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Going Green in Urbanisation Area: Environmental alternative dispute resolution as an option

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Abstract

The paper argues that though environment court is an important development in the court system in Malaysia, settlement via alternative dispute resolution (ADR) methods can be promising options available to all stakeholders involved in urbanisation era, i.e. developers, government agencies and citizens at large. Using the comparative qualitative approach, this paper provides the methodology behind the proposed application of various environmental ADR. The paper concludes that environmental ADR provides citizens with a structured dispute settlement system that secures the developers, government agencies' and citizens' rights and mutual benefits even without going through traditional legal proceedings.

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Keywords: Alternative dispute resolution; environmental disputes; environmental ADR; administrative ADR

1. Introduction

Many countries have promoted the use of alternative dispute resolution (ADR) techniques for dispute resolution due to the attractive features of ADR. Some countries use administrative ADR whereby settlement of environmental disputes is through administrative bodies related to the environment. Some countries have organized systems of internal specialization in environmental matters where ADR is applicable in some of the environmental tribunals or courts. Literatures on environmental ADR remain sketchy whereby many writings focus on ADR, development of environmental laws and policies and quantitative analysis of success rate of ADR in development disputes (Wang, C. & Lin, Z., 2010; Florin,

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M.A., 2013; Knudsen, L.F. & Balna, S., 2014). In the absence of comprehensive discussion on the usage of ADR in environmental disputes at the administration and environmental tribunal and courts, this paper is to fill the gap.

2. Methodology

Using the comparative qualitative approach, this paper provides the methodology behind the proposed application of various environmental ADR.

3. Findings

3.1. Administrative ADR

In the United States, the use of environmental ADR has steadily increased since the successful resolution of the difficult dispute over flood control measures on the Snoqualmie River in Washington State (H. Sachihiko, 1988). Over the past two decades, the U.S. Congress has encouraged federal agencies to increase the use of consensual dispute resolution processes. This movement has been accelerated by Executive Order 13353–Cooperative Conservation. The U.S. Environmental Protection Agency recently has stated that it will strongly support the application of ADR to deal with disputes and potential conflicts (United States EPA, 2000).

Unlike United States, in Europe, environmental ADR had rarely been employed (Holzinger, 2000). However, the European Commission established basic principles for its practice in October 2004 and submitted a draft directive on mediation to the European parliament and the council. The directive declared the commission's belief that mediation holds untapped potential for resolving disputes and providing access to justice for individuals and businesses (Commission of the European Communities, 2002).

South Korea uses settlement of environmental disputes through administrative bodies. The central organisation, Environmental Dispute Resolution Commissions, a quasi-judicial organisation under the Ministry of Environment, rely primarily on mediation to resolve environmental complaints in a prompt, fair, and efficient way. This is important so as to preserve the environment and to relieve national damages of health and property (Article 4 of the Environmental Dispute Adjustment Act). As of 2008, the National Environmental Dispute Resolution Commission has dealt with 2,400 cases of environmental disputes since the introduction of environmental dispute resolution system in 1991, mostly via mediation (Cho, H.S., 2007-2008). The Prefectural Environmental Pollution Councils at the local level of organisation treated 314 of 351 cases (89 percent) by mediation. The use of mediation is increasing year by year (H. Sachihiko, 1988). Korea has been providing citizens with a structured environmental dispute settlement system that secures the citizens' rights and mutual benefits even without going through traditional legal proceedings.

Between 1991 and 2003, a total of 1,345 environmental disputes was reported and recorded 1,016 success settlements. The disputes arising from noise and vibration marked 859 cases, which accounted for 84% of the total number of disputes, followed by 97 cases regarding air pollution (10%) and 47 cases regarding water pollution (5%). Among the 1,016 settled cases, 830 negotiation outcomes (approximately 83%) were mutually accepted by the concerned parties. The Commissions aim to further to strengthen the expertise of the settlement coordinators while promoting scientific and structured negotiation procedures and increasing the transparency of the decision-making processes (Ministry of Environment, Korea, 2004).

