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§ 1. ACCESS TO JUSTICE AND NECESSITY OF ADR IN TURKISH LAW

A right of access to judicial protection meant essentially the aggrieved individual's formal right to litigate or defend a claim. Access to justice is defined as to be able to easily access to justice by all segments of society and to provide them all kinds of means by state in order to seek right to judicial remedy by individuals and to inform effectively about the existence of these rights. Lack of efficiency in these facilities concerning access to justice may jeopardise public confidence to the judicial mechanism and therefore the state system.

An effective access to justice is one of the fundamental conditions for the establishment of the Rule of Law. One of the requirements of rule of law is to establish a mechanism which will provide judicial services efficiently and fairly for all citizens. In particular, measures developed to solve disputes concerning disadvantaged persons (children, women, disabled, elderly and poor) are important elements of access to justice. Effective access to justice has increasingly been accepted as a basic social right in modern societies. There are some barriers to effective access to justice; however, within the access to justice movement these barriers have been gradually overcome [2] .

The rights of access to justice and to a fair trail are guaranteed under Article 6 of the European Convention on Human Rights. Efficiency and fairness of criminal and administrative justice are prerequisites for a democratic society. Article 6 of the European Convention on Human Rights encompasses the ideal that promptness and fairness. If justice must be prompt without being unjust, it must be efficient. This article recognizes that justice that is not available within a "reasonable time" [3] is inaccessible justice for many people [4] . Within this context facilitating to access to justice is one of the priorities of the European Union, the Council of Europe and the European Court of Human Rights. Right to access to justice is guaranteed by right to seek judicial remedy and concept of social state rooted in the Constitution of Turkey [5] .

Moreover, access to justice is not just access to judicial system, but it includes access to adequate dispute resolution process for people [6] . Thus, there is a special place for alternative

dispute resolution processes in access to justice. Because, the establishment of alternative means of dispute resolution could serve to significantly reduce the number of minor disputes before the civil courts and thereby lead to an increase in overall efficiency. So, effective implementation of alternative means of dispute resolution explicitly eases the citizens' access to justice [7] .

Lately, there is a sense of crisis in the administration of civil justice. The administration of civil justice is falling to meet the needs of the community [8] . The existing system of civil procedure in Turkey is troubled by excessive costs, delay, and complexity. Justice is not accessible to everyone because of rising costs and overcrowded courts
[9]
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Over the past several decades, the average time required for civil cases to get into court has lengthened, adding to the cost and uncertainty of the litigation process. Court dockets are loaded, so civil litigation can easily be put off for years. On the other hand, disputes can be negotiated quickly if both parties are interested in doing so. Even if a party is on the losing side of mater, often there is value in knowing what cost must be borne, rather than having a liability of uncertain size hanging around for years. Therefore, Republic of Turkey Ministry of Justice has been planning to facilitate access to justice in the Turkish judicial system within the scope of Judicial Reform Strategy. According to Judicial Reform Strategy, although, certain institutions such as right to legal assistance, alternative dispute resolution methods, legal aid in civil disputes have been developed to facilitate access to justice, it is not possible to say that implementations in these areas are at satisfactory level yet. For these reasons within the scope of Judicial Reform Strategy, it is aimed to carry out works in a participatory manner in particular enhancing efficiency in legal aid in civil procedure, dissemination of information with regard to legal problems and judicial proceedings, designing web-sites for courthouses, standardizing interpretation services and taking precautions in order to provide facilitation of access to justice for disadvantaged groups in areas as such in which it is believed that implementation problems exist [10] .

Since most of disputes are resolved under the rule of law but outside of the courtroom, it is important to know the settlement process as it is to understand the trial process. Different formats may be used to resolve disputes outside of court. Judges often encourage parties to resolve disputes before trial and have ordered the use of alternatives to traditional litigation to reduce the time spent in court [11] .

Alternative dispute resolution (ADR) describes those dispute resolution processes which exist

as alternatives to traditional litigation. ADR is designed to be a less formal and less complex means of resolving disputes flexible, quickly and more cheaply than via court proceedings [12] . The term ADR refers to a range of process designed to aid parties in resolving their disputes without the need for a formal judicial proceeding. The most common methods of ADR are negotiation, mediation (or conciliation), mini trial, early neural evaluation, settlement week, case evaluation, med-arb, and arbitration
[13]
. As previously stated, ADR can take various forms but in essence it generally involves the use of a mediator to encourage open communications by helping the disputants identify the specific areas of dispute and agreement with the aim of ultimately reaching a negotiated settlement of their differences. The negotiated settlement may be placed before a judge so as to give it the form of a judicial settlement that is readily enforceable or it may be left merely as an agreement between the parties which is not readily enforceable
[14]
and which would thus require a regular judgment from a court after examination on the merits to be enforced. Either way, however, the important point remains the same, namely that the parties in dispute are required to submit to conciliation before adjudicating the matter before a court.

ADR processes are not necessarily confined to reduction of the number of pending trials, but are used as an instrument of social reconciliation as well, by operating on the reconstruction of relations. ADR can enhance public satisfaction with justice system and reduce the negative effects of the adversarial system [15] .

§ 2. LEGISLATIVE PROGRESS CONCERNING ADR IN TURKISH LAW

The practice of ADR in Turkey is limited. There are direct interested provisions about ADR in the Turkish law system such as Attorneyship Act, Code of Criminal Procedure, Code of Labor, Code of Consumer Protection and Draft Code of Mediation in Civil Disputes.

A. Negotiation in Attorneyship Act

There are two main provisions on ADR in the Turkish Law and both of these regulations' effectiveness started newly. The first statutory provision that supports ADR is in the Attorneyship Act. According to the article 35/A of the Attorneyship Act, if the client claims for negotiation, attorneys may invite the opposing party to negotiation before a lawsuit has been

filed of before hearings have commenced for an already-filed lawsuit. If the other party accepts the invitation and an agreement reached at the end of the negotiation, the statue provides that the parties and the attorneys will execute a written agreement disposing of the dispute. The agreement called “conciliation minute” signed by clients and their attorneys. Conciliation minute includes the subject matter of dispute, its place and date, and the actions that each party will carry out clearly. It is considered a binding agreement settling dispute. In addition, conciliation minute is enforceable in the same manner as any other final judgments under the terms of Article 38 of the Code of Enforcement and Bankruptcy, which grants creditors the right to commence enforcement or bankruptcy proceedings against a debtor without encountering and objections of the debtor [16] .

B. Penal Mediation in the Code of Criminal Procedure

Restorative justice is an approach that focuses on the interests of the community by balancing the needs of the community, the victims and the offenders. Victim offender mediation (VOM) is one of the main types of restorative justice programmes. In the VOM, the victim and the offender voluntarily participate actively in the resolution of matters arising from the crime, generally with the help of a mediator [17] .

