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Confidentiality in ADR Proceedings: Pakistani Law and International Standards

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Abstract

One of the most unique and valuable aspects of ADR is the concept of confidentiality, which allows parties to be more open and honest, and offers creative options in settling the case that they would not be willing to risk in the public forum of litigation. However, confidentiality is not a "no go" principle in ADR, but it must be weighed against other public interests in transparency and in enforcement of legal rights and in the prevention of abuse. It examines the theoretical underpinning for the principle of confidentiality in ADR, the statutory and common law structures of confidentiality in the United Kingdom, Australia, Singapore and the United States and the principle of confidentiality in Pakistan's ADR Act, 2017 and the Punjab ADR Act, 2019; pinpoints three key gaps in the current position in Pakistan; and recommends the provision of a comprehensive statutory confidentiality regime appropriate for the Pakistani context and legal traditions.

Keywords: ADR Confidentiality, Mediation Privilege, Pakistan, ADR Act 2017, Without Prejudice Rule, Settlement Communications, Evidence Exclusion, Dispute Resolution

Introduction

Confidentiality is not just a courtesy or a courtesy of ADR. It is the basis of the unique value of mediation and conciliation. Mediation is said to be based on the premise that parties, with the help of a neutral mediator, will discover their interests, understand the weaknesses in their positions, and develop innovative solutions which go beyond the "either-or" choices possible in adjudication. This is an exploration that must involve disclosure of information that would not be made in court; making concessions that would not be made on the record; and recognition of underlying interests that haven't been expressed in formal pleadings. This cannot happen without parties having confidence that information they provide in the mediation is not going to be used against them if the mediation does not resolve the dispute and it goes into litigation or arbitration (Moore, 2014).

In the different legal systems, there are various ways in which the legal discovery of ADR communications is protected. One of the layers of protection is the common law without-prejudice rule which bars from evidence communication made in a genuine attempt to settle a dispute. An even more specific layer of evidentiary immunity for communications created during formal mediation proceedings is provided by statutory mediation privilege. Additional layers are provided by so called "contractual confidentiality obligations", which parties and mediators agree to in the mediation agreement, and which can be enforced by means of breach of contract remedies. These layers create a

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Vol.03 No.01 (2025)

confidentiality "sandwich," which in a robust system affords strong, but not absolute, protection for communications in the ADR process (Menkel-Meadow, 2011).

Pakistan's ADR law is silent on confidentiality in particular but incomplete in general which leaves the parties, mediators and lawyers with genuine questions. The ADR Act 2017 introduces the concept of confidentiality for mediators and for the ADR process in general, but offers only general, non-specific,

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information about the implications of the confidentiality obligation, what types of communication are subject to the confidentiality obligation, what exceptions to confidentiality protection are provided, and what remedies are available for breach of confidentiality. With the absence of statutory clarity, the Pakistani lawyers and courts resolve these issues via the common law, and contractual interpretation, leading to uncertainty and loss of confidence in the protection of ADR communications (Law and Justice Commission of Pakistan, 2021).

The article examines this lack of confidentiality in the Pakistan's ADR system by comparing the mature ADR systems of confidentiality with an elaborate suggestion for the statutory reform. In Section 2, the theoretical underpinning and role of the confidentiality of ADR are examined. In Section 3, the authors provide a detailed discussion of the without-prejudice rule and how it is used in the Pakistani courts. Section 4 looks at the statutory confidentiality regimes in four comparator jurisdictions. A critical evaluation of the current framework along with the identified gaps exist in Pakistan is given in section 5. The proposed statutory confidentiality regime is outlined in Section 6. Section 7 presents conclusions.

Theoretical Foundations and Functions of ADR Confidentiality

There are two kinds of case-based arguments for preventing the future use of ADR communications in litigation: consequentialist and rights-based. The consequentialist theory is simple: if there is no way to ensure that material disclosures and offers made to the mediator are not used against a party at trial, then no party will be willing to make them in a constructive, and possibly candid, manner. In this absence, the business common sense of either party in mediation is to say the least and to avoid any concessions that might be interpreted as admissions of liability. This strategic prudence is counterproductive to mediation and transforms it into a formality of swinging the pendulum from one extreme to the other (Stipanowich, 2004).

The rights-based argument is based on what the parties to mediation reasonably expect. A party that provides information or makes a concession in the course of a formal mediation process in which the mediator stated he or she would keep the information confidential and the mediation agreement confirmed the mediator's representation has a legitimate expectation that this will be honored by the legal system. It would be unfair to use that information or concession at a later stage in the proceeding with the other party without the other party's consent, and would have a detrimental effect on the mediation process (Riskin, 2003).

