Exposé for Doctoral Thesis

preliminary title

Mediation in Civil Proceedings and its Impact on Fundamental Rights

by

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Vienna, 2021

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Degree Programme Code:	A 783 101
Field of Study:	Fundamental and Human Rights

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1. Introduction

Recently, many legal systems have changed significantly as governments have a particular interest in alternative dispute resolution to enhance the performance of the judiciary.[1] Consequently, individuals who seek to enforce their legal rights are strongly advised to use alternative dispute resolution methods, especially mediation.

Such a transformation in the judicial systems is particularly evident in common law countries, where mediation is already practised in several court-annexed programs and in the private sector.[2] This development is based on the growing problems in providing adequate access to justice due to delays and high procedural costs. Civil law countries have a greater reluctance to accept the resolution of legal disputes through mediation.[3] Nevertheless, there is also a noticeable trend towards mediation; for instance, in the Netherlands and Italy.[4] The Austrian Ministry of Justice has also announced plans to halve court fees in 2022.[5] It is intended to create an incentive to settle more legal disputes through mediation in the future, thereby easing the burden on the judicial system.[6]

In a nutshell, mediation can be characterised as a negotiation process between the parties to a dispute with a third party, the mediator, who helps the parties to the dispute to identify and understand their concerns and needs.[7] The mediator is not empowered to make decisions in a mediation process; therefore, the parties are responsible for the agreement reached. Moreover, mediation is conducted in private, so the process and outcome remain confidential to the parties.[8] Besides that, a legal system is not necessarily applicable during the mediation process. The agreements reached are based on

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[1] *Ali*, Court Mediation Reform Efficiency, Confidence and Perceptions of Justice (2018) 25.

[2] *Alexander*, Chapter 1: Global Trends in Mediation: Riding the Third Wave, in *Alexander* (ed), Global Trends in Mediation (2006) 7.

[3] *Alexander* in *Alexander* 7.

[4] *Alexander* in *Alexander* 7.

[5] ME ZVN 2021, 138/ME 27. GP.

[6] ME ZVN 2021, 138/ME 27. GP. Erläut 22.

[7] *Vettori*, Mandatory Mediation: An Obstacle to Access to Justice, 15 Afr Hum Rts LJ 355 (357).

[8] *Genn/Riahi/Pleming*, Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation, in *Steffek/Unberath* (eds), Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads (2014*)* 137.

negotiations that essentially aim to resolve social differences and, as a minor matter, to find a legal solution.[9] If an agreement has been reached, it has the binding effect of a contract, and it can be enforced.[10] Therefore, there is greater potential for impairment of fundamental rights.

When mediation aims to expedite the judicial process, court-based (*gerichtsnahe*) mediation schemes are mainly used. Court-annexed mediation is characterised by coordination with court proceedings, but the process itself is separated from the court, and carried out in private. In jurisdictions where court-annexed mediation systems are already established, elements of coercion are frequently used to create incentives for the parties to attend a mediation previous to a court ruling.

There are typically two situations in court-annexed mediation systems where the parties may be subject to coercion. The first circumstance is described as compulsion to mediate, and occurs when entering a mediation process. It is a prerequisite for initiating a process at a later point in time. The second aspect is characterised as compulsion in mediation. It is frequently referred to as “quasi-compulsory” because the parties are not effectively compelled to use ADR methods, but are required to face adverse costs orders or penalties when ADR methods have not been undertaken.[11]

The English Legal System must be emphasized in this connection, as it incorporates such monetary sanctions.[12] While not explicitly stated, the fact that judges can impose adverse costs orders is a strong incentive to attempt ADR procedures.[13] Nevertheless, requiring a party to use ADR methods to resolve the conflict without access to a court has the potential to conflict with Article 6 of the European Convention on Human Rights.[14]

The Austrian approach to mediation in civil proceedings is contrary to the previously described approach, as it emphasises the voluntary element – parties cannot be involved or forced to commence mediation proceedings.[15] In general, considering mediation is not a prerequisite for civil litigation.[16]

[9] *Hopt/Steffek*, Chapter 1 Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues, in *Hopt/Steffek* (eds), Mediation: Principles and Regulation in Comparative Perspective (2012) 12.

[10] *Hopt/Steffek* in *Hopt/Steffek* 137.

[11] *Hanks*, Perspectives on Mandatory Mediation, 35 UNSWLJ 929 (931).

[12] *Hanks*, 35 UNSWLJ, 931.

[13] *Hanks*, 35 UNSWLJ, 932.

[14] *Blake/Browne/Sime*, A practical approach to Alternative Dispute Resolution (2018) 13.

[15] *Roth/Gherdane*, Chapter 4 Mediation in Austria: The European Pioneer in Mediation Law and Practice, in *Hopt/Steffek* (eds), *Mediation: Principles and Regulation in Comparative Perspective* (2012) 251.

[16] *Roth/Gherdane* in *Hopt/Steffek* 251.

