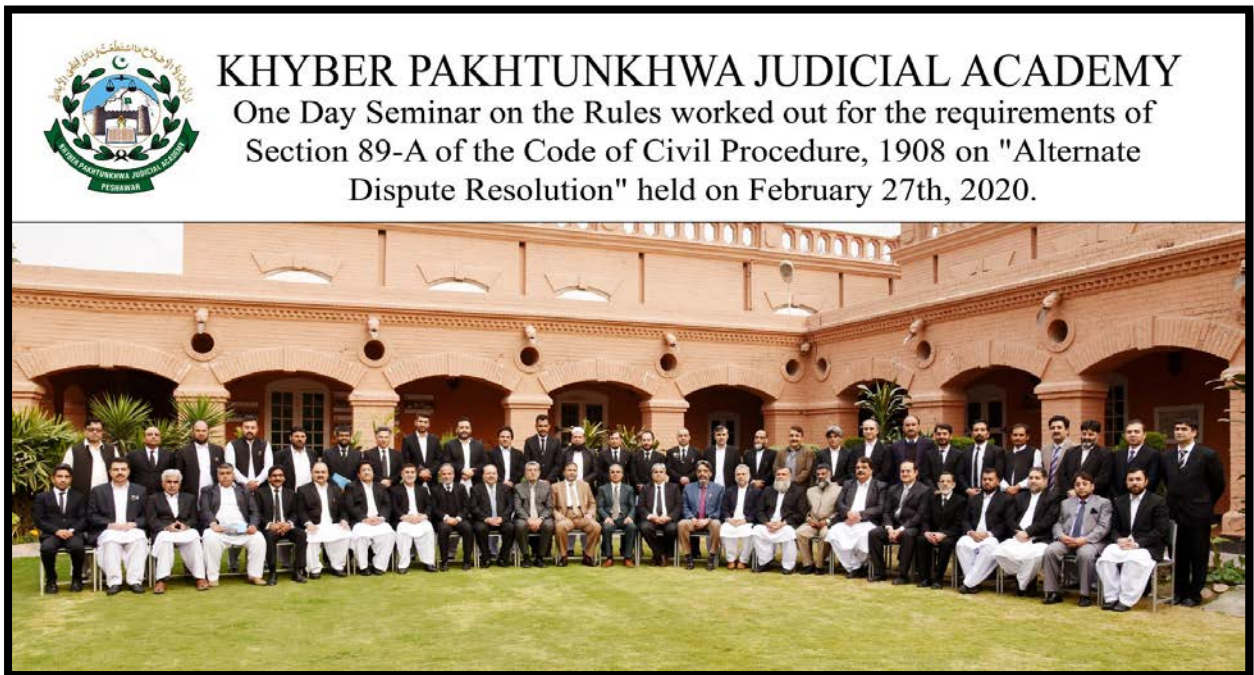




Khyber Pakhtunkhwa
Judicial Academy



REPORT
on
**1-Day National Seminar on the draft rules for the requirements of
section 89-A of the Code of Civil Procedure, 1908**
on
Thursday, 27th February 2010
at



Prepared by: Ahmed Iftikhar, Director Instructions
Finalized by: Dr. Shakeel Azam Awan, Dean Faculty

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1.0 Introductory remarks

The Academy, a creature of a provincial statute, namely:- , Khyber Pakhtunkhwa Judicial Academy Act, 2012 (IV of 2012), has a statutory mandate to: i) provide training to all justice sector stakeholders; ii) hold conferences, seminars, lectures, workshops and symposia in matters relating to court management, administration of justice, law, and development of skills in legislative drafting; and iii) establish liaison with research institutions, universities and other bodies including the Federal Judicial Academy towards the cause of administration of justice. (Section 4 of the Act)

1.2 UNDP, under Strengthening Rule of Law programme, has been assisting the Academy in the achievement of its afore-mentioned statutory objectives. There have been executed LoAs between KPJA and UNDP. Despite efflux of more

than 18 years since insertion of section 89-A in the Code of Civil Procedure, 1908, no effort has been made to make the Alternate Dispute Resolution (ADR) system effective in this province. Mr. Justice Waqar Ahmad Seith, Hon'ble Chief Justice, Peshawar High Court, Peshawar took initiative by constituting a Committee in March 2019 with a task of working out rules for the requirements of section 89-A of the Code. The committee completed its work in July 2019. The draft rules so worked out were placed before another forum comprising all the Principal Officers of Peshawar High Court and the members of such Committee during October and November 2019. During lengthy deliberations, they suggested certain changes therein. The draft was accordingly fine tuned in December, 2019. It was proposed that before holding seminar thereon, the feedback must be had

from all Judicial Officers and all District Bar associations of the province in respect thereof. Feedback was accordingly obtained. The same was reviewed. It was then decided that there must be held a national level seminar to dilate upon the draft rules.

With collaboration of UNDP, the Academy held such seminar on Thursday, 27th February, 2020. The participants included Judges, nominees of all District Bar Associations of the province, Registrar, Sindh High Court, nominee of Lahore High Court, nominee of Punjab Judicial Academy, Incharge Mediation Center Attock (Punjab), nominees of NGOs and media persons. Dr. Shakeel Azam Awan, Dean Faculty, KPJA as chairperson of the working out Committee presented the draft rules. That followed Panel Discussion and the participants' recommendations.

2.0 Concept Paper

SEMINAR:	The Rules worked out under section 89-A of the Code of Civil Procedure, 1908 on "Alternate Dispute Resolution"
DURATION:	1-Day Activity: Thursday, 27h February 2020
NUMBER OF PARTICIPANTS (Invitees):	79 (Seventy Nine): 2-Officers from Peshawar High Court; 15-Judicial Officers from NMDs and rest of Khyber Pakhtunkhwa; 1-Officer each from Lahore High Court, Sindh High Court, Baluchistan High Court and Islamabad High Court; 1-Officer each from PJA, SJA, BJA and FJA; Incharge, Mediation Center Lahore; Secretary Law, Govt of KP or his nominee; 1-Officer from Law & Justice Commission of Pakistan; 1-Lawyer from Peshawar High Court Bar Association; 1-Lawyer nominated by KP Bar Council; and President of each District Bar Association of KP (34); 5-Media persons; 10-nominees of different NGOs.
Methodology:	Deliberative, participative & orientative on conceptual framework of the draft rules
Designed by:	Ahmed Iftikhar, Director Instructions-II, KPJA
Finalized by:	Dr. Shakeel Azam Awan, Dean Faculty, Khyber Pakhtunkhwa Judicial Academy, Peshawar

CONCEPT NOTE

Introduction:

Ever since insertion of section 89-A in the Code of Civil Procedure, 1908 (V of 1908) (hereinafter referred to as "Code")

way back in 2002, there had been framed no rules to carry out the purpose of legislative piece. To achieve the objective of providing a dynamic mechanism for implementation of ADR system, Hon'ble Peshawar High Court, Peshawar was pleased to constitute a committee to work out draft rules for requirements of s. 89-A of the

Code vide Order contained in Endst # SDJ/PHC/REG/64-V.II.1301-6 dated 21.03.019. The rules have been worked out. The same have also been dilated upon in three meetings of Principal Officers of Peshawar High Court. The changes suggested in such meetings have been duly incorporated therein. The rules so fine tuned have been uploaded on *website* of Khyber Pakhtunkhwa Judicial Academy (hereinafter referred to as "KPJA") with a view to obtaining the feedback from the members of the bars-n-bench. The feedback so far received has been reviewed. Before the draft is to be further processed for being converted into the rules under section 122 of the Code, it is deemed necessary that there has to be a seminar thereon. The Academy contemplates such seminar on the date, time and place mentioned hereinbefore.

As a common law country, ours is an adversarial system of administration of justice of civil litigation as contra-distinguished from the inquisitorial system of civil law countries. History bears an ample testimony to the fact that it is a cumbersome process as every civil suit invariably undergoes 10-step routine process: institution, service

of summons on defendant, written statement to the plaintiff, settlement of issues, evidence of plaintiff, evidence of defendant, arguments and decision. *Lite pendente*, number of applications are made, each one consuming sufficient time for disposal. Recent amendments in the Code through providing procedural mechanism for "Case Management", "Scheduling Conferences" and "Summary Judgment", i.e., Order IX-A and Order XV-A are important steps to curtail the delay. Another integral component of reforms is Alternate Dispute Resolution (ADR) as it does have two-fold purposes, *firstly*, to make the process of seeking justice less complex; and *secondly*, save the parties against odds like expenses, time etc. ADR is basically meant to divert those cases from the litigious track to the alternate mode which can be sorted out through other modes: negotiation, conciliation and mediation. And only those cases should go to the Courts for adjudication which are of complex nature involving intricate questions of law and are not capable of being sorted out through the alternative methodology. The Courts will thus be able to give proper time to the genuine litigation. By creating a system for facilitating the people to

resolve their controversies and that too by judiciary through establishing mediation centers, good results are achievable. It will help curtail delays, reduce pendency, save parties against unnecessary expenses, and open up new venues for lawyers to represent parties before mediation centers.

The rules have been worked out after thorough review of literature comprising Research Articles; Books; Case Law; Islamabad ADR Act 2017; Lahore High Court ADR Rules; Sindh High Court ADR Rules; and relevant portions of Lord Woolf's Report. The Committee has taken note of administrative dynamics of ADR keeping in view the socio-political peculiarities of this province. The administrative and executive dimensions of these draft rules have been examined too. The same included financial implications of introducing these rules.

Since a statute, i.e., the Arbitration Act, 1940 was existing on the statute book, therefore, "ARBITRATION" could not be dwelt upon in these rules for two-fold reasons: *firstly*, it was statute (Act of legislature), hence it could not be bypassed by rule-making

process under s. 122 of the Code; and *secondly*, it could have only been touched upon in these rules, had the Act ever been repealed by Parliamentary enactment. It was thus resolved that draft rules would deal with generally prevalent and accepted three concepts, viz, i) Negotiation; ii) Conciliation; and iii) Mediation.

Major Components:

The rules provide for: i) pre-action conduct, ii) post-action proceedings, iii) online mediation, iv) establishment of mediation centers, v) code of conduct for mediators, vi) training of mediators, vii) confidentiality of mediation proceedings, viii) right to due process of law to remain unaffected, and ix) representation of parties through lawyers in the mediation centers.

Mediation Centers:

The draft rules provide for establishment of mediation centers at district and tehsil levels to be headed by Judicial Officers as mediators. The rules further provide for training of Judicial

Officers as mediators, a job altogether different from judicial portfolio as it requires different and special skills to administer and manage such centers.

Mediation Centers headed by Judicial Officers as mediators have been functional in Punjab. Our team had the advantage of visiting the Mediation Center Lahore in November 2019 with a view to learning from their experiences and best practices. It was really a pleasant trip of learning.

Note of appreciation:

Strengthening the rule of programme (SRLP), as developed and pursued by UNDP, is supportive of both demand and supply sides of the rule of law and justice through strengthening institutions, helping the enforcement of rights of citizens and the ongoing efforts of government and institutions to secure peace and stability. Strengthening the judiciary is one of key areas of UNDP. It has been supporting Khyber Pakhtunkhwa Judiciary (KPJA) and Judiciary to build their capacity and improve justice service delivery. The

activity will be sponsored by UNDP. It will help strengthen working relationship of KPJA with UNDP for capacity building of stakeholders of justice system and improve justice service delivery.