The second provision is in the new Code of Criminal Procedure (CCP) which came into force on June 1, 2005. Article 253 of the Code of Criminal Procedure, contain provisions about victim-offender mediation (penal mediation) in a criminal case, depend on a decision by the prosecution or the judge. Only offenses which can be prosecuted by the public prosecutor only upon complaint of the injured party are suitable for mediation. Basic purposes of this institution can be briefly stated as follows;

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

2) Accelerating criminal adjudication,

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

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

Penal mediation has been included into Turkish criminal procedure law with Criminal Procedure Code No. 5271. However, the institution of mediation, which has been regulated under Article 253 with the sub-heading “mediation” of Criminal Procedure Code No. 5271, and under Article 24 of Child Protection Code No. 5395 has been completely changed with an amendment made in Article 253 of Code of Criminal Procedure No. 5271 with Law No. 5560 dated 9.12.2006 due to such facts that it extends the procedure of investigating of articles foreseen under the law in practice, increases the work burden and makes mediation impossible to implement, and that those who implement it failed to adopt the concept sufficiently. In the last paragraph of Article 253 of the Law, it was stipulated that a Mediation Directive would be issued to regulate the issues pertinent to the implementation of penal mediation. This amendment which was brought under Article 24 of the Law No. 5560 had made the institution of mediation more practical.

Article 253 of the Turkish Code of Criminal Procedure gives the public prosecutor and the court authority to use VOM. The statutory regime for the conduct of VOM in Turkish penal procedure law has been substantially changed by the enactment of the amendments of Act No 5560 to the Criminal Procedure Act, which came into force on December 19, 2006. Under the CPC, the Mediation Directive published in the Official Journal of Turkey and came into effect on July 26, 2007

VOM may be used in the following offenses [18] :

1. Offenses which can be prosecuted by the public prosecutor only upon complaint of the injured party;

2. Intentional assault;

3. Negligent assault;

4. Violation of dwelling immunity;

5. Child kidnapping;

6. Disclose the information and documents contain commercial secret, banking secret or customer secret.

It is not a requirement for mediation that the accused and the victim accept the main facts of the case. The accused must accept to compensate fully or to a large extent for material or immaterial damages to the victim [19] .

Penal mediation shall not be applied in crimes for which effective repentance provisions are applicable, and crimes against immunity from sexual violation, even if the investigation and prosecution of these are dependent upon complaint [20] .

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 public prosecutor may propose mediation through annotated notification or through rogatory means. 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 [21] .

Mediation is available both during preliminary or final proceedings. Mediation in a proceeding can only take place if the parties freely consent. The parties are able to withdraw their consent at any time during the mediation. It is essential to ensure that both parties understand the process and implications [22] . If mediation is proposed, the nature of mediation and the legal consequences of acceptance or rejection of mediation shall be explained to the person [23]
.

Proposing mediation or acceptance of any such proposition shall not constitute an obstacle for collecting the evidence pertinent to the investigation or prosecution and for taking precautionary measures [24] .

In case that the suspect and victim or the person harmed as a result of the crime accept the proposal for mediation, the public prosecutor may realize the mediation himself/herself, or request from the bar to assign an attorney as mediator, or may assign a mediator from among persons who have received law education [25] .

The mediator shall conclude the mediation transactions within thirty days maximum following the submission of the copies of the documents in the file. The public prosecutor may extend this period for twenty days maximum [26] .

Mediation negotiations shall be executed confidentially. The suspect, victim, the person who has been harmed as a result of the crime and the legal representative, defender and attorney of these persons may participate in the settlement negotiations. In case that the suspect, victim, the person who has been harmed as a result of from 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 to have accepted the mediation [27] .

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 reached, how the mediation was reached shall be explained in detail in the report containing the signatures of the parties [28] .

If the public prosecutor determines that the mediation is based on the free will of the parties and that the action is in compliance with law, he/she shall seal and sign the report and shall keep it in the investigation file [29] . If the mediation effort fails to produce any result, the mediation attempt shall not be repeated.

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 without seeking for the conditions under Article 171. 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 without seeking the conditions under the fourth clause of Article 171. 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 mediation report or certificate shall be considered as the documents having the nature of verdict as indicated under Article 38 of Enforcement and Bankruptcy Law [30] .

Mediation discussions are confidential and may not be disclosed subsequently, except with the agreement of the parties. If the case is referred back to the proceeding as mediation is unsuccessful, an acceptance of some facts or even “confession of guilt” by the accused in the context of mediation may be used as evidence in any investigation and prosecution or lawsuit [31]
.

The case statute of limitations and case period, which is the condition for prosecution, shall not start from the date when the first mediation is 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 [32] .

A fee, which is to be assigned by the public prosecutor proportional to his/her works and costs, shall be paid to the mediator. Fee of the mediator and other mediation costs shall be considered as trial expenses. In case that mediation is effected, these costs shall be covered from the State Treasury [33] .

When the court refers a criminal case to mediation, the same procedure is followed. When the case has been mediated, the court order for the discontinuance of the proceedings [34] . In this code reference has been made to Recommendation no. R(99)19 of the Council of Europe Committee of Ministers on mediation in penal matters
[35]
.

The Directive explains in detail such issues as the basic principles and general provisions pertinent to 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.

C. Mediation in the Draft Administrative Procedure Act

A Draft Administrative Procedure Act is under consideration at the Ministry of Justice. This code envisages the introduction of Alternative Dispute Resolution mechanisms in settling administrative disputes [36] . Chapter 8 of the Draft Act deals with alternative means for resolving disputes between administrative authorities and private parties. There are the following alternative processes: internal reviews, negotiated settlement, and mediation (or conciliation). In this draft code reference has been made to Recommendation no. Rec(2001)9 of the Council of Europe Committee of Ministers on alternatives to litigation between administrative authorities and private parties [37] .

ADR will be recognized in Turkish judicial system as having a fundamental role to play in the resolution of civil, commercial and criminal disputes. Because lawyers who work on trials or those who encounter enormous difficulties in litigation expect the ADR to be extended to all civil cases. Nowadays, the Code of Civil Procedure does not provide necessary authority to use ADR. However, a broad authority for using ADR processes in all civil actions must be given in the Code of Civil Procedure. It is clear that in all fields of civil dispute resolution ADR will play a central and rather important role in the near future.

