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ABSTRACT

There have not been consensual models of conflict resolution in Turkish Criminal Law until the new Criminal Procedure Code. The penal mediation, which is an alternative way of conflict resolution in the field of criminal law, has been included into Turkish criminal practices with Turkish Criminal Procedure Code No. 5271. It was not included in the Turkish Criminal Code No. 765 and Criminal Procedure Code No. 1412. Penal mediation is a brand new process in terms of Turkish criminal law, and the aim of it is to eliminate the injury arising from crime.

The statutory regime for the conduct of Victim Offender Mediation in Turkish Criminal Procedure Law has been substantially changed by the enactment of the amendments of Code No 5560 to the Criminal Procedure Code (CPC), which came into force on December 19, 2006. Victim Offender Mediation has entered to Turkish law as a new concept and has been regulated under Article 253 with the sub-heading “Reconciliation” of Criminal Procedure Code, and under Article 24 of Child Protection Code No. 5395. Under the CPC, the Directive on the Application of Mediation Procedure According to the Code of Criminal Procedure published in the Official Journal of Turkey and came into effect on July 26, 2007.

An attempt for mediation shall be affected between the suspect and the victim or the real or private law legal entity who is injured as a result of the crime in the existence of the crimes mentioned under the first clause of Article 253 of CPC. In order to seek mediation in relation to crimes included in other laws, excluding those for which investigation and prosecution are dependent upon complaint, there should be a clear provision in the law (CPC Art. 253, 2).

If the crime, which is the subject of investigation, is subject to mediation, the public prosecutor, or the judicial security officer upon his/her instruction, shall propose mediation to the suspect and the victim or the person who has been harmed as a result of the crime. In case that the suspect, victim or the person who has been harmed as a result of the crime is not of legal age, the proposal shall be made to his/her legal representative. The proposal shall be deemed to have been rejected if the suspect, victim or the person who has been harmed as a result of the crime do not notify the public prosecutor about his/her decision within three days following the proposal of mediation (CPC Art. 253, 4). If reconciliation is proposed, the nature of reconciliation and the legal consequences of acceptance or rejection of reconciliation shall be explained to the person (CPC Art. 253, 5).

In case that the suspect and victim or the person harmed as a result of the crime accept the proposal for reconciliation, the public prosecutor may realize the reconciliation himself/herself, or request from the bar to assign an attorney as reconciler, or may assign a reconciler from among persons who have received law education (CPC Art. 253, 9). Mediation negotiations shall be executed confidentially (CPC Art. 253, 13) No remarks made during the reconciliation negotiations may be used as evidence in any investigation and prosecution or lawsuit (CPC Art. 253, 20).

At the end of the mediation negotiations, the mediator shall prepare a report and deliver this to the public prosecutor together with the copies of documents given to him/her. In case that a settlement is realized, how the settlement was reached shall be explained in detail in the report containing the signatures of the parties (CPC Art. 253, 15).

In case that the suspect fulfills his/her action all at once at the end of mediation, it shall be ruled that there is no ground for prosecution against him/her. In case that the fulfillment of the action is deferred to a future date, put into installments or has continuity, it shall be ruled to postpone opening of a public lawsuit about the suspect. The Statute of Limitations shall not be valid throughout the period of postponement. In case that the requirements of mediation are not fulfilled after the decision to postpone opening law case, a public lawsuit shall be opened. In case mediation is ensured, no lawsuit can be opened for damages due to the crime which is the subject of investigation; and any case opened shall be deemed to have been renounced. In case that the suspect fails to fulfill his/her action, the reconciliation report or certificate shall be considered as the documents having the nature of verdict as indicated under Article 38 of Enforcement and Bankruptcy Code (CPC Art. 253, 19).

ÖZET

Türk ceza hukukunda, yeni Ceza Muhakemesi Kanunun kabulüne kadar, anlaşmaya dayalı uyuşmazlık çözüm yöntemleri mevcut olmamıştır. Ceza hukuku alanında bir alternatif uyuşmazlık çözüm yolu olan ceza arabuluculuğu, Türk ceza uygulamasına, 5271 sayılı Ceza Muhakemesi Kanunu ile girmiştir. Ceza arabuluculuğuna, 765 sayılı Türk Ceza Kanununda veya 1412 sayılı Ceza Muhakemesi Kanunda yer verilmemiştir. Ceza arabuluculuğu, Türk ceza hukukunda çok yeni bir kurumdur ve ceza arabuluculuğunun amacı, suçtan doğan zararın giderilmesidir.

Mağdur fail arabuluculuğunun usûlüne ilişkin kanunî rejim, 19 Aralık 2006 tarihinde yürürlüğe giren, 5560 sayılı Kanunla Ceza Muhakemesi Kanununda (CMK) yapılan değişikliklerle önemli ölçüde değiştirilmiştir. Mağdur fail arabuluculuğu yeni bir kavram olarak Türk hukukuna girmiş ve Ceza Muhakemesi Kanunu'nun 253. maddesinde "Uzlaşma" başlığı altında ve 5395 sayılı Çocuk Koruma Kanunu'nun 24. maddesinde düzenlenmiştir. CMK uyarınca Ceza Muhakemesi Kanununa Göre Uz-laştır-ma-nın Uygulanmasına İliş-kin Yö-net-me-lik, 26 Temmuz 2007 tarihli Resmî Gazetede yayımlanarak yürürlüğe girmiştir.

CMK'nın 253. maddesinin birinci fırkasında belirtilen suçlarda, şüpheli ile mağdur veya suçtan zarar gören gerçek veya özel hukuk tüzel kişisinin uzlaştırılması girişiminde bulunulur. Soruşturulması ve kovuşturulması şikâyete bağlı olanlar hariç olmak üzere; diğer kanunlarda yer alan suçlarla ilgili olarak uzlaştırma yoluna gidilebilmesi için, kanunda açık hüküm bulunması gerekir (CMK m. 253, 2).

Soruşturma konusu suçun uzlaşmaya tâbi olması halinde, Cumhuriyet savcısı veya talimatı üzerine adlî kolluk görevlisi, şüpheli ile mağdur veya suçtan zarar görene uzlaşma teklifinde bulunur. Şüphelinin, mağdurun veya suçtan zarar görenin reşit olmaması halinde, uzlaşma teklifi kanunî temsilcilerine yapılır. Şüpheli, mağdur veya suçtan zarar gören, kendisine uzlaşma teklifinde bulunulduktan itibaren üç gün içinde kararını bildirmediği takdirde, teklifi reddetmiş sayılır (CMK m. 253, 4). Uzlaşma teklifinde bulunulması halinde, kişiye uzlaşmanın mahiyeti ve uzlaşmayı kabul veya reddetmesinin hukukî sonuçları anlatılır (CMK m. 253, 5).

Şüpheli ile mağdur veya suçtan zarar görenin uzlaşma teklifini kabul etmesi halinde, Cumhuriyet savcısı uzlaştırmayı kendisi gerçekleştirebileceği gibi, uzlaştırmacı olarak avukat görevlendirilmesini barodan isteyebilir veya hukuk öğrenimi görmüş kişiler arasından uzlaştırmacı görevlendirebilir (CMK m. 253, 9). Uzlaştırma müzakereleri gizli olarak yürütülür (CMK m. 253, 13). Uzlaştırma müzakereleri sırasında yapılan açıklamalar, herhangi bir soruşturma ve kovuşturmada ya da davada delil olarak kullanılamaz. (CMK m. 253, 20).

Uzlaşma müzakereleri sonunda uzlaştırmacı, bir rapor hazırlayarak kendisine verilen belge örnekleriyle birlikte Cumhuriyet savcısına verir. Uzlaşmanın gerçekleşmesi halinde, tarafların imzalarını da içeren raporda, ne suretle uzlaşıldığı ayrıntılı olarak açıklanır (CMK m. 253, 15).

Uzlaşma sonucunda şüphelinin edimini def'aten yerine getirmesi halinde, hakkında kovuşturmaya yer olmadığı kararı verilir. Edimin yerine getirilmesinin ileri tarihe bırakılması, takside bağlanması veya süreklilik arzetmesi halinde, şüpheli hakkında kamu davasının açılmasının ertelenmesi kararı verilir. Erteleme süresince zamanaşımı işlemez. Kamu davasının açılmasının ertelenmesi kararından sonra uzlaşmanın gereklerinin yerine getirilmemesi halinde, kamu davası açılır. Uzlaşmanın sağlanması halinde, soruşturma konusu suç nedeniyle tazminat davası açılamaz; açılmış olan davadan feragat edilmiş sayılır. Şüphelinin, edimini yerine getirmemesi halinde uzlaşma raporu veya belgesi, İcra ve İflas Kanununun 38. maddesinde yazılı ilâm niteliğindeki belgelerden sayılır (CMK m. 253, 19).

Keywords: Restorative justice, victim-offender mediation, penal mediation, mediator, confidentiality, impartiality.

Anahtar Kelimeler: Onarıcı adalet, mağdur-fail arabuluculuğu, ceza arabuluculuğu, arabulucu, gizlilik, tarafsızlık.

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§ 1. LEGAL BASIS OF PENAL MEDIAITON

IN CRIMINAL PROCEDURE LAW

With Turkish Penal Code (Türk Ceza Kanunu, TCK) No. 5237 and Criminal Procedure Code (CPC, Ceza Muhakemesi Kanunu, CMK) No. 5271, a new institution titled “mediation” (arabuluculuk, uzlaştırma) has been adopted in Turkish criminal justice system, which enables “settlement of penal disputes outside the criminal justice system”. According to the definition of the French Ministry of Justice, “Penal mediation (médiation pénale, ceza arabuluculuğu) is a process designed to bring parties in conflict together with reference to disputes of daily life (neighbourhood disputes, small thefts, property damage, issuance of cheques without funds) or of a family nature (non-payment of maintenance, custody and access issues etc.)” [1] . According to definition of the Council of Europe penal mediation is “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)” [2] . This institution has first emerged in the United States of America under the name “victim-offender mediation” (VOM) or “victim-offender reconciliation programmes [3] ” (VORP). The term “penal mediation” is viewed as more accurate and gradually being replaced by “victim/offender mediation”. The emphasis in this term is not on the punishment but on the search for a solution

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. Basic purposes of these programmes can be briefly stated as follows
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;

1) Settling the cases, which have accumulated at the courts, outside the justice system, and thus decreasing the workload of criminal courts,

2) Accelerating criminal adjudication,

3) Remedying the damage of the victim (restitution) arising from the crime within a short period,

4) Effecting a reconciliation between the parties through an “impartial and independent” mediator.

It can be seen that in the world a sensitivity which aims at protecting the benefits of the victims of crime has been emerging with increasing strength. In Turkey, as in the whole world, the care shown for the victims in the area of criminal justice has been at a very limited extent up to now [6]
. Today, however, in Europe and the United States of America, high importance is placed upon protecting the victims of crime and developing their rights within the justice system. While fulfilling the criminal justice in the justice system of 21’st century, satisfying the victim is also highlighted. Criminal sanction against crime is not sufficient; remedying and repairing the damage should be considered as the leading purpose. In this context, penal mediation has a potential to fulfill a significant function for the victims by remedying the damage of the victim arising from crime within short period
[7]
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On the other hand, it is among the targets of the criminal justice system to settle the conflict arising between the offender and the victim after committing a crime through the attempts of a judge (hâkim) or public prosecutor (Procureur de la République, Cumhuriyet savcısı) or a mediator (arabulucu) to be appointed by them, and thus to ensure both justice and satisfy the

victim. Eliminating the damage will lead peace between the offender (perpetrator, fail) and victim (mağdur) of the crime. Mediation also has a morale element in addition to remedying the damage. In mediation, the offender undertakes the responsibility of the crime he/she commits, and the consequences of the crime are eliminated and the possibility of reintegration emerges. Since what is required for determining the criminal responsibility of the offender and overcoming the damage will be fulfilled, the justice will be realized, validity of the legal rules that are violated with the action will be emphasized and thus a service will be rendered to reestablish the public peace, and also the state will be saved from many costs which it would have otherwise borne [8] .

In addition, since the mediation will end the conflict without resorting to a criminal trial, the already heavy workload of criminal courts will be decreased, and the justice will take place more rapidly for both parties. As a result of these, mediation will decrease the costs of the criminal justice system [9] .

Penal mediation, which emerged in the United Stated of America, has quickly spread through European countries and it has been adopted by the European Council, which we are a member of, and it has found its place in the international law with the Recommendation R (99) No. 19. The recommendation considers mediation as a flexible, comprehensive, problem-solving, participatory procedure, emphasizes the importance of increasing the active participation of the persons who are affected from the case, such as the victim and the perpetrator, as well as the society, and encouraging the feeling of responsibility towards rehabilitation and more integration of perpetrators to the society, and providing practical opportunities to remedy their conditions, and considers mediation as an efficient procedure to prevent crime, to struggle against crime and to resolve the conflicts created by the crime. Furthermore, this Recommendation suggests that, while developing mediation in their criminal justice systems, the member states should take into consideration the principles indicated in this Recommendation [10] .

The penal mediation, which is an alternative means of dispute resolution in the field of criminal law (ceza hukuku), has been included into our practices with Turkish Penal Code No. 5237 and Criminal Procedure Code No. 5271. It is not included in the Turkish Penal Code No. 765 and Criminal Procedure Code No. 1412. Penal mediation is a brand new institution in terms of Turkish criminal justice system, and the aim is to eliminate the injury arising from crime.

However, penal mediation, which has entered to our laws as a new concept and has been regulated under the Eighth Paragraph of Article 73 sub-heading “crimes, whose investigation (soruşturma) and prosecution (kovuşturma) are contingent on complaint, mediation” of the Turkish Penal Code No. 5237 which entered into force on June 1st, 2005 and under Article 253

with the sub-heading "Mediation" of Criminal Procedure Code No. 5271, and under Article 24 of Child Protection Code (Çocuk Koruma Kanunu, ÇKK) No. 5395 which entered into force on July 15, 2005, has been completely changed with an amendment made in Article 253 of Criminal Procedure Code No. 5271 with Law No. 5560 dated 9.12.2006. This amendment was made due to such facts that it extends the procedure of investigating of articles foreseen under the law in practice, increases the workload and makes mediation impossible to implement, and that those who implement it failed to adopt the concept sufficiently
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. In the last paragraph of Article 253 of the Law it was stipulated that a Directive would be issued to regulate the issues pertinent to the implementation of mediation. Under the CPC, the "Directive on Application of Mediation Procedure According to the Criminal Procedure Code" (Ceza Muhakemesi Kanununa Göre Uz-laştır-ma-nın Uygulanmasına İliş-kin Yö-net-me-lik) published in the Official Gazette
[12]
(Public Journal) of Turkey and came into effect on July 26, 2007.

This amendment which was brought under Article 24 of the Law No. 5560 had made the penal mediation more practical. The Directive particularly extended some issues which were left vague in the Law and thus aimed at directing implementation.

The Directive explains in detail such issues as the general principles and procedure pertinent to penal mediation, nature of the mediation and the legal consequences of accepting or rejecting the mediation, the procedure for appointing a mediator, mediator with law education, confidentiality, mediation negotiations, the subject of the action, mediation report and mediation certificate, the legal consequences of mediation at the stage of prosecution, obligations of the mediator, the place where the mediation is to take place, training of the mediator, fees and expenses of the mediators [13] .

§ 2. RESTORATIVE JUSTICE AND TRADITIONAL CRIMINAL JUSTICE

It should be enhanced active personal participation in criminal proceedings of the victim and the offender. Restorative justice (onarıcı adalet) approach provides an opportunity to participate in resolving conflict and addressing its consequences. Restorative justice include a flexible response to the circumstances of the crime, the offender and the victim, one that allows each case to be considered individually. In most of the world this process is referred as “penal mediation”. As a flexible, comprehensive, problem-solving, participatory option penal mediation is a restorative justice approach and complement to traditional criminal proceedings. Victim offender mediation is known as the earliest restorative justice initiative. In this process the crime victims are referred, as needed, for help and assistance and given input into the sanction or the shaping of a resolution or a restorative agreement. The mediator assists the two parties in arriving at an agreement that addresses the needs of both parties and provides a resolution to the conflict [14] .

In the light of above approach there is a clear necessity to enhance active personal participation in criminal proceedings of the victim and the offender as well as the involvement of the community in Turkish criminal law. Turkish lawyers recognize the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation (réparation). Victim-offender mediation will increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes in Turkish criminal law system [15] .

