision-makers

The parties to the dispute themselves identify decision-makers under the informal justice system, contrary to, formal justice system where they do not have any choice. *Faislo* seeks to resolve the dispute by bringing disputants

together. *Faislo*, the name given to mediations in Upper Sindh whereby conflicting sides resolve disputes, according to the people, is an eventuality; and it is said that there is no alternative to this course. "During the British times, a stage used to be set for the *Jirga* council. It was an elevated platform while other people would sit on the ground", says Mr. Babal Jhakrani, who decides tribal feuds and other matters in districts Naseerabad and Dera Murad Jamali in Baluchistan. Such elevated '*kursi*' or chair was the mark of honour conferred by the colonial authority and even now *Sardars* follow such settings with local variations.

The ceremony of the *Faislo* is chaired by a *Sarpanch*,³¹ usually a chief of a *Qaum* (Tribe/community). The function of the *Sarpanch* is to steer and supervise the *Faislo*. *Sarpanch* is agreed by consensus, but in case of disagreement the victims have an edge in opting for the *Sarpanch*, and in the tribal clashes choice is imposed by the government like Governmental *Jirgas* allowed in designated areas but to maintain transparency mutual agreement on nomination is preferred. *Musheers* or advisors sit next to the *Sarpanch*. The *Musheers* are nominated by each side, acting as mediators. They represent the point of view of the side that nominates them but also have the authority to amend the point of view, in order to settle the matter. Unlike the professional lawyers of criminal justice system, *Musheers* are volunteers who represent their sides as a part of the overall political or social responsibility. According to Mr. Peer Muhammad Shah, the District Police Officer of Khairpur, *Musheers* are not given monetary benefits but they carry local and tribal bias and prejudice. In addition, each side must have a guarantor, a *Zamin*, from within their group who guarantees mostly in writing the implementation of the *Faislo*, no matter what the outcome may be.

Unlike the state system of justice there is no appellate authority and the *faislo* is neither reviewed nor held again but the compensation if imposed could only be compounded or waived by the victim party or the tribes. The main instrument of establishing guilt or innocence in the *Faislo* is *sakh*-oath. There

³¹ The term is also applied to *panchayats* the village councils in rural Punjab and is probably derived from there. *Sar* - means head, and *panch* - is derived from *panchayat*.

are various ways of taking *sakh*, but more important than the oath itself, is who would take the oath. The *Faislo* chooses a respectable called *Chango/Naikmard/Malik* (the one who never lies or cheats) to swear on the Holy Quran.

In few Baloch tribes/communities if the Naikmard could not reach on any decision after hearing the parties and their witnesses, a unique practice is adopted to know the truth. According to Sajjad Naqvi “In few tribes, even in D.G. Khan, the accused is asked to walk on fire. If he crosses the way without sustaining injury, he is declared innocent³².”

Another unique method of *sakh* is the *charbeli* - a fire ordeal³³. The accusing side names a person who should take the *sakh*, and walk through a 12 foot pit of burning embers. If the person taking fire ordeal burns his feet, then the accusing side claims are considered to be true. The *charbeli* is particularly identified with the *Bugti* area, on the borders of Upper Sindh, and Balochistan but has now been adopted by some traditional mediators in other jurisdictions. The person named is made to go through the fire ordeal and have his feet bathed immediately in goat’s fresh blood. If there is a slightest scratch or burn on feet, it amounts to admission of guilt of the accused.

Enforcement of decisions; monitoring; recourse

Under informal justice system disputes are normally decided with the consent of the parties. The decision is made in black and white and parties to dispute put their signature in acknowledgement. The Notables used to issue written order but this practice is no longer followed. The parties in most of the cases act upon the decision of the *Jirga/Faislo*. The parties do respect the headman of their tribe/community and therefore obey the decision taken by the *Notable/Sardar* as Arbitrator or Mediator.

Possible support to claimant: legal aid, representation, material

Under informal justice system there is no concept of legal aid as understood in formal justice system. In tribal setting disputant may have assistance of *Musheers* i.e adviser to

³² A human right activist, from DG Khan shared during interview.

³³ Only in one instance of *Bhayo-Marfani* jirga, such demand for *charbeli* was made for settling tribal feuds in Shikarpur.

represent them. Before participation in *Faislo/Jirgo* the parties select or nominate some Notables to act as their *Musheers* who may be *Wadera* of their village. Normally *Musheers* are selected from those who enjoy good reputation in the community. The *Musheers* have sufficient experience to represent the case of their party. They may charge the parties to meet the expenditure of their participation. Normally the parties do not pay any amount to the person who decides the matter.

Protection issues related to victims and witnesses

Formal justice system do not provide adequate protection mechanism either to the victims or witnesses, same applies to informal justice system. Sometimes the victims or witnesses, under informal justice system are given shelter by the notable of the community or village. Under formal justice system one may seek protection subject to making written request to an authority. Normally women and children are given special treatment and attempts are made to provide protection while their matter is pending adjudication.

Implementation of decision/compromise within the informal justice system

Over 20 percent of the world's population is Muslim. The Islamic justice-legal system did not generally require any lawyers since the litigants themselves pleaded their own case. Disagreements and disputes were settled within the organic society through the community as well as formal processes.

The population of rural areas has more faith in the informal justice system and they desire to resolve their dispute in the light of Quran and Sunna. Normally decisions are made on oath in the presence of a number of persons of the locality/village who are assembled to participate in *Jirga* proceeding. The religious aspect as well as commitment before a number of persons of the locality socially compel the parties to accept and implement the decision taken in *Jirga/Faislo*. Formal justice system also provides a mode of decision making by taking special oath by one of the parties but this practice is not normally followed and adopted in the courts.³⁴ Sometimes gender violence cases are not directly referred to or brought for redressal in informal justice system.

³⁴ Article 163 of Qanoon-e-Shadat, 1984

Human rights aspects viz a viz women and children

Government of Pakistan should adopt a mechanism by which informal justice system can be regulated through official machinery. Furthermore, it should also ensure the protection of the fundamental rights enshrined in the Constitution of Pakistan, 1973 and international obligations arising through the signing or ratification of international treaties and conventions such as CEDAW, CRC and recently signed ICCPR and CAT on 17th April 2008. The signatory states are duty bound to respect, protect and fulfill obligations. Such states should refrain from taking actions which may be injurious to its citizens and the authorities cannot arbitrarily deprive any one from enjoyment of such rights. The states must exercise 'due diligence' in the prevention, investigation or punishment of delinquent persons. In the case of Council of elders or *Jirga* decisions impinge on the exercise of such obligation/duty of the state. However, implementation of international obligation of observing minimum judicial standards at the grass-root level requires sufficient political will and legislative measures to create harmony amongst various organs in preventing abuses by traditional justice system.

The institution of *Jirga* is deep rooted in culture, traditional and customary practices. It is equally intertwined with social order of communitarian life. Over a period of time this informal justice has taken many transformations. Thus *Jirga* has developed in its present indigenous norms, processes and mechanisms for resolving the disputes.

Human rights implications of the delivery of justice through informal mechanisms, especially for women, children, and vulnerable and marginalized groups

Under international human rights standards, states have an obligation to promote and protect the human rights of all persons within their jurisdiction. Human rights treaties to which Pakistan is a contracting party require to 'ensure' that human rights are effectively implemented by respecting, protecting and fulfilling obligations.

The obligation requires the enjoyment of rights which also means that the state, in allowing some public functions to be performed by specific bodies like the *Jirgas*, has to ensure that the *Jirgas* must respect fundamental rights, values and dignity in accordance with law.

Many of the practices that have crept in *jirga* are violative of the Constitution and laws of Pakistan; for instance *CHERBELI* i.e. walking over coal fire to prove innocence. Such practice amounts to torture or cruel, inhuman or degrading treatment or punishment. Torture is prohibited under the Constitution and laws of Pakistan. Host of international human rights standards such as the Universal Declaration of Human Rights (UDHR) says in Article 5: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*" Similarly article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits the infliction of torture and Convention Against Torture (CAT) exclusively aims at prohibition of torture.

Article 8 of UDHR states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted (to) him by the constitution or by law." Article 10 says: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11(1) of UDHR states: "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

When effective redressal in state judicial apparatus is inaccessible or beyond approach then aggrieved party has no option but to seek refuge in informal justice system. It is therefore imperative for the state, to reform the official judicial system to make it more effective, accessible and integrate informal justice system where it does not come in conflict with existing laws and is fully in consonance with relevant international standards. Furthermore, the Constitution of Pakistan, 1973 (Arts. 4, 9, 10, 11, 12, 13, 14 & 25) call for equal treatment and protection and positive action on the part of state to shield the rights of its citizen. Some of the decisions of informal justice system which legitimize the harmful traditional practices like *Vani* in Punjab, *Sangchatti* in Sindh & Baluchistan and *Walwar* in NWFP, are not only in-conflict with the Islamic values and laws of the land but also in negation of international obligations under various treaties to which Pakistan is a party.

Community perceptions regarding Informal Justice System.

Tribal *Sardars*, either as members of parliament or executive in the form of ministers, have themselves held or patronized the *Jirgas* or tried to institutionalize the dispensation of tribal justice. Few observers including Haji Anwar Mehar³⁵ have called for its abolition urging at the same time that the official judiciary be strengthened and reformed.

Political parties have not taken any clear cut position on the issue of the traditional justice system. Mainstream parties holding power and authority at Federal and Provincial level have not made any serious attempts to ensure that disputes are settled in accordance with statutory laws. Recent government's initiatives to use *Jirgas* to settle local disputes may have given new life to a system judged by some to have been in natural decline.

Some critics have pointed out that several of the supposed advantages of tribal justice that it is cheap and quick, familiar to tribal people and capable of solving conflict in a lasting way are simply not true. Some observers hence plead for a reform and renewal of the *Sardari* system on which the *Jirga* system is based. Others argue that if the *Sardari* system which is seen to be on decline can be reformed and an effort should be made to strengthen formal justice system.

Journalists and academics who have covered tribal developments in the interior of Sindh or rural Baluchistan for years have raised the concern that tribal justice grew due to failure and inaccessibility of the state justice apparatus. Such depending factors in turn undermine and weaken the official judicial system and respect for the rule of law. Efforts to settle tribal murders through *Jirgas* not only erode the writ of law and the government's authority but tend to patronize the feudal system.³⁶

Efforts on the part of Government and National Bodies to support the - informal justice systems.

The term "informal justice system" denotes Alternate Dispute Resolution (ADR) outside the court and it is often used to describe a wide variety of dispute resolution mechanisms that are alternative to full-scale court processes. The term can refer to every step from facilitating negotiations for settlement in which disputants are encouraged to negotiate directly with

³⁵ Haji Anwar Mehar, Member Provincial Assembly from Sukkur during interview and discussion insisted to strengthen existing formal judicial system for better result

³⁶ Amnesty International, "Pakistan: The tribal justice system", 2002, p.16

each other, sometimes prior to other legal process, like arbitration. Processes designed to manage community tension or facilitate community development issues can also be included within the frame work of community based Dispute Resolution like in the Aga Khan Community.

Informal justice system may be generally categorized as negotiation, conciliation/mediation, or arbitration systems. Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. It may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration authorizes a third party to decide how a dispute should be resolved.

Traditional ADR in Pakistan refers to the traditional centuries old system including *Panchayat (in Punjab)*, *faislo (in Sindh)* and *Jirga (in NWFP and Balochistan, FATA and PATA)* whereas public bodies ADR are attached to public bodies and includes *Arbitration Councils, Union Councils Conciliation Courts, Masalehat Committees, decisions through Saliseen under SCMOCO etc.* Arbitration Councils were confined to issues of divorce, permission for second marriage, and maintenance for wives. Union Councils provide arbitration forum (through elected councilors) under Muslim Family law Ordinance 1961 and looked after a few selected family related issues. Conciliation courts were established under Conciliation Courts Ordinance, 1961 and were vested with limited civil/criminal/pecuniary jurisdiction. Majority of the above initiatives were rendered ineffective for lack of concerted efforts and for bureaucratic and political motives and exigencies. Local councils (which had an important role in these form of ADR) were dissolved frequently and no clear strategies for capacity building of the members of these bodies were ever formulated. No serious efforts were made to institutionalize the mediation mechanism provided under the relevant enactments. Instant study being carried out by SJA in the field of ADR sponsored by UNICEF aims to provide better insight to the many facets of these systems and how they relate and interact with formal justice system. The endeavor is to support the program in the field of justice reform, and how such reform processes may work in the context of legal pluralism and informal justice resolution mechanism.

Recent Initiatives regarding ADR in Pakistan

- a. Grafting of Section 89-A read with Order X, Rule 1-A, Code of Civil Procedure, 1908 though a very rudimentary provision but it has sown seed for ADR mechanism in the primary procedural law in Pakistan.
- b. Small Claims and Minor Offences Ordinance, 2002 has been promulgated for providing exclusive forum (at the district level) for facilitating the resolution of smaller disputes. This law also provides ADR mechanism for facilitating the resolution and settlement of disputes within the framework of the formal court system. This could be transformed into an excellent forum for addressing disputes in the emerging justice sector in Pakistan. The mechanism under the Ordinance is not being used to its fullest capacity for lack of awareness amongst litigants and sustained training of judicial officers and other stake holders.
- c. Under the Access to Justice Program, the review of Arbitration Act represents a significant policy action. This review needs to be undertaken and capacity building initiatives put in place to promote effective arbitration regime in Pakistan.
- d. A new local government system through LGO has been introduced in Pakistan, establishing elected local governments at the level of Union Council, Tehsil (Sub District Level) and the District level. The institution of *Musalihat Anjuman* (literally means conciliation forums) has been provided at the level of Union Councils for dispute resolution through ADR (including conciliation, mediation and arbitration).
- e. The legislature has also provided following provisions regarding the ADR in various tax laws through finance bill, 2005 and ADR Committees have been formed to resolve taxing liability:
 - Section 134 A of the Income Tax Ordinance, 2001 and Rule 231 C of the Income Tax Rules, 2002.
 - Section 47 of the Sale Tax Act 1990 and Chapter X of the Sale Tax Rules 2004.

- Section 195-C of the Customs Act 1969 and Chapter XVII of the Customs Rules 2001.
 - Under the Finance Act 2006 ADR is made applicable even in cases where appeal has been filed.
 - Under current Trade Policy 2008-09 Initiative, Government of Pakistan propose to set up a “trade Dispute Settlement Organization” (TDSO) under the administrative control of Ministry of Commerce and the existing Directorate of Trade Dispute of Trade Development Authority of Pakistan (TDAP) will be brought under TDSO.
- f. Post amendment of Section 89-A CPC, International Finance Corporation (IFC), private wing of World Bank is working with close association with MOL and entered into MOU with Sindh High Court (SHC). SHC is supporting commercial dispute settlement through enhancement of court procedures as well as support for mediation in Pakistan. As a collaborative effort a nonprofit organization, a legal entity under the name and style of Karachi Centre for Dispute Resolution was conceived and registered on 30-11-2006 and became operation in February, 2007. KCDR the first mediation centre in the country has foreign accredited mediators and master trainers who are able to mediate disputes and train and sensitize stakeholders on ADR. It is expected to set up similar Project in Lahore (Punjab) and possibly other parts of the Country. KCDR has worked with Ministry of Law/AJP and trained 46 judges of District Judiciary in Sindh. In December 2008, KCDR trained legal practitioners in Karachi on ADR.

Scope for intervention through UNICEF, UNDP, and UNIFEM programmes, and constructive approaches to consider

Scope for intervention through UNICEF

The UNICEF may support the government to introduce effective restorative system while implementing legislations related to children. A model district or city may be selected for pilot project. Karachi would be an appropriate city as a number of communities are residing

there. The City Government, Social Welfare Department, Home Department, Law Department, members of civil society may be the stakeholders of the project. Necessary legislative measures may be needed to harmonize law with international standard. A Child Protection Unit having facility of investigation, detention, trial and rehabilitation may be set up.

Scope for intervention through UNDP & UNIFEM

The UNDP has worked out for introduction of ADR provisions of Provincial Local Government Ordinances 2001, and Small Claims & Minor Offences Ordinance, 2002. They may continue the efforts, however they may consider introducing court annexed mediation. Initially a model center in one district in each Province may be set up.

Liaison or networking with other stakeholders who are already working in the area of ADR may be established for instance ADB initiative for court annexed mediation centre under AJP. IFC, established KCDR, first mediation center in Pakistan, their expertise and experience in this sector may benefit UNDP, UNIFEM to avoid duplication or overlapping of efforts. ADB and IFC were also engaged on law reform of various legislative instruments such as CPC and other ADR/mediation interventions and initiatives. The provisions of CPC need improvement. Their intervention would be needed in this respect and the authorities may be motivated to make compulsory mediation before accessing the formal justice system. Sufficient efforts have been made to introduce ADR in Pakistan. UNDP, ADB and UNICEF in collaboration with provincial and federal governments, have arranged number of training and introductory programs. There is need to provide some infrastructure to execute and implement the idea of ADR. In family matters women are not given proper opportunity at union council level to represent and defend their disputes. UNIFEM may play an active role to facilitate women for availing better conciliation opportunity in or outside the court. UNIFEM may also motivate national level NGOs to establish and set up family dispute conciliation centres at provincial or district level.

Risk assessment of challenges that may be engendered through intervention

Human rights violations: Informal justice system in Pakistan context, particularly in rural areas, is not administered and supervised by law knowing or literate persons. In the present situation the headmen of the tribe or Notables of the community have their linkages and

affiliation with political and bureaucratic elite, which are used for mutual benefits at the alter of justice. Even if they are sensitized on human rights and gender issues, they may not respond properly to the people having affiliation with another political party and such situation may give cause to increase human rights and gender related issues in the community while they opt for informal justice system. Further the decision makers of informal justice system are not sensitized to treat properly with an offender or victim who is a woman or child. They treat women and children as tool of conciliation. Custom of *Vani* is the worst example of informal justice system. It would be very difficult to sensitize all the decision makers of informal justice system as there is no record available of the persons who act as decision makers of informal justice system. Due to feudal approach they would hardly conceive United Nation Human Rights approach prescribed for children and women. There is a need to take great care while introducing any legislation to further strengthen informal justice system.

Strengthening Tribal System: Informal justice system attracts rural area population due to its easy accessibility. It is cost effective and consumes less time for getting result. On the contrary formal justice system takes too much time to decide a case. Poor social status of rural area population, compel them to opt for informal justice system. It is quite possible that in case, a legal cover is given to *Sardari* system, it may strengthen tribe system and *Srdars/ Waderas* who already wield political and bureaucratic influence and may exalt more manipulative strength that may be a challenge to formal justice system. Mechanism of associating mediators/arbitrators/conciliators would need cautioned approach and well defined integrated mechanism.

Undermine the Judiciary: The importance of government judicial apparatus working under formal justice system may weaken, overall law and order situation may deplete and the State writ may be seriously threatened unless it develops an integrated system and reconciles it with the formal justice system.

RECOMMENDATIONS

a. To develop linkages between stakeholders of formal and informal justice system

The data collected during the instant study reflects that most of the cases pending for adjudication in formal justice system, initially in rural areas were dealt under informal justice system without court referral. Even during trial of cases parties engage in exploring settlement through informal means and the parties usually inform the courts when they reach at settlement. Presently there is no integration mechanism that may coordinate/connect decision-makers of two systems. Generally the settlement arrived through informal system between the parties is not brought on record of the formal judicial format. In civil cases parties prefer to file either an application for compromise or withdrawal of the case or allow the matter to be dismissed for non prosecution. In criminal matter of compoundable nature parties file compromise and in non compoundable cases parties do not support the prosecution that leads to acquittal.

Conflict resolution tools, and techniques and need to be developed, and integrated so that informal justice systems effectively interface with the formal justice apparatus of the state. It would bring the informal justice systems under regulatory discipline, inculcating value for fair play, adherence to basic principle of natural justice, minimum level of judicial protocol and human rights aspect while deciding the dispute amicably. Further it would ensure that the decisions are in accordance with Constitution and relevant laws. It is therefore, recommended that continuing efforts be made to devise and formulate mechanism for linkages between decision-makers of two systems. This would share the workload of the formal justice system. High Court may direct District & Sessions Judges to develop linkages between stakeholders of formal and informal justice system and for this purpose District Judge may use the forum of District Coordination Committee, established under Police Order 2002. The Committee is presided

by District Judge. Law & Justice Commission of Pakistan may suggest proper legislation for the purpose if so required.

b. To develop and design training module and material for mediators/arbitrators/conciliators/saliseen involved in resolving disputes under informal justice system and public bodies ADR mechanism.

