ALTERNATIVES TO PROSECUTION IN TURKISH CRIMINAL PROCEDURE LAW

"Türk Ceza Muhakemesi Hukukunda Kovuşturmaya Alternatif Yöntemler"

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Abstract: In this study, the alternatives to prosecution in criminal procedure law, which have in recent years gained increased importance in comparative law, in Turkish criminal procedure law are dwelled on. Following the reform made in 2005 by virtue of the revision of main codes in Turkish criminal law, certain alternatives to prosecution have been introduced. Over time, along with the extension in the scope of application of these methods, a new method "accelerated procedure" has been also put into practice more recently. The alternatives to prosecution are the methods that enable the completion of the judicial process by a decision generally issued at the investigation phase within the discretion of the prosecutor, albeit the existence of evidence and suspicion to the extent that would suffice for the initiation of criminal proceedings due to a criminal act. In this sense, the methods in the Turkish criminal procedure law namely *the discretionary power to decision non-prosecution by the prosecutor, the suspension to the initiation of criminal proceedings, the pre-payment, the victim-offender mediation and the accelerated procedure* are discussed and reviewed herein.

Keywords: Discretionary power by prosecutor, alternatives to prosecution, diversion, penal order, accelerated procedure.

Özet: Bu çalışmada son zamanlarda karşılaştırmalı hukukta önemi gittikçe artan ceza muhakemesinde kovuşturmaya alternatif yöntemlerin Türk ceza muhakemesi hukukundaki durumu ele alınmaktadır. 2005 yılında yapılan reform kapsamında Türk ceza hukukunun temel kanunlarının yenilenmesiyle kovuşturmaya alternatif bazı yöntemler ihdas edilmiştir. Süreç içerisinde sözü edilen yöntemlerin uygulama alanı genişletilirken yakın zamanda "seri muhakeme usulü" adında yeni bir yöntem de getirilmiştir. Kovuşturmaya alternatif yöntemler, suç niteliğindeki bir fiil ile ilgili olarak kamu davası açılmasına yetecek ölçüde delil ve şüpheye ulaşılmasına rağmen, soruşturma evresinde genellikle savcının kontrolü altında bir karar verilmek suretiyle sürecin tamamlanmasına imkan veren yöntemlerdir. Çalışmada Türk ceza muhakemesi hukukundaki, *savcının takdir yetkisinini kullanılması suretiyle kovuşturmadan feragat, önödeme, uzlaştırma, kamu davasının açılmasının ertelenmesi ve seri muhakeme usulü* kurumları bu kapsamda ele alınarak değerlendirmeye tabi tutulmaktadır.

Anahtar Kelimeler: Savcının takdir yetkisi, kovuşturmaya alternatifler, diversiyon, ceza kararnamesi, seri muhakeme.

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INTRODUCTION

Following the recent arrangements introduced as to the guarantees, which are embodied in the international/supranational human rights instruments concerning the right to a fair trial, in several countries including Turkey, it no longer seems possible to duly implement and complete *the traditional methods of criminal procedure* in terms of all offences committed, due to the lack of sufficient time and resources. Nowadays, many countries give priority to the *principle of procedural economy* owing to the methods bearing higher costs and vigorous effort due to the variety of the types of offences and increased number of offences and as required by the arrangements introduced in pursuance of the principle of a fair trial. In this sense, intending to cope with the excessive number of pending cases notably in cases of petty crimes/summary offences, there are in practice two basic methods called *diversion/diversionary disposal* which are generally considered alternative methods to prosecution and *short-cut/abbreviated/expedited/summary proceeding* to trial, to a full or certain extent from the *principle of no punishment without trial (nulla poena sine iudicio).*[1]

Diversion methods are the mechanisms to ensure divaricate from the principle of no punishment without trial which entails that for the imposition and execution of a criminal sanction, the offender must be tried by an impartial and independent tribunal in pursuance of the basic principles of the criminal procedure. However, the diversion methods are intended for officially addressing, and responding to, the acts constituting an offence, by deviating from the said processes of trial. On the other hand *in shortcut methods*, the offender is subjected to criminal proceedings during which certain processes required to be completed are skipped mainly with the offender's consent, and thereby a decision is issued at the end.[2]

In diversion practices, the *consensual procedural forms and/or negotiated case settlements*[3] generally come into prominence, whereas in

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[1] Vriend, Koen, *Avoiding a Full Criminal Trial, Fair Trial Rights, Diversions and Shortcuts in Dutch and International Criminal Proceedings,* Springer Pub., The Hague 2016, p. 6-7 ff; Adriaan M. Anderson, *Alternative Disposal of Criminal Cases by the Prosecutor, Comparing the Netherlands and South Africa,* Doctoral Thesis, University of Amsterdam, Amsterdam 2014, p. 56; Yavuz, Hakan A., *Ceza Muhakemesinde Kovuşturmaya Alternatif Yöntemler,* Adalet Pub., Ankara 2021, p. 22.

[2] Vriend, p. 7; Kai Ambos/Alexander Heinze, "Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal", in Morten Bergsmo (Editor), *Abbreviated Criminal Procedures for Core International Crimes,* Torkel Opsahl Academic EPublisher, Brussels 2017, p. 39 ff.

[3] Thaman, Stephen C., "A Typology of Consensual Criminal Procedures An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Trial", in Stephen C. Thaman (Editor), *World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial*, Carolina Academic Pub., Durham 2010, pp. 297-399.

shortcut practices, the focus is on the methods which last for a period shorter than that of the classic criminal procedures and which may yield a conclusion swiftly.

It appears that in many forms of the diversion methods, the prosecutor not only exercises the traditional *charging power* afforded to it but also acts as a decision-maker in the establishment of the alleged offence and determination of the corresponding sanction, thereby dealing with notably the intensified workload of the prosecution and trial phase.[4]

When the reforms intended for simplifying, expediting or setting aside the prosecution and trial phase are at stake, the question of whether the main principles of the criminal procedure would be relinquished is always the most important issue of discussion. Unequivocally, the principles of utmost importance are inter alia *the principle of material truth* and *the legality/mandatory principle*.[5] These principles in essence entail the prosecution of all offences with an identifiable offender as well as a rigorous assessment of the facts found established at the end of an oral and public trial, thereby ensuring an equal practice of law.[6]

Owing to the increased resort to these methods, it seems that the role undertaken by the courts as the authority to find establish the offence and impose the sanctions -irrespective of whether it is a court of jury, a mixed court with *lay judges* on the bench or a specialised court- has been increasingly reduced. By the powers afforded to the prosecution, the prosecutor, acting as a judge or a tribunal, decides on the establishment of the offence and the sanction to be imposed and the decision issued by the prosecutor is subject to the judicial review to the slightest extent, or only in form, or exempted from such review, which appears to be a matter of serious debate.[7]

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[4] Thaman, Stephen C., "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?", in Luna, Erik/Wade, Marianne (Editor), *The Prosecutor in Transnational Perspective,* Oxford University Pub., New York 2012, p. 156; Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study,* Clarendon Pub., Oxford 1995, p. 208; Hodgson, Jacqueline, "Guilty Pleas and The Changing Role of The Prosecutor in French Criminal Justice", in Luna, Erik/Wade, Marianne (Editors), *The Prosecutor in Transnational Perspective,* Oxford University Pub., New York 2012, p. 118; Luna, Erik/Wade, Marianne (Editors), "Prosecutors as Judges", *Washington and Lee Law Review,* Vol. 67, Y. 2010, p. 1413-1532; Jacoby, Joan E./Ratledge, Edward C., *The Power of the Prosecutor: Gatekeepers of the Criminal Justice System,* Preager Pub., Santa Barbara 2016, p. 61 ff.

