



Türkiye Cumhuriyeti  
Adalet Bakanlığı

Stephen A. Mayo  
ISDLS Executive Director  
The Institute for the Study  
and Development of Legal Systems  
San Francisco, California, USA

Yours sincerely,

Fahri KASIRGA Under  
Secretary Ministry of  
Justice of the Republic  
of Turkey

Ankara, 21 December 2005

Dear Mr. Mayo,

As we decided at the meeting which took place in Ankara, for the first step of your study relating to the solving the problems of mediation in Turkish Criminal Law;

A Commission was established by Ministerial authorisation for discussing the implementation and problems of the mediation which is regulated at the eighth paragraph of article 73 of Turkish Criminal Law No: 5237 which entered into force on June 1, 2005, having the title of "The crimes whose investigation are due to a complaint, mediation" and the article 253 of Criminal Procedural Law No:5271 having the title of "mediation" and the article 24 of Children Protection Law No: 5395 which came into force on July 15, 2005.

The Commission has collected and summarized the ideas of some Chief Public Prosecutors Offices concerning the determining of the problems in the implementation of mediation and prepared a report after its meetings.

I am sending the enclosed translation of the report of the Commission.

## COMMISSION REPORT

The Commission which was established upon the "Ministerial Authorisation" dated 14 November 2005, composed of the following members

- 1.Mr.Ahmet Cemal GÜRGEN-Inspector of Justice  
from Board of Inspection
- 2.Mr.Galip Tuncay TUTAR- Deputy Director General  
Mr.M.Yılmaz KÜÇÜK -Head of the Department  
Mr.Seyfullah ÇAKMAK Public Prosecutor from  
General Directorate of Penal Affairs
- 3.Mr.Akın ÇAKIN-Deputy Director General  
Mrs.Berrak YILMAZ -Investigation Judge  
from General Directorate of Legislation
- 4.Mr.Ahmet ÖZGÜNGÖR- Investigation Judge  
from General Directorate of Personnel
- 5.Mr.Sinan YILMAZ-Investigation Judge from  
General Directorate of European Union
- 6.Mr.Şener DALYAN- Investigation Judge  
from General Directorate of International Law and  
Foreign Affairs
- 7.Mr.M.E.Seçkin ARIKAN-Lawyer  
Mr.Mustafa ÖZBEK-Lawyer from  
Ankara Bar
- 8.Mr.Ahmet Berke -Deputy Chief Public Prosecutor  
Mr.Adil KUBAT- Public Prosecutor  
Mrs. Uğurcan Sevinç KIZILOGLU- Public Prosecutor  
from Ankara Chief Prosecutors Office

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9-Mr.Hasan Tahsin GÖKCAN- - Investigation Judge  
from the First Department of the Supreme Court of  
Appeal

and was delegated for the discussion of the  
practice of the conciliation mechanism which is a  
new concept in our Legislation and being regulated  
at the eighth paragraph of article 73 of Turkish  
Criminal Law No:5237 having the sub- title of "The  
Crimes Whose Investigation are Due to a Complaint,  
Conciliation" and at the article 253 of Criminal  
Procedure Law No.5271 having the sub-title of  
"Conciliation" and at the Article 24 of "Law on  
the Protection of the Children" No 5395 which has  
entered into force at 15 July 2005 and for the  
determination of the practical problems; at it's  
meetings on the dates 16 November and 2 December  
2005, taking into consideration of the problems  
arising from the practice and the reached solution  
proposals for them upon the letters sent to the  
16(sixteen) Chief Public Prosecutors Office, under

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the Secretariat of General Directorate of Penal Affairs; has listed the related legal texts and made solution proposals for the following problems that has been determined.

### **LEGAL TEXTS**

The eighth paragraph of article 73 of **Turkish Criminal Law No:5237** having the sub- title of "The Crimes Whose Investigation are Due to a Complaint, Conciliation" is as follows:

"in case of crimes whose sufferers are real persons or legal persons of private law and if the investigation of the related erime is dependant to a complaint, the public trial shall not be suited and the case shall be discontinued, under the condition of the perpetrator' s

acceptance of his erime and payment of either ali

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of, or the considerably important part of the damage he had caused."

The art icle 2 53 of **Criminal Procedure Law No. 5271** is as follows:

(1) Depending on the circumstances of the investigation, in cases where Law allows conciliation, Public prosecutor may invite the perpetrator within the procedure stated in this Law and ask him whether he accepts his liability arising from the crime, or not.

(2) in case of perpetrator's acceptance of his crime and payment of either all of, or the considerably important part of the damage he had caused, this will be notified to the sufferer or to his attorney if he has or to his legal representative.

