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**CONFLICT RESOLUTIONS PROGRAM**  
**MASTER’S THESIS**

**THE FUNCTION OF THE FAMILY COURT EXPERTS**  
**IN THE RESOLUTION OF FAMILY DISPUTES**

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## THESIS APPROVAL PAGE



## DECLARATION

I hereby declare that this master's thesis/non-thesis master's term Project titled as “**The Function of the Family Court Experts in the Resolution of Family Disputes**” has been written by myself in accordance with the academic rules and ethical conduct. I also declare that all materials benefited in this thesis consist of the mentioned resources in the reference list. I verify all these with my honour.

.../.../2019

Serap DEMİR

**ABSTRACT**  
**Master's Thesis**  
**Functions of Family Court Experts in Resolution of Family Disputes**  
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The aim of the study with the title “Functions of Family Court Experts in Resolution of Family Disputes” is to analyze legal remedies and mediation in resolving family disputes and the role of family experts throughout the process.

The study firstly deals with the legal remedies and mediation to resolve family disputes in Turkish Law within the legal framework and to identify the status of family court experts.

Second chapter of the study dwells on duties, working principles and methods of family court experts in Turkish Law. Whilst chapter three searches for family disputes solving mechanisms and the functions of the family court experts in the law systems of other countries in order to make a comparative analysis with the family dispute resolution mechanisms and the functions of the family court experts in Turkish Law, conclusion is dedicated to provide an evaluation.

**Keywords:** Family Disputes, Family Court Experts, Mediation, Foreign Law Systems

## **ÖZET**

**Yüksek Lisans Tezi**

**Aile Uyuşmazlıklarının Çözümlemesinde Aile Mahkemesi Uzmanlarının İşlevi**  
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**Anlaşmazlık Çözümü Programı**

“Aile Uyuşmazlıklarının Çözümlemesinde Aile Mahkemesi Uzmanlarının İşlevi” başlıklı çalışmada, aile uyuşmazlıklarının yargı yoluyla çözümü ve arabuluculuk yoluyla çözüm yöntemlerinin incelenmesi, bu süreçlerde uzmanların rolünün araştırılması amaçlanmaktadır.

Bu çalışmada öncelikli olarak Türk Hukukunda aile uyuşmazlıklarının yargı yoluyla ve arabuluculuk yoluyla çözüm mekanizmaları yasal çerçevede incelenmiş, aile mahkemelerinde uzmanların statüsü tespit edilmiştir.

İkinci bölümde Türk Hukukunda uzmanların görev, çalışma usul ve yöntemlerine ayrıntılı bir şekilde yer verilmiştir. Çalışmanın üçüncü bölümünde, Türk Hukuk Sistemindeki aile uyuşmazlıklarının çözüm mekanizmaları ve uzmanların işlevleri ile karşılaştırmalı bir değerlendirme yapabilmek için yabancı hukuk sistemlerindeki aile uyuşmazlıklarından doğan sorunların çözüm mekanizmaları ve uzmanların işlevleri araştırılmıştır. Sonuç bölümünde ise değerlendirmeye yer verilmektedir.

**Anahtar Sözcükler:** Aile Uyuşmazlıkları, Aile Mahkemesi Uzmanları, Arabuluculuk, Yabancı Hukuk Sistemleri.

**THE FUNCTION OF THE FAMILY COURT EXPERTS  
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## **ABBREVIATIONS**

<b>ADM</b>	Judicial Support and Victims' Services Directorates
<b>ADR</b>	Alternative Dispute Resolution
<b>AMINZ</b>	New Zealand Arbitration and Mediators Institute
<b>Art.</b>	Article
<b>CAFCASS</b>	Children and Family Court Advisory and Support Service
<b>CC</b>	Turkish Civil Code
<b>CCP</b>	Children's Cases Pilot Project
<b>CEFL</b>	Commission on European Family Law
<b>CEPEJ</b>	European Commission for the Efficiency of Justice
<b>CMK</b>	Code of Criminal Procedure
<b>CPR</b>	Civil Procedure Rules
<b>EC</b>	Directive
<b>EGZPO</b>	Gesetz, betreffend die Einführung der Zivilprozessordnung,
<b>etc.</b>	Etcetera
<b>EU</b>	European Union
<b>FCC</b>	French Civil Code
<b>FCCP</b>	French Civil Code of Procedure
<b>FDR</b>	Family Dispute Resolution
<b>FMC</b>	Family Mediation Council
<b>FPR</b>	Family Procedure Rules
<b>HUAK</b>	Mediation in Civil Disputes
<b>HUMK</b>	Law of Civil Disputes
<b>LAT</b>	Australian Approach of "Less Adversarial Trial"

<b>LEADR</b>	Dispute Solvers Association
<b>MIAM</b>	Mediation Information and Assessment Meeting
<b>PACS</b>	Pacte Civil de Solidarité
<b>TBNA</b>	Reasons for Divorce in Turkey
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNCITRAL</b>	Model Law on International Commercial Arbitration
<b>USA</b>	United States of America



## INTRODUCTION

Along with the progress achieved in science and technology, the modernization of the social life has caused some changes to occur in the lives of the individuals which has effected the family structure. Socializing has brought with itself conflicts and disagreement in communication. This change has resulted with an increase in the family conflicts. Any tenseness between the family members, any negative communication language used by family members towards each other, interventions from other family members and social environment, economical problems, domestic responsibilities, approaches of parents to raising the children and various others may lead miscommunication and conflicts between family members. Considering that family constitutes the building block of the society, in order to lay sound foundations, such domestic conflicts need to be resolved through constructive and peaceful means with due regard and affection. Along with the divorces which have increased in number recently, family members have to challenge with too many negative situations. Since the conflicts arising from family law are the conflicts which are relate not only to the family members but to the whole society, new ways have been searched to solve such problems taking the variety and versatility of these problems.

In order to resolve family disputes, our country focuses to adopt an approach which complies with our social structure but which also takes into consideration the new developments in other countries. For instance, thanks to the legal initiatives taken in 2003, family courts were established through Law numbered 4787 in compliance with the principles set by our Constitution and the relevant law was enacted. As of that date, such issues within the scope of family law as engagement, adoption, divorce, custody, change of custody after divorce, personal contact with the child, marriage licence, alimony and paternity related issues have been dealt with in the family courts.

Considering the changing social structure and dynamics in Turkey, through the Law on Family Courts, psychologists, pedagogues and social workers have been assigned to work in Family Courts. In addition to identifying the problem and providing a solution, family court experts also assist to courts on training, protection

and social measures. Since the date of their establishment, whilst family courts have served to solve family conflicts in a legal sense, family court experts' involvement in the processes have gained importance especially in terms of protecting the best benefit of the child. It is understood that receiving professional support in divorce process helps solving problems in a constructive way both for the parents and the children while the reports prepared by the social experts are influential for judges in making their judgement.

The aim of the first chapter of the study is to describe family conflicts, solutions, cases arising from family conflicts and solving family conflicts through mediation. As well as handling the appointment of family court experts to the family cases, their duties, powers and working principles, chapter two also mentions the researches and works carried out about the family court experts and the Court of Cassation decisions on the reports prepared by the family court experts.

Third chapter of this study dwells on family conflict solutions brought both by legal remedies and mediation in such EU countries as United Kingdom, France and Germany along with Switzerland, United States of America, Australia and New Zealand and the positions and functions of family court experts in this process. Conclusion provides a comparison between the duties of the family court experts in Turkish Law System, their working principles in providing solutions to family conflicts and the duties of the family experts in foreign law system, their statues and functions.

## CHAPTER ONE

### FAMILY CONFLICTS AND SOLUTIONS

#### 1.1. CONCEPT

Established as specialist court, family court is a regulation which enables to make judgements on social and economic problems, family conflicts and protection and development orders<sup>1</sup>.

Article 41 of the Constitution states that the state shall take the necessary steps to ensure peace and welfare of the society, to protect mother and children and establish the necessary organization to ensure “Protection of Family”. Since protecting the family is a duty of the state and since, through fast developments and complicated relationships, new approaches are must and inevitable, new regulations have been introduced in our country about family courts<sup>2</sup>.

Family Courts were established through the Law numbered 4787 on Establishment, Duties and Trial Procedures of Family Courts. As per the article 5 of the Law in question, psychologists, pedagogues and social workers are appointed to the Family Courts. Established to hear cases and deal with works arising from Family Law, Family Courts<sup>3</sup> have its cases and works regulated in articles 4,6 and 9 of the Law on Family Courts.

In preparing the draft Law on Family Courts, Germany’s system which is quite supportive to the family and which adjudicates domestic conflicts was used as a model. In our country, family courts function as peace courts and it is determined and said in the Law on Family Courts that in resolving the family conflicts, family court experts shall be applied first before commencing legal proceedings<sup>4</sup>. The Judge encourages the parties to reach an agreement about the conflict, however if no peace is achieved, he/she commences the proceedings<sup>5</sup>.

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<sup>1</sup>İbrahim Cılga, **Aile Mahkemelerinde Çalışma Yöntemi**, Sosyal Hizmetler Merkez Yayınları, Ümit Ofset Matbaacılık, Ankara, 2008, s.95.

<sup>2</sup>Erdal Tercan, “Türk Aile Mahkemeleri”, **Ankara Üniversitesi Dergisi**, Cilt:52, Sayı:3, 2003, <http://dergiler.ankara.edu.tr/dergiler/38/281/2567.pdf>, (17.12.2018), ss.19,20.

<sup>3</sup>Selma Baktır, **Aile Mahkemeleri**, Yetkin Yayınları, Ankara, 2003, s.22.

<sup>4</sup>Cılga, ss.1,2.

<sup>5</sup>Orhan Filiz, “Türkiye’de Aile Mahkemeleri Uygulaması ve Uygulamanın Değerlendirilmesi Üzerine Bir Araştırma”, **TC Başbakanlık Aile ve Sosyal Araştırmalar Genel Müdürlüğü Yayınları**, 2009,

## **1.2. RESOLUTION OF FAMILY CONFLICTS THROUGH LEGAL REMEDIES IN TURKISH LAW**

### **1.2.1. Establishment and Duties of Family Courts**

Family Courts were established through Law on Family Courts dated 9.1.2003 and numbered 4787 and are assigned and authorized to hear cases and handle issues related to the Family Law. The Law enabling the establishment of family courts aim to establish a special court to handle cases and works rising from family law<sup>6</sup>. As per the article 2 of the Law numbered 4787 on Establishment, Duties and Trial Procedure of Family Courts, Family Courts shall be established in every provinces and central districts with more than one hundred people, through the assignment of one presiding judge and at the level of first instance court. In places where no Family Court is established, the cases and works in the scope of the Law are dealt with by the First Instance Civil Court assigned by the High Council of Judges and Prosecutors.

High Council of Judges and Prosecutors assigns the judges to sit in Family Courts through a selection among the judges who are entitled to work in the relevant jurisdiction they are to be appointed to work or in a lower one, who are assigned to work in judicial justice, married with children as an asset, not younger than thirty and have a master's degree in family law (Law on Establishment of Family Courts, article 3).

Family Judges carry out duties and works rising from family law as per the Book Two of the Turkish Civil Code dated 22.11.2001 and numbered 4721 and the Law for the Implementation of the Civil Code dated 3.12.2001 and numbered 4722, recognition and enforcement of the foreign court orders on family issues as per the Act on Private International and Procedural Law dated 20.5.1982 and numbered 2675 and other duties given (Law on Establishment of Family Courts, article 4).

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<https://ailetoplum.aile.gov.tr/uploads/pages/bilim-serisi/57-turkiye-de-aile-mahkemeleri-uygulamasi-ve-uygulamanin-degerlendirilmesi.pdf> , (15.11.2017), s.97.

<sup>6</sup>Baktır, s.22.

### **1.2.2. Protection, Training and Social Orders**

Protection, training and social orders within the scope of family courts are regulated in two groups as “Adults” and “Minors” in the article 6 of the Law on Family Courts.

The first of the protection, training and social orders for adults is to alert spouses about the obligations they assume through marriage and to decide on mediation when necessary (Law on Family Courts article 6/1/a). The other one is about the necessary measures to protect the economic presence of the family and to meet financial obligations brought by marriage (Law on Family Courts article 6/1/b). Placing adults to public or private health or social care institutions, senior centres or enrolling them to a vocational course (Law on Family Courts article 6/1/c) or any other suitable education institution are other protection, training and social orders under this headline (Law on Family Courts article 6/1/d).

The first of the protection, training and social orders for minors is to ensure that the necessary measures are taken for alimony obligation for care and supervision of the child (Law on Family Courts article 6/1/a). Second one is to take the minor, whose physical and mental development is at risk or who is neglected, away from biological parents and give to another family or put in a public or private health institution or education institution for children with learning difficulties (Law on Family Courts article 6/1/b). Besides, taking necessary measures to manage and protect the properties of the child (Law on Establishment of the Family Courts article 6/1/c), to place the child to an association, institution or organization established by general or annexed budget institutions, local administrations, government business enterprises and banks or next to someone with a profession are the other protection, training and social orders regulated under this headline (Law on Establishment of the Family Courts article 6/1/d).

In following up and implementing the orders given by the family court, one or more than one experts may be assigned as per the article 5. As required by the article 113/A of the Code of Civil Procedure, any person who does not comply with the order given to implement a provisional injunction or any person who acts against



the order shall be punished with imprisonment up to six months unless his/her deed requires a heavier penalty<sup>7</sup>.

### 1.3. FAMILY CONFLICTS CASES

#### 1.3.1. Engagement and Legal Consequences of Breaking Off the Engagement

Engagement is that when two persons from different sexes declare their intent to get married or in other words to promise for marriage. The legal relationships between these two persons are described legally as engagement<sup>8</sup>. Engagement may be open or closed, orally or in a written form<sup>9</sup>.

The legal relationship between the fiancé and fiancée (engagement) which occurs after engagement might end because of various reasons<sup>10</sup>. These may include getting married either to each other or when one of the parties get marry to someone else, impossibility of marriage (death or disappearance), condition subsequent, absolute barrier before marriage, agreement (to end) or unilateral discontinuation<sup>11</sup>.

When the engagement is over, personal statues of the parties also change; both leave their titles as '*fiancé*' or '*fiancée*' and turns back to their pre-engagement status. When the engagement ends, the obligations arising from engagement contract are also over. Civil Code foresees compensation claim or returning the gifts after ending the engagement depending on the reason why<sup>12</sup>.

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<sup>7</sup>Bknz Hukuk Usulü Muhakemeleri Kanunu Dokuzuncu Fasil, “İhtiyati Tedbirler”, <http://www.mevzuat.gov.tr/MevzuatMetin/5.3.1086.pdf>, (22.12.2018), s. 779.

<sup>8</sup>Turgut Akıntürk, **Türk Medeni Hukuku, Yeni Medeni Kanuna Uyarlanmış Aile Hukuku**, Cilt:2, 6. Baskı, Beta Basım, İstanbul, 2002, ss.15,16.

<sup>9</sup>Bilge Öztan, **Medeni Hukukun Temel Kavramları**, 9. Baskı, Turhan Kitabevi Yayınları, Ankara, 2002, s.370.

<sup>10</sup>Akıntürk, ss.35,36.

<sup>11</sup>Mustafa Dural ve diğerleri, **Türk Özel Hukuku, Cilt III Aile Hukuku**, 10. Baskı, Yılmaz Basım Yayıncılık, İstanbul, 2015, ss.28-30.

<sup>12</sup>Akıntürk, ss.38,39.

### 1.3.1.1. Compensation Claim

It is possible to open a case with pecuniary and non-pecuniary claims when the engagement is over<sup>13</sup>. The party who ends the engagement without a ground or who is faulty is obliged to pay a pecuniary or non-pecuniary compensation. Engagement costs are within the scope of *pecuniary claims*. Pecuniary claims are regulated in article 120 of the Civil Code. For non-pecuniary claims are regulated in article 121 of the Civil Code. For non-pecuniary claims the engagement contract must have been ended unilaterally, the other party's personal rights must have been harmed and the defendant must be found faulty for the damage whilst the plaintiff must be found not faulty<sup>14</sup>.

### 1.3.1.2. Returning the Gifts

When the engagement is over, the gifts that the former fiancé and fiancée gave to each other are returned. This is regulated in article 122 of Civil Code. The gifts in question are the pecuniary ones such as the engagement ring, various goods, jewellery and etc. In order to be entitled to demand for returning the gifts one or more of such reasons must occur; for instance, the gifts must have been given because of the engagement, must have been unusual and the engagement must have been over because of death, disappearance, discontinuation and etc. The demand to return the gifts should be made by either the parents of the parties or some others who can act on behalf of the parties<sup>15</sup>.

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<sup>13</sup>Çağlar Özel ve Erol Tatar, “Aile Mahkemelerinin Yapısı ve Kararları Üzerine Genel Bir Değerlendirme”, **Sosyoekonomi Dergisi**, Sayı:1, 2008, <http://sosyoekonomi.dergipark.gov.tr/download/article-file/197623>, (11.12.2017), s.70.

<sup>14</sup>Öztan, s.378.

<sup>15</sup>Öztan, s.380.

### 1.3.2. Divorce Cases

Divorce is ending the marriage while the spouses are alive. Both husband and wife have equal rights to file a divorce case. In order to file a divorce case, the merit of the case must be based on one of the causes set in the law<sup>16</sup>.

#### 1.3.2.1. Principles that the Divorce is Based On

Some principles are adopted to ensure that the circumstances that lead to divorce are legally accepted as divorce reason. These principles are fault, will, irretrievable breakdown, incapableness and actual separation. *Fault* based divorce occurs only when one of the parties are faulty. In this case, right to file a suit is reserved by the not faulty party. This proceeding while on one hand is a kind of punishment to the faulty party, serves on the other to protect the interest of the damaged party. *Will* based divorce is to end, upon the wills of both party, the marriage which has been established upon the wills of both parties. Thus the court or the authority will adjudicate for divorce when either one or both of the spouses demand for so<sup>17</sup>.

*Irretrievable breakdown* means that if a marriage is irretrievably broken down, there is no point in continuing. Union of marriage should encourage the development of children and the spouses and bring joy. Irretrievable break down of marriage should be regarded as an acceptable reason to divorce alone and no fault of the parties should be sought after. Irretrievable breakdown is based on objective principles and is more suitable compared to the other principles due to the fact that it gives a wide discretion to the judge. *Incapableness* is a reason to end the marriage when one of the spouses, because of physical or mental disorders become incapable to manage his/her marital responsibilities. These physical and mental disorders may include mental disorder, impotence, infertility, perversity, and to have the potential of dangerous diseases for successors. *Actual separation* is when the spouses do not have any enthusiasm and belief to continue their marriage and when the spouses continuingly and actually live apart in which cases there is no point in maintaining

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<sup>16</sup>Dural ve diğerleri, ss.102,103.

<sup>17</sup>Akıntürk, ss.230, 231.

the marriage. Thus, if the spouses live apart for long year they should be divorced. At this point, it is important for divorce to take place to set a period of time for spouses to live apart<sup>18</sup>.

#### 1.3.2.2. Private and General Grounds for Divorce

Turkish Civil Code adopts *reason based divorce* approach. Since grounds for divorce given in Turkish Civil Code are different from each other in terms of content and scope, they are divided into two groups as private and general.<sup>19</sup>

Some grounds for divorce are described as private grounds in the Law<sup>20</sup>. *Private grounds for divorce* are adultery (CC. art 161), maltreatment or attempt to kill (CC. art.162), committing offence or leading a disgraceful life (CC. art.163), abandonment (CC. art.164) and mental disease (CC. art.165) Adultery is a man's or a woman's sexual intercourse with a third party. Thus, "if one of the spouses commits adultery, other spouse can file a divorce case" (CC. art.161/I)<sup>21</sup>. In order for adultery to be accepted as a ground for divorce in the Turkish Civil Code, one-time sexual intercourse of husband or wife with a third party is enough. Homosexual intercourses are not accepted as a ground for divorce as adultery. In addition to that, if one of the spouse is kidnapped against her/his will and raped, this is also not regarded as adultery<sup>22</sup>.

*Maltreatment, attempt to kill* is mentioned in the article 162 of the Turkish Civil Code by stating that when one of the spouses attempts to kill the other one or when he/she treats in a gravely disgraceful way, the spouse can file a divorce case. The situations described here are absolute, fault based and private grounds for divorce. Attempt to kill is the deeds of the spouse with the intention of killing the other spouse revealing this intention. These deeds may include an actual attempt to kill, encouraging to suicide or not doing anything to prevent the spouse from dying.

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<sup>18</sup>Akıntürk, ss.231-233.

<sup>19</sup>Akıntürk, ss.233,234.

<sup>20</sup>Dural ve diğerleri, s.103.

<sup>21</sup>Akıntürk, s.235.

<sup>22</sup>Dural ve diğerleri, s.104.

Since attempt to kill is a fault based ground for divorce, distinguishing power of the attempting party is sought<sup>23</sup>.

*Maltreatment* is the behaviour to harm physical integrity and health of the spouse. Oppressions, housebound, not giving food, beating, pushing into abnormal sexual intercourse, insulting and so on are all regarded as maltreatment<sup>24</sup>.

*Loss of right of action* may occur in two ways. First is when the not faulty party forgives his/her spouse who attempted to kill him/her or maltreated (CC. art. 162/III), second is because of the lapse of time for six months or five years the right to action is automatically lost (CC. art. 162/II). Here, as in adultery cases, the right to action is lost due either lapse of time or forgiveness<sup>25</sup>.

*Committing an insulting offence or leading a disgraceful life* is dealt with article 163 of the Civil Code to say that whether an offence is insulting or not is determined by the judge considering the social structure and understanding. Rape, thief, fraudulent bankruptcy are regarded as insulting offences. It is not important for the consequence of divorce case whether the offending spouse has been punished for that or not<sup>26</sup>.

*Leading a disgraceful life* generally include frequent use of drugs, abnormal sexual behaviours and habits (perversity), running a brothel, excessive fondness to nightlife, pimping, white slave and drug trafficking, fondness to alcohol, gambling, taking up with people though being married and so on<sup>27</sup>. In order for the disgraceful life that has started before the marriage to be accepted as a divorce ground, it should be sustained during the course of marriage, too<sup>28</sup>.

It is not enough for divorce to be adjudicated to have one of the parties lead a disgraceful life but this should have also made life for the other spouse unbearable (CC. art. 163). Thus leading a disgraceful life is not an *absolute* but a *partial* divorce ground as is insulting crime<sup>29</sup>.

*Abandonment*; is when one of the spouses leaves the joint home and abandons his/her spouse to discontinue their joint life. CC. article 164/ I says that “if one of the

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<sup>23</sup>Dural ve diğerleri, s.107.

<sup>24</sup>Akıntürk, s.240.

<sup>25</sup>Akıntürk, s.242.

<sup>26</sup>Dural ve diğerleri, s.109.

<sup>27</sup>Akıntürk, s.244.

<sup>28</sup>Dural ve diğerleri, s.110.

<sup>29</sup>Akıntürk, s. 244.

spouses abandons the other in order not to meet marital responsibilities or if he/she does not come back to the joint home without a rightful reason and if this separation lasts for at least six months and if the warning made by the judge upon demand has remained inconclusive, the abandoned spouse can file a divorce case.” The spouse who leaves the joint house and does not come back not because of a rightful reason is regarded as having abandoned his/her spouse<sup>30</sup>.

*Mental disease* is regarded as a divorce ground only when the disease has been revealed during the marriage and it is proved through a health board report that the mentally handicapped spouse will not recover his/her mental health and the union of marriage has become unbearable because of the mental disease for the other spouse<sup>31</sup>.

Contrary to the private grounds, those incidents which have not been foreseen to damage the union of marriage are gathered under *general grounds for divorce*. As per the article 166 of the Turkish Civil Code *general grounds for divorce* are listed as break down of marriage, spouses filing the divorce suit together or reaching an agreement to file the suit, fail in actual establishment of the union of marriage<sup>32</sup>. *Breakdown of marriage* is regulated in paragraphs I and II of the Turkish Civil Code. In order for this reason to be a ground for divorce, marriage must have been broken down and it must be impossible to expect at least one of the parties to sustain the marriage and no objection should have been made or accepted about the faultiness of the defendant<sup>33</sup>.

*Spouses filing the divorce suit together or reaching an agreement to file the suit* is based on article 166 of the Civil Code which enables the spouses to file uncontested divorce. For this, the marriage must have been sustained at least one year, the spouses must apply for divorce together or the other spouse must accept the divorce claim, the judge must listen both parties, the parties must have reached an agreement about the financial consequences of the divorce and about the child/ren and the judge must be deeming this arrangements and agreements suitable<sup>34</sup>.

