

## 2005 Draft of Child Protection Act in Turkey\*

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### I. Preliminary Information

There are three points that I want to mention as Preliminary information.

*Firstly*, even if the title of my presentation is written as "2005 Draft of Child Protection Act" in the Program of the Congress, this draft code has been legislated and put into force by Law no:5395 on 3rd July 2005, shortly after I have stated this presentation subject to the Organization Committee of the Congress. As a result of this, following my statements will be related to the *Child Protection Act*.

*Secondly*, Turkish Children Law is not regulated only by this law. In addition to this law, Turkish Penal Code, Turkish Code of Criminal Procedure, the Law on the Execution of Penalties and Security Measures, the Law on Police and Gendarme Forces contain rules related to children. Here, I will try to give information only about the Child Protection Act which has entered into force last month.

*Thirdly*: before this law has entered into force, the Code of Criminal Procedure for Children dated 1979, no: 2253 was in force. Before 1979, there was no special code concerning children or children courts. The law dated 1979 was in force together with the related articles of the Codes

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which I have mentioned above. On the other hand, the new law dated 2005, has abolished the old Code of Criminal Procedure Law for Children. The expression "law" that I will use below refers to the new law dated 2005.

## II. Basic Information About the Law

This law has been prepared after four years of preparatory work. Although the structure of the Commission that has prepared this law has changed a few times, it is hard to say that most members of this commission are specialized in children's law.

The law consists of 4 sections, includes 50 articles. In the first section; the objective, the coverage, the basic principles and protective and corroborative measures have been regulated. The second section includes subjects related to criminal procedure such as investigation and prosecution. While the third section regulates subjects concerning Courts and Public Prosecution Office, the fourth section regulates various subjects such as expenses and staff.

The objective of the law has been stated in the first article as "*to regulate the procedures and basics rules as to the protection of the rights and well-being of children and protection of children that need it.*" The second article of the Law states that this Law "*contains norms regarding the procedures and basics of security measures which will be applied for children that need protection or that are apt to commit a crime and also includes norms related to the establishment, function and competence of children courts*".

## III. Evaluations

It is impossible to explain this law with all of its specific features due to time restriction. Therefore, I will express my opinions about some specific points of this Law. First I will mention the negative aspects of the Law and then I will express my opinions on some aspects of the Law which I find positive.

### A) Negative Aspects of the Law

1) While this Law was being prepared, it has been assumed that children either "*need protection because they are victims of a crime and need help*" or "*apt to commit a crime*" and the related articles of the law have



been regulated according to this assumption. This assumption which is pronounced in the first article contradicts with criminology and the criminal law data. The Law has disregarded children "that have committed a crime" and this has caused the creation of many defective and incomplete articles.

2) The definition of "children that are apt to commit a crime" in the 2nd paragraph of clause "a" of the 3rd article is defective. In this definition, the child who has been investigated or prosecuted or has been sanctioned with security measures because he/she has committed a crime has been considered as "apt to crime". According to the clause "e" of 1st paragraph of the 2nd article of Criminal Procedure Law, the investigation of a person starts when he is suspected of committing a crime. However, after the investigation or prosecution, it may be concluded that the child in question is not related with any act of crime and the police or the public prosecutor may consider the suspicion baseless and decide not to carry out investigation. That's why the definition of "children who are apt to commit a crime" will cause defective legal conclusions.

3) The 2nd article which defines the scope of the law contains an important deficiency. Both this article and the articles 5 to 14 which regulate the measures about the children do not include measures for children who have criminal responsibility and who commit a crime. However, the biggest problem in Turkey is experienced about the children between the ages 12 and 18. The new Turkish Penal Code which has entered into force on 01.06.2005 has not regulated the measures that will be applied to these children while the old Penal Code and the Code of Criminal Procedure for Children had arranged these measures. Although the 56th of the article New Turkish Penal Code has foreseen that these measures will be arranged in the related laws, this issue has not been regulated in the New Child Protection Law. If this Law had contained the norms in the Code of Criminal Procedure for Children dated 1979 or in the Draft Turkish Penal Code, most of these deficiencies would not have come into existence.

