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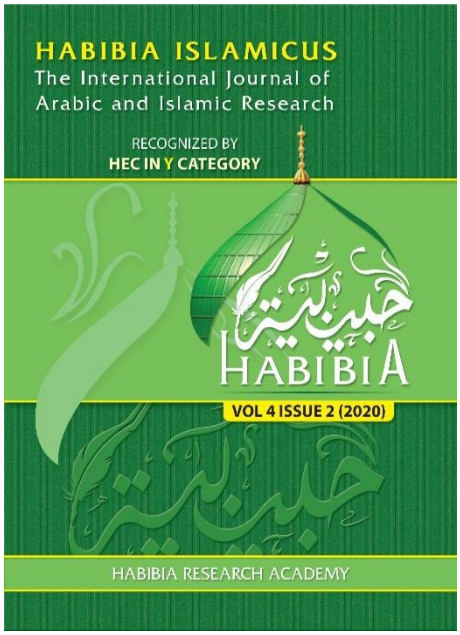

TOPIC:

AN OVER VIEW OF LITERATURE REVIEW ON ADR

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AN OVER VIEW OF LITERATURE REVIEW ON ADR

Abida Hassan, Dil Muhammad Malik.

ABSTRACT

This article aims to present national and international literature review with the object to highlight the scope and reasons to spread the concept of ADR. It has been highlighted in this article that there is a need for quality work on the said topic so that the purpose of introducing this system can be utilized without wastage of time when the author started to work on ADR in 2014 for writing proposal of Ph. D, there was too much difficult to find literature review in connection to ADR in Pakistan. At present, data is easily available and lot of work has been done in this area and this is the reason that people are aware about this term now.

KEYWORDS: *Literature Review ADR, National and International literature review of ADR.*

INTRODUCTION: Learning from past knowledge is the point to understand the present and apply for future.[1] Literature Review is a summary of thoughts, key finding, and progresses related to a research problem or question. Literature Review is basically past knowledge of scholars and for future scholars, which attracts researches and obtains their attention, which increases the worth of researcher's work.

Literature Review is important in many respects such as it provides new points of thinking which have not been covered by the scholar himself. It provides a vast thinking for future work. Through Literature Review researcher is able to identify the deficiencies in the existing work of any author. It can be used to support the recommendations and arguments of researcher. Through Literature Review, new or ongoing research work on same topic can be justified very easily.

Moreover, the Literature Review is as important as a map or construction material is important for a building because without material and map, building can not be built and whenever any research is started, first of all the researchers collect literature review, the main purpose of literature review is to collect reliable information regarding the scholarly work already done on the subject so as to assess the previous or current status of research and then to find oud out the deficiencies in the previous work (Literature Review) and then by keeping in view the scope, objectives of topic, a central question or questions are developed by using appropriate methodology. Sometimes, survey or interviews are conducted which is lengthy, time consuming, expensive methodology but is the creation of original work and increases the validity of research. Literature Review can be considered as a backbone of any research, especially, in advance study i.e., M. Phil or Ph. D level study is not a complete study if Literature Review has not been added in the research. Literature Review includes Books, Scholarly Articles, International Studies (relevant to the topic) and any other writing of someone, relevant to research. It is again important that Literature Review does not mean only Literature Review but it should be valid, serious, and fruitful knowledge otherwise it will be only useless material and will cause bad reputation for writer. Literature Review can be divided in two categories i.e., 1st is academic (education) and 2nd is traditional. In comparison of both, farmer is more important and

given importance at all levels and all countries. There are some important key points/ features to remember at the time of research writing are that researcher must be impartial, references mentioned in research work must be accurate and knowledge must be full of knowledge and informative.

Research Methodology

The study is conducted to find the reasons of shortage of Literature Review on the topic of in Pakistan in comparison with international studies of Literature Review and the differences in both studies. Descriptive research design was considered an appropriate model to study the problems and reasons in Pakistan. As mentioned above, although survey is suitable methodology to take the accurate results of research but that requires finance, moral and social support from society which is lacked in Pakistan. So that methodology has been avoided due to mentioned reasons.