D. Draft Code of Mediation in Civil Disputes

Finally, as the resolution of the disputes by ADR methods has been adopted by the legislations of many countries; the Turkish Government has realized the necessity of the adoption the Mediation Process in Turkey by drafting a Mediation Code in Civil Disputes. The Turkish Draft Code of Mediation in Civil Disputes (CMCD) is currently being discussed in the Turkish Grand National Assembly. The Turkish Draft Code concerns mediation, because mediation is the most extensive and successful process among the alternative dispute resolution methods [38] .

I. Scope of Application of the Draft Code of Mediation in Civil Disputes

The Draft Code can be applied to both national and international conflicts, and is readily available to any parties for any aspects of civil law. This Code applies to legal disputes that have risen by the works which Parties can dispose of them freely [39] .

According to the Draft Code, mediation means a voluntarily process before a suit has been filed or during the judgment; whereby a professionally trained neutral third Party using recognized methods systematically encourages communication between the Parties, with the aim of enabling the Parties to themselves reach a resolution of their dispute.

II. Mediator

The mediator is the third person who conducts mediation and registered the list of mediators that is issued by the Ministry. The mediator doesn't make a decision at the end of the mediation process, but tries to resolve the dispute by facilitating agreement between the parties [40] .

The mediator should be independent and neutral so that the mediation can come to a successful conclusion and this method can be a trustworthy one. Mediator shall execute her/his duty to the best of her/his knowledge, in person, directly and impartially towards the parties. When a person is approached in connection with his or her possible appointment as a mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Mediator shall oblige to consider equity between the Parties [41] .

The mediators have to get specialized training and only establishments authorized by the Ministry of Justice with be able to train mediators. The mediation training shall be a minimum of 150 hours training after a 4 year college education involving the basic skills, communication techniques, negotiation and the dispute resolution methods and theoretical and practical information determined by the mediation directive concerning behavioral psychology. People who don't posses a law degree will have to receive a basic legal training of 100 hours in order to be deemed to have completed the mediation training [42] .

Parties are free to apply mediator and continue, conclude or leave the process. Both parties have equal rights while they are applying to mediator like as all the mediation process [43] .

Whoever is registered in the List of Mediators is entitled to designation “registered mediator”. Mediator is obliged to carry designation when practicing mediation [44] .

Mediator has a right to charge a fee and expenses in consideration of her/his services. Mediator also may claim advance payment for her/his fee and expenses.

The mediator may meet or communicate with the parties together or with each of them separately. At the beginning of the mediation proceeding, Mediator shall clarify to the parties the basis, process and the legal consequences of mediation [45] .

III. Appointment of Mediator and Conducting of Mediation

Unless otherwise any procedure has been provided, the mediator or mediators shall be appointed by the Parties.

As soon as possible after being appointed, Mediator shall invite the Parties to the first meeting session. The Parties are free to agree on the manner in which the mediation is to be conducted. If the Parties do not agree on the conduct of mediation, the Mediator conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of dispute [46] .

IV. Confidentially and Admissibility of Evidence

Unless otherwise agreed by the Parties, Mediator is obliged to keep confidential any information

and documents obtained in the course of the mediation or which have otherwise become known.

If the Parties have agreed that their application of mediation proceedings will be kept confidential, they obliged to comply with this secrecy [47] .

A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in judicial proceeding rely on, introduce as evidence or give testimony or evidence regarding any of the following [48] :

a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

c) Statements or admissions made by a party in the course of the mediation proceedings;

ç) Documents prepared solely for the purposes of the mediation proceedings.

The disclosure of the information referred to the in paragraph 1 of this Article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible.. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or the purposes of implementation or enforcement of a settlement agreement.

Subject to the limitations mentioned above, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in mediation.

V. The End of Mediation

If the Parties reach an agreement at the end of the mediation process, settlement of conciliation shall be issued, where this conciliation documents to be signed by the mediator, parties and their legal counsels. If the parties reach to an agreement at the end of the mediation, they can request a declaratory clause for enforcement by presenting this agreement to the enforcement court whose competence will be determined according to the competent principles concerning the principal dispute. The agreement containing this declaratory clause is considered as a final court decision document [49] .

§ 3. WHAT SHOULD BE DONE IN REGARD TO ADR WITHIN THE TURKISH JUDICIAL SYSTEM?

In the Turkish Judicial System ADR should be promoted by legislative and operational initiatives. In the light of Turkish constitutional requirements, our legislation should be reviewed with regard to ADR. To this end the following steps should be initiated:

A. Preparing the Legislation on ADR

1) The implementation of ADR in Turkey remains too limited. For overcoming this problem, the application of ADR should be prompted and there should be a public support for ADR services [50]
. Relevant statutes should provide ADR processes and in appropriate actions using mediation should be facilitated. Mediation should be set up in civil and commercial matters, penal mattes, administrative matters, and family matters and should be available to all.

The most familiar example of ADR is mediation in civil law and family law. In civil law, Code of Civil Procedure should be changed and it should stipulate to recourse to ADR either before or during the case. Reference should be made to Recommendation no. R(2002)10 of the Council of Europe Committee of Ministers on mediation in civil matters [51] . Also, in family law, lawyers and legislator should give consideration to the question of family mediation
[52]

. Under the reference of the Article 13 of the European Convention on the Exercise of Children's Rights
[53]
, which deals with the provision of mediation to resolve disputes affecting children, Turkish Bar Association should encourage the introduction of family mediation. Therefore, Code of Family Courts should be changed. In this study, reference should be made to Recommendation no. R(2002)10 of the Council of Europe Committee of Ministers on family mediation
[54]
.

2) The relevant measures for the selection, responsibilities, training and qualification of mediators should be taken.

B. Giving Information on ADR Processes

3) General information on ADR processes especially on mediation should be provided for the public, and persons involved in civil and criminal disputes by Turkish Bar Association. Both Bar Associations and Ministry of Justice should work to presenting ADR in collaborating. ADR is not sufficiently understood or properly used in Turkey. However, it is clear that people prefer to resolve their disputes amicably rather than to bring their disputes before the courts. In order to improve knowledge and understanding of ADR, Turkish Bar Association should promote ADR processes, especially for court-based mediation, to inform the public and persons with civil disputes, e.g. through information programmes, written materials, web pages, and the media. The posters that will promote the awareness and application of ADR shall be placed to courthouses and lawyers' offices. These campaigns will try to get the message across to disputants that there are various dispute resolution processes other than court adjudication and they should consult their lawyer for unknown opportunities. This information should also include references to the costs and efficiency of mediation. Moreover, it should be ensured that lawyers and the judicial or other administrative authorities understand the mediation process and can provide accurate information to parties who may wish to use it [55] .

