

THE PRINCIPLES AND PROCEDURE OF PENAL MEDIATION IN TURKISH CRIMINAL PROCEDURE LAW

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Abstract

With the passage of recent legislation, mediation has become a viable alternative for the resolution of some types of crime in the Turkish legal system. As envisioned under Turkish law, mediation is a vehicle to achieve a better solution for all concerned than is possible through the criminal justice system. This article examines the statutory framework for penal mediation, including the basis in comparative law, the philosophy, procedures, and practices in Turkish penal mediation. The article finds that this process is beneficial to all parties and society as a whole.

Öz

Mevzuatta yapılan son değişikliklerin yürürlüğe girmesiyle arabuluculuk, Türk hukuk sisteminde bazı suçlardan doğan uyuşmazlıkların çözümünde uygun bir alternatif hâline gelmiştir. Türk hukukunda öngörüldüğü şekliyle arabuluculuk, ceza adaleti sistemine nazaran, tüm ilgililer için daha iyi bir çözüm bulmada kullanılan bir yöntemdir. Bu makale, ceza arabuluculuğunun, mukayeseli hukuk, felsefesi, usûlü ve uygulamasını esas alarak yasal çerçevesini incelemektedir. Makalede, bu usûlün, genel olarak tüm tarafların ve toplumun menfaatine uygun olduğu tespit edilmiştir.

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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INTRODUCTION

There had not been consensual models of conflict resolution in the Turkish Criminal Law until the new Criminal Procedure Code was enacted. Penal mediation, which is an alternative way of conflict resolution in the field of criminal law, has been included in Turkish criminal practice with the Turkish Criminal Procedure Code (Law No. 5271). It was included in neither the Turkish Criminal Code (Law No. 765) nor the Criminal Procedure Code (Law No. 1412). Penal mediation is a brand new process in terms of Turkish criminal law, with the purpose to eliminate any injury arising from crime.

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

This article takes an in-depth look at penal mediation under Turkish law. Section I examines the legislation and underlying EU policies. Section II looks at the philosophy behind this concept. Section III discusses the benefits of such a system whereas Section IV takes an in-depth look at the procedures and protections in the system. Section V then addresses the special case of children in penal mediation.

I. THE LEGAL BASIS FOR PENAL MEDIATION IN TURKISH CRIMINAL PROCEDURE LAW

With the Turkish Penal Code (*Türk Ceza Kanunu*, TCK), Law No. 5237, and the Criminal Procedure Code (*Ceza Muhakemesi Kanunu*, CMK), Law No. 5271, a new procedure called ‘mediation’ has been adopted in the 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 is a process designed to bring together the parties in conflict over daily life (neighborhood disputes, small thefts, property damage, issuance of checks without funds) or of a family nature (non-payment of maintenance, custody and access issues etc.).¹ According to the Council of

¹ See French Ministry of Justice, *Penal Mediation*, at http://www.justice.gouv.fr/mots-cles/mc_m.html (last visited Nov. 12, 2011). See also Nadja Marie Alexander, GLOBAL TRENDS IN MEDIATION 190 (Alphen aan den Rijn: Kluwer Law 2006).

Europe definition, 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 first emerged in the United States of America under the name “victim-offender mediation” (VOM) or “victim-offender reconciliation programs”³ (VORP). The term ‘penal mediation’ is viewed by some 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.⁴ Basic purposes of these programs can be briefly stated as follows:

- Settling cases which have accumulated at the courts, outside the justice system, and thus decreasing the workload of criminal courts,
- Accelerating criminal adjudication,
- Remedying the damage of the victim (through restitution) arising from the crime within a short period,
- Effecting a reconciliation between the parties through an “impartial and independent” mediator.⁵

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), at 16; European Commission for the Efficiency of Justice, *Better Implementation of Mediation in the Member States of the Council of Europe, Concrete Rules and Provisions* (CEPEJ Studies No. 5, Council of Europe, undated), at 25.

³ Henry Brown and Arthur Marriott, ADR PRINCIPLES AND PRACTICE 294 (Thomson 1999); John Burton and Frank Dukes, CONFLICT: PRACTICES IN MANAGEMENT, SETTLEMENT AND RESOLUTION 45 (Palgrave Macmillian, 1990); Dean E. Peachey, *The Kitchener Experiment*, MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 15 (Martin Wright and Burt Galaway, eds., Sage Pub., 1988); Gwen Robinson, VICTIM-OFFENDER MEDIATION: LIMITATIONS AND POTENTIAL 14, Oxford University, 1996; Kimberlee K. Kovach, MEDIATION, PRINCIPLES AND PRACTICE 483 (Thomson-West 2004); Mark S. Umbreit, Robert B. Coates and Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 31(2001).

⁴ Julien Lhuillier, *The Quality of Penal Mediation in Europe* (CEPEJ Working Group on Mediation, CEPEJ-GT-MED, 2007), at 3.

⁵ United Nations Office on Drugs and Crime, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, CRIMINAL JUSTICE HANDBOOK 9-11 (United Nations, 2007); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L. J. 1247, 1255 (1994); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 931-46 (1984); Mark S. Umbreit, Robert B. Coates, and Betty Vos, *Victim Offender Mediation: Evidence-Based*

It can be said that a sensitivity which aims to protect the benefits of the victims of crime has been emerging throughout the world with increasing strength. In Turkey, as in the rest of the world, there has been a limited amount of care shown for victims in the area of criminal justice up until now.⁶ Today, however, in Europe and the United States of America, high importance is being placed on protecting the victims of crime and asserting their rights within the criminal justice system. While fulfilling the needs of criminal justice in the 21st century, satisfying the victim should also be highlighted. Criminal sanctions against crime are not sufficient; remedying and repairing the damage should be considered to be the leading purpose. In this context, penal mediation has a potential to fulfill a significant need for the victims by remedying the damage arising from crime within short period.⁷

On the other hand, it is among the objectives of the criminal justice system to settle the conflict arising between the offender and the victim after a crime has been committed. This can be done through the services of a judge, public prosecutor or a mediator to be appointed by them, to ensure both justice and satisfaction for the victim. Eliminating the damage will help lead to peace between the offender and victim of the crime. Mediation also has a moral element beyond just remedying the damage. In mediation, the offender accepts responsibility of the crime he/she committed, so that the consequences of the crime are eliminated and the possibility of reintegration emerges. Since what is required to determine the criminal responsibility of the offender and compensate for the damage will be achieved, justice will then have been attained, the validity of the legal rules that were violated by the action will be emphasized and thus the public order will have been reestablished, and the state will also have been saved from many costs which it would have otherwise borne.⁸

Practice Over Three Decades, THE HANDBOOK OF DISPUTE RESOLUTION 456 (Michael L. Moffitt and Robert C. Bordone, eds., Jossey-Bass 2005).

⁶ Durmuş Tezcan, *Mağdurun Hakları and Tanıkların Korunması [Victim Rights and Witness Protection]*, CEZA HUKUKU REFORMU SEMPOZYUM, 20-23 EKİM 1999 [CRIMINAL LAW REFORM SYMPOSIUM 20-23 OCTOBER 1999], 75 (Umut Vakfı 2001).

⁷ United Nations Office on Drugs and Crime, *supra* note 5, at 10; Füsün S. Akıncı, *Mağdurun Korunması ve Mağdur Hakları [Victim Protection and Victim Rights]*, YARGI REFORMU 2000 SEMPOZYUMU, 5-6-7-8 NİSAN 2000 [JUDGMENT REFORM 2000 SYMPOSIUM, 5-6-7-8 APRIL 2000] 701 (İzmir Bar, 2000); Cumhur Şahin, *Ceza Muhakemesinde Uzlaşma [Mediation in Criminal Procedure]*, 6 SELÇUK ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ [SELÇUK UNIVERSITY LAW REVIEW] 221 (1998), at 228.

⁸ Detlev Frehsee, *Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications*, 3 BUFF. CRIM. L. REV. 235, 240 (1999); Robinson, *supra* note 3, at 3; John Harding, *Reconciling Mediation with Criminal Justice*, MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 27 (Martin Wright and Burt Galaway, 1989).

In addition, since the mediation will end the conflict without resorting to a criminal trial, the already heavy workload (docket) of criminal courts will have been reduced, and justice will have taken place more rapidly for both parties. As a result of these, the mediation decreased the costs of the criminal justice system.⁹

Penal mediation, which emerged in the United States of America, has quickly spread through European countries and it has been adopted by the European Council, which Turkey is a member of, and it has found its place in international law with the Recommendation R (99) No. 19.¹⁰ The recommendation considers mediation to be a flexible, comprehensive, problem-solving, participatory procedure, emphasizing the importance of the active participation of the persons who are affected by the case, such as the victim and the perpetrator, as well as society. Other benefits are that mediation encourages the perpetrator to feel responsible to complete rehabilitation and allows for better integration of perpetrators back into society, while providing practical opportunities to remedy their conditions. For these reasons, mediation is an efficient procedure to prevent crime, to fight against crime and to resolve conflicts created by crime. Furthermore, this Recommendation suggests that when instituting mediation in their criminal justice systems, member states should take into consideration the principles indicated in this Recommendation.¹¹

Penal mediation, which is an alternative means of dispute resolution in the field of criminal law, has been included into Turkish practices with the new

⁹ For further elaboration on the current development of penal mediation, see Umbreit, Coates, and Vos, *supra* note 3, at 30; Şahin, *supra* 7, at 223; Hamide Zafer, *Ceza Muhakemesi Hukukunda Özelleşme Eğilimi: Uzlaşma [Privatization Tendency in Criminal Procedure Law: Conciliation]*, ESSAYS IN HONOR OF PROF. DR. ERGUN ÖNEN 732-750 (Alkım, 2003); 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]*, 1 KAZANCI LAW REVIEW 116 (2010); Seydi Kaymaz and Hasan Tahsin Gökcan, *TÜRK CEZA VE CEZA MUHAKEMESİ HUKUKUNDA UZLAŞMA VE ÖNÖDEME [CONCILIATION AND PREPAYMENT IN TURKISH CRIMINAL AND CRIMINAL PROCEDURE LAW]* 38 (Seçkin 2005).

¹⁰ Committee of Experts on Mediation in Penal Matters, *supra* note 2.

¹¹ Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 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]*, 2005 DOKUZ EYLÜL ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ [DOKUZ EYLÜL UNIVERSITY FACULTY OF LAW REVIEW] 127, 134 (2005).

Turkish Penal Code (TCK)¹² and Criminal Procedure Code (CMK).¹³ It was not included in the old Turkish Penal Code¹⁴ and the old Criminal Procedure Code. Penal mediation is a brand new institution in the Turkish criminal justice system, with the aim to eliminate the injury arising from crime.

However, penal mediation, which has entered into Turkish law as a new concept, is regulated under the Eighth Paragraph of Article 73 of the new Penal Code under the subheading of “Crimes, whose investigation and prosecution are contingent on complaint, mediation,” with Article 253 of the New CMK under the subheading “Mediation,” and under Article 24 of the Child Protection Code.¹⁵ Mediation has been completely changed with an amendment made to Article 253 of the New CMK.¹⁶ This amendment was made to address such issues as mediation in practice that extended the procedure of investigation of crimes, increased the workload for police and was impossible to implement, and that those who had implemented it had failed to adopt the concept sufficiently.¹⁷ The last paragraph of Article 253 was amended to stipulate that a directive would be issued to regulate the implementation of mediation. Under the CPC, the “Directive on Application of Mediation Procedure According to the Criminal Procedure Code” was issued to address this.¹⁸

This amendment, which was brought under Article 24 of Amending Law 5560 made penal mediation more practical. The Directive particularly addressed some issues which were still vague after the amendment and thus aimed at fostering better implementation. The Directive explained in detail such issues as:

- the general principles and procedure pertinent to penal mediation,
- the nature of mediation,
- the legal consequences of accepting or rejecting mediation,

¹² Law 5237, promulgated in Official Gazette No. 25611, 12 October 2004.

