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EXPERT'S VOICE

Dr. Ashu Dhiman

A discussion with Dr. Ashu Dhiman and her thoughts on evolution of Family and Human Rights Law

MEDIATION: DEALING WITH EMOTIONS

By - Khushi Goel

INSIDE

**RESOLVING
CLIMATE
DISCOURSE
WITH
MEDIATION
A REMEDY
FOR
MOTHER
EARTH**

UPDATES

Most Significant Update/
Development
in the field of
ADR

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MediateGuru's
Events



EXPERT'S VOICE



Dr. Ashu Dhiman

Dr. Ashu Dhiman is currently working as an Assistant Professor at Vivekananda school of Law & Legal Studies, VIPS, situated in New Delhi and affiliated to Guru Gobind Singh Indraprasth University. Dr. Dhiman has her expertise in Criminal Laws as well as Business and Family Laws. She also has a deep interest and stake in Alternative Dispute Industry as the increasing scope of ADR is bringing speedy justice to needy.

Dr. Dhiman is also Elected Chief Advisor at MediateGuru's Global Advisory Board for tenure 2021 – 2023, where she regularly give her valuable advice and consultation to the team..

1) What would be your take on the application of Section 9 of the Hindu Marriage Act, 1955 during the contemporary times?

Restitution of conjugal rights provisions, such as Section 9 of the Hindu Marriage Act and Section 22 of the Special Marriage Act, allow a husband or wife to file a complaint with the local district court, claiming that the other partner has "withdrawn" from the marriage without "reasonable cause." The petition empowers the court to order the "withdrawn" spouse to return to the marital home. If the "errant" spouse does not comply with the court's order to return, Order 21 Rule 32 of the Civil Procedure Code allows the court to attach his or her property.



I believe that the meaning and scope of key words in the provisions, such as "withdrawn" or "reasonable cause," are unclear. For example, if a woman is required to be away from her husband for work, does this imply that she has "withdrawn" from the marriage? Furthermore, "reasonable cause" would differ from person to person.

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Also, I'd like to draw your attention to a recent petition filed in the Supreme Court against Law on Restitution of conjugal rights, which forces a woman to return to her husband and denies her sexual autonomy, which has been pending for months without a hearing. The petition, titled *Ojaswa Pathak versus Union of India*, was filed in February 2019 in the Supreme Court. The case was heard for the last time on July 8, 2021. It was scheduled to return on July 22, 2021. However, no additional dates are listed on the Supreme Court's website. Meanwhile, Justice Rohinton Nariman, who presided over the case's hearing, has retired. The heated debate over criminalizing marital rape necessitates a reconsideration of how the provisions of restitution of conjugal rights, while gender-neutral, impose an additional burden on women and pose a direct threat to their bodily autonomy, privacy, and individual dignity.

2) What do you feel adds up as the generic purview regarding the theory of female criminality, when it comes to country like India, where patriarchy prevails?

The history of mankind reveals that the woman has always been the cornerstone of a family, and of society in general.

A woman, particularly in India, is regarded as the guardian of social norms, traditions, customs, morality, and family cohesion. In today's world, a woman has taken on the additional responsibility of making her own mark in order to have an identity, in addition to caring for her family. However, it is disheartening to see that women's achievements in India's social, cultural, economic, and political milieu are also being extended to criminality. Female criminality in India is on the rise, as is crime against women. Data from the National Crime Records Bureau (NCRB) show that, while women criminals are in the minority when compared to criminals convicted of heinous crimes, the number of females arrested for criminal activities has increased dramatically in recent years.



The reason behind this may be seen from two viewpoints Psychological & Sociological.

1. **Psychological**- Women who are not passive and satisfied with their traditional roles as mothers and wives are misaligned. Women who are maladjusted refuse or fail to internalise the values associated with their role in society. Women who have been convicted exhibit emotional instability, insecurity, rejection, or frustration.

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2. **Sociological-** *Despite so much development and awareness, women in India face inequity at every stage of life. Equality for women is not practised as stated in the Indian Constitution. Due to inequity, women miss out on the majority of life's opportunities, affecting her financial independence and, as a result, her economic status. Women in Indian society are constantly expected to comprehend and adapt to their surroundings. The unequal position of women in society as a result of social oppression and economic reliance on men and the state must be addressed. In most cases, the crimes committed by women are viewed as the final outward manifestations of an inner medical imbalance or social instability.*

The heated debate over criminalizing marital rape necessitates a reconsideration of how the provisions of restitution of conjugal rights, while gender-neutral, impose an additional burden on women and pose a direct threat to their bodily autonomy, privacy, and individual dignity.

