

## **Syllabus**

### **Criminal Procedure in Europe**

**Atlanta's John Marshall School of Law, January 2013**

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**Course description:** This course is going to explore the development of the norms of the criminal justice in Turkey and in Germany in the light of the jurisprudence of the European Court of Human Rights. The decisions of the ECHR and the contribution of European Union to the approximation of criminal justice procedures triggers a transformation of the criminal justice in Europe. Aims and principles of substantial criminal law, general principles governing criminal procedure, rights of the accused, phases of criminal process, agencies involved in the criminal justice system, other participants in the criminal process, sources of evidence, finality, special forms of procedure and consensual disposal shall be examined.

**Final grading, research and writing assignment:** I will give each one of you a written assignment discussing the comparative aspects of a different judgment of the European Court on Human Rights in the field of criminal justice system. Please visit me at my office during the week and I will help you to structure your paper. You will submit this essay at the last day of class and make an oral explanation about your findings. Your final grade will be based on your written paper and on your answers to my questions during your oral presentation.

**Course material:** 1) Introduction to Turkish Criminal Law (Book in electronic format); 2) Turkish Criminal Procedure Code (Translation in electronic format); 3) Decisions of European Court of Human Rights (refer to the web site of the court under HUDOC)

**Teusday, January 22, 2013 (15.15-17.30):**

Introduction to European and Turkish Criminal Law (reading; pages 68-83 Yenisey Kluwer 2011)

**Thursday, January 24, 2013:**

Civil Law Tradition in Europe, Investigation; covert policing method, the powers to search and arrest, Pre-trial detention and judicial control, The warrant of attachment, Powers to interview the accused.

**Teusday, January 29, 2013:**

Phases and sections of the criminal procedure, Investigation phase, Suspension of prosecution under some conditions, Bill of indictment, Mediation

**Thursday, January 31, 2013:**

Main principles of the inquiry in court, Preparation of trial session, Trial session, Evidence, Conclusion of trial and judgment of the court, Enforcement of final criminal judgments, legal remedies.

**Teusday, February 5, 2013:**

European Union Criminal Law, European Arrest Warrant, Organized Crime and Terrorism.

**Thursday, February 7, 2013:**

Last day of class: oral presentations of essays on a decision of European Court of Human Rights and grading your answers to my questions.

## Introduction

### The Essence of the Rules: A Comparison of Turkish and U.S. Criminal Procedure

Jelani Jefferson Exum<sup>♦</sup>

In a general sense, criminal procedure codes throughout the world are all the same. They are rules designed to carry out the penal process. In its most basic sense, criminal procedure everywhere can be defined as, “the law governing that series of procedures through which the substantive criminal law is enforced.”<sup>1</sup> However, it is the philosophies, principles, and history behind those rules that define a particular sovereignty’s approach to criminal procedure and make one system significantly different from another. Prof. Yenisey’s translation of the Turkish Penal Procedure Code into English makes the newly revised criminal procedure system in Turkey readily accessible to millions. It also puts on display the spirit of the Turkish approach to criminal procedure, allowing for the comparison to other criminal procedure codes and laws. When compared to the criminal procedure laws of the United States, the essence of the Turkish criminal procedure system becomes even more apparent.<sup>2</sup>

Enumerating all of the similarities and differences between Turkish and U.S. criminal procedure would be tedious, and perhaps even uninteresting. And, when quickly reviewing the rules from an American’s perspective, Turkey’s criminal process may seem very similar to that of the United States. In Turkey, there is an investigation phase undertaken by the police and prosecutor’s offices through the use of search and arrest warrants, formal charges are brought against a suspect, a trial is conducted, a verdict reached, and there is some appeal process.<sup>3</sup> However, a deeper review reveals several key differences between the Turkish and American systems. For one, the Turkish system allows for settlement

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<sup>1</sup> 1 Wayne R. LaFare, Jerold H. Israel & Nancy J. King, *Criminal Procedure*, 469 (2d ed. 1999), at 5.

<sup>2</sup> This introduction compares certain points of Turkish criminal procedure to the United States’ federal criminal procedure. Truly, though, there are several criminal procedure systems throughout the United States within each separate state sovereignty. However, I focus only on the federal system for the clarity and manageability of the comparison.

<sup>3</sup> Turkish Penal Procedure Code (hereinafter, “TPPC”) Art. 100 and Federal Rules of Criminal Procedure (hereinafter “FRCP”), Rules 4 and 9 (arrest warrants); TPPC Art. 119 and FRCP 41(e) (search warrants); TPPC Art. 170(2) and FRCP 7 (indictments); TPPC Art. 182 and FRCP 23 (trial or main hearing); TPPC Art. 227 (1) and 18 U.S.C. §3553(a) (judgments and sentencing); TPPC Art. 272 and FRCP 37(a) (appeal).

agreements and mediation, which are quite different from the American plea bargaining system.<sup>4</sup> During the investigation phase, consent searches do not exist in Turkey, though they are heavily depended upon, and perhaps even overused, in American criminal investigations.<sup>5</sup> In the trial phase, Turkish judges take an extremely active role, including examining and calling witnesses, appointing experts, and even making decisions based on facts outside of the evidence presented by the parties.<sup>6</sup> And, perhaps the most obvious difference between the Turkish and American criminal processes is that there are no juries in the Turkish criminal court. However, while all of these similarities and difference are interesting in and of themselves, the real inquiry is whether these procedural differences have any bearing on the purposes of each country's criminal system. Therefore, defining the purposes of criminal procedure may be the first step in understanding whether the Turkish and American criminal procedure rules are more alike than different.

While giving a definition of criminal procedure may be an easy task, coming to a consensus on the purpose of criminal procedure is not quite as simple. For starters, the Turkish Penal Procedure Code does not contain a provision specifying its purpose. Rule 2 of the U.S. Federal Rules of Criminal Procedure states that the rules “are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”<sup>7</sup> However, anyone who is familiar with criminal procedure in the United States knows that the criminal process is more truly based in the U.S. Constitution than in the U.S. Code. With regard to criminal procedure in the United States, the Supreme Court has said that “[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice[.]”<sup>8</sup> The Supreme Court, though, has given no coherent statement on the overall purposes of criminal procedure in the United States.<sup>9</sup> However, a few purposes of criminal procedure that often receive scholarly attention are truth-discovery to promote public safety, deterrence of government misconduct to protect of the individual rights of the accused, and garnering societal respect for the criminal justice process.<sup>10</sup> Therefore, in discussing the

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<sup>4</sup> TPPC Art. 174(1)(c) and FRCP 11.

<sup>5</sup> See, e.g., David A. Harris, “The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-/11 America”, 38 Rutgers L.J. 1, 57-59 (2006) (discussing some of the problems with consent searches).

<sup>6</sup> TPPC Art. 43(3) (court can summons witnesses); TPPC Art. 63 (court can call experts); TPPC Art. 225 (2) (judge not bound by parties' evidence).

<sup>7</sup> FRCP 2.

<sup>8</sup> *Johnson v. State of N.J.*, 384 U.S. 719, 728 (1966).

<sup>9</sup> See, e.g., Peter Arenella, “[Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies](#)”, 72 Geo. L.J. 185, 185-86, 247 (1983) (arguing that there is “a glaring deficiency in criminal justice scholarship: the failure to identify the functions served by American criminal procedure.”).

<sup>10</sup> Of course, it is possible to identify several possible purposes of criminal procedure. For the sake of discussion, I have chosen to focus on these familiar purposes. However, I realize that identifying these factors as the purposes of criminal procedure is not without disagreement from some. See, e.g.,

similarities and differences between American and Turkish criminal procedure, it is helpful to think of each country's rules in light of three possible purposes of criminal procedure: (1) discovery of the truth; (2) protection of the accused from government misconduct; and (3) promoting respect for the criminal justice system.<sup>11</sup>

### Truth-Seeking and Truth Finding

An interesting question that develops upon comparing U.S. and Turkish criminal procedure is how each system approaches the job of ascertaining the truth. Finding out whether the accused is actually the culprit is important in a nation's duty to protect the public safety. The United States Supreme Court has made this clear several times, articulating such maxims as, "The state's obligation is not to convict, but to see that, so far as possible, the truth emerges."<sup>12</sup> However, at times in the criminal process, the rules can promote resolving a case to promote efficiency over discovering the truth.<sup>13</sup> The criminal procedure rules in Turkey as well as in the U.S. give the accused an opportunity to resolve the case before going to trial. Though the manner in which this resolution is carried out differs between the two nations, each runs the risk of allowing for the conclusion of a case to trump the truth behind the charges.

In the United States, we know this activity as plea bargaining. Rule 11 of the Federal Rules of Criminal Procedure allows for a defendant to plead not guilty, guilty, or nolo contendere to charges.<sup>14</sup> In the "bargaining" process, prosecutors can offer a defendant such comforting concessions as the recommendation of a lesser sentence or the promise to not bring additional charges in exchange for the defendant's plea of guilty to certain charges.<sup>15</sup> Before accepting a guilty plea, a court must be satisfied that, among other things, there is a factual basis for the plea.<sup>16</sup> Therefore, the court must have some indication of the truthfulness of the defendant's admission of guilt. However, this is not to say that only guilty defendants plead guilty. Rather, in the U.S. criminal procedure system, where

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*Id.* at 186,188 (expressing the view that "[s]cholarly references to reliable and efficient truth-discovery, deterrence of future criminality, and protection of individual rights provide an inadequate and misleading list" of criminal procedure purposes and functions.).

<sup>11</sup> These topics are separated for the ease of discussion. However, they are each intertwined with one another. For instance, a truth-seeking system that attempts to protect the accused often also promotes respect for the system. Additionally, these topics are often in conflict with one another as the remainder of the discussion will reveal.

<sup>12</sup> [\*Giles v. Maryland\*, 386 U.S. 66, 98 \(1967\)](#); *see also*, [\*Berger v. United States\*, 295 U.S. 78, 88 \(1935\)](#) ("[The State's interest] in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

<sup>13</sup> *See*, Ronald Wright, "Trial Distortion and the End of Innocence in Federal Criminal Justice", 154 U. Pa. L. Rev. 79, 86 (2005) (arguing that "Federal sentencing should become more a servant of truth and less a slave to efficient case disposition.").

<sup>14</sup> FRCP 11(a)(1)

<sup>15</sup> FRCP 11(c)

<sup>16</sup> FRCP 11(b)(3)

prosecutors often have a wide range of choices when it comes to charging a particular defendant, and where sentencing has become increasingly complex and uncertain<sup>17</sup>, defendants sometimes conclude that it is in their best interest to plead guilty though they maintain their innocence as to the faced charges.<sup>18</sup> In fact, the U.S. Supreme Court has even acknowledged that this happens and has upheld the practice in the states.<sup>19</sup> With the large number of cases resolved by guilty pleas in the federal system, the same situation is certainly probable.<sup>20</sup> Of course, there are those who argue that plea bargaining has efficiency benefits and that the high rate of guilty pleas simply indicates that prosecutors are bringing strong, accurate cases.<sup>21</sup> However, in addition to the possibility of defendants pleading guilty to crimes that they did not commit, plea bargaining is also problematic due to an even more certain consequence. Because plea bargaining allows for the resolution of cases without prosecutors needing to put on all of the evidence that they have gathered before the public at trial, a guilty plea can hinder the truth-seeking effort by preventing facts from being disclosed to the court, to the victims, and to the public at large.<sup>22</sup> For this reason, plea bargaining in the United States can act to the detriment of the truth finding function of criminal procedure.

Instead of using a plea-bargaining system, the Turkish Code of Penal Procedure allows for pre-trial mediation for certain crimes.<sup>23</sup> In this process, the prosecutor, judge, or hired mediator, can facilitate a resolution of the case between the accused and the victim. As a matter of procedure, mediation appears to be very different than plea bargaining. As in civil contexts, mediation in the Turkish criminal arena brings the injured party to the table with the alleged culprit. The Turkish prosecutor acts as a facilitator, rather than an adversary as in the U.S. plea bargaining model. And, if the accused and the victim freely decide on a resolution that is in accordance with the law, then the prosecutor gives his seal of approval to the plan.<sup>24</sup> Additionally, if the accused successfully carries out the mediated

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<sup>17</sup> See, e.g., *Irizarry v. U.S.*, 128 S.Ct. 2198 (2008) (holding that district courts do not have to give parties notice when contemplating a variance from the recommended Guidelines range).

<sup>18</sup> See, Ronald F. Wright, "Trial Distortion and the End of Innocence in Federal Criminal Justice", 154 U. Penn. L.R. 79, 81 (2005) ("Worst of all, plea bargaining can pressure some defendants to accept convictions for crimes they did not commit."); See also, Daniel Givelber, "[Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?](#)", 49 Rutgers L. Rev. 1317, 1342 (1997) ("[A] rational [but innocent] defendant who is likely to be convicted may choose the lesser sentence resulting from a plea bargain rather than risk erroneous conviction.").

<sup>19</sup> See *North Carolina v. Alford*, 400 U.S. 25, 37-8 (1970) (holding that a defendant who maintains his innocence may enter a guilty plea in order to avoid harsher punishment that may be imposed if found guilty at trial).

<sup>20</sup> The U.S. Department of Justice, Bureau of Justice Statistics reports that in 2004, 90% of federal defendants were convicted, and, of those convicted, 96% plead guilty. Available at, <http://www.ojp.usdoj.gov/bjs/fed.htm#Adjudication>.

<sup>21</sup> See Wright, *supra* note 17, at 83. (describing this as an "accuracy hypothesis").

<sup>22</sup> See *id.* at 81.

<sup>23</sup> TCPP Article 253 (1), (9), and Article 254(1).

<sup>24</sup> TCPP Article 253 (17).

plan, then the prosecution is dropped.<sup>25</sup> While this mediation procedure mirrors that of civil cases, when thought of in light of the problems that plague plea-bargaining, the two systems appear less different. When mediation is used in the criminal context, it arguably takes on some of the same traits of plea-bargaining. The accused may face the same dilemmas of deciding between negotiating the resolution of charges in order to avoid a stiff penalty if convicted and truthfully maintaining innocence at a risky trial. Therefore, it is possible that in certain situations, mediation may hinder the truth-finding efforts just as much as does plea bargaining.

However, there are also some key differences between mediation and plea bargaining with regards to truth-finding. For one, the accused who submits to mediation is not actually pleading guilty, though one can assume that, by mediating, he is accepting responsibility for the offense. As far as truth-seeking is concerned, it can be argued that allowing a potentially innocent person to decide to take responsibility for a crime by paying a fine or some form of restitution is less problematic than a system that encourages innocent people to state on judicial record that they are in fact guilty of a crime.<sup>26</sup> Further, unlike what often takes place in the U.S., the accused in mediation is not “bargaining” with the prosecutor by agreeing to guilt in a lesser offense in order to avoid a stiffer prosecution. This means that a defendant in the U.S. who is in fact guilty of a worse offense is oftentimes punished for something lesser, thus potentially blocking the victim and the public from knowing the truth of the worse crime. In Turkey, the victim is involved in mediation and the accused is not “bargaining” in the sense that he agrees to be held responsible for a lesser crime in order to avoid harsher prosecution. Instead, the crime charged determines whether mediation is even appropriate. Then, once faced with the charge(s), the accused and the victim agree on a resolution based on the fact known to each.

Of course, it is impossible to ascertain which approach allows the truth about the accused’s innocence or guilt to be known more often. However, the differences in the Turkish and American approaches reveal at least something about the two systems’ focuses. While both seem to value the efficient resolution of cases, the Turkish system places more importance on the involvement of the victim than does the American system. What that says about the overall truth-seeking function of each system is unclear. Therefore, taking a look at the trial procedures is necessary to shed more light on how each system approaches its truth-finding responsibilities. For the cases that are not resolved pre-trial, the trial plays a crucial role in determining the guilt or innocence of an accused individual. Again, there are several similarities and differences between the procedure for criminal trials in Turkey and in the United States that are too numerous to state. However, when it comes to

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<sup>25</sup> TCCP Article 253 (19). Alternatively, if the parties fail to reach an agreement during mediation, or if the mediation plan is not fulfilled by the accused, then the prosecution proceeds to trial. TCCP Article 253 (18), (19), and Article 254 (2).

<sup>26</sup> Though this is an arguable stance, it is by no means the only possible position. One could also argue that the situations are just the same, and that both are contrary to the truth-seeking responsibility of prosecutions. Also, some may maintain that neither mediation nor plea bargaining are problematic at all because they are efficient ways of discovering the truth without the cost of a trial.

truth-seeking and truth-finding, there are some trial procedures that are more relevant than others. One of those factors is the role of the prosecutor and judge, and the other is the role of evidence.

