Comparative Jurisprudence of Family Disputes in South Asia: Dissecting Legal and Non-Legal Way-Outs of Resolution in Light of Postmodernist Touch to Hybrid ADR and ODR

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Abstract: Religion and personal laws play a vital role in the lives of people. Some countries follow strict religious laws whereas some adopted a rather blended version of traditional law and statutes. Nonetheless, the South Asian approach of dealing with disputes emanating from personal matters are twofold. Firstly, the legislative approach or legal way and secondly the non-legal way or the complementary alternative approach in contrast to the formal system. The legal ways are statutorily granted whereas the non-legal ways are enshrined within statutes and practices. The "ineradicable romanticism" between these two could provide an efficient regime where family disputes won't be an uncalled burden on the parties and a sensitization of their rights, duties and obligations would be ensured. This paper aims at assessing the current scenario of India, Bangladesh and Pakistan as to the resolution of personal disputes from a comparative lens. The discussion extends to revisiting the legal regime along with assessment of prevalent non-legal practices and their viability. Elaboration on the matter have been tangled with Postmodernist theory to prove efficacy of the system in practice and to show how Postmodernism justifies the emergence and existence of need-based contextual dispute resolution mechanisms. Further, the current trend has been dissected keeping "constructive postmodernism" in mind that'll essentially play a large part in coming future to reach the high pinnacle in this discourse.

Keywords: Family court, dispute resolution, postmodernism, constructive postmodernism, and hybrid ADR.

1. Introduction

Generally, disputes emanating from familial relations are known as Family Disputes. Family as well as 'family law' is unique in itself because of its 'autonomous domain' and exceptional character in terms of privacy, psychological

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relation, intimacy, autochthonous and sacred root.[1] Family symbolizes unity in one hand and unequal asymmetrical gender role in other hand.[2] As such, a dispute in family matters is preceded by a Conflict. 'Conflict exists wherever there is incompatibility of interest'.[3] Dispute is associated with distinct justiciable issues attracting resolution. Apart from this general conception, legally we can understand family disputes from the statutory enactments in South Asia. In Bangladesh, dissolution of marriage, restitution of conjugality, dower, maintenance and guardianship are taken to be disputes resolvable by family court.[4] Whereas the Indian law gives an even broader scope of family disputes by extending the family court jurisdiction to declaration suit, property matters, injunctions and legitimacy of children.[5] The Pakistani law's declaration as to jurisdiction seems broader than that of Bangladesh but narrower than that of India. Because, apart from the five types mentioned in Bangladeshi law, there are 'jactitation of marriage' and 'dowry'.[6] Therefore, the meaning and extent of family disputes are not in any uniform shape throughout South Asia. However, they tend to be related via one root that is, they all emanates from and relates to family matters.

1.1 The South Asian Realities of Family Disputes

Compared to individualistic western ideology, South Asian cultures hold 'collective ideology'. Cultural Relativism is a very strong driving factor in every sphere of Asian countries. Our chosen three countries are very much related to each other culturally that the precedents or developments set by one is followed by another as cultural contemporary or to a great extent like legal twin or maybe triplet.[7] The family values here are rooted on religious, social and cultural injunctions and they highly impact determination of dispute. Further, negative notions like gender disparity, power gap and economic disparity plays pivotal role too in such determination. For instance, as a member of family (particularly woman) facing violence usually prefers resolution internally or at best through a

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[1] Janet Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 The American Journal of Comparative Law 753, 754.

[2] Parul Bhandari and Fritzi Marie Titzmann, 'Introduction to Family Realities in South Asia: Adaptations and Resilience' (2017) 16 South Asia Multidisciplinary Academic Journal 1,4. Available at (*https://journals.openedition.org/samaj/4365*) <https://journals.openedition.org/samaj/4365> accessed 17 October 2022.

[3] Peter Fenn, David Lowe and Christopher Speck, 'Conflict and Dispute in Construction' (1997) 15 Construction Management and Economics 513,515.

[4] Family Court Ordinance, 1985 s 5. (Ordinance No. XVIII of 1985) [hereinafter referred to as FCO, 1985]

[5] Family Courts Act, 1984 s 7. (ACT No. 66 of 1984) [hereinafter referred to as FCA, 1984]

[6] Family Courts Act, 1964 s 5 and schedule. (Act no. XXXV of 1964). [hereinafter referred to as FCA, 1964]

[7] Fizzah Mamoona, 'Effectiveness of ADR Methods in Combatting Delays in the Civil Justice System' (2017) 1 PCL Student Journal of Law 119, 129-130.

local non-state body like elders council or religious patrons as they consider approaching court or law shameful, disregard of family solidarity and against norms of feminine deportment.[8] The pre-Christian era was positively pro-women whereas post-Christian era (1AD-1950s) witnessed a steady decline in women's status both in terms of education and societal role that continued later too resulting into putting the South Asian women in the lowest ebb of her status by the end of 19th century.[9] This initiated the emergence of an 'oppressive patriarchy' in South Asian context that,

> [i]n its zeal to keep women reined in (presumably for their own good and that of society), ignored the practical implications of its discourses in the day to day lives of ordinary women and a plethora of patriarchal beliefs and practices emerged that degraded women and reduced them to the position being the property of males.[10]

Colonial rulers made some legislative reforms to provide a better gender co-existence but that was rather motivated by attainment of a moral justification for ruling the sub-continent as a harbinger of enlightenment.[11] The Patriarchal notion became so aggravated in form that a women would rather chose to imprison herself instead of getting into a decreed forceful restitution of conjugal ties.[12] Therefore, this type of 'internalized oppression' formulated a whole new psychological mindset where South Asian women seemed to have acquiesced the deprivations and don't see themselves as oppressed. 'It is the progressive degradation of values and an oppressive patriarchy that has allowed violence and abuse to take place'.[13] And it's going on even now as family disputes witness lack of rights advocacy due to gender bias and social norms derivating from patriarchal notion as well as religious injunctions.