[5] For mor reading: Gallant, Kenneth S., *The Principle of Legality in International and Comparative Criminal Law,* Cambridge University Pub., Cambridge 2009.

[6] Yavuz, 2021, p. 27.

[7] Thaman, 2012, p. 157.

This article will mainly deliberate on the methods available in the Turkish criminal procedure law to adjudicate the cases, which are mainly employed by the prosecutor at the investigation stage.

I. GENERAL OVERVIEW ON THE METHODS OF TERMINATE THE INVESTIGATION PHASE IN THE TURKISH CRIMINAL PROCEDURE LAW (EXCEPT FOR PUBLIC PROSECUTİON)

The methods employed in the Turkish criminal procedure law to terminate the investigation phase, except for a criminal case to be filed for bringing the matter in dispute to the prosecution phase, may be listed as follows:[8]

- The decision not to investigate: *Decision on no ground for an investigation (Art. 158 § 6 of the Code of Criminal Procedure ("the CCP"))*

- The decision not to prosecute: *Decision of non-prosecution (Art. 172 of the CCP)*

- To waive prosecution:

- *Unconditional waiver: Decision of non-prosecution issued through the exercise of discretionary power by the prosecutor (Art. 171 of the CCP)*

- *Conditional waiver: Suspension to the initiation of criminal proceedings (Art. 171/2 etseq. of the CCP), Pre-payment (Art. 75 of the Turkish Criminal Code ("the TCC") and Victim-Offender Mediation (Art. 253 of the CCP)*

- Penal/punishment order: *Accelerated Procedure (Art. 250 of the CCP)*

A. Decision not to Investigate

Any regulation concerning the decision not to investigate was not included in the former text of the CCP. It is then incorporated into the CCP by an addition in 2017, which was made to Article 158.

In order for initiating a criminal investigation, there must exist concrete (severe and real) suspicion of having committed an offence at least at a "basic" or "initial" level, that is to say, to the extent that would suffice for taking of an official action. Basic suspicion is defined in the CCP as *"any circumstance giving the impression that an offence has been committed"* (Art. 160 §1 of the CCP).

By virtue of a decision not to investigate, it is intended for striking a criminal report or complaint received by the law enforcement units or prosecutor's offices out of the system at an early stage before the

[8] See for the classification: Yavuz, 2021, p. 129 ff.

investigation process has not been initiated yet. Accordingly, at this stage, the person complained of or reported and the impugned act are respectively qualified as "suspect" and "act involving criminal suspicion" but are not placed on record, and the file is thereby closed. Therefore, the requirement to apply this process is the ability to clearly understand that the alleged act does not constitute an offence without any inquiry, or the abstract and general nature of the criminal report or complaint.[9]

Actually that an investigation is indeed conducted at this very stage; in other words, the decision not to investigate and the preliminary period before this decision are also a part of the process covered by the investigation phase. However, given the possibility that placing a person's name as a suspect on records -even though these records are confidential- may bear consequences likely to infringe his/her *right not to have his innocence called into question/presumption of innocence* irrevocably, it should be noted that this process is based on a sound formulation.[10]

As indicated in the official data, out of 240.403 criminal reports received by the chief prosecutor's offices in 2020, a decision not to investigate was issued in 141.986; a decision to initiate an investigation in 19.622; and other types of decisions were issued in 29.105. To put it in percentage, 74,5 % of the total criminal reports were concluded by a decision not to investigate.[11]

B. Decision not to Prosecute

In cases when the investigation process is initiated upon a criminal suspicion of at least a "basic" level, the prosecutor should inquire whether this suspicion reached a sufficient level to conclude that the alleged criminal act was committed by the identified offender and also whether there is a legal obstacle to proceeding with the prosecution phase. After it is revealed at the end of such an inquiry that these issues have been duly fulfilled, it should be then discussed whether the methods alternative to prosecution can be employed. If it is considered impossible to employ these methods, a criminal case must be filed, thereby proceeding with the prosecution phase.

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[9] For more reading: Kızılarslan, Hakan, "Soruşturma Yapılmasına Yer Olmadığı Kararları (SYOK) ve Bu Kararların Ceza Muhakemesi Sistematiği Açısından İrdelenmesi", *TBB Dergisi,* Y. 2019, Vol. 144, pp. 59-104; Özen, Muharrem/Köksal, Atacan, "Suçsuzluk Karinesi Bağlamında Soruşturma Yapılmasına Yer Olmadığı Kararı", AÜHF Dergisi, Y. 2019, Vol. 68(1), pp. 261-286.

[10] For more reading: Andrew Carl Stumer, *The Presumption of Innocence,* Hart Pub., Oxford, 2010.

[11] *National Justice Statistics 2020*, Ministry of Justice, Ankara 2020, p. 9, https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/22420211449082020H%C4%B0Z METE%C3%96Z ELK%C4%B0TAP.pdf, date accessed 08.08.2021.

However, if the evidence obtained, and the conclusion reached, by the prosecutor at the end of the inquiry does not reach the degree of severity required for the application of alternatives to prosecution or initiation of criminal proceedings, a decision non-prosecution should be issued.

As laid down in Article 172 of the CCP, titled *"Decision of non-prosecution"*, a decision not to prosecute may be issued in two circumstances based on factual and legal grounds: the lack of evidence giving rise to a sufficient suspicion (factual ground), and the inability to proceed with prosecution (legal ground).

1. The Lack of Evidence Giving Rise to a Sufficient Suspicion for Prosecution (Factual Ground)

In cases where it is concluded on the basis of the evidence obtained at the end of the inquiries conducted within the scope of the investigation that the possibility of the offender's conviction due to the alleged offence is higher than the possibility of his acquittal if a prosecution is held, a criminal case should be filed by considering that there is a *sufficient suspicion*.

If considered otherwise, a decision of non-prosecution should be issued. However, this decision must be unequivocally based on a thorough inquiry and an effective investigation for reaching the material truth, and these considerations must be precisely specified in the decision.

2. Inability to Proceed with Prosecution (Legal Ground)

Despite the conclusion reached, at the end of the investigation conducted by the prosecutor, to the effect that the disputes could be proceeded to the prosecution stage, there may exist certain legal obstacles to the initiation of criminal proceedings. In this case, the prosecutor must act by this legal ground with a view to both proceedings with the other investigatory acts and filing a criminal case by issuing an indictment.