In the American system, we have become accustomed to the drama of the courtroom trial. The prosecutor and defense attorney are opponents, each seeking to defeat the other with clever questions to their own witnesses, tricky cross-examination of the other's witnesses, and compelling opening and closing arguments. The judge in the U.S. criminal courtroom has the role of referee, ruling on objections, deciding on the admissibility of challenged evidence, and facilitating the timely and fair execution of the trial. However, the criminal trial in Turkey has developed differently. As the Turkish Penal Procedure Code explains, the presiding judge takes the lead in the trial, and has the responsibility of "interrogat[ing] the accused and provid[ing] for the presentation of evidence."<sup>27</sup> Though attorneys (as well as the accused and the victim) are permitted to ask direct questions to witnesses<sup>28</sup>, it is the judge who has the primary responsibility of discovering the truth, and in doing so, he is allowed to call his own witnesses and is not bound by the evidence presented by the prosecution or the defense.<sup>29</sup> Therefore, it has been left up to the judge in Turkey to protect the truth-seeking function of the trial.

It is easy to argue that the Turkish approach is a more effective if truth-seeking is in fact the purpose of trials.<sup>30</sup> The uninvolved judge acts as a sort of independent investigator hired to get to the bottom of situation and render a judgment. In contrast, the U.S. approach takes the prosecutor who has brought charges against the defendant, and is thus invested in the outcome of the case, gives him the ethical responsibility to only present the truth, and then pits him against the defense attorney who is bound to zealously represent the defendant within the bounds of the law.<sup>31</sup> Thus, the American prosecutor is left in the tenuous position of wanting to win the case that she has prepared and needing to always remember her ethical duty to only maintain the prosecution if she remains convinced of the guilt of the defendant throughout the trial.<sup>32</sup> One could argue that the American jury can act as the impartial decision-maker whose role mirrors that of the Turkish judge. And, in some ways that comparison is valid. However, there is a crucial difference. While the Turkish judge can directly question witnesses and look into his own evidence, the American

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<sup>27</sup> TPPC Article 192 (1).

<sup>28</sup> TPPC Article 201 (1).

<sup>29</sup> TPPC Article 225 (2).

<sup>30</sup> See, Stephen F. Smith, "The Supreme Court and the Politics of Death", 94 Va. L. Rev. 283, 316 (2008) (recognizing the truth-seeking function of trials).

<sup>31</sup> Model Code of Professional Responsibility and Code of Judicial Conduct, EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.").

<sup>32</sup> *Berger v. U.S.*, 295 U.S. 78, 88 (1935) (setting forth the long-accepted view that prosecutors have "a duty to refrain from improper methods calculated to produce a wrongful conviction"), overruled on other grounds).



jury cannot. In a sense, they are spectators watching the courtroom drama unfold, who are then charged with the task of determining guilt using only the script that they have been giving by opposing parties. For that reason, the jury in the United States may be less able to ascertain the truth than the judge in Turkey.

However, ascertaining a criminal procedure system's attention to truth finding must go beyond looking to pre-trial and trial procedures. It is also important to determine how a system handles truth-seeking after the completion of a trial. The Turkish Penal Procedure Code clearly states several grounds for holding a new trial after a judgment has been rendered.<sup>33</sup> Some of those grounds relate to misconduct or other procedural errors. However, some are directly related to the truth-finding function of the trial. For instance, convicts are entitled to a new trial if the conviction was based on any falsified documents used at trial.<sup>34</sup> The same is true if there is new evidence or facts that would change the outcome of the trial.<sup>35</sup> In Turkey, the prosecution is also entitled to a new trial if an accused individual was acquitted through the use of fraudulent documents at trial.<sup>36</sup> However, a new trial is also appropriate if the acquitted person makes a reliable confession to committing the acquitted crime before a judge once the trial has been concluded.<sup>37</sup> The United States takes a less clear, and perhaps less generous, approach. Rule 33 of the Federal Rules of Criminal Procedure allow for a new trial, upon motion by the defendant, in cases where "the interest of justice so requires."<sup>38</sup> Despite the open wording, federal courts have determined that the interest of justice only requires a new trial when "the evidence weighs heavily against the verdict" to the extent that allowing the guilty verdict to stand would be unjust.<sup>39</sup> Instead of enumerating grounds for a new trial as Turkey does, the U.S. has made it clear through court decisions that new trials are only to be granted in extreme cases. Both the U.S. and Turkey, however, recognize that even after the initial investigation, and still after the trial, there is still the possibility that the truth about a defendant's guilt or innocence was not revealed with the requisite level of confidence.

### **Protection of the Rights of the Accused from Government Misconduct**

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<sup>33</sup> TPPC Article 311.

<sup>34</sup> TPPC Article 311 (1)(a).

<sup>35</sup> TPPC Article 311 (1)(e).

<sup>36</sup> TCCP Article 314 (1)(a).

<sup>37</sup> TCCP Article 314 (1)(c).

<sup>38</sup> FRCP 33(a).

<sup>39</sup> *U.S. v. Taylor*, 2008 WL 2661125, \*3 (4th Cir. 2008) (explaining that "[a] district court must sparingly exercise the discretion to grant a new trial"); see also [United States v. Hughes, 505 F.3d 578, 592 \(6th Cir.2007\)](#) ("A motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure may be premised upon the argument that the jury's verdict was against the manifest weight of the evidence."); see also [United States v. Campos, 306 F.3d 577, 579 \(8th Cir.2002\)](#) (explaining that a district court may only grant a new trial under Rule 33 "if the evidence weighs so heavily against the verdict that a miscarriage of justice may have occurred.").

In addition to seeking the truth, criminal procedure is used to protect the rights of the accused. As the United States Supreme Court so eloquently stated, “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”<sup>40</sup> This means enforcing rules that deter government mistreatment of suspects and accused individuals. While the criminal process in both the United States and Turkey address the need to protect the accused, the two countries come to that place from rather different starting points.

The new Turkish Penal Procedure Code became enforceable in 2005 and took on the task of responding to the human rights issues that Turkey had faced for decades. Despite the country’s public safety issues, Turkey had to be sure to put thought into providing for the protection of suspects in custody and otherwise.<sup>41</sup> Turkey does so by providing for arrested individuals to be brought before a judge within 24 hours<sup>42</sup> and prohibiting the coercion of suspects during interviews and interrogation.<sup>43</sup> Also, much like the U.S., Turkey gives accused individuals the right to an attorney who can be present during many crucial points of the investigation and during the trial.<sup>44</sup> Also like the United States, Turkey provides for the appointment of counsel for those individuals who cannot afford to retain counsel on their own.<sup>45</sup> Of course, this right to an attorney is more than statutory in the United States. In the United States, most criminal procedure rules have a constitutional basis, and the protection of the accused is no different. The right to an attorney in the United States has roots in both the Fifth and Sixth Amendments of the U.S. Constitution. The Sixth Amendment explicitly gives a right to the assistance of counsel for accused individuals. Though the same is not true for the Fifth Amendment, the Supreme Court has interpreted the Fifth Amendment to give suspects the right to counsel during custodial interrogation, and has protected this right by requiring what is popularly known as Miranda warnings to advise suspects of that right.<sup>46</sup> Turkey also similarly requires suspects being subjected to police interrogation to be advised of their right to counsel.<sup>47</sup> In these respects, the criminal processes in Turkey and the United States look very much

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<sup>40</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>41</sup> See, David J. Gottlieb, Richard E. Levy, Stephen R. McAllister, John C. Peck, Feridun Yenisey, “Conference on Comparative Law – Recent Developments in European, American, and Turkish Law: “Team Kansas” Goes to Turkey”, 45 U. Kan. L. Rev. 671, 689-90 (1997) (“While the country has thus faced what it regards as severe threats to internal order, its government has also been subject to criticism by national and international human rights authorities for allegedly failing to prevent serious human rights violations, particularly as respects mistreatment of suspects in custody.”).

<sup>42</sup> TPPC Art. 94.

<sup>43</sup> TPPC Art. 148(1).

<sup>44</sup> TPPC Art. 149(3).

<sup>45</sup> TPPC Art. 74(2) and FRCP 44(a).

<sup>46</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>47</sup> TPPC Art. 147(c).

alike. Protecting the accused, however, is not just about giving the accused the protection of judges or counsel. Ensuring that accused individuals are treated fairly also requires the enforcement of rules designed to dissuade police and government misconduct. However, the cost of deterring police misconduct is often in conflict with the truth-seeking function and responsibility to protect the public safety that criminal procedure rules address. However, both the United States and Turkey have criminal procedure rules aimed at punishing police violations despite the potential costs to truth-finding and public safety. Rules allowing for the exclusion of illegally obtained evidence are the perfect examples of this truth/deterrence tension.

In the United States, the exclusionary rule developed as a means of protecting the right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment of the U.S. Constitution, and has been expanded to cover other constitutional protections.<sup>48</sup> From the time it began applying the exclusionary rule, the United States Supreme Court recognized the exclusion of evidence as necessary to stop law enforcement officials from committing constitutional violations. As the U.S. Supreme Court explained in 1914, allowing evidence obtained in violation of constitutional protections “would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.”<sup>49</sup> However, throughout the years, the Supreme Court has also recognized that the exclusionary rule hinders the truth-finding function of the criminal process by disallowing evidence that may be relevant.<sup>50</sup> Thus, the Court, through judicial decision, began limiting the application of the exclusionary rule through balancing tests that focused on the rule’s deterrent effect. Beginning in the 1970s, the Supreme Court carved out several exceptions to the exclusionary rule, finding that in those situations, the deterrent effect of exclusion did not outweigh the social costs of losing probative evidence. These exceptions include allowing illegally obtained evidence to be introduced in criminal trials when there was good faith on the part of the violating officer, when used to impeach the defendant, when the use of the evidence was sufficiently attenuated from the constitutional violation, when the evidence could have been obtained through a source independent of the constitutional violation, and when the discovery of the illegally obtained evidence was inevitable.<sup>51</sup> The

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<sup>48</sup> For example, the exclusionary rule has been used in the Fifth and Sixth Amendment contexts as well. See *Miranda*, supra n. 48 (Fifth Amendment exclusionary rule); see also *Massiah v. U.S.*, 377 U.S. 201 (1964) (Sixth Amendment exclusionary rule).

<sup>49</sup> *Weeks v. U.S.*, 232 U.S. 383, 394 (1914) (first case in which the United States held that evidence obtained by a federal official in violation of the Fourth Amendment had to be excluded from federal court).

<sup>50</sup> *United States v. Leon*, 468 U.S. 897, 922 (1984) (declining to apply the exclusionary rule where “the marginal or nonexistent benefits produced by suppressing evidence (...) cannot justify the substantial costs of exclusion.”).

<sup>51</sup> [United States v. Leon, 468 U.S. 897 \(1984\)](#) (good faith exception); *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (upholding the use of excludable evidence to impeach the defendant); [Wong Sun v. United States, 371 U.S. 471, 487-88 \(1963\)](#) (attenuation doctrine); [Murray v. United States, 487 U.S. 533, 536-37 \(1988\)](#) (independent source doctrine); [Nix v. Williams, 467 U.S. 431, 444 \(1984\)](#) (inevitability doctrine).

trend in the United States has been toward being “cautio[us] against expanding” the exclusionary rule<sup>52</sup> and, and focusing on “the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives”.<sup>53</sup> The statutorily-based exclusionary rule in Turkey seems more similar to the early days of the American rule.

The Turkish Penal Procedure Code does not refer to an exclusionary rule, *per se*; however, there are several instances in which evidence may be excluded without regard to its probative value. Article 206(2)(a) provides that requests to submit evidence may be denied “if the evidence is unlawfully obtained”. And, though that Article of the Code is written as though the decision on whether to admit illegally obtained evidence is in the judge’s discretion, in the case of confession obtained through coercion or torture, or any other means that would interfere with an individual’s free will, the exclusion of resulting evidence is required by the Code.<sup>54</sup> This is the case even if the speaker has consented to the use of the evidence.<sup>55</sup> Further, even if illegally obtained evidence somehow eludes suppression, the Code makes it clear that only legally obtained evidence can be used to prove the crime charged.<sup>56</sup> Thus, unlike the United States, Turkey’s use of exclusion in criminal proceedings, at least as written, focuses more on protecting the rights of the accused by deterring undesirable government conduct, than on being fearful of the useful evidence that may be lost in the process.

### **Promoting Respect for the Criminal Justice System**

If, at its core, criminal procedure exists to enforce substantive criminal law, then part of its role is to avoid undercutting the work of substantive criminal law by engendering societal disrespect for the criminal justice system and the rule of law. Respect for the rule of law has been widely accepted as essential to free, democratic societies.<sup>57</sup> Thus, criminal procedure is just as much about promoting societal faith in the criminal justice system as it is about finding truth, protecting the rights of the accused, and deterring government misconduct. Of course, all of these functions are related, and in many ways, finding truth, protecting the accused, and deterring government conduct are all necessary in encouraging trust in the system. However, there are some criminal procedure

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<sup>52</sup> [Colorado v. Connelly](#), 479 U.S. 157, 166 (1986).

<sup>53</sup> [Pennsylvania Bd. of Probation and Parole v. Scott](#), 524 U.S. 357, 364-365 (1998) (citation omitted).

<sup>54</sup> TPPC Art. 148(3).

<sup>55</sup> *Id.*

<sup>56</sup> TPPC Art. 217(2).

<sup>57</sup> See, e.g., Richard Herz, “The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement”, 21 Harv. Hum. Rts. J. 207, 209 (2008) (“U.S. companies will promote democracy and human rights in their interactions with foreign governments and citizens by conveying democratic values and pushing for respect for the rule of law.”); See also, Juan J. Linz & Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* 10 (Baltimore: Johns Hopkins University Press, 1996) (describing respect for the rule of law as necessary for stable, modern democratic nations).

rules that particularly serve respect for the rule of law by involving those besides the defendant, attorneys, and judge in the criminal process. Specifically, the way a particular criminal justice system incorporates victims' rights and involvement of the public in the criminal process speaks greatly to that system's desire to promote faith in the rule of law. While Turkey and the United States have many criminal procedure similarities, the nations' treatment of victims and the involvement of the public are areas in which Turkey and the United States are perhaps the most divergent.

Turkey takes a very expansive approach to involving victims in the criminal process. Throughout the Turkish Penal Procedure Code, there are references to ways in which victims can be involved, from moving for physical examinations of suspects<sup>58</sup>, to demanding copies of evidentiary documents<sup>59</sup>, to even calling for certain witnesses to be summoned to court.<sup>60</sup> The Code also gives victims the right to the appointed an attorney to represent his or her interests.<sup>61</sup> These rules allow victims in Turkey to be intimately involved in prosecuting their own case in ways that are not available in the United States. Perhaps the most striking difference between the rights of victims in Turkey and the United States is that, in Turkey, the victims actually have a right to intervene as parties in the criminal proceedings.<sup>62</sup> As intervening parties, victims can apply for legal remedies from the court apart from what is sought by prosecutors.<sup>63</sup> This is extremely different from the United States in which victims are often on the sidelines, watching the event as the rest of the public does. In fact, the only rights that are provided to victims by the Federal Rules of Criminal Procedure are the rights to: (1) have notice of a proceeding; (2) attend the proceeding; and (3) be heard upon release, plea, or sentencing of the accused. The U.S Code provides a few more rights to victims, but none allow victims to be as involved in the criminal process as the Turkish Code.<sup>64</sup> Included in these additional rights is the right to reasonably confer with the prosecution.<sup>65</sup> However, even this seemingly generous right is limited in comparison to Turkish victims' right to demand witness summons and request the gathering of certain evidence.

Though Turkey is more generous when it comes to promoting faith in the criminal system by involving victims in the criminal process, the United States arguably puts more effort into doing the same by involving the greater public. This is primarily done

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<sup>58</sup> TPPC Art. 75(1) and Art. 234(a)(1)

<sup>59</sup> TPPC Art. 234(a)(2) and Art. 234(b)(3)

<sup>60</sup> TPPC Art. 234(b)(4).

<sup>61</sup> TPPC Art. 234(a)(3).

<sup>62</sup> TPPC Art. 234(b)(2) and Art. 237(1).

<sup>63</sup> TPPC Art. 242(1).