4) In this context, the system "diversion" of children out of the penal system has been applied successfully in criminal law for children in Europe for years. This has not been regulated in this new law and this grave deficiency should be eliminated.

5) Clause "j" of the 4th article states that social responsibility in deciding on measures about children and in application of these mea-

asures should be shared by the community itself. However, how this social responsibility will be shared has not been defined in the Law. Besides, since some of these measures are restrictive in terms of freedom, this rule contradicts the principle that "the criminal responsibility is personal".

6) In the 4th article of the law which regulates "*principles*", the condition of the children who are involved in a crime with his/her mother and who have to stay with the mother because of his/her age had not been considered.

7) The 1st clause of the 4th article regulates that the identity of the children who are investigated or prosecuted should be kept secret. Although this rule is appropriate, it still includes deficiencies. First of all, this issue should be regulated in the "Code of Protection of Personal Data" which needs to be prepared separately. On the other hand how the identity of these children will be kept secret and the measures for this have not been defined in the article. As this issue is related to basic rights, it should be arranged by laws not by regulations or other administrative rules. With the term "others" the article forbids the disclosing the identity of the child for everyone. However, police forces, public prosecutors, judges or courts may need this information as it has been formulated in some other articles of this Law (e.g. paragraph of 19th article and 8. paragraph of 23rd article). This exception should have taken place in this article.

8) The 2nd paragraph of the 5th article states that the identity and the address of the persons who are under "*sheltering measure*" will be kept secret in the case that these persons demand it. The criticism which has been directed to the 1st clause of 4th article above is also valid for this article.

9) The 1st paragraph of the 6th article has charged on some persons and establishments the liability to denounce the children who need protection and to apply for the protection of those children. Nevertheless, the family and the legal attorney of the child or the persons that have the duty to take care of the child have not been regulated in this article.

10) This liability and the right to denounce and demand in the 1st paragraph of 6th article are to be made to the Institution of Social Services and Child Protection. However, the right or the liability to denounce and to demand should have been given also to legal authorities



because this institution may not exist at some places. Moreover, the sanctions which will be applied in the case that these liabilities mentioned above are not carried out have not been defined so the application of these rules seems as a weak possibility.

11) The 7th article regulates protective and supportive measures. However the upper and lower time limits have not been stated. Besides, it has been wrong to state that the measures will be valid until the child becomes a major (18). Exceptions such as becoming major by the rule of court or by marriage or exceptions related to children who have been adopted, should also be handled in this article. Although it has been regulated that audits will be conducted every three months, this time definitions do not concern measures but the audits. This drawback which is mentioned below can be eliminated if the measures are abolished when necessary. Especially, if the judge or the court uses the right to "*to abolish measures ex officio*" which is covered in the 3rd paragraph of 8th article, this drawback will be eliminated.

12) The 13th article states that cautionary judgments will be given without trial and only if it is deemed necessary by the judge a trial will be held. However, it is very important and necessary that the child should be known by the judge. Therefore, cautionary judgments should be taken after a trial is held and the trials should be held as closed hearings. Moreover, our practice of 80 years has shown that judges mostly do not consider necessary that a trial should be held and that they mostly arrive at decisions without trials. This practice will not be able to serve the objective of this law in application of measures for children.

