

NEGOTIATION AS A METHOD OF DISPUTE RESOLUTION IN INTERNATIONAL LAW WITH REFERENCE TO PERTINENT REFUGEE CRISIS

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“The most important trip you can take in life is meeting people half way”.

Henry Boyle

With is notion we can further highlight the concept of negotiation as method of dispute resolution internationally.

THE CONCEPT OF NEGOTIATION

Negotiation describes any communication process between individuals that is intended to reach a compromise or agreement to the satisfaction of both parties. Negotiation involves examining the facts of a situation, exposing both the common and opposing interests of the parties involved, and bargaining to resolve as many issues as possible. Negotiation takes place every day in nearly every facet of life—from national governments negotiating border disputes, to companies negotiating work agreements with labour unions, to real estate agents negotiating the sale of property, to former spouses negotiating the terms of a divorce.¹

International Negotiation

In addition to using a body of international law, international organizations may use ADR to create a framework for cooperation and interstate relations². In reference to international dispute regulation mechanism, international negotiation has been one of the most pervasive processes in world politics since the dawn of recorded history.³

The usual outcome of successful international negotiations is the conclusion of a legally binding international agreement or treaty, culminating from deliberations lasting from several successive phases. The first phase is the pre-negotiation stage which transpires before a mutual commitment to negotiations has been made. The second phase is the process of the negotiations itself, during which the negotiating states engage in substantive

¹ Negotiation, available at <https://financial-dictionary.thefreedictionary.com/negotiation>

² Salacuse J.W. (2013) International and Cross-Cultural Negotiations. In: Negotiating Life. Palgrave Macmillan, New York, https://doi.org/10.1057/9781137318749_9.

³ id

discussions and bargaining. The final phase is the period between the conclusion of negotiations and the entry into force of the recently negotiated obligations.⁴

Once the agreement enters into force, it creates binding legal obligations for its parties. In that sense, the outcome of the negotiating process is fully protected by law i.e. the parties are legally obligated to perform in good faith the obligations they have assumed and the legal consequences of noncompliance are prescribed. Modern international law also extends legal protection to the third phase of the negotiation process - the period between the conclusion of negotiations and the entry into force of the negotiated agreement.⁵ During this period, states which have signed an agreement or expressed their consent to be bound are obliged to refrain from acts which would defeat the object and purpose of the agreement. This requirement aims to prevent prospective parties to the agreement from undermining the benefits accorded by the agreement to other prospective parties. Negotiating states may also agree to apply the agreement, or parts of it, provisionally, prior to its actual entry into force, in order to effectuate immediately certain provisions of the agreement or to provide immediate legal protection to the successful outcome of their negotiations. International law recognizes the regime of provisional application, although the obligations imposed on states during this period are somewhat enigmatic.⁶

CONCEPT OF CROSS CULTURE NEGOTIATIONS

Nature of Conflict

Conflict is a feature of all human societies, and potentially an aspect of all social relationships. However, ideas about the root causes of conflict differ widely, and depending upon their variations their resolutions also differ. The conception of conflict finds its roots in the material world, as competition between individuals or groups over incompatible goals or scarce resources, or over the sources of power needed to reach those goals or control these resources, including the denial of control to others.⁷ A different conception locates the basic causes of conflict not so much in material scarcity as in divergent perceptions or beliefs about the nature of the situation, the other party, or oneself. The first orientation to conflict (and the world) is sometimes called “realism,” the second “constructivism.” But these terms, and the dichotomous way of thinking they enjoin, in actuality mask a great deal of social and behavioural complexity, both about the nature of conflict and about the possibilities for managing or resolving it.⁸

Culture

⁴ id

⁵ id

⁶ id

⁷ Amani, Elahe. What is a conflict? In Cross Cultural Conflict Resolution, available at https://hr.fullerton.edu/documents/professionaldevelopment/ubi/workshopmaterials/2012_2013/UBI-Cross%20Cultural%20Conflict%20Resolution-Fall%202012.pdf

⁸ id

According to cultural geographer, Don Mitchell ⁹, "...culture is a nebulous structure of feelings that define the life of a people, and a set of productions [art, etc.] that reflect upon, speak to, or mould that structure of feeling through various strategies of representation." Mitchell also notes that economics, politics, and society are all intricately tied to culture. "Perhaps," he suggests, "...culture, is that which is not nature." "Culture" is an intellectual quagmire; both a way-of-life, and a range of practices. Accordingly, he puts culture as:

- the opposite of nature – it makes humans, human,
- the actual, but sometimes unexamined, patterns and differentiations of a people (way-of-life),
- the processes by which patterns develop "culture" thereby making "culture," "culture,"
- a set of markers that set one people off from another (so that we can identify our group),
- the way that all these patterns, processes, and markers are represented, thereby producing meaning, and,
- an indication of a hierarchical ordering of all these processes.