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<sup>30</sup> Akıntürk, s.245.

<sup>31</sup> Dural ve diğerleri, s.115.

<sup>32</sup> Dural ve diğerleri, ss.115,116.

<sup>33</sup> Öztan, s.248.

<sup>34</sup> Öztan, ss.430,431.

*Fail to establish joint life or actual separation* is set in article 166 of the Civil Code which says that if the application for divorce was rejected however in three year's time since this rejection, joint life has not been established than the judge may adjudicate for divorce upon one of the parties' demand. Besides, in order for this ground to be accepted and the divorce to be adjudicated, a divorce suit must have been filed because of one or more of the grounds for divorce and the application must have been rejected by the judge<sup>35</sup>.

When we look at the grounds for divorce the primary reasons appear to be adultery maltreatment, adaptation problems, attempt to kill, diseases, incompatibility, not desiring to live together<sup>36</sup>. 2014 data of the Search on The Reasons for Divorce in Turkey carried out by the Ministry of Family and Social Policies, Directorate General for Family and Social Services indicated that 90% of the divorce cases based on the ground of breakdown of marriage. Thus, based on this information it is stated that the difference between general and private divorce does not that matter in practice which is because the breakdown of marriage reason covers all the others (abandonment, adultery, maltreatment and so on)<sup>37</sup>.

*Search on Family Structure* made by Turkish Statistical Institute in 2016 searched the divorce causes for people who have experienced divorce at least once. The research showed that the most common reason for divorce in Turkey is irresponsible and indifferent behaviours with a ratio of 50.9%, followed by economic incapacities with 30.2% and disrespectful behaviours of spouses towards each other's parents with 24.3% ratio<sup>38</sup>.

Since the family court experts have an opportunity to observe in detail the Dynamics between the couples through individual interviews with the parties upon

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<sup>35</sup>Öztan, s.431.

<sup>36</sup>Sebahat Aydos, **Boşanma Nedeniyle Parçalanmış Ailelerde Çocukların Velayetine Karar Verme Sürecinin Velayet Raporları ve Uzman Görüşlerine Dayalı Olarak İncelenmesi**, (Yayınlanmamış Yüksek Lisans Tezi), Ankara Üniversitesi Sağlık Bilimleri Enstitüsü, Ankara, 2017, s.13.

<sup>37</sup>Mustafa Turgut(Ed.), **Aile Sosyal Politikalar Bakanlığı Aile ve Toplum Hizmetleri Genel Müdürlüğü'nün Türkiye Boşanma Nedenleri Araştırması TBNA 2014**, Çizge Tanıtım ve Matbaacılık Ltd. Şti., 1. Baskı, İstanbul, 2015, <https://ailetoplum.aile.gov.tr/uploads/pages/indirilebilir-yayinlar/79-turkiye-bosanma-nedenleri-arastirmasi-2014.pdf>, (18.09.2018), s.200.

<sup>38</sup>TÜİK, **Aile Yapısı Araştırması 2016**, <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=21869>, (15.09.2018).

demand, they can inform the court about the possible problems to be encountered after divorce<sup>39</sup>.

### **1.3.2.3. Separation**

To have separation also included in the Civil Law together with divorce is because the Law has been adopted from Switzerland. As per article 167 of the Civil Code, the party who has the right to file a divorce lawsuit may demand separation or divorce. Subject matter of divorce is divided into two as divorce and separation. As long as the subject matter of the divorce suit is in compliance with any of the reasons given in the law, the party entitled with the right to sue will make a choice between 'divorce' and 'separation'. It is possible for the judge to adjudicate for separation if he/she deems there is a likelihood for agreement between the parties in a divorce case (CC. art.170/III)<sup>40</sup>.

In case the judge adjudicates for separation, the time for separation cannot be less than one year and more than three years (CC. art.171/c.1). The process starts with the adjudication (CC. m.171/c.2). The difference between separation and divorce is that in separation it is decided for a party to leave the mutual house. Throughout this process, married status of the spouses and their obligations rising from marriage continue. After judgement for separation is made, the judge orders for temporary alimony upon demanded by one of the parties (CC. art.197/II)<sup>41</sup>.

The duty of the family court experts is to make interview and inquiry through the whole process of hearings. Their duty is ended when the case is closed. Since separation process of the parties is not binding for the family court experts, they do not work in such cases.

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<sup>39</sup>Turgut, s.185.

<sup>40</sup>Akıntürk, s.266.

<sup>41</sup>Dural ve diğerleri, s.133.



### 1.3.3. Paternity Cases

Narrowly speaking paternity means the relationship between the child and mother and father, widely speaking, it refers to the relationship between the child and ancestors with a kinship (grandmothers and grandparents) and this relationship is set by affinity<sup>42</sup>.

The relationship between the child and the mother is established either through “giving birth” or “adoption”. Neither mother can reject the relationship with the child nor the child can. The relationship between the father and the child is established through “marrying the mother” “recognition”, “judge order” and “adoption”. The relationship established through adoption is subjected to the judgement of the judge<sup>43</sup>.

It is not easy nor simple for the relationship between the child and father to be established. When the child is born at least a hundred and eighty days after the marriage union has been established and within three hundred days utmost after the marriage has ended is accepted, it is accepted that the conception has been within the time of the marriage (CC. art.287/II)<sup>44</sup>. The right to file a suit for denying paternity is given to the husband and the child in article 286 of the civil Law.<sup>45</sup> In case of disappearance or presumption of death, this three hundred days period starts as of the risk of death or the last time anything was heard from the person in question (CC. art.285/III). As per article 286/II of the Civil Code, the child can also file a suit for denial of paternity against mother and husband<sup>46</sup>. However, if the child does not possess the power to distinguish to file a suit, the claim is made by the guardian to be appointed to the child (CC. art.291/f.2)<sup>47</sup>.

The child born out of wedlock has paternity with his/her father together with the affiliation. When the mother and father of the child born out of wedlock get marry, the child will be regarded as born in a marriage (CC. art.292). The mother and father informs the registrar in their residence about their marriage (CC. art.293).

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<sup>42</sup>Özta, s.441.

<sup>43</sup>Dural ve diğeri; s.253, Özta, s.442.

<sup>44</sup>Baktır, s.150.

<sup>45</sup>Dural ve diğeri, s.266.

<sup>46</sup>Özta, s.445.

<sup>47</sup>Dural ve diğeri, s.267.

However not to make this notification does not change the status of the child (CC. art.293/II). If the affiliation took place before the marriage, the registrar carries out the necessary procedures ex officio (CC. art.293/III)<sup>48</sup>.

The family court experts are rarely assigned to work in paternity cases. What judges mostly asses in paternity cases is whether the case is legally suitable or not. To my opinion, what paternity between the parents and the child is about is the emotional, mental and psychological development of the child, thus, the best interest of the child has to be protected by assigning family court experts to these cases to make an assessment about the suitability of the case for the child.

#### **1.3.4. Adoption Cases**

Adoption is to establish a paternity with no blood relation between the adoptee and the adopter.<sup>49</sup> There are two purposes of adoption; one is to enable those who cannot be natural mother and fathers to enjoy the happiness of having a child and taste the love of having a child and also to continue their bloodline and have an heir. The other purpose is to enable those children born out of wedlock to enjoy a family environment to be cared and raised<sup>50</sup>. Civil Code includes different provisions about the adoption of minors, adults and restricted persons<sup>51</sup>.

In order for minors to be adopted, the adopter has to take care and educate the adoptee for one year, the adoption must be for the good of the minor and the adopter has to preserve the rights of natural children fairly (CC. art.305-312). In adoption of adults or restricted persons the requirements that are sought for are those; the adopter does not have any successor, the adoptee is in need of care because of physical or mental disability, the adoptee has been cared for at least one year by the adopter or had been cared for five years by the adopter when he/she was younger and if there are other rightful reasons, adopter and adoptee live a family life together for at least five years (CC. art.313/II).

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<sup>48</sup>Öztan, s.446.

<sup>49</sup>Akıntürk, s.361.

<sup>50</sup>Dural ve diğerleri, s.300.

<sup>51</sup>Öztan, s.450.

Only the legal spouses can adopt together, otherwise it is not possible for two people to adopt together. The spouses have to be married for at least five years and not younger than thirty years. It is also stated that in case of being married for at least two years, one of the spouses, unless not younger than thirty years can adopt the spouse's child (CC.art. 306).

For single parent adoption, parent should be at least thirty years old. If he/she is married, he/she can still adopt as a single parent as long as he/she is not younger than thirty and proves that the spouse is lack of the power of distinguishing or absent for two years or lives away from him/her through court order and thus it is impossible to adopt as a couple (CC. art. 307).

#### **1.3.4.1. Consent and Age of the Minor for Adoption**

Age difference between the adopter and adoptee must at least be eighteen (CC. art.308/I). If the adoptee has the power to distinguish, his/her consent is definitely sought. If the adoptee is under guardianship, regardless of whether he/she has the power to distinguish, permission of the guardians is sought for (CC. art.308/III).

In seeking for the consent of the mother and father, the mother and father must give their statement of consent for adoption not to the adoptee or the minor but directly to the authorized court. It is enough for mother and father to possess the power to distinguish to be able to give a statement for consent (CC. art.309). On mother and father to give their statement for consent for adoption, CC. art.310/I says that; "the consent cannot be given before six week's time has passed since the birth of the minor". The consent can be withdrawn in six week's time after being given (CC. art 310/II). If the consent is given again after withdrawing, it is final (CC. art 310/II).

As per article 311 of the Turkish Civil Code, the consent of the mother and father is not sought after is their whereabouts and whereabouts are not known and if they are continuously lack of the power to distinguish, if they do not care the minor and meet their responsibilities.

Judge adjudicates on adoption only after a comprehensive analysis of all substantial condition and situations, hearing both the adopter and the adoptee and receiving the opinions of the family court experts when necessary (CC. art.316/I). Characteristics of the adoptee and adopter, their health conditions, financial statues, relationship with each other, reasons to adopt, family relations and parenting capacity all should be searched. The content of the analysis is given in CC. art.316/II and 316/III<sup>52</sup>.

In Germany, adjudication for adoption is only after a report is prepared by the pedagogue and social worker in Youth Department<sup>53</sup>. In our country, family court experts frequently work in adoption cases. To my opinion, family court experts have a functional role in identifying characteristics of adopters, their harmony in marriage if they are married, their potential to embrace the adoptee as if their natural child, capacity to assume parenting responsibilities, the reasons leading to adoption for adopters and so on. Additionally, the process of the adoptee and whether he/she sees the adopters as parents, possibility to adapt their lifestyle and whether the adoption will contribute to the emotional, social and educational development of the child are the other factors that are attached importance by the family court experts.

### 1.3.5. Custody Cases

Custody is the rights and obligations of the mother and father to protect the personal rights and properties of the minors and sometimes restricted persons and to represent them<sup>54</sup>. Right to custody is reserved by the mother and father sustaining the union of marriage<sup>55</sup>. In case one of the parents passed away or is declared as disappeared or found in a situation in which he/she cannot use the right to custody, for instance becoming restricted, right to custody is passed to the other parent alone<sup>56</sup>.

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<sup>52</sup>Dural ve diğçerleri, s.320.

<sup>53</sup>Esin Topal, ‘‘Aile Mahkemelerinde Uzman Raporuyla Çözümlenecek Sorunlar ve Usul’’, **Mevzuat Dergisi**, Yıl: 11, Sayı: 124, 2008, <https://www.mevzuatdergisi.com/2008/04a/02.htm>, (12.01.2018).

<sup>54</sup>Akıntürk s.400; Öztan s.481.

<sup>55</sup>Baktır, s.155.

<sup>56</sup>Akıntürk, ss.399,400.

Minors are under the custody of their mothers and fathers (CC. art.335). If the joint life has been ended or if the separation has taken place, the judge may order to give custody one of the spouses (CC. art.336/II). Whomever the child is given after divorce enjoys the right to custody and other's ends (CC. art.336/III); or the judge appoints a guardian. What matters here is with which party the child would be raised better and enjoy better education and training opportunities. Besides, adopter also has a right to custody on the child. (CC. art.314/I), right to custody is gained through the adjudication of judge on adoption<sup>57</sup>. Right to custody continues till the adulthood of the child. If an adult adoptee is restricted, he/she will stay under the custody of the mother/ father unless the judge deems it necessary to appoint a guardian to the adoptee (CC. art.335/II).

Mother and father entitled to the right to custody takes and implement necessary decisions about the care and education of the child considering the best interest of him/her (CC. art.339/I). Article 339/III of the Civil Code says that "mother and father provides the child, depending on his/her maturity, with the opportunity to manage his/her own life and considers, as much as possible, the wishes and opinions of the child in important issues"<sup>58</sup>. Legal representatives of the custody child are his/her mother and father with the right to custody (CC. art.342/I). Both are the custodians of the child. If only mother or the father has the right to custody than he/she is the custodian of the child<sup>59</sup>.

If the mother and father are not married, custody of the child belongs to mother together with the birth (CC. art. 337/I). Article 347/I of the Civil Code says that "if the child's physical and mental development is at stake or if the child is neglected, he/she may be taken away from the mother and father and placed to live with another family or to an institution". For instance, if the parents do not send the child to school, makes him/her do heavy works, if they do not have the child treated and encourages for begging, stealing and prostituon, judge can step in, take away the child from mother and father and place to live with a family or to an institution<sup>60</sup>.

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<sup>57</sup> Akıntürk, s.401.

<sup>58</sup> Dural ve diğerleri, s.344.

<sup>59</sup> Dural ve diğerleri, s.347.

<sup>60</sup> Akıntürk, s.400.

Custody cases are among the most common cases that the experts are assigned to work on. There is a dissertation on the custody evaluations of the family court experts with the title of “*An examination of the decision making process on custody of the children of the dissolved families due to divorce based on the reports on custody and expert opinion*”. For the study, qualitative searching model has been used and 107 custody reports prepared by the family court experts for contentious divorce cases were analysed and 5 voluntary family court experts who are also among the authors of the subject reports were interviewed<sup>61</sup>. The study reveals that in making an evaluation about the custody, the family court experts receive opinions of the children considering their age, capacity to understand, lingual and developmental levels and attach importance to the rights of children to participate.

In addition to that, an analysis was made in Court of Cassation Second Civil Department where the family case decisions are evaluated<sup>62</sup> to see some court decisions had been reversed due to lack of family court experts’ opinion or not complying with family court experts’ recommendations. When the decisions of the Court of Cassation Second Civil Department are analysed, it is seen that some divorce and custody case decisions *are reversed since the decision was made without receiving opinion from the family court expert/s with the title of psychologist, pedagogue and social worker and since it is unlawful and not in compliance with the procedures to make a judgement through deficient analysis*<sup>63</sup>. It is also seen that on some cases on regulating custody<sup>64</sup> and changing custody<sup>65</sup>; *the court decision was reversed due to it’s adjudication through deficient analysis is not compliant with the procedures since the family court expert’s report was prepared based on interview with only one of the parties and that is why another report should be prepared by a board of psychologist, pedagogue and social worker.*

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<sup>61</sup>Aydos, ss.60,61.

<sup>62</sup>Yargıtay, “Yargıtay Büyük Genel Kurul Kararı”, <https://www.yargitay.gov.tr/documents/ek1-1521634801.pdf>, (17.09.2018), s.7.

<sup>63</sup>Yargıtay 2. Hukuk Dairesi, 02.11.2017 tarih ve 2017/4669 E.,2017/12132 K., 19.12.2017 tarih ve 2017/2281 E., 2017/14852 K., 17.1. 2017 tarih ve 2016/19767 E. ,2017/556 K., 12.02.2018 tarih ve 2016/10996 E., 2018/1757 K., 07.11.2016 tarih ve 2016/10910 E., 2016/14465 K., 28.11.2017 tarih ve 2016/18299 E., 2017/13520 K., 21.12.2017 tarih ve 2016/9095 E., 2017/15134 K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

<sup>64</sup>2. Hukuk Dairesi, 28.11.2017 tarih ve 2016/7236 E., 2017/13473 K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

<sup>65</sup>2. Hukuk Dairesi, 25.05.2017 tarih ve 2017/1240 E., 2017/6234 K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

It is also learnt that in numerous cases, since the court gave an order contrary to what the family court expert report says, the Court of Cassation reversed the decision<sup>66</sup>. In addition to these, it is learnt that in a divorce case *since the expert report was not found sufficient and since a new report must have been prepared by a board consisting of a psychologist, pedagogue and social worker, it is judged to reverse the order because of deficient examination*<sup>67</sup>.

Analysis of the rulings made by the Court of Decision Second Civil Department has revealed that the best interest of the child is preserved on the issues about the child, family court expert reports are considered and regarded and the court orders given for the cases to which no family court experts are appointed are found deficient and unlawful and thus reversed. It is understood from the given information that the duties and responsibilities of the experts are attached great importance by the Court of Cassation.

It is known that the decisions to be made in the family courts on the disputes over the child are the most challenging and disturbing decisions with a high likelihood of victimizing and negatively effecting the child. Thus, in order for parties to go through this process with the minimum damage and protect the best interest of the child, family court experts have significant and functional roles<sup>68</sup>. Which of the parties will have the custody after divorce is a critical issue effecting the child. In sharing their opinions in their reports, family court experts mainly focus on aspects such as age period and needs of the child, psychological, social and economic conditions of the mother and father, their capacity to enjoy the right to custody and their relation with the child. Here the purpose is to protect the child and minimize victimization. Considering *the best interest* of the child as the main principle of children rights, opinions shared by the experts are deemed valuable<sup>69</sup>.

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<sup>66</sup>2. Hukuk Dairesi, 31.10.2016 tarih ve 2015/20251 E., 2016/14196 K., 05.10.2017 tarih ve 2016/4701 E., 2017/10597K., 19.04.2016 tarih ve 2016/7070 E., 2016/7930 K., 14.09.2017 tarih ve 2016/3747 E., 2017/9450 K., 24.10.2017 tarih ve 2016/6228 E., 2017/11550 K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

<sup>67</sup>2. Hukuk Dairesi, 24.05.2016 tarih ve E. 2015/18106, 2016/10191K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

<sup>68</sup>Aydos, s.38.

<sup>69</sup>Oğuz Polat ve Evin Güldoğan, “Uzman Görüşünün Boşanma Davalarında Velayetin Saptanmasındaki Önemi”, **Türkiye Barolar Birliği Dergisi**, Sayı:118, 2015, <http://tbbdergisi.barobirlik.org.tr/m2015-118-1479>, (20.04.2018), ss.253,254.

Of the international conventions of which our country is the signatory state, the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants” dated 1961 was amended to eliminate some of the vague points and to make it more clear in 1996 as “Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children” and re-prepared as Hague Convention on Protection of Children in 1996. Holding an important place in our law system, 1996 Hague Convention on Protection of Children includes comprehensive provisions on which contractual state institutions are authorized to take measures to protect the children and their properties and about recognition and enforcement of the decisions on protection orders and custody responsibility in other contractual states. This Convention was adopted to minimize the problems in legal regulations in different countries and to achieve international cooperation for the best interest of the child<sup>70</sup>.

Besides Hague Convention on the Civil Aspects of International Child Abduction dated October, 25, 1980 aims to protect the children from adverse effects of international kidnapping thus returning to child to his/her habitual residence, in other words his/her country as fast as possible since changing the place of the child through abduction or unlawful detention is violation of custody right<sup>71</sup>.

### 1.3.6. Abolishment of Custody

Mother’s and father’s right to custody continues till the child reaches puberty. However, due to the reasons such as mother and father not carrying out their duty of custody properly, their inexperience, illness, disability, neglect, not being present, not showing child the required amount of care or severely neglecting responsibilities towards the child, order can be given to abolish the custody (CC.art.348).

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<sup>70</sup>Ayşe Elif Uluş Karataş, “Velayet Sorumluluğu ve Çocukların Korunması Hakkında Tedbirler Yönündeki Yetki, Uygulanacak Hukuk, Tanıma, Tenfiz ve İşbirliğine Dair 1996 Tarihli Lahey Sözleşmesi ve Türk Milletlerarası Özel Hukukuna Etkisi”, **Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni**, Cilt:37,Sayı:2,2017, <http://dergipark.gov.tr/download/article-file/415124>, (12.02.2019), ss.913-915.

<sup>71</sup>Şebnem Nebioğlu Öner, “Uluslararası Çocuk Kaçırmanın Hukuki Yönlerine Dair Lahey Sözleşmesi: Amacı, Uygulaması ve Kısa Bir İhtihat Analizi”, **Türkiye Barolar Birliği Dergisi**, Sayı:115, 2014, <http://tbbdergisi.barobirlik.org.tr/m2014-115-1438>, (12.02.2019), ss.480,481.



Remarriage of mother or the father does not require abolishment of the custody. However, if the child's interest requires so, the custodian might be changed or, based on the conditions, custody may be abolished and a guardian might be appointed instead (CC. art. 349). On the other hand, even though the custody has been abolished, care and education responsibilities of the mother and father still continue. These costs are met by the State if the mother, father and child do not have the ability to pay (CC. art.350).

Abolishment of custody also have some consequences on the properties of the child. Mother and father continue to manage the property of the child, unless they are faulty, even though the custody is abolished<sup>72</sup>. If the reason to abolish the custody is removed, the judge gives the right to custody of the child back to the mother and father upon their demand (CC. art. 351/II).

In the Civil Code, guardianship is recognized to protect the minors and restricted persons whose mother and father are not present, dead, restricted or custody abolished (CC. art.404) and to represent and protect their properties<sup>73</sup>. In this sense, about the custody cases article 349 of the Civil Code says that; "if the right to custody of both the mother and father is abolished or if both parents are dead, a guardian is appointed to the child"<sup>74</sup>. As of the Law numbered 4787 on the Establishment, Duties and Trial Procedures of Family Courts was enacted, guardianship cases have been heard in family courts. However, article 2 of the Law numbered 5133 which makes amendment to the law says that authority to hear guardianship is the civil peace courts as before the law 4787 and the supervision authority is first instance civil court<sup>75</sup>.

We are of the opinion that even though with the transfer of the power to hear these cases to the civil courts of peace and power to supervise to the first instance civil courts, the family court experts cannot work on them, considering it is necessary that the content of the case, living conditions of the child and parents and parenting

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<sup>72</sup>Öztan, s.464.

<sup>73</sup>Doğa Elçin, "Vesayet ve Kısıtlılık Kararı Verilmesinde veya Sona Ermesine ve Vesayetin Yürütülmesine Uygulanacak Hukuk, Türk Mahkemelerinin Milletlerarası Yetkisi ve Yabancı Mahkeme Kararlarının Tanınması", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Cilt:67, Sayı:2, 2018, <http://dergiler.ankara.edu.tr/dergiler/38/2280/23733.pdf>, (25.12.2018), s.283.

<sup>74</sup>Dural ve diğerleri, s.397.

<sup>75</sup>Dural ve diğerleri, s.405

capacity for custody should be analysed, these cases should be evaluated by social experts considering the best interest of the child.

### **1.3.7. Establishing Personal Contact with the Child**

After divorce, custody of the child is given one of the parties and the other party is entitled to establish personal contact with the child. Article 323 of the Civil Code reinforces this right by saying that; “either mother or father as the party who has not get the custody of the child has the right to demand for personal contact with the child.” Judge announces the period and form of the personal contact at divorce hearing. Judge should regulate personal contact in the best way possible considering the conditions that both the child and the parent who has not get the custody are in<sup>76</sup>.

There are times when the demand for personal contact is rejected. For instance, if the welfare of the child is at stake because of personal contact or if the mother or father damages the right to personal contact of the other while enjoying his/her parenting rights or damages or prevents the child from being educated or raised or if the parents seriously neglect the child or in case of other major reasons, the right to establish personal contact may be rejected (CC. art.324). Considering the principle of *the best interest of the child* it would be suitable for the child not to be engaged in a personal contact with the parent or to be engaged accompanied by a supervisor in such cases where the child is victimized<sup>77</sup>.

Article 325 of the Civil Code regulates the relation between the relatives and the child. However, in order for this relationship to be established, the benefit of the child must require so<sup>78</sup>. The relationship between the party and the applicant relative should be established considering the age and developmental characteristics of the child and the personal contact should be sustained as long as it contributes to the development and welfare of the child<sup>79</sup>. Family court experts frequently work on these cases at the discretion of the judge.

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<sup>76</sup>Akıntürk, ss.304, 305.

<sup>77</sup>Baktır, ss.135,136.

<sup>78</sup>Öztan, s.456.