C. Establishing Court-Based ADR Programs

4) Court-based ADR Programs (court-annexed ADR) should be developed [56] . Code of Civil Procedure must give courts substantial authority to use ADR. Courts must be authorized by Code of Civil Procedure the use of ADR processes in all civil actions. Courts must implement

ADR processes and begin providing ADR services. Appropriate cases should be referred to ADR. The referral should be able to made sua sponte or at the request of one of the parties. Besides out-of-court mediation, court-based mediation also should be used. Mediation does not lose its influence just because proceedings have been initiated. Here the purpose of mediation is no longer to avoid bringing the matter before a court, but to bring the case to a conclusion without a trial and, to prevent subsequent disputes among the parties
[57]
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5) Well functioning court-based ADR programs should be established and guidelines for ensuring fair and effective court-based ADR programs should be determined.

6) A new approach that could ease the growing demands on courts throughout the country should be formed. This concept called in Anglo-American Law as “multi-door courthouse” or “multi option ADR”. In this idea there is one large courthouse with multiple dispute resolution doors or programs. Cases could be diagnosed and referred through the appropriate door for resolution. The programs could be located inside or outside of the courthouse [58] . Neural meetings rooms and dispute resolution rooms can be set up either in every courthouse or local Bar Association in order to urge lawyers to take consider mediation. Thus they can gather at a neutral place and mediate disputes freely.

7) Turkish Bar Association should identify some experimental program sites in Turkey. The goals of the multi-door experiment are to provide easy access to justice, to establish networks that would reduce citizen frustration, and to develop programs to fill service gaps, by making available more options.

8) Intake and Referral step should be establish to describe a process of case analysis that identifies various ways in which the case might be resolved. During an intake interview, factors about the case and the parties will be discussed with client. Factors generally are the nature of the case; its complexity; the number of parties; the relationship of the parties; any disparity in bargaining power; the history of the negotiations; and the relative size of the claim [59] . Following this assessment, the intake specialist and the client jointly determine the most appropriate steps to be taken in an effort to resolve the dispute. Intake step is also used to describe a screening process to determine if a case is appropriate for a specific program like family mediation
[60]
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D. Technical Assistance and Study Visit

9) An ADR Committee should be set up by the Turkish Bar Association. This Committee which is comprised of ADR specialists should visit some of the European Union member states like the United Kingdom or Netherlands in order to research ADR initiatives. This study visit should focus on how to develop court-based ADR systems and how to include statutory provisions concerning ADR processes in Code of Civil Procedure. The study visit to the European Union will assist experts on what should be achieved in Turkey in the future. In this way, the application of ADR in the European Union and know-how of ADR at European level will be transferred to Turkey. After this study visit, the ADR Committee should provide technical assistance to attorneys, judicial officers, legislators, and academicians on this matter. The ADR Committee should promote co-operation between the Turkish Bar Association and the European Union in the future.

E. Training of Lawyers and Organizing Symposiums

10) Measures to promote the development of appropriate standards for the training and qualification of mediators should be taken by States. Lawyers to become mediators should be trained periodically. Training programs range from 30-hour courses in mediation to two-hour in-service trainings or round table discussions. To this end training teams encompass ADR specialists should be established. The training agendas will be determined by using lectures, demonstrations, role-play and other exercises, discussions, video tapes and some written assignments.

11) The training on ADR should focus on the following branches:

a. General principles and practice of basic out-of-court dispute resolution methods like mediation or arbitration,

b. Court-based ADR,

c. Negotiation techniques,

d. Civil and commercial mediation,

e. Family mediation,

f. Employment mediation and conciliation,

g. Victim-offender mediation and reparation,

h. Online dispute resolution.

The training on court-based ADR should focus on the following topics:

a. Using of ADR,

b. Selecting cases appropriate for ADR,

c. Matching the ADR process to the case,

d. Deciding on party consent, client attendance, and degree of party participation,

e. Selecting the neutral,

f. Necessary qualifications and standards to appoint a neutral,

g. Ethical principles for ADR neutrals, establishing a code of conduct for neutrals,

h. Compensating the neutral,

i. Confidentiality of ADR communications,

j. Referring of the case to ADR and elements of the judge's referral order,

k. Managing cases in the ADR process,

l. Teaching of the general principles and practice of court-based ADR processes.

These training courses on ADR and negotiating skills should examine ADR processes being used in comparative law. The training courses should involve separately since the contents and specialties are totally different for arbitration and mediation. The lawyers that will be educated shall have the option on selecting mediation or arbitration or other process. The national codes connected with ADR and Acquis Communautaire should be the legislative backdrop for examining the policy, practice and procedure of ADR. Comparative definition, components and skills within the broader taxonomy of dispute resolution should be explored. Demonstrations and simulations should be utilized to assist with the understanding of how ADR is adjunct to the Common Law Tradition. Negotiation skills, historical foundations, and cross cultural aspects of dispute resolution should be considered.

12. The promotion of ADR has been a feature of numerous activities organized by the European Union and the Council of Europe for a long time. For this reason, lawyers should be trained about the acquis of the European Union like the proposal for a directive on mediation [61] , European Code of Conduct for mediators
[62]
or Green Paper
[63]
on ADR in civil and commercial law. Also, they should be informed on the various recommendations adopted by the Council of Europe in the field of justice
[64]
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13. In addition to basic training with its strong emphasis on interactive skills development, the Turkish Bar Association and local Bar Associations should offer neutrals Continuing Neutral Education Seminars throughout the country to further enhance their skills and knowledge. Turkish Bar Association should organize short term (each three-day) sessions. These sessions should take place in seven different regions of Turkey in seven different cities firstly. The cities here the sessions will take part will be chosen by Turkish Bar Association and special importance shall be given the places where the caseload is heavy. Two local and four international experts should be in these sessions and is aimed to train nearly total number of one thousand lawyers with these information studies.

14. An international symposium shall be organized for awareness raising on ADR for both public and private sector. The symposium should take place in Ankara or Istanbul. It should be three-day symposium and international and local experts should join in it. It is aimed to have three-hundred people (attorneys, judges, private and public sector) at this conference. Developments on ADR in the European Union, negotiation skills, court-based ADR and different ADR methods should take part in this activity. The contributions at symposium should be published for dissemination for ensuring further sustainability of project.

15. In addition interim seminars, a comprehensive in-service training on ADR should be held within the Turkish Bar Association. Continual training for trainers and neutrals is the responsibility of ADR Committee. There should be a long-standing training program for trainers in Turkish Bar Association. Also, law schools should be invited to join in ADR activities. They should be encouraged to teach negotiation and related skills. It should be recommended that alternative methods of dispute resolution be included in a school’s professional skills curriculum
[65]
and curriculum of the Justice Academy.