It is considered in the respective provisions of the CCP that under the following conditions, it is not possible to proceed with prosecution by the consequences to be yielded: *Absence/withdrawal of a criminal complaint (Art. 73 § 4 of the TCC); a previously rendered judgment or a pending case against the same accused because of the same conduct (Art. 223 § 7 of the CCP); minority, deafness and muteness (Art. 31 and 33 of the TCC); death of the suspect (Art. 64 § 1 of the TCC); expiry of the statutory time-limit (Art. 66 of the TCC); successful completion of pre-payment process (Art.75 § 1 of the TCC); successful completion of mediation process (Art. 253 § 19 of the CCP); general amnesty (Art. 65 § 1 of the TCC); parliamentary immunity (Art. 83 of the Constitution); the refusal of leave for an investigation and/or prosecution for offences subject to such leave (for instance Art. 299, 301, 305 and 306 of the*

TCC); and successful completion of the accelerated procedure (Art. 250 of the CCP).

As indicated in the official data, in 2020, the total number of investigations (including the number of files with unidentified offenders) is 7.449.844 whereas the number of decisions of non-prosecution is 4.176.893. The number of decisions to file a criminal case and the number of other decisions are respectively 2.357.600 and 915.351. To put it in percentage, the ratio of decisions of non-prosecution is 56.1 % whereas the decisions to file a criminal case are 31.6 %.[12]

II. WAIVER OF PROSECUTION

The reason why the notion *"waiver"* is used as the main heading is that the prosecutor, the authorised and incumbent person to conduct the investigation, is entitled not to file a criminal case by exercising his authority afforded by law, provided that certain conditions are satisfied, instead of proceeding to the criminal prosecution by way of filing a criminal case at the end of the duly completed investigation. Accordingly, it should be inferred from this notion that despite the existence of suspicion to the extent that would suffice for initiating criminal proceedings at the investigation stage, the prosecutor decides to waive the prosecution by filing no criminal case, in pursuance of the general public interest pursued through the functioning of the criminal justice system, sometimes based on his own discretion and sometimes on compulsory grounds. Such waiver, which is indeed based on the prosecutor's unilateral will, maybe rendered contingent upon the fulfilment of certain conditions prescribed for the suspect or maybe ensured unconditionally. In case of a waiver, no criminal record shall be issued concerning the offender.

At this point, the right and power to proceed with prosecution by way of filing a criminal case, which is a decision exclusively taken by the prosecutor, are waived by means of applying the methods set out in the law, both within the scope of the afforded power based on discretion and in pursuance of the "general public interest" as a requirement of criminal justice system. This waiver may be both *unconditional* as in the case of exercise of discretion and *conditional* as in the cases of the suspension to the initiation of criminal proceedings, pre-payment and mediation.

According to the system prescribed in the CCP, it is essential for the prosecutor to issue an indictment and thereby file a criminal case according to the principle of mandatory prosecution, whereas to decide not to prosecute based on discretion is exceptional. Therefore, it is

[12] *National Justice Statistics 2020*, p. 18.

incumbent on the prosecutor to file a criminal case in an investigation in respect of which all other issues have been satisfied.

The first waiver of the prosecution is the unconditional waiver *"by exercising the discretionary power"*. It is envisaged in the CCP that as a requirement of the opportunity principle, in certain cases of limited number, the prosecutor may issue a decision of non-prosecution instead of filing a criminal case. In Turkey, the power afforded to the prosecutor in the initiation of criminal proceedings is very limited, compared to the practices in comparative law. It should be emphasised that this limitation results from the traditional practice of law in Turkey, the problems arising from the practice, as well as essentially from the approach adopted in respect of the powers and responsibility of the prosecution as explained above.

The conditions classified as conditional waiver are the cases in which there is a waiver of prosecution upon the successful completion of the alternative methods, namely *"the suspension to the initiation of criminal proceedings"*, *"the pre-payment"*, and *"the victim-offender mediation"*.

A. Discretionary Power to Decision Non-Prosecution by the Prosecutor

The provisions on the waiver of prosecution by exercising discretionary power are set in Article 171 § 1 of the CCP, titled *"The discretionary power in initiating criminal proceedings"*, which reads as follows:

"In cases where the requirements for the application of the provisions of effective remorse that lift the punishment as a personal ground", or the provisions of personal impunity are satisfied, the public prosecutor may issue a decision of non-prosecution."

According to this provision, the prosecutor may waive to proceed with prosecution by exercising discretionary power under these two conditions:

-Existence of conditions that necessitate the application of the provisions of effective remorse that lift the punishment as a personal ground; and

-Existence of ground for personal impunity.

The cases of effective remorse lifting punishment and the grounds of personal impunity are similar. As regards the grounds for personal impunity, personal grounds that are already present in the commission of the offence pose an obstacle to the punishment of the offender, whereas, in case of effective remorse lifting the punishment, there is no situation that would preclude the punishment of the offender during the commission of the offence, but certain

conducts and behaviours displayed by the offender following the criminal act preclude the imposition of punishment.[13]

It should be particularly noted that in both cases, the prosecutor's discretionary power is absolute; in other words, it completely depends on the prosecutor's discretion to prefer whether to waive his power to initiate criminal proceedings.

B. Suspension to the Initiation of Public Prosecution

The suspension to the initiation of public prosecution *(kamu davasının açılmasının ertelenmesi)* is defined as the waiver/withdrawal of prosecution to be conducted against the offender under certain conditions given the gravity of the offence and personality of the offender and provided that the offender displays good behaviour for a certain period.[14]

The paramount aim of this practice is notably to prevent an increase in the punishment of petty crimes and to thereby reduce the courts' workload and generally expedite the trial of all offences. To achieve these aims, a flexible and practical means is applied in the system.[15]

The institution whereby the initiation of criminal proceedings is suspended is laid down in Article 171 of the CCP.

According to this provision, if sufficient suspicion is reached, at the end of the investigation, to initiate criminal proceedings against the suspect, the initiation of the criminal proceedings may be suspended under certain circumstances and limitations. As mentioned above, it is indeed a unilateral waiver of the exercise of the power to initiate criminal proceedings; however, this waiver is a conditional suspension for a certain period.

The decision to suspend the initiation of criminal proceedings can not be issued in respect of *all types of offences and all offenders.*

The first limitation prescribed for the type of offence is related to the practices of mediation and pre-payment, which are introduced as an

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13 Özgenç, İzzet, *Türk Ceza Hukuku Genel Hükümler,* Seçkin Pub., Ankara 2014, p. 67; Koca, Mahmut/Üzülmez, İlhan, *Türk Ceza Hukuku Genel Hükümler,* Seçkin Pub., Ankara, 2019, p. 377; Heinrich, Bernd, *Ceza Hukuku, Genel Kısım I,* Editor: Ünver, Yener, Translation by Hakeri, Hakan/Ünver, Yener/Özbek, Veli Özer/Yenerer Çakmut, Özlem/Erman, Barış/Doğan, Koray/Atladı, Ramazan Barış/Bacaksız, Pınar/Tepe, İlker, *Adalet Pub.,* Ankara, 2014, pp. 411-414.