Objectives:

- a. The activity is designed to browse upon the conceptual framework of the worked out rules;
- b. To get the feedback of the stakeholders of justice system on the same;
- c. To learn from the experiences and expertise of the participants in relation to ADR Rules and functioning of mediation centers.

Significance:

It would help understand the practical viability of the draft rules and the operationalization of ADR centers.

Main features:

It will be 1-Day Activity. Participants will be as highlighted in the table at the very outset. Activity is designed to achieve the objectives as hinted to above. Duration and breakup of activity will be as under:-

- a. Introductory address:
(30-45 minutes);
- b. Panel discussion on each component: 9-Components (15 minutes on each component); and

- c. Groups consultation and recommendations: (90 minutes).

The opinion of the galaxy of intellectuals (participants) will be documented in an executive summary. The same will be taken into account for further exercise under section 122 of the Code. The executive summary may form, if approved, one of integral components of a basis for First Training of Judicial Officers likely to be posted in the Mediation Centers to be set up in the province.

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3.0 Agenda

1- Day Seminar: 27th February 2020

Inaugural Session

09:00-09:30

Arrival of Participants & Registration

09:30-09:35

Recitation from the Holy Quran

09:35-09:45

Welcome Addresses by the DG KPJA

09:40-09:55

Inaugural Speech by Chief Guest

Session-1

Introduction:

10:00-10:45

The rules worked out under section 89-A of the Code of Civil procedure, 1908 on "Alternate Dispute Resolution" by Dean Faculty, KPJA

Tea Break: 1045-11:15

Session-2

Panel Discussion:

11:30-01:30

Moderated by Dean Faculty & Director

Instruction-II

Lunch and Prayer Break: 01:30- 02:30

Session-3

Recommendations:

02:30 -04:00

Group formulations & recommendations by each group

Concluding Ceremony:

- Concluding address by the Chief Guest
- Certificates distribution
- Group Photograph
- Tea

4.0 Inaugural Session

The session began with the recitation from the Holy Quran. Mr. Ahmed Iftikhar, Director Instructions-II anchored the session. He invited D.G, KPJA for a welcome address who, in his speech, expressed gratitude to all the participants for taking out time from their respective tight schedules to attend the seminar. He thanked UNDP on financial support for the seminar. He lauded the UNDP's cooperation with KPJA in holding

events like it. Dr. Shakeel Azam Awan, Dean Faculty, KPJA, moderated the session.

5.0 Session 1 (Introduction)

Dr. Shakeel Azam Awan, Dean Faculty, KPJA as chairperson the Committee for working out the draft rules on ADR gave an extensive briefing on the rules. His address is reproduced as hereunder:

"In the name of Allah,
the Most Beneficent, the
Most Merciful!

Distinguished guests,
Hon'ble Judges and
learned members of the
bar. *Assalam-o-Alaikum*
and good morning.

It is, indeed, a matter of pride and pleasure for me to present a draft of proposed legislation on Alternate Dispute Resolution before this galaxy of intellectuals. It

is so and we all know that the Parliament had made a very important amendment in the Code of Civil Procedure, 1908 way back in 2002 vide Ordinance No. XXXIV of 2002 which introduced alternate dispute resolution, a mode of informal character for resolution of disputes, in addition to the existing formal adjudicatory mode of seeking justice. Islamabad had enacted a separate law on the subject known as Alternative Dispute Resolution Act, 2017. Next to join the club was Punjab which effected an amendment in Code of Civil Procedure by inserting therein new Order IX-B with a title " Alternative Dispute Resolution". Sindh did not lag back and it also effected an amendment to the same effect in Code of Civil Procedure during 2019.

Our province remained very late in this respect. However, Mr. Justice Waqar Ahmad Seith, the Hon'ble Chief Justice of the Peshawar High Court took a very serious initiative in order to make section 89-A of the

Code of Civil Procedure, 1908 effective and meaningful to provide an additional venue for stake-holders of justice system for resolving the disputes through an informal mode. For this purpose, a committee was constituted in March, 2019 with directions to work out draft Rules for the requirements of section 89-A. The committee completed its task in July, 2019. Thereafter, it was decided that all Principal Officers of Peshawar High Court including the members of Committee should undertake a review of the draft Rules. The Draft Rules thus came under scrutiny of such Officers who suggested some changes therein. Ultimately, the Draft Rules were accordingly fine tuned in December, 2019. It was however, suggested that there should be held a National Seminar at KPJA on these Rules. But before holding the Seminar, the Draft Rules be circulated amongst all Judicial Officers and all District Bar Associations of the Province in order to seek their

feedback. The Draft Rules were accordingly circulated and feed-back received. The Academy conducted a review of the feed-back, hence this Seminar.

I would like to inform the house that before working out the Rules, the Committee had conducted extensive literature review: research articles, books, case-law, Islamabad ADR Act, the Lahore High Court ADR Rules and Sindh High Court ADR Rules as incorporated in CPC. It also took note of relevant portions of Lord Woolf's Report on the subject including CPR of United Kingdom. Besides that, the Chairman of the Committee interviewed three learned Barristers who had expertise in ADR and are certified mediators working in Pakistan and abroad. Before holding the meeting of Officers of the High Court on the subject to review the Draft Rules, some of officers and faculty of Academy had also the advantage of having visited mediation center of Lahore and it was a pleasant

and learning experience which provided an ample help in reviewing the Draft Rules.

I think that we must admit that formal system of administration of justice is not singularly sufficient to deal with all cases. Delay, complex nature of procedure and expensiveness of litigation are the major reasons for this decay. General perception of the public and viewpoint of a specific segment of society is that they hold the judiciary accountable for such delays and back-log. There is no denying the fact that it takes years to decide a civil suit. Sometimes decades pass on to reach its ultimate and logical conclusion. Even two generations pass away and the case is sometimes still pending before the courts. This all is because of flaws in the system. It is complex, it is expensive and it is vulnerable to inordinate delays. All these factors point out one thing more and that is that it raises serious questions on governance. Administration

of justice is part of governance. Judiciary is the third important pillar of government. We cannot escape this responsibility. By increasing the number of judges, by creating special courts and by capacity building of judicial officers, this problem cannot be resolved. For this purpose, we need to find out special mechanism and new venues. Section 89-A of the Code of Civil Procedure is an open window for reforms in the right direction. Whenever any dispute is sought to be resolved through ADR modes, the judges and the lawyers have no answer to the question as to how the ADR is to be done except this that one may take refuge under the Arbitration Act. Arbitration basically is an adversarial and adjudicatory mode of justice because Arbitrator has to give his award. As regards other modes such as mediation, conciliation and negotiation, these are not adjudicatory modes because the mediator just assists and facilitates the parties in reaching a

satisfactory and acceptable negotiated solution to their dispute without having any authority to decide. When the parties reach a settlement, the mediator records the same, gets it signed from the parties, certifies it and sends it to the court for being converted into judgment and decree. Here one must note that when we went through relevant parts of Lord Woolf's Report, it was very informative as it revealed that system of administration in United Kingdom had even fallen prey to choking in late 1980s. He pointed out three major flaws in the system: complexity, delay and ineffective mechanism regarding costs. It was his report of 1996 which was made a basis for bringing in radical changes in CPR (Civil Procedure Rules 1998) which introduced system of ADR. Now United Kingdom has a system where only those cases go to the courts which are complex and cannot be sorted out through ADR and rest of the cases are automatically diverted to the informal mode of justice, i.e., ADR.

He was of the opinion and his view was absolutely correct that we cannot bring into being any man-made system which will be able to resolve all the disputes singularly. He opined that those cases which can be sorted out through mediation must be diverted from the litigious track to that of ADR. And only those cases should go to the Courts for adjudication which are of complex nature and are not capable of being sorted out through alternate method. The Courts will thus be able to give proper time to the genuine litigation saving state money, time of courts and the parties against odds like delays and expensiveness. We have also examined ADR System as operating in India as per judgment of Indian Supreme Court in Salem Bar Association case (Salem Bar v. Union of India (Civil) No. 496/2002 decided on 2.8.2005) and the Legal Services Authorities Act, 1987. We had also tried to have glimpses of ADR Systems as operating in China, Malaysia and United States of America. We notice

that Japan, Korea, Vietnam, and some other countries have combined system of arbitration and mediation.

We have just listened the recitation from the Holy Quran and these were the verses from *Surah Hujrat*. These two verses 9 and 10 provide divine basis for ADR System. Urdu translation is:

اور اگر مومنوں میں سے کوئی دو فریق آپس میں لڑ پڑیں تو ان میں صلح کرا دو۔ اور اگر ایک فریق دوسرے پر زیادتی کرے تو زیادتی کرنے والے سے لڑو یہاں تک کہ وہ خدا کے حکم کی طرف رجوع لائے۔ پس جب وہ رجوع لائے تو وہ دونوں فریق میں مساوات کے ساتھ صلح کرا دو اور انصاف سے کام لو۔ کہ خدا انصاف کرنے والوں کو پسند کرتا ہے ﴿۹﴾ مومن تو آپس میں بھائی بھائی ہیں۔ تو اپنے دو بھائیوں میں صلح کرا دیا کرو۔ اور خدا سے ڈرتے رہو تاکہ تم پر رحمت کی جائے ﴿۱۰﴾

The system of administration of justice provided by Islam had three modes, firstly, *Adalat* means

adjudication; secondly, *Tehkim* that is Arbitration; and thirdly, *Sulah* meaning mediation, conciliation and negotiation. Holy Prophet (SAWW) also encouraged the people to settle their disputes by *Sulah*. Holy Prophet (SAWW) is reported to have said "*He who makes peace (Sulah) between the people by inventing good information or saying good things is not liar.*" He is further reported to have said "*There is a Sadaqa to be given for every joint of human body and for every day on which the sun rises. There is a reward for the Sadaqa for the one who establishes Sulah and justice among the people.*" The pious caliphs (R.A) also encouraged *Sulah*. Umer the Great, 2nd Caliph (R.A) wrote a letter to Abu Musa al Ashari containing the rules of *Sulah*. One of its recitals was, "*All types of compromise and conciliation are permissible except those which make haram anything which is halal and halal a haram*".

The charter of UNO in its Article 36 also provides for

mediation as mode for amicable settlement of international disputes. Once while addressing the legal fraternity, *Abraham Lincoln* the then President of United States of America said "*Discourage litigation, persuade your neighbours to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.*"

Keeping in view the western jurisprudence, the Chinese thought, the Indian system, the Malaysian system, the international law, our own Islamic thought and jurisprudence, and our social milieu, one thing is as clear as a day that formal system of administration of justice can never provide panacea for ills like complexity, delays and expensiveness of adjudication. We need to think how to make the system less complex, how to curtail the delays, how to save the parties against odds like expensiveness and how to create a system where frivolous litigation is to be

taken as a highly expensive bargain. We need to think out of box to come up with innovative solutions to resolve issues of people to create peace and harmony in the society. Our social set up and values accept mediation as a system to resolve disputes of parties. It is an amicable

1. We have not touched upon Arbitration because we have the Arbitration Act, 1940.
2. There are many kinds and types of ADR but we have chosen three: negotiation, mediation and conciliation as these are nationally and internationally accepted modes of ADR. We have, therefore, proposed to insert the well-acknowledged and generally accepted definitions of these three concepts in the definition clause (*Rule 1*) of the draft Rules.
3. We have also proposed to introduce concept of

mode of settlement. The Draft Rules have been worked out in the light of these principles which I have already hinted to before this august house.