<sup>64</sup> 18 U.S.C. §3771(a) grants victims the right to be protected from the accused, to notice of proceedings, to be present at proceedings, to be heard at proceedings involving release, plea, sentencing, or parole, to confer with the prosecution, to full and timely restitution, to be free from the delay of proceedings, and to be treated fairly and with respect to privacy.

<sup>65</sup> 18 U.S.C. §3771(a)(5).

through juries, a body that Turkey does not use at all in its criminal proceedings. Nowhere in the Turkish Penal Procedure Code is a jury mentioned. Instead, judges determine whether the defendant is guilty and also determine the appropriate sentence in the case of guilt.<sup>66</sup> The United States, on the other hand, uses juries throughout its criminal process. In federal felony cases in the United States, a grand jury must hand down the indictment in accordance with the Fifth Amendment to the U.S. Constitution.<sup>67</sup> In Turkey, the prosecution alone prepares the indictment,<sup>68</sup> and it is the responsibility of the presiding judge to determine whether the indictment should be accepted or returned.<sup>69</sup> Also, in the United States, the Sixth Amendment gives a criminal defendant facing non-petty charges a right to be tried by a jury of his peers. This jury trial right has been described as a “sacred palladium” ensuring the integrity of the criminal justice system.<sup>70</sup> And, even though the method of using grand juries and trial juries can be criticized for several reasons<sup>71</sup>, the fact remains that, at least on its face, the American jury system invites public involvement in the criminal process, helping to stimulate respect for and trust in the criminal system.<sup>72</sup>

### **The Essence of the Turkish Penal Procedure Code**

Comparing Turkish criminal procedure to that of the United States can lead one to many conclusions about both nations. However, when those procedures are viewed in light of the purposes of truth discovery, protection of the accused, and promoting respect for the criminal justice system, it is easier to formulate reasoned opinions about the spirit behind the Turkish Penal Procedure Code. The Turkish Penal Code puts more of an emphasis on involving the victims of crimes in the truth-seeking objectives and in encouraging respect for the criminal justice system as a whole. It does so by bringing the victim to the table with accused individuals in mediation, and by allowing victims to

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<sup>66</sup> TPPC Art. 227 (1).

<sup>67</sup> *See, Stirone v. U.S.*, 361 U.S. 212, 215 (1960)

<sup>68</sup> TPPC Art. 170(2)

<sup>69</sup> TPPC Art. 174.

<sup>70</sup> *See* Julie A. Seaman, “Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony”, 96 Geo. L.J. 827, 864 (2008) (discussing various views on the importance of juries).

<sup>71</sup> *See, e.g.*, Tracy Gilstrap Weiss, “The Great Democratizing Principle: The Effect on South Africa of Planning a Democracy Without a Jury System”, 11 Temp. Int'l & Comp. L.J. 107 (1997) (discussing criticism of and accolades for the American jury system).

<sup>72</sup> *See, e.g.*, Gerard E. Lynch, “Our Administrative System of Criminal Justice”, 66 Fordham L. Rev. 2117, 2145-46 (1998) (Explaining the aspirations of jury trials as being: (1) “a ceremonial reminder of the aspiration to due process;” (2) “a protection against the punishment of those of whom the government disapproves, but about whose blameworthiness there remain troubling doubts, and” (3) “the fail-safe appellate process that promotes the reasonableness of prosecutorial-administrative determinations by setting the limits within which it operates”).

intervene in criminal prosecutions. And, while the victim has much more participation in the Turkish criminal system than victims do in that of the United States, so do the Turkish judges. Judges in Turkey run the show in a way that prosecutors and defense attorneys do in the United States. Thus, one could conclude that Turkey balances the duty of its criminal process to seek the truth, protect the accused, and promote respect for the rule of criminal law by giving a majority of the power to judges and giving victims a loud voice.

The United States, on the other hand, fulfills the responsibilities of its criminal process by giving extensive power to prosecutors and bringing the public in as jurors to keep the system accountable. Additionally, the Turkish Penal Procedure Code very strongly sets forth rules that punish law enforcement misconduct, while the United States is wary of losing relevant evidence. Taking all of this into account, Turkey, when compared to the United States, has a criminal process that is serious about disciplining its enforcement agents, and that regards crime as touching the victim first. Turkey trusts its judges to discover the truth in ways in which the United States has historically been skeptical. And, where the United States inserts the jury - the public body - to cure that skepticism, Turkey invites the crime victim to become intimately involved in the proceedings. One could say that the Turkish criminal process welcomes those whom have been affected by the alleged crime – the prosecutor, the accused and his attorney, and the victim and his attorney – into the process, and gives the judge the tools to delve into the conflict. The United States, in contrast, allows the prosecutor and defense attorney to battle, and gives the public the opportunity to use its sense of justice and fairness as a measuring stick for guilt or innocence. Both Turkey and the U.S., though, carry out their criminal process with an eye toward the presumed innocence of the accused. Which procedural system more effectively enforces the substantive criminal law is debatable. However, Prof. Yenisey's translation project gives us the tools to have that hearty debate throughout the years.

**TURKISH PENAL PROCEDURE CODE**  
(4.12.2004-5271, RG. 17.12.2004, Nr. 25673)

**FIRST BOOK**

**General Provisions**

## **FIRST PART**

### **Extent, Definitions, Subject Matter Jurisdiction and Venue**

## **FIRST CHAPTER**

### **Extent and Definitions**

#### **The scope of the Code**

**Article 1** - (1) This Code regulates rules about the preliminary investigation and prosecution and rules about how to bring a criminal charge, carrying out the case and concluding it.

#### **Definitions**

**Article 2** - (1) In the application of this Code the following concepts mean,

- a) Suspect: The individual who is under suspicion at the investigation phase,
- b) Accused: The individual, who is under suspicion, after the prosecution phase has started, and until the final judgment,
- c) Defense counsel: The lawyer, who defends the suspect or the accused during the criminal proceedings,
- d) Representative: The lawyer, who represents the intervening party, the victim, or the person, who is responsible by his pecuniary compensation at issue at the criminal proceedings,
- e) Investigation: Phase that comprises transactions, starting with gaining knowledge of suspicion of a committed crime, and continuing until the indictment has been approved by the court,
- f) Prosecution: The phase beginning with the decision on the admissibility of the indictment and ending with the final judgment,
- g) Interview: Questioning of the suspect by law enforcement authorities or by the public prosecutor about the crime, which is under investigation,



h) Interrogation: A hearing of the suspect or the accused by a judge or the court about the crime, which is under investigation,

i) Party liable for pecuniary compensation: This word means any individual who shall be effected by the strict and secondary (material and monetary) liability and who is subject to the consequences of the court's final decision,

j) Offense detected in the act: this includes:

1. A crime that is being committed at the moment,

2. A crime that has just been committed when the perpetrator has been arrested without warrant by the law enforcement authorities, by the victim or by a neutral individual, after he has been chased,

3. A crime for which an individual has been arrested without a warrant after the crime has been committed, when there are moveable goods or evidence, which indicate that he has resently committed a crime,

k) Collective offense: An offense committed by three or more people with or without the intent of participation,

l) Disciplinary incarceration: The deprivation of liberty imposed for certain conduct, which will be put into effect with the aim of protecting the partial order in certain institutions; which cannot be transformed into alternative measures; and cannot be subject to settlement procedures; and shall not be a ground for application of repetition provisions; the perpetrator of which may not be released under certain conditions; which cannot be postponed; and cannot be taken into the records of convicted individuals.

## **SECOND CHAPTER**

### **Subject Matter Jurisdiction**

#### **Subject matter jurisdiction**

**Article 3 -** (1) The subject matter jurisdiction of the courts shall be designated by law.

#### **Ex officio decision on jurisdiction and conflict on jurisdiction**

**Article 4 -** (1) The trial court may render a decision related to its subject matter jurisdiction in a case at every stage of the prosecution phase by its own motion. The provision of Article 6 is reserved.

(2) If more than one court determines that it has subject matter jurisdiction at the same litigation, their common high court shall decide which of them shall be granted jurisdiction.

#### **Mandatory decision on lack of subject matter jurisdiction of court and its consequences**

**Article 5 -** (1) After the admissibility of the indictment has been decided, the court shall decide to send the case to the competent court, if it considers that the case is beyond or outside its jurisdiction.

(2) A party may oppose decisions on lack of jurisdiction rendered by the courts of ordinary jurisdiction.

#### **Instances, where the court has to try the case**

**Article 6 -** (1) The trial court shall not decide to send a case to the lower court, if it determines that the legal definition of the crime has changed during the inquiry at the trial. (As amended by Act 2006-5560)

#### **Decisions rendered by a judge or a court that has no jurisdiction**

**Article 7 -** (1) Except those that are not subject to renewal, legal interactions conducted by a judge or a court that has no jurisdiction are void.

### **THIRD CHAPTER**

#### **Connected lawsuits**

##### **The concept of connection**

**Article 8** – (1) Lawsuits shall be deemed to be in connection if an individual is accused of more than one offense, or if more than one person is charged with committing that same offense.

(2) Helping the perpetrator after the offense is committed, destroying or hiding evidences of the offense, or altering the evidence shall be deemed as connection.

#### **Merging the lawsuits at the stage of indictment**

**Article 9** - (1) Connected criminal conducts, which individually would be under the subject matter jurisdiction of different courts, may be filed jointly in the court of superior jurisdiction.

#### **Merging and severance of pending lawsuits**

**Article 10** - (1) The court of superior jurisdiction may decide to merge or sever connected lawsuits during any stage of the prosecution phase.

(2) Lawsuits that have been merged shall be subject to the procedural rules of the trial court that tries that typ of lawsuit.

(3) If the connected lawsuits are severed after the court had heard evidence, the same court shall keep the case for trial.

#### **Joinder of several lawsuits in cases of a broad sense of connection**

**Article 11** - (1) If the court deems that there is a connection between several lawsuits that are pending in the court, it may decide to merge and try these connected cases, even if the relationship between the lawsuits is not of the type defined in Article eight.

## **CHAPTER FOUR**

### **Venue**

#### **Court of venue**

**Article 12 -** (1) The court in whose district the offense was committed has venue.

(2) Venue shall be established in the court in whose district the last movement of an attempt was committed, or in the case of ongoing offenses and repeatedly committed offenses, where the last crime has been committed.

(3) If the offense has been committed by the contents of a printed matter published in Turkey, the court where the center of publishing of the printed matter is located has venue. However, if the same publication has been printed in several locations and the offense was committed by the content created beyond the center of publishing, then the venue for that offense shall be in the court, where the work was printed.

(4) In defamation lawsuits, which shall be prosecuted only upon the claim of the victim, the court in whose district the defamed person has his domicile or ordinary residence shall also have jurisdiction, if the publication was distributed there. In cases where the victim is in pre-trial detention or imprisoned outside of the place where the script has been printed, that location also has jurisdiction.

(5) The third paragraph of this Article shall also be applicable in cases of visual and auditory broadcasting. If the visual and auditory broadcasting has been viewed or heard at the domicile or ordinary residence of the defamed person, then the court in that district shall also have jurisdiction.

### **Special venue**

**Article 13 -** (1) If the place where the offense has been committed is not known, venue shall be established where the accused was arrested without warrant; if there was no arrest without warrant, the court of his domicile has jurisdiction.

(2) If there is no domicile of the suspect or the accused in Turkey, the venue shall be established in the court where he last resided.

(3) If venue cannot be established according the above tests, then the court in the district where the first transaction of criminal proceeding occurred shall be competent.

### **Venue for offenses committed in a foreign country**

**Article 14 -** (1) The venue for the offenses committed in a foreign country, which, according to the statutes are to be investigated and prosecuted in Turkey, shall also be designated according to paragraphs 1 and 2 of Article 13.

(2) However, upon request of the public prosecutor, the suspect, or the accused, the Court of Cassation is entitled to designate a court that is closer to the location where the offense was committed.

(3) In such offenses, if the accused has not been arrested without warrant in Turkey or if he had no domicile or did not reside in Turkey, then upon the request of the Minister of Justice, the First Public Prosecutor of the Court of Cassation shall submit an application with the Court of Cassation, which shall determine the competent court.

(4) Individual offenses and offenses committed by Turkish civil servants while on duty who have diplomatic immunities and reside in foreign countries shall be tried by Ankara courts.

### **Venue for offenses committed in or with maritime, air or railway vehicles**

**Article 15** - (1) If the offense is committed in a ship authorized to fly the Turkish flag, or in a like vessel, while she was outside of the Turkish territory, venue shall be established in the court located where the vessel first arrived in Turkey after the offense had been committed, or where the ship is registered.

(2) Air vessels that have the right to fly under the Turkish flag, as well as railway vehicles are subject to the above provision as well.

(3) If an offense is committed by or in a ship or air or land vessel or railway vehicle while it was in the Turkish territory, the court located at the place of first approach also has venue.

(4) If an offense related to the pollution of environment is committed by a ship that flies a foreign flag while she was outside of Turkish territorial waters the court closest to the place where the crime was committed, or the court located where the vessel first arrives in Turkey shall have jurisdiction.

### **Competence for connected offenses**

**Article 16** - (1) All or some of the lawsuits which fall under the jurisdiction of different courts, according to the above provisions, may be tried jointly at any of the competent courts.

(2) If the connected lawsuits have already commenced in different courts, in accordance to the request of the public prosecutor upon an agreement between the courts, all or some of the lawsuits may be joined.

(3) If such an agreement is not reached, the common superior court, upon a request by the public prosecutor or by the accused, shall decide whether the joinder is necessary and if it necessary in which court the lawsuits shall be joined.

(4) Lawsuits, that have been joined, also may be severed in the manner described above.

### **Affirmative or negative dispute regarding venue**

**Article 17** - (1) If several judges or courts have an affirmative or a negative dispute on the jurisdiction, the common superior court shall decide which one of them is competent.

### **Motion of non jurisdiction on the point of venue**

**Article 18** - (1) The accused must bring a motion: challenging the venue of the court of first instance at the beginning of the main hearing, before his interview by the judge starts; challenging the venue of the Regional Court of Appeal on Facts and Law, before the inspection has started, and in lawsuits, where a main hearing before the Regional Court of Appeal on Facts and Law shall be conducted, before the inspection report is read out in the main hearing.

(2) At the court of the first instance, the decision on the motion of incompetence shall be rendered before the interview by the judge starts; at the Regional Court of Appeal on Facts and Law in those cases tried without a main hearing, at the very beginning of the inspection; and in cases tried in public hearing, before the reading out of the inspection report. After this point, a motion challenging the venue may not be brought and the courts are not entitled to render a decision on their own motion.

(3) Decisions of the court related to the lack of venue may be subject to opposition.

### **Transferring of a lawsuit**

**Article 19** - (1) If a competent judge or court is, for legal or factual grounds, hindered from exercising its judicial authority, the common superior court shall assign the case to an equivalent instance court of another judicial district.

(2) If conducting the prosecution in the district of the court that has subject matter jurisdiction and venue would be endangering the public safety, the Minister of Justice shall request the Court of Cassation to issue an order on the transfer of the case.

### **Interactions of a judge or of a court, lacking jurisdiction**

**Article 20** - (1) Interactions by a judge or court lacking jurisdiction shall not be ineffective by virtue of that lack of jurisdiction alone.

### **Interactions in cases where there is peril in delay**

**Article 21** - (1) If there is peril in delay, a judge or a court shall conduct any interaction

in its judicial district, even if it is lacking the jurisdiction.

## **CHAPTER FIVE**

### **Exclusion of the judge from proceedings and motion to disqualify the judge**

#### **Cases, where a judge is excluded**

**Article 22** - In the following cases, a judge must not practice the judicial duty:

- a) If he himself had suffered damages by the offense,
- b) If the relationship of marriage or guardianship or tutorial relationship exist or previously existed between the judge and the suspect or the accused or the victim of the offense,
- c) If the suspect or accused or the victim of the offense is related lineally or collaterally to the ascendants or descendants of the judge,
- d) If the suspect or accused or the victim of the offense has an adoptive relationship with the judge,
- e) If the judge is lineally related to the third degree (including the third degree) with the suspect or accused or the victim,
- f) If the suspect or accused or the victim is related to the judge collaterally including the second degree, even if the marriage has ended,
- g) If he has acted in the same case as public prosecutor, investigating judicial police officer, or as defense counsel for the suspect or the accused, or as representative of the victim,
- h) If he had testified in the same lawsuit as a witness or expert.