Literature Review at International Level

Jerome (2004) has given a detailed history of ADR over a period of about four millennium (1800-BC to 2000-AD),[2] and Freyer traced the history of ADR in USA, starting from the year 1768 it has been identified that (a) the first case where the Supreme Court upheld arbitration in 1853, (b) thereafter, broad based advocacy started in 1970s, (c) in 1988 Congress authorized 10 pilot courts for mandatory mediation and ADR increased progressively.[3]

Stipanowich, traced a 'quiet revolution' in the 20th century, in solving differences of opinions by using ADR in courts, he has described the development of ADR in detail.[4]

Menkel-Meadow et.al, opined that ADR originated in California, a state of USA as an alternative to crowded court processes, he explained further that ADR means different things subject to what it is supposed as an alternative, ADR generally includes all volunteer processes through which disputants may resolve their disputes without involvement of 3rd person's decision, which means that in ADR methods the decision and dispute both are relate to parties themselves. [5]

Sander (2004) referred the US practice of ADR, by mentioning three types of major ADR processes, i.e., arbitration, mediation, negotiation and five types of this processes; early neutral evaluation, summary jury trial, neutral fact finding, and med-arb. He states that there is need of support not only from legal fraternity but also from academia, political, social and public at large.[6]

Tom Altobelli, pointed out the development of ADR in Australia in 1990s and pinpoints the important factors for their development such as necessary legislation, education, support of legal profession and constructive approach of courts. He has identified the major legislative improvements and changes in Australia.[7]

King. M, et.al, (2009) discussed about the popularity of ADR practices in civil courts of Australia and pointed out the reasons for its popularity, being inexpensive, flexible, speedy and reasonable process.[8]

French. B, mentioned about mandatory referral of proceedings to ADR processes in Australian, and that there is a growing tendency for courts and tribunals to prefer ADR for resolving disputes; sometime with consent of parties and sometimes use their discretion. In his opinion, with respect to cost, mediation is the useful process of alternative dispute resolution (ADR) in civil matters.[9]

Dutta provided an overview of informal dispute resolution in India since 500 B. C and then replacement of this system with the formal dispute resolution (court litigation) under Mughals and later on British colonial rule in the sub-continent. According to him, Indian legal framework of ADR in administrative matters is based on two enactments, the Legal Services Authorities Act 1987, which provides for the use of alternative methods of dispute resolution in very few areas of public administration.[10]

Shinde states that India developed a very good system of Lok Adalats (People's Courts) for utility service and the Gram Nayayaalays Act, 2008, which caters for mobile village courts for resolving the disputes relating to common areas of interest of ordinary people. He has highlighted that mediation, conciliation, arbitration, med-arb, Lok Adalat, early neutral evaluation and mini trial are different ADR procedures mostly being practiced in India and has been indicated that a cautious approach has been adopted in introducing the use of alternative dispute resolution techniques relating to administrative disputes in India. [11]

Sanjay-ilunu distinguished the Indian processes from that of western countries and highlighted the unique institution of Lok Adalat (People's Court), through an amendment in Legal Services Act 1987, in India with addition of section 22-B in 2002; which prefers compromise between parties through ADR processes, arbitration, negotiation, mediation, conciliation, Lok Adalat, etc., and discourages litigation, but allows court process in case of failure of compromise.[12] Kurlwal (2014), who has discussed ADR in India with all particulars, also gives similar views of Lok Adalats.[13]

Fisher et.al, referred the views of ADR practitioners who claim that ADR processes save resources and resolve disputes of parties very quickly,[14] Wang et.al, agreed with this view.[15] Sharma opined that there is also a requirement to involve it in the production of the knowledge and services,[16] he suggested that conflict resolution should be involved in coproduction between principals and agents. Dingwall and Abbott et.al, have advocated this view and stated that consulting, design, architecture, and law all are professional services.[17] Wolinsky, said that when clients have the knowledge about law, then they can think about the matter themselves and determine the quantity of disputes.[18]