Now I would like to highlight the major aspects of the draft Rules:-

- concise statement of claim* and *reply* thereto because mediation center is not a court and mediator is a facilitator to the parties in reaching an acceptable negotiated settlement of their dispute. This concept relates to mediation before institution of suit (Pre-action Conduct). (*Rule 1*)
4. We have also proposed to introduce concept of pre-action and post-action proceedings, as are in vogue in United Kingdom. When a party directly goes to mediation center for resolution of dispute without intervention of court and before

instituting a suit, it is named as *pre-action conduct*. But when the court, after the institution of suit and with the consent of the parties, refers the dispute to the mediation center for resolution, it is named as *post-action proceeding*.

5. The Draft Rules provide for establishment of mediation centers throughout the province and posting of judicial officers as administrators and mediators of such centers (*Rules 3 to 7*). The job of mediator is to assist the parties in reaching a mutually acceptable negotiated settlement of their dispute. Therefore, it requires the commitment, confidentiality, neutrality and special aptitude. The draft Rules provide for rigorous training of

mediators to equip them with skills and techniques of conducting the mediation. Only those judicial officers who undergo graded training and who are certified as mediators shall be posted in the mediation centers. A mediator has to be from amongst judges of district judiciary. A judge cannot wear these two hats at the same time that is why the draft Rules provide that after the mediation proceedings are successful, he will record the settlement arrived at between the parties in his presence, get the same signed from them and certified by him and it will be transmitted to the court of competent jurisdiction for being converted into judgment and decree. Besides, the Draft Rules provide that High Court shall issue Code of conduct for

mediators and the violation of such code shall be treated as misconduct. The nitty-gritty of pre-action mediation and post-action mediation have been reflected in the draft (*Rules 9 to 12*).

6. The Draft Rules also provide online mediation and conciliation (*Rule 13*). Although system of online mediation is operational in western countries but there is no such system in our country. It will perhaps be the first of its kind in Pakistan. The use of Information Technology is the order of the day. We would take full advantage of Information Technology. The I.T Board of our province and I.T team of Peshawar High Court will help develop a software to ensure safety, confidentiality and security of online mediations.

7. The Draft Rules further provide for insertion of *Sixth Schedule* at the end of Code of Civil Procedure with three appendices (*See Rules 1, 2, 9, 10, 11 & 12*). The Appendix-I contains the items which can be resolved through ADR System. Appendix-II provides for different forms in relation to mediation proceedings which will be helpful to the parties, lawyers and courts in respect of everything in relation to mediation proceedings. Appendix-III provides for three (03) forms to be used for maintaining Registers by Mediation Centers.
8. As regards manner of conducting the mediation proceedings, the draft Rules will be silent because it is nationally and globally accepted rule of prudence that mediator

may follow such procedure as may be deemed appropriate in the circumstances of the cases. The reason is that mediator is not to act as adjudicator like a judge or arbitrator and he is not to decide anything but to assist and facilitate the parties in reaching settlement mutually acceptable to them. In this respect, sub-rule (v) of Rule I-B of Order X of Sindh High Court Amendment of CPC is quite clear.

9. Confidentiality is of prime significance in mediation proceedings because these are proceedings without prejudice. It is nationally and internationally accepted rule that mediation has to be confidential because it is not adjudication but a facilitation by mediator to the parties to reach mutually acceptable settlement

of dispute. In this respect, *Order X Rule ID of Sindh Amendment in CPC* and *section 19 of ADR Act of Islamabad* are quite clear. The reason is that if the mediation fails, whatever is stated and done during the mediation proceedings by parties cannot be used as evidence in adjudication of suit. Otherwise every unscrupulous litigant will go to mediation in order to fish out the weaknesses of other party and then refuse to negotiate and take the matter to the court to bring the things said and done in mediation as a proof.

10. The Draft Rules do not make ADR compulsory (It is for house to see whether it be compulsory or optional) However, in all countries where ADR systems have been introduced, the non-compliance with ADR

by a party is linked with imposition of costs on that party which is at fault. The Draft Rules follow the global model and provide a mechanism for the court to which the settlement is sent by the mediation center for being converted into judgment and decree to determine and impose such costs on party at fault as circumstances warrant. The Draft Rules set out principles in this regard *(See Rule 2 and corresponding amendment in Order XX, rule 6 of CPC).*

11. The Draft also provides for timelines for determination of mediation proceedings. Maximum time limit is 120 days and a further extension may be allowed for thirty days. This is the maximum limit. In case of pre-action conduct, the mediator may adjust the time limit to a

minimum period during the scheduling conference with the parties *(See Rule 23)*. In case of the matter being sent by court to mediation (Post-action proceedings), the court may also determine time within which the mediation is to be completed.

12. It has to be noted that when the mediation is successful and the mediation center sends the settlement arrived at between the parties to the court, the Court will pass judgment and decree only if the settlement is lawful. It will consume no time because judge is not to enter into any other controversy because the settlement is a settlement between the parties and not a decision of a mediator unlike arbitrator. The same is not subject to any objections as parties have themselves settled such terms and

- conditions. Even the mediator being a judicial officer and having acquaintance with law may refuse to mediate a matter if it is found to be an unlawful move by the parties as a contrivance to get certificate of court for such decision (*See Rules 9 to 12*).
13. If in a pre-action conduct, the mediation fails, center will issue memo/certificate to the parties to that effect so that either party may show to the court during adjudication that it has made effort to mediate so that it could avoid the liability of the costs (*See Rules 9, 10 and 11*). In case of post-action mediation, the mediator informs the court that mediation has failed so that the court may recommence proceedings on the suit already stayed (*See Rules 8 & 12*).
14. CPC and QSO are not applicable because mediation is not a trial. It is rather a sort of exchange of views between parties to reach a private settlement out of court, hence, question of breach of fair trial or due process does not arise. (*See Rule 16 & Order X, IB (ix) of Sindh High Court Amendment in CPC*)
15. Judgment/Decree passed in consequence of mediation is not subject to appeal or revision because it is a consent decree. This is nationally and globally accepted rule. In this respect *section 96 (3) of CPC*, and *section 18 of Islamabad ADR Act* are clear. If third party is aggrieved from decree, such party has remedy of application under section 12 (2) of CPC.
16. During pendency of appeals and revisions, the parties may proceed to mediate if they so

agree and the appellate/revisonal court finds that such dispute can be sorted out in mediation center. Power to refer it to mediation center is subject to two condition, viz, consent of parties and observation of court that it can be sorted out through informal mode. (*See Rule 18 and read it with Rule 2*).

17. The draft Rules also provide for representation of parties through advocates. It will open a new vista for lawyers to be engaged by parties for mediation proceedings. (*See Rule 24*)

18. The mediation is since not adjudication, therefore *Order IX of CPC* does not apply. It is the parties who mutually go to the mediation center and if during pendency of mediation proceedings,

any party does not attend the proceedings, the mediation center may issue notice of appearance and when that party does not attend despite service, the mediation center will presume that such party is not interested in ADR, hence ADR has failed. Center will accordingly issue memorandum certificate to the attending party to that effect. And in case of matter being sent by court to mediation center, it will inform the court that the mediation has failed so that court may recommence the proceedings on suit. (*Principles set out in Rules 8 to 12 will be followed*)

19. The draft is in no way violative of the due process of law because ADR is neither compulsory, nor does it stop parties from going to courts of law for

adjudication of rights through formal system. It is an informal system of resolving disputes. *(See Rule 26 & read it with Rule 2)*

20. The draft Rules provides an additional forum for settlement of dispute and that too free of costs and under the patronage and protection of state. It envisages the social norm of community into the law and accepts social order regarding SULAH.
21. It is a consensual proceeding. No matter can be referred to mediation without consent of parties. In case of pre-action

conduct, it is the parties who directly can go to the mediation center and the consent of parties is the crux of the proceedings. *(See Rules 2, 9, 10 & 11).*

25. For service of process, *Rule 22* is quite self-contained.
27. For execution of decrees in consequence of mediation, *Rule 14* is explanatory to section 36 of CPC.
28. For removal of difficulty, High Court is empowered to pass apt orders. *(See Rule 20).*

6.0 Session 2 (Panel Discussion)

NOTE: There were four (4) niches, highlighted under the heading "AREAS" as hereinafter. Feedback received through District & sessions Judges of the

province was mentioned under the heading "questions/reservations". Next heading "ANSWERS" would show the replies of the Academy and the panelists.

- The Academy had had feedback from district judiciary and district bar associations of the province on this document. Their feedback has been reviewed. The reservations and questions relate to these areas.
- The Academy has accordingly formulated such reservations into statements, interrogative or otherwise for being placed before this august house for deliberation and recommendations:

6.1 AREA NO.1

- A. Judge as Incharge Administrator of Mediation Center and ex officio mediator and other judges posted as mediators in such center. Is it legal & logical?
- B. Is confidentiality of mediation proceedings a correct approach?
- C. Lawyers' participation in mediation proceedings. Is it right?

6.1.1 RESERVATIONS/QUESTIONS:

▶ Judge as Mediator/Lawyers Participation

- South Waziristan
 - An excellent effort for expeditious disposal of cases.
- Lakki Marwat
 - Comprehensive mechanism for resolution of dispute through ADR.
- Abbottbad
 - Mediator should be person other than judicial officer.
 - Whether mediator shall perform only mediation proceedings or other functions

as laid down in
CPC.

▶ Mardan

▶ Instead of
appointing
Senior Civil
Judge, additional
posts be created.

▶ No need of
separate court
for mediator
(Bar).

▶ Lower Kohistan

▶ Rules
meticulously
drawn and would
help decide
matters
expeditiously.

▶ Orakzai

▶ Mediation
centers be
established at the
level of union
council.

▶ Pleaders
representing
parties must be
trained with
certificate issued
by Bar Council.

▶ Swabi

▶ Prerequisite for
mediator is
judicial officer.
His sphere of
action be
explicitly given.

▶ Haripur

▶ Preferably a post
for SCJ should
be separately
created.

▶ Tank

▶ No separate
court needed.

▶ Kohat

▶ Rules should
provide
association of
experts in certain
cases.

▶ Number of cases
to be entertained
by a mediator be
fixed.

▶ Swat

▶ Separate posts of
SCJs be created.

▶ Separate
hierarchy of

ministerial staff
also needed.

▶ Charsadda

- ▶ Senior lawyers as mediators in pre-action proceedings and serving judges in post-action proceedings.
- ▶ Parties be allowed to associate experts.

▶ Kohistan Upper

- ▶ Rules provide mechanism for expeditious disposal of cases.

▶ Mohmand

- ▶ Increase the number of judicial officers so that there are separate judges as mediators.
- ▶ Number of cases to be entertained by a mediator be fixed.

▶ Karak

- ▶ By involving community, proposed system may serve in better way.

▶ Buner

- ▶ Mediator should not be assigned judicial work.

▶ Kurram

- ▶ People from all walks of life be included as mediators.

▶ Dir Upper

- ▶ Rules have limited the scope of section 89-A CPC. Parties have the choice to get their dispute resolved through a person of choice, be it an elder of locality, expert etc.

