Mediation in Environmental Disputes: Possibilities in Reference to the Cauvery Water Dispute

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Abstract

New methods of dispute resolution are emerging in the world with litigation becoming a less preferred choice. One of such methods is mediation. Though strikingly similar to the other ADR processes, it has the peculiar characteristics that help us differentiate it from its counterparts. It is a consensual form of resolution mechanism usually used in private conflicts where party autonomy is supreme. Mediation has not only been successful in private matters but has also proven to be equally effective in public conflicts by keeping in mind certain pre-requisites. The aim of this paper is to look into the various characteristics of mediation in terms of environmental dispute, advantages/disadvantages and whether it can be used to resolve such an issue. Lastly, if the conclusion drawn from such a discussion is positive, the possibilities of conducting the same in India with reference to the Cauvery Water Dispute shall be discussed.

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Introduction

Alternate Dispute Resolution is an area of dispute resolution which is fairly new in India even though the enactment has been subsisting for over two decades now. There are various forms of Alternate Dispute Resolution, one of which is mediation in which private parties indulge themselves with an objective of resolving their differences in a consensual form.

The term mediation means," an informal dispute settlement process run by a trainedthird party, called a mediator. Mediation is intended to bring two parties together to clear upmisunderstandings, find out concerns, and reach a resolution and the process is voluntary." There is a lot of similarity as to the nature of various ADR processes but due to certain peculiar characteristics of mediation, they can be differentiated. Some of the basic characteristics of mediation are:

1. The process is a voluntary submission of the parties who want to resolve the dispute and in cases where they are settled, it will be binding just like a contract.
2. There is an objective neutral stance given by the third-party mediator usually appointed by the consensus of the party, thus making 'party autonomy' an important aspect.
3. Mediation is a private affair ensuring confidentiality and is less time taking as the unnecessary technicalities of evidence collection and procedures are done away with.
4. The nature of mediation is more collaborative in nature, the process is informal as compared to others and the mediator acts more like a facilitator.
5. The control over the outcome of the process lies with the parties and the mediator does not pass a judgement but helps the parties reach a settlement which ensures a win-win situation for both the sides.

From the above characteristics, it might seem that mediation holds good only when it comes to private matters, but with ADR becoming more widely used, mediation for public disputes is also been sort after. Public disputes like environmental disputes includedisputes commonly concerned with air, water, flora and fauna, waste etc. These are disputes which involve a lot of differences with respect to vision, the point of view and philosophies. Environment and its protection have been a part of various religion especially Hinduism where the followers consider various elements to be sacred. Thus, whenever there have been disputes relating to rivers and forests, their resolution has been difficult due to the sentiments attached to these elements resulting in delay and distress. It may appear on the face of it that consensual dispute resolution between private parties and public disputes relating to the environment are

conflicting and contradictory ends. But the case is quite different from what it appears to be and not as hard to reconcile. There is no scarcity as to the number of cases in which mediation has been successfully employed in resolving environmental disputes around the world though, in India, the scope is still limited.[2]

There are certain characteristics which embody environmental disputes. These are:

1. Conflict resulting from the question as to what is more important, development or environmental protection? The complexity of the issue spans from identifying the stakeholders to the difficulty of isolating it from other social factors.
2. The issue is generally between two groups, one which is involved in actively doing something which results in the other group protesting against it as it is adversely affecting the environment. In such cases also, the groups in favour of protecting the environment have a lack of cohesive leadership, knowledge, immense diversity, different agendas and level of power resulting in conflict amongst them.
3. There is usually an inability to determine precise costs and boundaries during an environmental dispute. Further, certain environment settlements require government approvals which can be tough for private parties to get sanction for.

All these aspects are necessary to be listed out in order to understand the nature of the dispute in question and the impediments that may hamper the easy disposal of it. There have been various instances where mediation has been tried in settling environmental disputes but owing to the public nature of it, it has been difficult to reach a conclusive settlement. Nevertheless, mediation in this arena has been an emerging domain and can have its advantages and disadvantages like any other dispute resolution process.

Mediation as a Tool for Environmental Dispute Resolution

The nature of environmental resource conflict is universal and omnipresent as everyday, people compete to have an access to the constantly depleting resources. Experiments related to mediation and environmental disputes have had immense success in the US and in Europe because of various legislations and mechanisms in place. Other countries which lack legislations on protecting the environment also use mediation as a dispute resolution process. In a country like India, which is devoid of a law specifically on mediation, resolving such a complex issue can be difficult. The reasons for such difficulty can be:

1. The scientific and technical complexity of the issue: As mentioned earlier, environmental issues affect a large stratum of the society with huge diversity on a

[2]Jyoti Bharat Rangari, *Mediation in environmental disputes*, 3 JOURNAL ON CONTEMPORARY ISSUES OF LAW 6, 6 (2017).

local, regional or national level. Help from scientific and technical experts are sort after to get a comprehensive knowledge of the issue and to reach a feasible solution. But sometimes these experts give inconclusive advice due to the dynamic nature of the issue, unreliable predictive force and lack of information to assess the risk in totality.

