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CHILD FOCUSED MEDIATION IN FAMILY DISPUTES

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THESIS APPROVAL PAGE



DECLARATION

I hereby declare that this master's thesis titled as "Child Focused Mediation in Family Disputes" has been written by myself in accordance with the academic rules and ethical conduct. I also declare that all materials benefited in this thesis consist of the mentioned resources in the reference list. I verify all these with my honour.

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ABSTRACT
Master's Thesis
Child Focused Mediation in Family Disputes
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The resolution of disputes through mediation is a preferred method in our country as it is a particularly amicable way of resolution and allows for sustainable relationships in the future. Family is the first and the most important place where children, who are the foundation of society and at the same time the future of society, grow, develop and acquire basic education about life. The effects of all positive or negative actions, events, words and behaviors that children are exposed to during this period can have repercussions throughout their lives. For this reason, it is very important that family relationships, which are the main concern of the Family Law, should be established and maintained in a healthy way.

Research shows that divorce rates have increased in our country and in the world in recent years. Therefore, the number of children going through this process is also increasing. The resolution of disputes in the divorce and separation process through family mediation is successfully implemented in countries that apply this method. Although divorce and separation take place between married couples, the effects of the decisions taken during the process and at the end of it are of great importance for children both in the short and the long term. As the possible adverse effects of divorce on the child is so obvious, it is inevitable to consider the best interests of the child, to give importance to the feelings and thoughts of the child, to allow the child to express himself/herself, and to create a different approach for each child due to the unique characteristics of each child. At the same time, the benefits of involving

the child actively or passively in this process and in the decisions taken in the agreement reached through mediation are very important in terms of the best interests of the child. Recently, some methods have been developed so that the implementation of family mediation can serve the best interests of the child more and there are still a lot of efforts put into developing more of such methods.

For this reason, in our study, it is aimed to examine “family disputes” and “child focused mediation method in the resolution of family disputes”, which is an effective method in the resolution of family disputes, and which will not harm the development of children and which is developed to protect the best interests of children.

In the first chapter of our study, the concept of family dispute and that of family mediation are defined. In the second chapter, the judicial resolution of family disputes and the resolution of family disputes through mediation are discussed and some of the practices in other countries regarding the resolution of family disputes through mediation as well as the legal basis for the protection of children in family disputes are examined. In the third part, mediation methods for the protection of children in the resolution of family disputes are explained and the function and the functioning of the child focused mediation method in the resolution of family disputes, as well as the role of the mediator in this process are examined.

Keywords: mediation, family mediation, resolution of family disputes, child focused mediation.

ÖZET
Yüksek Lisans Tezi
Aile Uyuşmazlıklarında Çocuk Odaklı Arabuluculuk
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Anlaşmazlıkların arabuluculuk yolu ile çözümü, ülkemizde de uygulanan özellikle dostane bir çözüm yolu olması ve gelecekte sürdürülebilir ilişkilere imkan sağlaması nedeniyle tercih edilen bir yöntemdir. Aile ise toplumun temeli ve aynı zamanda, toplumun geleceği olan çocukların yetiştiği, geliştiği, hayata dair temel öğretileri edindiği ilk ve en önemli yerdir. Çocukların bu dönemde maruz kaldığı tüm olumlu ya da olumsuz eylem, olay, söz ve davranışların etkisinin tüm yaşamları boyunca yansımaları görülebilmektedir. Bu nedenle aile hukuku ilişkilerinin sağlıklı bir şekilde kurulması ve devam etmesi oldukça önemlidir.

Yapılan araştırmalarda son yıllarda ülkemizde ve dünyada boşanma oranlarının arttığı görülmektedir. Dolayısıyla bu süreci yaşayan çocuk sayısı da artmaktadır. Boşanma ve ayrılık sürecindeki anlaşmazlıkların aile arabuluculuğu ile çözümü bu yöntemi uygulayan ülkelerde başarılı bir şekilde uygulanmaktadır. Her ne kadar boşanma ve ayrılık evli çiftler arasında gerçekleşse de süreçteki ve sonuçta alınan kararların etkileri çocuklar açısından hem kısa hem de uzun vadede büyük önem taşımaktadır. Boşanma sürecinin olumsuz etkileri bu kadar açıkken, çocuğun üstün yararının dikkate alınması, duygu ve düşüncelerine önem verilmesi, çocuğun kendini ifade edebilmesine imkan tanınması, her çocuğun kendine has özellikleri sebebiyle her çocuk için farklı yaklaşım oluşturulması kaçınılmazdır. Aynı zamanda bu süreçte ve arabuluculuk yolu ile varılan anlaşmada alınan kararlarda çocuğun aktif veya pasif bir şekilde sürece dahil edilmesinin faydaları çocuğun üstün yararı

bakımından çok önemlidir. Son dönemlerde aile arabuluculuğunun uygulanmasının çocuğun üstün yararına daha çok hizmet edebilmesi açısından bazı yöntemler geliştirilmiştir ve geliştirilmeye devam edilmektedir.

Bu nedenle çalışmamızda aile uyuşmazlıkları ve aile uyuşmazlıklarının çözümünde etkin bir yöntem olan, çocukların gelişimine zarar vermeyecek ve çocukların üstün yararının korunması amacıyla geliştirilen aile uyuşmazlıklarının çözümünde çocuk odaklı arabuluculuk yönteminin incelenmesi amaçlanmıştır ve ülkemizde uygulanabilirliği değerlendirilmiştir.

Çalışmamızın birinci bölümünde aile uyuşmazlığı ve aile arabuluculuğuna ilişkin kavramların tanımlarına yer verilmiştir. İkinci bölümde aile uyuşmazlıklarının yargı yolu ile çözümü ve arabuluculuk yolu ile çözümüne yer verilmiş olup arabuluculuk yolu ile çözümüne ilişkin diğer ülke uygulamaları ve aile uyuşmazlıklarında çocukların korunmasına ilişkin hukuki dayanaklar incelenmiştir. Üçüncü bölümde ise aile uyuşmazlıklarının çözümünde çocukların korunmasına yönelik arabuluculuk yöntemleri açıklanarak, aile uyuşmazlıklarının çözümünde çocuk odaklı arabuluculuk yönteminin işlevi, işleyişi ve bu süreçte arabulucunun rolü incelenmiştir.

Anahtar Kelimeler: Arabuluculuk, aile arabuluculuğu, aile uyuşmazlıklarının çözümü, çocuk odaklı aile arabuluculuğu.

CHILD FOCUSED MEDIATION IN FAMILY DISPUTES

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ABBREVIATIONS

BAFM	Bundes-Arbeitsgemeinschaft für Familien-Mediation (Federal Association for Family Mediation)
EU	European Union
FMC	The Family Mediation Council
MIAM	Mediation Information & Assessment Meeting
No	Numbered
OECD	Organisation for Economic Co-operation and Development
TÜİK	Turkish Statistical Institute
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child

INTRODUCTION

Family is the foundation of the society we live in. Therefore, establishing the institution of family on a solid foundation and replacing family disputes with sustainable communication will ensure the development of the society in a healthy way. This issue is legislated in Article 41 of the Turkish Constitution as follows: "Family is the foundation of the Turkish society and based on the equality between the spouses". Therefore, it is very important that family relationships, which are the main concern of the Family Law, should be established and maintained in a healthy way. At the same time, family is a significant medium in terms of maintaining a lifelong psychological and physical health and well-being of children, who are the future of the society, as it is an environment where they are raised, grow up and develop.

Family dynamics are based on an emotional foundation. Considering that in most cases the man and the woman who form the family through the union of marriage come from different cultures and environments, from two different families, it is not surprising that conflicts arise. With the addition of the children to the family, the family transforms into an expanded family structure, and therefore, new needs and new responsibilities arise. Consequently, new disagreements within the family and new conflicts between the parties are inevitable. Studies conducted by the Organisation for Economic Co-operation and Development (OECD) and Turkish Statistical Institute (TÜİK) show that divorce rates in Türkiye and the world have been increasing in recent years. What is important in the resolution of disagreements and disputes that arise between parents is that children are not harmed by this process and that the process is carried out and completed with positive outcomes.

Family disputes can be resolved through jurisdiction or mediation. Child focused mediation in the resolution of family disputes is a method developed to protect the best interests of the child.

In Turkish Law, in the resolution of family disputes, judicial resolution mechanisms have been developed in accordance with the Law on the

Establishment and Duties of Family Courts (No. 4787), and family courts have been entrusted with the duty to adjudicate.

In Türkiye, according to the Law on the Establishment and Duties of Family Courts (No. 4787, Article 4), the Second Book of the Turkish Civil Code (No. 4721) and the Law on the Enforcement and Implementation of the Turkish Civil Code (No. 4722), family disputes are the cases regarding the annulment of engagement, the annulment of marriage, divorce and the secondary consequences of divorce, alimony, property division, compensation and custody.

In our country, with the entry into force of the Law on Mediation in Civil Disputes (No. 6325), mediation started to be applied on an optional basis in the resolution of civil disputes in which the parties can freely dispose of their rights and responsibilities, except for the disputes involving domestic violence allegations. Since family disputes such as separation, divorce, custody, and child support are matters of public order, it is not possible to resolve these disputes through mediation.

The purpose of this study is to examine, “child focused mediation” as a method used in the resolution of family disputes through mediation, on the basis of the principle of protecting the best interests of the child. It is in this framework that the mechanisms of judicial resolution of family disputes and mediation will be examined, and the methods developed for the protection of the best interests of the child in family disputes will be examined as well as compared and contrasted. While exploring these methods, the rules set forth and the practices applied or suggested for the protection of the best interests of the child will be examined.

In the first chapter of this study, the concepts of family dispute and family mediation will be discussed. In the second chapter, the judicial resolution of family disputes and the systems in the resolution of family disputes through mediation will be explained and different practices in different countries regarding the resolution of family disputes through mediation as well as the legal basis for the protection of children in family disputes will be examined. As for the third chapter, it will examine the mediation methods used for the protection of children in the resolution of family disputes and it will also discuss the function and functioning of these methods as well as the role of the mediator.

In the light of all these reviews, analyzing and interpreting research data collected from both Turkish and foreign studies and legislation, the function of child focused mediation in the resolution of family disputes will be discussed, the legal framework and the practice of family disputes in the international area will be examined, and the applicability of child focused mediation in the resolution of family disputes in Turkish law will be evaluated and some suggestions will be offered.



CHAPTER ONE

CONCEPTS

In this section, the concept of family dispute and that of family mediation are explained. The concepts of family, child, family dispute, mediation and family mediation are discussed respectively.

1.1. FAMILY DISPUTES

1.1.1. Family

The concept of family has unique definitions in different scientific fields and cultures. Considering the length of time it takes for a child to survive physically and psychologically on its own compared to other species, the concept of family gains more importance.

Family is the foundation not only of Turkish society but of every human society.¹ "The family is the primary place and environment where people live their lives after they are born. The family is also the source of most of the problems that occur in people's lives because it is where people spend most of their lives."²

The concept of family is not defined in the Constitution of the Republic of Türkiye, the European Convention on Human Rights, the Turkish Civil Code (No. 4721), the Law on the Protection of the Family and the Swiss Civil Code (No. 4320). In addition, these laws do not include a regulation on who constitutes family members.³

Family law is a branch of law that determines the mutual relations, rights and obligations of persons living in a family. In order for family law to be

¹ Hüseyin Hatemi and Burcu Kalkan Oğuztürk, **Aile Hukuku**, 6. Baskı, On iki levha Yayıncılık, İstanbul, 2018, p. 2.

² Tuğba Yüce and Ömer Miraç Yaman, **Aile Mahkemelerinde Görev Yapan Sosyal Çalışmacıların Evlilik ve Aile Kurumuna Bakışları Üzerine Nitel Bir Araştırma**, Journal of Society&SocialWork, Vol.: 34, Issue: 1, 2023, p.46.

³ Ömer Uğur Gençcan, **Aile Hukuku**, 1. Baskı, Yetkin Yayınları, Ankara, 2011, p.138.

applicable, the existence of a social relationship related to living in a family is necessary.⁴

Article 41 of the Constitution of the Republic of Türkiye⁵ emphasizes that the family is the foundation of Turkish society and is based on equality between spouses. The concept of "family" in this regulation is the family established by a marriage contract before an authorized marriage officer. In Turkish Law, the family is covered most comprehensively in Turkish Civil Code.⁶

The concept of family is regulated in the Turkish Civil Code in three different senses: family in the narrow sense, family in the broad sense and family in the broadest sense. In other words, the concept of family refers to three different things.⁷ Family in the narrow sense is regulated under the "marriage law" section of the Turkish Civil Code (Articles 124 - 281), family in the broad sense is regulated under the "parental authority" section (Articles 335 - 363), and family in the broadest sense is regulated under the heading of "house order" (Articles 367 - 371).⁸

In a narrow sense, the concept of family refers to the marital union consisting of spouses.⁹ The family in the broad sense is formed when children join the family in the narrow sense. The term "kinship" can also be used for extended family.¹⁰ The concept of family in the broadest sense is defined as "house order" in Article 367 of the Turkish Civil Code. In the broadest sense, the concept of family also includes in laws and, if any, persons living under the same roof due to a contractual relationship, such as workers, apprentices, servants and guards.¹¹

The third part of the Turkish Civil Code, entitled "guardianship", contains provisions on the guardianship system subject to the control of the State for

⁴ Ahmet M. Kılıçoğlu, **Aile Hukuku**, 4. Bası, Turhan Kitabevi, Ankara, 2019, p. 1.

⁵ Mevzuat Bilgi Sistemi, "Türkiye Cumhuriyeti Anayasası", <https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=2709&MevzuatTur=1&MevzuatTertip=5>, (05.11.2023).

⁶ Emine Akyüz, **Çocuk Hukuku**, 7. Baskı, Pegem Akademi, Kasım 2020, (ÇH), p.93.

⁷ Turgut Akıntürk, Derya Ateş, **Türk Medeni Hukuku Aile Hukuku**, Vol: 2, 18. Baskı, Beta Yayıncılık, İstanbul, 2016, (medeni), p. 5,6.

⁸ Mevzuat Bilgi Sistemi, "4721 Sayılı Türk Medeni Kanunu", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4721.pdf>, (08.11.2023).

⁹ Abdülkerim Yıldırım, **Türk Aile Hukuku**, 1. Baskı, Savaş Yayınevi, Ankara, Nisan 2014, p.3.

¹⁰ Gençcan, p. 140.

¹¹ Turgut Akıntürk and Derya Ateş, medeni, p. 6.

minors or adolescents in need of protection who do not have the protection of a normal family order.¹²

In the current legislation, the only law that includes the definition of "family" is the Population Services Law (No. 5490). According to Article 3/1-d subparagraph of this Law, "family" means "persons of the same lineage registered under a family sequence number and their spouses and children".¹³

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁴ contains a provision entitled "the right to respect for private and family life".¹⁵ The concept of family is not defined in the Convention. However, according to the jurisprudence of the European Court of Human Rights, in addition to the legal family, which is the union of a man and a woman in marriage, the de facto union of a man and a woman living together without marriage is also recognized as a family. In addition, even if the individuals who constituting the family do not live together, it is accepted that blood, economic, emotional and similar ties between individuals constitute a presumption of the existence of the family institution.¹⁶

However, short term unions and cohabitation with religious marriage, as in the case of Şerife Yiğit/ Türkiye, are not recognized as legal in official marriage.¹⁷

¹² Kemal Oğuzman, Nami Barlas, **Medeni Hukuk**, 19. Basım, Vedat Kitapçılık, İstanbul, 2013, (Medeni), pp. 53,54.

Mustafa Dural, Tufan Ögüz and Mustafa Alper Gümüş, **Türk Özel Hukuku Cilt III Aile Hukuku**, Filiz Kitabevi, İstanbul, 2014, p.251.

¹³ Mevzuat Bilgi Sistemi, "5490 Sayılı Nüfus Hizmetleri Kanunu", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5490.pdf>, (10.05.2023).

Akif Dursun, **Aile Kavramı, İslâm Hukukunda Ve Türk Hukukunda Ailenin Tanımı ve Kapsamı**, İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 7, Issue:13, 2022, p.433.

¹⁴ Adopted on November 4, 1950 by the Council of Europe, the ECHR entered into force on March 19, 1954 after being published in the Official Gazette No. 8662 on March 19, 1954 with reservations to the second and third articles of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed by the Republic of Türkiye in Paris on March 20, 1952.

¹⁵ Yargıtay, "Avrupa İnsan Hakları Sözleşmesi", <https://www.yargitay.gov.tr/documents/AIHM.pdf>, (07/05/2023).

¹⁶ Feyyaz Gölcüklü and Şeref Gözübüyük, **Avrupa İnsan Hakları Sözleşmesi ve Uygulaması**, 1. Baskı, Turhan Kitabevi, Ankara, 1994, pp. 262, 263.

¹⁷ M. Fatih Çınar, **Avrupa İnsan Hakları Sözleşmesi'nde Düzenlenen Haklar ve "Özel ve Aile Hayatına Saygı Hakkı"**, Uluslararası Hukuk ve Sosyal Bilim Araştırmaları Dergisi, Vol.: 4, Issue: 1, 2022, p. 113.

1.1.2. Child

In national and international legal documents, the definition of the concept of "child" is based on the criterion of "age" regardless of the physical and psychological development of the person. The age criterion, which is the main determinant of the concept of child, does not have a limit that is valid in every period and everywhere.¹⁸

In Part 1, Article 1 of the United Nations Convention on the Rights of the Child¹⁹ a child is defined as "every human being shall be deemed to be a child until the age of eighteen years, except where he or she comes of age at an earlier age."²⁰

According to the article 2 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children,²¹ the Convention applies to "children" from the moment that they are birth until they reach the age of 18.²²

According to the 1980 Hague Convention on the Civil Aspects of International Child Abduction,²³ children up to the age of 16 are subject to the provisions of the Convention, along with other conditions in the Convention.²⁴

¹⁸ Hande Bahar Aykaç, **Hukuksal Açıdan Çocuk ve Genç İşçiliği**, Türkiye Barolar Birliği Dergisi, Issue: 116, 2016, p.338.

¹⁹ Adopted on 20 November 1989 and entered into force on 2 September 1990, the United Nations Convention on the Rights of the Child was published in the Official Gazette No. 22184 dated 27 January 1995 with reservations to Articles 17, 29 and 30 by the Republic of Türkiye.

²⁰ Resmi Gazete, "Birleşmiş Milletler Çocuk Haklarına Dair Sözleşme", <https://www.resmigazete.gov.tr/arsiv/22184.pdf>, (20/10/2023).

Rona Serozan, **Çocuk Hukuku**, 2. Bası'dan Tıpkı Bası, Vedat Kitapçılık, 2017, p.51.

Banu Karakaş and Ömer Can Çevik, **Çocuk Refahı: Çocuk Hakları Perspektifinden Bir Değerlendirme**, Gazi Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi, Vol.:18, Issue:3, 2016, p. 890. <https://dergipark.org.tr/tr/pub/gaziuiibfd/issue/28284/300453> , (03.12.2023).

Sevinç Güçlü, **Çocukluk ve Çocukluğun Sosyolojisi Bağlamında Çocuk Hakları**, Sosyoloji Dergisi Armağan Sayısı, 2016, p.10.

Akyüz, ÇH, p.46

²¹ The Convention was ratified by Türkiye on 25/04/2016 with reservations and entered into force upon its publication in the Official Gazette dated 05/05/2016 and numbered 29703.

²² HCCH, "The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children", <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>, (13.10.2023)

²³ Türkiye ratified the Convention with reservations and it entered into force upon its publication in

"In Article 3, Definitions, of the Law No. 5717 on the Legal Aspects and Scope of International Child Abduction,²⁵ a child is defined as a person who has not completed the age of sixteen."²⁶

The Turkish Civil Code No. 4721 includes the concept of "minor" in the First Book titled "Law of Persons" and the concept of "child" in the Second Book titled "Family Law".

A person who is qualified as a minor before reaching the required age becomes a major when he/she reaches the legal age, without the need for any further procedures. In other words, underage people are called "minors".²⁷

"The term 'child' does not only refer to a 'minor' who has not yet reached puberty. A child is also a person who is in a blood kinship with his/her parents and is related to them by descent."²⁸ "With this statement, the beginning of childhood is explained, but there is no explanation as to when it ends. Therefore, in this sense, a child can be 5 years old or 50 years old. As a result, although every minor is a child, not every child fits the definition of minor."²⁹

In legal literature, a child is a term of kinship; it means a child descended from a particular parent. But a child is also, and more importantly, a person who is under the age of eighteen and has not yet attained puberty.³⁰ In other words, in law, the concept of child is used in two different senses to distinguish the minor from the adult and to indicate the child's parentage.³¹

the Official Gazette dated 11.11.1999 and numbered 23873.