14 For more info: Yılmaz, Davut, *Kamu Davasının Açılmasının Ertelenmesi,* Master's Thesis, İstanbul Kültür University, İstanbul 2009, p. 18; Alan Akcan, Esra, "Kamu Davasının Açılmasının Ertelenmesi", nin *Ceza Hukukunda Alternatif Uyuşmazlık Çözüm Yöntemleri Sempozyumu (18-20 Mayıs 2017 - Rize) Kitabı,* Adalet Bakanlığı Pub., Ankara 2018, p. 103.

15 Yavuz, 2021, p. 211.

alternative to prosecution. If the criminal act under investigation is among the offences that are subject to mediation or pre-payment process, it is not possible to order the suspension to the initiation of criminal proceedings.

The second limitation is related to the length of the imprisonment sentence to be imposed; that is to say, the criminal act must be among the offences in respect of which a maximum of three years' imprisonment is prescribed in the relevant law.

The third limitation is related to the types of offences that are exceptional.

The limitations as to the offender are prescribed as the conditions of suspension.

In this sense, *the first limitation* is related to the suspect's past. Accordingly, the suspect must not have previously committed an intentional offence. As such a previous offence must be found established by a finalised conviction, the suspect's criminal record must be examined.

The second limitation is related to the suspect's future. This assessment is based on the subjective opinion reached by the prosecutor within the scope of the investigation, and it must be considered that the suspect would abstain from committing a further offence. For soundly making such an assessment, a social investigation report/pre sentences report[16] must be certainly obtained as the collected information and documents concerning the establishment of the offence would not be sufficient.

The third limitation is in pursuance of public interest. The preference not to initiate criminal proceedings must be advantageous to both the suspect and society.

The fourth limitation is related to the redress of the pecuniary damage caused by the suspect by committing the offence. The pecuniary damage sustained by the victim due to the imputed criminal act must be redressed using full restitution, restoration to the original situation, or compensation. Such a redress doesn't need to be afforded by the suspect himself.

The fifth and final limitation is related to the commission of a further offence. The suspect must not commit any other intentional offence within the suspension period of five years.

Following an assessment as to all these limitations, the prosecutor does not initiate criminal proceedings, which he should initiate against the suspect under normal conditions, and adjourns the proceedings for

[16] For detailed info: Yavuz, 2018, p. 220-224.

five years, thereby suspending the investigation phase. If the suspect commits no intentional offence at the end of those five years, a decision of non-prosecution shall be issued.

As no criminal record is formed concerning the suspect at this stage, this method seems advantageous to the person involved in the judicial system for the first time as the offender of an intentional offence. Besides, as one of the limitations prescribed for the application of this method is the redress of the pecuniary damages resulting from the offence, it may be considered as an advantageous method also for the victim or the aggrieved person.

Normally, in order to decide to suspend the initiation of criminal proceedings, the above-cited conditions are sought to be fulfilled. However, a decision of suspension may be issued *in certain exceptional circumstances* set in the law, without making an assessment as to these limitations.

The first of these exceptional circumstances is mediation. According to Article 253 § 19 of the CCP, if a commitment determined at the end of the mediation negotiations is postponed to a future date, or is envisaged to be paid in instalments, or is continuous, the decision on the suspension to the initiation of criminal proceedings is to be issued in respect of the suspect, without taking into consideration the limitations laid down in Article 171 thereof. In case of any failure to fulfil the commitment within the suspension period, a public case must be filed, without seeking the condition of commission of a further offence.

The second exceptional circumstance comes into play in respect of the offence of *"Purchase, receipt or possession of narcotics or psychotropic substances for personal use"*, which is laid down in Article 191 of the TCC.

According to this provision, in the investigation conducted into this offence, a decision of suspension must be issued in respect of the suspect, without seeking the limitations laid down in Article 171. However, the regime applied during the suspension period involves significant differences compared to the general practice. That is because the suspect is to be subjected to conditional bail for a minimum of one year in the course of the suspension period, and if deemed necessary, he is to undergo treatment. If the suspect fails to comply with the obligations imposed on him or the requirements of such treatment or purchases, receives or possesses narcotics or psychotropic substances for personal use, or uses narcotics or psychotropic substances during the suspension period, the criminal proceedings must be proceeded.

The aggrieved party or the suspect may challenge the decision on the suspension to the initiation of criminal proceedings before the incumbent magistrate judge (Articles 171 and 173 of the CCP).

According to the official data obtained from the Ministry of Justice, the decisions on the suspension to the initiation of criminal proceedings was rendered in respect of 8.468 in 2019.[17]

C. Pre-payment

Pre-payment *(önödeme)* is an institution of criminal procedure alternative to prosecution, which has been introduced for relatively practical grounds such as preventing offenders from being exposed to adverse impacts of imprisonment in case of wrongdoings, saving on the public expenditures resulting from traditional proceedings, as well as reducing the courts' workload.[18]

In brief, pre-payment is a method that precludes the initiation of criminal proceedings for carrying out prosecution or the completion of the ongoing prosecution and which gives rise to no criminal record by enabling the suspect or the accused or any person on behalf of them to make the payment of the amount corresponding to the judicial fine prescribed in the relevant law for the alleged offence following the notice made by the prosecutor at the investigation phase and by the court at the prosecution phase.[19]

The pre-payment method is set in Article 75 of the TCC. Despite not being explicitly specified in the law, before applying the pre-payment method, a thorough and complete investigation must be conducted at the end of which "sufficient suspicion" to necessitate the initiation of criminal proceedings must be reached, as in all other methods envisaged as an alternative to prosecution. Otherwise, a decision of non-prosecution must be issued.

As laid down in the provision, the *sole limitation* prescribed for the application of the pre-payment method is *related to the offence*. There is no limitation concerning the offender. Therefore, there is no need to take into account the offender's previous criminal record and socio-economic condition.

The first limitation as to the offence is that the offence alleged to the offender must not be subject to mediation. In case of any offence concluded with mediation, the pre-payment method cannot be applied.

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[17] https://alternatifcozumler.adalet.gov.tr/Resimler/SayfaDokuman/1332020162854KDAE%2001.01.2019-31.12.2019.pdf, date accessed 08.08.2021.

[18] For more info: Toroslu, Nevzat, *Ceza Hukuku Genel Kısım*, Savaş Pub., Ankara, 2009, p. 443; Demirbaş, Timur, *Ceza Hukuku Genel Hükümler*, Seçkin Pub. Ankara, 2007, p. 637; Soyaslan, Doğan, *Ceza Hukuku Genel Hükümler,* Seçkin Pub., Ankara, 2005, p. 592; Özbek, Veli Özer, *Yeni Ceza Kanununun Anlamı,Vol I,* Seçkin Pub., Ankara, 2006, p. 719; Özgenç, p. 659; Koca/Üzülmez, p. 748.

