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Mediation in Turkish Health Law for Healthcare Disputes

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***Abstract*—**In order to prevent overburdened courts, rising costs of litigation, and lengthy trial resolutions, the Law on Mediation for Civil Disputes was enacted, which was aimed at defining the procedure and guiding principles for dispute resolutions under Civil Law, in 2012. This "Mediation Code" also applies for civil healthcare disputes in Turkey. Aside from mediation, reconciliation, governed by Articles 253-255 of Criminal Procedure Law, has emerged as an alternative way to resolve criminal medical disputes, but the difference between mediation and conciliation is mostly procedural. This article deals with mediation in Turkish health law and aspect of medical malpractice mediation in Turkey. In addition, this study examines the issue of mediation in health law from both a legal and normative point of view, including codes of mediation which regulate both the structural and professional practice of mediation providers. As a result, although there is not official record about success rate of medical malpractice litigations and malpractice mediation in Turkey, it is widely accepted that the success rate for medical malpractice cases is relatively low compared to other personal injury cases even if it is generally considered that medical malpractice case filings have gradually increased recently. According to the Justice Ministry's Department of Mediation in Turkey, 719 civil disputes have referred to mediators since 2013 (when the first mediation law came into force) with a 98% success rate.

***Keywords*—**Malpractice mediation, medical disputes, reconciliation, health litigation, Turkish Health Law.

I. Introduction

A dispute involves at least two parties, the disputants. The disputants can be individuals, corporations, governments, or other entities. A dispute does not occur until one party (the claimant) makes a claim against another (the respondent). Some disputes involve only a single claimant and a single respondent, while other disputes involve multiple claimants, multiple respondents or both. In general, respondents assert claims of their own so that some or all disputants are both claimants and respondents respect to the same dispute [1].

Disputes are as common in health care as in other industries and social circumstances that involve differing interests. Nevertheless, resolving medical disputes using the formal process of litigation is time-consuming and expensive. Thus, on the other side of formal adjudication, other alternatives may provide better opportunities to carry out a resolution that is acceptable to the parties [2].

Opportunities for parties to medical malpractice disputes to enter into a meaningful, significant discourse through the process of mediation, offering the potential for dealing with extra-legal concerns that may not rise up on the face of their complaints are often squandered because the form of mediation provided was not capacious enough nor designed to permit such a discourse [3].

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II. Alternative Dispute Resolution

The interest and utility of Alternative Dispute Resolution (ADR) methods in disputes among claimants has become increasingly popular in recent decades due to overburdened courts, rising costs of litigation, and lengthy trial resolutions [4]. For example, traditional litigation leads to overworked judges in the United States. Because in traditional litigation, a judge typically listens to arguments and expert witnesses on the interpretation of relevant law as applied to the particular dispute, and then makes a determination as to who wins and who loses. In addition, this process can be complex and drag on for years and can also be extremely costly [5]. According to the Presidency of the Supreme Court of Appeals, the judiciary had 1.4 million cases in 2013 plus over 500,000 cases pending from the prior year [6].

ADR encompasses various adjudication methods other than a formal trial proceeding, including negotiation, mediation, arbitration, and mixtures of these methods. Each method is generally quicker, less costly, involves an easier and less formal discovery process, and accordingly, is more flexible and responsive to the individual claimants and their respective needs. ADR is widely available across all dispute concerning contractual obligations between a consumer and a business. Additionally, less formal methods of adjudication are conducted outside of media attention and are usually accompanied by lengthy non-disclosure agreements, which make ADR more attractive to businesses (or health care organizations) given that their professional reputations are less likely to be negatively affected by the dispute. Thus, in the face of increased malpractice claims, sky-rocketing damage awards, and resulting increases in medical malpractice insurance cost [7], malpractice scholars have identified that traditional adjudication often fails to adequately suit the parties' needs [8] and that trial alternatives may provide better and effective opportunities to reach a resolution.

Although there are formidable cultural and professional barriers to ADR adoption in health care, there are also encouraging findings about the potential opportunities for implementing ADR programs in medical malpractice cases particularly in reducing costs, handling emotional issues, and dealing with the complexities of medical malpractice cases. ADR may also promote better management of emotional

issues in conflict. Finally, the flexibility of an ADR approach is especially appropriate in dynamic, complex, and emotional disputes [9].