APPENDIX

DIRECTIVE ON PRACTICE OF MEDIATION PROCEDURE

ACCORDING TO THE CODE OF CRIMINAL PROCEDURE

SECTION ONE

Purpose, Scope, Basis and Definitions

Purpose

ARTICLE 1 - (1) The purpose of this Regulation is to regulate the principles and procedures related to mediation.

Scope

ARTICLE 2 – (1) This Regulation covers the provisions pertinent to the enforcement of mediation transactions among the suspect or the accused and the natural person or private law legal entity who has been harmed as a result of any crime specified to be within the scope of

mediation in Article 253 of Code of Criminal Procedure No. 5271 and in other laws.

Basis

ARTICLE 3 – This Regulation has been prepared based on Articles 253, 254 and 255 of the Code of Criminal Procedure No. 5271 dated 4/12/2004.

Definitions

ARTICLE 4 – (1) The following terms as used in this Regulation shall have these meanings;

a) Law: Code of Criminal Procedure No. 5271 dated 4/12/2004,

b) Mediation: 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 Regulation,

c) Reconciling: 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 Regulation, or with the mediation of a mediator or a judge or a public prosecutor,

ç) 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.

SECTION TWO

Basic Principles and General Provisions

Basic Principles

ARTICLE 5 - (1) 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.

(2) The 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

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) Those provisions of the Law and the Regulation 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. 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 Regulation on Principles and Procedures Pertinent to Enforcement of Child Protection Law which came into force after being published in the Official Gazette No. 26386 dated 24/12/2006, and Regulation on the Enforcement of Protective and Supportive Action Decisions Taken as per Children Protection Law which came into force after being published in the Official Gazette No. 26386 dated 24.12.2006.

(8) The attorney who is the mediator shall not undertake any task as proxy or defender subsequently in relation to the case which he/she took served under such title.

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 mediation 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.

Crimes under the scope of mediation and exemptions

ARTICLE 7 - (1) In case of crimes mentioned under the first clause of Article 253 of the Law, the suspect or the accused and the victim or the natural person or private law legal entity, who are harmed as a result of the crime, an attempt shall be made for mediation.

(2) 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 must be clear provision in the law.

(3)Mediation shall not be applied in crimes, for which effective repentance provisions are applicable, and crimes against immunity from sexual violation, even if investigation and prosecution of these are dependent upon complaint.

(4) If a crime, which is included within the scope of mediation, is committed in order to commit another crime which is not included in this scope, or together with any such crime, mediation shall not be applied.

SECTION THREE

Mediation at the Stage of Investigation

Proposal for Mediation

ARTICLE 8 – (1) 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.

(2) If a suspect, victim or a person who has been harmed as a result of a crime is a minor or is restricted, or the victim or the person who has been harmed as a result of the crime do not have the judicial faculty, proposal for mediation shall be made to their legal representatives. After the fact that these persons do not have the judicial faculty is examined by a public prosecutor, the party that will receive the mediation proposal shall be determined.

(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 regulation and which states the nature of mediation mentioned in of this Regulation, 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 or judicial security officer, and that mediation is proposed, shall be put into the investigation documents.

(4) Call for proposing mediation may also be made by using such means of communication as phone, telegraph, fax, electronic mail. However, such calls shall not be deemed as proposal for mediation.

Proposal through an explanatory notice or letter rogatory

ARTICLE 9 – (1) When required, a public prosecutor may propose mediation through explanatory notice or through a letter rogatory.

(2) Explanatory notice shall be served through the delivery of the Mediation Proposal Form in which there are Attachment No. 1.a and Attachment No. 1.b of this Regulation and which states the nature of mediation of this Regulation, as well as the presence of legal consequences of accepting or rejecting the mediation, in an envelope containing delivery report in accordance with the provisions of the Notifications Law No. 7201 dated 11.2.1959, and Notification Law, which was put into force pursuant to Cabinet Decision No. 4/12059 dated 20.8.1959, reserving the special provisions mentioned in the Law. However, under conditions where the notification cannot be served, provisions of Article 11 of this Regulation shall be applied.

(3) In the proposal to be submitted through letter rogatory, provisions of clauses one and two of Article 8 of this Regulation shall be applied.

Period of decision in the mediation proposal

ARTICLE 10 - (1) Unless any of those who propose mediation notify the judicial security officer or the public prosecutor in charge who made the proposal about his /her decision within three days, the mediation proposal shall be deemed to have been rejected. In this case, reserving the provisions of Article 255 of the Law, no separate mediation proposal shall be made to others.

Consequences of not being present at the address

ARTICLE 11 – (1) In case of being not present at the address mentioned in the investigation file despite being declared to official authorities, or in case that the victim, the person who has been harmed as a result of the crime, the suspect or the legal representatives of these cannot reached due to being abroad or the address being not identified, the investigation shall be concluded without mediation process.

Obligation to inform during the investigation

ARTICLE 12 – (1) In case that a proposal of mediation is made, information included in the form, attached to this Regulation, which mentions the nature of mediation and the legal consequences of accepting or rejecting the mediation, shall be announced to the victim, or the person who has been harmed as a result of the crime , or their legal representatives.

Appointment of a mediator

ARTICLE 13 – (1) In case that the suspect and the victim or the person who has been harmed as a result of the crime accept the mediation proposal, the public prosecutor may perform the mediation himself/ herself, and or he/she may also request the bar to appoint an attorney as mediator, or may appoint any other person who had law training with qualifications indicated in this Regulation.

(2) (The execution of this paragraph was suspended [66]) In the appointment of mediator, an attorney or a person with law education, whom the parties have agreed upon may be preferred.

(3) Number of mediators is determined by the public prosecutor by taking into account the nature of the conflict.

(4) (The execution of this paragraph was suspended [67]) Conditions as set forth in this Law which require the rejection of the judge due to the fact that he/she may not work in the case or due to any reasons that create suspicion about the impartiality shall be taken into consideration in relation to the appointment of mediator. The mediator shall inform the public prosecutor about the existence of these conditions, however he/she may only take the task upon the consent of the parties.

Procedure of appointment of an attorney as mediator

ARTICLE 14 - (1) The bar shall as a priority appoint an attorney who has received education on mediation.

(2) The attorney whom the parties have agreed upon is not required to be registered in the bar of the place where the investigation is held. In this case, the appointment shall be made by the bar at which the attorney is registered.