2. Environmental disputes involve multiparty and agendas: Such issues attract the majority of public attention owing to the fact that there cannot be only two parties involved in such disputes. More and more people get wrapped up in the issue as it is being solved as there are no boundaries of the impact. The environmental disputes will within itself start having various other issues as per the different agendas of the parties which would lead to a difference in opinion as to the cost of the dispute, the possible solution, liability and responsibility.
3. The dispute entails a dispute over values as well: The parties to the issue may have opposing ideologies with the possibility of every group answering the questions according to their beliefs.
4. There is asymmetry of powers between the parties: When it comes to environmental disputes, one of the parties usually has an upper hand either commercially or politically. Sometimes, even the government is a party to the dispute which hampers the possibility of a fair resolution in cases of litigation. Thus, the environmentalists, who are more of underdogs, have to use all their resources to pursue their legal rights.

To ensure effective environmental mediation, certain steps need to be taken;

1. The mediator should be impartial and skilled which means that they should be a neutral third party having enough domain specific knowledge. They should possess the appropriate skill, experience and qualifications. If the mediator is biased, the disputing parties are left with little incentive to voluntarily fight for their rights in the dispute. But, impartiality of the mediator does not mean that the mediator should be absolutely independent of the disputing party. The parties must voluntarily accept the position and authority of the mediator whose duty shall be to facilitate the parties towards a resolution. The mediator shall be proficient enough to clearly define the legal issue at hand, the stakeholders, facilitate better communication and compromise. The compromise must be feasible in nature keeping in mind the interests and views of the parties. As mutual compromise is one of the pillars of a successful mediation, the mediator should ensure that the solution is viable and does not mitigate an adverse impact on development or the environment.

2. There must be an absence of a better alternative to a negotiated agreement (BATNA) which means that neither of the parties can achieve their objective through an alternative channel thus reaching an impasse. If either of the party believes that they have another alternative, their incentive to compromise in mediation is lost. The motivation to settle the matter comes from the uncertainty of outcome through judicial or other methods. Thus, the parties should be willing to reach a negotiated compromise.
3. There must be a balance of power amongst the parties. It is often seen that there is irregularity as to the division of power in environmental dispute due to the commercial or politically superiority of one party over the other. In the process of mediation, it is important that both the parties are equal in the sense that the other does not use its powers prejudicially to the interest of the other. Factors like the strength of civil society, the dominance of media and political influence of the industrial lobbyists, determine the power-sharing amongst the disputing parties. The eventual outcome should guaranteeequitability which can be confirmed by giving the parties equal access to information, production of evidence and representation. Further, there must be an ongoing relationship between the parties which acts as an encouragement to resolve the dispute harmoniously keeping in mind future interests and relations.
4. Lastly, all the stakeholders to the dispute are to be included. Stakeholders may be a person or an institution which has a direct interest in the outcome of the dispute resolution process and may belong to various groups' organisation and agencies. They may also include the government which has jurisdiction over the matter, gives approval to the solution and provides effective mechanism for the same. For a mediation process to be successful, it is thus important that all these parties are included in the procedure failing which the compromise will be ineffective to gratify the demands. Also, there should be technical, financial and political feasibility of the agreement to be successfully implemented. If proper mechanisms are not in place, the negotiated compromise would be rendered useless. Therefore, just like litigation, the effectiveness of mediation as an approach to dispute resolution will be influenced by and contingent upon the wider societal context including the nature of prevailing cultural mores, the distribution of political power, economic interests and the capacity of key institutions.

The DEC's environmental dispute resolution programme itself is clear on the fact that "many mediated settlements take place in the context of environmental enforcement. These disputes often readily lend themselves to an assisted negotiation because they may involve limited parties, may need negotiation of remedial activities and the amount of payable penalty". It says mediation can take place in various matters including enforcement of environmental programmes, negotiations of contentious conditions, allocation of resources or pollutants, public participation and efforts, contract dispute and regulatory rule development.

Many countries like China, Australia, Thailand and Canada have successfully used mediation as a mechanism for dispute resolution for environmental disputes. Apart from these developments, mediation in environmental disputes has found added backing in various treaties and international charters such as the United Nation Convention on Laws of The Sea (UNCLOS), Vienna Convention for Protection of the Ozone Layer and the WTO Dispute Settlement Regime amongst others. There have also been widespread legislative efforts across the world to promote mediation as a tool in resolving environmental disputes. In the United States the Environmental Policy and Conflict Resolution Act, 1998 created the United States Institute for Environmental Conflict Resolution. The EU, in the year 2002, advocated for the 6th Environment Action Programme of the European Community (2002-2012) for effective use of ADR and mediation in the area of environmental disputes within the EU countries. And Israel established a Joint Environmental Mediator training program which employed both Israeli and Palestinian mediators.