(3) If the sufferer with his free own will, declares to accept the conciliation when

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damage has been ceased totally or the most important part of it has been ceased, the investigation shall not be continued. (4)The public prosecutor shall ask the Bar to appoint one or more lawyers to manage the conciliation between the perpetrator and the sufferer and act as a conciliator in the solution of the conflict, in case the perpetrator and the sufferer can not agree on a particular lawyer. (5)The conciliator shall conclude the conflict in 30 days starting from the date of appeal, at the latest. For only önce, the public prosecutor may extend this period for another 30 days. The prescription shall be interrupted in the period of conciliation.

(6)The negotiations for the conciliation shall be kept confidential. Unless the parties agree otherwise, the information, the documents and the

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explanations that are forwarded during the negotiations can not be disclosed later. (7)The conciliator shall submit his report indicating the way of his contribution to the procedure of conciliation to the Public prosecutor in 10 days.

(8)When the damage has ceased in conformity with the conciliation and the expenditures of the conciliation has been paid by the perpetrator, the decision of the "unnecessity of the prosecution" shall be given.

**The Article 254 having the sub-title "Conciliation by the Court" is as follows:**

(1)In case of a started public lawsuit, and if the erime is available for conciliation, in conformity with the conciliation rules that are envisaged in article 253, the procedure can be executed by the Court as well.

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(2) in case conciliation occurs, the decision of the "discontinuation of the case "shall be given.

**The Article 255 having the sub-title "Conciliation When there is More Than One Perpetrator"** (1) In the crimes which are executed by more than one person, regardless of the relation of joint offense between them only the person who agreed conciliation shall benefit from it.

**The fourth paragraph of the Article 13 of the "Law on Enforcement and the Application Method of the Criminal Procedure Law" No 5320, having the sub-title of "The Fee for Defender, Attorney and Conciliator"** is as follows:

(4) According to the eighth paragraph of the Article 253 of the Criminal Procedure Law, being among the expenditures of conciliation, the fee of the conciliator shall also be indicated separately in the Tariff which has to be determined according

to the first paragraph.

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**The article 24 of "Law on the Protection of the Children" No 5395 is as follows:**

(1) Conciliation related with the children who are driven to erime shall be applied to the crimes whose inspection or investigation are dependant to a complaint, and to the crimes which are executed intentionally but the lower limit of their penalty does not exceed 2 years of prison or fine, and to the imprudent offenses as well.

(2) For the children who have not completed the age of fifteen at the execution day of the erime, the lower limit of the penalty which is regulated in the first paragraph, shall be applied as 3 years.

**PROBLEM / PROPOSAL 1-** There is no elarity in the Law whether the Judge or the Public Prosecutor can execute the conciliation or not, where else, this power is granted to the judge and the public  
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rosecutor in the explanatory memorandum of  
the

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article 253 of Criminal Procedure Law. This contradiction has to be corrected. There is no need for the appointment of a conciliator by Bar, when parties have announced their free own will to accept conciliation in the presence of the police, public prosecutor and the judge. Although the conciliation by the judge or the public prosecutor can be regarded as appropriate for the purpose of fastening the finalization of the investigation, as this can result with a questioning of the impartiality of these persons, the judge and the public prosecutor should not execute conciliation.

**PROBLEM / PROPOSAL 2-** The little injury crimes against the upper and the lower parental, the husband/wife and the brother/sister which are executed with arms but the sufferer can be recovered with a simple medical treatment, must be taken into the coverage of conciliation,

with a

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**modification of the last sentence of the Article 86 of the Turkish Criminal Law, as: "in case of the execution of..., for the paragraphs (b) , (c) and (d) regardless of whether there is a complaint or not, the penalty shall be increased in the proportion of H."**

**PROBLEM / PROPOSAL 3- There is no unity in the terminology of Laws. The article 73/8 of Law no 5237 has the expression "the perpetrator who accepts the erime", where else in the first paragraph of the article 253 of Criminal Procedure Law No 5271 the expression of "the perpetrator who accepts the liability arising from the erime", and in the second paragraph of the same article the expression of "the perpetrator who accepts the erime and the payment of either ali of<sub>f</sub> or the considerably important part of the material and the moral damages he had caused" has been used. To**

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bring the condition of the acceptance of the erime is an inappropriate regulation.

in case of the acceptance of the erime, this can result with a worry of the perpetrator about the future, regarding the time when the lawsuit will start, that his acceptance may lead a strong prejudice of the Court that the erime had been executed by him, although the provision of article 253/6 of the Criminal Procedure Law states that "this acceptance can not be regarded as evidence". Also the conciliation at the Court may lead such prejudice on the judge and may cause him to lose his impartiality, may give harm to the conjecture of innocence and it also constitutes a psychological factor that leads the perpetrator to have a negative attitude on conciliation mechanism.