<https://www5.tbmm.gov.tr/sirasayi/donem26/yil01/ss280.pdf>, (15.12.2023).

²⁴ HCCH, "The Hague Convention of 25 October 1980 on The Civil Aspects of International Child Abduction", <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>, (15.10.2023).

²⁵ This law regulates the procedures and principles for the implementation of the Hague Convention on the Civil Aspects of International Child Abduction dated 25/10/1980.

²⁶ Mevzuat Bilgi Sistemi, "5717 Sayılı Uluslararası Çocuk Kaçırmanın Hukukî Yön ve Kapsamına Dair Kanun", <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5717.pdf>, (20.04.2023).

²⁷ Kemal Oğuzman, Özer Seliçi, Saibe Oktay, **Kişiler Hukuku**, 12. Bası, Filiz Kitabevi, İstanbul, 2012, (Kişiler), pp. 63, 73.

²⁸ Serozan, p.146.

²⁹ Hacı Can, Ekin Tuna ve Nehir Tuna. **Çocuk Hukuku**, 1. Basım, Nobel Yayınevi, Mart 2019, p. 100.

³⁰ Serozan, p. 3.

³¹ Akyüz, ÇH, p. 102.

According to Article 3/1-a of the Child Protection Law No. 5395, “a child is defined as a person who has not completed 18 years of age, even if he/she became an adult at an earlier age.”³²

According to Article 6 of the Turkish Penal Code (No. 5237); "the term 'child' means a person who has not yet completion the age of eighteen.”³³

In the regulation of Turkish Civil Code on paternity, paternity is established in two different ways. The first is the existence of a blood kinship between the child and his/her parents, and the second is the establishment of an adoption relationship.³⁴ In other words, in the Second Book of the Turkish Civil Code on Family Law, the child has a place according to the relationship with the mother and father established through paternity or adoption.

According to the Turkish Civil Code, one of the conditions for a person to have the capacity to act, whereby he/she can acquire rights and incur obligations through his/her own actions, is to be a major.³⁵

However, in Article 11 of the Turkish Civil Code, it is accepted that majority begins with the age of eighteen and that marriage also makes a person a major.³⁶

Again, in Article 12 of the Turkish Civil Code, it is stipulated that "a minor who has reached the age of fifteen can be made a major by the court upon his/her own request and with the consent of his/her guardian". According to the regulation in Article 314 of the Turkish Civil Code; It is stipulated that with adoption, the rights and obligations of the parents are transferred to the adopter.³⁷ Accordingly, there is no difference between the adopted child and the parents' own children.

³² Mevzuat Bilgi Sistemi, “5395 Sayılı Çocuk Koruma Kanunu”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5395.pdf>, (20.04.2023).

³³ Mevzuat Bilgi Sistemi, “5237 Sayılı Türk Ceza Kanunu”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5237.pdf>, (20.04.2023).

³⁴ Dural et al, p.252.

Ayça Özdoğan, Ayşe Dilek Ergüler, Erol Ergüler, Nur Özden, Pervin Somer, Seda Özümücü, Sevede Keçer Korkmaz, Şebnem Akipek Öcal and Şükran Şıpka, **Aile ve Miras Hukukunda Uzman Arabuluculuk**, Optimist Yayın Grubu, Ankara, 2020, p. 107.

³⁵ Oğuzman et al, (kişiler), 2012, p. 51.

³⁶ Mevzuat Bilgi Sistemi, “4721 Sayılı Türk Medeni Kanunu”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4721.pdf> , (20.04.2023)
Oğuzman et al, (kişiler), 2012, p. 47.

³⁷ Mevzuat Bilgi Sistemi, “4721 Sayılı Türk Medeni Kanunu”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4721.pdf>, (20.04.2023).

Custody includes the powers and duties required for the care, supervision and education of the child, the management of the child's assets, and the representation of the child in legal proceedings.³⁸ According to Article 335 of the Turkish Civil Code, minors and majors who are restricted but for whom the judge does not deem it necessary to appoint a guardian are under the custody of their parents unless there is a legal reason.³⁹

Therefore, in Türkiye, unmarried children up to the age of 18, excluding children who have reached the age of fifteen and have been rendered adult by the court, and adult children over the age of 18 who are restricted but for whom the judge does not deem it necessary to appoint a guardian, may be subject to custody.

Nowadays, custody has become a social relationship rather than a relationship that grants rights only to the parents within the family. In other words, issues related to custody can be monitored by the society and, if necessary, the intervention of the judge can be requested.⁴⁰

1.1.3 Family Disputes

Conflicts or disagreements occur in all human relationships, societies and cultures.⁴¹

In other words, conflict is a state of disagreement or tension that arises when at least one person's desires, interests, values, beliefs, needs, views on limited resource allocation differ or conflict. Conflict is a fact of life and arises from competition in the pursuit of goals.⁴²

Family conflict is different from other types of conflict for some reasons. There is an emotional bond between family members. This may increase the conflict more. Family members are in a long-term relationship in which they

³⁸ Emine Akyüz, **Çocuk Hukuku Çocukların Hakları ve Korunması**, 7. Baskı, Pegem Akademi, Ankara, 2020, (ÇHK), p. 383.

³⁹ Mevzuat Bilgi Sistemi, “4721 Sayılı Türk Medeni Kanunu”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4721.pdf>, (20.04.2023).

⁴⁰ Selma Çetiner, **Velayet Müessesinin Tarihi Gelişimi ve Hukuki Niteliği**, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Prof. Dr. Şeref ERTAŞ’a Armağan, Vol.: 19, Özel Sayı, 2017, p. 37.

⁴¹ Christopher W. Moore, **Arabuluculuk Süreci**, Nobel Yayınevi, 4. Basımdan çeviri, 2016, (Çeviri: Tarkan Kaçmaz, Mustafa Tercan), p. 3.

⁴² Cennet Engin Demir ve diğerleri, **Temel Arabuluculuk Eğitimi Katılımcı Kitabı**, Hukuk İşleri Genel Müdürlüğü Arabuluculuk Daire Başkanlığı, 3. Basım, Arcs Matbaacılık, Aralık 2021, p. 15.

interact with each other frequently. In addition, families are usually in a relationship with their own rules and closed to external interventions. For these reasons, family conflicts can be long, complex and painful.⁴³

Council of Europe: Family Mediation, Recommendation No. R (98) 1 states that family mediation is applicable to all disputes between members of the same family, whether related to blood kinship or marriage, and to persons who live or have lived together in family relations as defined by national law.⁴⁴

1.2. FAMILY MEDIATION

1.2.1 Mediation

In the European Union, Article 3 (A) of the Directive of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters defines mediation as "a structured process whereby two or more parties to a dispute, on a voluntary basis, with the assistance of a mediator, seek to reach an agreement on the resolution of their dispute".⁴⁵

Mediation is regulated in our country by the Mediation Law No. 6325. According to Article 2/1-b of this law entitled definitions and Article 4/1-c of the Regulation on the Law on Mediation in Civil Disputes entitled definitions, mediation is a dispute resolution method carried out voluntarily and with the participation of a neutral and independent third party who has received specialized training. In this method, it is stated that the mediators, by applying systematic techniques, bring the parties together to discuss and negotiate, establish a communication process between them in order to ensure that they understand each

⁴³ Cate Malek, "Family Conflict", Updated 2013 by Heidi Burgess, <https://www.beyondintractability.org/coreknowledge/family-conflict>, (26.06.2023).

⁴⁴ Council of Europe, "Council of Europe: Family Mediation, Recommendation No. R (98) 1", <https://rm.coe.int/1680747b77>, (22.10.2023)

⁴⁵ European Union, "Directive 2008/52/Ec of The European Parliament and of The Council, on Certain Aspects of Mediation in Civil and Commercial Matters, of 21 May 2008", <https://eur-lex.europa.eu/eli/dir/2008/52/oj> , (30.06.2023).

other and thus produce their own solutions, and if it turns out that the parties cannot produce a solution, they can also propose a solution.⁴⁶

The most important reasons for the emergence of alternative dispute resolution methods are the formalism of the state jurisdiction and the barriers to access to justice due to socio-economic reasons.⁴⁷

Mediation is a non-judicial system. By actually contributing to the resolution of the dispute, the parties are not only part of the problem but also part of the solution.

Mediation and conciliation are the most frequently and effectively used alternative dispute resolution methods.⁴⁸

Alternative dispute resolution has been criticized on the grounds that, although they are a system that does not compete with the state's jurisdiction, they have developed as an alternative to the courts and undermine the judicial power of the state.⁴⁹

It is emphasized in the General Grounds of the Law on Mediation in Civil Disputes that mediation is not in competition with the judicial system and that the aim is not to eliminate the possibility of resorting to judicial remedies. Alternative dispute resolution methods aim for simpler and easier resolution of disputes without harming the absolute sovereignty of the judicial power belonging to the State.⁵⁰

Mediation is a procedure that incorporates some specific techniques, is carried out with the contribution or participation of a third party who is completely independent, impartial and objective, and brings the parties in dispute together to talk and negotiate, facilitating communication between them in order

⁴⁶ Mevzuat Bilgi Sistemi, "6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.6325.pdf>, (20.04.2023).
Demir et al, p.28.

⁴⁷ İbrahim Özbay, **Alternatif Uyuşmazlık Çözüm Yöntemleri**, Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi, Vol.: X, Issue: 3-4, 2006, p. 461.

⁴⁸ Süha Tanrıver, **Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk**, Türkiye Barolar Birliği Dergisi, Issue: 64, 2006, p.165.

⁴⁹ Alper Uyumaz and Kemal Erdoğan, **Aile Hukukundan Doğan Uyuşmazlıkların Alternatif Çözüm Yolları**, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 17, Issue: 1, 2016, p. 123.

⁵⁰ Kadriye Bakırcı, **"Alternatif" Bir Uyuşmazlık Çözüm Yolu (Arabuluculuk) Aracılığıyla "Alternatif" İş Hukukuna Doğru**, Türkiye Barolar Birliği Dergisi, Issue: 140, 2019, p. 361.

to ensure that they understand each other and thus produce their own solutions.⁵¹ The mediator is a neutral third party who does not participate in the negotiations but only assists the parties in resolving the dispute.⁵² The mediator provides the communication environment necessary for the parties to achieve their interests.⁵³

Like other alternative dispute resolution methods, mediation has an Anglo Saxon origin and was first adopted in the American and British legal systems and later adopted in the Continental European legal system and included in the European Union regulations.⁵⁴

In mediation, like other alternative dispute resolution methods, the parties take an active role in resolving the disputes between them. Mediation also reduces the judicial burden, enables reconciliation between the parties and allows them to maintain a positive relationship for the future.

1.2.2. Family Mediation

Although the family is the smallest unit of society, it is a structure that forms the basis for the growth and development of the individuals who make up society. With this feature, the establishment and continuation of this structure in a healthy way gains great importance. In this context, the way in which disagreements within the family are resolved will have a significant impact on the psychological and physical health and resilience of the individuals who make up the society and prepare the ground for its existence within the family.

"Family mediation is one of the alternative dispute resolution methods that can solve the problems of family law."⁵⁵

Family mediation is a process in which the mediator facilitates negotiations between the disputing parties with the aim of putting them back on

⁵¹ Tanrıver, p.165.

⁵² Özbay, p. 465.

⁵³ Duygu Dağlıoğlu, **Aile Hukukuna İlişkin Uyuşmazlıklarda Arabuluculuk**, Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 2, Issue:2, 2020, p. 556.

⁵⁴ Hikmet Bilgin, **Kıta Avrupası Hukuk Sistemlerinde Arabuluculuk**, Ankara Barosu Hukuk Gündemi Dergisi, Yaz 2009, (kıta), p. 10.

⁵⁵ Levent Börü, **Aile Arabuluculuğu Konusunda Güncel Gelişmeler**, II. Uluslararası Kadın ve Hukuk Sempozyumu, Türkiye Barolar Birliği Yayınları, Vol.:2, 2019, (1043-1061), p.1044.

speaking terms with each other and helping them reach a mutually satisfactory agreement.⁵⁶

"Family mediation is a practice aimed at enabling couples who are in the process of separation or divorce to reach a common compromise before the court process by resolving their disputes with the help of a neutral mediator."⁵⁷ While family mediation has been criticized as a manipulative or increasingly coercive service by the mediator, the mediation process is one in which the mediator encourages and helps the parties to reach an agreement.⁵⁸

For some families who cannot agree on parenting arrangements after separation and divorce, family mediation is an effective alternative to court proceedings. Family mediation enables separated parents, with the help of a mediator, to negotiate an agreement on how to exercise shared parental authority in a mutually acceptable manner that serves the best interests of their children. In this respect, family mediation is a widely used method in western countries.⁵⁹

Family mediation is a frequently used method to eliminate the negative effects of the contentious environment between spouses in the divorce phase on both spouses and children.⁶⁰

Family counseling is a protective, preventive, developmental and guiding service aimed at increasing and improving the problem solving and coping skills of individuals within the family, reducing communication problems, strengthening their relationships, parenting skills and regulating sibling relationships. For

⁵⁶ Madelene De Jong, **Child focused Mediation**, Jobname: Private Law Pertaini, PAGE: 3 SESS: 12, 2009, p.113. https://uir.unisa.ac.za/bitstream/handle/10500/21645/Chapter%205_Child_focused%20Mediation.pdf?sequence=2, (29.06.2023)

⁵⁷ Sunay İl, **Aile Arabuluculuğu**, Toplum ve Sosyal Hizmet, Dergipark, Vol.: 20, Issue: 1, Nisan 2009, p.23. <https://dergipark.org.tr/tr/download/article-file/798165>, (29.06.2023)

⁵⁸ Ruth Phegan, **The Family Mediation System: An Art of Distributions**, McGillLawJournal / Revue De DroitdeMcGill, Vol 40, Issue: 2, 1995, p. 367. <https://lawjournal.mcgill.ca/article/the-family-mediation-system-an-art-of-distributions/>, (07.12.2023).

⁵⁹ Nihal Coşkun, **Aile Arabuluculuğu Uygulama Becerileri**, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Hukuk Sayısı, Eylül/Yaz 2022, Vol.: 21, Issue: 44, p. 759.

⁶⁰ Abdurrahman Kavasoglu and Tansu Gündoğdu, **Aile Arabuluculuğunun Tarihi Gelişimi ve Ülkemizdeki Mevzuat Açısından Değerlendirilmesi**, Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 11, Issue: 2, 2021, p.773.

couples in the process of divorce, counseling services are provided before, during and after divorce.⁶¹

In general, family counselors work on the situations that may lead to separation and divorce and ensure the continuation of the marriage by eliminating them. However, in mediation, the primary goal is to finalize the dispute.⁶²

According to the existing international regulations and our national legislation, mediation is possible in property matters which are ancillary to divorce. However, mediation is excluded in cases involving allegations of domestic violence. In addition, mediation is not possible in cases such as divorce, nullity of marriage and related interim injunction requests, which are in the nature of constitutive decision.⁶³

⁶¹ Türkiye Cumhuriyeti Aile ve Sosyal Hizmetler Bakanlığı, **Aile Danışmanlığı**, <https://www.aile.gov.tr/ss/aile-ve-toplum-hizmetleri-genel-mudurlugu/aile-danismanligi/> , (06.12.2023).

⁶² İsmet Mazlum, **Alman Hukuku'nda Aile Arabuluculuğu**, Çankaya Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 5, Issue: 1, Nisan 2020, p. 2369.

⁶³ Dağlıoğlu, p. 580.

CHAPTER TWO

FAMILY DISPUTE RESOLUTION METHODS

2.1. RESOLUTION THROUGH JURISDICTION

"When a dispute arises between the parties to a legal relationship, recourse to the court is the first and principal way."⁶⁴

It is a well-known fact that in recent years divorce rates have increased in the world as well as in Türkiye.

According to the data of the Turkish Statistical Institute for 2022, 180,954 couples got divorced in 2022, 180,592 children were involved in custody cases, the court granted custody to the mother in 75.7% of the cases and to the father in 24.3% of the cases, 32.7% of divorces took place within the first 5 years of marriage and 21.6% within the 6-10 years of marriage. It is also observed that divorce rates have increased compared to previous years.⁶⁵

According to the OECD's Family Database Marriage and Divorce Rates for 2020, marriage rates are decreasing in most OECD countries, while divorce rates are increasing.⁶⁶ In many OECD countries, the ratio of divorced or separated parents has increased since the mid-1980s, and in some OECD countries, divorces appear to occur mainly between 5 and 9 years of marriage. Recent OECD data show that parents are more likely to be separated or divorced than adults without children, with the exception of Japan, Korea, Türkiye and the Slovak Republic.⁶⁷

In the research on "Analysis and Evaluation of Family and Divorce Process Counseling Service", the Ministry of Family and Social Services concluded that the Family and Divorce Process Counseling Service, which is provided free of charge by the Ministry of Family and Social Services in order to support couples to cope effectively with the problems they experience in family

⁶⁴ Özbay, p. 459.

⁶⁵ Türkiye İstatistik Kurumu, "Evlenme ve Boşanma İstatistikleri 2020", Sayı 37211, <https://data.tuik.gov.tr/Bulten/Index?p=Evlenme-ve-Bo%C5%9Fanma-%C4%B0statistikleri-2022-49437&dil=1> , (25.02 2021).

⁶⁶ OECD Family Database, "Marriage and Divorce Rates", https://www.oecd.org/els/family/SF_3_1_Marriage_and_divorce_rates.pdf, (11.11.2023).

⁶⁷ OECD Family Database, "Family Dissolution and Children", https://www.oecd.org/els/family/SF_3_2_Family_dissolution_children.pdf, (11.11.2023).

communication, can be effective in solving the problems between couples, especially couples who are about to file for divorce.⁶⁸

The "Family and Divorce Process Counseling Service" started with a pilot project in 2012. In 2013, it became widespread across the country. The number of applications to benefit from this service clearly demonstrates the need for couples to meet with a counselor about the problems they experience in their relationships. On the other hand, the fact that couples want to receive services for the healthy functioning of their marriages is also an indication of the importance given to marriage and family in our society and the belief in the institution of family.⁶⁹

On the other hand, in Türkiye, it is not common for spouses to receive counseling services for the problems they encounter during the marriage. Although social workers and other experts working in this field try to provide counseling to couples in this direction, it is difficult to get positive results since couples often use this service when they apply to the court for divorce. However, counseling before couples reach the stage of separation and divorce will ensure the sustainability of family unity. Another obstacle is that some experts think that it is not their duty to prevent couples from divorcing.⁷⁰

The resolution of each dispute varies depending on the nature of the dispute, the problem-solving skills of the parties and the way it affects their lives. While some disputes are acceptable to the parties, some disputes require judicial resolution.

The resolution of family law disputes requires special expertise due to the increasing number and complexity of these disputes. In our country, family courts have been established to resolve disputes arising from family law.⁷¹ In places

⁶⁸ Türkiye Cumhuriyeti Aile ve Sosyal Hizmetler Bakanlığı, "Aile ve Sosyal Hizmetler Bakanlığından 'Aile ve Boşanma Süreci Danışmanlığı Hizmeti' Araştırması", <https://aile.gov.tr/haberler/aile-ve-sosyal-hizmetler-bakanligindan-aile-ve-bosanma-sureci-danismanligi-hizmeti-arastirmasi/>, (28.06.2023).

⁶⁹ Türkiye Cumhuriyeti Aile ve Sosyal Hizmetler Bakanlığı, "Aile Danışmanlığı ve Boşanma Süreci Danışmanlığı Hizmeti", https://www.aile.gov.tr/Raporlar/ATHGM/aile_danismanligi.pdf , (28.06.2023).