Qualifications required of the mediator who received law training and the procedure of appointment

ARTICLE 15 – (1) The following conditions shall be required in the appointment of mediators who received law training.

a) Being a graduate of law faculties of universities,

b) (The execution of this subparagraph was suspended [68]) Being a graduate of a four-year school in the fields of political sciences, administrative sciences, economics and finance which include a sufficient level of law or law knowledge in their programs,

c) (The execution of this subparagraph was suspended [69]) Having a masters or PhD degree in law,

ç) Being a registered attorney of the bar,

d) Having not been sentenced to any of crimes such as those committed against the security of State, constitutional order or the processing of such order, national defense, secrets of the State, espionage crimes, as well as crimes against relations with foreign states, or misappropriation, extortion, bribery, theft, depredation, fraud, forgery, misuse of trust, fraudulent bankruptcy, rigging an tender, rigging the performance of an acquisition, laundering the property assets arising from crime, smuggling, tax smuggling, acting as false expert, perjury and

unjustified benefit, excluding negligent offences, even if these crimes have been subjected to expiry of time mentioned under Article 53 of Turkish Criminal Law dated 26.9.2004 No. 5237, and to amnesty, or has been deferred or converted into money.

e) Having not been expelled, or provisionally prohibited from the profession or civil service for discipline purposes

(2) Mediators who have received law training shall be elected from among those registered in the list determined by the offices of the central criminal public prosecutor's. Mediators, who are registered in this list, may take office throughout the country, and not only within the borders of the province where they are registered.

(3) Those who received law education shall apply through a petition to the public prosecutor's office by the end of November each year in order to be registered in the list so as to be appointed as a Mediator in the Criminal Court. The applications may be made in person, or through the chamber where the person is registered, or the institution and organization where he/ she works.

(4) the following shall be attached to the application petition which contains the communication information;

a) Copy of the national ID card,

b) Republic of Turkey ID number,

c) Certified copy of the graduation certificate,

ç) Criminal record,

d) Two portrait photos,

e) A petition declaring that he /she will participate in the trainings to be conducted pursuant to Article 30 of this Regulation,

f) Names of the chamber where the person is registered, if any, or the institution and organization where he/ she works.

(5) Application requests are registered and assessed by the office of the central criminal public prosecutor within thirty days following the date of application.

(6) In case that the applicant does not bear the conditions under first clause or if any of the documents in the fourth clause is missing, the request shall be ruled to be rejected. The relevant person shall be notified of the decision related to the rejection.

(7) The list, which is prepared by writing the names and surnames, open addresses and phone numbers of those whose requests are found to be appropriate, shall be posted in the judicial court at place visible by all in January of each year for a minimum of seven days. In addition, it shall be announced in the internet address of the public prosecutor's office. A copy of the list prepared shall be submitted to the judges and public prosecutors at the center, as well as the courts and public prosecutor offices of the jurisdiction.

(8) The list shall also be prepared in printed and electronic media and sent to the Training Department of the Ministry of Justice by the end of January of each year. The submitted lists shall be published by this unit.

(9) The mediator in the list shall be excluded from the list if:

a) it is subsequently understood that he/she has lost the conditions of acceptation in the list,

b) it is subsequently understood that he/she lacks any of the conditions indicated in this Regulation,

c) he/she requests to be excluded from the list,

ç) he/she has the attitudes or engages in behavior which is not appropriate for the job of a mediator,

d) he/she does not participate in the trainings held pursuant to Article 30 of this Regulation,

(10) The relevant person shall be notified of the decision regarding being removed from the list, and also sent to the places mentioned in seventh and eighth clauses

(11) In case of necessity, appointment may also be made from among people who received law education and who bear the conditions mentioned in this article, though they might not be registered in the list.

Issuance of documents and confidentiality notification

ARTICLE 16 – (1) A copy of the documents regarding the crime or crimes, which are the subject of mediation that is included in the investigation file, and that are required for mediation and approved by the public prosecutor, shall be submitted to the mediator.

(2) The public prosecutor shall notify to the mediator that he/she is obliged to act in compliance with the principle of confidentiality of investigation.

(3) Notification on which documents are submitted, date of submission and on the confidentiality of the investigation shall be established on a protocol containing the signature of the public prosecutor and the mediator.

Term

ARTICLE 17 – (1) 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 term.

(2) 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 mediation through a document verifying this until the date of issuance of the indictment at the latest.

(3) Even in cases where the mediation is conducted by a public prosecutor or a judge, periods mentioned in the first article shall be applied.

Mediation negotiations

ARTICLE 18 – (1) 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.

(2) 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.

(3) The negotiations may be executed through meetings to be held jointly with the parties or separately.

(4) Negotiations may also be held by using the audio-visual communication technique.

Confidentiality of the mediation negotiations

ARTICLE 19 – (1) Mediation negotiations shall be executed confidentially. 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.

(2) 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 in relation to such information.

(3) 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.

(4) 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.

Subject matter of restitution

ARTICLE 20 – (1) 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:

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.

Mediation report

ARTICLE 21 – (1) The mediator shall, from the date on which the mediation transactions are finalized, provide the public prosecutor without any delay with a report reproduced one more than the number of parties, prepared in accordance with the Mediation Report Sample in Attachment 2 of this Regulation, copies of documents issued to him / her, and documents, expense bill which demonstrates the costs incurred, or a statement prepared in accordance with

the market price, as well as the self employment receipt.

(2) In case that the mediation is realized, the manner of mediation shall be explained in the report containing the signatures of the parties. However, the report shall not include the explanations made in relation to the committing of the crime during the mediation negotiations.

(3) If the public prosecutor determines that the mediation is based on the free will of the parties and that the action is in compliance with law, he/she seals and signs the report and keeps it in the investigation file.

(4) If the chief public prosecutor determines that the mediation does not rely on free will of the parties and that the action is not in compliance with law, he/she shall not approve the report. The reason for not approving shall be written in the report. In this case the mediation shall be deemed not to have been realized.

(5) In cases where the mediation is made by the public prosecutor; parts of the report that are compliant with the nature of this process shall be completed, the report shall be sealed and signed and kept in the investigation file.

Mediation certificate

ARTICLE 22 – (1) If the suspect and the victim or the person who has been harmed as a result of the crime come to a mediation between themselves before the appointment of mediator or following the rejection of mediation, a mediation certificate, which is compliant with the Mediation Report Sample in Attachment No. 2 of this Regulation shall be prepared, to the extent this is found to be suitable by the parties. The public prosecutor shall examine and assess this certificate according to the criteria indicated in third and fourth clauses of Article 21.

(2) In case of crimes whose prosecution is dependent on complaint, this document shall not be issued if the victim or the person who has been harmed as a result of the crime withdraws from complaint after agreement with the suspect.

Legal consequences of mediation at the stage of investigation

ARTICLE 23 - (1) 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.

(2) 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 without seeking the conditions under Article 171 of the Law.

(3) Statute of limitations shall not be applicable during the period of postponement.

(4) After it is ruled to postpone opening a public lawsuit, if the requirements of mediation are fulfilled, it shall be ruled that there is no ground for prosecution.

