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THE INSTITUTION OF RECONCILIATION IN TURKISH LAW

According to the legal system currently applied in Turkey, the state initiates a public prosecution against individuals who commit crimes, and these individuals are punished after being tried in judicial courts. While this system has been in use for many years, the reconciliation procedure has recently been adopted in the Turkish legal system. Reflecting the restorative justice system inherent in our culture, the institution of reconciliation has emerged as an alternative path in our criminal justice system. The reconciliation procedure aims to restore the public order disrupted by the crime of the suspect or defendant through the parties' agreement before a court trial, facilitating the reintegration of the offender into society, while also ensuring quick compensation for the victim. The reconciliation institution, applied during the investigation phase, prevents the initiation of criminal proceedings against offenders, thereby alleviating the burden on the judicial prosecution phase. The reconciliation process serves to conclude potential criminal cases by enabling the parties to reach an agreement of their own free will, thus eliminating the threat of criminal investigation and prosecution. The reconciliation procedure concludes more quickly than criminal trials, thereby relieving the offender from prolonged judicial pressure, and if the victim consents to the proposed compensation, their losses are promptly recovered.

Key words: Reconciliation, Fair Trial, Restorative Justice, Criminal Law.

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Түрік құқығындағы батылым институты

Қазіргі уақытта Түркияда қолданылып жүрген заң жүйесіне сәйкес, мемлекет қылмыс жасаған тұлғаларға қарсы қоғамдық айыптауды бастайды және бұл адамдар сот соттарында қаралған соң жазланады. Бұл жүйе ұзақ жылдар бойы қолданылып келе жатқанымен, жақында ғана Түркияның заң жүйесінде татуластыру процедурасы қабылданды. Мәдениетімізге тән қалпына келтіруші сот төрелігі жүйесін көрсететін татуласу институты қылмыстық сот төрелігі жүйемізде балама жол ретінде пайда болды. Татуласу рәсімі күдіктінің немесе сотталушының қылмысы салдарынан бұзылған қоғамдық тәртіпті сот талқылауына дейін тараптардың келісімі бойынша қалпына келтіруге, қылмыскердің қоғамға қайта бейімделуіне ықпал етуге, сонымен бірге жәбірленушіге келтірілген зиянды тез арада өтеуді қамтамасыз етуге бағытталған. Тергеу сатысында қолданылған татуластыру институты құқық бұзушыларға қатысты қылмыстық іс қозғауды болдырмайды, сол арқылы сотта айыптау сатысына түсетін салмақты жеңілдетеді. Татуласу процесі тараптарға өз еркімен келісімге келуге мүмкіндік беру арқылы ықтимал қылмыстық істерді аяқтауға қызмет етеді, осылайша қылмыстық тергеу мен қудалау қаупін жояды. Татуласу рәсімі қылмыстық істерге қарағанда тезірек аяқталады, осылайша құқық бұзушыны ұзаққа созылған сот қысымынан босатады, ал егер жәбірленуші ұсынылған өтемақыға келісімін берсе, олардың шығыны тез арада өндіріледі.

Түйін сөздер: Татуласу, әділ сот, қалпына келтіретін сот төрелігі, қылмыстық құқық.

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Институт примирения в турецком праве

Согласно правовой системе, действующей в настоящее время в Турции, государство инициирует публичное преследование лиц, совершивших преступления, и эти лица наказываются после суда в судебных органах. Хотя эта система используется уже много лет, процедура примирения была недавно принята в турецкой правовой системе. Отражая систему восстановительного правосудия, присущую нашей культуре, институт примирения появился как альтернативный путь

в нашей системе уголовного правосудия. Процедура примирения направлена на восстановление общественного порядка, нарушенного преступлением подозреваемого или обвиняемого, путем соглашения сторон до судебного разбирательства, что способствует реинтеграции правонарушителя в общество, а также обеспечивает быструю компенсацию для жертвы. Институт примирения, применяемый на этапе расследования, предотвращает возбуждение уголовного дела против правонарушителей, тем самым облегчая нагрузку на этап судебного преследования. Процесс примирения служит для завершения потенциальных уголовных дел, позволяя сторонам достичь соглашения по собственной воле, тем самым устраняя угрозу уголовного расследования и преследования. Процедура примирения завершается быстрее, чем уголовные судебные разбирательства, тем самым освобождая правонарушителя от длительного судебного давления, и если жертва соглашается на предлагаемую компенсацию, ее убытки быстро возмещаются.