There is a pressing need to develop, design and make available materials on regular and sustainable basis regarding awareness and capacity building including guidelines both on substantive and procedural matters in simplified vernacular language for the decision-makers of informal justice system. It would be more appropriate if a minimum standard is designed for processing the matter under mediation, arbitration, and conciliation. This practice may help eliminate bias, prejudice, illegality, violation of human dignity, fundamental rights and will tend to inculcate human values and respect for the constitution and law. Judicial Academies (Federal & Provincial) in collaboration with UNICEF, UNDP and UNIFEM may develop and design such material.

c. To develop policy for early hearing of cases where court referred mediation fails

It is recommended that a mechanism be developed for early hearing of court referred mediation cases where mediation fails. Fast Track or evening Courts may be established for trial of such cases. This would be an incentive for the parties who opt for mediation as in case of failure their case will be decided in shortest possible time by the said Fast Track Courts or Evening Courts. This practice may promote court referred mediation. High Court may frame rules under Civil Procedure Code and Small Claim & Minor Offences Court Ordinance for developing mechanism for dealing cases on fast track which fails in mediation process. Each High Court may also establish a fast track court in each district. Law and Justice Commission of Pakistan may suggest proper legislation.

d. To design material to introduce procedure adopted in informal justice system for general public, practicing advocates and newly appointed judges

The public is unaccustomed of the modern and structured techniques of mediation or conciliation. They need to be sensitized on social and gender issues, and to adopt structured mediation process, develop training material for handling procedural issues of mediation/ conciliation/arbitration. Such materials may be developed for traditional mediator as well as professional mediators who deal with court referred mediation cases. Law & Justice Commission of Pakistan may be asked to design the material with the technical assistance of UNICEF, UNDP or UNIFEM.

e. Formation of a coordination, evaluation and implementation committee at all level

It is recommended that coordination; evaluation and implementation committees at all level from Supreme Court, High Court, and District Court level be formed by associating members of formal justice system, informal justice system, civil administration, bar associations and other stake holders to regulate, coordinate, evaluate and implement the mechanisms of informal grievance redressal. Till such time a new law is promulgated to this effect or amendments are made in relevant law/s. The District Criminal Justice Coordination Committee functioning under Police Order, 2002 be authorized to act as such committee and District & Sessions Judge be authorized to coopt three members. This would create harmony among all the segments of the society as well as stakeholders of formal and informal justice systems. The NGOs and media personnel being human rights activist sometimes become very critical of decisions given by decision-makers of informal justice system. An error or omissions in decision of mediator may be discussed and rectified in the committee instead of publishing them publicly. High Courts may incorporate rules in CPC and SCMOCO for the working of the proposed committee.

f. To propagate existing provision of laws that link formal justice system with the informal justice system

It is recommended that provisions of laws that link formal justice system with the informal justice system may be brought to the knowledge of public at

large through effective awareness campaign at national level. It has been observed that the litigants and lawyer generally are not aware of the provision of laws that link both systems together. Example of Karachi Centre for Dispute Resolution (KCDR) in Karachi may be followed as it has designed introductory material and placed the same on the information desks of each district court in Karachi as well as the High Court of Sindh at Karachi, beside, its website www@kcdr.org also contains valuable information and guidance. There is significant change in behavior of the litigants and advocate (in Karachi) who now have started to opt for mediation process. High courts to encourage Bar Associations, individuals, professionals' organizations etc for establishing specialized mediation centres and promote the idea by referring cases to those centres.

g. To impart training to the legal practitioners and judicial officers, police personnel on ADR mechanisms.

The family laws, rent laws, Civil Procedure Code, Criminal Procedure Code, Small Claim and Minor Offences Ordinance provide opportunity to the parties to opt alternate procedure of dispute resolution i.e. mediation, conciliation, arbitration. The judicial officers though fully aware with the provision of laws but they do not have the capacity to apply these provisions. Through this study they were usually found to follow the litigation procedure instead of resorting to mediation either themselves or referring the parties for mediation. Most of the judicial officers, who were imparted training on ADR by KCDR³⁷, have expressed that unless clear cut guideline is issued by the High Court for referral of cases to outside agency they cannot refer the cases. Court annexed mediation is not in place. Though, the judicial officers were of the view that mediation is useful and yields result, but is time and energy consuming and if they themselves indulge in conducting mediation, many other cases suffer delay. For example, rent law empowers the appellate court to itself persuade disputants to reconcile the matter with the consent of parties. Civil Procedure Code (CPC) empowers to refer a

³⁷ MoL under AJP arranged training program for judicial officers of Sindh KCDR was engaged for imparting the training. Director KCDR shared the view points of J.Os with us during study period. It would not be proper to disclose name of individual judicial officers.

matter to the mediator. These provisions have not been applied properly by the judicial officers and legal practitioners. It is therefore, recommended that training programs for the judicial officers, staff and members of the bar may be introduced on regular basis. Previously some efforts were made under AJP & *Masalehat Anjuman Program* a project of UNDP. IFC, which has been instrumental in institutionalizing ADR and mediation in Pakistan have been sensitizing and training stakeholders on ADR and mediation. Training capacity of KCDR may be utilized to save cost and resources to reinvent the wheel.

Some litigations and advocates (on promise of anonymity) have complaint that some judges refer the matter to Mediation Centre although both or one of them does not wish such referral . The result is the mediation fails and the parties suffer from loss of time and heavy fee paid to the centre/mediator. In the circumstances it is recommended that mediation be made compulsory. Law & Justice Commission of Pakistan may look into the proposed amendment in section 89-A CPC, attached to this report, whereby mediation may be made mandatory even prior to filing a suit. Furthermore extensive training program for each actor of judicial proceeding may be arranged at district level by Federal and Provincial Academies.

h. To introduce court annexed mediation centres in civil and criminal cases at district level

Small Claims and Minor Offences Ordinance has been promulgated. High Courts have notified *salehseen* to mediate the disputes referred to them by the court in petty matters (in criminal jurisdiction compoundable offenses up to 3 years and civil disputes involving an amount upto Rs. 1,00,000/-). The experiment/exercise has not succeeded so far. The judicial officers duly trained on ADR mechanism are of the opinion that the parties do not opt for the mediation process outside the court due to two reasons; firstly it would cost them more and secondly in case of failed mediation the case will be delayed. It is, therefore, recommended that court annexed mediation centre need to be established and the parties having petty disputes may not be charged for mediation proceedings. IFC due to their expertise in ADR may be

approached for their advisory support and some collaboration may be explored with UNICEF, UNDP and UNIFEM and MoL, have substantial financial resources but lacks expertise. Law & Justice Commission of Pakistan may suggest amendment in Civil Procedure Code and accordingly each High Court may propose and frame rules to run the court annexed mediation centre. Technical assistance may be sought from UNICEF, UNDP or UNIFEM for establishing model mediation centres at district level and the provincial governments may establish the centres in rest of the districts and provide funds.

i. To set up child protection unit in big cities

The actors of formal and informal justice systems are not aware of handling issues related to juvenile offenders. Under formal justice system, there are no specialized courts as referred to in the Sindh Children Act. Adults and juveniles are dealt with in one and the same court. The joint trial is only separated in official documentation. Cases are not disposed of in 4 months time period as stated by law. Probation officers may appointed are not asked to submit report about the juvenile concerned under section 9(1) of the Juvenile Justice System Ordinance, 2000 (JJSO). The investigation officers do not call probation officer and the parents of the juvenile while conducting investigation. It is, therefore, recommended that a child protection unit may be established in big cities where under one roof, investigation, detention, rehabilitation cells may be provided. Probation officers specially trained on juvenile issues, may be posted in the unit so that they may facilitate investigation officers, courts and parents in referring the juvenile under restorative justice system. Juvenile courts may also be part of Child Protection Unit. The staff should be properly trained and qualified on juvenile related issues and cultural sensitivities. The Provincial Governments in consultation with all the stakeholders may set up such Units.

j. To set up proper legal aid system for juvenile, women, disadvantaged and marginalized segment of the society

The juvenile and women are not taken care of while facing trial or proceedings under formal or informal justice system. Under informal justice system the juvenile and women hardly participate in the proceedings. The elders of their family represent them. Under formal justice system cases of juvenile are usually delayed due to non engagement of lawyer. JJSO specifically provides that state shall provide legal assistance to a juvenile but there is no adequate arrangement for providing legal assistance particularly in the light of section 3 of the Juvenile Justice System Ordinance 2000. Two fold strategy may be adopted, firstly, District and Sessions Judges to be sensitized on the issue and should add financial component, in financial demand for the next fiscal year to meet the cost of engaging counsel for the juvenile delinquent and women, based on the data of cases on the docket of each district. The financial demand is solicited through respective High Courts between February and March each year. Secondly Federal and Provincial Finance ministry/department should set up legal aid system by allocating yearly budget in favour of respective District & Sessions Judges for disbursing in the light of rule 3 of the Sindh Juvenile Justice System, Rules 2002. UNICEF may take lead in the matter by establishing the system in one model district of each province. The respective Judicial Academies may become the executing partner of the project which may develop linkages, protocol and operating mechanism between state partners of juvenile justice system and the State to replicate in rest of the judicial districts of the country.

k. To encourage and acknowledge the services of Mediators/Arbitrators/Conciliators/Saliseen who are playing their effective role to run traditional/informal justice system

The study shows that the decision-makers of informal justice system are disappointed from the role of NGOs and media. Though, they are deciding matters but, do not bring their verdict in writing due to fear of undue criticism. They admit, that their decision or settlement may not be sacramento and may be flawed and could be corrected if mechanism for correction is developed., The fear of criticism is affecting execution of the out come of

mediation/arbitration proceedings. Most of the *Sardars* in rural Sindh, for example, during study informed that they and their elders used to maintain record of each *jirga/faislo* but in the present circumstance the situation is different. They are of the view that their efforts are to be recognized. Most of the decision-makers were of the view that informal justice system may be run under the supervision and coordination of formal justice system. It is recommended that the media and NGOs may be sensitized and motivated to highlight positive verdicts given by the decision-makers of informal justice system so that traditional system may be strengthened and preserved to serve the down trodden mass, who cannot have access to formal justice system.

l. Extend the reach of formal courts throughout the country

It is recommended that reach of general public to formal courts may be extended throughout the country in particular FATA & PATA. There is a need to enhance and expand relationships among stakeholders of formal justice system with civil society, headmen of tribes involved in informal justice system. Protection should be provided to actors of informal justice system. Such reforms will require involvement of Ministry of Law, Government of Pakistan FATA Secretariat, and tribal elders of FATA.

m. Development of linkages between Governmental and non- Governmental organizations


It is recommended that the Federal and Provincial Governments through NCCWD, PCCWD and Ministry of Women Development to establish and strengthen relationships with UNIFEM, UNHCR, IFC, International Legal Foundation, UNDP and UNICEF and seek their assistance to sponsor study, to evaluate, suggest and workout implementation of best court annexed model as practiced in United Kingdom i.e. Wolf Committee Reforms, (CPR Reforms) and Commercial Mediation Act 2005, Legal Service Authority Act, 1987 of India, Mediation Board Act No.72 of 1988 & Mediation (Special Categories of Disputes) Act No.21 of 2003 of Sri Lanka, Uniform Mediation

Act 2004 of USA, Commercial Mediation Act 2005 of Canada and Mediation Act 1997 of Australia.

n. Decision under informal justice system may be in accordance with national laws and according to international obligations

It is recommended that the Government to frame laws to make sure that decisions made under informal justice system are in conformity with Statues and international obligations of the Government of Pakistan including guiding principles and framework for UN justice for children which reads as under:

1. Ensuring that the best interests of the child is given primary consideration
2. Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination
3. Advancing the right of the child to express his or her views freely and to be heard
4. Protecting every child from abuse, exploitation and violence
5. Treating every child with dignity and compassion
6. Respecting legal guarantees and safeguards in all processes
7. Preventing conflict with the law as a crucial element of any juvenile justice policy
8. Using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time
9. Mainstreaming children's issues in all rule of law efforts



Annex 1

Questionnaire

Annex 1: Questionnaire

Q.1 What are the major concerns of an individual about his safety and security?

Q.2 What are the possible causes of these problems?

Q.3 How do such problems affect the whole or sections of the community?

Q.4 In what ways are problems or disputes normally dealt with?

Q.5 To what degree do the local police become involved?

Q.6 How satisfied are people with the response of the police?

Q.7 (i) To what extent have formal courts been used?

(ii) By whom?

(iii) Involving what kind of problems or disputes?

Q.8 How satisfied are people with the way in which cases are dealt with in courts in terms of procedure and penalties?

Q.9 What constraints do exist in using the courts?

Q.10 How could these constraints be overcome?

Q.11 To what extent would use of formal courts increase if they were more accessible?

Q.12 (i) Are you aware of Informal Justice (Jirga, Panchayet, Masalehati Committee etc.?)

(ii) Do they exist in your locality?

(iii) How many forums of informal justice are available?

(iv) Are people satisfied with the informal justice system?

Q.13 What are the reasons for their satisfaction or dissatisfaction?

Q.14 Which aspects could be improved?

Q.15 Can you give suggestion to improve informal justice system?

Q.16 How many cases are decided through the informal justice forum?

Q.17 What kind of cases are heard and resolved there?

Q.18 Whether criminal cases are dealt by Mediator/Conciliator?

Q.19 Do you have any knowledge of compoundable and non-compoundable offences under the penal laws?

Q.20 Who brings these cases?

Q.21 What is the procedure followed in such cases?

Q.22 Who hears the disputes?

Q.23 What is the procedure for appointment/selection of arbitrator/mediator/conciliator by the individuals?

Q.24 What is the procedure for appointment/selection of arbitrator/mediator/conciliator by the community?

Q.25 (i) Can the arbitrators/mediators be changed before hearing?

(ii) If they can be changed then by whom and how?

Q.26 (i) Can the arbitrators/mediators be changed during hearing?

(ii) If they can be changed then by whom and how?

Q.27 What is the degree of support for the current arbitration/mediation/conciliator?

Q.28 What is the degree of support for the current arbitrators/mediators/conciliators?

Q.29 Is it necessary for the arbitrator/mediator/conciliator to be an educated person?

Q.30 Is it necessary for the arbitrator/mediator/conciliator to have legal knowledge?

Q.31 What types of sanctions or penalties are applied by arbitrators?

Q. 32 Are these sanctions or penalties appropriate?

Q.33 (i) Is any record of proceeding and decision maintained by the arbitrator?

(ii) If any record or proceeding is maintained then in what manner?

(iii) Is it advantageous to maintain the records of the proceedings?

Q.34 Can a party refuse to abide by the decision made by an arbitrator?

Q.35 Can a party refuse to attend the proceeding before conciliator and mediator?

Q.36 Can a party walk out of the proceeding before conciliator and mediator?

Q.37 Can a party refuse to abide by the mutual agreement made before the mediator/conciliator?

Q.38 Has any of the incidents mentioned in questions No.34 to 37 ever occurred? If so, what was the outcome?

Q.39 In which ways and to what extent do the people participate in informal dispute resolution proceedings?

Q.40 Do women, children and other members of deprived groups personally participate in informal dispute resolution proceedings?

Q.41 Do women, children and other members of deprived groups approach the informal justice system for redress their grievances?

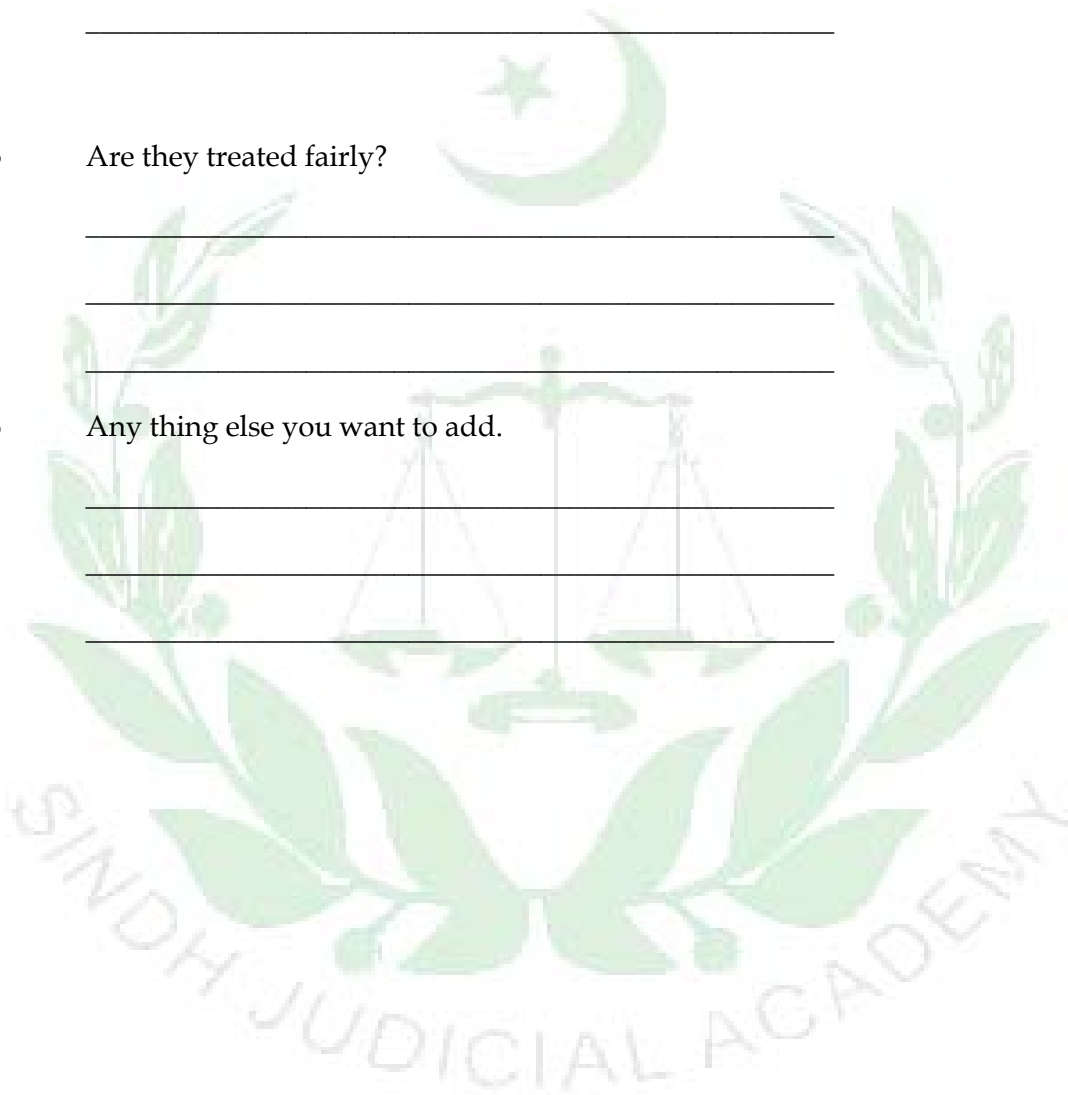
Q.42 How are women, children and deprived groups dealt with under the informal dispute resolution system?

Q.43 How should they be treated?

Q.44 What is the attitude of arbitrator/mediator/conciliator towards women, children and deprived groups?

Q.45 Are they treated fairly?

Q.46 Any thing else you want to add.



Annex 2: List of core group

Sr. #	Name	Contract Number
1.	Mr. Justice Saleem Akhtar, Hon. Director General, SJA & Principal Investigator.	5848904 03333456424
2.	Mr. Justice Nasir Aslam Zahid, NGO.	5854889 03008291191
3.	Mr. Justice Zafar Ahmed Sherwani, Judge High Court of Sindh.	5879209 03332299619
4.	Mr. Justice Zahid Qurban Alvi, Chairman Board of Governors of Law Colleges.	9215235
5.	Mr. Justice Shabbir Ahmed, Former Judge High Court of Sindh.	03082180074
6.	Mr. Justice Mushir Alam, Judge High Court of Sindh.	2229476 03003370751
7.	Ms. Mehtab Rashidi, Former Secretary Government of Sindh.	52451616 03002525463
8.	Mr. Zubair Motiwala, Industrialist.	03008233061
9.	Ms. Kousar Sultana, District & Sessions Judge Presiding Officer, Special Court Customs.	03009295808
10.	Mr. Yameen Khan, I.G. Prison, Sindh	5822000
11.	Barrister Kamal Jabbar.	03008270194
12.	Barrister Umaima Anwar Khan.	03008280290

The Core Group will discuss the methodology to implement the project activities and advise in developing desired tangible deliverables. All major policy decisions shall be made on the advice of the Core Group keeping in mind the implementation possibility of the recommendations to be made through the project. Core Group will share issues with the stakeholders to finalize the report to be submitted in due time.

Annex 3: Proposed Draft on Sindh Mediation Act

Section	Contents
	Preamble
1.	Short title, application and commencement
2.	Definitions
3.	Declarations about competency standards and approved Agencies
4.	Qualification of Mediator and Standard for Mediation Centre
5.	Registration of mediators
6.	Duration of registration
7.	Renewal of registration
8.	Cancellation of registration
9.	Admissibility of evidence
10.	Secrecy
11.	Ethical conduct of Mediators
12.	Protection from defamation
13.	Protection of mediators
14.	Regulation-making power

Proposed Draft.

THE SINDH MEDIATION ACT, 2009

An Act relating to mediation and the registration of mediators.

Whereas it is expedient to provide for the mediation and registration of mediators in the interest of litigants and to facilitate the courts;

And whereas such functioning of the mediation centre and mediators requires to be professional, service-oriented, and accountable to the courts refereeing to mediation centre;

It is hereby enacted as follow:

1. ***Short title, application and commencement.-***

- (1) This Act may be called *the Sindh Mediation Act, 2009*.
- (2) It shall extend to the whole of Province.
- (3) It shall come into force at once.