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From the point of view of conscientious responsibility, it is very hard to meet the reactions and criticisms that may arise, in case of acceptance of the accused or the suspected person of the erime, if the public prosecutor decides the unnecessary of the investigation, and the judge decides his innocence.

The suspected or accused person can not take this risk easily as well. Therefore, the condition of the acceptance of the erime of the suspected or accused person must be abolished with a modification. in our opinion, for the success of the conciliation mechanism, the questions whether he wants to pay/ cease the damages arising from his action or not and whether he accepts the conciliation or not, must be forwarded to the

suspected or the accused person. The positive

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answer of the suspected or the accused person must be regarded as adequate.

Again, if the acceptance of the erime will remain as a condition for conciliation, then this case must be regulated as a cause for the rejection of the judge. it is really impossible to remain impartial for a judge, if he knows that the accused person has admitted his guilt.

The danger stili remains, if the file is given to another judge even this danger is not at the same proportion. Although the conciliation documents are confidential and are not subject to diselosure, a copy of them will take place in the case file. The judge who will see them, will learn that the accused person has accepted the erime.

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PROBLEM / PROPOSAL 4- The start of the conciliation procedure with the proposal to the suspected person causes a loss of time and procedure, as this method requires to overcome the difficulties arising from the search of the suspected person and to ask his opinion on conciliation only after the suffered or complaining party had been found and declared his opinion on the conciliation issue. Therefore, the starting point of the procedure must be the suffered or the accused person and the procedure must start either with their demand or regardless of turn, the conciliation offer must be forwarded to both parties at the same time. This can be provided with a modification in the law.

in current circumstances the proposed application

will be against the law, but as it not possible to

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recover it, this shall not be regarded as a cause of abrogation.

PROBLEM / PROPOSAL 5- Taking into account the negative effect of the condition of the acceptance of the crime on the judges and public prosecutors, the execution of the conciliation procedure by a private office is important from the aspect of the conjecture of innocence and the impartiality principle as well. To avoid such perceptions on the public prosecutors and judges, private offices chained to public prosecutors can be established at the Administration of Justice. Such an office will meet the requirement of an impartial place where the parties can make negotiations for conciliation. As a method to be adopted, public prosecutor can send the file to this private office and want this office to apply the related provisions of conciliation, when a complaint

under

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the coverage of conciliation has been submitted to Public Prosecution Office, in case the conflict can not be solved by conciliation, the owner of the complaint should submit a complaint petition to the public prosecutor by adding a document issued by this private office, indicating that the conflict has remained unsolved by conciliation. As the documents regarding conciliation negotiations must not be available in the investigation files, the preservation of such documents at the archives of conciliation offices will be useful from this point of view as well.

Fort the avoidance of creating new conflicts, and for to facilitate the necessary security measures, the negotiations must be made at the House of Justice and an office must be established at every House of Justice.

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PROBLEM / PROPOSAL 6- A provision on the obligation of informing both the perpetrator and the sufferer about the results of the conciliation must take place in the Law. With this provision, the perpetrator and the sufferer must be informed in detail on the crime<sup>s</sup> being in the coverage of conciliation, on what the conciliation provisions are and the results of being able and unable to reach conciliation and all these must be indicated in a written protocol.

PROBLEM / PROPOSAL 7- The procedure regarding the parties' agreement on a conciliator, in case of their disagreement on the conciliator, the procedure for the public prosecutor to appoint a conciliator must be regulated in a more accurate and clear way. This issue is not comprehensible in the current regulation. The public prosecutor must

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have the right to appoint  
a lawyer who will act as  
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the conciliator, even in ca.se parties agree on this issue. However, a notification to Bar must be sent.

**PROBLEM / PROPOSAL 8-** The issue of whether the acceptance of the mission by the lawyer who is appointed as conciliator will be obligatory or not, should be regulated in both Advocacy Law and Criminal Procedure Law. The conciliator who has a temporary excuse must have the right to ask the Bar for his exemption from the duty.

**PROBLEM / PROPOSAL 9-** The rejection or the objection to the appointed conciliator from the Bar who is appointed by the Public Prosecutor must be regulated. Conciliator' s work should be regarded as public service and therefore in the law there must be provisions on it's mandatory nature but there must be a possibility

for

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abstinence. in practice the problem can be solved with a reference to the abstinence causes for the judge.

PROBLEM / PROPOSAL 10- What is Commission' s opinion on the following proposal?