(5) After it is ruled to postpone opening of a public lawsuit, if the requirements of mediation are not fulfilled, the criminal case is opened, without seeking the conditions under Article 171 of the Law.

(6) In case that the suspect fails to fulfill his/her action, the mediation report or certificate shall be considered as the documents having the nature of verdict as indicated under Article 38 of Enforcement and Bankruptcy Law dated 9/6/1932.

(7) In case mediation is ensured, no lawsuit shall be (filed, litigated) opened for damages due to the crime which is the subject of investigation; and any case (filed, litigated) opened shall be deemed to have been relinquished.

Statute of Limitations

ARTICLE 24 – (1) The case statute of limitations and case period, which is the condition for prosecution, shall not be deemed to be valid from the date when the first mediation is 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 his/her report and submits it to the chief public prosecutor at the latest.

(2) In case that the proposal for mediation is not responded to or the proposal is rejected within due period, the mediation attempt shall be deemed to have given no result.

(3) Upon refraining of the parties or their legal representatives or proxies from participating in the mediation negotiations, notification in writing or verbally by any of the parties during negotiation that the party has withdrawn from mediation, the case statute of limitations and the case period, which is the condition of prosecution, shall restart from the date of submittal of he report to the public prosecutor.

(4) In cases where the mediation is directly conducted by the public prosecutor, if the reasons under the third article occur, the case statute of limitations and the case period, which is the condition of prosecution, shall restart from this date. The chief public prosecutor shall establish the situation with a minute.

SECTION FOUR

Mediation at Court Stage

Mediation procedure at Court Stage

ARTICLE 25 – (1) In the occurrence of the following conditions following the opening of a public lawsuit, the mediation transactions shall be conducted by the court in accordance with the principles and procedures indicated at the investigation stage.

a) It is understood that the crime is within the scope of mediation due to the change of the legal nature of the crime, which is the subject of prosecution.

b) It is understood initially at the court stage that it is required to propose mediation at the investigation stage,

c) Presence of an action subject to mediation which is referred directly to the court without the indictment prepared by the public prosecutor,

ç) The action is included within the scope of the mediation due to a change in law at the court stage.

(2) The court may execute the notifications and correspondence regarding the mediation transactions on the file without waiting for the trial day.

(3) (The execution of this paragraph was suspended [70]) Despite the rejection of the mediation proposal sent at the court stage, the parties may apply to the court before the ruling is made and the trial is announced to end at the latest, with a document declaring that they have reconciled.

Obligation of information in prosecution

ARTICLE 26 – (1) Proposal of mediation by the court shall be made by having the Mediation Proposal Form with the number Attachment 1/c of this Regulation and which states the nature of mediation as well as the presence of legal consequences of accepting or rejecting the mediation, having it signed by the relevant person and explaining the information contained in the form. This matter shall be recorded and the obligation of information shall be fulfilled, and the signed copy of the form verifying that a mediation proposal was made shall be put into the prosecution file.

Legal consequences of mediation at the stage of prosecution

ARTICLE 27 – (1) If mediation takes place, the court shall decide to drop the case if the accused performs its action immediately as a result of mediation.

(2) 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 withhold the announcement of ruling about the accused without seeking the conditions under Article 231 of the Law.

(3) The statute of limitations shall not be applicable during the period of withholding.

(4) After it is ruled to withhold the announcement of the judgment, if the requirements of mediation are fulfilled, a decision shall be taken to drop the case by abolishing the judgment which is held over.

(5) After it is ruled to withhold the announcement of the judgment, if the requirements of mediation are not fulfilled, then the court shall announce the judgment without seeking the conditions under eleventh clause of Article 231 of the Law.

(6) If the accused fails to fulfill his/her action, the mediation report or certificate shall be considered as one of the documents having the nature of verdict as indicated under Article 38 of Enforcement and Bankruptcy Law no. 2004.

(7) In case mediation is ensured, no lawsuit shall be opened for damages due to the crime which is the subject of prosecution; and any case opened shall be deemed to have been relinquished.

SECTION FIVE

Miscellaneous and Final Provisions

Obligations of the mediator

ARTICLE 28 – (1) The Mediator;

a) shall act independently and impartially, and observe the common benefits of the parties. He /she shall pay attention to the fact that the parties have sufficient and equal opportunities in the negotiations. He/ she shall not be prejudiced regarding the guiltiness of the suspect or the accused pursuant to the presumption of innocence, nor shall he/ she shall have an attitude against the suspect or the accused.

b) shall explain to the parties before the commencement of the negotiations the basic principles of mediation, his /her impartiality, the process and consequences of mediation, functions of the mediator and the parties in the mediation, as well as the confidentiality obligation, and shall ensure that they understand the process.

c) shall inform the parties that they should behave respectfully to one another, participate in the negotiations with goodwill, and explain the issues they know.

ç) shall assist the parties in resolving the dispute and encourage the agreements, however shall not exert any pressure. He/she may not provide any opinion in favor or against any party, and shall not give any ruling which will bind the parties.

d) shall take the appropriate measures to ensure that the parties come to an agreement with their free will and fully knowledgeable about the judgment and consequences thereof.

Place of mediation

ARTICLE 29 – (1) The mediation negotiations may be held;

a) in parts of public institutions and organizations allocated for such purpose,

b) in the office where the mediator performs its activities provided that the parties accept this,

c) in a safe environment which is suitable for the interests of the parties and where they will feel themselves comfortable, or in any other place acceptable by the parties,

(2) Meeting rooms may be allocated to the extent the opportunities permit in order to hold the mediation negotiations in courthouse buildings. Arrangement of meeting rooms, providing office services and security if required, and the allocation order and hours for mediation meetings shall be undertaken by the chief public prosecutor's office.

Training of the mediators

ARTICLE 30 – (1) Persons to be appointed shall be ensured to receive training before starting their tasks, and to be trained during their appointment.

(2) The training should aim at developing alternative skills and methods for settling disputes and for negotiations, and at providing qualifications to ensure that the victim, the person who has been harmed as a result of crime, the suspect or the accused are informed about the special conditions of working together, as well as the criminal justice system.

(3) The subject of the training shall be comprised of minimum qualifications that the persons to be in charge should bear, as well as the developing the knowledge level and personal capabilities. Persons to be appointed as mediator shall be trained in the following issues:

a) Legal nature and consequences of mediation,

b) Fields of application of mediation,

c) Communication principles, question and negotiation techniques, negotiation method, mediation report,

ç) Conflict analysis,

d) Crimes subject to mediation,

e) Ethical rules,

(4) Training of the persons to be appointed as mediator shall be fulfilled in collaboration with Turkey Justice Academy, Training Department of the Ministry of Justice, Turkish Unions of Bars, relevant bars and universities providing training in this issue.