2. ***Definitions.-***

In this Act –

(a) ***Approved Mediation Centre-*** means an entity that is declared under section 4 (4) to be an approved Mediation Centre;

(b) ***Mediation Session-*** means a meeting between people in dispute and a registered mediator for the purpose of resolving the dispute by mediation, and includes anything done for the purpose of –

(i) Arranging the meeting (whether or not successfully); or

(ii) Following up anything raised in the meeting

(c) ***Party,*** to a mediation session, does not include the registered mediator for the session;

- (d) **Registered Mediator-** means a neutral third person who is registered under section 5 as a mediator (Registration of mediators) and conducts mediation;
- (e) **Chief Justice-** means Chief Justice of High Court of Sindh;
- (f) **Mediation agreement-** means statement of agreement on which parties to the Mediation have signed with their consent;
- (g) **Court-** means any court who refer to a mediation in accordance with any law;
- (h) **Mediation -** means a process in which a Mediator facilitates and encourages communication and negotiation between the mediation parties, and seeks to assist the mediation parties in arriving at a voluntary agreement;
- (i) **Mediation party -** means a person who participates in mediation and whose consent is necessary to resolve the dispute;
- (j) **Mediation process -** includes the mediation session together with all administrative processes and procedures leading to and necessary for the conduct of such mediation session and all processes and procedures after the completion of the mediation session ending with the signing of the mediation agreement or if there is no agreement, when the mediation session is otherwise terminated;
- (k) **Conflict of Interest -** means direct or indirect financial personal interest in the outcome of the dispute or an existing or past financial, business, professional family or social relationship which is likely to affect the impartiality or reasonably create an appearance of partiality or bias;
- (l) **Impartiality -** means freedom from favouritism and bias either by words, action or by appearance and implies a commitment to serve all mediation parties as opposed to a single mediation party in moving towards or reaching agreement.

3. *Declarations about competency standards and approved Agencies*

(1) The Chief Justice, in addition to this Act, may declare standards of competency and qualification, in writing, required for the registration of a person as Mediator and any entity as Mediation Centre.

(2) The Chief Justice may, in writing, declare an entity to be an approved Mediation Centre for this Act.

4. *Qualification of Mediator and Standard for Mediation Centre.-*

(1) All the Mediation Centers shall maintain the district court and apex court Mediators Roster for public information about mediators who meet their qualifications so that the parties or judges may select them.

(2) Minimum Qualification for district court Mediators/roster would be:

- a) good character;
- b) Enrolled advocate and 4 years practice of law, or have served professionally as the mediator in 10 cases in preceding 2 years’;
- c) 48 hours of approved mediation training;
- d) Subscribe to Code of Ethics and rules;
- e) Provide 10 hours annual pro bono upon request;
- f) Substantive knowledge of relevant laws;
- g) Familiarity with trial court system;
- h) Non-directive mediation styles;
- i) Objectivity;
- j) Acceptance of individual differences;
- k) Ability to analyze;
- l) Ability to recognize and manage power;
- m) Strong verbal and communication skills;
- n) Active listening skills;
- o) Ability to control the mediation process without dominating the parties;
- p) Ability to generate movement in the discussion of dispute;
- q) Creativity/inventiveness and focus.
- r) Acceptable to court;

- s) Willing to assist with local development of Mediation programs; and
- t) Reside near local limit/jurisdiction.

(3) **Minimum Qualification for apex court Mediators/roster:**

- a) good character;
- b) Enrolled advocate and 10 years practice of law, or have served professionally as the mediator in 10 cases in preceding 2 years’;
- c) 48 hours of approved mediation training;
- d) Subscribe to Code of Ethics and rules;
- e) Provide 10 hours annual pro bono upon request;
- f) Substantive knowledge of relevant laws;
- g) Familiarity with trial and appellate court system;
- h) Non-directive mediation styles;
- i) Objectivity;
- j) Acceptance of individual differences;
- k) Ability to analyze;
- l) Ability to recognize and manage power;
- m) Strong verbal and communication skills;
- n) Active listening skills;
- o) Ability to control the mediation process without dominating the parties;
- p) Ability to generate movement in the discussion of dispute;
- q) Creativity/inventiveness and focus.
- r) Acceptable to court;
- s) Willing to assist with local development of Mediation programs; and
- t) Aware with best practices and procedure of Mediation.

(4) High Court may declare any entity of association of professionals duly registered with the Registrar Joint Stock Companies or Society registered with the Registrar Firms as approved Mediation Centre if it provides following facilities-

- (a) Facility to hold mediation sessions;
- (b) Maintain a list of registered mediators;
- (c) Maintain permanent supporting staff for running the day to day activities;
- (d) Observe minimum standards for mediation process as may be prescribed by the High Court from time to time;

- (e) Ensure code of conduct of the mediator;
- (f) Maintain prescribed procedure for running the Centre; and
- (g) Maintain a fee structure for mediation process.

(5) A mediation centre may prescribe any regulation to run the Centre however any regulation shall not be in contravention to this Act or any legislation made by the Provincial or Federal Government and by the High Court of Sindh.

(6) All mediation centres shall engage an individual and designate him/her to be responsible for each mediation training programme and held accountable on behalf of the programme for -

(a) keeping a list and resumes of all trainers and subject matter specialists who will be used during the programme.

(b) ensuring proper facilities are secured and that appropriate equipment is provided.

(c) ensuring that the training agenda is followed and that all content is covered.

(d) ensuring that evaluation forms are completed and maintained;

(e) ensuring that a certified trainer is in attendance at all times;

(f) ensuring that no certificate is issued to a participants who fails to complete the requirements of attendance and participation.

(7) All training programmes shall provide the participants with the required reading but time spent reading required material shall not count towards the required number of hours of training and shall be completed by participants at times when the training programmes is not being conducted.

(8) Trainers shall incorporate some methods of ensuring that the required readings are completed and shall ensure that the current legislation and rules governing mediation are provided to the participants.

(9) The training methodology shall be as follows:

- (a) Pedagogy-Training programmes shall include, but are not limited to the following: lectures, group discussions, written exercises, mediation simulations and role-plays.
- (b) In addition, readings shall be provided by the trainer to supplement the training.
- (c) Written Exercises-written exercises shall include the reducing of a mediation agreement to writing.
- (d) Role-play Requirements - the objective of a role-play is for participants to develop confidence and experience. Each participant must have an opportunity to mediate in role-play.

(10) A training programme shall require participants to complete their training requirements by attending one entire training programme in which the certified trainer is responsible for ensuring that the integrity of each portion of the programme is not compromised and any portion of training missed shall be made up as directed by the trainer. If a participant misses portions of the training programme which compromise the integrity of the programme, the training programme shall require the participant to repeat an entire programme.

(11) In order to be accredited, each standard mediation training programme shall include the following topics:

(a) Conflict Resolution Concepts -

- (i) that define and understand the difference between non-litigation methods of dispute settlement, including negotiation, mediation and arbitration.
- (ii) that identify criteria by which parties select a method of dispute settlement for resolving particular disputes and evaluate the strengths and weaknesses of any dispute settlement method;
- (iii) that assist the participant to understand and demonstrate effective use of basic principles of negotiation and how mediation is an extension of negotiation; and
- (iv) that contrast mediation with litigation and demonstrate an understanding of the difference in roles of judges, lawyers, experts, mediators, arbitrators;

(b) *Court Process -*

- (i) explain the consequences of a mediated agreement as well as a failure to reach agreement;
- (ii) identify the statutes, rules, local procedures and forms governing mediation.

(c) *Mediation Process and Techniques -*

- (i) identification of the stages and components of the mediation session;
- (ii) understand and demonstrate the role of the mediator in structuring the mediation session, such as conducting an opening statement, preparing a party to mediate, maintaining decorum, professionalism, control of the session, structuring and managing the discussion, building on partial agreements. Scheduling the time, location, number of sessions, establishing the format of each session and focusing discussion;
- (iii) understanding the importance of demonstrating empathy, building rapport, establishing trust, setting a co-operative tone, demonstrating neutrality and impartiality, demonstrating sympathetic listening and questioning, empowering parties, and remaining non-judgmental;
- (iv) identification and demonstration of the characteristics which enhance or undermine the effectiveness of the mediator, including language use, non-verbal communication and eye contact;
- (v) identification of the principles and functions which define the mediators role and distinguishes it from other forms of dispute resolution;
- (vi) identification of those procedural elements which must be satisfied prior to the entry of the parties into the mediation room, including seating of parties and set-up of the room;
- (vii) understanding that upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator shall inform the mediation participants that mediation is a consensual process; the mediator is an impartial facilitator without the authority to impose a resolution or adjudicate any aspect of the dispute; and communications made during the process are confidential except where disclosure is required by law;

- (viii) understanding and demonstrating the mediator's role in identifying a full understanding of the parties' agenda;
- (ix) framing issues in neutral language and in such manner that the parties respective interests are identified and communicated;
- (x) differentiating between issues which are appropriate for mediation and those that are not appropriate.
- (xi) identification of individuals who are entitled to participate in the mediation session as well as those non-parties who may need to be present;
- (xii) identification of situations in which participation of non-parties, e.g., grandparents, children, new spouses may be necessary in the mediation;
- (xiii) identification of and demonstration techniques to obtain closure;
- (xiv) identification of the circumstances in which issues are appropriate for discussion in joint session and those which should first be discussed in separate session;
- (xv) identification of appropriate techniques for mediating cases in which one or more parties are represented by advocates;
- (xvi) identification of appropriate techniques for handling difficult situations, e.g., a party walks out, a party makes personal attacks on another party or mediator, a party is not really engaged in the mediation, a party or advocate is very recalcitrant, a party or non-party is emotionally overwrought or a party appears to be physically ill.

(d) Communication Skills -

- (i) identification and demonstration of the essential elements for effective listening, questioning and note taking;
- (ii) identification of and demonstrate appropriate non-verbal communication;
- (iii) understanding that a mediator shall cause the terms of any agreement reached to be recorded appropriately and discuss with the parties and counsel, if any, the process for formalization and implementation of the agreement;
- (iv) development of an awareness that people differ in how they make decisions, how they process information and how they communicate;

(e) Standards of Conduct/Ethics for Mediators -

- (i) identify the mediator's ethical dilemmas in the mediation context. Identify and demonstrate an appropriate course of action when confronted with an ethical dilemma;
 - (ii) understanding the mediator's responsibility to the parties and to the courts;
 - (iii) understanding when a mediator shall adjourn, terminate, cancel or postpone a mediation session;
 - (iv) understanding that a mediator shall respect the roles of other professional disciplines and shall promote cooperate between mediators and other professionals;
 - (v) understanding that a mediator shall promote awareness by the parties of the interest of persons affected by actual or potential agreements who are not represented at mediation;
- (f) *Diversity Issues -*
- (i) recognizing personal biases, prejudices, and styles which are the product of one's background and personal experiences;
 - (ii) understanding socio-economic, cultural, racial, ethnic, age, gender, religious, and disability issues which may arise in mediation and/or affect the parties negotiation style, ability or willingness to engage in mediation;
- (g) *Advocates and Mediation -*
- (i) understanding the role of litigants' advocates in the mediation process and the potential for conflicts;
 - (ii) understanding the advocate-client relationship within the context of mediation;
 - (iii) understanding the need to establish credibility with advocates and parties.

5. *Registration of mediators*

- (1) Subject to subsection (6), a person may apply in writing to an approved Mediation Centre for registration under this section.

(2) An approved Mediation Centre shall approve an application and register the applicant if –

- (a) Any fee determined by the Mediation Centre to be payable to it in relation to an application under this section has been paid to it;
- (b) It is satisfied that the applicant has achieved the standards of competency prescribed for section 4; and
- (c) The applicant satisfies any requirements of the Mediation Centre that relate to mediators.

(3) A person whose application under subsection (1) has been refused may, by written notice given to the Mediation Centre, require it to review the decision.

(4) An approved Mediation Centre that receives a notice under subsection (3) shall review the relevant decision.

(5) An approved Mediation Centre shall notify an applicant in writing within 7 days of determining an application under subsection (1) or a review under subsection (4) –

- (a) Of its determination; and
- (b) If the application has not been granted – of the grounds for not granting it.

(6) A person –

- (a) who has made an application under subsection (1) that has been refused; or
- (b) whose registration has been cancelled under section 8; is not eligible to make another application under subsection (1) to any approved Mediation Centre within 6 months of the refusal or cancellation.

6. *Duration of registration*

Subject to section 8, the registration of a registered mediator ends 3 years after the day when he or she was registered or when his or her registration was last renewed, as the case requires.

7. *Renewal of registration*

(1) A registered mediator may, before the end of his or her registration, apply to the approved Mediation Centre by which he or she has been registered or to another approved Mediation Centre for renewal of the registration.

(2) The approved Mediation Centre shall renew the registration of the mediator if any fee determined by the Mediation Centre to be payable to it in relation to an application under this section has been paid and the Mediation Centre is satisfied that the mediator –

- (a) Would, if he or she were an applicant under section 5 (1), be eligible for registration; and
- (b) Has, since his or her registration or last renewal, whichever last occurred, undertaken the further education in matters relating to mediation that is approved by the Mediation Centre.

8. *Cancellation of registration*

The approved Mediation Centre by which a registered mediator has been registered may cancel the registration if satisfied that –

- (a) if the mediator were an applicant under section 5 (1), he or she would not be eligible for registration; or
- (b) the mediator has made a disclosure in breach of section 10 and the circumstances are such that his or her registration should be cancelled.

9. *Admissibility of evidence*

Evidence of –

- (a) A communication made in a mediation session; or
- (b) A document, whether delivered or not, prepared –
 - (i) For the purposes of; or

- (ii) In the course of; or
- (iii) Pursuant to a decision taken or undertaking given in; a mediation session; is not admissible in any proceedings.

10. Secrecy:

- (1) A person who is or has been a registered mediator shall not disclose any information obtained in a mediation session.
- (2) This section does not apply if –
 - (a) The disclosure is required by or under an ACT; or
 - (b) The disclosure is made with the consent of the mediation parties; or
 - (c) The disclosure is made with the consent of the person who gave the confidential information; or
 - (d) The person referred to in subsection (1) believes on reasonable grounds that –
 - (i) A person's life, health or property is under serious and imminent threat and the disclosure is necessary to avert, or mitigate the consequences of its realization; or
 - (ii) The disclosure is necessary to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence.

11. Ethical Conduct of Mediators

- (a) This section shall apply to registered mediators and is intended to assist and guide registered mediators in their conduct and to provide a framework within which mediation is conducted and regulated.
- (b) Registered mediators shall –
 - (i) conduct themselves in a manner which will instill confidence in the mediation process, confidence in their integrity and confidence that disputes entrusted to them are handled in accordance with the highest ethical standards;

(ii) be responsible to the parties, to the profession, to the public and to themselves, and accordingly shall be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interest, but rather the needs and interest of the mediation parties;

(iii) act fairly in dealing with the mediation parties, have no personal interests in the terms of the settlement, show no bias towards individuals or parties involved in the disputes and be certain that the mediation parties are informed of the process in which they are involved.

(c) The primary role of the mediator is to facilitate the voluntary resolution of a dispute.

(d) The primary responsibility for the resolution of the dispute and the shaping of a settlement rests with the mediation parties.

(e) A mediator shall recognize that mediation is based on the principle of self-determination by the mediation parties and upon the ability of the mediation parties to reach a voluntary uncoerced agreement.

(f) A mediator shall request and encourage self-determination by the mediation parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive or judgmental regarding the issues in dispute and options for settlement.

(g) A mediator shall encourage mutual respect between the mediation parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

(h) A mediator shall make the mediation parties aware, where appropriate, of the option and importance of consulting other professionals to assist the mediation parties in the making of informed decisions.

(i) When a mediator believes a mediation party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the mediation parties to seek independent professional advice.

(j) While a mediator may point out possible outcomes of a case, the mediator shall not offer a personal or professional opinion as to how the Court in which the case has been filed will resolve the dispute.

(k) A mediator shall not use during the mediation process any title or honorific to which he may be entitled.

(l) A mediator shall mediate only when the mediator has the necessary qualifications, training and experience to enable him to satisfy the reasonable expectation of the mediation parties.

(m) A mediator shall acquire and maintain professional competence in mediation, and shall at all times strive to improve his professional skills and abilities by participating in relevant continuing education programmes.

(n) A mediator shall have information regarding his relevant training, education and experience available to the mediation parties.

(o) A mediator shall provide mediation services only for those disputes in which he can be impartial with respect to all the mediation parties and the subject matter of the dispute.

(p) A mediator shall in words and action, maintain impartiality towards the mediation parties and where his impartiality is in question, shall decline to serve or shall withdraw from serving as a mediator.

(q) Where at any time prior to, or during, the mediation process the mediator is unable to conduct the mediation process in an impartial manner, the mediator shall so inform the mediation parties and shall withdraw from providing services, even if the mediation parties express no objection to the continuation of the mediator's services.

(r) A mediator shall discuss issues of confidentiality with the mediation parties before beginning of the mediation process including, limitations on the scope of confidentiality and the extent of confidentiality provided in any private session that the Mediator holds with a mediation party.

(s) All proceedings shall be confidential and the mediator shall not voluntarily disclose to anyone who is not a mediation party to the mediation process, any information obtained through the mediation process except, with the written consent of the mediation parties, or when the information discloses an actual or potential threat to human life or safety.

(t) In the cases referred to in paragraph (s) hereinabove, the mediator shall advise the mediation parties, when appropriate to the mediation process, that the confidentiality of the mediation proceedings cannot necessarily be guaranteed.

(u) A mediator shall structure the mediation process so that the mediation parties make decisions based on sufficient information and knowledge.

(v) The mediator has an obligation to ensure that all mediation parties understand the nature of the process, the procedures, the particular role of the mediator and the mediation parties' relationship to the mediator.

(w) Where at any time the mediator believes that any mediation party is unable to understand the mediation process or participate fully in it for a justifiable reason, the mediator shall limit the scope of the mediation process in a manner consistent with the mediation party's ability to participate, and/or recommend that the mediation party obtain appropriate assistance in order to continue with the mediation process or shall terminate the mediation process.

(x) A mediator shall disclose all actual and potential conflict of interest known to him and thereafter shall withdraw from the mediation, if any mediation party objects to him continuing as mediator. The duty to disclose conflict of interest shall be a continuing obligation throughout the mediation process.

(y) Where the mediator determines that the conflict is so significant as to cast doubt on the integrity of the mediation process, the mediator shall withdraw from the process even if the mediation parties express no objection to the continuation of the mediator's services.

(z) Save with the consent of the mediation parties, and for a reasonable time under the particular circumstances, a mediator who also practices in another profession shall not establish a professional relationship in that other profession with one of the mediation parties, or any person or entity, in a substantially factually related matter.

(aa) In family mediation, the mediator has a responsibility to promote the mediation parties' consideration of the interest of children in relation to the issues being mediated. The mediator also has a duty to assist the mediation parties to examine, apart from their own desires, the separate and individual needs of such children.

(ab) A mediator shall not make untruthful or exaggerated claims about the mediation process, its costs and benefits, its outcome or the mediator's qualifications and abilities.

(ac) No commission, rebates, or other similar forms of remuneration shall be given or received by a mediator for the referral of clients.

12. Protection from defamation

The same privilege in relation to defamation as exists in relation to judicial proceedings exists in relation to –

(a) A mediation session; or

(b) A document or other material –

(i) Produced at a mediation session; or

(ii) Given to a registered mediator for the purpose of arranging or conducting a mediation session.

12. Protection of mediators

(1) A registered mediator has, in the exercise in good faith of his or her functions as mediator, the same protection and immunity as a judge of the apex Court.

(2) No legal proceeding may be commenced against a registered mediator or any person or official involved in the mediation process for any act done or omitted to be done in the course of the performance of his functions, in reference to such mediation process.

(3) Notwithstanding subsection (1) hereinabove, if a person suffers loss or damage as a result of the wrongful disclosure of confidential information by a registered mediator or by any person who in the course of his employment or training gained access to such confidential information, that person shall be entitled to bring suit for damages.