<sup>79</sup>Feridun Yenisey ve diğerleri, *Sosyal Çalışma Görevlileri Eğitim Programı El Kitabı*, Ankara, 2011, s.117.

When the Court of Cassation decisions are analysed, it is seen that in cases of establishing personal contact with the child<sup>80</sup>, abolishing-rearranging personal contact with the child<sup>81</sup> *expert report was not found sufficient because it bases on an interview with only one of the parties and since the case requires another report to be prepared by a board of experts including a psychologist, pedagogue and a social worker, the decision of the relevant court is reversed due to deficient analysis.* In another case on abolishing the personal contact with the child, it is seen that *since the hearing court made a decision contrary to expert report, the decision is reversed*<sup>82</sup>.

Experts play an active role in decision making process by sharing their opinions on *the best benefit of the child* in cases as custody, establishing personal contact with the child, change of custody after divorce, abolishing custody, rearranging or abolishing personal contact with the child and adoption. It is thought that in addition to being legal and beneficial in decision making process, the experts also make contribution to giving sound decisions<sup>83</sup>. To my opinion, in producing alternative solutions to improve the relationship between the child and the parents, family court experts are critical to solve problems between the parties and the child/ren not only because of presenting opinion reports but also giving constructive and solution oriented recommendations.

### **1.3.8. Alimony and the Order of the House**

*Alimony*; is defined in the Law as the obligation of a person to support his/her relatives in poverty. As per CC. article 364/I “those who are obliged with maintaining alimony are siblings to forerunners and successors”. In other words, the spouses have an alimony obligation towards each other while the parents to their child/ren and the siblings to each other. In adoption, since paternity is established between the adopter and the adoptee, there is also established an alimony relation

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<sup>80</sup>Yargıtay, 2. Hukuk Dairesi, 05.02.2018 tarih ve 2018/364 E., 2018/1341 K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

<sup>81</sup>Yargıtay, 2. Hukuk Dairesi, 14.06.2016 tarih ve 2016/12153 E., 2016/11703 K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

<sup>82</sup>Yargıtay, 2. Hukuk Dairesi, 06.10.2015 tarih ve 2015/19787 E., 2015/17540 K., <https://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServlet>, (23.04.2018).

<sup>83</sup>Aydos, ss.46,47.

between the two<sup>84</sup>. However neither uncles or aunts are obliged with alimony to their nephews and niece nor the nephew and niece to their uncles and aunts<sup>85</sup>.

Civil code regulates alimony in three different categories as *welfare alimony*, *temporary alimony and child support*<sup>86</sup>. *Temporary alimony* is the alimony paid by one of the parties to the other to support his/her living through the course of proceeding. It starts with the commencement of the suit and continues till the case is closed(CC.art.169)<sup>87</sup>. *Welfare alimony* can be demanded by the party who is going to be in poverty after divorce, provided that he/she is less faulty, from the other party depending on his/her financial situation (CC. art.175). Fault of the party to pay the alimony is not sought for.<sup>88</sup> *Child support* is explained in article 182 of the Civil Code. This is the alimony to be paid by the party, who has not get the custody of the joint child, to the other party for the care, education and other costs of the child<sup>89</sup>. The amount of the alimony is set by the judge (CC. art.330). Child support ends when the child reaches eighteen<sup>90</sup>.

*House order*; article 367/I of the Civil Code describes family as a community constituted by more than one person. Second paragraph of the article regulates the authority to manage the house as to cover people who live together as household because of reasons as affinity or affinity by marriage, working or apprenticeship and so on. Those who are subjected to the house order are obliged to follow the rules set by the house leader on the order and discipline of the home (CC. art.368I/).

Family court experts are rarely assigned to work for alimony cases as it is not that relevant to their job.

### 1.3.9. Marriage Licence Cases

Marriage is a legal act which constitutes the union of marriage of the engaged couples<sup>91</sup>. Article 124/ I of the Civil Code says that “woman or man cannot get marry

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<sup>84</sup>Dural ve diğerleri, s.358,359.

<sup>85</sup>Akıntürk, s.439.

<sup>86</sup>Akıntürk, s.438.

<sup>87</sup>Akıntürk, s.276.

<sup>88</sup>Akıntürk, s.294; Dural ve diğerleri, s.148.

<sup>89</sup>Akıntürk, s.307.

<sup>90</sup>Baktır, s.156.

<sup>91</sup>Dural ve diğerleri, s.46.

before the age of seventeen. However, the judge may allow man and woman of sixteen to get marry in extraordinary situations or due to an important reason. When possible, mother, father or the guardian is heard before issuing marriage licence.” This article seeks for an extraordinary situation for marriage licence. The judge has a wide discretion about this issue. In case an extraordinary situation has been identified, the judge should reach a decision upon assigning a psychologist to make a detailed evaluation<sup>92</sup>. However, courts rarely appoint experts for these cases. To our opinion, it is important for a report to be prepared and presented to the court considering the developmental age, mental and emotional characteristics, social and economic capability and needs of the children as well as their understanding of the marriage, wishes and feelings and whether they are under pressure or not.

#### 1.4. RESOLVING FAMILY DISPUTES THROUGH MEDIATION

Methods to resolve disputes out of court emerged first in Anglo- American law systems, gained wider recognition in the end of 1960s and European Union’s (EU) endeavours to protect the individuals helped mediation to be widely used in Continental Europe law systems<sup>93</sup>. Over time, mediation gained more popularity and used to resolve various disputes<sup>94</sup>. Globalization has served to spread social, economic and cultural values to the world which accelerated free movement of people in addition to free movement of product and capital. With all these developments, unusual and alternative resolution ways have been sought and adopted<sup>95</sup>.

Alternative dispute resolution methods are conventionally negotiation, conciliation, mediation and arbitration<sup>96</sup>. The aim of adopting alternative dispute

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<sup>92</sup>Topal, **Uzman Raporuyla Çözümünecek Sorunlar**.

<sup>93</sup>Süha Tanrıver, “Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk”, **Türkiye Barolar Birliği Dergisi**, Sayı: 64, 2006, <http://tbbdergisi.barobirlik.org.tr/m2006-64-227>, (12.08.2018), s.151.

<sup>94</sup>Çağatay Akça, “Alternatif Uyuşmazlık Çözüm Yollarından Arabuluculuk ve Uzlaştırma”, **Hukuk Gündemi Dergisi**, Sayı:1, 2009, <http://www.ankarabarasu.org.tr/siteler/ankarabarasu/hgdmakale/2009-1/9.pdf>, (18.08.2018), s.31.

<sup>95</sup>Gonca Gülfem Bozdağ, “Arabuluculuk ve Arabuluculuğun Ebeveynler Arasındaki Uluslararası İhtilaflarda Uygulanabilirliği”, **Gazi Üniversitesi Hukuk Fakültesi Dergisi**, Cilt: XX, Sayı:1, 2016, [http://webftp.gazi.edu.tr/hukuk/dergi/20\\_1\\_4.pdf](http://webftp.gazi.edu.tr/hukuk/dergi/20_1_4.pdf), (24.12.2017), ss: 102-104.

<sup>96</sup>William J. Barry, **Appropriate Dispute Resolution**, Wolters Kluwer Publishers New York, 2018, p.2.

resolution methods is to provide permanent and effective solutions to the interpersonal problems. In addition to helping legal disputes to be solved without judicial proceedings, alternative dispute resolution methods have other benefits as reducing workload of courts, saving time and expenditures and providing sound solutions beneficial for both parties as a result of open communication with both parties<sup>97</sup>.

In 1990s, various countries, especially England and France recognized mediation and adopted Model Law on International Commercial Arbitration (UNCITRAL) in 2004. Influenced by all these developments, in 2002 Green Paper on Alternative Dispute Resolution in Civil and Criminal Law (Green Paper) was published. Then with the purpose of enabling better access to justice, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters was adopted. In the year 2000, UN Security Council's Resolution on Women, Peace and Security numbered 1325 helped the link between mediation and gender established and the sensitivity to gender equality was underlined. In 2003, European Council's Recommendation on Family Mediation and Equality of Sexes (article 7.5 and 8.2) emphasized the necessity of power balance between the parties and that is the main responsibility of mediation<sup>98</sup>.

Amongst the alternative dispute resolution methods which depend on social needs of the countries, the most preferred one is the mediation<sup>99</sup>. Mediation is a voluntary basis, independent, impartial and objective process aiming parties to understand each other and produce solutions for themselves through the participation of a third party to help parties discuss and negotiate<sup>100</sup>. There are four principles ruling mediation which are "*voluntariness*," "*impartiality and independence of the*

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<sup>97</sup>Bozdağ, **Arabuluculuğun Uygulanabilirliği**, s.103.

<sup>98</sup>Ali Yeşilırmak ve Elif Kısmet Kekeç(Ed.), **Temel Arabuluculuk Eğitimi Katılımcı El Kitabı**, Altan Özyurt Matbaacılık, Ankara, 2017, s.27.

<sup>99</sup>Ersin Erdoğan ve Nurbanu Erzurumlu, "Hukuku Uyuşmazlıklarında Türkiye'nin Arabuluculuk Tecrübesi ve Zorunlu Arabuluculuk Taslağı Raporu", 1. Baskı, **Seta Yayıncılık**, İstanbul, 2016, <https://setav.org/assets/uploads/2016/12/Turkiyenin-Arabuluculuk-Tecrubesi-PDF.pdf>, (22.04.2017), s.7.

<sup>100</sup>Tanrıver, **Hukuk Uyuşmazlıklarında Arabuluculuk**, s.165.

*mediator*”, “*equality*” and “*confidentiality*”<sup>101</sup>. Mediation focuses on solution and the primary purpose here is to balance the interest of both parties<sup>102</sup>.

As per the *confidentiality principle* which can easily be regarded as the most important principle, the information gained through mediation process shall not be revealed neither to other party nor a third party unless otherwise consented upon. In addition to that, in case no agreement has been reached via mediation, none of the documents drawn up nor declarations made throughout this process can be used as evidence in the judicial proceeding<sup>103</sup>.

Voluntariness principle covers both the voluntariness of the parties to be involved in mediation process and to reach an agreement<sup>104</sup>. In all over the World, mediation practices regard and adopt voluntariness discretion as the main factor<sup>105</sup>. As well as voluntary mediation, there are some compulsory mediation practices. Compulsory mediation is a mediation process which the parties are obliged to engage with before applying to a court or judge through a procedural law institution<sup>106</sup>. A general overview upon Europe, England and Australia’s compulsory mediation approaches can show that even though compulsory mediation exist in various forms and parties are pushed to involve in this, the process is not continued if it is ineffective and there is no obligation to reach an agreement<sup>107</sup>.

A successful mediation process leads a win-win path for both parties while saving business and personal relationships which may be irrevocably harmed. All these potential benefits weigh more than the additional cost and time spent even when the mediation fails. Parties mostly agree to try mediation considering they will

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<sup>101</sup>Alper Uyumaz ve Kemal Erdoğan, “Aile Hukukundan Doğan Uyuşmazlıkların Alternatif Çözüm Yolları”, **D.E.Ü. Hukuk Fakültesi Dergisi**, Cilt: 17, Sayı: 1, 2015(Basım Yılı: Şubat 2016), <http://hukuk.deu.edu.tr/wp-content/uploads/2016/02/ALPER-UYUMAZ-KEMAL-ERDO%20%20C4%9EAN.pdf>, (12.02.2018), s.129.

<sup>102</sup>Tanrıver, **Hukuk Uyuşmazlıklarında Arabuluculuk**, s.167.

<sup>103</sup>Yeşilirmak ve Kekeç, s.29.

<sup>104</sup> Elif Kısmet Kekeç, **Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler**, Dokuz Eylül Üniversitesi Sosyal Bilimler Enstitüsü, İzmir, 2010, s.85.

<sup>105</sup>Kürşat Karacabey, “Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığı ve Uygulanabilirliğine Dair Sorunlar”, **Ankara Barosu Dergisi**, Sayı:1, 2016, <http://www.ankarabarusu.org.tr/siteler/ankarabarusu/tekmakale/2016-1/14.pdf>, (12.02.2018), s.465.

<sup>106</sup>Erdoğan ve Erzurumlu, **Zorunlu Arabuluculuk Taslağı**, s.35.

<sup>107</sup>Melissa Hanks, “Perspectives on Mandatory Mediation”, **UNSW Law Journal**, Volume:35, Number: 3, 2012, <http://www.austlii.edu.au/au/journals/UNSWLawJl/2012/39.pdf>, (23.03.2018), p.952.

be involved in the process, have a chance to describe the incident from their own perspectives and an opportunity to contribute to the result<sup>108</sup>.

#### 1.4.1. Mediation in Turkish Law

In Turkey, Law numbered 6325 on Mediation in Civil Disputes (HUAK) was adopted and as of its enforcement on 22.6.2012, the Department of Mediation was established under Ministry of Justice Directorate General for Legal Affairs which was followed by a committed work on the subject<sup>109</sup>. As in other countries' practices, mediation system in Turkey aims to reduce proceeding costs and backlog cases in courts, to shorten proceeding times and to have a more effective dispute resolution system by ensuring the participation of public to the solution process as well<sup>110</sup>.

About the scope of disputes that the mediation can cover, article 1 of the Law on Mediation states that; "this Law shall be applied in private disputes, arising solely from the acts or proceedings which the parties may freely dispose, including those possessing the element of foreignness, in so far as disputes containing domestic violence are not suitable for mediation". The most frequently preferred mediation method for family law disputes in the world can be applied on private law proceedings which the parties may freely dispose, as is stated in Article 1 of the Law on Mediation<sup>111</sup>. Thus, mediation shall not be applied in public law disputes including criminal and administrative law. What is meant by parties' freely disposing is that the dispute shall not be arising from public order, in other words, shall be of a nature that may be solved through reaching an agreement<sup>112</sup>. Thus, mediation covers commercial disputes, employer-employee disputes, consumer disputes, rental disputes and terminating a joint tenancy<sup>113</sup>.

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<sup>108</sup>Stavros Tsormpatzoglou, **Compulsory Mediation: A contradiction?**, International Hellenic University, School of Economics, Thessaloniki Greece, 2012-2013, Dissertation, [https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/289/Stavros%20Tsormpatzoglou\\_3724\\_asignsubmission\\_file\\_Dissertation%20Tsormpatzoglou%20Stavros.pdf?sequence=1](https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/289/Stavros%20Tsormpatzoglou_3724_asignsubmission_file_Dissertation%20Tsormpatzoglou%20Stavros.pdf?sequence=1), (28.08.2018), p.14.

<sup>109</sup>Karacabey, **Zorunlu Arabuluculuğun Aykırılığı**, s.460.

<sup>110</sup>Uyumaz ve Erdoğan, **Alternatif Çözüm Yolları**, s.129.

<sup>111</sup>Bozdağ, **Arabuluculuğun Uygulanabilirliği**, s. 131.

<sup>112</sup>Uyumaz ve Erdoğan, **Alternatif Çözüm Yolları**, s.137.

<sup>113</sup>Yeşilırmak ve Kekeç, ss.30,31.



Paragraph 2 of article 2 of the HUAK states that “mediation shall mean a dispute resolution method carried out voluntarily, by employing systematic techniques, with the participation of an impartial and independent third person who brings the parties together to discuss and negotiate, who establishes a communication process between the parties in order to ensure that they understand each other and find their own solutions by this means, and who is specially trained”. In order for someone to work as a mediator he/she has to make a written application and enrolled in register of mediators. In order to be enrolled in the register of mediators, one is required to be “a Turkish citizen”, “be a graduate of faculty with at least five years of seniority in the profession”, “be fully competent” “have no criminal record for committing an intentional offence”, “complete the training on mediation” “succeed in the written and practice examination held by the Ministry” (HUAK, article.20; Regulation, article 24).

Using communication techniques, the mediator provides parties with a comfortable and free negotiation environment under equal terms, makes it easier for parties to express themselves and effectively communicate and helps them reach their own solutions. Mediators can offer solutions but cannot push parties to take them, cannot give legal advises<sup>114</sup>. The process and how it will work should be totally up to the parties<sup>115</sup>. Paragraph 1 of the article 13 of Law on Mediation says that “the parties may agree to apply to a mediator before the lawsuit is filed or during the course of lawsuit. The court may also enlighten and encourage the parties to resort to a mediator”. 2nd paragraph of the same article states that “unless agreed otherwise, the proposal of one of the parties to resort to a mediator shall be considered to be rejected if such proposal is not answered within thirty days.” This specifies the terms that the mediation contract is valid for<sup>116</sup>. Parties reserve their rights to resort to judicial remedies if no agreement is reached through mediation<sup>117</sup>.

Mediation process in our country is based on voluntariness principle and is an optional process. However, recently, Ministry of Justice, Department of Mediation

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<sup>114</sup>Melis Taşpolat Tuğsavul, **Arabuluculuk Kanunun Tasarısı Çerçevesinde Türk Hukuku’nda Arabuluculuk**, Bahçeşehir Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul, 2009, s.9; Uyumaz and Erdoğan, **Alternatif Çözüm Yolları**, ss.130,131.

<sup>115</sup>Tanrıver, **Hukuk Uyuşmazlıklarında Arabuluculuk**, s.170.

<sup>116</sup>Erdoğan ve Erzurumlu, **Zorunlu Arabuluculuk Taslağı**, s.20.

<sup>117</sup>Uyumaz ve Erdoğan, **Alternatif Çözüm Yolları**, s.129.

has been working on some draft amendments to make mediation compulsory for some legal disputes before filing a lawsuit<sup>118</sup>. In this regard, paragraph 1 of article 3 of the Labour Courts Law numbered 7036 adopted on 12.10.2017 states that “application to mediation is a pre-condition for cases on employee or employer receivables and compensation based on individual or collective employment contracts or claims for reinstatement”. This article brings the obligation to resort to a mediator for employer- employee disputes. Paragraph 2 of the same article states that “If it is found out that the court is applied before trying mediation the case will be rejected on the grounds of lack of cause of action without carrying out any proceeding”<sup>119</sup>.

Thus, there are some views upon compulsory mediation. One points that the amendment which make it a pre requisite to resort to mediation before filing a lawsuit in some cases lead to elimination of voluntariness principle of mediation as one of the main ones. Also, this amendment which has not finalized yet is stated to have the likelihood of producing the risk of constituting a barrier before persons to directly reach the courts<sup>120</sup>.

#### 1.4.2. Mediation in Family Disputes

International practices orient parties to the mediators first before filing a lawsuit in family disputes. Europe names this process as *family mediation* whilst USA uses the term *divorce mediation*. The difference between family mediation and divorce mediation is that the first covers unmarried couples as well. Family mediation especially aims for couples with children to help them agree and improve their relationships about disputes arising from separation or divorce including financial issues<sup>121</sup>.

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<sup>118</sup>Karacabey, **Zorunlu Arabuluculuğun Aykırılığı**, s.461.

<sup>119</sup>Kaan Muharrem Yağcıoğlu, “Yeni İş Mahkemeleri Kanunu Uyarınca Arabuluculuk ve Arabuluculuğun İş Yargılamasına Etkileri”, **D.E.Ü. Hukuk Fakültesi Dergisi**, Cilt:20, Sayı:2, 2018, <http://hukuk.deu.edu.tr/wp-content/uploads/2018/12/KAAN-MUHARREM-YAGCIOGLU.pdf>, (23.01.2019), ss.459,460.

<sup>120</sup>Karacabey, **Zorunlu Arabuluculuğun Aykırılığı**, s. 470.

<sup>121</sup>Lisa Parkinson, **Aile Arabuluculuğu, Yeni Adalet Sistemine Dair Uygun Uyuşmazlık Çözüm Yöntemi, Family Mediation**, (Ed. Yonca Fatma Yücel), Ankara, 2017, <http://www.adb.adalet.gov.tr/ailearabuluculuk.pdf>, (12.08.2018), s.20.

On the other hand, divorce mediation is a process led by social workers, lawyers and other professionals to help solving problems, that the couples in divorce process encountered in the union of marriage, apart from court. Main purpose of this process is set as to help couples understand their problems, equal share of the joint movables and immovable, regulating alimony procedures, deciding about custody and times to see the children<sup>122</sup>.

Considering the advantages of mediation, both in Europe and USA, governments introduce legislations and procedures to ensure couples voluntarily resort to mediators to reach an agreement without the intervention of state and to encourage pre-trial resolution methods<sup>123</sup>. However, domestic violence and abuse, children in need of protection, threat, drug addiction, imbalance of power, mental disability and disease, deceiving and rejection of mediation are the subjects which are not considered suitable for mediation<sup>124</sup>. The fact that countries recognizing mediation provide suitable conditions for mediation to grow further, ensured practice areas for mediation both out of court and during the course of proceeding<sup>125</sup>.

In our country, family or divorce mediation is an area which is yet implemented by law or regulation. However as required by the article 7 of the Law on Family Courts, judges encourage parties to peace for that aim and appoint experts<sup>126</sup>. Family mediation practice which is compulsory in USA and some EU countries is recommended to be included in our justice system. It can be said that family mediation is applicable in our country especially for divorce and liquidation of shared property<sup>127</sup>.

Considering that there is violence psychological, if not physical, in every divorce case, mediation may seem difficult to be applied in resolving the family law disputes. Regarding Committee of Ministers of the Council of Europe recommendation on implementing and encouraging family mediation, in our country,

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<sup>122</sup>Bülent Şen, **Boşanma Süreci ve Arabuluculuğu**, (Yayınlanmamış Doktora Tezi), Hacettepe Üniversitesi Sosyal Bilimler Enstitüsü, Ankara, 2013, s.98.

<sup>123</sup>Margit Gaffal, **Psychosocial and Legal Perspectives of Marital Breakdown with Special Emphasis on Spain**, Springer Science & Business Media, Spain, 2010, p. 186.

<sup>124</sup>Parkinson, s.58.

<sup>125</sup>Şükran Şıpka, “Hukuk Uyuşmazlıklarında Arabuluculuk Kanun Tasarısı’nın Değerlendirilmesi”, **İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi**, Yıl:6, Sayı:12, Güz 2007/2, <https://ticaret.edu.tr/uploads/Kutuphane/dergi/s12/M00191.pdf>, (22.08.2018), s.167.

<sup>126</sup>Turgut, ss.39,40.

<sup>127</sup>Tanrıver, **Hukuk Uyuşmazlıklarında Arabuluculuk**, s.173.

amendments in the mediation law to soften the law and to make it compulsory for solutions provided as a result of family mediation to be presented to the judge's consent, may be a solution to the problem stated<sup>128</sup>.

Family mediation is not a family consultancy nor a family therapy. It is not a sole legal process, either. Thus while on one hand some advocate that the lawyers can work as family mediators upon receiving a special training to prevent this job to be held only by specific professionals and they can also help parties legally,<sup>129</sup> others think that qualified and senior social workers, therapists or psychologists should be mediators<sup>130</sup>. At this point, the training and the job that the family experts are assigned to do in family courts for divorce proceedings differ from family mediators. Family experts assist to the judge in making a judgement about whether the marriage is sustainable after the lawsuit is filed, custody and relationship with children<sup>131</sup>. Thus in light of the given information, we believe that professionals to work in family mediation services should be determined upon interdisciplinary consultancy and a comprehensive evaluation.

#### 1.4.3. Convenience of Family Law Disputes to the Mediation in General

In order for family disputes to be convenient for mediation, as in other civil disputes, the matter shall be related to the acts or proceedings which the parties may freely dispose<sup>132</sup>. Principle of disposal is regulated in article 24 of Turkish Civil Code of Procedure as “it is at the disposal of the parties to file a suit or not for family disputes, to identify subject matter, to file a suit together and to bring the dispute to a higher court or not. Besides on the subject matter which the parties can freely dispose of, they can continue to do so after the legal proceedings are commenced<sup>133</sup>. When is

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<sup>128</sup>Uyumaz ve Erdoğan, **Alternatif Çözüm Yolları**, s.162.

<sup>129</sup>Sunay İl, “Aile Arabuluculuğu Derleme”, **Toplum ve Hizmet Dergisi**, Cilt: 20, Sayı:1, 2009, <http://www.acarindex.com/dosyalar/makale/acarindex-1423931285.pdf>, (12.08.2018), s.30.

<sup>130</sup>Parkinson, s.23.

<sup>131</sup>Turgut, s.37.

<sup>132</sup>Huriye Reyhan Demircioğlu, “Aile Hukuku Uyuşmazlıkları Bakımından 6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu’nun Uygulanabilirliği”, **Türkiye Adalet Akademisi Dergisi**, Sayı:23, 2015, <http://www.taa.gov.tr/yayin/turkiye-adalet-akademisi-dergisi-sayi-23/>, (14.03.2018), ss.59,60.