¹³ Law 5271, promulgated in Official Gazette No. 25673, 17 December 2004.

¹⁴ Law 765, promulgated in Official Gazette No. 320, 13 March 1926.

¹⁵ *Çocuk Koruma Kanunu*, Law No. 5395, promulgated in Official Gazette No. 25876, 15 July 2005.

¹⁶ Criminal Procedure Code, Law No. 5271 with Law No. 5560 dated 9.12.2006.

¹⁷ Mustafa Özbek, *Report on Alternative Dispute Resolution within the Context of Better Access to Justice*, 2009 DOKÜZ EYLÜL ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ [DOKUZ EYLÜL UNIVERSITY FACULTY OF LAW REVIEW] ESSAYS IN HONOUR OF PROF. DR. BİLGE UMAR 453, 461 (2010).

¹⁸ *Ceza Muhakemesi Kanununa Göre Uzlaştırmanın Uygulanmasına İlişkin Yönetmelik*, promulgated in Official Gazette Nr 26594, 26 July 2007. For an English translation of the Directive, see Özbek, *supra* note 17, at 481-507.

- the procedure to appoint a mediator,
- legal education for mediators,
- confidentiality in mediation,
- the conduct of mediation,
- the subject of the action,
- mediation reports and mediation certificates,
- the legal consequences of mediation at the stage of prosecution,
- the obligations of a mediator,
- the place where the mediation would take place,
- training for mediators, fees and expenses of the mediators.¹⁹

II. RESTORATIVE JUSTICE AND TRADITIONAL CRIMINAL JUSTICE

Mediation should enhance the active personal participation of the victim and the offender in criminal proceedings. This restorative justice approach provides an opportunity to participate in resolving conflicts and addressing its consequences. Restorative justice includes 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 to as ‘penal mediation.’ As a flexible, comprehensive, problem-solving, and participatory option, penal mediation is a restorative justice approach to complement traditional criminal proceedings. Victim offender mediation is known as the earliest form of restorative justice initiatives. In this process, the victims of crimes are referred, as needed, for help and assistance, and then given the opportunity to have input into the criminal sanction or the shaping of a resolution of the crime 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.²⁰

¹⁹ Mustafa Özbek, ALTERNATİF UYUŞMAZLIK ÇÖZÜMÜ [ALTERNATIVE DISPUTE RESOLUTION] 761 (Yetkin 2009).

²⁰ United Nations Office on Drugs and Crime, *supra* note 5, at 17; James Coben and Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY 235, 236 (2004); Nurullah Kunter, Feridun Yenisey, and Ayşe Nuhoğlu, MUHAKEME HUKUKU DALI OLARAK CEZA MUHAKEMESİ HUKUKU, [CRIMINAL PROCEDURAL LAW AS A PROCEDURAL LAW BRANCH] 1213 (Beta 2008).

In light of the above approach, there is a clear necessity in Turkish criminal law to enhance the active personal participation of the victim and the offender, as well as the involvement of the community, in criminal proceedings. Turkish lawyers recognize the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimization, to communicate with the offender and to obtain an apology and reparations. 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 the Turkish criminal law system.²¹

In accordance with Recommendation No. R (99) 19 concerning mediation in penal matters that was adopted by the Committee of Ministers of the Council of Europe,²² member states should develop mediation in penal matters and give the widest possible circulation to penal mediation.²³ As mentioned above, the Turkish Parliament, as the lawmaking body of a member state of the Council of Europe, made the necessary amendments to laws and rules dealing with criminal procedure so as to facilitate the settlement of criminal law disputes between victim and offenders.

In Turkey, the care shown for the victims in the area of criminal justice has been very limited previously. Criminal sanctions against crime are not sufficient; remedying and repairing the damage should be considered to be the leading purpose. In this context, mediation has a potential to fulfill a significant need for the victims by remedying, in as short a time as possible, the damage to the victim that arising from crime.²⁴

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

²¹ Ekrem Çetintürk, ONARICI ADALET [RESTORATIVE JUSTICE] 13 (HD 2008); Mualla Buket Soygüt-Arslan, TÜRK CEZA VE CEZA USUL HUKUKUNDA UZLAŞMA KURUMU [CONCILIATION INSTITUTION IN TURKISH CRIMINAL AND CRIMINAL PROCEDURE LAW] 9 (Galatasaray Üniversitesi 2008).

²² See *supra* note 2.

²³ Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 7; Özbek, *supra* note 11, at 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, CEPEJ/2007/13, 7 (Council of Europe, 7 December 2007); European Commission for the Efficiency of Justice, *supra* note 2, at 29.

²⁴ Soygüt-Arslan, *supra* note 21, at 73.

III. THE 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.²⁵ There are potential benefits for victims, suspects (offenders), the criminal justice system, and communities.

A. Benefits for the Victim

Offenses eligible for mediation are offenses that are primarily individual. In other terms, they are of concern more to the individual rather than the society as a whole. 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 satisfaction as soon as possible after the offense has been committed.²⁶

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 use of conventional penalties.

Further, while a conventional court trial ensures the rights of victims, going through such proceedings is itself a burden.²⁷

B. Benefits for the Suspect

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

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

²⁵ See, e.g., Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, WESTERN CRIMINOLOGY REVIEW, Vol. 1, No. 1 (1998), at <http://wcr.sonoma.edu/v1n1/umbreit.html> (last visited Nov, 13, 2011); see also Cambridge University, AN EVALUATION OF RESTORATIVE JUSTICE PROGRAMS (U.K. Ministry of Justice, 2008).

²⁶ Umbreit, Coates and Vos, *supra* note 3, at 456.

²⁷ Susan C. Taylor, *Victim-Offender Reconciliation Program: A New Paradigm Toward Justice*, 26 UNIVERSITY OF MEMPHIS LAW REVIEW 1187, 1188 (1996).

²⁸ United Nations Development Program, CEZA UYUŞMAZLIKLARINDA UZLAŞMA EL KİTABI [HANDBOOK FOR RESOLUTION IN CRIMINAL DISPUTES] 34 (Turkish Ministry of Justice, 2009).

arising from a mediation will be more palatable to the suspect because they involve his/her own will and choice because the suspect will have agreed to a resolution. Thus, mediation will contribute much more to social peace in the end than will a conventional court trial.²⁸

C. Benefits for the Criminal Justice System

Each conflict ending in mediation will first alleviate the workload of criminal courts and other authorities involved in punitive remedies. 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 trials where the parties cannot adequately contribute. When parties are not satisfied with the verdict from a conventional court trial, new workloads are imposed on the judiciary in the form of appeals. Mediation involving free will of the parties will avoid such problems.

Mediation also aims to alleviate the workload of justice systems other than the penal system. This is because conflicts that end through mediation do not only go away with respect to criminal law, but also in all areas of the legal system.²⁹

D. Benefits for Communities

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 provides a more realistic approach of restorative justice.³⁰

²⁹ Çetintürk, *supra* note 21, at 171-235; Ekrem Çetintürk, *Onarıcı Adalet Anlayışı ve Uzlaştırma Kurumunun Türk Ceza Adalet Sisteminde Algılanışı (Geleneksel Ceza Adalet Anlayışına Eleştirel Bir Bakış)* [RESTORATIVE JUSTICE CONCEPT AND THE PERCEPTION OF CONCILIATION INSTITUTION IN TURKISH CRIMINAL JUSTICE SYSTEM: A CRITICAL VIEW TO THE TRADITIONAL CRIMINAL JUSTICE CONCEPT], 9 CEZA HUKUKU DERGİSİ [CRIMINAL LAW REVIEW] 191, 221 (2009); Özbek, *supra* note 19, at 758.

³⁰ Ekrem Çetintürk, CEZA ADALETİ SİSTEMİNDE UZLAŞTIRMA [CONCILIATION IN THE CRIMINAL LAW SYSTEM] 397 (HD 2009); United Nation Development Program, *supra* note 27, at 35.

IV. THE PRINCIPLES OF PENAL MEDIATION IN THE CRIMINAL PROCEDURE CODE

Mediation as a method of alternative dispute resolution (ADR) is a tool that gives breathing room to the penal justice system. This advantage should become clearer if its scope is extended.³¹

Mediation also has a positive effect in reducing the population in correctional facilities. Further, it is known that the short-term prison sentences that are normal for the offenses eligible for mediation normally do not provide much benefit in rehabilitating perpetrators.

A. Relevant Definitions in the Mediation Directive

The principles and procedures related to mediation were established in the Directive promulgated under the CPC. This Directive contains provisions for the enforcement of mediations between the suspect or the accused and the victim³² who has been harmed as a result of any crime specified to be within the scope of mediation according to Article 253 of the New CMK and in other laws.

The definitions as used in the Directive shall have the following meanings:

Settlement: 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

³¹ For more detail on alternative dispute resolution, see Stephen B. Goldberg, Frank E.A. Sander, and Nancy H. Rogers, *DISPUTE RESOLUTION, NEGOTIATION, MEDIATION AND OTHER PROCESSES* (Little, Brown and Company, 1999); Stephen B. Goldberg, *et al*, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* (3rd ed., Aspen Pub., 2003); Elizabeth Plapinger and Donna Stienstra, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (Federal Judicial Center and the CPR Institute for Dispute Resolution, 1996); Federal Judicial Center, *GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR* (U.S. Government Printing Office 2001); Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell*, (West Pub., 2001); Stephen J. Ware, *ALTERNATIVE DISPUTE RESOLUTION* (West Pub., 2001); Kovach, *supra* note 3; Gülgün Ildır, *ALTERNATİF UYUŞMAZLIK ÇÖZÜMÜ - MEDENİ YARGIYA ALTERNATİF YÖNTEMLER* [ALTERNATIVE DISPUTE RESOLUTION: ALTERNATIVE METHODS TO CIVIL JUSTICE] (Seçkin 2003); Özbek, *supra* note 19; Mustafa Özbek, *Avrupa'da Arabuluculuğun İlkeleri ve Uygulanması* [The Principles and Practice of Mediation in Europe], *ESSAYS IN HONOR OF PROF. DR. ÖZER SELİÇİ* (Seçkin, 2006); John H. Wilkinson, *Advantages and Obstacles to ADR*, *DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK* 11-29 (Wiley Law Pub., 1998).

³² Note a victim can be a natural person or a legal person. Directive, art. 2.

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 being 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 a law education, or the attorney appointed by the bar upon the request of the public prosecutor or the court.³³

B. Basic Principles of Penal Mediation

Basic rules for opting mediation under Turkish law can be summarized as follows:

- First of all, it is mandatory that the offense under investigation is eligible for mediation (a ‘catalog offense’).³⁴
- Mediation may be attempted only if the suspect or the accused and the victim or the person who has been harmed as a result of a crime freely give their consent. These people may withdraw their consent at any time before an agreement is reached.³⁵
- Evidence that leads to the belief that the offense has been committed is required. It is necessary to emphasize this rule in particular because there will be many adverse effects when the conflict is referred to mediation without having sufficient evidence that the suspect actually committed the crime. 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, offers to mediate should not be made where sufficient evidence has not yet been collected in the investigation.³⁶ Still further, in a case where

³³ Directive, art. 4.

³⁴ Article 253.1 of the New CMK.

³⁵ Directive, art. 5; *see also* Recommendation R(99)19 on mediation in criminal matters, II.1, IV.11 and V. 31.