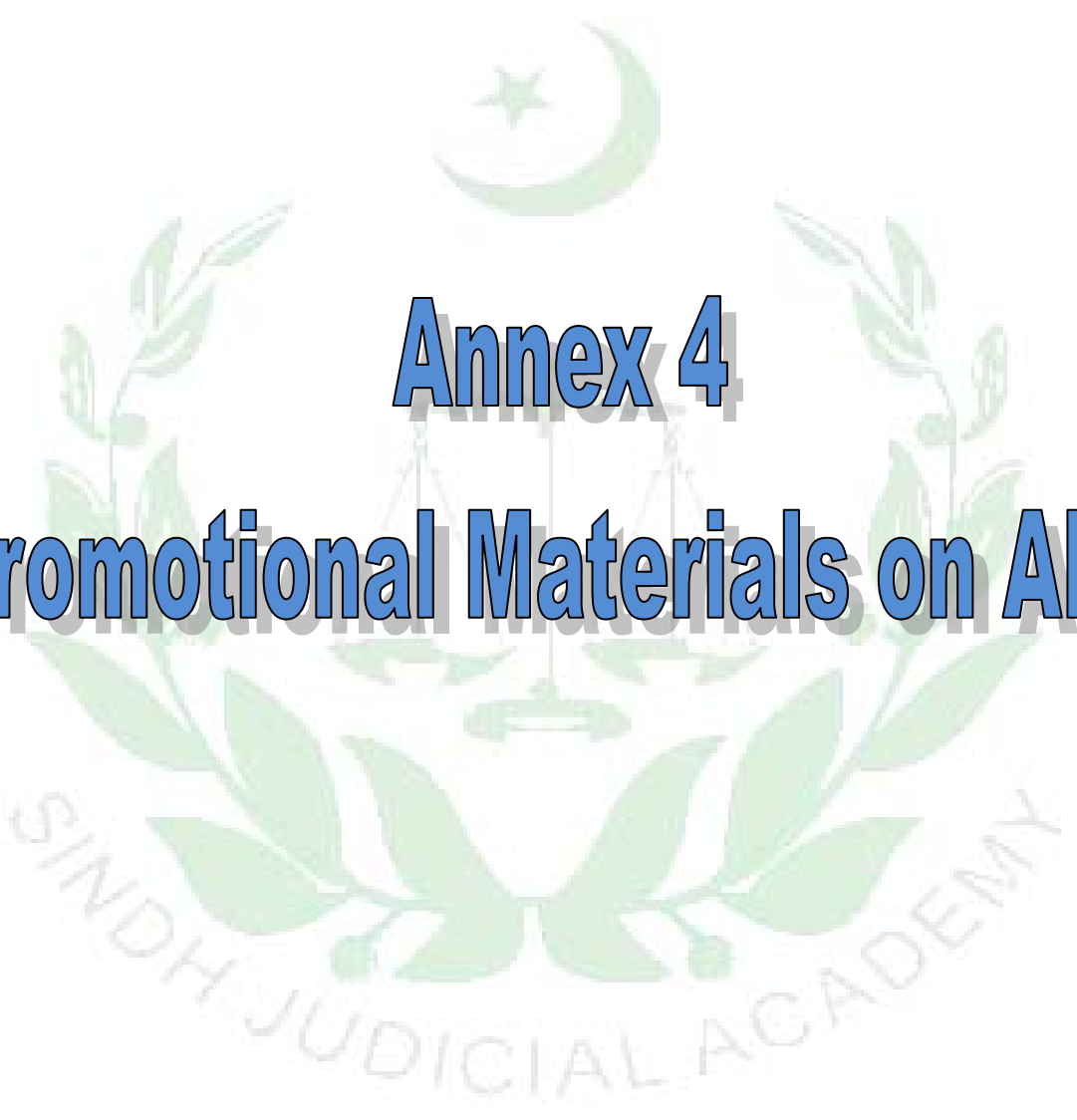
(4) Subject to sub-section (3) hereinabove, the registered mediator or any other person involved in the mediation process in the mediation process is not compellable as a witness, to give evidence of any matter which occurred during the mediation session or any confidential information which came to his knowledge during the mediation process.

13. Regulation-making power

(1) The High Court of Sindh may make rules for this Act.

(2) The rules may prescribe requirements to be complied with by an approved Mediation Centre.

(3) The rules may also prescribe offences for contraventions of the rules and prescribe minimum and maximum penalties.



Annex 4

Promotional Materials on ADR

Annex 4: Promotional Material on ADR

I N D E X

1. Introduction
2. Forward
3. What is Mediation
4. Why and when it is used
5. What are the benefits of Mediation
6. Is mediation the right process for every person
7. Who is the mediator
8. Does Mediation replace the need for legal advice
9. How a mediator is chosen
10. How do I find a Mediator
11. What is the jurisdiction of a court under the Small Claim and Minor Offences Ordinance, 2002
12. What is the procedure of civil trials
13. Can court reject a plaint? If so, what may be the circumstances
14. How the defendant is summoned
15. What is the procedure of filing written statement
16. What is the time limit of filing written statement
17. What will happen if the defendant avoids appearance or fail to file written statement
18. What would be the stage for opting mediation
19. Who may act as mediator
20. How the salis call parties for settlement
21. What are the responsibilities of the Salis?
22. What happens when parties reach at some settlement
23. Who decide the payment of salis's fee
24. What is happens when mediation process is failed

INTRODUCTION

Sindh Judicial Academy, initiated a study on informal justice system which was awarded by the Law & Justice Commission of Pakistan. The project was funded by the UNICEF. During the study it was felt necessary to propagate the provision of law related to court annexed mediation. In the year 2000 section 89-A was incorporated in the Code of Civil Procedure which empowers the court to decide or refer the matter with the consent of parties to ADR mechanism. Sec 14 of the Small Claims & Minor Offences Court Ordinance empowers the court to refer any pending adjudication to a notified Salis. Chapter 10 of the Sindh Local Government Ordinance also deals with the procedure of Mediation. Hon'ble Chief Justice notified the judicial officer & Salis at District level under Small Claims & Minor Offences Ordinance. The provision of mediation available in different legislations could not be utilized effectively by the litigants and the practicing advocates. The judicial officers are also not fully aware with referral mechanism provided under law and it was therefore felt necessary that the concept of ADR need to be disseminated and is to be familiarised among the judicial officer, practicing Advocates, Saliseen and litigants. Publication of this handbook is one of the efforts to achieve the objectives.



FOREWORD

It gives me great pleasure to introduce and present this booklet containing FAQs on the concept of Mediation.

ADR mechanism has been introduced in Pakistan only recently for resolving Civil & Criminal related disputes. Like most new initiatives, the introduction of this system too has given rise to a number of searching questions in the minds of litigants and professionals.

Sindh Judicial Academy recently conducted a study on informal justice system in Pakistan. Law & Justice Commission of Pakistan conceived the idea to initiate the study and UNICEF appreciated by allocating funds to achieve the goal. During study a number of actors of informal justice system were interviewed. They were asked about the court annexed mediation. Most of them were not aware about the court annexed mediation and they insisted to develop some linkages between formal and informal justice system and to share the mechanism of refereeing cases to mediators through courts.

The booklet in your hands brings to you the introduction of alternate means of dispute resolution and how does such mechanism works.

I wish to place on record my deep appreciation for all who facilitated Sindh Judicial Academy and its team associated to conduct study on informal justice system. I am also thankful to all actors of formal and informal justice system who shared their experiences on the subject study which facilitated us to draft this handbook. It may be beneficial for the public at large and may cause to introducing the concept of restorative justice system.

Justice (R) Saleem Akhtar,
Hon. Director General
Sindh Judicial Academy

F.....A.....Q

What is Mediation?

Mediation is a process where an impartial third party helps two or more parties, to discuss a dispute and to work out a solution that is acceptable to the same. The Participation is voluntary, unlike a judge or arbitrator. The mediator does not decide the outcome of the dispute, and the Mediated agreements tend to facilitate the parties concerned to generate their own solutions.

Why and when it is used?

Mediation works in situations where the parties are willing to participate in discussions aimed at resolving the dispute. It is particularly valuable when there is an on-going relationship among or between the parties.



IF THIS IS MY FINAL MARK, I HAVE NO CHOICE BUT TO GO TO MEDIATION.

What are the benefits of mediation?

Mutual satisfaction/effective results: One goal of mediation is to reach agreements that address the concerns and needs of all parties involved in a dispute. Solutions that are reached through co-operation and mutual agreement lead to increased satisfaction. The Participants are more likely to voluntarily honour a mediated agreement than to be ordered by the court.

Enhanced communication: The mediation process promotes co-operation and communication between or among the disputing parties.

Participant driven: Mediation allows individuals to take control and make decisions that could affect their lives.

Efficiency: Mediation is goal-oriented agreement which can often be more quick than imposed through the courts or other formal processes. However, the time taken to reach an agreement depends on the number and complexity of the issues and the willingness of the parties concerned.

Confidentiality: Mediated agreements generally provide confidentiality in the process.

Resolution of a broad range of disputes: *During the mediation process, the parties concerned can discuss and resolve a much wider range of issues than the dispute being taken through the formal court process.*

Cost effectiveness: Mediation, with legal consultation and/or counseling, is often less costly than litigation.

Is mediation the right process for every person?

Mediation may not be an appropriate for every person or situation. Mediated agreements tend to result from meetings where participants are willing to express themselves while showing respect for the other party. A skilled mediator can help parties assess their situation to determine if the mediation process is to be an appropriate way to resolve the dispute.

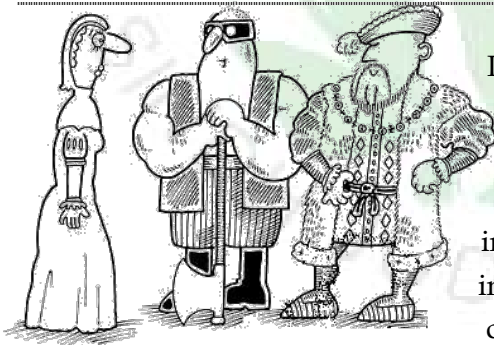
Who is the mediator?

A mediator is an impartial third party who facilitates the communication between or among two or more parties in the dispute. The mediator does not take sides or make decisions for the parties but he helps to create a safe environment where the parties could discuss issues in an open and respectful manner. The mediator helps the parties to explore and understand the issues in dispute, develop alternatives, make informed decisions and work toward reaching a practical and mutually-satisfying outcome.

Does mediation replace the need for legal advice?

Mediation is not a substitute for legal advice in most mediation situations. It is advisable that parties could consult with a lawyer before and during the mediation process. It is also advisable that parties have a lawyer review any written agreement before it is signed.

How a mediator is chosen?



Parties involved in a dispute choose the mediator and they must be satisfied with the selection. They should have an overall sense of the mediator's ability to develop a report, be empathetic and maintain impartiality while conducting the mediation. Some intend to ask questions about the Mediator before choosing him as Mediator. Which are:

"I'm a specialist in matrimonial dispute resolution."

- What is the mediator's education and employment history?
- What type of mediation training the mediator has received?
- What mediation experience does the mediator have? For example, commercial mediation, family mediation or multi-party?
- Does the mediator belong to any professional associations?
- Does the mediator have any other professional support?

- Does the mediator adhere to a Code of Professional Conduct?
- What is the mediator's view of your lawyer or other professionals such as accountants, counselors or therapists?
- How long does the mediator expect the mediation to take? How long before the mediation can begin?
- Can the mediator provide references?

How do I find a mediator?

- Ask friends or co-workers who have been to mediation to suggest a mediator.
- Contact website of the High Court of Sindh or Registrar High court of Sindh "Directory of Mediators".
- Contact District and Sessions Judge, President of Bar Association.

What is the jurisdiction of a court under the Small Claims and Minor Offences Ordinance, 2002?

The Court shall have an exclusive jurisdiction to try all suits and claims arising there from, specified in Part I of the Schedule to the Ordinance, the subject matter of which does not exceed one hundred thousand rupees in value for the purposes of jurisdiction. The court shall also try offences specified in Part II of the Schedule to the Ordinance.

Part I

1. Suit for recovery of money due on contract in writing, receipt or any other documents.
2. Claim for damages on account of contract in writing.
3. Suit for the specific performance or rescission of a contract in writing.
4. Suit for recovery of movable property or value thereof.
5. Suit for separate possession of joint immovable property through partition or otherwise.
6. Suit for compensation.
7. Suit for redemption of mortgage property.
8. Suit for enforcement of easement rights.
9. Suit for rendition of accounts of joint property.
10. Suit to restrain waste and remove nuisance.
11. Disputes under the Canal and Drainage laws.
12. Mesne profits of property.

13. Suit for compensation for wrongful taking or damaging movable or immovable property.
14. Suit for damages by cattle trespass.
15. Suit for damages and compensation arising out of traffic accidents.
16. Any other relief not falling under the schedule but agreed to by the parties to be settled under this ordinance.

PART II

All offences in the Pakistan Penal Code (Act XLV of 1860), punishable with imprisonment not exceeding three years or with fine or with both.

What is the procedure of civil trials?

Every claim or suit before the Court is instituted by presentation of a plaint duly verified on oath or solemn affirmation. The plaint should contain all material facts relating to the claim or dispute, a schedule giving the number of witnesses intended to be produced in support of the plaint, the names and addresses of witnesses and a brief summary of the facts to which they would depose.

Where a plaintiff sues or relies upon a document in his possession or power, he should produce it in the Court either in original or photocopy thereof along with the plaint.

Where a plaintiff relies on any other document, not in his possession or power as evidence in support of his claim, he should enlist such documents in a list to be appended to the plaint, giving reasons of relevancy to the claim in the plaint. The plaint should be accompanied by as many copies thereof, including the schedule and the lists of the above referred documents as there are defendants in the suit, for service upon the defendants; and

The plaint should be accompanied by one time the process fee of twenty-five rupees.

Can court reject a plaint? If so, what may be the circumstances?

The plaint may be rejected in the following cases:

Where it does not disclose a cause of action;

Where the relief claimed is under valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;

Where the suit appears from the statement in the plaint to be barred by any law.

How the defendant is summoned?

The Court within two days of the presentation of the plaint, may send summons to the defendant for the final determination of suit, through the process server and by registered post, acknowledgment due, along with the copies of the plaint, schedule of witnesses, documents or list of documents relied upon.

Wherein in any suit the defendant is not found and has no agent empowered to accept service of the summons on his behalf, service is made on any adult member of the family of the defendant who resides with him.

Every summons and its accompaniments is served within fifteen days.

Where the Court has reasons to believe that the defendant is avoiding services, or that for any other reason the summons cannot be served in the ordinary way the Court orders for service of summons by:

- a. Affixing a copy of the summons at some conspicuous part of the house, if any, in which the defendant resides or is known to have last resided or carries on or is known to have carried on business or personally works or is known to have worked for gain; or
- b. Any electronic device of communication which may include telegram, phonogram, telex, fax and e-mail; or
- c. Urgent mail service or public courier services; or
- d. Beat of drum in the locality where the defendant resides; or
- e. Publication in press; or
- f. Any other manner or mode as it may deem fit;

The Court may also order the use of all or any of the aforesaid manners and modes of service simultaneously.

What is the procedure of filing written statement?

The defendant shall on the date fixed, appear before the Court and file his written statement duly verified on oath or solemn affirmation and attach therewith a list of his witnesses and also a summary of the evidence that each witness is expected to give.

What is the time limit of filing written statement?

The Court may, on being shown a sufficient cause, adjourn the matter and permit to file written statement on the subsequent date, which shall not exceed fifteen days.

What will happen if the defendant avoids appearance or fails to file written statement?

Where on the day which is fixed for the defendant to file written statement, it is found that the summons have been served but the defendant has failed to file written statement without sufficient cause, the Court may proceed ex party and pass decree.

What would be the stage for opting mediation?

Where at any stage of the proceedings, it appears to the Court either on application of any party or otherwise, that there exists a possibility of friendly settlement between the parties, the court may, subject to consent of parties, through salis or any other person, conciliate, arbitrate, mediate or resolve through any other means, the claim or offence, as the case may be.

Who may act as mediator?

The Chief Justice of High Court, in consultation with the District Judge, the President, Bar Association of the District or Sub-division concerned, has prepared a list of persons (retired judges and lawyers) to act as salis for effecting amicable settlement, which is maintained in the District Court. The parties may, with their consent, suggest any person to act as Mediator.

How the salis calls parties for settlement?

On receipt of reference, the salis makes efforts for amicable settlement of dispute or complaint and submits his report within the time fixed by the Court.

The salis shall call the parties through registered post telegram, fax telephone or any other appropriate way to a venue and on a day and time specified by him.

The parties shall appear in person or through their representatives before the salis and shall state their claim or defence in writing supply copies of their pleadings or complaint and all other necessary documents as required by salis.

What are the responsibilities of the Salis?

The Salis before proceeding in the matter, may disclose to the Court any circumstance that is likely to create an impression of a bias or which may prevent him from acting promptly, whereupon the Court directs the parties to nominate another salis;

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.

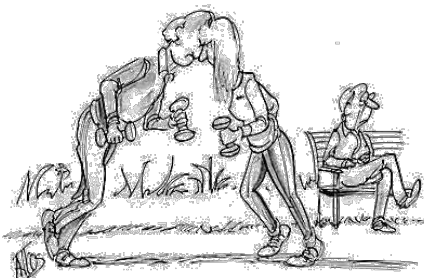
What happens when parties reach at some settlement?

If a settlement of a suit or complaint is reached between the parties, the Salis prepares a deed of settlement containing terms of such settlement, signed by the parties and submits it to the Court on the day fixed by the Court together with a certificate that the settlement between the parties was voluntary. The Salis makes an award and submits it in the Court on or before the date fixed.

Who decides the payment of Salis's fee?

The Court determines the amount of fees, if any, to be paid by the party or parties to Salis, against a valid receipt.

What happens when mediation process fails?



If no settlement is reached between the parties, the Salis records the statement of the fact, signed by the parties and submits it to the Court on or before the date fixed.



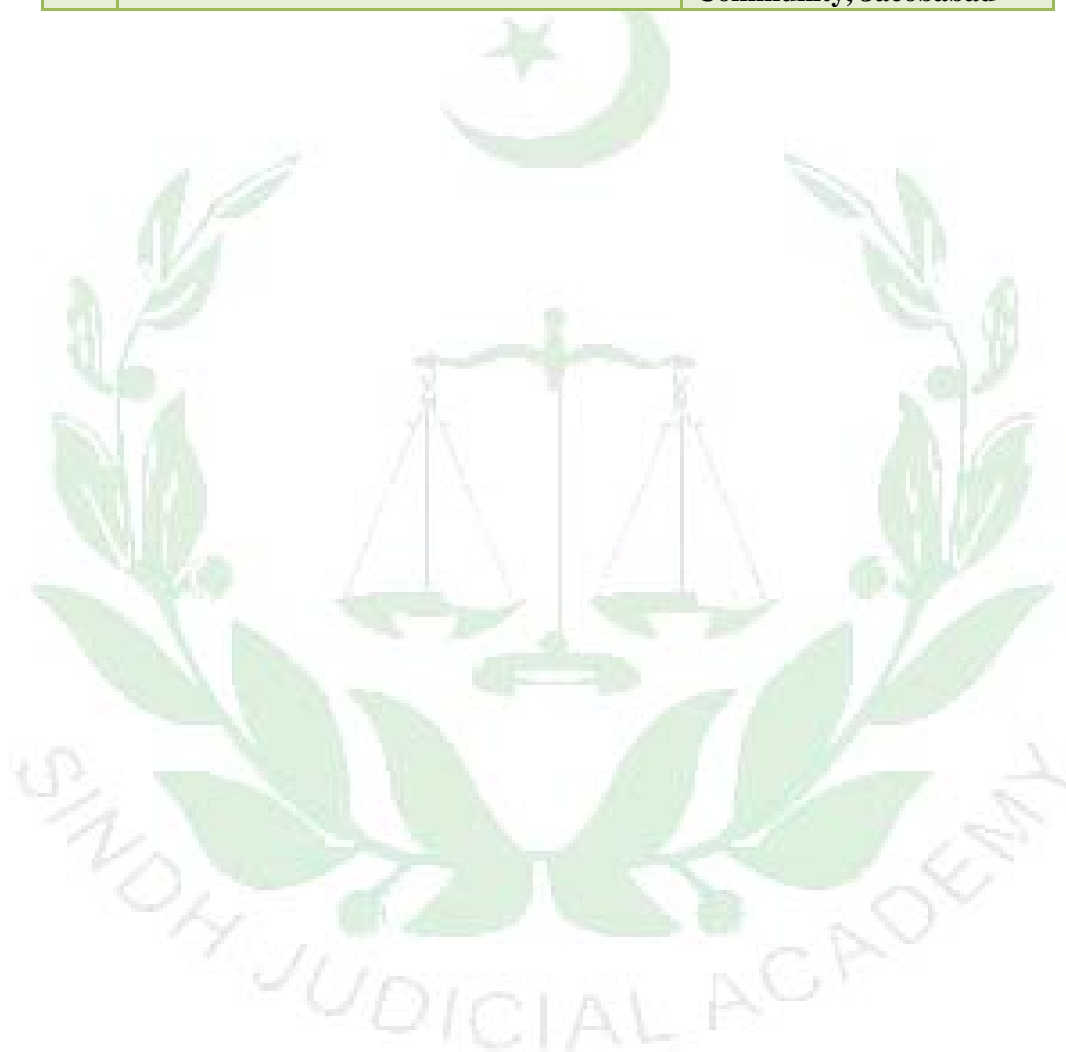
Annex 5

List of Persons Interviewed

Annex 5: Persons Interviewed

Sr.	Name	Address with Phone
1	Sardar Rahim Bux Bazdar	District Ghotki Tehsil Mir Pur Village Ghari Chakra 0300-2271753 683162
2	Mr. Ali Bux Mehar	Mehar House Rohri 0300-9313214 9239060
3	Mr. Shabbir Hunain Khoso U.C. Nazim	0300-3180176 5625786
4	Haji Anwar Mehar	Member Provincial Assembly, Sukkur
5	Haji Mushtaq Ali Mehar U.C. Nazim	Talka Lakhi District Shikarpur 0301-3889433
6	Syed Husain Abbas	Pakistan Mussawir Council Khairpur 0300-2960968
7	Prince Mir Mehdi Raza Khan Talpur	Khairpur 0300-8244610
8	Mr. M. Dinno Naich	Social Worker/Zamindar Khairpur 0300-3187234
9	Mr. Bashir Ahmed Khuwaja Advocate	Khairpur. 0300-3292987
10	Mr. Tahir Hunain Shah	Zamindar Rohri. 0321-3620786
11	Sardar Haji Karim Binno Badani Jattoi	Village Haji Karim Binno Badani Jattoi Taluka Likhi Shikarpur 0334-2911277
12	Sardar Karam Allayi Mehar	Zamindar Taluka Panu Akil Head of Tribe Mehar District Shikarpur.

