Environmental Conflicts
ADR to EDR

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A legitimate question….

“Judicial domination of spheres of domestic policy would probably not be very controversial if there were not doubts over the capacity of courts to make timely, informed, and balanced decisions. But once one dispenses with the aura of judicial mystique that long dominated social science accounts of judicial behavior, a very serious set of questions must be explored. In fact, a growing number of criticisms have been raised in recent years that pose basic challenges to the ability of courts to confine themselves to appropriate areas of intervention and effectively address complex issues”.

Barry Rebe; “The Politics of Environmental Dispute Resolution”; 1989
“Conflict”

- Most conflicts at all levels are directly based on or attributable to environment. (“Security”/ “root causes of conflict”)
- Ecosystem/ ecology is the interrelation between the living beings and their environment with a feedback loop/control
- Destabilizing that equilibrium → leads to conflict (depletion and degradation)
- **Environmental conflict →**
  - man made disturbance to the regeneration capacity of the environment (overuse and pollution)
  - Depletion (inter generational conflict)
- **Nature of (Environmental) conflicts that can be subject to judicial review?**

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Is there a sea-change?
“Environmental conflict” to “Environmental Justice”

**Diagnosis** → **Conflict** → **Process** → **Justice**

“Process is the human bridge between justice and peace”

*Prof. Carrie Menkel-Meadow (on Dispute Resolution and Civil Procedure)*
The Court’s Response

- Polluter pays
- Standing in PIL
- Precautionary principle
- Intergenerational equity and “trust”
- Principles of non regression (constitutional paradigm)
- Innovative remedies → Writ of Kalikasan
- Activism for change (& for status quo) (Protagonist Judge)
- Specialized Courts (policy)

Court’s response in the context of:

- Adversarial system (Distributive and not integrative or conciliatory)
- Limitations of rules of evidence (e.g. to include social factors)
- Inability to deal with/review “policy”
- Narrow focus and limited choice (based on “rights” vs “duties” / “do” vs “refrain”)
- System is used to address very specific issues (environmental issues are very broad)
- “Winners curse” (in environmental disputes) vs shared vision for the future
IN Mediation/Negotiation/Conciliation

BUT IN Arbitration/Courts

Continuum of Conflict Management & Resolution Processes

Private decision making by parties

Private third party decision making

Public (Legal) third party decision making

Extra legal coerced decision making

Conflict avoidance

Informal Discussion & problem solving

Negotiations

Mediation

Administrative decisions

Arbitration

Judicial Decision

Legislative Decision

Non violent action

Increased coercion and likelihood of win-loose outcome

Violence

Adopted from Christopher Moore; “The Mediation Process”
Why choose the adversarial process?

- Only tool in the lawyers’ tool box
- Faster and cheaper with possibility of injunctive relief (as against lobbying for policy and legislative change)
- Brings the issue to the open
- Catalyze a coalition
- Ability to obtain “unpopular” decisions
- Lack of confidence in environmental sentinels (e.g. regulatory capture by elite)
- Enhance leverage for ADR (negotiate with a case pending) = Negotiation/Mediation

Paradigm

- People vs process
- Substance vs process
- Substance vs people
Framework for analysis and intervention

**If “No”**

- COMMUNICATION
- RELATIONSHIP

**If “Yes”**

- COMMITMENT
- ALTERNATIVES
- CRITERIA
- OPTIONS
- INTERESTS

Adopted by Sea-Change Partners (Pvt) Ltd based on “Getting to Yes”, Fisher & Ury
## Communication & Relationships

<table>
<thead>
<tr>
<th>ADVERSARIAL</th>
<th>NON ADVERSARIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information limited by evidence</td>
<td>No such restriction</td>
</tr>
<tr>
<td>Parties are heard</td>
<td>Stakeholders are consulted</td>
</tr>
<tr>
<td>Limited to factual</td>
<td>Factual + emotional (fear of failure/outcomes of policy)</td>
</tr>
<tr>
<td>Precise but narrowly framed</td>
<td>Broad framing of issues</td>
</tr>
<tr>
<td>Focus on a very few issues</td>
<td>Broad range of issue</td>
</tr>
<tr>
<td>Advocacy (Adversarial)</td>
<td>Inquiry (empathetic)</td>
</tr>
<tr>
<td>Parties to a dispute</td>
<td>Stakeholders in a process</td>
</tr>
<tr>
<td>Polarization</td>
<td>Enhances relationship</td>
</tr>
<tr>
<td>“Winners” and “losers”</td>
<td>Shared vision</td>
</tr>
</tbody>
</table>