A number of councils and committee such as the National Economic Consultative Council and the Malaysian Business Council are notable for environmental conservation and development in Malaysia. The establishment of the Department of Environment (DOE) in 1974 maintains environmental administration under the Ministry of Science, Technology and Environment (MOSTE). There are Enforcement Division Headquarters of the Department of Environment, Ministry of Natural Resources and Environment (DOE) which manage and handle cases of environmental pollution complaints. DOE State Offices carry out an investigation into alleged environmental contamination and provide advice to developers on the development of their projects. However, environmental issues in Malaysia are very much related to criminal sanctions and environmental disputes in Malaysia are very much settled via litigation process in court, for example, in the case of Kajing Tubek v Government of Malaysia [1997] 3 MLJ 23. It would appear that ADR function is not specifically mentioned in the various environmental-related departments.

Administrative ADR is an effective way to address environmental conflicts and to act as an alternative avenue to allow for adequate public participation in important environmental decision and to avoid costly litigation and extremely long process of litigation. (Emerson, K. et. al, 2003) In Malaysia, the avenue for administrative ADR indirectly can be seen in section 21(6) of the Town and Country Planning Act 1972. The statute provides that planning permission needs to be approved by the local planning authority. This administrative ADR accords an opportunity to the public to object to any proposed development from being carried out when there is no local plan approved or available in that particular area. As soon as after the receipt of an application for planning permission, the local planning authority shall take into consideration various factors. One of the factors are the objections made by the public (section 22(2)(c) of TCPA) whereby they submit their grounds of objection within twenty-one days of the date of service of the notice [section 21(7)]. Hence, before the local authority approves planning permission [section 21(6)], administrative ADR is best practice where upon receipt of the objection, the planning authority shall, within thirty days after the expiry of the objection period, conduct a hearing.

Decided cases for example Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors, Mentari Housing Development Sdn Bhd & Anor v Abdul Ghapor Hussin & Ors [2011] MLJU 1009 purported that planning permission approved by the planning authority was null and void. This is because no statutory hearing was ever held by the planning authority prior to the so-called planning permission. The decision of these cases proves that administrative ADR stands a very important role in solving environment disputes in planning development. Unfortunately, the practice of environmental ADR involving planning authority and the public is confined to the participation of public who is residing on the land adjoining to the land as illustrated in the case of Abdul Razak bin Ahmad v Majlis Bandaraya Johor Bahru (1995) 2 MLJ 287.

3.2. Modus operandi in environmental administrative ADR

In Japan, when environmental pollution problem arises, residents file complaints with their local government. If the local government decides to handle the case, Environment Pollution Complaint Counsellors hear residents' complaints and initiate the settlement process. (Shigeru, M., 2011) Hence, all pollution problems in Japan are initially recorded as complaints and become official disputes if counsellors fail to resolve them. When pollution compliant counsellors fail to resolve the problem, the Environmental Dispute Coordination Commission (EDCC) or the Prefectural Pollution Examination Commission (PPEC) assists the negotiation between the parties in the dispute. EDCC is an administrative commission established as an external agency of the Prime Minister's Office and consists of a chairman and six commissioners appointed by the Prime Minister. Most prefectures set up PPEC in accordance with the regulation. (Shigeru, M., 2011) EDCC and PPEC can appoint experts such as lawyers, engineers, and

scholars to investigate technical issues. EDCC handles inter-prefectural cases, grave cases, and cases with nationwide implications. PPEC handles the remaining cases.