13) According to the 17th article, in case that an adult and a child commit a crime together their inquiry and prosecution will be conducted separately. The court that adjudicates the child may wait until the result of the trial in the general court. In the case that it is deemed essential to join the two cases, the trial will be held under the framework of the general court. The regulation in this article is defective in many ways. The article assumes only two cases one at a general court and the other at a juvenile court. However, the number of the cases may be more than two and when one of the courts do not consider that to combine the case is not appropriate the process will be locked. It has not been determined as to which court will give the combination decision. This situation becomes more complicated when the numbers of the courts increase. The upper authority from the general courts should have had the right to give this decision on the condition that juvenile court approves. Besides, although



the joining of the cases has been arranged, the separation of them has not been regulated. The cases which have been joined do not have to be tried together until the end. In addition to all this, it has not been determined which court will hold the hearing in the event that two general courts of equal authority are included. In such a circumstance, the court which has made the first decision should have the authority. Nevertheless, since the approval of both courts is necessary, the practice will be much more different because it is not clear as to which court will ask the other or whether demand will come from the juvenile court. The wording of the article is also wrong. Because, it states that "it is necessary to conduct the cases together" and also it points out the discretionary power by stating that "it can be decided to join the cases on condition that courts deem it appropriate". The expression of "deeming necessary" is vague. It is also unfavorable to let the cases be joined in all phases. Sometimes, cases will be invalid by prescription and sometimes the principle of "Fair Trial" will be violated because at the beginning the case is in a general court and both these situations will create unfavorable results for the children. In the 2nd paragraph of 25th article, Aggravated Criminal Court for Children has been arranged in addition to the Juvenile Court. It has also not been identified that which court will have the responsibility when Aggravated Criminal Court for Children and General Aggravated Criminal Court are included in the case. The Law has regulated the joining of the cases but it has not cleared the joining of inquiry and prosecution and also the commencement of a suit by a public prosecutor by joining charges (accusations). However, when the 174th article of New Turkish Penal Procedure Code dated 2005 which has regulated the rejection of a criminal charge, is taken into consideration this possibility must have been covered. But, since only one suit is brought in such a circumstance, "to consider appropriate" would be impossible and therefore an exception related to this situation should be taken into consideration.

14) In the 2nd paragraph of the 17th article, it has been regulated that the trial about the child can be suspended until the end of the trial at the general court. However, there is a very significant deficiency in this article. It has not been stated that prescription will stop in this time frame. If this deficiency is not eliminated, many cases will be invalid by prescription.

15) The 20th article of the Law refers to the 109th article of Criminal Procedure Law in terms of "Legal Control" and it makes it possible to apply this for children. However, clause e of the 3rd paragraph of 109th



article of Criminal Procedure Law contradicts with the principle of "fair trial" because according to this article the persons may be subject to a forceful alcohol and drug treatment at and institution at the beginning of an investigation when their guilt is not certain.

16) The 3rd paragraph of the 27th article regulates that the Higher Board of Judges and Prosecutors can define and change the judging framework of High Criminal Court for Children on proposal of Ministry of Justice. Here, the proposal of Ministry of Justice becomes binding and this contradicts with the principle of "judicial independence". The article should be changed.

17) The 28th article regulates the appointment of judges and prosecutors to the courts which will execute this Law. However, although it has been expressed in the 2nd paragraph that, the "preference" of judges and public prosecutors will be taken into consideration in their appointments, no other determinative criterion has been defined. The judges or prosecutors who will be assigned in this field should be married and should have children.

18) The 3rd paragraph of 28th article states that in the case that a judge does not commence his/her duty for some reason, Judicial Justice Commission determines which judge will be assigned for this post until a new judge is appointed by the Higher Board of Judges and Prosecutors or until the judge in question commences his/her duty. However, this Commission is affiliated with the Ministry of Justice and is under political effect. This affiliation violates judicial independence and the principle of "fair trial". This authority should be withdrawn from the Commission.

19) While this Law was being prepared, it has been assumed that the Institution of Social Services and Child Protection is the most reliable institution and it has been given many special duties and authority. For instance, the duty to monitor the controlled freedom for children under the age of 12 and children who need protection has been given to this institution. Nevertheless, many children in sheltering houses affiliated with this institution have been subject to sexual crimes by the employees in these places and this institution itself needs to be audited. Since these audits or controls are not carried out properly and sufficient importance is not given to reported crimes, these deficiencies should be eliminated.