⁷⁰ Türkiye Cumhuriyeti Aile ve Sosyal Hizmetler Bakanlığı, Aile ve Toplum Hizmetleri Genel Müdürlüğü, "Türkiye Boşanma Nedenleri Araştırması TBNA 2014", p. 185. <https://www.aile.gov.tr/uploads/athgm/uploads/pages/arastirmalar/tbna2014-kitap.pdf> , (29.06.2023)

⁷¹ Erdal Tercan, **Türk Aile Mahkemeleri**, Dergipark, Vol.: 52, Issue: 3, 2003, p. 21.

where a family court cannot be established, the Civil Courts of First Instance have jurisdiction for the resolution of family disputes.⁷²

2.1.1. Constitution of the Republic of Türkiye

The third chapter of the Constitution of the Republic of Türkiye includes social and economic rights and duties. The first regulation in this section is on the protection of the family and children's rights in Article 41 of the law. With the amendment made by Law No. 5982 dated 7/5/2010, the phrase “children's rights” was added to the title of the article. It is stated that the family is the foundation of Turkish society. By Law No. 4709 dated 3/10/2001, the phrase that the family is based on equality between spouses was added to this article. It is defined as the duty of the State to protect the family and especially the mother and child and to take the necessary measures. Establishing the necessary organization for this purpose is also among the duties of the State. It is stated that every child has the right to protection and care. It is also regulated that every child has the right to establish and maintain a personal and direct relationship with his/her parents. However, it is emphasized that this right must not be clearly contrary to the best interests of the child. It is also among the duties of the State to take measures to protect children against all forms of abuse and violence.⁷³

In the ground of the article, it is stated that the universal principles on children's rights, which are included in international documents to which Türkiye is a party, have been included in the text of the Constitution.⁷⁴

2.1.2. Family Disputes Under the Law No. 4787

According to Article 4 of the Law No. 4787 on the Establishment, Duties and Trial Procedures of Family Courts, family courts have jurisdiction over cases

⁷² Mevzuat Bilgi Sistemi, “4787 Sayılı Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4787.pdf>, (05.11.2023).

⁷³ Mevzuat Bilgi Sistemi, “Türkiye Cumhuriyeti Anayasası”, <https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=2709&MevzuatTur=1&MevzuatTertip=5>, (05.11.2023).

⁷⁴ Türkiye Cumhuriyeti Anayasa Mahkemesi, “Türkiye Cumhuriyeti Anayasası (Gerekçeli)”, https://www.anayasa.gov.tr/media/7465/gerekceli_anayasa_2021.pdf, (10.11.2023).

and matters arising from family law in accordance with the Second Book of the Turkish Civil Code No. 4721, excluding the Third Part, and the Law No. 4722 dated 3.12.2001 on the Enforcement and Implementation of the Turkish Civil Code.⁷⁵ Accordingly, disputes regarding the breaking of engagement, marriage, separation, divorce, annulment and nullity of marriage, property regime, compensation, alimony, custody and guardianship are disputes within the scope of family law.

The majority of the cases in family courts consist of matters of public order. It is not possible for the parties to freely dispose of these matters. Therefore, the judge's decision on these matters is not bound by the agreements made by the parties. Only the court can decide on the validity of marriage, nullity of marriage, annulment of marriage, separation and divorce. These cannot be subject to agreements between the parties. The parties may only make agreements on the secondary consequences of separation and divorce.⁷⁶

Custody includes the protection of the child's person, property and representation of the child by the parents. Custody is not for the parents, but for the protection of the child and to prevent the child from being in need of protection. Although custody is a right granted to the parents, this right has constitutional and legal limits.⁷⁷

Custody cases are subject to simplified procedure. However, since these cases are of public order, the principle of ex officio examination applies. Experts are used if the court deems it necessary. Experts prepare a report by interviewing both the parents and the child and examining the lives of the parties. The opinion and preference of the child, who has the capacity of judgment, is taken into consideration by the court in cases of change of custody. Therefore, it is accepted that the child should be heard in court about the decision to be made about the

⁷⁵ Mevzuat Bilgi Sistemi, “4787 Sayılı Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4787.pdf>, (05.11.2023).

⁷⁶ Tercan, p.47.

⁷⁷ Serozan, pp. 250, 251.

child. However, if the opinion and preference of the child conflicts with his/her best interests, a decision must be made in the best interest of the child.⁷⁸

2.1.3. Qualifications of the Family Court Judge

The qualifications of family court judges are regulated in Article 3 of the Law No. 4787 on the Establishment, Duties and Trial Procedures of Family Courts. In 2003, when the Law was entered into effect, family court judges were required to be married, have children, be at least thirty years old, and have a postgraduate degree in the field of law. Law No. 5133 on the Amendment of the Law on the Establishment, Duties and Trial Procedures of Family Courts, which entered into force in 2004, amended the qualifications required for a family court judge. Accordingly, it is stated that family court judges will be preferred among judges who are married, have children, are at least thirty years old and have a postgraduate degree in family law.⁷⁹ The qualifications specified as family judge are not stated as a condition but as a reason for preference.⁸⁰

2.1.4. Experts And Social Workers Assigned in Family Courts

According to Article 5 of the Law No. 4787 on the Establishment, Duties and Trial Procedures of Family Courts, the court shall make use of experts appointed by the Ministry of Justice in the courthouses to conduct research on the dispute between the parties, to be present at the hearing when necessary, to conduct studies on the requested issues, to give opinions and to perform other duties to be assigned by the court. These experts are psychologists, pedagogues and social workers. In cases where the assigned experts are not available or in cases where another branch of expertise is needed, other experts are also used.

⁷⁸ Mehmet Akçaal, **Velayetin Değiştirilmesi**, İnönü Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 13, Issue: 1, 2022, pp. 199, 200. <https://dergipark.org.tr/tr/download/article-file/2186676>, (15.11.2023).

⁷⁹ Mevzuat Bilgi Sistemi, “4787 Sayılı Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4787.pdf>, (05.11.2023).

⁸⁰ Çağlar Özel and Erol Tatar, **Aile Mahkemelerinin Yapısı ve Kararları Üzerine Genel Bir Değerlendirme**, Vol.:7, Issue:7, 2008, p.57. <https://dergipark.org.tr/en/download/article-file/197623>, (15.11.2023).

These experts can be dismissed according to the grounds for recusal of the judge regulated in the Code of Civil Procedure dated 12/1/2011 and No. 6100. According to Article 6 of Law No. 4787 on the Establishment, Duties and Trial Procedures of Family Courts, the court may decide to take protective, educational and social measures separately for adults and children. In the follow-up and fulfillment of these decisions, experts assigned according to Article 5 may be utilized.⁸¹

A pedagogue is a specialist in educational science who works specifically with children. Social workers are social service experts who work on personal and social problems. Like family court judges, experts working in Family Courts are primarily selected from among those who are married, have children, are over the age of thirty and have postgraduate education in the field of family problems.⁸²

According to Law No. 5395 on Child Protection, Social Worker, professionals who graduated from institutions providing education in the fields of psychological counseling and guidance, psychology, sociology, child development, teaching, family and social sciences and social work.⁸³

The Social Investigation Report is a document prepared by the social worker, which identifies the social, emotional and cognitive characteristics of the child, the family and environmental conditions in which the child lives, and proposes what kind of intervention should be done to integrate the child into society. The Social Investigation Report is of great importance for the decisions to be made in family courts. In the decisions to be made regarding the custody of the child, the social worker makes a home visit and observes the child both with the parents and in the home environment. In this way, the child is less affected by the courthouse environment.⁸⁴

⁸¹ Mevzuat Bilgi Sistemi, “4787 Sayılı Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4787.pdf>, (08.11.2023).

⁸² Aziz Serkan Arslan, **Türk Aile Mahkemelerinin Yapısı ve Yargılama Usulü**, Ankara Barosu Dergisi, Issue: 1, 2010, p. 192. <https://dergipark.org.tr/tr/download/article-file/397676>, (18.11.2023).

⁸³ Mevzuat Bilgi Sistemi, “5395 Sayılı Çocuk Koruma Kanunu”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5395.pdf>, (04.11.2023).

⁸⁴ Sema Buz, Kübra Düzyurt and Mehmet Sağlam, **Aile Mahkemesinde Çalışan Sosyal Çalışma Görevlilerinin Sosyal İnceleme Raporlarına İlişkin Değerlendirmeleri: Ankara Adliyesi Örneği**, Toplum ve Sosyal Hizmet, Vol.: 26, Issue: 2, Ekim 2015, pp.11, 12. <https://dergipark.org.tr/tr/download/article-file/153086>, (05.11.2023).

The experts working in the Family Courts are employed as permanent employees of the State and serve as auxiliary judicial personnel, whose duty is to help the judge. Unlike expert witnesses, these experts are employed not to prove the facts in the dispute, but to learn the source of the dispute, to understand the psychological state of the parties and to implement protective measures.⁸⁵

2.1.5. Measures For The Protection of Children in Family Courts

Family courts adjudicate interim injunctions as well as judgments. These decisions are based on the cautionary decisions in the Second Book of the Turkish Civil Code and the protective, social and educational measures for adults and children in Article 6 of Law No. 4787.⁸⁶ The aim of the Family Courts is not to create new types of cases or decisions, but to resolve cases with specialized staff.⁸⁷

The Turkish Civil Code gradually regulates child protection measures. This regulation aims to protect the child's personality and property of the child. In order to protect the child in terms of his/her personality, the judge may decide on the measure of receiving guidance and psychological counseling services, the measure of warning the parents about their responsibilities towards the child in the family, the measure of placing the child in a foster family or an institution, or the measure of changing the custody of the child or the measure of removing the custody of the child. The measure of removal of custody is the most severe measure for the protection of the child and requires justified reasons.⁸⁸

Within the scope of Law No. 4787, in relation to children; to take the necessary measures regarding the alimony obligation for care and supervision; to take the child whose physical and mental development is in danger or who is

⁸⁵ Çağlar Özel and Erol Tatar, p.59.

⁸⁶ Orhan Filiz, **Türkiye’de Aile Mahkemeleri Uygulaması ve Uygulamanın Değerlendirilmesi Üzerine Bir Araştırma**, Aile ve Toplum, Vol.: 7 Issue: 25, 2011, p. 87. <https://dergipark.org.tr/tr/pub/spcd/issue/21104/227280>, (03.12.2023).

⁸⁷ Buz et al, pp. 8, 9.

⁸⁸ Ebru Ceylan, **Türk Medeni Kanunu’nda Çocuğun Korunmasıyla İlgili Güncel Yargıtay Kararlarının Değerlendirilmesi**, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Prof. Dr. Şeref ERTAŞ’a Armağan, Issue: 19, Özel Sayı, 2017, p. 372. <https://hukuk.deu.edu.tr/wp-content/uploads/2017/11/9-EBRU-CEYLAN.pdf>, (03.12.2023).

mentally abandoned, from the parents and place him/her with a family or in an official or private health institution or in an institution for children with difficult education; taking measures regarding the management and protection of children's property; placing the child in organizations, establishments or enterprises established by general and annexed budget departments, local administrations, state economic enterprises and banks or in similar workplaces or in the care of a professional.⁸⁹ Injunctions issued by family courts are interim injunctions that provide temporary legal protection.⁹⁰

In most of the cases seen in Family Courts, children are victimized and decisions are taken on issues concerning children due to reasons such as children's voices not being heard enough, not paying enough attention to children in courts, and wrong attitudes of families. Although the best interest and benefit of the child is taken in the decisions taken, it is not possible to protect the child from all kinds of risks and victimization in the justice system. On the other hand, the measures in the Child Protection Law can be applied for children who are determined to be at risk in the cases seen in the Family Courts and efforts are made to protect the best interests of the child.⁹¹

Child Protection Law No. 5395 aims to protect and secure the rights of children in need of protection and children dragged into crime. In Article 5 of the Law, protection and supportive measures for children are listed as counseling measures, education measures, care measures, shelter measures and health measures. It is also stated that these measures are primarily aimed at protecting the child in his/her own family environment.⁹²

Article 6 of the Regulation on the Implementation of the Protective and Supportive Measure Decisions Made Pursuant to the Child Protection Law stipulates that those who are aware that a child is in need of protection are obliged to notify the Family and Social Policies directorates in provinces and districts, and that the child and the persons responsible for the care of the child may also apply

⁸⁹ Filiz, pp. 81,82.

⁹⁰ Çağlar Özel and Erol Tatar, p.66.

⁹¹ Zeynep Mutlu, **Aile Mahkemesinde Tedbir Kararlarının Çocuğun Psikososyal Sağlığına Etkisinin Vaka Analizi Yoluyla Değerlendirilmesi** III. International Health Science And Life Congress, 04-06 June 2020, Burdur/TÜRKİYE, pp. 194, 195.

⁹² Mevzuat Bilgi Sistemi, “5395 Sayılı Çocuk Koruma Kanunu”, <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5395.pdf>, (04.11.2023).

to the Family and Social Policies directorates in provinces and districts in order to take the child under protection.⁹³

In a study conducted on children under health measures, it was concluded that there are social risk factors such as broken families and that family-oriented studies and early intervention are important. It was determined that interventions should be made to improve the current conditions of families and children. It was recommended that family counseling services and counseling cautionary decisions should be implemented more effectively.⁹⁴

2.2. RESOLUTION THROUGH MEDIATION

A family dispute is a private law dispute. The purpose of the resolution of civil disputes through mediation is to describe an activity in which the parties help to resolve their disputes with the help of a mediator. Mediation in civil disputes is not used as a substitute for the judiciary, but as an alternative dispute resolution method to the judiciary. The resolution of family disputes through mediation has been adopted by some countries. However, there is a difference between the methods and practices between the countries that accept mediation for the resolution of family disputes and the countries that do not.

"Family mediation provides a wide range of advantages as a safe, effective, flexible, time-saving, less costly, simple and straightforward process in which relationships are developed for the future, all issues are reviewed and explored, and the parties are in control."⁹⁵

In mediation, the lack of jurisdiction of the mediator, the parties' voluntary participation in the process and their voluntary decision on the terms of the

⁹³ Mevzuat Bilgi Sistemi, "Çocuk Koruma Kanununa Göre Verilen Koruyucu ve Destekleyici Tedbir Kararlarının Uygulanması Hakkında Yönetmelik", <https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=10884&mevzuatTur=KurumVeKurulusYonetmeligi&mevzuatTertip=5> (17.11.2023)

⁹⁴ Ferda Karadağ and Yaşar Çavdar Kolbüken, **Sağlık Tedbiri Kararı Bulunan Çocukların Koruyucu/Önleyici Hizmetler Kapsamında Değerlendirilmesi**, Tıbbi Sosyal Hizmet Dergisi, Issue: 19, 2022, p. 97, 98. <https://dergipark.org.tr/tr/download/article-file/2256172> , (03.12.2023).

⁹⁵ İl, p. 29.

agreement, the voluntary and flexible structure of the parties are the characteristic features that distinguish mediation from other alternative solutions.⁹⁶

Although family disputes arise from clear and serious differences of opinion, an action or a clear disagreement, they sometimes involve other problems underlying the alleged cause. Therefore, in family disputes, first of all, determining the exact source of the dispute fully and accurately by the parties or experts in their field will contribute to reaching the right solution.

2.2.1. In the European Union

2.2.1.1. In the European Union Law

In the European Union, interest in alternative dispute resolution has increased due to the fact that alternative dispute resolution is a facilitating way of access to justice, that the Member States of the European Union have enacted encouraging laws on this subject in their domestic laws, and that an environment conducive to the widespread application of this method is provided. For this reason, the Council of the European Union requested the European Commission to examine the current situation regarding alternative dispute resolution methods and to prepare a Green Paper containing opinions and recommendations on the measures taken. The European Commission published the Green Paper on Alternative Procedures for the Settlement of Private Law Disputes in 2002 and the European Code of Conducts for Mediators in 2004.⁹⁷

The aim of the Green Paper is to launch a broad consultation on alternative dispute resolution in civil and commercial law. The Green Paper helps to make alternative dispute resolution more widely known and the initiatives taken by Member States and the Community more visible. The purpose of public consultation during the preparation of the Green Paper is to ascertain general

⁹⁶ Felix Steffek, **Mediation in the European Union: An Introduction**, June 2012, pp. 1, 2. <https://e-justice.europa.eu/fileDownload.do?id=b3e6a432-440d-4105-b9d5-29a8be95408f>, (30.06.2023).

⁹⁷ Mustafa Özbek, **Avrupa Birliğinde Alternatif Uyuşmazlık Çözümü**, Türkiye Barolar Birliği Dergisi, Issue: 68, 2007, pp. 265, 266, 276, 317. <http://tbbdergisi.barobirlik.org.tr/m2007-68-291> (19.11.2023).

views on the subject and reactions to the questions asked. The Commission also intends to use the views received as input to define the general contours of its policy for the following years.⁹⁸

2.2.1.1.1. Treaty on European Union and Treaty on the Functioning of the European Union

The Lisbon Treaty was signed at the European Union Summit held in Lisbon in 2007. With this treaty, an agreement was reached that brought some changes in the institutional structure of the European Union.⁹⁹ The Lisbon Treaty entered into force in 2009 and introduced significant changes to the Treaty on European Union and the Treaty on the Functioning of the European Union, the founding treaties of the European Union. Article 2 of the Treaty on European Union emphasizes the importance given to fundamental human rights by referring to equality, freedom and the rule of law. With regard to children's rights, the Common Provisions of the Treaty on European Union stipulate that the protection of children's rights shall be promoted. In the Treaty on the Functioning of the European Union, there is a provision stating that trafficking in women and children will be combated and necessary measures will be taken against the sexual abuse of children. Furthermore, the Treaty on European Union confirms the commitment to the fundamental rights in the European Social Charter signed in 1961.¹⁰⁰

The Lisbon Treaty states that the EU is bound by the rights, freedoms and principles set out in the Charter of Fundamental Rights. In this way, the Charter of Fundamental Rights has become a legally binding text with the same legal value as the Treaties.¹⁰¹

⁹⁸ T.C. Dış İşleri Bakanlığı Avrupa Birliği Başkanlığı, “Green Paper”, https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_2_green_papers/com2002_green_paper_on_alternative_dispute_resolution.pdf, (12.11.2023).

⁹⁹ T.C. Dış İşleri Bakanlığı, “Lizbon Antlaşması”, <https://www.mfa.gov.tr/lizbon-antlasmasi.tr.mfa>, (18.11.2023).

¹⁰⁰ T.C. Başbakanlık Avrupa Birliği Genel Sekreterliği, “Avrupa Birliği Antlaşması ve Avrupa Birliği’nin İşleyişi Hakkında Antlaşma”, <https://www.ab.gov.tr/files/pub/antlasmalar.pdf>, (18.11.2023).

¹⁰¹ Yüksel Metin and Ümmühan Kaygısız, **Avrupa Birliği’nde Temel Hakların Korunması ve**

2.2.1.1.2. Charter of Fundamental Rights of the European Union

Charter of Fundamental Rights of the European Union was adopted in Biarritz, France on October 13-14, 2000. It was ratified at the "Nice Summit" on December 7-8, 2000.¹⁰² In particular, the Charter incorporates rights deriving from constitutional traditions and international obligations common to Member States, the European Convention on Human Rights, the European Social Charter and the case law of the Court of Justice of the European Union and the European Court of Human Rights. Article 7 of the Charter sets out the right to respect for private and family life and Article 9 the right to marry and found a family. Article 24 of the Charter regulates the rights of the child. The rights of the child include the right to due protection and care, freedom of expression, the right to have their opinions taken into account in decisions concerning them according to their age and maturity, the right to give priority to the protection of the child's interests in all institutions and organizations, and the right to have regular contact with their parents, provided that it is not contrary to their interests. Article 32 of the Charter prohibits child labor and sets a minimum age limit.¹⁰³ Social and economic rights are also included in the Charter, and new rights such as "the right to good administration" have been added.¹⁰⁴

2.2.1.1.3. Directive 2008/52/EC of the European Parliament and of the Council

Following the publication of the Green Paper and the European Code of Conduct for Mediators, Directive 2008/52/Ec of the European Parliament and of

Lizbon Antlaşması'nın Getirdiği Yenilikler, Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 1, Issue: 1, 2011, pp. 136. <https://www.acarindex.com/pdfler/acarindex-8d91ff84-12a8.pdf> , (14.12.2023).

¹⁰² İnsan Hakları Derneği, "Avrupa Birliği Temel Haklar Bildirgesi", <https://www.ihd.org.tr/avrupa-birligi-temel-haklar-bildirgesi/> , (23.11.2023).

¹⁰³ European Union, "Charter of Fundamental Rights of The European Union", <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT>, (23.11.2023).