After analysing all the definitions of the world culture, one thing can be observed that the nuances of the word "culture" develop over time rather undergo metamorphosis. With each new definition, the meaning of "culture" becomes more complex, To the contrary, the concept - the word, is a product of a long developmental process greatly influenced by power relationships through which people have sought to make "culture" work to their advantage. Culture is a politically-charged, and sometimes politically-powerful, tool that people often manipulate to gain the upper hand (power).

At one point, "culture" was used to differentiate between the "good" and the "bad," or the "cultivated" and the "primitive." To be "cultured" was to be "civilized" or "refined," whereas, to be "uncultured" was to be "unruly" or "uncivilized." By the end of the nineteenth century, Europeans, Americans, and others, generally used the term "culture" to distinguish between "refined people" and "savages." In fact, European culture was held up by many (at least in the Western World) as the epitome of all that is good and refined in the world (an idea that is now much maligned).

In the last half of the twentieth century, it became increasingly improper for people to describe "culture" in hierarchical terms. Now, many lean toward the notion that different cultures are of equal value, and therefore, should not be subjected to criticism or ridicule (although "scholarly criticism" of traditional European culture is often considered appropriate and deserved). This romanticized concept of "culture" (that cultural practices in general should not be criticized) rests on the belief that "civilization" is material, whereas "culture" is spiritual and symbolic. This way of viewing culture has created many complications for scholars, academics, religious leaders, politicians, and ordinary people. For example, a few years ago, a teacher asked a group of teenage students whether or not the Aztec practice of human sacrifice could be justified because it was an integral part of

⁹ Mitchel, Don, Definition of Culture (in Cultural Geography: A Critical Introduction, Blackwell Publishers, 2000)

Aztec culture. A surprising number of students took the position that the Aztec should not be condemned for their cruel, bloody sacrifices, because they truly believed that such behaviour was proper. Therefore, “culture” has become an increasingly “relative” concept.¹⁰

Cross-Cultural Disputes

Considering the literal interpretation, conflict occurring between individuals or social groups that are separated by cultural boundaries can be considered “cross-cultural conflict.” But individuals, even in the same society, are potentially members of many different groups, organized in different ways by different criteria, for example, by kinship into families or clans, by language, religion, ethnicity, or nationality, by socioeconomic characteristics into social classes, by geographical region into political interest groups and by education, occupation, or institutional memberships into professions, trade unions, organizations, industries, bureaucracies, political parties, or militaries. The more complex and differentiated the society the more numerous are potential groupings. Each of these groups is a potential “container” for culture, and thus any complex society is likely to be made up various “subcultures,” that is of individuals who, by virtue of overlapping and multiple group memberships, are themselves “multicultural.” This means that conflict across cultural boundaries may occur simultaneously at many different levels, not just at the higher levels of social grouping—for example, those that separate “American” from “Japanese” cultures.¹¹

Resolving Cross Cultural Disputes

It is contended that there has been made reference to certain strategies and models of conflict resolution thereby providing for a range of possible responses to cross-cultural ethical conflict. These are based on models by Rubble and Thomas and strategies from Buller et al.¹² These strategies are:

Avoiding. Described as the low involvement approach, a party simply chooses to ignore or not deal with the conflict. The conflict may dissipate, but usually smoulders and flares up at a later time. Strong parties can ignore the conflict when they are pleased with the status quo. For them, it may be a form of forcing. Avoiding is a frequent choice when the costs of pursuing a conflict are high. For example, one may decide not to sue someone who has wrongfully damaged her business, because the legal costs could bankrupt the company, or one does not mount a defense against a lawsuit to avoid prolonged publicity.¹³

