

# Conquest of Sustainable Development through Reformative Mechanisms of ADR

Rachel Jacob Tharakan<sup>1</sup> and Kanika Lahoti<sup>2</sup>

## Abstract

An ever booming world population in the recent years have made a significant impact on the environment and a proportional rise in environmental issues. Amicable dispute settlement in environmental conflicts seem a far-fetched dream with the vastly different judicial systems of countries worldwide and thus, there exists a need for reinventing dispute resolution mechanisms to achieve the Sustainable Development Agenda. Goal 16 of the Sustainable Development Agenda calls for peace, justice and strong institutions and in furtherance of the same, The United Nations Environment Programme have discussed Alternative Dispute Resolution in Environmental Disputes as a part of Access to Justice. Like any other system, ADR also has its barriers to practical implementation. Moreover on a philosophical level, it is significant to question the ethics of environmental ADR as a form of restorative justice. With the help of this paper, the authors aim to examine and reconcile the identified benefits and issues of environmental ADR while focusing on the aspect of sustainable development. The authors also aim at evaluating the effectiveness of ADR on a global level and bring out the practicality of the mechanism in the same domain before concluding the paper with derived and intended suggestions.

*Keywords: Alternate Dispute Resolution Mechanism, Environmental Conflict, Sustainable Development, United Nations Environment Programme*

## 1. Introduction

The twentieth century witnessed an exponential rise in population from 1.65 billion to 6 billion, ("Current World Population") accompanied by a chain of events that heralded significant changes in world history so as to redefine the era with two World Wars, emerging developments in technology and most importantly, a rising awareness of the degrading environment.

The 2030 Agenda for Sustainable Development was adopted by all member states of the United Nations in 2015, which provides for a shared blueprint for peace and prosperity for the people and the planet, at present and in the future. The 17 Sustainable Development Goals form the centre of focus for the Agenda and serve as an urgent call for action by all countries, regardless of whether developed or developing, in a global partnership. The Sustainable Development Goals were the result of decades of consultations and deliberations by countries worldwide along with the United Nations. The history can be traced back to June 1992, wherein over 178 countries adopted the Agenda 21, a comprehensive plan of action to build a global partnership for sustainable development to improve human lives and protect the environment, at the Earth Summit in Rio de Janeiro, Brazil. The next milestone in the process was the Johannesburg Declaration on Sustainable Development and the Plan of Implementation, adopted at the World Summit on Sustainable Development in South Africa in 2002,

<sup>1</sup>14th year BBA-LLB (Hons.) Student at School of Law, Christ (Deemed to be University), Bengaluru  
<sup>2</sup>14th year BBA-LLB (Hons.) Student at School of Law, Christ (Deemed to be University), Bengaluru

which reaffirmed the global community's commitments to the environment with more emphasis on multilateral partnerships. Finally, the process culminated with the initiation of the negotiation process on the post-2015 development agenda by the General Assembly in January 2015 and subsequent adoption of the agenda at the UN Sustainable Development Summit in September 2015. ("SDGs.: Sustainable Development Knowledge Platform")

The paper focuses on Goal 16 of the Agenda, which calls for peace, justice and strong institutions to promote rule of law and access to justice at a global level. Goal 16 forms an interplay with several other goals in the sector of environmental sustainability, which have been identified as follows –

1. Goal 6 – To achieve universal access to clean water in the age of water scarcity, flooding and lack of proper wastewater management.
2. Goal 7 - To ensure access to affordable, reliable, sustainable and modern energy for all.
3. Goal 11 - To confront the environmental impact of urban sprawl and manage rapid urbanization.
4. Goal 12 – To create a sustainable community by decoupling economic growth from resource use.
5. Goal 13 – To combat climate change through urgent and accelerated action as per the Paris Agreement, 2016.
6. Goal 14 – To advance the sustainable use and conservation of the oceans, seas and marine resources.
7. Goal 15 – To protect, restore and promote sustainable use of terrestrial ecosystems.
8. Goal 17 - To build and strengthen partnerships globally to support and achieve the 2030 Agenda targets, with the participation of national governments, the international community, civil society, the private sector and other actors. ("SDGs ∴ Sustainable Development Knowledge Platform")

The interaction of the Sustainable Development Goals forms the foundation of environmental sustainability and in furtherance of the same, it becomes necessary to reinvent dispute resolution mechanisms to achieve amicable settlement in environmental conflicts.