¹⁰⁴ Yüksel Metin, **Avrupa Birliği Temel Haklar Şartı**, Ankara Üniversitesi Sosyal Bilimler Fakültesi Dergisi, Vol.: 57, Issue:4, 2002, p.46. <https://dergipark.org.tr/tr/pub/ausbf/issue/3098/42874>, (22.11.2023).

the Council was issued to facilitate and improve access to alternative dispute resolution.¹⁰⁵

Directive 2008/52/Ec of the European Parliament and of the Council of 21 May 2008 should apply to matters where the parties can reach an agreement voluntarily and freely decide according to their own law. It is also stated that it should be applied in cases where mediation is provided for in national law. According to the Directive, in order for a family dispute to be resolved through mediation and for the agreement reached to be enforceable, it must be in accordance with the domestic law of the State party and be enforceable. The Directive may be applied in cross-border disputes, in civil and commercial matters, and in rights and obligations that may be at the disposal of the parties themselves. The Directive defines a mediator as a third party who is able to conduct the mediation process effectively and independently, irrespective of his/her profession and the manner of his/her appointment. The importance of voluntariness, confidentiality and enforceability of the agreement reached in the mediation process is emphasized.¹⁰⁶

According to Felix, the scope and nature of the directive and the different regulations on mediation in the member states show that mediation is evolving. He stated that most of the articles, except for confidentiality and enforceability, express a desire rather than an absolute rule. He also stated that the directive states that the training of mediators should be encouraged but does not explain how it should be done.¹⁰⁷

EU Directive 2008/52 on Mediation in Civil and Commercial Matters has been incorporated into the domestic laws of the EU Member States in accordance with their own preferences. Therefore, each EU Member State is free to adopt or not to adopt compulsory mediation in civil and commercial matters while incorporating the Directive into its domestic law according to its own preference.¹⁰⁸

¹⁰⁵ Hakan Yıldırımöğlu, **Avrupa Ülkelerinde Ticari Arabuluculuk Uygulamaları**, Vol.: 21, Issue: 44, 2022, p. 949. <https://dergipark.org.tr/en/pub/iticusbe/issue/72505/1168254> (19.11.2023)

¹⁰⁶ European Union, “Directive 2008/52/Ec Of The European Parliament and of The Council of 21 May 2008”, <https://eur-lex.europa.eu/eli/dir/2008/52/oj>, (30.06.2023).

¹⁰⁷ Steffek, pp. 8 - 10.

¹⁰⁸ Sibel Özel, **Zorunlu Arabuluculuğun Adalet Erişim Hakkı Çerçevesinde İrdelenmesi**,

2.2.1.1.4. European Code of Conduct for Mediators

The European Code of Conduct for Mediators consists of principles developed for mediators. In the first article regulating the competence of the mediator, it is stated that mediators should have received and update the necessary training and practices in order to have the knowledge and skills to manage the mediation process. The European Code of Conduct for Mediators regulates that the mediator should fulfill his/her duties independently, impartially, fairly, by providing the necessary information to the parties and respecting the confidentiality of the process. The independence of the mediator means that the mediator shall not derive any personal, commercial, financial or any other benefit from the parties or from the outcome of the mediation process. If such a situation exists, the mediator must be confident that he or she can conduct the process independently and the parties must consent. The impartiality of the mediator requires him/her to treat the parties equally. Fair conduct of the process by the mediator implies that the parties are given sufficient opportunity and that the agreement reached at the end of the process is lawful and enforceable. The mediator must clearly inform the parties about the mediation process and the agreement reached at the end of the process. In addition, the mediator is obliged to keep all information and documents related to the mediation process confidential, unless there is a legal obligation and the parties give their consent.¹⁰⁹

2.2.1.2. In Member States of the European Union

2.2.1.2.1. Germany

Family mediation in Germany started in 1977. First of all, issues such as agreeing on the payment of alimony in relation to children, resolving problems

Public and Private International Law Bulletin, Vol.: 40, Issue: 2, 2020, pp. 874-875, https://dergipark.org.tr/tr/pub/ppil/issue/56082/835502#article_cite, (29.06.2023).

¹⁰⁹ European Justice, "European Code of Conduct For Mediators", https://e-justice.europa.eu/63/EN/eu_rules_on_mediation, (10.11.2023).

related to the family home, reaching an agreement on custody and establishing a personal relationship with the child were addressed.¹¹⁰

On July 26, 2012, the Mediation Act entered into force and established the legal framework for mediation in Germany.¹¹¹

"The content, principles and implementation of family mediation are regulated by the Federal Association for Family Mediation (BAFM)."¹¹² "50% of BAFM members come from psycho-social professions and 50% from the legal profession."¹¹³

In Germany, Part 2 of the Federal Working Community Directive on Family Mediation regulates the child focused activities of the family mediation institution. These activities include: where and with whom (which parent) the child will live, the place of residence, upbringing and education of the child; how the parents who do not live with the child and do not have custody of the child, or close relatives such as the child's grandparents, will establish a personal relationship with the child; how the family's property, the family home and possessions will be divided in accordance with the needs and circumstances of the parties.¹¹⁴

In Germany, the German legislation allows the parties to agree on the establishment of a relationship with the child, provided that the judge approves it.¹¹⁵ In 2009, the Non-Contentious Jurisdiction Law made it possible to apply mediation and other alternative solutions in the regulation of the personal relationship with the child, which is not an area that the parties can freely dispose of.¹¹⁶

¹¹⁰ Mazlum, p. 2369.

¹¹¹ European Justice, "Family Mediation in Germany", https://e-justice.europa.eu/372/EN/family_mediation?GERMANY&member=1, (26.06.2023).

¹¹² Mazlum, p. 2370.

¹¹³ Lisa Parkinson, **Aile Arabuluculuğu**, Sorumlu Editör Yonca Fatma Yücel, Ocak 2018, p. 410.

¹¹⁴ Yasemin Güllüoğlu Altun, **Aile Arabuluculuğu (Sisteme Genel Bakış)**, Prof. Dr. Hüseyin Hatemi'ye 80. Yıl Armağanı, İstanbul, 2018, p. 494.

¹¹⁵ TBMM, "Türkiye Büyük Millet Meclisi, Meclis Araştırması Komisyonu Raporu", 14 Mayıs 2016, Sıra Sayısı: 399, p. 379, <https://www.aile.gov.tr/media/4129/meclis-aras-tirma-komisyonu.pdf>, (29.06.2023).

¹¹⁶ Tolga Akkaya, **Boşanma Davasında Alınabilecek Geçici Hukuki Korumalar veya Hakimin Müdahalesi Yoluyla Çocuğun Korunması Kapsamında Zorunlu Arabuluculuk ve Boşanma Süreci (Aile) Danışmanlığı**, Ankara Barosu Dergisi, Issue: 4, 2014, p.37. <https://dergipark.org.tr/tr/pub/abd/issue/33819/374515>, (03.12.2023).

2.2.1.2.2. France

In France, the rapid increase in divorces, problems related to child custody, spouses filing lawsuits against each other after divorce and continuing the problems between them have been effective in the emergence and development of family mediation. It has been observed that the decisions rendered by the courts on family disputes do not fully resolve the problems between parents, especially on issues such as child custody. For this reason, family mediation, which is an amicable solution method, has been understood to be necessary for the protection of the family.¹¹⁷

In France, mediation is supported by the state and in doctrinal circles. This is because mediation reduces the workload of the courts and provides a faster, simpler, cheaper and effortless resolution of disputes. In France, since 1996, mediation has been regulated in the legislation as a voluntary or compulsory conciliation procedure as a preliminary stage to be applied before judicial proceedings.¹¹⁸

The beginning of family mediation in France was marked by the introduction of the Quebec Model in Canada. This practice has enabled people who believe that alternative methods are more appropriate for the resolution of family disputes to work on this issue before family mediation has been legalized.¹¹⁹ "The model is also characterized by what we call 'global mediation' in the sense that the mediators do not confine themselves to questions concerning the children but also cover matters of finance and property."¹²⁰

In France, family court judges are obliged by the "Joint Parental Authority Act" of March 2002 and the "Reform of the Divorce Act", which entered into force on January 1, 2005, to refer the parties to mediation, provided that they have

¹¹⁷ Cem Özcan, **Fransız Hukukunda Aile Arabuluculuğu**, Dergipark, Issue: 9, 2017, pp.385, 386. <https://dergipark.org.tr/en/download/article-file/316045>, (29.06.2023).

¹¹⁸ Bilgin, kıta, p.13.

Mustafa Özbek, **Avrupa Konseyince Adalet Hizmetlerinin Etkinliğinin Artırılması İçin Öngörülen Tedbirler**, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 55, Issue: 1, 2006, p. 238. <https://dergipark.org.tr/tr/pub/auhfd/issue/42634/513921>, (03.12.2023).

¹¹⁹ Özcan, p. 386.

¹²⁰ Benoit Bastard and Laura Cardia-Voneche, **Family Mediation in France**, International Journal of Law and the Family, Vol: 7, 1993, p. 273.

https://www.researchgate.net/publication/232911563_Family_mediation_in_France_A_new_profession_has_been_established_but_where_are_the_clients, (03.12.2023).

been informed about mediation and that mediation is implemented after the consent of both parties. The Association for Family Mediation (Association pour la Médiation Familiale - APMF) and the National Federation of Family Mediation Associations (Fédération Nationale Des Associations de Médiations Familiales - FENAMEF) are the two main civil society organizations working in the field of private family law in France.¹²¹

In divorce proceedings, the court may direct the parties to attend a free information meeting on mediation, recommend mediation in matters of custody or interim measures, as long as there is no allegation of violence between the parents or against the child. If the parties cannot agree, the court tries to conciliate them. If the parents agree to mediation, the court may appoint a family Ombudsman who will inform them about the purpose and progress of the mediation measure, and this appointment may be included in the final decision on how to exercise parental authority. In the process of compulsory family mediation, which began on an experimental basis in 2019, pre-trial mediation is compulsory for decisions on the child's place of residence and visitation rights, the parent's contribution to the child's education and care, and the exercise of parental authority, unless there is a history of abuse or other cause of abuse between the parents or against the child.¹²²

The most important reasons for the success of family mediation in France are the effective work of family mediators, the support of family court judges and the State, the struggle for the rights of fathers who are only responsible for child support and have limited personal contact with the child in court decisions, and training programs on family mediation.¹²³

¹²¹ Parkinson, p.410.

¹²² European Justice, "Mediation in EU Countries, France", https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?FRANCE&member=1, (30.11.2023).

¹²³ Benoit Bastard, **Family mediation in France: a new profession has been established, but where are the clients?**, Journal of Social Welfare & Family Law, Vol. 32, No. 2, 2010, pp. 137, 138. https://www.researchgate.net/publication/232911563_Family_mediation_in_France_A_new_profession_has_been_established_but_where_are_the_clients, (03.12.2023).

2.2.1.2.3. Croatia

In the Republic of Croatia, compulsory counseling and family mediation came into force on November 1, 2015 with the new Family Code. As a way to help family members reach an agreement on family relations, the parties participate in compulsory counseling in person and without a proxy. Family mediation, on the other hand, is a voluntary process in which family members participate. Only before the divorce is filed, the parties are required to attend the first meeting of family mediation. During the family mediation process, the parties can reach an agreement on both property and all other issues. However, family mediation cannot take place if the spouses feel that it is not possible to participate equally in the family mediation process due to domestic violence, if both spouses lack the capacity to contract, and if they cannot understand the meaning and legal consequences of the process even with the help of an expert. During the mediation process, the family mediator is obliged to inform the participants about the welfare of the child. The mediator may also allow children to voluntarily express their views during the family mediation process.¹²⁴

2.2.1.2.4. Netherlands

In the Netherlands, both the district court hearing the case and the court of appeal are authorized to refer parties to mediation. Courts may also refer family law cases to a parental review procedure, which involves the use of mediation to help the parties find a possible solution to the problem.¹²⁵

A pilot project was implemented in the Netherlands between 1999 and 2003. In this project, 1000 families were referred to compulsory mediation among the cases pending in court. In this project, it was found that in 61% of the cases referred to compulsory mediation with court involvement, reconciliation was reached.¹²⁶

¹²⁴ European Justice, “Family Mediation in Croatia”, https://e-justice.europa.eu/372/EN/family_mediation?CROATIA&member=1, (26.06.2023).

¹²⁵ European Justice, “Family Mediation in Netherlands”, https://e-justice.europa.eu/372/EN/family_mediation?NETHERLANDS&member=1, (26.06.2023).

¹²⁶ Akkaya, p.36.

In the Netherlands, the legal framework for divorce mediation is regulated by the "Law on Continued Parenting after Divorce", which came into force in 2009. In order to divorce, parents are required to submit a parenting plan explaining how they will carry out their parental responsibilities. Divorce mediation in the Netherlands is mostly concerned with the consequences of divorce for children and the maintenance of family ties between parents and their children, but also with financial and property issues.¹²⁷

2.2.1.2.5. Spain

In Spain, the first law on mediation was enacted in 2012 in order to integrate the European Directive 2008/52/EC. This law regulated mediation in civil and commercial matters. However, it made no specific reference to family mediation.¹²⁸

In the autonomous regions of Spain, regional laws on family mediation were enacted. However, these laws contained variable provisions on the definition and use of mediation. However, a federal law introduced many changes to the legal procedure for shared parental responsibility in divorce and separation. The aim of this law was to facilitate parental agreement and reduce parental conflicts in order to improve the welfare of the child.¹²⁹

Family mediation in Spain is entirely voluntary. It is governed by the principles of confidentiality, equality of the parties and mediator impartiality, among others. The parties can choose the mediator themselves, or a mediator can be appointed by the judge while the case is pending.¹³⁰

¹²⁷ Parkinson, p.413.

¹²⁸ European Justice, "Family Mediation in Spain", https://e-justice.europa.eu/372/EN/family_mediation?SPAIN&member=1, (26.06.2023).
Parkinson, p. 419.

¹²⁹ Parkinson, p. 420.

¹³⁰ European Justice, "Family Mediation in Spain", https://e-justice.europa.eu/372/EN/family_mediation?SPAIN&member=1, (26.06.2023).

2.2.1.2.6. Sweden

It is a general principle of Swedish law that consensual solutions are considered best for the child. Parents have a responsibility to first reach a consensual agreement between them. If this is not successful, the court may order conciliation or mediation. The rules aim to ensure that parents can first reach agreement on matters affecting their children.¹³¹

Swedish law makes it clear that arrangements agreed by the parents themselves are generally preferred to court orders. In 1998, the Swedish Parliament amended the law so that custody and child access agreements reached through "cooperative negotiations" have the same force as a court order, provided that the agreement is approved by the social welfare officer in the best interests of the child. The aim of this amendment was to ensure that parental agreements benefit children and to help parents to reach agreements with their children.¹³²

2.2.1.2.7. Belgium

The legal basis of the mediation institution in Belgium is the regulation in Articles 1724-1737, which was added to the Belgian Code of Civil Procedure as Chapter 7 under the title "Mediation". This regulation is fully in line with the EU Directive. It also provides a very modern and ideal infrastructure for mediation compared to other countries. This regulation consists of three parts; "general principles", "voluntary mediation" and "judicial mediation". In the general principles section, the criterion of "amenability to settlement" has been introduced in terms of the dispute that can be submitted to mediation. Apart from this, other disputes that can be resolved through mediation are determined as "uncontested divorce", "legal consequences of divorce" and "legal cohabitation".¹³³

Mediation in Belgium is regulated by the law of 21 February 2005. Mediation is voluntary and confidential. The mediation process in Belgium

¹³¹ European Justice, "Family Mediation in Sweden", https://e-justice.europa.eu/372/EN/family_mediation?SWEDEN&member=1, (26.06.2023).

¹³² Parkinson, p. 414.

¹³³ Bilgin, K1ta, p.14.

consists of three stages: appointment of the mediator by the judge, postponement of the case to a later date and conclusion of the mediation. If the mediation is successful, the agreement between the parties can be approved by the judge. If the mediation is unsuccessful, the parties may file a lawsuit, continue the proceedings or ask the court to appoint a new mediator.¹³⁴

2.2.1.2.8 Finland

In Finland, according to the Marriage Act of 1987, municipalities are obliged to provide mediation services to parents on child related issues on a voluntary basis. In 2009, the project FASPER has been developing family mediation approaches and specialized training. In general, the aim is to use mediation as a way for parents to cooperate in the best interests of their children and to change the culture of family dispute.¹³⁵

There are three different applications of family mediation in Finland: Out-of-court mediation, court mediation as a stand-alone procedure and mediation as part of the implementation of a decision on custody or access rights of a child. The mediator's specific task is to protect the rights of children in divorce proceedings. In order for the agreement reached between the parents to be enforceable, the mediator asks the parents to confirm the agreement with a child welfare officer. In court mediation, the courts can mediate issues related to child custody, housing, access rights and financial support. The mediator is usually a psychologist specialized in child psychology, a social worker specialized in child protection or a child welfare officer. The aim of mediation is to promote the welfare of children. To this end, cooperation between children and their parents or other interested parties is facilitated. The mediator first holds a meeting with the parents. If the age and developmental level of the child is appropriate, he or she meets with the child separately to find out the child's wishes and views. The mediator prepares a report on the mediation for the court. If the mediation process

¹³⁴ European Justice, "Family Mediation in Belgium", https://e-justice.europa.eu/372/EN/family_mediation?BELGIUM&member=1, (26.06.2023).

¹³⁵ Parkinson, pp. 407, 408.

does not result in an agreement, the court will consider the mediator's report in its decision.¹³⁶

2.2.2. United Kingdom

Mediation began in the UK in 1978 as a pilot scheme in Bristol by an independent group of social workers and family lawyers. Couples at any stage of separation or divorce can benefit from this practice.¹³⁷

In the UK, the Family Law Act of 1996 introduced mediation as a compulsory condition for the resolution of family disputes. The court first informs the parties of this requirement. If the parties do not voluntarily apply for mediation, the court may order the parties to initiate the mediation process under certain circumstances and if the parties have requested legal aid.¹³⁸

In England and Wales, the Family Law Act 1996 recognized the important role of mediation. The legal acceptance of family mediation through the legal aid system therefore took place through the Divorce Law reform, which set regulations and standards for mediation.¹³⁹

In English law, mediation is a process in which the dispute is negotiated with a specially trained mediator and ends with the parties reaching an agreement and putting it in writing. In the UK, mediators who are lawyers are not considered to be good mediators due to their formalistic way of thinking and their adherence to legal regulations. However, the subject matter of the dispute determines which profession the mediator should be.¹⁴⁰ Family mediators may come from a lawyer, therapy or counseling background. Sometimes two mediators with different specializations can work together as co-mediators. All family mediators are specially trained to work with families in conflict and to help them find practical solutions to their problems. All mediators must be members of one of the five

¹³⁶ European Justice, "Family Mediation in Finland", https://e-justice.europa.eu/372/EN/family_mediation?FINLAND&member=1, (26.06.2023).

¹³⁷ Parkinson, p. 10.

¹³⁸ Akkaya, p. 36.

¹³⁹ Parkinson, p. 72.

¹⁴⁰ Hikmet Bilgin, **Anglo Sakson Hukuk Sisteminde Arabuluculuk**, Ankara Barosu, Hukuk Gündemi Dergisi, 2009, (anglo), pp.21, 22.

organizations¹⁴¹ affiliated to the Family Mediation Council (FMC). Family mediators are highly experienced in separation and divorce issues and inform the parties about these issues. Mediators provide information about the possible effects of the parties' choices on the family and the legal consequences. As family mediators are specially trained to focus on the needs of children, they help parents to focus on the needs of their children. In the case of a mediation process involving children, the mediator who meets with the child must have received special training in this area.¹⁴²

In the UK, the first meeting that couples applying for family mediation have with the mediator is called the Mediation Information and Assessment Meeting (MIAM). At the MIAM, couples inform the mediator about their situation. The mediator assesses the suitability of mediation for the applicants and informs the couples about the process. If they have children, they explain the rights of the children and guide them to make decisions in the best interest of the children. In addition, if there is a situation that requires support, the mediator provides information about the relevant institutions and organizations.¹⁴³

In the UK, family mediation can be used in relation to options for maintaining or ending marriage or other relationships and the consequences thereof; arrangements for dependent children: parenting arrangements between parents and/or career and extended family as appropriate; the future of parental responsibility; the future of the family home and other property or assets, including pensions, belonging to the parents; child maintenance and spousal maintenance issues; matters relating to debts; how to decide on these arrangements in the future.¹⁴⁴

¹⁴¹ Organizations affiliated to the Family Mediation Council: College of Mediators, Family Mediators Association, The Law Society, National Family Mediation, Resolution first for Family Law.

¹⁴² Family Mediation Association, "A Step by Step Guide to Family Mediation", <https://thefma.co.uk/about-family-mediation/a-step-by-step-guide-to-family-mediation/>, (30.11.2023).

