Environmental Justice through Alternative Dispute Resolution in Bangladesh: An Assessment

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Abstract
Dispute is as old as existence of human civilization in the earth while environmental disputes as diversified from other forms are comparatively not that much older. Court room litigation procedure for all forms of disputes resolution especially environmental ones are facing manifold troubles around the world paving the way for application of alternative dispute resolution (ADR) with impressive success. Environmental disputes are not like other social and personal disputes rather demand special cautious approach and care for the peaceful settlement of those for worthy human existence now and in future. However, Bangladesh is not lagging behind in respect of availability of environmental norms, statutes and courts but lacking initiatives concerning sustainable environmental governance and justice. The traditional court room settings for resolution of environmental disputes are not working well to meet the needs of justice and so recent inclusion of ADR is praiseworthy. But effective implementation of such mechanisms is the challenge of time demanding immediate attention coupled with skilled and matured approach from the government by developing all sorts of capacities taking lessons from means and techniques from the tremendous success of environmental ADR in the developing and developed states as well. This paper's aims at exploring the challenges and opportunities of the application of ADR in environmental disputes in the country.

Key words: Environmental dispute, access to justice, environmental law and alternative dispute resolution.

Introduction
As a means of non adversarial system, ADR is a buzz phrase and much talked about mechanism at almost every legal system varying from adversarial to non adversarial or inquisitorial one (King, 2005). As a consensual form of dispute resolution this format is being practiced almost in all disputes or conflicts ranging from family to business except grievous criminal cases and also has proven to be an effective mechanism. It refers the ways of settling disputes outside of the traditional court room setting. Over the ages, the disillusionment and frustration of people over the cost, inordinate delay in dispensation of justice looms large as a great threat to erode the confidence of people in the formal court system. As a result, this device has been immensely popular and effective throughout the world. Like other nations, Bangladesh has also imbibed ADR mechanism both as informal means and in the court procedure to streamline justice delivery system (Kamal, 2002). Environmental disputes are quite different and more damaging in nature and the impact goes beyond the disputant parties, often transcends national boundaries evolving concern for human existence. Despite these concerns, many countries in their environmental justice system have introduced voluntary and court annexed ADR for ensuring easy access to justice in the growing arena of environmental jurisprudence. The recent inclusion of ADR in environmental law in the country looks theoretically sound but practically unutilized (Wahid, 2005). In fact, environmental issues in the country have got comparatively less attention for research resulting dearth of materials for further study while any study on the success and failure of inclusion of the method in environmental dispute resolution is yet to be started. The article is a venture to explore the viability, practicability, applicability, adaptability and efficacy of ADR in the dispensation and proper management of environmental disputes in Bangladesh leading to a sustainable environmental justice and sustained future for a better tomorrow assessing threats and opportunities.
Legal Regime of ADR in Bangladesh

The justice dispensation system in the country as a legacy of the British common law system is basically of adversarial (Ali, 2007). Tracing ADR before the entry of the British in the sub-continent in early 1600 dated back to the heritage of its voluntary uses since 6th century or even before. It was practiced and prevailing in undivided India as a format of Panchayet from the period of Dharmasastra and the same in the then Bengal as a brand of Shalish (Rao, 2005). Both Panchayet and Shalish are interchangeably the same encouraging the disputants to arrive at a negotiated understanding with a minimum of outside help (Islam, 2000). The Village Court system has been added as a new dimension of quasi-formal ADR familiar as Shalish in the then East Pakistan and now Bangladesh after its hard earned independence in 1971 (Haq, 1998). The formal use of the system can be traced back to the then Arbitration Act, 1940, the Industrial Relations Ordinance, 1969, then in Muslim Family Laws Ordinance, 1961, Village Court Ordinance, 1976 and in Family Court Ordinance, 1985. Replacing the Arbitration Act of 1940, the government enacted a new one in 2001 with substantial reforms in arbitration regarding domestic and international commercial disputes. The Village Court Ordinance, 1976 was substituted by the Village Court Act, 2006 with enhanced jurisdiction under the Local Government Administration. The use of ADR in general civil suits started under the Code of Civil Procedure (CPC) Amendment Act, 2003 with addition of Section 89A and 89B containing the provisions of mediation and arbitration. The CPC was amended again in 2006 adding Section 89C that deals with mediation at Appellate stage. The Artharin Adalat Ain (Money Debt Recovery), 2003 was enacted with in-built provision of ADR with amendment in 2010 making it more ADR friendly. The Conciliation of Disputes (Municipal Areas) Board Act, 2004 was another step forward for expediting conciliation. The Industrial Relations Ordinance, 1969 is replaced by Bangladesh Labour Act, 2006 in which envisages two different approaches to industrial or individual employment disputes resolution viz. quasi judicial action comprised of negotiation, mediation, conciliation and arbitration and adjudicatory methods (Akhtaruzzaman, 2008). Repealing earlier Environment Court Act (ECA) of 2000, the new ECA, 2010 was enacted attaching provision of mediation in Pretrial stage, Trial stage, and Appellate stage and even in Review stage. The flow of ADR has been increased further in 2011 with its affiliation in the Customs Act, 1969, Income Tax Ordinance, 1984 and Value Added Tax Act, 1991. Under the above laws ADR in the country are voluntary and may be court annexed or not depending on parties. But in 2012, the government has amended the CPC again making out-of-court settlement of lawsuits mandatory. However, in criminal cases ADR is not well recognized in the country but Section 345 of the Code of Criminal Procedure, 1898 provides for in-built provisions for compounding of offences through compromise in all stages of a criminal suit but without a provision of plea bargaining in the code. Nonetheless, some NGOs are mediating some pretty criminal cases in the name of negotiation, mediation and conciliation.