13	Mr. Faiz M. Mehar	0300-2424450
14	Mr. Ghulam Mustafa Mithan	Kot Diji District Khairpur Mirras Zamindar/Advocate
15	Syed Peer Muhammad Shah	DPO Khairpur 0303-7650065
16	Mr. Sher Ali Bazwani	Chairman, Mediation and Conciliation Board of Aga Khan community
17	Mr. Babal Khan Jhakrani	Tribal Chief of Jhakrani Community, Jacobabad





ANNEX 6


List of Literature reviewed and Laws containing provision of Alternate Dispute Resolution

Annex 6: List of Literature reviewed and Laws containing provision of Alternate Dispute Resolution

Literature reviewed and Laws containing provision of alternate dispute resolution

1. Introduction of the Restorative justice concept and Victim-offender mediation practice in Serbia and Montenegro within the "Children's Chance for Change" project - A juvenile justice reform initiative in Serbia and Montenegro
2. Report 2 - Comparison of Aboriginal and Non-aboriginal contact with South Australia Juvenile Justice System, 1997 BY Justine Doherty
3. IDLO Italian-funded projects (2005 - 2008) for Legal and Judicial Reform in Afghanistan evaluation report August 2008 commissioned by the IDLO, Monitoring and Evaluation Unit conducted by Sheila Reed (Team Leader), Conor Foley & Hamayoun Hamed
4. **Doing Justice:** How informal justice systems can contribute **Ewa Wojkowska, December 2006** United Nations Development Programme - Oslo Governance Centre
5. The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations. The Case of Burundi Tracy Dexter JD, Dr Philippe Ntahombaye
6. **Pakistani Women in Context:** A companion volume to the Pakistan Country Gender Assessment October 2005 - A Compilation of Four Papers By: Zia Ahmed Awan, Rukhshanda Naz, Simi Kamal and Justice Majida Razvi
7. **Juvenile Justice in South Asia:** Improving Protection for Children in conflict with the law BY the United Nations Children's Fund (UNICEF), Kathmandu, Nepal
8. Convention on the Rights of the Child, 1989
9. United Nation Standards Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985
10. "The Justice System: Is it Failing or Serving Minorities?" The Urban Alliance on Race Relations (UARR) Justice Conference was held at Osgoode Hall in Toronto on Friday, March 26 and Saturday, March 27, 1993
11. Processes of Dispute Resolution, The Role of Lawyers, Second Edition, by John S. Murray, Alan Scott Rau & Edward F. Sherman, University Casebook Series

12. Alternate Dispute Resolution – What it is and how it works, Edited by P.C. Rao
13. Civil Procedure Code, 1908 [section 89-A]
14. Small Claims and Minor Offences Ordinance, 2002 [complete text]
15. Sindh Local Government Ordinance, 2001 [Chapter 10]
16. Federal & Provincial Ombudsman laws
17. Income Tax Ordinance, 2001
18. Sales Tax Act,
19. Custom Act
20. Consumer Protection Ordinance, 2006
21. Criminal Procedure Code, 1898
22. Pakistan Penal Code, 1860
23. Pakistan Muslim Family Courts Ordinance, 1964
24. Muslim Family Laws Ordinance, 1961
25. Conciliation Courts Ordinance, 1961
26. Frontier Crime Regulation, 1901
27. The Conciliation Boards Act No 10 of 1958 (Sri Lanka)
28. The Mediation Boards Act of 1988 (Sri Lanka)
29. The Legal Service Authorities Act, 1987 (India - Lok Adalat system - came into force with effect from 9th November 1995)
30. The Central Excise Act, 1944
31. Sardari System Abolition Act, 1974
32. Hadood laws



ANNEXURE 7
Proposed Amendment in Code of Civil Procedure

Annex 7: Proposed amendment in Code of Civil Procedure (Section 89-A)

Law Reforms Act 2007 as passed by the National Assembly of Pakistan on _____

(17) For the Section 89A, the following shall be substituted, namely:-

“89A. Alternative Dispute Resolution. (1) All courts shall, in cases of civil or commercial nature at any stage of the case, preferably at the initial stage, require the parties to have resort to one of alternative dispute resolution methods, such as mediation or conciliation.

(2) Notwithstanding anything contained in subsection (1), the parties may resort to mediation or conciliation before the legal proceedings are commenced in a court and in that case the parties or either of them may apply to court for resolution of their dispute through mediation or conciliation. If either of the parties applies to the court for resolution of their dispute through mediation or conciliation, the court shall serve notice on the other party or parties and if both or all of them agree to on resolution of their dispute through mediation or conciliation, the court shall refer the matter to a mediator or conciliator as provided in subsection (3) and upon such reference other provisions of this section shall mutatis mutandis apply.

(3) The court may refer the matter to a retired judge of a superior court or of a subordinate court, a technocrat having experience in the relevant field or a lawyer from a panel maintained for the purpose or any other person agreed by the parties. Upon referring the matter, the court shall direct the parties to appear before the conciliator or mediator on date and time fixed by the court under intimation to the mediator or conciliator.

(4) The parties to the dispute shall take part in the mediation or conciliation proceedings in person or through an authorized representative.

(5) A mediator or conciliator to whom a matter is referred for mediation or conciliation under this section shall try to resolve the dispute within a period of sixty days, extendable by the court for sufficient cause for another period of thirty days and during this period the court proceedings shall remain stayed.

(6) In dealing with the dispute or difference referred to him, the mediator or conciliator may follow such fair procedures as it may be necessary in the circumstances of the case.

(7) If as a result of the efforts of mediator or conciliator, a settlement is reached between the parties, the mediator or conciliator shall record such statement, duly signed by him and the

parties and submit it to the court. The court shall pronounce judgment in terms of settlement and upon the judgment so pronounced a decree shall follow.

(8) If the efforts of mediator or conciliator, fail in bringing about a settlement between the parties, the mediator or conciliator shall submit a report certifying that the parties have not reached any settlement and the court shall proceed with the case.

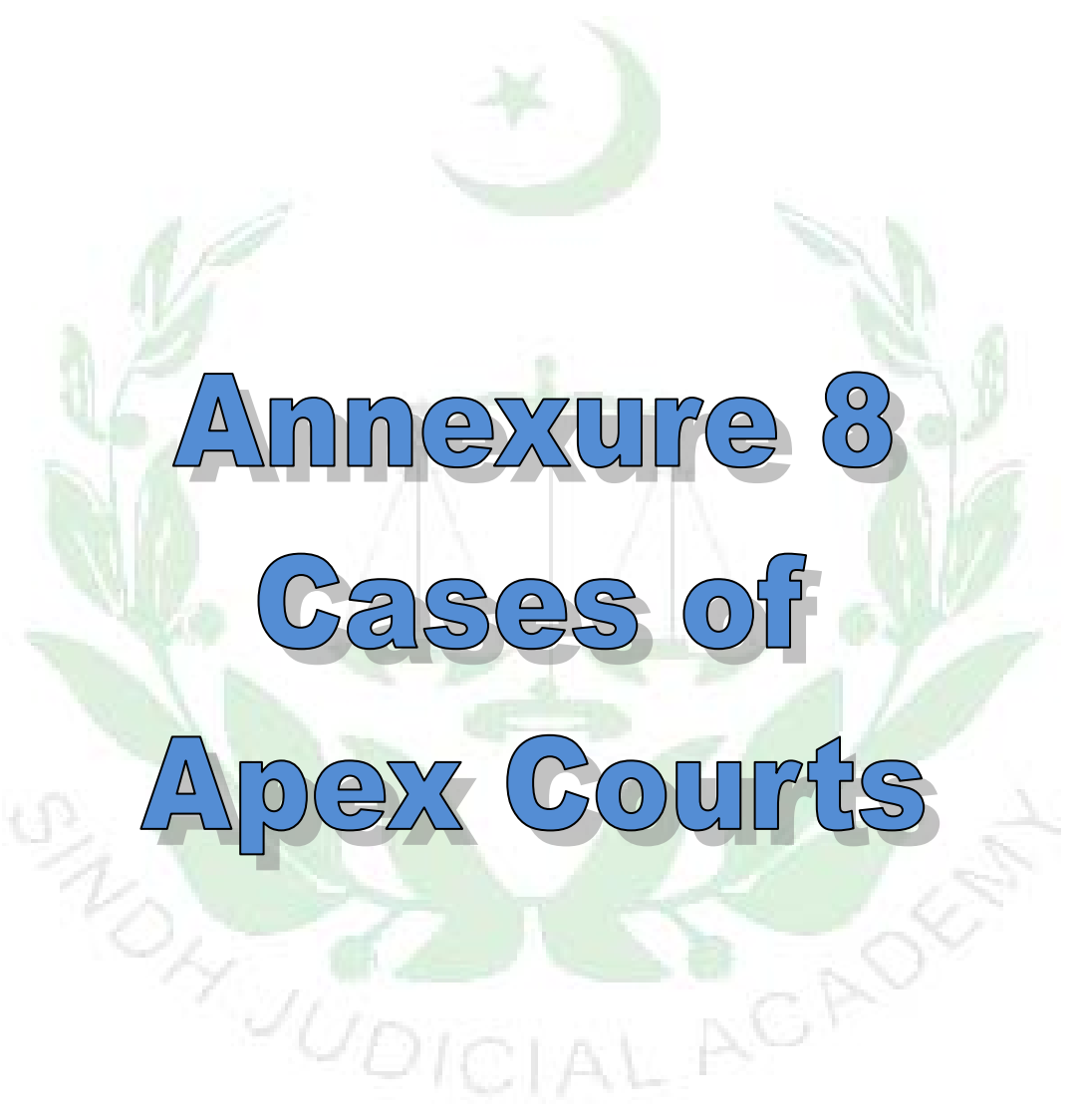
(9) Save as otherwise provided in this section, the proceedings before the mediator or conciliator shall not be admissible before any court and the mediator or conciliator shall not be required to appear as witness or otherwise in any arbitral or judicial proceedings with respect to a dispute that is or was the subject-matter of mediation or conciliation. The mediator or conciliator shall also not act as an arbitrator or as representative or counsel of a party in any arbitral or judicial proceedings with respect to a dispute that is or was the subject-matter of a mediation or conciliation.

(10) This code and the Qanun-e-Shahadat, 1984 (P.O. No.10 of 1984) shall not apply to the proceedings before the mediator or conciliator.

(11) No appeal or revision shall lie from a decree or order made a result of the consent of the parties.

(12) The High Court or Federal Government may make rules giving effect to the provisions of this section”.





Annexure 8

Cases of

Apex Courts

Annexure 8 Cases of Apex Courts

2004 P Cr. L J 1523

[Karachi]

Before Rahmat Hussain Jafferi, J

Mst. SHAZIA—Petitioner

versus

STATION HOUSE OFFICER and others—Respondents C.P. No.92 of 2004, decided on 24th April, 2004.

(a) Constitution of Pakistan (1973)—

—Art. 199—Constitutional petition for saving the petitioner and her husband from being subjected to Jirga system—Petitioner had complained to the police to protect her life and the life of her husband but when she could not get a proper response and on the contrary she and her family members were being harassed, she approached the High Court to save her life and that of her husband—Duty was cast upon the Court to save the life of the citizens—Respondents had not controverted the said allegations by denying the same in their written statements or by filing their own affidavits—Factual aspect of the allegations of the petitioner thus stood proved—Jirga system being not a creation of Constitution or law, Jirga was not a Parliament and they could not declare a valid marriage contracted under the provisions of the relevant law as invalid or unlawful—Supreme Court had already held that for contracting a marriage consent of parents was not essential if the parties were sui juris—Boy and girl having become husband and wife through a valid marriage could not be declared as "Karo Kari" during the subsistence of their marriage---Persons participating in such a Jirga would expose themselves to appropriate action to be taken against them—All executive and judicial authorities throughout the country were duty bound to come in aid of Supreme Court and its decision was to be protected, preserved and implemented by all concerned—Duty of the police was to act swiftly and to preserve the basic fabric of the society, Injunctions of Islam, law of the land and decision of the Supreme. Court—Decision of Jirga declaring a valid piece of law as unlawful amounted to legislation and usurping the powers of parliament—After the repeal of the West Pakistan Criminal Law (Amendment) Act, 1963, trials known as Jirga trials were not permissible—Jirga system, thus, was unlawful and illegal, the same being against the provisions of the Constitution and the law of the land—Police was duty bound to take appropriate action to prevent the holding of Jirgas—Official respondents were consequently directed to provide due protection to the petitioner to save her life and the life of her husband by invoking the provisions of the Criminal Procedure Code, 1898, relating to the prevention of offences or after commission of offences, the provisions of Police Order, 2002 and other enabling provisions of laws—Constitutional petition was disposed of accordingly, [pp. 1535, 1539, 1544] A, B, C, I, J, K & L

PLD 1983 Quetta 52; PLD 1995 SC 530; Muhammad Shafiq v. Additional District Judge 1990 CLC 1108; Ghulam Mustafa v. Mehran University of Engineering and Technology 1986 CLC 1056; Muhammad Farooq v. Government of Sindh 1986 CLC 1408; Hafiz Abdul Waheed v. Asma Jehangir Appeal No.98 of 1997; Muhammad Iqbal v. S.H.O,

Police Station Batala Colony Civil Appeal No.563 of 1997 and suo motu case No.4 of 2003 ref.

(b) Jirga—

—Jirga system is not a creation of the Constitution or law—Jirga, therefore, is not a Parliament and they cannot declare a valid marriage contracted under the provisions of the relevant law as invalid or unlawful, [p. 1539] B

Hafiz Abdul Waheed v. Asma Jehangir Appeal No.98 of 1997 and Muhammad Iqbal v. S.H.O. Police Station Batala Colony Civil Appeal No.563 of 1997 ref.

(c) Jirga—

—Not protected by any law—Functions which are exclusively to be performed by the Courts of law are being performed by the Jirgas thereby usurping the power of the Courts—Jirgas as such are a parallel judicial system which by themselves are unlawful and illegal and are not protected by any law—Decision of Jirgas being final no appeal is filed against them which is also against the principle of natural justice. [p. 1541] D

(d) Jirga—

—Compromise effected by Jirga has no protection of law—Matters referred to a Jirga to settle the dispute or effect a compromise between the parties without the permission of, the Court will not be protected by the law as such Jirga will not be having blessing or backing of the Court. [p. 1542] E

(e) Jirga—

—Execution of the orders of Jirga—Not permissible under the Constitution or the law—Execution of the orders is the function of State Agencies—Private persons have no authority to execute the decisions of Jirgas, nor the Jirgas have the authority to execute their own decisions through their own sources—If such decisions are carried out and executed by killing persons, then the offence of murder will be committed and they will be liable to be proceeded against as per law— Jirgas have also usurped the powers of the executing authorities which is not permissible under the Constitution or the law. [p. 1543] F

(f) Jirga—

—Constitution undermined—Jirgas are against the trichotomy powers of the Constitution and are exercising the power of Legislature, Judiciary and executive enshrined therein and in this way are undermining or attempting to undermine the provisions of the Constitution, [p. 1544] G

(g) Jirga—

—Duties of police—Assembly in Jirgas in the first instance may be lawful, but the purpose for which they assemble is unlawful and then they conspire to commit some offences and expose themselves for action as provided under various relevant provisions of the Penal Code—Police in such a situation is duty bound to act swiftly and exercise their powers to curb the offences being committed or book the offenders—If nobody comes forward to lodge the F.I.R., then the police on their own can file such F.I.Rs. as are being filed in the cases of unlicensed arms and ammunition and Narcotics—Is also one of the public duties of the police to protect the life of the citizens when complained to them. [p. 1544] H

P L D 1957 (W. P.) Peshawar 100

*Before S. A. Rahman, C. J., M. R. Kayani and
Muhammad Shaft, JJ*

KHAN ABDUL AKBAR KHAN—Petitioner

versus

THE DEPUTY COMMISSIONER OF PESHAWAR
and others—Respondents

Writ Petition No. 20 of 1956, decided on 22nd April 1957, for the issue of a writ of *certiorari* to direct the certification and the production of proceedings taken under section 8 of the Frontier Crimes Regulation in a civil matter.

(a) *Frontier Crimes Regulation (111 of 1901), S. 8-* "Satisfaction" is that of the Deputy Commissioner and no other authority.

Held, that the satisfaction as to the existence of a dispute should be that of the Deputy Commissioner, and where the Deputy Commissioner has at no stage of the case testified to its existence, the reference can be removed and quashed only on that ground, [p, 102] A

(b) Frontier Crimes Regulation (III of 1901), Ss. I (4) & 8-Inconsistent with Art 5. Constitution of Pakistan so far as civil references are concerned-Frontier Crimes Regulation (III of 1901), S. 49-Ineffective-Constitution of Pakistan, Art. 4.

Held, that so far as *civil* references go, subsection (4) of section 1, which provides for the application of the Regulation to Pathans and Biluchis only, and section 8, which provides for the reference of civil disputes to a Council of Elders, are inconsistent with Article 5 of the Constitution, in so far as they do not provide equal protection of law to Pathans and Biluchis, and are, therefore, void under the provision of Article 4. Along with section 8 of the Regulation, sections 9 and 10 also fall. Section 49, to the extent to which it provides for revisions in relation to decisions and decrees on civil matters, should be resarded as ineffective. [p. 108]B

P L D 1957 (W. P.) Quetta 9

Before S. A. Rahman, C. J. and Yaqub AH, J

DOSSO and another—Petitioners

versus

THE STATE and others—Respondents

Writ Petition No. 21 of 1957, decided on 9th August 1957.

Constitution of Pakistan, Arts. 170 & 178—High Court whether can issue writ in the nature of habeas corpus in respect of persons present within the area of its own jurisdiction, but detained under order illegally passed by authority immune to jurisdiction of the High Court—Frontier Crimes Regulation, (III of 1901)—Provisions enabling executive authorities to refer criminal case to jirga—Void under Art. 4 of the Constitution of Pakistan—Constitution of Pakistan, Art. 5—Establishment of West Pakistan Act, 1955, S. 2.

By section 2 of the Establishment of West Pakistan Act, 1955 the Tribal Areas of Baluchistan, along with certain other tribal areas and States were incorporated in the Province of West Pakistan. Article 1 of the Constitution of Pakistan declares that the territories of Pakistan shall comprise the territories of the Provinces of East Pakistan and West Pakistan. Thus even the special areas, which is the name given to the Tribal Areas, are included within the areas of Pakistan and the citizen residing therein are entitled to the benefit of the fundamental rights guaranteed by the Constitution. Thus the provisions of the Frontier Crimes Regulation, 1901, which enable the executive authorities to refer any criminal case to a *jirga* are repugnant to Article 5 of the Constitution and therefore, void under Article 4. A conviction based on the award of *jirga* in a criminal case, even in the Special Areas, is, therefore, to be regarded as without jurisdiction. [p. 11] A & B

Despite a provision in an enactment ousting jurisdiction of all Courts in respect of proceedings under it, the constitutionality of the enactment could be inquired into and if it was *ultra vires* the constitution writ in the nature of *habeas corpus*, in respect of a person convicted for any offence committed under such *ultra vires* Act, could be issued by the High Court. [p. 13]E

Article 178 of the constitution apparently enacts that the High Court shall not entertain any appeal or revision from the orders passed by authorities in a Special Areas, whether in a civil or a criminal matter. To that extent, the Article entails the consequence that although the order in question may be *ultra vires* of the Constitution, it is not open to residents of the Special Area concerned, under Article 170 of the Constitution or under any other Provisions of law, to approach the High Court for redress. But the High Court is not debarred from expressing an opinion upon the legality or otherwise of orders passed by the relevant authorities in a Special Area in all conceivable cases. Nor is it precluded from exercising its jurisdiction under Article 170 of the Constitution in respect of persons detained by an illegal order within the territorial limits of its jurisdiction although such persons may have been tried and convicted by an authority immune to the jurisdiction of the High Court, [pp. 12, 13]C, D & F

P L D 1991 Quetta 7

Before Mir Hazar Klian Khoso, C.J. and Amir-ul-Mulk Mengal, J

BALUCHISTAN BAR ASSOCIATION through
President Baluchistan Bar Association and others—Petitioners

versus

GOVERNMENT OF BALUCHISTAN through the Chief Secretary, Baluchistan
and others—Respondents

Constitutional Petitions Nos. 8, 17, 18, 57, 58, 63, 77, 83, 95, 79, 98, 106, 107, 113, 136, 141, 150, 213 of 1990, heard on 16th August, 1990.

(a) Frontier Crimes Regulation, 1911--

—Preamble—Purpose of enforcing the Regulation by Britishers and subsequent legislative developments with regard thereto discussed, [p. 13] A

Malik Toti Khan v. District Magistrate, Sibi and Ziarat PLD 1957 (W.P.) quetta 1 and PLD 1957 (W.P.) Pesh. 100 ref.

(b) Criminal Law (Special Provisions) Ordinance (II of 1968)--

-Preamble-Salient features of the Ordinance stated, [p. 16] B

(c) Constitution of Pakistan (1973)--

-Art. 199—Constitutional jurisdiction of High Court—High Court, under its constitutional jurisdiction is hardly concerned with good or bad aspects of a statute if the same has been validly enacted by a competent legislature provided any of its provisions is not violative of the Constitutional provisions, [p. 19] C

(d) Constitution of Pakistan (1973)--

-Art. 199—Criminal Law (Special Provisions) Ordinance (II of 1968), Preamble-Vires of statute—Constitutional jurisdiction of High Court—Powers High Court are limited to examine legislative competence or any other such limitation as is provided in the Constitution.