In this backdrop, it is pertinent to reassess the viability of both legal and non-legal ways of dispute resolution in South Asia. Discussions below thus try to give a realistic scenario of available legal and non-legal ways and how those are continuously evolving with time to ensure a sustainable family dispute resolution culture.

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[8] Sylvia Vatuk, 'The "women's court" in India: an alternative dispute resolution body for women in distress' (2013) 45(1) The Journal of Legal Pluralism and Unofficial Law 76, 81.

[9] Janki Shankar, Gita Das and Sabrina Atwal, 'Challenging Cultural Discourses and Beliefs That Perpetuate Domestic Violence in South Asian Communities: A Discourse Analysis' (2013) 14 Journal of International Women's Studies 248,254.

[10] ibid, 248, 258.

[11] Flavia Agnes, 'Patriarchy, Sexuality, And Property the Impact of Colonial State Policies on Gender Relations in India', *Family, Gender, and Law in a Globalizing Middle East and South Asia* (1st edn, Syracuse University Press 2009) 1,19.

[12] *Dadaji Bhikaji v Rukhmabai*, [1886] ILR 10 Bom 301.

[13] Janki Shankar, Gita Das and Sabrina Atwal (n 9) 248, 260.

2. The Legal Way of Resolution

Legal way implies legislative approaches. Being special in nature, countries enacted laws establishing specialized organ to deal with the family disputes or disputes emanating from personal matters. Particularly, Pakistan was the first country to introduce a 'family court' (hereinafter FC) which was subsequently adopted in India and Bangladesh. The laws are-

i. The Family Courts Act, 1964 (Pakistan) [hereinafter FCA, 1964]
ii. The Family Courts Act, 1984 (India) [hereinafter FCA, 1984]
iii. The Family Courts Ordinance, 1985 (Bangladesh) [hereinafter FCO, 1985]

Specialized court is a much-practiced phenomenon since the beginning of 90's in twentieth century and the primary criteria of specialization is the subject structure of the matter in controversy.[14] However, there remains substantial discontent about exclusive specialty of FC. As in Bangladesh, at least four of the five matters under exclusive jurisdiction of FC are also entertained by regular civil and/or criminal court.[15] Thereby a watertight separation may not be plausible. Here comes Postmodernism at rescue as it provides a theoretical approach where considerable variation could be made based upon contextual need. Nonetheless, for now, let's keep our discussion confined within comparative analysis of the forum only.

2.1. Comparative Variation of Statutory FC System in South Asia

Though the nomenclature remains same in all three countries, the formation and functioning of FC is rather varied. Further, jurisdiction and extent of exercising power varies too. In Pakistan, the Govt. could establish one or more FC in each District or at such other place or places as it may deem necessary.[16] Each of the court is presided by a judge and there's a mandatory requirement of appointing at least one woman judge in each district.[17] Whereas the Indian establishment is done on the basis of population residing in an area. Indian appointing authority is the state govt. and there's a requirement of consultation with the High Court.[18] FC is mandatorily established for every area comprising of city or town exceeding one million population[19] whereas there is optional scope of such establishment for other areas as necessary. In India, the judges presiding the FC could be one or more.[20]

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[14] Prizhennikova A. Nikolaevna, 'Conceptual Problems of Specialized Courts System Formation (Case Study Labour Justice)' (2015) 7-8 European science review 163.

[15] M Jashim Ali Chowdhury and Asma Bint Shafiq, 'Jurisdictional and Procedural Dilemmas of the Family Courts in Bangladesh' (2021) 9(1) Jahangirnagar University Journal of Law 51,53.

[16] FCA, 1964 s 3.

[17] ibid, s 3(1) proviso.

[18] FCA, 1984 s 3.

[19] ibid, s 3 (1a).

[20] ibid, s 4(1).

Indian law defined Judge to be, 'the Judge or, as the case may be, the Principal Judge, Additional Principal Judge or other Judge of a FC'.[21] Thus, there is a division among judges when there are more than one judge presiding FC. Such division is not to be found in Pakistan or Bangladesh. Bangladeshi law provides a clear-cut mandate declaring all the courts of Assistant Judges to be the FCs and all the Assistant Judges to be the FC judges.[22] Assistant Judge court is one of the civil courts and reference to Assistant judge in other laws is to be construed accordingly.[23] Normally there is a fixed pecuniary jurisdiction of Assistant Judges but that doesn't strictly apply for FC though the same is presided by Assistant Judges.

Apart from these, variation in terms of qualification of the FC Judges is quite apparent within the laws abovementioned. In this regard, the Indian law focused upon experience mandating no appointment without '7 years holding of judicial office in India or the office of a member of a tribunal or any post under the union or a state requiring special knowledge of law' or 7 years' experience as an advocate of a High Court or of two or more such courts in succession.[24] Along with it, preference to women and those having expertise in preservation and promotion of familial ties, children welfare, dispute resolution is to be given. In Pakistan too, the qualification is fixed at someone who is/has been/qualified to be a District judge, an Additional District judge, a civil judge or a Qazi appointed under the Dastur-ul-Amal Diwani, Riasat Kalat.[25] However, in Bangladesh the Assistant Judges are appointed via competitive examination and there is hardly any expertise factor regarding appointment.

Indian FCs are vested with all exercisable power of the 'district court or any subordinate civil court' regarding the concerned matters[26] unlike Bangladesh where the Assistant Judge could exercise District Court power in only one matter[27] of 'The Guardians and Wards Act, 1890'.[28] In regard to appeal too, there are considerable variation as in India appeal from FC lies to High Court bench of two or more judges[29] whereas in Bangladesh the same lies to District Judge.[30] In Pakistan, the appellate forum varies between High Court and District Court depending on who pronounced the judgement in original suit.[31]

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21 ibid, s 2a.
22 FCO, 1985 s 4.
23 Civil Courts Act, 1887 (ACT No. XII of 1887) s 3 and 25A.
24 FCA, 1984 s 4(3).
25 FCA, 1964 s 4.
26 FCA, 1984 s 7(1).
27 FCO, 1985 s 24.
28 Act no VIII of 1890.
29 FCA, 1984 s 19.
30 FCO, 1985 s 17.
31 FCA, 1964 s 14.