#### **The judge, who is not entitled to participate in decision-making**

**Article 23** - (1) A judge, who has participated in the decision-making process of a decision or a judgement, must not participate in the ruling of the decision or the judgement about the same lawsuit at the superior court.

(2) A judge, who has observed duties in the investigation phase at the same case, shall be excluded in the prosecution phase.

(3) A judge, who has observed duties in the previous adjudication, shall be excluded in the new trial.

**Grounds for a motion to disqualify the judge and ability to submit such a request**

**Article 24** - (1) A motion to disqualify a judge may be forwarded both where he has been excluded by law from exercising judicial office and where doubt raise concerning his impartiality.

(2) The public prosecutor, the suspect, the accused, the intervening party and their attorneys are entitled to move for disqualification of the judge.

(3) The names of the judges, who are going to participate in the decision or in the judgment, shall be furnished upon the request of any of them.

**Time limit of the motion to disqualify the judge on the grounds of doubt concerning his impartiality**

**Article 25** - (1) A motion to disqualify a judge on the basis of doubt concerning his impartiality may be forwarded to the court of the first instance at the beginning of the main hearing until interrogation of the accused by the judge starts; where there is a hearing at the Regional Court of Appeal on Facts and Law shall be conducted, until the inspection report is read out in the main hearing; and at the Court of Cassation, until the member of the Court who had been appointed to make a report on the case, or the examination judge gives explanations to the other members of the court. At other cases, the judge may be challenged until the beginning of the inspection.

(2) On the grounds that appear or has been found out after the time limit had expired, the motion may also be submitted until the main hearing or the inspection is over. However, such a request must be submitted within seven days after gaining knowledge of the grounds of disqualification.

**Procedure concerning challenge**

**Article 26** - (1) The motion for challenge shall be filed by a petition with the court of which the judge is a member or it may be made orally to be recorded by the court recorder, asking to do so.

(2) The person putting forward the motion has the burden of declaring all grounds for challenge within his knowledge at once, within its limited time and in a plausible manner.

(3) The challenged judge shall make an official written statement on the grounds for



challenge.

### **The court deciding on the motion to disqualify the judge**

**Article 27** - (1) The court of which the challenged judge is a member shall decide on the motion to disqualify. However, the challenged judge is not entitled to participate in the deliberations about this motion. If the non-participation of the challenged judge results in the court's lacking a sufficient quorum and;

- a) The challenged judge is a member of the court of general jurisdiction, the court of assize in the same district of jurisdiction shall decide on the motion; or
- b) The challenged judge is a member of court of assize and in the same district of jurisdiction there are more than one chambers of the court of assize, the next chamber with the following number (and for the last numbered chamber, chamber one) shall decide on the motion; if there is only one chamber of the court of assize in that district of jurisdiction, the proximate court of assize shall decide on the motion.

(2) If the motion for disqualification was filed against the judge of peace in criminal matters, court of general jurisdiction of the same district of jurisdiction, which the judge belongs to shall decide the issue, and if the motion was filed against the single judge, the court of assize in his district of jurisdiction shall decide.

(3) On a motion of challenge made against the president and members of the Criminal Chamber of the Regional Court of Appeal on Facts and Law, the same court shall make a ruling, but without the participation of challenged chairman or member.

(4) If the motion of challenge is granted, a new judge or court shall be appointed to try the case.

### **The decisions on the motion of challenge and legal remedies**

**Article 28** - (1) Decisions granting a motion to suppress the judge are final; a motion of opposition may be filed against a ruling rejecting the motion. The ruling denying the motion of rejection may be challenged only after the verdict as a part of the appeal on the points of law to the Court of Cassation.

### **Interactions of a challenged judge**

**Article 29** - (1) A challenged judge shall, prior to the decision on motion for challenge, perform only interactions in cases where there is peril in delay.

(2) However, if a judge is challenged in the main hearing and even if the decision on the challenge would require an interruption of the main hearing, the hearing shall continue without any interruption. But, motions and speeches of the parties shall not be submitted according to Article 216, and the next sessions of the main hearing shall not be carried on by the challenged judge or with his participation unless there has been a ruling on the

motion of challenge.

(3) If the challenge is declared admissible, the part of the hearing after submission of motion for challenge shall be repeated, except for the interactions, which had been conducted previously, due to peril in delay.

### **Self-disqualification and inspecting authority**

**Article 30** - (1) If a judge conducts self disqualification by declaring its grounds, the ruling authority on the motion to disqualify shall decide on its admissibility.

(2) If the judge refrains from the office by submitting grounds on his impartiality, the authority shall decide if the refraining is acceptable or not. If the refraining has been approved, a new judge or court shall be appointed.

(3) Article 29 shall be applied for interactions conducted in cases where there is peril in delay.

### **Inadmissible challenge**

**Article 31** - (1) The court shall reject a motion to disqualify the judge, which had been filed during the prosecution, as inadmissible if;

- a) The motion was not filed in time,
- b) There is no disclosure of the ground for the challenge or of the grounds by which the challenge could be substantiated,
- c) It is obvious that the motion was filed just to delay the main trial.

(2) In these cases, the motion shall be rejected as inadmissible by the courts of collective judges with participation to the deliberations of the challenged judge; if a judge sitting alone is challenged, he himself shall decide on rejecting the challenge.

(3) The decisions of on the above mentioned issues may be subject to opposition.

### **Challenge or self-disqualification of the court recorder**

**Article 32** - (1) The provisions of this chapter shall also apply to the court recorders.

(2) If a court recorder is challenged or he reports circumstances, which might justify his being challenged, the president of the court or the judge has been assigned to shall decide on his challenge or disqualification.

(3) The adjudicative authority, which shall decide on motion for challenge of both of judge and registering clerk in the same case, shall be designated depending on the status of judge.

## **SECOND PART**

### **Decisions, Pronouncement and Notification, Time Limits and Reinstatement**

#### **FIRST CHAPTER**

##### **Decisions, Pronouncement and Notification**

###### **How the decisions are to be given**

**Article 33** – (1) Decisions, that are to be rendered during the main hearing, shall be ruled on after hearing the public prosecutor and the defense counsel who is present at the main trial, the representative and the other related persons; decisions to be rendered besides during the main hearing shall be ruled after the oral or written submission of the public prosecutor had been taken.

###### **Written motives required at decisions**

**Article 34** – (1) All kind of decisions rendered by a judge or by a court, including dissenting opinions, shall be delivered in a written form and contain the motives. While writing the motives, Art. 230 shall be considered. The duplicates of the decisions shall include the dissenting opinions.

(2) The decisions shall contain explanations on the legal remedies that are open to the parties, the time limits for the motion, where to apply and formalities of the application.

###### **Explanation of decisions and their notification**

**Article 35** – (1) Where the related party was present while the decision was rendered, the contents of the decision shall be explained to him orally and if he requests so, he shall be furnished with a duplicate of the decision.

(2) Other decisions rendered by a judge or the court, which may be challenged, shall be notified to the related party, if he is not able to be present; decisions related to the

measures of protection are exempted from this rule. (As amended by 2005-5353)

(3) Where the related party is deprived of his liberty or he is under arrest, the notified decision shall be read and explained to him.

### **Procedure of notifications and correspondence**

**Article 36** – (1) The presiding judge of the court or the judge shall make all manner of notifications or correspondence with real or private persons or public legal entities and state departments and establishments.

(2) Decisions to be executed shall be forwarded to the office of the chief public prosecution.

### **Procedure of the notification**

**Article 37** – (1) Notifications shall be made according to the related provisions of the related Act; special provisions in this Code are reserved.

(2) In cases where international agreements contain provisions permitting sending written documents directly by post or by other means of communication, notifications to the foreign countries shall be achieved by registered mail or by other means of correspondence.

### **Notifications to the office of the chief public prosecution**

**Article 38** – (1) Notifications to the office of the chief public prosecution shall be completed by handing over the original documents that is subject to the notification. If the notification has the effect of commencing the running of a time limit, the office of the chief public prosecution shall record on such document the date on which it was exhibited to him.

## **SECOND CHAPTER**

### **Time limits and reinstatement**

#### **Measures of time limits**

**Article 39** – (1) Where a time limit was set by days, the period shall begin to run on the

day following the actual day of notification.

(2) Where the period is stated in terms of weeks, it shall expire at the time of office closing hours on the same day of the latest week.

(3) Where the period is stated in months, it shall expire at the time of the office closing hours on the same numbered day of the latest month. If there is no equivalent day in the latest month, then on the last day of that month.

(4) Where the last day of a period falls on a Sunday or holiday, the term shall expire on the following day.

### **Reinstatement**

**Article 40** – (1) Where an individual failed to comply with a limitation of time without his personal fault, he may ask for reinstatement in to the original status quo.

(2) He shall be considered without personal fault, if he had not been notified of his right to an existing legal remedy.

### **Petition of reinstatement**

**Article 41** – (1) The petition of reinstatement must be filed within seven days following the ending of the cause of inability to comply with the time limitation, to the court that would have taken the procedural steps in case of compliance with the time limitation.

(2) In his petition, the applicant shall state the grounds for his failure to comply, and submit by a preponderance of evidence the grounds giving rise to his failure, attaching any necessary documents. At that time he shall undertake whatever other procedural interactions he has failed to undertake.

### **Ruling on the motion of reinstatement**

**Article 42** – (1) If the procedural interaction would have been conducted within the time limit, the court having jurisdiction on the interactions shall consider the petition of reinstatement.

(2) The decision accepting the petition of reinstatement is final; a motion of an opposition may be filed against the decision of rejection of the request for reinstatement.

(3) The petition of reinstatement does not bar the execution; however, the court is entitled to stay the execution.

## **THIRD PART**

### **Witness-stand, expert examination and judicial inspection**

## **FIRST CHAPTER**

### **Witness-stand**

#### **Summoning witnesses**

**Article 43** – (1) Witnesses shall be invited to court by summons. The summons shall contain a caution about the consequences of a failure to appear. In cases where the suspect is under arrest, a subpoena order may be issued for the witness. The subpoena order shall contain an explanation of reasons for the direct application of the subpoena and such witnesses shall be subject to the equal interactions applicable to the witnesses, who appear upon summoning.

(2) Summons may also be served by communication means such as telephone, telegraph, fax, email. In such cases, the legal consequences of a summons are not applicable.

(3) During the course of the main hearing at the trial, the court may give written orders to the officials to subpoena the witnesses at the day and hour designated by the court, if it determines that a witness should be heard immediately.

(4) The State President may refrain from taking the witness-stand under his discretion. If he decides to testify, the testimony of the State President as a witness shall be taken in his residence, or he may send a written text.

(5) The provisions of this Article are only applicable to witnesses who are to be interviewed by the Public prosecutor, the judge, or by the court.

#### **Failure of witness to appear**

**Article 44** – (1) Witnesses, who fail to appear after having been summoned according to the regular procedural rules and failed to notify the reason of their absence, shall be subpoenaed by the use of force and shall be subject to a restitution covering the losses of failing to appear, and this amount shall be paid by him under the rules of public debts. If the reason of failing to appear is subsequently justified, the decision on paying the losses shall be lifted.

(2) Subpoena orders related to the soldiers serving their duty shall be executed with the help of military authorities.

### **Refraining from testimony**

**Article 45** – (1) The following persons may use the privilege to not testify as a witness:

- a) The fiancée of the suspect or the accused,
- b) The husband or wife of the suspect or the accused, even if the link of marriage is not existing at that time,
- c) Persons related to the suspect or the accused in the direct line, either by blood relationship or affinity relationship,
- d) Persons lineally related to the accused within three degrees, or persons collaterally related to the accused within two degrees,
- e) Persons having a relationship to the accused by virtue of adoption.

(2) Individuals, who are not capable of understanding the importance of refraining from testimony because of their minor age, mental illness or mental weakness, may be heard as a witness, if their legal representative consents. The legal representative is not entitled to make a decision on behalf of these individuals about refraining from taking the witness-stand, if he is one of the suspects or accused at the same matter.

(3) The individuals who have the right of refraining from testimony shall be given notice of their privilege before being called upon to testify. These individuals may also assert their privilege at any point of the testimony during the hearing.

### **Professional privilege and privilege caused by permanent occupation**

**Article 46** – (1) The persons who have the right of refraining from taking the witness-stand because of their professions or their permanent occupations, as well as the subject matter and the conditions of refraining are listed below;

- a) The lawyers or their apprentices or assistants about the information they have learned in their professional capacity or during their judicial duty,
- b) Medical doctors, dentists, pharmacist, hebammas and their assistants, as well as other members of the medical profession, about their patients' information and that of the relatives of the patients that they acquired in their capacity as a professional,
- c) Certified public accountants and notary publics in respect to information of their clients that they acquired in their capacity as a professional.

(2) Except for those mentioned in the sub-paragraph (a), those persons shall not refrain from taking the witness-stand if the related person gives his consent.

### **Testimony by related parties about state secrets**

**Article 47** – (1) Knowledge related to the facts of a crime shall not be kept secret from a court. Knowledge that could impose any harm to the external relations of the state, to national defense and national security, or that create a danger in respect to the constitutional order and in external relations, if revealed, shall be considered as state secret.

(2) In cases where the knowledge of the witness is related to a state secret, the trial judge or the court panel hears the witness in camera, without even the court recorder being present. The judge or the president of the court shall dictate to the court records only the relevant information that would be clarifying the charged crime.

(3) The provisions of this Article are applicable where the punishment of the crime is imprisonment of five years or more at the lower level.

(4) If the State President is a witness, he has the discretion to determine the nature of the secret and whether to reveal it to the court or not.

### **Refraining from testimony against himself, or against his relatives**

**Article 48** – (1) A witness has the privilege of refraining from testimony on questions that would incriminate him or any individual listed in Article 45, paragraph one. His right of refraining from answering questions shall be declared to the witness before any testimony is given.

### **Declaration of the grounds of refraining from testimony**

**Article 49** – (1) If it is deemed necessary by the presiding judge or the judge or the public prosecutor, the witness shall declare reasons for refraining from testimony in cases regulated by Articles 45, 46 and 48, and he shall be asked to take an oath.

### **Witnesses who are exempted from taking an oath**

**Article 50** – (1) The following individuals shall testify without taking an oath:

- a) Individuals, who at the date of testimony have not attained the age of 15,
- b) Individuals, who lack the ability to distinguish between right and wrong, and therefore cannot comprehend the meaning and the nature of the oath,
- c) Individuals, who are suspects or accused or convicted and are under investigation or prosecution because they have participated in or abated the related offenses.



### **Testimony of witnesses, who had the privilege of not testifying**

**Article 51** – (1) The judge or court shall have discretion whether to require an oath from the individuals who have the privilege of refraining from testimony according to Article 45. However, such witnesses may refrain from taking an oath. This right shall be declared to him.

### **Hearing of the witnesses**

**Article 52** – (1) Every witness shall be heard separately, and no witness shall be heard in the presence of the next one.

(2) Until the prosecution phase, witnesses may be confronted with each other and with the suspect, only if there is peril in delay, or purposes of identification require such confrontation.

(3) It is permissible to make image or voice recordings during the witness-testimony. However, recording is required in cases, where;

- a) A child victim is the witness, or;
- b) The witness is an individual, who cannot be brought before the court because of some impossibility but their testimony is indispensable for the investigation of the factual truth.
- (4) The voice and image recordings obtained as described in subsection 3, shall only be used at criminal proceedings.

### **Advising the witness of the importance of his duty**

**Article 53** – (1) If needed, before witnesses give their testimony, they shall be cautioned;

- a) About the importance of the telling of the truth,
  - b) That they shall be punished of perjury if they don't tell the truth,
  - c) That they have to take an oath that they are going to tell the truth, and
- That they are not allowed to leave the courtroom without an open permission of the presiding judge or the judge.

### **Giving an oath to the witnesses**

**Article 54** – (1) Witnesses shall be given an oath separately before they testify. Where necessary or where there was a doubt about whether the individual is eligible as a witness, the oath of the witness may be postponed until the testimony has been received.

(2) Public prosecutor shall also be entitled to give an oath to the witnesses during the

investigation phase.

### **Form of the oath**

**Article 55** – (1) The witnesses shall be required to say the following words before testifying: "I swear on my honor and conscience that I shall disclose what I know of the truth"; and according Article 54, if the oath had been postponed until the testimony had been received, "I swear on my honor and conscience that I have disclosed what I know of the truth".

(2) During the witness oath, everybody stands.

### **Giving the oath, and swearing of deaf or dumb persons**

**Article 56** – (1) The witness shall take his oath by repeating the oath in a loud voice or by reading it in a loud voice.