Necessity and Justifiability of ADR

Justice has been a foundation and object of a civilized society. In this regard, the necessity and justifiability of ADR cannot be denied for attaining justice pacifying the disputants resolving their conflicts in a harmonious way. ADR is a combination of processes which may be used within or outside courts and tribunals to resolve disputes not involving traditional litigation processes (Sinha, 2008). ADR procedure can be broadly divided into two categories namely adjudicatory and non adjudicatory. The adjudicatory procedure is arbitration and non-adjudicatory procedures include negotiation, mediation, conciliation, reconciliation, evaluation, case appraisal. The terminology denotes processes that are non adjudicatory, as well as adjudicatory, that may produce binding or non binding decisions. The decision or award of arbitration is relatively more binding upon the parties than that of negotiation, mediation and conciliation. Now, ADR had become a global necessity and an integral segment of practice as part of the efforts to reduce pendency of cases. It is flexible, peaceful, informal, less time consuming and cheap to yield win-win situation for both parties. The judicial dispute resolution mechanism in the country has come under a great stress for several reasons mainly because of the huge pendency of suits
and the number of cases has shown a huge increase in recent years. As of January 1, 2010 there are over 1.8 million pending cases. Among the pending suits, 9375 are in the Appellate Division, 293901 in the High Court Division and 1525889 in the Subordinate Courts. Systemic difficulty and lack of sufficient judges have aggravated the pendency of suits. In reality, the number of courts, judges and affiliated staffs are scanty to resolve a huge number of undecided disputes. ADR can be an aiding part for the judiciary to resolve the backlog of cases to heal the wounds of undue delay in justice delivery system (Law Commission Report, 2010).

**Judiciary and Access to Environmental Justice**

In Bangladesh, justice, judiciary and the rule of law are bound together as an integrated whole (Razzaque, 2000). ADR, access to justice and the concept of rule of law are not incompatible rather consistent bearing same spirit and attaining peace and harmony among the people and society as well (Sternlight, 2006). Generally judiciary is a root way of access to justice but litigation is mostly serving a smaller section of elites. Justice seekers are in vulnerable situation while the situation of environmental justice is more deplorable. Like many other least developed countries in the world (Pring, 2008), around 35 people live under the poverty mark and most people think environment as a secondary issue due to economic and other constraints. The expenditure on judiciary in terms of GNP is less than 0.5% while it is 4 per cent on the average in developed countries. However, the steps for environment protection in Bangladesh started since the British ruling in the Sub Continent. Even before the separation of India and Pakistan there were about 60 environmental legislations enacted by the British rulers. During Pakistan period there are around 40 laws enacted attempting to safeguard the environment from degradation and pollution. After the independence, the approach of environmental legislation in Bangladesh started from pollution control to environmental protection and about 100 statutes are framed for the protection and conservation of environment. As a major development, Bangladesh Environment Conservation Act (BECA) was enacted in 1995 coupled with Environment Conservation Rules of 1997. In an amendment of the BECA in 2002 the Act was given an overriding effect over all environmental laws. To make these laws judicially workable, the Environment Court Act (ECA), 2000 was passed and the same has been replaced by a new ECA of 2010. In a latest venture a new ECA of 2010 has been made with ADR provisions. Under the new ECA, 2010, the government pledges to set up special Environment Court in each district. The Government in June 30, 2011 by the 15th amendment of the constitution of 1972 has added article 18A entailing protection and improvement of environment and biodiversity but placed it in the fundamental principles of the state policy which are not enforceable. In fact, Bangladesh is not lagging behind in framing environmental legislation but really struggling to implement the existing laws. Despite presence of around 200 laws on environment environmental NGOs in the country are using Public Interest Litigation (PIL) for access to environmental justice but implementation of PIL orders is a far cry (Hasan, 2005).