▶ Confidentiality

- ▶ Lakki Marwat
 - ▶ Rules require proceedings before mediator to be privileged. if one party waives the privilege and other does not, whether proceedings would be admissible in evidence.
- ▶ Mardan
 - ▶ Confidentiality of proceeding cannot be assured. Leakage of information exposes mediator to misconduct which is not justified.
- ▶ Haripur
 - ▶ Neither party should be entitled to rely on views expressed before mediator in another proceedings
- ▶ Mansehra
 - ▶ Whether SCJ (Judicial) or SCJ (Admn) shall be the mediator.

6.1.2 ANSWERS:

Judge as Mediator:

- A. Centers are not courts. These will not be adjudicatory proceedings in the centers like the courts proceedings. These will be no proceedings of adjudicatory nature like those of arbitration.
- B. Each center will be headed by administrator. He will be ex-officio mediator.
- C. Keeping in view pendency of ADR cases, such number of other mediators may be posted as are deemed required for the purpose.
- D. Job of mediator is different from that of judge.
- E. Training of mediators is necessary as he/she is to assist the parties to reach a mutual

- acceptable and satisfactory settlement of dispute without compromising his/her impartiality.
- F. Serving judges will be administrators and mediators.
- G. A judge cannot wear the hat of mediator and that of adjudicator at the same time as is the case of arbitrator. Therefore, the settlement arrived at between parties during mediation and certified by mediator is to be sent to court for disposal of cause.
- H. Administrator/Mediator may adopt any mode to hold the proceedings .
- I. These are not adjudication proceedings, hence it is not trial. It is parties who would themselves settle their dispute with facilitation of mediator.
- J. There is no prohibition on parties to negotiate their dispute through another mediator without mediation center. Mediation center provides support to people free of costs etc.
- K. The mediation center is a facility created by the State for the parties to adopt informal mode of settlement of disputes.
- L. Monitoring of mediation center by High Court is necessary to ensure proper performance of duties by mediators for public service.
- M. The Code of Conduct is necessary because High Court will issue Code of Conduct for mediator as per Rule 19 of Order III-A. As a consequence, non-compliance therewith will be a misconduct.
- N. Specialized training is must for judicial officers to equip them with nationally and internationally accepted models of skills on commitment, confidentiality, neutrality, behavior and professionalism to be observed by administrator and mediator. It will add a feather into the hat of judicial officer.
- O. Graded training will make the judicial officers responsible to effort to qualify and learn.
- P. Trial judge cannot mediate. If he does so, he is in difficulty and parties object. It is because of this reason that we have not been able to make section 89-A of CPC effective. International practice is that a judicial officer may act as mediator without being trial judge as one who mediates is disqualified to sit as trial judge in the same matter. This is mentioned in Code of Conduct of judicial mediators in number of countries.

- Q. Judge has acumen to evaluate evidence. In some cases of technical nature, mediator needs to have trait of evaluation. This trait and quality gives him an edge over any other person and it is judicial officers who fits in, in such cases.
- R. It is service free of costs for parties.
- S. Other forms of mediations are already there in our society. We are creating a separate and additional forum to ease the people for mediation free of service charges and fee and that too under protection of State. It will be a special facility to them.
- T. As justice is assignment and responsibility of judiciary under the doctrine of separation of powers under the Constitution, and mediation is meant to provide inexpensive and expeditious justice to the people, therefore, it falls within the gamut of judiciary to create such forum to supplement adjudicatory system with an alternative mode for seeking justice.
- U. Wherever this experiment is done, whether common law countries, civil law countries or Islamic countries, it has been successful bringing fruitful results. Singapore, Canada, Australia & USA as common law countries, Germany as civil law country and Egypt and Malaysia as Islamic states are few examples.
- V. Judge's role as mediator does not contravene his judicial duties. There is case law from Australian jurisdiction on it. This debate is over. Now they are thinking to go much beyond it as to how to go for integrated approach to develop and improve system of ADR to supplement adjudicatory system of justice.
- W. Mediator cannot act as a judge.
- X. It is essential for confidentiality of proceedings.
- Y. Proceedings are not adjudication, hence the role of adjudication cannot be given to the mediator as the arbitrator cannot become judge under Arbitration Act.
- Z. Mediator is disqualified to sit as judge in case he has mediated.

Confidentiality:

A. Confidentiality is essence of mediation. Parties will feel free to negotiate if they are satisfied that the proceedings are secret because in many cases, secrecy and privacy are involved. It must be such person who can maintain secrecy of whatever is said and disclosed by and between parties during mediation. At the same time, not only society must trust him but the code of conduct must be so stringent and rigorous that he cannot dare violate it. It is only judge whom society trusts and he is supposed, as a matter of his official position, to keep things secret and the code of conduct is so strict that he can never think of leaking the secrecy. No one can legally force him under

- any law to disclose what he heard in camera proceedings.
- B. These being non-judiciary proceedings and that before mediator and center who and which are not judge and court.
- C. Rule 21 is self contained.
- D. It is internationally and globally accepted rule and practice.
- E. In case of unsuccessful mediation, if such proceedings are allowed to be open, then either party may take undue advantage from the things said by other party during proceedings. It will take it as proof before court. It will affect the spirit of "without prejudice" attached to these proceedings
- F. This is to save the right to due process of law as given in Rule 26.

Appearance through Counsel:

- Rule 24 is clear.
- Parties may engage counsel for such proceedings and this will open up new venues for lawyers

to appear in mediation centers too.

6.2. AREA NO. 2:

A. Nature of mediation proceedings. Are these adjudicatory or otherwise?

B. Confidentiality of mediation proceedings.

C. Attendance of parties & service of process upon them.

D. Application of CPC & QSO.

E. Judgment & decree by Court & not mediator.

F. Record of proceedings, maintenance thereof.

6.2.1 RESERVATIONS/QUESTIONS:

▶ Nature of Proceedings

• Kurram

- At what stage of appeal, matter can be referred to ADR: Effect if later on appeal found time barred.

- More time for mediation proceedings; complicated issues may arise.

- What does attested copy of record mean; record relied upon by party or record of proceedings.

- Sub-rule 12 provides concept of compromise. There is

also separate mechanism in Order XXIII Rule 3-A-duplication of compromise.

- Right of appeal can only be withdrawn by legislation.

- Should formal rules of QSO be not applicable.

• Dir Upper

- As per proposed sub-rule 2, Rule 9-A Order XX, appearance of parties is compulsory. Parties having already endorsed compromise before mediator, court

- should have power to pronounced judgment even party does not appear on notice.
- Sub-rule 2, Rule 7 Order III-A and Rule 10(10), Rule 11(10) Contradictory regarding time.
- Mansehra
 - In post-action proceedings, referral need to be at any stage.
- Haripur
 - Define administrative powers of Administrator.
 - Mediator needs power to:
 - Requisition public record
 - Record oral or documentary evidence
 - Calling experts
- Tank
 - Forum needed against grievance redressed in case of mediator's decision.
- Time for mediation proceedings be enhanced.
- In case of ex-parte, mediator should send case back to court.
- Kohat
 - Compulsory referral in petty nature cases.
 - Period of mediation proceedings to be excluded for disposal policy.
 - In case of ex-parte, referral back to the trial court.
 - Mediator needs power to call witnesses etc.
- Swat
 - Compulsory referral.
 - Mediator power to compel appearance of parties.
- Charsadda
 - Mediator power to issue process – Order V CPC.

- Mandatory referral in some cases like family matters.
- How can rules exclude QSO & CPC.
- Kohistan Upper
 - Proceedings of mediator to be like open court.
 - Provision of *Half-bil-Quran* be inserted.
 - Apprehension of Bar against no appeal against mediator's decision.
- Mohmand
 - Part VII Order III-A Rule section 12(1) Court before settling issues where as Part IX miscellaneous section 18 applies to appeals-contradiction. It should be at any stage.
 - Stay (injunction) pending mediation proceedings: Aggrieved party may challenge.
 - Mediator power to summon official record, conduct spot inspection.
- Bannu
 - Mediator should pass decree.
 - Trial court should after referral fix 3 months time on register *paishy*
- Karak
 - Complication of procedures by providing Performa, statement of claims, reply.
 - Partial settlement and referral back to confuse the proceedings.
- Buner
 - There should be procedure for setting aside award or decree when there is no appeal.
 - In case of failure of proceedings, record be sent back to trial court

and mediator should record reasons of failure.

- Mansehra

- Settlement cannot be kept confidentially.

- South Waziristan

- Order X Rule 1 CPC qua Article 163 QSO provision of family court to be taken in consideration.

- Lakki Marwat

- CPC and QSO not applicable: remedy if collusive decree obtained.
- Whether order sheet recorded or not.
- Whether record consigned in record room or sent to trial court.

- Abbottbad

- Question of fraud/misrepresentation.
- Mode of service of summons and its authenticity.

- Absence of penal provisions in case of non-compliance of mediator's decision.

- Right of appeal of settlement made through negotiation.

- Question of res judicata.

- Mediator should pass decree.

- Rule 15 part X against principle of natural justice- one right of appeal at least; creation of appellate mediation forum

- Mardan

- Introduce negotiation with and without intervention of mediation.

- In case of successful mediation parties should be debarred from agitating it in court of law.

- Contradictory regarding form of land.

- Matter decided whether executable

- before same court or not?
- No appeal or revision – against fundamental rights.
- There should be pleader for legal assistance of parties.
- Orakzai
 - Mechanism needed for compulsory referral.
- Swabi
 - Matter listed in schedule quite complex and broad. Scope be restricted to matters rarely requiring evidence.
 - Section 36 empowers courts to execute decree. Question of ousting CPC & QSO – inability to call witnesses.
 - Applies to pending appeals. How mediator will annul decree of court of competent jurisdiction.
- Details of mediation proceedings be left to mediator.
- Disposal of matters in sixth schedule be made time bound.
- Haripur
 - What procedure if party fails to appear.
 - Mediator should pass decree.
 - Question of Res judicata.
 - Stage of referral- if possible after framing of issues.
 - Remedy of appeal to be provided.
 - Question of stay in proceedings Order XXXIX Rule 1 & 2 and its effect.
 - Professional litigants would, by getting consent decree, exploit.
 - Mediator's power of spot inspection needed.
- Mardan

- Confidentiality of proceedings cannot be assured. Leakage of information exposes

mediator to misconduct which is not justified.

6.2.2 ANSWERS:

Nature of proceedings:

- It is not mandatory. However, non-compliance with it will be taken into consideration by court for the purpose of determination of costs and that too for reasons.
- Rules are kept silent.
- Mediator is to follow national & global practice.
- SEE sub-rule (v) of Order X Rule 1B of CPC (Sindh Amendment) 2019

Confidentiality:

- These are *Proceedings without prejudice*.
- Nationally and internationally accepted rule that mediation has to be confidential.
- See Order X Rule 1D of CPC (Sindh Amendment) 2019.
- See section 19 of ADR Act of Islamabad 2017.
- SEE RULE 21 of draft rules:
- Reason: Whatever takes place during the mediation proceedings cannot be used as evidence in adjudication of suit.

Attendance by Counsel:

- See rule 24 is self-contained.

CPC/QSO:

- CPC & QSO are not applicable.
- See Rule 16. It is private settlement, hence no breach of fair trial or due process.
- See Order X, IB (ix) of Sindh High Court Amendment in CPC.
- Rule 16 is clear.
- .
- If such procedural rules are applied, informal proceedings will become formal.
- No evidence can be recorded during mediation as mediator is not court.
- This is essential to observe confidentiality of proceedings.

