

TÜRKİYE’DE ARABULUCULUK UYGULAMALARI

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Özet

Bu makale, Türkiye’de resmi ve gayri-resmi arabuluculuk üzerine betimleyici bir tartışma içermektedir. Çalışma, dünya genelinde gelişmekte olan arabulucuğun farklı kültürlerden beslenmesi gerektiği varsayımından yola çıkmakta ve bu bağlamda daha önce çok çalışılmamış bir ülke olarak Türkiye’nin arabuluculuk deneyimlerine yer vermektedir. Türkiye vakasından yola çıkarak çalışma, arbuluculuğun bazı aksayan yönlerine değinmekte ve bu konuda neler yapılabileceğine ilişkin öneriler de geliştirmektedir.

Anahtar Kelimeler: Arabuluculuk, Alternatif Uyuşmazlık Çözümü, Türkiye, Uyuşmazlık Çözümü.

MEDIATION PRACTICES IN TURKEY

Abstract

This essay provides a descriptive discussion on informal and formal mediation in Turkey, a case whose mediation practices have not been studied before well. The study is based on the assumption that since mediation has been a growing activity around the world, exploring different cultures and learning how these cultures resolve their conflicts may contribute to the path towards an excellence practice of mediation. Through exploring the Turkish case and talking about many practical shortcomings of mediation, the study also reaches certain suggestions to make mediation a more effective tool of conflict resolution.

Key Words: Mediation, Alternative Dispute Resolution, Turkey, Conflict Resolution.

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I. Introduction

Mediation is an efficient tool to resolve conflict. In a generic sense, mediation refers to a confidential process in which a neutral third party assists conflicting parties in the resolution of their conflict. An informal process of conflict resolution through mediation is designed to incorporate all issues in the dispute - especially those that may not come under any rule of law but are nonetheless the driving force behind the ongoing conflict. The parties’ participation in a dispute resolution process facilitated by a skilled neutral can resolve the conflict, save money, improve working relationships, and more important, make it less likely that the problem will reoccur.

We do not know how common mediation was in earlier history, but studies of modern societies reveal that it has expanded exponentially worldwide, especially since the 1960s. This growth is due in part to a wider acknowledgement of individual human rights, the expansion of aspirations for democratic participation at all social and political levels, as well as a belief that an individual has a right to participate in decisions affecting his or her life.¹ Change has also been motivated by growing dissatisfaction with authoritative, top-down decision-making procedures that do not adequately address parties’ strongly felt or genuine interests. As result, in most Western countries, mediation has grown as a formal and widely-practiced approach to community dispute resolution. It is practiced in schools and institutions of higher education as well.

The field is still growing and indeed, modern practice of mediation is not confined to Western countries. Many non-Western cultures in Asia, Africa, and Latin America have also developed informal and formal mediation procedures that are integrated into day-to-day interactions

¹ Christopher W. Moore, *The Mediation Process: Practical Strategies For Resolving Conflict* (Third Edition, San Francisco: Jossey-Bass Publishers, 2003), p. 22.

for the resolution of conflicts. No doubt, learning from these cultures is very important for further growth of mediation theory and practice.

Within the framework of this goal, the purpose of this article is to explore mediation activities in one of the non-Western countries, Turkey, whose contribution has not been studied before. The study will start with talking about informal mediation process in Turkey, followed by formal mediation, which has been started to be utilized in recent years in certain disputes under the name of *alternatif uyumsuzluk çözümü*, alternative dispute resolution (ADR).

II. Informal Mediation

As a generally traditional country, Turkey, indeed, has a long history of using mediation at the informal level. Mediation is especially critical in Turkish society when honor is at stake and any concessions will appear to result in loss of self-respect or face. Thus, face-to face negotiations are extremely difficult, and an intermediary is needed to separate the parties and to work out an acceptable arrangement that preserves honor.

In most cases, intermediary services are performed by a mediator who is a person of respect. Such mediators are usually local community leaders that are trustworthy and experienced. They are mainly old people and males, though women can also handle many conflicts, especially those among women. Sometimes, younger well-educated people with economic power and high status can become mediators as well. In any case, candidates for local mediation must not have a criminal record. Those punished by formal authorities or under threat of sanctions for various reasons could be ineligible for mediation.

Informal mediators as such also possess basic mediation skills. These include -but are not limited to- setting an agenda, carefully planning negotiation stages (between the parties), reviewing key issues and concepts in the conflict, searching for a solution rather than analyzing responsibility, calling for specific exercises and thought

processes which might move the parties from conflictive thinking to creative design, promoting ideas and making suggestions towards a solution after negotiation is well advanced, being sensitive to the needs of the parties, and maintaining neutrality while remaining in contact with the parties.