2. State of research

Given the mediation proceedings, the right to a fair trial, as set out in Article 6 of the European Convention on Human Rights, is of paramount importance. Article 6 is narrowed to the fairness of proceedings; namely, a "*fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*.[17]

Thus, the European Court of Human Rights ruled in the key decision of *Golder v the United Kingdom*[18] that the right of access to a court is not to be interpreted as absolute, which is the reason why there is a possibility of limitations since the right *"by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals"*[19]. Restrictions within the scope of Article 6 ECHR are therefore only permitted, if they pursue a legitimate objective, and are interpreted as proportionate.[20]

The leading case in respect of compulsory mediation is *Rosalba Alassini v Telecom Italia SpA*[21] ruled by the European Court of Justice. This influential decision reviewed a provision in Italian Law that obliged parties to conduct mediation, which led to a forfeiture of their right to bring an action before a court.[22] The tribunal found that provided mediation schemes that are considered coercive are in the general interest and proportionate, therefore comply with the principle of effective judicial protection, and do not violate Article 6 ECHR.[23] Furthermore, it was pointed out that a "*settlement procedure which is merely optional is not as efficient as a mandatory one*".[24] On the other hand, obligatory mediation schemes do not seem to contravene Article 6 of the European Convention on Human Rights in general. Instead, a case-by-case decision is required.

Austrian Jurisprudence on mediation takes a different perspective. While the Austrian Supreme Court held that courts were entitled to order and enforce participation in an initial information about mediation, it has also ruled that courts cannot order mandatory participation in a mediation against the will of either party.[25] Courts should recommend mediation to the parties, if they suppose it would be beneficial for the case at hand. However, if a party denies the attempt, the Supreme Court ruled that obligatory mediation was incompatible due to the absence of a corresponding legal provision. This ruling raises the question of whether a referral to mediation might be acceptable, if there would be an adequate legal provision under Austrian Law.

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[17] European Convention on Human Rights, Art 6(1); *Schabas*, The European Convention on Human Rights: A Commentary, (2015) 271.

[18] ECHR 21.2.1975, 4451/70, *Golder/United Kingdom*.

[19] *Schabas*, *ECHR Commentary*, 285; ECHR 21.2.1975, 4451/70, *Golder/United Kingdom*.

[20] *Grabenwarter*, European Convention on Human Rights Commentary, (2014) art 6, para 67.

[21] ECJ 18.3.2010, C-317/08, *Rosalba Alassini/Telecom Italia SpA.*

[22] *Meggitt*, PGF II SA v OMFS Co and Compulsory Mediation, 33(3) CJQ 335 (338).

[23] ECJ 18.3.2010, C-317/08, *Rosalba Alassini/Telecom Italia SpA.*

[24] ECJ 18.3.2010, C-317/08, *Rosalba Alassini/Telecom Italia SpA.*

[25] OGH 26.4.2017, 7 Ob 46/17s; OGH 15.7.1997, 1 Ob 161/97a; OGH 14.12.2011, 3 Ob 196/11m.

3. Central research questions and objectives of the doctoral thesis

The doctoral thesis aims to examine the fundamental rights perspective of the use of mediation in civil proceedings.

The following questions shall be addressed:

- To what extent may private mediation, court-annexed mediation and judicial mediation affect the fundamental rights of individuals?
- Would the Austrian Legal System permit the Introduction of a quasi-compulsory mediation system similar to the English one?
- Would a judicial referral to Mediation be acceptable if the Austrian Law contained an adequate provision, also with regard to Article 83 para 2 B-VG?
- In cases where individuals voluntarily engage in a mediation process, the question arises whether this can be interpreted as a waiver to particular rights under Article 6 of the European Convention on Human Rights? When is a waiver considered effective or void?
- If the waiver is void, which requirements of Article 6 ECHR are applicable?
- Which elements of compulsion can be interpreted as proportionate in view of Article 6 ECHR?
- To what extent has the case law on compulsory mediation schemes in other European Countries an impact on the developments in Austria?
- May the case law on other alternative dispute resolution methods, such as arbitration, also be applied to mediation?

4. Methodology

To evaluate the outlined research questions, all common scientific and legal methods are applied. The starting point in this research project is a detailed legal literature research. Thereby all available electronic databases, as well as the physical library resources, are used. The literature sources used are textbooks, monographs, commentaries, journal articles and anthologies. In this context, the relevant legislation and its materials are also examined and analysed. A particular focus will be on Article 6 of the European Convention on Human Rights. In this regard, the jurisprudence of the European Court of Human Rights and the European Court of Justice is explored in detail. Subsequently, the obtained results are assessed, the research questions are answered, and conclusions are drawn.

5. Preliminary Table of Contents

6. Preliminary Bibliography

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7. Timeline

Winter term 2020/21	• Research and drafting of the Exposé • Attendance of the following courses: Seminar zur Vorstellung des Dissertationsvorhabens (2 SSt, 6 ECTS) Seminar (2 SSt, 6 ECTS)
Summer term 2021	• Submission of the Exposé • Research and drafting of the thesis • Attendance of the following course: Vorlesung zur rechtswissenschaftlichen Methodenlehre (2 SSt, 4 ECTS)
Winter term 2021/2022	• Research and drafting of the thesis • Attendance of the following course: Seminar aus dem Dissertationsfach (2 SSt, 6 ECTS)
Summer term 2022	• Writing Process • Attendance of the following course: Seminar aus dem Dissertationsfach (2 SSt, 6 ECTS)
Winter term 2022/2023	• Writing Process
Summer term 2023	• Finalisation of the thesis and Submission • Defensio