Ключевые слова: примирение, справедливое судебное разбирательство, восстановительное правосудие, уголовное право.

Introduction

In accordance with the crime and punishment policies pursued within the national criminal law system in Turkey, significant emphasis has been placed on alternative solutions to resolve criminal disputes outside of the courtroom. In recent years, various alternative dispute resolution methods have been explored. Foremost among these alternative solutions in criminal law is the reconciliation institution, which was comprehensively integrated into the legal system in 2016. Reconciliation, whereby a neutral third party intervenes to facilitate communication between the victim and the offender, is considered one of the oldest and most widespread alternative dispute resolution methods.

In contemporary criminal justice, the protection of the interests of crime victims has become a primary objective, and addressing the harm suffered by victims has become as crucial as punishing the offender. Consequently, within the framework of justice, the reconciliation institution offers numerous benefits, including compensating the victim for the harm caused by the crime, facilitating the reconciliation between the victim and the suspect or defendant to reintegrate the offender into society, and swiftly establishing justice by resolving the dispute before it reaches the courtroom, thereby reducing the case-load of the courts.

This study will first explain the reconciliation institution and then describe its practical implementation. It will assess the benefits of the reconciliation institution, evaluate whether it has been adequately implemented, identify common problems encountered during its application, and propose solutions to enhance the functionality of the reconciliation institution.

1. The concept and purpose of reconciliation

Reconciliation, as an alternative solution in criminal proceedings, is grounded in the concept of restorative justice. The primary objective is to utilize alternative resolution methods outside the courts to swiftly resolve disputes arising from certain types of crimes. In Turkey, the concept of restorative justice began to be discussed with the implementation of the reconciliation institution, which has since been integrated into the criminal justice system as an alternative method (Akdeniz, 2019:2).

Restorative justice recognizes that the commission of a crime not only violates a penal statute but also causes an injustice. Therefore, it is acknowledged that the crime is an act between the offender and the victim, yet the primary victim affected by the crime is society at large. Restorative justice is characterized by practices aimed at ensuring the offender takes responsibility for the crime, facilitating their reintegration into society, and involving the victim actively in the process (Yavuz 2019:95).

Reconciliation is a process wherein a neutral mediator engages with both the victim and the offender to resolve the dispute between the parties in a criminal case or investigation. While “reconciliation” refers to the activity conducted by the mediator, “settlement” denotes the agreement reached at the end of this process (Özbek 2018: 21). In the reconciliation procedure, the damage suffered by the victim or the person harmed by the crime is compensated, thus alleviating their victimization. For the defendant or suspect, the aim is to resolve the dispute through an alternative means other than punishment, thereby achieving social peace.

2. The legal nature of reconciliation

Reconciliation holds significance in substantive criminal law by terminating the penal relationship between the suspect or defendant and the state and protecting the victim of the crime while facilitating the reintegration of the offender into society. However, in cases where reconciliation is required, if criminal proceedings are initiated without undergoing the reconciliation process, the indictment is returned. Similarly, in cases subject to reconciliation, if the reconciliation process is not conducted, the court cannot impose a penalty on the defendant. Thus, it can be said that reconciliation has a mixed legal nature, encompassing both substantive and procedural aspects of criminal law (Kaymaz & Gökcan, 2017:146). The Court of Cassation has also defined reconciliation as an institution with a mixed nature, identifying it as both a procedural institution and a substantive criminal law institution terminating the penal relationship (Court of Cassation 4th Criminal Chamber, 2007/5662).

The mixed nature of reconciliation has two fundamental implications regarding its temporal application and the prohibition of analogy. In terms of temporal application, the principle of immediate application of procedural provisions to crimes committed in the past is fundamental. However, based on the principle of “no crime and no punishment without law,” procedural provisions generally cannot be applied retroactively to past crimes. Nonetheless, in the interest of criminal justice, if it is in favor of the offender, substantive criminal law provisions can be applied retroactively to past crimes. Since the reconciliation institution concerns the penal relationship between the offender and the state, a norm expanding the scope of reconciliation, being in favor of the offender, can also be applied to past crimes. Regarding the prohibition of analogy, while analogy is permitted in criminal procedure law, it is prohibited in criminal law. Consequently, the scope of reconciliation cannot be expanded or restricted through analogy, but procedural provisions related to how reconciliation processes should be conducted can be interpreted analogously (Özbek, 2018:25).