Service of process:

- Rule 22 is clear.
- In case a party does not attend such proceeding at any time in center, the center may call him up through process and if a party does not attend it, there will be no dismissal in default or ex-parte proceedings under Order IX of CPC. It will be failure of mediation.
- In such case, mediator will issue certificate/memo to the other party or inform the court, as the case may be, that mediation has failed. Whereafter, any party may bring suit or court will commence the proceedings on the case.

Judgment/ decree by Court:

- Order XX of CPC is silent regarding passing of judgment and decree in terms of settlement through ADR.
- In view of insertion of an Order regarding ADR in CPC, corresponding amendments in Order XX is necessary. It is consent decree. There is no adjudication. Parties settle dispute with facilitation of mediator. It is not trial.

- It will consume no time to convert such settlement into judgment for drawing up a decree as court will only look into legality or otherwise of settlement. Court cannot ask either side to file objections. Only legality of settlement may be looked into.
- Order XX of CPC is silent regarding decree in terms of settlement arrived at between parties in consequence of Mediation etc. Therefore, after Rule 19 in Order XX, there is need to insert Rule 19-A to help the courts for disposal of cases in terms of mediatory, conciliatory and negotiatory proceeding.
- The amendments is necessary as result of inserting new Order III-A on ADR in CPC.
- The amendment will further help legal fraternity and parties in assisting the court siezed of the *cause* for disposal as per lawful settlement of dispute by parties as a result of ADR proceedings. It is new phenomenon.
- (Addition of rule 19-A after rule 19 in Order XX).
- Order XX of CPC is silent regarding decree in terms of compromise arrived at between parties during Mediation etc. Therefore, after Rule 19 in Order XX, there is need to insert Rule 19-A to help the courts for disposal of cases in terms of compromise during mediatory, conciliatory and negotiatory proceedings.
- As Order XXIII of CPC is silent regarding compromise during mediation proceedings, therefore insertion of sub-rule (3-A) is necessary to clarify the position for judge for disposal of cases coming from ADR Centers
- It is a corresponding amendment
- (Addition of rule 3-A after rule 3 in Order XXIII).

[Record of proceedings:](#)

- Mediation center will maintain separate registers for proceedings (Registers in form O,P, and Q in appendix-III to the Sixth Schedule).
- These registers will be used for assessment of ADR's impact on regular
- litigation after comparison thereof with disposal of courts.
- No proceedings such as evidence, order sheets shall be recorded.
- After recording settlement, center will prepare two original documents: one to be sent to court and other to be retained in record room of mediation center. Center will issue memo/information to parties or court as the case may be, regarding failure of mediation. No other document will be prepared. It will ensure confidentiality of proceedings.

6.3. AREA NO.3:

- | | |
|------------------------|------------------------|
| A. Pre-action Conduct. | C. Linkage with costs. |
| B. Conflict with suit. | D. No Appeal/Revision |

6.3.1 RESERVATIONS/QUESTIONS:

▶ Pre-Action

▶ Haripur

- ▶ Party attendance be made binding.

▶ Swat

- ▶ Mediator to have power to record evidence.

▶ Charsadda

- ▶ Mandatory pre-action in certain cases like matrimonial.

▶ Kohistan Upper

- ▶ Simplification of procedure.
- ▶ Charsadda
- ▶ Form for negotiation missing.

- ▶ In case of disposal certificate to be given to operate as decree.

6.3.2 ANSWERS:

Pre-action Conduct:

- Rule 1(vi) and (vii) of Order III-A is clear.
- Words "in relation to suit" as used in section 89-A of CPC are clear.
- Every procedure is permissible if not specifically prohibited.
- Pre-action conduct is legally correct for five-fold reasons, *firstly*, ADR Act of Islamabad in section 8 provides for pre-action proceedings, Sindh High Court Amendment in CPC also provides for it and Arbitration Act is also providing for arbitration without intervention of court; *secondly*, there is no prohibition in any law including CPC for parties to go to mediation center for settlement of dispute without intervention of court; *thirdly*, it is a settled

principle of law that whatever is not prohibited is permissible; *fourthly*, it is in line with constitutional framework of Pakistan which in Article 37(d) provides for "ensuring inexpensive and expeditious justice"; and *fifthly*, it provides an additional informal remedy to the parties and it will help courts give proper time to other cases as mediations will bring down pendency of cases in courts.

- The expression "in relation to suit" as used in section 89-A of CPC is an indicator that pre-action conduct is allowed because when parties go to mediation center without intervention of court and the center settles dispute and sends the settlement to court for passing decree, it will be a matter in relation to suit. The matter is

to ultimately go to court, if mediation is successful, for judgment/decree, that is why it is a matter in relation to suit. Suit is undefined in CPC.

- The expression "including" used in Section 89-A of CPC is clear as it includes all other modes besides mediation and conciliation. Had the word meaning been used instead of including, the situation would have been otherwise.
- The expression "in relation to suit" as used in s. 89-A of CPC is indicator that pre-action conduct is permissible through mediation center as the matter is to ultimately go through mediation center to the court for being converted into decree as can be visualized from *rules 7 to 12* along with corresponding amendments in Order XX of CPC. Settlement arrived at between parties during pre-action conduct is thus a matter in relation to suit within the meaning of s. 89-A as when this settlement is sent by mediation center to the court, the court will enter it into register of suit and pass judgment and decree in terms thereof.

- Pre-action conduct will help the courts to resolve dispute of parties through informal mode by way of giving shape of judgment and decree to the settlement arrived at between parties before mediator in mediation center or negotiated between parties out of mediation center and brought to mediation center for being sent to court for conversion into judgment/decree, as the case may be. It will thus be a matter relating to procedure of court for disposal of causes within the meaning of sections 122 and 128 of CPC.
- Pre-action conduct and post-action proceedings are matters relating to procedure of courts in the ultimate analysis, hence the rules will ease the mechanism of seeking justice for parties as besides the formal mode of litigation, they will be able to get their disputes resolved through informal modes and that too through mediation centers and courts and free of service charges and fee.
- The proposed system will help divert easy cases to informal mode and only those cases will go to courts on formal track

which are complex and cannot be sorted out through informal modes enabling courts to give proper time to genuine litigation. It will help bring reduction in backlog.

- These are not rules under s. 89-A of CPC. These are rules for requirements of s. 89-A of the Code. The power to make rules lies in s. 122 of the Code. Pre-action conduct and post-action proceedings as proposed by these rules are matters of procedure in relation to suit, hence can be framed under s. 122 of the Code. These rules will facilitate the
-

courts for disposal of causes. These rules do not offend against anything in the Code or any other law of the land. These rules do not create new jurisdiction as mediators will not have power to decide but to facilitate parties in reaching settlement of dispute, they will neither record evidence, nor will they give decision but will record all what parties settle and send the same to the Court for conversion into judgment/decreed. Therefore, it is just a matter relating to procedure facilitating courts and parties regarding cases.

Linkage with costs:

- Sections 35 and 35-A of CPC are general in nature. The same provide basic concept of costs. Therefore, insertion of sub-rule(4) after existing sub-rule(3) in Order XX is necessary.
- Amendments will supplement sections 35 and 35-A of CPC. It is explanatory thereto.
- Amendments will help court in relation to imposition of costs as the amendment provides basic parameters in this respect.
- Success of ADR system, it is globally known, is closely linked with effective system of costs: determination, suitability and imposition.
- It is linked with COSTS as per international practice.
- See sub-rule (4) to rule 6 of Order XX.

No Appeal/Revision:

- See Rule 15.
- Consent decree. It is nationally and internationally accepted rule.
- See S. 96 (3) of CPC.
- See S. 18 of ADR Act 2017.
- If third party is aggrieved from consent decree, such party has remedy of application under section 12 (2) of CPC.
- During pendency of appeal/revision, if parties opt and court finds it fit, it may refer case to mediation center.
- SEE RULE 18 & RULE 2

6.4. AREA NO. 4

A. Code of conduct.

B. Why different for Judge.

6.4.1 RESERVATIONS/QUESTIONS:

▶ Code of Conduct

- ▶ Confidentiality not possible.
 - ▶ Mardan
 - ▶ Mansehra
- ▶ Judicial officers do have a code of conduct.
 - ▶ Buner
 - ▶ Orakzai

- ▶ Swabi
- ▶ Monitoring through District & Sessions Judge.
 - ▶ Mardan
- ▶ Misconduct not defined.
 - ▶ Kurram

6.4.2 ANSWERS:

Code of Conduct: Why different for Judge:

Concept of concise statement of claim:

- Concept of *concise statement of claim* and *reply* thereto. Mediation center is not a court. Mediator is a facilitator to the parties in reaching an acceptable negotiated settlement of their dispute. This concept relates to mediation before institution of suit (Pre-action Conduct). (*Rule 1 and Forms A & B in Appendix-II to Sixth Schedule*).
- Pre-action Conduct & Post-action Proceedings. (*Rule 1, 9, 10 & 11*).
- CPC was silent regarding ADR. It is new concept.
- Mediation Center are not courts, hence plaint cannot

be presented before them during pre-action conduct. Therefore, these concepts are necessary to distinguish the cases directly coming from ADR centers to courts from other cases including the cases sent by courts to ADR centers for mediation.

- This segregation will help work out pendency and disposal of ADR claims and pendency and disposal of regular claims to measure the impact of ADR system in a convenient way.

Timeline for mediation:

120 days + 30 days extension

Maximum Time

Mediator to fix time

Court to fix time

(*Read Rules 7, 9 to 12 subject to Rule 23*)

- As regards negotiation, it is purely between parties and they have to bring settlement arrived

at between them out of mediation center as a result of negotiation before the mediation

center as a formality for transmission thereof to the court for being converted into decree. Timeline is only guideline for them.

- As regards conciliation or mediation, whether pre-action or post-action under Rules 10, 11, and 12, maximum time is 120 days with further facility for extension up to 30 days.
- In cases covered by law of limitation where period is short, mediation center in case of pre-action and courts in cases of post-action matters may fix such

period as may be necessary to keep the cause alive for limitation purpose enabling the parties to take the issue to Courts well in time.

- Global practices reveal that there is a debate and that unsettled too that time spent during mediation proceedings can be excluded for the purpose of triability of causes before courts of law as the Limitation Acts are silent.
- Same is case in relation to Pakistan as Limitation Act is silent on this aspect.

Online mediation:

- This is being practiced at international level .
- This will be new concept at national level in relation to ADR for civil disputes.
- It will require technical support of IT to ensure safety and security of online mediation against odds like cyber crimes, hacking of websites etc.

Failure of mediation:

- In case of pre-action conduct, mediation center will issue a certificate/memo to the parties to that effect.
- In case of post-action proceedings, mediation center will inform the court that mediation has failed and the court will start the proceedings on the suit
- already stayed.

6.5. House Open for Deliberations (QAs)

After that, there was a QAs session. The house raised questions regarding the following aspects:-

1. Corresponding amendments in Order XX regarding judgment/decree in terms of settlement and imposition of costs for non-compliance with mediation.
2. Order XXIII regarding decree in terms of settlement.
3. Rules 1 as to concise statement of claim and reply thereto.
4. Establishment of mediation centers.
5. Judge as mediator.
6. Training of mediators.
7. No separate mediation center but judge to be empowered to pass judgment/decree.
8. Definitions of conciliation, mediation & negotiation.
9. Pre-action conduct.
10. Code of conduct for mediators.
11. Confidentiality of mediation proceedings
12. Record of mediation proceedings.
13. Forms prescribed by rules as complex
14. Time line for mediations etc
15. Ex parte proceedings, if allowed in mediation proceedings.
16. Recording of evidence/manner of conducting mediation proceedings.
17. Service of parties.
18. Application of CPC & QSO: Why not?
19. Why to frame rules for ADR under s.89-A of CPC.