[19] Yavuz, 2021, p. 218.

The second limitation is related to the type and amount of punishment prescribed in the law for the given offence. Accordingly, the pre-payment method may be applied only when the corresponding penalty in the relevant law is a judicial fine or imprisonment for a maximum period of *six months*[20]. Nevertheless, this method may be applied also in terms of the catalogue offences listed in Article 75 § 6 of the TCC despite not satisfying the above-cited conditions.

As could be inferred from its name, pre-payment is indeed a method that may be applied through ensuring the payment of a certain amount of money corresponding to the judicial fine specified in the law where the given offence is set forth. Accordingly, even if the penalty prescribed in the law is imprisonment, payment would be made based on the amount determined by converting the prescribed imprisonment sentence to a judicial fine.

If the payment is duly made, a decision of non-prosecution is issued at the investigation phase and a decision of discontinuation of criminal proceedings at the prosecution phase. Therefore, although the offender has been charged with a criminal offence and imposed a commitment on account thereof, this process would not be reflected in the criminal record.

Given the consequences to the effect that no criminal record is created in respect of the offender in the pre-payment method, that this process is not taken into consideration as a repetition, and that it does not pose an obstacle to suspending a given sentence or commuting it to an alternative sanction in case of an offence to be committed in future, it may be said that the law-maker has attributed the *public interest* to the duly completion of the pre-payment process by the offender. That is because, in case of any failure to duly perform the pre-payment proposal, it would become null and void, and the general investigation process is continued. The law-maker attributes a general public interest regarding the criminal justice system to the fulfilment of pre-payment method, as an objective of criminal justice policy, as this method would obviate the acts and actions to be performed at the investigation, prosecution and execution phases which are to be completed in case of any failure.

As indicated in the official data obtained from the Ministry of Justice, the decisions of non-prosecution was rendered in respect of 36.551 for being concluded through the pre-payment process in 2019.[21]

D. Victim-Offender Mediation

[20] Before the 2019 amendment, the upper limit of the prison sentence was *three months*.

[21] https://alternatifcozumler.adalet.gov.tr/Resimler/SayfaDokuman/1132020154652 %C3%96N%20%C3% 96DEME%202019.pdf, date accessed 08.08.2021.

The mediation *(uzlaştırma)* process was legislated into the judicial system as a part of the reform introduced in 2005 and is still the single *restorative justice* mechanism.[22] It is considered as a method, which re-establishes, through the settlement of the parties, the disturbing public order due to the commission of the offences which are investigated and prosecuted upon a criminal complaint and/or wrongdoings.[23]

The mediation process is set in Articles 253-255 of the Code of Criminal Procedure. If there is sufficient suspicion to initiate criminal proceedings at the end of the investigation phase and the prosecutor qualifies the given offence as among the ones that may be subject to mediation, then the mediation process shall be initiated. The prosecutor is not afforded any discretionary power in this respect (Article 253 § 4 of the CCP).

The mediation process may be applied only in terms of offences that are investigated and prosecuted on a criminal complaint. However, it is also prescribed that mediation process may be applied also in cases of the following offences laid down in the TCC, irrespective of whether they are contingent on a criminal complaint: *actual bodily harm (Art. 86, 88); reckless injury (Art. 89); threat (Art. 106 § 1); violation of the inviolability of the home (Art. 116); violation of the freedom to work or labour (Art. 117 §1 and 119 § 1 (c)); theft (Art. 141); abuse of trust (Art. 155); fraud (Art. 157); purchasing or accepting property acquired through the commission of an offence (Art. 165); kidnapping and detention of a minor (Art. 234); disclosure of confidential documents or information relating to commerce, banking or private customers (Art. 239).*

Also in cases where the mediation negotiations end successfully and the commitment in question is duly performed by the suspect, the prosecutor is *in principle* given no discretion to initiate criminal proceedings. Therefore, it is necessary to issue a decision of non-prosecution (Art. 253 § 19 of CCP). However, there is a single exception to this necessity (Art. 253 § 17 of CCP). Accordingly, the prosecutor may deem the mediation process invalid and initiate criminal proceedings *if he considers that the mediation is not based on the free will of the parties and/or the commitment is not lawful.*

In cases where the investigation is proceeded with the mediation process, if at the end of the negotiation between the victim and the offender

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[22] Yavuz, Hakan A., "Onarıcı Adalet ve Uzlaştırma Kurumu Bağlamında Ceza Adalet Sisteminde Mağdurun Konumu", Türkiye Adalet Akademisi Dergisi, Y. 6, Vol. 23, October 2015, p. 98; Jahic, Galma/Yeşildağlı, Burcu, "Onarıcı Adalet: Yeni Bir Yaklaşım", *Onarıcı Adalet, Mağdur-Fail Arabuluculuğu ve Uzlaşma Uygulamaları: Türkiye ve Avrupa Bakışı*, İstanbul Bilgi University Pub., Ankara, 2008, p. 18.

[23] For more reading: Çetintürk, Ekrem, *Onarıcı Adalet ve Ceza Adalet Sisteminde Uzlaştırma*, Adalet Pub., Ankara 2017; Değirmenci, Olgun, *Ceza Muhakemesinde Uzlaştırma*, Seçkin Pub., Ankara, 2021.

held with the assistance of the expert mediator, the parties reach a settlement and if the given commitment, if any, is performed, then the State's power to prosecute and thereby punish are waived. Therefore, according to the classification given above, it may be said that a waiver of prosecution in terms of offences subject to mediation is a type of conditional waiver.

At this point, the law-maker renders the power to waive prosecution, which is afforded to the prosecutor, contingent upon the successful completion of the mediation process. Upon the performance of the commitment, which has been agreed to be performed by the offender at the end of the negotiations between the victim and the offender, then the condition has been achieved, and prosecution has been thereby waived.

As indicated in the official data, out of 513.297 files allocated to the mediator in 2020, 219.639 files were concluded by way of mediation.[24]

III. PENAL ORDER (ACCELERATED PROCEDURE)

A. Legal Nature

Penal order is a recently introduced method named "accelerated procedure" *(seri muhakeme usulü)* laid down in Article 250 of the CCP, which was amended by Article 23 of Law no. 7188 and dated 17 October 2019.[25]

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[24] *National Justice Statistics 2020*, p. 126.