¹⁴³ Family Mediation Council, "What is a MIAM?", <https://www.familymediationcouncil.org.uk/family-mediation/assessment-meeting-miam/>, (07.12.2023).

¹⁴⁴ Family Mediation Council, "Code of Practice for Family Mediators", <https://www.familymediationcouncil.org.uk/wp-content/uploads/2018/11/FMC-Code-of-Practice-v1.3-November-2018.pdf>, (03.11.2023).

However, research has shown that children are rarely included in the mediation process. The reason for this is the concern of the parents and the mediator that the inclusion of the child in the mediation process may create pressure on the child and therefore negative outcomes may occur.¹⁴⁵

2.2.3. Australia

Australia was one of the first states to promote the use of mediation in family disputes with the enactment of the Australian Family Law Act 1975.¹⁴⁶

Mediation in civil disputes, and in particular in family disputes, is a common practice in Australia.¹⁴⁷ Following the Australian Family Law Act of 1975, the Family Law Amendment Act No. 46 of 2006 introduced new provisions on the division of parental responsibilities. This law made it a prerequisite for parents to obtain a certificate from a family dispute resolution practitioner before making a child-related application to the court. Thus, it made mediation compulsory for parents in court proceedings concerning children. The exception to this requirement is in cases where a history or threat of domestic violence or child abuse has been identified. This certificate, which is to be submitted to the court before the proceedings, must indicate either that the participants have made a genuine effort to resolve the issues in question or that participation in mediation is not appropriate under the circumstances.¹⁴⁸

The positive aspects of compulsory family mediation are that it facilitates communication between the parties, that the parties make their own decisions, that they consider both themselves and their children in the agreement, and that it saves time and money. On the other hand, the State partially finances compulsory mediation and lawyers generally do not support mediation.¹⁴⁹

¹⁴⁵ Amel Ketani, **Family Mediation in England and Wales: Children's Voice**, Anuario Jurídico y Económico Escurialense, Iss: 51, 589-602, 2018, p. 592.
<https://publicaciones.rcumariacristina.net/AJEE/article/view/321>, (03.12.2023).

¹⁴⁶ Parkinson, p.72.

¹⁴⁷ Bilgin, Anglo, pp. 22-23.

¹⁴⁸ De Jong, p. 120.

¹⁴⁹ Jurgita Milišauskaitė and Jolanta Sondaitė, **Family Dispute resolution Practitioners' Subjective Experience and Attitude on Compulsory Family Mediation in Australia**, Acta Prosperitatis, Vol.: 13, Issue: 1, 2022, pp. 101,102. <https://sciendo.com/article/10.37804/1691-6077-2022-13-90-112>, (03.12.2023).

In Australia, mediation in family disputes is recognized as one of the constituent elements of divorce proceedings. Family courts offer free family counseling and family mediation services to the parties.¹⁵⁰

2.2.4. Turkish Law

2.2.4.1. Law on Mediation in Civil Disputes (No.6325)

The legal regulation of mediation in our country was made with the Law on Mediation in Civil Disputes (No. 6325). This law entered into force after being published in the Official Gazette on 22.06.2012. In addition, the Department of Mediation was established within the Ministry of Justice General Directorate of Legal Affairs.¹⁵¹ In the preparation of the Law on Mediation in Civil Disputes in Türkiye, the Green Paper on alternative dispute resolution methods, the Austrian Federal Law on Mediation in Civil Disputes, the Baden Württemberg Conciliation Law enacted in Germany, the Law on Compulsory Alternative Dispute Resolution in Private Law adopted in Bavaria, the Hungarian Mediation Law, the Mediation Laws adopted in Bulgaria and Slovakia, the UNCITRAL Model Law and the European Union Directive Proposal were taken into consideration.¹⁵²

According to the on Mediation in Civil Disputes (Law No. 6325, Article 1/2), mediation is applicable only in the resolution of private law disputes arising from business or transactions that the parties can freely dispose of, including those with a foreign element. In addition, it is stipulated that disputes involving allegations of domestic violence are not eligible for mediation.¹⁵³

Law on the Protection of the Family and Prevention of Violence against Women (No. 6284) entered into force on March 8, 2012. The purpose of the Law

¹⁵⁰ Akkaya, p. 35.

¹⁵¹ Kürşat Karacabey, **Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığı ve Uygulanabilirliğine Dair Sorunlar**, Ankara Barosu Dergisi, Issue: 1, 2016, p. 460. <https://dergipark.org.tr/tr/download/article-file/398508>, (03.12.2023).

¹⁵² Mustafa Serdar Özbek, "Law on Mediation in Civil Disputes No 6325 With Comparisons", <http://www.ankaratahkim.com/LAW%20ON%20MEDIATION%20IN%20CIVIL%20DISPUTES%20NO%206325.pdf>, (22.11.2023).

¹⁵³ Mevzuat Bilgi Sistemi, "6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.6325.pdf>, (28.06.2023).

is to regulate the procedures and principles regarding the measures to be taken in order to protect not only women, children and family members who have been subjected to violence or are at risk of being subjected to violence, but also the victims of unilateral stalking and to prevent violence against them.¹⁵⁴ Therefore, although mediation in family disputes is not regulated under Turkish Law, any business or transaction where there is an allegation of violence and the parties cannot freely dispose of it is not eligible for mediation.

In Türkiye, the Law No. 6325 on Mediation in Civil Disputes was adopted in 2012. In 2017, mediation was made a condition of litigation in labor disputes. As a result of successful practices, commercial cases were also included in the scope of compulsory mediation.¹⁵⁵

Under Turkish law, the judge has wide discretion in divorce and custody matters and is not bound by the parties' agreement on these matters.¹⁵⁶ Therefore, issues such as divorce and nullity of marriage, which are among the family law disputes related to the dissolution of marriage, and issues such as custody and personal relationship with the child, which are not of a monetary nature, are not issues that the parties cannot freely dispose of. Therefore, these issues are not suitable for mediation. Mediation can only be applied for the property claims that are ancillary to the divorce.¹⁵⁷

Article 48 of the Istanbul Convention stipulates that compulsory family mediation cannot be applied in cases of domestic violence, and Article 1 of the Law on Mediation in Civil Disputes stipulates that not only compulsory but also voluntary mediation cannot be applied in cases of domestic violence.¹⁵⁸

The most important shortcoming of this law was that there was no regulation in Law No. 6284 regarding the inability to mediate or reconcile

¹⁵⁴ TBMM, “Türkiye Büyük Millet Meclisi, Meclis Araştırması Komisyonu Raporu”, 14 Mayıs 2016, Sıra Sayısı: 399, s. 379, <https://www.aile.gov.tr/media/4129/meclis-aras-tirma-komisyonu.pdf>, (29.06.2023).

¹⁵⁵ Mustafa Serdar Özbek, **Alternatif Uyuşmazlık Çözümü Alanında Hukuk Politikası Belgesi**, Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 3, Issue:1, 2021, (HPB), p. 7. <https://dergipark.org.tr/tr/download/article-file/1518117> (19.11.2023)

¹⁵⁶ Özcan, pp. 391, 392.

¹⁵⁷ Dağlıoğlu, p. 567.

¹⁵⁸ Ahmet Temel, **İslam Aile Hukukundaki Arabulucu-Hakemlik Uygulamasının Türkiye’de Aile Arabuluculuğuna Muhtemel Katkıları**, Dergipark, İstanbul Üniversitesi Yayınevi, Vol.: 30, Issue: 2, 2019, p.332. <https://dergipark.org.tr/tr/pub/darulfunun/issue/50255/669861>, (18.11.2023).

between the parties after the legal process regarding violence was initiated. Article 1 of the Law No. 6325 on Mediation in Civil Disputes addresses this deficiency and regulates that "disputes involving allegations of domestic violence are not eligible for mediation."¹⁵⁹

2.2.4.2. Turkish Civil Code (No.4721)

According to Article 195 of the Turkish Civil Code No. 4721, spouses may request the intervention of the judge regarding obligations and disputes within the marriage union. The judge warns the spouses about this issue, tries to reconcile them and may request the assistance of experts if the spouses agree.¹⁶⁰

For example, spouses who have a dispute about having a child may request the intervention of a judge pursuant to Article 195 of the Turkish Civil Code. However, if a compromise cannot be reached between the spouses on this issue, there will be no sanction by the judge.¹⁶¹

In a case where the father requested the judge's intervention upon the mother's naming of the child born within the marriage union without the father's knowledge, the 2nd Civil Chamber of the Court of Cassation ruled that the lack of a decision in accordance with Article 195 of the Turkish Civil Code required a reversal. The fact that no decision was made in accordance with Article 195 of the Turkish Civil Code required a reversal.¹⁶²

2.2.4.3. Law of Civil Procedure (No. 6100)

Article 137 of the Code of Civil Procedure No. 6100 regulates that the judge shall encourage the parties to settle or mediate in cases where the parties

¹⁵⁹ Necla Öztürk, **Ailenin Korunması Ve Kadına Karşı Şiddetin Önlenmesine Dair Kanunun Getirdiği Bazı Yenilikler Ve Öneriler**, İnönü Üniversitesi Hukuk Fakültesi Dergisi, Vol.:8 Issue:1, 2017, pp. 23, 24. <https://dergipark.org.tr/tr/download/article-file/283776>, (03.12.2023)

¹⁶⁰ Mevzuat Bilgi Sistemi, "4721 Sayılı Türk Medeni Kanunu", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4721.pdf>, (08.11.2023).

¹⁶¹ Metin İkizler, **Eşlerin Çocuk Sahibi Olma Konusunda Uyuşmazlığa Düşmesi**, Türkiye Barolar Birliği Dergisi, Issue: 132, 2017, pp. 174, 175. <http://tbbdergisi.barobirlik.org.tr/m2017-132-1685>, (03.12.2023).

¹⁶² Yargıtay, Yargıtay 2. Hukuk Dairesi 4/12/2017 tarih, 2016/26017E., 2017/14036K., <https://karararama.yargitay.gov.tr/>, (01.12.2023).

can freely dispose of the dispute. Article 320/2 of the same law stipulates that after the determination of the subjects of dispute in the first hearing, the judge shall encourage the parties to settlement or mediation, whether the parties have settled or not, and if they have not settled, what the issues they cannot agree on should be written in the minutes.¹⁶³ Therefore, the judge's encouragement of the parties to conciliation or mediation at the preliminary examination stage, in cases where the parties can freely dispose of the matter, is a compulsory and court-related procedural act.¹⁶⁴

2.2.4.4. Law on the Establishment, Duties and Trial Procedures of Family Courts (No.4787)

Article 7 of the Law No. 4787 on the Establishment, Duties and Trial Procedures of Family Courts stipulates that in order to protect the love, respect and tolerance within the family, the judge shall encourage the settlement of the problems through peaceful settlement by identifying the problems, by making use of experts when necessary, according to the characteristics of the cases and affairs seen in the family courts and before entering into the merits. If settlement cannot be achieved, the proceedings will continue and a decision will be taken on the merits.¹⁶⁵

"It can be said that the procedure of invitation to reconciliation in Article 7 of Law No. 4787 carries the function of official mediation in the family and is an important step for the protection of the family."¹⁶⁶

2.2.4.5. Attorneyship Law (No.1136)

In addition, according to Article 35/A of the Attorneyship Law No. 1136; Before a lawsuit is filed or a hearing is started in a lawsuit, lawyers may invite the

¹⁶³ Mevzuat Bilgi Sistemi, "6100 Sayılı Hukuk Muhakemeleri Kanunu", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.6100.pdf>, (28.06 2023).

¹⁶⁴ Seda Özmumcu, **Karşılaştırmalı Hukuk ve Türk Hukuku Açısından Zorunlu Arabuluculuk Sistemine Genel Bir Bakış**, İÜHFM Vol.: LXXIV, Issue: 2, 2016, p.831.

¹⁶⁵ Mevzuat Bilgi Sistemi, "4787 Sayılı Aile Mahkemelerinin Kuruluş, Görev Ve Yargılama Usullerine Dair Kanun", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4787.pdf>, (28.06.2023)

¹⁶⁶ Filiz, p. 82.

other party to reconciliation together with their clients on matters that the parties can decide on their own will. In the event that the other party accepts this invitation and a compromise is reached, it is regulated that the minutes containing the subject matter and conditions of the compromise can be signed by the lawyers and their clients together and that this minute has the effect of a court decision.¹⁶⁷ After the lawsuit is filed and the first hearing is held, it is possible for lawyers or parties to reconcile with the other party and sign a settlement report. However, this reconciliation means out-of-court settlement. Since the signed reconciliation report is not within the scope of 35/A, it does not have the force of a judgment. It contains the mutual statements of the parties regarding the settlement. With the submission of the minutes to the court, the agreement becomes a settlement made before the court and the agreement between the parties becomes a judgment. It is ruled that there is no need for a decision in the case that is not subject due to the settlement.¹⁶⁸

Pursuant to Article 35/A of the Attorneyship Law No. 1136, the "Regulation of the Union of Turkish Bar Associations on Reconciliation", which determines the procedures and principles to be applied in resolving disputes between the parties through reconciliation, entered into force after being published in the Official Gazette dated April 14, 2017 and numbered 30038. This regulation includes the basic principles of reconciliation, the rights and obligations of reconciling lawyers, the invitation to reconciliation, the acceptance of the invitation and the reconciliation report.¹⁶⁹

Pursuant to Article 35/A of the Attorneyship Law (No. 1136), the issues that the parties may agree on regarding family disputes are limited to financial issues related to the division of property and alimony, which the parties may decide on of their own volition, since divorce and custody are matters of public order.

¹⁶⁷ Mevzuat Bilgi Sistemi, "1136 Sayılı Avukatlık Kanunu", <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.1136.pdf>, (28.11.2023).

¹⁶⁸ Alper Bulur, **Avukatlık Kanunu M. 35/A'nın Alternatif Uyuşmazlık Çözüm Yolları Çerçevesinde İrdelenmesi ve Bir Düzenleme Önerisi**, Türkiye Barolar Birliği Dergisi, Issue: 89, 2010, pp. 210, 211. <http://tbbdergisi.barobirlik.org.tr/m2010-89-626>, (30.11.2023).

¹⁶⁹ Mevzuat Bilgi Sistemi, "Türkiye Barolar Birliği Uzlaşma Sağlama Yönetmeliği", <https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=23513&mevzuatTur=KurulurVeKurulusYonetmeli&mevzuatTertip=5>, (28.11.2023).

2.2.4.6. Developments in Family Mediation

For the development of Family Mediation in Türkiye, a cooperation program/project entitled "Improvement of Mediation Practices in Civil Disputes in Türkiye" funded by the Council of Europe Swedish International Development Cooperation Agency (SIDA) and the Turkish Government was implemented. The main objectives of the project are the effective implementation of mediation, reducing the cost and time required for the resolution of civil disputes and increasing the efficiency of justice.¹⁷⁰

The first Workshop on Family Mediation was organized in Ankara on 11-13.05.2016. In this workshop, attention was drawn to the disputes that can be resolved through mediation in Family Law. It was pointed out that disputes related to ration and receivables after engagement and disputes related to ration and receivables after divorce (property regime, alimony and compensation) can be resolved through mediation, but disputes on domestic violence are not suitable for resolution through family mediation.¹⁷¹

The aim of the second Workshop on Family Mediation within the scope of the Project on Improving Mediation Practices in Civil Disputes in Türkiye, held in Istanbul on 21-22 November 2016, was to review the general approach to family mediation in Türkiye and Europe and to develop a general framework for the effective implementation of family mediation in Türkiye by identifying the scope and requirements of family mediation. The workshop also focused on the issues of domestic violence and divorce in Türkiye and the potential problems and concerns regarding the implementation of family mediation.¹⁷²

The Third Family Mediation Legislation Workshop was held in Ankara on 15-16 May 2017. In this workshop, the legal framework of the family mediation

¹⁷⁰ Fatih Uşan, "Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu", <https://testapi.aybu.edu.tr/admin/genel/GetFile?id=4db24fd3-a751-44f4-bc2e-71cd8758aeba.pdf>, (29.06.2023).

¹⁷¹ Sevdâ Yaşar Coşkun, **Aile Uyuşmazlıklarında Dava Şartı Arabuluculuğun Avantaj ve Dezavantajları, 9. Uluslararası Balkanlarda Sosyal Bilimler Kongresi 26-27 Ekim Bildiriler Kitabı, 2019, Kuşadası/Türkiye**, İzmir 2019, p. 45. http://isamveri.org/pdfdr/g00661/2019/2019_OMERM.pdf, (29.06.2023).

¹⁷² Türkiye Avrupa Konseyi Program Ofisi Ankara, "Aile Arabuluculuğu Çalıştayının ikincisi İstanbul'da 21-22 Kasım 2016 tarihinde gerçekleştirildi", <https://www.coe.int/tr/web/ankara/-/the-second-family-mediation-workshop-was-conducted-on-21-22-november-2016-in-istanbul>, (30.06.2023).

system in Türkiye was examined and studies were conducted on the training and qualifications of family mediators. In addition, various recommendations were made on how family mediation can develop in Türkiye and what its legal framework should look like.¹⁷³

2.2.4.7. Opinions on the Applicability of Family Mediation in Türkiye

According to an opinion in the doctrine, it is considered that based on the success of mediation within the current application areas, its scope should be expanded. In this view, it is also stated that this expansion of the scope of mediation will also be beneficial by leading to a decrease in the habit of litigation, hence decrease a in the workload in the judiciary and an increase in the efficiency and effectiveness of the judiciary. Besides, it states that mediation should also be developed in the field of family law, and that specialized and trained mediators should be assigned in this field and that experts should be employed functioning as co-mediators.¹⁷⁴

The criticism made regarding mediation is that, considering the nature and parties of legal disputes, it is not possible to apply mediation with its current structure, that the parties continue to seek reconciliation due to the costly and long duration of seeking rights in the judiciary, and that mediation can be applied only if an effective and economical alternative dispute resolution method is offered or mediation is compulsory.¹⁷⁵

As for the disadvantages of introducing compulsory mediation in family disputes in our country, the fact that the majority of family law disputes in our country involve violence, and the fact that men and women are not on equal footing in society are considered negative in terms of compulsory family mediation, since the mediation institution will operate between equal parties.¹⁷⁶

¹⁷³ Türkiye Avrupa Konseyi Program Ofisi Ankara, “3. Aile Arabuluculuğu Mevzuat Çalıştayı”, <https://www.coe.int/tr/web/ankara/-/3rd-workshop-on-family-mediation> , (30.06.2023).

¹⁷⁴ M. S. Özbek, HPB, pp. 9, 10.

¹⁷⁵ Atilla Öz, *Yargıda Alternatif Çözümler Neden Başarılı Olmuyor?*, İstanbul Barosu Dergisi, Vol.: 89, Issue: 4, 2015, pp. 36, 37.

¹⁷⁶ S. Y. Coşkun, pp. 48, 49.

2.3. REGULATIONS ON THE PROTECTION OF CHILDREN IN FAMILY DISPUTES IN INTERNATIONAL LEGAL DOCUMENTS

The United Nations Convention on the Rights of the Child, The Hague Conventions, and the Council of Europe Documents are examined in relation to the child focused mediation method in family disputes.

2.3.1. United Nations Convention on the Rights of the Child

The "Convention on the Rights of the Child" was adopted by the United Nations General Assembly resolution 44/25 dated November 20, 1989.¹⁷⁷ The "United Nations Convention on the Rights of the Child" (UNCRC) is the main legal text regulating children's rights in international law.¹⁷⁸ This convention regulating children's rights is the most important international document that can be defined as the Magna Carta of children.¹⁷⁹

States that have ratified the UNCRC must bring their laws in line with the Convention. However, countries with higher standards and principles will apply their own principles.¹⁸⁰

In the preamble of the UNCRC, it is recognized that children are in need of special sensitivity and protection due to their vulnerable position and that it is necessary for the child to grow up in a family environment, in an atmosphere of happiness, love and understanding so that the child's personality can develop fully and harmoniously.¹⁸¹

¹⁷⁷ Resmi Gazete, "Birleşmiş Milletler Çocuk Haklarına Dair Sözleşme", <https://www.resmigazete.gov.tr/arsiv/22184.pdf>, (20/10/2023).

Hayrunnisa Özdemir and Ahmet Cemal Ruhi, **Çocuk Hukuku ve Çocuk Hakları**, 1. Baskı, On iki levha Yayıncılık, İstanbul, Eylül 2016, p. 17.