**Suitability of ADR in Environmental Disputes**

In recent years, dispute resolution techniques have caught the public imagination as a preferred and painless way to reconcile conflicting positions (Girald, 2010). In fact, ADR methods are simply better at addressing the issues and interests that arise from environmental law cases. These are expanding into areas that were once thought to be the exclusive domain of judges and lawyers. Apart from civil, commercial, matrimonial disputes, health care, education and community conflict are all benefiting from the advantages that ADR methods offer. The win loss adversarial approach forced by litigation typically does not address and resolve controversies satisfactorily for all parties and can lead to continued and further conflict. This is an especially undesirable result in the environmental arena where the decisions being made and policies enforced can have far reaching impacts beyond the interest of the parties in court. So, it is better to create sound and logical environmental guidelines, and not to be bound by procedural ropes that often tie the hands of judges and judicial officers in a court of law. Yet, many of the issues in environmental law cases are of complex in nature and unique in characteristics
due in part to the public policy and societal interest inherently not suitable for voluntary mediation or conciliation method rather may be a good match for court-annexed mediation. Also, in complex environmental cases, often the real issues aren’t what come out in court and the parties that can really resolve the problem often aren’t at the table. It is most likely to be successful when all parties participate voluntarily with equal ability to participate in the process (Barron, 2004). Although ADR cannot be a substitute for formal adjudication system in a country rather it is a complement to the adjudication system. Due to giving lot more importance to the use and wider application of ADR in developed countries some researchers comment that ADR is much more than a substitute for trial. The growth and impact of ADR seem that it has been vanishing trial in almost all cases (Stipanowich, 2004).

Application of ADR in Environmental Disputes

Conflict may be inevitable, but there are ways to turn conflict into collaboration. Many countries in conformity with own local conditions have so far introduced and practiced various forms of ADR in all cases including environmental ones in the format of Environmental Dispute Resolution (EDR) or Environmental Conflict Resolution (ECR) with stupendous success. The use of such mechanisms has been used extensively in the US and Canada for several decades starting in the 1970s (Cormick, 1976). In case of Australia it started in early 1990s but blossomed very rapidly (Fowler, 1992). The origins of environmental dispute resolution through conciliation in the US can be traced back to 1969 and environmental mediation started in 1973. The provision streamlined during 1980s and reached the peak of success during 1990s. Administrative Dispute Resolution Act, 1990, amended in 1996 empowered agencies to resolve its disputes involving of neutral mediator or conciliator. Also, the Civil Justice Reform Act of 1990 was a step forward for smooth functioning of the hybrid mechanism of dispute resolution applicable to federal court cases, including environmental enforcement cases. Ultimately, the dominating regime of ADR in USA started after the specialized Alternative Dispute Resolution Act (ADR) of 1998. In pursuance to the ADR Act, 1998 the district courts established neutral panels for mediation and early neutral evaluation in specific cases.

Moreover, the Environmental Policy and Conflict Resolution Act, 1998 established the US Institute for Environmental Conflict Resolution (IECR), an independent and impartial federal program, with a mission to find workable solutions to tough environmental conflicts. Thus, the history of EDR in the US spanned about 40 years as an outgrowth of a broader ADR movement beginning in the 1970s (Sipe, 1995). Environmental ADR has often been referred to as Environmental Conflict Resolution (ECR), and the terms environmental ADR and ECR interchangeably same (Emerson, 2003). During the 1970's, environmental advocates in Canada argued strongly for greater public participation in environmental decision making process. The first attempt at incorporating dispute resolution techniques into environmental mediation was passed in 1992 and the Canadian Environmental Assessment Act, 1992 functions as a planning tool. In the courts of USA and Canada, around 80% to 90% civil cases are resolved at pre-trial stage through ADR. In UK ADR in the civil justice system got a momentum during 1990s. In Australia, EDR history begins in the early 1990s, when the Australian Resource Assessment Commission considered using mediation in its inquiry process.