3. The fundamental principles of reconciliation

Reconciliation, which involves compensating the victim for the harm caused by the crime committed by the suspect or defendant and the state refraining from punishing the offender for the crime,

is subject to strict formal requirements and rules (Regulation on Reconciliation in Criminal Procedure). In this regard, Article 5 of the Regulation on Reconciliation in Criminal Procedure includes provisions related to fundamental principles. These are outlined below.

3.1. Based on the Free Will of the Parties

Reconciliation is carried out by the parties' acceptance of reconciliation and their decision to settle of their own free will. The parties have the right to change their minds until the reconciliation report is signed (Yenisey & Nuhoglu, 2016:835). During this process, the mediator must not exhibit coercive or irrelevant behaviors that might influence the parties' wills. The assigned neutral mediator provides the parties with legal and procedural information related to the reconciliation process and informs them about the consequences of reconciliation, ensuring that their decisions are made based on the information they have obtained of their own free will.

The mediator's task of informing the parties must take into account their ages, maturity, education, and social and economic conditions. The public prosecutor or judge approves the report prepared by the mediator if they conclude that the obligation to be fulfilled has been prepared in accordance with the law and based on the parties' free will. This procedural act by the public prosecutor or judge also ensures a control mechanism regarding the parties' free will.

3.2. Protection of the Basic Rights and Freedoms of the Parties

Reconciliation procedures are carried out in accordance with fundamental rights and freedoms, emphasizing the protection of the interests of the parties (Regulation on Reconciliation in Criminal Procedure, Art. 5/2). During the reconciliation process, both the victim or the person harmed by the crime and the suspect or defendant will benefit from the constitutional rights and the rights provided by the criminal procedure law. Both the victim and the offender have the right to complete the reconciliation process voluntarily, as well as the right to terminate the process (Court of Cassation 15th Criminal Chamber, 2017/7517 Case, 2019/3719 Decision). Exercising the right to withdraw from the process does not affect the right to a fair trial (Çetintürk, 2017:70).

3.3. Ensuring the Basic Safeguards Granted by the Criminal Procedure Law for the Parties and Their Legal Representatives

The parties and their legal representatives participating in the reconciliation procedures have the

rights and safeguards provided in Articles 147 to 156 of the Criminal Procedure Code No. 5271 (Özbek, 2018:34). Throughout the reconciliation process, the dignity of the parties must be respected, and their fundamental rights as enshrined in the constitution and criminal procedure law must be protected.

3.4. Assignment of a Translator for Parties Who Do Not Speak Turkish

If any of the parties do not speak Turkish, a translator must be assigned to ensure the free will of the parties is manifested. The cost of the assigned translator will not be considered part of the legal expenses and will be covered by the treasury.

3.5. Sufficient Information of the Parties Regarding the Reconciliation Procedures

The mediator must inform the parties about the legal consequences of reconciliation before starting the reconciliation procedures. After the mediator's briefing, if the parties agree to begin the process based on their free will, they must be informed that starting the reconciliation procedures does not imply an admission of guilt by the suspect or defendant, nor does it mean that the victim waives their rights. The parties must also be informed that they can withdraw from the reconciliation process until the reconciliation report is prepared.

3.6. Continuation of the Process Considering Differences Between the Parties

After being assigned, the mediator can access information about the parties from the provided documents. Once the mediator has detailed information about the parties, they must form an approach on how to deal with the parties and conduct the reconciliation process correctly.

3.7. Confidentiality of Information and Documents

The mediator is responsible for maintaining the confidentiality of the information and documents provided to them after being assigned (Regulation on Reconciliation in Criminal Procedure, Art. 5/7). Without the consent of the parties or unless necessary, the mediator cannot disclose any information to anyone. Confidentiality is essential throughout the reconciliation process.