Examples of Mediation in Environmental Disputes

There have been various mediations around the world in environmental disputes, some of which have been successful while the others failed to achieve the agenda. The Snoqualmie River mediation in the U.S was one of the earliest examples of the use of ADR in an environmental dispute. In this case, there was a dispute between the U.S Army Corp. of Engineers and environmental groups regarding the building of a dam to prevent consequences of a serious flood. Representatives from both the groups were involved in the mediation but talks failed and the mediator had to conduct private sessions. As a result of the private sessions, an agreeable proposal was finally reached. Though the dam was never actually built, this is one of the earliest cases of a successful environmental mediation. Another early example of a successful mediation was the Storm water permit mediation which ended a 4-year long dispute and resulted in an environmentally protective permit. The parties had

achieved their goal of protecting the environment while also ensuring the production of electricity.

Taking a look at the Indian perspective, it is clear that India has no expressed law on mediation but this does not bar the possibility of referring an issue to such a process of ADR. All of above instances build confidence in the idea that a negotiated compromise can be achieved in India in an environmental dispute, provided the perquisites of a successful mediation are met. Mediation is being used worldwide as a powerful tool of dispute resolution and India is preparing to walk on the same path soon enough.

Mediation in Cauvery Water Dispute

The Cauvery water dispute between the state of Karnataka and Tamil-Nadu has been a long-running acrimonious litigation which has had difficulty in reaching to a conclusion that is accepted by both the states. Traditionally the are three approaches to determine the right over the water, namely the Harmon, History and Hobbes approach. The Harmon approach gives the right to the land which is the source of water, history gives primacy to the historical user of water and Hobbesian relies on the result of awards due to the negotiation between the parties. Usually, the upstream entity exercises their Harmon right and the application of this approach by the courts has resulted in violence and petty parochial politics. Both the states have created a situation of allegations and counter-allegations and the centre has failed to reconcile the issue between them as per the power given to it by the Constitution. This has resulted in the dispute becoming not only an environmental dispute but also a dispute of political and emotional tussle. The matter was left for judicial adjudication ignoring the element that such dispute requires extended and meaningful negotiations owing to its emotive flavour. A judicial dispensation of the case results in one of the parties being the 'winner' while the other goes back empty handed which can have an outcome adverse to the interest of the region or the nation as a whole. The directions of the court have to be adhered to by the parties but the state which disagrees with such a decision could resort to different forms of hooliganism and vigilantes. There is no 'quick fix' of such an issue and the central ought to have played an important role in adjudicating between the parties.

A solution to this 'winner-takes-all' decision is to resort to ADR. Mediation is the best form of ADR for such a sensitive dispute. A successful example of mediation in water dispute was the Lake Michigan dispute in the U.S. The beginning of the 20th century in the U.S., saw the Federal Governmentin conflict over the use of Lake Michigan's water as removing too much water was disparagingly affecting the lakes in other states. This dispute led to more than four

U.S. Supreme Court cases between 1920 and 1995.[3] But in 1995, when another litigation was brought in for the same issue, states like Illinois, Michigan, Wisconsin, Indiana, Minnesota, Ohio, New York and Pennsylvania along with the U.S government decided to resort to mediation with the costs being equally shared by them. The parties could produce a working framework within a year of referring the matter to mediation. A memorandum of understanding was signed between the 8 states with certain limitations and compliances towards the decree of the U.S courts as well.

Thus, mediation can be used as an effective tool to solve the Cauvery Water Dispute as the present Inter-State Water Dispute Act along with the Indian Constitution fails to resolve the clash. The Central government can act as the neutral mediator between the states and ensure a 'win-win' situation. It should keep in mind that all the stakeholders should be involved in the process, the parties should have a power parity and there is facilitation of an achievable settlement with proper mechanisms in place. It is one of the Constitutional duties of the Centre to ensure that the harmony amongst the states is not hindered and they maintain cordial relations in the future as well. Apart from the Cauvery Water Dispute, other matters such as the alleged stoppage of construction of the Koodakulum Nuclear Plant and Subansiri Lower Dam can also be referred to mediation because if such matters are left for judicial adjudication, it will bear the same result as the Cauvery Water Dispute. Thus, success in this environmental dispute can be achieved only by the active participation by the Central government and its holistic approach towards the amicable settlement of this long-running dispute.

Conclusion

Over the past few decades, the use of mediation to resolve environmental issues has been on the rise and it suggests that this practice will gain popularity in the coming future due to the vast exploitation of environmental resources and disputes arising as a resultant. Even though there is no certainty as to the dispute being definitely solved by mediation, but after trying all the various alternatives, mediation appears to be an attractive option. Mediation can serve as a relief from the cumbersome and delayed proceedings of the court while ensuring that political integrity of the country is not compromised because of a corrigible dispute. Thus, the road towards mediation in environmental dispute appears bright and India seems to be on that path too.

[3]Jyoti Bharat Rangari, *Mediation in environmental disputes*, 3 JOURNAL ON CONTEMPORARY ISSUES OF LAW15, 15 (2017).