6.5.1 Replies of panelists

The panelists gave their replies thereto. The same are as under:-

- 1.

Corresponding amendments are must to make ADR system smooth and effective. As Order XX is silent as to settlement through mediation, therefore, the proposed amendment is necessary in Order XX by inserting therein rule 19-A after rule 19 so that Court may convert settlement into judgment and decree. Insertion of sub-rule (4) after sub-rule (3) in rule 6 of Order XX is must so that court may consider effect of non-compliance by parties with option as to mediation because costs are linked with mediation. Costs will make system of ADR effective.

2. Order XXIII of CPC does not make mention of settlement through mediatory proceedings. To provide specific provision for disposal of case in terms of settlement arrived at between parties through mediation is highly necessary to enable court to decide the cause as per settlement by mediation, whether during pre-action conduct or post-action proceedings.

3. The proposed draft introduces concept of concise statement of claim and reply thereto because mediation center is not a court and mediator is a facilitator to the parties in reaching an acceptable negotiated settlement of their dispute. This concept relates to mediation before institution of suit (Pre-action Conduct). (*Rule 1*). It will show that such case has come through pre-action conduct.
4. Establishment of separate mediation centers at Tehsil and District Headquarters throughout province is necessary as mediation center and court are two different things, former facilitates the parties to reach settlement acceptable to them and center has no power to decide while the later has power to decide. Judge cannot wear two hats at the same time. It will have different set up etc.
5. Centers are not courts. These will not be adjudicatory proceedings in the centers like the courts proceedings. These will be no proceedings of adjudicatory nature like

those of arbitration. Each center will be headed by administrator. He will be ex-officio mediator. Keeping in view pendency of ADR cases, such number of other mediators may be posted as are deemed required for the purpose. Job of mediator is different from that of judge. Training of mediators is necessary as he/she is to assist the parties to reach a mutual acceptable and satisfactory settlement of dispute without compromising his/her impartiality. Serving judges will be administrators and mediators. A judge cannot wear the hat of mediator and that of adjudicator at the same time as is the case of arbitrator. Therefore, the settlement arrived at between parties during mediation and certified by mediator is to be sent to court for disposal of cause.

Administrator/Mediator may adopt any mode to hold the proceedings. These are not adjudication proceedings, hence it is not trial. It is parties who would themselves settle their dispute with facilitation of mediator.

There is no prohibition on parties to negotiate their dispute through another mediator without mediation center. Mediation center provides support to people free of costs etc. The mediation center is a facility created by the State for the parties to adopt informal mode of settlement of disputes. Monitoring of mediation center by High Court is necessary to ensure proper performance of duties by mediators for public service. The Code of Conduct is necessary because High Court will issue Code of Conduct for mediator as per Rule 19 of Order III-A. As a consequence, non-compliance therewith will be a misconduct. Specialized training is must for judicial officers to equip them with nationally and internationally accepted models of skills on commitment, confidentiality, neutrality, behavior and professionalism to be observed by administrator and mediator. It will add a feather into the hat of judicial officer. Graded training will make the judicial

officers responsible to effort to qualify and learn. Trial judge cannot mediate. If he does so, he is in difficulty and parties object.

6. The job of mediator is to assist the parties in reaching a mutually acceptable negotiated settlement of their dispute. Therefore, it requires the commitment, confidentiality, neutrality and special aptitude. The draft Rules provide for rigorous training of mediators to equip them with skills and techniques of conducting the mediation. Only those judicial officers who undergo graded training and who are certified as mediators shall be posted in the mediation centers. A mediator has to be from amongst judges of district judiciary. A judge cannot wear these two hats at the same time that is why the draft Rules provide that after the mediation proceedings are successful, he will record the settlement arrived at between the parties in his presence, get the same signed from them and certified by him and it will be transmitted to the

court of competent jurisdiction for being converted into judgment and decree. Besides, the Draft Rules provide that High Court shall issue Code of conduct for mediators and the violation of such code shall be treated as misconduct. The nitty-gritty of pre-action mediation and post-action mediation have been reflected in the draft *(Rules 9 to 12)*.

7. A judge cannot wear these two hats at the same time that is why the draft Rules provide that after the mediation proceedings are successful, he will record the settlement arrived at between the parties in his presence, get the same signed from them and certified by him and it will be transmitted to the court of competent jurisdiction for being converted into judgment and decree. Besides, the Draft Rules provide that High Court shall issue Code of conduct for mediators and the violation of such code shall be treated as misconduct. *(Rules 9 to 12)*.

8. There are many kinds and types of ADR but we have chosen three: negotiation, mediation and conciliation as these are nationally and internationally accepted modes of ADR. We have, therefore, proposed to insert the well-acknowledged and generally accepted definitions of these three concepts in the definition clause (*Rule 1*) of the draft Rules. These are universally accepted definitions. See ADR Act 2017 and other laws.

9. Pre-action Conduct: Rule 1(vi) and (vii) of Order III-A is clear. Words "in relation to suit" as used in section 89-A of CPC are clear. Every procedure is permissible if not specifically prohibited. Pre-action conduct is legally correct for five-fold reasons, *firstly*, ADR Act of Islamabad in section 8 provides for pre-action proceedings, Sindh High Court Amendment in CPC also provides for it and Arbitration Act is also providing for arbitration without intervention of court; *secondly*, there is no prohibition in any law

including CPC for parties to go to mediation center for settlement of dispute without intervention of court; *thirdly*, it is a settled principle of law that whatever is not prohibited is permissible; *fourthly*, it is in line with constitutional framework of Pakistan which in Article 37(d) provides for "ensuring inexpensive and expeditious justice"; and *fifthly*, it provides an additional informal remedy to the parties and it will help courts give proper time to other cases as mediations will bring down pendency of cases in courts. The expression "in relation to suit" as used in section 89-A of CPC is an indicator that pre-action conduct is allowed because when parties go to mediation center without intervention of court and the center settles dispute and sends the settlement to court for passing decree, it will be a matter in relation to suit. The matter is to ultimately go to court, if mediation is successful, for judgment/decree, that is why it is a matter in relation to

suit. Suit is undefined in CPC. The expression "including" used in Section 89-A of CPC is clear as it includes all other modes besides mediation and conciliation. Had the word meaning been used instead of including, the situation would have been otherwise. The expression "in relation to suit" as used in s. 89-A of CPC is indicator that pre-action conduct is permissible through mediation center as the matter is to ultimately go through mediation center to the court for being converted into decree as can be visualized from *rules 7 to 12* along with corresponding amendments in Order XX of CPC. Settlement arrived at between parties during pre-action conduct is thus a matter in relation to suit within the meaning of s. 89-A as when this settlement is sent by mediation center to the court, the court will enter it into register of suit and pass judgment and decree in terms thereof. Pre-action conduct will help the courts to resolve dispute of parties through informal mode by way of

giving shape of judgment and decree to the settlement arrived at between parties before mediator in mediation center or negotiated between parties out of mediation center and brought to mediation center for being sent to court for conversion into judgment/decree, as the case may be. It will thus be a matter relating to procedure of court for disposal of causes within the meaning of sections 122 and 128 of CPC. Pre-action conduct and post-action proceedings are matters relating to procedure of courts in the ultimate analysis, hence the rules will ease the mechanism of seeking justice for parties as besides the formal mode of litigation, they will be able to get their disputes resolved through informal modes and that too through mediation centers and courts and free of service charges and fee. The proposed system will help divert easy cases to informal mode and only those cases will go to courts on formal track which are complex and cannot be sorted out through informal modes enabling

courts to give proper time to genuine litigation. It will help bring reduction in backlog. These are not rules under s. 89-A of CPC. These are rules for requirements of s. 89-A of the Code. The power to make rules lies in s. 122 of the Code. Pre-action conduct and post-action proceedings as proposed by these rules are matters of procedure in relation to suit, hence can be framed under s. 122 of the Code. These rules will facilitate the courts for disposal of causes. These rules do not offend against anything in the Code or any other law of the land. These rules do not create new jurisdiction as mediators will not have power to decide but to facilitate parties in reaching settlement of dispute, they will neither record evidence, nor will they give decision but will record all what parties settle and send the same to the Court for conversion into judgment/decree. Therefore, it is just a matter relating to procedure facilitating courts and parties regarding cases.

10. The Draft Rules provide for establishment of mediation centers throughout the province and posting of judicial officers as administrators and mediators of such centers (*Rules 3 to 7*). The job of mediator is to assist the parties in reaching a mutually acceptable negotiated settlement of their dispute. Therefore, it requires the commitment, confidentiality, neutrality and special aptitude. The draft Rules provide for rigorous training of mediators to equip them with skills and techniques of conducting the mediation. Only those judicial officers who undergo graded training and who are certified as mediators shall be posted in the mediation centers. A mediator has to be from amongst judges of district judiciary. A judge cannot wear these two hats at the same time that is why the draft Rules provide that after the mediation proceedings are successful, he will record the settlement arrived at between the parties in his presence, get the same signed from them and certified by him and it

will be transmitted to the court of competent jurisdiction for being converted into judgment and decree. Besides, the Draft Rules provide that High Court shall issue Code of conduct for mediators and the violation of such code shall be treated as misconduct. The nitty-gritty of pre-action mediation and post-action mediation have been reflected in the draft (*Rules 9 to 12*). Job of Judge and that of mediator are different, hence, there has to be separate job description and code of conducts. High Court will supervise the mediators. Therefore, they need to be dealt with under separate code for that purpose.

11. Confidentiality is of prime significance in mediation proceedings because these are *proceedings without prejudice*. It is nationally and internationally accepted rule that mediation has to be confidential because it is not adjudication but a facilitation by mediator to the parties to reach mutually acceptable

settlement of dispute. In this respect, *Order X Rule 1D of Sindh Amendment in CPC* and *section 19 of ADR Act of Islamabad* are quite clear. The reason is that if the mediation fails, whatever is stated and done during the mediation proceedings by parties cannot be used as evidence in adjudication of suit. Otherwise every unscrupulous litigant will go to mediation in order to fish out the weaknesses of other party and then refuse to negotiate and take the matter to the court to bring the things said and done in mediation as a proof. The Draft Rules do not make ADR compulsory. However, in all countries where ADR systems have been introduced, the non-compliance with ADR by a party is linked with imposition of costs on that party which is at fault. The Draft Rules follow the global model and provide a mechanism for the court to which the settlement is sent by the mediation center for being converted into judgment and decree to

determine and impose such costs on party at fault as circumstances warrant. The Draft Rules set out principles in this regard (*See Rule 2 and corresponding amendment in Order XX, rule 6 of CPC*).