In Pakistani law, the application of the Evidence Act, 1872 and Code of Civil Procedure, 1908 (hereinafter CPC) is barred[32] and the procedural stages are described by the law itself making it 'self-contained' but not as elaborate as the Bangladeshi version.[33] In contrast, the Indian law rather relies upon CPC by expressly tagging the FC to be a civil court having all the powers therefore.[34] However, India seems to have opened a floodgate of 'admissibility of evidence' even if that's not expressly mandated by Evidence Act, 1872.[35] Indian law ensured a good co-operative mandate by involving different experts like counsellors, medical experts and welfare experts to assist court unlike Bangladesh and Pakistan. Therefore, Indian law took a progressive approach by not pressuring solely the court but by involving other agencies. This is in fact, reflection of Postmodernism in the sense of contextuality.

2.2. Lessons for Having an Efficient FC System

In India, the establishing criteria of FC is 'number of people living in an area' whereas Bangladesh and Pakistan totally overlooked any such consideration in establishment. Therefore, Indian version seems good considering people are the beneficiary of FCs and if they are limited to a number for each court then that court won't face too much unwanted pressure and case backlog. Secondly, official 'counsellors and welfare experts' are appointed under the Indian law[36] who assists in deciding. This appears to be a good mechanism leading to efficient and need-based disposal. Bangladesh and Pakistan can rethink about transplanting such mandate.

Conversely, Bangladeshi and Pakistani version of FC law seems to be 'self-contained' as they discuss elaborately about the institution of suit and subsequent proceedings which in fact, "is rather a 'simmering imitation' of CPC process"[37] whereas the Indian law flatly entrusts the same to normal civil suit procedure as contained in CPC. Result is, in all the three jurisdiction, noble motive of prompt and efficient disposal isn't attained. Family matters being distinct in nature should be dealt through self-contained law that truly ensure prompt and efficient disposal of matters by distinctly fitted mandate which is present in none of the models currently.

The legal mandates must have some basis laid upon normativity because 'without foundational normative standard, dispute resolution would become just another component of bureaucratic processing attracting set of tacit, intra-organizational,

[32] FCA, 1964 s 17. But the limited application of CPC is allowed by saving the application of ss10-11.
[33] FCO, 1985 ss 6-8 and 9.
[34] FCA, 1984 s 10.
[35] FCA, 1984 s 16.
[36] FCA, 1984 s 6 and 12.
[37] M Jashim Ali Chowdhury and Asma Bint Shafiq (n 15) 51,59.

often biased norms.[38] FCs should revitalize the normative standard as per contextual necessity to have a better success regime. The Indian version of FC is presided by more than one judge which is a good feature[39] considering the backlog of cases in FC. Bangladeshi and Pakistani FC is presided by only one judge and therefore, making the disposal lengthy and burdensome compared to India.

Women judge is mandatorily required to be appointed in Pakistani FC whereas Bangladeshi law is totally silent on such preferential treatment. India too focused upon preferring women[40] and expertise criteria in appointing FC judges. Whereas Bangladesh appoints fresh recruits to the position. As part of a *sui generic* framework, FC should try to devise its own 'institutional culture as happened in Canada, USA and Australia'.[41] For this end, training the different stakeholders (Judges, Advocates, Law enforcing agencies, Psychologists, Medical Experts etc.) associated with such court is a dire need.[42]

3. The Non-Legal Ways of Dispute Resolution

The non-legal or complementary alternatives to court-based mechanism of dispute resolution are called Alternative Dispute Resolution (hereinafter ADR). When retaliation via revenge or destroying opponent is the goal then trial seems attractive but if the aim is to remove hostility keeping mutual relation, ADR is the way-out.[43] ADR emerged and expanded widely that it 'is no longer shackled with the reputation of a cult movement'[44] rather is taken as the most fair and workable alternative to heavily burdened formal system. The non-legal ways are fusion of different discourses including law, psychology, counseling, and other human services that leaves an impression 'not that one lost and one won, but that together they created a mutually beneficial arrangement'.[45] That's why, ADR have gained huge popularity globally including South Asia for resolving disputes. Even the courts of undivided India itself accepted the prevalence of alternative methods in

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[38] Richard A. Posner, 'Natural Monopoly and Its Regulation' (1969) 21 Stan. L. Rev. 548,624. Also see Mark Green and Ralph Nader, 'Economic Regulation v Competition: Uncle Sam the Monopoly Man' (1973) 82 Yale Law Journal 871,876. [here the authors justified their arguments mainly in terms of industrial sector where the interchanges between regulator and regulatee are the main concern].

[39] FCA, 1984 s 2(a) defined Judge to be "Principal Judge, Additional Principal Judge or Other Judge".

[40] FCA, 1984 s 4(4b).

[41] Janet Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 The American Journal of Comparative Law 753.

[42] M Jashim Ali Chowdhury and Asma Bint Shafiq (n 15) 51, 58.

[43] Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley and Sons Inc. 2001) 1,25.

[44] Harry T. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 Harvard Law Review.

[45] Nancy T. Gardner, Jay Folberg and Alison Taylor, 'Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation' (1986) 84 Michigan Law Review 1036, 1039.

this subcontinent 'to be the natural way of deciding disputes'.[46] The core feature of such ways include dealing with not only the dispute but also the emotions and ego behind it[47] and maybe that's the reason ADR mechanisms are taken to be win-win approach rather than normal win-lose trait. Let's have a country wise overview in our below sections.