3) Does the concept of Human Cloning, hamper the human rights of people, in any sense?

Human cloning is a contentious issue that raises legal, political, ethical, and religious concerns about human integrity and human rights.

Creating an individual who is genetically identical to another has sparked debate in all social circles. This contentious issue raises certain ethical concerns like; will science create a superhuman with higher intelligence and higher levels of consciousness? Will man use science to overpower the entire human race, thereby triggering the risk?

To address the issue, the United Nations adopted the Declaration on Human Cloning in 2005. The declaration is ambiguous in its language, prohibiting "all forms of human cloning that are incompatible with human dignity and the protection of human life." It received only lukewarm support from UN member countries.

4) How do you see the concept of Neuroscientific Evidence in India? Does it affect ones Right to Privacy, in a true sense?

The use of neuroscience evidences in courtroom symposium has grown tremendously, but with this blossoming advancement comes a slew of questions that must be addressed. The language of law and the language of neuroscience are diametrically opposed. Experts from both fields must collaborate to develop a set of rules for determining when a particular defendant's neurological profile meets the legal requirements.

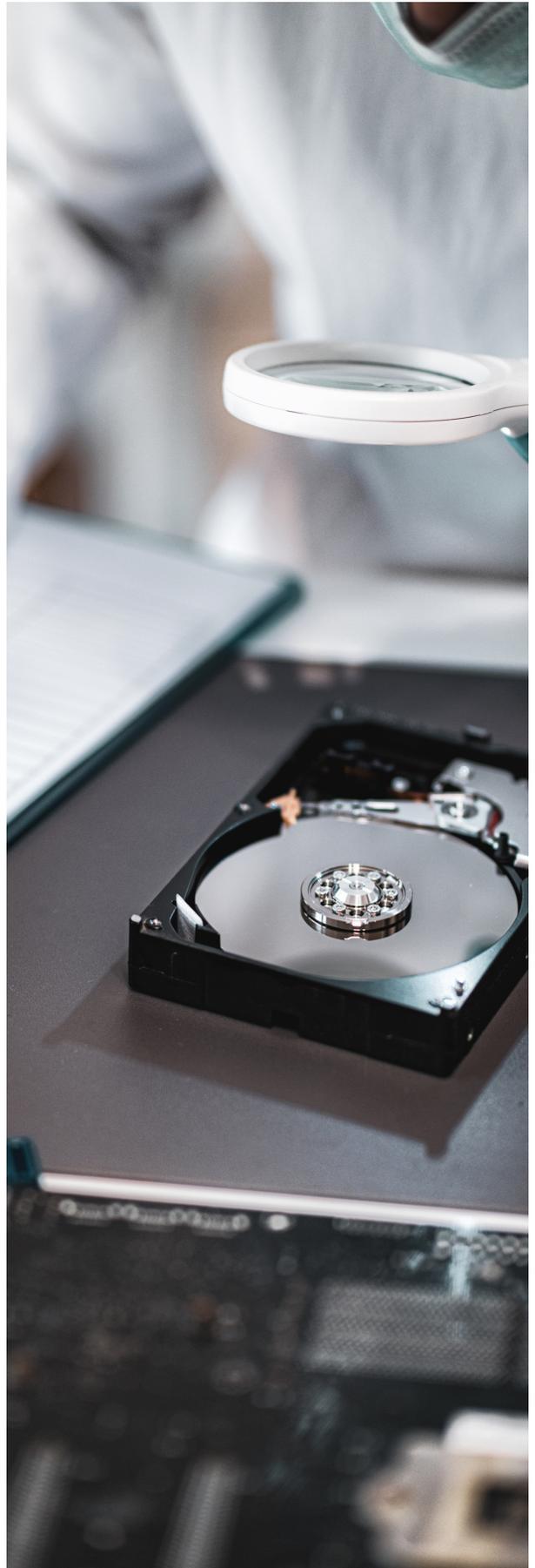
EXPERT'S VOICE

These rules must be carefully examined because being too liberal will release the guilty while being too strict will cause the innocent to suffer.