In the functional approach to ADR confidentiality, there are three separate functions of confidentiality protection: The first is candour function, which allows for honest and open communication and discussion of information and views that promotes settlement prospects. The second is the creativity function to allow for parties to brainstorm and propose settlement options without binding themselves, to test and refine creative options without risking that an offer that would be made during brainstorming would be considered as an offer made in good faith. The third is the relationship preservation function that of allowing the parties involved in an ongoing relationship (whether commercial or family or employer/employee) to come to mediation in a manner that the information they share does not become part of the adversarial record of their conflict and could thereby irreparably damage the relationship (Wall & Dunne, 2012).

The principle of confidentiality of ADR does not, and should not, have an absolute meaning. There are a number of types of exception recognised in comparative law and also in academic writing that are considered to be legitimate exceptions to the protection of confidentiality in ADR. The first is the public interest exception that communications which have a practical purpose of disclosing a serious crime, an imminent threat to safety or fraud cannot be withheld from disclosure because they were made in the context of a mediation. The second exception is the "enforceability exception": A party seeking to enforce a mediated settlement agreement cannot bar introduction of mediation in the

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enforcement proceedings on the basis of confidentiality. The third exception is the mediator misconduct exception: A party alleging a mediator's actions in handling the mediation were improper must provide evidence of the misconduct in disciplinary or legal proceedings. One of the most difficult tasks involved in the ADR confidentiality legislation (Goldsmith & Ingen-Housz, 2018) is the creation of the definition of the exceptions.

The compatibility of confidentiality in ADR and the public interest in transparency in the settlement of some types of disputes should be particularly discussed. Private settlement of disputes through confidential mediation may appear to be inconsistent with the accountability obligations of the public parties involved in the dispute in cases involving public authorities, public spending or issues of significant public importance. This tension is particularly evident when a dispute arises with the government relating to government procurement, environmental issues or consumer protection issues where the results of the individual case may have ramifications on a broader public interest basis. The tension is not explicitly addressed by the Pakistan's ADR legislations and the need for developing a principled approach to this is one of the tasks to be carried out during the comprehensive reform suggested in this article.

The Without-Prejudice Rule in Pakistani Courts

The without-prejudice rule is a principle of common law which was picked up by Pakistan on inheriting the English common law and which prevents communications made in the process of genuine negotiations to resolve a dispute from being used as evidence in litigation. The common law rule reflected by the rule is partially codified in the Evidence Act 1872, which excludes from evidence admissions made under conditions that constitute an offer of compromise, but the statutory rule is narrower, and less precise, than the common law rule. In fact, Pakistani courts practice the without-prejudice rule in light of the common law rules that have emerged from case law in England, but there are few reported cases on how it is applied in a mediation context (Qanun-e-Shahadat Order, 1984).

As persuasive precedent, the English case law on without prejudice privilege has matured to a nuanced understanding of its application, scope and exemptions. The principle is applicable to both oral and written communications, which are made in an honest effort to resolve the conflict, even if the communications are not specifically identified as 'without prejudice'. The test is objective would a reasonable person have understood the communication as being part of a settlement negotiation? The rule is a BIPA privilege, shared by both parties to the negotiations, thus neither party can waive the protection by itself. Apart from the above, there have been a few exceptions recognised in English case law, such as misrepresentation and fraudulent communications, communications which are required to admit to, or otherwise prevent the party seeking the admission from abusing the privilege, and communications which form part of the agreement whose enforcement is sought (Sourdin, 2016).

A few specific questions are not conclusively answered in the existing case law in the context of the without-prejudice rule of formal mediation proceedings in Pakistan. First, does the rule apply to private sessions with the mediator (caucuses) or does it apply to joint sessions as well? Second, will the rule bar the mediator from being compelled to testify as to what was said during the mediation? Third, do notes, summaries, and draft settlement agreements (made by the mediator during the mediation) fall under the rule? Fourthly, whether the rule covers preliminary discussions regarding mediation? The answers to these questions, where they will have to be found, must be clear, whether to be taken from the common law, or, preferably, from the statute.

The reported decisions of Pakistani courts indicate low awareness of ADR confidentiality, as mediation institutions (IMAC and provincial centres) are still a relatively recent phenomenon in Pakistan and there is hence little litigation regarding the admissibility of mediated communications. As more parties to an IMAC become involved as the mediation cases increase, and formal mediation proceedings become more common, there will be more disputes over the admissibility of IMAC communications

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and less consistency in judicial rulings, which will have a negative impact on the predictability an effective confidentiality regime must offer. Statutory reform should be done before the growth of a development of conflicting case law.