3.1. Scenario in Bangladesh

ADR as the third wave of access to justice has proved so beneficial for Bangladesh that currently, almost every sector of Bangladeshi laws incorporated ADR. Unsurprisingly, Bangladesh transformed the optional ADR mechanism into compulsory.[48] Among the sectors practicing ADR, 'family matters' could be said to be the oldest one. Having a large Muslim community, the Quranic mandate of practicing ADR played a vital role in ushering Bangladeshi ADR regime.[49] Two core family laws namely Muslim Family Laws Ordinance, 1961[50] (hereinafter MFLO) and FCO, 1985[51] incorporated ADR during their promulgation itself based upon probably the Quranic revelation in 30:21, 4:35 and 42:40 where "*Rehma*" (Mercy) has been described as a foundation of Marriage and Family, that if becomes dysfunctional, must be resolved via 'harmonious reconciliation'. MFLO applies to the majority population (Muslims) whereas the FCO applies irrespective of religious identity. FCO provides a two-tier mechanism of ADR but that was hardly successful at the initial phase. It was only under the sponsorship of USAID and some other organization that Mediation attempts gained popularity since 2000.[52]

The process is rather complex due to linkage with other laws. For example- a Family Court decreed dissolution needs to go through ADR again in the hands of *Arbitration Council* under MFLO.[53] This not only delays the procedure but also raises question as to credibility when a judicial decree is being redirected to a non-

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[46] In *Chanbasappa Gurushantappa Hiremath v Baslingayya Gokurnaya Hiremath*, [1927] AIR 1927 Bombay 565, 568-9 [Indian court observed "to refer matters to a panch is one of the natural ways of deciding many disputes in India"].

[47] Krishna Agarwal, 'Justice Dispensation through the Alternative Dispute Resolution System in India' (2014) 3 Russian Law Journal 63,71.

[48] In Bangladesh, a 2012 amendment of CPC into section 89A made Mediation compulsory in civil procedures.

[49] Jamila Ahmed Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (3rd edn LCLS South 2020) 11.

[50] Ordinance no. VIII of 1961. Available at, (*Bdlaws.minlaw.gov.bd*) <http://bdlaws.minlaw.gov.bd/act-305.html> accessed October 20, 2022.

[51] Ordinance no. XVIII of 1985. Available at, (*Bdlaws.minlaw.gov.bd*) <http://bdlaws.minlaw.gov.bd/act-details-682.html> accessed October 20, 2022.

[52] See Zahidul Islam, 'Strengthening Family Court: An Analysis of the Confusions and uncertainties thwarting the family courts in Bangladesh' (*Blast.org.bd*, 2006) <https://www.blast.org.bd/content/publi cations/family_courts.pdf> accessed 21 October 2022.

[53] Muslim Family Laws Ordinance, 1961 s 7 and 8. [hereinafter MFLO].

judicial body.[54] The Legal Aid Act, 2000 (hereinafter LAA) provides scope of Mediation[55] by Legal Aid Officer but there remains considerable objection due to unclear co-relation between FCO, 1985 and LAA as well as the optional nature of LAA mediation.[56] CPC only provided two mode namely; 'compulsory mediation' and Arbitration, keeping a large scope of multimodality in abeyance. Therefore, the statutory ADR mechanism in Bangladesh cannot be said to be in a good shape in terms of implementation. Bangladesh also has sector specific mandates including formal, quasi-formal and informal ADR. But those aren't expanded towards an institutionalized ADR culture unlike India and Pakistan.

3.2. Scenario in India

Indian subcontinent has witnessed the majestic role played by informal methods of dispute resolution from time immemorial dating as back as to the *Vedic Regime* and the adversarial system of justice introduced by foreign rulers was rather an alien addition. The early period of informal dispute resolution involved practices like *Panchayat's Raj* where people used to adhere to the decision of Panchayat. However, in late 1950s, there emerged a reinvented version named *Nyaya Panchayat* that had substantial differences with previous *Panchayat* in terms of 'democratically elected deciders' and 'application of state law rather than local custom'.[57] Despite having a great hype, it resulted into being Moribund during 1970s[58] and was replaced by *People's Court* or *Lok Adalat* in 1982. This Lok Adalat faced refurbishment many times and right now there are even many dedicated Lok Adalats presided by *all women panel*.[59]

Indian ADR culture was further crystallized by enacting The Legal Services Authorities Act, 1987[60]. This state sponsored enaction was preceded by former Chief Justice P. N. Bhagwati headed committee. *Permanent Lok Adalats* in every District proved to be quite efficient for India in redressing grievances by using a 'give and take' mechanism through motivating and persuading the parties.[61] A decision of *Lok Adalat* is similar to compromise decree. That means it is final, non-

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[54] Muhammad Ekramul Haque, *Muslim Family Law: Sharia and Modern World* (London College of Legal Studies South 2015) 485-86.

[55] Legal Aid Act, 2000 s 21A.

[56] M Jashim Ali Chowdhury and Asma Bint Shafiq (n 15) 51,64.

[57] Sylvia Vatuk, 'The "women's court" in India: an alternative dispute resolution body for women in distress' (2013) 45(1) The Journal of Legal Pluralism and Unofficial Law 76,78.

[58] Catherine S. Meschievitz and Marc Galanter, 'In Search of Nyaya Panchayats: The Politics of a Moribund Institution' in Richard Abel (ed) *The Politics of Informal Justice: Comparative Studies* (New York: Academic Press 1982).

[59] Sylvia Vatuk (n 57) 76,85.

[60] Act 39 of 1987. Available at, "The Legal Service Authorities Act, 1987 - India Code" <https://www.indiacode.nic.in/bitstream/123456789/1925/1/198739.pdf> accessed October 20, 2022.

