

Criminal Law

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I. INTRODUCTION AND GENERAL INFORMATION

A. THE FUNCTION AND PURPOSE OF PENAL LAW¹

The Romano-Germanic-based understanding of penal law adopted by most continental European states accepts that the purpose of penal law is to protect certain legal interests considered essential from the viewpoint of the society. This purpose is achieved through the prevention of crime. In fact, Article 1 of the Turkish Penal Code (PC), Law No. 5237, entry into force 1 June 2005) provides that: 'The purpose of the PC is to protect individual rights and freedoms, public order and security, the rule of law, public health and the environment, social peace, and to prevent the commission of offences. In order to achieve this purpose, basic principles of criminal responsibility, criminal offences, punishments and security measures are regulated in this law.'

In this framework, penal law fulfills two functions: general prevention (*genel önleme*) and special prevention (*özel önleme*). 'General prevention' refers to the deterrent effect (*caydırıcılık*) that the punishment of a criminal has on other

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1. In Turkey, as is the case with other countries adhering to the Romano-Germanic tradition of law, both academic writings and judicial practice prefer the term 'penal law' (*ceza hukuku*) to 'criminal law'.

Tuğrul Ansay & Don Wallace Jr, *Introduction to Turkish Law*, pp. 175–212.

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individuals who might be considering committing a criminal offence. 'Special prevention' aims at preventing the perpetrator from committing another offence by isolating him from society, and also by resocializing him through the corrective (*ıslah edici*) effect of the enforcement of the sentence.

Obviously, as in any other state, the capability of criminal law to actually prevent crime and the efficiency of this discipline in achieving the preventive function is open to debate. Certain shortcomings exist in the national law enforcement machinery, such as the frequent adoption of amnesties and pardons, the inability to determine those responsible for the commission of the crime, or the failure by the judiciary to apply appropriate penalties in some cases. There are, as well, some sociological perceptions providing justifications for the commission of certain offences, such as 'honour killings' (*namus cinayetleri*) or 'blood killings' (*kan gütmeye*). These are major factors contributing to the public perception that penal law lacks, at least in part, a dissuasive effect in Turkey.

B. FUNDAMENTAL PRINCIPLES GOVERNING TURKISH PENAL LAW

1. Rule of Law (*Hukuk Devleti İlkesi*)

The rule of law is based upon three basic foundations: realizing human rights, providing justice, and ensuring security. The sovereignty which is exercised by the legislative, the executive and the judicial organs is not unlimited – the acts of these organs must be legitimate. Legitimacy is established by respecting human rights, and by complying with the relevant principles elucidated below. The most important requirement regarding legitimacy is the absolute prohibition of arbitrary acts on behalf of the abovementioned organs. This is achieved through the principle of legality, which is explained below.

2. Humanism (*İnsancılık*)

Article 17, paragraph 2 of the Turkish Constitution provides that 'No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity'. Thus, penalties provided by PCs should not violate human dignity; and the manner and method of the execution of sentences should not subject the person in question to physical and mental distress exceeding the unavoidable level of suffering inherent in punishment. As explained by the Constitutional Court,² corporal punishment, public exposure, public execution of sentences and similar practices will violate Article 17 of the Constitution, as well as run against the basic understanding of modern penal law which aims at the correction of the convict.

3. Principle of Legality (No Crime or Punishment without Law, *Kanunsuz Suç ve Ceza olmaz, Nullum Crimen Sine Lege e Nulla Poena Sine Lege*)

Penal law is the legal discipline which has the biggest effect on fundamental rights and freedoms. This is why certain principles which aim at safeguarding such rights and freedoms have to be adopted. The principle of legality (*kanunilik ilkesi*) is the basic tenet which guarantees penal law an assurance function (*ceza hukukunun güvence fonksiyonu*). According to this principle, unless an act is designated as a crime by the legislative organ, a person cannot be held criminally responsible for such act. The universal principle of legality protected by international instruments such as the European Convention on Human Rights (Article 7 (2)) and the Universal Declaration of Human Rights (Article 11 (2)) is also safeguarded by the Turkish Constitution (Article 38). Article 2 (1) of the PC also provides that: 'Nobody shall be punished or subjected to security measure for an act which is not clearly prescribed by law as a criminal offence. Punishments or security measures shall not be imposed unless it is prescribed by law'. Therefore, the principle of legality as laid down in the Turkish Constitution and the PC requires the following elements:

- certainty (*belirlilik*): for the sake of legal security and protection against arbitrary or unforeseeable prosecutions, criminal statutes may not be ambiguous;
- prohibition against creating crimes and assigning punishments by custom or tradition;
- prohibition against creating crimes and assigning punishments through executive acts (PC, Article 2 (2)): 'No criminal offence or punishment shall be created by any regulatory act adopted by the administration';
- prohibition against interpretation by analogy (*kıyas yasağı*) in substantive penal law (PC, Article 2(3)): 'When applying the law which governs criminal offences and punishments, the use of analogy shall not be permitted. Provisions relating to criminal offences and punishments shall not be interpreted so extensively as to lead to analogy';
- prohibition against retroactive application (*geçmişe yürüme yasağı*) of penal law (except in cases where the result of the application will favour the accused).

4. Proportionality (*Orantılılık*)

According to PC Article 3 (1) 'Any punishment and security measure imposed upon an offender should be proportionate to the gravity of the crime'. As shall be explained below, punishment is imposed upon the offender as a response to and in relation to his culpability. However, security measures (reformatory/corrective measures) are a response to the danger posed by the offender, and the purpose is to protect society. Thus, proportionality with regard to such measures should

refer to the necessity of imposing a measure which suffices to achieve that aim, and not to the gravity of the crime.

5. Equality Before the Law (*Kanun Önünde Eşitlik*)

According to PC Article 3 (2) 'In the application of the PC no one shall be discriminated against on the basis of his race, language, religion, sect, nationality, colour, gender, political or other thought and ideas, philosophical beliefs, national and social background, birth, economic and other social positions, and no one shall be entitled to any privilege.' This provision mirrors the constitutional rule (Article 10) on equal treatment.

6. No Punishment Without Guilt (*Kusur İlkesi, Nullum Crimen Sine Culpa*)

Modern penal law aims to penalize a wrongful act, not the wrongdoer's personality. Therefore, the character or the way of life of individuals cannot be used as the basis for punishment.³ Unless a person has been found to have acted intentionally or negligently in a specific case, he cannot be held criminally responsible for this act. Contrary to the previous PC, which held the perpetrator responsible in certain instances for the consequences of his own act based only on the existence of a causal nexus, the new PC does not recognize objective (strict) liability. This is expressly stated by Article 23: 'Where an act causes a more serious result, or result other than intended, a person will only be held responsible if he has acted, at least, with negligence in regard to such act.'

This principle prevents assignment of criminal responsibility to persons who do not have the required mental capacity for reasons beyond their control, during the commission of a crime. Only security measures (*güvenlik tedbirleri*) can be imposed on such persons (see PC, Articles 53 et seq.). It is partly due to this principle that legal entities, to which guilt cannot be imputed, may only be subjected to security measures (PC, Article 60), and not punishment.

7. Personal Penal Responsibility (*Ceza Sorumluluğunun Şahsiliği*)

As stated by Article 38 of the Constitution and Article 20 of the PC,⁴ criminal responsibility is personal, and no one shall be held responsible for the conduct of another. This is also another reason why the penal responsibility of legal entities is

3. Such factors, though, may be taken into account in the application of Art. 62 (grounds for discretionary mitigation) and in determining whether to suspend the execution of the sentence of imprisonment (Art. 51).

4. Article 20: '(1) Criminal responsibility is personal. No one shall be held responsible for the conduct of another.

(2) Criminal sanctions shall not be imposed on legal entities. However, security measures prescribed by law to be applied to such in respect of a criminal offence shall be reserved.'

rejected by Turkish academic writings and the PC, which allows only security measures to be imposed on legal persons.