<sup>133</sup>İbrahim Ercan, Medeni Usul ve İcra İflas Hukukçuları Toplantısı, II. Gün, “Boşanma Davalarında Geçerli Olan Yargılama İlkeleri”, **S.D.Ü. Hukuk Fakültesi Dergisi MİHBİR Özel Sayısı**, Cilt:4, Sayı:2, 2014, <http://dergipark.gov.tr/download/article-file/213542>, (13.12.2017), s.253.

examined, it can be seen that in Turkish family law the matters which the parties may freely dispose are not many<sup>134</sup>.

#### 1.4.3.1. Ineligible Cases

HUAK article 1/II states that “disputes containing domestic violence are not suitable for mediation”<sup>135</sup>. Justice Commission ruled out all disputes containing domestic violence considering the possibility that one of the parties repress the other and the implementation of the principle of equality in family law may be challenged<sup>136</sup>.

Since such family law issues as custody, parenting arrangements, temporary spousal support and child maintenance are related to public order which the parties cannot dispose and judge makes decision ex officio, these matters are not covered by mediation<sup>137</sup>. If the divorce suit is filed because of any physical, economic, sexual and especially psychological violence, considering the secondary consequences, such disputes are not considered suitable for mediation either<sup>138</sup>. Thus, it is understood that since such matters as separation, divorce and custody of the children effect all family members, such disputes are not convenient for mediation<sup>139</sup>.

R (98) 1 recommendation of the Committee of Ministers of European Council states that mediation covers disputes arising from custody and personal contact with the child in divorce and separation proceedings. Article 8 of the relevant recommendation emphasizes that in international family conflicts, disputes arising from raising the children and personal contact with the children are suitable for family mediation. However as is stated before, custody and personal contact with the children are not considered suitable for family mediation in HUAK. On the other

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<sup>134</sup>Demircioğlu, *Aile Hukuk Uyuşmazlıklarında Arabuluculuk*, ss.67,68.

<sup>135</sup>Uyumaz ve Erdoğan, *Alternatif Çözüm Yolları*, ss.138,139.

<sup>136</sup>Uyumaz ve Erdoğan, *Alternatif Çözüm Yolları*, s.219.

<sup>137</sup>Bozdağ, *Arabuluculuğun Uygulanabilirliği*, s.104.

<sup>138</sup>Şamil Demir, “Arabuluculuk ile Aile İçi Şiddet ve Uzlaşmaya Tabi Suçların İlişkisi”, *Hakemli Ankara Barosu Dergisi*, Sayı:2, 2014, <http://dergipark.gov.tr/download/article-file/398164>, (28.12.2017), s.222.

<sup>139</sup>Yeşilırmak ve Kekeç, s.31.

hand, 1980 Hague Convention to which Turkey is a party does not have the issue of returning child to the habitual residence covered by mediation<sup>140</sup>.

Another issue to mention is invalidity of marriage, in other words, if the marriage is not carried out before a registrar of marriage and if one of the parties do not declare his/her will for marriage voluntarily the marriage is regarded as *invalid*. This situation where there is no marriage union is established between the parties is a dispute concerning public order, and not considered appropriate for mediation<sup>141</sup>. Besides, such cases on nullity of marriage, annulment of marriage and ending the marriage are not suitable for mediation<sup>142</sup>.

The person to be assigned as guardian represent the persons who live within the society but who are in a weak position and guards their immaterial rights and properties, thus, guardianship is closely related to the public order and the disputes arising from this matter are not convenient for mediation<sup>143</sup>. In paternity cases, the disputes arising from the fact that while man is entitled to get marry as soon as he wishes to right upon the divorce is adjudicated, for women, three hundred days of waiting to get remarried is a condition to be met to prevent any paternity confusions are not possible to be settled within the scope of Mediation Law. In addition to that, the disputes arising from woman's wish to continue using ex-husband's surname after divorce are not suitable for mediation, either<sup>144</sup>.

As is seen since the disputes given above concern public order and arise from civil relations and proceedings which parties cannot freely dispose, it is not possible to resolve such disputes through mediation<sup>145</sup>.

#### 1.4.3.2. Suitable Cases

In order to apply any alternative dispute resolution method including mediation, the prerequisite is that dispute should be of a subject matter which does

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<sup>140</sup>Bozdağ, *Arabuluculuğun Uygulanabilirliği*, s.118.

<sup>141</sup>Uyumaz ve Erdoğan, *Anlaşmazlık Çözüm Yolları*, s.146.

<sup>142</sup>Tuğsavul Taşpolat, ss.65,66.

<sup>143</sup>Uyumaz ve Erdoğan, *Anlaşmazlık Çözüm Yolları*, s.160.

<sup>144</sup>Uyumaz ve Erdoğan, *Anlaşmazlık Çözüm Yolları*, s.149.

<sup>145</sup>Levent Börü, "Kadına Karşı Şiddette Arabuluculuk Kurumuna İlişkin Bazı Değerlendirmeler", *Türkiye Barolar Birliği Dergisi*, Özel Sayı, 2017, <http://tbbdergisi.barobirlik.org.tr/m2017-2017-1720>, (14.09.2018), ss.184,185.

not concern public order and parties can freely dispose<sup>146</sup>. It is possible to resort to mediation for private civil disputes which the parties may dispose<sup>147</sup>. In other words, it is possible to apply mediation in some cases which may concern public<sup>148</sup>.

Parties can come to agreement only on issues they can freely dispose<sup>149</sup>. Given this, such matters as returning gifts when the engagement is over and pecuniary claims, management of property in the course of marriage, dispose of the properties throughout marriage, division of property after divorce, damages and alimony are regarded as suitable for mediation<sup>150</sup>.

Additionally, as per article 7 of the Law on Family Courts, family court judge has an obligation to encourage the parties for peace in family disputes<sup>151</sup>. Thus, the judge may act as a family mediator and is entitled to assign family court experts as mediators. It is stated that since family disputes concern public order and the parties cannot freely dispose, family judge has limited functions to encourage and ensure peace between the parties and these functions may be used of in divorce and liquidation of marital property<sup>152</sup>. The word ‘peace’ here refers to parties waive the case and its acceptance<sup>153</sup>.

As is explained above, it can be seen that most of the family disputes concern public order and thus, the subject matters which the parties can freely dispose are limited which leads to the deduction that practice area for mediation method is also limited<sup>154</sup>.

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<sup>146</sup>Kekeç, s.119.

<sup>147</sup>Börü, **Kadına Karşı Şiddette Arabuluculuk**, s.184.

<sup>148</sup>Ferhat Yıldırım, “Türk Hukuk Sisteminde Alternatif Bir Çözüm Yolu Olarak Arabuluculuk”, **International Journal of Social Sciences and Education Research**, Volume:2, Number:3, 2016, <http://dergipark.gov.tr/ijsser/issue/26512/279020>, (01.02.2019), s.751.

<sup>149</sup>Kekeç, s.119.

<sup>150</sup>Yeşilirmak ve Kekeç, s.31.

<sup>151</sup>Tuğsavul Taşpolat, ss.64,65.

<sup>152</sup>Tanrıver, **Hukuk Uyuşmazlıklarında Arabuluculuk**, s.173.

<sup>153</sup>Tuğsavul Taşpolat, s.66.

<sup>154</sup>Gizem Ersen Perçin “Alternatif Uyuşmazlık Çözüm Yöntemlerinden Arabuluculuğun Hukuksal Düzenlemelerdeki Yeri”, **Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni**, Cilt 31, Sayı 2, 2011, <http://dergipark.gov.tr/download/article-file/411053>, (15.09.2018), ss.191,192.

## CHAPTER TWO

### SOCIAL EXPERTS WORKING IN FAMILY COURTS

#### 2.1. GENERAL OVERVIEW

While article 5 of the Law on the Establishment, Duties and Trial Procedures of Family Courts numbered 4787 refers to “expert” the Law in general sense states that these experts should be appointed among psychologists, pedagogues and social workers. However Juvenile Protection Law numbered 5395 signs that in Juvenile and Juvenile Assize Courts those from the professions such as psychological consultancy and guidance, psychology, sociology, child development, teaching, family and consumer and social service are to be appointed. In order to eliminate the terminological confusion to describe different professions carrying out similar duties under different laws, those from these professions are gathered under the umbrella term “*social worker*”<sup>155</sup>. However, this study will use “Family Court Expert” instead of “Social Worker”.

As mentioned before, Germany’s system was used as a sample in preparing Law on Family Courts. Reaching the opinion that the family consultancy and guidance departments’ in Germany working together with family courts play a complimentary role in resolving family disputes, in national practice, psychologists, pedagogues and social workers are employed within the body of family courts <sup>156</sup>.

In improving the reconciliatory sides of parties and settling the disputes in an amicable way, knowledge and experience of court experts are quite valuable, also the reports they prepare play a crucial role for judgments<sup>157</sup>.

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<sup>155</sup>Emrah Kırımsoy ve diğerleri(Ed.), **Sosyal Çalışma Görevlileri için El Kitabı**, Ankara, 2013, s.266.

<sup>156</sup>Cılga, ss.2,3.

<sup>157</sup>Sema Buz ve diğerleri, “Aile Mahkemesinde Çalışan Sosyal Çalışma Görevlilerinin Sosyal inceleme raporlarına ilişkin değerlendirmeleri: Ankara Adliyesi örneği”, **Toplum ve Sosyal Hizmet Dergisi**, Cilt: 26, Sayı: 2, 2015, <http://dergipark.gov.tr/download/article-file/153086>, (25.03.2018), s.27.



## 2.2. EXPERTS WORKING IN FAMILY COURTS

As is stated in article 5 of the Law numbered 4787 on Establishment, Duties and Trial Procedures of Family Courts, in family courts, as different than the other courts, a pedagogue, psychologist and a social worker work. The Law does not clearly specify the statues of family court experts<sup>158</sup>. It is possible to explain the duties of social workers, psychologists and pedagogues working in family courts as given below.

### 2.2.1. Social Worker

For social workers also the term social expert may be used. The term “social service” is described in Law numbered 2828 on Social Services and Child Protection Agency. The law describes social services as systematic and programmed services aiming for eliminating individuals’ and families’ material, nonmaterial and social poverties born by their own or environmental conditions that they do not have control upon, meeting their needs, preventing and helping to solve social problems and improving life standards (2828 SY. Law art.2)<sup>159</sup>.

In general sense, social workers work on social conditions of individuals to ensure necessary treatments are made to solve personal and social problems and possible disputes. So through inquiries they identify psycho- social needs<sup>160</sup> and help material and immaterial needs to be met and problems to be solved<sup>161</sup>.

The role of social workers in family courts is to identify problems between parties and with the children during the course of proceeding, to guide to the parents to help them improve their weaknesses and to help the family to be affected as minimum as possible by the whole process , to make recommendation on the custody of the child to ensure that the child will maintain a sounder and better life in the future, to make social inquiries when necessary to understand the psychological,

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<sup>158</sup> Muhammed Zeki Temel, **Aile Mahkemelerinin Kuruluşu ve Yargılama Usulü**, (Yayınlanmamış Yüksek Lisans Tezi), Gazi Üniversitesi Sosyal Bilimler Enstitüsü, Ankara, 2007, s.20.

<sup>159</sup> Baktır, s.60.

<sup>160</sup> Temel, s.24.

<sup>161</sup> Özel ve Tatar, **Aile Mahkemeleriyle İlgili Değerlendirme**, s. 59

economic and social conditions that the family is in and to prepare a social investigation report based on this<sup>162</sup>.

### 2.2.2. Psychologist

Psychologists help people to fix and improve their behaviours through gathering information about the emotions and thoughts of the people and their behaviours as a result along with their intellect and skills<sup>163</sup>.

In family cases, psychologists identify the psychological conditions of the family members and help them keep their psychological resilience both in the course of the proceeding and afterwards, to examine the family member who suffers from psychological problems both individually and as a member of his/her community through psychological research methods to identify the root causes of the problem<sup>164</sup>.

Especially in divorce proceedings, psychologists contribute to the proceeding by identifying psychological factors in the divorce causes<sup>165</sup>. In addition to the divorce, they make qualified research, examination, identification and observations about the children neglected and in need of protection and prepare an evaluation report to inform the judge in an impartial way<sup>166</sup>.

### 2.2.3. Pedagogues

Pedagogues work especially on children<sup>167</sup>. Pedagogues can be described as professionals who examine the children in terms of their skills and capabilities, social and personal developments and their education and maturation<sup>168</sup>. The duties of the pedagogues working in family courts may be given as informing the child about the

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<sup>162</sup>Elvan Atamtürk, **Aile Mahkemeleri Uygulamalarında Yaşanan Sorunların Aile Mahkemesi Uzmanlarının Tükenmişlik Düzeylerine ve İş Doyumlarına Etkisi**, (Yayınlanmamış Yüksek Lisans Tezi), Hacettepe Üniversitesi Sosyal Bilimler Enstitüsü, Ankara, 2010, ss.13,14.

<sup>163</sup>Baktır, s.59.

<sup>164</sup>Atamtürk, s.13.

<sup>165</sup>Aziz Serkan Arslan, “Türk Aile Mahkemelerinin Yapısı ve Yargılama Usulü”, **Ankara Barosu Dergisi**, Sayı:1, 2010, <http://www.ankarabarusu.org.tr/siteler/ankarabarusu/tekmakale/2010-1/2010-1-arслан.pdf>, (13.12.2017), s.192.

<sup>166</sup>Temel, s.22.

<sup>167</sup>Baktır, s.60.

<sup>168</sup>İbrahim Demirtaş, “İç Denetim Birimi Başkanlığı İnceleme Raporu”, Ankara, 2012, [http://www.icdenetim.adalet.gov.tr/raporlar/yayinlanan\\_rapor/2012-3.pdf](http://www.icdenetim.adalet.gov.tr/raporlar/yayinlanan_rapor/2012-3.pdf), (14.03.2017 ), s.5.

court, observing and identifying their mental state, helping the child to keep his/her psychological and social health in the course of the proceeding and afterwards<sup>169</sup>. In addition to that, they make recommendations to the court about the issues relevant to the child including custody and staying with which parent would be a benefit to the child in terms of his/her psychological health<sup>170</sup>.

As of 1982 when the Law numbered 2547 was enacted, pedagogy departments of the universities under The Council of Higher Education were closed<sup>171</sup>. Thus, when the family courts were first established, it was found appropriate for the staff to be recruited for this position to be graduated from teacher training programs of Education Faculties and bachelors of educational sciences, then, only the graduates of the department of “Psychological Consultancy and Guidance” have been appointed as pedagogues<sup>172</sup>.

### **2.3. APPOINTMENT OF FAMILY COURT EXPERTS**

Article 5 of the Law on Family Courts state that “preferably from those who are married with children, not younger than thirty and have a master degree on family disputes, a psychologist, a pedagogue and a social worker is appointed by the Ministry of Justice. In the absence of these professionals or in case they are not available, or there is a legal or actual barrier in given professionals to carry out the duty or when another expertise is needed, those who work in other public institutions or organizations or freelancers are used.”

Even though some criteria are set for the court experts to be assigned, those about marital status, seniority and age have been flexed<sup>173</sup>.

### **2.4. DUTIES AND POWERS OF FAMILY COURT EXPERTS**

Job descriptions of the family court experts are given in the article 5 of the Family Court. Main duties are described as to do the research and investigations

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<sup>169</sup> Atamtürk, s.12.

<sup>170</sup> Arslan, *Aile Mahkemelerinin Yargılama Usulü*, s.192.

<sup>171</sup> Atamtürk, s.12.

<sup>172</sup> Demirtaş, *İç Denetim Başkanlığı*, s.5.

<sup>173</sup> Cılga, s.114.

upon the reasons of the dispute between the parties and inform about the findings during the preliminary research (done by judge) or during the course of the proceeding (Law on Family Courts article 5/1) to be present at the trials if demanded by the Court (Law on Family Courts article 5/2), to work on the demanded issues and to give opinion, to carry out other tasks assigned by the Court (Law on Family Court article 5/3)<sup>174</sup>.

As is understood from the duties specified in the Family Courts Law, family court experts, upon assigned by the judge, inform court about the dispute and reasons for that through a social investigation, share opinions about the psychological states of the parties by being present in the court room while they are heard and assist to the court in implementing and following up the protection, education and social orders (measures)<sup>175</sup>.

The duties specified in the paragraph 1 of the article 5 of the Law explained above is closely related to parties' reaching to an agreement. Paragraph 2 refers to being present in the trials which is subject to judge order. Having the experts accompanied to the parties in the courtroom helps family court experts better understand the disputes and also in doing so, the family court experts have a chance to observe parties in the first hand and to provide healthy solutions to the problems combining these observations with the information they already obtained. As is seen, the duties given in paragraphs 1 and 2 are more closely related to each other<sup>176</sup>. The reports to be prepared by the family court experts combined with the information they obtained during the trial will contribute to the acceleration of the proceedings<sup>177</sup>.

There is no clear explanation about what the other duties are as given in paragraph 3<sup>178</sup>. However, a clear description about the functions and specialisms of the experts is quite necessary for strengthening the quality of family courts as specialized courts<sup>179</sup>. About this, article 6/II of Family Courts Law states that; "one or more of the court experts can be assigned with following up and implementing the protection, education and social orders that the judge may give" which is understood

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<sup>174</sup>Tercan, **Türk Aile Mahkemeleri**, s.31.

<sup>175</sup>Özel ve Tatar, **Aile Mahkemeleriyle İlgili Değerlendirme**, s. 59.

<sup>176</sup>Temel, s.28.

<sup>177</sup>Nagehan Kadioğlu, **Aile Mahkemelerinde Yargılama Usulü**, (Yayımlanmamış Yüksek Lisans Tezi), İstanbul Bilgi Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul, 2007, s.30

<sup>178</sup>Temel, s.29.

<sup>179</sup>Cılga, s.110.

to be clearly related to the task mentioned in paragraph 3<sup>180</sup>. Experts' assuming the duty of following up and implementing the orders will help to strengthen the implementation of the orders<sup>181</sup>.

That no clear explanation is provided about the content of these tasks may be interpreted as the judge may ask the experts to do examination and research about all matters he wished to. This is how the law maker leaves a gap about the duties of experts in the family disputes which change and become more and more complicated<sup>182</sup>.

As is understood, the family court experts are assigned to help enlighten the case by identifying the problems that the parties are faced with and the reasons within the scope of their expertise using the Professional knowledge they have upon demand of the judge<sup>183</sup>. As a psychologist, pedagogue and social worker, these three experts must be present in a family court<sup>184</sup>. However, the number of courts where these three experts are working together as a team is quite less<sup>185</sup>.

In order to write a report about a case, the family court experts are assigned at the discretion of a judge, as a recommendation to the parties by the judge, by the relevant party or parties or by demand of the lawyer<sup>186</sup>. The expert presents the report he/she prepared based on the information he/she gained through interviews with the parties and other relevant persons to learn about the causes of the dispute<sup>187</sup>. Experts hold the position of assistants of the judges, who assume such a big responsibility as making decisions for family and society in family courts, by using both their life experiences and professional knowledge<sup>188</sup>.

Of the family disputes given above, family court experts mostly work in the cases on possibility for peace, divorce, custody, change of custody, abolishment of

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<sup>180</sup>Tercan, **Türk Aile Mahkemeleri**, ss.31,32.

<sup>181</sup>Arslan, **Aile Mahkemelerinin Yargılama Usulü**, s.193.

<sup>182</sup>Kadioğlu, s.30.

<sup>183</sup>Tercan, **Türk Aile Mahkemeleri**, s.31.

<sup>184</sup>Baktır, s.60.

<sup>185</sup>Baran Çiftçi, “Aile Mahkemeleri Uzmanlarının Hukuki Niteliği ve Mesleki Uygulama Sorunları”, **Ankara Barosu Dergisi**, Yıl:65, Sayı:3, 2007, <http://www.ankarabarusu.org.tr/siteler/ankarabarusu/tekmakale/2007-3/14.pdf>, (03.02.2019), s.174.

<sup>186</sup>Neşe Doğan Yüksel, “Nereden Çıktı Aile Mahkemelerindeki Bu Uzmanlar?”, **Türkiye Barolar Birliği Dergisi**, Sayı:99, 2012, <http://tbbdergisi.barobirlik.org.tr/m2012-99-1175>, (07.01.2018), s.414.

<sup>187</sup>Çiftçi, **Aile Mahkemeleri Uzmanlarının Hukuki Niteliği**, s. 175.

<sup>188</sup>Kadioğlu, s.34.

custody, personal contact with the child and adoption<sup>189</sup>. Article 7 of the Law on Family Courts states that “the Judge encourages the parties to come to an agreement, if no agreement is reached, proceeding shall continue and a judgement shall be made”. This article refers to the endeavour to reconcile and compromise the parties<sup>190</sup>. Along with the Law, as appropriate to the purpose of establishment of the court, the obligation to use the methods for maintaining sustainability of marriage unit by using the family court experts when needed and seeking for peaceful methods has been introduced<sup>191</sup>. In addition to that the presiding judge may assign the family court experts to encourage parties for peace. In this sense, the family court experts may assume a mediator role between the parties<sup>192</sup>.

About this issue, in cooperation with the General Directorate of Family and Social Researches, a research with the subject of “*Family Court Practices in Turkey and Evaluation of the Practice*”. Conducted through qualitative data collection based interview techniques; the research was carried out with in total 114 people including judges, prosecutors, experts, plaintiffs, respondents and family members. The research put forward that the judges do not sufficiently use family court experts in *inviting to come to an agreement*, and the view is that using more of the experts’ support will ensure that the psychological states of the parties shall be observed and the ratio of concluding cases with peace will increase<sup>193</sup>.

Considering the *principle of the best benefit of the child*, article 12 of the UN Children’s Rights Convention states that every child with the capacity of reaching an opinion about the issues concern himself/herself has the right to express his/her opinions about the matters relate to himself/herself<sup>194</sup>. Thus, family court experts, in addition to their duties given above, prepare the child to the hearing, informs him/her and helps him/her to understand and answer the questions asked in the court. The most essential role that the family court expert assumes here is to prevent second

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<sup>189</sup>Kırımsoy ve diğerleri, (Sosyal Çalışma Görevlileri İçin), s.266.

<sup>190</sup>Bahattin Aras, “Aile Mahkemelerinde Yargılama Usulü”, **Ankara Barosu Dergisi**, Sayı:2, 2007, <http://www.ankarabarosusu.org.tr/siteler/ankarabarosusu/tekmakale/2007-2/19.pdf>, (03.02.2018), s.159.

<sup>191</sup>Bahattin Aras, “Aile Mahkemelerinde Tarafların Sulh Yoluyla Çözümüne Teşviki”, **Yargıtay Dergisi**, **Ankara**, Cilt:31, Sayı:3, 2005, <http://www.yargitaydergisi.gov.tr/dergiler/ym/temmuz2005.pdf#page=95>, (03.02.2018), s.305.

<sup>192</sup>Tanrıver, **Hukuk Uyuşmazlıklarında Arabuluculuk**, s.173.

<sup>193</sup>Filiz, **Türkiye’de Aile Mahkemeleri**, ss.250- 253.

<sup>194</sup>Aydos, s.41.

victimization of the child and to provide a socio-pedagogical insight into the process by providing written or verbal explanations about the child during the hearing<sup>195</sup>.

Saying that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration,” article 3 of the UN Children’s Rights Convention emphasizes the fact that this principle should be applied in all areas<sup>196</sup>. *Best interest of the child principle* implies that especially the parents should recognize that the child is an individual, his/her characteristics must be respected and his/her physical, social, mental and moral development should be enabled<sup>197</sup>.

Through the amendments made on 12th September 2010, in our country, *best interest of the child principle* is put in the Constitution. Thus article 41 of the Constitution with the title of “Protection of Family and Children’s Rights” states that “every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her best interests”. Thanks to the Juvenile Protection Law numbered 5395, all acts and proceedings related to the child shall prioritize the *best interest of the child*<sup>198</sup>. Judges make decision about the custody of the child based on *best interest of the child principle*. Also in child relevant matters, experts consider *best interest of the child principle* and thus make an impartial assessment of the family dynamics and child’s needs to provide semi-consultancy service to the judge<sup>199</sup>.

In family courts, especially about the disputes arising from child relevant matters, family court experts working in this area are needed to decrease the time of the proceeding whilst increasing the quality and to obtain information and understanding about the developmental phases of the child, his/her ability to express self and how the child is to be effected by the legal process<sup>200</sup>. To summarise, family court experts assume a role to get sound and healthy results and help eliminating

<sup>195</sup>Yenisey ve diğerleri, ss.165-167.