[25] For more info: Kızılarslan, Hakan, "7188 Sayılı Kanun'la Ceza Muhakemesi Hukukuna Getirilen Seri Muhakeme ve Basit Yargılama Usulü", Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi, Vol. 14, No 183-184, November-December 2019, s. 1890 ff; Ildırar, Elif, *Seri Muhakeme Usulü,* Seçkin Pub., Ankara, 2021, p. 23; Yaşar, Ercan, "Türk Ceza Muhakemesi Hukukunda Seri Muhakeme Usulü", Adalet Dergisi, Y. 2020/2, No 65, p. 255 ff; Koç, Ziya, "Karşılaştırmalı Hukuk ve Uluslararası Mahkeme Kararları Işığında Seri Muhakeme Usulüne Farklı Bir Bakış: Masum Kişilerin Cezalandırılması Tehlikesi", Ceza Hukuku Dergisi, Ağustos 2020, Y. 15, No 43, pp. 607-663; Sevdiren, Öznur, "Adil Yargılanma Hakkı Bağlamında Seri Muhakeme Usulü Üzerine Eleştirel Değerlendirmeler", Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi, May-June 2020, Vol. 15, No 189-190, p. 573-616; Baytaz, Abdullah Batuhan, "Seri Muhakeme Usulü", *Ceza Hukuku ve Kriminoloji Dergisi-Journal of Penal Law and Criminology*, Y. 2020, No 8 (2), p. 248 ff; Atalay, Ayşe Özge, "Türk Ceza Muhakemesinde Seri Muhakeme Usulü ve Mukayeseli Hukuktaki Benzer Usuller", Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, Y. 2020, No 2, p. 694 ff; Aygörmez Uğurlubay, Gülsün Ayhan/Haydar, Nuran Korkmaz, Mehmet, "Serî Muhakeme Usûlüne İlişkin Sorunlar", Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi, Y. 2019, No 2, p. 260; Karakehya, Hakan/İnce, Asuman Tunçer, *Türk Ceza Muhakemesinde Seri Muhakeme ve Basit Yargılama,* Adalet Pub., Ankara, 2021, p. 44; Erdem, Mustafa Ruhan/Şentürk, Candide,"Ceza Muhakemesi Hukukunda Yeni Bir Kurum Olarak Seri Muhakeme Yöntemi", Ceza Hukuku Dergisi, Y. 14, No 41, December 2019, pp. 573-601.

This method is one of the penal orders that constitute an exception to the *principle of no punishment without trial (nulla poena sine iudicio)*. All of the following basic characteristics of the similar procedures called penal order in the comparative law appear to be valid also for the accelerated procedure: being a method alternative to prosecution; being applied mainly under the supervision of the prosecutor at the investigation phase; the assessment as to the establishment of the offence and determination of the sanction to be imposed is made by the prosecutor himself; the sanction to be determined accordingly must be accepted also by the suspect; being enforceable upon being endorsed by a court if prescribed; the decision through this method shall bear the same effects with a conviction decision issued at the end of a trial; upon being finalised, the decision shall become enforceable with immediate effect; and a criminal record shall be created.[26]

Unlike the decisions of non-prosecution such as the suspension to the initiation of criminal proceedings, pre-payment and mediation, which are considered as the other methods applied by the prosecutor and qualified as conditional waivers, a “criminal sanction” is designated in the accelerated procedure. On the other hand, in these other methods, certain obligations, which are to be undertaken by the suspect actively or passively, are prescribed as a condition and provided that the suspect acts in compliance with these conditions, the prosecutors waive, on behalf of the public, his right and power to proceed with prosecution and concludes the investigation phase by a decision of “non-prosecution”.[27]

Whereas, in the accelerated procedure, no negotiation is held between the suspect and the prosecutor as to whether a prosecution would be conducted or as to the type and length of the penalty to be imposed; but there is only a proposal pertaining merely to the sanction determined by the prosecutor and the way how the sanction will be executed. In the same vein, the application of this method is not also contingent upon admission or confession of the offence by the suspect. In this sense, it may be said that the accelerated procedure is a method based on consensus rather than a kind of bargaining based on negotiation.[28]

Lastly, despite certain advantages offered by the accelerated procedure for the suspect in terms of the conditions such as the gravity of the sanction to be determined and the way how it will be applied, this procedure should be considered as an institution of criminal procedure.

[26] Yavuz, 2021, p. 301-302.

[27] Ibid, p. 236.

[28] Ibid, p. 236.

That is why these advantages cannot be accepted as a right promised to the offender.[29]

It should be also noted that as with all other acts performed by the prosecutor, the act in the form of the accelerated procedure is indeed a special administrative act concerning the executive power and is not "judicial".[30]

B. Conditions

As set in the relevant statutory arrangement, there are *four basic conditions* for the application of the accelerated procedure: *The investigation phase must have been completed; a decision on the suspension to the initiation of criminal proceedings could not be issued; the offence alleged to the suspect must be one of the offences prescribed as a catalogue offence;* and *there must be no situation which prohibits or renders impossible the application of this method.*

1. The Investigation Phase Must Have Been Completed

The law-maker has made a significant reservation at the very beginning of the provision (Art. 253 § 1 of the CCP) for the application of the accelerated procedure. This reservation is the completion of the investigation phase. As a matter of fact, in the first sentence of the provision, the phrase "at the end of the investigation phase" is used, thereby seeking to emphasise that the investigation conducted by the prosecutor's office must have been duly completed and it is now the proper time to issue a decision.

At the end of the investigation phase, if there is a legal or factual reason that would require to issue a decision of non-prosecution, the prosecutor shall issue a decision of non-prosecution; or if there are sufficient evidence to initiate criminal proceedings and reasonable suspicion to allege the criminal act to the offender, the prosecutor shall primarily discuss the applicability of, and then apply if possible, the methods alternative to the prosecution and if not, he shall initiate the criminal proceedings to go onto the prosecution phase.

2. A Decision on the Suspension to the Initiation of Public Prosecution Must not Have Been Issued

The second condition is the lack of a decision on the suspension to the initiation of criminal proceedings. Accordingly, if the offence alleged to the suspect is one of the limited numbers of offences specified in the second paragraph, the prosecutor is obliged to primarily ascertain

[29] Ibid, p. 237.

[30] Ibid, p. 238.

whether it is possible to order the suspension to the initiation of criminal proceedings. In cases where the prosecutor finds it impossible, he will then discuss the possibility of applying the accelerated procedure. If the relevant condition is satisfied, he shall take the necessary steps to apply this procedure. The prosecutor does not have any discretionary power in this respect as the law-maker renders the initiation of this procedure compulsory by an *imperative provision*.

3. The Alleged Offence Must be One of Those Designated as Catalogue Offences

The third condition is the requirement that the offence alleged to the suspect must be one of the offences designated as catalogue offences.