"A regulation is necessary also for the power of the lawyer appointed, in accordance with place. From our point of view, in case the parties agree on a particular lawyer, to which Bar he is registered must not be taken into account. However for the conciliator to be appointed with the initiative of the judge, Bar of the investigation place should be authorized."

PROBLEM / PROPOSAL 11- The conditions for the appointed lawyer who will act as conciliator, his being very well informed about the conflict should be supplied, in order to have his duty

fulfilled

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profoundly. For this reason he must be provided with the chance to examine the file, at least in the same conditions with the parties or their attorneys. Under the restrictions of the article 157 of Criminal Procedure Law, the conciliator must also have the right to examine the file and the right to have copies.

**PROBLEM / PROPOSAL 12-** There are hesitations on the issue that, whether some crimes are subject to conciliation or not, because of the inappropriate regulation of article 167 of Turkish Criminal Law. This fact must be clarified. The article 167 of Turkish Criminal Law is as follows:

(1) "Except pillage and aualified pillage, the crimes regulated in this chapter (...)." "

(2) "in case of these crimes being executed against one of the husband/wife who are under the decision of living separately,

against

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brother/sister who doesn't live in the same residence, against uncle, aunt, nephew and secondary relatives who live in the same residence, the penalty of the relative concerned shall be reduced in the proportion of *H.*"

The sufferer of the crimes in which there is a reference to articles 141-167 in this article, is for some crimes public and for some crimes the sufferer is everyone who lives in the society. For example article 152/1-a regulates the crime of stealing the goods in public places, buildings and the other goods allocated to the public establishments, enterprises, things allocated for public use. According to Article 73/8 of Turkish Criminal Law only the crimes against real persons and private legal persons are subject to conciliation. Therefore, the general reference

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be regulated by Law, Deputy Public Prosecutor Mr. Ahmet BERKE has the opinion that there is not any problem, as there is not any particular reference to the theft crimes against the indicated persons, although the reference in the Law is general.

**PROBLEM / PROPOSAL 13-** in case of the theft of a bung of a barrage or a water wall, belonging to a private person, which prevents the flow of the water, many people who live in that region may die or get injured because of the flood. This situation is accepted as a erime which causes general danger in article 171/1-b. Now in this case, will the conciliation provisions be applied to the person who steals the bung of the barrage or the water wall? If yes, what will be accepted as the damage to be paid/recovered by the thief? Our personal opinion is that, in case of such a erime, as the sufferer will not only be the

owner

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of the stolen material, and many unknown number of people's life, health and belongings will be under danger, this erime should not be considered among the crimes that are subject to conciliation.

On this issue Deputy Public Prosecutor Mr. Ahmet BERKE has the opinion that the conciliation can not be applied in such crimes and a new regulation

**I. necessa<sub>ry</sub>.** ^

**PROBLEM / PROPOSAL 14-** The term "suspected" must be preferred in order to reach unity of terminology in Law, instead of the term "perpetrator" used in article 253 of Criminal Procedure Law.

**PROBLEM / PROPOSAL 15-** There are legal obstacles against some issues. Whether the poliçe should be authorized for conciliation, or not; whether the current application facilitates this, or not;

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whether the public prosecutors can submit written orders to police, or not... The regulation in the first paragraph of the article 253 of Criminal Procedure Law does not allow it. in this regulation, there is clarity on the issue that the proposal for conciliation must come from public prosecutor. After receiving the file, the public prosecutor should determine the nature of the crime, i. e, whether it is in the scope of conciliation, or not. If he determines so, then he will make the proposal for conciliation. This will take some time and parties will have the chance to think once more, in a cold-blooded manner and this can help conciliation. However, the application of the proposal will also be useful in praetice.

PROBLEM / PROPOSAL 16- in crimes of sexual attack or sexual harassing which are subject to conciliation, taking into account the values of

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the public, there is not any legal objection for the parties to choose conciliation to solve the conflict, as the values may vary from person to person and conciliation is a voluntary process.

PROBLEM / PROPOSAL 17- with the appearance of long term conciliation protocols, the questions on parties' agreement on the payment of the damage with installments, the validity of such an agreement, if accepted valid, the possibility for the public prosecutor to postpone his decision to end of the period, may rise. From the wording of the article 253/8 of Criminal Procedure Law it can be seen that when damage is paid/or being ceased and the expenditures of conciliation has been paid by the perpetrator, the decision for the unnecessary of the investigation should be given. However in article 254/2 of the same law, the

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occurrence of  
conciliation during the  
Court's

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procedure is regarded as a sufficient reason for the discontinuation of the case. These two articles are in controversy. At the explanatory memorandum of article 253 there is a provision such as: "For a crime subject to conciliation, if the public prosecutor in conformity with the article 253 starts the lawsuit without any further operation, the judge executes all the procedure that public prosecutor should do and decides the abolishment of the case, under the condition that the damage is paid according to the article. in this case all the conciliation expenditures have to be paid by the perpetrator and the decision of abolishment of the case shall not be given." Although with an interpretation of the wording of the law in a narrow sense, it can seem possible for the public prosecutors to execute their duty during the examining phase, but this will increase

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the volume of their  
work and will cause  
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accumulation of files. Therefore, the examining should also be completed at the investigation phase. With a modification of Law the suspension of this issue must be avoided.