<sup>196</sup>İlknur Serdar, “Kişisel İlişki Kurma Hakkı”, **D.E.Ü. Hukuk Fakültesi Dergisi**, Cilt: 9, Özel Sayı, 2007, <http://hukuk.deu.edu.tr/dosyalar/dergiler/dergimiz9ozel/iserdar.pdf>, (03.02.2019), s.747.

<sup>197</sup>Serdar, **Kişisel İlişki Kurma Hakkı**, ss.744,745.

<sup>198</sup>Aydos, s.30.

<sup>199</sup>Philip M. Stahl, **Velayet Değerlendirmeleri Basitten Karmaşık Konulara**, (Ed. Gülsen Erden, İlkiz Altınoğlu Dikmeer ve Çiğdem Kudiaki), Türk Psikologlar Derneği Yayınları No:43, Ankara, 2014, ss.4,5.

<sup>200</sup>Aydos, s.49.

communication problems between the parties and the child via presenting the information they obtained through interviews about psychological, socio-economic status of the parties to the court<sup>201</sup>.

## 2.5. LEGAL STATUS OF THE FAMILY COURT EXPERTS

There are a couple of different views about the legal status of family court experts. One of them claims that family experts are at the status of a technical expert and thus the judge can ask for a report from them<sup>202</sup>. Supportingly article 67 of the Code of Criminal Procedure (CMK) mentions family court experts to present their reports to the court, to give one copy of the report to the parties while article 63 of CMK states that this report is at the quality of a technical expert report in criminal procedure. It is also given that the judge explains whether he/she based upon technical experts reports as discretionary proof in his/her justified/detailed ruling<sup>203</sup>.

Another view upon the debatable subject whether family court experts are technical experts or not points at article 275 of the Code of Civil Procedure saying that the judge resorts to technical expert in settling/ proving disputes requiring special and technical knowledge. On the other hand, family court experts are assigned by the court to search about the reasons of the dispute and gain an understanding about psychological states of the parties as well as implementing protection, education and social orders given by the judge<sup>204</sup>. Thus, whilst the reports prepared by the technical experts are about proving the causes of the dispute, family court experts share their opinions about the causes of the disputes this is why their reports cannot be considered as evidence<sup>205</sup>.

To conclude, considering the jobs carried out by family experts and technical experts are different from each other and family court experts are permanent staff, it is understood that as per the article 275 of the Code of Civil Procedure, family court experts are not regarded as technical experts, instead they hold an auxiliary position

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<sup>201</sup> Atamtürk, s.40.

<sup>202</sup> Çiftçi, **Aile Mahkemeleri Uzmanlarının Hukuki Niteliği**, s.175.

<sup>203</sup> Yenisey ve diğerleri, s.150.

<sup>204</sup> Özel ve Tatar, **Aile Mahkemeleriyle İlgili Değerlendirme**, s.59.

<sup>205</sup> Tercan, **Türk Aile Mahkemeleri**, s.32.



to the judge<sup>206</sup>. As is seen by the explanations given above, there is no clarity about either the legal status of the family court experts<sup>207</sup>.

## 2.6. WORKING PRINCIPLES OF THE FAMILY COURT EXPERTS

Family court experts commence their work on a case that is assigned to them by the judge, by giving an appointment to the relevant parties and inviting them for an interview. Before the interview date, the family court expert examines the case file, prepares an interview plan and prepares the room for interview. During the interview, family court expert gives information to the parties and to the child/ children about his/her role and responsibilities, explains the purpose of this meeting and then starts the interview. Throughout the interview, the family court expert helps identify the problems that the parties and the child/ children are faced with and settle these problems amicably, if no agreement has been reached, he/ she makes social investigation depending on the subject matter and prepares the report. When found necessary, he/she re-interviews with the parties to enlighten some vague or missing points. Before sitting to write the report, he/she consults and exchanges ideas with other professionals as social worker, psychologist or pedagogue. The process ends with family court expert's submitting the report to the court<sup>208</sup>.

It is important for family court experts to work by taking team work principles into consideration<sup>209</sup>. The number of experts working in a family court varies. While there are three experts in one court, the other may employ only two or one. It is considered that the reports prepared together by a psychologist, social worker and pedagogue with different professional knowledge are more comprehensive with more accurate and to the point observations<sup>210</sup>.

Family court experts follow an amicable way through interviewing with the parties and taking into consideration their psychological, political and cultural features to avoid causing any pressure upon them<sup>211</sup>. In this sense, about determining

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<sup>206</sup>Özel ve Tatar, *Aile Mahkemeleriyle İlgili Değerlendirme*, s.59.

<sup>207</sup>Çiftçi, *Aile Mahkemeleri Uzmanlarının Hukuki Niteliği*, s.176.

<sup>208</sup>Kırımsoy ve diğerleri, (Sosyal Çalışma Görevlileri İçin), s.267.

<sup>209</sup>Cılga, s.105.

<sup>210</sup>Aydos, s.118.

<sup>211</sup>Buz ve diğerleri, *Sosyal İnceleme Raporları*, s.9.

the function of the family court experts in divorce proceedings, the research with the name of “*Reasons for Divorce in Turkey*” (TBNA 2014) was carried out by the General Directorate for Family and Social Services, Ministry of Family and Social Policies, the subjects were asked whether the judge of the divorce proceeding oriented them to any family court expert or experts (psychologist, pedagogue and social worker). 15% of the subjects confirmed such an orientation. It was also shared that of the very limited number of individuals oriented to a family court expert service, %24 of the women and 20% of the men gave positive feedbacks about the family court experts they met and confirmed that the interviews helped them relax and take steps towards the solution of the problem<sup>212</sup>.

Parties and children have a chance to express their feelings, wishes and demands more comfortably and safely in the meetings made in the experts’ room instead of courtroom. Since the parties have the opportunity to look back on their attitudes and marriage unit process sometimes more than one interview may be necessary<sup>213</sup>.

When the judge asks for a social investigation report, based on the matter, upon interviewing with the parties, other family members and child/ children, the social experts may visit the school of the child and talk to the principle, psychological consultancy and guidance teacher and class teacher about the child<sup>214</sup>. The crucial element of the report is to preserve *the best interest of the child*<sup>215</sup>. Thus, in preparing the social investigation reports the experts should primarily dwell on the mental, emotional, physical and social developmental areas, characteristics, relation with the family and family environment, education and attending to school, relationship with the teacher and classmates and the conditions he/she is in<sup>216</sup>. In addition to that, determining the psychological and socio-economic conditions that the family members are in would help court get fully informed about the case<sup>217</sup>.

Considering his/her professional responsibilities, the family court expert is obliged to keep confidential the information he/she obtained through the interviews

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<sup>212</sup>Turgut, ss. 151, 152.

<sup>213</sup>Yüksel Doğan, **Aile Mahkemelerindeki Uzmanlar**, ss.417-419.

<sup>214</sup>Buz ve diğerleri, **Sosyal İnceleme Raporları**, s.10.

<sup>215</sup>Stahl, s.40.

<sup>216</sup>Yenisey ve diğerleri, ss.149,150.

<sup>217</sup>Atamtürk, s.40.

made within the framework of confidence, protection of private life and respect. When found necessary, upon consent from the relevant person or institution, this information may be revealed for scientific or professional purposes<sup>218</sup>.

Main purpose of the social investigation reports is to collect information<sup>219</sup> and the reports are of a very important document nature<sup>220</sup>. At the phase of collecting information, auxiliary sources are quite helpful. Friends of the parents, relatives, teachers, documents attached to the case file and observations are all auxiliary sources<sup>221</sup>. Along with this, to identify accurately what the auxiliary sources are and to make an impartial assessment about the custody, standardization of the form and content of the reports as well as the procedures to be used within the process, use of checklists and applying tests to both the parties and the children are the issues on the table. However national current practices do not have such a checklist or standardization<sup>222</sup>. Besides, the family court experts do not have such functions as applying tests, scales (surveys, cohesion scales and etc.) and etc.to parties to get information about the divorce case<sup>223</sup>. Thus, the family court experts cannot make use of tests, scales or inventories in making a decision about the custody and instead focus on the auxiliary source data as explained above and making home visits<sup>224</sup>.

In the research named “*Reviews of Family Court Experts on the Social Investigation Reports: Ankara Courthouse Example*” data was collected from 15 family court experts through interview techniques<sup>225</sup>. The results of the research put forward that the fact that physical needs of the experts are not met (not to have their own room, desk, computer etc.) adversely affects the quality of the interview they make and since there is not provided a safe environment, it is not possible to collect sufficient data from the parties, that the court practices vary from judge to judge prevents a common format to be adopted and all these challenge to reach a standard in the reports.

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<sup>218</sup>Topal, **Uzman Raporuyla Çözümlenecek Sorunlar**.

<sup>219</sup>Emrah Kırımsoy ve diğerleri(Ed.), **Hukukçular için Eğitim Kitabı**, Ankara, 2013, s.78.

<sup>220</sup>Buz ve diğerleri, **Sosyal İnceleme Raporları**, s.11.

<sup>221</sup>Stahl, ss.150,151.

<sup>222</sup>Aydos, s.120.

<sup>223</sup>Yenisey ve diğerleri, s.169.

<sup>224</sup>Aydos, ss.128-130.

<sup>225</sup>Buz ve diğerleri, **Sosyal İnceleme Raporları**, s.20.

The family court experts should base on their scientific and professional knowledge in communicating with the parties and stay within the framework of respect<sup>226</sup>. At this point, it is quite important for family court experts to have professional competency considering the role they assume for the decisions to be made about the lives of people. The professional knowledge and law knowledge help the expert to make a multifaceted evaluation. His/ her professional knowledge will help the family court expert to make an evaluation of the information to be obtained through the interviews about the family dynamics and relations whilst the law knowledge will help to understand legal rights of the persons of the case<sup>227</sup>.

The quality of the service that the family court experts provide are widely effected by experts' life and work satisfaction, education and qualifications<sup>228</sup>. In the research named "*Training Needs of the Family Court Experts*", interview technique was used to interview with 9 family court experts to carry out a qualitative study<sup>229</sup>. It was found out that the experts participated to the study found insufficient the number, length and content of the in service trainings they have been provided with so far and they are in need of further training to catch up with the developments in the field and improve their professional knowledge<sup>230</sup>. Thus, following the current trends in the profession, updating the knowledge and encouraging different training programs would be another effective method to increase the quality of reports<sup>231</sup>.

The core of the work carried out by the judges and family court experts in family court as a specialized court on examining the family disputes affecting all family members is constituted by collecting information and data, identifying problems, evaluating the life style of the family and settling the disputes in an amicable way<sup>232</sup>.

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<sup>226</sup>Cılga, s.124.

<sup>227</sup>Yenisay ve diğerleri, s.163.

<sup>228</sup>Filiz Bilge ve diğerleri, "Aile Mahkemesi Uzmanlarının Meslek Doyumları, Yaşam Doyumları ve İlişkilere Yönelik İnançlarının İncelenmesi", **Türk Psikolojik Danışma ve Rehberlik Dergisi**, Cilt:4, Sayı:32, 2009, <http://dergipark.gov.tr/download/article-file/199963>, (25.03.2018), s.22.

<sup>229</sup>Çiğdem Kılıç, "Aile Mahkemelerinde Görev Yapan Uzmanların Hizmet içi Eğitim İhtiyacı", **Ahi Evran Üniversitesi Kırşehir Eğitim Fakültesi Dergisi**, Cilt:14, Sayı: 2, 2013, <http://dergipark.gov.tr/download/article-file/15898>, (18.08.2018), s.276.

<sup>230</sup>Kılıç, **Uzmanların Eğitim İhtiyacı**, ss.287,288.

<sup>231</sup>Buz ve diğerleri, **Sosyal İnceleme Raporları**, s.27.

<sup>232</sup>Cılga, s.154.

## 2.7. REJECTING FAMILY COURT EXPERTS

Due to the disablement of hearing the case and rejection of the judge regulated in article 28 and 37 of the HUMK, family court experts can withdraw sharing any opinions or thoughts on the case or can be rejected by the parties of the case (Family Courts Law article 5/final). This article in a way aims to ensure family court experts are impartial just as judges<sup>233</sup>.

Application to reject a family court expert is made through presenting to the Family Court where the expert in question works two copies of the application which clearly grounds the reasons of the rejection including the evidences if any (HUMK m.34/II). Then the sitting judge examines the application and makes a decision. If the family court expert withdraws from handling the case on his/her own will, he/she has to present a petition explaining the situation to the chief clerk. In five days after this demand of the family court expert is notified to the parties, parties share their opinions. Last decision is made by the judge upon evaluating both the demand of the family court expert and opinions of the parties<sup>234</sup>.

As well as rejecting the family court expert it is also an issue to object to the opinions and reports of the family court experts. It is not clearly stated in the law whether it is possible to object to the reports prepared or opinions shared by the family court experts. However, since article 7 of the Family Courts Law states that for issues about which no provision is given, family law related procedures of Turkish Civil Code and the provisions of Code of Civil Procedure shall apply, thus it is possible to object to the opinions shared and reports prepared by the family court experts (HUMK art.283)<sup>235</sup>. In addition to that, the judge has the power to ask for additional report or inquiry for issues he/she deems need improvement<sup>236</sup>.

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<sup>233</sup>Temel, ss.33-35.

<sup>234</sup>Kadıoğlu, ss.44,45.

<sup>235</sup>Temel,s.36.

<sup>236</sup>Topal, *Uzman Raporlarıyla Çözümlenecek Sorunlar*.

## 2.8. PROBLEMS ENCOUNTERED IN FAMILY COURT PRACTICES

The fact that duties and responsibilities of the experts, working in the family courts which were established as specialised court, are not clearly defined and that they have insufficient working conditions is a big gap in terms of the functioning<sup>237</sup>. Not having job descriptions for family court experts create the vagueness about who the family court experts are and as a result of leaving the job descriptions of the family court experts at the discretion of the judges, there are different practices and some problems occur between the family court experts and other personnel<sup>238</sup>.

Literature search shows that some studies have been conducted on the level of burnout and job satisfaction of the family court experts. One of the researches carried out about the topic is a master's thesis with the name of *"Effect of the Problems Encountered in Family Court Practices to the Burnout Levels and Job Satisfaction of Family Court Experts"*. 131 family court experts participated to the study. In the descriptive study where the complete inventory method was used, the data was collected through four main data collection tools including a personal information form with socio- demographic information, a question paper including the problems encountered in family court practices, Maslach Burnout Inventory and Minnesota Job Satisfaction Scale<sup>239</sup>. The results of the research put forward that the technical issues, working environment related problems, infrastructural problems and the problem of not being seen as a part of the judicial system effect the family court experts' job satisfaction. The findings of the research show that burnout level of the family court experts is at moderate level while job satisfaction is close to neutral level.

To another study about the issue with the name of *"Examination of the Job Satisfaction, Life Satisfaction and Beliefs in Relationships of Family Court Experts"* 86 experts from 19 provinces participated and Job Satisfaction Scale, Life Satisfaction Scale and Relationship Belief Inventory were applied<sup>240</sup>. The research put forward that there is a significant, positive and high relation between the job and life satisfaction of the experts and that psychologists have more satisfaction than the

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<sup>237</sup> Cılga, s.129.

<sup>238</sup> Atamtürk, s.22.

<sup>239</sup> Atamtürk, ss.50,51.

<sup>240</sup> Bilge ve diğerleri, *Uzmanların Meslek Doyumları*, s.20.

pedagogues. The research recommends that the family court experts should be given in service training, regulations should be made about the job descriptions of the experts and the physical conditions should be improved.

Considering the studies and researches given above and the gaps mentioned before, I am of the opinion that such problems as not ensuring the security of the family court expert, insufficient physical conditions (family court expert's lack of own room, interview room, desk, computer etc.), in service trainings' content's not meeting the needs, not being able to organize home visits and not to use auxiliary sources because of technical incompetencies no matter how important the family court experts believe they are or judge's interventions are the common problems that have yet been solved.

## **2.9. DEVELOPMENTS IN FAMILY SUPPORT EXPERTISE**

In the study named "Access to Justice and Developing Practices for Victims and Disadvantaged Groups" within the 2015-2019 Strategic Plan of the Ministry of Justice, as compliant with the purpose, a victim- oriented approach was adopted and Department of Victims' Rights was established in this respect. The priority was given to preserve the best benefit of the child, taking care of the disabled and practices related to women<sup>241</sup>. Also, Judicial Interview Rooms were established within courthouses under the Department of Victims' Rights. Paragraph 1 of the article 4 of the relevant regulation about the judicial interview rooms expresses that "the officials holding the posts of psychologist, pedagogue and social worker within the body of Family, Juvenile and Juvenile Assize Courts" are assigned with the duties that are within the scope of this Regulation<sup>242</sup>.

After establishing Judicial Interview Rooms and assigning experts, Department of Victims' Right commenced the project of Judicial Support Directorate which aims to gather all social experts under one roof. The purpose of this regulation

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<sup>241</sup> Adalet Bakanlığı, "Stratejik Amaç 2: Adalet Erişim ile Mağdurlara ve Dezavantajlı Gruplara Yönelik Uygulamaları Geliştirmek", **Adalet Bakanlığı Stratejik Planı 2015-2019**, <http://www.adalet.gov.tr/bakanlik/stratejikplan/stratejik-plan-2015-2019.pdf>, (22.02.2019), s.86.

<sup>242</sup> Adalet Bakanlığı, "Adli Görüşme Odaları Yönetmeliği", <http://www.cigm.adalet.gov.tr/images/ago-yonetmelik.pdf>, (22.02.2019), s.4.

is to ensure necessary works have been carried out about victims' rights to provide the services to the crime victims.

In paragraph (ğ) of article 2 of the Draft Law on Victims' Rights prepared by the Ministry of Justice, it is stated that within the body of the Directorate and departments, psychologists, pedagogues and social workers will work as Judicial Support Officers. Directorate explains that article 15 of the Draft Law will deal with measures and services to be provided to the vulnerable groups, article 16 is about returning the child and personal contact with the child, article 17 is on the victims of sexual crimes and article 18 is about other services to the vulnerable groups. It is also stated that these services are to be provided to the victims by the judicial support officers (psychologists, pedagogues and social workers).

About returning of the child and personal contact with the child, Article 16 of the Draft Law says that in case the parties do not obey with this obligation, it is possible to resort to the judicial support and victim services directorate in the child's location and then a plan will be prepared to show the implementation of the order with the participation of parties and lawyers. Prioritizing the best interest of the child, the plan will dwell on the rights, obligations and responsibilities of the parties and the sanctions to be imposed in case of disobedience. Upon approved by the judge, the plan is notified to the party who does not let the other party see the child. If disobedience continues, during returning the child, a social worker, pedagogue, psychologist or child development specialist, if not, an educator is present.

Established with the purpose of informing crime victims about the process and providing psycho-social support to the vulnerable crime victims, Judicial Support and Victims' Services Directorates (ADM) were developed in 7 pilot provinces and commenced first in İzmir Justice Palace. Pilots are İzmir courthouse, İstanbul Anadolu, Samsun, Adana, Eskişehir, Malatya and Rize Courthouse and the Directorates started to work in İzmir<sup>243</sup>.

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<sup>243</sup> Adalet Bakanlığı Ceza İşleri Genel Müdürlüğü Mağdur Hakları Daire Başkanlığı, “Ceza Adalet Sisteminde Mağdur Haklarının Güçlendirilmesi (CeMRe) Eşleştirme Projesi Kapsamında İzmir Adli Destek ve Mağdur Hizmetleri Müdürlüğü Ziyareti”, **Duyuru Arşivi**, <http://www.magdur.adalet.gov.tr/ceza-adalet-sisteminde-magdur-haklarinin-guclendirilmesi-cemre-eslestirme-projesi-kapsaminda-izmir-adli-destek-ve-magdur-hizmetleri-mudurlugu-ziyareti-01743>, (28.04.2019).



## CHAPTER THREE

### FOREIGN LAW SYSTEMS

#### 3.1. EUROPEAN UNION (EU)

##### 3.1.1. Legal Remedy

In the European Union, the harmonisation of law method is primarily used to reach economic targets. The Treaty establishing the European Union did not mention the harmonisation of private law and Family Law in this sense. Even though the primary issue of the Union is to ensure economic and monetary union, increasing social protection level, improving the conditions and quality of life and the cooperation between member states are also among the duties of the European Union<sup>244</sup>. This is how the Union respects to the variety of cultures and customs of the folks and national identities of the Member States, organizations of national, regional and public authorities to ensure protection and improvement of these common values<sup>245</sup>.

Later on, the need to introduce uniform rules for the solution of such disputes as recognizing foreign judicial decisions, adoption, marriage and custody emerged. So, on 4th November 1950 the framework of “European Convention on the Protection of Human Rights and Fundamental Freedoms”, which is known as the constitution of European Union on fundamental rights, and the framework of European Family Law were drawn. The convention includes provisions on respect to the family life and private life, getting married and establishing a family. The convention was signed and ratified by all member states<sup>246</sup>. In addition to that, in other areas which are not regarded as family law such as public aid, employment, social security and tax, some regulations were made on the grounds that they are also about family life. Despite of the contrariness between the legal and political scopes

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<sup>244</sup>Canan Yılmaz, “Avrupa Birliği’nde Aile Hukuku Uyumlaştırması”, **MÜHF Hukuk Araştırmaları Dergisi**, Cilt:14, Sayı:1-2, 2008, <http://dergipark.gov.tr/download/issue-file/554>, (17.09.2018), s.89.

<sup>245</sup>Delegation of the European Union to Turkey, “Charter Of Fundamental Rights Of The European Union”, <https://www.avrupa.info.tr/en/charter-fundamental-rights-european-union-708>, (12.09.2018).

<sup>246</sup>Yılmaz, **AB Aile Hukuku Uyumlaştırma**, ss.91,92.

of the legal reform, it is seen that in the last two decades the national differences between the family law systems have been gradually decreased<sup>247</sup>.

On 1st September 2001 a group of faculty member full independently and scientifically establish the “Commission on European Family Law (CEFL)”<sup>248</sup>. The Commission started its works under the chairmanship of Prof. Katharina Boele-Woelki<sup>249</sup>. Main target of CEFL is to create the most ideal “European Family Law Principles” to have harmonisation in family law. Here the purpose is to ensure equal opportunities and to find a common ground with the citizens of each country by preferring the most suitable rules of the most convenient country, ensuring the integration of all member states on European private law and family law and preserving right to free movement in respect for divorce and its consequences<sup>250</sup>. Commission on European Family Law is constituted by two groups as Organization Committee and Experts Group. Organization Committee creates Specialization Groups to work on family law and comparative law of the non-member states such as Switzerland, Russia and Norway and set the basic criteria for harmonisation project<sup>251</sup>.

Along with these developments, considering different material law norms of the member states, it can be said that in family law there exists more or less a harmonisation and a common ground is established and principles were set for such issues as divorce, alimony to be paid to the ex-spouse and child, secret affairs, parental responsibilities and marital property<sup>252</sup>. Basic principles of the EU

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<sup>247</sup>Mary Ann Glendon, **The Transformation of Family Law: State, Law, and Family in the United States and Western Europe**, The University of Chicago Published, United States of America, 1989, p.1.

<sup>248</sup>Walter Pintens, “Europeanisation of Family Law”, **Perspectives for the Unification and Harmonisation of Family Law in Europe**, (Ed. Katharina Boele-Woelki), Intersentia, Antwerp-Oxford-New York, 2003, p.29

<sup>249</sup>Zehra Özkan, “Avrupa Özel Hukukunun Uyumlaştırılması”, **Ankara Üniversitesi. Hukuk Fakültesi Dergisi**, Cilt:66, Sayı:1, 2017, <http://dergiler.ankara.edu.tr/dergiler/38/2204/22870.pdf>, (17.09.2018), s.188.

<sup>250</sup>Şükran Şıpka, “Avrupa Birliği Aile Hukuku ve CEFL(Avrupa Birliği Aile Hukuku Komisyonu, Prensipleri, Amaçları ve Yapılan Çalışmalar)”, **İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi**, Sayı:10, 2006, <https://www.ticaret.edu.tr/uploads/Kutuphane/dergi/s10/M00152.pdf>, (14.09.2018), s.164.

<sup>251</sup>Katharina Boele-Woelki, “The principles of European family law: its aims and prospects”, **Utrecht Law Review**, Volume:1, Number:2, 2005, <http://www.utrechtlawreview.org/>, (17.09.2018), p.163.

<sup>252</sup>Yılmaz, **AB Aile Hukuku Uyumlaştırma**, s.113.

provisions effecting family law are legal certainty, predictability, to protect autonomy of the parties and to establish mutual trust between the member states<sup>253</sup>.