In accordance with Recommendation No. R (99) 19 concerning mediation in penal matters adopted by the Committee of Ministers of the Council of Europe, member states should develop mediation in penal matters and give the widest possible circulation to penal mediation [16] . As mentioned above Turkey law maker, as a member state of Council of Europe, made necessary amendments to criminal procedure rules and legislation so as to facilitate the settlement of criminal law disputes involving victim and offenders.

In Turkey, the care shown for the victims in the area of criminal justice has been at a very limited extent up to now. Criminal sanction against crime is not sufficient; remedying and repairing the damage should be considered as the leading purpose. In this context, mediation has a potential to fulfill a significant function for the victims by remedying the damage of the victim arising from crime within short period [17] .

Penal mediation requires specific skills and calls for codes of conduct and accredited training and to the establishment of penal mediation, lawyers should be trained in basic mediation methods and negotiation techniques.

§ 3. BENEFITS OF PENAL MEDIATION

The penal mediation process has potential benefits for all sectors of society. This has been demonstrated through research conducted on VOM programs around the world [18] . There are potential benefits for Victims, Suspects (Offenders), the Criminal Justice System, and the Community.

A) Benefits for Victim

Offenses eligible for mediation are offences that are primarily individual. In other terms, they are of concern more to the individual rather than the society. For such offenses, victims are not necessarily satisfied with the punishment imposed on the offender after a long period of conventional trial. More effective is when victims get sooner satisfaction after the commitment of the offense [19] .

Similarly, victims play an effective role in resolving the conflict as they wish, because they actively participate in the mediation process. Thereby, social peace is served better and more permanently compared to the conventional penalizing method.

Further, while the rights of victims are ensured in the conventional court trial, going through such proceedings is itself a burden [20] .

B) Benefits for Suspect

Penal mediation is also advantageous to the suspect (şüpheli) and the defendant. First, the risk of being convicted is eliminated. Since there is to be no conviction, the person shall not be subject to loss of rights associated with conviction, and his/her criminal record will not be adversely affected.

Even if not convicted in the end, the suspect will be affected more than a victim is under the conventional court trial. In such process, he/she may be subject to restrictions on fundamental rights and freedoms.

The decision arising from the mediation will be one with the involvement of his/her own will. He/she will have agreed to a resolution. Thus, mediation will contribute much more to social peace than will conventional court trial [21] .

C) Benefits for the Criminal Justice System

Each conflict ending in mediation will first alleviate particularly the workload of criminal courts and other authorities of legal remedy. Thus, such bodies will have more time to devote to other conflicts.

Mediation will not involve indirect effects in the form of snowball effects as in the case of conventional court trial where parties cannot adequately contribute. When parties are not satisfied with the verdicts from conventional court trial, new workloads are imposed on the judiciary. Mediation involving free wills of parties will not lead to such problems.

Mediation aims to alleviate the workload of justice systems other than the penal system. It is because, the conflict ended by mediation does not only go away in respect of criminal law, but also all fields of the legal system [22] .

D) Benefits for Community

Mediation makes a longer term contribution to social peace and ensures more social peace. The joint resolution created by parties listening to and understanding each other implements also the approach of restorative justice in real life [23] .

§ 4. PRINCIPLES OF PENAL MEDIATION

IN CRIMINAL PROCEDURE CODE

Mediation as an alternative dispute resolution (ADR, Alternatif Uyuşmazlık Çözümü) method is a tool that would give breathing space to the penal justice system. This advantage should become clearer if its scope is extended [24] .

Mediation has also positive effect in reducing the capacity in correctional facilities. Further, it is known that short term prison sentences that may be sanctioned against offenses eligible for mediation does not provide much benefit in rehabilitating the convicts.

A) Relevant Definitions in the Mediation Directive

The principles and procedures related to mediation were regulated in the Directive. This Directive covers the provisions pertinent to the enforcement of mediation transactions among the suspect or the accused and the natural person (gerçek kişi) or private law legal entity (özel hukuk tüzel kişisi) who has been harmed as a result of any crime specified to be within the scope of mediation in Article 253 of Criminal Procedure Code No. 5271 and in other laws (Directive Art. 2).

The definitions as used in the Directive shall have these meanings (Directive Art. 4);

Settlement (Uzlaşma): Agreement reached or caused to be reached between the suspect or accused and the victim or the person who has been harmed as a result of the crime included under the scope of mediation as a result of a mediation process in accordance with the procedures and provisions in this Law and this Directive,

Mediation: The process of settling a dispute between the suspect or accused and the victim or the person who has been harmed as a result of the crime due to a crime included under the scope of mediation as a result of a mediation process in accordance with the procedures and provisions in this Law and this Directive, or with the mediation of a mediator or a judge or a public prosecutor,

Mediator (conciliator): The person who manages the mediation negotiations between the suspect or the accused and the victim or the person who has been harmed as a result of the crime, who is appointed by a public prosecutor or the court, and who has received law education, or the attorney appointed by the bar upon the request of the public prosecutor or the court.

B) Basic Principles of Penal Mediation

Basic rules for opting mediation under Turkish law can be summarized as follow. First of all, it is mandatory that the offense under investigation is eligible for mediation (catalogue offense).

According to article 5 of the Directive, mediation shall be realized if the suspect or the accused and the victim or the person who has been harmed as a result of a crime give their consent with their free will. These people may withdraw their consent until an agreement is reached [25] .

Evidence that leads to belief that the offense has been committed. It is necessary to emphasize this rule particularly. It is because, there will be many adverse effects when the conflict is referred to mediation without obtaining sufficient evidence.

First, in such case, the suspect is almost unlikely to be willing to accept mediation. Then the mediation process ends negatively, and the expected advantages will not materialize. Therefore, it should be avoided to offer mediation at the stage of police investigation where sufficient evidence has not yet been collected [26] .

Still further, in such case, the suspects in bad faith would be favorably treated. It is because, when such suspects know that evidence is not sufficient, they may seem willing to accept mediation, prolong the process and have the time they need to suppress evidence. Also, the victim will not have effective bargaining powers in such case [27] .

For mediation, the victim must be a natural person or private law legal entity.

For offenses perpetrated by several persons, whether or not in complicity, only those offenders who agree to mediation shall benefit from mediation. In case of several victims, mediation occurs only if all victims agree to mediation (Directive Art. 4-6).

This rule is significant for the acceptability of mediation particularly for the offender. For the offender, mediation is important in that it also eliminates the risk of trial and penalty. Where not all victims agree to mediation, the offender will undergo trial anyway and may be convicted. In such case, mediation with some of the victims shall have no practical value. Therefore, the offender will not agree to mediation, and time will be wasted by unnecessarily commencing a mediation process [28] .

Mediation shall be executed in accordance with the basic rights and freedoms of the suspect or the accused and the victim or the person who has been harmed as a result of the crime, by respecting the principle of protecting interests [29] .

The suspect or the accused and the victim or the person who has been harmed as a result of the crime, who participate in the mediation have the basic guarantees granted by the Law [30] .

If the suspect or the accused and the victim or the person who has been harmed as a result of the crime do not know Turkish or are handicapped, provisions of Article 202 of the Law shall be applicable [31] .

Before starting the mediation process, the suspect or the accused and the victim or the person who has been harmed as a result of the crime shall be informed of the nature of the mediation and the legal consequences of the decisions they will make [32] .

Such factors as age, maturity, education, social and economic status of the suspect or the accused and the victim or the person who has been harmed as a result of the crime shall be taken into consideration in the mediation process [33] .

Those provisions of the Law and the Directive that are pertinent to mediation shall also be applicable for the children who are the victims of a crime which is subject to mediation as well as the children who are drawn to crime [34] . In case of mediation related to children, the process to be followed shall be in accordance with the provisions of Children Protection Law No. 5395 dated 3.7.2005, and Directive on Principles and Procedures Pertinent to Enforcement of Child Protection Law (Çocuk Koruma Kanununun Uygulanmasına İlişkin Usûl ve Esaslar Hakkında Yönetmelik) which came into force after being published in the Official Gazette No. 26386 dated 24.12.2006, and Directive on the Enforcement of Protective and Supportive Action Decisions Taken as per Children Protection Law (Çocuk Koruma Kanununa Göre Verilen Koruyucu ve Destekleyici Tedbir Kararlarının Uygulanması Hakkında Yönetmelik) which came into force after being published in the Official Gazette No. 26386 dated 24.12.2006.

The attorney (avukat) who is the mediator shall not undertake any task as proxy (vekil) or defender (müdafi) subsequently in relation to the case which he/she took served under such title [35]
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Mediation Directive, article 6 provides the following provision on this matter:

“General provisions

Article 6 - (1) In order to use the mediation process, it is required that the victim or the person who is harmed as a result of the crime be a natural person or private law legal entity.

(2) In case of crimes committed by several persons, regardless of whether there is any relation of partnership between them, only the suspect or the accused who are urged to reach a settlement shall benefit from the mediation.

(3) In order to resort to a mediation process due to a crime which leads to injury or grievance of several people, all of the victim or those who are injured from the crime should accept mediation.

(4) If a mediation effort fails to yield any result, mediation attempt shall not be repeated.

(5) Proposing mediation or acceptance of any such proposition shall not constitute an obstacle for collecting the evidences pertinent to investigation or prosecution and for the implementation of precautionary measures.

(6) In crimes that are subject to mediation, no decision shall be taken for postponing the opening of a public lawsuit, or proclamation of the judgment thereof without making an attempt at mediation".

D) Basic Rules for Eligibility for Penal Mediation

The first paragraph of Article 253 of the Criminal Procedure Code lists the offenses for which mediation may be sought. Accordingly, the following offenses are eligible for mediation:

a) Offenses those are dependent on complaint for investigation and prosecution.

b) The following offenses in the Turkish Penal Code regardless of dependency on complaint:

1. Deliberate bodily injury (except third paragraph Article 86; Article 88),

2. Tortuous bodily injury (Article 89),

3. Violation of inviolability of abode (Article 116),

4. Kidnapping and forcibly keeping a child (Article 234),

5. Disclosure of information or documents in the nature of trade secret, banking secret or customer privacy (except fourth paragraph, Article 239).

Mediation may be sought for offenses in the Turkish Penal Code and other laws that are dependent on complaint for investigation and prosecution. Thus, in order to seek mediation, first, a duly filed complaint must exist. Except for offenses that are dependent on complaint for investigation and prosecution, in order to seek mediation for offenses in other laws, there must exist explicit provision in the law (CPC Art. 253, 2; Directive Art. 7,2).

Even if investigation and prosecution depend on complaint (şikâyet), mediation may not be sought for offenses listed as eligible for effective repentance and offenses against sexual inviolability (CPC Art. 253, 2; Directive Art. 7,3).

Mediation may be sought for offenses committed by children. According to Article 24 of the Child Protection Law No. 5395, mediation provisions of the Criminal Procedure Code shall apply also to children induced to crime (Child Protection Law Art. 24,1).

The public prosecutor must consider carefully whether the offense is covered under mediation

in such a way not to violate the equality and non-discrimination between persons when making the mediation proposal and instructing the judicial police (judicial security officer) to handle mediation [36] .

For offenses for which the Criminal Procedure Code allows mediation, an attempt shall be made to mediate the suspect and the victim who is a natural person or a private law legal entity (CPC Art. 253,1; Directive Art. 7,1). The victim must be a natural person or a private law legal entity (e.g., a society, foundation or commercial company) to seek mediation (Directive Art. 6,1).

In order to propose and seek mediation for offenses that are dependent on complaint for investigation and prosecution, in addition to the complaint by the victim, there must be sufficient reason to believe that the suspect has committed the crime in the meaning of Article 170 of the Turkish Penal Code (Directive Art. 8,1); that is, the suspect must be identified correctly. Before seeking mediation, if legally appropriate and valid evidence is collected that the suspect has committed the crime, it would be prevented that a complaint would be filed against a person who has indeed not committed the crime but now is being forced to accept mediation, and ultimately forced to accept mediation for an offense he has not committed, or by assuming the guilt for an offense committed by somebody else [37] .

It is mandatory to seek mediation for offenses covered under eligibility for mediation; and the public prosecutor may not decide to “defer the institution of a public case” (kamu davasının açılmasının ertelenmesi kararı) without first seeking mediation (Directive Art. 6,6). Thus, the third paragraph of Article 171 of the Criminal Procedure Code provides that mediation provisions are reserved.

For affairs explicitly understood from the investigation file to be eligible for mediation, if the public prosecutor institutes a public case without first seeking mediation, the court shall decided to return the indictment (CPC Art. 174,1/c). Due to this provision, the seeking of mediation is a “precondition to prosecution” [38] (kovuşturma şartı).

Making a mediation proposal or acceptance of such a proposal shall not bar collecting evidence for the offenses being investigated or prosecuted and implementing protective measures (CPC Art. 253,8; Directive Art. 6,5). The law orders that collection of evidence shall continue when the mediation is proposed because the outcome of the mediation is yet not known. Particularly, pursuant to the paragraph nineteen of Article 253 of the Criminal Procedure Code, where the institution of a public case is deferred conditional upon the performance of an obligation which is

to be executed in the future, in installments or permanently, if the requirements of the mediation are not observed, it shall be required that the evidence collected so far should give sufficient grounds to believe that the suspect has committed the crime so that a public case may be instituted against the suspect. Further, according to Article 171 of the Criminal Procedure Code, the public prosecutor must collect evidence regarding the offense being investigated in order that the public prosecutor may decide to defer the institution of a public case (CPC Art. 171,2) despite the existence of sufficient grounds, for offenses that are dependent on complaint for investigation and prosecution and require imprisonment up to one year. Finally, the collection of evidence regarding the offense being investigated prior to making mediation proposal is required also to determine the nature of the offense and identify whether it is eligible for mediation and eliminate the loss of evidence if mediation does not occur [39] .

For offenses perpetrated by several persons, whether or not in complicity, only those offenders who agree to mediation shall benefit from mediation (CPC Art. 255; Directive Art. 6,2).

In case of several victims, all victims should agree to mediation in order to seek mediation for the offense in question (Directive Art. 6,3). If any of the victims declines mediation, no mediation shall be sought (CPC Art. 253,7). It is because, any of the victims agreeing to mediation shall not bar other victims from proceeding with the investigation or prosecution. In this case, the suspect may, although having reached an agreement with some of the victims, be penalized as a result of the prosecution due to the continuing complaint of victims (those not agreeing to mediation), this out come is not compatible with the purpose and nature of mediation in respect of positive law.

Where mediation fails, it shall not be attempted again (CPC Art. 253, 18; Directive Art. 6,4).

E) Making the Mediation Proposal

In the investigation phase, if the investigated offense is eligible for mediation, the public prosecutor, or a judicial police officer (adlî kolluk görevlisi) upon instructions from the public prosecutor, shall make a mediation proposal to the suspect and the victim. Upon written instructions, or verbal instructions in urgent cases, from the public prosecutor, the judicial police officer may make a mediation proposal to the suspect and the victim. The verbal instruction shall be soon confirmed in writing (Directive Art. 8,1). If the mediation proposal is to be made by a judicial police officer, when the statements are being taken (CPC Art. 95), the mediation must be proposed to the suspect, the nature of mediation explained, and this should be noted in the

statement [40] .

The judicial police officer may not handle mediation, nor appoint a mediator. Such actions shall be taken by the public prosecutor (CPC Art. 253,4). Further, the investigation on children induced to crime will be handled personally by the public prosecutor in charge of the children's office, thus the mediation proposal may not be made by the judicial police officer, but by the public prosecutor in person [41] . As required by the principle that "special care shall be taken appropriately for the children during the investigation and prosecution process" [42] , the child may receive support from the childe social worker during the making of mediation proposal to the legal custodian [43] .

Because both the decision regarding the acceptance or rejection of mediation proposal and the decision regarding the mediation are strictly personal rights, it would be appropriate to make the proposal to the suspect and the victim in person; however, there is no problem if their answers are relayed through attorneys or counselors.

Where the suspect, defendant or victim, or their legal representatives if they are minors fail to notify their decisions within three days following the making of the mediation proposal through explanatory notice or rogatory letter, they shall be considered to have rejected the proposal. Then, without prejudice to Article 255 of the Law, no more mediation proposal shall be made to others (CPC Art. 253,4; Directive Art. 10). Where no answer is returned in the specified time to the mediation proposal, or the proposal is rejected, then the attempt at mediation shall be deemed failed (Directive Art. 24,2). Where the suspect is a juvenile, the proposal shall be made to his legal representative (custodian or guardian), and if the legal representative fails to respond within three days he shall be deemed to have rejected the proposal, which may in the end be to the detriment of the juvenile [44] .