## Framework for analysis and intervention

![Framework Image]

If “No”
- Commitment

If “Yes”
- Alternatives
- Communication
- Relationship
- Criteria
- Options
- Interests
## Interests, Options, Criteria

<table>
<thead>
<tr>
<th>ADVERSARIAL</th>
<th>NON ADVERSARIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues as framed (limited to substance)</td>
<td>Needs + fears (substance, emotions, and social impacts)</td>
</tr>
<tr>
<td>Positional (works backward)</td>
<td>Gets to real interests (moves forward)</td>
</tr>
<tr>
<td>Choses a few positions and consolidates (win-loose)</td>
<td>Explores common and conflicting interests</td>
</tr>
<tr>
<td>Zero – sum (Claiming of value)</td>
<td>Creating value (no winners)</td>
</tr>
<tr>
<td>Within the pleadings (as framed)</td>
<td>Innovative/creative solutions</td>
</tr>
<tr>
<td>One option (my option).</td>
<td>Our Options / many options</td>
</tr>
<tr>
<td>Rule of law &amp; based on law</td>
<td>Equity + Strong philosophical base</td>
</tr>
<tr>
<td>“Winner’s” set of experts</td>
<td>All relevant experts</td>
</tr>
<tr>
<td>Writ limited to “do” or “don’t do”</td>
<td>Number of instruments available</td>
</tr>
</tbody>
</table>

### Framework for analysis and intervention

- **INTERESTS**
- **OPTIONS**
- **CRITERIA**

If “No”

- **COMMITMENT**

If “Yes”

- **ALTERNATIVES**

**COMMUNICATION**

**RELATIONSHIP**
### Alternatives & Commitments

<table>
<thead>
<tr>
<th>ADVERSARIAL</th>
<th>NON ADVERSARIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coercive</td>
<td>Persuasive</td>
</tr>
<tr>
<td>Likelihood of disruptive behavior (esp by loser)</td>
<td>Willing implementation</td>
</tr>
<tr>
<td>Alternative is only a criteria to assess suitability</td>
<td>Alternative is a decision that can be made</td>
</tr>
<tr>
<td>EIA used to accept or reject the design (“or”)</td>
<td>EIA used as possible options (“and”)</td>
</tr>
<tr>
<td>Forced to make a decision limiting creating value</td>
<td>Decision reached only after substantial discussion – creating value</td>
</tr>
<tr>
<td>Decision based as fixed on date of filing</td>
<td>Decision factors dynamism</td>
</tr>
</tbody>
</table>

### “The Middle Path”

**Negotiate with a case pending = Judge led Mediation**

- Coerce to mediate but persuade to resolve
- Mediation and adjudication – same continuum (“ADR leading to Court proceedings”)
- Alternative approach/paradigm; essential for environmental justice
- Shift from ADR to EDR (Environmental Decision Making)
  - Interventions before its too late; upstream (policy making & planning) as well as downstream (once disputes have arisen over administrative decisions)
  - Institutionalize ADR in the whole environmental decision and policy making process (we aware of regulatory capture)
- Watch out for Regulatory Capture
Thank you

References

- Carnworth, Robert; “Institutional Innovation for Environmental Justice”; Pace Environmental Law Review; Volume 29, Issue 2; Winter 2012
- Maser, Chris & Polio, Carol A; “Resolving Environmental Conflicts”; CRC press, Taylor & Francis Group; 2012
- Meadow, Carie Menkel; “Inaugural Lecture of the A.B. Chettle Jr. Chair in Dispute Resolution and Civil Procedure; Georgetown University Law Centre; 2006