³⁶ United Nations Development Program, *supra* note 28, at 39.

insufficient evidence exists, suspects acting in bad faith would gain advantage because when such suspects know that evidence is not sufficient, they may seem willing to accept mediation, prolong the process and then have the time they need to suppress evidence. Also, the victim will not have effective bargaining powers in such a case.³⁷

- For mediation, the victim must be a natural person or private law legal entity.³⁸
- 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.³⁹ This rule is significant 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 by commencing a mediation process.⁴⁰
- Mediation shall be executed in accordance with the basic rights and freedoms of the suspect or the accused, as well as the victim or the person who has been harmed as a result of the crime, by respecting the principle of protecting interests.⁴¹
- The suspect or the accused and the victim or the person who has been harmed as a result of the crime will have the basic guarantees granted by law when participating in mediation.⁴²
- 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.⁴³

³⁷ Ivo Aertsen and Tony Peters, *Mediation for Reparation: The Victim's Perspective*, 6 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 106, 111 (1998); 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]*, 56 ANKARA UNIVERSITY FACULTY OF LAW REVIEW 123, 143 (2007).

³⁸ Article 253, 1 of the New CMK.

³⁹ Directive, art. 4-6.

⁴⁰ United Nations Office on Drugs and Crime, *supra* note 5, at 18.

⁴¹ See Recommendation R(99)19, Sec. III.8; see also The Rights of Victims and Offenders, Sec. 2.1, European Commission for the Efficiency of Justice, *supra* note 28, at 33.

⁴² See Recommendation R(99)19, Sec. III.8.

- 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.⁴⁴
- 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.⁴⁵
- 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 commit to crime.⁴⁶ In case of mediation related to children, the process to be followed shall be in accordance with the provisions of Children Protection Law, the Directive on Principles and Procedures Pertinent to Enforcement of Child Protection Law⁴⁷ and the Directive on the Enforcement of Protective and Supportive Action Decisions Taken as per Children Protection Law.⁴⁸

⁴³ Article 202 of the Criminal Procedure Code provides the following provision: Cases where the presence of an interpreter is required, Article 202. – (1) If the accused or the victim does not know sufficient Turkish to explain his plight, during the hearing the essential points of the prosecution and defense shall be interpreted by an interpreter to be appointed by the court.

(2) In the hearing of a handicapped accused or victim, the essential points of the prosecution and defense shall be explained to him in a way that he is able to comprehend.

(3) The provisions of this article shall also apply in respect of suspects, victims or witnesses heard during the investigation phase. During that stage, the interpreter shall be appointed by the judge or the public prosecutor.

See Recommendation R(99)19, Sec. III.8.

⁴⁴ See Recommendation R(99)19, Sec. IV.10. See also Awareness of the Victims and Offenders, Sec. 3.2, European Commission for the Efficiency of Justice, *supra* note 23, at 34.

⁴⁵ See Recommendation R(99)19, Sec. IV.15.

⁴⁶ See *id.*, Sec. IV.12.

⁴⁷ *Çocuk Koruma Kanununun Uygulanmasına İlişkin Usûl ve Esaslar Hakkında Yönetmelik*, promulgated in Official Gazette No. 26386, 24 December 2006.

⁴⁸ *Çocuk Koruma Kanununa Göre Verilen Koruyucu ve Destekleyici Tedbir Kararlarının Uygulanması Hakkında Yönetmelik*, promulgated in Official Gazette No. 26386, 24 December 2006.

An attorney shall not act as a mediator in any action where he/she was a representative of the victim or accused.⁴⁹

Article 6 of the Mediation Directive provides the following provision on this matter:

General provisions

Article 6 – General provisions

(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 agrees to reach a settlement shall benefit from the mediation.

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

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

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

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

C. 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:

- Offenses those are dependent on complaint for investigation and prosecution.
- The following offenses in the Turkish Penal Code regardless of dependency on a complaint:

⁴⁹ See Recommendation R(99)19, V.26 and V.32.

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 be an explicit provision in the law.⁵⁰ Even if investigation and prosecution depend on a complaint, mediation may not be sought for offenses listed as eligible for effective repentance and offenses against sexual inviolability.⁵¹

Mediation may be sought for offenses committed by children, the mediation provisions of the Criminal Procedure Code shall apply also to children committing crimes.⁵²

The public prosecutor must consider carefully whether the offense is covered under mediation in such a way so as not to violate the principles of equality and non-discrimination between persons when making the mediation proposal and instructing the judicial police (judicial security officer) to handle mediation.⁵³

For offenses for which the Criminal Procedure Code allows mediation, an attempt shall be made to mediate for a suspect who is a natural person or a private law legal entity.⁵⁴ The victim must be a natural person or a private law legal entity (e.g., a society, foundation or commercial company) to seek mediation.⁵⁵

⁵⁰ CPC, art. 253. 2; Directive, art. 7.2.

⁵¹ CPC, art. 253. 2; Directive, art. 7.3.

⁵² Child Protection Law, art. 24.1.

⁵³ Ali İhsan İpek and Engin Parlak, *İÇTİHATLARLA TÜRK CEZA HUKUKUNDA UZLAŞMA [CONCILIATION WITH OPINIONS OF COURTS IN TURKISH CRIMINAL PROCEDURE LAW]* 87 (Adalet 2009); Çetintürk, *supra* note 30, at 499; Kaymaz and Gökcan, *supra* note 9, at 161; Özbek, *supra* note 19, at 766; Soygüt-Arslan, *supra* note 21, at 135.

⁵⁴ CPC, art. 253.1; Directive, art. 7.1.

⁵⁵ Directive, art. 6.1.

In order to propose and seek mediation for offenses that are dependent on a 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 within the meaning of Article 170 of the Turkish Penal Code, that is, the suspect must be identified correctly.⁵⁶ Before seeking mediation, if legally appropriate and valid evidence has been 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.⁵⁷

It is mandatory to seek mediation for offenses covered under the eligibility for mediation and the public prosecutor may not decide to “defer the institution of a public case” without first seeking mediation.⁵⁸ Thus, mediation provisions are reserved.⁵⁹

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 refuse the case.⁶⁰ Due to this provision, the seeking of mediation is essentially a “precondition to prosecution.”⁶¹

If a mediation proposal is made or accepted, such a proposal shall not bar the collection of evidence for the offenses being investigated or prosecuted and implementing protective measures.⁶² 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 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, the evidence collected should provide sufficient grounds to believe that the suspect has committed the crime so that a public case may be instituted against the suspect.⁶³ Further, 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, despite the

⁵⁶ Directive, art. 8.1.

⁵⁷ Kunter, Yenisey, and Nuhoglu, *supra* note 20, at 1214; Kaymaz and Gökcan, *supra* note 9, at 161.

⁵⁸ Directive, art. 6.6.

⁵⁹ CPC, art. 171, para. 3.

⁶⁰ CPC, art. 174,1/c.

⁶¹ Kunter, Yenisey, and Nuhoglu, *supra* note 20, at 1213; Soygüt-Arslan, *supra* note 21, at 84; Çetintürk, *supra* note 30, at 501.

⁶² CPC, art. 253.8; Directive, art. 6.5.

⁶³ CPC, art. 253, para. 19.

existence of sufficient grounds, for offenses that are dependent on complaint for investigation and prosecution and allow imprisonment of up to one year.⁶⁴ Finally, the collection of evidence regarding the offense being investigated prior to making a mediation proposal is required also to determine the nature of the offense and whether it is eligible for mediation; this also will eliminate the loss of evidence if mediation does not occur.⁶⁵

For offenses perpetrated by several persons, whether or not in complicity, only those offenders who agree to mediation shall benefit from mediation.⁶⁶

In the case of several victims, all victims should agree to mediation in order to seek mediation for the offense in question; if any of the victims declines mediation, no mediation shall be sought.⁶⁷ The reason for this is that agreement of some of the victims should not bar other victims from proceeding with the investigation or prosecution if they so desire. 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 not agreeing to mediation; this outcome is not compatible with the purpose and nature of mediation with respect to positive law.

Where mediation fails, it shall not be attempted again.⁶⁸

D. Making the Mediation Proposal

During the investigation phase, if the offense under investigation is eligible for mediation, the public prosecutor, or a police officer, 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 police officer may make a mediation proposal to the suspect and the victim. The verbal instruction shall be soon confirmed in writing.⁶⁹ If the mediation proposal is to be made by a police officer, the mediation must be proposed to the suspect, with the nature of mediation explained, and this should be noted in the suspect's statement.⁷⁰

⁶⁴ CPC, art. 171.2.

⁶⁵ Özbek, *supra* note 37, at 165; Özbek, *supra* note 19, at 771.

⁶⁶ CPC, art. 255; Directive, art. 6.2.

⁶⁷ CPC, art. 253.7; Directive, art. 6.3.

⁶⁸ CPC, art. 253.18; Directive, art. 6.4.

⁶⁹ Directive, art. 8.1

⁷⁰ CPC, art. 95; Asuman Aytekin İnceoğlu and Ulaş Karan, *Türkiye'de Ceza Davalarında Uzlaşma Uygulamaları: Hukuki Çerçevenin Değerlendirilmesi* [Conciliation Practices in Criminal Litigations in Turkey: Evaluation of Legal Frame], ONARICI ADALET, MAĞDUR-FAIL ARABULUCULUĞU VE UZLAŞMA UYGULAMALARI:

A police officer may not handle the mediation, nor appoint a mediator. Such actions shall be taken by the public prosecutor.⁷¹ Further, any investigation regarding children committing 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 police officer, but only by the public prosecutor in person.⁷² As required by the principle that "special care shall be taken appropriately for the children during the investigation and prosecution process,"⁷³ a child may receive support from a child social worker during the making of mediation proposal to the legal custodian.⁷⁴

Because both the decision regarding the acceptance or rejection of a 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 representative if they are a minor, fails to notify the prosecutor of his/her decision regarding the mediation within three days following the making of the mediation proposal through either an explanatory notice or rogatory letter, they shall be considered to have rejected the proposal. Then, no more mediation proposal shall be made.⁷⁵ Where no answer is returned in the specified time regarding the mediation proposal, or if the proposal is rejected, then the attempt at mediation shall be deemed to have failed.⁷⁶ 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/she shall be deemed to have rejected the proposal, which may in the end be to the detriment of the juvenile.⁷⁷

The invitation to make the mediation proposal may be communicated through such instruments as telephone, telegram, facsimile, or electronic mail.

TÜRKİYE VE AVRUPA BAKIŞI [RESTORATIVE JUSTICE, VICTIM OFFENDER MEDIATION AND CONCILIATION PRACTICES: TURKEY AND EUROPE VIEW] 57 (Bilgi Üniversitesi 2008).

⁷¹ CPC, art. 253.4.

⁷² See Child Protection Law, art. 15.1.

⁷³ See *id.*, art. 4/g.

⁷⁴ See *id.*, art. 15.2.

⁷⁵ This is without prejudice to Article 255 of the Law. CPC, art. 253.4; Directive, art. 10.

⁷⁶ Directive, art. 24.2.

⁷⁷ Çetintürk, *supra* note 30, at 518; İnceoğlu and Karan, *supra* note 70, at 56; Kaymaz and Gökcan, *supra* note 9, at 130, 132; United Nations Development Program, *supra* note 28, at 41.

However, such invitation shall not mean the proposal itself, which must be done in person.⁷⁸

There is no order of precedence as whether to make the mediation proposal to either the victim or the offender first. It is mandatory that, prior to the mediation proposal, the public prosecutor or a police officer, upon instructions from the public prosecutor, must inform the parties of the effect and consequences of mediation and make a recorded report of this. The Turkish *Yargıtay* (High Court of Appeals) has held that failure to inform a defendant of all consequences of mediation is a cause for reversal in a case.⁷⁹

The public prosecutor may first invite the offender and make the mediation proposal to him, as well as to the victim, first. When a mediation proposal is 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.⁸⁰

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 cannot be located.⁸¹ If the victim (or legal representative if 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 these 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 regarding notice by announcement or the requirement regarding address changes;⁸² however, the address should at least be investigated by a police officer.