Statutory Confidentiality Frameworks: Comparative Analysis

In Australia the most developed statutory regime relating to the confidentiality of mediation is contained in the confidentiality standards of the National Mediation Accreditation System (NMAS) and in state and territory legislation which affords specific statutory privilege to those who communicate during a mediation. The Australian Law Reform Commission's 2009 report on the uniform evidence law framework is a comprehensive report on mediation privilege which has been adopted with modifications in some Australian jurisdictions. The Australian model separates the issues of confidentiality (disclosure in the proceedings) and evidentiary privilege (disclosure as evidence) as distinct, but related protections, each with its own scope and exceptions (Sourdin, 2016).

The Mediation Act 2017 is Singapore's latest and most pro-ADR statute, incorporating a statute of confidentiality in the common law world that is also the most International. The Act establishes a statutory mediation communication privilege that is available for communications during the mediation process and includes communications during private sessions, mediator notes and documents and party written submissions to the mediator. The privilege is shared by the parties and the mediator and can be waived only by the joint will of all the privileges' holders. Other provisions in the Act that allow for exceptions to privilege include disclosure needed to prevent physical harm, disclosure to a court for the purpose of enforcing or setting aside a mediated settlement agreement, and disclosure in a proceeding for professional misconduct of the mediator. The Singapore Mediation Act, 2017, is seen as the international model for a new statutory confidentiality regime for ADR (Singapore).

The without prejudice rule is a common law based approach, which is largely developed by judges, with the provisions relating to ADR and mediation under the Civil Procedure Rules developing the rule. In 2020, the English Law Commission consulted on the possibility of creating a statutory mediation privilege but has yet to see any changes to the law following the consultation. The advantages of the English approach are that it is flexible and that it has the ability to be developed judicially in response to new fact scenarios (Wall & Dunne, 2012); the drawback is that it is ill-defined and uncertain as to what circumstances the questions outlined in the previous Section 3 apply to the formal mediation process.

Adopted in various US states in 2001 by the National Conference of Commissioners on Uniform State Laws, the United States Uniform Mediation Act (USUA) offers a detailed statutory framework for mediation confidentiality, which has been widely researched and analysed in comparative law studies. The UMA establishes a mediation privilege, which is not subject to discovery in any action, except for actions for conduct crimes, imminent threats to safety, or enforcement or challenge of mediated agreements. To achieve predictability and clarity, the drafters of the UMA chose to draft a broad privilege that has well defined exceptions, rather than a narrow privilege with a general public interest override (Stipanowich, 2004).

Pakistan's Current Framework: Gaps and Uncertainties

The ADR Act 2017 also has provisions in respect of confidentiality in Section 14 which stipulates that the mediator and the parties shall keep the information relating to the proceedings of the mediation confidential and shall not divulge the information to any third party without the consent of the parties. The same duty is stated in Section 19 of the Punjab ADR Act 2019 with an additional requirement that the confidentiality requirement remains after the mediation process ends. Such provisions create a

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CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.03 No.01 (2025)

contractual confidentiality agreement without any clarity about whether the communication of mediation is privileged from use in subsequent proceedings (Alternative Dispute Resolution Act, 2017 and Punjab Alternative Dispute Resolution Act, 2019).

The first problem in the system established in Pakistan is the lack of statutory mediation privilege. It does not explicitly prohibit disclosure to third parties as a result of the Act, but it does not explicitly state what the consequences of the Act's confidentiality are for subsequent litigation between the same parties. It is not strictly speaking disclosure of evidence to a third party that is the forum in which the dispute between the parties would be resolved. While the without-prejudice rule does offer a remedy, it is unclear what its meaning is in a mediation setting in Pakistan as discussed in Section 3. When there is no specific statutory privilege, parties will not be able to be certain that mediation communications are not subject to evidentiary use.

The second problem is that there is no clear exception framework to confidentiality. The confidentiality requirement of the Act is unqualified: No disclosure without the consent of the parties. This formulation is over-broad: it seems it would forbid a mediator from telling the other party to a mediation to which he or she has revealed a credible threat of violence in one mediation session, from describing in a disciplinary proceeding his or her own alleged conduct, or from describing in a proceeding information on a fraud on the process. There are no clear and principled exceptions to the confidentiality obligation, which means that in practice mediators will have legal uncertainty and ethical difficulty. The exceptions in the framework must be carefully designed to maintain the principle of confidentiality and ensure that, without being unduly restrictive, exceptions are not denied where the public interest and basic ethical requirement to preserve privacy demands it.