III. Medical Malpractice

Medical malpractice is defined as an act or omission by a physician during the course of a patient's treatment that deviates from acceptable norms in the medical community and causes an avoidable injury to the patient [10]. According to the another definition, medical malpractice is "a doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances [11].

For a patient suffering an adverse event from medical care, the legal system's standard remedy is tort litigation, whose goals are justice, compensation for those injured by others' negligence, quality improvement via deterrence, and sometimes punishment.

Litigation sometimes fails to satisfy these goals in medical malpractice cases. Although a lawsuit is considered the only way to achieve justice, litigation generally does poorly in compensating losses or improving quality of care [12].

Litigation does poorly as a vehicle for improving quality-which purportedly is to occur via deterring similar negligent performance in the future by this and other providers. In addition, according to the Harvard Medical Practice Study, the link between medical liability and deterrence of medical negligence was small and negative, though the correlation was weak [13]. Deterrence as quality improvement, however, is problematic in several ways.

First, litigation tends to inspire costly and sometimes harmful defensive medicine, loosely defined as "tests and procedures ordered by physicians principally to reduce perceived threats of medical malpractice liability [14].

Second, litigation can impair providers' quality of performance. Evidence suggests that physicians named in a lawsuit tend to suffer a marked increase in symptoms of depression, including fatigue, insomnia, difficulty in concentrating, decreased self-confidence, or a loss of nerve in clinical activities [15].

Third, and most important for present purposes, litigation's deterrence approach to quality improvement tends to inhibit communication at a time when robust communication is most urgently needed [16].

In theory, this sort of early dispute resolution should be at least as attractive to physicians as to hospitals [12, p.125]. Hospitals also have a keen interest in improving quality to reduce future errors. And they, like many patients, may want to repair the relationship damage that an adverse outcome can cause, and to reach some sense of fairness and equilibrium for all in the process.

A. Issues Arising for Patients in Medical Malpractice Disputes

1. Compensation in Damages: Compensation is clearly one factor in the decision to sue following an adverse medical outcome [17]. Patients sue for a breach in medical care that can result in significant or permanent injury or death and they seek compensation for those injuries [18].
2. Harm Prevention: At the top of the list of nearly every study conducted on why patients sue is a desire on the part of patients that what happened to them should not occur again [19].
3. Communication Failure: Studies on the etiology of a medical malpractice suit indicate that communication inadequacies or breakdowns between the healthcare provider and the patient are more responsible for the vast majority of suits than any other factor. In fact, the literature reveals that patient issues regarding communication can be divided along two lines: the concrete need to hear an explanation for an adverse outcome and the human need for validation [20].
4. Apology: When a physician makes an error, the trust-based relationship with a patient is breached; failure to apologize for such errors compounds the problem. Patients expect that someone worthy of their trust will behave ethically; that ethical responsibility may extend an obligation on a physician to offer an apology for a mistake [21].

There are reasons why physicians might refrain from issuing an apology. Lawyers and insurance carriers usually insist that a physician cease communication with a suing a patient [22]. Physicians fear an apology may be used as evidence against them at a later trial. Physicians also fear that disclosure and apology will result in a loss of respect from patients and colleagues [23].

B. Medical Malpractice in Turkish Civil Law

Medical Malpractice liability in Turkey rests almost entirely within the fault-based civil tort liability system and civil contract law, with very specific and discreet areas of criminal liability and strict liability. Under civil tort liability, an injured plaintiff has both the burden of persuasion and production and may only recover if the health care provider was negligent.

In Turkey, when one acts (such as physician or health providers) beyond the restrictions imposed by law on individual conduct, the acts of them become wrongful. If a wrongful act results in an injury to another, the law requires that redress be made in the form of compensation for such injuries. Such a wrongful act is a tort (haksız fiil). In this case, tortuous liability consist of four main elements of which are acts against law (hukuka aykırı davranış), damage (zarar), causal relation (illiyet bağı) and negligence (ihmal, kusur) [24].