Primary duty of the judiciary is to administer or to interpret laws validly enacted but it is also the duty of the judiciary to review any law so made on the touchstone of legislative competence or fundamental rights or any limitations imposed by the Constitution of the country. Constitution contemplates trichotomy [powers between three organs of the State i.e. legislature, Executive and the judiciary. The powers of each of such organs are well defined in the Constitution and each of such organs has to operate within the limits so defined in the (institution. The judiciary is not more superior in dignity to the legislature but it the duty of the judiciary to ensure that none of the organs should act in violation of the provisions of the Constitution. This role of the judiciary is popularly termed as a ‘watch-dog’ or the ‘balanced wheel’ and while exercising such powers it has to ensure that no organ of the State should transgress into the realm of another and hence to keep the equilibrium.

The courts are the creature of the Constitution, therefore, their powers are limited only to examine legislative competence or any other such limitation as is provided in the Constitution [p. 19] D

When a Court which is a creature of the Constitution itself, examines the vires of an Act, its powers are limited to examine the legislative competence or to such other limitations as are in the Constitution; and while declaring a legislative instrument as void, it is not because the judicial power is superior in degree or dignity to the legislative power but because it enforces the Constitution as a paramount law either where a legislative instrument is in conflict with it so as to give effect to it or where the legislature fails to keep within Constitutional limits [p. 20] E

The sole judge of necessity of legislation rests with the law giver and vires of legislation cannot be attacked by reference to such extrinsic factors. Therefore, the courts cannot see and examine the legal justification for issuing a statute which is sole discretion with the competence of the law-givers and which cannot be judicially reviewed, except on legislative incompetency or Constitutional limitations. [p. 20] F

If any statute or provision thereof are found to be infringing any fundamental right same shall stand void to the extent of such infringement. [p. 20] G

Fauji Foundation's case PLD 1983 SC 457 and Mrs. Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 60 ref.

(e) Constitution of Pakistan (1973)—

----Arts. 25 & 8---"Equality before law" and "equal protection of law"---Distinction--- Concept of sovereignty has undergone a change and particularly constitution of Pakistan (1973) puts an embargo within the meaning of Art. 25 of the Constitution, as well as a clog has been imposed of the Fundamental Rights on the legislature----Legislature, thus shall not make any law which takes away or abridges a Fundamental Right or any law which is in contravention of the Constitution.

Equality before law and equal protection of Law are two different phenomena and the distinction is very often very inconspicuous. These concepts are borrowed from different Constitutions of the world, specially from English and American theories of rule of law. The concept of 'equality before law' has been derived from English Constitutional Law whereas concept of 'equal protection of law' has been taken from American Constitution. The 'equality before law' is a basic characteristic of English Constitutional Law which means that all men are equal before law. Thus all the citizens are equally subject to the ordinary law of the land being administered by the ordinary Courts. [p. 20] H

The concept of sovereignty has undergone a change and particularly our Constitution puts an embargo within meaning of Article 25, as well as a clog has been imposed of fundamental rights on the legislature, [p. 21] I

Hence the legislature shall not make any law which is in contravention of the Constitution. Such law thus would be void to the extent of such contravention. Thus, if put concisely, the concept connotes equal protection of law which means that "no person or class of persons shall be denied the same protection of law as is enjoyed by other persons or other classes in the same place and in the like circumstances.

The rule of equal protection is also not absolute and this concept has to undergo substantial change. The Courts, therefore, have held permissible inequality provided the same is based on a classification which is further based on (rational and reasonable basis; where there is an object to be achieved and such qualification has got nexus with such object or is relatable to the same, classification may be found reasonable, [p. 21] J

Commentary of Constitution by late Muhammad Munir, former Chief Justice of Pakistan ref.

(f) 'Criminal Law (Special Provisions) Ordinance (II of 1968)--

-S. 1(3)—Constitution of Pakistan (1973), Arts. 4 & 25—Reasonable classification —Application of the Ordinance in the areas where people live in like circumstances was neither universal nor uniform and it had been left entirely to the whims and caprice of the Government to decide without any rational basis to withdraw the Ordinance or re-apply the same in any area in a most subjective manner and there being no criterion in taking any such decision, the classification, held, was neither intelligible nor reasonable nor it was discernible and thus offended Arts. 4 and 25 of the Constitution of Pakistan— Government has been given unbridled, unlettered and unlimited powers to apply to all withdraw provisions of the Ordinance in any area of the Province without any rational basis thus discriminating amongst the people or class of people who lived in the like circumstances—Prescription of some procedure or uniform Rules, however, was desired by the High Court. [pp. 23, 24, 25, 26] K, L, M, N, O, P, O, R, S, & T

Malik Muhammad Usman v. The Slate PLD 1965 Lah. 229; Yick Wo v. Hopkins (1886) 118 US 356; Mir Behman Khan v. Sardar Abdullah Khan PLD 1983 Quatta 52 and Nazar Khan v. The State PLD 1987 Quatta 141 ref.

(g) Constitution of Pakistan (1973)--

-Art. 25—Rule or Procedure also comes within the purview of Art. 25 in the same manner as any such provision of substantive law. [p. 27] U

(h) Criminal Law (Special Provisions) Ordinance (II of 1968)--

Preamble—Constitution of Pakistan (1973), Arts. 175 (3) & 2-A—Concept of independence of judiciary being totally alien to the provisions of Criminal Law (Special Provisions) Ordinance, 1968 inasmuch as the entire criminal justice was administered by the executive officers instead of the judicial officers, mandatory provisions of the Constitution could not be given effect to, if the Ordinance was not struck down.

The concept of independence of judiciary is totally alien to the provisions of the Ordinance inasmuch as the entire criminal justice is administered by the executive officers instead of the judicial officers. There is no concept of independent judiciary in the Ordinance because right from the rank of Naib-Tehsildar who investigates into the matter upto the Member, Board of Revenue, who finally adjudicates upon the revision petitions, the whole hierarchy comprises of Executive Officers. In the scheme of the Ordinance there is no room for any judicial Magistrate and no authority whatsoever has been left to be exercised by the ordinary Courts. Thus the concept cannot be conceived in a system where all the judicial powers are exercisable by executive officers, [p. 27] V

Concept of independence of judiciary as envisaged in the Objectives Resolution can never be achieved through legal machinery under the Ordinance II of 1968 where the Executive Officers administer criminal justice and no judicial officer finds any mention anywhere in the Ordinance.

Similarly separation of judiciary from the executive is not a mere desire but a Constitutional requirement and therefore, it has to be given effect to. This cannot be done at least in the Province of Balochistan with the only exception of Quetta District or Sub Division of Dera Allahyar where there is regular law for the simple reason that the Ordinance is a great impediment and an insurmountable hurdle in the way of separation of judiciary from

the executive. If the Ordinance continues to be in force then the concept of separation of judiciary falls in fiasco. Both the concepts just cannot co-exist because with the removal of Deputy Commissioner and other Executive Officers and their replacement by the judicial officers, the entire edifice of the Ordinance falls to the ground. Thus a mandatory

provision of the Constitution cannot be given effect to, if the Ordinance is not struck down. [p. 28] W

If the Courts find a law inconsistent with the Constitution, it is competent to strike it down to the extent of such inconsistency. [p. 29] X

The entire provisions of the Ordinance II of 1968 are inconsistent with Article 175(3) of the Constitution and are thus void on this score as well. [p. 29] Y

The provisions of the Ordinance II of 1968 being inconsistent with the constitutional provisions, the same are void. [p. 29] Z

(i) Constitution of Pakistan (1973)--

—Art. 199—Constitutional jurisdiction—If Court finds a law inconsistent with the Constitution, it is competent to strike it down to the extent of such inconsistency, [p. 29] X

(j) Criminal Law (Special Provisions) Ordinance (H of 1968)--

--Preamble—Constitution of Pakistan (1973), Arts. 25, 2-A & 175(3)—Criminal Law (Special Provisions) Ordinance, 1968 being inconsistent with Arts. 25, 2-A & 175(3) of the Constitution of Pakistan is void. [p. 30] AA & BB



P L D 1993 Supreme Court 341

*Present: Muhammad Afzal Zullah C.J., Saleem Akhtar
and Wali Muhammad Khan, JJ*

GOVERNMENT OF BALUCHISTAN through Additional Chief Secretary ---
Appellant

versus

AZIZULLAH MEMON and 16 others --- Respondents Civil Appeals Nos.1412 to
1428 of 1900, decided on 10th April, 1993.

(On appeal from the judgment of the High Court of Balochistan dated 29-8-1990 passed in Constitutional Petition Nos.150, (3, 57, 17, 18, 58, 79, 83, 98, 95, 106, 107, 136, 141 and H of 1990 and Constitutional Petition No. 213 of 1989).

(a) Criminal Law (Special Provisions) Ordinance (II of 1968)—

— Preamble—Historical background of applicability of Ordinance to Province of Balochistan. [p. 351] A et seq

Malik Toti Khan v. District Magistrate", Sibbi PLD 1957 (W.P.) Ouetta 1; Khan Abdul Ghaffar Khan v. The Deputy Commissioner, Peshawar PLD 1965 (W.P.) Pesh. 100 and (Civil and Criminal Law) Ordinance, 1965 PLD 1965 (W.P.) Statutes 96 ref.

(b) Criminal Law (Special Provisions) Ordinance (II of 196X)—

—Preamble—Provisions of Ordinance examined, [pp. 352, 360] B et seq & K

(c) Constitution of Pakistan (1973)—

—Part II, Chap. 1 [Arts. 8 to 28]—Fundamental Rights—For purposes of applying Fundamental Rights guaranteed under the Constitution wherever the word "State"¹ is used, it shall include all agencies and functionaries specified in Art. 7 of the Constitution, [p. 354) C

(d) Constitution of Pakistan (1973)—

---Art. 8—Scope and application of Art. 8.

Article 8(1) of the Constitution of Pakistan (1973) commands that "any law, or any custom or usage having the force of law in so far as it is inconsistent with the rights conferred by (his Chapter shall to the extent of such inconsistency be void.". Therefore, any law which is inconsistent will) the fundamental rights will be void. Article 8(2) further command', and prohibits the Slate as defined in Article 7 from enacting any law which takes away or abridges fundamental lights guaranteed and any law made in contravention of (his clause shall be to the extent of inconsistency/contravention be void. Therefore, Articles 8(1) and (2) relates to the existing laws as well as the laws which may be enacted after the promulgation of the Constitution. Sub-clause (3)(a)&(b) excludes the enactments and persons from the operation of Article 8(1) and (2). However, Article 8(4) furl her provides that the laws saved under clause 3(b) shall be In ought in conformity with the fundamental rights within a period of two years from the commencing day or such period as may be extended by the Legislature. Article 8(5) further provides that provides that the rights conferred by Chapter 1 of Part II shall not he suspended except as provided by the Constitution, [p. 354) D)

(e) Constitution of Pakistan (1973) —

—Art. 25---Scope and application of Art. 25. [p. W] E

(f) Criminal Law (Special Provisions) Ordinance (II of 1968) —

—Preamble—Constitution of Pakistan (1973), Ails. 25(2) (3) & 8(3) (b)-Criminal Law (Special Provisions) Ordinance, 1968 does not fall within the provisions of Art. 25(2) & (3) nor it has been saved under Ail. 8(3) (b) of the Constitution of Pakistan (1973), [p. 355] F

(g) Interpretation of Constitution—

—Principles.

The interpretation of Constitution attracts most of the principles employed in interpreting the statutes, but care has to be taken that it is not restrictive, pedantic or limited. Unlike other enactments the Constitution is a living document which portrays the aspirations and genius of the people and aims at creating progress, peace, welfare and amity among the citizens and the nations abroad. It is (he basic structure on which the entire edifice is built and therefore it has to be interpreted in a manner to keep it alive and blossom in every atmosphere and in every situation, [p. 355] G

(h) Constitution of Pakistan (1973) —

—Art. 25—Application of Art. 25—Principles—Any law made or action taken in violation of principles contained in Art. 25 is liable to be struck down.

Following arc the principles for application of equality clause of the Constitution—

- (i) that equal protection of law docs not envisage that every citizen is to be treated alike in all circumstances, but in contemplates that persons similarly situated or similarly placed are to be treated alike;
- (ii) that reasonable classification is permissible but it must be, founded on reasonable distinction or reasonable basis;
- (iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings and persons accused of heinous crimes;
- (iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, maybe unreasonable in the other set of circumstances;
- (v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;
- (vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;
- (vii) that in order to make a classification reasonable it should be based—
 - (a) on an intelligible differentia which distinguished persons or things that are grouped together from those who have been left out;
 - (b) that the differentia must have rational nexus to the object sought to be achieved by such classification, [p. 358] I

Although class legislation has been forbidden, it permits reasonable classification for the purpose of legislation. Permissible classification is allowed provided the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others who arc left out of the group and such classification and

differentia must be on rational relation to the objects sought to be achieved by the Act. There should be a nexus between the classification and the objects of the Act. This principle symbolises that persons or things similarly situated cannot be distinguished or discriminated while making or applying the law. It has to be applied equally to persons situated similarly and in the same situation. Any law made or action taken in violation of these principles is liable to be struck down. If the law clothes any statutory authority or functionary with unguided and arbitrary power enabling it to administer in a discriminatory manner, such law will violate equality clause. Thus, the substantive and procedural law and action taken under it can be challenged as violative of Articles 8 and 25. [p. 359] J

Where the statutory functionary acts mala fide or in a partial, unjust, oppressive or discriminatory manner, his action can be challenged for violation of equality clause of the Constitution [p. 357] H

Jibendra Kishore Achharyya Choudhury and 58 others v. *The Province of East Pakistan* PLD 1957 SC (Pak.) 9; Waris Meah v. *The Slate* and another PLD 1957 SC (Pak.) 157, Bazal Ahmad Ayyubi v. *The West Pakistan Province* PLD 1957 Lah. 388; Zain Noorani v. *Secretary of the National Assembly of Pakistan* PLD 1957 Kar. 1; Malik Muhammad Usman v. *The Slate* and another PLD 1965 Lah. 229; Jibendra Kishore and Waris Meah reiterated in *East and West Steamship v. Pakistan* PLD 1958 SC 41; F.B. Ali's case PLD 1975 SC 506; Fauji Foundation's case PLD 1983 SC 457; I.A. Sherwani's case 1991 SCMR 1041; Abdul Wall Khan's case PLD 1976 SC 57; Aziz Begum's case PLD 1990 SC 899 and Shirin Munir and other v. *Government of Punjab* PLD 1990 SC 295 ref.

(i) Administration of justice—

---Mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedures of criminal law, trial and detention which is enforceable in the entire country, [p. 361] L

(j) Constitution of Pakistan (1973) —

---Art. 25—Criminal Law (Special Provisions) Ordinance (II of 1968), Preamble—Mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedures of criminal law, trial and detention which is enforceable in the entire country, [p. 361] L

(k) Criminal law (Special Provisions) Ordinance (II of 1968) —

---Preamble—Constitution of Pakistan (1973), Art. 25—Provisions of Criminal Law (Special Provisions) Ordinance, 1968 have no nexus with the object of the Ordinance; confers unrestricted and unfettered power in the executive to administer criminal justice; has discriminated from the other areas of Pakistan which are similarly situated and further provides that Government may by Notification on such a date specified therein, direct that the Ordinance shall cease to be in force in any area in which it is in force and shall be deemed to have been repealed in that area—Such classification, is neither rational nor based on any intelligible differentia and thus offends against the guarantee contained in Art. 25 of the Constitution.

The generality of the application of the Criminal Law (Special Provisions) Ordinance, 1968 has discriminated from the other areas of Pakistan which are similarly situated. This classification is neither rational nor based on any intelligible

differentia. Further it can be noted that under section 1(3) of the Ordinance the Government may, by notification on such a date as specified therein, direct that the Ordinance shall cease to be in force in any area in which it is in force and shall be deemed to have been repealed in that area. [p. 362] M

This power to repeal in any area is unguided and unfettered depending entirely upon the mercy, whim and wishes of the Government. In the absence of any guideline such repeal may be discriminatory and unreasonable. If the object of the Ordinance is to meet the undefined requirements of the area, then unless a certain form of repeal is laid down, the exercise of power may lead to discrimination, favouritism, despotic order and in spite of an area having achieved the level to be governed by general law will not get rid of the Ordinance. This provision by itself may be justified but its operation is destructive of equality clause and fundamental right to have protection of law. [p. 364] N

Although area-wise classification on the basis of local circumstances for applying different laws may be justified, it must be intended to achieve a lawful, rational and reasonable object which may not run contrary to the fundamental rights guaranteed by the Constitution and principles of justice and equality. The law should have real nexus with the object. It is not sufficient to decorate the Act by making provisions which may seemingly look like complying with the demands of justice as required by the Constitution but the effective and operative provision may in application be violative of these provisions. Such complex and compounded provisions will have, to be examined and scrutinized to find out the real object and the effect of such provisions in their application, [p. 364] O

In the Ordinance the process of applicability has been reversed. It has been applied to areas instead of tribe and race but the power to notify its cessation thereby repealing it from any area has been given to the Government without any guiding principle or fixed criteria (or exercise of discretion). Thus a "repulsive procedure" could be withdrawn or allowed to continue without any reasonable ground. Even the power to notify the cessation of the Ordinance from any area must be based on certain grounds, reasons and principles which are completely absent here. This offends against the guarantee contained in Article 25 of the Constitution. [p. 365] P

The Ordinance confers unrestricted and unlettered power in the executive to administer criminal justice. When regular Courts have been established in the area to adjudicate civil disputes, to provide for trial of criminal offences by tribunal (Jirga) under a different procedure, leaving the destiny entirely in the hands of the executive officers does not serve the object and purpose of the Ordinance. It is complete negation of the fundamental rights which guarantee equal protection of law, equality before law and right of access to justice unhindered and unfettered as provided by the Constitution and the Injunctions of Islam. [p. 365] Q

Constitution is based on the principle of trichotomy of power in which executive, legislature and judiciary have their own functions independent from each other. None of these three organs are dependent upon the other nor can claim superiority over the other. In this context and background to impose executive officers to carry out the judicial work by ignoring the Courts established in that area by itself creates discrimination and negates the very concept of justice and violates fundamental rights, (p. 366] R

Facts clearly contradict and negate the assertion that the provisions of the Ordinance have nexus with the object of the Ordinance. [p. 366] S

These provisions create a bar to the right of citizens to approach the established Courts of law and to be governed by the general criminal law applicable in the entire country. The exclusion is not based on any rational classification or intelligible differentia [p. 367] T

After passage of about four decades the situation has much improved, Courts have been established in every district and judicial officers are performing their duties and adjudicating civil cases, investigating agencies with sufficient experience and training exist, which have in the past handled criminal cases. The infrastructure for trial of criminal offences is available. It will only require issuance of notifications by the Government for trial of offences under the ordinary law in the entire province, which in adjudication of civil rights, is governed by the ordinary law of the land. [p. 374] DD

Doso's case PLD 1958 SC (Pak.) 533; Muhammad Usman v. State PLD 1965 Lah. 229 and The Slate v. Nawab Gil PLD 1963 SC 270. ref.

(I) Criminal Law (Special Provisions) Ordinance (II of 1968)—

--Preamble—Constitution of Pakistan (1973), Arts. 9, 25 & 175—Right to access to justice—Meaning—Legislature cannot frame such law which may bar right of access to Courts of law and justice—Provisions of Criminal Law (Special Provisions) Ordinance, 1968 deny the right of access to Courts and justice which is infringement of Arts. 9, 25 & 175 of the Constitution.

The right of access to justice does not only mean that the law may provide remedies for the violation of rights, but it also means (hat every citizen should have equal opportunity and right to approach the Courts without any discrimination. It also envisages that normally the Courts established by law shall be open for all citizens alike. Where the jurisdiction of the ordinary Courts established under the ordinary law is excluded or barred and certain class of cases or class of persons or inhabitants of an area are not allowed to approach such Courts and are to be tried or rights adjudicated by special Courts, then a fair, rational and reasonable classification must be made which have nexus with the object of the legislation. Even in such cases where special Tribunals are constituted, arbitrary powers cannot be conferred on executive for appointing persons on the Tribunal, providing procedure or imposing any Sentence of conviction. Such special Tribunals and Courts must follow the ordinary rules of justice, equality and good conscience. In fact the administration of justice cannot be made subject to or controlled by the executive authorities. [p. 368] W

By the provisions of Criminal Law (Special Provisions) Ordinance, 1968 the right of access to Courts and justice has been denied. This by itself is an infringement of fundamental rights which provide that every citizen shall be entitled to equal protection of law and will not be deprived of life or liberty save in accordance with law. An examination of Articles 9 and 25 read collectively does not permit the legislature to frame such law which may bar right of access to the courts of law and justice. [p.367] U

The right of access to justice is internationally well recognized human right and is now being implemented and executed by granting relief under the Constitutional provisions. Article 10 of Universal Declaration of Human Rights and Article 14 of the United Nations Convention on Criminal and Political Rights recognize the right of fair trial by an independent and impartial Tribunal established by law. The right of equal access to ordinary Tribunals and Courts is recognized in other countries also. [p. 368] V

One of the modes for blocking the road to free access to justice is to appoint or hand over the adjudication of rights and trial of offences in the hands of the executive officers. This is merely a semblance of establishing Courts which are authorized to decide cases and adjudicate the rights, but in fact such Courts which are manned and run by executive authorities without being under the control and supervision of the judiciary can hardly meet the demands of Constitution.