Forcing. In this approach, one party forces its will upon the other. Forcing is often used when one party is stronger than the other. Host country officials sometimes use their power to demand payoffs for initiating or continuing a business operation. Similarly,

¹⁰ id

¹¹ Avruch, Kevin, Cross Cultural Conflict, available at <https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/cross-cultural-conflict.pdf>

¹² Kohls, J. & Buller, P. J Bus Ethics (1994) 13: 31. <https://doi.org/10.1007/BF00877152>

¹³ id

multinational companies sometimes demand practices that are inconsistent with the indigenous cultures of the host countries in which they operate.¹⁴

Education -persuasion. This mechanism attempts to convert others to one's position through providing information, reasoning, or appeals to emotion. For example, multinationals often extol the virtues of free enterprise. As U.S. MNC's conduct business in host countries, they also have the opportunity to communicate the importance of due process for employees, and protecting employee health and safety.¹⁵

Infiltration. By introducing your values to another society, an appealing idea may be spread. This may be done deliberately, or it may be unintentional. The values associated with freedom and consumerism are examples.¹⁶

Negotiation - compromise. In this strategy, both parties give up something to negotiate a settlement. The resulting compromise usually leads one party or the other (or both) to feel dissatisfied with the outcome and that the basic conflict has not been resolved. The recent negotiations on unfair trade practices between Japan and the U.S. are a good example.

Accommodation. In this approach, one party merely adapts to the ethic of the other. A foreign company may meet U.S. expectations for legally precise agreements in order to do business in the U.S. market, and an American businessman might learn to drink sake to do business in Japan.¹⁷

Collaboration -problem solving. In this strategy, both parties work together to achieve a mutually satisfying solution, a win-win outcome in which both their needs are met. This approach is most likely to address the sources of the conflict. An example might be in the discussions leading to an agreement between a multinational company and host country in which both desire an agreement satisfying to the other as well as themselves, to help insure an effective, long-term relationship. It is our position that the appropriate conflict¹⁸

Conflict Resolution Models

Conflict resolution as a discipline has developed theoretical insights into the nature and sources of conflict and how conflicts can be resolved through peaceful methods to effectuate durable settlements.

Morton Deutsch: Cooperative Model

One of the first to develop insight into the beneficial consequences of cooperation as an academic enquiry was Morton Deutsch. In his view, a number of factors like the nature of the dispute and the goals each party aims at are pivotal in determining the kind of orientation a party would bring to the negotiating table in its attempt to solve the conflict.

¹⁴ id

¹⁵ id

¹⁶ id

¹⁷ id

¹⁸ id

Two basic orientations exist. These are competitive and cooperative. Deutsch further predicts the type of interactions which would occur between negotiating parties as a result of their disputing style. Cooperative disposition of the party would evoke an atmosphere of trust and eventually lead to mutually beneficial options for settlement. On the other hand, competitive approach leads to win-lose outcomes. This approach is inclined to intensifying animosity and distrust between parties and is generally considered destructive.¹⁹ Some critics of this approach argue, both cooperation and competition are essential to some extent to effectuate resolution of conflict since negotiating a desirable agreement always includes common and diverse goals. Thus, finding a balance between these two approaches is the key to successful negotiation.

Roger Fisher and William Ury: Principled Negotiation

Other theorists who advocated cooperative conflict behavior include Roger Fisher and William Ury. They put forward four principles for effective negotiation. These four principles are:

- Separate people from their problem. What Fisher and Ury argue is that this principle helps parties to get a clearer picture of the substantive problem.
- Focus on interest rather than position.
- Generate a variety of options before settling on an agreement.
- Insist that the agreement be based on objective criteria.