## **2. Alternative Dispute Resolution as a part of Access to Justice**

Alternative Dispute Resolution or ADR, as it is herein referred to in the paper, encompasses all forms of non - traditional dispute settlement recourses such as but not limited to arbitration, mediation, conciliation and negotiation. These mechanisms divert themselves from the court adjudication process to provide a more flexible, consensual, time-efficient and cost-effective system, which continues to grant a legally enforceable solution, while being more accommodative to the stakeholders. Hence, it is essential to understand each process of ADR before moving forward to their application in environmental issues. ("Barbara Ruis United Nations Environment Programme")

Arbitration falls on an extreme end of the ADR spectrum, wherein it is more adjudicative than consensual. Arbitration is thus, akin to a hybrid form of litigation and ADR. It involves a third party neutral who establishes a final, binding and enforceable

decision upon parties to the dispute. The process is subject to the same laws and rules applicable, if litigation was the recourse. (Bank, M., Bank, C., 2017)

Mediation, as all methods of ADR, is a voluntary process in which disputants engage the assistance of a neutral or an impartial third-party mediator, who facilitate negotiations between them so as to reach an amicable settlement of their disputes. It requires direct involvement of a third party, only to encourage the disputants to resolve their differences themselves. Interest and relationship of the parties are given more weightage than legal rules, which provides for its popularity in sensitive, confidential and/or private disputes. (Bank, M., Bank, C., 2017)

Facilitation is a collaborative process in which a neutral third party assists a group of stakeholders in constructively discussing the issues of controversy. Most often, the difference between facilitation and mediation is a blurred line and these terms are sometimes used interchangeably. However, the important note is that facilitation merely provides for improved communication between parties whereas mediation serves the purpose of reaching an agreement. (Bank, M., Bank, C., 2017)

Negotiation is the most consensual form of ADR mechanism and falls on the opposite end of the spectrum in comparison to Arbitration. It refers to a dialogue or discussion wherein an agreement is sought for without the aid of third parties. Negotiation is an indispensable part of all agreements and transactions, since it provides for a mutually beneficial solution. Thus, decisions taken in negotiations are binding solely due to the control vested upon the parties as regards the process and outcome. (Bank, M., Bank, C., 2017)

Access to justice is a universally accepted fundamental right and encompasses within it the concept of environmental justice. It is a nodal principle in matters of natural resource governance, since it provides individuals and communities with the ability to seek and obtain remedies for grievances through formal and informal institutions. In a rights-based approach to environmental sustainability, access to justice forms a key tool in the hands of aggrieved. The strengthening of access to environmental justice must be addressed at local, national, regional and international levels. The best way forward in this multi-tier approach to ensure access to justice would be to provide stakeholders at all levels with ADR mechanisms, so as to simultaneously benefit the State and the citizen. (Crawhall & Silverman, 2016)

### **3. Theoretical background for Adoption of ADR in Environmental Conflicts**

The need for public involvement in environmental conflicts was recognized in the 1990s and the same came to be reflected in the legal instruments starting from Principle 10 of the Rio Declaration, 1992. Principle 10 states that “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Thereby, it

determines three pillars of environmental governance in the form of fundamental rights: access to information, access to public participation and access to justice. ("UNEP Implementing Principle 10 of the Rio Declaration", 2016) Following the international benchmark laid down by Rio Declaration, though non-binding, Article 16 of the Aarhus Convention, 1998 provides for settlement of disputes by way of negotiation or any other means of dispute settlement acceptable to all parties. Further, it provides for recourse to compulsory dispute settlement by means of arbitration or proceedings before the International Court of Justice, in case of failure to resolve dispute by other methods. (Squintani, 2019) In June 2011, United Nations General Assembly Resolution 65/283 called for "Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution", which was adopted by consensus and broadened Member States' support for mediation and other forms of ADR. The resolution was fundamental in the recognition of contributions of all key players, including but not limited to Member States, the United Nations system, sub-regional, regional and other international organizations and civil society, while simultaneously providing for fresh perspectives on the use and further adaptation of mediation to contemporary disputes and conflicts. ("Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution ", 2012) In yet another leap, The Minamata Convention on Mercury, which was signed in 2013 and came into effect from 2017, recognized the need for ADR in settlement of disputes by virtue of its Article 25. Akin to the Article 16 of the Aarhus Convention, Article 25 of the Minamata Convention provides for amicable settlement of dispute firstly through negotiation or any other peaceful means as chosen by parties, before providing for compulsory means via arbitration or proceedings before the International Court of Justice. In a step further, it also presents an opportunity for parties to submit their dispute before a conciliation commission, in case all other methods have failed. ("Minamata Convention on Mercury ") Thus, ADR has found a strong theoretical foothold in the international community as a means of amiable dispute resolution in all matters ranging from civil conflict to environmental issues. Hence, the way forward to the adoption of ADR in environmental disputes rests in the evaluation of the practical application.

