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Research Article

THE ROLE OF MEDIATION AS AN ALTERNATIVE METHOD OF CONFLICT RESOLUTION, THE ESSENCE AND PRINCIPLES OF MEDIATION

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ABSTRACT

This article analyzes the essence of mediation, its importance in international law, its role in conflict resolution, the difference between international and national legislation on mediation, and the importance of mediation principles for the legal resolution of disputes.

KEYWORDS

Mediation, third party, conflict resolution, mediation process, voluntary and involuntary participation, confidentiality.

INTRODUCTION

Definition and essence of mediation

Mediation refers to an approach to conflict management in which a third party, which is not a direct party to the dispute, helps disputants through their negotiations and does so in a non-binding fashion. The overall aim of mediation is to stop violence and establish peaceful relations between conflicting parties. However, there appears to be no consensus on the definition of mediation, as mediation and mediator roles have been understood differently by various scholars and have different meanings in different religious-cultural contexts.[1] Therefore, in Mediation, a third party who is not a direct party to the dispute resolves disputes through negotiation and does so in a non-binding manner. The general goal of mediation is to stop the violence and find a peaceful solution between the disputing parties.

Mediation is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute. [2] It follows that in a Mediation Agreement, the third party will not have any decision-making authority and will provide a solution to the problem by intervening in the dispute on an acceptable, impartial and neutral basis.

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Mediation is a process intended to dissolve a conflict or dispute with participation of a third party, namely a mediator, accepted by all participants. The mediator is not the one who makes the decision for the participants of the conflict, but rather an individual who acts as an intermediary with a purpose to improve relations and communication.

Mediation is one of the alternative dispute resolution methods, abbreviated to ADR. Mediation, as a different form of conflict resolution, provides persons with a possibility to talk to each other, and offers knowledge by looking on the conflict from numerous points of view. [3] The third party accepted in the mediation process is proposed by the disputants on the basis of their consent. He does not make a decision in the mediation process as mentioned above, but helps the two disputing parties to find a solution to the problem without the intervention of the court. In this case, the parties listen to each other and negotiate to find alternative solutions to the dispute.

The United States District Court for the Eastern District of New York, for example, defines mediation as a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy. [4]

Based on the above definition, it can be provided that the Mediation process helps to improve the communication between the parties, the parties to express their interests and understand the interests of the other party, to identify the areas of agreement and to develop options for mutually agreed resolution of the dispute.

A distinctive feature of mediation is its ability to expand upon traditional settlement discussions and to expand resolution options by exploring claimant claims and interests that may often be formally independent of the legal issues in dispute.

Mediation is a voluntary endeavour in which the consent of the parties is critical for a viable process and a durable outcome. The role of the mediator is influenced by the nature of the relationship with the parties: mediators usually have significant room to make procedural proposals and to manage the process, whereas the scope for substantive proposals varies and can change over time.

Rather than being a series of ad hoc diplomatic engagements, mediation is a flexible but structured undertaking. It starts from the moment the mediator engages with the conflict parties and other stakeholders to prepare for a process – and can include informal "talks – abouttalks" – and may extend beyond the signing of agreements, even though the function of facilitating the implementation of an agreement may best be performed by others.

An effective mediation process responds to the specificity of the conflict. It takes into account the causes and dynamics of the conflict, the positions, interests and coherence of the parties, the needs of

the broader society, as well as the regional and international environments. [5]

Importance of mediation in the international law

Mediation plays an important role in conflict and conflict resolution in a variety of contexts, from interpersonal relationships to international diplomacy. Mediation is a form of conflict resolution in international politics which stresses the vital role of a third party in the process of creating peace and facilitating agreement between erstwhile disputing actors. Mediation plays a prominent role in contemporary international affairs. Whenever some historic or epoch-making international events make the news headlines a mediator has often played a role in the shaping of events. The prominence of this type of international politics, where a few individuals make decisions which can affect the lives of millions, entails the need for serious critical analysis and debate within International Relations theory. [6]

The importance of mediation is not only in interpersonal relations, but also in diplomacy between countries, where countries resolve various conflicts and disputes through the intervention of a third party. Third-party dispute resolution also helps to maintain their reputation in the international arena.