How Does The Mediation Process Work?

Informal mediators enter conflicts basically in three ways: as a result of direct initiation by the parties, referral by secondary parties, or direct initiation by themselves.

Direct initiation by a party or parties is the most common mechanism by which a mediator enters a conflict. The request for mediation may come from a single party or all the disputants. Secondary parties, on the other hand, are those concerned about the general ramifications of continued conflict, such as friends, neighbors, and relatives. To avoid negative aspects of the conflict, they try to convince the parties or a mediator to initiate the mediation process. Interventions initiated unilaterally by mediators are not unusual as well, as local community leaders are usually motivated to preserve communal harmony.

However initiated, mediators who intervene in interpersonal conflicts basically use three modes to accomplish their purposes- *communication*, *formulation*, and *manipulation*, usually in that order.

When the conflict has made direct contact between the parties impossible, thereby preventing them from talking to each other and from making concession without appearing weak or losing face, the mediator serves as communicator. In this situation, it simply acts as a conduit, opening contacts and carrying messages. This role is completely passive, with no substantive contribution by the mediator. The mediator may also help the parties understand the meaning of

messages by translating them into a language that is mutually understandable and acceptable.

The second mode of mediation requires the mediator to enter into the substance of the negotiation. Since a conflict may not only impede communications between parties, but be so encompassing that it prevents them from conceiving ways out of the dispute, the parties need a mediator as formulator too. Once face-to-face discussions are underway, the main functions of a mediator traditionally include:

- Providing ideas or possible solutions, especially when the parties are deadlocked.
- Initiating proposals which originate from one or other party, but which could not be advanced for fear of revealing weakness or uncertainty.
- De-committing the parties by providing some formula by which they can gracefully abandon previous positions to which public acts and statements have heavily committed them.
- Acting as a substitute source of ideas or proposals.

As long as the parties are able to search for a formula for the resolution of their conflict, the mediator just facilitates the negotiation process. It leaves the ultimate solution to the parties. If the parties are unable to develop a solution by themselves, however, the mediator generally comes up with a solution for them, based on traditions and requirements of the situation. When this happens, the parties are supposed to accept the mediator’s solution, but they can ask for minor modifications.

The third mode requires the mediator to act as a manipulator. Here the mediator assumes the maximum degree of involvement, becoming a party to the solution. As a manipulator, the mediator uses its personal power to bring the parties to an agreement, pushing and

pulling them away from conflict into resolution. When final agreement is reached, the parties are requested to shake hands and hug each other. The session ends up with everyone drinking coffee together.

III. Formal Mediation

Despite its physical proximity to Europe and being a candidate for the European Union membership, formal mediation in Turkey has not developed yet. At present, there is no specific law pertaining to ADR. However, there are provisions of ADR in the current legislation, one being the provision that supports ADR in the Advocateship Law and the other in Code of Criminal Procedure. A Mediation Law is also being prepared with the support of the European Union, but the progress seems to be going on rather slowly.

The Advocateship Law

Article 35/A of the Advocateship Law suggests that an attorney and his or her client may invite the other party to negotiation before the case or the trial is commenced. If the invitation is accepted and the parties reach an agreement at the end of negotiation, they execute a written agreement disposing of the dispute. Such an agreement typically includes the subject of negotiation, place and date of negotiation, and the duties of the parties as accepted mutually. The parties can also revise the agreement later on as new issues emerge, especially regarding the implementation process. Once accepted, no party can intentionally violate the agreement, which, indeed, is enforceable under the supervision of the related court.²

Code of Criminal Procedure

An amendment made to the Code of Criminal Procedure in 2006 contains provisions about victim offender mediation in criminal cases during investigation or prosecution phases in certain criminal offences. According to that if the parties agree on mediation, they appoint a

² For further information, visit Ministry of Justice Advocateship Law, accession date 29.03.2012, <http://www.mevzuat.adalet.gov.tr/html/440.html>.

lawyer as their mediator. If they cannot choose a mediator for any reason, the public prosecutor or the judge may contact the local bar association to appoint a mediator. To be a mediator in these cases, one must be an attorney and a member of the local bar association. The mediator has to complete the mediation process in thirty days from the time of appointing. An extension of the thirty-day limitation may only be granted by the prosecutor once. The limitation period suspends during the mediation. All mediation activities are confidential and may not be disclosed subsequently, except with the agreement of the parties. If the case is referred back to the proceeding as mediation is unsuccessful, an acceptance of some facts or even “confession of guilt” by the accused in the context of mediation cannot be used as evidence in subsequent criminal proceedings on the same manner.