#### **4. Implementation - Benefits and Barriers**

The implementation of ADR varies between United Nations member states and an appropriate procedure is chosen based on nature of dispute to be resolved. It often takes the form of a public or private procedure such as but not limited to Ombudsman schemes, Consumer complaint boards, Private mediators and Trade associations. ("Barbara Ruis United Nations Environment Programme") To evaluate the benefits and barriers to adoption of ADR, this paper focuses on different case studies in the following countries:

##### **1. Estonia –**

The Case of the ICCP Permit for the Kunda Pulp Plant Factory is an excellent example showcasing the efficiency of negotiations and mediations when parties have an interest in collaborating and compromising despite being on opposite sides of the dispute. In the present case, AS Estonian Cell required an integrated environmental permit (IPPC),

which determined the measures to prevent pollution, in order to construct a pulp plant in Kunda on Estonia's northern shore. The IPPC initially issued was disputed by Estonian Fund for Nature (ELF) due to its inadequacy, which formed a serious threat to the marine environment of Baltic Sea. After negotiations between the parties, mediated by an attorney of the AS Estonian Cell itself, an agreement was made to change the conditions and a new IPPC was issued. Though the process was useful to depict the possibility of negotiation between key players to arrive at a solution, the final outcome came with its share of big compromises on both sides and wasn't entirely satisfactory to either party. Moreover, the lack of time and experience on the part of the NGO increased the intensiveness of the process. (Handler, Purker, Romanescu, & Tingas) ("Barbara Ruis United Nations Environment Programme")

On the other hand, the case of the Saaremaa Deep Harbour helps to understand how ADR is not a feasible option when either party is unwilling to conclude any settlement and thus, leaves all parties unsatisfied with the outcome. In this case, environmental organisations opposed the construction plan of a harbour on Saaremaa Island inside a bay that had been designated as a Special Protected Area for birds. The NGOs further disputed the environmental impact assessment and water use permit, issued by the Ministry of Environment. Though the NGOs negotiated a possible settlement with the construction company, the Ministry refused to be involved and defeated the same. (Handler, Purker, Romanescu, & Tingas) ("Barbara Ruis United Nations Environment Programme")

## **2. Hungary –**

In the case of Szentgál Regional Landfill, ADR mechanism failed due to the disagreement between parties as to which ADR process would be best to facilitate the conflict. As per the facts of the case, the construction of the Northern Lake Balaton Regional Waste Disposal Facility by grant of an environmental permit was opposed by the neighbouring settlements. A facilitated negotiation was initiated between all stakeholders but no substantial agreement could be reached due to the absence and reticence of conflicting parties. It clearly depicts the need for enhanced capacity building activities to promote the use of ADR. (Handler, Purker, Romanescu, & Tingas) ("Barbara Ruis United Nations Environment Programme")

Route 10 Case is another example of how ADR mechanisms fail as a result of multiple stakeholders with different objectives. Multiple environmental NGOs requested for the annulment of the environmental protection permit provided for the construction of Route 10, since the project would only aggravate the transport and environmental problems of the region. Several meetings and conciliatory discussions were organised by various stakeholders for direct or facilitated negotiations. However, all meetings failed to change in the viewpoint of the stakeholders, due to the lack of a coherent group and involvement of large number of actors without any real power. (Handler, Purker, Romanescu, & Tingas) ("Barbara Ruis United Nations Environment Programme")

## **3. Ukraine –**

The Case of Returning the Protected Status to Natural Areas in the Lviv Region was an exemplary usage of ADR mechanism to make effective use of time, thereby saving large forest areas that would have been subject to felling otherwise. Several environmental NGOs and scientists came together to protest the removal of status of protected areas

by the Regional Council without a scientific basis. Playing the role of an informal or virtual facilitator, media campaigns organised round table discussions, which led to the creation of a commission of stakeholders, who were tasked the responsibility of inspection and determination of protected status of areas. (Handler, Purker, Romanescu, & Tingas) ("Barbara Ruis United Nations Environment Programme")