**PROBLEM / PROPOSAL 18-** in the Directive which was adopted with the decision of the Union of Bars of Turkey, dated 4 September 225 and no 394-2 the payment of conciliation expenditures with 250 YTL in advance, to the account of Bar by the perpetrator and then the commencement of the conciliation procedure is envisaged, as an obligation. As explained above, we can state that the conciliation mechanism does not work well because of the perpetrators acceptance of the erime is regarded as a precondition for conciliation and because of the requisition of perpetrator's payment of conciliation expenditures

in advance.

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in article 253 of Criminal Procedure Law, there is a clear provision for perpetrator's payment obligation of conciliation expenditures, but there is no clarity in the issue of the payments being in advance or in installments. Besides there isn't any provision in the legal arrangements about that if paid in advance, would this money be deposited for the account of the bar or a bank account which will be opened by the Office of the Chief Public Prosecutor, The guideline of the Union of Bars of Turkey is not binding for the Judicial authorities. The opinions of the General Directorate of Legislation and General Directorate of Criminal Affairs is collecting of the money from the perpetrator in advance and depositing into a bank account which will be opened by the Office of the Chief Public Prosecutor.

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On the other hand, the perpetrator shouldn't pay the expenditures if the conciliation fails. Because, the sufferer who wants the perpetrator to bear the loss does not accept the conciliation proposal and cause the expenditures to be run and as the result of the trying process, the perpetrator is convicted or acquitted. If the perpetrator is convicted he pays double expenditures. If he gets acquitted the amount he paid becomes unfair from his point of view. Because of this, it is thought that in case of fail, the conciliation expenses should not be paid by the perpetrator.

it is possible to solve the problem by the adding of "Conciliator" expression to the first paragraph of Article 13 of Law number 5320.

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in the 26th Meeting for the Justice Ministers, it is emphasized on that conciliation expenses are not paid by the perpetrator in many countries and met by the public sources.

There isn't any clarity in the law about that the discretion and security measures for the discussions of the meeting and the place where conciliation meetings will be made will be provided by the Office of the Chief Public Prosecutor. From the view of application, the Offices of the Public Prosecutors do not have any obligations. By the arrangement of the regulation this problem can be solved. The guideline of the Union of Bars of Turkey is not binding for the Offices of the Chief Public Prosecutors. Offices of the Chief Public Prosecutors have to appreciate these demands made by the bars, by the evaluation of them according to the physical environment and

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practicability of the judicial courts. Although it is possible to provide the discretion by the allocation of a private room, the conciliator is always obliged to consider the discretion. If feels an infirmity of security, it is always possible for the conciliator to apply the police authorities regarding the preventive police duty for the provision of the security.

**PROBLEM / PROPOSAL 19-** it is not required to examine the matter of paying the entire or a major portion of the damage mentioned in the law, spontaneously by the Office of the Chief Public Prosecutor, in the application of the conciliation. The declaration of the sufferer and the report is enough.

**PROBLEM / PROPOSAL 20-** it has to be provided that,  
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view of that a major portion of the  
crimes

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subjected to conciliation being dependant on the complaint and the investigations being resulted with the withdrawal of the complaint in the application, in spite of this criterion, which crimes will be subjected to conciliation has to be determined by the legislator and the conciliation mechanism be applied by covering of the situations of the commitment of the economical crimes within certain limits, which are not subjected to complaint and crimes subjected to complaint against the State.

Although it is thought to be suitable to expand its scope when the conciliation mechanism becomes an establishment which is effectively accepted and working, it is in the opinion of that the proposal has to be considered in the law amendment in the long term in view of the resulting of the

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investigations with the withdrawal of the complaints in the application.

Especially regarding the children, more than paying money, arrangements related with being subjected to some obligations have to be made and also arrangements directed to that conciliation can be applied in the crimes whose sufferer is not a certain person such as the crimes committed against the public.

PROBLEM / PROPOSAL 21- in the investigations, if the sufferer does not show up within a certain time upon the notification of the invitation, it can be useful for the provision of convenience and speed in the application not to give possibility for the extension by sending an explanatory invitation in the form of that the sufferer did not accept conciliation and besides an

arrangement

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in direction of prohibiting this is not found in the legislation. This problem can be solved with the regulation.