Brett et.al, stated that lawyers can handle disputes through three different approaches: power, law, or the parties' interests, their values, needs, preoccupations and motivations, but ADR decision is not imposed by a third party but decided by parties themselves, after a discussions and sessions to talk about their own interests.[19]

Sander et.al, also favored ADR and stated that satisfactory dispute resolution is reached through a balanced use of ADR, as resolution through ADR can save the time and resources, as well as provide an opportunity to look for, 'win-win' agreements.[20]

Some scholars criticize the views of scholars. Vagiokas et.al, explained that in the literature, a difference is clear between the term 'conflict' and 'dispute', a conflict is wider term of dispute with full complexities, and the non-legal context of both sides while a dispute can be taken as a mismanaged conflict; shortly stated, dispute is the summary of the conflict, making it resolvable through litigation.[21]

Galanter was of the view that these practices of litigation are of little value, as the objective is not to deal with the whole conflict, but simply to resolve the dispute before the judicial forum.[22] Lande, agreed by explaining view of Brett et.al, that these practices are conducted in court room, and the term 'negotiation' is bargaining through lawyers difficult, will therefore, be included in adjudication, as it aims to avoid the litigation process but reaching a similar result.[23]

Menkel-Meadow et.al, stated that that ADR is developing very slow and laws were helpful in identifying the different kinds of ADR methods, it is confidential and avoids external interventions, does not appear in statistics and formal ADR, the only observable kind, shows very limited quantitative results.[24]

Wade, talked about the limitations of ADR, he is of the view that in some cases, ADR should not be used, since adjudication may serve useful objectives, such as clarifying and strengthening the law or obtaining compensation from bad faith act and further stated that ADR does not always work and a significant percentage of attempts fail.[25]

Arrow, mentions the resistance factors to ADR, he identifies the obstacles to the development of ADR and classified these barriers in three broad categories, planned barriers, psychological barriers and organizational barriers; first type of barriers occur due to the interaction of parties as each party in a dispute acts and tries for its own outcome, leading to suboptimal processes and results, the psychological barriers deal with the individuals' intellectual and emotional factors which causes bias in their personal decisions in a dispute.[26] Gilson et.al, supports the idea and states that the academic literature on barriers to conflict resolution which tends to focus on lawyers and their bias, especially when motivated by an hourly fee structure.[27] Mnookin (1994) is of the view that this approach may be criticized and the idea that the legal profession is only responsible for the peculiarity of ADR to develop these negotiated alternatives while the role of clients is ignored.[28]

Jehn et.al, aims to look at alternative dispute resolution in administrative disputes.[29] Similarly, Raines et.al, criticizes that the administrative literature virtually is non-existent, the legal academia's approach to such topics has generated little data and that there does not seem to exist past research on the way disputants address their legal advisors in dispute settlements, outside of existing ADR systems. It has been claimed that the Administrative

Appeals Tribunal, during 2015 to 2016, the success rate of ADR in Administrative Appeals Tribunal was 80% which can be termed as very high level of efficiency, in which conferences, conciliation, case appraisal, neutral evaluation used by the Tribunal and arbitration is especially excluded.[30]

Literature Review at National Level: In Pakistan, generally, there is shortage of scholarly research on ADR. The Honorable Judges of the Supreme Court have explained the use of ADR to relieve the courts from their heavy backlog. Mr. Justice Tassaduq Jilani, Mr. Justice Zahid Hussain and Mr. Justice (R) Fazal Karim have written on the subject with convincing logic. Kalanuri, has contributed some articles on the subject of ADR.