[61] Krishna Agarwal, 'Justice Dispensation through the Alternative Dispute Resolution System in India' (2014) 3 Russian Law Journal 63,64.

appealable, executable and binding.[62] Statutorily there is post of Counsellor to assist FC in India.[63] Along with it, mutual settlement via assisting and persuading is allowed at any stage among which endeavor to do so is compulsory in the first instance after filing suit.[64] India is comparatively well advanced in terms of some lucrative developments. For example, it established a state sponsored autonomous organization that works with ADR techniques and facilities on 6th October 1995 named the International Centre for ADR (ICADR) which functions under the aegis of Ministry of Law, Justice and Company Affairs.[65] India being a large country in terms of area, this institution has further been decentralized as needed. The National Legal Services Authority (hereinafter NALSA) works to promote 'legal literacy' and they work in collaboration with state legal service authority. Therefore, India is doing the capacity building via Govt. agencies which is plausible.

3.3. Scenario in Pakistan

ADR in Pakistan wasn't something imported from west rather Pakistan culturally practiced ADR since time immemorial via mechanism like *Panchayats* as well as *Jirgas*.[66] People used to adhere to decisions by these mechanisms despite those not having any legal backing.[67] The Pakistani position regarding family matters too goes in same line with previous two. That means here also a statutory ADR mechanism is devised for resolution of family disputes and as part of that, an attempt of compromise or reconciliation is made at the pre-trial stage along with a pre-judgement ADR attempt before pronouncing judgment.[68] In fact, Pakistani constitution promoted ADR via articles 153-155 in water related matters. Amongst other Pakistani laws incorporating ADR in civil matter, there are Code of Civil Procedure, 1908 (2002 amendment); Qanun-i-Shahdat Order, 1984; The Small Claims and Minor Offences Courts Ordinance, 2002; The Alternative Dispute Resolution Act, 2017[69] and Arbitration Act, 1940.

The 1961 law of The Conciliation Courts Ordinance is also a remarkable early law after Pakistan's independence that mandated ADR through conciliation in civil disputes and minor offences. At union level, *Musalihat Anjuman* (Conciliation

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62 *P.T. Thomas v Thomas Job,* [2005] 6 SCC 478,486.

63 FCA, 1984 s 6.

64 ibid, s 9.

65 See (*India.gov.in*.) <https://www.india.gov...alternate-dispute-resolution> accessed 21 October 2022.

66 Sung-Kwon Won, 'Overview of Alternate Dispute Resolution with Special Reference to Arbitration Laws in Pakistan' (2013) 23(3) Journal of Arbitration Studies 150,151. [Panchayat system is prevalent mostly in Punjab and Jirga is prevalent in Khybar Pakhtunkhwa and Balochistan now as traditional ADR mechanism]

67 ibid 159.

68 FCA, 1964 ss 10(3),12.

69 Act XX of 2017. [Pakistan].

Forum) works to resolve disputes via conciliation, mediation and arbitration.[70] The Pakistani authority's chequered attempt of familiarizing ADR is evident from formulation of The National Judiciary Policy, 2009 coupled with subsequent Islamabad Declaration of International Judicial Conference, 2013 and establishment of Pakistan Mediators Association (hereinafter PMA) in 2013.[71] PMA in Pakistan had aim of devising a self-sustaining mediation program and the institution has indeed been successful as evidently it's program got IMI certification in 2020.[72] PMA is functioning through diverse activities including mediation training, dispute resolution, conflict management and lobbying legislation.

3.4. Comparative Variation in ADR Practices of South Asia

Historically, Indian Panchayet is the oldest form of informal resolution mechanism. Unsurprisingly, three countries we're discussing were part of one single territory in past. Therefore, the influence of past practices is relevant for all three. Nonetheless, the cultural diversity coupled with religious, political and economic attributes devised varied practices of informal dispute resolution in these countries. The FCO, 1985 of Bangladesh is greatly influenced by Pakistani 1964 law and added the same 'two-tier' ADR mechanism in it (Pre-Trial and Pre-Judgment ADR). Whereas the Indian version is rather of *sui generic* character as they adopted a mandatory first instance attempt of settlement and subsequent attempt at any stage subject to FC's satisfaction as to 'reasonable possibility of settlement'.[73] However, the Bangladeshi position in the first instance isn't mandatory and 'given the law's failure to make pre-trial mediation compulsory, judges find it unattractive and burdensome to venture the route'.[74] Further, the Bangladeshi FC judges being Assistant Judges of civil court are also vested with their traditional jurisdiction making them overburdened with caseloads.

In India, the evolution of Panchayet system is quite noteworthy and their journey from Panchayet to Nyaya Panchayet to Lok Adalat to All Women Lok Adalat signifies a notion of contextual ADR culture. India made timely changes in their informal ADR system and even gave it formalized shape when needed which is itself proof of Postmodern notion. They may not have Postmodernism in mind in doing so but their result necessarily corroborates Postmodern philosophy. In this

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[70] Fizzah Mamoona, 'Effectiveness of ADR Methods in Combatting Delays in the Civil Justice System' (2017) 1 PCL Student Journal of Law 119, 127.

[71] Majid Ali and Li Lu Geng, 'Alternative Dispute Resolution (ADR) In Pakistan: The Role of Lawyers in Mediation Procedure' [2019] 6(4) International Journal of Research 421,424. See also, Sung-Kwon Won, 'Overview of Alternate Dispute Resolution with Special Reference to Arbitration Laws in Pakistan' (2013) 23(3) Journal of Arbitration Studies 150,164.

[72] 'Pakistan Mediators Association (PMA)' (*International Mediation Institute*) <https://imimediation.org/program/pma/> accessed 21 October 2022.

[73] FCA, 1984 s 9.

[74] M Jashim Ali Chowdhury and Asma Bint Shafiq (n 15) 51,63.

regard Bangladesh is rather one step behind as the informal ADR organs are yet to be brought under some uniform institutionalized version. In terms of ADR inclusion in CPC, India adopted an extended mode with at least four modes whereas Bangladesh kept two modes. Pakistan also extended the ADR mechanism in CPC via adding some extra provisions. However, what takes Pakistan one-step further is the adoption of dedicated institutionalized capacity building programs. Nonetheless, what remains common impediment in all the three is 'gender-bias', 'patriarchy' and 'traditional culturally derived mindset'.