In Japan, in the settlement of pollution disputes, EDCC provides conciliation, mediation, arbitration, and adjudication services; PPEC provides conciliation, mediation, and arbitration services. In conciliation services, conciliators appointed by EDCC or PPEC assist the negotiation, and as the most frequently used service, a committee consisting of the commission members provide mediation. If the disputants accept the committee's proposed solution, the agreement becomes a legally binding contract. (M. Shigeru, 2011)

A committee consisting of the commission members provides arbitration. In the arbitration process, the disputants are asked to waive their right to judicial appeals and to obey the judgment of the arbitration committee. Adjudication is available only from EDCC. The disputants agree on the methods of conciliation, mediation, and arbitration. On the other hand, the adjudication committee makes legal determinations of responsibility for damages. Local governments received 93,016 environmental complaints in 2000, and pollution counsellors resolved 76,931 of them. Of the remaining 16,085 complaints, 426 were transferred to the police; 1184 were transferred to the EDCC, and 10,295 were transferred into the next fiscal year. (M. Shigeru, 2011)

3.3. Administrative ADR and environmental policies and regulations

In Malaysia, the courts are unwilling to permit anyone to the right of the forum unless he was able to show violations of some personal rights. In other words, only a person who has suffered legal injury can maintain an action and no third party can be permitted to have access to the court to seek redress on behalf of the person injured. As such, environmentalists or non-profitable organisations could not petition in court on behalf of the public in the event of a violation of environmental rights. Hence, administrators of environmental agencies or even local councils can adopt environmental ADR in settlement of disputes brought by environmentalists or non-profitable organisations. Unlike Malaysia, excess to environmental justice is enlarged through the liberalisation of traditional locus standi rule in environmental matters in United States, India and Germany. This gave massive opportunities to environmental NGOs and civil society-at-large to approach the Court in public interest cases where the aggrieved persons were disadvantaged or difficult to ascertain. Hence, the application of ADR at the environmental administrative agencies can assist to negate the severe criticisms on the misuse of the public interest litigation concept. Indeed administrative ADR which allows public interest groups to bring up environmental issues aims at reducing the critics on judiciary's discretionary powers in accepting those actions the courts of a heavy burden of public interest cases, hence making environmental justice more accessible to the public.

In line with public interest litigation, in some countries, the widening of conferment of standing on individuals living within the area of land on which the environmental impact is being assessed could be better accomplished by the implementation of administrative ADR. Widening of the scope of individuals living within an Environmental Impact Assessment area have a concrete, specific interest (rather than abstract, general interest that any members of the general public can share with others) to be protected by the Environmental Impact Act that the developer is alleged to have violated. (Amirante, D., 2012)

Disputes solved via administrative ADR can be beneficial to the relevant administrative agency as it provides useful and specific information about environmental violations that the administrative agency must regulate. It alerts the administrative agency to the necessity of regulation not only of the accused violators but also the industry as a whole. However, too much precautionary regulations should be avoided so that administrative controls would not deter free economic activities. In this context, the administrative ADRs come to be a good means for the administrative agencies to find out where an environmental problem is and to regulate industries in order to avoid violations.

3.4. Development of environmental courts and tribunals

The first decade of the 21st Century witnessed an astonishing growth of environmental courts and tribunals. A recent comprehensive and updated study found that as of September 2010, there were approximately 360 environmental courts and tribunals all around the world, with the majority of them created in the last five years (Pring, G. & Pring, C., 2010)

China's on-going institutional reform process has set up an articulate system of Environmental Tribunals at the regional and local levels. Other Asian States have organized systems of internal specialization in environmental matters. For example, Philippines has extremely comprehensive system of 117 local and regional trial (environmental) courts established by the Supreme Court's rules, and Indonesia has established a system of an informal specialization of single judges. The Indian sub-continent has an established tradition of public interest environmental litigation. There is also progressive development of Environmental Tribunal and Environmental Courts in Pakistan and some reforms in Bangladesh.

