Mandatory Mediation: An obstacle to access to justice?

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Mediation is essentially a dispute resolution method; and an ancient institution throughout the history of mankind that is traditionally recognized in almost all societies. Instead of bringing an action before court; by applying mediation, the disputing groups [i.e., the villagers, townsfolk or members of a profession] discuss the issue with the assistance of a third person, and that third person assists parties in reaching a settlement. In this conventional system based on the fundamental principle of freedom of will, mediation is perceived to be an "alternative" dispute resolution method free from the coercive power of state. Such situation similarly appears in the settlement of disputes between the states.

Furthermore, mediation has been subject to myriad definitions as a concept. "*Mediation as a form of alternative dispute resolution is normally considered to prevent the potential dispute with the assistance and contribution of the independent and impartial third person who facilitate discussions between the disputing parties aimed at forming an agreement on the settlement of the dispute or with regard to key issues of the dispute*" is the most frequently used definition of mediation. Thus, the traditional mediation seems preferable alternative/option for the disputants with its definition both in legal doctrine and in the vocabulary. For instance, people who are called as "muslih" under the institution of "muslihun" in the Ottoman Empire, acted as an optional mediator who is entitled to reconcile the parties without resorting the Muslim judge for the settlement.

Nevertheless, the ever-extending regulations frequently known as "mandatory mediation" that require the parties to apply for mediation prior to filing a lawsuit have many distinct characteristics in comparison to conventional mediation methods. Reaching an agreement on a "mandatory" basis divests the structure of "mediation" based on the concept of freedom of will. Therefore, many lawyers delineate "mandatory mediation" for the parties to undertake as a legal prerequisite to commencing proceedings. In this respect, mandatory mediation compels parties to enter the process of mediation than being an alternative to the traditional system of court procedures. Mandatory meditation, which was designed as a prerequisite for litigative action is generally seen as a manifestation of the liberal tradition maintaining for the minimisation of the state. Locke, Hume and Smith's understanding of "night-watchman state / minarchy" advocates the lowest intervention of the state in the areas other than security and judiciary. Hence, the mandatory mediation procedure results in the transfer of conventional judicial power of the state arising under its sovereignty and therefore, may be considered an obstacle in attaining access to justice.

Mandatory Mediation and The Approaches under Turkish Law

Mandatory mediation was initially envisaged under Turkish law as of 1 January 2018 for the settlement of labour disputes except those arising out of the occupational accidents and work-related diseases. In the following period, the new legislations regarding mandatory mediation entered into force for: (i) the commercial disputes concerning monetary receivables and compensation claims [as of 1 January 2019] and (ii) the consumer disputes falling under the specified monetary thresholds and non-monetary claims fall within the scope of consumer courts [as of 22 July 2020]. For the disputes stated herein, mandatory mediation is recognized as a legal prerequisite under the Civil Procedure Law to the extent its compulsory nature. Thus, the foregoing types of disputes must be referred to mandatory mediation, before pursuing the dispute in court. If a lawsuit is brought before the court without applying to mandatory mediation, the case will be dismissed on procedural grounds without any further examination of the merits of the case. In other words, mandatory mediation is therefore considered as a required step to be exhausted for the respective disputes. Otherwise, the right of access to justice is lost.
For each case, the whole process of mediation may be completed within the different periods of time depending on whether parties reach an agreement on settlement or not. In addition to this, during the mediation procedure statutes of limitation will be suspended. Consequently, if the parties apply to mediation within the statutory period of time, the legal periods will be suspended until the completion of the procedure. If the parties fail to reach an agreement on the settlement during negotiations, they will be entitled to resort to court within the relevant statute of limitation which resumes as of the completion of mediation procedure.

It is stated that mandatory mediation is essential for the encouragement of voluntary mediation as a result of its implementation throughout years. In case of a conflict, the idea of creating an alternative to "file a suit" notion which comes to the mind as the first option delivers the main purpose of the mandatory mediation institution. Together with these aspects,

mandatory mediation can be referred as a temporary but useful tool for breaking down the prejudices towards the mediation institution. Hence, before the introduction of mandatory mediation in Italy, the number of applications for voluntary mediation was 18.525 in 2010, however, this number has increased to 41.604 in 2013 after the process became mandatory.

Examples of Mandatory Mediation in the World

The mandatory mediation is not a practice specific to our country. Especially in Europe, “European Code of Conduct for Mediators” was published in 2004 pertaining to mediation. The Directive of the European Council dated 21 May 2008 and numbered 2008/52/EC regarding "The Certain Aspects of Mediation in Legal and Commercial Disputes" has been approved by the European Parliament and the implementation of mandatory mediation was left to the discretion of the member states. With the Law issued in 2013, Italy has made the use of mediation compulsory for the disputes arising from the real estate, insurance, banking, finance, property sharing, inheritance, family law, rental law, negligence allegations against healthcare professionals and smear claims through the press.

Mandatory mediation has also been adopted in various states of Australia. For instance, disputes arising out of the agricultural claims, workplace leases and the state-specific condominium system (Strata Scheme) in the state of New South Wales are subject to mandatory mediation. On the other hand, courts in Australia also have discretionary powers in referring other disputes to mandatory mediation. Accordingly, the court can refer the dispute to a mediator without the prior consent of the parties, and therefore, parties of the dispute will be compelled to attend at the mediation meetings.

In comparison with the implementation of mediation in Australia, the mandatory mediation attempts resulted in disappointment in England. Some disputes can still be referred to the mediation with the court order. If one of the parties unreasonably refuses such referral, then the court is allowed to award the costs incurred during the proceedings against that party even if it is the prevailing one. Although the boundaries of the court's authority in referral the dispute to the mediator are not regulated by law, according to the Jackson Report, which is one of the most important documents in terms of alternative dispute resolution methods in England, insurance disputes, material and moral compensation claims arising from the injuries and negligence allegations towards to healthcare professionals are considered the main types of disputes that are appropriate for the application of mediation.

Mediation from Liberalism Perspective and the Problem of Access to Justice

Without taking into account the conventional voluntary mediation lacking of coercive power of state, the institutionalization of mediation and its implication -sometimes compulsorily- to judicial system as an alternative dispute resolution method are essentially quite novel understanding in our legislative system. It is the fact that this trend -the so-called "adventure of the privatization of judicial system"- is closely related to the privatization, one of the fundamental principles of liberalism. The United States, where the management of the prisons has been transferred to the private sector in many states, is the leader of this trend.

Mandatory mediation -despite the allegations of breach of constitution- is a tremendous example in terms of the judicial outlook for the desire of the states to gradually transfer their interventionist and protectionist role. States and political competences tend to expand the implementation of mandatory mediation in all developed legal systems on the grounds of diminishing the well-known and famous workload of the judiciary. However, the global crises that have occurred in the last century caused the concept of the state to change, the neo-liberal views and the concepts of "night-watchman state" and "let them do" to strengthen.

The rhetoric of the “workload of the judiciary” notion with regard to the mandatory mediation gains strength against the opposing view which is basically based on the argument of access to justice, and the implementation of mandatory mediation is broadening its scope. Admittedly, the severe global economic crisis triggered by the Covid-19 outbreak and the economic transformation associated with it will increase the workload of the judiciary. This will be a very important argument for the further expansion of the implementation of mandatory mediation. In our country, the implementation of mandatory mediation is still being discussed for the settlement of disputes arising from the family law and similar legal disputes. The consolidation of the views advocating the mandatory mediation will accelerate the implementation of it in the several areas of law in the future.

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