According to the legislation, the accelerated procedure may be applied in respect of these offences: *trespass (Art. 154 § 2-3 of the CC); intentionally endangering public safety (Art. 170 of the CC); endangering traffic safety (Art. 179 § 2-3 of the CC); causing noise (Art. 183 of the CC); counterfeiting (Art. 197 § 2-3 of the CC); destruction of a seal (Art. 203 of the CC); providing false information in the course of issuing an official document (Art. 206 of the CC); providing an environment, or the means, for gambling (Art. 228 § 1 of the CC); using another's identity card or information (Art. 268 of the CC), as well as other petty offences laid down in certain special criminal codes.*

Given the legislative intent of the regulation concerning the criteria that are taken as a basis for the determination of the type of offences in question, it seems impossible to reach a satisfactory conclusion except for certain general statements. In consideration of the catalogue, it appears that the designated offences are those which may be found established through a report or a speedy expert examination, without the need for a detailed inquiry. The length of imprisonment sentences prescribed for these types of offences is mainly a maximum of three years. Lastly, these offences are generally the ones that are committed not against real persons.[31]

As regards the offence types, despite not being specified in the Code, a further restrictive provision is laid down in the Regulation on the Accelerated Procedure in the Criminal Procedure ("the Regulation"). According to Article 5 § 1 of the Regulation, the accelerated procedure cannot be applied directly in terms of the offences subject to pre-payment and mediation procedures. The repeat offending is not prescribed as a circumstance precluding the application of the accelerated procedure. In cases where the offences specified in the catalogue are committed for the first time and the other conditions are also satisfied, this procedure cannot be applied; however, a decision to

[31] Yavuz, 2021, p. 244.

suspend the initiation of criminal proceedings may be issued. In case of a repeat offending under Article 58 of the TCC, the accelerated procedure may be nevertheless applied.

4. Lack of a Circumstance Under which the Application of This Procedure is Prohibited or Impossible

The last condition is the lack of any circumstances under which the application of the accelerated procedure is prohibited or impossible on account of the reasons specified in the CCP. These circumstances are laid down in Article 250 §§ 11, 12 and 13 thereof.

Accordingly, in case of the commission of an offence collectively, if one of the suspects does not consent to the application of this procedure; if the suspect is under the age of 18 or mentally handicapped or deaf or mute; or if the suspect cannot be found at the address declared before the public authorities and specified in the investigation file or for being abroad or for any other reason, the accelerated procedure is in no way applied.

C. Application Phases

After the above-cited four basic conditions are satisfied, the prosecutor shall then proceed to the application stage of the accelerated procedure. At this stage, the prosecutor does not have any discretionary power according to the statutory arrangement, which is like an imperative norm (Art. 250 § 1 of the CCP). However, the prosecutor may waive his will to apply the accelerated procedure until communicating such request to the incumbent court, on the ground that the legal classification of the alleged act has changed.

The order of stages for the application of the procedure is as follows:

Subpoena and Informing: These two stages, namely subpoena and informing, are to be applied at the initial stage and concurrently. In this sense, the suspect shall be subpoenaed for being informed of the situation and accordingly provided with general information about the application of the procedure.

Determination of the Corresponding Sanction: The prosecutor shall designate the penalty and/or security measure by reducing by half the main penalty to be determined between the lower and upper limit of the penalty corresponding to the legal definition of the given criminal act. In doing so, the prosecutor shall pay regard to the rules concerning the designation and individualisation of punishment, which are laid down in the TCC. If the relevant conditions are satisfied, a decision on the suspension to the pronouncement may be given by the prosecutor. Besides, the imprisonment sentence

determined accordingly may be converted into alternative sanctions or suspended, if necessary conditions are satisfied.

Proposal and Acceptance: The prosecutor shall then submit a proposal indicating the sanction determined and concerning the application of the accelerated procedure. If the suspect accepts the proposal before his defence counsel, then the next step shall be taken.

Issuance of a Requisition and Its Submission to the Court: The prosecutor shall submit to the incumbent court a written requisition for the application of the accelerated procedure. In the requisition, the following information shall be included: identity information of the suspect and the defence counsel; identity information of the victim and the aggrieved parties and their lawyers or legal representatives if any; the alleged offence and the relevant provisions of law; the place, date and time where and when the alleged offence was committed; whether the suspect is detained on remand; if detained, the dates when he was taken into custody and detained on remand as well as the custodial and detention periods; a summary of the incidents giving rise to the alleged offence; the consideration that the conditions have been satisfied; the sanction determined; and the considerations as to the given case; and security measures.

In the first form of the article, the court was not entitled to make an assessment of, and to change, the type and amount of the sanction proposed by the prosecutor and specified in the written request upon the suspect's consent. By its decision dated 31 March 2021 and no. E.2020/35 K.2021/26, the Constitutional Court annulled the statutory provision whereby the court did not have any option but to issue a decision in line with the sanction specified in the written request. Thereafter, a new arrangement was introduced by the Law no. 7331, which is dated 8 July 2021, and courts are thereby ensured to order a sanction which cannot be, however, more severe than the one specified in the written request.

Examination of the Requisition and Short Hearing of the Suspect by the Court: If the court, after hearing the suspect in the presence of his defence counsel, concludes that the conditions laid down been satisfied and the alleged act falls under the scope of the accelerated procedure, it shall give a decision in line with the sanction specified in the requisition. Otherwise, it shall dismiss the proposal and communicate the file to the prosecutor's office for the conclusion of the investigation following the general provisions. The suspect, who fails to appear before the court albeit with no excuse, shall be deemed to have waived the accelerated procedure.

Notification of the Decision: The court shall notify the decision to the suspect and his defence counsel, as well as if any, the victim, the aggrieved party or any other persons having the capacity to intervene in the process according to the general provisions.

Judicial Review: The decision issued by the court within the scope of the accelerated procedure may be *challenged* (Art. 267 of the CCP). In case of a challenge raised against the decision, within seven days, before the criminal court issuing the decision, the court shall rectify its decision if the challenge is found justified and send the rectified decision to the parties concerned. If the challenge is not found justified, it shall refer the challenge to the competent appellate authority within at the latest three days. The competent appellate authority is the assize court within the same place of jurisdiction as that of the criminal court. The assize court, examining the challenge, shall communicate it to the prosecutor and the other party for a written reply. If deemed necessary, the assize court may either conduct an examination and inquiry by itself or instruct the prosecutor's office to do so. It may, in principle, carry out its appellate examination over the file without holding a hearing. However, if deemed necessary, it may hear the prosecutor, the suspect's defence counsel and representative of the aggrieved party. Examining the decision as to its compliance with the accelerated procedure, the court shall decide on the challenge, if found it justified. The decision rendered by the assize court is final and cannot be appealed.

As indicated in the unofficial data obtained from the Ministry of Justice, 73.853 files for being concluded through the accelerated procedure between 1 January 2020 and 12 March 2021.[32]

CONCLUSION

This article is intended for making a general review as to the above-explained methods available in the Turkish criminal procedure system.