1. Content of the 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.⁸³ Such information shall be

⁷⁸ Directive, art. 8.4.

⁷⁹ Yargıtay File 2007/6404, Decision 2007/9808 (2nd Crim., 02 July 2007; Kaymaz and Gökcan, *supra* note 9, at 163, fn 4.

⁸⁰ CPC, art. 253.16; Directive, art. 17.2.

⁸¹ CPC, art. 253.6; Directive, art. 11.

⁸² See Law 7201, Notices Law, promulgated in Official Gazette No. 10139, 19 February 1959, art. 28 and 35.

⁸³ CPC, art. 253.5; Directive, art. 12, 26 and 5.5.

provided by giving the person presenting the Mediation Proposal Forms, which include the nature of mediation and legal consequences of accepting or rejecting the mediation, as contained in Annex 1/a or Annex 1/b to the Directive, when the public prosecutor or a police officer is making the proposal, placing the signatures of the 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 police officer and that the mediation has been proposed, shall be placed in the investigation file.⁸⁴

It is possible that parties may reject mediation due to having inadequate information regarding mediation. Before seeking mediation, properly informing the parties shall contribute to their understanding and willingness to participate 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 an 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 against him if the conditions in Article 231 do exist, if he declines mediation while the victim agrees, then it cannot be decided to

⁸⁴ Directive, art. 8.3.

defer the verdict regarding the prosecuted offense charged on him even if the conditions in Article 231 do exist;

- that if the offender 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, and that if he does not perform the obligations arising from the mediation after the deferral decision, a public case will be initiated against him,

- that if mediation is achieved, no restoration suit may be launched against him for the investigated offense, that such a suit shall be deemed waived if pending.⁸⁵

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 initiation of a public case where the conditions listed in the third paragraph of Article 171 of the Law exist, despite the existence of sufficient grounds for offenses that are dependent on complaint for investigation and prosecution and require imprisonment up to one year.

Since mediation is a resolution of conflict resolution based on mutual agreement of the parties, the suspect and the victim or their legal representatives must accept the mediation proposal with their free and informed consent in order to seek mediation.⁸⁶ The Criminal Procedure Code remains loyal to the willingness principle of consent, which is a fundamental principle of victim-offender mediation.⁸⁷ 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 will. Parties may withdraw their consent during the mediation up until the point of agreement.⁸⁸

2. No Forcible Bringing of Offenders for Mediation

Article 145 of CPC regulating the use of force provides that if suspects do not show up when they are called up for a statement and interrogation, they can

⁸⁵ Inceoğlu and Karan, *supra* note 70, at 57.

⁸⁶ Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 5; Çetintürk, *supra* note 21, at 527.

⁸⁷ İpek and Parlak, *supra* note 53, at 78.

⁸⁸ Directive, art. 5.1.

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.⁸⁹ The reason is that mediation is “a judicial resolution mechanism dependent on the free will of parties under judicial scrutiny outside of criminal justice based on a 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.⁹⁰

3. Mediation Proposals to Minors and Restricted Persons

Where the suspect or the victim is a minor, restricted or lacks capacity, the mediation proposal shall be made to his/her legal representative. The public prosecutor shall examine if such person has the capacity, then identify the person to whom the mediation proposal shall be made.⁹¹ If the suspect or the victim is a minor, his will regarding the mediation must be solicited.

The United Nations Convention on the Rights of the Child provides that:

State Parties shall assure that the child who is capable of forming his or her own views has 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.⁹²

The child’s opinion must be solicited because the mediation process concerns the child and is close to its effects and consequences.⁹³

While Article 253.4 of the 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.

⁸⁹ Yargıtay File 2006/9889, Decision 2007/970 (4th Crim., 31 January 2007); Kaymaz and Gökcan, *supra* note 9, at 163, fn. 3.

⁹⁰ United Nations Development Program, *supra* note 28, at 41.

⁹¹ Directive, art. 8.2.

⁹² United Nations Convention on the Rights of the Child, Art. 12(2).

⁹³ Çetintürk, *supra* note 30, at 518; İpek and Parlak, *supra* note 53, at 104; Kaymaz and Gökcan, *supra* note 9, at 166; Özbek, *supra* note 19, at 769; Soygüt-Arslan, *supra* note 21, at 127; United Nations Development Program, *supra* note 28, at 42.

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.⁹⁴

4. Proposal by Notice or Rogatory Letter

The public prosecutor may, as necessary, make the mediation proposal with 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.⁹⁵

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 valid.⁹⁶

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. Upon receipt of the rogatory letter, the addressee can go to the prosecutor's office which sent 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 of the Directive 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.⁹⁷

5. Mediation Proposal and Other Actions by Public Prosecutor

A police officer makes the mediation proposal directly to the affected person, which is acknowledged by a signature. However, as indicated in Article 8,3 of the Directive, it is not sufficient to merely give the proposal form to the affected person; it is also required to explain the information on the form to the person in a suitable manner, considering age, maturity, education level, and socioeconomic status of the person.

⁹⁴ Yargıtay File 2007/6481, Decision 2007/9229 (2nd Crim., 21 June 2007; Kaymaz and Gökcan, *supra* note 9, at 170, fn. 10.

⁹⁵ Directive, art. 9.

⁹⁶ Yargıtay File 2005/10287, Decision 10287/19090 (10th Crim., 19 December 2005).

⁹⁷ United Nations Development Program, *supra* note 28, at 42.

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

The public prosecutor may verbally instruct a police officer to propose mediation in urgent cases, but must confirm the instruction later in writing. Thus, the public prosecutor shall instruct in writing a police officer to propose mediation, or verbally in urgent cases.⁹⁸ 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 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 police officers. Therefore, the police may call up the person to whom the proposal will be made through the listed means but the actual proposal must be made in person

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 made by police officers. In other words, it is not possible for the police to 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. This is because the public prosecutor may propose by explanatory notice or rogatory letter.⁹⁹ Therefore it is the public prosecutor himself who may send the explanatory notice that includes the mediation proposal. For the persons outside the jurisdiction of the locale of offense, the public prosecutor may request the public prosecutor of the appropriate 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 police under his direction.¹⁰⁰

E. The Role of the Police in Penal Mediation

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

⁹⁸ CPC, art. 161.3.

⁹⁹ CPC Art. 253.4, Directive, art. 9.1.

¹⁰⁰ Çetintürk, *supra* note 30, at 504; İpek and Parlak, *supra* note 53, at 89; Kaymaz and Gökcan, *supra* note 9, at 162; Özbek, *supra* note 19, at 769; Soygüt-Arslan, *supra* note 21, at 136.

In some countries, specially-trained police officers act as the mediators in certain juvenile cases. This happens, for example, in Canada, Australia, and Iceland.¹⁰¹ 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"¹⁰² call for a significant role to be played by the police in penal mediation and contains the following:

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.¹⁰³

The Turkish judicial system provides that "[i]f 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."¹⁰⁴

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

¹⁰¹ Çetintürk, *supra* note 30, at 264.

¹⁰² See CEPEJ, *supra* note 23.

¹⁰³ CEPEJ, *supra* note 23, at 7; European Commission for the Efficiency of Justice, *supra* note 2, at 34. For Turkish translation of this text, see Özbek, *supra* note 19, at 929-938.

¹⁰⁴ CPC, art. 253. 4.

It would appear that the act of delegation must be done separately for each case and that there 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.¹⁰⁵

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.¹⁰⁶

Regardless of whether police officers are delegated the responsibility for making the formal mediation proposal to the parties or not, they may play other important roles to promote the use of penal mediation. For example,

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

F. Appointment and Qualifications of Mediator

The term ‘mediator’ “means a person who has a legal education or a lawyer assigned by the bar association upon the request of the public prosecutor or the

¹⁰⁵ 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 was fulfilled by the chief public prosecutor (*Cumhuriyet başsavcısı*) or judicial security officer, and that mediation is proposed, shall be put into the investigation documents.”

¹⁰⁶ United Nations Development Program, *supra* note 28, at 43; Kunter, Yenisey, and Nuhoglu, *supra* note 20, at 1214; Özbek, *supra* note 19, at 163; Soygüt-Arslan, *supra* note 21, at 137; İnçeoğlu and Karan, *supra* note 70, at 55.

court, who manages the mediation negotiations between the suspect or the defendant and the victim.”¹⁰⁷ Where the suspect and the victim accept the mediation proposal, the public prosecutor may handle the mediation himself, 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 an education in law.¹⁰⁸

Where the public prosecutor personally handles the mediation negotiations and the mediation does not end in settlement, any subsequent investigation should not be carried out by the same public prosecutor. It is recognized in the doctrine that the public prosecutor who handled the mediation negotiations should not be the trial prosecutor in the prosecution phase.¹⁰⁹

The public prosecutor may decide to assign a mediator in order to handle mediation actions between the suspect and the victim, then bring them together to reach an agreement. When assigning a mediator, preference should be given to a person on whom the suspect and the victim both agree.¹¹⁰ However, since CPC Article 253.9 removes the powers of the parties to elect a mediator and institutes the “appointment method,” the Plenary of Administrative Chambers of the High Administrative Court (*Danıştay*) suspended the execution of the provision that allows this practice (Directive Article 13.2). The opinion stated:

The Directive on the 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 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 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

¹⁰⁷ Directive, art. 4/ç.

¹⁰⁸ CPC, art. 253.9; Directive, art. 13.1.

¹⁰⁹ Kunter, Yenisey, and Nuhoglu, *supra* note 20, at 1217; CPC, art. 23.2.

¹¹⁰ Directive, art. 13.2.

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 into 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 proposals 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, depend on the offender to accept guilt and agree to make restitution for the damages arising from the offense, and depend on the victim to release the offender from punishment on condition of making restitution; and mediation, as is, leads to suspension of criminal investigation/prosecution, and removal of the same if mediation is successful and the offender makes restitution for the damages.

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 the 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; it is allowed to appoint lawyers or persons having law education as mediators. However, there is no doubt that the mediator as such should have the qualifications required of a public prosecutor or a judge.

Thus, for this reason, pursuant to Article 253 of the Criminal Procedure Code and Article 254 that refers 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 where the judge cannot try the case, the reasons for the recusal of the judge must be considered when appointing the mediator. By the amendment made by the Law No. 5560, dated 06 December 2006, to Article 253 of 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 second paragraph of Article 13 of the Directive, which states that a lawyer or person having a law education may be preferred when the suspect and the victim can agree on the selection of a mediator, may actually contradict the authority of the public prosecutor or the court to appoint a mediator and in contradiction to the nature of mediation; the fourth paragraph of Article 13 of the Directive allows the mediator to perform or continue the assignment with the agreement of the parties despite the existence of conditions which would bar a judge from trying the case or that would cast doubts on his impartiality,

as well as the second paragraph of Article 14 that allows a lawyer on whom the parties agree to not 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.

Further, in addition to the explanations above, in light of the fact that the ninth paragraph of Article 253 of Law No. 5271 clearly provides that the mediator may be selected from among persons who have graduated schools of law, it can be concluded that subparagraphs (b) and (c) of the first paragraphs 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 also contrary to the Law.

The challenged third paragraph of Article 25 of the Directive provides that “[w]hen the mediation proposal made in 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 first paragraph of Article 254, ‘Mediation by Court,’ of Law No. 5271, provides that where the alleged 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. Article 253 regulates the principles and procedures of mediation in the investigation phase. While the eighteenth 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 have agreed to settle by a document indicating their agreement.