The United States have only one environmental court, i.e. the State of Vermont Environmental Court and a cluster of quasi-judicial institutions disseminated in different states. In Malaysia, on 14 January 2012, the Chief Justice Tun Ariffin Zakaria announced the setting up the environmental courts. The environmental courts start operation on 10 September 2012. However, the jurisdiction of an environmental court in Malaysia only covers specific environmental offences within the purview of 38 Acts and 17 Regulations. The specialised Environment Court is effectively implemented in Malaysia on 10 September 2012. Among others, the Acts concerned are the International Trade in Endangered Species Act 2008, Atomic Energy Licensing Act 1984, Waters Act 1920, Drainage Works Act 1954, Sewerage Services Act 1993, Fisheries Act 1985, Wild Conservation Act 2010 and Irrigation Areas Act 1953. Whereas the regulations involved among others are the Environmental Quality (Clean Air) Regulation 1978, Environmental Quality (Prescribed Premises)(Raw Natural Rubber) Regulations 1978, Environmental Quality (Motor Vehicle Noise) Regulations 1987 and Environmental Quality (Control Of Emission From Diesel Engines) Regulations 1996. Environmental Quality (Refrigerant Management) Regulations 1999 In Peninsular Malaysia, environmental cases must be concluded within six months of the charged date the offender. In Sabah and Sarawak, cases should be concluded within three months and six months consecutively.

3.5. Mediation/reconciliation in environmental court/tribunal

The Law Commission of Indian Report provides access to environmental justice via ADR, specifically powers of mediation. In New Zealand, the right of appeal to the environmental court, commonly referred to as adjudicator of sustainability; extends to any person who makes a submission on resource-consent decisions (i.e. to third parties) and to applicants. Hence, the Court may ask one or more of its Environment Commissioners to conduct mediation or reconciliation to resolve the dispute. (Amirante, D., 2012)

The courts in Malaysia have embarked on the practice of mediation as one of the forms of ADR. However, this practice is not applicable for the environmental courts. This is because the jurisdiction of environmental courts is only confined to specifically environmental offences under the specified 38 Acts and 17 Regulations. Moreover, the practice of ADR is only applicable for civil disputes. Hence, the Practice Direction No 5 of 2010, Practice Direction on Mediation by the Chief Registrar of the Federal Court of Malaysia which came into effect on 16 August 2010, should be extended to cover mediation in areas of breach of environmental statutes.

The Practice Direction in Malaysia is used in the event settlement of civil disputes via ADR between victims of environmental violators and the environmental violators in normal courts. The Practice

Direction allows for two choices of mediation; the judge-led mediation or the mediation to be conducted by the Malaysian Mediation Centre (MMC) under the auspices of the Malaysian Bar Council. In the judge-led mediation, if mediation is successful, the Judge mediating shall record a consent judgment on the terms agreed by parties. In the mediation by MMC, a successful mediation will be reduced into writing in a Settlement Agreement signed by parties and similar to the judge-led mediation, parties are then mandated to record the terms of the settlement as a consent judgment. However, in the case where parties fail to reach a settlement in the judge-led mediation, the case will revert to the original judge to hear and complete the case.

3.6. Composition of non-legal environmental scientific experts

The Swedish environmental courts require environmental experts, where the decision makers of the courts include non-lawyer, scientific-technical experts. The Swedish system assumes that the burden of investigation rests on the decision-making body, which takes an inquisitorial approach (Amirante, D., 2012). Similar environmental experts are also available in the Austrian system; however, the Independent Environmental Senate, which, is comprised of ten judges and thirty-two legal specialists is only confined to cases concerning the Environmental Impact Assessment Act, and its caseload is very limited (Lavrysen, L. & Geytere, L.D., 2004). In the United States, the Environmental Court of Vermon is competent to appoint independent experts who are responsible to the court (Pring, G. & Pring C., 2009).