The invitation to make the mediation proposal may be communicated through such instruments as telephone, telegram, facsimile, electronic mail. However, such invitation shall not mean the proposal itself (Directive Art. 8,4).

There is no order of precedence to make the mediation proposal to either the victim or the offender. It is mandatory that, prior to the mediation proposal, the public prosecutor or a judicial

police officers upon instructions from the public prosecutor must inform the parties on the effect and consequences of mediation and make a recorded report of this. The Court of Cassation (Yargıtay) decided that it was a cause for reversal in a case where mediation was not made on grounds that a defendant who had not been informed on all consequences of mediation had indeed denied his offense [45] .

The public prosecutor may first invite the offender and make the mediation proposal to him, as well as to the victim first. While the mediation proposal was rejected, the suspect and the victim may inform the public prosecutor no later than the official preparation of the indictment that they had agreed to settle by a document indicating their agreement (CPC Art. 253, 16; Directive Art. 17,2).

The investigation shall be concluded without seeking mediation if the victim or the suspect or their legal representatives cannot be contacted because any of them is not at the address declared to the authorities or outside the country or for any other reason (CPC Art. 253,6; Directive Art. 11). According to this paragraph of Article 253, if he victim or his legal representative if he is a minor or lacks capacity cannot be contacted for any reason, the investigation shall be concluded without seeking mediation. For example, if the address cannot be identified, or the addresses in the investigation file cannot be located or the said persons are outside the country, this shall be the course of action. This Directive brings ease of notification, and aims to continue with the investigation without prolongation if mediation negotiations cannot be started because of failure to reach the victim. Therefore, if a notice cannot be served, it is not mandatory to follow the procedure in Article 28 regarding notice by announcement or Article 35 regarding the requirement to notify address changes in the Notices Law No. 7201; however, the address should be inquired by the judicial police officer at least.

I- Content of Mediation Proposal

When the mediation proposal is made, the nature of mediation and legal consequences of accepting or rejecting the mediation shall be explained to the suspect, and the victim or their legal representatives (CPC Art. 253,5; Directive Art. 12, 26 and 5,5). Such information shall be provided by giving the person present the Mediation Proposal Forms which include the nature of mediation and legal consequences of accepting or rejecting the mediation in Annex 1/a or Annex 1/b to the Directive when the public prosecutor or a judicial police officer is making the proposal, placing the signatures of recipients on the form, and explaining the information on the form.

The signed copy of the form which indicates that the requirement to furnish information has been fulfilled by the public prosecutor or a judicial police officer, and the mediation has been proposed shall be placed in the investigation file (Directive Art. 8,3).

It is possible that parties may reject mediation due to having inadequate information on mediation. Before seeking mediation, informing the parties shall contribute to their guidance and participating sincerely in mediation negotiations.

When proposing mediation, the explanations made to the suspect and those to the victim shall be different. The nature of mediation and legal consequences of accepting or rejecting the mediation are laid down in various paragraphs of Article 253. The content of explanations regarding the nature of mediation when proposing mediation is indicated in details in the forms annexed to the Mediation Directive separately for the investigation and prosecution phases. In this context, the suspect may, for example, be told that agreeing to mediation shall not mean admission of guilt, that he does not have to agree to mediation, that he may withdraw from mediation any time, that none of the explanations made, information and documents furnished and reports recorded during the mediation negotiations may be used as evidence in any investigation or prosecution or civil suit including those at the present investigation and discipline, that even if the victim agrees to mediation, when he (the suspect) declines mediation, it cannot be decided to defer the institution of a public case against him, and if there is sufficient evidence such public case shall be instituted, that if he agrees to mediation but the victim declines, then the court may decide to defer the verdict regarding the prosecuted offense charged on him if the conditions in Article 231 do exist, if he declines mediation while the victim agrees, then it cannot be decided to defer the verdict regarding the prosecuted offense charged on him even if the conditions in Article 231 do exist, that if he performs his obligation arising from the mediation at once, then a decision of no prosecution shall be returned and he shall not be subject to public prosecution for the same offense except for the emergence of new evidence, that the matter shall not be recorded in judicial records; that if the performance of such obligation is deferred, made in installments or permanent, he shall have a decision of deferral of public case, that if he does not perform the obligations arising from the mediation after the deferral decision, a public case will be instituted against him, that if mediation is achieved, no restoration suit may be launched against him for the investigated offence, that such a suit shall be deemed waived if pending [46] .

1) Rejection of Mediation Proposal

If the mediation proposal is rejected by any of the parties, the investigation shall be concluded without mediation and without having to make a proposal to the other party. If no mediation is achieved, the public prosecutor made decide to defer the institution of a public case where the conditions listed in the third paragraph of Article 171 of the Law despite the existence of

sufficient grounds for offenses that are dependent on complaint for investigation and prosecution and require imprisonment up to one year.

2) Acceptance of Mediation Proposal

Since mediation is a conflict resolution based on complete willingness, the suspect and the victim or their legal representatives must accept the mediation proposal with their free and informed wills in order to seek mediation [47] . The Criminal Procedure Code remains loyal to the willingness principle which is a fundamental principle of victim-offender mediation [48] . Under the Directive, in order to seek mediation in criminal conflicts, it is required that the victim and the offender must consent by their free wills. Parties may withdraw their wills during the mediation up until the point of agreement (Directive Art. 5,1).

II- No Forcible Bringing of Offenders for Proposal

Article 145 of CPC regulating the bringing by force provides that if suspects do not show up when they are called up for statement and interrogation, they can be brought by force. While in such case the suspects may be brought in by force when they should provide statement, it is not possible to do so only for mediation. Thus, the Court of Cassation decided in this line [49] . The reason is that mediation is “a judicial resolution mechanism dependent on free wills of parties under judicial scrutiny outside the criminal justice based on court trial” and it is not technically a matter of “investigative process”.

The prosecutor may send an invitation for the mediation proposal through a notice or technical means listed in Article 8 of the Directive. However, if parties do not accept the call, no sanctions may be imposed [50] .

III- Mediation Proposal to Minors and Restricted

Where the suspect or the victim is a minor or restricted or lacks capacity, the mediation proposal shall be made to their legal representatives. The public prosecutor shall examine if the said persons has the capacity, then identify the person to whom the mediation proposal shall be made (Directive Art. 8,2). If the suspect or the victim is a minor, his will as regards the mediation

must be solicited. Article 12 of the United Nations Convention on the Rights of the Child provides that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body (Article 12.2 of the United Nations Convention on the Rights of the Child). The child’s opinion must be solicited because the mediation process concerns the child closely by its effects and consequences [51] .

While Article 253,4 of CPC provides that the proposal or notice shall be served to the legal representatives of minors, Article 8,2 of the Directive requires that the proposal or notice be served to the legal representatives of those lacking capacity.

It is not possible to make the mediation proposal to attorneys or counselors of the parties. Further, attorneys or counselors have no authority to accept mediation [52] .

IV- Proposing by Notice or Rogatory Letter

The public prosecutor may, as necessary, make the mediation proposal by an explanatory notice or rogatory letter. The explanatory notice shall, without prejudice to specific provisions in the Law, be served by sending the Mediation Proposal Form which includes the nature of mediation and legal consequences of accepting or rejecting the mediation in Annex 1/a or Annex 1/b to the Directive, in an envelope of notice letter according to the Notices Law and the Notices Bylaw. However, where notice is not made, Article 11 of this Directive shall apply (Directive Art. 9).

Mediation may be proposed to an addressee within the jurisdiction of the authority proposing the mediation by an explanatory notice, however, if the person is not within the jurisdiction, then such act is not legally appropriate [53] .

Further, if the addressee is outside the jurisdiction, then it is more appropriate to make the proposal to him by a rogatory letter rather than an explanatory notice. Then, he can go to the prosecutor’s office which sends him the paper.

Where a mediation proposal is sent by an explanatory notice, the notice letter envelope must be used and one of the forms either in Annex 1/a or 1/b should be prepared and placed in the envelope according to the Notices Law and the Notices Bylaw. However, it would be more appropriate to develop a form specific to mediation proposals by notice [54] .

V- Mediation Proposal and Other Actions by Public Prosecutor

The judicial police officer makes the mediation proposal by giving the form in Annex 1-a to the Directive to the relevant person and having his signature. However, as indicated in Article 8,3 of the Directive, it is not sufficient to merely give the proposal form to the relevant person; it is also required to explain the information in the form to the person in a manner intelligible to the person considering age, maturity, education level, and socio-economic status etc.

The judicial police can make the mediation proposal only upon instructions from the public prosecutor. Without such instruction, the judicial police cannot by themselves make the mediation proposal.

The public prosecutor may verbally instruct a judicial police officer to propose mediation in urgent cases, to confirm the instruction later in writing. Thus, pursuant to CPC Art. 161,3, the public prosecutor shall instruct in writing a judicial police officer to propose mediation, or verbally in urgent cases. Accordingly, verbal instructions shall be soon confirmed in writing. Also, Article 8,1 of the Directive provides that the public prosecutor shall instruct in writing a judicial police officer to propose mediation, or verbally in urgent cases, then confirm such instruction in writing soon. The notion of “soon” in both the Law and Directive is the shortest possible time considering the nature of the investigation, conditions at the time and place of verbal instructions.

The rule in Article 8,4 of the Directive that the invitation to make the mediation proposal may be communicated through such instruments as telephone, telegram, facsimile, electronic mail also covers the mediation proposal by the judicial police officers. Therefore, the judicial police may call up the person to whom the proposal will be made through the said means. However, such invitation shall not mean making the proposal itself.

The rule in CPC Art. 253,4 that the mediation proposal may be made by an explanatory notice or rogatory letter does not apply to the mediation proposal by the judicial police officers. In other words, it is not possible that the judicial police may send an explanatory notice to propose mediation to the person, or request the judicial police of the jurisdiction by a rogatory letter to make the proposal. It is because both CPC Art. 253,4 and Article 9,1 of the Directive specify that the public prosecutor may propose by explanatory notice or rogatory letter. Therefore it is the public prosecutor himself to send the explanatory notice that includes the mediation proposal. Regarding the persons outside the jurisdiction of the locale of offense, the public prosecutor may request the public prosecutor of the relevant place to make the proposal. The public prosecutor who has received the rogatory letter to propose mediation may make the mediation proposal either in person or through an explanatory notice or by instructing the judicial police under his direction [55] .

F) The Role of the Police in Penal Mediation

The role that the police play in penal mediation programs varies from country to country. It is dependant on their level of professionalism, competence, training, and the degree to which they are trusted and respected by the public.

In some countries, specially trained police officers act as the mediators in certain juvenile cases. This happens, for example, in Canada, Australia, and Iceland. In most countries the police (as well as prosecutors) may refer cases to mediation services.

The Council of Europe's "Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters (CEPEJ(2007)13)" call for a significant role to be played by the police in penal mediation and contains the following [56] :

"Awareness of the victims and offenders

Members of the judiciary, prosecutors, the police, criminal justice authorities, lawyers and other legal professionals, social workers, victims support organisations as well as other bodies involved in restorative justice should provide early information and advice on mediation to the victims and offenders, accentuating the potential benefits and risks to both.

Awareness of the police

Since the police intervene during the early stages of a case, and are therefore the first to be in contact with the victims and offenders, their training should include an understanding of restorative justice. Specific consideration should be given to the matter of referring cases to mediation. This could be achieved by training including information on perpetrators and victims, as well as through the distribution of leaflets/brochures".

In Turkish judicial system, the Criminal Procedure Code, article 253,4 provides that, "If the crime, which is the subject of investigation, is subject to mediation, the public prosecutor, or the judicial security officer upon his/her instruction, shall propose mediation to the suspect and the victim or the person who has been harmed as a result of the crime".

Mediation Directive, article 8,1 states that, "If a crime, which is the subject of the investigation, is subject to mediation and there is sufficient suspicion that it is committed, a public prosecutor shall propose mediation for the suspect and victim or the person who has been harmed as a result of the crime. Upon the written, or in emergency conditions, verbal instruction of a public prosecutor, the judicial security officer may also propose mediation for the suspect and the victim or the person who has been harmed as a result of the crime. The verbal order shall also be notified in writing at the earliest possible time".

It is therefore clear that in Turkish law system the law permits the prosecutor to delegate to the police the responsibility for making the formal mediation proposal to the parties.

It would appear that the act of delegation must be done separately for each case and that it may not be a "blanket" delegation authorizing the police to make the formal mediation proposal in all cases.

The Directive requires that the formal proposal be made by presenting the prescribed forms to the parties as well as by providing an explanation to the parties about the contents of the form.

Article 8,3 “The proposal for mediation to be made by a public prosecutor or the judicial security officer, shall be made through signing by and delivery to the relevant person of the Mediation Proposal Form in which there are Attachment No. 1.a and Attachment No. 1.b of this Directive and which states the nature of mediation mentioned in of this Directive, as well as the presence of legal consequences of accepting or rejecting the mediation , and through explaining the information mentioned in the form. A signed copy of the form, which indicates that the responsibility of informing is fulfilled by the chief public prosecutor (Cumhuriyet başsavcısı) or judicial security officer, and that mediation is proposed, shall be put into the investigation documents”.

The person providing the explanation to the parties must have a good understanding of all of the important aspects of penal mediation. It is therefore recommended that prosecutors only delegate this responsibility to properly trained police officers. It may be practical to designate one or more police officers in each district who would be specially trained to carry out this responsibility [57] .

Regardless of whether police officers are delegated the responsibility for making the formal mediation proposal to the parties they may play other important roles to promote the use of penal mediation. For example,

1) The police could provide written information about penal mediation to the parties including leaflets/brochures describing the program. The information would give instructions to the parties about what to do if they are interested in exploring the possibility of mediation.

2) The police could draw specific cases to the attention of prosecutors when they believe the case would be particularly suitable for penal mediation.

G) Appointment and Qualifications of Mediator

The mediator “means a person who has law education or a lawyer assigned by the bar association upon the request of the public prosecutor or the court, who manages the mediation negotiations between the suspect or the defendant and the victim” (Directive Art. 4/ç). Where the suspect and the victim accepts the mediation proposal, the public prosecutor may handle the mediation himself, or request the bar association to assign a lawyer as a mediator, or assign

a mediator from among persons with qualifications specified in the Directive and having law education (CPC Art. 253,9; Directive Art. 13,1).

Where the public prosecutor personally handles the mediation negotiations and the mediation does not end in settlement, the investigation should not be carried on by the same public prosecutor. It is recognized in the doctrine that, the public prosecutor who has handled the mediation negotiations should not be the trial prosecutor in the prosecution phase [58] (CPC Art. 23,2 compare).

The public prosecutor may decide to assign a mediator in order to handle mediation actions between the suspect and the victim, and bring them together to reach an agreement. When assigning a mediator, a person may be preferred on whom the suspect and the victim agree (Directive Art. 13,2). However, since CPC Art. 253,9 removes the powers of the parties to elect a mediator and installs the “method of appointment”, the Plenary of Administrative Chambers of the Council of State (PACCS) suspended the execution of the provision that allows this practice (Directive Art. 13,2). The opinion in the said suspension of execution (yürütmenin durdurulması) by the Plenary of Administrative Chambers of the Council of State (Danıştay İdarî Dava Daireleri Kurulu) is as follows [59] :

“The Directive on Exercise of Mediation according to the Criminal Procedure Code covers the rules for the exercise of mediation actions between the suspect or the defendant and the victim who is a natural person or a private law legal entity in respect of offenses eligible for mediation under Article 253 of the Criminal Procedure Code no. 5271 and other laws. In this context, it is first necessary to focus on the nature, method and legal consequences of the ‘mediation’ practice as regulated in Articles 253 to 255 of the Law no. 5271 for legal scrutiny of the rules in the said Directive being challenged.

As a requirement of increased sensitivity to protect the interests of victims in the criminal system, it is not sufficient to impose penal sanctions on the offender, but also it is important to restore the damages inflicted by the offense. Based on this, limited to certain offenses, it is made possible to resolve the conflict between the offender and the victim by way of mediation after the commitment of the offense, and thus mediation has been developed to both serve the justice, satisfy the victim, and alleviate the workload of the judiciary. In other words, in the context of the mediation method, the offender admits that he has committed the offense and assumes the responsibility and is allowed to integrate to the society by restoring the damages arising from the offense; then the fundamental purpose of punishment to rehabilitate the offender is achieved; the victim is satisfied by restoration of damages suffered; and in the end, the validity of the violated rules are reaffirmed and the public interest is served, at the same

time, the state is relieved of much expenditures arising from the trial activities and imposition of sanctions on the offender.