As can be seen, the challenged third paragraph of Article 25 of the Directive provides that the rule established in the sixteenth paragraph of Article 253 of Law No. 5271 regarding mediation at

the investigation phase¹¹¹ is applicable to the prosecution phase based on the reference in Article 254 of the Law to the previous Article 253.¹¹²

However, since Article 254 of Law No. 5271 regulates mediation in the prosecution phase, it is obvious that the criminal court shall determine which rules of mediation for the investigation phase shall apply to the mediation in the prosecution phase – in other words, the scope of the reference made to Article 253, that considers the nature of the mediation, the principles and the 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 Law No. 5271 that matters relating to the exercise of mediation shall be regulated by a Directive,¹³ which is indeed a matter that should be decided by the court.

For these reasons, it has been decided on 15 May 2008 by a majority that the objection raised by the claimant be accepted, that the second and fourth paragraphs of Article 13 and the second paragraph of Article 14 of the Directive on the Exercise of Mediation according to the Criminal Procedure Code, promulgated in Official Gazette 26594, dated 26 July 2007, be suspended, and by unanamos vote that the subparagraphs (b) and (c) of the first paragraph of Article 15 and the third paragraph of Article 25 of the Directive be suspended.¹¹³

The public prosecutor may request the bar association appoint one or more lawyers as mediators; he may also assign a person not registered with the bar association but having law education as a mediator.¹¹⁴ To be a mediator, it is not mandatory to be a lawyer registered with the bar association; it is only sufficient

¹¹¹ CPC, art. 253.16. “Despite the rejection of the reconciliation 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 Public Prosecutor that they have come to a reconciliation through a document demonstrating this by the date of issuance of the indictment at the latest.”

¹¹² CPC, art. 254.1. “In case that, after the criminal case is opened, it is understood that the crime, which is the subject of prosecution, is under the scope of reconciliation, reconciliation processes shall be conducted by the court in accordance with the principles and procedures stipulated under Article 253.”

¹¹³ Yargıtay Plenary Decision 2008/463, 15 May 2008, Suspension of the Execution Objection; Özbek, *supra* note 19, at 776-780.

¹¹⁴ CPC, art. 253.9.

to have had an education in law. In this context, faculty members of law schools, public notaries or retired judges may be mediators.

Where mediators having legal education are assigned, the conditions in Article 15 of the Mediation Directive shall be sought. The Plenary of Administrative Chambers of the High Appeals Courts suspended the execution of subparagraphs (b) and (c) of the 1st paragraph of Article 15 of the Directive allowing that, in addition to graduates of law schools, those graduates from programs that contain sufficient law courses in their curricula may 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.¹¹⁵

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.¹¹⁶

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 addresses “training for mediators.” Accordingly, persons to act as mediators shall receive training prior to such a mission and continue to receive in-service training as long as they do such jobs. Such training should aim to provide competency skills on alternative dispute resolution and negotiation skills as well as developing methods, acquiring knowledge on special conditions of working with a suspect or a defendant, and the criminal justice system.¹¹⁷ The training shall cover the 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 the 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.¹¹⁸

¹¹⁵ Directive, art. 13.3.

¹¹⁶ Directive, art. 14.

¹¹⁷ Çetintürk, *supra* note 30, at 497; İpek and Parlak, *supra* note 53, at 114; Kaymaz and Gökcan, *supra* note 9, at 176; Özbek, *supra* note 19, at 781; Soygüt-Arslan, *supra* note 21, at 148.

¹¹⁸ Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 23; Lhuillier, *supra* note 4, at 10; Özbek, *supra* note 11, at 158.

Training for persons to be appointed as mediators shall be provided in cooperation with the Justice Academy, the Ministry of Justice Division of Training, Union of Turkish Bar Associations, relevant bar associations and universities providing such training.¹¹⁹

The Criminal Procedure Code does not require that a general register of mediators be kept; however, the Mediation Directive provides that mediators having an education in law shall be registered in a list specified by the public prosecutor's office in the locality of the criminal courts and mediators shall be selected from among those listed.¹²⁰

As specified in the Criminal Procedure Code, cases where the judge cannot try the case and the reasons for recusal of the judge¹²¹ must be considered when appointing the mediator¹²² in order to preserve the impartiality of the mediation process and the mediator. The mediator should then inform the public prosecutor of the existence of such circumstances and not perform the assignment. However, in such a case, the Law should make a provision that the mediator could continue the mission if both parties agree although such a provision has been found contrary to law by the Plenary of the Administrative Chambers of the Danıştay which suspended its execution.

G. Mediation Term and Suspension of Limitation Periods

The mediator shall conclude a mediation transaction within thirty days following the submission of the file to mediator. The chief public prosecutor may extend this period of his/her own motion or upon demand, for an additional twenty days maximum.

Even if a mediation proposal has been rejected, the suspect and the victim or the person who has been harmed as a result of the crime may declare to the chief public prosecutor that they have come to a settlement through a document verifying this up until the date of the indictment.

Even in cases where the mediation is conducted by a public prosecutor or a judge, the periods mentioned in the first article shall be applied.¹²³

The case statute of limitations shall not start from the date when the mediation is first proposed to any suspect, victim or person who has been harmed as a result of the crime, until the date when the mediation attempt turns

¹¹⁹ Directive, art. 30.4.

¹²⁰ Directive, art. 15.2.

¹²¹ CPC, art. 22-31.

¹²² CPC, art. 253.10.

¹²³ CPC, art. 253.12; Directive, art. 17.

out to be futile and when the mediator prepares the report and submits it to the public prosecutor at the latest.¹²⁴

H. Mediation Negotiations and Confidentiality Principle

A suspect, victim, or person who has been harmed as a result of the crime, legal representatives, the victim's attorney and the defense attorney may attend the mediation negotiations. If the suspect, victim, person harmed by the crime, a legal representative, or an attorney does not attend the negotiations without any justifiable reason, the affected party shall be deemed to have not accepted the mediation.

Several negotiations may be held in order to ensure mediation. The mediator may meet with the public prosecutor to discuss 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 regarding possible mediation may be executed through meetings to be held jointly with the parties or separately. Negotiations may also be held by using audio-visual communication techniques.¹²⁵

Mediation negotiations shall be executed confidentially.¹²⁶ The mediator is obliged to keep confidential any statements made throughout the mediation process as well as the facts transferred to him/her or facts he/she becomes aware of in any other manner.¹²⁷

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 regarding such information.¹²⁸

¹²⁴ United Nations Development Program, *supra* note 28, at 55; *see* Tolling, Sec. 2.3, European Commission for the Efficiency of Justice, *supra* note 23, at 33; CPC, Art. 253.21; Directive, art. 24.1).

¹²⁵ CPC, art. 253.13; Directive, art. 18.

¹²⁶ Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 21; Kaymaz and Gökcan, *supra* note 9, at 186; Lhuillier, *supra* note 4, at 11; Özbek, *supra* note 19, at 789; Özbek, *supra* note 17, at 464; Çetintürk, *supra* note 30, at 531; *see* Recommendation R (99) 19, Sec. II.2 and V.29; European Commission for the Efficiency of Justice, *supra* note, 23, Sec. 1.6, at 31.

¹²⁷ United Nations Development Program, *supra* note 28, at 50; Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise*, 2 J. DISP. RES. 401, 406 (2004); Özbek, *supra* note 37, at 139, 183.

¹²⁸ 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 if needed to resolve any dispute to arise due to a claim as to the falseness of the report prepared by the mediator then 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 trial.¹²⁹

I. Subject Matter of Restitution

According to Article 20 of the 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:¹³⁰

- a) Providing full or partial compensation or recovery of pecuniary or immaterial damages of the victim 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 to the rights of the victim or any person injured from the crime,
- c) Performing actions such as making a donation to a public institution or a private organization serving the public interest, or to person(s) in need of help,
- ç) Undertaking some obligations of the victim or a person 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 to the victim or person harmed as a result of the crime.

¹²⁹ CPC, art. 253.13; Directive, art. 19.

¹³⁰ United Nations Development Program, *supra* note 28, at 53; Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 16; Kaymaz and Gökcan, *supra* note 9, at 140; Seydi Kaymaz and Hasan Tahsin Gökcan, *Uzlaşmada Edimin Konusu [Subject Matter of Obligation in Conciliation]*, 1 KAZANCI LAW REVIEW 391, 402-408 (2010); Özbek, *supra* note 19, at 791; Özbek, *supra* note 37, at 186-87; Soygüt-Arslan, *supra* note 21, at 130.

J. Preparing the Mediation Report or Mediation Document

When the mediation negotiations are concluded, either positively or negatively, the mediator should prepare a report (mediation report) in the format of attached as Annex 2 to the Directive, in a number of copies that is one more than the number of parties, and submits such report to the public prosecutor without delay along with the copies of documents furnished to him, any papers supporting his mandatory travel expenses, expense slips or written statement of conformity with market rates, and the self-employed service receipt.¹³¹

If a settlement is achieved, this report signed by parties shall explain in detail how the parties settled.¹³² 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 returned 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; the report must be signed by the offender, victim, attorneys if any, legal representatives and the mediator.¹³³

When the suspect or the victim is a child (minor) or other restricted person, the Civil Code provisions shall apply to the signing of the mediation report (or mediation document).¹³⁴ Accordingly, if a person in custody (e.g. a child) lacks full capacity, the mediation report must be signed by the parents because the acts of those persons lacking capacity shall have no legal effect.¹³⁵

If minors of limited incapacity (those having capacity to discern) are in custody, they may execute a mediation report which would bind them only upon the consent of their parents¹³⁶ because they cannot assume obligations without the consent of their legal representatives but minors are still liable for their torts.¹³⁷ 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 continues. Article 342 provides that the father and mother shall represent the child from within the framework of custodianship without

¹³¹ Directive, art. 21.1.

¹³² CPC, art. 253.15; Directive, art. 21.2.

¹³³ United Nations Development Program, *supra* note 28, at 52.

¹³⁴ Turgut Akıntürk, *TÜRK MEDENÎ HUKUKU*, VOL. 2, AİLE HUKUKU [TURKISH CIVIL LAW, VOL. 2, FAMILY LAW] 428 (Beta 2006).

¹³⁵ See Turkish Civil Code, art. 15.

¹³⁶ See *id.*, art. 16.1.

¹³⁷ See *id.*, art. 16.2.

discrimination. Accordingly, the parents must jointly sign the mediation report as long as the marriage is in effect. For this, the parents, contrary to a legal guardian, do not need to obtain permission from the court.¹³⁸

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 the explicit or implicit consent or later approval by the guardian.¹³⁹ Further, according to Article 462.8 of the Civil Code, since the guardian's permission is required for the guardian to settle, the Civil Court of Peace [*Sulh Mahkemesi*] should give permission so that the mediation report could be valid for those restricted.¹⁴⁰

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 guardian must be sought.¹⁴¹ Finally, if the person under guardianship has the ability to form and express an opinion, it would be appropriate to solicit the opinion of the person under guardianship because the guardian is under obligation to solicit the ward's opinion, to the extent possible, before deciding important matters¹⁴² and the mediation report is deemed to be an important affair.

Pursuant to Article 15 of the Civil Code, the minor who has reached the age of fifteen and has become an adult with the approval of a court upon his/her own request and parental consent, and the minor who has become adult by marriage pursuant to Article 11.2 of the Civil Code may sign the mediation agreement on their own account.

If the mediation fails, the reasons must be noted briefly in the report. However, because of confidentiality concerns, the mediator should not include statements, explanations and behavior of the parties made during the negotiations nor the content of the negotiations be disclosed.¹⁴³ This report must include the items listed in Article 21 of the Directive and conform to the Mediation Report format in Annex 2 to the Directive in order to be as uniform as possible. The public prosecutor shall review the report so as to determine whether it includes the necessary items.