In some cases, Germany, Austria, France, Netherlands, Greece, Italy, Portuguese and Spain apply other states' divorce laws. Considering these differences between the countries, EU recommended through a draft regulation the implementation of laws applicable to all relevant countries. The purpose is to ensure that couples are managed in compliance with the pre-determined laws in such issues as divorce and relevant financial issues<sup>254</sup>. In addition to that, some other regulations were also made to bring solutions to such questions as in which EU country should the lawsuit for divorce or separation of international couples be filed, which state's rules should be applied and which law should be applied about alimony requirements<sup>255</sup>.

If a couple do not decide on which national law to be applied for their divorce, the competent judge determines which national law shall the couple apply to for divorce. The regulation is applied in 16 EU countries. These countries are Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Latvia, Luxemburg, Malta, Portuguese, Romania, Slovenia and Spain. As of 2018 February, in Estonia too. The other EU countries continue to apply their own rules for divorce<sup>256</sup>.

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<sup>253</sup>Family Law Bar Association (FLBA), International Academy of Family Lawyers (IAFL) and Resolution, "Brexit and Family Law-Resolution", 2017, [http://www.resolution.org.uk/site\\_content\\_files/files/brexit\\_and\\_family\\_law.pdf](http://www.resolution.org.uk/site_content_files/files/brexit_and_family_law.pdf), (12.09.2018), p.9.

<sup>254</sup>David Hodson et al., "European Family Law: Faster Divorce and Foreign Law", **Centre for Social Justice**, London, 2009, <https://www.centreforsocialjustice.org.uk/library/european-family-law-faster-divorce-foreign-law>, (27.12.2018), p.15.

<sup>255</sup>Pınar Çağlayan Aksoy, "Avrupa Birliği'nde Aile ve Miras Hukuku Alanlarında Neler Oluyor?", **II. Avrupa Birliği Hukukunda Güncel Gelişmeler Konferansı –Bildiri Kitapçığı**, 10 Mayıs 2018 / ATAUM, <http://ataum.ankara.edu.tr/wp-content/uploads/sites/360/2018/04/II-AB-Hukukunda-Guncel-Gelismeler-Konferansi-Bildiri-Kitapciği.pdf>, (12.09.2018), s.17.

<sup>256</sup>European Commission, "Rules for Divorce for International Couples", **Divorce and Separation**, [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/divorce-and-separation\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/divorce-and-separation_en), (10.09.2018).

### 3.1.2. Mediation

Along with the developments in family law, in many countries' judicial systems various solutions have emerged to decrease work load and to enable parties to reach the best solution. As a result of this, Alternative Dispute Resolution Methods were practiced first in American and then British law systems. Later on it was tried in Continental European Law Systems and finally had its place in EU regulations<sup>257</sup>.

In 1990s many countries especially England and Franca adopted mediation method and in 2002 the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Mediation. Influenced by these developments, EU prepared the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (Green Paper)<sup>258</sup>. Green Paper has served to introduce the facilities brought by the Dispute Resolution Methods to the society and show the relevant works carried out by member states and European Union<sup>259</sup>. Also, the publication of the Green Book helps put an end to the ongoing discussions in Member States and provide the best environment to develop alternative dispute resolution in the international platform. Commission also made effort to encourage the use of alternative dispute resolution methods in such issues as proceedings on family relationships, marriage and parental responsibility and to ensure that the provisions and judgments are recognized and implemented in these areas through the Bylaw numbered 2201/2003 (EC) it published on 27th November 2003<sup>260</sup>.

In 2004, Ethical Behaviour Rules for Mediators was drawn up to ensure smooth and accurate implementation of mediation in EU countries and to increase quality and to ensure that the system can control itself. Then European Parliament

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<sup>257</sup>Hikmet Bilgin, "Kıta Avrupası Hukuk Sistemlerinde Arabuluculuk", **II Hukuk Gündemi Dergisi**, Makaleler, Sayı:2, 2009, <http://www.ankarabarusu.org.tr/siteler/ankarabarusu/hgdmakale/2009-2/1.pdf>, (26.12.2017), ss.9,10.

<sup>258</sup>Yeşilirmak ve Kekeç, s.27.

<sup>259</sup>Mustafa Özbek, "Avrupa Birliğinde Alternatif Uyuşmazlık Çözümü", **Türkiye Barolar Birliği Dergisi**, Sayı:68, 2007, [http://portal.ubap.org.tr/App\\_Themes/Dergi/2007-68-291.pdf](http://portal.ubap.org.tr/App_Themes/Dergi/2007-68-291.pdf), (27.12.2017), ss.265, 266.

<sup>260</sup>European Commission, "The European Union is very interested in alternative dispute resolution", Alternative dispute resolution - Community law [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm), (30.12.2017).

and Council adopted Directive on Mediation (2008/52/EC) which sets the principles for mediation in civil matters in 2008<sup>261</sup>.

Directive on Mediation is applicable in all EU countries and aims to encourage member states to mediation. Directive is about the mediation in civil and commercial matters. With all the advantages it offers, mediation helps secure legal rights of citizens effectively by helping to ease solutions of disputes and prevent concerns, time and costs for court based cases<sup>262</sup>.

Mediation can be especially helpful in cross border family disputes and child abduction cases. Through mediation, a constructive environment can be established for discussion and fair relations may be built between the parties considering the best interest of the child<sup>263</sup>. When the parents disagree upon the custody of the child in case of separation or divorce, first a mediator participates into the process to help parties reach an agreement. If the parents still cannot reach an agreement they can choose to go to a court. Assessing the situation, the court may decide on joint or single custody<sup>264</sup>.

### 3.1.3. Experts

To carry out the works in the family law and to reach right decisions, family court experts are needed to provide insight. Experts, when consulted in the context of law, can help judges to give more effective decisions by providing clear and verified answers to specific and complicated problems. Even though experts and their reports are conventionally used as evidence in all codes of European Law, it plays a role in identifying realities beyond expert witness role. Thus, as per the law and in all European countries, though expert decisions are not binding upon judges, their

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<sup>261</sup>Bilgin, *Kıta Avrupası'nda Arabuluculuk*, s.10.

<sup>262</sup>European Justice, "EU Overview on Mediation", **Mediation**, [https://e-justice.europa.eu/content\\_eu\\_overview\\_on\\_mediation-63-en.do](https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do), (10.09.2018).

<sup>263</sup>European Justice, "Find a Mediator", [https://e-justice.europa.eu/content\\_find\\_a\\_mediator-117-en.do?clang=en](https://e-justice.europa.eu/content_find_a_mediator-117-en.do?clang=en), (14.09.2018).

<sup>264</sup>European Justice, "Who Decides on The Custody and Visiting rights?", **Parental Responsibility**, [https://e-justice.europa.eu/content\\_parental\\_responsibility-302-en.do?clang=en](https://e-justice.europa.eu/content_parental_responsibility-302-en.do?clang=en), (14.09.2018).

opinions have a trend to have a determinant influence upon the case results and the quality of judgments.<sup>265</sup>

European Commission for the Efficiency of Justice (CEPEJ) divided experts into three groups in 28 EU Member States. First is the law experts and supported by judges only in 6 member states of the 28 (Germany, Estonia, Greece, Malta, Holland and Poland) to work in specific law related problems and judicial areas. Second category is the technical experts who provide the technical knowledge to the courts in solving scientific and factual issues in 26 member states of 28. Lastly there are the expert witnesses assigned by the courts in 20 states out of 28 who use their expertise to support the arguments presented by the parties. In UK, expert witness and technical experts work only in England and Wales whilst in Northern Ireland there work only expert witnesses. While most of the states employ both technical experts and expert witnesses, Northern Ireland only have expert witnesses and the other six countries (France, Luxembourg Portuguese, Slovenia, Bulgaria and Croatia) only have technical experts<sup>266</sup>.

For instance, if there is a dispute between parties upon the parenting responsibility in Spain, both parties may apply to a judge to solve the problem. The court hears both the parties and the child in any case if older than 16, but if younger they can still ask for an expert report and hear the child as long as he/she is mature enough<sup>267</sup>.

In various law systems there are two main status category for experts. In many systems the experts are considered as the technical eyes and brain of the court and as the deputies of the courts they have the same responsibilities and privileges as the judges. This is the reason why only judges are authorized to appoint family court experts in such countries. In other systems which can be described as “Anglo-Saxon” systems (applicable for 11 countries and England), when it is judged to resort to an expert report, the court invites each party to assign their own. The judge only steps in when parties do not do that. Independency, impartiality and ethics of the

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<sup>265</sup> Alain Nuée, “Civil-law expert reports in the EU”: national rules and practices”, **European Parliament Policy Departments**, Brussels, May 2015, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL\\_IDA\(2015\)519211\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA(2015)519211_EN.pdf), (14.09.2018), pp.8-10.

<sup>266</sup> Nuée, **Civil-law Expert Reports**, p.11.

<sup>267</sup> Katharina Boele-Woelki et al.(Ed.), **European Family Law in Action, Volume III: Parental Responsibility**, Intersentia, England, Antwerp-Oxford, 2005, p.522.

expert witnesses assigned by the parties are guaranteed through some legal obligations. On the other hand, technical experts are assigned by the courts. There is cooperation between the judge and these technical experts in criminal issues however technical experts do not have a specific position<sup>268</sup>.

## **3.2. ENGLAND**

### **3.2.1. Legal Remedy**

In England and Wales, Family Court and Family Unit deals with any kind of legal dispute and deterioration of relationship including children. Parents disputes on raising child, marital issues, local administration intervention to protect the children, financial support for children after divorce or separation, some aspects of domestic violence and adoption are the issues dealt with<sup>269</sup>.

Previously in England, Civil Courts of Peace were the most frequently applied civil and criminal courts. A civil court of peace would serve as a family court for family issues<sup>270</sup>. Main reforms about divorce were made through Family Law Act enacted in 1996. On 22 April 2014 Children and Families Act was adopted. As of the adoption of this Law, family dispute issues such as divorce or where the children will live after separation and resolving such disputes including children have been heard in the Single Family Court and the High Court.

In 2014, about 164.000 children, 45.000 family lawsuits were filed. Family court can question who has what right after the marriage or civil partnership ends. More complicated family cases may result in Family Unit of High Court. Also, some international kidnapping cases, forced marriage and female mutilation cases are heard in this court. There is no jury in family courts. Appeal application against the judgement mostly refer to a higher judge than the family court judge<sup>271</sup>.

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<sup>268</sup>Nuée, **Civil-law Expert Reports**, pp.13,14.

<sup>269</sup>Full Fact, “The legal system, explained: the Family Court”, **Family Law**, <https://fullfact.org/law/family-court-england/>, (31.12.2017).

<sup>270</sup>Filiz, **Aile Mahkemeleri Uygulamaları**, s.26.

<sup>271</sup>The Family Court, <https://fullfact.org/law/family-court-england/>, (31.12.2017).

Courts also assume the duty of introducing some limitations or reporting individual cases to protect children's and families' welfare. Family courts make such important decisions as to affect the safety and future lives of children and families<sup>272</sup>.

### 3.2.2. Mediation

EU Member States, England and Wales suggest to use alternative mediation methods instead of appearing in court to solve a dispute. England and Wales justice practitioners are aware of the advantages of mediation and determined to introduce and use mediation to solve disputes, when appropriate, as an alternative to going to the court. There are two types of mediation as Civil Mediation and Family Mediation. Civil mediation cannot be regulated through Law and is not a prerequisite for court proceedings. Practice and procedure to be followed in civil departments of Appeal Court, High Court and County Courts are managed by civil procedure rules (CPR)<sup>273</sup>.

Main purpose of CPR is to lead courts to encourage parties to use an alternative dispute resolution procedure for themselves. Mediation is totally voluntary but also put forward the factors to be considered in setting the law procedures, costs to be met and so on. On the other hand, family mediation consists of a series of membership organization or accredited bodies that the mediators work under. These bodies have united to create Family Mediation Council (FMC) to harmonise family mediation standards. Another function of FMC is to represent founder member organizations and family mediation practitioners in the meetings with the government. Civil Procedure Rules and Family Procedure Rules recommend the use of alternative dispute resolutions<sup>274</sup>.

The first family mediation service started as a pilot project carried out by a small interdisciplinary group consisting of family lawyers and social workers for

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<sup>272</sup>Family Law Courts, <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/family-law-courts/>, (12.01.2018).

<sup>273</sup>European Justice, "Mediation in Member States – England and Wales", **Mediation**, [https://e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-ew-en.do?member=1](https://e-justice.europa.eu/content_mediation_in_member_states-64-ew-en.do?member=1), (01.01.2018).

<sup>274</sup>European Justice, "Mediation in Member States – England and Wales", **Mediation**, [https://e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-ew-en.do?member=1](https://e-justice.europa.eu/content_mediation_in_member_states-64-ew-en.do?member=1), (01.01.2018).



children related issues in Bristol. Then the mediation service between courts become widespread in the country in parallel to the conciliation programs for disputes over the children<sup>275</sup>.

Civil Procedure Rules find it important for parties to pay attention to the Dispute Resolution Methods and encourage them accordingly<sup>276</sup>. As per the legal regulations, as of April 2011 everybody who thinks to apply to a court has been obliged to participate to a Mediation Information and Assessment Meeting (MIAM). To support this, the Government includes mediation and family mediation in the scope of legal aid. If one of the parties is entitled for legal aid, initial MIAM cost is met for both parties<sup>277</sup>. Courts cannot force reluctant parties to mediation. England adopts quasi compulsory ADR and continues proceedings<sup>278</sup>.

In England and Wales mediation is not regarded suitable for issues as birth, harmony of child with parents, elderly care and legacy. In addition to that disputes containing domestic violence allegation are not considered suitable for mediation as well.<sup>279</sup>

Along with the recent changes, the government prefers family mediation to resolve family disputes especially including children. Family mediation helps resolve disputes and parties reach agreement in all issues regarding divorce, civil partnership, dissolution of civil partnership or separation<sup>280</sup>.

### 3.2.3. Experts

Experts have a clear primary responsibility to provide impartial opinion to the courts. Main duty of the court in making final judgement is to protect the best benefit of the child. Experts are assigned by the courts to provide evidence to be used in family proceeding and to assist judges making decisions on the fields of their own

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<sup>275</sup>Virgina Dunn and Veronical Lachkovic, **Family Law in Practice**, 11th Edition, Oxford University Press, London, 2015, p.281.

<sup>276</sup>Hanks, **Mandatory Mediation**, p.939.

<sup>277</sup>European Justice, “Mediation in Member States – England and Wales”, **Mediation**, [https://e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-ew-en.do?member=1](https://e-justice.europa.eu/content_mediation_in_member_states-64-ew-en.do?member=1), (01.01.2018).

<sup>278</sup>Hanks, **Mandatory Mediation**, pp.939, 940.

<sup>279</sup>Marian Roberts, **Mediation in Family Disputes**, 4th Edition, Routledge Published, London, 2016, p.66.

<sup>280</sup>National Family Mediation, “About Family Mediation”, **Family Mediation**, <http://www.nfm.org.uk/family-mediation/about-family-mediation>, (01.01.2018).

expertise. Experts work within the framework of Family Procedure Rules (FPR). These Rules were included in the legislation on Child and Families Law enacted in April 2014<sup>281</sup>. For experts, specific criteria have been developed including professional registry requirement, practice, knowledge level and continuity of professional development. This amendment gives an opportunity to explain about the contributions that using experts in family law made to the courts<sup>282</sup>.

In England on 1 April 2001, Children and Family Court Advisory and Support Services (CAFCASS) were established to protect the welfare of the children included in family justice system and to support families and children. Cafcass is supported by the Ministry of Justice and a public institution out of department<sup>283</sup>.

Social workers working for Cafcass are assigned as Family Court Advisor by the Family Court about family proceedings and inform courts about with whom the child lives or spends time in civil cases. In public cases when the local authorities have serious concerns about the welfare and safety of the child, social service experts work for care and adoption of the child cases. In such cases a Cafcass social expert is assigned to work as the Protector of the Children. Their duty is to ensure that the decision to be made is the best one possible for the child by supervising the plan of the local authority<sup>284</sup>. As is understood, social workers in Cafcass in England provide report to the court for the cases appointed by the court and especially engaged with representing the child for legal proceedings such as custody of the child after divorce<sup>285</sup>.

When the report of the Family Court Advisor is finalized, it is sent to the court and unless otherwise is stated, a copy of the report is shared with all the parties. The parties may question the recommendations in the report and may object to any

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<sup>281</sup>Sarah J. Brown et al., “The use of experts in family law understanding the processes for commissioning experts and the contribution they make to the family court”, **Ministry of Justice Analytical Series** **2015**, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/486770/use-experts-family-law.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486770/use-experts-family-law.pdf), (03.02.2018), p.5.

<sup>282</sup>Brown et al., **The Use of Experts**, pp.7,8.

<sup>283</sup>Cafcass, “About Cafcass”, <https://www.cafcass.gov.uk/about-cafcass/>, (01.07.2018).

<sup>284</sup>Cafcass, “Annual report and accounts 2017-18”, **Annual Reports**, <https://www.cafcass.gov.uk/about-cafcass/reports-and-strategies/annual-reports/>, (01.02.2019), p.9.

<sup>285</sup>Mark Doel, **The Social Work the Basics**, First Edition, Routledge Published, USA and Canada, 2012, p.71.

actual fault in the court. The relevant Family Court Advisor may also be demanded to attend the trial and subject to cross questioning<sup>286</sup>.

### 3.3. GERMANY

#### 3.3.1. Legal Remedy

Family courts in Germany are different than the ones in our country. Family courts in Germany were regulated as per article 23/b of The Law on the Organization of German Courts (Gerichtsverfassungsgesetz). It was adopted in 1976 with the Reform Law on Family and Marriage and enforced in 1977. So, Family Courts were established as a special unit in the body of Peace Courts as per article 23/b of this Law. Article 23/c of the same law states that for the family disputes which require to be heard by more than one civil court of peace in the same state, state government can appoint a specific civil court of peace for such issues<sup>287</sup>.

These courts hear certain disputes as divorce, custody and alimony cases while the claims for damages between spouses to divorce are adjudicated by general civil courts. Court rulings can be appealed against High State Court or Federal Courts. While the titles of plaintiff and defendant are used in other courts, in family courts the title of parties is used. In some states in Germany it is compulsory to apply to the mediation unit before filing a suit in family case while in some others it is optional. Oral statements of parties which constitutes the base in mediation are not considered as evidence in family courts.<sup>288</sup>

In family courts the hearings are closed in compliance with the privacy of the family. Participation to the trial as audience is subject to an application beforehand and the consent of the parties. Court rooms of family courts are designed as to keep the judge and parties sit on more or less the same height tables<sup>289</sup>.

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<sup>286</sup>Child Law Advice, “The Role of Cafcass”, <https://childlawadvice.org.uk/information-pages/the-role-of-cafcass/>, Information, (01.07.2018).

<sup>287</sup>Baktır, s.31.

<sup>288</sup>Demirtaş, **İç Denetim Başkanlığı**, s.13.

<sup>289</sup>Raymond Youngs, **English, French & German Comparative Law**, Third Edition, 2014, Routledge Published, New york, p.13.

Germany is the signatory state of II. Brussel Regulation, European Law on Keeping and Hague International Child Abduction Convention. Germany has signed most of the international conventions primarily Brussels I Regulation<sup>290</sup>.

Family courts in Germany do not only hear family issues but also the cases which are heard in juvenile courts in Turkey<sup>291</sup>. When a child under 14 commits a crime, family courts give orders and the implementation of these orders are supported by non-governmental organizations<sup>292</sup>.

In German Law, there are no written rules for couples living together. German Federal High Court of Justice has accepted one claim for damage in an exceptional case. This has changed with a new decision made by Federal High Judiciary High Court dated 9th July 2008 accepted that the compensation can be claimed due to unjust enrichment or disappointment in contracts<sup>293</sup>.

### 3.3.2. Mediation

In Germany, if there is no official legal requirement saying that a specific dispute shall be handled in court, mediation is always allowed. Mediation is most frequently applied in family law, inheritance law and commercial law. Various organizations can provide mediation services in Germany<sup>294</sup>.

An overview upon the increasing number of organizations providing mediation services in private sector in Germany, the tendency to be organized in various areas can be seen. Mediation is mostly applied in such areas as victim offender mediation, family mediation, community mediation, school mediation, environmental mediation, commercial mediation and workplace mediation<sup>295</sup>.

There is not a federal level law applicable to solve legal disputes out of court. However, article 15 a of the Validity and Implementation of the German Civil

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<sup>290</sup>Daniela Kreidler-Pleus and Andrea Fromherz, “Germany”, **Family Law Jurisdictional Comparisons**, (Ed. James Stewart), Sweet&Maxwell Publishing, London, First Edition, 2011, p.139.

<sup>291</sup>Filiz, **Aile Mahkemeleri Uygulamaları**, s.29.

<sup>292</sup>Demirtaş, **İç Denetim Başkanlığı**, s.14.

<sup>293</sup>Kreidler-Pleus and Fromherz, p.141.

<sup>294</sup>European Justice, “Mediation in Member States– Germany”, **Mediation**, [https://e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-de-en.do?member=1](https://e-justice.europa.eu/content_mediation_in_member_states-64-de-en.do?member=1), (05.07.2018).

<sup>295</sup>Nadja Alexander et al., “Mediation in Germany: The long and Winding Road”, Singapore Management University, 2003, [https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?referer=https://scholar.google.com.tr/&httpsredir=1&article=3852&context=sol\\_research](https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?referer=https://scholar.google.com.tr/&httpsredir=1&article=3852&context=sol_research), (12.09.2018), p.181.

Procedure Law (Gesetz, betreffend die Einführung der Zivilprozessordnung, EGZPO) adopted on 15th December 1999 and enforced on 1st January 2000 is about solving disputes firstly through mediation<sup>296</sup>.

According to the law, mediation is a structured process where the liable parties voluntarily and autonomously seek for resolving their disputes with the help of one or more mediator. Mediators are independent and impartial, not authorized to make decisions but lead the parties on mediation process. Mediators should have the required knowledge and experience (through appropriate training and courses) to guide parties reliably. German laws define the procedures and general knowledge and competencies that an appropriate training should provide. Everyone who meets the given criteria can mediate, there is no age limit. Mediation is not free of charge, the cost is subject to an agreement between the mediator and the parties. There is no regulation regulating the mediation costs<sup>297</sup>.

Family mediation in Germany emerged in the South of Germany in mid-1980s and not widely known in the North side till 1990s; only then thanks to the developments it became widespread.<sup>298</sup> Family mediation is about solving family disputes between married, unmarried, divorced or separated couples considering the interest of all parties. Mediators aim to develop a joint parental responsibility concept for mother and father after divorce or separation. Mediation helps parties see and understand about their disputes by bringing the aim of finding a solution to the unsolved disputes at the phase of divorce<sup>299</sup>.

In the 16th German Family Courts Congress in 2008, it was decided that an obligation should be introduced for families at divorce to at least be informed about mediation process. And a legal regulation made it compulsory for mediators to provide information service for free. Also as per the Law on Non-Contentious Proceedings adopted in 2008 and enacted on 1 September 2009, for regulating personal contact matter which the parties cannot freely dispose, the parties have been

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<sup>296</sup>Tuğsavul Taşpolat, s.27.

<sup>297</sup>European Justice, “Mediation in Member States – Germany”, Mediation, [https://e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-de-en.do?member=1](https://e-justice.europa.eu/content_mediation_in_member_states-64-de-en.do?member=1), (05.07.2018).

<sup>298</sup>Miquel Martín Casals, “Divorce Mediation in Europe: An Introductory Outline”, **Electronic Journal of Comparative Law**, Volume:9.2 , July, 2005, <https://www.ejcl.org/92/art92-2.doc>, (14.09.2018), p.14.

<sup>299</sup>European Commission, “Alternative Dispute Resolution – Germany”, **European Judicial Network**, [http://ec.europa.eu/civiljustice/adr/adr\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ger_en.htm), (05.07.2018).

given the opportunity to use mediation and other alternative resolution methods to come to an agreement provided that the court approves<sup>300</sup>.

### 3.3.3. Experts

In Germany, social experts do not work in family courts. When the courts need social expert report, they resort to the help of Youth Unit (Jugendamt). Youth Unit works under municipality and is an administrative technical unit enforcing official guardianship assignments related to social service. Psychologists, social workers and social pedagogues know about the families residing in their own responsibility area and intervene to the problems occur between individuals. Experts working under the title of “Jugendsgerichteshelfer/Youth Court Assistant” are not technical experts but serve to assist to the child and seek his/her best benefit within public and administrative duties. The reports prepared by the social experts are used as evidence in the proceedings<sup>301</sup>.