Sevil Lale Kurt, **Çocuk Haklarına İlişkin Temel Uluslararası Belgeler ve Türkiye Uygulaması**, Sosyal Politika Çalışmaları Dergisi, Issue: 36, Ocak- Haziran 2016, p.113. <https://dergipark.org.tr/tr/download/article-file/227835>, (03.12.2023).

¹⁷⁸ Akyüz, ÇHK, p. 45.

¹⁷⁹ Ercüment Erbay, **Çocuk Hakları**, 1. Baskı, Kayhan Matbaacılık, İstanbul, 2009, p. 31.

¹⁸⁰ Akyüz, ÇHK, p. 45.

¹⁸¹ Şükran Şıpka, **4721 sayılı Türk Medeni Kanunu'nun "Evlar Edinme"ye İlişkin Hükümlerinin İncelenmesi**, İstanbul Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 57, Issue: 1-2, 2011, p. 303. <https://dergipark.org.tr/tr/download/article-file/95714>, (03.12.2023).

Resmi Gazete, "Birleşmiş Milletler Çocuk Haklarına Dair Sözleşme", <https://www.resmigazete.gov.tr/arsiv/22184.pdf>, (20/10/2023).

The first article of this convention stipulates that every person up to the age of 18 shall be considered a child, except in special circumstances, and the twelfth article stipulates that the child who is capable of expressing his/her views shall be entitled to express his/her views on all matters concerning him/her and that his/her views should be sought in judicial and administrative proceedings. This article is taken into consideration in all custody cases in our country.¹⁸²

The United Nations Convention on the Rights of the Child and the Council of Europe Strategy on the Rights of the Child are based on four basic criteria for the regulation of children's rights. These four criteria are; “non-discrimination”, that is recognizing the rights of the child to all children without any discrimination, prioritizing “the best interests of the child”, protecting “the child's right to survival and development”, and “the views of the child”, encouraging the child to express his/her opinions by including him/her in decision-making processes in all situations.¹⁸³

The best interest of the child is not a right but a guide to the realization of all children's rights. The principle of the best interests of the child supports a perspective where the focus is on the child. It also draws attention to the interrelated rights and needs of the child. This principle requires that in cases where the best interests of the child and the best interests of others conflict, the best interests of the child should be given priority and the solution in the best interests of the child should be preferred.¹⁸⁴

The right of the child to participate", which was first formulated in the United Nations Convention on the Rights of the Child, includes the empowerment of the child to be involved in decisions that affect him/her, the freedom to express himself/herself and his/her opinions, and the freedom to participate in decisions that affect him/her.¹⁸⁵ In other words, among other things, the United Nations Convention on the Rights of the Child recognizes the right of children to have a

¹⁸² TBMM, “Türkiye Büyük Millet Meclisi, Meclis Araştırması Komisyonu Raporu”, 14 Mayıs 2016, Sıra Sayısı: 399, p. 379, <https://www.aile.gov.tr/media/4129/meclis-aras-tirma-komisyonu.pdf>, (29.06.2023).

¹⁸³ Karakaş et al, pp. 890, 891.

¹⁸⁴ Akyüz, ÇHK, p. 12.

Erbay, pp. 19, 20.

Serozan, pp. 66, 67.

¹⁸⁵ Erbay, p.20.

Hayrunnisa Özdemir and Ahmet Cemal Ruhi, p. 13.

voice in decision-making on matters affecting them. In 2009, the United Nations Committee on the Rights of the Child clarified that States parties to the Convention should implement their domestic legislation on separation and divorce "in a manner that includes the child's right to be heard by decision-makers and in mediation processes".¹⁸⁶

Based on this convention, which Türkiye ratified with reservations,¹⁸⁷ the Social Services and Child Protection Agency was assigned as the Coordinating Organization responsible for implementation.¹⁸⁸

2.3.2. Hague Conventions

HCCH (The Hague Conference on Private International Law - Conférence de La Haye de droit international privé) is an intergovernmental organization whose mission is to work towards the progressive unification of private international law rules and a world in which people (individuals and companies) can enjoy a high level of legal security despite differences between legal systems.¹⁸⁹

The encouragement of reconciliation of the parties in the field of family law, especially in recent years, shows that this is due to the importance given to the best interests of children.¹⁹⁰

¹⁸⁶ Hadeel Al-Alosi, **Will Somebody Please Think of the Children?! Child Focused and Child Inclusive Models in Family Dispute Resolution**, 2018, 29 ADRJ 8, p. 8. <https://l24.im/0JnaUx>, (18.12.2023).

¹⁸⁷ Resmi Gazete, "Birleşmiş Milletler Çocuk Haklarına Dair Sözleşme", <https://www.resmigazete.gov.tr/arsiv/22184.pdf>, (20/10/2023).

¹⁸⁸ Ömer F. Tutkun and Mustafa Koç, **Çocuk Hakları Sözleşmesi Çerçevesinde Türkiye’de Çocuk Haklarına Yönelik Çalışma Ve Yasal Düzenlemeler**, Ege Eğitim Dergisi, Vol.: 3, Issue. 2, 2003, p. 12. <https://dergipark.org.tr/tr/pub/eggefd/issue/4921/67319>, (03.12.2023).

¹⁸⁹ HCCH, "About The HCCH", <https://www.hcch.net/en/about>, (22.10.2023)

¹⁹⁰ Gonca Gülfem Bozdağ, **Arabuluculuk ve Arabuluculuğun Ebeveynler Arasındaki Uluslararası İhtilaflarda Uygulanabilirliği**, Gazi Üniversitesi Hukuk Fakültesi Dergisi Vol.: XX, Issue: 1, 2016, p. 119. https://webftp.gazi.edu.tr/hukuk/dergi/20_1_4.pdf, (03.12.2023).

2.3.2.1. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction¹⁹¹ sets the return of the child to his/her country of habitual residence as the main objective and is based on the assumption that it is in the child's best interest to return to the environment to which he/she is accustomed. With this Convention, the best interests of the child are taken into account not only in the relations between the child and the parents, but also in the relations of the spouses with third parties related to the child. When determining the best interests of the child by the competent authorities, all aspects related to the child must be taken into account.¹⁹²

This Convention aims to protect children who have been unlawfully removed or detained by a parent who has sole or no parental authority over the child from the harmful effects of the removal, to ensure the immediate return of the child to his or her habitual residence, to protect the right to personal contact with the child and to protect the best interests of the child.¹⁹³ According to Article 5, 6 and 8 of the on the Legal Aspects and Scope of International Child Abduction (Law No. 5717), which entered into force within the framework of the 1980 Convention on the Legal Aspects of International Child Abduction, in case of international child abduction, if the Family Court applies for reconciliation in the

¹⁹¹ The Convention, which was signed on behalf of Türkiye on 21.01.1998, was ratified by Law No. 4461 dated 03.11.1999, with a reservation to paragraph 3 of Article 26 of the Convention stating that "The Republic of Türkiye does not assume any responsibility for court costs or costs arising from the participation of legal advisors and consultants or costs arising from the return of the child" and entered into force upon its publication in the Official Gazette No. 23873 dated 11.11.1999.

¹⁹² Ahmet Ekinci, Aslıhan Kaplan Arık, **1980 Tarihli Uluslararası Çocuk Kaçırmanın Hukuki Yönlerine Dair Lahey Sözleşmesi'nde Çocuğun İadesi Talebinin Reddi Nedenleri Ve Konuya İlişkin Anayasa Mahkemesi İçtihadı**, Hakemli Makale, Hacettepe Hukuk Fakültesi Dergisi, Vol.: 11, Issue: 2, 2021, p. 1136, 1137. <https://dergipark.org.tr/en/download/article-file/1973434>, (11.12.2023).

¹⁹³ HCCH, "The Hague Convention of 25 October 1980 on The Civil Aspects of International Child Abduction", <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>, (20.10.2023).

dispute regarding the return of the child, mediation may be considered by making a regulation in the legislation.¹⁹⁴

In this context, pursuant to Article 6 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Article 4 of the Law No. 5717 on the Civil Aspects and Scope of International Child Abduction, Türkiye has designated the Ministry of Justice General Directorate of International Law and Foreign Relations as the central authority to fulfill the obligations stipulated in the Convention. The central authority fulfills this duty through the local Chief Public Prosecutor's Offices.¹⁹⁵

2.3.2.2. Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption

Signed on 29 May 1993 in The Hague, the "Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption"¹⁹⁶ aims to ensure the best interests and fundamental rights of children in adoption. It also aims to cooperate in taking measures against child abduction and child trafficking. It is stated that when adopting a child, the child should be informed according to his/her age and maturity, the child's opinions should be taken into account and the conditions for obtaining his/her consent when necessary should be ensured.¹⁹⁷

¹⁹⁴ TBMM, "Türkiye Büyük Millet Meclisi, Meclis Araştırması Komisyonu Raporu", 14 Mayıs 2016, Sıra Sayısı: 399, p. 159, 380. <https://www.aile.gov.tr/media/4129/meclis-aras-tirma-komisyonu.pdf>, (29.06.2023).

¹⁹⁵ Şebnem Nebioğlu Öner, **Uluslararası Çocuk Kaçırmanın Hukuki Yönlerine Dair Lahey Sözleşmesi: Amacı, Uygulaması Ve Kısa Bir İctihat Analizi**, Türkiye Barolar Birliği Dergisi, 2014 (115), p.487. <http://tbbdergisi.barobirlik.org.tr/m2014-115-1438>, (03.12.2023).

¹⁹⁶ Türkiye signed this convention on 5/12/2001 and published it in the Official Gazette dated April 19, 2004 and numbered 25438.

¹⁹⁷ Dış İlişkiler ve Avrupa Birliği Genel Müdürlüğü, "Convention on Protection of Children and Co-operation in respect of Intercountry Adoption", https://diabgm.adalet.gov.tr/arsiv/sozlesmeler/coktarafli/soz/lahey/turkce_lah33.pdf, (22.11.2023).

2.3.2.3. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for The Protection of Children

The 1996 Hague Custody Convention is a revision of the earlier 1961 Hague Convention for the Protection of Minors on the same subject, with a view to its wider application.¹⁹⁸

The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Measures relating to Parental Responsibility and Protection of Children¹⁹⁹ was adopted with the aim of minimizing the conflicts created by different legal regulations in domestic laws regarding the taking of measures and decisions necessary for the protection of the person and property of children, the applicable law and the recognition and enforcement of decisions regarding the measures taken in other contracting states and to increase international cooperation.²⁰⁰

¹⁹⁸ HCCH, “The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children”, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>, (13.10.2023).

Ayşe Kübra Altıparmak, **Velayet Uyuşmazlıklarında Yeni Bir Dönem mi? 1996 Tarihli Lahey Velayet Sözleşmesi Hakkında Bir İnceleme**, Anadolu Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 6, Issue.: 2, 2020, p. 411. <https://dergipark.org.tr/en/download/article-file/1287423>, (22.10.2023).

¹⁹⁹ By objecting on behalf of Türkiye to the use of the French language in relation to Article 54, Paragraph 2 of the Convention, and by making a reservation to Article 55, Paragraph 1, with reference to Article 60, "Türkiye reserves the right not to recognize the competence of its own authorities to take protective measures in respect of the property of the child in its own territory" and "custodial responsibility or a measure which cannot be compensated by a measure previously taken by its own authorities in respect of such property. " was adopted by Law No. 6707 on 25/04/2016 and entered into force after being published in the Official Gazette dated 05.05.2016 and numbered 29703.

²⁰⁰ Dış İlişkiler ve Avrupa Birliği Genel Müdürlüğü, “19 Ekim 1996 Tarihli Velayet Sorumluluğu ve Çocukların Korunması Hakkında Tedbirler Yönünden Yetki, Uygulanacak Hukuk, Tanıma, Tenfiz ve İşbirliğine Dair Sözleşme”, <https://diabgm.adalet.gov.tr/arsiv/sozlesmeler/coktarafli/soz/lahey.html>, (12.04.2023).

HCCH, “The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children”, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>, (13.10.2023).

2.3.2.4. Convention of 23 November 2007 on the International Recovery of Child Support And Other Forms of Family Maintenance

Signed on 23 November 2007, the Convention on the International Collection of Child Support and Other Forms of Family Maintenance aims to ensure that parents meet the financial obligations necessary for the development of the child and the provision of necessary living conditions on the basis of the best interests of the child. This Convention covers the maintenance obligations of children under the age of 21. It also includes provisions on the recognition and enforcement of spousal maintenance.²⁰¹

2.3.3. Documents of the Council of Europe

2.3.3.1. The European Social Charter

The European Social Charter²⁰², is a Council of Europe treaty guaranteeing fundamental economic and social rights. It is also seen as Europe's social constitution. The European Social Charter is a treaty that guarantees fundamental human rights and emphasizes the protection of people such as children and the elderly. Article 7 of Chapter 1 of the European Social Charter states that children and young people have the right to special protection against physical and moral hazards and Article 17 states that children and young people have the right to appropriate social, legal and economic protection. Article 7 of Chapter 2 regulates the protection rights of children and young people. This article includes provisions on the work, wages and conditions of children and young people in the workplace and prioritizes the health, morals and education of children and young people.

²⁰¹ Dış İlişkiler ve Avrupa Birliği Genel Müdürlüğü, “Convention on the International Recovery of Child Support and other Forms of Family Maintenance”, https://diabgm.adalet.gov.tr/arsiv/sozlesmeler/coktarafilisoz/lahey/turkce_lah38.pdf, (22.11.2023).

²⁰² Türkiye signed the European Social Charter on October 18, 1961. The European Social Charter entered into force in Türkiye upon its publication in the Official Gazette dated July 4, 1989 and numbered 20215. (<https://www.resmigazete.gov.tr/arsiv/20215.pdf>) Pursuant to Article A of Chapter III of the "Revised European Social Charter" of 1996, the Republic of Türkiye has accepted Article 1, Article 2, paragraphs 1, 2, 4, 5, 6 and 7, Article 3, Article 4, paragraphs 2, 3, 4 and 5, Articles 7 and 31 of Chapter II of the Charter.

<https://www.resmigazete.gov.tr/eskiler/2007/04/20070409-1.htm>, (09.12.2023).

Article 17 of Chapter 2 states that measures should be taken to ensure that the necessary institutions and services are in place to enable mothers and children to effectively exercise their right to social and economic protection.²⁰³

Revised in 1996, the European Social Charter incorporated the 1961 Charter and the 1988 Additional Protocol into a single document and replaced the 1961 Treaty.²⁰⁴

2.3.3.2 European Convention on the Exercise of Children's Rights

The "European Convention on the Exercise of the Rights of the Child" was adopted by the member States of the Council of Europe and other signatory States on 25 January 1996 in Strasbourg, France. The purpose of the Convention is to promote the rights of children in their best interests, to grant them procedural rights and to facilitate the exercise of those rights by ensuring that children are informed, either themselves or through other persons or institutions, and are permitted to participate in proceedings affecting them before a judicial authority, in particular in cases concerning the residence and custody of children. Each State party to the Convention must specify at least three types of family disputes before a judicial authority to which the Convention applies. In addition, no reservations can be made to this Convention.²⁰⁵

Article 13 of this convention, entitled "Mediation and other dispute resolution procedures", states that the Parties encourage the use of mediation and other dispute resolution procedures to prevent or resolve disputes, to prevent litigation involving children, and to use such procedures to reach an agreement in appropriate cases determined by the parties.²⁰⁶ It also aims to protect and safeguard the rights of children who have not reached the age of 18 before the

²⁰³ Council of Europe, "European Social Charter (Revised)", <https://rm.coe.int/168007cf93>, (11.12.2023).

²⁰⁴ Council of Europe, "Details of Treaty No.163", <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=163>, (11.12.2023).

²⁰⁵ Council of Europe, "European Convention on the Exercise of Children's Rights", <https://rm.coe.int/european-convention-on-the-exercise-of-children-s-rights/1680a40f72>, (24.10.2023).

²⁰⁶ TBMM, "4620 Sayılı Çocuk Haklarının Kullanılmasına İlişkin Avrupa Sözleşmesinin Onaylanmasının Uygun Bulunduğuna Dair Kanun", <https://www.tbmm.gov.tr/kanunlar/k4620.html>, (30.03.2023).

judicial authority, in particular in cases concerning their residence, the establishment of personal relations and custodial responsibilities with their parents.²⁰⁷

Pursuant to Article 1 of the Convention, when signing the Convention, the Republic of Türkiye declared that the Convention shall apply to family law cases, including divorce cases, separation cases, cases concerning the custody of children, cases concerning the establishment of personal relations between parents and children, and cases concerning the establishment of paternity by court order.²⁰⁸

2.3.3.3. Convention on Contact Concerning Children

The European Convention on the Establishment of Personal Contact with Children was adopted in Strasbourg on 15.5.2003. According to this convention, the child shall have the right to be informed, consulted and to express his/her views. They shall also be encouraged to reach an amicable solution to the issue of establishing personal contact between the child and his/her parents and other persons with family ties, in particular by resorting to family mediation and other methods of dispute resolution.²⁰⁹

2.3.3.4. Council of Europe Recommendations

"Recommendation R (98) 1 of the Committee of Ministers of the Council of Europe on Family Mediation, adopted at the 616th meeting of the Deputy Ministers on January 21, 1998."²¹⁰

²⁰⁷ TBMM, "Türkiye Büyük Millet Meclisi, Meclis Araştırması Komisyonu Raporu", 14 Mayıs 2016, Sıra Sayısı: 399, p. 379, <https://www.aile.gov.tr/media/4129/meclis-aras-tirma-komisyonu.pdf>, (29.06.2023).

²⁰⁸ Council of Europe, "Çocuk Haklarının Kullanılmasına İlişkin Avrupa Sözleşmesi", <https://rm.coe.int/cocuk-haklar-n-n-kullan-lmas-na-iliskin-avrupa-sozlesmesi/1680a40f34>, (24.10.2023).

²⁰⁹ Resmi Gazete, "Çocuklarla Kişisel İlişki Kurulmasına Dair Avrupa Sözleşmesi", <https://www.resmigazete.gov.tr/eskiler/2011/11/20111117-1-1.pdf>, (24.10.2023).

²¹⁰ Council of Europe, "Council of Europe: Family Mediation, Recommendation No. R (98) 1.", <https://rm.coe.int/1680747b77>, (29.06.2023).

The aim of Council of Europe: Family Mediation, Recommendation No. R (98) 1 is to promote the adoption, implementation, dissemination and development in the member states of the Council of Europe of family mediation, which aims to resolve family disputes on the basis of mutual agreement, reducing conflict by protecting the interests of all family members.²¹¹

Recommendation R (98) 1 of the Committee of Ministers of the Council of Europe on Family Mediation, Article 5, it is pointed out that family disputes differ from other disputes in that they involve persons who are interconnected and have continuous relationships, arise in the context of distressing emotions and increase these emotions, and affect all family members, especially children. According to this recommendation, family mediation is applicable between all members of the same family and between persons who are or have been in a family relationship under domestic law.²¹²

At its 808th meeting, on September 18, 2002, the Council of Europe adopted Recommendation Rec (2002) 10 on Mediation in Civil Matters. This recommendation, without prejudice to the provisions of Recommendation No. R(98)1 on family mediation, covers issues such as the scope and composition of mediation and the mediation process.²¹³

Recommendation Rec (2002) 10 on Mediation in Civil Matters of 18 September 2002 defines mediation as a dispute resolution process in which the parties, with the assistance of one or more mediators, negotiate the issues in dispute in order to reach an agreement.²¹⁴

Various recommendations adopted by the Committee of Ministers of the Council of Europe have recommended the development of protective legal

²¹¹ Mustafa Özbek, **Avrupa Konseyi Bakanlar Komitesinin “aile arabuluculuğu” konulu tavsiye kararı**, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi Vol.: 7, Issue: 2, 2005, p. 72. <https://hukuk.deu.edu.tr/dosyalar/dergiler/DergiMiz7-2/PDF/ozbek3.pdf>, (03.12.2023).

²¹² Council of Europe, “Council of Europe Family Mediation, Recommendation No. R (98) 1.”, <https://rm.coe.int/1680747b77>, (29.06.2023).

²¹³ Council of Europe, “Council of Europe Committee of Ministers Recommendation Rec (2002) 10”, <https://rm.coe.int/16805e1f76>. (13.10.2023).