¹³⁸ Özbek, *supra* note 37, at 188, fn. 189.

¹³⁹ See Turkish Civil Code, art. 451.1.

¹⁴⁰ See *id.*, art. 397.2.

¹⁴¹ See *id.*, art. 462.13.

¹⁴² See *id.*, art. 450.

¹⁴³ Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 25; Özbek, *supra* note 37, at 189; Directive, art. 21.2.

If the public prosecutor decides that the mediation is based on the free will of the parties and the obligation complies with the laws, he shall sign and seal the report or the document and place it in the investigation file.¹⁴⁴ If the public prosecutor concludes that the mediation is based on the free will of the parties and the obligation is reasonable and complies with the laws and the principle of proportionality, he should sign and seal the 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 to have occurred,¹⁴⁵ 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 a party was coerced or the obligation is contrary to law, 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 could be the basis for court-ordered enforcement, then the mediation should still be upheld and the parties be given extra time to remedy such deficiencies. Thereby, the risk of invalidation due to a deficiency in form shall be eliminated. After the correction of the 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.¹⁴⁶

The public prosecutor (or the court in the prosecution phase) should first make sure that the mediation process has occurred duly under the free will of the parties. If the will of a party has been somehow invalidated by force or a threat, parties have failed to act on their free will or the damage cannot be remedied according to the settlement, then a decision of 'no prosecution' should not be returned, but instead a public case must be filed. 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 the ability to discern to have free will, 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.¹⁴⁷ Thus, according to the Council of Europe Recommendation No. R (99) 19, the mediation should not proceed if any of the

¹⁴⁴ CPC, art. 253. 17; Directive, art. 21.3.

¹⁴⁵ Directive, art. 21.4.

¹⁴⁶ Kaymaz and Gökcan, *supra* note 9, at 189; Özbek, *supra* note 19, at 793.

¹⁴⁷ United Nations Development Program, *supra* note 28, at 52; Özbek, *supra* note 37, at 190.

main parties involved is not capable of understanding the meaning of the process due to minority or mental handicap or for a similar reason.¹⁴⁸

In such a situation, the public prosecutor should closely scrutinize the agreement to ensure that the obligation agreed to through mediation conforms to laws and ethics, is reasonable and is proportional to the offense. However, such scrutiny by the public prosecutor (or the court in the prosecution phase) is limited to the matters listed above; it is not possible to extend the scope to include the quantity or type of the agreed obligation. The approval by the public prosecutor (or the court in 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 the public interest, making 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 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.¹⁴⁹

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.¹⁵⁰ 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 21.¹⁵¹ 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.¹⁵²

¹⁴⁸ Kaymaz and Gökcan, *supra* note 9, at 133; Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 21; Özbek, *supra* note 11, at 133, 154; Soygüt-Arslan, *supra* note 21, at 133.

¹⁴⁹ Directive, art. 21.5.

¹⁵⁰ CPC, art. 253.19.

¹⁵¹ Directive, art. 22.1.

¹⁵² *Id.*, art. 22.2.

K. 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.¹⁵³ 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.¹⁵⁴ Time shall not run during the deferral period.¹⁵⁵ 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.¹⁵⁶

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.¹⁵⁷ Afterwards he shall not be subject to public prosecution for the same offense except for the emergence of new evidence¹⁵⁸

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 filing of a public case against the suspect shall be returned without seeking the requirements of 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 filing of a public case is that the commitment to perform the obligation so deferred, arranged in installments or made permanent should be monitored. The decision to defer the filing of a public case because of the permanence of the obligation agreed in mediation¹⁵⁹ is not subject to appeal pursuant to CPC Article 171.2, because Article 171 grants the victim the right to appeal the decision to defer the filing of a public case without seeking the consent of the victim if the conditions that listed in the law exist. However, pursuant to CPC Article 253.19, since the decision to defer the filing 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 a

¹⁵³ *Id.*, art. 23.1.

¹⁵⁴ *Id.*, art. 23.2.

¹⁵⁵ *Id.*, art. 23.3.

¹⁵⁶ *Id.*, art. 23.7.

¹⁵⁷ *Id.*, art. 23.4.

¹⁵⁸ United Nations Development Program, *supra* note 28, at 54; CPC, art. 172.2.

¹⁵⁹ CPC, art. 253.19.

decision. Further, granting such right of appeal will lead to delay and uncertainty in the performance of a permanent obligation for public service.¹⁶⁰

If the requirements of the settlement are not observed after the decision to defer the filing of a public case, an indictment shall be prepared against the suspect to file a public case without seeking the requirements contained 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 make restitution for the damages and suffering of the victim, if mediation is achieved, no restitution suit may be launched against the person who committed that act for that offense; such a suit shall be deemed waived *ipso iure* if pending.¹⁶¹

Regarding the decisions returned at the end of mediation, legal remedies indicated in the Criminal Procedure Code may be sought¹⁶²

L. Non-performance of the Obligation Agreed to in the Mediation

If the suspect (in the investigation phase) or the defendant (in the prosecution phase) does not perform the obligation agreed to in the mediation, it is possible to place this report into 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 to be a court order as per Article 38 of the Enforcement and Bankruptcy Law.¹⁶³

However, if the suspect or the defendant does not perform the requirements of the mediation, his right to the criminal trial process shall continue.¹⁶⁴ 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 in the investigation phase; if one of the installments is not performed, the decision to defer the filing of a public case¹⁶⁵ (or ‘defer the declaration of verdict’ in the prosecution phase) may not be returned, and a public case shall be filed against the suspect or the defendant (or prosecution continues).

¹⁶⁰ Çetintürk, *supra* note 30, at 538; İpek and Parlak, *supra* note 53, at 125; Kaymaz and Gökcan, *supra* note 9, at 189-90; Özbek, *supra* note 19, at 795; Soygüt-Arslan, *supra* note 21, at 157.

¹⁶¹ See Soygüt-Arslan, *supra* note 21, at 159.

¹⁶² CPC, art. 253.23.

¹⁶³ United Nations Development Program, *supra* note 28, at 55.

¹⁶⁴ CPC, art. 253.19.

¹⁶⁵ Çetintürk, *supra* note 30, at 537; İpek and Parlak, *supra* note 53, at 120; Kaymaz and Gökcan, *supra* note 9, at 191; Özbek, *supra* note 19, at 796; Soygüt-Arslan, *supra* note 21, at 165.

When a public case is filed against the suspect or the defendant (or prosecution continued), two possibilities emerge. If the offender is acquitted at the end of the 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 still 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 of the obligation to the victim. However, it is a 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 started, and also, a second criminal case cannot be started against the same person for the same act after a trial that ended in final conviction (no ‘double jeopardy’).¹⁶⁶ Pursuant to the principle laid down in CPC Article 223.7 that “if there is a verdict against the same defendant for the same act or a case started, then the (new) case shall be rejected,” after the mediation report is executed by way of a court-ordered execution against the defendant, it is not possible to return a criminal verdict against the defendant for the same act. Therefore, if the prosecution is continued because of the non-performance of the 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 any court-ordered execution.¹⁶⁷

M. Mediation in the 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; the mediation actions shall be carried by the court in accordance with the principles and procedures specified for the investigation phase:¹⁶⁸

- 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 been made during the investigation phase,

¹⁶⁶ Kunter, Yenisey, and Nuhoğlu, *supra* note 20, at 46.

¹⁶⁷ Çetintürk, *supra* note 30, at 537; Özbek, *supra* note 19, at 797.

¹⁶⁸ Directive, art. 25.1.

- c) The offense brought directly to the court without an indictment by the public prosecutor is eligible for mediation,
- d) 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 but was not for any other reason after the acceptance of the indictment, the mediation actions shall be carried on by the court.¹⁶⁹ The reason for this is that 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.¹⁷⁰ Thus, if the offense is understood to be eligible for mediation in the first hearing, it is possible to seek mediation at this point. Similarly, where the power to decide to investigate and prosecute is conferred on persons other than the public prosecutor by a special provision, the court should seek mediation in the first phase of the prosecution.¹⁷¹

The mediation procedure is regulated by Article 253, thus the court follows the same procedure to carry out mediation actions. The court may make the notices and correspondence for mediation for the file without waiting for the hearing day.¹⁷²

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 information on the nature of mediation and the legal consequences of accepting or rejecting the mediation, as contained Annex 1/c of the Directive and by explaining the information on the form. This shall be reflected in the court minutes, so that the obligation to inform shall be accomplished, and the signed copy of the form indicating that the mediation has been proposed shall be placed in the prosecution file.¹⁷³

If the mediation proposal made during the trial phase is been rejected, the parties may declare to the court their agreement to mediation with a document indicating their agreement no later than the conclusion of hearings but before the declaration of the verdict. The third paragraph of Article 25 of the Directive

¹⁶⁹ CPC, art. 254.1; Directive, art. 25.1.

¹⁷⁰ CPC, art. 174.1/c.

¹⁷¹ Çetintürk, *supra* note 30, at 546; İpek and Parlak, *supra* note 53, at 127; Kaymaz and Gökcan, *supra* note 9, at 195; Özbek, *supra* note 19, at 799; Soygüt-Arslan, *supra* note 21, at 174.

¹⁷² Directive, art. 25.2.

¹⁷³ United Nations Development Program, *supra* note 28, at 57; Directive, art. 26.

that lays down this rule has been deemed to be a matter reserved to the court by the Plenary of Administrative Chambers of the *Danıştay*, and held to be not compliant with law and the Law. Since this rule was established by an administrative act, the meaning and scope of the reference in CPC Article 254.1, thus the execution of this paragraph was suspended.

The legal consequences of accepting or rejecting the mediation in this phase shall be different than those in the investigation phase. When an offense eligible for effective contrition is at hand, the court may not seek mediation.¹⁷⁴ However, if conditions exist, the court may decide to defer the declaration of verdict.

With respect to ideal law (*de lege feranda*), where the victim rejects mediation without a justifiable cause, it would be appropriate to empower the court with the discretion, without conditions, to defer the declaration of the verdict for the prosecuted offense with respect to any defendant who has accepted mediation. Besides that, any good faith, sincere will and effort shown by the defendant in the mediation negotiations should be taken into account by the court in sentencing and the judge should be able to set the punishment at the lowest limit specified by law, based on his discretion.¹⁷⁵ 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 justification of mitigation in the sentence.¹⁷⁶

When settlement occurs, decisions to be rendered by the court that depend 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 shall dismiss the case.¹⁷⁷ 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 231.¹⁷⁸ Time shall not run during the deferral period.¹⁷⁹ 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.¹⁸⁰ If after the decision to defer the declaration of verdict is

¹⁷⁴ CPC, art. 253.3; Directive, art. 7.3.

¹⁷⁵ Turkish Penal Code, art. 61.

¹⁷⁶ Özbek, *supra* note 19, at 800; Turkish Penal Code, art. 62.

¹⁷⁷ Directive, art. 27.1.

¹⁷⁸ Directive, art. 27.2.

¹⁷⁹ Directive, art. 27.3.

¹⁸⁰ Directive, art. 27.4.

given the obligations of the settlement are not performed, the court shall enter the verdict without performing the requirements contained in Article 231.¹⁸¹

After the decision to not prosecute or dismiss the case against the offender because of the settlement, the offender cannot file an indemnification lawsuit for damages or suffering against the state due to the protections in Article 141 of the Criminal Procedure Code. Similarly, where settlement is reached, no indemnification suit may be filed against the defendant for the prosecuted offense and any lawsuit pending shall be deemed waived.¹⁸²

For offenses perpetrated by several persons, whether or not in complicity, only those offenders who agree to mediation shall benefit from mediation.¹⁸³

Finally, Article 32 of the Directive provides that the decisions returned by the public prosecutor or the court shall be entered into the records for the purpose of keeping accurate statistics for mediation. To that end, the public prosecutor's office shall keep special files in which a copy of the decisions such as 'no prosecution,' 'defer the filing of a public case' are retained at the public prosecutor's office, with copies of the decisions to 'dismiss' or 'defer the declaration of verdict' be retained at the courts. For copies to be placed in these files, the signature of the public prosecutor or the judge, along with the seal of the public prosecutor's office or the court, respectively as the case may be, should be affixed on these copies.

