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*
Law, Environmental Conflicts and Justice

**Ecology**
Interrelation between the living beings and their environment

**Environmental Conflict**
- Overuse
- Pollution
- Depletion

**Process**

**Justice**
(limited to human point of view)

Nature of (Environmental) conflicts that can be subject to judicial review?

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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

Continuum of Conflict Management & Resolution Processes

- Conflict avoidance
  - Informal Discussion & problem solving
    - Negotiations
    - Mediation
  - Administrative decisions
  - Arbitration
  - Judicial Decision
  - Legislative Decision
  - Non violent action
  - Violence

Increased coercion and likelihood of win-loose outcome

Adapted from Christopher Moore; “The Mediation Process”
**IN** Mediation/Negotiation/Conciliation

**BUT IN** Arbitration/Courts

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

Adopted by Sea-Change Partners (Pvt) Ltd based on "Getting to Yes"; Fisher & Ury
Framework for analysis and intervention

If "No"

ALTERNATIVES

If "Yes"

COMMITMENT

INTERESTS

OPTIONS

CRITERIA

COMMUNICATION

RELATIONSHIP

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

<table>
<thead>
<tr>
<th>Interests, Options, Criteria</th>
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<tbody>
<tr>
<td><strong>ADVERSARIAL</strong></td>
</tr>
<tr>
<td>Issues as framed (limited to substance)</td>
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<tr>
<td>Positional (works backward)</td>
</tr>
<tr>
<td>Choses a few positions and consolidates (win-loose)</td>
</tr>
<tr>
<td>Zero – sum (Claiming value)</td>
</tr>
<tr>
<td>Within the pleadings (as framed)</td>
</tr>
<tr>
<td><strong>One option</strong> (my option).</td>
</tr>
<tr>
<td>Rule of law &amp; based on law</td>
</tr>
<tr>
<td>“Winner’s” set of experts</td>
</tr>
<tr>
<td>Writ limited to “do” or “don’t do”</td>
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</tbody>
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Framework for analysis and intervention

If “Yes”
- Alternatives
- Commitment

If “No”
- Communication
- Relationships
  - Alternatives & Commitments

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

- Coerce to mediate but persuade to resolve
- Alternative approach/paradigm; essential for environmental justice
- **Negotiate with a case pending = Judge led Mediation**

Final Thoughts

What is the best means (method/methods) for effective (problem) solving?

“Transformative empathy is among the most significant and important ways of grounding justice and moving people to new places…”

Thank you

References

- Bacow, Lawrence S. & Wheeler, Micheal; "Environmental Dispute Resolution"; Plenum Press, New York; 1984
- 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