It is observed in Articles 253 to 255 of the Criminal Procedure Code that regulate mediation that:

- The exercise and conclusion of mediation has been made dependent on the acceptance of mediation by the offender and the victim by their free wills,

- Based on the point that restoration of damages and suffering arising from the offense mostly requires ‘negotiation’, a mediator is being appointed to manage and conclude such negotiations,

- The mediation proposal can be made as a rule at the investigation phase, or in the prosecution phase if it is understood after the institution of a public case that the offense is eligible for mediation,

- Where the victim and the offender decline the mediation proposal, they are allowed to inform the public prosecutor by the preparation of the indictment that they have agreed to mediate; thus, mediation is accepted, however if mediation does not occur, then no more mediation proposal shall be made,

- Where mediation is achieved, the institution of a public case/declaration of verdict shall be deferred until the performance of obligation by the offender, the decision of no prosecution/dismissal of the case shall be returned if the obligation is performed; otherwise, a public case shall be instituted/verdict be declared if the obligation is not performed.

Considering such rules, it is understood that mediation exercised, as limited to the offenses listed in the Law, in the aftermath of the start of the criminal trial process for identifying the offender, dependent on the will of the offender that he accepts the guilt and agrees to restore the damages arising from the offense, and the will of the victim to release the offender of penal sanctions on condition of restoring the damages; and mediation, as is, leads to suspension of criminal investigation/prosecution, and removal of the same if mediation is achieved and the

offender restores the damages.

The Law no. 5271 provides that mediation requires that the actual damages must be identified considering the nature of the offense, the causality link between the offense and the damages, the settlement, indeed mediation, between the offender and the victim should be exercised by the public prosecutor during the investigation phase and the court during the prosecution phase; further, it is allowed to appoint lawyers or persons having law education as mediators. However, there is no doubt that the mediator as such must have the qualifications required of the public prosecutor or the judicial judge. Thus, for this reason, pursuant to Article 253 of the Criminal Procedure Code and Article 254 referring to the previous Article, the principle has been adopted that the mediator shall be appointed by the public prosecutor or the judge from among lawyers or persons having law education; and it is indicated that the cases when the judge cannot try the case and the reasons for refusal of the judge must be considered when appointing the mediator; on the other hand, by the amendment made by the Law no. 5560 dated 06.12.2006 to Article 253 of the Law no. 5271, the method of selecting the mediator by ‘agreement of the offender and the victim on a lawyer’ was removed.

In light of these explanations, the 2nd paragraph of Article 13 of the Directive that a lawyer or person having law education may be preferred on whom the suspect and the victim agree in such a way to contradict the authority of the public prosecutor or the court to appoint a mediator and in contradiction to the nature of mediation; the 4th paragraph of Article 13 of the Directive that allows the mediator to perform or continue its mission by the signature of parties despite the existence of conditions which bar a judge from trying the case or casting doubts on his impartiality, and the 2nd paragraph of Article 14 that the lawyer on whom the parties agree does not have to be registered with the bar association of the locale of investigation, then the appointment shall be made by the bar association with which the said lawyer is affiliated are not compliant with law and the Law.

Further, in addition to the explanations above, in light of the fact that the 9th paragraph of Article 253 of the Law no. 5271 provides, clearly beyond doubt, that the mediator may be selected from among persons who have graduated schools of law, it is concluded that the subparagraphs (b) and (c) of the 1st paragraph of Article 15 of the Directive allowing that, in addition to graduates of law schools, those who have had at least four years of higher education in political sciences, administrative sciences, economics and finance that contain sufficient law courses in their curricula and those who have had postgraduate education in law to be appointed as ‘mediators’ are contrary to the Law.

The challenged 3rd paragraph of Article 25 of the Directive provides that 'While the mediation proposal made at the court trial phase has been declined, the parties may declare to the court that they have settled by no later than the time when the hearings are concluded but the verdict is not declared, by a document indicating their agreement'.

The 1st paragraph of Article 254 'Mediation by Court' of the Law no. 5271 provides that where the prosecuted offense is understood to be eligible for mediation after the institution of a public case, the mediation actions shall be handled by the court under the principles and procedures laid down in Article 253. The referred Article 253 regulates the principles and procedures of mediation at the investigation phase. While the 18 th paragraph of Article 253 provides that no mediation attempt shall be made again if the mediation fails, the possibility of benefiting from the legal consequences of mediation is preserved by providing that the suspect and the victim may inform the public prosecutor no later than the official preparation of the indictment that they had agreed to settle by a document indicating their agreement.

As would be seen, the challenged 3rd paragraph of Article 25 of the Directive provides that the rule established in the 16 th paragraph of Article 253 of the Law no. 5271 regarding mediation at the investigation phase is applicable to the prosecution phase based on the reference in Article 254 of the Law to the previous Article 253.

However, since Article 254 of the Law no. 5271 regulates the mediation at the prosecution phase, it is obvious that the criminal court shall determine which rules of mediation for investigation phase shall apply to the mediation at the prosecution phase, in other words, the scope of the reference made to Article 253, considering the nature of mediation, principles and legal consequences. Thus, it is not compliant with law and the Law that the respondent administration has specified by an administrative act the meaning and scope of the reference in the 1st paragraph of Article 254 of the Law relying on the rule in the 24th paragraph of Article 253 of the Law no. 5271 that 'Matters relating to the exercise of mediation shall be regulated by a Directive', which is indeed a matter that should be decided by the court.

For the said reasons, it has been decided on 15.05.2008 by majority that the objection raised by the claimant be accepted, the 2nd and 4th paragraphs of Article 13 and the 2nd paragraph of Article 14 of the Directive on Exercise of Mediation according to the Criminal Procedure Code promulgated in the Official Gazette dated 26.07.2007 issue 26594 be suspended, and by unanimity that the subparagraphs (b) and (c) of the 1
st

paragraph of Article 15 and the 3rd paragraph of Article 25".

The public prosecutor may request the bar association to appoint one or more lawyers as mediators, as well as he may assign a person not registered with the bar association but having law education as a mediator (CPC Art. 253,9). To be a mediator, it is not mandatory to be a lawyer registered with the bar association, it is sufficient to have had law education. In this context, faculty members of law schools, public notaries or retired judges may be mediators.

Where mediators having law education are assigned, the conditions in Article 15 of the Mediation Directive shall be sought. The Plenary of Administrative Chambers of the Council of State suspended the execution of the subparagraphs (b) and (c) of the 1st paragraph of Article 15 of the Directive allowing that, in addition to graduates of law schools, those graduate from programs that contain sufficient law courses in their curricula to be appointed as "mediators" because such rule contradicts CPC Art. 253,9. Therefore, it is not possible to include non-graduates of law schools as eligible mediators.

The public prosecutor shall determine the number of mediators considering the nature of conflict. If deemed necessary, more than one mediator may be appointed (Directive Art. 13,3).

The Criminal Procedure Code does not require specific professional experience or training to be a mediator. However, the Directive indicates that the bar association shall in priority appoint a lawyer who has training in mediation (Directive Art. 14).

Since it is necessary to teach negotiation skills to lawyers for mediation and other ADR methods to work smoothly and since this training is important, Article 30 of the Mediation Directive specifically regulates "training for mediators". Accordingly, persons to act as mediators shall receive training prior to such mission and continue to receive in-service training as long as they do such job. Such training should aim to provide competency skills on alternative dispute resolution and negotiation skills and developing methods, acquiring knowledge on special conditions of working with a suspect or a defendant, and the criminal justice system [60] . The training shall cover minimum qualifications required of persons to be appointed as mediators, developing knowledge level and personal abilities. Training shall be given to persons to be appointed as mediators on legal nature and consequences of mediation, exercise areas of mediation, communication principles, question and negotiation techniques, negotiation

management, dispute analysis, offenses eligible for mediation and ethical rules [61]
.

Training for persons to be appointed as mediators shall be provided in cooperation with the Justice Academy, the Ministry of Justice Division of Training, Turkish Bar Association, relevant bar associations and universities providing such training (Directive Art. 30,4).

The Criminal Procedure Code does not require keeping a general register of mediators; however, the Mediation Directive provides that mediators having law education shall be registered in a list specified by the public prosecutor's office in the locality of criminal courts, and mediators shall be selected from among the listed ones (Directive Art. 15,2).

As specified in the Criminal Procedures Code, the cases when the judge cannot try the case and the reasons for refusal of the judge (CPC Art. 22-31) must be considered when appointing the mediator (CPC Art. 253,10) in order to preserve impartiality of the mediation process and the mediator. The mediator shall inform the public prosecutor of the presence of such cases and does not perform the mission. However, in such a case, the Law should make a provision that the mediator could continue the mission if both parties agree. The 4th paragraph of Article 13 of the Directive which makes such a provision has been found contrary by the Plenary of Administrative Chambers of the Council of State which suspended its execution.

H) Mediation Term and Suspension of Limitation Periods

The mediator shall conclude the mediation transactions within thirty days maximum following the submission of copies of documents in the file. The chief public prosecutor may extend this period of his/her own motion or upon demand, for twenty days maximum. The public prosecutor shall notify the mediator about his/her decision regarding the extension of the mediation period.

Despite the rejection of the mediation proposal, the suspect and the victim or the person who has been harmed as a result of the crime may declare by applying to the Chief public prosecutor that they have come to a settlement through a document verifying this until the date of issuance of the indictment at the latest.

Even in cases where the mediation is conducted by a public prosecutor or a judge, periods mentioned in the first article shall be applied (CPC Art. 253, 12; Directive Art. 17).

The case statute of limitations and case period, which is the condition for prosecution, shall not start from the date when the first mediation proposed to any of the suspect, victim or the person who has been harmed as a result of the crime, until the date when the mediation attempt turns out to be futile and when the mediator prepares the report and submits it to the public prosecutor at the latest [62] (CPC Art. 253, 21; Directive Art. 24,1).

I) Mediation Negotiations and Confidentiality Principle

The suspect, victim, the person who has been harmed as a result of the crime, his/her legal representative, the defender and the attorney may attend the mediation negotiations. If the suspect, victim, the person who has been harmed as a result of the crime, his/her legal representative, or his/her attorney refrain from attending the negotiations without any justifiable reason, the relevant party shall be deemed not to have accepted the mediation.

Several negotiations may be held in order to ensure mediation. The mediator may meet with the public prosecutor in relation to the method to be followed during negotiations; the public prosecutor may instruct the mediator to execute the mediation negotiations in accordance with the law.

The negotiations may be executed through meetings to be held jointly with the parties or separately. Negotiations may also be held by using the audio-visual communication technique (CPC Art. 253, 13; Directive Art. 18).

Mediation negotiations shall be executed confidentially [63] (gizlilik). The mediator is obliged to keep confidential any statements made throughout the mediation process as well as the facts transferred to him/her or he/she becomes aware of in any other manner [64]
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Explanations made throughout the mediation period shall not be used as evidence in any investigation, prosecution or lawsuit. Attendees of the negotiations shall not be required to testify as a witness (tanık) in relation to such information (CPC Art. 253, 20).

If required by the mediator, the minutes or notes kept shall be submitted to the public prosecutor in a closed envelope. The closed envelope, which is sealed and signed by the public prosecutor, shall be kept in the file. This envelope may only be opened to be used as evidence in order to resolve the dispute to arise due to a claim as to the falseness of the report which is prepared by the mediator and sealed and signed by the chief public prosecutor.

The fact that a document or fact, which existed previously, is asserted during the mediation negotiations shall not prevent them from being used as evidence in the investigation and prosecution process or in a case (CPC Art. 253, 13; Directive Art. 19).

J) Subject Matter of Restitution

According to article 20 of Mediation Directive, in case that the parties agree on performing a certain action at the end of the mediation, they may agree on any or several of the following actions (obligations), or on any action (obligation) other than these in accordance with law [65] :

a) Providing full or partial compensation or recovery of pecuniary or immaterial damages arising from the action,

b) Providing full or partial compensation or recovery of pecuniary or immaterial damages of a third person (party) or persons (parties) who succeed the rights of the victim or the person injured from the crime,

c) Performing actions such as making donation to a public institution or a private organization serving public interest, or to person(s) in need of help,

ç) Undertaking some obligations undertaken by the victim, the person who has been harmed as a result of the crime, or a third person to be appointed by them, such as provisional fulfillment of certain services of a public institution or a private organizations serving for public benefit, or participating in a program which will ensure them to be beneficial individuals for the society,

d) Apologizing from the victim or the person who has been harmed as a result of the crime.

J) Preparing Mediation Report or Mediation Document

When the mediation negotiations are concluded, positively or negatively, the mediator should prepare a report (mediation report). At the conclusion of the mediation negotiations, the mediator shall prepare a report in the format of Mediation Report attached as Annex-2 to the Directive in the number one more than the parties, and submits such report to the public prosecutor without delay along with the copies of documents furnished to him, and papers supporting his mandatory travel expenses, expense slips or written statement of conformity with market rates, and the self-employed service receipt (Directive Art. 21,1).

If a settlement (uzlaşma) is achieved, this report signed by parties shall explain in detail how the parties settled (CPC Art. 253, 15; Directive Art. 21, 2). If the report includes an order for performance of an obligation, the mediation process must be documented accurately and completely because if the agreed obligation is not voluntarily performed, it may be subject to a court ordered enforcement. Along with the report, copies of documents in the investigation file given earlier to the mediator shall be delivered to the public prosecutor. If the parties reach an agreement at the end of mediation, the subject of mediation, place, date, obligations that must be mutually performed must be noted down clearly in the report, and the report must be signed by the offender, victim, attorneys if any, legal representatives and the mediator [66] .

Where the suspect or the victim is a child (minor) or restricted, the Civil Code provisions shall apply to the signing of the mediation report (or mediation document) [67] . Accordingly, if a person under custody (e.g. a child) fully lacks capacity, the mediation report must be signed by the parents because the acts of those persons lacking capacity shall not have legal effect [68]
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If minors of limited incapacity (those having capacity to discern) are under custody, they may execute a mediation report which would burden them only upon the consent of their parents [69]
because they cannot assume obligations without the consent of their legal representatives but they are liable for their torts
[70]
. Article 336 of the Civil Code provides that the father and the mother shall jointly exercise custody with none being superior over the other as long as the marriage is in continuance; and Article 342 provides that the father and mother shall be represent the child in the framework of custodianship without discrimination. Accordingly, the parents must jointly sign the mediation report as long as the marriage is in continuance. For this, the parents, contrary to a legal guardian, do not need to obtain permission from the court
[71]
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If a person who lacks limited capacity is under guardianship (if restricted), the guardian should consent to the mediation report because the person may assume obligations or waive rights upon explicit or implicit consent or later approval by the guardian [72] . Further, according to Civil Code Art. 462,8, since the guardianship authority's permission is required for the guardian to settle, the Civil Court of Peace (Sulh Hukuk Mahkemesi) should give permission so that the mediation report could be valid for the restricted
[73]
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Similarly, since the mediation report may involve the placement of the person under guardianship in an educational, care or health facility, the permission of the guardianship authority must be sought [74] . Finally, if the person under guardianship has the ability to form and express opinion, it would be appropriate to solicit the opinion of the person under guardianship because the guardian is under obligation to solicit his opinion, to the extent possible, before deciding important matters [75] and the mediation report is deemed an important affair.

Pursuant to Civil Code Art. 15, the minor who has come of age fifteen and made adult by the court upon own request and parental consent, and the minor who has become adult by marriage pursuant to Civil Code Art. 11,2 may sign the mediation agreement on their own account.

If the mediation fails, the reasons must be noted shortly in the report. However, because of the

confidentiality principle, the mediator should not include statements, explanations and behaviors of the parties during the negotiations and the content of negotiations [76] (Directive Art. 21, 2). This report must include the items in Article 21 of the Directive and conform to the Mediation Report format in Annex-2 to the Directive to be as uniform as possible. The public prosecutor shall review the report so as to determine whether it includes necessary items.