In India, the first case dates back to 1986 and refers to the need to involve non-legal experts drawn from the scientific field in the solution of environmental litigation. The Indian National Green Tribunal, established on 18 October 2010 comprises of minimum composition of the Tribunal, vary from 21 to 41 members: a chairperson (judicial), 10 to 20 full-time judicial members, 10 to 20 expert members, all chosen by the Central Government. There is a strict requirement of a balanced mix of strict qualified judges and technical experts. The qualifications of green judges include academic and experience – they must be holders of a Master in Science with a Doctorate (in the fields of physical sciences and life sciences) or a Master of Engineering or Technology. They also need to have a minimum of fifteen years of experience in a relevant field, including five years of practical experience in the field of environment and forest [section 5(2)(a) of the National Green Tribunal Act 2010]. The experts may also come from the administrative filed. They need to have administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or a State Government. Experience in a reputed National or State level institution is also counted, and members from civil society organizations (NGOs and others) as not excluded from the list. Some observe that the scientific experts are confined in the field of science, engineering, or technology and deserve some criticism due to the broad environmental issues. However, maybe this concern is addressed where anyone or more persons can be invited by the Tribunal to assist the Tribunal on case-to-case basis, as per decided by the Chairman [section 4(2)].

In Malaysia, the requirement of environmental experts is obvious where the experts assist the court in giving their opinions in the process of examination and cross-examination. However, the scientific-technical experts are not the decision makers of the environmental courts, unlike in Sweden and India. As discussed earlier, the courts in Malaysia have embarked on the practice of mediation as a one of the forms of ADR through the issuance of a Practice Direction No 5 of 2010, Practice Direction on Mediation on all civil litigation. Hence, ADR can better be performed by scientific-technical experts especially when the method of ADR used is facilitative mediator or evaluative mediation.

3.7. Procedures in green tribunal

In India, an application for relief and compensation under the National Green Tribunal Act 2010 has to be made within five years from the initial cause of action and compensation is payable under those persons specified in Schedule II. The National Green Tribunal in India has a unique feature i.e. it is free to devise its own procedures since environmental issues involve complex bio-chemical and ecological processes. This is to avoid the rigidity of Civil Procedure Code and the Indian Evidence Act for collection and recording of evidence may not be suitable for making a just and fair assessment of loss to the environment in such complex proceedings. (Bakshi, P. & Yadav, M., 2011)

The National Green Tribunal has the power of the Civil Court in respect of summoning, enforcing attendance, receiving evidence on affidavits, examining on oath, and granting ex parte and interim orders and injunctions. The National Green Tribunal Act integrated strict liability, precautionary and polluter pay as part of Sustainable Development management through stare decisis. Civil courts honour the National Green Tribunal orders and award the costs the National Green Tribunal declares appropriately. (Bakshi P. & Yadav, M., 2011) Although the jurisdiction of the environmental courts in Malaysia is wide, however the environmental courts do not enjoy the flexibility in procedures as experienced by the environmental tribunals in India. However, the judge-led mediation concept applied in environmental civil litigation enjoys flexibilities in operation.

4. Discussion

The better scenario in environmental ADR services is ranging from legal to non-legal mediators with various backgrounds that suit environmental issues. Disputing parties appreciate that the way of dispute resolution and the resulted private ordering can vary, depending on the individual situation and priorities and that the private ordering by the disputants themselves empowers them and brings better tailor-made results for them. This scenario may require the integration of the images of ADR and rule of law in countries which administer administrative, environmental ADR and specialised environmental courts or tribunals. This paper also points out the necessity to liberalize the rules for the access to environmental courts. For countries that strictly apply the locus standi concept like Malaysia, administrative ADR can offer a better solution for the implementation of public interest litigation in environmental disputes. Administrative ADR also assists in the widening scope of persons who could participate in public consultation relating to Environmental Impact Assessment.

5. Conclusion

Application of administrative ADR helps to uncover potential environmental disputes between the developer and the public at a much earlier stage, when they are easier to resolve, and that makes a positive contribution to the resolution of environmental disputes. Environmental ADR is indeed in line with international environmental principles and Islamic principles such as the precautionary principles, the environmental impact assessment and the polluter pays principles.

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