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THE ORIGINS AND THE DEVELOPMENT OF MEDIATION

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Abstract

Mediation is becoming more and more popular as a way for a peaceful settlement of disputes and conflict situations. Basically, mediation is some good offices in resolving various conflicts and arguments. To carry out an integrated and comprehensive study of mediation, we need to examine its origins, the history of development from ancient times and the modern state of mediation development in the world. The article describes the background for the emergence of conciliation helped by a mediator as well as the stages in the development of this institution. Mediation became widespread in the XX century, especially in common law countries. The author of this article has considered in detail the development of mediation in the USA as this country is rightly regarded as the birthplace of mediation in its modern sense. At the end of the XX century, mediation gained international recognition, while at the beginning of the XXI century it became the fact of international law and international relationships. First, mediation is gaining an active use to settle, interstate, ethnic, racial, trade, and war conflicts. Second, mediation received its international legal implementation in the form of Model Law on International Commercial Conciliation (UNICITRAL) and the European Code of Conduct for Mediators. The document serves a unified and effective base for enforcing international world agreements resulting from mediation. Thus, the scope of mediation application is growing year by year with the support of the international community.

Keywords: Mediation, dispute resolution, history, modern mediation.

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1. Introduction

Mediation appeared at the same time as conflicts. Of course, we cannot say that this method of dispute settlement was used in ancient times in the same way as it is used now. However, the content of mediation principles and methods has virtually remained unchanged in the course of time.

The word “mediation” is of Latin origin. Some scientists believe this term proceeds from the word “mediare” which means “to mediate”, while others see «medius» or «medium», which means “in the middle”, as the origin. It is here where the essence of mediation comes from – it involves a mediator directly.

2. Problem Statement

After analyzing multiple publications on the history and theory of mediation, the author found that some scientists think the main idea of mediation is of archaic origin. The other group of scientists believes mediation appeared only in the middle of the XX century.

The two groups also disagree on the birthplace of mediation. The latter group states that mediation appeared in the USA and then spread to Europe, while the former group indicates that mediation is a part of the culture in any society.

3. Research Questions

Global social, cultural, political, and economic transformations bring new methods to manage the relationships between people. Each historical period had its specific methods for conflict settlement. For example, brute force was the main way to resolve conflicts in primitive societies. The Antiquity and the Middle Ages saw the prevalence of the “inherited authority force” and then the “force of people in power”.

The development of conflict resolution methods is not linear as it depends on the prevalence of various trends in society. That’s why we can say with confidence that the participation of a third party in dispute settlement is not new. However, the content of this process has been subject to changes in time.

4. Purpose of the Study

The objectives of the research are:

1. Determine the historical background for the emergence and development of mediation as a method for alternative dispute settlement.

2. Study the way mediation developed in the USA.

3. Analyze basic international and European acts, governing the use of mediation.

5. Research Methods

The research is based on historical, formal, and comparative legal methods.

The historical method allowed us to show the consistent establishment and development of the mediation institution.

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The comparative method was used to study the legislation and practices for applying this procedure, as well as models of its legal regulation.

The synchronic and diachronic comparative methods allowed us to find problematic issues in the mediation integration, as well as particular features of objective conditions in the development of the mediation institution.

6. Findings

Confucius, who lived in Ancient China, used to say that conflicts should be resolved by searching for mutual understanding. He encouraged conflicting parties to use the help of a mediator instead of immediately going to court.

We should note that the People's Republic of China has been actively practicing mediation to resolve conflicts and agreements since ancient times. For example, it is mentioned in documents that are 4 000 years old (Cao, 1999).

A peculiar legal culture, as well as religious traditions, have contributed to the fact that since ancient times Chinese prefer mediation and relations built on the basis of moral norms to legal means for regulating social relationships (Kovach, 2013). According to experts, about 30 % of modern-day arguments in China are resolved by extrajudicial remedies (Kurnosova, 2017).

Mediation has evolved rapidly in the regions with developed trade. The roots of modern mediation go back to the Phoenician civilization where sea trade was the main activity.

Disputes that arose between two ancient city-states were settled by a mediator, i.e. another city. For example, the conflict between Athens and Sparta, which were the largest cities, could be resolved by any small Greek town acting as a mediator (Bessemer, 2005).

It's noteworthy that provisions on mediators were implemented in the law of ancient Rome (530–533), which was one of the leading civilizations in the ancient world.

The Middle Ages saw a dramatic increase in the development of mediation. For example, during the Thirty Years' War (1618–1648) involving almost all European countries a series of peace treaties were signed with the direct participation of a third party. In 1629 Sweden and the Polish-Lithuanian Commonwealth signed the Truce of Altmark with England, France, and Holland acting as mediators.

Next was the Act of Mediation signed in the modern period. At that time, continuous revolts in Switzerland made the country adopt a federal constitution under the mediation of Napoleon Bonaparte in 1803. This constitution was a kind of compromise between new and old orders.

Mediation became especially popular in the USA in the 1920s and 1930s, especially due to shortcomings and low efficiency of the judicial system.

In 1947 the US government established the Federal Mediation and Conciliation Service (FMCS).

It's noteworthy that it's the USA where the institution of mediation appeared in the XX century.