(2) Deaf or dumb persons, who can read and write, shall take the oath by writing the words of the oath and putting their signature under it. Deaf and dumb persons, who can neither read nor write, shall take the oath through an interpreter, who knows the gestures of deaf or dumb persons, making the required motions.

### **Subsequent testimony of a witness**

**Article 57** – (1) If it is necessary to call a witness, who had testified under an oath during the same investigation or prosecution phase again to the witness-stand, than it may be deemed sufficient to remind him of his original oath, and a new oath procedure may not be conducted.

### **Preliminary questions to be asked of a witness and witness protection programs**

**Article 58** – (1) The witness shall be asked first about his name, family name, age, occupation and domicile, the address of his work or where he is residing temporarily, if any and his telephone numbers. If deemed necessary, questions related to the reliability of his testimony shall be asked, to inform the judge, especially about his relationships with the suspect, accused or the victim.

(2) If there is a fear of gravely endangering the witness or his relatives if the witness's identity is revealed, necessary precautions shall be taken in order to keep the identity a

secret. The witness, whose identity shall not be revealed, is obliged to explain the grounds and occasion for obtaining knowledge of the facts about which he is going to testify. The personal data about the witness shall be kept with the public prosecutor, judge or the court, in order to keep his identity as a secret.

(3) If there is a probable grave danger for the witness in being heard in the presence of others, and if there are no other means of preventing this danger, or other measures would endanger the aim of revealing the factual truth, the judge is empowered to hear the witness in the absence of others who have the right to be present. During the hearing of the witness, voice and image may be transmitted. The right to ask questions to the witness is reserved.

(4) The measures, which shall be applied after the witness has testified, in order to keep his identity as a secret, and measures about his security, shall be ruled by an Act in this respect.

(5) The provisions of subparagraphs 2, 3 and 4 are only applicable for crimes committed within the activities of an organized crime gang.

### **Instructing the witnesses and permissible questions**

**Article 59** – (1) Before hearing the witness, the Presiding judge or the judge shall explain to him the subject of the lawsuit that shall be tried; and shall also show him the accused, if he is present. If the accused is not present, his identity shall be revealed to the witness. The witness shall be requested to tell all his knowledge of the subjects about which he is going to testify and shall not be interrupted during his hearing as a witness.

(2) The witness may be asked additional questions in order to clarify, complete and evaluate the sources of his knowledge about the subject he is giving a testimony.

### **Refraining from testimony and from taking the oath without a valid ground**

**Article 60** – (1) A witness, who refrains from testimony or from taking the oath without a legally accepted ground shall be subject to compensate the expenditure stemming there of, additionally he may be subject to disciplinary imprisonment not exceeding a period of three months while the lawsuit is pending, in order to compel him to take the oath or to take the witness stand. If the individual complies with his duties as a witness, he shall be released immediately.

(2) The member of the court who was delegated to accomplish a certain interaction, or a court that had been asked to perform an interaction by a letter of rogatory, as well as the judge of the peace in criminal matters during the investigation phase, shall also be entitled to order such measures.

(3) If such a measure had been applied once during a pending lawsuit, and the periods according to the kind of offense, mentioned in the above Article had fully expired, it shall not be applied repeatedly at the same lawsuit or at another lawsuit related to the same case.

(4) The rulings related to the disciplinary imprisonment may be subject to a motion of opposition.

### **Covering the losses of the witness and his expenditures**

**Article 61** – (1) A witness summoned by the Public prosecutor or the presiding judge or the judge shall be reimbursed, in an amount proportional to the time he has spent according to a scale, yearly decided by the Ministry of Justice. If the witness had to travel in order to be present, his travel expenses, as well as his daily allowance at the place where he had to testify, shall be reimbursed.

(2) The payment to the witness made to cover his losses and his expenditures is free of tax, duty and fee.

## **SECOND CHAPTER**

### **Expert inspection**

#### **Provisions applicable to experts**

**Article 62** – (1) The provisions related to the witnesses, which do not contradicting the following Articles, shall be applicable to the experts as well.

#### **Appointment of expert**

**Article 63** – (1) Where a special or technical knowledge for the solution of some cases is required, it may be decided to obtain the vote and opinion of an expert, by the court's own motion, by the request of the public prosecutor, or by request of the intervening party; of his representative, of the suspect or the accused or their defense counsels, or their legal representatives. However, if the solution of the subject is possible by applying a judges' professional, general and legal knowledge, then an expert shall not be heard at the main hearing.

(2) The judge or court shall be entitled to appoint an expert; if the number of experts shall be more than one, the appointment shall be made by a decision, for which reasons shall be given. If a motion on appointing more than one expert has been denied, the decision shall meet the same requirements.

(3) The public prosecutor shall also be entitled to exercise the powers regulated in this Article, during the investigation phase.

### **Individuals who are eligible to take the expert stand**

**Article 64** – (1) The experts shall be chosen from the names of the natural or legal persons, yearly listed by the judicial commission at the courts of ordinary jurisdiction. Public prosecutors and judges may choose the experts not only from the lists of experts compiled for the city of their jurisdiction, but may also choose from lists of other cities. The internal regulation shall regulate the principles and procedures on how the lists of experts shall be prepared or how the experts named in the list shall be removed.

(2) An expert, whose name is not listed, may be appointed if the motive of this appointment is explained in the decision of the appointment.

(3) Where official experts have been designated by Statute for certain areas of expertise, such experts have a priority at the appointment. However, a civil servant shall not be appointed as an expert in a case that is related to the office to which he is attached.

(4) In cases where a legal person is appointed as an expert, this legal person shall name the natural person or persons who shall conduct the examination on his behalf to the judicial authority for its approval.

(5) The experts, who are placed on the expert-lists, shall give an oath, repeating the following words in front of the judicial commission at the courts of ordinary jurisdiction: "I swear on my honor and conscience, that I shall fulfill my duty pursuing the justice and in accordance with sciences and technology, in an impartial manner". These experts need not take a repeated oath for every single expert testimony they shall give in the future.

(6) The experts who are not enlisted shall take the oath in the above-mentioned manner before the authority that appointed them. The protocol for attesting that the oath had been given shall be signed by the judge or public prosecutor, court recorder and the expert.

(7) In cases where there are obstacles, the oath may be given in a written form and the text of it shall be attached to the file. The reasons for this must be laid down at the decision.

### **Obligation to accept to serve as an expert**

**Article 65** – (1) The following persons and institutions are obliged to accept to serve as an expert:

- a) Those who have been assigned as official experts and those who have been enlisted as shown in Article 64,
  - b) Those who are professionals in the field of science and arts that are necessary for the inspection,
- Those who are officially empowered to work as professionals in that field of inspection.

### **The decision on the appointment and the course of examination by the experts**

**Article 66** – (1) The decision granting an expert examination shall clarify the questions to be asked requiring specialized and technical knowledge, the subject of the examination,

and the duration within which this task is to be accomplished. This duration shall not exceed three months, according to the qualifications of the duty. In cases where special grounds make it necessary, the appointing authority may prolong this duration upon the demand of experts, with a decision that includes reasons, for not longer than three months.

(2) Experts who do not deliver their written opinion within the determined duration may be immediately replaced. In such instances, the aforementioned shall submit a written report, explaining what has been conducted up to that point, and shall immediately return items and documents delivered to them in connection with their duty. Such experts may be taken out of the lists mentioned in Article 64; also, a ruling against them may be made, setting forth the compensation of the losses suffered because of the delay.

(3) Experts shall fulfill their duties in accordance with the authority that had appointed them; they shall deliver information about the developments in their examination, if necessary, and may ask for the application of useful measures.

(4) The experts are entitled to ask questions also to individuals who are not the suspect or accused in order to collect information while fulfilling their duties. If the experts require information related to a problem that is outside of the scope of their expertise, the judge, the court or the public prosecutor may give them permission to meet individuals who are qualified and nominated in their field. In such cases, the invited individuals shall give an oath and the written opinions delivered by them shall be attached to the file as an annex to the expert opinion report.

(5) During the inspection, the concerned individuals are also entitled to ask the authority to render a decision in order to hear persons who are capable of submitting technical knowledge to the experts, or to hear the individuals whose names have been submitted, or to make certain explorations.

(6) If the experts deem it necessary to ask questions to the suspect or the accused, these questions shall be addressed through the presiding judge, judge or public prosecutor. However, the presiding judge, judge or public prosecutor may give a permission, to ask direct questions. The experts who are medical doctors, appointed to make the examination are entitled to ask questions they deem necessary in order to fulfill their duties directly to the suspect or the accused, the presence of the judge, the public prosecutor or a lawyer is not required.

(7) The items that are subject to expert inspection shall be given in a sealed container and those items shall be listed and counted before being handed over. These issues shall be documented. The experts shall make a document about the breaking of the seal and a new document after their inspection about sealing, and are obliged to produce a list of the items.

**Written opinion of the court appointed experts, and the opinion of the experts appointed by the parties**

**Article 67** – (1) After the inspection of an expert has ended, he shall produce a written

opinion, describing the procedure he has followed during the inspection and its outcomes; he shall additionally testify that he has personally conducted the requested inspection and he shall give or send his written opinion to the respected authority after he has signed it. Items that are in sealed containers shall also be delivered or sent to the respected authority and a document about this will be produced.

(2) If there is more than one expert appointed and they have different views or they have different opinions on common outcomes, they shall write this instance along with their reasons in the written expert opinion.

(3) In his written opinion, the expert shall not make legal evaluations, which shall be conducted by the judge.

(4) The duplicates of the written expert opinions shall be directly given to the public prosecutor, intervening party, his representative, to the suspect or the accused, his defender or the legal representative during the main hearing, or may be sent to them by registered mail.

(5) After the expert has finished the inspection, the public prosecutor, the intervening party, his representative, the suspect or the accused, his defender or the legal representative shall be given a specified time limit to ask any new expert opinion or to put motions of opposition against this given written expert opinion. If the motion filed by these individuals is denied, the reasons for the denial shall be produced within three days.

(6) The public prosecutor, the intervening party, his representative, the suspect or the accused, his defender or the legal representative may ask an expert of that field to produce a scientific opinion which they shall utilize to evaluate the subject matter of the trial or to use it while preparing a written expert opinion or to evaluate the written opinion of the experts. However, they are not entitled to ask for additional time for this purpose.

### **Rendering an oral opinion during the main hearing by the expert**

**Article 68** – (1) The court may decide to hear the oral explanations of the expert at the main hearing at any stage on the court's own motion; or upon the request of the concerned individuals, the court may summon the expert to the main trial to give oral explanations.

(2) After they have rendered their opinion orally in the above mentioned manner, the experts shall remain in the court room until the presiding judge or the judge permits them to leave; however, it is not necessary that they be let into the court room one by one, in order to be heard.

(3) About the hearing of the expert during the main trial who has prepared a scientific opinion upon the request of the public prosecutor, intervening party, his representative, suspect or the accused, his defense counsel or legal representative, the rules of the foregoing subparagraph shall apply.

### **Exclusion motion against an expert**

**Article 69** – (1) The grounds related to the exclusion of judges are valid for the experts as well.

(2) Public prosecutor, the intervening party, the suspect and the accused, his defense counsel or his legal representative may file a motion to exclude the expert. The names and surnames of experts appointed by the judge or the presiding judge shall be revealed to the parties who have the right to file a motion to exclude, unless there is a ground that bars revealing.

(2) The motion to exclude an expert shall be examined by the trial judge or the trial court. During the investigation phase this examination shall be done by the Judge of Peace in Criminal Matters. The party who files this motion has support the motion by a preponderance of the evidence.

### **Right to decline, persons who are not qualified as experts**

**Article 70** – (1) The grounds valid for declining to testify as a witness shall be applicable to the experts. Experts may put forward also other valid grounds to be excused.

### **Interactions about the experts who fail to fulfill their duty**

**Article 71** – (1) Where an expert who had been summoned in accordance with the rules does not appear, or if after appearing refuses to take an oath or to deliver his vote and his opinion, he shall be subject to the provisions of Article 60, paragraph one.

### **The expenditures and fee of the expert**

**Article 72** – (1) The expert shall receive a compensation for his expenditures related to his inspection and travels, as well a fee proportional to the work done by him.

### **Inspections related to counterfeiting money and values**

**Article 73** – (1) In crimes related to falsification, committed on currency and values such as bank papers and treasury checks, all seized items of the currency and values shall be asked to be examined by those authorities in the center or their affiliated units in the country having responsibility for circulating the original materials.

(2) Also in cases, where foreign currency and values are involved, a ruling shall be made having an expert-opinion delivered by Turkish authorities.



## **CHAPTER THREE**

### **Stationary mental examination, inspection of the body, judicial inspection and autopsy**

#### **Stationary mental examination**

**Article 74** – (1) If strong indications of suspicion are present, which tend to show that the suspect or the accused committed the criminal conduct; then in order to clarify whether the suspect or the accused was mentally ill (while committing) the crime, and if so, the duration of the illness, and whether this affected his actions, the Justice of the Peace in Criminal Matters during the investigation phase, and the trial court during the prosecution phase, may order the suspect or the accused to be stationed in a public medical center upon the proposal of the expert, after hearing both the public prosecutor and the defense counsel.

(2) In cases, where the suspect or the accused has no defense counsel, a defense counsel shall be appointed for him by the Bar Association.

(3) The period of the stationary mental examination shall not exceed three weeks. If this period is not sufficient, upon the request of the public medical center, a ruling may be made and the additional terms not exceeding three weeks each may be given; the sum of the terms shall not exceed three months.

(4) The decision on stationary mental examination may be attacked by opposition; this motion stays the execution of the decision.

(5) This provision shall also apply in cases where a decision on the stay of the proceedings is required according the Article 223, paragraph eight.

#### **Physical bodily examination of the suspect or the accused, and taking samples**

**Article 75** – (1) In order to obtain evidence of a committed crime, the judge or the trial court by its own motion, or upon the request of the public prosecutor or the victim; and in cases where there is peril in delay, the public prosecutor, may issue an order to conduct an internal physical bodily examination on the suspect or the accused, or to take sample from his body, such as blood or a like biological samples, as well as hair, saliva, nail. The decision of the public prosecutor shall be submitted to the approval of the judge or the court within 24 hours. The judge or the court shall issue it's decision within 24 hours. Unapproved decisions shall be invalid, and evidence so obtained shall not be used.

(2) The internal physical bodily examination or an intervention in order to take blood or similar biological samples from the body may only be conducted, if it shall not create a danger of harm to the subject's health.

(3) The internal physical bodily examination or taking blood or similar biological samples from the body shall only be undertaken by a medical doctor or by another member of medical profession.

(4) Any examination of the genital organs or anus shall be deemed as internal physical bodily examination.

(5) There shall be no internal physical bodily examination undertaken related to crimes that carry imprisonment less than 2 years at the upper level; in these instances, it is also forbidden to take blood or similar biological samples from the body, as well as hair, saliva, nail.

(6) The decisions ruled according to this Article by a judge or the court may be subject to a motion of opposition.

(7) Alcohol tests and taking blood samples according to special laws are reserved. (As amended in 25/5/2005 – 5353/2 md.)

### **The physical bodily examination on, and taking samples from third parties**

**Article 76** – (1) The judge or the court upon the request of the public prosecutor or on their own motion or, in cases of peril in delay, the public prosecutor, may decide to conduct external or internal physical bodily examination on the victim or taking blood or similar biological samples from the body of the victim, as well as hair, saliva, nail in order to obtain evidence of a crime, so long as this shall not create a danger to the subject's health and there is no surgical intervention: the decision of the public prosecutor shall be forwarded to the judge or the court for approval within 24 hours. The judge or the court shall give their decision within 24 hours. Unapproved decisions shall be invalid, and evidence so obtained shall not be used.

(2) In cases where there is the consent of the victim, obtaining a decision according to the rules as mentioned in the subparagraph one is not required.

(3) Where there is a need to determine the parentage of a child, a decision according to the rules in subparagraph one is required, in order to conduct this research.

(4) The witness may refrain from bodily examination or giving body samples under the grounds of refraining from testimony. If the individual is a child or mentally ill, the decision to refrain shall be made by his legal representative. In cases where the child or the mentally ill person is capable of understanding the legal meaning and consequences of taking the witness-stand, his view on the subject shall also be asked. In cases where the legal representative is the suspect or accused, then the judge must make the decision. However, evidence of the crime obtained in this way shall not be used as evidence in the further stages of the lawsuit unless the legal representative who is not under criminal charges as a suspect or an accused gives his consent.

