Mediation for Environmental Disputes in India

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Dhruv Shekhar (O.P. Jindal Global University, Jindal Global Law School)

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The judgment by the Uttarakhand High Court granting entities such as the River Ganga, River Yamuna and more recently the Yamnotri [fn] *Mohd. Salim* v. *State of Uttrakhand and Ors,* W.P.PIL No. 126 of 2014 [/fn] and Gangotri glaciers [fn] *Lalit Miglani* v. *State of Uttarakhand*, W.P.PIL No. 140 of 2015 [/fn] the status of legal personality under Articles 48-A & 51 A(g) of India's constitution was met with loud support. This judgment, delivered mere days after New Zealand's passing of the Te Awa Tupua Bill which granted legal personality to the Whanganui River (as discussed in Ian Macduff's recent post), couldn't have come at a more opportune time.
While this is clearly an enthusing development, it is not the first case which has decreed desecrating rivers as illegal [fn] *Krishan Kant Singh Anr v. National Ganga River Basin* Original. Application No. 299/2013 (presented before the National Green Tribunal) [/fn] and simultaneously appears ignorant of certain practical realities at play. The estimated daily amount of untreated sewage entering the rivers is placed at 5bn litres along with 500m litres of industrial waste. This will not stop overnight, irrespective of the courts granting the status of legal person to these entities.

An important corollary of this chain of events could be the potential shutdown of the operations of industries and enterprises which are set on the banks of these rivers. While previous judgments such as the Krishan Kant Singh case have already deemed the actions of these industries illegal, the effect of granting these water bodies the status of a legal person should in theory have a greater impact than the previous decisions. However, what the state may fail to realize is that, in the rush for sustainable development, it might ignore not only the practical realities behind implementing the court's order but also fail to recognize the livelihood of people that might be lost. Such action might result in a raft of public interest litigation for the disgruntled and dislocated factory owners and workers.

In principle the decision of the High Court follows the Te Awa Tupua Bill, however if the state truly wishes to follow the initiative of the New Zealand government then it is essential for it to identify the actual stakeholders in the matter. Rather than merely handing over the control and liabilities to an assortment of government officials, it is essential that the government works together with the very same denizens who are contributing to the unchartered pollution of the rivers.

It is here that the route of mediation comes into play to achieve an effective resolution. Unlike the traditional gamut of litigation which employs the concept of adjudication, assessment of evidence and then a final judgment on the matter, mediation provides the parties with a greater degree of control on the procedure employed in the resolution of the matter.

The principles of confidentiality (regarding the information shared in the mediation sessions) and the voluntary nature (parties can opt in/opt out from the procedure) of the process make it a unique prospect within the myriad of Alternative/Appropriate Dispute Resolution (ADR) processes.

Specific to the realm of environmental disputes, there have been attempts in the past to establish exclusive mediation centers. Back in 2001, the Kentucky India Project was set up, however it proved to be unsuccessful as mediation was yet to evolve fully in India. Having an immediate impact in the contentious sphere of environmental disputes was a well-intentioned yet a far-fetched thought at that given point in time.

The question to ask is: what is different 16 years on? For starters, we see the general expansion of mediation in the country. From the establishment of the mediation center by the Madras High Court in 2001 to the effective and frequent recourse to mediation in a wide array of family and commercial disputes, we see the growth of this mechanism of dispute resolution.

Furthermore, the extensively lengthy nature of environmental disputes in the country is another factor. An example is the Cauvery Water Dispute which has been an ongoing matter which has engulfed the southern part of the country since 1892. Violent protests in Karnataka concerning this matter in September 2016 demonstrate the importance of environmental matters to the public and their wider political and economic resonance.

Furthermore the issue of the costs of proceedings, the time-consuming nature and unpredictability of the final outcomes and lastly the absence of a mutually beneficial ground being reached make the traditional methods of adjudication an impractical approach to resolve disputes in a timtely manner.

In contrast, mediation offers a plethora of advantages. As a technique reliant on direct communication, it reduces the risk of creating fractures between parties in the way litigation tends to. On the contrary it allows for parties to view a dispute from various vantage points, allowing them to examine the dispute from a point of view other than their own. Additionally, individuals who are skilled in specific sectors or matters can act as mediators. This ensures that not only are parties able to find solutions which are mutually beneficial but can also be guided by subject experts.

Furthermore, mediation as a recourse to resolving environmental disputes is not unprecedented, with one of the earliest mediations of an environmental dispute taking place in the United States in 1973. The Snoqualimie river mediation dealt with a dispute regarding the decision to dam a flood-prone river. Residents of the area contested this decision on the grounds of it impacting the pristine wilderness of the area. The mediation proved successful as a consensus was reached which allowed for the dam to be built on a smaller portion of land providing protection to farmers and also not completely eroding the environment.

In the years since the Snoqualimie river mediation other nations such as China [fn] In China, the Department of Environmental Protection Administration mediates disputes as stipulated by laws relating to environmental protection. [/fn], Australia, Thailand and Canada have used mediation as a mechanism for dispute resolution for environmental disputes. Along with these developments, mediation has found further support in various treaties and international charters such as the United Nation Convention On Laws Of The Sea (UNCLOS), Vienna Convention for Protection of the Ozone Layer and the WTO dispute Settlement Regime amongst others.

Indeed, there have been widespread legislative efforts across the world to promote mediation as a tool in resolving environmental disputes. In the United States the Environmental Policy And Conflict Resolution Act of 1998 created the United States Institute for Environmental Conflict Resolution. The EU, in the year 2002, advocated for the 6th Environment Action Programme of the European Community (2002-2012) for effective use of ADR and mediation in the area of environmental disputes within the EU countries. And Israel established a Joint Environmental Mediator training program which employed both Israeli and Palestinian mediators.

All in all, the road for mediation in environmental disputes appears bright. While there is no certainty that employing mediation will lead to the resolution of environmental disputes, upon examining the numerous and already exhausted options as well as the various advantages provided by mediation, it certainly appears like an attractive option to try. In addition to the previously mentioned scenarios and cases in India, there are other matters such as the purported stoppage of construction of the Koodankulum Nuclear Power Plant and the Subansiri Lower Dam. These matters, if contested in a litigation battle, are likely to leave one side empty handed thus providing basis for further discord.

Thus it is scenarios such as these in which the government has to act as an enabler to allow for Indian citizens to take control of the management of their own natural resources. Mediation here, as already illustrated, could play a pivotal role. It is therefore essential that the government gives a nationwide push to the practice of mediation which would ensure that instead of being looked at as an alternative means it is looked at as an appropriate means of dispute resolution. For if the intent of the state regime is to ensure the conservation of natural resources, it will have to go beyond merely making laws and setting up governing bodies. Instead focus should be employed on identifying the right stakeholders and empowering them with mediation as being the first step to achieve such conservation.