20) In the Law, the competence, status and the authority of auditors or supervisors have not been defined clearly and the legislation to which

they will be subject to as a result of their acts has not been stated. Although the 6th article of New Turkish Penal Code defines people who conduct public activities or services as "public officials", this definition is not sufficient. First of all, it is still arguable that the expression "public service" is in the framework of this concept. On the other hand, the most important drawback of this law is that the New Turkish Penal Code has turned the crimes of breach of duty and malpractice into crimes of damage and stipulated that the victim should be damaged or the perpetrator should have unjust gain in order to consider this crime "committed" and completed. Since the Code of Child Protection does not contain a special article for this issue, it is almost impossible to punish these officials for malpractice or breach of duty.

21) The Law has not regulated as to when Juvenile Courts or High Criminal Courts for Children that the act mentions will be established. As a result of this, it will take a time to be able to apply this law although it has entered into force. However, the system which has been brought about by this law is founded upon these courts and it should have been rendered obligatory to establish these courts until a definite date that should have been determined by the Law itself.

### **B) The Considerably Positive Points of the Law**

1) It has been appropriate to cover the children who need protection even if they are not the victims of a crime with the children who are victims of a crime under the definition of "*children who need protection*" in clause a of the 1st paragraph of 3rd article of the Law. However, the 14th article of the old Code of Criminal Procedure for Children had the similar content and it was hardly applied. We all hope that the mentioned article of the Law is put into practice.

2) Clause e of the 1st paragraph of 5th article regulates that the persons who have children and who do not have a shelter or pregnant women whose lives are in danger, should be provided with sheltering places. If this positive decree is applied accordingly, it will meet an important need.

3) It has been regulated that "*urgent protection decision*" will be given immediately in emergencies within the time defined in the article 9 and that the location of the child will be concealed. Besides, the ruling of personal relationship by the decision of the judge and the limitation of this measure to 30 days has been very proper arrangements.



4) The arrangement of "postponement of opening a public lawsuit" in the 19th article is a very satisfying point because such an arrangement had not existed in our system and it had been demanded by Turkish lawyers for a long time. However, the regulation in the article still contains deficiencies. For instance, the observation of the condition for the family of the children to compensate the damage of the victim or the public will weaken this important establishment. This drawback can be eliminated partially in practice by the last sentence of the 1st paragraph of 19th article. According to this, if the economic condition of the child or his/her family, the prosecutor may not observe this condition. However, this situation is not obligatory for the public prosecutor not to open a lawsuit and it is still up to the will of public prosecutor; therefore it does not annihilate the drawback mentioned above. Moreover, since it will be applied according to the will of the prosecutor without a definite criterion, it will create the grounds for applications which are in contradiction with the principle of equality<sup>1</sup>.

5) The 4th paragraph of 19th article is a favorable norm because it regulates that a special record of the lawsuits whose commencements are postponed be kept. Besides, it provides the opportunity to open lawsuits later when some conditions are not satisfied. The protection of personal data which has been brought about by this article is also in accordance with the Criminal Code related to protection of personal data and Code of Criminal Procedure.

6) The 23rd article regulates the "*postponement of announcement of the final verdict of the court*". This concept was absent in our laws before and it was expressed by the lawyers that it had to be accepted by legists. However, the article contains some faults: for example the prerequisite of the postponement is the compensation of the losses or damages of the persons. On the other hand 4th paragraph of the same article regulates that the damage or loss should be met by the child and it is almost impossible for the children to be able to meet this condition.

7) The regulation in the 8th paragraph of the 23rd article that the decision will be recorded in a special system in case the announcement of the final verdict of the court is postponed, the protection of personal data and the opportunity to announce the final verdict if some conditions are not realized are very positive developments. This regulation is also in accordance with the Criminal Code regarding the protection of personal data and the system of Code of Criminal Procedure.