In this context, two aspects of the right to privacy become crucial: informational privacy and informational self-determination. Informational privacy is concerned with an individual's mind as well as their body. The right to informational privacy exists to promote individual autonomy by preventing the unfair dissemination of personal information; it also exists to protect one's mental freedom. As a result, any technology that interferes with one's thoughts violates these liberties. According to Puttaswamy, the mind is an inseparable component of an individual's personality, and the sanctity of the mind is the very foundation of one's right to privacy.

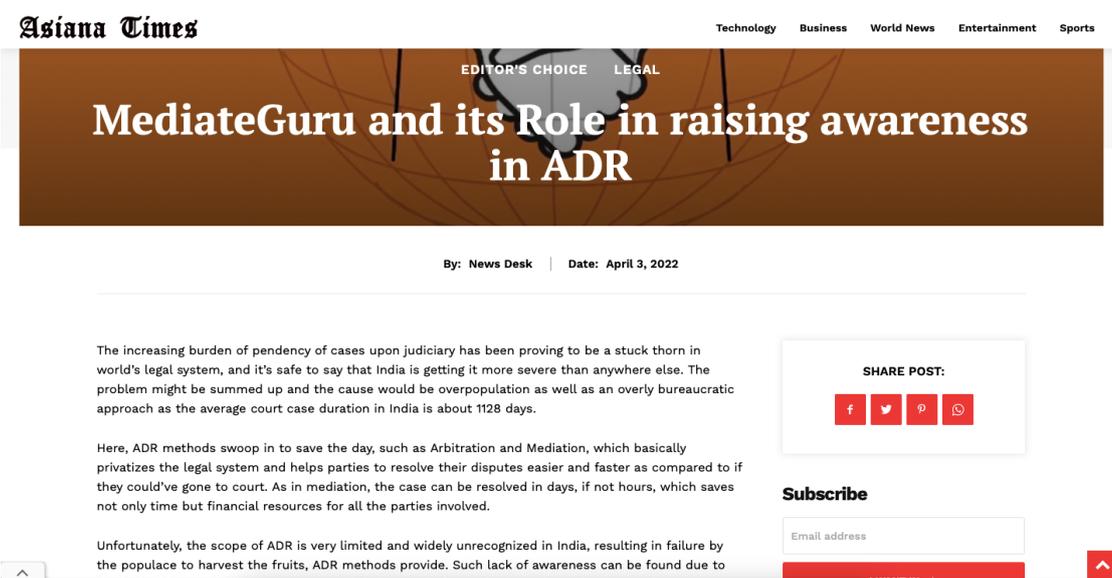


**Interview prepared by -
Mr. Rithik Aggarwal**

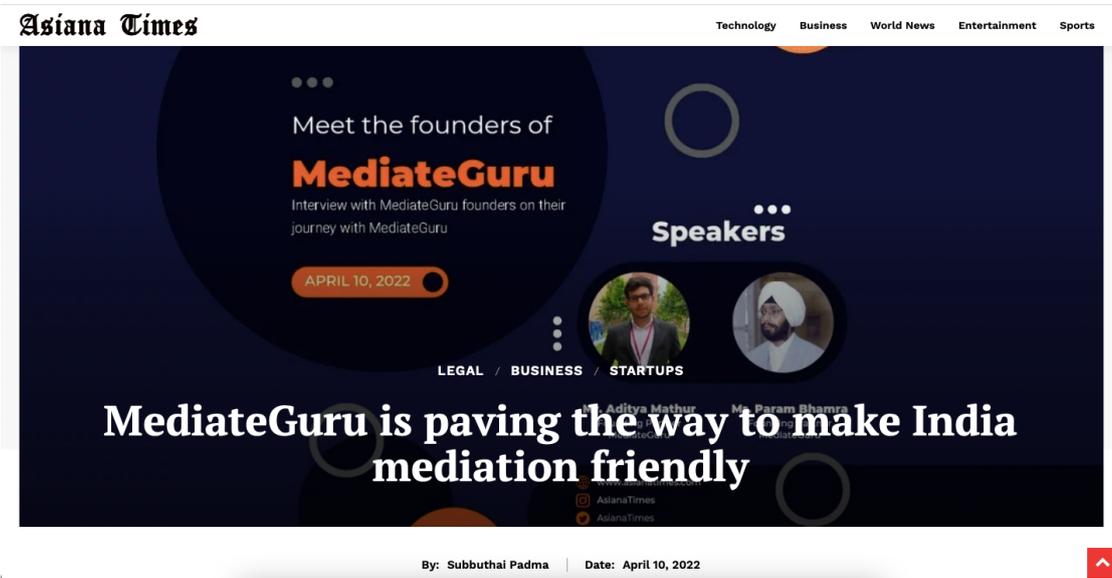


MediateGuru in News

MediateGuru got featured in News on 3rd April 2022, by Asiana Times in the article titled "MediateGuru and its Role in raising awareness in ADR"