In New Zealand, ADR has been acknowledged as an efficient means of providing effective remedies for parties in environmental disputes over the last 20 years (Supperstone, 2006). The experience of New Zealand shows that 23 environmental statutes and 150 other affiliated laws were integrated under the Resource Management Act (RMA), 1991 through undertaking an extensive research creating a wide working field for the Environment Court (Young, 2001). The RMA, 1991 has wider provisions of ADR. In Germany, the history of environmental mediation started a little earlier in 1980s. Until the end of 1998, environmental mediation in South Africa was initiated under the National Environmental Management Act, 1998. In India, the National Environment Tribunal Act, 1995 and National Environment Tribunal Appellate Authority Act, 1997 which functions under the Environment Protection Act, 1986 are devoid of having any provision of ADR and similarly Pakistan, Sri Lanka and Nepal are without direct provision of ADR or EDR (Haider, 2010).
Viability and Practicability of ADR in Environmental Disputes

The judiciary especially the subordinate ones of the country has been the target of persistent criticism for mounting arrears as well as inefficiency in disposing of litigation. So, the recent Law Commission Recommendation Report underscored the need for expanding the purview of ADR in both civil and criminal cases. For making ADR system binding the report also stressed the urgent need for adoption of legal and administrative steps to save the judiciary from its over burdened position owing to pendency of suits. It further put forward the adoption of National ADR Policy with a development project. The Law Commission after a series of seminars, view exchange meeting with judges, lawyers, judicial officers, court visit, prepared the report by thorough analysis (Sinha, 2010). Moreover, the report focused on establishing a training institute for mediation, a national ADR research academy with the ample of facilities for professional mediators, conciliators and arbitrators. The report says since ADR is practiced under various existing laws and it may be experimented in some other disputes. Accordingly, it is imperative to introduce ADR in some environmental cases on the experiment basis and observing its success the same may be experimented at a wider scale. Now, the government is keen to introduce binding court annexed ADR in civil cases. Better court administration and efficient case management are two necessary pre-requisites for success of case disposal by trial as well as for settlement of disputes either by voluntary or court sponsored ADR (Alam, 2000). In Bangladesh, pursuing environmental justice has most often depended on public interest litigation in an effort to get grievances heard and to bring attention the plight of low-income communities. In order to tailor knowledge of dispute resolution in the environmental justice context, the government should undertake research aimed at better understanding and documenting how ADR package can be useful and succeeded in environmental agreements and environmental projects along with other agreements with industry and agency. Countries in South Asia are facing similar types of environmental pollution and also environmental disputes are of similar nature. So, a model statute or a uniform environmental law can be introduced in this region to and important guidelines for adjudicating environmental issues may be adopted.

Challenges and Opportunities of ADR in Environmental Cases

Alternate dispute resolution in environmental law is a thorny or knotty issue, since most environmental disputes arise from actions in rem. In addition, the stands taken by parties in such disputes are intractable in nature. Serious environmental disputes tend to consist of highly intractable moral conflicts or high-stakes distributional debates over who gets what and to what extent. In such a scenario, whether ADR methods would be productive is a matter of serious debate (Halem, 2007). ADR processes largely arise from actions in personam and are best suited to one-to-one across-the-table settlements. Environmental disputes, on the other hand, are a curious mix of actions in rem and actions in personam. Identifying the parties in environmental disputes is itself a difficult task. An additional disadvantage that advocates of ADR face is the total lack of recognition accorded to ADR in International environmental law treaties and domestic environmental laws alike. However, there are a number of initiatives the world over, to achieve such recognition through formulation of concrete proposals and guidelines for alternatives to environmental litigation. Some of the prominent initiatives in this field include the American Arbitration Association's Environmental Dispute Avoidance and Resolution Program, the International Court of Environmental Arbitration and Conciliation (ICEAC), the New York State Department of Environmental Conservation's (NYSDEC) Environmental Dispute Resolution Program (EDRP).

The main limitations to mediated or negotiated settlements are intractable conflicts, the availability of Better Alternatives to Negotiated Agreements (BATNAs) in the form of power contests. In true sense, the win-win situations do not exist in environmental conflicts. Moreover, lawyers in Bangladesh and their mindsets are dead against ADR since its inception because they consider ADR as a big blow to their legal profession. There are no specific guidelines regarding fees of mediators, conciliators or arbitrators triggering the lawyers to take their hard stand against ADR. In absence of the specific ADR policy is not expectable to yield positive result in the field of ADR. Also, judges are not well acquainted...
with ADR and since litigant people are not aware of the system leading ADR dysfunctional. In fact, ADR is a friend of legal system not an enemy focusing on maximizing total benefits for all and minimizing collective costs. On the other hand, many environmental statutes expressly require elaborate procedural safeguards because speedy and final resolution of environmental problems may not always be in society’s best interest. At times disputes involve such highly charged issues and potentially devastating effects to health and the environment that there is no room for compromise (Tompkins, 1996). Settlement reached through mediation does not establish judicial precedent. In addition, a consensual settlement is not subject to judicial review (Schoenbrod, 1983).