3.8. Taking Appropriate Measures to Ensure Reconciliation

The mediator's communication with the parties and efforts to persuade them during the reconciliation process will ensure the success of the reconciliation procedures. At the end of the process, the mediator will take appropriate measures to facilitate the parties' reconciliation if they reach an agreement.

4. The conditions for reconciliation

For crimes subject to reconciliation, such as threats, disturbing the peace and tranquility of individuals, theft, or simple fraud, certain conditions must be met to carry out reconciliation procedures. These conditions are outlined below.

4.1. Presence of Procedural Conditions Related to the Committed Crime

For the reconciliation process to be carried out, the act must be investigable or prosecutable (Özbek 2018:3). The execution of investigation or prosecution procedures depends on certain conditions or the absence of obstacles, referred to as procedural conditions. The presence of procedural conditions includes the necessity of a complaint, obtaining permission, a request, or a decision. The absence of procedural conditions prevents the accusation, initiation, progression, and adjudication of the case.

A complaint is defined as a request by individuals with the right to complain to the competent authorities for the investigation and prosecution of the crime (Öztürk 2015: 5). The failure to file a complaint by those with the right to complain or the failure of such individuals to withdraw the complaint requires the annulment of the decision. For instance, if the father of an abducted child files a complaint in a child abduction case, but the decision is based solely on the child's withdrawal of the complaint, the decision is unlawful. The father of the child must also withdraw the complaint (Court of Cassation 14th Criminal Chamber, 2016/7386 Case, 2016/7526 Decision).

4.2. The Legal Capacity of the Suspect or Defendant

For reconciliation procedures to be conducted, the suspect or defendant must be punishable. In cases where the person's culpability is nullified, only security measures can be applied instead of punishment (Özgenç 2015: 51). The reconciliation procedure cannot be applied to individuals without legal capacity. However, in cases of reduced criminal responsibility, such as minority or mental illness, reconciliation provisions can be applied.

4.3. The Victim or the Person Harmed by the Crime Must Be a Natural Person or a Private Law Legal Entity

Reconciliation can only be applied in crimes where the victim or the person harmed by the crime is a natural person or a private law legal entity.

4.4. *The Committed Crime Must Be Among the Crimes Subject to Reconciliation*

According to Article 73 of the Turkish Penal Code No. 5237, reconciliation can be applied to crimes that are subject to investigation and prosecution upon complaint. For crimes not subject to complaint, it must be explicitly stated in the law that the crime is subject to reconciliation. The procedure for reconciliation is regulated in Articles 253 and subsequent articles of the Criminal Procedure Code.

If multiple crimes are committed by the same offender, separate reconciliation procedures are conducted for each crime if the crimes are committed with unity of place and time or with the same intent, provided that all the crimes are subject to reconciliation. If a crime subject to reconciliation is committed alongside another crime not subject to reconciliation, reconciliation provisions will not apply (Court of Cassation 11th Criminal Chamber, 2021/32877 Case, 2024/6224 Decision).

4.5. *Sufficient Suspicion That the Crime Has Been Committed*

In a case subject to reconciliation, if the public prosecutor reaches sufficient evidence that the suspect committed the crime as a result of the investigation, the file is sent to the reconciliation office. If there is insufficient suspicion to initiate a case, a decision of non-prosecution is made. In such cases, reconciliation cannot be pursued (Yenisey & Nuhoglu, 2016:824).

5. The reconciliation process

The institution of reconciliation is separately regulated for the investigation and prosecution phases in criminal procedure. Reconciliation during the investigation phase is regulated in Article 253 of the Criminal Procedure Code (CMK) and Articles 9 to 21 of the Regulation on Reconciliation in Criminal Procedure. Reconciliation during the prosecution phase is regulated in Article 254 of the CMK and Articles 22 to 27 of the Regulation on Reconciliation in Criminal Procedure. Reconciliation procedures during both investigation and prosecution phases are conducted by the reconciliation office and carried out through a mediator.