Founders of MediateGuru, got interviewed by Asiana Times on 10th April in conversation titled "MediateGuru is paving the way to make India mediation friendly"





MEDIATION: DEALING WITH EMOTIONS

- Ms. Khushi Goel

INTRODUCTION

Emotions and conflict are two different terms with different meanings but are not directly connected with each other due to the fact that emotions play a principal function in the procedure of conflict and resolution. So as to clear up, the conflict recognition of emotions is very crucial however in litigation, it isn't always viable as courts paintings strictly beneath regulation however not emotions. Additionally, courts do not have numerous cases which result in a postpone of justice which eventually increases the scope of conflict. As a way to solve this hassle, ADR comes into view which is time-saving and less difficult.

Mediation which is one of the components of alternative dispute resolution is effective so as to handle emotionally related cases.

WHY ONLY MEDIATION?

Mediation is a manner of solving a dispute among parties with the guide or assistance of a third impartial neutral party.

A neutral party is also referred to as the mediator who perceives emotions as closely as feasible than some other aspect of ADR. The mediator is specialized inside the capabilities including emotional intelligence, listening, and appropriate conversation abilities. Moreover, there are few mediation strategies for managing feelings throughout the mediation.

Mediators are accountable for developing secure and trustable surroundings that make the party share their emotions easily and pay attention to the problem with empathy. Emotions can indeed play both a tremendous and negative role in mediation also it's miles a totally critical step is to apprehend the character of feelings. in other words, to study whether or not mediators have a correct perception of the emotions in their customers. tremendous emotions are happiness, pleasure, and enthusiasm while poor emotions consist of fear, anger, disgrace, humiliation, and unhappiness. tremendous feelings are clean to manipulate and they inspire innovation and motion but terrible emotions are very tough to cope with as they foster self-centered behavior.





Too much of any emotion can turn out to be detrimental, while some emotions can be positive. The effective negotiator or mediator must take into account not only the monetary, political, and bodily aspects of the process but also the emotional tenor of themselves as well as that of all of the parties because it not only understand the part's position but also through the expression of emotions can glean valuable information that may be instructive to the mediator.

Litigation can only provide the option but mediation solves the problem. Mediation offers a friendly settlement of matrimonial dispute due to the fact that it is a very sensitive personal issue that only includes law but also feelings which are needed to be resolved outside the court and the better way to by the means of mediation. Matrimonial mediation is an extraordinary process from any other meditation type because it inherently involves emotions and sentiments and sometimes includes negative emotions like anger and frustration. Doubts related to past, present, and future is being solved during the process of mediation as it aims to solve. Resolution of each spouse's concerns is the backbone of mediation, and resolution can only occur by understanding what each spouse needs.

Once the goals are the focal point of the conversation, finding a resolution becomes much simpler and helps to arrive at a mutually agreed solution. But there are certain barriers to mediation, maybe due to differences of opinion and different bargaining power of both parties. Still, overall the issue in matrimonial cases where the children, financial assets are involved can be solved through communication and negotiation which is the best possible way to resolve and can fill the gaps in a relationship.

CONCLUSION

Empathy and emotion are the two predominant factors within the mediation system additionally the most valuable opportunity to assist parties with both. Empathy can be seen as the oil within the machine of emotion regulation and feelings inside the mediation placing is to cope with concerns of appreciation, affiliation, popularity, popularity, and position. moreover, the use of emotions to promote and foster fine dispute resolution and being able to cope with feelings skillfully is an effective tool to be had to mediators and disputants in achieving a long-lasting and entire resolution.



AROUND THE GLOBE

ASIA

Permanent Court of Arbitration stated in press release that public hearing will commence from 21 to 26 March 2022 [PCA Case No. 2018-55: 1. Mason Capital L.P. (U.S.A.) 2. Mason Management LLC (U.S.A.) v. Republic of Korea, March 2022].