Last but not the least, the case of Znesinnia Regional Landscape Park v. Electric Power Supplier is a depiction of how public interest can influence stakeholders to find a satisfactory compromise via mediation. From the initiation of a proposal for felling of large number of trees to facilitate Electricity Supply Networks Maintenance, the public council at the Lviv Oblast State Administration on Environment and Natural Resources employed ADR mechanisms to settle the issue. The negotiations resulted in offering sustainable solutions to the general issue rather than the mere problem at hand. (Handler, Purker, Romanescu, & Tingas) ("Barbara Ruis United Nations Environment Programme")

The case studies identify that ADR mechanisms in environmental issues help to increase access to justice for public and NGOs, while being cost and time – effective. Moreover, parties to the dispute are left with higher levels of understanding of the issue and better satisfaction with the solution. This provides for long term benefits, in any incidental and consequential matters. However, the adoption has faced barriers in the form of low levels of commitment, especially by public authorities due to fear of loss of control and unwillingness due to the entrenched litigation culture. Inappropriateness of ADR measures due to complexity of certain issues or increased number of stakeholders also hinder its acceptance as a general notion. Despite these barriers, the evaluation of opportunities and obstacles puts forth the conclusion that ADR mechanisms are the way forward. (Seigel, 2007)

## 5. Ethics of Environmental ADR

Acceptance of environmental ADR as a form of restorative justice has brought to light the question of the ethics involved with respect to neutrals, stakeholder representation as well as the system of administration. Professor Owen Fiss was one of the first to question the same in his essay, *Against Settlement*, wherein he declared ADR to be overly concerned with efficiency rather than justice. In his understanding, justice referred to public judgment rendered according to public norms by a neutral who has been chosen by the public. Since then, advocates of ADR have challenged his assertions, claiming superiority of ADR in terms of quality and quantity. (Brown, 2000) In order to answer this philosophical question, it is essential to draw a conclusion with regard to each point.

With regard to the ethical aspect of a neutral party, Fiss' normative argument is a concern about the quality of justice that would be served. He believed that the values seen in public litigation would be lost in a private dispute resolution, especially due to the lack of accountability. He, therefore, felt the need for public to choose the neutral, who would preferably a judge with substantial independence, coercive power and years of wisdom. Though Fiss' argument holds water, the problem has resolved itself with appointment of experienced and learned neutrals, most often by courts themselves in an

age where ADR methods have obtained legal standing by virtue of legislations as well as by court's discretion. (Brown, 2000)

The second issue is with respect to the problem of representativeness. This arises from the need to ensure public and representative stakeholder participation in environmental conflicts, due to the impact of its after-effects. With the concept of sustainable development, the question has extended itself to involve the matter of representation of future generations. Even the debate around awarding of legal personality to natural resources and other species furthers the issue. The answer to this pressing problem has been identified by scholars to lie in a mandate for parties to the dispute, including the neutral to take into consideration interests of all, who may be affected. In essence, they call for a representation of the absent parties by those present, which puts a greater responsibility on the shoulders of the third party, especially in cases where professional limitations exist with respect to other parties. (Menkel-Meadow, 1997)

Last but not the least, the matter regarding the system of administration of ADR mechanisms have become fairly transparent with its acceptance as a part of judicial culture. With the adoption of ADR as a legal recourse by most member states and the establishment of different institutions for the same, such as Arbitration Centres, Mediation councils, to name a few, the administrative side of the processes have become more systematic. In addition to this, ADR system has developed by virtue of education and training and remains lacking only in terms of awareness and espousal by the public.

## 6. Conclusion

This paper set out to identify as to whether the complex and challenging nature of environmental problems could be resolved by the application of alternative dispute resolution mechanisms. Arbitration, mediation, conciliation and negotiation, the main forms of ADR have been exercised by various nations in the resolution of environmental disputes and have found success in the same. Moreover, this practical implementation has helped determine the barriers which need to be overcome, to provide better results. Majority of the barriers and shortcomings of adoption of ADR can be traced back to a singular issue of lack of awareness and thereby, lack of acceptance. The resolution to this problem lies in the trial and error method of adoption of ADR mechanisms by member-states at all levels. ADR mechanisms have proved its effectiveness on a global level and is much-needed in order to realize the Sustainable Development Goals and in turn, the 2030 Sustainable Development Agenda. Albert Einstein rightly pointed out - "We cannot solve problems using the same kind of thinking we used when we created them." Thus, the future of justice lies in Alternate Dispute Resolution.

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