

NEUTRALITY IN CONFLICT MEDIATION PROCESS

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Abstrak

Dalam mediasi konflik memahami konsep dan menguasai keterampilan netralitas merupakan hal yang penting. Disamping sebagai sebuah hal yang mendasar dan prinsipil dalam mediasi, netralitas itu sendiri telah menjadi perdebatan di antara mediator mengenai hasil mediasi itu sendiri. Prinsip ini di satu sisi menempatkan mediator sebagai fasilitator yang tidak akan mempengaruhi atau parsial atas para pihak yang berkonflik. Bahkan mediator dalam hal ini sangat menghormati aspirasi dan tuntutan dari para pihak dapat diterima dengan menciptakan suatu kerangka prosedural yang memungkinkan pihak yang berselisih untuk mencapai tujuan mereka secara adil. Namun demikian secara praktek di lapangan hal ini tidak dapat diterapkan. dan merupakan prinsip yang sulit. Lebih daripada itu, netralitas bukan ketentuan untuk keberhasilan mediasi namun justru mediator perlu dan harus parsial dan bias dalam beberapa kasus. Artikel

ini, oleh karena itu, ini bertujuan untuk mengkaji masalah mengenai isu netralitas dalam proses mediasi.

Kata Kunci: *Mediasi, Netralitas, Penyelesain Konflik, Pihak-pihak yang bertikai.*

Abstract

In conflict mediation understanding the concept and mastering the skill of neutrality is perceived as essential. Despite as a fundamental and core principle in mediation, it has been a debate among mediators upon the outcome of the mediation itself. This principle puts mediator as facilitator who would not influence or be partial over the parties. Indeed, mediators highly respect on aspirations and demands of the parties by creating an acceptable procedural framework which enables disputants to achieve their goals fairly. Nevertheless it is practically an arduous principle and inapplicable. In addition, neutrality is not a stipulation for a successful mediation; rather, mediators need to and should be partial and biased in some cases. This article, therefore, is aimed to examine the problems revolve around the issues of neutrality in mediation process.

Key Words: *Mediation, Neutrality, Conflict Settlement, Parties.*

Introduction

Being neutral for third parties who mediate conflicting parties in the conflict resolution process is perceived as essential. In the literature of mediation (Bercovitch & Jackson, 2009; Erickson & McKnight, 2001; Boule, 2001), neutrality is asserted as the core aspect of the mediator's role, although it is not easy to be neutral since human being is rarely neutral about anything. This is what

mediators, as the third party, should aware about as the fact that mediator is just like us who tend to bring their own perspectives, opinions, biases, and ideas to the mediation process (Erickson & McKnight, 2001, p. 68). If they do so, a just mediation process and outcome could hardly be achieved and the next conflict would likely erupt. Preventing from this complicated situation, mediators therefore have to keep their neutrality in any kind of situations. By doing so, the mediators will get the trust of disputants that will determine the effectiveness of mediation process and eventually reach a successful mediation (Bercovitch & Jackson, 2009, p. 36)

Despite the arguments recognize the importance of neutrality or so called 'impartiality' in third party intervention, scholars and practitioners in conflict resolution field and mediation contend that neutrality will not benefit the mediation process because the fact that there are often some power imbalance between parties in conflict which may bring them to an asymmetrical power relationship. In this situation, if mediators insist to be neutral, the mediation process will merely facilitate the stronger party to stress the weaker party. Consequently, mediators would likely contribute to the unjust outcome of agreement. (Hoglund & Svensson, 2007; Erickson & McKnight, 2001). Thus, mediators should be partial, rather being neutral, by empowering the weaker party and creating the structural ground for better negotiation. It is therefore by many argue that the principal of neutrality is not necessary to be applied in the process of mediation.