12. Mediation center will maintain separate registers for proceedings (Registers in form O,P, and Q in appendix-III to the Sixth Schedule). These registers will be used for assessment of ADR's impact on regular litigation after comparison thereof with disposal of courts. No proceedings such as evidence, order sheets shall be recorded. After recording settlement, center will prepare two original documents: one to be sent to court and other to be retained in record room of mediation center. Center will issue memo/information to parties or court as the case may be, regarding failure of mediation. No other document will be prepared. It will ensure confidentiality of proceedings.
13. The Draft Rules further provide for insertion of *Sixth*

Schedule at the end of Code of Civil Procedure with three appendices (*See Rules 1, 2, 9, 10, 11 & 12*). The Appendix-I contains the items which can be resolved through ADR System. Appendix-II provides for different forms in relation to mediation proceedings which will be helpful to the parties, lawyers and courts in respect of everything in relation to mediation proceedings. Appendix-III provides for three (03) forms to be used for maintaining Registers by Mediation Centers.

14. The Draft also provides for timelines for determination of mediation proceedings. Maximum time limit is 120 days and a further extension may be allowed for thirty days. This is the maximum limit. In case of pre-action conduct, the mediator may adjust the time limit to a minimum period during the scheduling conference with the parties (*See Rule 23*). In case of the matter being sent by court to mediation (Post-action proceedings), the court may also determine time within which the mediation is to be completed.

15. The mediation is since not adjudication, therefore *Order IX of CPC* does not apply. It is the parties who mutually go to the mediation center and if during pendency of mediation proceedings, any party does not attend the proceedings, the mediation center may issue notice of appearance and when that party does not attend despite service, the mediation center will presume that such party is not interested in ADR, hence ADR has failed. Center will accordingly issue memorandum certificate to the attending party to that effect. And in case of matter being sent by court to mediation center, it will inform the court that the mediation has failed so that court may recommence the proceedings on suit. (*Principles set out in Rules 8 to 12 will be followed*).

16. As regards manner of conducting the mediation proceedings, the draft Rules will be silent because it is nationally and globally accepted rule of prudence that mediator may follow

such procedure as may be deemed appropriate in the circumstances of the cases. The reason is that mediator is not to act as adjudicator like a judge or arbitrator and he is not to decide anything but to assist and facilitate the parties in reaching settlement mutually acceptable to them. In this respect, sub-rule (v) of Rule I-B of Order X of Sindh High Court Amendment of CPC is quite clear. It is linked with confidentiality. Confidentiality is of prime significance in mediation proceedings because these are proceedings without prejudice. It is nationally and internationally accepted rule that mediation has to be confidential because it is not adjudication but a facilitation by mediator to the parties to reach mutually acceptable settlement of dispute. In this respect, *Order X Rule ID of Sindh Amendment in CPC* and *section 19 of ADR Act of Islamabad* are quite clear. The reason is that if the mediation fails, whatever is stated and done during the mediation proceedings by parties cannot be used as evidence in

adjudication of suit. Otherwise every unscrupulous litigant will go to mediation in order to fish out the weaknesses of other party and then refuse to negotiate and take the matter to the court to bring the things said and done in mediation as a proof. No evidence can be recorded during mediation as mediator is not court. This is essential to observe confidentiality of proceedings.

17. For service of process, *Rule 22* is quite self-contained. Order V of CPC is applicable.
18. CPC and QSO are not applicable because mediation is not a trial. It is rather a sort of exchange of views between parties to reach a private settlement out of court, hence, question of breach of fair trial or due process does not arise. (*See Rule 16 & Order X, IB (ix) of Sindh High Court Amendment in CPC*).
19. Rules are not being made under s. 89-A of CPC. High Court has power to make rules under s. 122 of CPC.

The wordings of section 122 are clear. Section 26 refers to institution of suit but sections are silent as to plain, written statement, lists of witnesses, settlement of issues and even recording of evidence. But Orders VI, VII, VIII, XIV, XVI & XVIII of CPC provide mechanism in relation to all these concepts, i.e., components of suit. As section 89-A is silent as to how to do ADR, therefore, rules are needed to be framed for requirements of ADR to make system effective. The words "In SUIT" in section 89-A refer to ADR during pendency of suit. The expression "in relation to suit" as used in section 89-A is meant to cover pre-action conduct as after the settlement is arrived at between parties at mediation center before instituting suit, the mediator will have no power to pass judgment and decree to make such settlement executable as a decree. He will send it to Court of competent jurisdiction which will, if settlement is lawful, pass judgment/decree in terms

thereof. Hence, it will be a matter in relation to suit within the meaning of section 89-A CPC. Therefore, High

Court can make rules under s.122 of CPC for requirements of ADR.

6.6 Specific Questions & Answers

Specific Questions by participants and replies thereto by the panelists are as under:

1. Mr. Ayaz, SCJ: In Punjab, time for mediation proceedings is 30 days. Under these rules, it is 120 days. Time may be lessened.

Reply by Dean Faculty: 120 days is maximum limit. Mediator in pre-action conduct or Court in post-action proceedings, as the case may be, may fix any other time.

2. Mr. Ikhtiar Khan, Sessions Judge: In view of proposed rule 2, do not you think that saves parties against period of limitation?

Reply by Dean Faculty: In UK, this question came under discussion of legal fraternity. Opinion was that period spent during mediation proceedings could not be excluded unless the Statute of Limitation was amended. Same is position here. However, parties may first go to

mediation and simultaneously institute suit before court but get suit stayed till conclusion of mediation proceedings.

3. Mr. Liaqat Ali, Sessions Judge: Can elder/s of locality be involved as mediator/s keeping in view social peculiarities of NMDs?

Reply by Dean Faculty: No bar. However, mediators must ensure the confidentiality of proceedings.

4. Mr. Khalid Rehman, Advocate Haripur: What will be situation of mediation in pre-emption cases where period for suit is 120 days?

Reply by Dean: The parties may first go to mediation and simultaneously, pre-emptor should institute suit before court but get suit stayed till conclusion of mediation proceedings.

5. Mr. Tariq Khan, Sessions Judge: Can the qualifications be prescribed for mediator/s?

Reply by Dean Faculty: It is duty of judiciary to ensure expeditious disposal of case/s as ordained by Article 37 (d) of the Constitution of Pakistan. In Turkey, this practice was followed but failed.

Reply by Sharafat Chaudhry, Advocate/panelist: We visited Turkey, watched operation of mediation centers and studied their law on ADR. They had allowed lawyers with 5 years standing at the bar to work as mediators. There were, as they were told, two-three center in each district. Now there are many. There are 10,000 certified advocate mediators: 6% of disputed amount goes in fee. Mediator/s charge high fees. Despite being an Advocate, I believe, that from practical perspective, Judge as a mediator is good for many reasons, *firstly*, regulatory mechanism of High Courts to monitor conduct of Judicial Officers is strict and strong then that of Bar Councils; *secondly*, practice of private mediation centers will involve huge expenditures on infrastructure raising; and *thirdly*, judiciary will utilize already available resources.

6. Mr. Asif Khan-I, Sessions Judge: DRCs and Local Government ADR system are in vogue. Can we harmonize all these systems?

Reply by Dean: Parallel system of justice is sought to be created with mala fide intentions. DRCs and LGADRCs have no judicial power to grant decree, nor do they have execution power. They want to get judicial powers. The Constitution of Pakistan lays down unalterable Trichotomy of powers: legislative, executive and judicial. It is duty of judiciary to administer justice. This power cannot be delegated to any other organ as provided for in Art. 175 (3) of the Constitution.

7. Mr. Shahzeb, Sessions Judge, Chakwal: Opinion: Awareness campaign is required. I conducted awareness seminars in remote areas of district Chakwal (Punjab). Court-annexed mediation is brainchild of Mr. Justice Mansoor Ali Shah, the then CJ, LHC. No judicial work is assigned to Judicial Officers serving as mediators in Punjab.

Dean: We will also make efforts to launch awareness raising. Moreover, people of this area are well aware about *Jirga* system.

8. Advocate from DBA Swat: If a person is aggrieved from a mediator,

where should he/she seek remedy? Arbitration Act also provides ADR system, hence there is no need of these rule.

Dean Faculty' Reply: In arbitration, the arbitrator exercise adjudicatory powers as he is to give award. In conciliation, mediation and negotiation, the mediators has no power to decide but he facilitates the parties in reaching a negotiated settlement acceptable to them. If a party has no trust in mediator, such party will ask mediator to stop the proceedings and mediator will accordingly issue memo in case of pre-action conduct or inform Court in post-action proceedings that mediation has failed as it is consensual proceeding.

9. Mr. Asad Hameed Bangash, Sessions Judge: Where settlement is referred to the court and it involves intricate questions of jurisdiction, what the trial court would do?

Reply by Dean Faculty: Mediator does not act as Judge. Being a judicial officer having acquaintance with law, he/she may see such questions and legality of proceeding during mediation and refuse to mediate in such cases. If matter is sent to Court after settlement arrived at between parties for being

converted into decree, the Court is not denuded of power to see legality of settlement.

10. Mr. Haibat Advocate: If mediation proceedings are not judicial ones, will it not be better to take Bar Councils on board to take volunteers as mediators? Pre-action conduct is beyond the scope of section 89-A of CPC, hence will it not be better to take up the matter with government to have one system? Why not a lawyer as mediator?

Reply by Mr. Zia-ur-Rehman, ADSI/Director, SDJ: DRCs and LGADRCs have no power to execute their verdicts. As an officer of KPJA, we as team had visited DRCs, heard them. Their problem, which they revealed, was the implementation of the decisions of DRCs. They want judicial powers. ADR 2019 of LGKP creates a parallel system of courts. A Judge being legal man, is better suited for mediation job. 3-Cs, viz, Costs, confidentiality and confidence must be borne in mind. Only Judge fits in the job.

Reply by Dean: Parallel system of justice is sought to be created with mala fide intentions. DRCs and LGADRCs have no judicial power

to grant decree, nor do they have execution power. They want to get judicial powers. The Constitution of Pakistan lays down unalterable Trichotomy of powers: legislative, executive and judicial. It is duty of judiciary to administer justice. This power cannot be delegated to any other organ as provided for in Art. 175 (3) of the Constitution. The words "in relation to suit" as used in section 89-A refers to pre-action conduct as the matter is, after settlement, if any, shall go to Court for being converted into decree. If we read section 89-A twice: once with the expression "in suit" and then by deleting the expression "in" but simply with words "in relation to suit", the matter becomes clear. Law is living document. This construction unveils the true intention of legislature.

11. Mr. Dost Muhammad, ADSJ: Mediator should have no judicial work.

Reply by Dean, KPJA: Rules are clear. It will be a separate portfolio, hence mediator will have no judicial work/assignment.

12. Mr. Ikhtiar Khan, District & Sessions Judge: OPINION: Mediation may be made compulsory in certain cases.

13. Advocate from District Momand: FCR was good law with less power of implementation. DRCs are good but they have no authority to decide and execute. Confidentiality is not possible in ur society. LG ADR is one-man show. The proposed rules of ADR will not be workable. Nobody will go for mediation because of number of cases being false.

Reply by Dean Faculty: ADR System will effectively function for these reasons: i) consensual as consent of parties is its essence; ii) Judge will be mediators whom society trusts; iii) there will be no costs and fee as it will be state0run system without service charges and fee; and iv) parties can engage lawyers to represent them in mediation centers.

Reply by Mr. Zia-ur-Rehman, ADSJ/Director, SDJ: Yours is a society which keeps the traditions in esteem. ADR system will flourish like anything. There will be no burden on national exchequer as to expenses and infrastructure of ADR centers. It will be consensual proceedings with consent of parties.

14. Advocate, Bajaur District: Forms are complex. If the consent is

against Quran, what will happen? Is not judiciary itself challenging the formal system of justice by encouraging informal system of ADR?