4. Aligning Hybrid ADR and Online Dispute Resolution (hereinafter ODR) with Postmodernism

The inherent limitations of primary ADR modes prompted emergence of hybrid modes and many sub-modes within them. Therefore, both the hybrids and ODR are result of contextual need and backed by postmodern notion resulting from Cultural Priority or Relative Universalism.

4.1. Demystifying Postmodernism

Penumbra of Postmodernism is quite holistic within which the core notion is of urging law 'to be particular, local and plural instead of abstract and universal'.[75] Therefore, it is a diversion from established or universal truth by taking law beyond the positivist theme of *'dry command'*. The term emerged in 1980s-1990s resulting from 'emancipatory struggle' against gender, race, sexuality and socio-economic issues. Brit Crits[76] resulted into ushering a new discourse of Postmodernity that was solidified by the works of various scholars including Michel Foucault, Costas Douzinas and Jacques Derrida. While Foucault's view could be described as *'epistemological skepticism'* or *'ethical subjectivism'*, Derrida's view[77] was *'deconstruction'*. Leading postmodern philosopher Michel Foucault expresses his view as,

> [M]y point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So, my position leads not to apathy but to a hyper and pessimistic activism.[78]

In other words, Postmodernism could be regarded as skepticism or cynical attitude towards anything apparently sorted. Particularly, as psychoanalytically law is

[75] Costas Douzinas, Ronnie Warrington and Shaun Mcveigh, *Postmodern Jurisprudence: The Law of Text in the Texts of law* (Routledge 1993).

[76] Brit Crits implies "Crticial Legal Studies in Britain". To know more about it, see Tim Murphy, 'BritCrits: Subversion and submission, past, present and future' (1999) 10 Law and Critique 237–278.

[77] Jacques Derrida, *Of Grammatology* (John Hopkins University 1998).

[78] 'Political Philosophy - Foucault and Postmodernism' (*Encyclopedia Britannica*) <https://www.britannica.com...philosophy/Foucault-and-postmodernism> accessed 19 October 2022.

often considered 'father' demanding obedience in blind manner,[79] Postmodernism comes at rescue by adding sufficient fluidity in law. Therefore, post modernists question the established version and seek changes as needed considering the context. Thus, postmodernism is rather highly associated with contextualism.

4.2. Discovering Co-relation between Hybrid ADR and Postmodern Theory

Family matters being unique in nature, is highly influenced by contextualism. As Bhandari and Titzman mentions,

> [t]hat the family is adapting but is also resistant to change, as it re-aligns itself with the changing realities of contemporary South Asia brought forth by technology, processes of individualization, media presence, and state involvement.[80]

The practices, clientele and management of ADR are highly rooted in South Asian cultural context which now has travelled in other jurisdictions too creating an 'unofficial legal pluralism'.[81] Our claim of Postmodern touch could be corroborated by shedding light upon hybrid ADR modes and their adoption in South Asian countries. Postmodernism supposes, 'plural moralities rather than one, neutral and overarching theme'.[82] That's why various hybrid modes of ADR emerged alongside primary modes of 'Negotiation, Conciliation, Mediation and Arbitration' (hereinafter NCMA). But are those efficient always? Answering this may not be easy. The success or failure of any mechanism doesn't solely depend on its adoption. Because, 'the potential ethical disaster lies not in using these processes, but in allowing them to develop without supervision'[83] and that's the reason there's a need of gatekeeping instead of blindly following anything devised by others. Therefore, Postmodernist theory could be co-related not only with the emergence of these ADR modes but also in their application. Particularly, the need-based nature of hybrid methods proves the notion of postmodernism or contextuality.

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[79] Peter Goodrich and David G.Carlson (eds), *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (University of Michigan Press 1998).

[80] Parul Bhandari and Fritzi-Marie Titzmann, 'Introduction. Family Realities in South Asia: Adaptations and Resilience' [2017] 16 South Asia Multidisciplinary Academic Journal 1,9.

[81] Justin Jones, 'Muslim Alternative Dispute Resolution: Tracing the Pathways of Islamic Legal Practice Between South Asia and Contemporary Britain' [2020] 40(1) Journal of Muslim Minority Affairs 48.

[82] Andreas Philippopoulos-Mihalopoulos, 'Postmodern Theory of Law' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer Netherlands 2019).

[83] Donna Ross, 'Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2012)* (Brill Nijhoff 2013) 352-366.

4.2.1. Hybrid Modes Perpetuating Postmodernism

These ADRs are hybrid in the sense that, they combine more than one primary mode as per context-specificity. They present a better, efficient, and autonomous Best and Worst Alternative to a Negotiated Agreement (BATNA, WATNA) and Most Likely Alternative to a Negotiated Agreement (MLATNA) model thereby reaching Zone of Possible Agreement (ZOPA).[84]

Med-arb is a hybrid combination of mediation and arbitration that cures individual inherent lacunae of them by consolidating mediation's hospitable environment with arbitration's binding effect and finality of agreement.[85] Med-Arb diminishes weakness of mediation by adding Muscle (the decision-making power)[86] and it is the very existence of subsequent arbitration that incentivizes parties psychologically to succeed in mediation rather than leaving the same in Arbitrator's hand.[87] Med-Arb is particularly suited for 'contract negotiation disputes'[88] where previously arbitration ploughed in monopolistic manner.

Emergence of Med-Arb was the contextual need which continued growing with new sub-approaches (e.g., Kagel Model[89] though was initially lauded got replaced by Wisconsin Model of Med-Arb[90] later). Similarly, the current trend is in favor of extended Med-Arb-Med or Arb-Med-Arb which necessarily represents constructive postmodernism. Because, deviating from the universal primary ADR notions, hybrids emerged and those hybrids not having a 'one size fits all' approach gave birth to sub-approaches or extensions like Med-Arb-Med. The UNCITRAL Model Law on Mediation, 2018[91] keeps the scope of switching roles of

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[84] See Jessica Notini, 'Effective Alternatives Analysis in Mediation: "BATNA/WATNA" Analysis Demystified' (*Mediate.com*, 10 January 2005) <https://www.mediate.com/effective-alternatives-analysis-in-mediation-batna-watna-analysis-demystified/> accessed 21 October 2022 to know more about conceptual framework of BATNA, WATNA, MLATNA and ZOPA.