The essay explores and discusses two major arguments upon the principal of neutrality in third party mediation process. While scholars maintain that neutrality is essentially needed in third

party interventions, it argues that biased-partial mediators would be more effective in settle the conflicts than the neutral one. This essay will be done by firstly exploring the nature of third party mediation; in what circumstances mediators should begin or are requested to mediate the disputants and what skills and principles should be applied during the process of mediation; and inquiring the nature of conflicting parties as well. The next part will examine the principle of neutrality included the definition of the term from some primary literatures of mediation and arguments regarding the essentiality of being neutral, whereas the third part will discuss notions challenging the notion of neutrality in mediating conflict. The last part will be the conclusion of the essay.

Analyses

Third Party Mediation in Conflict Settlements

Mediation, as a form of conflict management that involves an outsider or third party who is not related to disputants, has been well known and used everywhere. For instance, in the last decade we have seen the intervention of various third parties such as the United Nation in the Vietnam-Kampuchea conflict, the Falkland-Malvinas dispute, and the Afghanistan conflict; the Pope in the Beagle Channel dispute; African Union in the Tanzania-Uganda dispute; the Swiss-based Centre for Humanitarian Dialogue in Aceh; the Arab League and the Islamic Conference in the Iran- Iraq conflict; and numerous effort of powerful states in the Middle East conflicts. Bercovitch and Jackson (2009, p.32) point out that mediation is used in 70 percent of all conflicts and 34 percent of cases reach some success. Furthermore, in Berkovitch's work (1996), he

found that mediation has been used as part of dispute settlements in approximately two-thirds of post-Cold War conflicts. This fact was encouraged by a similar finding of Wilkenfeld (2005) that two thirds of international crises in post-Cold War era were mediated. Wilkenfeld and his colleagues also found that comparing with crises which were not mediated; crises which were mediated were likely ended with a durable outcome and an agreement accepted by all parties (Miall, Ramsbotham, and Woodhouse, 2011, p.180).

Mediation, as Bercovitch and Jackson (2009) argue, is the continuation of negotiation process by other means which reflects different conflicts, different parties, and different situations. Parties decide to use mediation as a means to solve their problems commonly have failed to do negotiation at the first time. According to research done by Bercovitch and Jackson in 2001, they found that mediation tends to be used when conflict has been transformed from simple to complex dispute; low to high intensity; relatively equal to unequal and fractionated power between parties; and when there is a doubt in the willingness of parties to undertake peacefully settlement. Under these circumstances negotiation is no longer effective and thus mediation is requested to settle the conflict.

The Principle of Neutrality in Mediation

One of the main important characteristics in mediation is the principle and practice of neutrality. Neutrality is strongly associated with an effective mediation. Young claims (1967) that “a high score in such areas as impartiality would seem to be at the heart of successful interventions in many situations” (in Bercovitch & Jackson, 2009, p.36). Gail Bingham (1985) even defines mediation

as the “assistance of a ‘neutral party’ to a negotiation”. In line with Bingham, Jay Folberg and Alison Taylor see mediation “as the process by which the participants, together with the assistance of a ‘neutral person or persons’, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs” (in Bercovitch & Jackson, 2009, p. 34). The stress upon the principle of neutrality in mediation by some scholars suggests that it should be consistently upheld by mediators because it will ensure the credibility and independence of the mediators over the disputants. If it does so, the disputants will be motivated and confident to involve actively in mediation process in order to achieve a peaceful agreement.

Neutrality in mediation, according to Astor (2007), has several meanings that mainly stress upon the acts and attitudes that should be upheld by mediators. The first meaning suggests that mediators should not influence the content and outcome of mediation process. The main task of mediators is that to control the process of mediation and to provide procedural framework for participants of mediation. The second meaning suggests that mediators should not be *partisan* which means that mediator should treat parties equally and avoid favoring one over the other. The last, mediator should not be influenced by persons who have connection with disputants; or not be influenced by other dominant powers such as government. Moreover, the term of ‘neutrality’ is also commonly known as ‘impartiality’. These terms generally have similar meaning and are used interchangeably. For instances, Cobb and Riflin (1991) use the term ‘neutrality’ and ‘impartiality’ synonymously. They define

these terms as “the absence of feelings, values, or agendas; “bias” is to be avoided-it is a strong opinion, value, feeling, or agenda” (Cobb and Riflin, 1991, p. 42). It is also emphasized by Douglass (2008, p. 144) that “impartiality has been identified as a generally recognized synonym for neutrality. Neutrality as impartiality is said to invoke ‘a stronghold against bias’, and to act as ‘an antidote against bias”.