²¹⁴ Türkiye Cumhuriyeti Anayasa Mahkemesi, “Medeni Hukuk Meselelerinde Arabuluculuk Konusunda Rec(2002) 10 Sayılı Tavsiye Kararı”, <https://www.anayasa.gov.tr/media/3666/cmrec200210trmediationcivilmatters.pdf>, (20.10.2023).

measures and alternative dispute resolution methods in order to ensure peace between the parties and to reduce the judicial burden.²¹⁵



²¹⁵ M. S. Özbek, HPB, p. 10.

CHAPTER THREE

PROTECTION OF CHILDREN IN FAMILY DISPUTE RESOLUTION

3.1. THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD

The resolution of family disputes through mediation serves the purpose of protecting the best interests of the child.

It is stated in Article 3, paragraph 1 of the United Nations Convention on the Rights of the Child 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”.²¹⁶

As a concept, the best interest of the child primarily refers to ensuring the child's holistic development and the full enjoyment of all rights recognized for children in the UNCRC. The holistic development of the child means the child welfare. In other words, it includes the child's physical and psychological needs as well as the child's needs for love and security.²¹⁷

Making the best interest of the child as the primary consideration is not only in the interest of the child but also in the interest of the society because children are one of the most important elements of society. Society can have solid foundations with well-educated and well bred children whose interests are protected in the best way.²¹⁸

The best interest of the child is an interdisciplinary concept. That is why different disciplines have different approaches to the issue. For example, in the mediation process the perspective of a lawyer on the best interests of the child and that of a psychologist differs.²¹⁹

²¹⁶ United Nations, “Convention on the Rights of the Child”, <https://www.ohchr.org/sites/default/files/crc.pdf> , (09.12.2023).

²¹⁷ European Commission, “Best Interest of the Child”, https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/best-interests-child-bic_en , (07.12.2023).

²¹⁸ Canan Ruhi and Ahmet Cemal Ruhi, **Velayet Hukuku**, 1. Bası, Seçkin Yayıncılık, Ankara, 2017, p. 25.

²¹⁹ Kirsikka Salminen, **Mediation and the Best Interests of the Child from the Child Law Perspective**, 2018, p. 219.

Child welfare includes education, health, justice and child protection services. In Türkiye, child welfare services are not limited to supervising and supporting child caregivers. It is the State's obligation to ensure and protect child welfare. The Ministry of Family, Labor and Social Services carries out activities in this area.²²⁰

"In the research conducted by Uyar (1999), it is assumed that the divorce rate is higher in the first years of marriage, about half of the divorced individuals have children and the presence of children prolongs the divorce process rather than preventing divorce."²²¹

"When protracted contested divorce proceedings are finalized, there comes up parents with deteriorating mental health, children who have been worn out in this battlefield, and relationships that cannot be carried forward in any way with the ending of the marriage union."²²²

After divorce, parents feel guilty for not being able to continue the marriage. The future of their children and the negative effects of divorce on their children are the most important concerns for them in the process of getting used to their new life style after divorce.²²³

"While certain provisions in the mediation agreements families sign may not be legally enforceable, they may nevertheless be quite effective and significant to the family members. Perhaps, too, it is the process by which those agreements were reached which is of the most enduring value."²²⁴

https://www.researchgate.net/publication/324184848_Mediation_and_the_Best_Interests_of_the_Child_from_the_Child_Law_Perspective, (07.12.2023).

²²⁰ Türkiye Cumhuriyeti Aile ve Sosyal Hizmetler Bakanlığı, "Aile, Çalışma ve Sosyal Hizmetler Bakanlığı'nın Çocuk İhmali ve İstismarı Konusuna Kurumsal Yaklaşımı", Ankara, 2021, p. 1. <https://www.aile.gov.tr/media/72849/cocuk-politikalari-serisi-1.pdf>, (07.12.2023).

²²¹ Murat Binay, **Türkiye'de Boşanma Nedenlerinin Analizi ve Alternatif Uyuşmazlık yöntemleri**, Ombudsman Akademik, Vol.: 5, Issue: 9, 2018, p. 242. <https://dergipark.org.tr/en/download/article-file/644800>, (03.12.2023).

²²² Beyhan Kaplan Güler, **Boşanmanın Hukuki Sonuçlarında Arabuluculuk**, Akdeniz Üniversitesi Sosyal Bilimler Enstitüsü, Özel Hukuk Ana Bilim Dalı Yüksek Lisans Tezi, Antalya, 2014, p.86.

²²³ Sema Öngören, **Boşanma ve boşanmanın erken çocukluk dönemi çocuklar üzerindeki etkileri**, Uluslar arası Eğitim Bilimleri Dergisi, Issue: 13, Aralık 2017, p. 76. <https://dergipark.org.tr/tr/pub/inesj/issue/40066/476676>, (03.12.2023).

²²⁴ Margaret L Shaw, Family Mediation, **New York University Review of Law & Social Change**, 14, Issue: 3, 1986, p.770. https://socialchangenyu.com/wp-content/uploads/2017/12/Margaret-Shaw_RLSC_14.3.pdf, (29.06.2023).

In family conflicts, family members exhibit different behaviors towards each other. These behaviors have traumatizing and permanent effects on both family members and children. In order to protect the best interests of children in particular, an effective resolution process needs to be developed.²²⁵

3.2. MEDIATION METHODS USED FOR THE PROTECTION OF CHILDREN IN THE RESOLUTION OF FAMILY DISPUTES

During separation and divorce processes, arguments and fights between parents can have negative effects and long-term consequences on the child's well-being and psychological development. This is where the importance of family mediation emerges in terms of meeting the needs of not only adults but also children.²²⁶

Three main methods are applied in the mediation process of the resolution of family disputes, involving children: child focused mediation, child informed mediation, and child inclusive mediation.

During mediation processes that take place in the parents' separation and divorce phases, in order to protect the best interests of the child, child focused mediation may be preferred, as well as child informed mediation or child inclusive mediation depending on culture, family structure, socio-economic status and especially the age and maturity of the child.

3.2.1. Child Focused Mediation

In child focused mediation, the child is not actually involved in the mediation process. In this method, the mediator actively defends the rights and interests of the child and taking into account the child's development and psychology, he or she focuses on enabling the divorcing parties to establish a common and acceptable arrangement in terms of parent-child relationship.²²⁷ In

²²⁵ Börü, p.1046.

²²⁶ Parkinson, p.VI.

²²⁷ Ece Parlak, *Sosyal Hizmet Perspektifinden Aile Arabuluculuğu Uygulamalarının İncelenmesi: Türkiye İçin Bir Model Önerisi*, Yüksek Lisans Tezi, Ankara Üniversitesi Sağlık Bilimleri Enstitüsü, 2019, p. 118.

child focused mediation, the mediator helps the parties to reach a parenting agreement that takes into account the developmental needs of the child.²²⁸ In other words, child focused mediation is a mediation method in which the mediator indirectly tries to "bring the child into the room" by focusing on the child in this process with the parents.²²⁹

Child focused mediation essentially aims to "find the voice of the child in the absence of the child". In the mediation process, parents are encouraged to consider the needs of their children in the arrangements they make between themselves.²³⁰

It is important to create a safe space for children during separation and divorce processes. Therefore, the best interest of the child should be prioritized. Since the child should be kept away from the discussions between the parents as much as possible, it is important that the child does not actually attend the mediation meetings.²³¹

In child focused mediation method, which is preferred by most mediators, the mediator is informed about the child's name, age, about what the child knows about his/her parents' separation and how he/she reacts to it; he or she keeps the focus on the child by asking questions to the parents. In this process in which the child is indirectly involved, the mediator also works on a quality life plan for the child by prioritizing the child's welfare in the decisions made by the parents, especially those regarding the child, and helps to prevent problems that may arise later by conducting a reality check on the plans regarding the child.²³²

²²⁸ Rachel Birnbaum, "The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review." Canada: Family, Children and Youth Section Department of Justice Canada, 2009, p.11. <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vcsdm-pvem/pdf/vcsdm-pvem.pdf>, (30.06.2023).

²²⁹ Anna Nylund, Kaijus Ervasti and Lin Adrian, "Nordic Mediation Research", ISBN 978-3-319-73018-9 ISBN 978-3-319-73019-6 (eBook) <https://doi.org/10.1007/978-3-319-73019-6>, November 2017, p. 186. https://www.researchgate.net/publication/324201329_Nordic_Mediation_Research, (30.06.2023).

²³⁰ Al-Alosi, p. 11.

²³¹ MD Law Group, "How Does Divorce Mediation Put My Children's Best Interest First?", <https://www.mdlawgroup.ca/articles/how-does-divorce-mediation-put-my-childrens-best-interest-first>, (07.12.2023).

²³² Siún Kearney, **The Voice of the Child in Mediation**, Journal of Mediation and Applied Conflict Analysis, 2014, Vol. 1, No. 2, pp. 153, 154. <https://mural.maynoothuniversity.ie/5052/7/SK-Voice-2014.pdf>, (30.06.2023).

In child focused mediation, it is important that the child does not participate in mediation meetings with the parents. As a matter of fact, in New Zealand, it was concluded that the compulsory parental information program, which parents attend before the case, at the stage of separation, created positive and important changes, such as parents' avoiding arguments in front of their children and listening to their children more.²³³

3.2.2. Child Informed Mediation

Child informed mediation is designed to increase parents' consideration of their child's perspective in the mediation process and to promote protective factors. It helps to reduce conflict between parents and to keep children out of parental disputes, while also encouraging them to make arrangements that are more appropriate for children in terms of their development. In child informed mediation, a child counselor should be present with the mediator.²³⁴

According to a study, the families who take part in child informed mediation would very probably benefit from the positive short-term effects, which, in turn, theoretically result in further positive effects in the long term, such as their possibility to take further legal action in the future being decreased.²³⁵

3.2.3. Child Inclusive Mediation

The United Nations Convention on the Rights of the Child has been influential in the development of mediation involving children. In particular, thanks to the provision in Article 12 of this Convention which is on the right of the child to express his or her views freely in matters that concern them and giving

²³³ Parkinson, pp. 198, 199.

²³⁴ Robin H. Ballard, Amy Holtzworth-Munroe, Amy G. Applegate, Brian M. D'Onofrio, John E. Bates, **A Randomized Controlled Trial of Child-Informed Mediation**, Featured Article | Psychology, Public Policy, and Law, 2013, Vol. 19, No. 3, p. 278. https://www.academia.edu/55443311/A_randomized_controlled_trial_of_child_informed_mediation, (03.12.2023).

²³⁵ Brittany N. Rudd, Rachel K. Ogle, Amy Holtzworth-Munroe, Amy G. Applegate, Brian M. D'Onofrio, **Child-Informed Mediation Study Follow-Up: Comparing the Frequency of Relitigation Following Different Types of Family Mediation**, Psychology, public policy, and law, Vol: 21 Sayı: 4, 2015, p. 453.

due weight to the views of the child, policymakers and lawmakers all around the world have prioritized the protection of the rights of and the participation of the children in legal proceedings more. The development of child inclusive mediation was pioneered by clinical child psychologist Jennifer McIntosh.²³⁶

In child inclusive mediation, children do not have to give their opinion about parental options. Children have the opportunity to express their feelings. This allows the interests and needs of children to be taken into account in resolving the dispute between parents. According to McIntosh, the most important elements of mediation negotiations in this method are negotiating appropriately with the child and providing support for the child to cope with the process.²³⁷

In a study conducted in New Zealand on Child inclusive family mediation, it was found that this method reduced conflict between parents, increased reconciliation and cooperation, reduced the negative effects of conflict, and increased awareness of the importance of cooperation for children. Children also reported that they liked being listened to and wanted to participate in the restructuring of family relationships. Children were more satisfied with the parenting plan created in this way.²³⁸

The most important advantages of mediation involving children are that it allows children and young people to be listened to, respected and to contribute to family arrangements. Mediators discuss these issues with parents first, encouraging them to take into account any reservations they may have. Mediators should utilize many techniques in this method, such as attachment and systems theory, crisis and chaos theory, family interactions and communications.²³⁹

²³⁶ Pauline Muto, **A Family Affair: Acknowledging Children's Voices in Custody Mediation**, Dispute Resolution Journal Vol.: 71 No.: 2, 2016, p. 173.

²³⁷ Felicity Bell, Jude Cashmore, Patrick Parkinson, Judi Single. "Outcomes of child- inclusive mediation", **International Journal of Law, Policy and the Family**, 27 (1), 2013, pp. 117,118. https://www.researchgate.net/publication/268390391_Outcomes_of_Child_inclusive_Mediation, (03.12.2023).

²³⁸ Carles Rodríguez-Domínguez and Marina Roustán, **The Inclusion of / Focus On Children In Family Mediation: A Review of Studies and Future Proposals**, Papeles del Psicólogo, , Vol.: 36, Issue: 3, 2015, p. 200.

²³⁹ Lisa Parkinson, **Aile Arabuluculuğu Yeni Aile Adalet Sistemine Dair Uygun Uyuşmazlık Çözüm Yöntemi**. Ed.: Yonca Fatma Yücel, Adalet Bakanlığı Yayını, Ankara, 2017, (YAS), pp. 157, 158.

"Studies of family mediation practices involving children have found results that strongly support the inclusion of children in the mediation process."²⁴⁰

An Australian study found results that supported the use of child inclusive mediation. This method provided children with the assurance that their views on the way their parents resolved their conflict would be given significant consideration.²⁴¹

The advantages of involving children in the mediation process are that it helps children to better understand their parents' decisions, it helps parents to listen to their children, it allows children to express their wishes, opinions, feelings and concerns, the child feels valued, the tension between parents and children is reduced by facilitating communication.²⁴² "Child inclusive mediation seeks to change hearts as well as minds."²⁴³

The disadvantages of involving children in the mediation process are that the conflict between parents can cause upset and confusion for the child, children may feel under pressure and their opinions may not always reflect their own interests. Another disadvantage is that children take on the role of decision-maker in resolving the conflict between the parents and the parents risk putting pressure on the child.²⁴⁴

3.3. THE FUNCTION OF THE MEDIATION METHODS

It is important that mediation in the divorce and separation process is conducted in a way that reduces the negative emotions that participants and children may be exposed to and encourages participants to establish a good relationship with their children. To this end, certain principles should be observed in order to conduct the process in a way that eliminates or reduces the risk of possible abuse to which children may be exposed.²⁴⁵

²⁴⁰ De Jong, p.125.

²⁴¹ Rodríguez-Domínguez and Marina Roustan, p. 200.

²⁴² Ketani, p. 595-597.

²⁴³ Bell, p. 117.

²⁴⁴ Ketani, p. 595-597.

²⁴⁵ Family Mediation Council, "Code of Practice for Family Mediators", <https://www.familymediationcouncil.org.uk/wp-content/uploads/2018/11/FMC-Code-of-Practice-v1.3-November-2018.pdf>, (03.11.2023).

"Child Focused Mediation is a method of working with parents in dispute resolution forums and education programs, focusing the process on the needs of their children."²⁴⁶

Child inclusive and child focused mediation are methods developed to improve mediation outcomes for children when mediating their disputes during separation and divorce. Child inclusive mediation takes into account the specific characteristics of the child, while child focused mediation uses general knowledge about children and divorce to improve mediation outcomes.²⁴⁷

The key differentiator between Child focused Mediation and Child inclusive Mediation is the difference between indirect or direct inclusion of the voice of the child in the mediation process.²⁴⁸

It is very important that children, who are both the most vulnerable and the most affected group in cases of parental separation or divorce, have a say in this process. Children, like parents, have the right to contribute to the preservation of family relationships, parenting plans and the subsequent relationship with themselves. Research on practices that involve children in the mediation process has found strong support for this method.²⁴⁹

Child focused and child inclusive mediation methods in resolving family disputes reduce the conflict between parents. According to the results of a research, child inclusive mediation method has been found to permanently repair relationships.²⁵⁰

Research in New Zealand, Canada and Australia has found that careful planning of the purpose, terms and format of child involvement in mediation can have significant benefits for both children and parents in the agreement reached.²⁵¹

Children who encounter a conflict situation in the family may see themselves as the cause of the conflict and blame themselves according to their

²⁴⁶ McIntosh, Jennifer. "Child Focused Mediation", <https://childrenbeyonddispute.com/Child-inclusive-mediation/child-focused-mediation/>, (10.06.2023).

²⁴⁷ Ballard et al, p. 272.

²⁴⁸ Kearney, p. 156.

²⁴⁹ De Jong, p.124.

²⁵⁰ Jennifer E. McIntosh, Caroline M. Long, **Children Beyond Dispute**, Family Transitions Pty Ltd, La Trobe University, 2006, p.10.

²⁵¹ Parkinson, pp. 242, 243.

own interpretation and evaluation depending on their development. Studies have shown that as the frequency of conflict in the family increases, adaptation problems in children also increase.²⁵²

Divorce is a long process that begins when a parent leaves home and children are more likely to be affected. The child's age, gender, developmental period, the quality of the relationship with the parents, the continuity of communication with the parent who left home can be given as examples of these variables.²⁵³ In this context, each child may show different reactions to the divorce process depending on the developmental period they are in and may be affected differently.

After a divorce, there is no longer a shared life between the parents, so they need to come to an agreement about the most important thing they have in common: their children. Children need an organized life. They want to know where they will live, who will take care of them, whether they will see their siblings.²⁵⁴

Every child feels out of balance when his or her parents divorce. The first emotion a child feels in this situation is guilt.²⁵⁵ Studies have shown that children of divorced families experience adaptation and behavioral problems, their success in school decreases, their self-esteem decreases, feelings such as hostility, loneliness, hatred, anxiety levels, negative behaviors such as aggression increase, there are deviations in attitudes and behaviors related to sexuality, and their perspectives on marriage and marriage are negatively affected.²⁵⁶

When parents separate, children are usually not informed, not given any explanation, not asked about their thoughts and feelings. In a British study of

²⁵² Ali Bayer, **Ailede Yaşanan Anlaşmazlıklar ve Çözüm Önerileri**, Hatay Mustafa Kemal Üniversitesi İlahiyat Fakültesi Dergisi, Vol.: 1 Issue: 2, 2018, p. 225.
<https://dergipark.org.tr/tr/pub/antakiyat/issue/41579/491271>, (03.12.2023).

²⁵³ Parkinson, YAS, pp. 129, 130.

²⁵⁴ Leyla Erdim and Ayşe Ergün, **Boşanmanın Ebeveyn Ve Çocuk Üzerindeki Etkileri**, Sağlık Bilimleri ve Meslekleri Dergisi, Vol.: 3, Issue: 1, 2016, p. 82.
<https://dergipark.org.tr/tr/pub/hsp/issue/25147/265534>, (03.12.2023)

²⁵⁵ Öngören, p. 80.

²⁵⁶ Bülent Şen, **Boşanma Arabuluculuğu**, 1. Baskı, Nobel Akademik Yayıncılık, Ankara, 2015, pp.67-68.

children whose parents had separated, a quarter of the children said that no one had spoken to them about their parents' separation.²⁵⁷

In practice in Fenamef²⁵⁸, the child is usually included at the end of the mediation process, with the explicit acceptance of both parents. At this stage, the child learns about the parents' decisions and is allowed to come to terms with their separation. The child's voice does not influence the parents' decisions about him/her, but it can guide them. The child has the freedom to react to his/her feelings and concerns. The mediator helps the child to express his/her feelings freely and does not speak for him/her. He or she also identifies the child's needs and helps to meet them.²⁵⁹

Research on mediation involving children has shown that involving children in the mediation process shifts the focus of parents and helps them to act like parents and strengthens their parental role. In this method, children experience a sense of relief by having their ideas, concerns and problems heard. In addition, it is easier for children to cope with changes in situations when they know and understand the reasons for them.²⁶⁰

"Research carried out in New Zealand into the efficacy of a model involving children directly in the mediation process following marital breakdown, confirmed that parental conflict was reduced and conciliation was enhanced."²⁶¹

Family mediation is a difficult method for parents with high conflict between the parties and psychological problems. One of the difficulties encountered in family mediation is the difficulty of establishing communication between the parties and organizing co-parenting plans when the desire for separation is unilateral and one party blames the other party.²⁶²

²⁵⁷ Parkinson, YAS, p. 153.

²⁵⁸ Fenamef, the "Comité National des Associations et services de Médiation Familiale" (National Committee of Family Mediation Associations and Services), is a non-profit association established in France to promote family mediation and bring together mediation activities.

²⁵⁹ Fenamef, "Médiation familiale", <https://www.fenamef.asso.fr/mediation-familiale/>, (30.11.2023).

²⁶⁰ De Jong, p.128.