In addition to that, Mediation is a voluntary process in which the parties take part in voluntarily. This allows them to actively participate with each other in finding valuable solutions rather than making decisions. This collaborative approach helps the parties in the resolution process to listen to each other to solve the problem based on the situation. Besides, mediation does not focus only on legal outcomes, but also on saving and restoring relationships. It provides a safe and neutral space for parties to express their concerns, interests and perspectives. By facilitating constructive communication, mediation can help restore trust and foster long-term partnerships.

Moses, in her own book named “The Principle and Practice of International Commercial Arbitration”, provided that Mediation differs from arbitration because it is nonbinding. An arbitral institution is likely to have rules for mediation as well as rules for arbitration. A mediator will try to make sure each party understands the other’s point of view, will meet with each party privately and listen to their respective viewpoints, stress common interests, and try to help them reach a settlement. [7]

Compared to traditional litigation or arbitration, mediation typically resolves disputes in a faster and more cost-effective manner. This avoids lengthy litigation, reduces litigation costs, and offers flexibility in planning and process design. Mediation can be particularly useful for businesses, individuals, large business firms and commercial institutions looking to save time and resources.

Mediation is by far the most common form of peaceful third-party intervention in international conflicts. It is predicated on the need to supplement conflict management, not to supplant the parties’ own efforts.

Although mediation has become an integral part of many systems (e.g. labor-management, family disputes), it is a form of conflict management that is particularly well-suited to the international environment with its numerous and diverse political actors all interacting to achieve scarce resources or influence, and where each guards its interests and autonomy jealously and accepts any outside interference in their affairs only if it is strictly necessary and explicitly circumscribed. Mediation is both voluntary and peaceful, and this makes it an attractive option for many states. [8]

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Mediation is confidential. There is usually a provision in the chosen rules that no disclosure made during the mediation can be used at the next level of the dispute, whether arbitration or litigation. If the rules do not provide for this, then there should be an agreement in writing to the effect that anything disclosed in the mediation process cannot be used at the next level, except to the extent it comes in through documents not created for the mediation. [7] It follows that this confidentiality allows the parties to freely express their opinions, concerns and settlement proposals without fear of public disclosure. Maintaining confidentiality helps protect sensitive information, preserve the reputation of the parties, and promote open communication in mediation sessions.

We view mediation as a form of joint decision-making in conflict in which an outsider controls some aspects of the process, or indeed the outcome, but ultimate decision-making power remains with the disputants. Mediation is best seen as an extension of bilateral conflict management. It is a rational, political, though at times risky, process with anticipated costs (e.g. time spent mediating) and benefits (e.g. achieving a reputation as a successful mediator). It operates within a system of exchange and social influence whose parameters are the actors, their communication, expectations, experience, resources, interests and the situation within which they all find themselves. Mediation is a reciprocal process; it influences, and is in turn influenced by and responsive to, the context, parties, issues, history and environment of a conflict. All these aspects shape and influence the selection, process and outcome of mediation. [8]

Mediation can occur at any time in the dispute. If parties get to a point in litigation, or in arbitration, where they want to settle, and need some help, they can get a mediator. Mediators are also sometimes used in the negotiation stage of a contract, when negotiations have reached an impasse, but both parties actually want the deal to go through. Because mediators try to understand and reconcile the interests of the parties, mediation is sometimes referred to as an interest-based procedure, while arbitration is referred to as a rights-based procedure. [7]

Mediation provides an opportunity for the parties to actively participate in the resolution of their disputes. They have the opportunity to express their needs and interests directly to each other. This sense of agency and self-determination leads to greater satisfaction with the outcome and adherence to the final agreement.

Principles of mediation in the international law system

There are several important principles of mediation in the international framework, which play an important role in the peaceful resolution of disputes. These principles consist of confidentiality, voluntariness, cooperation and equal rights of the parties, independence and impartiality of the mediator, and help the disputing parties and the mediator to see the dispute fairly.