If the public prosecutor decides that the mediation is based on the free wills of the parties and the obligation complies with the laws, he shall sign and seal he report or the document and place it in the investigation file (CPC Art. 253, 17; Directive Art. 21, 3). If the public prosecutor concludes that the mediation is based on the free wills of the parties and the obligation is reasonable and complies with the laws and the principle of proportionality, he should sign and seal he report or the document and place it in the investigation file. Otherwise, the public prosecutor shall not approve the report and write the reasons in the report. Then, since the mediation shall be deemed not occurred (Directive Art. 21, 4), it is not possible to seek mediation again or the parties be allowed time to complete missing elements. However, if the public prosecutor rejects the report not because it is not based on the free wills of the parties or the obligation is contrary to laws, but because the report includes a remediable deficiency in the form (e.g., simple typographical errors, calculation errors, material errors etc) or the obligation is disproportional, considering that it is in the nature of a document basis for court ordered enforcement, then, the mediation should still be upheld and the parties need to be given extra time to make up such deficiencies. Thereby, the risk of invalidation shall be eliminated due to a deficiency in form. After the correction of ambiguity or doubt on the obligation or the remedy of deficiencies in the report by the parties, then there would be no obstacle for the public prosecutor to approve the report [77] .

The public prosecutor (or the court at the prosecution phase) should first make sure that the mediation process has occurred duly under the free wills of the parties. If the will of the parties has been somehow invalidated by force or threat, parties have failed to act on their free wills or the damages cannot be restored according to the settlement, then the decision of no prosecution should not be returned, but a public case must be instituted. For example, if the suspect or the defendant is a minor or mentally handicapped, then the condition of “free will” becomes more important. Since it is not possible for persons lacking ability to discern to have free wills, then no mediation should be sought. In this context, since children younger than age twelve have no criminal liability or fully mentally handicapped persons have no ability to discern, they cannot participate in mediation [78] . Thus, according to the Council of Europe Recommendation No. R (99) 19, the mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process due to minority or mental handicap or for a similar reason [79] .

Then, public prosecutor should scrutinize that the obligation agreed through mediation must

conform to laws and ethics, be reasonable and proportional to the offense. However, such scrutiny by the public prosecutor (or the court at the prosecution phase) is limited to the matters listed above; and it is not possible to extend such scope to include the quantity or type of the agreed obligation. The approval by the public prosecutor (or the court at the prosecution phase) of the mediation report submitted is not only a note that makes clear that the mediation report has been finalized, but also a judicial act which gives effect and validity to the report for its conformity to procedures, form and public interest, and makes the report a “document of court decision that can be enforced”. The mediation report can only become a document of court decision in the meaning of Article 38 of the Enforcement and Bankruptcy Law (İcra ve İflâs Kanunu) after such approval by the public prosecutor (or the court at the prosecution phase).

Where the mediation is handled by the public prosecutor, the parts of the report relating to such nature of the act shall be filled in, signed and sealed and kept in the investigation file (Directive Art. 21, 5).

Where the suspect and the victim, before the appointment of the mediator or the rejection of the mediation proposal, negotiate and agree among themselves without the help of a mediator (external settlement), the text of agreement drawn up at the end of negotiations is called a “mediation document” in the Criminal Procedure Code (CPC Art. 253,19). The parties so agreeing should prepare a mediation document in the form of the Mediation Report in Annex 2 to the Directive. The public prosecutor shall review and evaluate such document according to the criteria specified in the third and fourth paragraphs of Article 21 (Directive Art. 22, 1). For offenses that are dependent on complaint for investigation and prosecution, where the victim agrees with the suspect and withdraws his complaint, there is no need to prepare such a document (Directive Art. 22, 2).

I) Decisions by Public Prosecutor at the End of Mediation

If an agreement is reached at the end of mediation and the suspect performs his obligation arising from the mediation at once, then a decision of no prosecution shall be returned (Directive Art. 23, 1). If the performance of such obligation is deferred, made in installments or permanent, he shall have a decision of deferral of public case without seeking the requirements in Article 171 of the Law (Directive Art. 23, 2). Time shall not run during the deferral period (Directive Art. 23, 3). If mediation is achieved, no restoration suit may be launched against him for the investigated offence, that such a suit shall be deemed waived if pending (Directive Art. 23, 7).

It is possible that an agreement has been reached at the end of mediation on condition that the

damages or suffering arising from the offense should be partially or fully restored to the victim, and a commitment may be made to perform an obligation in this regard. If the offender performs the obligation at once, the deferral will be removed and a decision of no prosecution shall be returned (Directive Art. 23, 4). Afterwards he shall not be subject to public prosecution for the same offense except for the emergence of new evidence [80] (CPC Art. 172, 2).

If the performance of the obligation is deferred, arranged as an installment or made permanent such as employing the victim for a certain time, the decision of deferring the institution of a public case against the suspect shall be returned without seeking the requirements in Article 171. The reason why the requirements in Article 171 are not sought and the public prosecutor has no discretion to decide to defer the institution of a public case is that, the commitment to perform the obligation so deferred, arranged in installments of made permanent should be monitored. The decision to defer the institution of a public case because of permanence of the obligation agreed in mediation (CPC Art. 253, 19) is not subject to appeal pursuant to CPC Art. 171, 2. It is because, CPC Art. 171 grants the victim to appeal against the decision to defer the institution of a public case without seeking the consent of the victim if the conditions listed in the law. However, pursuant to CPC Art. 253, 19, since the decision to defer the institution of a public case due to reaching a settlement is made at the end of a mediation process based on the consent of the victim, there is no legal benefit in appealing such decision. Further, granting such right of appeal will lead to delay and uncertainty in the performance of a permanent obligation such public service [81] .

If the requirements of the settlement are not observed after the decision to defer the institution of a public case, an indictment shall be prepared against the suspect to institute a public case without seeking the requirements in the fourth paragraph of Article 171. For this, it is necessary to continue to collect evidence during the mediation phase. Because mediation seeks also to restore the damages and suffering of the victim, if mediation is achieved, no restoration suit may be launched against him for the investigated offence, that such a suit shall be deemed waived ipso iure if pending [82] .

Regarding the decisions returned at the end of mediation, legal remedies indicated in the Criminal Procedure Code may be sought (CPC Art. 253, 23).

J) Non-performance of Obligation Agreed in Mediation Report or Mediation Document

If the suspect at the investigation phase or the defendant at the prosecution phase does not

perform the obligation agreed in the mediation report or mediation document, it is possible to place this report in the court ordered execution and send an enforcement order pursuant to Article 24 et seq. of the Enforcement and Bankruptcy Law to the suspect or the defendant because the mediation report or mediation document is deemed a document of court order as written in Article 38 of the Enforcement and Bankruptcy Law [83] .

However, if the suspect or the defendant does not perform the requirements of the mediation, his relation to the criminal trial process shall continue (CPC Art. 253, 19). If the suspect or the defendant does not perform his obligation at once, the decision of no prosecution (or “dismissal of case”) shall not be returned at the investigation phase; and if he does not perform one of the installments, the decision to defer the institution of a public case [84] (or “defer the declaration of verdict” at the prosecution phase) may not be returned, and a public case shall be instituted against the suspect or the defendant (or prosecution continues).

When a public case is instituted against the suspect or the defendant (or prosecution continued), two possibilities emerge. If the offender acquits at the end of prosecution, since the mediation report or mediation document is still valid and the offender has undertaken to perform a certain obligation against the victim in private law, it is possible to execute it against the offender through court ordered enforcement.

On the other hand, if the offender is proven guilty and convicted at the end of prosecution, he shall both serve the sentence, and also be subject to court ordered execution. However, it is the requirement of the principle of “no more than one penalty for an offense” (ne bis in idem crimen iudicetur) that as a result of mediation, no prosecution shall be carried for the same events. Pursuant to the principle of no re-trial (Ne bis in idem), while there is a criminal case pending, a second criminal case cannot be instituted, and also, a second criminal case cannot be instituted against the same person for the same act after a trial that ended in final conviction [85] . Pursuant to the principle laid down in CPC Art. 223, 7 that “if there is a verdict against the same defendant for the same act or a case instituted, then the (new) case shall be rejected”, after the mediation report is executed by way of court ordered execution against the defendant, it is not possible to return a criminal verdict against the defendant for the same act. Therefore, if prosecution is continued because of non-performance of mediation requirements and if the offender is convicted, the mediation report or mediation document should bear no consequence. In this case, it would be appropriate to recognize that when the offender is penalized as a result of the prosecution, then the mediation report or mediation document would be invalid and no longer be a basis for court ordered execution
[86]
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K) Mediation at Trial Phase

Mediation which is regulated primarily as a stage of the investigation phase in the Law may be sought by the court during the prosecution phase in the following circumstances; and the mediation actions shall be carried by the court in accordance with the principles and procedures specified for the investigation phase (Directive Art. 25, 1):

a) The offense being prosecuted is understood to be eligible for mediation due to a change in its nature,

b) It is understood during the court trial phase that a mediation proposal should have made during the investigation phase,

c) The offense brought directly to the court without an indictment by the public prosecutor is eligible for mediation,

ç) The offense becomes eligible for mediation during the court trial phase due to legislative amendments.

Where the offense being prosecuted is understood to be eligible for mediation due to a change in its nature, or it is understood during the court trial phase that a mediation proposal should have made during the investigation phase due to forgetfulness or for any other reason after the acceptance of the indictment, the mediation actions shall be carried on by the court (CPC Art. 254, 1; Directive Art. 25, 1). It is because, if it is understood before the acceptance of the indictment that a mediation proposal should have made during the investigation phase, then the indictment must be returned according to the Law (CPC Art. 174, 1/c). Thus, if the offense is understood to be eligible for mediation in the first hearing, it is possible to seek mediation at this phase. Similarly, where the power to decide to investigate and prosecute is conferred to persons other than the public prosecutor by a special provision, the court should seek mediation at the first prosecution phase [87] .

The mediation procedure is regulated in Article 253, thus the court follows the same procedure

to carry on mediation actions. The court may perform the notices and correspondence for mediation on the file without waiting for the hearing day (Directive Art. 25, 2).

The court shall, after identifying the parties, propose mediation to the parties. The mediation proposal made by the court shall be made by giving the parties the Mediation Proposal Form which includes the nature of mediation and legal consequences of accepting or rejecting the mediation in Annex 1/c to the Directive and by explaining the information on the form. This shall be captured in court minutes, and the obligation to inform shall be performed, and the signed copy of the form indicating that the mediation has been proposed shall be placed in the prosecution file [88] (Directive Art. 26).

While the mediation proposal made during the court trial phase has been rejected, the parties may declare to the court by a document indicating their agreement no later than the conclusion of hearings but before the declaration of verdict. The third paragraph of Article 25 of the Directive that lays down this rule was deemed a matter reserved to the court by the Plenary of Administrative Chambers of the Council of State, and found not compliant with law and the Law that the respondent administration has specified by an administrative act the meaning and scope of the reference in CPC Art. 254, 1, thus the execution of this paragraph was suspended.

The legal consequences of accepting or rejecting the mediation at this phase shall be different than those at the investigation phase. When an offense eligible for effective repentance is at hand, the court may not seek mediation (CPC Art. 253, 3; Directive Art. 7, 3). However, if conditions exist, the court may decide to defer the declaration of verdict (hük-mün açıklanması-nın ge-ri bı-ra-kıl-ma-sı kararı).

In respect of ideal law (de lege feranda), where the victim rejects mediation without a rightful cause, it would be appropriate to empower the court with the discretion, without seeking conditions, to defer the declaration of verdict for the prosecuted offense with respect to the defendant who has accepted mediation. Besides that, good faith, sincere will and effort shown by the defendant in the mediation negotiations must be taken into account by the court in sentencing, and the judge should be able to determine the penalty at the lowest limit as specified in the law based on his discretion (Turkish Penal Code Art. 61). Similarly, the judge should be able to take into account the positive and good faith attitude of the defendant in the mediation negotiations as a cause of mitigation in the sentence [89] (Turkish Penal Code Art. 62).

Where settlement occurs, the decisions to be rendered by the court depending on the performance of the obligation are listed in the second paragraph of Article 254 of the Law. If settlement occurs and the defendant performs his obligation agreed in mediation at once, the court decides to dismiss the case (davanın düşmesi kararı) (Directive Art. 27, 1). Where the performance of the obligation is deferred to a future date, arranged as installments or made permanent, the decision to “defer the declaration of verdict” shall be returned for the defendant without seeking the requirements in Article 231 (Directive Art. 27, 2). Time shall not run during the deferral period (Directive Art. 27, 3). After the decision to defer the declaration of verdict is given, if the obligations of the settlement are performed, the deferred verdict shall be removed and the case shall be dismissed (Directive Art. 27, 4). After the decision to defer the declaration of verdict is given, if the obligations of the settlement are not performed, the court shall declare the verdict without seeking the requirements in Article 231 (CPC Art. 254, 2; Directive Art. 27, 5).

After the decision of no prosecution (kovuşturmaya yer olmadığı kararı) or dismissal of the case (davanın düşmesi kararı) against the offender due to reaching a settlement, the offender cannot institute an indemnification lawsuit for damages or suffering against the state due to protection measures relying on Article 141 of the Criminal Procedure Code (CPC Art. 144,1/c). Similarly, where settlement is reached, no indemnification suit may be instituted against the defendant for the prosecuted offense, and the lawsuit pending shall be deemed waived (Directive Art. 27, 7).

For offenses perpetrated by several persons, whether or not in complicity, only those offenders who agree to mediation shall benefit from mediation (CPC Art. 255; Directive Art. 6, 2).

Finally, Article 32 of the Directive provides that the decisions returned by the public prosecutor or the court shall be entered in the cards for keeping accurate statistics for mediation. To that end, the public prosecutor’s office shall keep special cards in which a copy of the decisions such as “no prosecution”, “defer the institution of a public case” at the public prosecutor’s office, and the decisions to “dismiss” or “defer the declaration of verdict” at the courts. For copies to be placed in these cards, the signature of the public prosecutor or the judge, and the seal of the public prosecutor’s office or the court, respectively as the case may be, should be affixed on these copies.

§ 5. MEDIATION FOR CHILDREN INDUCED TO CRIME AND

CHILDREN VICTIMIZED BY CRIME

A) Effect of Restriction and Incapacity on Mediation

Legal systems divide the offenders as juvenile and adult, and subject them to separate penalties, trial and enforcement systems. [90] Article 61 of the Constitution provides that “The State shall take all measures to integrate to society the children in need of protection.”

The preamble to the United Nations Convention on the Rights of the Child [91] “recalls that in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance”; and Article 3, 1 provides that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Article 13 of the European Convention on the Exercise of Children’s Rights [92]
provides that: “In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties”.

As emphasized in the general rational for the Child Protection Law no. 5395, international instruments notes that laws, procedures and authorities specific to children must be established based on the fact that, trying and penalizing children induced to crime as adults do not protect the children from crimes and similar risks, on the contrary expose them more to such risks. By the United Nations Convention on the Rights of the Child, it has become an obligation for the signatories to establish laws, procedures and authorities specific to children.

Article 5.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice [93] (Beijing Rules) notes two important aims for the juvenile justice system: “The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any

reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence".

Article 11 of the Beijing Rules encourages the institutionalization and exercise of mediation by providing for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims, in order to facilitate the discretionary disposition of juvenile cases without recourse to formal criminal procedures.

In many judicial systems, restorative justice programs (e.g. victim-offender mediation programs) have first been developed for children induced to crime, then formed the basis of programs applied to adults. For example, in the United States of America where the victim-offender mediation programs are most frequently exercised in the world, the fundamental priority of mediation programs are the children induced to crime. Restorative justice programs are an effective alternative to justice systems which try children, convict them and stigmatize them as convicts [94] .

The idea of "penalizing" the children should be left for ever, however, non-penalizing should not mean non-response. Juvenile penal law is a law of cautionary measures. Penalty is the last resort and an exception. According to Article 11 of the Beijing Rules, mediation is essential for children and must be exercised. [95]

B) Children's Status in Criminal Justice System

According to the Child Protection Law [96] no. 5395, the purpose of this Law is to protect children in need of protection (at risk by bodily, mental, moral, social and emotional development and personal safety or exploited or victimized by crime) or children induced to crime, and secure their rights and well-being.

According to Article 6 of the Turkish Penal Code no. 5237, and Article 3 of the Child Protection Law no. 5395, a child means a person not completed eighteen years of age even if he is an adult at earlier age. Children in this scope have been defined as follows in the categories of children in need of protection and children induced to crime:

1) Children in need of protection: Children at risk by bodily, mental, moral, social and emotional development and personal safety or exploited or victimized by crime,

2) Children induced to crime: Children who are under investigation or prosecution on charges of an act defined as offense in the laws, or children on whom a security measure is pending due to an act committed.