All patients are deemed to have a contractual relationship with the physician, referredto as a medical treatment/service contract, mandate contract, or patient admittance agreement, or the hospital, referred to as a "Hospital Admission Contract". In fact, the Turkish Court of Cassation has qualified the legal nature of medical treatment contract as a "Mandate Contract". There are a lot of decisions regarding with that.[1] In

[1] Some of them are 15. H.D., E:1999/004007, K: 1999/003868 (November 3, 1999,); 13. H.D., E: 2000/008590, K: 2000/009569 (November 6, 2000); 13. H.D., E: 2014/30305, K: 2014/35473 (February 17, 2014). (In Turkish).

particular. In case of treatment in a private hospital or clinic, the contract is made between the patient and the hospital. The medical treatment contract concluded with a hospital or health institution is called "Hospital Admittance Agreement". This is true for patients who pay out of their own pocket in private hospitals, and a vast majority of patients whose treatment is paid for directly by their social and private health insurance.

Turkish tort law is mainly based on liability for wrongful and faulty conduct. The tort law section of the Turkish Obligation Code (TOC) gives each individual such freedom activity as is compatible with the rights granted to others. When one acts beyond the restrictions imposed by law upon individual conduct, the acts become wrongful. If a wrongful act results in an injury to another, the law requires that redress be made in the form of compensation for such injuries. Such a wrongful act is a tort. In addition to the civil sanctions against the wrongful acts, certain wrongful acts may also be punished under the provisions of the Turkish Penal Code [24, p.170].

According to Turkish law, adverse events may in principle be redressed through criminal, contract, and tort law remedies. However, the criminal law plays a very minor role in addressing medical malpractice, primarily because of the substantive and procedural standards; it is mentioned by failing to take proper care or precaution instead of felonious injury and felonious homicide.

C. Medical Malpractice in Turkish Criminal Law

In Turkey, if the physician is to be found liable for a criminal medical negligence act, general elements of the crime must be proven. Each crime must contain four general or constitutive elements (suçun genel veya kurucu unsurları) are widely accepted by some legal authors, without their existence it is not possible to define an act as a crime. These elements are the legal element (kanuni unsure/tipiklik), the material element (actus reus – maddi unsur), the moral element (mens rea – manevi unsur), and the unlawfulness of the act (hukuka aykırılık) [25].

It should be noted that medical negligence may also amount to a criminal offense like unintentional manslaughter or involuntary harm to the integrity of the person. Physicians and health professionals may be confronted with criminal proceedings for acts committed in the exercise of their functions. Turkish criminal courts have the ability to award compensation to the victims under which the health professional can be criminally convicted and the victim can obtain damages directly from the criminal court. In addition, the patients can pursue not only civil remedies in contract and in tort law, but also criminal remedies. So, bringing a claim under both the criminal law and civil law, especially contract law as well as tort law, does not influence on outcome of the both cases are criminal and civil.

IV. Mediation in Medical Malpractice

Among the various ADR methods, mediation in particular has grown significantly in medical malpractice disputes. In fact, the United States was on the forefront of this growth [26].

Mediation is a negotiation that is facilitated by a neutral third-party mediator. The most important characteristic of mediation is that it is nonbinding. When parties choose to attempt mediation, it is not binding and parties can break off the negotiations at any time.

TABLE I
Features of Mediation and Litigation

Litigation	Mediation
Adversarial	Consensual
Inflexible	Flexible
Backward-looking	Forward-looking
Externally imposed judgement	Mutually agreed solution
Time-consuming	Relatively quick
Very costly	Relatively cheap

The key to mediation is that the mediator does not decide. The aim of mediation is not to produce answers but mutually agreed and accepted solutions to deeply held differences of opinion (Table I).

Mediation takes place in a neutral setting and has been defined as "a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution

V. Medical Malpractice Mediation in Turkish Health Law

Two types of mediation exist: traditional mediation, also known as interest-based mediation, and right-based mediation. Traditional mediation is the less structured of the two types and typically involves a single non-expert mediator counsels the parties to reach a mutually acceptable solution. Right-based mediation involves two co-mediators, whom are practicing medical malpractice attorneys and formally trained in mediation, and resolution is focused on the respective legal rights of the parties [7, p.306]. Turkey has only implemented the traditional method to date.

A. Mediation in Turkish Laws

In Turkey, on the other hand, mediation received traction later in recent history. In 2001, the International Arbitration Law was enacted to provide official procedures and principles for international commercial arbitration [27]. Then Turkish Mediation Law which provides civil procedures for out-of-court mediation in cases of medical liability in order to resolve disputes between patients and health care providers as quickly as possible was enacted in 2012, rather than solely international commercial arbitration. Finally, 2014 marked the enactment of the Istanbul Arbitration Center, which is a legal entity aimed at facilitating the settlement of national and international disputes by way of arbitration or ADR mechanisms**.** Except for the system of mediation in medical disputes, there is a Turkish Criminal Procedure Law [28] (article 253-255) offers other resolution way for criminal medical disputes as a reconciliation. However, the difference between mediation and reconciliation is mostly procedural.