(5) Judge or court decisions rendered under this provision may be subject to opposition. (As amended in 25/5/2005 – 5353/3 md.)

### **The physical bodily examination of a female**

**Article 77** – (1) Upon her request and if it is possible, the physical bodily examination of a female shall be conducted by a female medical doctor.

#### **Molecular-genetic tests**

**Article 78** – (1) Molecular-genetic tests shall be conducted on the material obtained through interactions described in Articles 75 and 76, only if it is necessary to determine the family connections or to determine if those body samples are related to the suspect or to the accused or to the victim. Tests that are outside of the scope of these aims are forbidden.

(2) Permitted tests mentioned in paragraph one may also be conducted on other body parts, that had been found and seized, and their owner's identity is not known. The second sentence of the paragraph one shall apply accordingly.

#### **Ruling of the judge and procedure of the test**

**Article 79** – (1) Molecular genetic-tests according to Article 78 shall only be conducted upon a judge's order. The ruling shall also contain the name of the expert appointed to conduct the test.

(2) Expert may be selected from the officially appointed experts or from the individuals who are required to act as an expert or from officials who are not attached to the investigating or prosecuting authorities, or from officials belonging to an objectively separate structural branch of the investigating or prosecuting authority. These individuals are obliged to take all suitable organizational and technical precautions in order to prevent illegal conduct of molecular-genetic tests and so that unauthorized third parties may not obtain knowledge about the outcomes. The items subject to test shall be delivered to the experts without labeling them with the name, family name, address and date of birth of the person from whom the items originate.

#### **The secrecy of the outcomes of genetic analysis**

**Article 80.-** (1) The outcome of the analysis on samples obtained according to Arts. 75, 76 and 78 are considered as personal data and shall not be used for another purpose; the individuals, who have access to the files, shall not disclose the information to unauthorized persons.

(2) As soon as the time limit for opposing the decision to drop the prosecution is exhausted, the opposition has been overturned, the court gives a final judgment on acquittal or a judgment is rendered on not punishing the accused and those judgments are made final, the samples and information shall be destroyed immediately in the presence of the public prosecutor, and this fact shall be documented and its document shall be kept in the file. (As amended: 25/5/2005 – 5353/4 md.)

#### **Fixing the identity in a physical way**

**Article 81** – (1) If the committed crime requires a maximum prison term of two years or a heavier punishment, upon the order of the public prosecutor, a picture shall be taken,

measurement of the body shall be made, fingerprints or palmprints shall be taken, special marks on the body, that would enable the recognition of the suspect or the accused shall be registered; and a voice sample and a video film shall be produced as well, and inserted into the file where the interactions related to the investigation and prosecution are kept.

(2) In cases where the time limit for opposing the decision to drop the prosecution is exhausted, the opposition has been overturned, the court gives a final judgment on acquittal or a judgment is rendered on not punishing the accused and those judgments are made final, related records shall be removed from the files and be destroyed in the presence of the public prosecutor and this fact shall be documented. (Değişik: 25/5/2005 – 5353/5 md.)

### **Internal regulations**

**Article 82** – (1) The procedures regarding the interactions foreseen in Articles 75 to 81 shall be fixed in an internal regulation.

### **Judicial inspection**

**Article 83** – (1) Judicial inspection shall be conducted by the trial judge or the trial court or by member of the court who was delegated to accomplish a certain interaction, or by the court that had been asked to perform an interaction by a letter of rogatory, and if there is peril in delay, by the public prosecutor.

(2) The minutes of the judicial inspection shall contain information about the existing facts and the absence of the evidence of the crime that ought to be expected to exist according to the special circumstances of the conduct.

### **The right to be present during the judicial inspection, during the witness hearing and the hearing of an expert's opinion**

**Article 84** – (1) The suspect, the accused and the victim and their defense counsel and representative may be present during the judicial inspection.

(2) In the event that a witness or expert is unable to be present at the trial, or it would be difficult for him to appear because he is living a far distance away, the provisions of the first paragraph shall apply during his hearing.

(3) If the presence of the suspect or the accused may prevent one of the witnesses from testifying truthfully, it may be ruled that the suspect or the accused shall be removed from the courtroom during this interaction.

(4) The individuals who have the right to be present during this interaction shall be informed of the date of the interaction in advance of the due day.

(5) If the suspect or the accused is in custody, the trial judge or the trial court may decide that he may be present during the judicial inspection only if it is necessary.

### **Showing the crime scene**

**Article 85** - (1) The public prosecutor is entitled to conduct a crime scene visit with the suspect, if the suspect had already given some information about the crime of which he is suspected. The chief of the judicial police is also empowered to conduct a crime scene visit with the suspect, if the crime is related to a crime that is mentioned in Art. 250 subsection one.

(2) The defense counsel may also be present during the crime scene visit by the suspect, if this would not delay the investigation.

(3) Crime scene visit by the suspect shall be documented as regulated in Art. 169. (Değişik: 25/5/2005 – 5353/6 md.)

### **Identification of the deceased and post mortem legal examinations**

**Article 86** – (1) If there are no preventing grounds, before post-mortem legal examinations, the identity of the deceased person shall be determined by any means preferably by exhibiting the body/corps to those persons who know the deceased, asking them of their personal knowledge; and if there is a suspect or an accused in that matter, the corps shall be exhibited to him also, with the purpose of identification.

(2) During the post mortem legal examinations, medical indications, time of death and all diagnosis in order to clarify the cause of death shall be determined.

(3) This examination will be conducted in presence of the public prosecutor by a medical doctor who has been appointed for this purpose.

### **Autopsy**

**Article 87** – (1) Autopsy shall be conducted in the presence of the public prosecutor by two medical doctors, one of them being a coroner, the other an expert from the field of pathology or an expert of other branches, or a physician who is a general practitioner. The medical doctor summoned by the defense counsel or representative may be present during the autopsy as well. In cases of necessity, the autopsy may also be conducted by one medical doctor only; the report on autopsy shall contain clear indications on this point.

(2) Where the condition of the body/corps permits, autopsy shall definitely consist of an opening of the head, chest and abdomen.

(3) The medical doctor who had treated the deceased person for an illness immediately prior the death shall not be appointed as a medical doctor to conduct the autopsy. However, this medical doctor may be asked to be present during the autopsy and give information about the course of the illness.

(4) A body/corps that had been buried may be exhumed in order to examine and to conduct an autopsy. This decision shall be rendered during the investigation phase by the

public prosecutor, in the prosecution phase by the court. The decision of the exhumation shall be immediately notified to one of the relatives of the deceased person, if this would not jeopardize the aim of the investigation and if the relative is not difficult to reach.

(5) During the interactions described above, pictures of the body/corps shall be taken.

### **Post mortem legal examination of the corps of a newly born child and autopsy**

**Article 88** – (1) Post mortem legal examination of the body/corps of a newly born child or autopsy shall be performed in order to clarify whether the child lived during or after delivery and whether it was born at the due time and if it was mature enough biologically to live outside the womb of the mother, or if it was in a condition to live at the time of the birth and after delivery.

### **Interactions in cases of the suspicion of poisoning**

**Article 89** - (1) In cases where there are grounds to suspect poisoning, while removing samples from organs, the visible appearance as well as damage to the organ shall be described. Suspected substances, found in the body/corps, or in other places, shall be analyzed by an expert officially assigned.

(2) The public prosecutor or the court may rule that the inspection shall be conducted in the presence or under the lead of a medical doctor.

## **PART FOUR**

### **Measures of protection of evidence**

## **CHAPTER ONE**

### **Arrest without a warrant and Custody**

#### **Arrest without a warrant and interactions with the individual**

**Article 90** – (1) In the instances listed below, any individual is entitled to make an arrest of another person temporarily without a warrant:

- a) If the other person was seen committing an offense,
- b) If the other person was under pursuit after committing an offense, if there is the possibility of escape of the person under pursuit after committing an offense or, if the establishment of his identity rightaway is not possible.

(2) In cases where an arrest warrant or apprehension order could be required to be issued, and there would be peril in delay; if there is no immediate possibility to ask permission from the public prosecutor or their superiors, the officers of the security forces shall be entitled to arrest the individual without a warrant.

(3) Although the crime would only be investigated and prosecuted by a claim of the victim, such crimes detected in the act that are committed against children, or individuals, who are not capable of making determination about themselves because of a bodily or mental illness, are handicapped, or have limited physical strength, shall be arrested without a warrant and the claim is not required.

(4) The officers of the security forces shall inform the arrested individual promptly about his legal rights, after taking measures to prevent him from escaping, and harming himself and others. (As amended by Act 2005-5353)

(5) In cases where an individual was arrested according to paragraph one above and handed over to the security forces, or where an individual was arrested without a warrant in accordance to paragraph two above, the public prosecutor shall be informed immediately; further interactions shall be conducted upon the orders of the public prosecutor. (As amended by Act 2005-5353)

(6) In cases, where the arrest is based on an apprehension order and this order has been enforced, thus the apprehension order is no longer needed, the court, judge or the public prosecutor shall ask for the immediate return of the apprehension order.

### **Custody**

**Article 91** – (1) If the individual, who has been arrested without a warrant is not released by the public prosecutor in accordance with the above mentioned Article, then it may be ordered that he be taken into custody with the aim of completing the related investigation. The duration of the custody shall not exceed 24 hours, beginning from the moment of the arrest; the necessary time for transporting the suspect to the nearest judge or court of the place where the arrest had occurred, shall not be included. The necessary time for transportation to the nearest judge or court where the arrest had occurred, shall not exceed 12 hours. (As amended by Act 2005-5353)

(2) Taking an individual into custody requires that this measure is necessary in respect to the investigation and that evidence exists, which indicates the belief that the individual has committed an offense.

(3) If the crime has been committed collectively and if there are difficulties in collecting evidence of the crime, or there are a large number of suspects, the public prosecutor may order in writing an extension of the custody period for 3 more days, not exceeding one day at a time. The order of extension shall immediately be notified to the individual who is taken into the custody.

(4) The individual who has been arrested without a warrant, his defense counsel or his legal representative, his or her spouse, or a blood relative of first or second degree may file a motion with the Justice of the Peace against the interaction of arrest without a warrant, or against the written order by the public prosecutor on taking the individual into custody or

on the extension of the custody period, in order to achieve an immediate release from custody. The Justice of the Peace shall conduct an immediate inspection on the files and shall make a ruling before the period of 24 hours has expired. If the arrest without warrant, or taking into custody or extension of custody period is appropriate, the motion shall be denied or a decision shall be rendered stating that the individual arrested without a warrant shall be immediately arraigned to the public prosecutor, accompanied by investigative documents.

(5) After the individual arrested without a warrant has been released, due to the expiration of the custody period, or upon the decision of the Justice of the peace, the same individual shall not be arrested without a warrant for the same offense, unless new and sufficient evidence related to the conduct that was the ground of his previous arrest without a warrant has been obtained, and the public prosecutor gives an order.

(6) In cases where the individual who is taken into custody is not released, he shall be arraigned the latest at the end of these periods of time before the Justice of the Peace and interrogated. During the interrogation, his defense counsel shall also be present.

### **Supervision of interactions during the custody**

**Article 92** – (1) In the course of their judicial duties, the chief public prosecutors or public prosecutors appointed by them shall inspect the custody centers where the individuals taken into custody shall be accommodated, including, if any, the rooms where interviews are conducted, the factual situation of the individuals in custody, the grounds for being taken into custody and for the custody periods, as well as all the written material and interactions related to being taken into custody, and the outcome shall be noted into the record book of individuals taken into custody.

### **Transportation of individuals arrested with or without an arrest warrant**

**Article 93** – (1) The individuals who have been arrested with or without an arrest warrant, and who are to be transported from one place to another shall be handcuffed if there are indications that they may be elusive or there are indications that they pose a danger for the life or bodily integrity of themselves or others.

### **Initial appearance upon an apprehension**

**Article 94** - (1) If it is not possible to arraign the individual who has been apprehended during the investigation phase or prosecution phase upon an apprehension order issued by the judge or the court the latest within 24 hours in front of the competent judge or court, he shall be arraigned in front of the nearest justice of the peace within the same period of time; if he is not released, he shall be put in pre-trial detention in order to be transported within the shortest time to the competent judge or court. (As amended by Act 2005-5353)

### **Notification to the relatives of the status of the individual arrested without a**



## **warrant and taken into custody**

**Article 95** - (1) The status of an individual arrested without a warrant, taken into custody, or ordered to have an extension of custody shall be notified to one of the relatives, or an individual designated by the arrestee or person taken into custody, by the order of the public prosecutor, without delay.

(2) In cases where the individual arrested without an arrest warrant or taken into custody is a foreigner, his status shall be notified to the consulate of the country of citizenship if he doesn't oppose the notification in writing.

### **Information given to interested parties about the arrest without warrant**

**Article 96** – (1) In cases where the suspect had been arrested without warrant according to Article 90, paragraph three, for offenses that are investigated and prosecuted only upon claim, the individual who has the right to put forward a claim, and if there are more than one interested parties, at least one of them, shall be informed of the arrest.

### **Records of an arrest**

**Article 97** - (1) The proceedings of an arrest without a warrant shall be recorded. In this record there shall be a clear indication of the offense for which the suspect has been arrested, under what circumstances, where and at what time he had been apprehended, who made the arrest and by which member of the security force the suspect had been specified, a clear indication shall be included that the rights of the suspect have been explained to him in the full extent.

### **Apprehension order and the grounds for issuance**

**Article 98** - (1) During the investigation phase, if the suspect does not appear upon a summons, or if it is not possible to serve a summons on him, the Justice of the Peace may issue an apprehension order upon the request of the public prosecutor. Additionally, if the request on pre-trial detention has been rejected and there is an opposition to this decision and the inspecting authority has rendered a decision on pre-trial detention, the examining authority at the level of opposition is also entitled to issue an apprehension order. (As amended by Act 2005-5353)

(2) Also, in cases where the suspect or unconvicted prisoner or convicted prisoner, who after seizure escapes from the hands of security forces or a prison or jail, the public prosecutors and the office of security forces are entitled to issue an apprehension order.

(3) During the prosecution phase, the apprehension order against a fugitive accused shall be rendered either by the court's own motion, or by the request of the public prosecutor, by a judge or a trial court.

(4) The apprehension order shall contain open descriptions and, if known, the identity of the individual, the offense the person is charged with, and where to take him in the case of

the seizure.

### **Internal regulations**

**Article 99** – (1) The Ministry of Justice and the Ministry of Interior shall enact an internal regulation setting forth provisions for the following: structural requirements of custody centers; where individuals taken into custody shall be accommodated; the procedure how to conduct the health control; registrations and books to be kept about the custody proceedings; which documents are to be prepared at the beginning and at the end of the taking into custody and which documents shall be handed out to the individual, as well as the rules of the procedures of security forces related to arrests without an arrest warrant.

## **Second Part**

### **Pre-trial detention**

#### **Grounds for pre-trial detention**

**Article 100** – (1) If there are facts that tend to show the existence of a strong suspicion of a crime and an existing “ground for arrest”, an arrest warrant against the suspect or accused may be rendered. There shall be no arrest warrant rendered if arrest is not proportionate to the importance of the case, expected punishment or security measure.

(2) At the below mentioned instances, a “ground for arrest” may be deemed as existing:

a) If the suspect or accused had fled, eluded or if there are specific facts which justify the suspicion that he is going to flee.

b) If the conduct of the suspect or the accused tend to show the existence of a strong suspicion that he is going to attempt;

a. destroy, hide or change the evidence,

b. To put an unlawful pressure on witnesses, the victims or other individuals.