5.1. *Reconciliation Procedure During the Investigation Phase*

Reconciliation is primarily regulated during the investigation phase. However, it may also occur during the prosecution phase in exceptional cases. The investigation phase refers to the period from the discovery of the suspicion of a crime until the ac-

ceptance of the indictment (Öztürk 2015: 370). If an indictment is prepared without resorting to reconciliation for crimes subject to reconciliation, it is returned to the Chief Public Prosecutor's Office by the court. The public prosecutor will decide to send the file to the reconciliation office to prepare the indictment.

For crimes subject to reconciliation, if there is sufficient suspicion, the public prosecutor evaluates the legal qualification of the incident and the evidence and sends the file to the reconciliation office. The public prosecutor does not have discretion regarding crimes subject to reconciliation, as reconciliation is a procedural condition (Aşkın 2020: 122). Once the file reaches the reconciliation office, the authorized public prosecutor reviews whether the file is subject to reconciliation and whether there is sufficient suspicion to initiate a case. Then, a mediator is appointed. Mediators are assigned automatically by the office staff based on the principle of automatic distribution. The mediator is reminded to act in accordance with the confidentiality of the investigation (Soyaslan 2015: 347). After the file is handed over to the mediator, the parties are notified by phone or email.

The mediator must complete the reconciliation procedures within thirty days after being appointed. If this is not possible, the mediator may request an extension, not exceeding twenty days each time, for a maximum of two times, by submitting a petition explaining the situation to the office. The mediator must complete the reconciliation procedures within a maximum of seventy days (Yıldırım 2020: 99).

The mediator makes a reconciliation offer to either party. The offer must be made directly to the parties, although there is no obstacle to them conveying their response through their defense counsels or legal representatives. If one of the parties is a minor or under guardianship, or if the victim or the person harmed by the crime lacks the capacity to discern, the reconciliation offer must be made to the legal representatives. In the case of a child driven to crime who was at least twelve but under fifteen years old at the time of the offense, or if the victim of the crime is a minor, the reconciliation offer must be made to the legal representative, even if they have the capacity to understand. If any party rejects the offer, the reconciliation procedures are concluded without entering into reconciliation negotiations. If the parties accept the reconciliation offer, the negotiation process begins. During this process, the parties decide how to compensate for their damages. After compensating for the material or moral dam-

ages determined by the parties, the reconciliation procedures proceed to the conclusion stage.

After concluding the reconciliation procedures, the mediator must prepare a reconciliation report. The mediator must personally prepare the report (Yıldırım 2020: 99). The mediator submits the report to the reconciliation office. If the reconciliation procedures fail, the report must explain this situation in detail. After the mediator submits the reconciliation report to the office, the public prosecutor reviews it. Based on the reconciliation report, the public prosecutor will issue a “Decision of Non-Prosecution” for the files of the reconciled parties. If reconciliation is not achieved, an indictment will be prepared.

5.2. Reconciliation Procedure During the Prosecution Phase

The prosecution phase begins with the acceptance of the indictment and continues until the judgment becomes final. Reconciliation during the prosecution phase depends on the nature of the crime changing, the indictment prepared without resorting to reconciliation during the investigation phase being accepted, the case being initiated with a document replacing the indictment, and the crime falling within the scope of reconciliation being recognized during the prosecution phase (Akbulut & Aksan 2019:145).

During the prosecution phase, the file related to the crime subject to reconciliation is sent to the reconciliation office established by the Chief Public Prosecutor’s Office for the necessary procedures, where it is registered and assigned a number. For the file sent to the reconciliation office, the public prosecutor appoints a mediator. The reconciliation process during the prosecution phase operates in the same manner as during the investigation phase. The reconciliation report prepared by the mediator is reviewed and accepted by the court.

6. The benefits of the reconciliation process

The proper implementation of the reconciliation institution offers several benefits to the victim, the offender, and society.

6.1. Benefits of Reconciliation for the Victim

During the reconciliation process, the face-to-face meeting between the victim and the offender allows the offender to see the negative impact of their crime on the victim (Yenisey 2005: 205). The victim may feel a greater sense of satisfaction from the reconciliation process compared to the outcome of a trial.

6.2. Benefits of Reconciliation for the Offender

The reconciliation institution allows the offender to remedy the harm caused by their crime rather than being punished. The offender, in a setting where they face the victim, will attempt to make amends for their wrongdoing (Erdem 2015: 21). Instead of having the offense recorded in the offender’s criminal record, reconciliation gives the offender the opportunity to compensate for the harm they caused and thus be reintegrated into society.