However, academia has not done much in this field except that Kalanuri. A. Z suggests designing and implementation of ADR methods in Pakistan and states that mediation is formerly entrenched in procedural rules for most of the common law countries. He further explained that ADR is not new in sub-continent as panchayats were common in medieval and ancient India, and that arbitration was introduced by Lord William Bentick in 1859 which was subsequently formally enacted under Arbitration Act 1940, which has too many grounds of judicial intervention and defeated the whole object of speedy and cost effective dispute resolution. He identifies four factors for the revival of ADR which are drawbacks of litigation, changing business scenario, legislative responses and judicial sponsorship. Among drawbacks of litigation, he highlights the huge backlog of cases. Unlike many other writers on ADR in Pakistan, he has dealt with ADR in administrative disputes in public domain under Income Tax Ordinance 2001 (Section-134-A), Sales Tax Act (Section-97), Customs Act 1969 (Section-195-C) and Federal Excise Act, 2005 (Section-38).[31] Mir also explains arbitration and mentions the advantages of arbitration, such as, economical, flexible, speedy and time saving. He links arbitration to pre-Islamic period which was continued during Islamic era. In the present day context, he identifies laws such as Cooperative Societies Act 1925, Income Tax Ordinance 2001, Customs Act and Sales Tax Act 1990, section 89-A of Civil Procedure Code 1908 and Electricity Act 1910. He stated that an Arbitration Center was opened in Lahore in 2009 but it was shut down due to poor response for lack of developed procedural law under Arbitration Act, 1940, and also linked that intervention of national courts is inevitable in international arbitration.[32]

Ghani highlights ADR processes of negotiations, conciliation, arbitration along with means of resolving industrial workmen disputes and brings out advantages of those processes which, include cost effectiveness, reduced court work and, mutuality etc., and also highlights problems with these ADR processes and suggests awareness among people and structured training of lawyers and judges.[33]

Khan defines ADR as non-violent dispute resolution outside court, and identifies negotiation, mediation, conciliation and arbitration in the context of section 89-A, Civil Procedure Code 1908, Small Claims and Minor Offences Courts Order 2001, section 102 of Punjab Local Government Ordinance 2001, Section 10 and 12 of Family Court Act

1964, and highlights the reasons of failure of 89-A as court annexed ADRs, primarily lack of support to ADR.[34]

Chaudhary (2012)[35] suggests making section 89-A CPC, which is now optional, can adopted as mandatory, cost imposition in litigation at various stages, removing limit of amount awarded as cost of litigation, establishment of ADR centers and teaching ADR as a subject in law schools.

Khilji (2013) discusses the history of Arbitration Act, 1940 and criticizes the application of Code of Civil Procedure, 1908 and intervention of court in arbitration cases.[36]

Ashfaq believes that mediation, which is most popular in the world, has origin in Panchayat and Jirga system of the Sub Continent and explains benefits as cost saving, finality, time saving, protection of relationship, wider range of solutions, better efficient use of judiciary. However, there is no reference to use of ADR in administrative disputes.[37]

Gondal states that the National Judicial Policy of Pakistan 2009 lays stress on expeditious disposal of cases through ADR, but his suggestions for reforms, have passing reference to ADR.[38]

Dar lays stress on expeditious disposal of cases and stresses need for proper use of ADR processes under section 89-A of Code of Civil Procedure, 1908.[39] Haq. I et.al mentions the need for promotion of arbitration in international disputes only[40] while Khan refers merely to ADR in criminal cases only.[41]

Khan. refers ADR benefits, such as cost saving, time saving, better access to justice, simple process, confidentiality, and also talks about negotiation, mediation, conciliation, arbitration, and ombudsman. He has mentioned numerous laws providing for ADR, but does not suggest the procedure for implementation of ADR.[42]

Alam believes that due to complex system of litigation, the courts are unable to cope with the heavy work load, which has led to ADR processes such as out of court settlement through mediation, conciliation, arbitration, neutral evaluation, expert evaluation and ombudsman, he suggests that arbitration and conciliation are as old as human history.[43]

Zubair states that mediation is not substitute for litigation but an independent institution and that confidentiality is the bedrock of mediation and explains justification for confidentiality.[44]

Hassan. P suggests the appointment of expert's commission for environmental issues these are highly technical in nature, expert evaluation is needed, he suggests the appointment of judicial commissions in other public interest litigation cases.[45]

Khan, has given detailed statistics of pending cases in courts on 31 July 2010 and highlights limitations of section 89-A, such as implementation issues, lack of awareness, reluctance to use ADR, lack of training and lack of ADR centers. He has recommended amendments in section 89-A and suggested for making mediation as part of education and training of professionals and insertion of mediation clauses in contracts.[46]