Considering from this point of view Ordinance II of 1968 from the cognizance of the case till the revision is disposed of the entire machinery is in the hands of the executive from Naib-Tchsildar to the officials of the Government in the Ministry. Such a procedure can hardly be conducive to the administration of justice and development of the area nor will it achieve the desired result of bringing law and order, peace and tranquillity or economic prosperity and well-being. The Constitution envisages independent judiciary separate from the executive. Thus any Tribunal created under the control and superintendence of the executive for adjudication of civil or criminal cases will be in complete conflict with Articles 175, 9 and 25 of the Constitution, [p.] Y

Muhammad Usman v. Slate PLD 1965 Lah. 229; Abdul Akbar Khan's case PLD 1957 Pesh. 100; Malik Toti Khan's case PLD 1957 Quetta 1; Abdul Ghani and another PLD 1964 (W.P.) Lah. 612 and Waris Mean's case PLD 1957 SC 157 **ref.**

(m) Constitution of Pakistan (1[^]73)—

--Arts. 9, 25 & 175—Right of access to justice—Separation of judiciary from the executive—Separation of judiciary from executive being the cornerstone of independence of judiciary, unless it was independent, the fundamental right of access to justice could not be guaranteed, [p. 369] X

(n) Constitution of Pakistan (1973)—

—Arts. 175 & 203—Separation of judiciary from the executive—Fixed time limit for separation of judiciary from the executive has expired since 1987 and from then onwards irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation—Steps to be taken to avoid financial dependence of judiciary on the executive suggested.

The Constitution provides for separation of judiciary from the executive. It aims at an independent judiciary which is an important organ of the State within the Constitutional sphere. The Constitution provides for progressive separation of the judiciary and had fixed a time limit for such separation. It expired in the year 1987 and from then onwards, irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation. Separation of judiciary is the cornerstone of independence of judiciary and unless judiciary is independent, the fundamental right of access to justice cannot be guaranteed, fp. 369J X

Separation of judiciary from executive is essential for its independence. The judiciary though an important pillar of the Constitution does not have the purse and power. The administrative mechanism devised is such that the judiciary is made dependent in matters of finances, development and its establishment, [p. 369] Z

The separation of the judiciary as contemplated in Article 175 of the Constitution and independence of the judiciary as envisaged in the Objectives Resolution (Article 2A) cannot be achieved without having independent annual budget for the judiciary. In other

words, the judiciary should generate its own annual income according to its annual requirements. This may not be practicable. The requirements of Article 175 will be met if the judiciary has effective say in formulation of its annual demands. To put it differently, the executive should place annual funds as per requirements at the disposal of the judiciary for operating it without being interfered with by any agency of the Executive.

This view in effect finds support from Articles 81, 82, 121 and 122. The first two Articles relate to remuneration payable to the Judges of the Supreme Court and the administrative expenses including the remuneration payable to officers or servants of the Supreme Court. The expenditures are charged on the Federal Consolidated Fund which under Article 82 "may be discussed in, but shall not be submitted to the vote of the National Assembly". The same provisions have been made in respect of High Court Judges and administrative expenses of the High Court. The financial requirements of the Supreme Court and the High Court should be assessed by the Courts and after meaningful consultation with such Courts annual funds as per requirement be allocated and placed at the disposal of the Courts. All remunerations, expenses and disbursements relating to the judiciary should be made without any interference by any department which are usually technical in nature requiring compliance with certain rules and practice of other departments of the Government. In case of any objection, if approval of the Chief Justice concerned is given, it should stand waived and set aside. Such steps should be taken to avoid financial dependence of judiciary on the executive. Article 175 envisages separation and independence of judiciary which includes the lower judiciary as well. The lower judiciary is a part of the judicial hierarchy in Pakistan. Its separation and independence is to be equally secured and preserved as that of the superior judiciary. The lower judiciary is more dependent and prone to financial dependence and harassment at the hands of the executive. In practice and effect the separation of judiciary is the main problem of the lower judiciary which under several enactments and rules is practically under the control and supervision of the executive. Articles 175 and 203 lay, down that the judiciary including lower judiciary shall be separate from the executive and "High Court shall supervise and control all Courts subordinate to it". Such control and supervision can be achieved only when the judiciary is administratively and financially separate from the executive. Separation of Magistracy is the first step towards separation and independence. The next step should be taken to devise proper scheme and frame rules dealing with financial problems within the framework of the Constitution. So long financial independence is not achieved, it will be difficult to improve the working conditions, accommodation, building and expansion to meet the growing needs of the people, [p. 369] AA

The mandate and command of Article 175 must be obeyed and implemented; any laxity in this regard will amount to violation of Constitutional provisions and perhaps the judicial orders passed by the functionaries under the control and superintendence of the executive may be challenged, which will create embarrassing situation for the Government and the administration of justice shall be seriously jeopardised. [p. 373] CC

(o) Constitution of Pakistan (1973)—

—Art. 203—Separation of judiciary from the executive—Historical background on the question of separation of subordinate judiciary from the executive in general with reference to Province of Sindh in particular detailed, [p. 371] BB

Sharaf Faridi's case known as "Judiciary case" **ref.**

(p) Criminal Law (Special Provisions) Ordinance (II of 1968)—

—Preamble—Constitution of Pakistan (1973), Arts. 9, 25, 175 & 203-Criminal Law (Special Provisions) Ordinance, 1968 is void being in conflict with Arts. 9, 25, 175 & 203 of the Constitution of Pakistan (1973)—Steps to be taken by the Provincial Government of Balochistan consequent upon declaring Ordinance II of 1968 as void enumerated.

As Ordinance II of 1968 is declared to be void being in conflict with Articles 9, 25, 175 and 203 of the Constitution, the question arises what further relief should be granted as in the absence of Ordinance II of 1968 there should be some valid law to hold the field. It has been admitted that District Judges and Civil Judges are functioning in every district. In cases of violation of fundamental rights the superior Courts are empowered to issue direction to the Federal Government or the Provincial Government to bring the law in conformity with fundamental rights and/or enforce law and issue notification in that regard. The State as defined in Article 7 is bound to discharge its Constitutional obligations. In case of failure even the legislature and executive can be directed to initiate legislative measures to bring law in conformity with the fundamental rights. In these circumstances, while maintaining the impugned judgments, Supreme Court dismissed the appeals, declared Ordinance II of 1968 as void being in conflict with Articles 9, 25, 175 and 203 of the Constitution and directed the Provincial Government of Balochistan--

- (i) to issue necessary notification in terms of subsection (2) of section 1 of Ordinance XII of 1972 for enforcing the aforesaid Ordinance by creating posts of and separately appointing Judicial Magistrates and Executive Magistrates and to place Judicial Magistrates under the administrative control of the High Court within a period of three months;
- (ii) to take necessary steps as required by the Constitution to amend and implement laws and rules relating to Courts, judiciary and its officers and lower staff to bring them in conformity with Articles 9, 25, 175 and 203 of the Constitution within a period of six months, [p. 374] EE

Raja M. Afsar, A.-G. Balochistan for Appellant.
S.A. M. Quadri, Advocate-on-Record for Respondent No.1 (in CA No.1412 of 1990).

Respondents in other Appeals : Ex parte

Date of hearing: 18th January, 1993.

HIGH COURT OF WEST PAKISTAN
(QUETTA BENCH)

P L D 1957 (W. P.) Quetta 1 *Before S. A. Rahman C. J. and Yaqub All, J Malik TOTI KHAN etc.—Petitioners versus THE DISTRICT MAGISTRATE, SIBI AND ZIARAT— Respondents*

Writ Petition No. 17 of 1957, decided on 5th August 1957.

Frontier Crimes Regulation (III of 1901), Ss. 1 (4) (5), 11, 12, 14, 15, 16, 17, 19, 40 & 41—Provisions enabling the executive authorities to refer any criminal case to Jirga—Repugnant to Art. 5 and void under Art. 4 of Constitution of Pakistan.

Subsection (4) of section 1 of the Frontier Crimes Regulation, read with section 11 of the Regulation singles out Pathans and Baluchs, primarily, for action under the relevant provisions of the Regulation which may also be applied by a Notification to a group of persons who may be specified as a class in a Notification issued by the Provincial Government. However, such a class need not be a well-defined class as normally understood because of the Explanation appended to subsections (4) and (5) of section 1. The executive Government may choose to describe any group of persons mentioned in the notification as a class. Therefore, it cannot be held that the classification mentioned in the Regulation for application of the relevant provisions is a rational or reasonable one. It is based principally on racial or tribal considerations, and to the extent that there is provision for other classes being added to the Pathans or Baluchs for attracting the provisions of the Regulation, the classification may be wholly arbitrary and capricious at the sweet will of the executive. These provisions are, therefore, *ex facie* discriminatory and do not rest on any classification such as could take the enactment out of the mischief of Article 5 of the Constitution, [pp. 6, SJA, D

Not only is there no reasonable classification of persons whose cases may be referred to a Jirga but also the fact that the executive authorities have been given an unfettered discretion in the choice of persons belonging even to Baluch or Pathan tribes as to whether their cases should go to a regular Court of law or to a Jirga. This discrimination may be exercised in respect of any one or more of a group of accused being tried jointly in a regular Court of law. There is no guiding principle prescribed by which the discretion of the executive authorities as regards the choice of forum is to be regulated. These provisions of the Regulation, therefore, to the extent that they permit arbitrarily the cases of persons belonging to the Pathan or Baluch tribes or of any individual member of such tribes to be referred to a Jirga, are *ultra vires* to Article 5 of the Constitution and so void under Article 4 thereof, [p. 8]C

Jibendra Kishore etc. v. Province of East Pakistan P L D 1957 S C (Pak.) 9; Bazal Ahmad Ayyubi v. The West Pakistan Province P L D 1957 Lah. 388 and Khair Muhammad Khan v. The Government of West Pakistan P L D 1956 Lah. 668 ref.

P L D 1995 Supreme Court 281

Present: Nasim Hasan Shah, Shafiur Rahman, Saad Saood Jan,
Muhammad Afzal Lone and Saleem Akhtar, JJ

Civil Appeal No.543 of 1990

GOVERNMENT OF N.-W.F.P. through
Chief Secretary and another—Appellants
versus

MUHAMMAD IRSHAD and 3 others—Respondents

(On appeal from the judgment/order of Peshawar High Court, Peshawar, dated 24-2-1990 in Writ Petition No.495 of 1989).

Civil Appeal No.544 of 1990

GOVERNMENT OF N.-W.F.P.
through Chief Secretary and another—Appellants
versus

MUHAMMAD WAKIL and 4 others—Respondents

(On appeal from the judgment/order of Peshawar High Court, Peshawar, dated 24-2-1990 in Writ Petition No.417 of 1989).

Civil Appeal No.545 of 1990

GOVERNMENT OF N.-W.F.P. through Chief Secretary and 2
others—Appellants
versus

AMEER KHAN and 2 others—Respondents

(On appeal from the judgment/order of Peshawar High Court, Peshawar, dated 24-2-1990 in Writ Petition No.442 of 1989).

Civil Appeal No.546 of 1990

NORTH-WEST FRONTIER PROVINCE through Advocate-General and
another—Appellants
versus

YOUSAF KHAN and 4 others—Respondents

(On appeal from the judgment/order of Peshawar High Court, Peshawar, dated 24-2-1990 in Writ Petition No.495 of 1989).

Civil Appeal No.547 of 1990

GOVERNMENT OF N.-W.F.P. through Chief Secretary and another—
Appellants
versus

MUHAMMAD ZEB and 3 others—Respondents

(On appeal from the judgment/order of Peshawar High Court, Peshawar, dated 24-2-1990 in Writ Petition No.28 of 1990).

Human Rights Case No.5Q of 1992
Mst. NIAZ PARWARAH—Petitioner

versus
GOVERNMENT OF N.-W.F.P.—Respondent

Civil Appeals Nos.543 to 547 of 1990 and Human Rights Case No.50 of 1992, decided on 13th February, 1993.

(a) Provincially Administered Tribal Areas Criminal Law (Special Provisions) Regulation (I of 1975)—

—Preamble—Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation (II of 1975), Preamble—History of Legislation! of both the Regulations traced, [p. 289] J et seq

(b) Constitution of Pakistan (1973)—

—Art. 8(1)—Expression "any law" as occurring in Art.8(1) of the Constitution, cannot be narrowly construed so as to exclude from its purview a Regulation! which possesses the efficacy of law in a part of Pakistan, particularly when its effect has been extended to all customs and usages which have the force of law [p. 296]A

(c) Words and phrases—

—Word "any" is ordinarily used to enlarge the amplitude of the term to which it is attached, [p. 296] A

(d) Constitution of Pakistan (1973)—

—Arts. 7 & 247—"State"—Definition—Definition of State as given in Art.7 of the Constitution is fairly wide and encompasses all Authorities which perform executive and legislative functions in any part of the country—President and Governor while exercising their powers under Art.247 of the Constitution, therefore, cannot be excluded from the definition of the "State" so far as the Tribal Areas are concerned.-- Words and phrases], [p. 297] B

(e) Constitution of Pakistan (1973)--

—Art. 247(3)—President and the Governor can modify the laws made by the Parliament or the Provincial Assembly before extending them to the Tribal Areas, [p. 297] C

(f) Constitution of Pakistan (1973)—

—Art. 247(3) & (4)—President and the Governor has the power under Art.247(3) to modify the laws made by the Parliament or the Provincial Assembly before extending them to the Tribal Areas—Regulation made by the President or the Governor cannot be declared invalid by mere reason of the fact that it is in conflict with the other provisions of the Constitution—Law made by the President or Governor under Art.247 of the Constitution, therefore, cannot be declared void on the ground that same is different from the corresponding law in force in the other parts of Pakistan and is thus in conflict with the Fundamental Rights relating to equality of treatment, [p. 297] C

(g) Constitution of Pakistan (1973)—

—Arts. 247(6) & 2ATMExtraordinary power that has been vested in the President and the Governor has to be exercised in a manner that would facilitate the

introduction of representative administration in Tribal Areas and thus bring that at par with the other parts of Pakistan—Any legislative and administrative measure which obstructs or delays such ultimate goal is beyond the bounds of power vested in the President and the Governor—When the President or the Governor makes a law for the Tribal Areas which is different from that prevailing in the rest of the country it must be accompanied by good reasons—Omission in this regard would lay the President and the Governor open to charge of arbitrariness and on that account compromise the validity of their action whether it is in the legislative field or it relates to a purely administrative act. [p. 298] D

(h) Constitution of Pakistan (1973)—

—Arts. 247 & 175(3)—Exercise of powers by the President and the Governor under Art.247 of the Constitution—Provisions of Art.247 of the Constitution though override the other provisions of the Constitution but the President and the Governor cannot lightly ignore the Constitutional mandate as incorporated in Art.175(3) of the Constitution that the judiciary should be separated from the executive, [p. 298] D

(i) Provincially Administered Tribal Areas Criminal Law (Special Provisions) Regulation (I of 1975)—

—Preamble—Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulations (II of 1975), Preamble—Constitution of Pakistan (1973), Arts.247, 25, 8, 7 & 2-A—Provincially Administered Tribal Areas Criminal Law (Special Provisions) Regulation, 1975 and Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation, 1975 have not only replaced the ordinary judicial system which is in force in the other parts of Pakistan without any apparent justification but have introduced a set-up which is condemned by the residents of the Tribal Areas—Both the Regulations, therefore, cannot be regarded as measures conducive to the peace and good Government of the Tribal Areas and thus are not a legitimate exercise of the extraordinary power which the President and the Governor enjoy in reference to the Tribal Areas under Art. 247 of the Constitution of Pakistan (1973).

The word 'any' is ordinarily used to enlarge the amplitude of the term to which it is attached and there seems to be no reason why the expression 'any law' as occurring in Article 8(1) of the Constitution of Pakistan (1973) be so narrowly constructed as to exclude from its purview a Regulation which possesses the efficacy of law in a part of Pakistan, particularly when its effect has been extended to all customs and usages which have the force of law. Article 7 of the Constitution falls in Part II of the Constitution which bears the rubric Fundamental Rights and Principles of Policy, (p. 296] A

The definition of the 'State' as given in Article 7 of the Constitution is fairly wide; on its plain reading it would appear to encompass all authorities which perform executive and legislative functions in any part of the country. So far as the Areas are concerned, the President and the Governor while exercising their powers under Article 247 of the Constitution stand in the position of the Federal and the Provincial Governments. There is therefore no reason why they should be excluded from the definition of the 'State' so far as the Areas are concerned. In fact, to hold otherwise, would tend to deprive a sizeable part of the Pakistan citizenry of the Fundamental Rights enshrined in the Constitution which could never have been the intention of the Constitution-makers, fp. 297] B

Dual system of justice introduced by the Provincially Administered Tribal Areas Criminal Law (Special Provisions) Regulations, 1975 and Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation, 1975 places the residents of the Areas in less advantageous position as compared to their fellow countrymen living in the other parts of Pakistan, but then it will be noticed, Article 247 itself envisages that the laws that may be made by the President or the Governor or the two together for the Areas may be different from those prevailing in the rest of the country. Thus, clause (3) of the Article permits the President and the Governor to modify the laws made by the Parliament or the Provincial Assembly before extending them to the Areas. This by itself introduces an element of discrimination so far as the Areas are concerned. Apart from that clause (4) which empowers the President and the Governor to make Regulations for the Areas contains a non obstante clause; consequently, a regulation made by them cannot be declared invalid by mere reason of the fact that it is in conflict with the other provisions of the Constitution, There is, therefore, some difficulty in holding (hat a law made by the President or Governor under Article 247 can be declared void on the ground that it is different from the corresponding law in force in (he other parts of Pakistan and is thus in conflict with the Fundamental Right relating to equality .of treatment.

However, there is another aspect of the matter. No doubt, the Federal Government and the Parliament, the Provincial Government and the Provincial Assembly have been precluded by Article 247 of the Constitution from exercising their respective functions in the Areas and the same have been entrusted to the President and the Governor but that docs not necessarily imply that the President and the Governor have and will have a free-hand for all times to come in making laws of their own choosing for the Areas. In this context reference may be made to the Objectives Resolution which now forms a substantive part of the Constitution (see Article 2A). One of the clauses of the Resolution declares that in Pakistan the State power and the authority shall be exercised by the chosen representatives of the people. Although in view of the conditions that prevail there (he Constitution-makers did deviate from the said declaration when making special provisions for the administration of the Tribal Areas but then they also envisaged the ultimate raising of the quality of the administration therein to the same status and position as was enjoyed by the rest of the country. In this context, clause (6) of Article 247 of the Constitution needs to be noticed, fp. 297] C

Clause (6) of Article 247 when read with the Objectives Resolution places a special responsibility on the President and also on the Governor in respect of the Area. The extraordinary power that has been vested in them must be exercised in a manner that would facilitate the introduction of representative administration in those Arera and thus bring them at par with the other parts of Pakistan. Any legislative and administrative measure which obstructs or delays this ultimate goal must be held to be beyond the bounds of this power, [p. 298] D

There is no doubt whatsoever that the President and the Governor are high functionaries of the State and one can normally assume that in exercising their power under Article 247 they are and will be motivated by a high sense of responsibility but then it has also to be kept in mind that they are not the chosen representatives of the people for exercising legislative and executive powers in the Areas. The theme throughout the Constitution is of responsible Government which is answerable to the people. It is therefore necessary that when the President or the Governor make a law for the Areas which is different from that prevailing in the rest of the country it must be accompanied by good

reasons. The omission in this regard would possibly lay the President or the Governor open to the charge of arbitrariness and on that account compromise the validity of their action whether it is in the legislative filed or it relates to a purely administrative act.

The administration of the States of Dir, Swat and Chitral was taken over first by the Government of West Pakistan and later, after dissolution of the said Province, by the North-West Frontier Province. The Court system which existed in the rest of the Province was introduced in these States as well. The Courts thus set up continued to function till July 1975 when by the said Regulations slight inroads were made in their jurisdiction in respect of comparatively less serious criminal matters and almost petty civil disputes. However, a year and half later the Regulations were extensively amended and as a result thereof the Tribunals were replaced by Jirgas and were given the exclusive jurisdiction over serious crimes and civil disputes. There can be little doubt that the Regulations, trespassed as they did on the jurisdiction of the ordinary Courts, were pieces of retrograde legislation and in the absence of any visible justification, constituted in a way a negation of the goal set out in clause (6) of Article 247 of the Constitution, and the Objectives Resolution. Although highly qualified and trained judicial officers, well-equipped to administer relevant laws relating to serious crimes and civil disputes, continued to be available in the Areas yet, as a consequence of the Regulations, their jurisdiction was drastically curtailed and entrusted to persons of little academic and professional qualifications. The Jirgas are presided over by Naib-Tehsildars/Tehsildars who in the hierarchy of the Courts existing elsewhere in Pakistan do not exercise powers higher than that of a Magistrate of the First Class. It is true that the power to make effective orders vests in the Deputy Commissioner but then he too may not have any grounding in law. The appeals and revisions from the orders of the Deputy Commissioner do not lie before the District and Sessions Judge or the High Court but before the functionaries occupying positions in the executive. It is thus a system entirely controlled and administered by non-judicial functionaries of the Province. It is true that Article 247 overrides the other provisions of the Constitution but then the

President and the Governor ought not to lightly ignore the Constitutional mandate as incorporated in Article 175 (3) that the Judiciary should be separated from the Executive.