In the case of two United State investors and Republic of Korea, Permanent Court of Arbitration clarified in a press release that public hearing will take place from 21st March to 26th March. The hearing shall be open to the public except when necessary to protect confidential information.

**“Amazon driving us to our knees. We’re broke”:
Future to Supreme Court of India [Future v. Amazon Case, March 2022].**

Talks between Amazon.com Inc and Future Retail aimed at resolving a long-running dispute over whether Future’s retail assets can be sold to Reliance Industries (RIL) have failed, lawyers for the companies told the Supreme Court on 15th March, 2022.



The Secretary-General of ICSID registers a request for the institution of arbitration proceedings [Primesouth International Offshore S.A.L. v. Republic of Iraq (ICSID Case no. ARB/22/7), March 2022].

Subject matter of the dispute is thermal power plant project. The case is still pending.

Singapore: Court of Appeal sets aside arbitral award for breach of natural justice [CAJ v. CAI, February 2022].

The Court of Appeal in CAJ v. CAI has upheld an earlier High Court decision to set aside part of an arbitral award, in circumstances where the party was deprived of its fundamental right to be heard- i.e., the right to present its case, and the right to respond to the case against it. While cases of arbitral awards being set aside are uncommon, this case shows that the Singapore court will intervene when there are meritorious challenges.

Hong Kong Court of Appeal confirms presumption against taking bills of exchange into arbitration [T v. W, February 2022].

The case of T v. W reinforces the important principle that bills of exchange have a legal life of their own, separate from the underlying contracts. They usually do not fall within the scope of an arbitration clause in the underlying contract unless there is a clear and express indication that they do.

Malaysian casemaker declares win in dispute over Chinese venture [March 2022].

An HKIAC administered tribunal has ruled that Malaysian carmaker Proton validly terminated a joint venture to produce and sell a new luxury SUV for the Chinese market, a dispute that saw its former partner bring a US \$ 3.2 billion counterclaim.

Malaysia ordered to pay US\$15 billion [February 2022].

A Spanish arbitrator has ordered Malaysia to pay US\$14.92 billion plus interest and costs to the heirs to a sultanate on the Island of Borneo, while criticizing the state’s “intimidatory and coercive” tactics against him.

AROUND THE GLOBE

EUROPE

German Supreme Court confirms that Achmea-decision is transferable to arbitration clauses in other BITs [March 2022].

One year ago, the Higher Regional Court Frankfurt decided that the Achmea-decision by the Court of Justice of the EU (“CJEU”) is transferable to arbitration clauses in other BITs.

Paris Court of Appeal provided further insight on arbitral tribunal’s jurisdiction over investments allegedly tainted by corruption. [Libya v. NuroI Insaat Ve Ticaret Anonim Sirketi, January 2022].

In State of Libya v. NuroI Insaat Ve Ticaret Anonim Sirketi, the international Commercial Chamber of the Paris Court of Appeal was called upon to rule on the lack of jurisdiction of an arbitral tribunal due to the alleged corruption practices that tainted the contracts constituting the investment that was the subject of the dispute.

ICSID panel won’t call halt to anti-arbitration suit [March 2022].

An ICSID tribunal has expressed its “grave concern” at the Netherlands’ decision to seek a German court declaration as to the admissibility of an EU investor’s Energy Charter Treaty claim – but for the time being has refused to recommend that the suit be withdrawn.

Dominion Republic defeats bid to revive lost profits claim [March 2022].

A Spanish wind farm investor has failed to revive a nearly US\$288 million ICC claim against the Dominican Republic for lost profits, while an Australian mining company’s ICSID claim against the Caribbean state has cleared the jurisdictional stage.

Poland overturns denial of justice award [March 2022].

A Brussels court has set aside a US\$10 million UNCITRAL award that held Poland liable for a denial of justice – in what is thought to be the first time an investment treaty award has been annulled in Belgium.

CAS to hear Russian appeals against sports bans [March 2022].

Russian sports organizations are preparing appeals to the court of Arbitration for Sport over bans of their athletes and teams from international competitions due to Russian’s invasion of Ukraine, including the upcoming World Cup in Qatar.



Houthoff and Foley Hoag join exodus from Russia work [March 2022].

Houthoff and Foley Hoag are the latest firms to announce they are abandoning Russia as a client following its attack against Ukraine, as they withdraw from the Yukos dispute and a series of Crimea-related investment treaty cases.