In 1964 the country established the Community Relation Service (CRS) that acts as a peacemaker for community conflicts and tensions arising from differences of race, color, national origin, gender, gender identity, sexual orientation, religion, and disability. This service is still functioning as part of the US Department of Justice.

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In the late 60s – early 70s such private organizations as Community Mediation and Neighborhood Justice Centers appeared in the USA. Their aim was to resolve the arguments among family members, neighbors, and low-income citizens.

In the 70s mediation became a widespread and publicly available procedure in the US. The number of information and consultation centers providing mediation services was rapidly growing. Nowadays, there are more than 700 such organizations in the USA (Mavrin, 2014).

One event that triggered popularization and active implementation of alternative methods for dispute settlement was the Pound Conference held in the USA in 1976. The importance of this conference is in the fact that it gave birth to the movement for alternative dispute resolution in the USA (Nosyreva, 2005).

Courts stopped to be the place for judicial proceedings only and started to perform the functions of centers where parties could find resources for more effective addressing and resolution of conflicts. This included arbitration programme carried out in courts or forwarding a case to a non-for-profit mediation organization.

The first use of mediation procedure in the US was in the City of Elkhart, Indiana in 1978. It was used on the initiative of Mennonites (Umbreit, 1992).

In the same year, mediation was used to resolve international conflict. An agreement that established peace between Israel and Egypt was signed in Camp David with the mediation of Jimmy Carter.

The implementation of mediation in the civil sphere, in particular family law, dates back to 1981. In California, mediation was used to resolve arguments related to custody of children and communication with children.

Starting from the 1980s, mediation quickly and strongly establishes as a way to resolve conflicts all over North America, some European countries, India, and Australia.

After the U.S. Congress adopted the legal act on civil proceedings reform in 1990, the federal judicial branch had to stimulate the use of alternative methods of dispute settlement, including mediation. Thus, the laws of states gave judges broad rights aimed at the active use of mediation services by the conflict parties.

Concurrently, this method of legal dispute settlement evolved in the extrajudicial sphere. We can say with confidence that mediation has fully integrated into the US legal culture.

The institution of mediation has gained global acclaim after the first international conference on mediation held in Austria in 1999 (Kulapov, 2013). This event brought together mediation specialists from all over the world and stimulated the distribution of new professional practice and the development of professional identity.

Second, the Model Law on International Commercial Conciliation (UNICITRAL), recommended by the UN General Assembly in 2002, was implemented in the international law as well as the European Code of Conduct for Mediators that was elaborated for EU member-states by the group of practicing mediation experts assisted by the European Commission and adopted on the 2nd of June 2004 in Brussels (Belgium).

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The Model Law aims at implementing the procedures of extrajudicial settlement of disputes in international commercial relations with the help of a mediator.

The European Code of Conduct for Mediators aims at all types of mediation in both civil and commercial cases. Also, the Code presents principles that a mediator must follow.

There are also other regulations on mediation, adopted by some international institutions despite their priority for third-party (arbitral) dispute settlement. Such projects establish standards in the sphere, simultaneously showing some peculiar features of mediation (e.g. national specificity) (Allahverdova & Ivanova, 2007).

The United Nations Charter defines mediation as a way to resolve legal disputes and conflict situations (article 33). According to the resolutions of this international organization, mediation is used in global and domestic practice as an alternative for judicial processes.

Besides, the scope of mediation application is growing year by year with the support of the international community. For example, in 2019 the European Court of Human Rights (ECHR) introduced a new stage of the case hearing.

The introduction of this new stage of obligatory amicable settlement is an attempt to resolve ECHR cases where there are clear signs of violation of Convention and which are subject to communication and hearing. The stage is aimed at non-recurrent, justified complaints that cannot be examined in a list. Currently, there are about 15 000 of such complaints in the ECHR.

In such cases, the ECHR will play the role of a mediator and will force the parties to reconciliation.

The stage of the obligatory amicable settlement won't be used in cases that containing difficult factual and legal issues, new legal issues, and critically important cases. Also excluded are the cases where it is difficult to calculate damage and the cases where human rights issues require considering the merits of a case.

On the 7th of August 2019, the UN adopted the Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation".

The Convention applies to international commercial amicable settlements resulting from mediation. It is not applicable to international amicable settlements resulting from judicial and arbitral proceedings and uses as a judicial or arbitral judgment. It also doesn't apply to amicable settlements reached for private, family, or domestic purposes of one party as well as amicable settlements related to family, inheritance, and labor law.

As we see, the Singapore Convention offers many instruments for a quick, fair, efficient, and inexpensive settlement of international disputes.

7. Conclusion

Thus, mediation appeared at the same time as conflicts. Of course, we cannot say that this method of dispute settlement was used in ancient times in the same way as it is used now. However, the content of mediation principles and methods has virtually remained unchanged in the course of time.

Mediation has become well settled in many countries. In some states where this method of legal dispute resolution is common and publicly available, the legislative framework for mediation formed after

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this mechanism started to function. In other countries, mediation was introduced as an obligatory pre-trial procedure, received recognition, and started to be used actively by the public.

Over centuries mediation has been used in international politics, relationships, trade, etc. This method of legal dispute resolution has several advantages: flexibility, availability, confidentiality, individual approach to every particular case, lack of long bureaucratic procedures as well as corruption-related offenses.

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