In parallel with the physical development of a person, his ability to grasp the value judgments of the society, and their meaning and content develops. In addition to ability to grasp in this development process, his ability of will to direct his actions in line with the requirements of social extent and behavioral rules. [97]

A child who has not completed twelve years of age has no criminal liability. Being below age of twelve at the date of commitment of the act is recognized as a cause which absolutely removes the fault from the child [98] .

Article 31,1 “Being minor” of the Turkish Penal Code provides that “Children who are below twelve years of age at the time of commitment of the act have no criminal liability. They may not be subject to criminal prosecution; however, security measures specific to children may be applied.” The 2nd and 3rd paragraphs of this Article provide for penalty reduction by age groups, and Article 33 associates the status of the deaf and blind with the status of minors regulated in Article 31 by age groups.

Despite the existence of the Child Protection Law, Turkish Penal Code no. 5237, Criminal Procedure Code no. 5271 and the Law no. 5275 on Execution of Penalties and Security Measures include scattered rules for the children.

While the 2005 progress report of the European Commission for Turkey published on 9 November 2005 praises the enactment of the Child Protection Law as a positive development for the protection of children’s rights; it also criticizes the fact that the criminal provisions for juvenile offenders are the same as the general criminal procedures and the Law is not compliant with the international principles on special children’s legislation [99] .

C) Children and Penal Mediation

According to the Council of Europe's "Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters", "member states should recognise the importance of supporting and protecting minors during their participation in the mediation process by the establishment of adequate safeguards and procedural guarantees" [100] .

The procedures of investigation and prosecution for children induced to crime have been laid down in Articles 15 et seq. of the Child Protection Law and the Directive on Principles and Procedures for Implementing the Child Protection Law.

Investigation for children induced to crime must be handled by the public prosecutor assigned in the children's bureau. For urgent cases, it may be handled by other public prosecutors.

A social worker may be present by the child when the statement from children induced to crime is being taken or other actions for the children. Pursuant to Article 150 of the Criminal Procedures Code, a defense counselor must be appointed for the children induced to crime.

The children taken under police custody must be kept at the juvenile unit of the judicial police. Where there is no juvenile unit, they must be kept separate from the adults. Where children commit offenses in conjunction with adults, the judicial police officers must prepare separate papers for the children and the investigation and prosecution must be carried on separately.

Children induced to crime may not be restrained by chains, handcuffs or similar tools. However, under necessity, the judicial police shall take necessary measures to prevent the escape of the child, or prevent dangers to his or else's life or physical safety.

Article 21 of the Child Protection Law bans arrest of children less than fifteen years of age for offenses requiring less than five years of prison as upper limit. Accordingly, children of ages 15 to 18 have no difference from adults.

Mediation in our country for children induced to crime is exercised in the framework of the Criminal Procedure Code no. 5271 (Article 253), the Child Protection Law no. 5395 (Article 24), the Directive on Principles and Procedures for Implementing the Child Protection Law, and the Directive on Application of Protective and Supportive Measures Imposed according to the Child Protection Law. The provisions on mediation of the Criminal Procedure Code shall apply to both children induced to crime and children victimized by offenses eligible for mediation.

Article 42 of the Law no. 5395 provides that “Where this Law is silent, the provisions of the Criminal Procedures Code, Turkish Civil Code, Civil Procedure Code no. 1086 dated 18.06.1927 and the Social Services and Child Protection Agency Law no. 2828 dated 24.05.1983 shall apply”.

I- Requirement of Criminal Liability for Mediation

Mediation requires the existence of a criminal investigation being carried out or possible to carry out against the offender. Accordingly, children below age 12 and deaf and mute children below age 15 have no criminal liability. Similarly, those children who are aged 12 or above but below 15, and deaf and mute children aged 15 or above but below 18 and who have no sufficiently developed ability to grasp the legal meaning and consequences of their acts or direct their behaviors have no criminal liability (Turkish Penal Code Art. 31,1-2; 33).

While it is possible to impose security measures specific to children on such persons having no criminal liability, the mediation provisions may not be applied [101] . The subject of mediation is relief from penalty, not security measures. It is obvious that persons who lack the capacity to discern due to age or illness cannot express legal will on the mediation which would burden themselves. Therefore, mediation is possible only after the reports as regards the capacity to grasp the meaning and consequences of acts by minors below 15 and deaf and mute children aged 15 or above but below 18, then if they are determined to be capable of grasping the meaning and consequences of their acts.
[102]

Because Article 24 of the Child Protection Law has been amended by the Law no. 5560 on 19.12.2006, this situation calls for review by a separation.

II- Mediation According to Child Protection Law No. 5395

Article 24 of the Law no. 5395 had the following provision before amendment by the Law no. 5560 [103] :

“(1) Mediation in respect of children induced to crime shall be applied for offenses that are dependent on complaint for investigation and prosecution require imprisonment up to one year or deliberate offenses which require no more than two years of imprisonment by the lower limit or judicial fine or tortuous offenses.

(2) For children below age fifteen on the date of offense, the lower limit of the imprisonment in the first paragraph shall be taken as three years.”

This Directive held a wide scope of mediation for children. Offenses that are dependent on complaint for investigation and prosecution require imprisonment up to one year or deliberate offenses which require no more than two years of imprisonment by the lower limit or judicial fine or tortuous offenses were all included in the scope. The second paragraph of the Article specified the lower limit as three years [104] . In practice, this rule which is favorable as of the date of offense must be taken into account. [105]

III- Situation After Amendment by Law No. 5560

Article 41 of the Law no. 5560 and Article 24 of the Child Protection Law have been amended as “Mediation provisions of the Criminal Procedure Code shall apply also to children induced to crime”, eliminating the special conditions for children and adopting the scope and general mediation scheme in Articles 253 et seq. of CPC for children.

While the form of Article 253 before amendment by the Law no. 5560 did not explicitly specify to whom the mediation proposal would be made in respect of children induced to crime and children victimized by crime, the practice was based on the restriction and capacity as provided for in the Civil Code, and mostly the mediation proposal was made to children where the children induced to crime were deemed to have penal capacity.

CPC Art. 253, 4 as amended by the Law no. 5560 regulates that the mediation proposal in case of offenses eligible for mediation shall be made to the legal representative where the suspect or the victim is a minor, thus eliminating doubts on the issue. Further, a similar directive was made in Article 8, 2 of the Mediation Directive, and mediation proposal would be made to the legal representative where the suspect or the victim lacks capacity to discern.

The response to the mediation proposal must also emanate from the will of the parties (or legal representatives for minors). However, it should be recognized that the person would deputize an attorney or a defense counselor by expressing his will vis-à-vis the mediation proposal.

The first precondition to making a mediation proposal to children induced to crime is that there must be sufficient grounds to believe that the child has committed the offense (Directive Art. 8, 2). In absence of sufficient grounds, the decision of no prosecution is required, thus, mediation shall not be sought.

Mediation negotiations shall be carried on confidentially (CPC Art. 253, 13). Where one or both parties are children, confidentiality is more important. It is because, while court trial is public, mediation negotiations are held confidential in general, it is more important that mediation negotiations must be held confidential for children considering that their trial should be held confidential.

Confidentiality is required for two reasons. First, confidentiality is required so that an effective exchange of information could occur in mediation and a constructive outcome may be reached. Confidentiality creates an environment suitable for parties to express their views easily and discuss more confidently compared to conventional criminal trial. Thus, the information disclosed serves as a basis for non-judicial solution. The second reason for confidentiality is to protect interests of the parties. By confidentiality, negotiations conducted during the mediation may not be disclosed unless agreed by the parties. This contrasts the principle of public trial (trials held in public) prevalent in the conventional criminal trials and emphasizes the “special characteristic” of mediation [106] .

The suspect, victim, legal representative, defense counselor and attorney may participate in the mediation negotiations. Where suspect, victim, legal representative, defense counselor or attorney does not participate in the mediation negotiations, this means that they have not

accepted mediation (CPC 253, 13).

IV- Effect of Restriction and Incapacity on Mediation

1) Adulthood, Capacity to Discern, Capacity to Act, Minors and Restricted Having Capacity to Discern and Legal Representatives in Civil Code

According to the Turkish Civil Code (Türk Medenî Kanunu) no. 4721, every adult person having capacity to discern and not restricted has capacity to act [107] . Adulthood starts upon the completion of eighteen years of age. Marriage makes a person adult
[108]
. A minor of aged fifteen or above may be made adult by the court upon his wish and the consent of his custodian
[109]
. Every person who does not lack the ability to act rationally for any of such reasons as young age or mental illness, mental impairment, drunkenness or similar reasons have the capacity to discern according to this Code
[110]
. Those lacking capacity to discern, minors and restricted have no capacity to act
[111]
.

Without prejudice to cases specifically excepted in the law, acts of those lacking capacity to discern shall not have legal consequences [112] . Minors and the restricted who have capacity to discern may not assume obligations by their own acts unless consented by their legal representatives. This consent is not required for gratuitous acquisition and exercise of strictly personal rights. Minors and the restricted who have capacity to discern are liable for their torts
[113]
. According to the Civil Code, legal representatives are custodians, guardians or administrators. The matter of custodianship is regulated in Articles 331 to 335.

“Cases requiring guardianship” are young age and other restrictions and regulated in Articles 404 to 407 of the Civil Code; and “End of cases requiring guardianship” are regulated in Articles 470 et seq [114] .

2) Minors' Power of Complaint and Mediation

a) Minors' Power of Complaint

There exists no rule in the Turkish Penal Code no. 5237 and the Criminal Procedure Code no. 5271 regarding the power of complaint of minors. The matter is clarified by court verdicts under the Civil Code no. 4721.

According to Articles 31, 1 and 33 of the Turkish Penal Code no. 5237, children below age 12 and deaf and mute children below age 15 at the time of committing the act have no criminal liability. Those children who are aged 12 or above but below 15, and deaf and mute children aged 15 or above but below 18 and who have no sufficiently developed ability to grasp the legal meaning and consequences of their acts or direct their behaviors have no criminal liability. It is indicated that offenders having the ability to grasp the legal meaning and consequences of their acts or direct their behaviors shall be penalized (by reduction at certain rates). Accordingly, it is adopted as a rule that children who are aged 12 or above but below 15, and deaf and mute children aged 15 or above but below 18 have the ability to grasp the legal meaning and consequences of their acts or direct their behaviors. If there are indications to the contrary, they shall be investigated.

When considered in light of Article 16 of the Civil Code, it is necessary to investigate whether the minors aged 12 or above have the capacity to discern, the ability to grasp and will, and if they do, they shall be deemed to have the power to complain [115] .

The Court of Cassation, in its Decision of Reconciliation of Opinions dated 15.04.1942 no. 14/9, stated that minors who have capacity to discern and are victimized by crime have the right to sue and complain, and the same Decision further stated that if such minors do not exercise such powers, their legal representatives may step in and exercise the power to complain in order to protect their interests. This opinion is based on the grounds that minors aged 15 but below 18 have the ability to grasp and will, however their ability to direct their behaviors is not fully developed. This decision is still valid today. As a rule, anyone who has the right to complain must also have the right to withdraw complaint [116] . In some decisions of the Court of Cassation, the will of the minor having capacity to discern was taken as the basis of withdrawing the complaint [117] .

b) Minors' Power of Mediation

The second sentence of CPC Art. 253,4 provides that "If the suspect or the victim is a minor, the mediation proposal shall be made to his legal representative." Accordingly, if a childe induced o crime or victimized by crime is not an adult, the mediation proposal shall be made to his legal representative even if he child has the ability to grasp and will. Thereby, while the minor having capacity to discern has the right to complaint, he is not granted the power to agree to mediation. Here it is understood that the legislator wishes to protect minors who is thought of not having sufficient ability to grasp, not capable of grasping the meaning and consequences of mediation sufficiently based on the provision in Article 16 of the Civil Code that "Minors and the restricted who have capacity to discern may not assume obligations by their own acts unless consented by their legal representatives." Another reason is the provision in CPC Art. 253,19 that "no restoration suit may be launched against him for the investigated offence, that such a suit shall be deemed waived if pending".

If no material obligation (indemnification) is claimed in mediation, the mediation proposal should be made to the minor who is the victim and has the ability to grasp and will; however, the consent of his legal representative should be sought in respect of accord with Article 16 of the Civil Code.

Where the child is made an adult by the court decision, the mediation proposal shall be made to the child himself.

V- Death of Minor Victimized by Offense

For offenses that are dependent on complaint for investigation and prosecution, if the minor who has capacity to discern dies before the lapse of time for complaint and before he has exercised his right to complain, his legal representative may exercise the right to complain. Then, the mediation proposal shall be made to the legal representative. The same procedure applies to offenses investigated ex officio.

On the other hand, if the victim has not filed a complaint within the time prescription and died after the lapse of such time, then there is no offense that could be investigated or prosecuted. However, if he has died after filing a complaint, the mediation proposal shall be made to the

legal representative.

VI- Status of Persons of Partial Mental Handicap and Mute

According to the Civil Code, adulthood starts at the completion of eighteen years of age, and marriage makes a person adult [118] . However, since the persons with mental illness are recognized as having lessened ability to direct their behavior in respect of their acts, they shall be given reduced penalties (Turkish Penal Code Art. 32, 2). The same applies to the deaf and mute. In this respect, pursuant to the provision in CPC Art. 253, 4 that “Where the victim is a minor, the mediation proposal shall be made to his legal representative”, the mediation proposal shall be made to the legal representative of persons with partial mental handicap and the deaf and mute without examining whether persons with partial mental handicap, the deaf and mute are adults or not [119] .

VII- Conflict of Interest between Minor and Legal Representative

Where the interests of the children induced to crime or children victimized by crime and those of the legal representative conflict, the legal representative may not exercise the right to complain on behalf of the minor having capacity to discern. Then, an administrator must be appointed for the minor according to the Civil Code [120] . For example:

“That the defendant inflicted bodily harm to the minor victim who is the defendant’s son, considering that the defendant was separated from his spouse, being the mother of the victim, while it was necessary to investigate the status of custodianship on the minor, where the custodianship is held by the mother, the mother should have been asked if she would file complaint against the defendant, where the custodianship is held by the defendant father, then due to the conflict of interest, an administrator should have been requested and obtained from the Civil Court of Peace in order to represent the victim pursuant to Article 426 of the Civil Code by way of Article 403 of the same code, and this administrator should have obtained the permission to act against from the Civil Court of Peace and exercise the right to complain within the time prescribed in Article 108 of the Turkish Penal Code, thus the court should have decided to wait the outcome of the aforesaid required actions; then, rendering a verdict as the one being appealed deserves reversal of the verdict” [121] .

VIII- Can Mediation Proposal Be Made to Legal Representative Where Victim Minor Having Capacity to Discern Withdraws Complaint?

In order to apply the provisions of mediation, the act can be investigated or prosecuted. In other words, it is a rule of procedure to consider the conditions of complaint, permission, claim or decision for each offense, and refer to the relevant legislation. Where the condition of criminal trial does not materialize, the provisions of mediation may not be applied [122] .

However, if the practice of Court of Cassation that the approval of the legal representative is required for the withdrawal of the complaint to be valid according to the practice in the time of the Turkish Penal Code no. 765 still applies (where some contrary opinions were indicated in the new era), for an offense dependent on complaint, the withdrawal of complaint by the minor (having the capacity to discern) shall not be valid if not approved by the legal representative. Then, since the existing complaint is valid, the mediation proposal may be made to the legal representative in light of the explicit legal provision. However, where the minor having the capacity to discern withdraws his complaint and declines to participate in the mediation negotiations, then the mediation will be difficult to achieve. It is because, CPC Art. 253, 13 provides that “The suspect, victim, legal representative, defense counselor and attorney may participate in the mediation negotiations. Where suspect, victim, legal representative, defense counselor or attorney does not participate in the mediation negotiations, this means that they have not accepted mediation”.

Looking at the opinions of the Court of Cassation after the promulgation of CPC no. 5271, the will of the minor having the capacity to discern is valued in respect of withdrawal of complaint, and it is not stated that the approval of the legal representative is required so that the withdrawal may have effect. If the Court of Cassation does not change opinion, it is possible to conclude the case without mediation upon the withdrawal of complaint by the minor having the capacity to discern [123] .

Upon withdrawal of complaint in the case of an offense dependent on complaint, the precondition to investigation and prosecution ceases to exist; therefore the decision of no prosecution or dismissal of the case must be returned. For an offense not dependent on complaint, withdrawal shall not mean settlement. It is because two are different by nature and consequences. The opinions of the Court of Cassation are in this line [124] .