AROUND THE GLOBE

AUSTRALIA

Kingdom of Spain v Infrastructure Services Luxembourg

In February 2021, the Full Court of the Federal Court of Australia published its decision in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3. The Court upheld an appeal against a decision to recognise and enforce two awards of ICSID against a foreign State under Australia's International Arbitration Act 1974 (Cth) (IAA). The Court's decision provides useful clarity on the distinction between the 'recognition' of an arbitral award, and its 'enforcement' and 'execution', and why that distinction matters in response to claims of foreign state immunity from ICSID awards in Australia.



Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company

In June 2021, the decision of *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110 was handed down by the Full Court of the Federal Court of Australia. The Court considered an appeal against a decision to enforce an arbitral award under Australia's IAA that was brought primarily on the basis that the constitution of the tribunal was improper. The Court provided useful guidance on a range of matters, including re-iterating the applicable standard of proof for a party seeking to oppose the enforcement of a foreign award under section 8(5) and (7) of the IAA. The Court also considered the bounds of judicial discretion to enforce an arbitral award, where a ground to refuse enforcement is established under section 8(5) of the IAA.

Obtaining early coercive orders for production by departing employees: *Skytraders Pty Ltd v Ian Wallace Meyer* [2021] NSWSC 1670

The case illustrates that the Court will be willing to step in to assist a Plaintiff to investigate a case at an early stage, and to obtain disclosure from a defendant, and permit expert analysis of material, prior to finalisation of pleadings and evidence. This will assist Plaintiffs to properly formulate their cases in circumstances where they have strong suspicions, but lack adequate evidence to progress their case. It also highlights that there is an obligation on applicants for ex parte orders to be truthful, but the standard is not so high as to prohibit the Court making orders in appropriate circumstance. It is a useful case for employers when they become aware of use of their confidential information by a departing employee, but where they have inadequate evidence to prove breach.

Personal injury damages in NSW - *Osei v P K Simpson Pty Ltd* [2022] NSWCA13

The case relates to a barrister's advice to settle a worker's compensation claim, the barrister was found to have breached his duty of care to the plaintiff by providing wrong and incomplete advice. However, the solicitor was also found to have breached his duty to the plaintiff by failing to correct that advice. In relation to that part of the claim, the Court held that it would have been just to apportion liability between the solicitor and barrister equally. However, liability was ultimately apportioned 70% to the solicitor and 30% to the barrister on the basis of separate advice provided by the solicitor which was ultimately found to have been negligent.

AROUND THE GLOBE

Power and Influence: Chau v Australian Broadcasting Corporation (No 3) [2021] FCA 44

There be a verdict for the applicant in the sum of \$590,000 (inclusive of pre-judgment interest). The respondents by themselves, their servants and agents be restrained from publishing, making available online for download or otherwise, so much of the Four Corners program first broadcast by the first respondent on 5 June 2017 and subsequently made available for download, playing, streaming or otherwise being viewed on any website of, or controlled by, them or of any of them that conveys any one or more of the following imputations of and concerning the applicant, namely that: he is a member of the Chinese Communist Party and of an advisory group to that party, the People's Political Consultative Conference (CPPCC), and, as such, carries out the work of a secret lobbying arm of the Chinese Communist Party, the United Front Work Department; he donated enormous sums of money to Australian political parties as bribes intended to influence politicians to make decisions to advance the interests of the Republic of China, the Chinese government and the Chinese Communist Party; he paid a \$200,000 bribe to the President of the General Assembly of the United Nations, John Ashe; and he was knowingly involved in a corrupt scheme to bribe the President of the General Assembly of the United Nations and the respondents pay the applicant's costs.



RESOLVING CLIMATE DISCOURSE WITH MEDIATION: A REMEDY FOR MOTHER EARTH

- Ms. Khushi Goel

INTRODUCTION

Pollutants and other factors which might be causing damage are hidden in the back of the name of improvement. People are developing the globe with sophisticated technologies but at the cost of harming and hurting our mother Earth.