Reply by Syed Ali Raza, ADSJ: We need to think out of box to resolve genuine problems of parties. My experience as judicial officers is that mediation is far better in many cases.

Reply by Dean KPJA: Forms are simple as parties can give summary

of controversy. Say, if something immoral is sought to be mediated, mediator being judicial officer may refuse to mediate. Judge cannot do mediation during regular suit in formal proceedings as it creates untoward situation for judge. It will be consensual proceeding, i.e. with consent of parties and that too "proceedings without prejudice". Rule 26 saves parties against odds as it saves their right to due process of law.

7.0 Session 3 (Group formulation & recommendations)

Four Groups were formed. They held separate deliberations. After thorough consideration, they formulated their respective

recommendations. The group leaders read such recommendations. Details are as follows:-

7.1 Recommendations:

7.1.1 Recommendations of "Group A"

Recommendations from "Group A" represented by Mr. Asad Hameed Bangash (District and Sessions Judge, Orakzai) are as follows:-

- | | |
|---|---|
| <ul style="list-style-type: none"> i. Conceptual framework principally agreed. ii. We approved Judge as Mediator. iii. Center must be established in court premises. iv. Awareness Campaign – public and Lawyers. v. Bars of Kurram , Mansehra and Nowshera welcomed and offered to facilitate awareness campaign vi. IIUI offers its services in the | <ul style="list-style-type: none"> area of human resource for capacity building. vii. Time frame for mediation proceedings may be curtailed to 60 days and extention may be applied only in appropriate cases. viii. Provincial government and federal government may be approached for allocation of funds for infrastructural needs. |
|---|---|

7.1.2 Recommendations of "Group B"

Recommendations from "Group B" represented by Mr. Sarfraz Akhtar (Director Legislation & Research Lahore High Court) are as follows:-

89A. Alternate dispute resolution. The Court may, where it considers necessary, having regard to the facts and circumstances of the case, with the object of securing expeditious

disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation].

Section 122. The High Courts may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the civil Courts subject to their superintendence, and may by such rules annul, alter or add to all of any of the rules in the First Schedule.

Existing Sections 89A and 122 read with section 128 CPC do not empower the High Court to regulate the procedure and proceedings of any other forum.

These sections only empower High Court to make rules for regulating its own procedure and the procedure of the civil courts and that too in case of pending lis.

Regulation of statutory body and disciplinary proceedings are not within the domain of CPC.

In the absence of any suit pending before the court, how Arbitration, Mediation, Conciliation, and Negotiation can be regulated under CPC?

What is the status of Arbitration Act 1940?

Why section 89 CPC was deleted?

128. Matters for which rules may provide.__(1) Such rules shall not be inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

What is the scope of Section 89-A CPC?

Whether Arbitration Act 1940 and proposed draft rules under section 89-A CPC are alien or harmonious to each other and rest of CPC?

What is the scope of applicability of CPC upon proceedings not pending before the Court?

How proceedings prior to filing of the suit can be regulated under CPC?

Whether proposed draft rules fall within the legislative domain of CPC?

How while living in CPC a High Court can say that upon proceedings carried on under CPC, the provisions of CPC would not be applicable?

How regulation of statutory body and disciplinary proceedings can be made subject matter of rules framed under CPC?

Both sections 89A and 122 CPC do not empower the High Court to establish any forum for the purpose of settlement of disputes and in the absence of any enabling provision in the principal legislation how any forum can be created and regulated under the shadow of subordinate delegated legislative domain?

How KP Judicial Academy can be controlled/regulated under CPC?

Section 89-A CPC has been repealed by respective Legislature:-

To the extent of Islamabad Capital Territory under section 27 of the Alternate Dispute Resolution Act 2017; and

To the extent of Punjab under section 26 of the Punjab Alternate Dispute Resolution Act 2019

Both these enactments are independent statutes and cater for ADR in pending litigation as well as prior to start of litigation

In Sindh, Section 89-A CPC has been amended by introducing new Section 89-A and 89-B wherein complete mechanism has been given by the Legislature vide “The Code of Civil Procedure (Sind Amendment) Act 2018 Sindh Act No. IV of 2019.

The amendment brought by the Legislature cater ADR in pending litigation in section 89-A whereas ADR without intervention of the court in section 89-B on the line similar to as in the Arbitration Act.

In Bangladesh comprehensive mechanism has been given by the legislature in CPC by introducing sections 89A, 89B and 89C.

In India a complete mechanism has been introduced in CPC in section 89 in year 2002.

In both the countries the amendments brought in CPC merely cover ADR in pending litigation.

In case the object is:-

to amend the Schedule of CPC without involving Legislature, only domain is to frame rules for the purposes of ADR in pending litigation;

Cater for ADR prior to litigation as well as in pending litigation, while living in CPC, suitable amendment in section 89-A CPC would be essential and that is the domain of Legislature;

Cater for ADR mechanism as well as establishment of ADR Centre and control thereon, independent statutory legislation would be required that is the domain of Legislature.

Order 10 Rule 1-A (iii) to be deleted.

Arbitration Act to be re-consolidated.

Proceedings must not be Confidential.

Proceedings must be in written form.

Time limit be minimized.

In case of failure no extension of time (if independent Act is passed).

7.1.3 Recommendations of "Group C"

Recommendations from "Group C" represented by Mr. Shahzeb Saeed, Director (Admn), Punjab Judicial Academy are as follows:-

1. The term negotiation, mediation and conciliation need to be clearly defined.
2. The forms in Schedule II of the Rules should be more simplified and may be provided in local languages.
3. Mediator/conciliator may not to be allowed to make any observation about the demeanor and conduct of any party to an unsuccessful ADR attempt.
4. The post-action mediation / conciliation should not be restricted before the settlement of issues, rather it should be allowed at any stage of the trial.
5. The question of confidentiality also needs clarification as to far how long and of what facts the mediator shall keep confidentiality intact.
6. Small Claims should compulsorily be sent to Mediation Centre.
7. Public Awareness.

8. Benefits. Instead of *Adalat*
mediation centre *Sulah Ki*

7.1.4 Recommendations of "Group D"

Recommendations from "Group D" represented by Mr. Sharafat Ali, Advocate are as follows:-

Classification of cases and referral to mediation be considered mandatory in certain cases.

It shall be considered necessary that the parties would be bound to make clarification regarding that he is ready to opt for mediation.

Post action stage/proceedings should be extended to the stage of procurement of judgment.

The rules shall be extended to pending cases.

The mediation center/administrator shall not be authorized to impose costs. The power be delegated to the trial court and the trial court shall impose minimum costs on the

defaulting party in mediation proceedings.

Minimum costs be specified.

The formality of prescribed forms be dispensed with.

There should also be graded training for advocates appearing as counsel in mediation centers.

Review of rules be made to simplify them to curtail formalism.

8.0 Conclusions:

- i. There was consensus upon the framework of the draft rules;
- ii. Out of 4 groups, three (3) groups endorsed the rules with minor suggestions;
- iii. Group C did not object to the overall concept and framework of the draft rules. The group had reservations as to set up of mediation centers and pre-action conduct as per rule-making powers under section 122 of CPC;
- iv. Over all, there was consensus as to making of rules for requirements of section 89-A of CPC. The rules are not being made under section 89-A of the Code. These rules are proposed to be made under section 122 of the Code in order to facilitate the parties, lawyers and courts in relation to settlement of disputes;
- v. In the light of recommendations, broader scope is there under Article 202 of the Constitution as regards immediate establishment of mediation centers and issues of Code of Conduct for mediators. And nitty-gritty, as highlighted in the draft Rules, can be provided through exercise of rule-making power under section 122 of CPC. Immediate action under Art. 202 will strengthen the process as High Court will directly monitor the mediators. nitty-gritty of mediation centers, mediators, pre-action conduct, post-action proceedings etc, as mentioned in the Draft

Rules, can be covered under section 122 of CPC.

Draft Rules has been okayed by the participants.

- vi. Nub of the whole exercise is that the overall scheme of the

8.1 Concluding Ceremony

8.1.1 Address by Chief Guest

Mr. Muhammad Zubair, MIT, in his concluding address, thanked all participants for having graced the occasion. He further thanked UNDP for having supported this activity.

8.1.2 Certificate Distribution

After concluding address, certificate distribution ceremony was held.

8.1.3 Photograph

Group Photograph of all participants was taken.

9.0 Participants

Table below, describes in detail, the names of participants. It also highlights four (4) groups.

S.No	Name	Designation	Groups
1	Mr. Ghulam Rasool Samoon	Registrar, Sindh High Court	A
2	Mr. Asad Hameed Khan	District & Sessions Judge	
3	Mr. Asghar Shah	District & Sessions Judge	
	Mr. Zia Ur Rehman	Director Regulation	
4	Mr. Dost Mohammad	Additional District & Sessions Judge	
5	Mr. Taimur Afzal	Civil Judge	
6	Mr. Jawad Hussain	Advocate	
7	Mr. Muhammad Asim	Advocate	
8	Mr. Arif Ameen	Advocate	
9	Mr. Riaz Ali	Advocate	
10	Dr. Ataullah Khan	Professor, IIUI	
11	Syed Sajjad Ali Shah	Advocate	
12	Mr. Muhammad Ali	Advocate	B
13	Mr. Muhammad Sarfarz Akhtar	D&SJ / Legislation & Research Dept,	
14	Mr. Jehanzeb Shinwari	District & Sessions Judge	
15	Mr. Kalim Arshad Khan	District & Sessions Judge	
16	Syed Ali Raza	Additional District & Sessions Judge	
17	Mr. Muhammad Ayaz	Senior Civil Judge	
19	Mr. Zakir ullah	Advocate	
20	Mr. Muhammad Shoaib Khan	Advocate	
21	Mr. Sirajuddin Rabbani	Advocate	
22	Mr. Muhammad Rashid Naseeb	Advocate	
23	Mr. Fazal Karim	Advocate	
24	Mr. Shazeb Saeed	Director Admin, Punjab Judicial Academy	C

25	Mr. Muhammad Asif Khan	District & Sessions Judge	
26	Mr. Muhammad Tariq	District & Sessions Judge	
27	Mr. Jamal Shah Mehsood	Additional District & Sessions Judge	
28	Mr. Muhammad Rafiq	Field Manager, SHARP	
29	Mr. Sanaullah	Advocate	
30	Mr. Ehsan Mehsud	Advocate	
31	Mr. Ikramullah Shahid	Advocate	
32	Mr. Waqas Khan Jadoon	Advocate	
33	Mr. Muhammad Javed Shah	Advocate	
34	Mr. Haibet Khan	Advocate	
35	Mr. Ikhiar Khan	District & Sessions Judge	
36	Mr. Rehmat ul Haq	Advocate	
37	Mr. Sharafat Ali	Advocate / Legal Consultant	
38	Mr. Rashid ullah Kundi	Additional District & Sessions Judge	
39	Mr. Hameed ur Rehman	Advocate	D
40	Mr. Hamza Gillani	Advocate	
41	Mr. S. Shah Badsha	Advocate	
42	Mr. Shahid Qayum	Advocate	
43	Mr. Umar Wattoo	Advocate	

10.0 Draft Rules

The worked out draft rules for the requirement of s.89-A of the Code of Civil procedure, 1908, as uploaded on website of KPJA, as also placed before the house in a booklet form are a separate part of this report but in a separate cover.

11.0 Seminar in Pictorial