IX- Impossibility to Make Mediation Proposal to Defense Counselors or Attorneys of Minors

Since the Law provides that mediation proposal shall be made to the parties themselves, or the legal representatives if they are minors, the proposal made to attorneys or defense counselors are invalid [125] .

The provision of CPC Art. 253, 6 that "… the investigation shall be concluded without seeking mediation if the victim or the suspect or their legal representatives cannot be contacted because any of them is not at the address declared to the authorities or outside the country or for any other reason" should not be taken to mean the proposal could be made to the defense counselor or attorney of the parties. Here, the legal representative refers to the legal representatives of persons who cannot exercise rights due to minority or restriction. On the other hand, it is possible that defense counselor or attorney of the minors may respond to the mediation proposal made to the parties or their legal representative, if they are explicitly empowered. Thus, the 2nd Criminal Chamber of the Court of Cassation declared contrary to laws the failure to obtain the statements from the attorneys in consideration of the provisions that the attorneys should make a statement on the mediation [126] .

X- Can Mediation Be Proposed to Someone Who Should Be Restricted?

According to the Civil Code, a notice shall be made to the Civil Court of Peace first regarding the persons who are included under "Cases requiring guardianship" but not place under guardianship or restricted because such state is not known (e.g., drunkard, wasteful etc.), then the mediation proposal should be made to the guardian if the person is placed under guardianship, or to himself if not [127] . The provision in Article 8 of the Directive that "The public prosecutor investigates whether such persons have the capacity to discern and identify the person to whom the mediation proposal shall be made" requires doing so.

XI- Can Children Induced to Crime or Children Victimized by Crime Accept a Mediation which does not Burden themselves without Participation of their Legal Representative in case of an Offense Eligible for Mediation?

While CPC Art. 253, 4 provides that the mediation proposal shall be made to the legal representative if the suspect is a minor, it needs to be deemed that the settlement has occurred where a child who has the capacity to discern and is induced to crime receives the mediation proposal and accepts such proposal if the obligation does not burden himself financially, or can

be performed by apology. While Article 16 of the Civil Code provides that “minors and the restricted who have capacity to discern may not assume obligations by their own acts unless consented by their legal representatives”, the final sentence provides that “This consent is not required for gratuitous acquisition and exercise of strictly personal rights.” It is a gain for the child induced to crime (suspect/defendant) that the decision of no prosecution is returned as a result of mediation without incurring financial burden by apology, and lawsuit of indemnity cannot be instituted based on the investigated crime, and the lawsuit if any is waived [128] (CPC Art. 253,19).

However, it does not apply to the child who is victimized by the offense. Unless the child victimized by the offense is an adult, the mediation proposal must be made to the legal representative (even if he has the capacity to discern). It is because if he accepts the mediation proposal made to him, a lawsuit for indemnity may not be instituted, therefore there is no gratuitous acquisition [129] .

XII- Can Judicial Police Officers Propose Mediation to Children Induced to Crime?

The mediation proposal may be made by the judicial police officers to parties upon instructions from the public prosecutor. CPC Art. 253, 4 provides that “if the investigated offense is eligible for mediation, the public prosecutor, or a judicial police officer upon instructions from the public prosecutor, shall make a mediation proposal to the suspect and the victim.” Paragraphs 1 and 3 of Article 8 “Mediation Proposal” of the Directive provide similarly. However, the judicial police officers by themselves may not handle mediation, nor appoint a mediator; such acts shall be handled by the public prosecutor. The mediator shall start the mediation process upon request from the public prosecutor or the judge [130] .

XIII- If, upon Mediation Proposal by Judicial Police Officers, Legal Representatives of Parties Declare that They Have Agreed without Appointment of a Mediator, would such Agreement Be Valid? Should this Declaration Be Repeated before Public Prosecutor?

The declaration by free wills of the parties that they have settled even at the premises of the judicial police is a valid declaration. All settlements without financial burden at the premises of the judicial police must be accepted. It is because CPC Art. 253, 17 provides that “If the public prosecutor decides that the mediation is based on the free wills of the parties and the obligation complies with the laws, he shall sign and seal he report or the document and place it in the investigation file.” Accordingly, what is important is that the public prosecutor (or the judge at the

prosecution phase) decides that “the mediation is based on the free wills of the parties and the obligation complies with the laws. It is not required that the mediation report must be prepared or signed in the presence of the public prosecutor.

XIV- Persons Participating in Mediation Process

It would be useful to obtain a social review report both for children offenders and children victims before the start of the mediation. The participation of social workers and psychologists must be ensured to the extent possible. It is useful that parents of parties participate in the mediation negotiations.

The Law and the Directive do not provide for the participation in the mediation negotiations of “other persons agreed by parties.” For resolution of conflicts that require specialization, special or technical knowledge, it should be possible that specialist persons (such as a financial adviser, and accountant, a physician) can participate in the mediation negotiations upon the affirmative opinion of the parties and the approval of the public prosecutor in order to facilitate negotiations.

In mediation negotiations, care should be taken that the parties and particularly the children should have sufficient and equal opportunity, and the child must be granted sufficient opportunity to speak up.

Article 15 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) provides that “Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country. The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.”

CONCLUSION

Although these new amendments made to the CPC, the practice of penal mediation is still very limited. One of the main reasons of this situation is that lack of education and consciousness. There are not mediators, judges, public prosecutors, probation officers, social workers, police officers and criminal justice personnel specially trained to carry out mediation in Turkey. Also, there have not been any independent community based organisation like victim support programmes which will provide mediation service. Because of this serious impediment penal mediation has not been used sufficiently in practice [131] .

Extensive standards and guidelines for training of mediators should be developed in Turkish criminal law system and mediators must have necessary qualifications and training on mediation techniques. The mediators should preferably possess a good all-round knowledge [132]
.

All mediators need a minimum level of initial training, and their training should continue throughout the course of their work. The contents of their training should be linked to the standards of the mediation service. Such training should aim at developing the specific skills and techniques needed for conflict resolution [133] . In addition, the training should provide for a good understanding of the general problems of victims and victimization which, for example, can be obtained from victim support groups, as well as problems concerning offenders and related social problems.

Therefore, Republic of Turkey Ministry of Justice is planning to increase the efficiency of penal mediation system in the Criminal Procedure within the scope of Judicial Reform Strategy [134] . Penal mediation is one of the novelties brought about by the new criminal justice system in criminal procedure. According to Judicial Reform Strategy, it is important to enhance applicability and efficiency of provision concerning penal mediation. Within the scope of Judicial Reform Strategy it has been set as target that all aspects of penal mediation in criminal law will be reconsidered, problems will be determined and necessary measures will be taken to solve the problems
[135]
. Within the scope of this purpose raising public awareness with regard to penal mediation is of paramount importance. For this reason, Judicial Reform Strategy provides that “Activities shall be conducted aiming at improving legislation and organizing training courses in order to enable reconciliation method to be applied in a more effective and common manner”
[136]
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[1] See the definition of penal mediation France Ministry of Justice website, available at http://www.justice.gouv.fr/mots-cles/mc_m.html
. See also, Nadja Marie Alexander, Mediation in France (Global Trends in Mediation, Alphen aan den Rijn: Kluwer Law 2006, pp. 181-221), p. 190.

[2] Committee of Experts on Mediation in Penal Matters, Mediation in Penal Matters: Recommendation No. R (99) 19 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999 and explanatory memorandum, Council of Europe 1999, p. 16; European Commission for the Efficiency of Justice (CEPEJ), Better Implementation of mediation in the member states of the Council of Europe, Concrete rules and provisions, CEPEJ Studies No. 5, Council of Europe, p. 25.

[3] Henry Brown/Arthur Marriott, ADR Principles And Practice, London: Sweet and Maxwell 1999, p. 294; John Burton/Frank Dukes, Conflict: Practices in Management, Settlement and Resolution, New York: St. Martin's Press 1990, p. 45; Dean E. Peachey, The Kitchener Experiment (Mediation and Criminal Justice: Victims, Offenders and Community, London: Sage 1989, pp. 14-26), p. 15; Gwen Robinson, Victim-Offender Mediation: Limitations and Potential, Oxford 1996, p. 14; Kimberlee K. Kovach, Mediation, Principles and Practice, St. Paul: Thomson-West 2004, p. 483; Mark S. Umbreit/Robert B. Coates/Betty Vos, The Impact of Victim-Offender Mediation: Two Decades of Research (Federal Probation 2001, Vol. 65, pp. 29-38), p. 31.

[4] Julien Lhuillier, The Quality of Penal Mediation in Europe, European Commission for the Efficiency of Justice (CEPEJ), Working Group on Mediation (CEPEJ-GT-MED), Strasbourg, 22 August 2007, p. 3.

[5] United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series, New York 2006, pp. 9-11; Jennifer Gerarda Brown, The Use of Mediation to Resolve Criminal Cases: A Procedural Critique (Emory Law Journal 1994, Vol. 43, pp. 1247-1310), p. 1255; Notes, Victim Restitution in the Criminal Process: A Procedural Analysis (Harvard Law Review 1984, Vol. 97, pp. 931-946), pp. 930-935; Mark S. Umbreit,

Robert B. Coates, Betty Vos, Victim Offender Mediation: Evidence-Based Practice Over Three Decades (The Handbook of Dispute Resolution, San Francisco: Jossey-Bass 2005, pp. 455-470), p. 456.

[6] Durmuş Tezcan, Mağdurun Hakları ve Tanıkların Korunması [The Rights of Victim and Protection of Witnesses] (Ceza Hukuku Reformu, Sempozyum, 20-23 Ekim 1999, İstanbul: Umut Vakfı 2001, pp. 73-84), p. 75.

[7] United Nations Office on Drugs and Crime p. 10; Füsun S. Akıncı, Mağdurun Korunması ve Mağdur Hakları [The Protection of Victim and Rights of Victim] (Yargı Reformu 2000 Sempozyumu, İzmir Barosu 5-6-7-8 Nisan 2000, pp. 693-712), p. 701; Cumhur Şahin, Ceza Muhakemesinde Uzlaşma (Conciliation in Criminal Procedure) (Selçuk University Faculty of Law Review 1998/1-2, pp. 221-297), p. 228.

[8] Detlev Frehsee, Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications (Buffalo Criminal Law Review 1999, Vol. 3, pp. 235-259), p. 240; Robinson p. 3; John Harding, Reconciling Mediation with Criminal Justice (Mediation and Criminal Justice: Victims, Offenders and Community, London: Sage 1989, pp. 27-43), p. 27.

[9] For further elaboration on the current development of penal mediation see Umbreit/Coates/Vos p. 30; Şahin p. 223; Hamide Zafer, Ceza Muhakemesi Hukukunda Özelleşme Eğilimi: Uzlaşma [Privatization Tendency in Criminal Procedure Law: Conciliation] (Essays in Honour of Prof. Dr. Ergun Önen, İstanbul: Alkım 2003, pp. 727-750), p. 732; Mustafa Özbek, Çağdaş Ceza Adaleti Sistemlerinde Alternatif Çözüm Arayışları ve Arabuluculuk Uygulaması [Searches for Alternative Measures in the Contemporary Criminal Justice Systems and the Practice of Mediation] (Kazancı Law Review 2010/1, pp. 116-183); Seydi Kaymaz/ Hasan Tahsin Gökcan, Türk Ceza ve Ceza Muhakemesi Hukukunda Uzlaşma ve Önödeme [Conciliation and Prepayment in Turkish Criminal and Criminal Procedure Law], Ankara: Seçkin 2005, p. 38.

[10] Committee of Experts on Mediation in Penal Matters p. 6; Mustafa Özbek, Avrupa Konseyi Bakanlar Komitesinin “Ceza Uyuşmazlıklarında Arabuluculuk” Konulu Tavsiye Kararı [Recommendation of the Committee of Ministers of the Council of Europe on “Mediation in Criminal Matters”] (Dokuz Eylül University Faculty of Law Review 2005/1, pp. 127-166), p. 134.

[11] Mustafa Özbek, Report on Alternative Dispute Resolution within the Context of Better Access to Justice (Dokuz Eylül University Faculty of Law Review, Essays in Honour of Prof. Dr. Bilge Umar, 2009/Special Issue, pp. 453-507), p. 461.

[12] Turkish Official Gazette Nr. 26594, dated July 26, 2007. For English translation of the Directive see also Özbek-Report pp. 481-507.

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[15] Ekrem Çetintürk, Onarıcı Adalet [Restorative Justice], İstanbul: HD Yayıncılık 2008, p. 13; Mualla Buket Soygüt-Arslan, Türk Ceza ve Ceza Usul Hukukunda Uzlaşma Kurumu [Conciliation Institution in Turkish Criminal and Criminal Procedure Law], İstanbul: Galatasaray Üniversitesi 2008, p. 9.

[16] Committee of Experts on Mediation in Penal Matters p. 7; Özbek-Tavsiye Kararı p. 135. See also European Commission for the Efficiency of Justice (CEPEJ), Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, Strasbourg, 7 December 2007, p. 7; European Commission for the Efficiency of Justice p. 29.

[17] Soygüt-Arslan p. 73.

[18] See, for example, Umbreit, Mark S.: Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment (Available on line at http://wcr.sonoma.edu/v1n1/umbr

eit.html). See also an evaluation of restorative justice programs by Cambridge University, 2008, done for the U.K. Ministry of Justice, available at http://www.iirp.org/realjustice/library/cambridgerjreport.html .

[19] Umbreit/Coates/Vos-Evidence-Based Practice p. 456.

[20] Susan C. Taylor, Victim-Offender Reconciliation Program-A New Paradigm Toward Justice (The University of Memphis Law Review 1996, Vol. 26, pp. 1187-1195), p. 1188.

[21] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı: Ceza Uyuşmazlıklarında Uzlaşma El Kitabı [Handbook of Conciliation in Penal Disputes], Ankara 2009, p. 34.

[22] Çetintürk pp. 171-235; Ekrem Çetintürk, Onarıcı Adalet Anlayışı ve Uzlaştırma Kurumunun Türk Ceza Adalet Sisteminde Algılanışı (Geleneksel Ceza Adalet Anlayışına Eleştirel Bir Bakış) [Restoraitve Justice Concept and the Perception of Conciliation Institution in Turkish Criminal Justice System: A Critical View to the Traditional Criminal Justice Concept] (Criminal Law Review 2009/9, pp. 191-245), p. 221; Özbek p. 758.

[23] Ekrem Çetintürk, Ceza Adaleti Sisteminde Uzlaştırma [Conciliation in Criminal Justice System], İstanbul: HD Yayıncılık 2009, p. 397; Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 35.

[24] See for more detail on alternative dispute resolution Stephen B. Goldberg/Frank E.A. Sander/Nancy H. Rogers, Dispute Resolution, Negotiation, Mediation and Other Processes, New York: Little, Brown and Company 1999; Stephen B. Goldberg/Frank E.A. Sander/Nancy H. Rogers/Sarah Rudolph Cole, Dispute Resolution: Negotiation, Mediation and Other Processes, New York: Aspen 2003; Elizabeth Plapinger/Donna Stienstra, ADR and Settlement in the Federal District Courts, a sourcebook for judges and lawyers, Federal Judicial Center and CPR Institute for Dispute Resolution 1996; Robert J.Niemic/Donna Stienstra/Randall E. Ravitz, Guide to Judicial Management of Cases in ADR, Federal Judicial Center 2001; Jacqueline M. Nolan-Haley, Alternative Dispute Resolution in a Nutshell, St. Paul: West Group 2001; Stephen J. Ware, Alternative Dispute Resolution, St. Paul: West Group 2001; Kovach p. 5; Gülgün Ildır,

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[25] See Recommendation R(99)19 on mediation in criminal matters, II.1, IV.11 and V. 31.

[26] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 39.

[27] Ivo Aertsen/Tony Peters, Mediation for Reparation: The Victim's Perspective (European Journal of Crime, Criminal Law and Criminal Justice 1998, Vol. 6/2, pp. 106-124), p. 111; Mustafa Özbek, Ceza Muhakemesi Kanununda Yapılan Değişiklikler Çerçevesinde Mağdur Fail Uzlaştırmasının Usul ve Esasları [Procedure and Principles of Victim Offender Mediation within the Framework of the Amendments made in the Criminal Procedure Act] (Ankara University Faculty of Law Review 2007/4, pp. 123-205), p. 143.

[28] United Nations Office on Drugs and Crime p. 18.

[29] See Recommendation R(99)19 on mediation in criminal matters, III.8. See also the rights of victims and offenders in Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, 2.1 (European Commission for the Efficiency of Justice p. 33).