A copy of the application about the joint child prepared by the spouses who filed for divorce is sent to the Youth Unit to provide insight. Youth Unit experts present their opinions in a written form or verbally. In Germany, if the families or the child does not want the social expert they are working with, the expert is replaced considering the best interest of the child<sup>302</sup>.

## 3.4. SWITZERLAND

### 3.4.1. Legal Remedy

The Swiss Civil Code adopted in 1907 is the main source for family law and is based on marriage unit and the issues of the parties about their mutual child. Throughout the years as the gap between social reality and the law widens, a

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<sup>300</sup>Tolga Akkaya, “Boşanma Davasında Alınabilecek Geçici Hukuki Korumalar veya Hakim’in Müdahalesi Yoluyla Çocuğun Korunması Kapsamında Zorunlu Arabuluculuk ve Boşanma Süreci (Aile) Danışmanlığı”, **Ankara Barosu Dergisi**, Sayı:4, 2014, <http://www.ankarabarusu.org.tr/siteler/ankarabarusu/tekmakale/2014-4/1.pdf>, (27.12.2017), ss.36,37.

<sup>301</sup>Demirtaş, **İç Denetim Başkanlığı**, s.13.

<sup>302</sup>Youngs, p.13.

comprehensive family law reform was made in 1956 on the Civil Code to help it catch up with the changes. Divided into parts, the reforms were enacted in 1973 and 1978 in two phases. An amendment only about the effects of the marriage in Civil Code was adopted in 1984 by the Parliament and enforced on January, 1st, 1988. Revision on family law was followed by a revision on the provisions on marriage and divorce and on January, 1st, 2000 “New Divorce Law” was enforced<sup>303</sup>.

Swiss Civil Code was used as a resource for Turkish Civil Code. Swiss Procedure Law was enforced on January, 1st, 2011 to eliminate problems arising from different practices of each canton. As regards to the comparative law, between Turkish Civil Procedure Code enacted in the same year and Swiss Civil Procedure Code has practical differences as well as different approaches on compulsory mediation<sup>304</sup>.

Switzerland is a confederation of 26 cantons with its legislative authority divided between the cantons. In Switzerland, Federal Law manages family and divorce issues. While there is a family court in some cantons of Switzerland, in others where there is no individual family court, peace courts deal with family court issues. In order to file a divorce lawsuit, the couples must remain separate for a period of time and a certain amount of fee has to be paid. Two different templates are available for both divorce cases and mediation courts (contentious and uncontentious divorce), applicants can make individual applications or file the documents in the website to commence a suit. There are centres in Switzerland to provide legal consultancy services to the couples who want to divorce for free<sup>305</sup>.

As per the Swiss Procedural Law, first instance proceeding has three different types as general proceeding (ordentliche), simple proceeding and serial proceeding. There are also private provisions on divorce, custody and child’s rights for family law disputes<sup>306</sup>.

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<sup>303</sup>Marie-Eve Zufferey and Eric Widmer , “Family Policies: Switzerland (2014)”, **Policy-Family&Children**, <https://www.perfar.eu/policy/family-children/switzerland>, (22.04.2018).

<sup>304</sup>Abdurrahman Kavasoglu ve Ömer Çon, “İsviçre Usul Hukukuna Genel Bir Bakış”, **S.D.Ü. Hukuk Fakültesi Dergisi**, Cilt: 8, Sayı: 1, 2018, <http://dergipark.gov.tr/download/article-file/510628>, (18.09.2018), s.49.

<sup>305</sup>Demirtaş, **İç Denetim Başkanlığı**, s.18.

<sup>306</sup>Kavasoglu ve Çon, **İsviçre Usul Hukuku**, s.55.

### 3.4.2. Mediation

Swiss Federal Procedure Law regulated mediation in chapter 2 between articles 213 and 218. Article 216 dwells on the relation between the courts and mediation method and secures the principle of confidentiality in mediation. However, on the grounds that this article is a regulation brought in terms of civil procedural law, while it secures the confidentiality during court proceedings, it does not cover any aspect about mediation to be public and the obligation of the mediator and parties to keep secret<sup>307</sup>.

In Switzerland mediation principles are given through standards set by the institutions and mediation institutions. Those principles are volunteerism, impartiality, confidentiality, right to self-determination and reliability<sup>308</sup>. In Switzerland mediation training and practice is regulated by private mediation associations and the state does not have any active involvement<sup>309</sup>.

In Switzerland mediation can be regarded as suitable in such issues as environmental disputes arising from big construction projects, various public institutions, organizations and cantons, disputes between citizen and a public party. Mediation is rarely used for environmental disputes. Mediation of the disputes between private companies and public employees is an important area for practice. In addition to that, commercial dispute resolution is also suitable for mediation and in the last decade significant works have been carried out to promote mediation in the given field. Victim- offender mediation is at a beginning phase. Those cases are about insult, punitive damages and slight injuries upon the claim of the victim<sup>310</sup>.

In addition to those given above, mediation is most frequently applied for family disputes (divorce cases). As per the New Divorce Law adopted in 2000, the couples are encouraged to go for mediation if they can reach an agreement upon all legal issues including division of goods, alimony and custody. If the parties cannot reach an agreement on legal issues, court proceedings apply. In all Swiss cantons,

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<sup>307</sup>Çiğdem Yazıcı Tıktık, **Arabuluculukta Gizliliğin Korunması**, İstanbul Kültür Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul, 2010, ss.103, 104.

<sup>308</sup>Isaak Meier, “Mediation and Conciliation in Switzerland”, **Global trends in mediation**, [http://www.175jahre.uzh.ch/fakultaeten/recht/fachbereiche/zprschkg/Dokumente/report\\_mediation\\_eng.pdf](http://www.175jahre.uzh.ch/fakultaeten/recht/fachbereiche/zprschkg/Dokumente/report_mediation_eng.pdf), (20.07.2018). pp.13, 14.

<sup>309</sup>Parkinson, s.268.

<sup>310</sup>Meier, **Mediation and Conciliation in Switzerland**, pp.7-9.



there are specialized mediators on family mediation. Family mediation is jointly carried out by lawyer and psychologist<sup>311</sup>.

In Switzerland mediation was regarded as useful to decrease the number of cases and enable positive outcomes. It also is a part of legal process. As per the Swiss Federal Law enacted on July, 1st, 2009 on International Child Abduction, mediation is compulsory for returning the children who are abducted to Switzerland as a country which is party to The Hague Convention<sup>312</sup>.

### 3.4.3. Experts

In Switzerland family courts there are no psychologist or social worker. When needed, the social workers or psychologists working under Youth Unit are assigned. In Youth Unit, young people and minor's protection and proceedings are handled by different units. Youth Unit provides protection and support services to the children and young people in need within the schools or domestically in health and social fields. This unit has an authority to intervene to the family<sup>313</sup>.

Social workers working in this unit have the duty of placing orphans or those children, whose custody responsibility is abused by the parents or pushed to crime, to the foster families or trainer families or those voluntary families who are trained by the trainers for two years for a fee, periodically follow them up and control. Additionally, these units gain occupations to those juveniles/ minors pushed to crime through vocational courses. Legal status of the juvenile unit social experts assigned in youth courts is not technical expert, instead they are accepted as guides to the children seeking for their best interest<sup>314</sup>.

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<sup>311</sup>Meier, **Mediation and Conciliation in Switzerland**, pp.6,7.

<sup>312</sup>Parkinson, ss.268,269.

<sup>313</sup>Demirtaş, **İç Denetim Başkanlığı**, s.18.

<sup>314</sup>Demirtaş, **İç Denetim Başkanlığı**, ss.18,19.

### 3.5. FRANCE

#### 3.5.1. Legal Remedy

Family law in France is designed as to protect the children and the weak<sup>315</sup>. Legal provisions about family law has been set in French Civil Code (FCC) while some others in French Civil Code of Procedure (FCCP). Provisions on marriage is set between articles 143 and 227 of FCC. Provisions on dissolution of marriage are given between articles 229- 309 of FCC. Provisions on welfare of children and parental responsibility are given in articles 371 and 387 of FCC. Article 309 covers the provisions on disputes. Provisions on welfare of children and parental responsibility are given between the articles of 372 and 381. France does not have private international legal rules. Article 3 of the Civil Code gives some general rules whilst article 9 gives private rules for divorce. Other rules managing the disputes come from international conventions or case laws<sup>316</sup>.

As of January, 1st, 2016 family courts (Juge aux affaires familiales) has jurisdiction over divorce and abolishing property ownership of spouses. Article 267 of FCC has been amended as to allow family courts to make decision on liquidation and division of marital benefits of the spouses when they cannot reach an agreement. Family courts in France are the main courts with the jurisdiction over family issues. The cases that are heard by the family courts include marriage, divorce, parenting, adoption, protection of child's properties, kidnapping, parental responsibilities, credentials of adults protected by laws, name, surname, residence, partners and civil partnerships ( Pacte Civil de Solidarité (PACS), marital rights and obligations and so on<sup>317</sup>.

If the marriage ends with a divorce, French family law introduces joint custody. Thus, regarding to the disputes to arise on custody, French Civil Code has taken some measures including family mediation<sup>318</sup>. Though French laws are less

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<sup>315</sup>Cem Özcan, "Fransız Hukukunda Aile Arabuluculuğu", **Uyuşmazlık Mahkemesi Dergisi**, Sayı:9, 2017, <http://www.adb.adalet.gov.tr/frarb.pdf>, (08.01.2018), s.384.

<sup>316</sup>Veronique Chauveau et al., "France", **Family Law Jurisdictional Comparisons**, (Ed. James Stewart), Sweet&Maxwell Publishing, London, First Edition, 2011, p.113.

<sup>317</sup>Chauveau et al., p.113.

<sup>318</sup>Youngs, p.389.

comprehensive than German and American, due to the recent developments in French tradition and direct Access to the European Court of Human Rights, it is subject to the authority of constitutional and contract law jurisdiction.<sup>319</sup>

### 3.5.2. Mediation

As in other countries, in France also the Alternative Dispute Resolutions (ADR) are supported by the state to decrease workload and to solve disputes faster and less costly. Being in practice for long years, ADR has started to develop after II. World War. As a preliminary stage for filing a suit, mediation was an alternative dispute resolution either voluntarily or compulsory, yet in 1995 through the Law numbered 95-125 and the Decree dated 1996 “Judicial Mediation” was made completely voluntarily<sup>320</sup>.

Especially family and labour disputes are regarded as most suitable for mediation. With 2011 Decree a series of regulations were introduced to professionally manage mediation and set the procedures of mediation as well as straightening out the status of mediator and develop their trainings. In addition to that, with the initiative of mediation associations, mediation is promoted in bigger commercial and civil cases<sup>321</sup>.

There are no national codes of conduct for mediators set by the Government. Paris Chamber of Commerce and Industry (Chambre de commerce et d'industrie) has created some codes of conduct and supervises these. When parties use mediation as an alternative source to solve disputes within or out of court proceedings, they pay an amount.<sup>322</sup> In French system family mediators are not only lawyers. Specialists in psycho-social fields can also work in this field. Those university graduates from different departments are allowed to start this profession after receiving a very comprehensive training and passing through an evaluation process. In continuous

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<sup>319</sup>Catherine La Brusse-Riou, “Family Law”, **Introduction to French Law**, (Ed. George A Bermann and Etienne Picard), Published by Kluwer Law International, The Netherlands, 2008, p.275.

<sup>320</sup>Bilgin, **Kıta Avrupası’nda Arabuluculuk**, s.13.

<sup>321</sup>Jean-Georges Betto and Adrien Canivet, “France”, **EU Mediation Law and Practice**, (Ed. Giuseppe De Palo and Mary B. Trevor), Oxford University Press, First Edition, United Kingdom, 2012, p.129.

<sup>322</sup>European Justice, “Mediation in Member States – France”, **Mediation**, [https://e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-fr-en.do?member=1](https://e-justice.europa.eu/content_mediation_in_member_states-64-fr-en.do?member=1), (13.02.2018).

education centers of some universities, those candidates completing the course successfully are given a “state diploma as family mediator”<sup>323</sup>.

Since family disputes create problems both for spouses and the children, first steps on family mediation in France were taken long before production of legal documents, in 1980s. Also, Recommendation numbered R (98) I adopted on January, 21, 1988 by the Committee of Ministers of European Council was effective on France as in other countries<sup>324</sup>. Later on in 2002, an amendment was made on French Civil Code as to lead parties to family mediator for disputes on custody and in 2004 for divorce cases<sup>325</sup>.

As per articles 373- 2- 10 of the French Civil Code, in a dispute on custody, the judge tries to reconcile parties. As per article 2 of the same article the judge can lead the parties to a mediator upon receiving the opinions of both parties. The judge may force the parties to go to a mediator but cannot impose any sanction. If a party does not see family mediator, this is regarded to the detriment of that party. If the parties reach an agreement, the mediator informs the judge through a report. Third and last paragraph of the same article does not find domestic violence appropriate for family mediation<sup>326</sup>.

### 3.5.3. Experts

In the end of 1980s, because of the challenges parents and children have in contested divorce cases, communication centers emerged in France. Along with these developments a group of lawyers, social worker and psychologists in Bordeaux made interviews with the parents and the children while the parents are in conflict<sup>327</sup>. Later on, experts assigned to work in the court start to be assigned in some parenting cases

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<sup>323</sup>Özcan, **Fransız Hukuku Aile Arabuluculuğu**, ss.387,388.

<sup>324</sup>Özcan, **Fransız Hukuku Aile Arabuluculuğu**, s.385.

<sup>325</sup>Youngs, p.387.

<sup>326</sup>Özcan, **Fransız Hukuku Aile Arabuluculuğu**, s.390.

<sup>327</sup>Benoit Bastard, “Different Approaches to Post-Divorce Family Relationships: The Example of Contact Centres in France”, **Family Law: Processes, Practices, Pressures: Proceedings of the Tenth World**, (Ed. John Dewar and Stephen Parker), Hart Publishing, Australia, 2003, p.272.

and nullities. As of 1999, the parties have been encouraged to use experts' help for their cases<sup>328</sup>.

Article 3 of the French Civil Code says that "the Judge has the power to supervise the progress, set time limitations and take necessary precautions." Judge can appoint a judicial expert to enlighten the situation, to recommend necessary steps and to implement an investigation<sup>329</sup>.

Upon the recommendation of the expert, the judge can demand for a second investigation or may have to decide partly based on expert's recommendation and/ or on his/her own findings. Fees for experts can freely be decided when working with a family judge, however the fees are subject to a fee tariff in juvenile court. Court reserves the right to change the duty/ position of the expert or work with another one. The expert to be assigned by the judge can be a doctor, social investigator, psychologist or an association specializing in family issues. Expert report focuses on parents, children's relation with each parent and the relation between the parents. To gather information about the family situation and life conditions of the children, the expert interviews with child/ren and parents and to prepare an assessment report based on his/her opinions about the parenting capacity. Experts rarely visit the home or school of the children and their reports contain the information they get through one interview with each parent of the child and the child/ren<sup>330</sup>.

### **3.6. UNITED STATES OF AMERICA (USA)**

#### **3.6.1. Legal Remedy**

State Legislature traditionally regulated family law. Also named traditionally as internal affairs law, family law is a political and economic unit covering legal relation between the parent and the child<sup>331</sup>. With the increase of offences among

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<sup>328</sup>Deirdre Dwyer, **The Judicial Assessment of Expert Evidence**, Cambridge University Press, First Published, 2008, p.212.

<sup>329</sup>Jonathan W. Gould et al., "Scientific and Professional Knowledge for Family Court: Legal Expectations of Experts", **Parenting Plan Evaluations: Applied research for the family court**, (Ed. Leslie Drozd et al.), Second Edition, Oxford University Press, USA, 2016, p.27.

<sup>330</sup>Gould et al., pp.28, 29.

<sup>331</sup>Peter N. Swisher, **Understanding Family Law**, Richmond School of Law Faculty Publications, Fourth Edition, 2013,

young people in USA due to reasons as poverty, immigration and inequality, it was understood that imposing punishments to the juvenile involved in crime does not lead any effective result and it has been thought that here the change should be created for the parents before the child. Based on all these, improving the child and all those around the child constituted the purpose of establishment of the family courts<sup>332</sup>. Family courts emerged first in USA and Japan and founded in USA in 1899. Family courts are there to protect the interests of the child acting as a mother and father when the parents are insufficient with the motto of “State is mother and father; state is the parent”<sup>333</sup>.

In family courts juvenile matters, child abuse, custody, visitation, child support, probate, domestic issues and other relevant issues are heard. Besides, family courts in USA provide service on issues as social services, parenting classes, counselling and mediation cases are heard<sup>334</sup>. Family courts in some states of USA also deal with cases of protection of adults, civil commitment cases and subject to maltreating of adults<sup>335</sup>.

In family courts, procedures vary from region to region however there are some certain steps which are applicable in everywhere. In most of the time the process starts with an adult calling or messaging the local child welfare centre or social services institution. Social workers search about the case and if they find about any abuse or neglect they inform the family court with a petition. Those who report to the police are mostly the teachers, probation officers and school officers<sup>336</sup>.

In USA within each family court there sits a judge, judge’s assistant, stenotypist and an usher. During the hearing, in order to focus on and identify the dispute between the parties and take their statements in a clearer way, the judge delegates such works as hearing management and other typing works to the assistant.

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<https://scholarship.richmond.edu/cgi/viewcontent.cgi?referer=https://www.google.com.tr/&httpsredir=1&article=1121&context=law-faculty-publications>, (15.09.2018), p.2.

<sup>332</sup>Baktır; ss.39, 40.

<sup>333</sup>Özel ve Tatar, **Aile Mahkemeleri Genel Değerlendirme**, s.51,

<sup>334</sup>Family Court Resource Guide, <https://www.ncsc.org/Topics/Children-Families-and-Elders/Family-Courts/Resource-Guide.aspx>, (02.08.2018).

<sup>335</sup>Filiz, **Aile Mahkemeleri Uygulamaları**, ss.22,23.

<sup>336</sup>Anne Bianchi, **Everything You Need to Know About, Family Court**, First Edition, The Rosen Publishing Group, p. 49.

In order for a divorce suit to be accepted it is enough for parties to lose their faith in maintaining the marriage union<sup>337</sup>.

USA is one of the signatory countries of The Hague Convention thus imposes the sanctions as stated in the convention in international move-in/move-out cases especially custody and personal contact cases<sup>338</sup>.

### 3.6.2. Mediation

USA has a long history for Alternative Dispute Resolution (ADR) methods and most of the states have adopted mediation laws. That there are too many different laws adopted by each states have created the need of the introduction of Uniform Mediation Act in The National Conference of Commissioners on Uniform State Laws<sup>339</sup>.

USA has introduced laws to increase ADR use and established ADR programs affiliated to court. In 1983, article 16 of the Federal Civil Code was amended to give power to encourage to the courts considering the likelihood of parties to reach an agreement with the aim of increasing out of court remedies to solve disputes arising in pre-court negotiations. ADR Act dated 1998 gave directives to the district courts in USA to support mediation when the case is suitable to be solved through ADR<sup>340</sup>.

ADR Law dated 1998 explained the characteristics of mediation as well. It states that the courts can use as third parties the trained peace (court) judges, impartial experts in qualified private mediation bureaus or other people who received the training on mediation that the court made compulsory<sup>341</sup>. To decrease the work load of courts and court fees and to sustain domestic relations of family public, private mediation centers were opened. These centers which employ lawyers or

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<sup>337</sup>Demirtaş, **İç Denetim Başkanlığı**, s.20.

<sup>338</sup>Stahl, s.275.

<sup>339</sup>Özbek, **Avrupa Birliği'nde Uyuşmazlık Çözümü**, s.278.

<sup>340</sup>Seda Özümücü, "Karşılaştırmalı Hukuk ve Türk Hukuku Açısından Zorunlu Arabuluculuk Sistemine Genel Bir Bakış", **İstanbul Üniversitesi Hukuk Fakültesi Mecmuası**, Cilt: 74, Sayı: 2, 2016, <http://dergipark.gov.tr/download/article-file/292467>, (13.02.2018), s.820.

<sup>341</sup>Jay Folberg, "Development of Mediation Practice in the United States", **Revista Iuris Dictio**, Año 16, Volume: 17, 2015, [https://www.usfq.edu.ec/publicaciones/iurisDictio/archivo\\_de\\_contenidos/Documents/IurisDictio\\_16/iurisdicio\\_016\\_002.pdf](https://www.usfq.edu.ec/publicaciones/iurisDictio/archivo_de_contenidos/Documents/IurisDictio_16/iurisdicio_016_002.pdf), (15.09.2018), p.37.

psychologists, social workers serve as a therapy centre where the couples can freely reveal about their disputes. The interviews made here are confidential and an agreement is signed in case the parties reconcile<sup>342</sup>.

Some courts hire full time personnel to manage cases in ADR programs and to provide mediation service. When this is the case, peace (court) judges and court ADR staff work for the implementation of alternative resolution methods and courts present different ADR procedures, primarily mediation, to the parties as options<sup>343</sup>.

Researches showed that those parties who make use of mediation first, prefer court remedy less. Those couples apply for divorce in USA are first given a training on divorce for four hours including the procedural information and the effects of divorce upon children. The purpose of this training on divorce is to help parents for their child/ren to adapt to the changing circumstances<sup>344</sup>. Mediation in USA is mostly applied to resolve family disputes<sup>345</sup>.

### 3.6.3. Experts

In USA, the psychologists and family court experts work at different floors of the same building under social service unit. When found necessary by the judge, the children are heard out of court, in social service unit with the help of these experts and if he/she has a demand he/she puts it in the demand table and send to the family court expert. Social service experts and psychologists work as a separate unit than the court. Family judge can take the statements of psychologist, social worker and lawyer through video conference methods as well<sup>346</sup>.

As per the article 5.220 of the Bylaw of Court in California State of USA in order to make an evaluation on the custody of a child, one has to have at least a master's degree, officially licenced and completed 40 hours of general and 16 hours of domestic violence training programs. Besides, to continue to make evaluation on

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<sup>342</sup>Demirtaş, **İç Denetim Başkanlığı**, s.20.

<sup>343</sup>Folberg, **Development of Mediation in the U.S**, p.37.

<sup>344</sup>Akkaya, **Boşanma Davalarında Zorunlu Arabuluculuk**, ss.34,35.

<sup>345</sup>Kekeç, s.120.

<sup>346</sup>Demirtaş, **İç Denetim Başkanlığı**, ss.20,21.



custody one has to attend continuous training for 8 hours general and 4 hours on domestic violence<sup>347</sup>.

Though there are some gaps between the social workers and courts, this has not created any major problems. Social service practices in courts, psychological sciences and social service officials assume various responsibilities and make contributions as experts<sup>348</sup>. While psychologists and family court experts present their assessment forms to the courts with the aim of preserving the best benefit of the child, they take into consideration all the dynamics of the family, observe impartially all members of the family and evaluate the functionality of the child within the family<sup>349</sup>.

### 3.7. AUSTRALIA

#### 3.7.1. Legal Remedy

Family law in Australia is federal law. With the Family Law Act of 1975, Australia Family Court was established as a specialized court to hear divorce, child/ren related issues and division of goods cases. Australian approach of “Less Adversarial Trial” (LAT) emphasizes on the interests of the child recognizing that the parental dispute is a serious one with the capacity of creating long term effects upon the child/ren about the issues on divorce and child/ren while the divorce proceeding continue. LAT was adopted in 2006 in Family Court as well upon the success of Children’s Cases Pilot Project (CCP). CCP examined the effect of LAT on parenting capacity in Sydney and Parramatta. Study showed that this approach helps parents be more satisfied and less conflict and focus more on their child/ren and their emotional welfare<sup>350</sup>.

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<sup>347</sup>Stahl, ss.9,10.

<sup>348</sup>Dana E. Prescott, “Social Workers as “Experts” in the Family Court System: Is Evidence-Based Practice a Missing Link or Host-Created Knowledge?”, **Journal of evidence-based social work**, Volume: 10, Issue: 5, 2013, <http://nofsw.org/wp-content/uploads/2015/08/39-Social-Workers-as-Experts-in-the-Family-Court.pdf>, (10.02.2019), p.467.

<sup>349</sup>Stahl, s.33.

<sup>350</sup>Gould et al., p.32.

Family Law guards the interest of the child. Both parents are held responsible for the care of their child/ren till they reach 18<sup>351</sup>. Australia Family Court and Australia Federal State Court are the ones enjoying judicial power under Family Law Act<sup>352</sup>.