(3) For the below mentioned crimes, if strong grounds for suspicion are present, “the ground for arrest” may be deemed as existing:

a) Following crimes as defined in the Turkish Penal Code dated 26.9.2004 and No. 5237:

1. Genocide and crimes against humanity (Arts. 76, 77, 78),
2. Killing with intent (Arts. 81, 82, 83),
3. Intended wounding committed by a gun (Art. 86/3-a) and intended wounding which has been aggravated by its result (Art. 87)
4. Torture (Arts. 94, 95),
5. Sexual assault (Art. 102, except for subsection 1),

6. Sexual abuse of children (Art. 103),
7. Theft (Arts. 141, 142), and aggravated theft (Arts. 148, 149)
8. Producing and trading with narcotic or stimulating substances (Art. 188),
9. Forming an organization in order to commit crimes (Art. 220, except for subsections 2, 7 and 8),
10. Crimes against the security of the state (Arts. 302, 303, 304, 307, 308),
11. Crimes against the Constitutional order and crimes against the functioning of this system (Arts. 309, 310, 311, 312, 313, 314, 315),
12. Smuggling with guns, as defined in Act on Guns and Knives and other Tools, dated 10.7.1953, No. 6136, (Art. 12),
13. The crime of embezzlement as defined in Act on Banks, dated 18.6.1999, No. 4389, Art. 22, subsections (3) and (4),
14. Crimes defined in Combating Smuggling Act, dated 10.7.2003, No. 4926, and carry imprisonment as punishment,
15. Crimes defined in Act on Protection of Cultural and Natural Substances, Arts. 68 and 74,
16. Crime of intentionally start a fire in forests, as defined in Act on Forests, dated 31.8.1956, No. 6831, Art. 110.

(4) In cases where the committed crime is punishable with judicial fine, or with imprisonment not more than one year at the upper level, no arrest warrant shall be issued. (As amended by Act 2005-5353)

### **The pre-trial detention warrant**

**Article 101** - (1) During the investigation phase, upon the request of the public prosecutor, the Justice of the Peace in Criminal Matters shall issue a pre-trial detention warrant for the suspect, and during the prosecution phase the trial court shall issue a warrant for the accused upon the request of the public prosecutor, or its own motion. The afore mentioned requests must contain reasons and must contain an explanation for why judicial control would not be sufficient in a given case, based on legal and factual grounds.

(2) The decision on pre-trial detention, continuation of the detention, or a decision denying the motion of release from custody, must be furnished with the legal and factual grounds and reasons. The contents of the decision shall be explained to the suspect or accused orally, additionally a written copy of the decision shall be handed out and this issue shall be mentioned in the decision.

(3) In cases where a request for an arrest has been submitted, the suspect or accused must have the legal help of a defense counsel chosen by him, or appointed by the bar association.

(4) In cases, where no pre-trial detention decision has been rendered, the suspect or the accused shall be released immediately.

(5) A decision rendered according to this Article and Article 100 may be subject to a motion of opposition.

### **The duration of arrest**

**Article 102** - (1) Where the crime is not within the jurisdiction of the court of assizes, the maximum period of detention shall be one year. However, if necessary, this period may be extended, for six more months and, the decision of extension shall contain the reasons.

(2) Where the crime is under the jurisdiction of the court of assize, the maximum period of detention is two years. This period may be extended by explaining the reasons in necessary cases, but the extension shall not exceed 3 years.

(3) The decisions of extension, which in accordance with this article, shall be rendered only after the opinions of the public prosecutor, the suspect or accused and their defense counsils have been asked. (Değişik: 6/12/2006 – 5560/18 md.)

### **Public prosecutor's motion on revocation of the arrest warrants**

**Article 103** - (1) The public prosecutor may ask the justice of the peace to release the suspect and put him under judicial control. In cases where there is a pending arrest warrant, the suspect and his defense counsel may file the same motion. (As amended by Act 2005-5353)

(2) During the investigation phase, if the public prosecutor deems that judicial control or arrest is no longer necessary, he shall release the suspect by his own motion. In instances where a decision on dropping the prosecution has been rendered, the suspect automatically will be released.

### **Motion of release by suspect or accused**

**Article 104** - (1) The suspect or accused is entitled to file a motion of release at any stage of the investigation and prosecution phases.

(2) The judge or trial court shall decide on this motion whether the detention period should continue, or the suspect or accused should be released. The decision that denies the motion of release may be subject to opposition.

(3) When the file gets in the hands of the Regional Court of Appeal on Facts and Law, or the Court of Cassation, the decision on the motion of release shall be rendered by the related Chamber of the Regional Court of Appeal on Facts and Law, or the related Chamber of the Court of Cassation, or the General Assembly of the Court of Cassation after reviewing the file; this decision may be rendered also by the courts' own motion.

### **The procedure**

**Article 105** – (1) In cases where there is a motion filed according to the provisions of Arts. 103 and 104, the decision on approving the request, denying the request or ordering judicial control shall be rendered by the competent authority within three days, after the

views of the Public Prosecutor, suspect, accused or defense counsel have been obtained. These decisions may be subject to a motion of opposition. (As amended by Act 2005-5353)

### **The obligations of the released**

**Article 106** - (1) Before released, the suspect or accused has the obligation to leave with the competent adjudicative authority, or with the warden of the jail, his address and, if any, his telephone numbers.

(2) The suspect or accused shall be warned that he has to notify of any changes in his address either by appearing and notifying orally or by registered mail until the investigation or prosecution ends; additionally, the individual shall be notified that if not in compliance with the warning, all notification shall be sent to the known address. The records of these warnings and the new address as well as the original or copy of the document produced by the warden of the jail shall be sent to the competent adjudicative authority.

### **Notification of the status of the arrestee to his relatives**

**Article 107**- (1) In cases where a decision of arrest and the extension of the period of arrest has been rendered, each decision shall be notified to a relative or to an individual designated by the arrestee, only if the judge decides so, without any delay.

(2) Additionally, the arrestee is permitted to talk and notify his arrest to one of his relatives or an individual designated by him, only if this does not tamper with the aim of the pending investigation.

(3) In cases where the suspect or accused is a foreigner, the fact that he has been arrested shall be notified to the consulate of the country of citizenship, if he does not oppose it in writing.

### **The evaluation of pre-trial detention**

**Article 108** - (1) During the investigation phase while the suspect is in jail, and in time limits not exceeding 30 days each, an evaluation on whether the continuation of the status of the pre-trial detention is necessary or not shall be conducted by the Justice of the Peace upon the request of the public prosecutor; Article 100 shall apply during this evaluation.

(2) Within the time limit mentioned in the foregoing paragraph, the suspect may also file a motion of evaluation of the status of his pre-trial detention.

(3) The judge or court on their own motion shall evaluate the status of the accused who

is in jail on each trial day or, if the conditions make it necessary, between the trial days, or within the time limits foreseen in the first subparagraph whether it is necessary that the detention period to continue.

### **THIRD PART**

#### **Judicial Control**

#### **Judicial Control**

**Article 109** – (1) In cases where the grounds as regulated in Art. 100 are present, which would have resulted in arrest, a decision to put the suspect under judicial control may be rendered, instead of arresting him, if the conducted investigation is about a crime that carries a punishment of imprisonment at the upper level of 3 years or less.

(2) Also in cases where the Code regulates a restriction of pre-trial arrest, the provisions of judicial control may still be applicable.

(3) Judicial control includes one or more obligations inflicted on the suspect as stated below:

- a) To not travel outside of the country,
- b) To regularly apply to places under periods that will be specified by the judge,
- c) To obey the calls of authorities or persons specified by the judge and, when necessary, fulfilling the measures of control with respect to the professional activities or issues of continuing education.
- d) Not being able to drive any or some of the vehicles and, when necessary, leaving his driving license to the office of registry in return for a receipt,
- e) Obeying and accepting the measures of medical diligence, treatment or examination, including being hospitalized for purification from dependency on narcotics, stimulating or evaporating substances and alcohol,
- f) To deposit an amount of the money as a safeguard, which shall be determined by the judge upon the request of the public prosecutor, after taking into account the financial conditions of the suspect, and whether it shall be paid by more than one installments and the period of payment,
- g) No to be permitted to have or to carry weapons and, when necessary, to leave the guns to the judicial depositary in return for a receipt,
- h) Providing real and personal guarantee for the money to assure rights of the injured party; the judge upon the request of the public prosecutor shall specify the amount and the payment period of the money,
- i) Providing assurance that he shall pay alimony regularly, pursuant to the judicial decisions, and that he shall fulfill the obligations towards his family.

(4) In cases where the suspect is subject to the measures mentioned in subparagraph 3 (a) and (f), the upper limit mentioned in subparagraph one shall not apply. (As amended by Act 2005-5353)

(5) In the application of the obligation mentioned in subsection (d), the judge or the prosecutor may permanently or temporarily allow the suspect to drive vehicles in his

professional activities.

(6) Time periods that are spent under judicial control are not considered as restriction of freedom and shall not be subtracted from the punishment. This provision shall not apply to subparagraph 3, subsection (e).

(7) In cases where the arrested individual has been released because the upper limits of pre-trial detention has run out, provisions about judicial control may be applied without taking into account the time limits requirement mentioned in subparagraph one.

### **Judicial control decision and the competent authorities to issue the decision**

**Article 110** – (1) The suspect may be taken under judicial control in every phase of investigation upon the request of the public prosecutor and with the decision of the Judge of the Peace in Criminal Matters.

(2) During the application of judicial control, upon the request of the public prosecutor, the judge may put the suspect under one or more new obligations, may partly or completely revoke the obligations that constitute the content of the control, or may alter the obligations or temporarily exempt the suspect from obeying some of them.

(3) The provisions of this Article and Article 109 are applicable at every stage of the prosecution phase by the judicial authorities with subject matter jurisdiction and venue, when it is deemed necessary.

### **Repealing of the judicial control order**

**Article 111** – (1) Upon the request of the suspect or the accused, the judge or the court may render a decision under the second paragraph of Article 110 within 5 days, pursuant to obtaining the opinion of the public prosecutor.

(2) The decision on the judicial control may be subject to a motion of opposition.

### **Non-compliance with the measures**

**Article 112** – (1) The judicial authority with venue may immediately issue an pre-trial arrest warrant with respect to the suspect or the accused who voluntarily fails to comply with the conditions of judicial control, regardless of the duration of the custodial penalty that may be inflicted upon him.

### **Security deposit**

**Article 113** - (1) The security that shall be deposited by the suspect or accused shall

guarantee the following points:

a) The presence of the suspect or accused during all the procedural interactions, during the execution of the judgement or during the fulfillment of other obligations he may be required to fulfill;

b) To make the following payments in the following row:

1. The expenditures that the intervening party has made, security for compensating the damages occurred through the offense and for restitution; in cases where the suspect or the accused are prosecuted because they did not pay the alimony,
2. Public expenses,
3. Judicial fines.

(2) The decision that obligates the suspect or the accused to deposit a security shall include each portion separately covered by the security.

### **Advance payment of the security**

**Article 114** - (1) In cases where the suspect or the accused consent, the judge, court or public prosecutor may issue an order upon the request of the victim or recipient of the alimony, the portion of the security to be paid to them in advance that would cover the losses of the victim or the sum that constitutes the alimony.

(2) If there is a final court judgment in favor of the victim or the alimony recipient, related to the events that constitute the substance of the investigation or prosecution, then the payment may be ordered even if there is no consent of the suspect or the accused.

### **Return of security deposit**

**Article 115** - (1) In cases where a convict had fulfilled all the requirements as laid down in paragraph (1) of Article 113, then the security deposit that would guarantee the obligations listed in said Article 113 paragraph one, subsection (a) and the portion of the security that is specified in the decision, which is to be rendered according to the second paragraph of the same Article, shall be returned to him.

(2) The second portion of the remaining security that was not paid to the victim of the crime or alimony recipient shall be returned to the suspect or accused, as well as in cases where a decision of non-prosecution or acquittal had been rendered. Otherwise, except in the absence of a good reason, the security shall be transferred to the state treasury as income.

(3) In cases of a conviction, the security shall be used in accordance with the first paragraph of the subsection (b) of Article 113, the remainder shall be returned.



## **Fourth Part**

### **Search and Seizure**

#### **Search related to the suspect or the accused**

**Article 116** – (1) In cases where there is probable cause for suspicion to believe that the suspect or the accused shall be apprehended, or evidence of the crime shall be obtained; then a body search and a search of his belongings, or a search in the dwelling, business place and in his other premises, may be conducted.

#### **Search related to the other persons**

**Article 117** – (1) With the aim of securing the apprehension of the suspect or the accused, or with the aim of obtaining evidence, a body search and a search of his belongings, or a search of his dwelling, his business place or his other premises may be conducted.

(2) In such cases, the search shall only be conducted, if there are facts to conclude, that the person who is being searched or the vidence of the crime is located in those premisses.

(3) This restriction shall not apply to premises where the suspect or the accused is present, as well as in premisses that he entered during the pursuit.

#### **Search during the night hours**

**Article 118** – (1) Private dwellings or business places, as well as other property closed to the public, shall not be searched at the night hours.

(2) The provisions of the first subparagraph shall not apply for crimes detected in the act, or where there is peril in delay, or for searches conducted for the purpose of re-apprehending an individual who escaped after he had been apprehended or he had been put into the police custody or an escaped unconvicted or convited prisoner.

#### **Search warrant**

**Article 119** – (1) The members of the security forces shall conduct searches upon an order of the judge, or if there is peril in delay, upon a written order of the public prosecutor, if the public prosecutor is not reachable, upon a written order of the superior of the security force. However, searches in private dwellings or business places, as well as other property

closed to the public, shall only be conducted upon the order of the judge; and in cases where there is peril in delay, upon the written order of the public prosecutor. The outcome of a search conducted upon the written order of the superior of the security forces shall be notified to the office of the public prosecution immediately.

- (1) The search warrant or order shall clearly include;
  - a) The conduct that constitutes the grounds for the search,
  - b) The person with respect to whom the search shall be conducted, the address of the dwelling or the place to be searched, or the material that is to be searched,
  - c) The time limitation of the validity of the warrant or order.
- (3) The open identities of those who have conducted the search shall be included in the document produced after the search.

(4) If private dwellings or business premises or properties that are not open to the public are to be searched without the public prosecutor being present, then two members of the community council in that district or two neighbors shall be called to be present, in order to be entitled to conduct the search.

(5) The search in places assigned for military services shall be conducted by the competent military authorities upon the request and with the participation of the public prosecutor.

#### **Persons who may be present at the search**

**Article 120** – (1) The owner of the premises or possessor of the items to be searched may be present at the search; if he is not present, his representative or one of his relatives who has the capability of distinguishing or a person living in his household or a neighbor shall be present.

(2) In cases stated in the first paragraph of Article 117 the possessor, and in his absence, the person called on his behalf, shall be informed of the purpose of the search before it begins.

(3) The attorney of the individual shall not be prevented from being present during a search.

#### **Documents to be handed over to the person subjected to search**

**Article 121** – (1) At the end of the search, the person who was subjected to the search, shall receive upon his request a document declaring that the search was conducted in accordance with Articles 116 and 117; and in an event which is regulated in Article 116, a document declaring the qualifications of the punishable conduct, and upon his request, a book-list of the items that were seized by force or taken under protection; and if nothing justifying the suspicion was found, a document including this fact, shall be given to him.

(2) The documents mentioned in the first subparagraph shall also include the searched person's submission and claims regarding the ownership of the seized objects.

(3) A complete book-list of the items put under the protection or seized by force shall be made and those items shall be sealed with an official seal or marked.

### **The power for inspection of documents and papers**

**Article 122** – (1) It is the Public prosecutor's and judge's authority to inspect the documents or the papers of the person, with respect to whom the search was made.

(2) The possessor of the papers or his representative may use his own seal or signature. If it is subsequently decided to break the seal and inspect the papers, the possessor or his agent or his defense counsel or his representative shall be summoned to be present at that time; in case they fail to appear, the interaction that is deemed necessary, shall be implemented.

(3) Documents or papers which are established as not connected to the crime subject to investigation or prosecution at the end of the inspection shall be delivered to the concerned individual.

### **Securing and seizure of materials or gains**

**Article 123** – (1) Materials likely to be useful as means of proof or values of property which are subject to confiscation of goods, or confiscation of gains shall be secured.

(2) In cases where the individual who carries the evidence refuses to surrender voluntarily, those items may be seized by force.

### **Interactions related to individuals who refuse to surrender the requested items**

**Article 124** – (1) A person who carries such material or other values of property described in Article 123 is obliged to show and surrender this item upon request.

(2) If the surrender is refused, disciplinary arrest provisions of Article 60 are applicable against the possessor. However this provision does not apply to the suspect or the accused or those persons, who may refrain from giving a testimony as a witness.

### **Inspection of documents by the court that include state secrets**

**Article 125** – (1) Documents that include information about a fact related to a crime shall not be classified as state secret in the court proceedings.

(2) Documents that include information of the nature of a state secret shall only be examined by the judge of the court or by the panel of judges. Only the information included in these documents that are suitable to reveal the charged crime shall be dictated to the court files by the judge or by the president of the court.

(3) The provisions of this Article are only applicable to the crimes that carry imprisonment of 5 years at the lower level or more.