<sup>1</sup> See Turkish Code of Criminal Procedure, Article 171.



8) The inclusion of "reconciliation" in the 4th article has been an affirmative development. Different from the New Turkish Penal Code and the New Criminal Procedure Law, it even allows. Reconciliation not only in crimes subject to complaint but also in crimes committed by negligence. Moreover, according to this decree, this principle can be applied in crimes that have been committed willfully by persons who have not finished the age of 15 until the date of the crime when the lower limit of the crime does not exceed 3 years. As for children who have finished the age of 15 at the date of crime the lower limit is 2 years. However, it does not mean that there aren't any drawbacks in these norm, because the basic principle about reconciliation has been regulated in the 8th paragraph of 73rd article of Criminal Code and the 253rd, 254th and 255th articles of Code of Criminal Procedure Law. According to these articles, the compensation of the loss or the damage by the children is a prerequisite for reconciliation. However, in most cases since the child is unable to meet this damage, it should have been considered sufficient for the child to carry out some liabilities for reconciliation. Moreover, currently Ministry of Justice plans to regulate the conduction of conciliations with a regulation. Such an attempt will violate independency of the judiciary as the system is based upon prosecutors, judges and lawyers. As a political organ, the Ministry of Justice should not be involved in this process. In the same way, the assignment of the conciliator lawyer in the process of conciliation is an obligation which has been stipulated by the Law and it should not be hindered by a regulation that is prepared by the Ministry of Justice.

9) The 1st paragraph of 26th article expresses that Juvenile Courts be established in every city and there is a need for such a development. On the other hand, this legal obligation should not be neglected as it was done in the past about the related article of the Code of Criminal Procedure for Children dated 1979. Although the old Code included the same decree, only 8 juvenile courts have been established until 2005. Another deficiency related to this article is that the 2nd paragraph of 25th article does not contain a norm that High Criminal Courts for Children will be established in every city.

10) The 30th article defines the duties of the office of the Children Branch of Directorate of Public Prosecutors. Article 30 and 32 regulate the children's unit of police and gendarmerie and the education of the personnel respectively. Besides, articles 33 and 34 regulate the qualifications and duties of social service officials. Although all these regula-



tions are very favorable and necessary, the absence of rules about "legal restrictions" for social service officials and their "refusal" in some objectionable circumstances have not been envisaged.

11) It has been expressed by article 44 that rules of the special code (no:4483) which is related to the trial of public officials and which over-protects them will not be applied for public officials which are charged with crimes under the coverage of this law and this is a very important step towards providing a fair trial. This will assure that public officials will be prosecuted investigated like ordinary citizens. However, the lack of regulation for all persons involved in activities concerning this law and the arrangement of crimes of breach of duty and malpractice as crimes of damage will cause that these persons will not be subject to any punishment in most cases.

#### IV. Conclusion

This Law, which I have tried to explain, has been prepared with the objective of combining all fields of law and providing a basis for a social state. When compared to the old Code of Juvenile Courts, it is a better Code and an important step taken with good will partially considering international conventions related to Children's Rights. However, some important deficiencies, drawbacks in terms of criminal law have come about and confusions and deficiencies still exist in the legislation. When we compare it with the legislations in developed countries, the number of these deficiencies is very high. The current Turkish Act of Protection of Children has fallen far behind the level of Turkish Law itself. This Law which has been put into effect in 2005, does not have the capacity to meet the demands and needs of Turkish Law of Children in the future years. I think that the deficiencies which I have mentioned above should be urgently corrected.

Another significant issue not to forget is that the norms of this law and other related laws should be applied carefully and thoroughly. The law dated 1979 had not been applied properly and many regulations that existed in it were not put into practice. Unfortunately, the practice between 1979 and 2005 proved to fail. I think, attentive and proper practice is as important as the existence of the law.