According to the Turkish Criminal Procedure Law, there shall be an attempt to conciliate between the suspect and the victim or the real or juridical person of private law, who has suffered damages from the crime that is investigated and prosecuted upon the claim (art.253). Examples of this sort of crimes are a negligent injury and misuse of trust. However, healthcare providers, mostly physicians, often face more civil litigation than criminal prosecution or charge because of false medical intervention [29].

The Turkish mediation centers are solely operated from the Justice Ministry Department of Mediation. The requirements to become a mediator are explicitly provided in the Turkish Code of Mediation. The centers are staffed with attorneys only. To be a mediator one must be a person who has a law school degree and minimum five years of seniority [30], be a Turkish Citizenship, not having intentional felony in background and be full capacity person.

Unlike mediation in civil law, reconciliation in criminal law is a free service in Turkey if the parties reach a compromise [28, art.253]. In the criminal matters, conciliators may be a jurist or an attorney and do not need to take a reconciliation training. However, in the civil matters, a jurist or an attorney can be a mediator as long as they undertake basic mediation training to pass the mediation exam [31]. In conciliation of criminal disputes, the applicant applies to the public prosecutor or the judge either orally or in writing for the conciliator position. The local court may, with the consent of the parties, appoint a conciliator to attempt conciliation. In addition, in cases where the crime under investigation depends on mediation, the public prosecutor, or upon his orders, the official of judicial security forces shall propose mediation to the suspect and to the victim or to the person who has suffered damages from the crime [28, art.253]. On the other hand, in mediation of civil disputes, the parties can start proceeding of conciliation before the case or during litigation [30, art.13]. Victims are not obligated to enter into conciliation procedures and may request a court decision if dissatisfied with the compensation proposed by the health professional or his insurer [28, art.253].

B. Aspect of Mediation in Turkey

Turkish citizens have been slow to initiate mediation proceedings, but for those citizens who have, the results have been largely successful. Initially, despite growth in mediation programs, a Turkish citizen is still most likely to begin the process of traditional litigation and only seek the services of a mediation center in the event that he or she is unsatisfied with the traditional process. Indeed, mediation is available before and during trial and may be initiated by either party as an informal request [31, art.13]. Once both parties agree to mediate, they must appoint a third-party mediator and attempt to draft a conciliation agreement [30, art.18]. The parties are able to withdraw their consent at any time during the mediation session [30, art.21]. Based on official record of the Justice Ministry's Department of Mediation, vast majority of civil disputes (98%) have been successfully mediated since the first mediation law came into force in 2013 [32]. However, the most likely cases to be mediated are employment, dispute involving land ownership, and other non-violent disputes, and no mediation data was available for medical malpractice cases [33]. Thus, given that such high success rates have been realized in other civil disputes and so many potential medical malpractice disputes are never litigated, a medical malpractice model that focuses more on mediation-based resolution may best suit the injured plaintiffs.

VI. The Turkish Consumer Protection Code and Medical Malpractice Mediation

In May 28, 2014, a new Consumer Protection Code (CPC) was enacted in Turkey, replacing the nineteen-year-old Consumer Protection Code of 1995. The principal aim of this code is to recognize the vulnerability of common citizens in consumer transactions [34]. The Code brings within its ambit the services of the medical profession and treats patients as consumers of such services. For expeditious disposal of complaints of negligence or deficiency in health service of private hospital, a consumer/ the patient may file a complaint in a Consumer's Court for recovery of damages. In addition to providing protection against defective goods sold in the market, the Code protects consumers against deficient or negligent services provided by physicians. The services of the medical profession or a private hospital become subject to adjudication for damages under the consumer protection code. This means that certain categories of patients can sue errant health care providers for compensation under the Consumer Protection Code, as a breach of contract.