V. MEDIATION FOR CHILDREN INDUCED TO CRIME AND CHILDREN VICTIMIZED BY CRIME

A. Effect of Restriction and Incapacity on Mediation

Legal systems classify offenders as juvenile or adult, then subject them to separate penalty, trial and enforcement systems.¹⁸⁴ Article 61 of the Constitution provides that "The State shall take all measures to integrate into society the children in need of protection."

The preamble to the United Nations Convention on the Rights of the Child "recalls that in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance" and

¹⁸¹ CPC, art. 254.2; Directive, art. 27.5.

¹⁸² Directive, art. 27.7.

¹⁸³ CPC, art. 255; Directive, art. 6.2.

¹⁸⁴ Yusuf Solmaz Balo, *ULUSLARARASI İLKELER IŞIĞINDA ÇOCUK KORUMA KANUNU VE UYGULAMASI* [CHILD PROTECTION CODE AND PRACTICE IN THE LIGHT OF INTERNATIONAL PRINCIPLES] 112 (Seçkin 2005).

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.”¹⁸⁵ Article 13 of the European Convention on the Exercise of Children’s Rights 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.”¹⁸⁶

As emphasized in the general rationale for the Child Protection Law No. 5395, international instruments note 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 does not protect the children from crimes and similar risks, but on the contrary exposes them more to such risks. Under the provisions of 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.¹⁸⁷

Article 5.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice¹⁸⁸ (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 programs, 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.

¹⁸⁵ Turkish Official Gazette Nr. 22138, 11 December 1994.

¹⁸⁶ Turkish Official Gazette Nr. 24743, 02 May 2002; text of the treaty is *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm> (last visited Nov. 14, 2011); *see also* Ankara Barosu, ÇOCUK HAKLARININ KULLANILMASINA İLİŞKİN AVRUPA SÖZLEŞMESİ [EUROPEAN CONVENTION ON THE EXERCISE OF CHILDREN’S RIGHTS] (Ankara Bar, 2001).

¹⁸⁷ Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25, 20 November 1989, entry into force 2 September 1990. Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child, *at* <http://www2.ohchr.org/english/law/crc.htm> (last visited Nov. 14, 2011).

¹⁸⁸ Adopted by the UN General Assembly Resolution No. 40/33, 29 November 1985.

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 for programs created for 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.¹⁸⁹

The idea of 'penalizing' children should be abandoned forever; however, 'not penalizing' should not mean 'no-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 used generously.¹⁹⁰

B. The Status of Children in the Criminal Justice System

According to the Child Protection Law,¹⁹¹ the purpose of this law is to protect children in need of protection or children induced to crime in order secure their rights and well-being.

According to Article 6 of the Turkish Penal Code¹⁹² and Article 3 of the CPL, a child means a person who has not attained eighteen years of age even if he is legally made 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 of bodily, mental, moral, social or emotional harm or their personal safety endangered or they have a higher possibility of being exploited or victimized by crime,

¹⁸⁹ Mark S. Umbreit, *Victim Offender Mediation in Juvenile or Criminal Courts*, ADR HANDBOOK FOR JUDGES 229 (American Bar Association 2004); Mustafa S. Özbek, *Suçta 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 AKINTÜRK 449, 450 (Beta, 2006); Özbek, *supra* note 37, at 136.

¹⁹⁰ Feridun Yenisey, *Genç Ceza Hukukunun Yeniden Yapılandırılması Hakkında Bazı Düşünceler [Some Remarks about the Reorganisation of Juvenile Criminal Law]*, KARŞILAŞTIRMALI GÜNCEL CEZA HUKUKU SERİSİ 4, ÇOCUKLAR VE SUÇ-CEZA [COMPARATIVE CURENT CRIMINAL LAW SERIES 4, CHILDREN AND CRIME-PUNISHMENT] 19, 43 (Seçkin 2005).

¹⁹¹ Law 5395, promulgated in Turkish Official Gazette Nr. 25876, July 15, 2005.

¹⁹² Law 5237, promulgated in Turkish Official Gazette Nr. 25611, October 12, 2004.

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

In parallel with the physical development of a person, his/her ability to grasp the meaning and content of societal values develops. In addition to the ability to grasp values during this developmental process, the ability to conform actions in line with the requirements of social extent and behavioral rules develops.¹⁹³

A child who has not attained twelve years of age has no criminal liability. Being below the age of twelve as of the date of the illegal act is recognized as an excuse which absolutely removes the criminal liability from the child.¹⁹⁴

Article 31.1 “Being minor” of the Turkish Penal Code provides that “[c]hildren 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 as regulated in Article 31 by age groups.

Despite the existence of the Child Protection Law, the Turkish Penal Code, the Criminal Procedure Code¹⁹⁵ and the Law on Execution of Penalties and Security Measures¹⁹⁶ include scattered rules for the children.

While the 2005 progress report of the European Commission for Turkey praised the enactment of the Child Protection Law as a positive development for the protection of children’s rights; it also criticized the fact that the criminal provisions for juvenile offenders are the same as the general criminal procedures and that Turkish law is not compliant with the international principles on special children’s legislation.¹⁹⁷

C. Children and Penal Mediation

According to the Council of Europe’s “Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in

¹⁹³ Haydar Erol, YENİ TÜRK CEZA KANUNU [NEW TURKISH CRIMINAL LAW] 161 (Yayın 2005).

¹⁹⁴ İzzet Özgenç, TÜRK CEZA HUKUKU MEVZUATI [TURKISH CRIMINAL LAW ACT] 141 (Seçkin 2007).

¹⁹⁵ Law 5271, promulgated in Turkish Official Gazette Nr. 25673, December 17, 2004.

¹⁹⁶ Law 5275, promulgated in Turkish Official Gazette Nr. 25685, December 29, 2005.

¹⁹⁷ Özbek, *supra* note 190, at 464.

Penal Matters,” “member states should recognize the importance of supporting and protecting minors during their participation in the mediation process by the establishment of adequate safeguards and procedural guarantees.”¹⁹⁸

The procedures of investigation and prosecution for children induced to crime have been laid down in the Child Protection Law (starting with Article 15) and the Directive on Principles and Procedures for Implementing the Child Protection Law.

Investigation of children induced to crime should be handled by the public prosecutors assigned to the children’s bureau. For urgent cases, it may be handled by other public prosecutors.

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

Children taken into police custody must be kept at the juvenile unit of the police. Where there is no juvenile unit, they must be kept separate from adults. Where children commit offenses in conjunction with adults, the police officers must prepare separate files for the children; the investigation and prosecution of the adults and children must be carried out separately.

Children induced to crime may not be restrained by chains, handcuffs or similar devices. However, if necessary, the police shall take necessary measures to prevent the escape of the child or prevent danger to the child’s or anyone 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 time as upper limit. Accordingly, children aged 15 to 18 may be placed under arrest.

Mediation in our country for children induced to crime is exercised within the framework of the Criminal Procedure Code (Article 253), the Child Protection Law (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 Child Protection Law provides that where the law is silent, the provisions of the Criminal Procedures Code, Turkish Civil Code, Civil

¹⁹⁸ European Commission for the Efficiency of Justice, *supra* note 23, Sec. 1.8, at 32.

Procedure Code and the Social Services and Child Protection Agency Law¹⁹⁹ shall apply.

1. Requirement for Criminal Liability for Mediation

Mediation requires the existence of a criminal investigation being carried out or that may be carried 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 those who have not sufficiently developed the ability to grasp the legal meaning and consequences of their acts or direct their behaviors have no criminal liability.²⁰⁰

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.²⁰¹ 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 the legal will to mediate and obligate themselves to restorative measures. Therefore, mediation is possible only after the reports regarding 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 have been received and such reports find that the children are capable of grasping the meaning and consequences of their acts.²⁰²

Because Article 24 of the Child Protection Law has been amended, this situation calls for separate review.

2. Mediation according to the Child Protection Law

Article 24 of the Child Protection Law had the following provision before amendment:

(1) Mediation with respect to children induced to crime shall be applied for offenses that are dependent on complaint for investigation and prosecution and 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.

¹⁹⁹ Law 2828, May 24, 1983, promulgated in Official Gazette No. 18059, 27 May 1983.

²⁰⁰ Turkish Penal Code, art. 31, 33.

²⁰¹ Kaymaz and Gökcan, *supra* note 9, at 142; Yusuf Solmaz Balo, TEORİ VE UYGULAMADA ÇOCUK CEZA HUKUKU [JUVENILE CRIMINAL LAW IN THEORY AND PRACTICE] 375 (Adalet, 2005).

²⁰² Kaymaz and Gökcan, *supra* note 9, at 142.

(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.²⁰³

This Directive held a wide scope of mediation for children.²⁰⁴ In practice, the rule which is more favorable as of the date of offense is used.²⁰⁵

3. Situation After Amendment

Article 41 of Amending Law 5560 and Article 24 of the Child Protection Law have been amended to be “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 beginning in Article 253 of the CPC for children.

While the form of Article 253 before amendment did not explicitly specify to whom the mediation proposal would be made with respect to 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. For the most part, the mediation proposal was made to children where the children induced to crime were deemed to have penal capacity.

CPC Article 253.4, as amended, provides 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 doubt on the issue. Further, a similar provision was placed in Article 8.2 of the Mediation Directive, so that the 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

²⁰³ Law 5560, promulgated in Turkish Official Gazette Nr. 26381, 19 December 2006.

²⁰⁴ Erol Karaaslan, *Ceza Yargılamasında Uzlaşma [Conciliation in Criminal Litigation]*, 29 ADALET DERGİSİ [JOURNAL OF JUSTICE] 303 (2007).

²⁰⁵ Kaymaz and Gökcan, *supra* note 9, at 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...” Yargıtay Case 2006/7515, Decision 2007/4198 (3rd Crim., 30 May 2007).

recognized that the person may deputize an attorney or a defense counselor to express 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.²⁰⁶ In the absence of sufficient grounds, the decision of no prosecution is required, thus, mediation shall not be sought.

Mediation negotiations shall be carried on confidentially.²⁰⁷ Where one or both parties are children, confidentiality is more important. It is because, while a court trial for an adult is public, mediation negotiations are held confidential in general, so that it is more important that mediation negotiations must be held confidential for children considering that their trial would also be held confidential.

Confidentiality is required for two reasons. First, confidentiality is required so that an effective exchange of information can 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 a conventional criminal trial. Thus, the information disclosed serves as a basis for a 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 with the principle of public trials (trials held in public) prevalent in the conventional criminal trials and emphasizes the “special characteristic” of mediation.²⁰⁸

The suspect, victim, legal representative, defense counselor and attorneys may participate in the mediation negotiations. Where a suspect, victim, legal representative, defense counselor or attorney does not participate in the mediation negotiations, this means that they have not accepted mediation.²⁰⁹

4. The Effect of Restriction and Incapacity on Mediation

a. Adulthood, Capacity to Discern, Capacity to Act, Minors and Restricted Having Capacity to Discern and Legal Representatives in Civil Code

²⁰⁶ Directive, art. 8.2.

²⁰⁷ CPC, art. 253.13.

²⁰⁸ Paul R. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System-An Overview and Legal Analysis*, 29 AM. U. L. REV. 17, 72 (1979); Committee of Experts on Mediation in Penal Matters, *supra* note 2, at 21; Özbek, *supra* note 11, at 149; Kaymaz and Gökcan, *supra* note 9, at 186; Çetintürk, *supra* note 30, at 531; Şahin, *supra* note 7, at 247.