[85] Karen L. Henry, 'Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes' (1988) 3 Ohio St. J. on Disp. Resol. 385, 390.

[86] Sam Kagel and John Kagel, 'Using Two New Arbitration Techniques' (1972) 95 Monthly Lab. Rev. 11,12.

[87] Karen L. Henry (n 88) 390. See also Stephen B Goldberg, Eric D. Green, and Frank EA Sander, 'ADR problems and prospects: Looking to the future' (1986) 69 Judicature 291-299.

[88] See Stephen Allred, 'Med-Arb and the Resolution of the SSA-AFGE Bargaining Impasse: A Case Study' (1984) 39 Arbitration Journal to know more about the particular resolution between SSA and AFGE.

[89] This model mainly upholds the generally accepted notion of Med-Arb where initially Mediation is attempted and failure vests the decision-making authority to the Arbitrator.

[90] This model was introduced by "The Wisconsin's Municipal Employment Relations Act" and had mandated that even after failure to resolve initially by Mediation, the Arbitrator won't impose at his sweet will rather would be confined within the options propounded by parties in Mediation.

[91] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), U.N. Doc. A/73/17, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf.

the facilitator via Article 13 and New York Convention[92], Singapore Convention[93] followed the same too. Some jurisdictions allow same neutral whereas some prefer different neutral but the prime notion remains same as, adoption of 'multi-step processes' 'pursuant to standards that reflect prevailing cultural and legal traditions framing expectations for dispute resolution'[94] or in other words the contextual need as promoted by Postmodern view (the continuous necessary diversion).

Another hybrid form of Expert Appraisal or Expert Determination tends to appoint a neutral expert third party who presents his evaluation on the likely court outcome based upon merit.[95] For example- a family dispute could be entertained by a retired family court judge within early neutral evaluation.[96] Thereby, through the expertise of the facilitator, parties get taste of their future outcome along with collateral gains or damages on their part. Such quasi-decisive approach or blend of conciliation and negotiation reflects the 'postmodern notion of a need-based solution' which may not have been gained via the primary modes. Making Early Neutral Evaluation antecedent of formal trial in contrast to traditional application of primary ADR mostly after filing suit reaffirms Postmodern view of not adhering to any set method.

4.3. ODR Perpetuating Postmodernism

ODR is the extended version of ADR having online environment's qualities coupled with traits gained from ADR that aims at establishing online civic institutions that would change not only the traditional approach of resolution but also be an 'entrepreneurial boom'.[97] ADR pushed disputes to be resolved out of court whereas ODR pushed one step further into virtual space resulting in bringing alternative methods to foreground and litigation into further background.[98] The emergence of ODR is backed by the same advantages associated with ADR in more efficient ways probably. Because just like ADR, it is time friendly, inexpensive and less bureaucratic but close look reveals it to be even more efficient due to no face-to-face meetings, less power manipulation and no concern as to place of sitting. ODR notion is particularly suited to family disputes due to its efficiency in terms of various tangible factors (Money, Physical Burden, Lex Fori) and intangible factors (Gender Neutrality, Power Dynamics, Invisible

[92] The International Convention on the Recognition and Enforcement of Arbitration Awards, 1958.
[93] G.A. Res. 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation, (Aug. 7, 2019) (entered into force Sept. 12, 2020).
[94] Thomas J. Stipanowich, 'Arbitration, Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators' (2020) 26 Harv. Negot. L. Rev. 265,278.
[95] Jamila Ahmed Chowdhury, *ADR Theories and Practices: A Glimpse on Access to Justice and ADR in Bangladesh* (3rd edn, LCLS 2020) 1,108.
[96] ibid.
[97] Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley and Sons Inc. 2001) 1,19.
[98] ibid 26.

Control). A wife may prefer ODR if there is possibility that physical presence in offline process would reveal her whereabouts to husband from whom she may be subjected to further violence out of retaliation.[99] Therefore ODR entertains a 'need-based approach' which is the core of Postmodernism and Constructive Postmodernism.

4.4. 'Thematic Adoption vs. Utility' leading towards Constructive Postmodernism

The terminology Postmodernism itself suggests a surpassing of modernity though there remain a question mark as to whether we have ever been modern.[100] Nonetheless, with time we have to move forward not backward and that's the reason probably "constructive post-modernism" is taking the wheel of change. Impact of other disciplines are propelling law to travel for 'unchartered territories' beyond textual and sometimes even beyond contextual. The system of law that apparently looks to be rationally determined and unveils strict societal casual order is in reality a system beyond collective control let alone individual control.[101] That's why a better version of legal understanding is argued by Postmodernists that encapsulates not merely what's textual but what's material, spatial and usable. Postmodernism suggests flat diversion by presenting multiple options whereas constructive postmodernism argues for adopting the option which is culturally and contextually fitted and not totally unconnected with the ultimate thematic notion.

We may appreciate all the hybrid modes of ADR as well as ODR for their co-relation with Postmodern approach. But at the end of the day, we may not appreciate the adoption of all hybrid modes for us. Here comes the Constructive Postmodernism at play. Our particular need should attract the particularly shaped hybrid mode and not all the modes. Therefore, constructive postmodern approach narrows the apparent floodgate opened by Postmodernism.[102] And that's where the beauty of Constructive Postmodernism lies. This approach fixes the dynamicity of Postmodernism in proportionate flexibility. Just like we saw in previous segment how variations occurred within the Hybrid (Postmodern) approach itself giving rise to need based sub-models and sub-approaches. Thereby, the adoption then works successfully and efficiently. For example-compared to Med-Arb the current practice is going towards a Med-Arb-Med or going for a differently formatted approach of Med-Arb like Wisconsin Model. Another example could be adoption of *'all women lok adalat'* by India which

[99] Mellisa H. Conley Tyler and Mark W. McPherson, 'Online Dispute Resolution and Family Disputes' (2006) 12(2) Journal of Family Studies 165.