After the mediation process is concluded, the mediator reports to the relevant public prosecutor about his or her interventions in ten days. If the mediation process is successful in bringing about an agreement between the parties, the public prosecutor orders not to prosecute. If the court refers a criminal case to mediation, the same procedure is followed.³

Draft Mediation Law

In conjunction with the European Union encouragement and support,⁴ the Ministry of Justice has also been working on a general mediation law. The objective of the mediation law is to facilitate the resolution of private law disputes speedily and effectively with the lowest cost possible. It also aims to ensure the resolution of these

³ For further information, visit Ministry of Justice Code of Criminal Procedure, accession date 06.04.2012, <http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.html>.

⁴ On 23 April 2008, the European Parliament adopted the Directive on Certain Aspects of Mediation in Civil and Commercial Matters to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation, as well as by ensuring a sound relationship between mediation and judicial proceedings.

disputes through an alternative method rather than judicial proceedings.

The first Draft Law, indeed, was prepared in September 2007 and submitted to the relevant authorities to be discussed. However, this first version was heavily criticized for two reasons. First, many objected to the directly enforceable nature of the mediation agreement signed by the parties and mediator. They argued that mediation had to be a voluntary act and the scope of the mediation process could be freely arranged by the parties. Second, most lawyers objected that being a mediator was not a privilege given to lawyers only. In fact, the first version of the Draft Law gave this right to basically all professions.⁵

The first critique was recognized by the committee preparing the Draft Law and changes were made to make the mediation process more flexible in accordance with the parties’ decisions. The second critique, however, was not recognized and the new version of the Draft Law also gave the right to become a mediator to all professions. Although further progress is said to have been made since then, the law arranging the area of formal mediation has not been passed to date. Various news agencies intermittently report that the government in general, and the Ministry of Justice, in particular, are still working on it.

IV. Concluding Remarks

Conflict is an omnipresent phenomenon of human interactions that may lead to productive or destructive consequences. Mediation is a significant way of third-party intervention that can minimize destructive consequences of social conflict and make an important contribution to the process of peaceful resolution.

It is a welcoming development that the use of mediation has grown tremendously since the 1960s around the world. Yet for

⁵ For further information, visit Ministry of Justice Draft Mediation Law, accession date 06.04.2012, <http://www.kgm.adalet.gov.tr/gorus/huakt.htm>.

mediation to achieve even broader utilization and perfection as a means of conflict resolution, it is important to learn how different cultures resolve their conflicts. In that sense, exploring the mediation activities in Turkey would hopefully make a contribution to exchange of ideas. That aside, the Turkish case reveals several important points, which can be summarized as follows:

First, informal mediation generally contribute to social peace and harmony in countries where professional mediation is not yet available. However, it is also important to acknowledge that since informal mediation is based on community traditions, “resolution” sometimes may result in the perpetuation of structural discrimination. To be more specific, I observed that Turkish traditions tend to give more power to certain social categories, to old people and males, mostly. Hence, interpersonal conflict resolution outcomes could favor, indeed often do favor, these categories. Also, it is not common that women can directly bring disputes to mediation. Usually, men, relatives or community leaders initiate the mediation process.

Hence, what is actually needed in countries like Turkey is that formal mediation has to become institutionalized as quickly as possible. Mediation is still underutilized because of its lack of applicability resulting from institutional deficiencies. For greater success, professional mediation services should be readily available. The European Union, United Nations special agencies, and even non-governmental organizations can be particularly helpful in providing professional assistance, in this respect.

Second, mediation itself requires more research to become a more effective vehicle of conflict resolution. Research is especially needed on cultural variations so that we can exchange ideas and learn more about how different people resolve their conflicts. Research must particularly target countries or communities that have not been studied, or studied extensively, before. There are still so many African, Asian, and Latin

American communities whose mediation activities are largely unknown. This should be an area in which future research efforts must go.

Finally, some sort of international funding must be developed to promote the growth of mediation around the globe and to financially support the countries trying to institutionalize professional mediation. Funding can come from governmental agencies, the business sector, foundations, as well as individuals believing in peace. The stronger the budget, the more likely mediation services can grow faster.

In conclusion, people around the world today are in need of effective means to manage and resolve their conflicts. Mediation has been proven itself in the past, as well as at present, to be a helpful tool in accomplishing this goal in a variety of conflict situations. Mediation can even function better as a conflict resolution tool if people increasingly believe in its utility and exchange ideas to make it better.

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