The success in mediation in family court in Bangladesh has created an avenue for other courts including the environmental courts to launch the mechanism to mitigate the sufferings of the people due to environmental degradation.

Evaluation of Inclusion of ADR in ECA, 2010

Following the developed countries practices of environmental ADR, Bangladesh has also introduced this mechanism of mediation in the Environment Court Act (ECA), 2010. But this embedded mediation provision is subject to prior approval and satisfaction of the Director General (DG), Department of Environment (DoE). It is pertinent to mention that the previous Environment Court Act, 2000 was repealed due to its failures to cope up with environmental disputes. Similarly, the new ECA, 2010 with a wider mandate of environmental protection and conservation seems to be unutilized. The inclusion of mediation in all stages of a suit including during investigation, after submission of charge sheet, trial stage and even during appeal or review is a laudable step but in practice not working. The provision of mediation under section 18 of the ECA, 2010 in line with some provisions of Bangladesh Environment Conservation Act (BECA), 1995 is unused and there is no data of success of this hybrid mechanism. One of the impediments of mediation mechanism in ECA, 2010 is the inclusion of a condition of deposit of TK 50,000 to the Office of DG, DoE and compliance of the order of the DG or his empowered agent before availing this opportunity. According to new ECA, 2010 government will establish Environment Court and Special Magistrate Courts in each district of the country but after lapse of two years no such attempt is visible in any district except in Dhaka, Chittagong and Sylhet reflecting poor condition of environmental justice in the country (Arman, 2010). Though, ADR tries to reach micro levels of disputes and embodies the spirit of law not the form of law that keeps the justice alive reflecting the quote of Lord Justice Earl Warren. There are now a range of specialist courts and tribunals in Australia, Bangladesh, India, Ireland, New Zealand, Sweden, Denmark, Canada: Ontario, USA, Vermont, Mauritius and few others as well as ‘green benches’ for environmental cases in Brazil. Except India and Bangladesh all these countries have the provisions of environmental ADR.

Amid plenty of hurdles ADR in environmental disputes the system has emerged as a new opportunity to build more sustainable communities around the globe. Giving importance to the use and wide application of ADR in develop countries some researchers comment that ADR is much more than a substitute for trial. The ADR system is a virtue and a reflection of the notion of restorative justice focusing more on preserving social norms, relationship, status, social ties and values. Sometimes people prefer the phrase ADR as ‘Appropriate Dispute Resolution’ rather than ‘Alternative Dispute Resolution’. Many people refer to brand ADR as Mainstream Dispute Resolution (MDR). In India it reveals that the principal barriers to justice through ADR are lawyers and laws themselves (Murlidhar, 2005). In Bangladesh also the same proposition are expressed in the seminars, symposiums on effective implementation of ADR in the country because lawyers’ community feel it will eat up their share of the pie (Halim, 2010). American President Abraham Lincoln long ago in a speech called for discourage litigation and persuade compromise pointing out how the normal winner is often a loser in fees, expenses, cost and time. The USA has taken a lesson from their great leader and practicing ADR in almost all sectors including environmental disputes. Optimists still hope that in the near future in Bangladesh ADR will be popular in all legal disputes including environmental ones.
Conclusion

ADR has been proved to be a creative and cutting-edge technique in all civil suits throughout the world. Recent trends of resolution of environmental disputes are also carried out by the same way in most Environmental Courts and Tribunals across the globe. Environmental ADR is a bit risky but it can enhance access to justice for all parties, and particularly for the impoverished, by reducing costs, speeding the process, developing better solutions that are available from the judge, and assuring a more level playing field. There has been a movement of ADR all over the world as alternative to formal adjudication systems. Although it cannot be a substitute for the formal adjudication system but can a complement to this. Protection and conservation of environment in a developing country like Bangladesh is a perennial challenge in the pervasive importance of man-nature relationship. Environmental case management is a piercing threat to the environment of the country, but ADR as a means of coordinated and concerted efforts can serve the common purpose to resolve the environmental disputes but huge caution to be taken otherwise environmental justice can be a nightmare. Developed countries first opposed the notion of ADR in environmental disputes but later accepted the mechanism as part its deontological value. So, inclusion of the provision of ADR in ECA, 2010 is a good gesture but materialization of its spirit is more important for the present and future generation for expediting their efforts towards environmental protection and conservation avoiding litigation as zero sum game.

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