At each stage of the negotiation process, the above principles should be observed. Developing a method for reaching good agreements is central to this model. This model asserts that "separate people from their problem". However, this could make matters worse if human needs of the people are the problem. Moreover, conflicts between ethnic groups are mostly needs based conflicts since one group feels that its basic needs of identity, security, recognition or equal participation are being neglected. Here human needs model can be more useful than interest based model.²⁰

John Burton: Human Needs Model

John Burton's work is of immense significance in the field of human needs model. He argues when an individual or group is denied its fundamental need for identity, security, recognition or equal participation within the society, protracted conflict is inevitable. To resolve such conflict, it is essential that needs that are threatened be identified and subsequently restructuring of relationships or the social system take place in a way that needs of all individuals and groups are accommodated. For instance, this model can be

¹⁹ Dixit Meha, Theories of Conflict Resolution: An Analysis, available at <http://www.ipcs.org/article/terrorism/theories-of-conflict-resolution-an-analysis-1531.html>

²⁰ id

useful in the case of Maldives where there are restraints on freedom and participation of its citizens in political life.²¹

Bush, Folger And Lederach : Conflict Transformation

Theorists of conflict transformation, while referring to the interest-based and the human needs models argue, solution that satisfies each country's interests and needs could be reached through these models. However, if negative attitudes developed in each country during the conflict are not addressed, these could serve to generate further conflicts some time later. Whereas conflict transformation aims at a fundamental change in attitude and/or behavior of individuals and/or the relationship between two or more disputing parties.²² This approach is very well exemplified in Bush and Folger's theory of transformative mediation and Lederach's model of conflict transformation. Lederach uses the term conflict resolution to refer to peacebuilding. For building peace destructive or negative communication patterns need to be transformed or replaced by constructive or positive interaction patterns. Like Bush and Folger, Lederach stresses the need to transform the disputing parties by empowering them to understand their own situation and needs, as well as encouraging them to recognize the situation and needs of their opponents.²³

Conflict Transmutation

Those theorists, who practice conflict transmutation argue that conflict transformation may transform relationships, however it does not go far enough in addressing the underlying sources of conflict behavior. Conflict transmutation is centered on the principles found in alchemy as a set of contemplative practices that transform deeply encrusted feeling and thoughts that fuel destructive conflict behavior.²⁴

CONCLUSION

As we take a closer view of world events as well as mundane day to day reality of life, it becomes apparent that conflict is an indisputable fact of our physical and mental existence.

Conflict in fact permeates each and every strand of human existence and often takes shape of diabolic cyclical violence unless dealt with creatively and constructively. Though each conflict resolution theory has its own limitations yet conflict resolution as a discipline can be of immense significance in this respect and as we ruminate the current world politics where the powerful does not have qualms about resorting to force at any given opportunity, conflict resolution theories are emblematic of how military force is not always the right approach for dealing with conflict effectively.

²¹ id

²² id

²³ id

²⁴ id

Negotiation in Refugee Law

Observing the concept of cross cultural disputes and their resolution one could address the issue of existent refugee crisis. The analysis commences from recognition of refugee crisis as cross-cultural conflicts. As, per the definition of refugee as given under 1951 Refugee Convention, refugee is a person who leaves his country of abode due to fear of persecution on the basis of religion, race, sex, membership of particular political and social group. And has been elaborated earlier a person's country or region of origin can influence that individual's culture, it is not the only influence on his or her cultural identity. Cultural identity is shaped by a multitude of factors, including religious beliefs, ethnicity, schooling, social affiliations, social class, interests, gender identity, neighbourhood, profession, organization, department, workgroup in which one works, etc. Giving a broader meaning to the concept of cross cultural conflicts, negotiation at international level that is drafting of an amicable resolution to deal with it is the need of the hour. Application of negotiation to dispute resolution in this regard can be done in three ways:

Firstly, where contracting parties could come to amicable solution via means of agreements, i.e. deliberations on inadequacy of treaty or as in case of India work on requisites of having a law on this regard.

Secondly, 'recognition of gatekeeping' as a negotiating tool itself. In regular parlance this phenomenon entails checking of dissemination of information that reaches the concerned crowd. Applying it to refugee law it is used as the phenomenon of checking or filtering the illegal immigrants from regular applicants. But this system itself does not have any legal character per se and is mostly a policy measure, subject to modifications and alterations by nations. One of the illustration of this mechanism can be seen by analysing treatment of border areas of European Union (such as Turkey, Greece etc.) as hotspots to control exodus of refugees till Refugee Status Determination is done.

Lastly, Empowering UNHCR (United Nations High Commissioner for Refugees) to be official gatekeeper. It is to be noted that as per the statute is to work as a negotiator b/w the state and the people, i.e. to assist the state in formation of legislations and for determination of refugee status applications. Negotiation in this regard can come into picture to resolve the dispute regarding the implementation of the statute to existing situation.