6.3. Benefits of Reconciliation for Society

The greatest benefit of reconciliation for society is the restoration of peace by mending the damaged relationships between the parties. This benefit significantly contributes to preventing future hostilities and crimes between the parties. By including the offender in the process, reconciliation prevents the isolation of the offender from society and helps the offender feel like a part of the community (Yenisey 2005: 207). Additionally, it strengthens public confidence in the justice system, contributing to a peaceful and harmonious society. Moreover, it significantly reduces the courts’ caseload, ensuring that other cases are resolved in a timely manner and preventing violations of the right to a fair trial.

7. Criticisms of the reconciliation institution

One criticism of the reconciliation institution is the lack of a legal regulation preventing suspects or defendants from benefiting from reconciliation multiple times. The reconciliation institution, which provides an opportunity to resolve the criminal dispute between the victim and the suspect/defendant through settlement, should be applied appropriately and correctly, with measures in place to prevent abuse. There should be a limit on how many times the same offender can benefit from reconciliation for the same offense. If the same offender commits the same crime again, they should face a criminal penalty. This would increase public trust in justice.

Another frequent issue in practice is that the reconciliation institution is generally applied during the investigation phase, with its application during the prosecution phase being exceptional. Reconciliation during the prosecution phase can only occur in the situations regulated by Article 22 of the Reconciliation Regulation. If the legal nature of the offense changes in an ongoing case, revealing that the act is a crime subject to reconciliation, reconciliation procedures can be carried out during the prosecution phase. If the legal nature of the crime does not change, but it is first realized during

the prosecution phase that reconciliation should have been applied during the investigation phase, reconciliation can still be conducted. However, if the parties were offered reconciliation during the investigation phase and they did not agree, they cannot seek reconciliation during the prosecution phase as per the regulation (Ertuğrul 2020: 132). This limitation contradicts the main purpose of the reconciliation institution, which is to restore peace between the parties.

There are some inconsistencies between the types of crimes excluded from reconciliation and the purpose of the reconciliation institution. Given that the reconciliation institution is designed with the restorative justice concept and the aim of establishing social peace, the exclusion of crimes such as simple assault committed against family members, descendants, ascendants, siblings, or former spouses from reconciliation is criticized, as there is a greater need for reconciliation in such cases within the criminal justice system and society.

The inconsistency within the system arises when considering the penal severity of crimes subject to reconciliation; some serious crimes are included while much simpler crimes are not.

Another issue highlighted by the legislation and practice is the disparity between the crimes subject to reconciliation and the prohibition on detention. Some crimes subject to reconciliation are exempt from detention, while others are not. Including suspects or defendants who are detained for a crime without a detention prohibition in the reconciliation process might compel them to accept terms they normally would not agree to, simply to end their detention, thus negatively affecting their free will. Crimes subject to reconciliation should include a prohibition on detention.

According to the Criminal Procedure Code, reconciliation cannot be applied if a crime subject to reconciliation is committed alongside a crime not subject to reconciliation. To expand the use of reconciliation, this provision of the law needs to be amended.

Conclusion

The institution of reconciliation is a relatively new concept within the legal system. With the introduction of reconciliation, there has been a shift in the traditional understanding of the criminal justice system. The inclusion of reconciliation in the criminal system primarily aims to establish social peace by resolving disputes between parties through the assistance of neutral third parties and the voluntary will of the parties involved to address the victimization caused by the crime. However, it is not yet possible to assert that the reconciliation institution is fully functional today.

The legislator needs to introduce several new regulations. Although the scope of crimes included under reconciliation has been expanded, it is still insufficient. Considering the severity of the crimes currently included in reconciliation, it is evident that simple crimes are still not covered, and offenders can still be detained for crimes under reconciliation. Addressing such inconsistencies that affect the public's perception of justice will enhance trust in justice and make the reconciliation institution more effective and functional.

Periodic training should be provided to mediators to ensure they are aware of their responsibilities and can effectively reach and persuade the parties involved. This will help mediators carry out their roles more efficiently and contribute to the success of the reconciliation process.

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