After enacted CPC, Consumer's Court started using the concepts of a consumer and a service provider as defined in the CPC to resolve healthcare disputes which regarding compensation cases between patients and physician who practicing in private hospital. This application creates an almost tangible tension among the medical associations which rejecting the possibility of having the medical profession considered as a consumer-oriented relationship. However, from the American perspective, consumer protection laws or product liability laws are viewed as legal regimes that are separate from ordinary medical malpractice [35].

The first problematic issue that arises is whether the practice of medicine – or in other words, the physician patient relationship – can be viewed as a consumer or commercial relationship according to the CPC [36].

According to the purpose of the CPC, it can be said that the patient is considered a consumer of services, regardless of whether it is a simple consultation or a complex medical treatment in private hospitals. As a result, the physician-patient relationship, which based on confidence, gains a new dimension under the CPC. Although beforehand the Turkish Court of Cassation made a decision that patient-physician cases arising from medical disputes did not associate with Consumer's Court, it has currently ruled that this type of cases are related to Consumer's Court [36, p.990].

Consumer's Court deal with cases related to healthcare or other disputes such as purchasing, food products, shopping if

the minimum value of the claim is three thousand Turkish Liras [36] which is about US $1035.

Unlike the Consumer's Court, there is a Consumer Committee which aims to settle between service provider and consumer. In addition, the objective of the committee is to promote and protect the rights of the consumers. A consumer as a patient may apply o district consumer committee for recovery of damages if value of a claim is less than three thousand Turkish Liras [34, art.68]. In this committee process, parties can come to an agreement like a medical malpractice mediation process.

Consumer Committee must consist of five members, one of whom must be a provincial director of trade or district governor or its officer as a head of committee. Other members must be municipal officers, a lawyer from a district bar, a member of consumers' organization and a member of trade and consumer association [34].

VII. Conclusion

Turkey suffers from a different type of medical liability problems such as patient rights, efficient use of health care resources. Those are caused by the related problems in not only quality of health care but also organizational and financial structure [37].

In the very nature of the profession, physicians are vulnerable to liability under civil and criminal law in Turkey. However; the consumer law in Turkey enables patients to obtain a quicker recovery of damages than traditional tort law, as the action under a civil lawsuit is lengthy and time consuming.

It is clear that the practice of medicine and delivery of medical care by all healthcare providers is significantly influenced by the fear of malpractice claims [38]. It is believed that with the adverse consequences, including financial liability and the fear of litigation, there is a need for change in order to allow for better, more efficient healthcare in the future for Turkey.

For litigants today, faced with the potential of a long and drawn-out jury trial, along with the uncertainties that accompany such an exercise, mediation is becoming a very important alternative in the dispute resolution process including in the medical malpractice area. That is why it is important to underline that the malpractice mediation has the possibility of creating a more constructive dialogue between the parties. Most of the medical malpractice claims are settled by the mediation sessions in the U.S. and the low incidence of litigation is attributable to the role of the mediation centers. However; it is hard to say that medical malpractice mediation plays very active role during the medical malpractice disputes process in Turkey. Some contributing factors for that are the new mediation law for civil disputes comes into force in 2013, both physicians and lawyers do not embrace readily the regulations of mediation law and the patients seek to file medical malpractice claims to the court instead of settlement.

Alternative dispute resolution method is practically quicker, less costly, more flexible and responsive to the individual claimants and their respective needs. Hence, it can play a significant role for medical malpractice disputes. Although, the Law on Mediation for Civil Disputes was enacted in 2012, which was aimed at defining the procedure and guiding principles for dispute resolutions under Civil Law, officially malpractice dispute resolution records have not officially been recorded yet. Clearly, mediation law for civil disputes in Turkey is quite new regulation; on the other hand, if policy-makers really want to apply the regulation for malpractice disputes, they should take into consideration for importance of recording data.

There is not well organized official record about medical malpractice cases against the health providers in Turkey, however, it is commonly accepted that the rate for successful cases involving medical malpractice is relatively low compared to other civil injury cases. There are various reasons why the claiming rates are so low relative to incidence. These might be reluctance to sue the doctor who is perceived as trying to help or perceived respectable job in the society. However, it has considered that the rate of patients tend to file against the health providers is progressively increase lately.

There are number of reasons for low success rate of malpractice cases, some of which are that it is hard to submit for evidence of medical malpractice. Because judge presumes physician should not intentionally make a medical mistake on a patient. Also, it is deemed that patients do not intend to file against physicians as a cultural factor.

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