Due to this contamination, there's a severe change in the climate. The change of climate has obliquely given upward thrust to warfare. For instance, countries are fighting for river water, the hassle of overpopulation has created a prime trouble of deforestation to be able to get land to live. Moreover, due to water shortage or in search of a suitable climate and fertile land. People are migrating so one can get an appropriate environment to stay in, which gives upward thrust to prime migration hassle or climate refugees. In order to solve these problems, there is an excessive need to remedy them in an amicable manner rather than dragging to the International court of justice to solve the matters. Conflict can give rise to which is not a solution but Alternative dispute resolution can be a solution as there is a need for an eco-centric solution in place of an anthropocentric one.

REMEDY: MEDIATION

Alternative dispute resolution is a formal way to resolve the dispute without going to standard courts or litigation. In the modern days, the rapid increase in disputes relating to climate change has again and again proved that the appropriate technique for the decision of these disputes is through mediation which can be traced in an april 9, report which was submitted to the Security Council wherein the United Nations Secretary General acknowledged the existence of potential advantages that reasonably skilled and unbiased Mediation can bring to the table for peaceful settlement of conflicts.[1]Also, in a yearly conference of oslo forum in 2019 emphasised on the need of mediation in climate change wherein the mediators basically conversed how mediation dialogues are sustainable for the decision of weather exchange-associated conflicts.

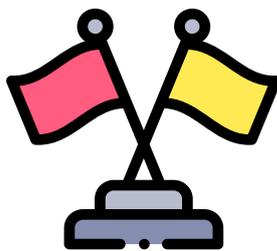
Mediation allows respectful active participation and engagement of both the Parties to reach a common consensus for solution-building. It's far one of the resolutions which is extra effective than other components of dispute decisions.





In mediation events are the selection-maker themselves and not the mediator, not like within the case of arbitration because it permits the parties to discover “win-win” conditions wherein they all are in a good deal better situation than they might have been if they had chosen the option of litigating in the court or arbitration. Taking the view of climate into consideration, mediation is a centric talk that is sustainable for the resolution of exchange-associated conflicts. Such immoderate choices modified that is given to mediation considering that draconian parochial -based negotiations are fantastically probable to be counter-efficient in making sure peace and harmony within the global community. Now, the query arises is why and how mediation can solve this trouble.

The answer is that mediation resolves conflict constructively preference to destructively. It additionally addresses the root causes of conflict via overcoming the limitations that block development through conventional manners and creating sustainable agreements that facilitate implementation. But it can only be possible with the help of mutual cooperation between the disputant countries.



WHAT IS DIPLOMATIC MEDIATION?

“Climate change have given the rise of conflict but an opportunity of peacemaking”

In order to conduct mediation, there is a need for representatives or diplomats from disputant countries for the sake of peace and harmony. Wherein diplomats cope with climate change in conflict settings is an inherently political undertaking. Further, deliberate upon political and monetary support. Diplomatic mediation provides a mechanism for people to work together, even when political communication isn't always operating.

The function of mediation is very critical as it allows verbal exchange for each party and ensures open communication. In addition, Mediators ought to make certain that they turn to the right expertise who has the calibre of expertise, the leader of environmental and useful resource troubles that can aggravate a conflict. During assistance, mediators should emphasise on what mediated negotiations are appropriate and what are the prevailing challenges and opportunities for addressing those conflicts; how do those conflicts and problems compare to public coverage issues which have been addressed to date through mediated negotiations. This makes mediation a desirable process.



CONCLUSION

Climate change is most likely to trigger violence in places wherein humans are vulnerable to the impacts of climate change, this creates a problem of unlawful migration and violence. This climate conflict can be solved by mutual cooperation with the assistance of diplomatic mediation that will help in understanding the root cause of a problem and can also help to draw solutions, such as transfer of technology to solve the particular problem and by way of sharing the resources.



Events

Upcoming events by MediateGuru

**MediateGuru's 1st Virtual International
Negotiation Competition 2022, hosted by
Newcastle University, United Kingdom**



Scan QR to register

**MediateGuru's 2nd International Arbitration Moot
October 2022
(to be launched soon)**



Scan QR for more details

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ABOUT MEDIATEGURU

Disputes are rife in all walks of life. In the era of increasing legal disputes due to high population within which there are different demographics, not all people can afford the high cost of going to court to seek justice or wait for years to get justice. Here we come to assist you. We intend to bridge the gap between the classes in a community and mediators, and provide a linkage between the same with an aim to provide social awareness.

Apart from this, we organize various landmarks events such as conferences, webinars, competitions including Mediation and Arbitration Competitions.

Pay us a visit at

www.mediateguru.com 



PHILANTHROPISTS

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