The draft law "On Mediation" contains the principles of voluntariness, equality of arms, neutrality and impartiality, confidentiality. Experts in the field of mediation suggest the possibility of continuing the discussion on the qualitative and quantitative composition of those principles that are not reflected in Art. 3 of the draft law "On Mediation" and are derived from the general content of the legislation (dispositiveness, mutual respect of the parties, neutrality of the mediator, transparency of the procedure and others). [9]

International documents and national legislation provide information about the principle of

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confidentiality of mediation, and the national legislation of Uzbekistan provides: mediation participants do not have the right to disclose the information that became known to them during the mediation process without the written consent of the mediating party that provided them, its legal successor or representative. [10]

Mediation is confidential. There is usually a provision in the chosen rules that no disclosure made during the mediation can be used at the next level of the dispute, whether arbitration or litigation. If the rules do not provide for this, then there should be an agreement in writing to the effect that anything disclosed in the mediation process cannot be used at the next level, except to the extent it comes in through documents not created for the mediation. [7]

Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly... If discussions with the mediator are not confidential and privileged, the mediation process, the mediator's role and the potential for resolution are significantly diminished. [11]

The draft law "On Mediation" contains the principles of voluntariness, equality of arms, neutrality and impartiality, confidentiality. Experts in the field of mediation suggest the possibility of continuing the discussion on the qualitative and quantitative composition of those principles that are not reflected in Art. 3 of the draft law "On Mediation" and are derived from the general content of the legislation (dispositiveness, mutual respect of the parties, neutrality of the mediator, transparency of the procedure and others). [9] Additionally, any involuntary action is prohibited during the mediation process, and the parties and the third party participate voluntarily in the process. Mediation parties have the right to withdraw from mediation at any stage. The parties are free to choose the issues to discuss a mutually acceptable agreement. It is prohibited to force conciliation during the implementation of the mediation procedure. [10]

It is a fact that the mediator should be liked and respected, as the conflict participants feel affection to such a person. A good mediator consists of both personality and knowledge. However, a mediator is an outside person who resolves or attempts to resolve conflicts, and therefore must adhere to the mediator's work ethics, rules and principles. [12] In the mediation process, the independence of the mediator who resolves the dispute plays an important role, and no one is allowed to interfere in his activities.

The mediator must be impartial, implement the mediation procedure in the interests of the parties and ensure their equal participation in the mediation, and create the necessary conditions for the parties to fulfill their obligations and exercise their rights. If there are circumstances that hinder the mediator's independence and impartiality, he should refrain from carrying out the mediation procedure. [10]

Problems and solutions in the Mediation Process

There are some problems in mediation process, they include lack of willingness to participate, power imbalance, lack of trust, communication and mediator neutrality. As regards mediator neutrality in mediation, mediators should remain neutral and impartial during the process.

Any perceived bias or lack of neutrality can erode parties' confidence and trust in the mediator and result

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in an unsuccessful mediation. It is crucial for a mediator to continuously uphold their neutrality and manage their own biases.

The dilemma of even-handedness (that it could lead to unequal outcomes) focuses attention on the fact and dynamic of the parties' relationship with each other. The problem of neutrality in this context is identified as the problem of redressing imbalances of power as between the parties. Redressing power imbalances focuses attention on the activity of the mediator in relation to both parties (although the objective would be to influence the relationship between them). [13]

A power imbalance between the parties can lead to difficulties in mediation. If one party has significantly more power or influence, this can affect the dynamics of mediation and the ability to reach a fair and balanced agreement. The mediator must address and manage these imbalances to ensure equal participation and a level playing field.

If there is a history of mistrust, miscommunication, or conflict escalation, it can be challenging to establish open and honest dialogue. The mediator plays a crucial role in facilitating trusting relationships and fostering effective communication.

Effective mediation requires a supportive external environment; most conflicts have a strong regional and international dimension. The actions of other States can help to reinforce a mediated solution or detract from it.

A mediator needs to withstand external pressures and avoid unrealistic deadlines while also developing the support of partners for the mediation effort. In some circumstances the mediator's ability to harness incentives or disincentives offered by other actors can be helpful to encourage the parties' commitment to a peace process. [14]

Mediation requires the voluntary participation of all participants. If one or more parties are not genuinely committed to the process or have low motivation to work towards a resolution, this can hinder the progress and effectiveness of the mediation.

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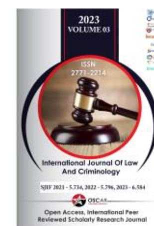

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