For the initiation of criminal proceedings concerning a criminal act in the criminal procedure, the findings obtained at the end of the investigation conducted into the impugned incident must give rise to suspicion, that is to say, evidence, to a certain extent that would demonstrate that the imputed act has been committed by the suspect. However, in certain cases, despite the existence of suspicion at a certain level sufficient for the initiation of criminal proceedings, the prosecutor may either issue a decision of non-prosecution that entails certain conditions, or order the imposition of certain sanctions on the suspect through a penal order or seek the approval of the incumbent court to that end. In this regard, ***the alternative methods to prosecution*** are the venues whereby the investigation phase is ended through a decision issued under the control and/or within the discretion of the prosecutor to the impugned criminal act, without the prosecution and trial phase being proceeded, albeit the existence of suspicion sufficient for the

[32] https://www.aa.com.tr/tr/turkiye/seri-muhakeme-usulunde-75-bin-853-basit-yargilamada-ise-85-bin-175-dosyada-karar-verildi/2180091, date accessed 08.08.2021.

initiation of criminal proceedings as well as of no *de jure* or *de facto* obstacle to that end. [33]

Although the methods alternative to prosecution are assigned different names in comparative law and have characteristics specific to the country concerned, they are similar notably throughout Continental Europe including also Turkey. In consideration of their prominent characteristics, these methods may be classified as *"conditional or unconditional waiver of proceeding with the prosecution"*, *"penal order" as a method based on consensus* and *"methods of bargaining based on negotiation"*.[34]

In Turkey, whereas certain institutions are being employed, which may be defined as a waiver and penal order under the above-mentioned classification, no method may be classified as a method of bargaining based on negotiation.

Out of the methods likely to be classified as a waiver of proceeding with prosecution, *the decision not to prosecute, issued in pursuit of public interest within the discretion of the prosecutor* is an unconditional waiver, whereas the *suspension to the initiation of criminal proceedings*, *prepayment* and *mediation* are the venues of a conditional waiver. The accelerated procedure is in the form of a penal order, which is a consensual method.[35]

Unlike the comparative law examples from the other countries, the Turkish CCP system envisages not a *spectrum model* but a *gradual model* in terms of the application of the alternative methods available at the investigation phase. The prosecutor is granted no discretion to prefer and employ any of these methods. It appears that the law-maker intends to avoid any competition among these methods to ensure a uniform functioning.[36]

According to the said system, at the end of the investigation phase, the prosecutor shall primarily determine whether a decision of non-prosecution may be issued given the legal and factual reasons in a particular case. If the prosecutor considers that such a decision cannot be issued, he shall decide on the category of the offence alleged to the suspect. In doing so, he will consider the possibility to waive prosecution, by exercising his discretionary power. He shall then discuss whether any of the methods, namely pre-payment, suspension to the initiation of public prosecution, victim-offender mediation and accelerated procedure, applies to the given type of offence. If these methods are not applicable or have been unsuccessfully applied, the

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[33] Yavuz, 2021, p. 337.

[34] Ibid, p. 338.

[35] Ibid, p. 338.

[36] Ibid, p. 231.

prosecutor shall issue an indictment and initiate criminal proceedings to bring the dispute to the prosecution phase.[37]

As is seen, the prosecutor has several available methods alternative to the prosecution. In cases of the successful application of these methods, save for the accelerated procedure, a decision of non-prosecution shall be issued, and the investigation phase shall be finalised. No criminal record is formed concerning the offender.[38]

As for me, it should be focused on extending the circumstances in which the prosecutors may decide not to prosecute by exercising their discretionary power in pursuance of the public interest. As also observed in the precedents in comparative law, a decision of non-prosecution may be rendered given the consideration that it would be more reasonable to conduct no prosecution in certain cases in pursuance of the victim's personal interest and/or general public interest or sometimes the suspect's personal interest.[39]

Today in this system, the decisions rendered at the end of several prosecutions neither satisfy the victim to a sufficient degree nor constitute as an official response due to the imposition of imprisonment sentences that are indeed unenforceable. Therefore, along with the labour and time spent to that end, the time spent by the victims, witnesses and offenders at the courthouses are of no avail. Therefore, notably in cases that may serve for the purpose of attaining the objectives of criminal justice policy, the prosecutor shall be enabled to decide not to proceed with prosecution by exercising his discretionary power.[40]

However, guides including comprehensive principles and practices, which would assist the prosecutors in the exercise of their discretionary power and which are binding, accessible to the public, and applicable to possible concrete cases should be drawn up. [41]

The accelerated procedure is a method that may be classified as a form of the penal order in comparative law. However, in the legislative intent of the relevant Law, where this method is laid down, not the methods employed in comparative law, which are similar to the accelerated procedure, but the sample practices regarding the methods of bargaining based on negotiation that are in force in certain countries are provided. There are certain basic differences between these methods -which are based on an agreement as a product based on the offender's

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[37] Yavuz, 2021, p. 232.

[38] Ibid

[39] Ibid

[40] Ibid

[41] Ibid, p. 233.

confession and the negotiation and bargaining process by and between the parties/subjects of the relevant criminal procedure- and the venue of the penal order that is based on the offender's consensus. That is because, *in the accelerated procedure*, *a significant difference* has been introduced *by way of not entailing the necessity of an admission or confession and not providing the opportunity to appeal the verdict*, which is probably the most significant element of similar practices in Germany and France.[42]

In the accelerated procedure, another issue that must be discussed is the possibility of imposing an imprisonment sentence as a sanction. In such a case, the prosecutor is entitled to order, as a sanction, imprisonment sentence which has not been converted into one of the other alternative sanctions and execution or pronouncement of which has not been suspended. The imprisonment sentence, designated by the prosecutor, is to be immediately executed upon being finalised after the court's approval. The application of the accelerated procedure is not conditional upon the suspect's admission or confession that he has committed the imputed offence. Because of the sample practices in comparative law and the related debates in doctrine, the matter is a significant determinant. In Germany, France and Switzerland, an imprisonment sentence may be ordered if the offender has confessed to having committed the imputed offence and has, at least in principle, acknowledged the claims under private law. In this regard, within the scope of the bargaining methods based on negotiation where confession/admission is sought as a basic condition, imprisonment sentence may also be generally ordered along with the other applicable sanctions. The rationale of the bargaining methods is that as the offender has confessed to having committed the offence, there is no longer a need to carry out *a trial*, the most important, troublesome and costly stage of the proceedings which must be necessarily conducted to reveal the material truth. This is both in pursuit of the general public interest and in favour of the offender for granting remission or relieving him of certain criminal charges.[43]

There are several criticisms about the compatibility of the accelerated procedure with *the right to a fair trial*. [44] The criticisms raised in the light of the *principles of equality of arms, adversarial proceedings, the right to defence and raise arguments/provide explanations, the presumption of innocence, principle of the natural judge, constitutional jurisdiction, in dubio pro reo principle and the right to a reasoned decision* are made even though the accelerated procedure is not a traditional process of trial, but a method which is formulated primarily in pursuit of the public interest concerning judicial services and subsequently in favour of the offender

[42] Ibid, p. 235, pp. 308-310.

[43] Yavuz, 2021, pp. 311-320.

[44] See for the summary of the criticisms: Ibid, pp. 324-330.

and which affords, if employed, significant advantages to him. Therefore, notably given the established case-law of the European Court of Human Rights, these criticisms are not found justified. Nevertheless, those raised under *the prohibition of self-incrimination* and *the right to remain silent* are partially found justified. That is because the most problematic issue in the accelerated procedure is the remission of the given sentence. An expectation or promise of remission may induce the offenders, who are indeed innocent, to give consent to the application of the procedure.[45]

[45] Ibid, p. 324 ff.

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