²⁰⁹ CPC, art. 253.13.

According to the Turkish Civil Code,²¹⁰ (*Türk Medenî Kanunu*) not every adult person having capacity to discern and not otherwise restricted²¹¹ has the capacity to act.²¹² Adulthood starts upon the completion of eighteen years of age unless earlier marriage makes a person an adult.²¹³ A minor of aged fifteen or above may be made an adult by the court upon his wish and the consent of his custodian.²¹⁴ 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 has the capacity to discern according to this Code.²¹⁵ Those lacking capacity to discern, minors and those restricted have no capacity to act.²¹⁶

Without prejudice to cases specifically excepted in the law, acts of those lacking capacity to discern shall not have legal effect.²¹⁷ Minors and those restricted who have capacity to discern may not assume obligations by their own acts unless consent is obtained from their legal representatives. This consent is not required for gratuitous acquisition and exercise of strictly personal rights. Minors and those restricted who have capacity to discern are liable for their own torts.²¹⁸ 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, starting with Article 470.²¹⁹

²¹⁰ Law 4721, promulgated in Turkish Official Gazette No. 24607, 8 December 2001.

²¹¹ Under certain conditions, a real person may be interdicted, which means to be put under guardianship. Legal grounds for interdiction are; minority (Turkish Civil Code, art. 404), diseased in mind or weakness of the mind (Turkish Civil Code, art. 405), habitual drunkenness, wasteful expenditure or bad treatment of assets and personality (Turkish Civil Code, art. 406), imprisonment over one year (Turkish Civil Code, art. 407) and voluntary interdiction (Turkish Civil Code, art. 408).

²¹² See Turkish Civil Code, art. 10.

²¹³ See *id.*, art. 11.

²¹⁴ See *id.*, art. 12.

²¹⁵ See *id.*, art. 12.

²¹⁶ See *id.*, art. 14.

²¹⁷ See *id.*, art. 15.

²¹⁸ See *id.*, art. 16.

²¹⁹“Accordingly, any minor not under custodianship shall be taken under guardianship.” Turkish Civil Code, art. 404.1. “Guardianship of 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 of a person restricted due to conviction to imprisonment shall cease automatically upon

b. Minors' Power of Complaint and Mediation

There exists no rule in the Turkish Penal Code or in the Criminal Procedure Code regarding the power of complaint for minors. However, the matter has been clarified by court verdicts under the Civil Code.

According to Articles 31.1 and 33 of the Turkish Penal Code, children below age 12 and deaf and mute children below age 15 at the time of committing an 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 not sufficiently developed the ability to grasp the legal meaning and consequences of their acts or direct their behaviors, also 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 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.²²⁰

The High Court of Appeals has held that minors who have capacity to discern and are victimized by crime have the right to sue and complain and if such minors do not exercise such powers, their legal representatives may step in and exercise the power to complain in order to protect the minor's interests.²²¹ 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.²²² In some

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, 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.

²²⁰ Kaymaz and Gökcan, *supra* note 9, at 110.

²²¹ Yargıtay Reconciliation Opinion, 14/9, 15 April 1942.

²²² Kaymaz and Gökcan, *supra* note 9, at 114-15.

decisions of the High Court of Appeals, the will of the minor having capacity to discern was taken as the basis for withdrawing a complaint.²²³

The second sentence of CPC Article 253.4 provides that “[i]f the suspect or the victim is a minor, the mediation proposal shall be made to his legal representative.” Accordingly, if a child induced to 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 complain, he is not granted the power to agree to mediation. Here it is understood that the legislature wished to protect minors who were thought of not as having sufficient ability to grasp, but not capable of grasping the meaning and consequences of mediation sufficiently based on the provision in Article 16 of the Civil Code that “[m]inors 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 Article 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.

5. Death of Minor Victimized by an Offense

For offenses that are dependent on complaint for investigation and prosecution, if the minor who has the capacity to discern dies before the lapse of time for the complaint and before he has exercised his right to complain, his legal representative may exercise the right to complain on his behalf. 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 died after filing a complaint, the mediation proposal shall be made to the legal representative.

²²³ See, e.g., Yargıtay File 21813, Decision 2007/25898, (2nd Crim., 21 November 2007; Kaymaz and Gökcan, *supra* note 9, at 124, fn 70.

6. Status of Persons of Partial Mental Handicap or Mute

According to the Civil Code, adulthood starts at the completion of eighteen years of age, but marriage prior to that time makes a person an adult.²²⁴ However, since persons with mental illness are recognized as having lessened ability to direct their behavior regarding their acts, they shall be given reduced penalties.²²⁵ The same applies to the deaf and mute. In this respect, pursuant to the provision that “[w]here 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.²²⁶

7. 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.²²⁷ 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.²²⁸

²²⁴ See Turkish Civil Code, art. 11.

²²⁵ Turkish Penal Code, art. 32.2.

²²⁶ CPC, art. 253.4; Kaymaz and Gökcan, *supra* note 9, at 132.

²²⁷ Kaymaz and Gökcan, *supra* note 9, at 114.

²²⁸ Yargıtay File 2716, Decision 2006/18388 (2nd Crim., Nr. 16 November 2006).

8. Can a Mediation Proposal Be Made to Legal Representative Where a Victim Minor Having Capacity to Discern Withdraws the 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 the complaint, permission, claim or decision for each offense, and refer to the relevant legislation. In situations where a criminal trial could not materialize, the provisions of mediation may not be applied.²²⁹

However, if the practice of High Court of Appeals 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 High Court of Appeals after the promulgation of the CPC, the will of the minor having the capacity to discern is valued with respect to 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 High Court of Appeals does not change its opinion, it is possible to conclude the case without mediation upon the withdrawal of complaint by the minor having the capacity to discern.²³⁰

Upon withdrawal of a complaint in the case of an offense dependent on complaint, the precondition to investigation and prosecution ceases to exist;

²²⁹ Kaymaz and Gökcan, *supra* note 9, at 104.

²³⁰ See, e.g., “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.” Yargıtay File 2007/1487, Decision 2007/7094 (2nd Crim., 17 May 2007).

therefore the case must not be prosecuted or must be dismissed. For an offense not dependent on complaint, withdrawal shall not mean settlement. This is because these two situations are different by nature and consequences. The opinions of the High Court of Appeals follow this line²³¹.

9. Impossibility to Make a Mediation Proposal to Defense Counselors or Attorneys of Minors

Since the law provides that a 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.²³²

The provision of CPC Article 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 that 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 minor status or restriction. On the other hand, it is possible that the defense counselor or attorney of 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 High Court of Appeals declared that it is contrary to

²³¹ "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." Yargıtay File 785, Decision 785/1729 (of the 4th Crim., 19 February 2007; "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." Yargıtay File 2849, Decision 2007/10172 (2nd Crim., 04 June 2007).

²³² "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" Yargıtay File 2007/777 Decision 2007/4908 (2nd Crim., 04 April 2007).

law to fail to obtain statements from the attorneys that the attorneys are empowered to make a statement on the mediation.²³³

10. 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 any person who is included under the category of “Cases requiring guardianship” but not placed under guardianship or restricted because such state is not known (e.g., drunkard, wasteful, etc.). In such a case then the mediation proposal should be made to the guardian if the person is placed under guardianship, or to himself if not.²³⁴ The provision in Article 8 of the Directive that “[t]he 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.

11. 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 Article 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 agreement has been made 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 without the consent of their legal representatives,” the final sentence provides that “[t]his 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 a decision of ‘no prosecution’ is returned as a result of mediation without incurring any financial burden but requires only an apology; a lawsuit of indemnity cannot be filed based on the investigated crime and the lawsuit if any is waived²³⁵

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).

²³³ Yargıtay File 461, Decision 2007/8504 (2nd Crim., 11 June 2007); Kaymaz and Gökcan, *supra* note 9, at 170, fn 8.

²³⁴ United Nations Development Program, *supra* note 28, at 68.

²³⁵ *Id.*; CPC, art. 253.19.

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.²³⁶

12. Can Police Officers Propose Mediation to Children Induced to Crime?

A mediation proposal may be made to the parties by police officers 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 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, 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 a request from the public prosecutor or the judge.²³⁷

13. Validity of a Mediation Proposal Made by Police Officers

The declaration of the free will of the parties to mediate at the police station is a valid declaration. All settlements without financial burden at the police station must be accepted because Article 253.17 of the provides that “[i]f the public prosecutor decides that the mediation is based on the free will of the parties and the obligation complies with the laws, he shall sign and seal the report or the document and place it in the investigation file.” Accordingly, what is important is that the public prosecutor (or the judge in the prosecution phase) decides that “the mediation is based on the free will 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.

14. Persons Participating in Mediation Process

It would be useful to obtain a social review report, both for child offenders and child victims, before the start of the mediation. The participation of social workers and psychologists must be ensured to the maximum extent possible. It is useful that the parents of minor 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 special or technical knowledge, it should be possible that the specialists (such as financial advisers, accountant, or physicians) can participate in the mediation negotiations upon the agreement of the parties and the approval of the public prosecutor in order to facilitate negotiations.

²³⁶ Kaymaz and Gökcan, *supra* note 9, at 131-32.

²³⁷ United Nations Development Program, *supra* note 28, at 69; Balo, *supra* note 202, at 375.

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

Article 15 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) provides that “[t]hroughout 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 have been made to the CPC, the practice of penal mediation is still very limited. One of the main reasons for this situation is the lack of education and consciousness. There are no 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 organizations like victim support programs which will provide mediation service. Because of this serious impediment, penal mediation has not been used sufficiently in practice.²³⁸

Extensive standards and guidelines for the training of mediators should be developed in the Turkish criminal law system and mediators must have the necessary qualifications and training on mediation techniques. The mediators should preferably possess good all-round knowledge.²³⁹

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.²⁴⁰ In addition, the training should provide for a good

²³⁸ Luca Perilli, FOURTH ADVISORY VISIT REPORT ON THE CRIMINAL JUDICIAL SYSTEM 20 (Ankara, 2009).

²³⁹ See European Commission for the Efficiency of Justice, *supra* note 23, Sec. 1.7, at 32.

²⁴⁰ Frank E. A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL ED. 229, 229 (1984); Mustafa Özbek, *Alternatif Uyuşmazlık Çözüm Yollarına Genel Bir Bakış [An Overview to Alternative Dispute Resolution Procedures]*, 2004 GALATASARAY ÜNİVERSİTESİ HUKUK DERGİSİ [GALATASARAY UNIVERSITY LAW REVIEW] 261, 266 (2004).

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, the Ministry of Justice of the Republic of Turkey is planning to increase the efficiency of the penal mediation system in criminal procedure within the scope of its Judicial Reform Strategy.²⁴¹ Penal mediation is one of the novelties in criminal practice brought about by the new criminal justice system. According to the Judicial Reform Strategy, it is important to enhance the applicability and efficiency of provisions concerning penal mediation. Within the scope of the Judicial Reform Strategy, it has been set as a target that all aspects of penal mediation in criminal law will be reconsidered, problems will be determined and the necessary measures will be taken to solve the problems.²⁴² Within the scope of this purpose, raising public awareness with regard to penal mediation is of paramount importance. For this reason, the Judicial Reform Strategy provides that “[a]ctivities 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.”²⁴³

²⁴¹ Turkish Ministry of Justice, JUDICIAL REFORM STRATEGY 46 (2009).

²⁴² See European Commission for the Efficiency of Justice, *supra* note 23, Sec. 1.1, at 29.

²⁴³ Turkish Ministry of Justice, *supra* note 242, at 49.

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