(5) Principles and procedures setting forth the selection, training, ethical rules and standards that the attorney to be appointed as mediator shall be assessed by Turkish Union of Bars.

Mediator fee and expenses

ARTICLE 31 – (1) A reasonable fee, excluding the costs, shall be determined by the public prosecutor at the stage of investigation, and by the court at the stage of prosecution for the mediator, which fee shall not exceed twice the amount determined for the investigation stage in the Tariff of Fees To Be Paid to Defenders and Attorney Appointed Pursuant to Code of

Criminal Procedure, and which fee shall be proportional to the effort of the mediator to assess certain differences between the suspect or the accused and the victim or the person who has been harmed as a result of the crime such as age, maturity, education, social and economic status, taking into account such factors as the effort and work exerted by him/her as well as the scope and nature of the conflict. Any costs incurred by the mediator, including the necessary traveling expenses, shall be paid separately so as not to exceed the amount determined in the said fee tariff for the investigation stage.

(2) The fee to be determined for the appointed mediator shall be paid by the public prosecutor or the judge upon the decision of spending within a reasonable period following the presentation of the report to be issued at the end of mediation transaction.

(3) In cases where several mediators are appointed, the fee shall be shared among these persons proportional to their contributions.

(4) Mediator fee and other mediation expenses shall be considered as trial costs, and these expenses shall be covered using the relevant allowance.

(5) If mediation is not realized, provisions of the Law relevant to adjudication expenses shall be applied for the mediator fee and other mediation costs.

(6) In case that mediation is realized, the mediator fee and other mediation costs shall be left to State Treasury.

(7) In cases where the mediator does not demand any mediation fee in exchange of his/her work, provisions of this article shall not be applicable.

Folders to be kept

ARTICLE 32 - (1) A copy of the decrees on absence of any ground for prosecution or on

postponement of opening the criminal case ruled as a result of mediation in chief public prosecutor's office, and of decrees at courts regarding the decisions of dropping the case or withholding the announcement of the judgment shall be kept in a special folder. Copies of decrees to be put into these folders shall necessarily bear the signature of the public prosecutor or the judge as well as the seal of the chief public prosecutor’s office or the court as relevant.

Printing and distribution of forms

ARTICLE 33 – (1) Forms other than the Mediation Proposal Form in Attachment 1/a of this Regulation shall be printed in sufficient number by spending by the chief public prosecutor’s offices from relevant allowance item, and distributed to courts and public prosecutors.

(2) Printing and distribution of the proposal forms of mediation to be performed by judicial security forces shall be undertaken by relevant judicial security force.

Informing the public

ARTICLE 34 – (1) The public shall be informed through guidebook containing guiding information about the nature, conditions and consequences of mediation, crimes which are subject to mediation and the mediation process, as well as through other methods.

Effective date

ARTICLE 35 – (1) - This Regulation shall come into force on the date of publishing.

Execution

ARTICLE 36 – (1) Provisions of this Regulation shall be executed by the Minister of Justice.

(APPROPRIATE JUDICIAL POLICE UNIT)

MEDIATION PROPOSAL FORM

A. As part of Article 253 of the Criminal Procedure Code numbered 5271, since the crime .....

Judicial Police Officer

Name, Surname

Rank and Employee Number

B. THE PERSON TO WHOM MEDIATION IS PROPOSED

1. (….) Victim

2. (….)Victim’s Legal Representative

3. (....) Person who was Harmed as a Result of the Crime

4. (….) Legal Representative of the Person who was Harmed as a Result of the Crime

5. (….) Suspect

6. (….)Suspect’s Legal Representative

C. INFORMATION ON THE PERSON TO WHOM MEDIATION

IS PROPOSED

1. Republic of Turkey ID No.

2. Name, Surname

3. Father’s Name

4. Mother’s Name

5. Place and Date of Birth

6. Address and Contact Information

D. Nature of mediation and the legal consequences of accepting or rejecting mediation:

a) Mediation is an agreement of both parties in exchange for partial or whole remedy of the damage ari

b) Accepting the mediation proposal and negotiating with the other party on the issue shall not mean ac

c) Even if parties accept the mediation proposal, they shall not be required to reconcile as a result of

ç) The proposal shall be deemed to have been rejected if the legal enforcement officer or the Public P

d) Despite the rejection of the mediation proposal, parties may declare by applying to the Public Prosecu

e) If the attempt at mediation fails to be successful despite the acceptance of the offer, the Public Prose

f) Proposing mediation or the acceptance of such a proposal shall not constitute an obstacle for collecti

g) Parties may be mediated by a Public Prosecutor, and they may also request the assignment of an at

ğ) Statements which are made by parties during negotiations of mediation in relation to the subject, in

h) Negotiations of mediation shall be conducted confidentially. A suspect, victim, a person who is harm

ı) In case a suspect, victim or a person harmed as a result of the crime himself or his/her legal repres

i) If it is determined by the Public Prosecutor that the mediation is based on parties' free will and that t

j) If a mediation is realized and the action is fulfilled in all at once, a ruling shall be made that there is no

k) In case the fulfillment of an act is postponed to a future date or set up to be carried put in installment

l) After a ruling is made to postpone initiating a public lawsuit, if requirements of mediation are fulfilled,

m) After it is ruled to postpone initiating a public lawsuit, if requirements of mediation are not fulfilled, a

n) In case a mediation is reached, no lawsuit shall be started for damages due to the crime which is the

o) The mediator fee and other expenses pertaining to mediation shall be considered as trial expenses,

ö) In case a mediation is not realized, provisions of the Law pertaining to trial costs shall be applied in r

p) If a suspect fails to fulfill his/her action, the report or certificate of mediation shall be considered docu

r) As from the date of making the first mediation proposal to any suspect, victim or a person who was

s) If a mediation cannot be reached, a public prosecutor may, despite the existence of sufficient doubt

E. As part of Article 253 of Criminal Procedure Code numbered 5271 under Section D of this form, I ha

Concerning this proposal of mediation which was offered to me;

I would like to examine it and make a declaration in three days

…./…./20… Time: …. Signature:

I accept it.

…./…./20… Time: …. Signature:

I reject it.

…./…./20… Time: …. Signature:

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[43] CMCD a. 3.

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[65] For further elaboration on the current state of the ADR teaching and the widespread adoption of ADR in the American law schools see Symposium: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges, Part I (Florida Law Review 1998/4, Vol. 50, pp. 583-760), p. 584 et seq.

[66] The Plenary of Administrative Chambers of the Council of State 15.05.2008, Suspension of the Execution Objection No: 2008/463. See Özbek, pp. 776-780.

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