The highest court to deal with family law issues is the family court. Western Australia State has its own family court. It hears the family cases as per its own state laws and federal laws. Other than this, in all states of Australia there are family court bureaus as desks for registration and application to court. And as of 2000, Federal Magistrates Court has been dealing with family law issues to provide faster and cost effective family court services. This court hears cases other than those pecuniary cases more than 700.000 dollars, adoption, validity of marriage and high-conflict. Australia is one of the signatory countries of The Hague Convention which is about international child abduction. All the issues about the children are regarded within the scope of family law and these cases can be opened in Family Court or Federal Magistrates Court<sup>353</sup>.

### 3.7.2. Mediation

In the beginning of 1980s in Australia, Community Justice Centers were established in New South Wales state to practice voluntary mediation. Since the desired outcomes were reached in the report dated 1982, the program was settled in 1983. Then the number of the organizations providing mediation services increased significantly and Australia became one of the leading countries to establish compulsory mediation programs<sup>354</sup>.

The National Alternative Dispute Resolution Council described mediation in Australia as a process to identify the contentious issues between the parties, lead them think about the alternatives and help them reach an agreement by a mediator in

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<sup>351</sup>Family Court of Australia, “Parenting cases–The Best Interest of The Child”, **Family Law Matters**, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-law-in-australia/parenting-cases-the-best-interests-of-the-child/parenting-cases>, (12.02.2018).

<sup>352</sup>Family Court of Australia, “The Family Law Act 1975 (Commonwealth)”, **Family Law Matters**, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-law-in-australia/the-law/>, (12.02.2018).

<sup>353</sup>Filiz, **Aile Mahkemeleri Uygulamaları**, ss.20,21.

<sup>354</sup>Özmumcu, **Zorunlu Arabuluculuk Sistemine Bakış**, s.818.

2003. The mediator does not have a determining role about the content or outcome of the dispute but can make recommendations throughout the mediation process. Mediation can voluntarily be subjected to a court rule or an existing convention<sup>355</sup>. There is this general perception that the mediation is more cost effective and faster than the court proceeding. Besides, mediation in Australia is seen as an effective method to decrease the workload of courts. Federal Court signs in its official web site that mediation is more advantageous compared to the civil cases and actively encourages the use of mediation. When mediation or other ADR methods fail, courts deal with cases through traditional ways<sup>356</sup>.

Mediation in family courts in Australia has been active since 1991. Mediation is an important part of divorce proceeding. In family courts, the parties are given family consultancy and family mediation for free. It is compulsory for those who are married for less than two years to receive consultancy support<sup>357</sup>. Those who have relationship problems (marriage, living together, heterosexual or homosexual relation), those who have problems about raising joint child (separated parents or guardians, those having problems about the implementations of the orders given as a result of a previous conflict on the relevant issue) and those who cannot reach an agreement about the custody can also make use of this service<sup>358</sup>.

In Australia social workers as one of the three main profession working for mediation in Australia have an important and continuing role for family planning and development. Main contribution of the social service is the commitment and loyalty to the social justice focusing on access and equality issues and it involves reflexive implementation within the range of family dispute resolution models. Reflexive social service practices encourage access and equality for all family members based on justice and social justice principles<sup>359</sup>.

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<sup>355</sup>Jennifer Martin and Kathy Douglas, “Social Work and Family Dispute Resolution”, **Australian Social Work**, Volume: 60, Number: 3, September 2007, [https://www.researchgate.net/publication/233438682\\_Social\\_Work\\_and\\_Family\\_Dispute\\_Resolution](https://www.researchgate.net/publication/233438682_Social_Work_and_Family_Dispute_Resolution), pp.296, 297.

<sup>356</sup>Ulrich Magnus, “Mediation in Australia: Development and Problems”, **Mediation Principles and Regulation in Comparative Perspective**, (Ed. Klaus J. Hopt and Felix Steffek), Oxford University Press, First Edition, United Kingdom, 2013, p.902.

<sup>357</sup>Akkaya, **Boşanma Davalarında Zorunlu Arabuluculuk**, s.35.

<sup>358</sup>Atamtürk, s.6.

<sup>359</sup>Martin and Douglas, **Social Work**, p.305.

### 3.7.3. Experts

Family advisors work in Australian family courts. Family advisors are those psychologists and social workers experienced in working with family. Family advisors oath before the court and present an assessment form summarizing children and parental issues. This assessment is presented to the parties, legal representative and court. Additionally, anything that might be said to the family advisor by the parties and sometimes by the children during the evaluation process or intervention can be accepted as evidence. Judge may use family advisor to provide evidence to the evaluation on children and parents and to make use of a wider social science perspective about the issues raised by the parties and their lawyers<sup>360</sup>.

Family advisors can be quite helpful to the families. Main duties of the family advisors are to define important problems effecting the child/ren and family after separation or divorce, identify risk factors and to make comprehensive evaluations, make recommendations about the sources and services that may help to the families and children and to help the parties solve disputes if possible<sup>361</sup>.

Mostly family advisor collects information about the parenting capacity upon the subject matter, relation of the child with the key people, wishes and feelings of the child and risk factors for the child. The parties have the right to object to the report prepared and for this; family advisor has to be informed at least 14 days before<sup>362</sup>.

## 3.8. NEW ZEALAND

### 3.8.1. Legal Remedy

Family Courts were established as per Family Courts Act dated 1980 as part of the District Court. The judges are appointed here as District Judges or Family

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<sup>360</sup>Gould et al., p.34.

<sup>361</sup>Family Court of Australia, “What is Child Dispute Services”, **Family Law matters**, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/child-dispute-services/>, (18.02.2018).

<sup>362</sup>Family Court of Australia, “What if I don’t agree with the Family Report?”, **Report and Publications**, <https://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/child+dispute+services/family-reports>, (21.03.2017).

Court Judges. Family courts have the judicial Powers on family issues as separation, marriage, guardianship and protection of the family. It is possible to file a lawsuit for an issue within the limits of High Court in the Family Court, if it is too complicated the case can be transferred to the High Court<sup>363</sup>.

As a result of some legal amendments in New Zealand, significant improvements have been achieved especially in terms of child's welfare, taking care of the child/ren, removing the status of out of wedlock and financial support, fighting against domestic violence and child abuse, equal division of property, easier divorce and so on<sup>364</sup>. Named as '2014 reforms' some changes were introduced to the family law system on the existing systems and processes to help couples separate and on some regulations about the care of child/ren and personal contact to enable parties reach agreement and these changes were enforced on March, 31, 2014<sup>365</sup>.

In addition to that with the General Policy Declaration included in Family Court Proceeding Reform Draft the objectives are given as to provide a sensitive, effective, modern and an accessible family justice system to the children and vulnerable people, to encourage resolving family disputes faster and less hostile, to make family courts more effective, to decrease demolishing effects of court proceedings, to improve the court response to the domestic violence victims, to help system be sustainable in the future and to make courts support children and those in need of protection. 2014 reforms mostly focus on issues of children care<sup>366</sup>.

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<sup>363</sup> Anthony H. Angelo, **Constitutional law in New Zealand**, Kluwer Law International Published, The Netherlands, 2011, p.97.

<sup>364</sup> Bill Atkin, "New Zealand: the emergence of cultural diversity", **The future of child and family law: international predictions**, (Ed. Elaine E. Sutherland), First Edition, Cambridge University Press, UK, 2012, p.265.

<sup>365</sup> Ministry of Justice New Zealand, "The 2014 family justice system reforms- Have your say on the family justice system", <https://www.justice.govt.nz/assets/Documents/Publications/have-your-say-on-the-family-justice-system-english2.pdf>, (27.04.2019), p.4.

<sup>366</sup> Megan Gollop and Mark Henaghan., "Evaluation of the 2014 Family Law Reforms: Phase One", **Report to the New Zealand Law Foundation**, Otago, University February 2015, <http://www.otago.ac.nz/cic/otago624688.pdf>, (08.03.2018), p.1.

### 3.8.2. Mediation

Recently mediation has been turned into a strategy adopted to respond to any kind of dispute in New Zealand. In the last 20-30 years with the need of reducing litigation costs, various regulations have been introduced to provide mediation in different issues. Most of these regulations describe regulation and the process. They also have articles about proceeding, arbitration, reconciliation, simplification or review as a solution for disputes. Some regulations are compulsory and only in some there is a foreseen process<sup>367</sup>.

Family Dispute Resolution is carried out by an organization as New Zealand Law Association, AMINZ (New Zealand Arbitration and Mediators Institute) or LEADR (Dispute Solvers Association) or a person approved by such organizations. Some of these mediators working in these organizations are experienced lawyers. The role of the mediator is to help parent make decisions to the good of their child/ren. As per the Care of Children Act, it is compulsory to apply to FDR in most issues regarding children<sup>368</sup>. Supporters of mediation in New Zealand believes that going for an agreed resolution method in which the parties reveal their needs and concerns is better than court proceeding<sup>369</sup>.

Till March 2014 family court provided free consultancy and mediation in each case. These services are provided for free now only to people who are under a certain income threshold. Before starting FDR process, first an interview is made with one of the FDR mediators, this talk can also be made through phone. Mediator obtains information about the other party during this interview and gets into communication with that other party as well. This is how the process starts and the mediator evaluates whether the subject matter is suitable for FDR or not. If the problem or problems are suitable for FDR the parties meet with the mediator. This is an unofficial process and with no court involvement. Mediator first identifies the

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<sup>367</sup>David Hurley, “Restorative justice in the Civil Jurisdiction”, **Restorative justice and practices in New Zealand: Towards a restorative society**, (Ed. Gabrielle Maxwell and James H. Liu), Wipf and Stock Publishers, Eugene, 2010, p.168.

<sup>368</sup>Community Law, “Family Dispute Resolution”: Mediation through the Family Court”, **Parents, Guardians & Caregivers**, <http://communitylaw.org.nz/community-law-manual/chapter-11-parents-guardians-and-caregivers/about-the-family-court/family-dispute-resolution-mediation-through-the-family-court/>, (05.02.2019).

<sup>369</sup>New Zealand Law Commission, “Overview 296. Mediation is a process”, **Mediation**, [http://www.nzlii.org/nz/other/nzlc/report/R82/R82-8\\_.html](http://www.nzlii.org/nz/other/nzlc/report/R82/R82-8_.html), (29.12.2018).

problems and help parties to reach an agreement which preserve the interests of both parties and children. In case not all the disputes are resolved despite applying to FDR, party/ies can apply to the Family Court in 12 months as per the Care of Children Act<sup>370</sup>.

In New Zealand, Family Court Consultancy service is provided. The purpose of providing this service is to enable reaching an agreement in disputes by using consultancy and mediation skills. Consultancy includes psycho- education and mediation methods. It is a process which require to keep the needs of each child at the top. Approved consultants who meet the criteria of the Ministry of Justice, social workers, psychologists and psychotherapists can work as Family Court Consultants. Family Court Consultancy service is based on presenting various models and intervention methods to the parties, identifying problems of parties and solutions and encouraging to formulate applicable choices to develop parenting plans and on mediation principles<sup>371</sup>.

In New Zealand it is believed that family mediation has advantages as avoiding long and costly court proceedings and the stress that comes along with that. The process helps parties to discuss about their problems and reach a solution instead of forcing them to obey to the court rulings. Besides, it helps parties to bargain and make use of creative and flexible solutions which do not push for obedience to the generic social standards and strict legal rights<sup>372</sup>. New Zealand is a signatory country of a couple of international agreements on child protection including Hague Convention<sup>373</sup>.

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<sup>370</sup>Community Law, "Family Dispute Resolution": Mediation through the Family Court'', **Parents, Guardians & Caregivers**, <http://communitylaw.org.nz/community-law-manual/chapter-11-parents-guardians-and-caregivers/about-the-family-court/family-dispute-resolution-mediation-through-the-family-court/>, (05.02.2019).

<sup>371</sup>Aotearoa New Zealand Association of Social Workers (Anzasw), "Ministry of Justice Reviewing the Family Court'', February 2012, <https://anzasw.nz/wp-content/uploads/ANZASW-Review-of-Family-Court-Final-Feb-2012.pdf>, (08.03.2018), pp.7, 8.

<sup>372</sup>New Zealand Dispute Resolution Centre, "Mediation'', <https://www.nzdrc.co.nz/Mediation.html>, (27.12.2018).

<sup>373</sup>Kenneth J. Keith, "New Zealand Family Law and International Law-A Comment with some question'', **Victoria U. Wellington L. Rev.**, 47, 2016, <http://www.nzlii.org/nz/journals/VUWLawRw/2016/2.pdf>, (20.12.2018), p.9.

### 3.8.3. Experts

New Zealand can assign “specialist report writers” to produce cultural, medical, psychological or psychiatric social work reports. Specialist report writer is described in article 133 of chapter 2 of the Care of Children Act as the person from whom a report is demanded. 2013 Care of Children Amendment Act introduced limits to the judge’s power to ask for an expert report. There is a list in chapter (133:1) of the issues that the Judge can ask for a report. This section elaborates judicial (interview) appointments, timetables, addresses, invoice related issues and numerous procedures designed to protect objectivity of the report writer<sup>374</sup>.

Family judges may ask an expert to prepare a special report to have a better understanding about the case and the history of child. Cultural report includes ethnic origin, language and religion. If the parents of the child who has a serious medical condition do not agree about the medical treatment, judge may ask a medical report. To understand whether the child has a mental disease or not, a psychiatric report may be asked. There is also psychological report which may be asked by the judge to search what may have affected the child about the issue he/she describes. Psychiatric reports are prepared by doctors or psychiatrists; psychologic reports are prepared by psychologists. The role of specialist report writers is to give information to the judge to make decision about the child. In reaching a decision about the child, the judge makes use of the information given in the report. In cases of disputes on the care of children, care and protection of the children, a copy of the report is given to the parents or their lawyers. Parties or lawyers have the right to object to the report and complain about the report writer<sup>375</sup>.

These reports where the opinions of specialist report writers are expressed must include the justification, reasons of the opinions expressed, issues raised and the assumptions regarding the issues<sup>376</sup>.

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<sup>374</sup>Gould et al., p. 30.

<sup>375</sup>Ministry of Justice New Zealand, “Specialist reports in the Family Court”, **About Family Court**, <https://www.justice.govt.nz/family/about/specialist-reports-in-the-family-court/>, (11.02.2019).

<sup>376</sup>Gould et al., p.31.



## CONCLUSION

Considering the variety of the problems arising from family disputes and versatility of the issues, a set of judicial reforms have been applied in Turkish Law System to eliminate ill-communication between parties and to provide healthy, fair and permanent solutions. Thus, with the aim of handling cases and issues rising from family law and protecting Turkish family structure, family courts have been established.

Introduced to the Turkish Law System in 2003, family courts employ psychologist, pedagogue and social workers as family court experts. These experts play an active role at decision making stage through their evaluation report based on their knowledge and experiences on solving family disputes. Family court experts are especially needed to shorten the time spent for proceedings, to provide more healthy solutions to family disputes and to enable more fair process.

In case the judge makes the assignment as stated in the Family Courts Law, family court experts make an examination of the dispute between parties and causes and informs the court, they are also present in the trial when the parties are heard to give opinion about their psychological conditions and helps court to implement protection, training and social orders given by the judge. The family court experts are assigned to work for the case at the discretion of the judge or on demand of the lawyers of parties.

Family court experts mostly work on cases as divorce, searching for the likelihood of agreement, changing custody, abolishing custody, adoption and personal contact with the child. Prepared based on article 3 of the UN Convention of Children's Rights about *the best interest of the child*, these reports aim for protecting the child and preventing victimization of the child. Among the family disputes, divorce is one of the most effective ones upon the child. Custody of the child is an important decision to determine his/her future. Family Court experts prepare their reports considering characteristics of the child, health and education needs, socio-economic conditions of the parties, psychological health status of the parties, parenting capacities for custody and their relation with the child. These factors are the main ones to protect the best interest of the child. Besides, domestic neglect,

abuse, drug and alcohol addiction and other risk factors are searched carefully and if anything is found out the court is informed.

Family court experts start their work upon assignment by the court by examining the case file then gives appointment to the parties to invite parties and the child/ren to interview, prepares interview plan and suitable environment for the interview and makes individual interviews with mother, father and child/ren separately and sometimes together when necessary. In family court practices, the parties are heard in court environment for a limited time while however in their interviews with the family court experts either alone or together with the other party and/or the child/ren, the parties have a chance to express themselves freely. Besides, these interviews managed by the social experts enable children to stay away from crowded, tense and gloomy court atmosphere.

Family court experts contribute to obtain effective and sound results in resolving the disputes including children in an amicable by making use of objective and scientific evaluations in identifying the causes of dispute between the parties in line with the principles of impartiality and confidentiality. Family court experts create a safe and unbiased environment for interviews and thus help parties share their feelings, thoughts and needs.

The social investigation reports which include observations and information obtained through interviews with open-ended questions, statements of the parties and in some cases, home, school and social environment visits and the recommendation given by the family court expert in the conclusion help the judge to run the process in a healthier and sound way.

When the family court experts conclude the analysis, interviews and observations, they present to the court their reports with their opinions. Evaluation of the report is at the discretion of the judges. While some judges tend to implement the recommendations given by the social expert in referring the person to a specific institution or giving a specific order, some judges do not apply them. However, the most important function of family experts is to play an effective role in the decisions given about the future of the child.

It is observed that since 2003, the work carried out by the family court experts have been understood better by the court organs and parties and the parties have

regarded more the interviews with the family court experts and hugely participated to the interview. Though it is seen that the parties sometimes reject to cooperate with the other party to solve problems together and to go for another solution than the family court expert recommended, generally speaking, the conclusions and recommendation given in the family court expert reports significantly affect the families.

Studies and researches carried out on the issue reveals the importance of the work carried out by the family court experts and effective upon decision making process of the judge through partial and objective assessments. As is stated in 2009 research made by Filiz, reports prepared by the family court experts significantly affect court decision in interview with judges, lawyers and experts. In addition to that, it is also seen that some judgments of the Court of Cassation Second Civil Department reverse the decisions made by some courts because of “not being sent to the expert” or “not finding expert report sufficient”. Also in some cases, some judgements are made against family court expert report by the Court of Cassation. As can be understood by the Court of Cassation decisions, receiving opinion from family court expert report is important at the phase of decision making and is necessary, thus lack of this procedure is a reason to reverse decision.

As we have mentioned before in our study, some problems are encountered due to the lack of legislation and regulation on the job descriptions of Family Court experts and not answering the needs. This leads judges to adopt different working procedures. The fact that job descriptions, personal rights, status, working conditions and ethic codes of the social experts are not clear and the physical conditions are insufficient (not to have an individual office room, interview room, desk, computer and etc.) and not to be provided with a vehicle to make social investigation visits are among the problems mentioned.

In USA, in order to make an evaluation on custody, at least master degree, completion of long term courses and to take continuous trainings each year are requirements whilst in our country for the family court experts (psychologist, pedagogue and social worker) the only requirement is to complete a four years university degree in their own fields. In addition to that, no experience criteria are sought for and the experts are not given any formal training when they start their

work. 2010 research by Atamtürk revealed significant correlation between the problem of not receiving sufficient in service training and emotional exhaustion. Thus it is needed to provide regular and frequent in service training to increase Professional knowledge of the experts and keep up with the developments.

It is recommended that in order to ensure the desired efficiency in family courts, needs of the family court experts should be identified and comprehensive training programs that can meet the needs should be provided, supervision support should be given to the family court experts on issues they need as family consultancy, forensic interview techniques, report writing and standardization of reports and these trainings and supervision supports should be repeated periodically and regularly.

Working procedures and status of social experts in Turkish Law System greatly differ from those of foreign law system with various practices. In England and Wales for instance, it is learnt that the experts do not work in family courts and there is Children and Family Court Advisory and Support Service (Cafcass) and in making decision about the children, Family Court Advisors in Cafcass are applied for support and that these advisors are social workers. It is also found out that in German and Switzerland no experts are employed within the body of family courts and when specialist report is needed, social workers, pedagogues and psychologists working in Youth Department are applied. In France the experts appointed by the family judge is a doctor, social investigator, psychologist or a body specialized in family matters and when deemed necessary, the judge can ask for specialist report from the people working in these fields.

It is learnt that in USA, the psychologists and social workers serving for family courts are working in the same building but on different floors and within the scope of social service and when judge finds necessary, children are heard in the social service unit outside of the court and that the judge appoints the family court experts when there is an issue he/she needs to elaborate and that the social workers and psychologists work as a separate unit not under the court. In Australia Family Court and/ or Federal State Court, qualified social workers or psychologists capable of and experienced in working with children and families work as Family Advisors. It is also understood that in New Zealand family courts, the judge asks for cultural,

medical, psychological, psychiatric or any kind of social reports from Specialist Report Writers.

It is seen that in every country, those people from the professions such as social work, psychology or social pedagogy who are authorized to make evaluations about the children and the family are titled as Family Court expert, Family Court Advisor, Specialist Report Writer, Expert, Social Worker and so on in their assignment to work for the court. Even though different words are used for the title of the family court experts and even though their working conditions and types are different, it is clear that each has the role of protecting the best benefit of the child and help judge make decision through the reports they prepare. When the practices in Turkish Law System and Foreign Law Systems are compared, it can be seen that the procedures about the family court experts in some European Union member states such as Germany, France and England and Switzerland, United States of America, Australia and New Zealand are quite different than our country.

An evaluation of all the given information lead to the thinking that ensuring in Turkish Law System such opportunities as the social experts work in a different premise than the court and appointed upon need as in England, Germany and Switzerland will help to increase professional satisfaction, clarify the limits of practice and eliminate the parties and children being subjected to adversities.

In addition to courts, various methods have been developed in many countries primarily USA as alternative dispute resolution methods to solve the disputes of the individuals. The most preferred alternative dispute resolution is mediation. In the light of these developments, Law on Mediation was enacted on 22.06.2012 in Turkish Law. The Law as many other foreign relevant laws state that disputes including domestic violence are not suitable for mediation while those which include division of property, pecuniary and non-pecuniary compensation, returning gifts after the engagement is over are regarded as suitable for the mediation.

Family mediation which has started to be applied due to the increase in the family disputes, especially the divorce, long court proceedings for solving family disputes and increase in the litigation costs emerged as a practice which helps parties to debate on the disputed issues before applying to court and reach an agreement. This method is widely used in numerous EU state as well as Switzerland USA and

New Zealand to solve disputes. In addition to that, many countries provide free consultancy service before divorce or family mediation orientation programs whilst there is a huge gap in our country in this sense.

Comparative analysis with the foreign law systems has shown that in solving family disputes either through court or mediation the family court experts play a functional role. However, since family mediation has not become a law in the Turkish system yet, family court experts do not have any legal role or function. Ministry of Justice carries on working on family mediation. What the family court experts do in Turkey about family disputes is to identify the situation. In other words, the family court expert stands at a point where he/she can assist to the judge in making a decision about whether the marriage can continue or not or about custody of the child, personal contact and adoption. As can be understood the functions as well as education and experiences of the family court experts are different than the family mediators. The training that the experts receive and their Professional competencies are not found suitable for mediation.

It is suggested that, if the mediation practice becomes a law in the future, carrying out the process together with psychologists and lawyers, through well designed, qualified and practical trainings, would help the parties and the child/ren to properly understand about their legal rights and minimize their victimization through the process.

Directorate for Judicial Support Services designed by the Department of Victim's Rights as to provide solutions to the problems that the social experts have encountered so far plans to gather all social experts working for family, juvenile and juvenile assize courts under one single roof and defines all issues including returning the child as the main duties of the social experts. Though this project to unitise seems to help equal job division among the experts, it is also foreseen that it may lead some challenges as well. Here, the social experts are expected to carry out forensic interviews in judicial interview rooms as judicial interviewers, specialize in juvenile offending and work in in juvenile courts, specialize in family mediation and family consultancy and serve for family courts while on the other hand to work in all courts within a courthouse and thus specialize in various issues. It would not be wrong to say that this may cause some problems for specialization and the quality of services.

Further works should be regulated as to improve the existing legal status and conditions of social experts to help them work more effectively and efficiently.

To conclude, due to the variety and multifaceted nature of the problems arising from family disputes, a serious judicial reform has been made and as of 2003, family courts have employed psychologists, pedagogues and social workers preferably with a master's degree on family. Also, as of this date family court experts have assumed an active role in solving the family disputes. It is understood that the reports and opinions of these experts who have worked in this field for a period of time which can easily be regarded as a long time, are quite effective in judicial processes however due to the gaps in law and legislations a suitable working environment is hardly provided for them.

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