Bukhari and Haque critically reviews the use of ADR in taxation laws and argues that there is poor response of tax payers for the use of ADR mechanisms and also points out the reasons for poor response such as lack of consultation with stakeholders, appointment of ADR committees by Federal Board of Revenue and final order passed by that Board. He has mentioned the defects of Board i.e., lack of confidence in ADR Committees, costly process, duplication of recourse as ADR is provided through Ombudsman under Federal Tax Ombudsman, Ordinance 2002. According to him, similar provision was enacted in, with similar results in, Sales Tax Act 1990, and has suggested permanent forum for ADR as fast dispute resolution process.[47] Shahid, agrees with this thinking and only focuses on commercial arbitration,[48] but Nazir, is of the view that commercial arbitration is not popular due to inconsistent and ambiguous law.[49]

Rafique, states that backlog of cases and shortage of judges is not the only factor, but it is a lengthy process and takes about 25 years' time frame for civil cases. He presented a case study of ADR in Vehari, district of Punjab Province, where 364 out of 389 cases were settled through ADR center.[50]

Jilani, refers ADR for matters dealing under Sales Tax Act, 1990 has merely recommendatory role of Federal Board of Revenue, the appointment of ADR committee, order on recommendations of committee are subject to approval of Board. He expresses similar views about the Customs Act 1969, section 195-C. In his view, the arbitration in most cases is decided through mediation, and that mediation and negotiation are main methods of ADR because the arbitration has fallen out of practice.[51]

Majid, discusses the Arbitration Act 1940, begging for modernity with other fast moving international jurisdiction and provides insight to the Arbitration and Conciliation Bill 2016, which makes provisions for arbitration, conciliation and mediation, and opines that the Bill is largely based on the Indian Arbitration and Conciliation Act 1996. He refers two novelties of the Act, i.e., Conciliation Centers and that every commercial contract must contain arbitration clause. However, the author deals with only the arbitration aspect of the Bill only and there is no discussion on conciliation and mediation.[52]

The Higher Education Commission of Pakistan (HECP) has included Alternative Dispute Resolution (ADR) as a subject for LL. B as well as LL. M curriculum, but no details or even an outline has been provided for the guidance of the teachers/students.[53] International Judicial Conference (2014) has highlighted the importance of ADR.[54]

Conclusion: This review of literature highlights the seriousness of federal government, supportive role of judiciary and positive attitude of legal profession which can be termed as main factors responsible for high level of success rate; the most common types of review relate to client support veteran entitlement. This practice is growing in Pakistan now. Presently, People are working on the said topic but seem not so serious because they are not giving unique results except to discuss the previous work which is utmost important for the growth and development of this subject. It can be stated that the present literature

review in Pakistan is knowledge sharing but not a knowledge flow based. There is need of identification, creation, application of knowledge along with the implementations. In brief, it is suggested that Pakistan Bar Council, Punjab Bar Council, and Judiciary should spare a valuable time for meetings, and provide reasonable funds to scholars for the solution of this serious issue and proper grooming of knowledge in legal society rather to waste time of disputants and lawyers. Legal system of Pakistan is not getting the real purpose of ADR as is in other countries.

Findings of Literature Review: From Literature Review, it is founded that ADR is not a new invention. In fact, what is termed as ADR was the normal method of dispute resolution in ancient times.

The use of informal dispute resolution started in USA in 1970s in order to avoid heavy cost of litigation, time factor, non-confidentiality, rigid processes, and inconvenience to parties. A variety of informal dispute resolution methods for example, negotiation, mediation, conciliation, facilitation, mini-trial and informal arbitration are in practice in the developed legal systems such as USA, Australia and these processes are applicable in civil, family, banking, labor, education, environmental, employment and administrative disputes.

From the study of national Literature Review, it is realized that there is an extreme deficiency of scholarly and academic research work on ADR in Pakistan. So, there is an ominous requirement of a comprehensive research work which can provide doctrinal and institutional frame work for informal resolution of disputes in general as well as in particular (administrative disputes) in Pakistan.

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