[100] Bruno Latour, *We Have Never Been Modern* (Harvard University Press 2012).

[101] Niklas Luhman, *Law as A Social System* (OXFORD University Press 2004).

[102] Martin Schiralli, *Constructive postmodernism: Toward renewal in cultural and literary studies* (Greenwood Publishing Group 1999).

occurred for the very need of women in suppressive cultural context. Trial by same judge (for sake of privacy) after failed Mediation attempt under FCO,1985 is another contextual addition made in Bangladesh. Thus, the ADR movements are inseparably connected with Postmodernism and Constructive Postmodernism prioritizing contextual need and the sooner we realize this theoretical connection the better we can shape our dispute resolution system (both legal and non-legal).

Another thematic adoption with utility corroborating our notion of Postmodernism and Constructive Postmodernism is practicing of ODR. Though ODR has been in practice since the 1980s, it is continuously evolving due to modern era globalization as evident from a 2004 review that says there are 'over hundred institutions addressing disputes online along with additional twenty to fifty emerging newly each year'[103] which obviously elevated to larger form currently.[104] As Marshal Mcluahan comments, 'when a new technology comes into a social milieu it cannot cease to permeate that milieu until every institution is saturated'.[105] That's the reason ODR hasn't left it's pace even after this long. The small-scale system emerging as Blind Bidding[106] constantly subdivided into 'hybrid form utilizing both humans and technology as well as standalone form solely reliant upon software'.[107] Factually this is Postmodernism because what was non-existent, became a contextual need subsequently as Nicholas Negroponte said, 'now we can transmit bits instead of transporting atoms like before'.[108] The factual skepticism coupled with entrepreneurial endeavors initiated Postmodern approach like ODR. And scholars believe, 'the ambit of ODR is at starting point that'll soon be supplemented with teleconferencing, robotic intelligence, holograms and avatars making resolution in online virtually same as that of offline'.[109] COVID period is a glaring example before us that showed how online or virtual world would be our ideal workplace and 'for changed circumstances like COVID there cannot be more flexible approaches than hybrid forms in altering or striking down the resolution process resulted by altered economic conditions'.[110] And thus, normalization of resolving disputes online would soon occur that even

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103 Thomas Schultz, 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust' (2004) 6 NC JOLT 71,73.

104 Charlotte Austin, 'Online dispute resolution: An introduction to online dispute resolution (ODR), and its benefits and drawbacks' (2017) Summer Research Scholarship Programme 2016/17 Victoria University of Wellington 1,3.

105 Ethan Katsh, 'Communications Revolutions and Legal Revolutions: The New Media and the Future of Law' (1984) 8 (3) Nova Law Review 1-39.

106 In Blind Bidding parties used to submit their offers to a computer not revealing to each other. Computer assessed the proximity range set earlier by parties themselves and split the difference between offers if successful and remain undisclosed if unsuccessful.

107 Robert J Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab' (2017) 18 Cardozo J. of Conflict Resolution 717.

108 Nicholas Negroponte, *Being Digital* (Hodder and Stoughton, London 1995).

109 Ethan Katsh, 'Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code' (2004) 49 N.Y.L. Sch. L. Rev. 271, 286.

110 Thomas J. Stipanowich (n 100) 265,280.

today is regarded as exceptional[111] and our children (future generation) are going essentially in that path as evident from their relational behavior online.[112] Similarly, the subjects of family disputes would be accustomed with virtual platform replaced with offline ones. This is what Constructive Postmodernism is all about. Arguing that development never has a dead end but at the same time must not give up the source of emergence in the name of utility. What emanates from Modernity to Postmodernism would further reshape into Constructive Postmodernism meaning 'take as you need but don't go too far that results into denial of the source totally'. This is the need-based contextual phenomena that would continue to extend for the very reason of meeting the ever-expanding need of people and society.

5. Conclusion

Family dispute resolution trends (both legal and non-legal) in South Asia isn't pitch perfect. Dispute resolution cannot surpass the essential blend of legal and non-legal ways as evident from statutes of all the three countries and that's why, despite having specialized FC, the same enacting law also vowed for non-legal ADR mechanism. Further, the mechanisms aren't in ditto everywhere rather contains contextual variation. Then there is ODR or hybrid ADR modes that could prove effective in family disputes in lieu of conventional primary dispute resolution modes. The context-specific inclusion of blended legal and non-legal mechanism is specially influenced by our cultural component, religious component and social dynamics. Further, even if we keep the statutory non-legal or formal ADR mechanism in side, we have informal ADR too. However, what we need is the 'correct context specific version of resolution'. That's where Postmodernism and Constructive Postmodernism could come into play. Because, just because some hybrid mode is successful in western jurisdictions won't justify its inclusion in our context. General notion of law discourages a 'half-hearted attempt or cherry picking' but due to social realities sometimes that becomes inevitable. Whole-heartedly adopting any mechanism may prove fatal in front of anomalous social structure. At this juncture, adopting Postmodern theoretical approach could put some solution. Shaping the legal and non-legal approaches of dispute resolution in light of Postmodernist theory could provide a better regime of personal law disputes. Probably, then we would find fit solutions like 'ODR or Med-Arb-Med' that would not only reduce burden of formal system but also contribute in upholding some common cause by ensuring access to justice for underprivileged, poor and needy ones.

[111] Maximilian A. Bulinski and J.J. Prescott, 'Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency' (2016) 21 Mich. J. Race and L. 205,228.

[112] David A. Larson, 'Online Dispute Resolution: Do You Know Where Your Children Are?' (2003) 19 Negot. J. 199, 199.