Apart from the similar meaning of both terms, neutrality is a vital concept that will determine the effectiveness of the mediation process. Many scholars agree that ‘neutrality’ is the core principle and a vital value in the mediation process. Mediators who consistently uphold this principle in mediation process will be trusted by conflicting parties, will enhance the confidence of parties to share the information to other and mediator, and will prevent abuses upon the process and outcome of mediation (da Silveira, 2007).

Considering the importance of neutrality, the absence of this principle in mediation process will likely undermine the process and even refusal toward the mediator from one party could be happened. In this case, the involvement of the Nordic monitors and Norwegian mediator in Sri Lanka peace process can be taken as an example. During the peace process between the Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka (GoSL), Norwegian mediators and the Nordic Sri Lanka Monitoring Mission (SLMM), which consist of Norway, Sweden, Denmark, Finland and Iceland as the personnel, have striven to be neutral in all mediation process. This attempt results a commitment in February 2002 between LTTE and GoSL to do cease-fire, to initiate dialogue and to restore condition with a peaceful way. However, during the cease-fire period, LTTE perceived that SLMM was not

being neutral by frequently reporting and publishing a statistic on complaint of cease-fire violation which accused them as actor committed in cease-fire violation. Although SLMM claimed that they have maintained to be neutral, the LTTE could not accept this reason and did demonstration against the presence of SLMM along with the Norwegian's flag burning incident outside the embassy in Colombo, the capital of Sri Lanka (Hoglund & Svensson, 2008). This event showed that the presence of neutrality in mediation process was quite demanded by parties. Failed to do so will consequently lead to mistrust over the mediator and ruin the prior agreement.

Challenging the Principle of Neutrality

Hoglund and Svensson (2008), however, argue that the principle of neutrality is neither applicable nor effective in situation where an asymmetrical relationship exists within parties. It was in fact happening in what they illustrated in the Nordic mediation in Sri Lanka. The effort of SLMM to be neutral in all their activities and agendas was not perceived by disputants and public as impartial. SLMM, in contrast, claimed that they have acted impartially by reporting the truth and fact happened in conflict area. For example, it published that the LTTE has committed 96% of cease-fire violations during 2002-2005 period. This information nevertheless affected the relationship between GoSL and the LTTE which led to an offensive attack between two parties at the late 2005. It is true that SLMM have maintained to be neutral by telling the 'truth' and not taking sides with anyone, however it indeed exacerbated the situation and aggravated the image of SLMM alone as mediator. It raises the question of whether mediators should prioritize the

neutrality or the trust of disputants on their intervention. Since in fact the neutrality failed to ensure the peace process in Sri Lanka, Hoglund and Svensson suggest that mediator should consider other means which may assist the weaker party in order to countervail the power relationship between disputants and build the trust of disputant in a flexible manner.

Consideration upon the principle of 'trust' in challenging neutrality in mediation process was examined by Wehr and Lederach in their 1991's research. They examined the peace process between Sandinista government and Atlantic Coast Indian leaders in Nicaragua which focuses on the use of mediation as conflict management between local government and local people. Wehr and Lederach argue that neutral and impartial mediators are not the stipulation of the successful of mediation process. In fact, biased and partial mediators have proven, in some cases, that they able to settle conflicts (Wehr & Lederach, 1991, p. 87). Moreover, Wehr and Lederach have argued that, based on their observation, people in Central American never seek for outsider-neutral mediators; despite, insider-partial mediators who have connectedness with and can build the trust or '*confianza*' of disputants are more accepted. The connectedness and *confianza* from the insider-partial assumes that this will ensure the convenience of parties to involve actively in mediation process. The selection of insider-partial will be based on the trust of both conflicting parties. By doing so, it is hoped that by the connectedness of the insider-partial will know well what both parties want, while the trust have been built since parties have recognized the mediator from a long time. Connectedness and *confianza* of insder-partial, therefore, ensures the openness and

revelation of the parties which may result to a fair outcome.