The argument that the Jirga system as introduced by the said Regulations is better suited to the needs of the Areas is of extremely doubtful validity, [p. 298] D

It is difficult to regard both the Regulations as measures conducive to the peace and good Government of the Areas for they have not only replaced the ordinary judicial system which is in force in the other parts of Pakistan without any apparent justification but have introduced a set up which is condemned by the residents of the Areas. They can therefore hardly be regarded as legitimate exercise of the extraordinary power which the President and the Governor enjoy in reference to the Areas under Article 247. The Regulations are not peices of valid law. [p. 303] E

Per Shafiur Rahman, J.—

.The scope of the non obstante clause (clause 4 of Article 247 of the Constitution of Pakistan) is shittled down by the use of the expression legislative competence in the same empowering clause. The commanding words of Article 8 "The State shall not make any law which takes away or abridges the rights so conferred" affects the competency of respective legislatures. The President or the Governor cannot on the strength of non

obstante clause and in the presence of the expression "within the legislative competence" overstep in the domain of legislative incompetence.

The Regulations under examination are according to me violative of—

(i) Constitutional guarantee of equality of citizens (Article 25). It does not satisfy the legitimate criteria of classification.

(ii) Constitutional mandate of clause (3) of Article 175 which came into effect and became fully enforceable as and from 15th August, 1987.

(iii) Constitutional requirement of clauses (4) and (5) of Article 247, "Peace and good Government not being satisfied", [p. 305] H

Per Shafiur Rahman, J.—

(j) Supreme Court and High Courts (Extension of Jurisdiction to the Certain Tribal Areas) Act (XXVII of 1973)—

—Ss.2 & 3—Constitution of Pakistan (1973), Preamble—Jurisdiction of the High Courts and Supreme Court exists over the Tribal Areas as specified in S.2, Supreme Court and High Courts (Extension of Jurisdiction to Certain Tribal Areas) Act, 1973—Fundamental Rights also extend to certain Tribal Areas and even the Executive Authority of the Federation is controlled by it as are all executive acts under Art.4 of the Constitution of Pakistan (1973).

With the coming into force of the Supreme Court and High Courts (Extension of Jurisdiction of Certain Tribal Areas) Act, 1973 (Act XXVII of 1973), the normal jurisdiction of the Peshawar High Court including the Constitutional jurisdiction under Article 199 of the Constitution, now extends to the Provincially Administered Tribal Areas of Chitral, Dir, Swat and Malakand Protected Area, as the Court has, "in the other areas of the North-West Frontier Province".

The jurisdiction of the High Court and Supreme Court, therefore, exists over these territories, [p. 305] F

Fundamental Rights extend to Tribal Areas and that even the executive authority of the Federation is controlled by it as are all executive acts under Article 4 of the Constitution of Pakistan (1973) [p. 305] G

Abdul Rahim and others v. Home Secretary, Government of West Pakistan and another PLD 1974 SC 109; Mian Muhammad Nawaz Sharif v. Federation of Pakistan PLD 1993 SC 473; Jibendra Kishore Achharyya Chowdhary and 58 others v. The Province of East Pakistan and Secretary, Finance and Revenue (Revenue) Department, Government of East Pakistan PLD 1957 SC (Pak.) 9 and East and West Steamship Co. v. The Collector of Customs and others PLD 1976 SC 618 **ref.**

(k) Constitution of Pakistan (1973)--

—Arts. 25 & 184(3)—Provincially Administered Tribal Areas Criminal Law (Special Provisions) Regulation (I of 1975), Preamble—Equality before law—Bail—Accused, a lady had been charged with causing death to a person and was released on bail by Assistant Commissioner—Bail granted to the accused, however, was cancelled by the Additional Commissioner and the order of the Additional Commissioner was upheld by the Provincial Government—Validity—Held, Fundamental Right of Equality had been violated

by the order of cancellation of bail—Supreme Court, under Art.184(3) of the Constitution declared the order of cancellation of bail as violative of the Constitution and allowed the accused bail in circumstances.--[Bail]. [p. 306] I

K.M.A. Samadani, Advocate Supreme Court and Haji M.A. Qayyum Mazhar, Advocate-on-Record (absent) for Appellants (in above Civil Appeals).

S. Iftikhar Hussain Gilani, Advocate Supreme Court and Mian Shakirullah Jan, Advocate-on-Record for Respondent Mo.1 (in above Civil Appeals).

S. Sardar Khan, Senior Advocate Supreme Court: Amicus curiae (in above Civil Appeals).

M. Munir Peracha, Advocate Supreme Court and Ch. Akhtar Ali, : Advocate-on-Record for Petitioner (in Human Rights Case No.50 of 1992). Nemo for Respondent (in Human Rights Case No.50 of 1992).

Dates of hearing: 20th to 24th February, 1993.



Annex 9: Case Studies

Case study I

On 04-05-2004 complainant Fazaluddin Bhutto lodged FIR³⁸ at New Foujdari Police Station disclosing that that his sister Mst. Tahmina and cousin Mst. Abida aged about 17 and 18 years respectively have left the house. Relatives including the complainant started searching the girls and it came to their knowledge that they were in the possession of Suleman and others. They assured the complainant to return the girls on the next day but failed. Suleman and others were of the view that the girls were of bad character and therefore they suggested to the complainant to kill the girls. On refusal of the complainant, Suleman and other murdered the girls.

During investigation, the Investigating Officers recorded the statement of the witnesses and also produced witnesses before the Magistrate for recording their statements who categorically deposed against the culprits. Accused were challaned in the court where their trial was initiated. During the trial, the accused and the complainant party approached a Naik Mard of their community to resolve the dispute. The matter was amicably settled between the parties and thereafter the witnesses appeared before the court and resited from their earlier statements, recorded before police officer and magistrate. The trial court keeping in view the statement of the witnesses disposed of the case whereby the accused were acquitted from the charge.

The record of the court shows that the parties took few dates for amicable settlement but there is no record to show that the matter was referred to an actor of informal justice system for decision. The complainant informed that he has resolved the dispute amicably and some compensation has been paid to the family of the victims. After disposal of the case none of the parties filed an appeal against the court order and the dispute ended forever.

³⁸ Crime No. 65 of 2004 of P.S. New Foujdariipur & S.C. No.687 of 2004. Case was pending in the court of District & Sessions Judge, Shikarpur.

Case study II

Accused Zahid & others were booked in Crime No. 160/2004 of Police Station New Foujdari³⁹ registered under section 302 Pakistan Penal Code. As per FIR son of the complainant Sajan was murdered during the incident. After formal investigation and recording statement of the witnesses, the accused were challaned. Trial was pending since 2004 in the court of III Additional District & Sessions Judge Shikarpur. On 20-05-2008 the complainant and the accused filed an application praying therein that they may be permitted to enter into a compromise as due to the intervention of Nek Mards dispute between them has been resolved and legal heirs of the deceased had received compensation in the sum of Rs. 10,00,000/-. The court after hearing legal heirs of the deceased accepted the compromise, resultantly the accused were released and case was disposed of by the court.

The complainant and the accused were satisfied with the decision of the Naik Mard. The parties did not subsequently file any litigation against each other.

³⁹Session Case No. 95 of 2005. As per court record name of Nek Mard was not disclosed in the court, nor copy of his decision was made part of court proceeding.

Case study III

FIR bearing No. 50 of 2008 was registered at Police Station Abad Sukkur on 19-04-2008⁴⁰. Accused Sikandar and others were charged for the offence of murder of Mst Zuri. The Complainant, one of the family members of the deceased, filed an application in the court praying therein to permit the legal heirs of the deceased to withdraw the prosecution against the accused as they had resolved the dispute through the intervention of *Naik Mard* of the vicinity. The parties filed their affidavits in the court disclosing the facts relating to compromise. The court called the legal heirs and enquired the facts which they had disclosed in their affidavits and ultimately the compromise was accepted and accused was released from the charge. The parties (accused and legal heirs of deceased) were satisfied with the decision of *Naik Mard*. They did not file decision of *Naik Mard* in the court and therefore this couldn't come on court record. During interview, the accused persons also avoided to disclose the terms and conditions of the *Faisla*. According to the parties they didn't spend any amount as fee towards *Faislo* except bearing travelling cost at the Otaq of the *Naik Mard*.

The persons interviewed from the category of victim and the accused did not share terms and conditions of the *Faislo* and most of them avoided to disclose the name of their *Naik Mard* who acted as Mediator. However they responded that the decision was made as per their traditions and customs⁴¹.

⁴⁰ The Criminal case was pending in the court of 1st Additional District & Sessions Judge, Sukkur.

⁴¹ Complainant of Crime No. 50/2008 registered at Police Station Abad, Sukkur.

Case study IV

On 04-09-2007 complainant Mr. Ismail registered an FIR stating therein that Riaz and others kidnapped his daughter. He approached the culprits and asked them to return the girl (Ms. Haleema). Family members of the girl insisted for the custody of Haleema to which accused became aggrieved. They fought with each other and fire arms were used during the quarrel which resulted death of Bilawal, younger brother of Ismail. The matter was reported to the Police Station where an FIR was registered against Riaz and others.

The incident had taken place in 2007 and since then it was pending in the court of law⁴² for decision. During pendency of the case (in the year 2009), a compromise application was filed duly signed by the parties. They filed their affidavit disclosing therein that they have resolved the dispute outside the court and do not want to proceed with the matter further. As the offence was compoundable, the compromise was accepted by the court.

The parties were approached by the research team of the study to understand the mechanism of compromise of their dispute. It was disclosed that the dispute was pending in the court of law for the last two years. They had spent much time and money while attending the court. The accused persons approached the Naikmard of the tribe for amicable settlement. On their request the aggrieved party was called through Naikmard. According to one of the accused a date of Faislo was fixed with the consent of all relatives and their Mushirs. Separate meetings were also arranged on the same day between Naikmard and Mushirs of both the parties.

According to the accused the Naikmard is not only Zamidar of the area but he also has affiliation with a political party and therefore his decision was honoured by the complainant. He added that, "We accepted the amount of compensation fixed by the Naikmard. ---- Sometimes agricultural land is also given to the aggrieved party but Ismail preferred to receive Cash amount as our agricultural land was undivided property and its transfer was difficult".

⁴² Criminal case was pending in the court of 1ST Additional District & Sessions Judge, Sukkur.

Parties were satisfied with amicable settlement for two reasons; firstly, it did not cost them and secondly, it concluded in one day long session. They avoided to disclose the name of Naikmard or provide copy of decision made by the Naikmard.



Case study V:

Eisso and Nadir both sons of Haji Adho Almani were arrested by the police as they were named in FIR No. 24/2004, registered at Police Station Baji Shareef, Sukkur.

They were charged with the murder of Ghulam Hussain. During investigation, conducted by the police, the accused were found guilty and therefore challaned and produced before the court for trial⁴³. During investigation the complainant and his witnesses who were close relative of the deceased deposed against the accused persons. The case proceeded upto 2009 and thereafter it was decided by the court in favour of accused whereby they were acquitted from the charge.

The case was initially dealt with under formal justice system but during pendency of the case the parties amicably settled their dispute outside the court. In this case one of the accused was juvenile. The parties instead of filling compromise application, preferred to lead evidence of the witnesses. The complainant and the witnesses who had lodged FIR and had deposed against the accused persons before the police resiled from their statement. They did not disclose any fact against the accused due to compromise.

The accused were interviewed during the study period. According to them Sardar had decided the case on the Holy Qur'an and due to the decision of Sardar the witnesses did not depose against the accused. It was a case of juvenile offender and could not be decided under formal justice system in a period of 4 months which is provided under the law. The accused and the complainant were satisfied with the decision of the Sardar.

⁴³ Criminal case was pending in the court of 1ST Additional District & Sessions Judge, Sukkur.

Case study VI

Rape, Vani victim seeks case against punchayat members

MULTAN: Rape victim Qureshian Bibi of Chak No 61/SP in Arifwala tehsil filed an application with the Pakpattan district police officer for registration of a case against a local jury of Punchayat members who allegedly solemnised her nikkah with the brother of the alleged rapist. Qureshian told reporters on Sunday that her cousin, Muhammad Aslam, raped her at gunpoint two months ago. She said he had threatened her with dire consequences if she breathed a word about it. "When I got pregnant, I told about the incident to my sister, Razia Bibi, and father, Nazir Ahmad, who tried to report it to the police," she said and added that an influential landlord convened the punchayat, which solemnised her nikkah with the brother of the accused, Muhammad Ramzan. However, she has refused to marry him. She said that she had insisted on registering a case against the accused. On this, she said, punchayat members Habib, M Zaman Wattoo, M Sharif Wattoo, M Tufail Wattoo and Maulvi Yaqoob also solemnised the nikkah of the daughter of the accused, Saadia, 3, with her brother, Muhammad Ramzan as vani. She said the punchayat members had also threatened that her family's lives would be in danger and their household articles would be confiscated if they did not accept the decision. Qureshian and her father filed a petition in the Lahore High Court to register a case against Aslam and the punchayat members, but they were asked to file the same before the ASJ Arifwala. On this, the police registered the case against Aslam, but not the punchayat.

Arifwala Saddar SHO Syed Shahid Abbas Shah has registered an attempt to rape case against two brothers and a brother-in-law of the rape victim on the statement of Ume Kalsoom, the wife of Aslam, apparently in an attempt to stop them from litigation. staff report

http://www.dailytimes.com.pk/default.asp?page=2006\04\24\story_24-4-2006_pg7_32

Case study VII

'Punchayat pressing rape victim's family'

Staff Report

LAHORE: The family of a 12-year-old girl who was allegedly raped by two relatives last month is under pressure from a punchayat to reconcile the case by taking Rs 60,000 from the rapists, the Society for the Protection of the Rights of the Child (SPARC), a non-governmental organisation, told Daily Times on Wednesday.

SPARC Coordinator Jawad Aslam requested the Lahore the High Court to take suo moto action against the rapists and order an inquiry.

Mr Aslam said Abdul Ghafoor, a resident of Mauza Bait Dirayee in Muzafargrah district, was a servant of a local landlord. One of his three daughters, Parveen, was in the fields on the night of August 15 when Mr Ghafoor's relatives Mukhtar and Bashir Ahmad raped her and escaped the scene, leaving her unconscious. Her family searched for her when she did not return home and found her unconscious in the fields.

Mr Aslam said that Mr Ghafoor told him he was homeless because the landlord had expelled them from the lands. "I can't do anything to pursue the case because I don't have fare to get to the police station and court, and money to get medicine for my daughter. I can't hire a lawyer. So I have left the decision to the punchayat," Mr Aslam quoted Mr Ghafoor as having said.

http://www.dailytimes.com.pk/default.asp?page=story_16-9-2004_pg7_43

Case study VIII

Pakistani court agrees to review gang-rape case By Seattle Times news services

ISLAMABAD, Pakistan – Pakistan's Supreme Court agreed yesterday to reopen an inquiry into the high-profile case of Mukthar Mai, a laborer's daughter from southern Punjab province who allegedly was gang-raped on the orders of a tribal council in 2002.

The court decision overturned a judgment by the Lahore High Court, issued in March, that threw out the convictions of five of the men accused of involvement in the rape and commuted the death sentence of a sixth.

The Supreme Court also ordered the rearrest of 13 of the original suspects in the case. The decision, after two days of hearings, was a victory for Mai, whose case has prompted international sympathy and become a focal point for concern about violence against women in Pakistan.

Hundreds of women are raped, maimed and killed every year in so-called honor attacks, many at the hands of their own families. Victims of sexual assault often suffer in silence for fear they will be shunned by their families if they come forward.

The court now will review the evidence and make its own determination as to the guilt or innocence of the accused, a process likely to take months.

Outside the court yesterday, dozens of women hugged and congratulated Mai. "I am happy, and I hope those who humiliated me will be punished," she said.

Iftikhar Mohammed Chaudhry, the head of a panel of three judges that heard the appeal, issued nonbailable arrest warrants for the 13 suspects, who are in jail but not formally charged.

Pakistan has been under intense international pressure to punish those involved in the alleged rape and recently came under renewed criticism when Gen. Pervez Musharraf, Pakistan's president, barred Mai from traveling to the United States on grounds that she might project a "bad image" of Pakistan. The ban was lifted after protests from the U.S. and other governments.

Women's-rights activists say Mai's greatest impact may be at home, where her boldness has helped change people's perceptions of rape victims.

"She has become a symbol of resistance and defiance in the country," says Farzana Bari, a leading women-rights activist. "For the women's movement, her case is significant as she is showing the cruel face of a system which considers women as property."

The fate of Mai, 32, changed when she was allegedly raped by several men on the orders of a self-styled community justice council, known as a punchayat, in the Punjab village of Meerwala. The councils consist of tribal elders and influential feudal lords.

She was punished after a rival clan claimed her teenage brother allegedly had a sexual relationship with a girl of their clan. Villagers said the boy was merely seen walking with the girl. The punchayat ordered that Mai be raped to settle the score.

Mai said she shouted and screamed for help while she was dragged in front of hordes of villagers to be raped. She walked back to her family house in front of the villagers, shivering, crying. But nobody came forward as a witness in her case.

When the case hit the headlines of international media, Mai became a celebrity and visited several countries in the West.

Using money she raised abroad, she runs a primary school for girls and boys. Within two years, the enrollment increased to 350 and she plans to build more classrooms. The success shows that the villagers trust her, even to teach the Quran.

This story was compiled from The Washington Post, The Associated Press and The Christian Science Monitor.

http://seattletimes.nwsourc.com/html/nationworld/2002351514_pakistan29.html

Case No.IX

One Juvenile named Sikandar Zaman s/o Wakeel Khan aged 15/16 years resident of Bamkhel district Swabi lodged FIR No.751 dated 8/08/08⁴⁴ against Asif s/o Parveez R/ O Bamkhel Swabi in police station Swabi city. He alleged that Asif wanted to have friendship with him and tried to show that he loved him a lot. That's why on 8/08/08 he started fighting with him. After that he fired on him to force him to make love with him. Due to this he lodged FIR under section 506, 337 (F) (V) PPC against Asif. Police arrested the accused and sent him to judicial lock up Swabi. The accused remained in jail for five days after which he was released on bail by a Judicial Magistrate, Swabi. In the month of July, 2009 the Local elders (Jirga) at the request of Asif's parents visited the parents and relatives of Sikander and convinced them to compromise with the opposite party. They went to them for more than five times and at last Sikander and his elders agreed to compromise and the local elders promised that if Asif commits any wrongful act in future they will be responsible for that. The local elders promised that the accused alongwith the elders will come to be the Hujra of the complainant and give undertaking that Asif will not commit any wrongful act in future and also tender apology for his wrongful acts. On 12/05/09 the local elders alongwith the accused and his elders visited to the Hujra of Sikander and compromised with him. The compromise was made in the name of ALLAH and no compensation was charged. A written compromise between the two parties was submitted in the court of Judicial Magistrate Syed Obaidullah Shah who disposed the case and acquitted the accused. Since the offence for which the accused was charged was compoundable and in view of the statement of the complainant and compromise deed the compromise was accepted and the accused was acquitted. Thus due to the steps taken under the informal justice system, compromise was arranged by the local elders without any expenses and the accused was acquitted.

⁴⁴ Case No.122/2 decided by Syed Obaidullah Shah, Judicial Magistrate, Swabi on 13-05-2009. FIR No.751 dated 08-08-2008 U/S 506, 337F(V) P.P.C.

Case No.X

One Juvenile named Halim s/o Bacha aged 16/17 years R/O Guli Bagh, Mardan lodged FIR No.1260 dated 27/07/06 against Fawad s/o Faizullah R/ O Mayyar, district Mardan in police station Mardan city⁴⁵. He stated that Fawad and he have a cosmetic shop in Gaju Khan Market Mardan. On 27-07-2007 Fawad came to him and told that he had some important work with him and asked to go with him at the top open room in the market. When they reached the top room Fawad tried to sexually abuse him. The complainant had a knife in his pocket which he picked and tried to escape from there. He succeeded and ran away to home. He therefore lodged FIR under “section 355 PPC, 12 Islamic” against Fawad. The Police arrested the accused and sent him to the District Jail Mardan. The accused spent two months in jail after which he was released on bail by an Additional District Sessions Judge, Mardan. In the month of April, 2009 the Local elders (Jirga) at the request of Fawad’s parents visited the parents and relatives of Halim Sheer and convinced them to compromise with the opposite party. They visited them for more than four times and at last Halim Sheer and his elders agreed to compromise. The Local elders assured that if Fawad commits any wrongful act in future they will be responsible for that. The Local Elders promised that the accused along with his elders will come to complainant’s Hujra and promised that Fawad would not commit any immoral act in future and also paid him fine of RS.10,000 for his wrongful acts. On 14/04/09 the Local Elders along with the accused and his elders visited the Hujra of Halim Sheer and compromised with him. A written compromise between the two parties was submitted in the Court of Additional Sessions Judge II, Mardan, who disposed off the case and acquitted the accused. As the offence for which the accused was charged was compoundable, in view of the statement of the complainant and settlement deed the compromise was accepted and the accused was acquitted. Thus the accused was acquitted through a compromise brought about under the informal justice system.

⁴⁵ Case No.78/56 dispose off by Addl. Sessions Judge II, Mardan, by order dated 29-04-2009. FIR No.1260 dated 27-07-2006 U/S 355 P.P.C.