PROBLEM / PROPOSAL 22- Regarding the matter of if confessing of the perpetrator of some of the events and the erime could be used as an evidence in the civil court because of the possible disagreement which could take place between the parties in the future, it is thought to be useful if the conciliation is not realized, a clear arrangement has to be made in the regulation about that executive proceedings will not be made and a case will not be litigated by the civil court for the portion of the damage which is not made good, after the conciliation is provided between the perpetrator and the sufferer because, although it is stated in the Article 253/6 of Criminal

procedure Code that this confession can not be

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accepted as an against evidence in the case, it is not clear if the "case" term covers civil case or not.

PROBLEM / PROPOSAL 23- The conciliation has to be fixed with a protocol. This protocol must carry the elements which the decision contains from the view of application unity. The conditions and elements which have to be found in the regulation as minimum should be clearly stated. The information which has to take place in the protocol and the shape will be settled in time. But, for the development of a certain standard, Directive of the Union of Bars of Turkey should be taken as the base.

PROBLEM / PROPOSAL 24- The question of "Could this mechanism be functionalized by not limiting the

conciliator with the lawyer, suitable with the  
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establishment aim and the soul of the conciliation mechanism, other than the lawyers, leading the appointment of social service experts, account experts, retired chief public prosecutors, managers of the establishments in the nature of public organizations and the similar persons and the persons whom the parties can come to an agreement on and by making the lists of the persons who could be charged for the conciliation, by the justice commissions as it is with the expert lists when needed?" may come up,

But, for the establishment of the conciliation which is introduced as a new mechanism, it is appropriate for the lawyers who had legal education and have a certain professional discipline, order and a professional institution, to undertake the conciliation, Ali the countries where the conciliation application is settled in

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an advanced way, started for the application in a similar way and later they made possible for the other profession members to be conciliators. in spite of this, in the application, a majör portion of the conciliators consist of the jurists.

Moreover, although many problems of the conciliation mechanism which just started to be applied newly, are so obvious, the basic problems sourcing from the lawyers being the conciliators are not experienced.

This is a situation which requires the law amendment. it is in the opinion of that first of ali, the current application is needed to be stabilized.

Investigation judge Şener DALYAN, from the General Directorate of International Law and Foreign

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Affairs, has the opposite opinion with his idea of" The legal arrangement authorized only the lawyers in this matter. But, I think that the necessity of conciliator's being a lawyer is not needed. As a matter of fact, in the 22nd Article of Recommendation of European Council Ministerial Committee, dated 15.09.1999 and number 99, with the topic of "Conciliation on the Criminal Matters", it is emphasized on that the conciliators have to be selected from ali the sections of the community. So, the person to be selected can be a lawyer or could be a person who has influence in that county and known by everybody, a mayor or village mouktar."

**PROBLEM / PROPOSAL 25-** Although there isn't a clear provision about the matter of when the conciliation proposal can be made, Article 253/1 of Criminal Procedure Law and Article 73/8 of

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Turkish Penal law used the expression of "... according to the state of the investigation". So, conciliation proposal can not be made without having any evidences. in order to make the conciliation proposal the suspicion has to be reached to reasonable degree-  
reasonable  
suspicion

**PROBLEM / PROPOSAL 26-** Shortening of the conciliation term which is arranged by the law and can be extended to a maximum of 70 days, will not be suitable as the terms which will function with the notifications, according to the states of the parties will be the point of issue.

**PROBLEM / PROPOSAL 27-** Especially the matters of how the houseless and the lone suspicious minors will benefit from the conciliation and if the conciliation expenses of these will be borne by

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the state or not, is not clear. As it can not be expected from the suspects who can not pay the conciliation expenses, to indemnify the damage, it is thought that the conciliation expenses be borne by the State but public assistance should also be provided for these people.

**PROBLEM / PROPOSAL 28-** With the opinion of that it can not be thought that the suspect who can not pay the conciliation expenses can indemnify the damages, in case of the legal establishment of a system similar to the compulsory defense payments directed to the meeting of the conciliation expenses by the Union of Bars of Turkey, it is possible to meet the conciliation expenses from the appropriation provided by the Union of Bars of Turkey, by the Ministry of Finance. But in the light of the existing arrangements, it is not possible to meet the conciliation fees

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expenditures by the Turkey Union of Bars. Judicial assistance is only possible regarding the interrogations in the courts.

