ADR as a Tool for Environmental Governance

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The central principle of alternative dispute resolution is the aim of mutual benefit, rather than a win-loss equation. Several countries have incorporated alternative dispute resolution mechanisms into tackling environmental disputes.

The Environmental Protection Authority (EPA) in the United States strongly supports the use of alternative dispute resolution (ADR) inclusive of, but not limited to "conciliation, facilitation, mediation, fact finding, mini-trials, arbitrations, use of ombuds".[1] Common to all these techniques is the neutral third party, assisting the consensus-building process, but holding no stake in the substantive outcome.[2] Environmental ADR has often been referred to as environmental conflict resolution (ECR). Some typical characteristics of ECR include (1) voluntary participation; (2) the ability of parties to withdraw from the ECR process; (3) direct participation in the process; (4) use of a neutral party with no decision-making authority; and (5) formulation of solutions and outcomes by the parties.[3]

Environmental disputes generally involve a diverse range of stakeholders, from private citizens, to Governments, to corporations, and individual organisations. Each hold differing views about what must be prioritised when allocating resources,[4] whether it is conservation, development, etc. Moreover, their stakes do not always exist within the same sphere, with the same environmental conflict potentially raising the question of detriment to one party's industrial pursuits, and another's territorial integrity.[5] The United States Congress, in enacting the Negotiated Rulemaking Act, 1990, found that traditional rule-making procedures discourage stakeholders with different interests from communicating with one another, leading to "conflicting and antagonistic positions".[6]

Amidst the complexity inherent to this variation, the rigid structures and limited autonomy of traditional dispute resolution, such as litigation, may be inadequate in efficiently balancing, or even recognising each stake.

The influx of cases in courtrooms across the world, and particularly in an overburdened judiciary in India, make the process of litigation far lengthier. Alongside being unable to curb the pressing environmental concern, it is also an immense drain on time and financial resources. A United States Institute for Conflict Resolution Report provides compelling evidence for the cost-effectiveness of environmental ADR.[7] 70% of the mediated cases studied were solved, with participants either "very" or "moderately" satisfied with the process, and median savings amounting of $75,000 per party.[8] The same is evidenced in data collected by South Korea's Environmental Dispute Resolution Commission, which received 1347 cases (till 2003) since the institution of the policy in 1991 and resolved over 75% successfully via structured ADR by 2008.[9] While this burden may appear to be borne equally, it has disproportionate impact, more likely to dissuade, and thus disenfranchise the economically weaker party in the dispute, preventing the case from ever materialising in court either due to unregulated settlement, or exhausted resources. To formalise mechanisms outside the courtroom for such dispute resolution, would enhance access to justice, and create checks and balances within quasi-judicial means of reaching consensus.

The flexibility of ADR has been a prevailing reason in its recent rise as a means to resolve high-stake disputes. Parties can choose the format and the individuals through which they communicate, increasing the level of trust and commitment to adhering to the eventual outcome. Due to the confidential, relatively informal, and solution-oriented format, parties are able to restore or maintain important relationships. This is particularly vital in environmental disputes, which are likely to recur across many of the common stakeholders repeatedly, all of whom must be in a position to reasonably reach a consensus. Typically, voluntariness to participate[10], to choose a process, and the content of the final agreement is intrinsic to ADR. Thus, the solutions reached have also been found more likely to be more "creative, satisfying and enduring".[11]An enduring example of the advantages of mediation vis-à-vis litigation is demonstrated by one of the earliest cases of environmental ADR, the Storm King Dispute, 1979. After countless and fruitless litigation over ten years in the United States, unable to reach a satisfactory resolution or to manage litigation and appeals costs, the parties turned to mediation. A consensus was reached within a year, in a cost-efficient manner, with citizen groups previously overpowered finding a legitimate seat at the bargaining table, a "win" in some or other sphere for each party, and thus led to a sustainable agreement.

The overwhelming prevalence and reliance on the present litigation structure within which environmental disputes operate creates resistance to change in the fundamental mechanisms of resolution. Governments fear the loss of control in mediated cases, parties fear a lack of implementation. For example, third-party intervention, lacking the traditional qualifications or symbolic office of Judges, lead to hesitance. This, however, is arguably misconceived, as parties may at any point opt out of ADR[12], and pursue another

process such as unfacilitated negotiation or litigation. Another proposed strategy is to create judicial guidelines for the case-by-case selection of the neutral party.[13] The Government may retain some role in the selection of these parties in cases affecting the nation's public policy. They may also encourage facilitative mediation[14], giving primacy to parties, as opposed to evaluative, which involves deciding the merits of the case and more closely mirrors a judicial role. A third model is demonstrated by Japan, which has a multi-tier mediation system[15], within the governmental setup. The first step involves a complaint to the local Government and attempted mediation by the Environment Pollution Complaint Counsellors. However, if this fails, the complaint is forwarded to appellate bodies such as Environmental Dispute Coordination Commission (EDCC) or the Prefectural Pollution Examination Commission (PPEC), of which are administrative commissions established as external agency of the Prime Minister's office (PMO). They are comprised of qualified lawyers, specialists, and Judges appointed by the PMO, and arbitrate or adjudicate disputes more formally. Upon incorporating the tenets of ADR into the primary judicial bodies, the Government also retains control over ensuring the enforcement of settlements and decisions reached.

A concern, particularly for many developing economies lacking ADR cultures, is that the formal and increased use of these mechanisms require the institutionalising of new infrastructure, in terms of legislation, frameworks, trained professionals, oversight, and enforcement. Most nations currently suffer from paucity of sufficient data and expertise to be confident in such an endeavour. Further, mechanisms for translating consensus reached via ADR would need to find a place in policy and legislation, equivalent to precedent via litigation to have a sustainable impact on environmental dispute resolution and prevent redundancies and inconsistencies in certain fundamental principles in each jurisdiction. Nevertheless, the manifold benefits of alternative dispute resolution as a tool for environmental governance. The principles of ADR have historically permeated inter-governmental organisations such as the United Nations, Association of Southeast Asian Nations (ASEAN), and COP-26, in the process of discourse used to create treaties, guidelines and frameworks, for the determination of both present and potential conflicts. The Paris Climate Change Agreement, 2015[16], is evidence of the large-scale success of negotiating a document[17], ratified by all participating countries, as a commitment to curb and control emissions. Its success was hailed by United Nations Secretary, Ban Ki-moon, as a "monumental triumph for people and our planet".[18] The models and frameworks provided by numerous countries and inter-governmental organisations recognising these merits, should act as an impetus for furthering and institutionalising the use of this method.

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