²⁶¹ Kearney, p. 152.

²⁶² Megan Morris and W. Kim Halford, **Family Mediation: A Guide for Family Therapists**, Australian and New Zealand Journal of Family Therapy 2014, Vol: 35, p. 482. https://www.researchgate.net/publication/269727819_Family_Mediation_A_Guide_for_Family_Therapists, (08.12.2023).

3.4. THE FUNCTIONING OF THE MEDIATION METHODS

In child focused mediation of family disputes, since the child is not present in the process, "the child's voice in mediation is heard through the parents who provide information about their children". This method aims to create an environment that supports parents to actively consider the needs of the child, facilitate parenting agreements that support children's psychological adjustment to separation, and ensure that the decisions made reflect the needs of the children.²⁶³

During the separation process, parents try to detach from each other, may find it difficult to communicate and set boundaries with their children, and seek approval from their children, whereas children need to remain connected to both parents and need the freedom to express negative feelings towards their parents. This is possible through the child's participation in the mediation process.²⁶⁴

Australian legislators have not incorporated into their legislation the recommendation of the United Nations Committee on the Rights of the Child that the right of the child to express his or her views on all matters affecting him or her should be explicitly guaranteed, nor the Committee's recommendation that this right should extend to "alternative dispute mechanisms such as mediation and arbitration". Thus, children's rights to participate in the resolution of family disputes are not mandated under the Australian Family Law Act.²⁶⁵

Under Australian family law, parents are required to seek pre-litigation mediation for parenting plans. This requirement does not apply in cases of domestic violence and child abuse. The child's participation in the mediation process is not compulsory. However, during the mediation process, the mediator includes children of appropriate age and maturity in the mediation process. Sometimes a "child inclusive" method can also be applied, with a child counselor who speaks to the children and provides the parents with the child's views during the mediation.²⁶⁶

²⁶³ Al-Alosi, p. 11.

²⁶⁴ Kearney, p. 153.

²⁶⁵ Al-Alosi, p. 10.

²⁶⁶ An Australian Government Initiative, "Family Mediation and Dispute Resolution", <https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution>, (26.06.2023).

In Finland court mediation, the district court judge acts as the mediator. In addition, expert mediators and social workers play a supporting role in the process. In practice, child informed and child focused methods are preferred where the child is not involved in the mediation process. In court mediation, the mediator's responsibility is to protect the best interests of the child. However, the neutral, objective and non-authoritarian role of the mediator seems to be incompatible with the need to safeguard the interests of the child in the family mediation process.²⁶⁷

Children's rights both to have a meaningful relationship with their parents and to be protected from harm are enshrined in Australian family law. Parental responsibility encompasses all of the duties, powers and responsibilities that parents have in relation to their children. The court may decide that parental responsibility should be equal for both parents, or it may decide that it is in the best interests of the child to remove parental responsibility from one or both parents.²⁶⁸

In New Zealand, after separation and divorce, parents can make their own arrangements for the care of their children. If these arrangements are not respected, one or both parties can apply to the court.²⁶⁹ Before asking the court to make a decision on a parenting issue, parents must attend a free four-hour parenting course, which provides practical advice to help understand and manage the needs of children after separation. Parents attend this course separately.²⁷⁰ If the parties cannot reach an agreement during the separation and divorce phase, they may benefit from mediation. However, mediation is not appropriate in cases of domestic violence, if the child is at risk and if there is a plan to take the child abroad without the other parent's permission. The mediator will help them focus on what is best for the children, but will not force them to agree to anything. The

²⁶⁷ Salminen, p. 211.

https://www.researchgate.net/publication/324184848_Mediation_and_the_Best_Interests_of_the_Child_from_the_Child_Law_Perspective, (07.12.2023).

²⁶⁸ An Australian Government Initiative, "Children and Family Law", <https://www.familyrelationships.gov.au/parenting/children-family-law>, (26.06.2023).

²⁶⁹ Ministry of Justice New Zealand, "Parenting Through a Break up", <https://www.justice.govt.nz/family/care-of-children/parenting-through-a-break-up/>, (26.06.2023).

²⁷⁰ Ministry of Justice New Zealand, "Parenting Through Separation Course", <https://www.justice.govt.nz/family/care-of-children/resolving-parentings-disagreements/parenting-through-separation/>, (26.06.2023).

mediator will first meet with the parties separately to assess whether the dispute is suitable for "Family Dispute Resolution". In subsequent discussions, the mediator will help the parties to make decisions that are in the best interests of the children. He/she will not try to bring them back together. The mediator will not judge who is right or wrong or make decisions on behalf of the parties. In the process, they will work on how each will care for the children, when they will see the children, how they will pick up and drop off the children, where the children will spend their vacations, how birthdays and other celebrations will be handled, and develop skills to resolve other parenting disputes in the future.²⁷¹ If the parties cannot reach an agreement through mediation, they can apply to the Family Court. Before applying to the Family Court, the parties must have attended a Parenting through Separation course within the last two years and a Family Dispute Resolution mediation within the last 12 months.²⁷²

According to FMC²⁷³ rules in the UK, in the mediation process of parents during separation and divorce, their children, if any, from the age of 10, have the right to meet with the mediator. However, this requires the consent of the parents. If parents have more than one child, the mediator will first meet with each child separately. During this process, children have the opportunity to share their feelings, thoughts and expectations from their parents with the mediator. Everything the child shares with the mediator is very important. The child's meeting with the mediator takes place in a sincere and confidential manner. The mediator will only share with the parents what the child allows. The only exception to the principle of confidentiality is if there is a situation that may jeopardize the safety of the child. In this way, the mediator will be able to inform the parents about what is important for the child in the decisions they will take.

²⁷¹ Ministry of Justice New Zealand, "Mediation to Work Out Parenting Disagreements", <https://www.justice.govt.nz/family/care-of-children/resolving-parentings-disagreements/mediation-to-work-out-parenting-disagreements/>, (26.06.2023).

²⁷² Ministry of Justice New Zealand, "Going to Family Court After Mediation", <https://www.justice.govt.nz/family/care-of-children/resolving-parentings-disagreements/going-to-family-court-after-mediation/>, (26.06.2023).

²⁷³ The FMC (The Family Mediation Council) is the peak body overseeing family mediation services in the UK.

Children who participated in this process often reported that it was helpful to have met with the mediator.²⁷⁴

They use a number of methods to help ensure that mediators' parenting plans are child-centered. For example, mediators might write on a white board at the beginning of the mediation that the purpose of the session is to "work together to reach agreements that are in the best interests of their children". In another example, mediators may "symbolically" bring the children into the mediation room by writing their names and ages on the whiteboard. Some mediators may encourage parents to bring a photo of their child to the session. However, this technique should be used with caution as it can cause pain in parents who have not seen their children for some time. In child focused mediation in family disputes, children do not actually participate in the process. Therefore, a criticism of this method is that parents may make incorrect assumptions about children's needs because they have not been able to listen to their opinions.²⁷⁵

3.5. THE ROLE OF THE MEDIATOR

Recommendation R (98) 1 of the Committee of Ministers of the Council of Europe on Family Mediation stipulates that in the mediation process, the mediator should be impartial between the parties and as to the outcome of the mediation process, assess whether there is violence between the parties, not impose a solution on the parties, protect the confidentiality of the negotiations, respect the parties' perspectives and maintain equality between the parties, inform the parties about the possibility of using marriage and other forms of counseling where appropriate, encourage parents to focus on the needs of the children for the welfare and best interests of the children.²⁷⁶

The FMC has set out the rules for family mediators in the "Code of Practice for Family Mediators". This Code sets high standards for the qualifications and training of family mediators. Family mediators must have

²⁷⁴ Family Mediation Council, "Mediation Is Not Only for Adults!", <https://www.familymediationcouncil.org.uk/mediation-isnt-only-for-the-adults/>, (07.12.2023).

²⁷⁵ Al-Alosi, p. 8- 11.

²⁷⁶ Council of Europe, "Council of Europe: FamilyMediation, Recommendation No. R (98) 1.", <https://rm.coe.int/1680747b77>, (29.06.2023).

received training approved by the FMC or be accredited by the FMC. Every mediator registered with the FMC must follow these rules. Mediators who act as mediators in Child Inclusive Mediation must be registered with the FMC, have fulfilled the requirements of the FMC or be accredited by an organization affiliated to the FMC. The Code also sets out the basic principles of the mediation process. Accordingly, the mediator's impartiality, fairness and non-bias, confidentiality, caution against power imbalances and abuse, and voluntary participation are listed as the basic principles of mediation. The exception to the principle of confidentiality is the possibility of any harm or abuse to the parties or the child. In such a case, the mediator should immediately take the necessary measures and notify the necessary institutions. It is also a principle that the mediator should encourage the parties to take into account the needs and wishes of the child. The mediator should inform the parties about the general principles of mediation. The parties should also accept the general principles of mediation. If there is a possibility that the welfare of one of the parties or the child may be harmed in the mediation process, the mediator may withdraw from the process. The meetings held by the mediator for the suitability of the parties' application for mediation can be held face-to-face or by video conference, separately or together. However, it is not deemed appropriate to hold meetings via teleconference. During the mediation process, the mediator should be in control of the process. Lawyers usually do not attend mediation meetings. However, the mediator informs the parties that they may seek legal assistance. At the request of the parties and if the mediator deems appropriate, lawyers, consultants or third parties may also participate in the mediation process.²⁷⁷

In a 2001 interview on child custody mediation, Joan Thomas, a divorce lawyer and mediator, stated that the best and most workable solution for the child can be negotiated by the parents. At this stage, she stated that it would be easier for the parents to agree on what they expect from each other first. He also stated that having a lawyer or a legal background of the mediator would make it easier

²⁷⁷ Family Mediation Council, "Code of Practice for Family Mediators", <https://www.familymediationcouncil.org.uk/wp-content/uploads/2018/11/FMC-Code-of-Practice-v1.3-November-2018.pdf>, (03.11.2023).

for the mediator to guide the parties in this process and to prepare the terms of the agreement.²⁷⁸

Family mediators need knowledge, human understanding and specific skills to help spouses facing separation or divorce to come together through dialogue and find a common agreement for their future and that of their children. In other words, mediators need to have the necessary knowledge, skills and attitudes.

When the qualities and characteristics of effective family mediators are examined through studies, they are addressed in four main groups: conflict resolution skills, knowledge, reflectivity and responsiveness. Family mediators should have a basic understanding of all areas of divorce, including both legal areas and taxes and finance. The family mediator should be able to constantly reflect on what he/she is doing, why he/she is doing what he/she is doing, how he/she is doing what he/she is doing and what his/her goals are.²⁷⁹

Family mediators have a responsibility to encourage parents and others with parental responsibility to consider and take into account the needs and views of the child when making arrangements for children.²⁸⁰

Family mediators should first assess whether there are any security threats against each other and the children and ensure security during the mediation process.²⁸¹

In the practice of mediation about children, the mediators' questioning skills, generalization, drawing an ecogram on a flipchart and the timing and structure of the mediation about children become important. With past, present, future-oriented and circular questions, parents will be able to take responsibility for themselves and help them to think in order to find answers in search of solutions to possible problems. With generalization, when parents blame each other for the child's reactions, the mediator can say that this is normal or a common problem. Drawing an echogram on the flipchart is useful to underline

²⁷⁸ Bethany Zeps, **Interview: Child Custody Mediation**, The Journal of Contemporary Legal Issues, Vol.: 16, 2007, p. 243, 244.
<https://07a6e75f442811d380d2e720fdbf18c26b54cdc4.vetisonline.com/HOL/Page?lname=&handle=hein.journals/contli16&collection=&page=241&collection=journals>, (08.12.2023).

²⁷⁹ N. Coşkun, p.760.

²⁸⁰ Parkinson, p.VI.

²⁸¹ Jurgita Milišauskaitė and Jolanta Sondaitė, pp. 103, 104.

important questions and priorities. The timing and structure of the mediation is important to emphasize questions and comments and to manage the pace of the discussion.²⁸²

In the family mediation process, the mediator uses specific techniques and strategies such as empathic listening, power balancing or equalization, rephrasing or reframing, refocusing, summarizing, clarifying, prioritizing, mutualizing, neutralizing, hypothesizing, role reversal, option building and reality testing.²⁸³

Family mediators provide support for parents to make arrangements for the child. In particular, they help to emphasize the positive, increase cooperation and reduce conflicts with children, encourage them to accept each other's continuing role in their children's lives, and consider how to talk to their children and explain the arrangements to them. They also provide to help them focus on each child individually, consider areas of responsibility and how they can be shared or delegated by one parent, make arrangements that will free children from loyalty conflicts or pressure, learn how to support children financially, develop greater awareness of what their children may be going through.²⁸⁴

"In Ireland, family mediators include the voice of the child in the mediation process in different ways: indirectly through the information brought into the process by their parents, directly through a meeting with the mediator, Family meeting when the agreement is complete."²⁸⁵

In France, mediators are not required to be lawyers in family mediation, which is used to resolve family law disputes. In practice, it is seen that people specialized in psycho-social fields are mostly oriented towards this profession. Family mediators are trained in both theoretical and practical aspects of their work and are also required to complete a graduation project that must be defended in front of a jury before receiving a diploma.²⁸⁶

In Australia, family mediators are independent and impartial individuals who are trained in mediation, negotiation, family disputes, responding to domestic violence and creating a supportive environment for the safety of vulnerable

²⁸² Parkinson, pp. 220-223.

²⁸³ De Jong, p.113.

²⁸⁴ Parkinson, p.216.

²⁸⁵ Kearney, p. 152.

²⁸⁶ Özcan, p.387.

people. Mediators should encourage parties to talk about specific contentious issues during the mediation process, providing an environment that allows issues to be openly discussed and clarified and for parties to feel safe when they disagree.²⁸⁷

Mediators should also be trained on the effects of parental conflict on children. Parents would also benefit from information to help them understand the needs of their children at different stages of development. When necessary, mediators should refer parents to relevant service providers, such as counseling services or legal service providers.²⁸⁸



²⁸⁷ An Australian Government Initiative, “Family Mediation and Dispute Resolution”, <https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution>, (26.06.2023)

²⁸⁸ Al-Alosi, p. 14.

CONCLUSION

The process of separation and divorce is a difficult process for both parents and children. Couples often focus on themselves while trying to resolve the problems in their relationship. Negative experiences they have gone through, possible scenarios for the future, demands and expectations occupy their minds. However, it should not be forgotten that the parental relationship will continue even if the parents are separated from each other. In this process, they should also be aware of the situation their children are in. This process and the decisions to be taken afterwards may leave traces that will deeply affect the lives of children. That's why, the process of separation and divorce should be carried out by prioritizing the physical and mental health of the children. The separation of parents will never be a complete separation and it has to be transformed into a lifelong union of purpose for the best interest of their children.

The best interest of the child refers to the decisions taken to protect the rights and interests of the child in all matters concerning the child. When we look at the countries we have examined in this study in general, the protection of the best interest of the child is prioritized both in their own legislation and in international conventions and documents. Likewise, we have seen that in order to protect the best interest of the child in the resolution of family disputes, some regulations have been made both in the resolution of disputes through litigation and in the resolution of disputes through mediation.

In Türkiye, family disputes are cases related to the annulment of engagement, annulment of marriage, divorce and the secondary consequences of divorce, alimony, property division, compensation and custody. In our country, with the entry into force of the Law on Mediation in Civil Disputes (No. 6325), among family disputes, only the issues in which the parties can decide of their own free will are eligible for mediation. In other words, in our country, mediation can be applied voluntarily to settle financial matters between the parties. However, resolution through mediation is not possible in disputes involving allegations of domestic violence. Therefore, concerning the decisions to be made

on divorce and children, there is a need for a trial and the intervention of the judge.

Although in Türkiye, family disputes concerning financial matters can be resolved through mediation as we have mentioned above, this is mostly in theory; in practice, the parties prefer the judicial remedy for all kinds of family disputes, including those they can settle out-of-court, through mediation. In Türkiye, this type of case is litigated in Family Courts. Judges who are married with children and who have a master's degree in this field are preferred to be employed in Family Courts. In the judicial resolution of family disputes, it is possible for the child to receive support from experts such as psychologists and pedagogues and to be heard in court. The support and opinion of experts gain importance especially when it comes to making a decision regarding the child. Judges make the decision in the best interests of the child within the framework of the law and according to their conscientious opinion.

The UK, New Zealand, Australia and many EU countries have successfully implemented family mediation in family dispute resolution. For example, in Germany, they started to work on family mediation in 1977 and it was legalized in 2012. The BAFM has regulated the content, principles and implementation of family mediation and child focused activities in family mediation. In France, it was seen that court decisions for the resolution of family disputes were not sufficient and family mediation was deemed necessary to protect the family. In 1991, an association called FENAMEF was established to promote family mediation and to bring together mediation activities. In the UK, family mediation, which started as a pilot scheme in 1978, still continues successfully. In the UK, high standards have been set for the qualifications and training of family mediators. The rules for family mediators are set out by the FMC in the "Code of Practice for Family Mediators".

In countries that prefer to resolve family disputes through mediation, the mediators who carry out mediation processes are experts in this field and have certain standards. In this regard, the principles that mediators in the EU must comply with are regulated in the European Code of Conduct for Mediators.

If there is a child in question, child focused and child inclusive methods are generally used in the mediation process. The actual involvement of the child in the family mediation process usually depends on his/her age and maturity level. In the UK, it is possible for a child of 10 or over to meet the mediator. The actual involvement of the child in the mediation process also requires the joint consent of the parents. The results obtained show that in decisions taken at the end of mediation processes, the rights and interests of the child are protected, children are prioritized, and parents' ability to solve problems increases and during the post-mediation period, parents are more compliant with the decisions they have made.

In child focused mediation, the child is not actually involved in the mediation process. The mediator meets with the child without the parents. The mediator includes "the child's voice" in the mediation process by using special techniques. Therefore, with this method, the needs and interests of the child are identified by the experts and the awareness of the parents is increased. In this process, the child is both able to express himself or herself and is not negatively affected by the process. Another advantage of this method is to enable the parents to focus on their children.

The best interest and welfare of the child is the primary consideration when resolving family disputes both through judicial proceedings and through mediation. However, there are significant differences between the two ways.

In the judicial resolution of family disputes, the judge makes decisions regarding the parties and the child, whereas in mediation, it is the parties who make decisions and the parents have the opportunity to make decisions with their children in mind. In the judicial process, parents are placed in the case in a position against each other, they fight against each other and the conflict between them may continue after the case. In mediation, on the other hand, parents strive for the common interest of the child in an environment of compromise, and in this process, problem-solving skills are enhanced and a sustainable relationship between parents is possible. In the judicial process, the judge usually makes a decision based on the minutes of the child's interviews with experts and sometimes the child's testimony during the hearing. It is not possible for him/her

to conduct a reality check on the applicability of this decision during the proceedings. Moreover, in cases where circumstances have changed for the parents and the child and a new decision is required, the length of the retrial and the length of the proceedings will make it difficult to ensure the best interests of the child. Although the best interests of children are prioritized in judicial resolutions, mostly it is not possible for children's voices to be heard and it is not possible either that sufficient attention should be paid to children.

When child focused mediation method is compared with the child inclusive method in the resolution of family disputes, the former is more advantageous than the latter in terms of protecting children because child focused mediation method involves a process in which the child is protected against possible risks. Among these possible risks that child is protected against in the child focused mediation method whereas he or she may possibly be exposed to in the child inclusive method are the child feeling under pressure and the child witnessing an argument between the parents. While in all mediation methods protecting the child, prioritizing the best interest of the child is aimed at, when compared to the other methods, child focused mediation method is more effective in creating awareness in parents to prioritize the interest of the child in their future decisions concerning their children, as well as in their present decisions during the divorce or separation process.

To conclude, in the resolution of family disputes through child focused mediation, the child is observed to be less adversely affected than other resolution methods; therefore, it is more preferred by parents, and in addition, the decisions to be taken regarding the child are in accordance with the best interests of the child. Although cultural and educational levels of people change a lot throughout Türkiye, child focused mediation can be applied in the resolution of family disputes in our country; when it is applied, it will allow the dispute between the parents to be resolved amicably with the support of mediators and experts who have received a special training in this field and it will also provide the parents with the opportunity to make decisions in the best interests of the child and to create a sustainable parental relationship, especially by creating awareness in them because with this method, parents will direct the focus of their attention to their

children. It will ensure, as well, a sustainable communication between parents for the future and allow them to develop awareness of themselves, their children and the relationship between them.



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