**PROBLEM / PROPOSAL 29-** in some crimes, especially as the litigation terms which are envisaged in the Article 26 of the Press Law of number 5187 are short and for preventing the prejudice of the rights of the suffered, regarding not to apply the conciliation in these kinds of the crimes or making the conciliation in the form of a legal arrangement or stopping the prescription term starting from the start of the conciliation procedure, conciliation should not be applied in these kinds of crimes or legal arrangement has to be made in the law for not functioning of the final term.

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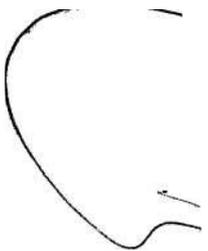
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The procedure where the prescription term stops is not defined in the law. What it is meant by the law with the "conciliation term" is the negotiation term of 30 (or if the term is extended sixty) days in the 5th paragraph of the Article 253. If a term longer than the negotiation term is decided at the end of the conciliation, for making good of the damage of the sufferer, it can be suitable with the aim to accept that prescription is stopped in that term. in order to overcome the hesitation in this matter, by a law amendment, the term when the prescription is stopped should be stated clearly. in our opinion, the prescription term has to stop "on the date when it is decided to appiy for the conciliation". If an agreement is made at the end of the conciliation, the prescription term starts to function again from the date of "making good of the damage according to the agreement", if an agreement could not

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made, from the date of "stating by one of the parties or conciliator that the conciliation is concluded or withdrawn from the conciliation".

**PROBLEM / PROPOSAL 30-** in case the sufferer and the suspect are found in different cities and different judicial boundaries, it is an important problem for the functioning of the mechanism, how the sufferer and the perpetrator will come together, by whom and how will the expenditures which will be required for this, be paid.

**PROBLEM/PROPOSAL 31-** The idea of that as the Child Protection Law number 53 95 expands the conciliation/ it contradicts with the Article 5 of Law number 5237 and it is not possible to apply it before the date of 1.1.2007 is not correct because the law number 5395 became into force before the

Law number 5237.

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**PROBLEM/PROPOSAL 32-** Taking of the crimes within the Child Protection Law which are not subjected to complaint, within the scope of conciliation, from the expression in the Article 24, if the conciliation provisions will be applied or not in the situations where the damaged party is the public, is needed to be discussed.

Application of the conciliation provisions; it is required that the action is dependent on the complaint, the sufferer has to be a real person or corporate person, the sufferer has to complain, conciliation is reached about the matter of the payment of the damage or removal of the suffer, conciliation is dependent on the free will of the parties, conciliation is determined by the Chief Public Prosecutor or the judge, the

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indemnification or the  
expenditures are realized  
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suitable with the conciliation and conciliation expenditures are paid by the perpetrator.

it is thought that upon the provision of "in the situations where there isn't any provision by this law, the provisions of Criminal Procedure Law, Turkish Civil Law, Law of Civil Procedure dated 18.6.1927 and number 1086 and Law of Social Services and Child Protection Agency dated 24.5.1983 and number 2828 are applied.", which takes place in the first paragraph of the Article 42 with the side topic of "Provisions to be applied" of the Child Protection Law number 5395, as there is not any arrangement for the application method of the Article 24 of the mentioned law, and because of the reference made to the Article 253 of Criminal Procedure Law, number 5217, with the side topic of "Conciliation", in the situations where

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damaged party is the public the conciliation provisions can not be applied.

PROBLEM/PROPOSAL 33- As there is not a clear arrangement about what will be made in the situations where the sufferer withdraws his complaint without making any demand or not complaining at ali, because of the crimes committed by the children, in the crimes which are not dependent to complaint, withdrawal of the sufferer from his complaint can not be sufficient. Provisions of conciliation have to be applied as well.

PROBLEM/PROPOSAL 34- As the conciliation negotiations of the child suspect will be required to be made by his legal representative, there is not any provision about this matter both in the Criminal Procedure Law and Child Protection Law.

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it is legally obligatory that the legal representative and defense lawyer has to be present during the conciliation negotiations because according to the arrangement anticipated in the Article 24 of Child Protection Law, as to our Civil Law, the parental right belongs to the father and mother and the children cannot carry out the borrowable procedures. The defense lawyer will defend the rights of the child according to the Article 150/2 of Criminal Procedure Law and the legal representative will make the borrowable procedures.

**PROBLEM/ PROPOSAL 35-** If one of the suspects meet all the damages in the crimes with multiple perpetrators, the investigation should be concluded regarding the other suspects (conciliation spread). The same method should be applied in the crimes with multiple sufferers.

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But, there is an impediment because of the clear provision in the Article 255 of Criminal Procedure Code. in the crimes with the multiple sufferers, ali of the sufferers should accept in a similar way.