[30] See Recommendation R(99)19 on mediation in criminal matters, III.8.

[31] See Recommendation R(99)19 on mediation in criminal matters, III.8.

[32] See Recommendation R(99)19 on mediation in criminal matters, IV.10. See also

awareness of the victims and offenders in Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, 3.2 (European Commission for the Efficiency of Justice p. 34).

[33] See Recommendation R(99)19 on mediation in criminal matters, IV.15.

[34] See Recommendation R(99)19 on mediation in criminal matters, IV.12.

[35] See Recommendation R(99)19 on mediation in criminal matters, V.26 and V.32.

[36] Ali İhsan İpek/Engin Parlak, İçtihatlarla Türk Ceza Hukukunda Uzlaşma [Conciliation with Opinions of Courts in Turkish Criminal Procedure Law], Ankara: Adalet 2009, p. 87; Çetintürk p. 499; Kaymaz/Gökcan p. 161; Özbek p. 766; Soygüt-Arslan p. 135.

[37] Kunter/Yenisey/Nuhoğlu p. 1214; Kaymaz/Gökcan p. 161.

[38] Kunter/Yenisey/Nuhoğlu p. 1213; Soygüt-Arslan p. 84; Çetintürk p. 501.

[39] Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları p. 165; Özbek p. 771.

[40] Asuman Aytekin İnceoğlu/Ulaş Karan, Türkiye'de Ceza Davalarında Uzlaşma Uygulamaları: Hukuki Çerçevenin Değerlendirilmesi [Conciliation Practices in Criminal Litigations in Turkey: Evaluation of Legal Frame] (Onarıcı Adalet, Mağdur-Fail Arabuluculuğu ve Uzlaşma Uygulamaları: Türkiye ve Avrupa Bakışı, İstanbul: Bilgi Üniversitesi, 2008, pp. 45-81), p. 57.

[41] See Child Protection Law Art. 15, 1.

[42] See Child Protection Law Art. 4/g.

[43] See Child Protection Law Art. 15, 2.

[44] Çetintürk p. 518; İnceoğlu/Karan p. 56; Kaymaz/Gökcan p. 130, 132; Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 41.

[45] Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 6404/9808 and dated 02.07.2007 (Kaymaz/Gökcan p. 163, footnote 4).

[46] İnceoğlu/Karan p. 57.

[47] Committee of Experts on Mediation in Penal Matters p. 5; Çetintürk p. 527.

[48] İpek/Parlak p. 78.

[49] Decision of the 4th Criminal Chamber of the Court of Cassation, Nr. 9889/970 and dated 31.01.2007 (Kaymaz/Gökcan p. 163, footnote 3).

[50] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 41.

[51] Çetintürk p. 518; İpek/Parlak p. 104; Kaymaz/Gökcan p. 166; Özbek p. 769; Soygüt-Arslan p. 127; Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 42.

[52] Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 6481/9229 and dated 21.06.2007 (Kaymaz/Gökcan p. 170, footnote 10).

[53] Decision of the 10th Criminal Chamber of the Court of Cassation, Nr. 10287/19090 and dated 19.12.2005 (Kazancı Case Law Information Bank, available at http://www.kazanci.com.tr).

[54] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 42.

[55] Çetintürk p. 504; İpek/Parlak p. 89; Kaymaz/Gökcan p. 162; Özbek p. 769; Soygüt-Arslan p. 136.

[56] European Commission for the Efficiency of Justice (CEPEJ)-Guidelines p. 7; European Commission for the Efficiency of Justice p. 34. For Turkish translation of this text see also Özbek pp. 929-938.

[57] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 43; Kunter/Yenisey/Nuhoğlu p. 1214; Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları p. 163; Soygüt-Arslan p. 137; İnceoğlu/Karan p. 55.

[58] Kunter/Yenisey/Nuhoğlu p. 1217.

[59] PACCS 15.05.2008, Suspension of the Execution Objection No: 2008/463 (Özbek pp. 776-780).

[60] Çetintürk p. 497; İpek/Parlak p. 114; Kaymaz/Gökcan p. 176; Özbek p. 781; Soygüt-Arslan p. 148.

[61] Committee of Experts on Mediation in Penal Matters p. 23; Lhuillier p. 10; Özbek-Tavsiye

Kararı p. 158.

[62] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 55. See also suspension of limitation terms in Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, 2.3 (European Commission for the Efficiency of Justice p. 33).

[63] Committee of Experts on Mediation in Penal Matters p. 21; Çetintürk p. 531; Kaymaz/Gökcan p. 186; Lhuillier p. 11; Özbek p. 789; Özbek-Report p. 464. See also Recommendation R(99)19 on mediation in criminal matters, II.2 and V.29; Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, 1.6 (European Commission for the Efficiency of Justice p. 31).

[64] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 50; Mary Ellen Reimund, Confidentiality in Victim Offender Mediation: A False Promise (Journal on Dispute Resolution 2004, Vol. 2, pp. 401-427), p. 406; Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları p. 139, 183.

[65] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 53; Committee of Experts on Mediation in Penal Matters p. 16; Soygüt-Arslan p. 130; Kaymaz/Gökcan p. 140; Seydi Kaymaz/Hasan Tahsin Gökcan, Uzlaşmada Edimin Konusu [Subject Matter of Obligation in Conciliaiton] (Kazancı Law Review 2010/1, pp. 391-410), pp. 402-408; Özbek p. 791; Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları pp. 186-187.

[66] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 52.

[67] Turgut Akıntürk, Türk Medenî Hukuku, C. 2, Aile Hukuku [Turkish Civil Law, Vol. 2, Family Law], İstanbul: Beta 2006, p. 428.

[68] See Turkish Civil Code Art. 15.

[69] See Turkish Civil Code Art. 16,1.

[70] See Turkish Civil Code Art. 16,2.

[71] Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları p. 188, footnote 189.

[72] See Turkish Civil Code Art. 451,1.

[73] See Turkish Civil Code Art. 397,2.

[74] See Turkish Civil Code Art. 462,13.

[75] See Turkish Civil Code Art. 450.

[76] Committee of Experts on Mediation in Penal Matters p. 25; Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları p. 189.

[77] Kaymaz/Gökcan p. 189; Özbek p. 793.

[78] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 52; Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları p. 190.

[79] Committee of Experts on Mediation in Penal Matters p. 21; Özbek-Tavsiye Kararı p. 133, 154; Soygüt-Arslan p. 133.

[80] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 54.

[81] Çetintürk p. 538; İpek/Parlak p. 125; Kaymaz/Gökcan p. 189-190; Özbek p. 795; Soygüt-Arslan p. 157.

[82] See Soygüt-Arslan p. 159.

[83] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 55.

[84] Çetintürk p. 537; İpek/Parlak p. 120; Kaymaz/Gökcan p. 191; Özbek p. 796; Soygüt-Arslan p. 165.

[85] Kunter/Yenisey/Nuhoğlu p. 46.

[86] Çetintürk p. 537; Özbek p. 797.

[87] Çetintürk p. 546; İpek/Parlak p. 127; Kaymaz/Gökcan p. 195; Özbek p. 799; Soygüt-Arslan p. 174.

[88] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 57.

[89] Özbek p. 800.

[90] Yusuf Solmaz Balo, Uluslararası İlkeler Işığında Çocuk Koruma Kanunu ve Uygulaması [Child Protection Code and Practice in the light of Inernational Principles], Ankara: Seçkin 2005, p. 112.

[91] Turkish Official Gazette Nr. 22138, dated December 11, 1994.

[92] Turkish Official Gazette Nr. 24743, dated May 02, 2002. See also http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm
; Ankara Barosu: Çocuk Haklarının Kullanılmasına İlişkin Avrupa Sözleşmesi [European Convention on the Exercise of Children's Rights], Ankara 2001.

[93] Adopted by the UN General Assembly Resolution no. 40/33 dated 29 November 1985.

[94] Mark S. Umbreit, Victim Offender Mediation in Juvenile or Criminal Courts (ADR Handbook for Judges, American Bar Association 2004, pp. 225-236), p. 229; Mustafa S. Özbek, Suça Sürüklenen Çocuklara Yönelik Onarıcı Adalet Programları ve Çocuk Arabuluculuğu [Restorative Justice Programs for Children Induced to Crime and Juvenile Mediation] (Essays in Honour of Prof. Dr. Turgut Akıntürk, İstanbul: Beta 2008, pp. 449-466), p. 450; Özbek-Mağdur Fail Uzlaştırmasının Usul ve Esasları p. 136.

[95] Feridun Yenisey, Genç Ceza Hukukunun Yeniden Yapılandırılması Hakkında Bazı Düşünceler [Some Remarks about the Reorganisation of Juvenile Criminal Law] (Karşılaştırmalı Güncel Ceza Hukuku Serisi 4, Çocuklar ve Suç-Ceza, Ankara: Seçkin 2005, pp. 19-48), p. 43.

[96] Turkish Official Gazette Nr. 25876, dated July 15, 2005.

[97] Haydar Erol, Yeni Türk Ceza Kanunu [New Turkish Criminal Code], Ankara: Yayın Matbaacılık 2005, p. 161.

[98] İzzet Özgenç, Türk Ceza Hukuku Mevzuatı [Turkish Criminal Positive Law], Ankara: Seçkin 2007, p. 141.

[99] Özbek-Çocuk Arabuluculuğu p. 464.

[100] Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, 1.8 (European Commission for the Efficiency of Justice p. 32).

[101] Kaymaz/Gökcan p. 142, Yusuf Solmaz Balo, Teori ve Uygulamada Çocuk Ceza Hukuku [Juvenile Criminal Law in Theory and Practice], Ankara: Adalet 2005, p. 375.

[102] Kaymaz/Gökcan p. 142.

[103] Turkish Official Gazette Nr. 26381, dated December 19, 2006.

[104] Erol Karaaslan, Ceza Yargılamasında Uzlaşma [Conciliation in Criminal Litigation] (Justice Review 2007/29) (available at www.yayin.adalet.gov.tr/29_sayi%20içerik/Erol%20KARAASLAN.htm).

[105] Kaymaz/Gökcan p. 150. “In consideration that Article 24 of the Child Protection Law no. 5395 that went into force on 15.07.2005 before the amendment by the Law no. 5560 dated 19.12.2006 provides that mediation is possible for offenses which are deliberately committed children induced to crime and receive no more than 3 years of imprisonment by the lower limit for children aged 12 to 15, and that the lower limit is 2 years for the imprisonment in Article 456,2 of the Turkish Penal Code no. 765 as charged on the defendant, while it was necessary to apply the mediation provisions as indicated in Article 24 of the Law no. 5395 for the minor defendant, the return of a verdict as noted on grounds that mediation is not possible according to the provisions of the Law no. 5237 as a result of erroneous assessment…” (Decision of the 3rd Criminal Chamber of the Court of Cassation, Nr. 7515/4198 and dated 30.05.2007: Unpublished Decision).

[106] Paul R. Rice, Mediation and Arbitration as a Civil Alternative to the Criminal Justice System-An Overview and Legal Analysis (The American University Law Review 1979, Vol. 29, pp. 17-81), p. 72; Committee of Experts on Mediation in Penal Matters p. 21; Özbek-Tavsiye

Kararı p. 149; Kaymaz/Gökcan p. 186; Çetintürk p. 531; Şahin p. 247.

[107] See Turkish Civil Code Art. 10.

[108] See Turkish Civil Code Art. 11.

[109] See Turkish Civil Code Art. 12.

[110] See Turkish Civil Code Art. 12.

[111] See Turkish Civil Code Art. 14.

[112] See Turkish Civil Code Art. 15.

[113] See Turkish Civil Code Art. 16.

[114] Accordingly, any minor not under custodianship shall be taken under guardianship (Turkish Civil Code Art. 404, 1). Guardianship on the minor shall cease automatically upon adulthood (Turkish Civil Code Art. 470, 1). Any adult convicted of imprisonment of one year or more shall be restricted (Turkish Civil Code Art. 407, 1). Guardianship on a person restricted due to conviction to imprisonment shall cease automatically upon the end of imprisonment (Turkish Civil Code Art. 471). Similarly, any adult who cannot handle his affairs due to mental illness or mental impairment or who needs assistance for protection and care or who jeopardizes the safety of others shall be restricted (Turkish Civil Code Art. 405, 1), and also any adult who creates the risk of impoverishing himself or his family due to wastefulness, alcohol or substance addiction, leading a base lifestyle or mismanagement of assets, and who needs permanent care and protection for these reasons, or who jeopardizes the safety of others shall be restricted (Turkish Civil Code Art. 406).

[115] Kaymaz/Gökcan p. 110.

[116] Kaymaz/Gökcan pp. 114-115.

[117] See, for example, Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 21813/25898 and dated 21.11.2007 (Kaymaz/Gökcan p. 124, footnote 70).

[118] See Turkish Civil Code Art. 11.

[119] Kaymaz/Gökcan p. 132.

[120] Kaymaz/Gökcan p. 114.

[121] Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 2716/18388 and dated 16.11.2006 (Kazancı Case Law Information Bank, available at http://www.kazanci.com.tr).

[122] Kaymaz/Gökcan p. 104.

[123] See for example: “Since Article 16 of the Civil Code provides that minors having the capacity to discern may exercise their personal rights without the consent of the legal representative, the necessity that the victim [name] having the capacity to discern born in 1990 stated that he withdrew his complaint in the last session dated 02.02.2006 was valid and the public case must be dismissed made it necessary to reverse the decision, … it was decided that the public case instituted against the defendants pursuant to CPC Article 223,8 BE DISMISSED” (Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 1487/7094 and dated 17.5.2007: Kazancı Case Law Information Bank, available at http://www.kazanci.com.tr).

[124] "The fact that the case was dismissed taking the withdrawal of a complaint as actual settlement in the case of offenses which are eligible for mediation under Article 24 of the Child Protection Law and must be prosecuted ex officio, due to the existence of mediation, without considering that mediation and withdrawal of complaint are different in nature, and that the court may impose sanctions as a result of the mediation, without taking the actions in Articles 253 and 254 of CPC, … required the reversal of the decision" (Decision of the 4th Criminal Chamber of the Court of Cassation, Nr. 785/1729 and dated 19.02.2007: Kazancı Case Law Information Bank, available at http://www.kazanci.com.tr). "The fact that the offense of bodily injury deliberately committed by children induced to crime (defendants) above age 15 but below 18 on the date of crime are eligible for mediation pursuant to Article 24 of the Child Protection Law no. 5395 that was adopted on 03.07.2005 and went into force on 15.07.2005, and that the decision to dismiss the public case was returned pursuant to CPC Art. 253 and 254 required reversal" (Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 2849/10172 and dated 04.06.2008: Kazancı Case Law Information Bank, available at http://www.kazanci.com.tr).

[125] "In consideration of the necessity that mediation actions in respect of the offense of swearing through television charged on him must be carried on by the methods laid down in the subparagraphs of Articles 253 and 254 of the Criminal Procedure Code no. 5271, the return of a decision based on the incomplete and undue action by way of making the mediation proposal to the defense counselor and attorney of the defendant in contradiction also to the rules prior to amendment …" (Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 777/4908 and dated 04.04.2007: Kazancı Case Law Information Bank, available at http://www.kazanci.com.tr).

[126] Decision of the 2nd Criminal Chamber of the Court of Cassation, Nr. 4615/8504 and dated 11.6.2007 (Kaymaz/Gökcan p. 170, footnote 8).

[127] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 68.

[128] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 68.

[129] Kaymaz/Gökcan pp. 131-132.

[130] Adalet Bakanlığı/Birleşmiş Milletler Kalkınma Programı p. 69; Balo-Çocuk Ceza Hukuku p. 375.

[131] Luca Perilli, Fourth Advisory Visit Report on Criminal Judicial System, Ankara 2009, p. 20.

[132] See Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, 1.7 (European Commission for the Efficiency of Justice p. 32).

[133] Frank E.A. Sander, Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles (Journal of Legal Education 1984, Vol. 34, pp. 229-236), p. 229; Mustafa Özbek, Alternatif Uyuşmazlık Çözüm Yollarına Genel Bir Bakış [An Overview to Alternative Dispute Resolution Procedures] (Galatasaray University Faculty of Law Review, Essays in Honour of Prof. Dr. Erden Kuntalp, 2004/1, pp. 261-292), p. 266.

[134] Turkish Ministry of Justice, Judicial Reform Strategy, Ankara 2009, p. 46.

[135] See Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, 1.1 (European Commission for the Efficiency of Justice p. 29).

[136] Turkish Ministry of Justice p. 49.

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