The third key gap is that there are no remedies for breaches of confidentiality. The confidentiality obligation is established by the ADR Act 2017, but does not detail what remedies are available if the confidentiality obligation is breached. If mediation confidentiality has been violated, the party must then seek relief under the general law of contract, tort or equity, either of which might or might not be sufficient to compensate the party in the circumstances. The lack of specific remedies also does not mean there is any statutory authority to exclude from evidence mediation communications that are mistakenly revealed, which would simply be a question of general admissibility. The current lack of any enforceable framework to stop further disclosure would be provided by a specific statutory remedy such as exclusion of the wrongly disclosed communication as evidence, damages for breach of the confidentiality obligation and injunctive relief to prevent further disclosure. The Proposed

Proposed Statutory Confidentiality Regime

This article suggests a detailed statutory ADR confidentiality regime to be incorporated in an amended ADR Act 2017 or the new consolidated ADR bill which is expected to be the outcome of the reform programme in Pakistan. The proposed regime is inspired by the Singapore regime, Australian regime, and the Indian regime, but has been modified according to the institutional setup and legal framework in Pakistan.

The proposed regime's first component is a new statutory mediation communication privilege. The proposed provision is: ‘A mediation communication is privileged and shall not be admissible in evidence in any legal proceedings and a mediator shall not be compelled to give evidence in any legal proceedings relating to any mediation communication.’ The term ‘mediation communication' shall be given a broad interpretation to encompass any communication by any person in the course of, or in connection with, a mediation proceeding under this Act whether through oral or written means in joint sessions, in private sessions, in a submission to the mediator, or any document prepared for the purpose of the mediation. The privilege should be a party to party privilege that is only subject to the privilege log and may only be waived by all privilege holders together.

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CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.03 No.01 (2025)

The second is an explicit list of exceptions to the privilege and also the confidentiality duty. The exceptions proposed are: disclosure in proceedings to enforce, interpret or set aside a mediated settlement agreement, to the extent required for that purpose; disclosure in proceedings for a violation of professional responsibilities, fraud or other serious misconduct of the mediator, to the extent necessary to prove the professional misconduct of the mediator; disclosure that was agreed to in writing by all parties to the mediation; and disclosure required by law for the prevention or investigation of any scheduled offence under the Anti-Money Laundering Act (the "AML Act"), such as disclosure to prevent the imminent physical harm of any person, but only with respect to evidence of the mediator's own conduct.

The third is a particular remedies structure to suit a breach of mediation confidentiality. The proposed remedies are: Exclusion from evidence of any mediation communication wrongly disclosed (as of right, without a separate admissibility determination); Damages for loss caused by wrongful disclosure (which includes the cost of any proceedings needed as a result of disclosure); Injunctive relief to stop further disclosure or use of wrongly disclosed communications; and, in the case of disclosure by a mediator in violation of their professional duties, referral for professional discipline to the National Mediation Standards Board. A damages remedy should exist for any party, their attorney or mediator who improperly releases a mediation communication.

The fourth component of the proposed regime deals with the question of the participation of the public authorities in mediation. Where a public authority is involved in mediation under the Act, the confidentiality protection should apply with the proviso that where the Act requires transparency and/or accountability provisions to apply, the public authority may be required to disclose the fact of the mediation and the amount of any mediated settlement, but without disclosing the content of mediation communication. This change does not compromise the legitimate privacy interest of the private party; it contributes to the accountability of public authorities and, in line with the public interest transparency concern highlighted in Section 2, it also ensures transparency.

Conclusion

The key to effective ADR is confidentiality. If there is no effective and reliable protection for ADR communications, the open discussion and innovative problem solving that mediation aims to promote will not take place, and mediation's unique advantage over litigation will be greatly reduced. The current country's ADR legislation lays the groundwork for a confidentiality framework but has some significant gaps in the notion of the mediation privilege in the exceptions framework, and remedies for breach that compromise the credibility of the protection afforded. The detailed statutory framework suggested in this article tackle each of these gaps and provide provisions, firmly anchored with the best comparative practice and in keeping with the legal fabric and institutional framework in Pakistan. The proposed regime aims to assure parties that they will be able to speak candidly and freely during mediation, assure mediators of clarity about their obligations and protections, ensure clarity for courts in deciding admissibility motions, and offer effective remedies for parties who have their confidentiality rights violated. The reform of the Pakistan's ADR confidentiality framework should be seen in the context of the overall effort of establishing a modern, comprehensive and international friendly legislation framework for ADR in Pakistan. These specific provisions can be introduced as a stand-alone ADR act amendment in the short-term in the amended ADR act 2017, and as part of a longer-term project to streamline Pakistan's ADR laws into a single comprehensive act. Whatever be the case, the need for changing the confidentiality regime is important enough to the quality and credibility of Pakistan's ADR system to not await the consolidation in its entirety.

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Vol.03 No.01 (2025)

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