**PROBLEM/ PROPOSAL 36-** The conciliation text should be of the documents which will be the base for the judgment enforcement. To be able to be the base for the judgment enforcement for the Conciliation text, can only be possible with the amendment to be made in the Article 38 of Law of Bankruptcy.

in case the conciliation protocol and report is taken among the documents which have the judgment nature mentioned in the Article 38 of Law of Bankruptcy, if the conciliation conditions are not fulfilled, the state of the sufferer and if the conciliation expenditures and Conciliator Lawyer

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fees and expenditures are not paid, the state of the Conciliator lawyer will be strengthened and the creation of the new legal problems will be minimized.

PROBLEM/ PROPOSAL 37- The responsibility of the Conciliator has to be arranged. The rules to be followed by the Conciliator lawyer are determined by the Turkey Union of Bars which is a profession organization in the nature of a public establishment (Article 14 and 15 of the Directive approved by the decision of dated 4..9.2005 and number 394-2). But, it will be more suitable to arrange the rules more detailed by taking care of the EU arrangements. Besides, the conciliator who is a lawyer is also bound by the profession rules and general rules.

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in case the conciliator commits a crime related with this duty, investigation can be made about him according to the Article 58 of Advocacy Law. The necessary procedures regarding the discipline will be carried out by the Bar to which he belongs. Another directive can be prepared for the discipline. Criminal liability can also be arranged as separate.

**PROBLEM/ PROPOSAL 38-** If the conciliation fails, the information and documents obtained during the conciliation stages should be put into the investigation dossier according to the paragraph 253/6 of Criminal Procedure Law. By the forming of special conciliation rooms and archive rooms - these should be kept there or would be given under the responsibility of the conciliator lawyer.

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If the conciliation succeeds and as the investigation or interrogation will be concluded because of this result, the documents have to be protected suitable with the archive regulation within the terms stated in the general provisions.

Besides the above evaluations, it is stated that the problems which are defined below and sent by the Offices of the Chief Public Prosecutors, are the handicaps that hinder the mechanism.

### **PROBLEMS**

1-The regulation is not enacted, The law itself is full of contradictions regarding its technique. This creates difficulty regarding its application.

2-it causes the extension of the investigation from the view of the conciliation procedure.

The work load increased.

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3-Material burdens are encumbered for the perpetrator. 4-The conciliation mechanism caused a significant portion of the investigation documents to be in a bottleneck. 5-in the application, conciliation plays a more engaged role than the investigation procedures related with the erime of intentional murder. 6-There is the problem of infrastrueture (conciliation rooms, conciliation arehive, providing the security, education, informing of the public, ete problems). 7-When there is the conciliation mechanism, this is not appropriate with the social-economical strueture of the community\* 8-it is in the nature of encouraging the child criminality. 9-Limiting the application with the crimes

dependent on the complaints, does not reap

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practical benefits and plays a restrictive role.

10- As the long process causes expenditures, the parties prefer to settle externally and withdraw from the complaint.

11- Any application which resulted with conciliation has not been determined until now or it is very limited.

#### CONCLUSION

The commission completed the duty which was entrusted to them, in the light of the above problems/proposals and it is in the opinion of that for the improvement of the conciliation culture, the mechanism should be functionalized with the training, law and regulation works. The fact of the case is presented for your appreciation. 05.12.2005

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MEMBERS OF THE COMMISSION                      SIGNATURE

Galip Tuncay TUTAR- Deputy Director General, General Directorate of Penal Affairs

Akın ÇAKIN-Deputy Director General, General Directorate of Legislation

M.Yılmaz KÜÇÜK -Head of the Department, General Directorate of Penal Affairs

Seyfullah ÇAKMAK - Investigation Judge, General Directorate of Penal Affairs

Berrak YILMAZ -Investigation Judge, General Directorate of Legislation

Ahmet ÖZGÜNGÖR- Investigation Judge, General Directorate of Personnel

Sinan YILMAZ-Investigation Judge, General Directorate of European Union

Şener DALYAN- Investigation Judge, General Directorate of International Law and Foreign Affairs

Ahmet Berke -Deputy Chief Public Prosecutor, Ankara

A.Adil KUBAT- Public Prosecutor, Ankara

Uğurcan Sevinç KIZILOĞLU- Public Prosecutor, Ankara

Hasan Tahsin GÖKCAN- Investigation Judge, Fourth Penal Department of the Supreme Court of Appeal

M.E.Seçkin ARIKAN-Lawyer (Ankara Bar)

Dr.Mustafa ÖZBEK-Lawyer, (Ankara Bar)

Ahmet Cemal GÜRGEN-Inspector of Justice

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İŞBU ÇEVİRİ TARAFIMDAN  
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