Contending the notion of neutrality as well, Astor (2007) has argued that mediators, in fact, influence the content and outcome of mediation. Mediators tend to assert a pressure in mediation process by creating opportunities upon parties so that they can pursue the outcome which mediator favors. For instance, in family dispute, mediators influence parties' view by giving their own opinions on what should be the best for children or giving an idea on how a responsible parent should behave. Astor claims that mediator actually realize about the importance of neutrality which underpins the legitimacy of mediation process. However, the interventions of mediator in reality often overstep the principle of neutrality that has been asserted at the very beginning. An example of empirical case observed by Linda Mulcahy (2001, in Astor, 2007), in addition, shows the mediator failed to be neutral. In this case, a mediator was trying to mediate the housing problem in a London borough. The conflict was about the noise that has been endemic on that building. Mediator presumed that this problem is not an individual problem, but it is a systemic mater. Mediator thereby provided procedural framework that guides disputants to initiate demonstration toward local council who was responsible for the housing. Mulcahy challenged the mediator by arguing that the act has been done is not reflecting the principle of neutrality while on the first time the mediator has asserted would uphold their neutrality. It therefore shows that neutrality is hardly applied and is not comprehended well by mediators in the practical level.

By not being neutral, mediators still can be a good mediator indeed. In an interview of Dr. Antje Herrberg with Marti Ahtisaari

who received the Nobel Peace Prize for his role as an outstanding international peace mediator, under a tough situation and issues are getting critical, the mediator, according to Ahtisaari, "cannot be absolutely neutral; he needs to support one party over the other if one party strongly misbehaves. Parties should get the feeling that they are both being treated fairly. In other words: the mediator should be 'all-partial'" (Savolainen & Herrberg, 2009).

The study done by Svensson (2009) moreover found that biased or partial mediators are more effective than neutral mediators in undertaking mediation process. Svensson argues that neutral mediators involved in conflict tend to hasten the attainment of the agreement without considering its quality which would determine the durability of the agreement itself, whereas biased mediators who tend to be partial upon one party aim to protect their side by ensuring that there will be no any stress from other party. It is by Svensson concluded that "biased mediation processes are therefore more likely than neutral mediation processes to lead to elaborated institutional arrangements that are generally considered conducive to democracy and durable peace, such as power sharing, third-party security guarantees, and justice provisions". For instances, it is proved by empirical facts in Sudan and Israel-Palestine conflict. In Sudan conflict, the mediation process mediated by the regional organization Inter-governmental Authority on Development (IGAD) was done by the alignment of mediator toward the Sudan People's Liberation Army/National Democratic Alliance (SPLA/NDA) against the government of Sudan. It was then, by 1997-1998, accomplished in reaching an agreement between disputants. This partiality was taken by mediator because the fact showed that

there were power imbalances dominated by government. If this step was not taken, it may further risk the position of the rebellion and affect to an unfair outcome. On the other case, the involvement of U.S as mediator in Israel-Palestine conflict was perceived as an effective mediation since Palestinian acknowledged that U.S is the only one state can persuade Israel to make costly concession and can protecting Palestinian from any form of exploitation (Svensson, 2009).

Conclusion

In conclusion, the principle of neutrality in third party mediation has been a debate among scholars from various disciplines. The concept itself is regarded as the core and fundamental principle which may ensure a fair outcome of the mediation process. This principle puts mediator as facilitator who would not influence or be partial over the parties. Indeed, mediators highly respect on aspirations and demands of the parties by creating an acceptable procedural framework which enables disputants to achieve their goals fairly. Conceptually, neutrality is perceived as essential and thus need to apply in third party intervention, however, it is practically an arduous principle and inapplicable. In addition, neutrality is not a stipulation for a successful mediation; rather, mediators need to and should be partial and biased in some cases. Some facts discussed in this essay have showed that these biased-partial mediators can solve the conflict peacefully. Therefore, mediator neutrality in mediation and conflict resolution process is neither essential nor vital.

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