### **Letters and documents immune from seizure**

**Article 126** – (1) Letters and documents communicated between the suspect or the accused and those persons capable of asserting a privilege to refrain from testimony as a witness in accordance with the provisions of Articles 45 and 46 may not be seized as long as such items are at the hands of persons who have this privilege.

### **Jurisdiction on the seizure decision**

**Article 127** – (1) The seizure may be conducted by the members of the security forces upon the decision of the judge, or if there is peril in delay, upon the written order of the public prosecutor; in cases where it is not possible to reach the public prosecutor, upon the written order of the superior of the security forces.

(2) The open identity of the member of the security forces shall be included in the record of the seizure.

(3) Where a seizure was made without a warrant of a judge, the seizure shall be submitted to the judge who has jurisdiction for his approval within 24 hours. The judge shall reveal his decision within 48 hours from the act of seizure; otherwise the seizure shall be automatically void.

(4) The individual whose goods of his possession or his other property values have been seized, may ask the judge to give an order in this issue at any time.

(5) The seizure shall be notified to the victim, who suffered losses, without any delay.

(6) Seizures within places assigned for military services shall be conducted by the military authorities, upon the request of and with the participation of the public prosecutor.

### **Seizure of immovable goods and on rights and accounts receivebles**

**Article 128** – (1) The following items belonging to the suspect or the accused may be seized in cases where there are strong grounds of suspicion tending to show that the crime under investigation or prosecution has been committed and that they have been obtained from this crime;

- a) Immovable goods,
- b) Transport vechicels of land, sea or air,

- c) All kinds of accounts in banks or other financial institutions,
- d) All kinds of rights and accounts receivables by real or juridical persons,
- e) Valuable documents,
- f) Shares at the firm where he is a shareholder,
- g) Contents of the rented safe,
- h) Other valueables belonging to him.

Even in cases where these immovables, rights, accounts receivables and other values of belongings are in possession of individuals other than the suspect or the accused, the seizure is also permitted.

(2) The provisions of subparagraph one are only applicable to the following crimes:

- a) The following crimes as defined in the Turkish Penal Code;
  1. Genocide and crimes against humanity (Arts. 76, 77, 78),
  2. Smuggling migrants and human trading (Arts. 79, 80),
  3. Theft (Arts. 141, 142),
  4. Aggravated theft (Arts. 148, 149),
  5. Breach of trust (Art. 155),
  6. Forgery (Arts. 157, 158),
  7. Fraudulent bankruptcy (Art. 161),
  8. Producing and trading of narcotic or stimulating substances (Art. 188),
  9. Forgery of money (Art. 197),
  10. Forming an organization in order to commit crimes (Art. 220),
  11. Forgery in public bits (Art. 236),
  12. Forgery in fulfilling of obligations (Art. 236),
  13. Embezzlement (Art. 247),
  14. Bribery by force (Art. 250),
  15. Bribery (Art. 252),
  16. Crimes against state security (Arts. 302, 303, 304, 305, 306, 307, 308),
  17. Crimes of an armed organisation (Art. 314), or supplying such organisations with arms (Art. 315),
  18. Crimes against state secrets and spying (Arts. 328, 329, 330, 331, 333, 334, 335, 336, 337),
- b) Smuggling weapons as defined in the "Act on Firearms and Knives as well as Other Tools" (Art. 12),
- b) Embezzlement as defined in the Banking Act (Art. 22/3 and 4),
- c) Crimes as defined in the Combating Smuggling Act that carry imprisonment as punishment,
- d) Crimes as defined in Arts. 68 and 74 of the Act on Protection of Cultural and Natural Values.

(3) A decision on the seizure of an immovable shall be enforced by taking a note in the title.

(4) A decision on the seizure of vehicles operating on land, sea and air shall be enforced by taking a note in the title, where they are registered.

(5) A decision on the seizure of accounts at banks and other financial institutions shall be enforced by immediately informing the bank or financial institute by technical communication means. The related decision shall also be notified to the bank or financial

institution separately. The interactions at the bank account, aimed to make the decision of seizure ineffective, which are conducted after the decision has been rendered, are void.

(6) A decision on the seizure of shares at a firm shall be enforced by notifying the administration of the related firm and the head of the commerce title by technical communication means immediately. The related decision shall also be notified to the bank or financial institution separately.

(7) A decision on the seizure of rights and accounts receivables shall be enforced by immediately notifying the related real or juridical person by technical communication means. The related decision shall also be notified to the real or juridical person separately.

(8) In cases where there are violations of the requirements of the decision on seizure, Art. 289 of the Turkish Penal Code related to the “misusing of the power of protection” shall apply.

(9) Seizure under the provisions of this Article shall only be decided by a judge.

### **Seizure at the post office**

**Article 129 –** (1) Communications that are at the post office, may be seized by the order of a judge, or in cases where there is peril in delay, with the order of the public prosecutor, if there is probable cause to believe that these items are comprising evidence of the crime and it is deemed necessary to keep those items under the custody of the Administration of Justice during the investigation or prosecution in order to reach the truth.

(2) The officers of the security forces shall act and make the requested seizure, after they have been notified of the orders of the judge or the public prosecutor; and they shall not be entitled to open the envelopes or packages containing the written items mentioned in the paragraph one. Seized items of communication shall be sealed in the presence of the post officials and shall be delivered immediately to the judge or the public prosecutor who ordered the seizure.

(3) The concerned persons shall be informed of the applied measures, if there is no risk of harm to the aim of the investigations.

(4) If the judge rules that the items shall not be opened, or, if after breaking the seal, he does not deem it necessary that these items are to be held in the custody of the Administration of Justice, those communications shall be immediately given back to the addressee.

### **The search and seizure in attorneys’ offices, and seizure of mail**

**Article 130 –** (1) The attorneys’ offices shall only be searched with a court decision and in connection with the conduct that is indicated in the decision and under the supervision of the public prosecutor. The President of the Bar or an attorney representing him shall be present at the time of search.

(2) If the attorney whose office is searched or the president of Bar or the attorney representing him objects to the search in respect to the items to be seized, at the end of the search, by alleging that those items are related to the professional relationship between the attorney and his client, then those items shall be put in a separate envelope or a package and be sealed by the present individuals and, in the investigation phase, the judge of peace in criminal matters, or the judge or the Court in the prosecution phase, to give the necessary decision on this matter. If the judge with venue establishes that the seized items are under the privilege of attorney client relationship, the seized object shall be promptly returned to the attorney and the transcripts of seizure shall be destroyed. The decisions mentioned in this paragraph shall be issued within 24 hours.

(3) In cases of seizure in the mail office, the procedure stated in the second paragraph shall be applicable, if the attorney, whose office is subjected to search, or the president of Bar Association, or the attorney representing them disagree.

### **Seized items to be returned**

**Article 131** – (1) The items that were taken from the suspect, accused or the third parties, that are no longer needed with regard to the investigation and prosecution, or items of which it became clear that those are not subject to confiscation, shall be returned with the decision of the Public prosecutor, judge or the court on its own motion or upon a request. The decision on denial may be subject to a motion of opposition.

(2) Items or other values of patrimonium which have been seized under the provisions of Article 128 shall be returned to the owner, if they belong to the victim who is the injured party and they are no longer needed as pieces of evidence.

### **Protection of the seized items or their liquiditation**

**Article 132** – (1) In cases where there is a present danger that the seized item is going to be damaged or suffer a substantial loss of value, that item may be liquiditated before the judgement is made final.

(2) The decision on the liquiditation shall be rendered during the investigation phase by the judge, and by the court during the prosecution phase.

(3) Before making a decision, the suspect, accused or other individual, who is the owner of the item, shall be heard; the decision on the liquiditation shall be notified to them.

(4) Necessary measures shall be taken in order to avoid any damage and to maintain the value of the item.

(5) The seized item may be given to the suspect, accused or to any other individual in order to protect it, during the investigation phase by the office of the public prosecution, during the prosecution phase by the court, under the condition to take related measures of care and protection and to return immediately in cases of request. This delivery may be subject to posting a security.

(6) In cases where there is no need to keep the seized item as evidence, that item may be

handed over to the concerned individual, if he pays the current value of the item immediately. In such cases, the paid current value shall become the subject of the confiscation decision.

### **Appointing a trustee for the administration of a firm**

**Article 133 -** (1) In cases where there are strong grounds of suspicion that the crime is being committed within the activities of a firm and it is necessary for revealing the factual truth, the judge or the court is entitled to appoint a trustee for the administration of a firm with the aim of running the business of the firm, for the duration of an investigation or prosecution. The decision of appointment shall clearly indicate that the validity of the decisions and interactions conducted by the organ of the administration depends upon the approval of the trustee, or that the powers of the organ of the administration has been transferred to the trustee. The decision on appointing a trustee shall be announced by the newspaper for the record of the trade and by other suitable means.

(2) Fees for the trustee estimated by the judge or the court, shall be compensated by the budget of the firm. However, in cases where there is a decision rendered to not prosecute the investigated crime, or if there is a judgment of acquittal, the total sum of money paid as the fee of the trustee shall be compensated by the state treasury, with interest.

(3) The related persons are entitled to apply to the competent court against the interactions of the trustee, according to the provisions of the Turkish Civil Code dated 22.11.2001, No. 4721 and of the Turkish Commerce Code dated 29.6.1956, No. 6762.

(4) The provisions of this article are applicable only for the following crimes as listed below:

- a) Crimes regulated in the Turkish Criminal Code,
  - 1. Smuggling migrants and human trafficking (Arts. 79, 80),
  - 2. Producing and trading in narcotic or stimulating substances (Art. 188),
  - 3. Forgery in money (Art. 197),
  - 4. Prostitution (Art. 227),
  - 5. Providing place and opportunity for gambling (Art. 228),
  - 6. Embezzlement (Art. 247),
  - 7. Laundering of property values emanating from crime (Art. 282),
  - 8. Armed organization (Art. 314), or providing arms for such organizations (Art. 315),
  - 9. Crimes against the secrets of the state and spying (Arts. 328, 329, 330, 331, 333, 334, 335, 336, 337),
- b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Art. 12),
- c) Embezzlement as defined in Banking Act Art. 22, subsection (3) and (4),
- d) Crimes as defined in Combating Smuggling Act that require the punishment of imprisonment,
- e) Crimes as defined in the Act on Protection of Cultural and Natural Substances, Arts. 68 and 74.



## **Search of computers, computer programs and transcripts, copying and provisional seizure**

**Article 134** – (1) Upon the request of the public prosecutor during an investigation with respect to a crime, the judge shall issue a decision on the search of computers and computer programs and records used by the suspect, the copying, analyzing, and textualization of those records, if it is not possible to obtain the evidence by other means.

(2) If computers, computer programs and computer records are inaccessible, as the passwords are not known, or if the hidden information is unreachable, then the computer and equipment that are deemed necessary may be provisionally seized in order to retrieve and to make the necessary copies. Seized devices shall be returned without delay in cases where the password has been solved and the necessary copies are produced.

(3) While enforcing the seizure of computers or computer records, all data included in the system shall be copied.

(4) In cases where the suspect or his representative makes a request, a copy of this copied data shall be produced and given to him and this exchange shall be recorded and signed.

(5) It is also permissible to produce a copy of the entire data or some of the data included in the system, without seizing the computer or the computer records. Copied data shall be printed on paper and this situation shall be recorded and signed by the related persons.

## **FIFTH PART**

### **Interception of correspondence through telecommunication Location, listening and recording of correspondence**

**Article 135** – (1) The judge or, in cases of peril in delay, the public prosecutor, may decide to locate, listen to or record the correspondence through telecommunication or to evaluate the information about the signals of the suspect or the accused, if during an investigation or prosecution conducted in relation to a crime there are strong grounds of suspicion indicating that the crime has been committed and there is no other possibility to obtain evidence. (As amended by Act 2005-5353) The public prosecutor shall submit his decision immediately to the judge for his approval and the judge shall make a decision within 24 hours. In cases where the duration expires or the judge decides the opposite way, the measure shall be lifted by the public prosecutor immediately.

(2) The correspondence of the suspect or the accused with individuals who enjoy the privilege of refraining from testimony as a witness shall not be recorded. In cases where this circumstance has been revealed after the recording has been conducted, the conducted recordings shall be destroyed immediately. (As amended by Act 2005-5353)

(3) The decision that shall be rendered according to the provisions of subsection 1 shall include the nature of the charged crime, the identity of the individual, upon whom the

measure is going to be applied, the nature of the tool of communication, the number of the telephone, or the code that makes it possible to identify the connection of the communication, the nature of the measure, its extent and its duration. The decision of the measure may be given for maximum duration of 3 months; this duration may be extended one more time. However, for crimes committed within the activities of a crime organization, the judge may decide to extend the duration several times, each time for no longer than one month, if deemed necessary. (As amended by Act 2005-5353)

(4) The location of a mobile phone may be established upon the decision of the judge, or in cases of peril in delay, by the decision of the public prosecutor, in order to be able to apprehend the suspect or the accused. The decision related to this matter shall include the number of the mobile phone and the duration of the interaction of the establishment. The interaction of establishment shall be conducted for maximum of three months; this duration may be extended one more time.

(5) Decisions rendered and interactions conducted according to the provisions of this article shall be kept confidential while the measure is pending.

(6) The provisions contained in this article related to listening, recording and evaluating the information about the signals shall only be applicable for the crimes as listed below:

- a) The following crimes in the Turkish Criminal Code;
  1. Smuggling with migrants and human trafficking (Arts. 79, 80),
  2. Killing with intent (Arts. 81, 82, 83),
  3. Torture (Arts. 94, 95),
  4. Sexual assault (Art. 102, except for subsection 1),
  5. Sexual abuse of children (Art. 103),
  6. Producing and trading with narcotic or stimulating substances (Art. 188),
  7. Forgery in money (Art. 197),
  8. Forming an organization in order to commit crimes (Art. 220, except for subsections 2, 7 and 8),
  9. Prostitution (Art. 227, subsection 3) (as amended by Act No. 5353),
  10. Cheating in bidding (Art. 235),
  11. Bribery (Art. 252),
  12. Laundering of values emanating from crime (Art. 282),
  13. Armed criminal organization (Art. 314) or supplying such organizations with weapons (Art. 315),
  14. Crimes against the secrets of the state and spying (Arts. 328, 329, 330, 331, 333, 334, 335, 336, 337).
- b) Smuggling with guns, as defined in Act on Guns and Knives and other Tools, dated 10.7.1953, No. 6136, (Art. 12),
- c) The crime of embezzlement as defined in Act on Banks, Art. 22, subsections (3) and (4),
- d) Crimes as defined in Combating Smuggling Act, which carry imprisonment as punishment,
- e) Crimes as defined in Act on Protection of Cultural and Natural Substances, Arts. 68 and 74.

(7) No one may listen and record the communication through telecommunication of another person except under the principles and procedures as determined in this Article.

## **Office and domicile of a defense attorney**

**Article 136** – (1) In connection with investigations related to the suspect or the accused, Article 135 shall not be applied for telecommunication devices in the office, dwelling and domicile of a defense counsel.

## **Enforcement of decisions, destroying the contents of the communication**

**Madde 137** – (1) The decision rendered according to Article 135 shall be enforced by the officials of the institutions that provide the service of telecommunication immediately, in cases where it is requested in writing by the public prosecutor or by the judicial police official who has been empowered by the public prosecutor to locate, listen to or record the correspondence through telecommunication and to implant the relevant devices; if this request is not fulfilled, use of force is permitted. The beginning and ending date and time of the interaction and the identity of the individual who is enforcing the decision shall be put into the records.

(2) The recordings that are produced according to article 135 shall be decoded by individuals who are been appointed by the public prosecutor and shall be transcribed into written form. Recordings in a foreign language shall be translated by a translator into the Turkish language.

(3) In cases where there is a decision rendered about not prosecuting the suspect, or where the judge does not give his approval according to the first subsection of Article 135, the application shall be terminated immediately by the public prosecutor. In such cases the recordings shall be destroyed within 10 days under the supervision of the public prosecutor and this event shall be recorded into the files.

(4) The office of the public prosecution shall inform in written form the related individual within 15 days the latest, beginning from the date of the end of the investigation phase, about the reasons, context, duration and the outcomes of the measure, if the recordings related to locating and listening have been destroyed.

## **Coincidental evidence**

**Article 138** – (1) If a search or seizure reveals an evidence that is not connected to the current investigation or prosecution, but there are reasonable grounds of suspicion that another criminal offense was committed, those items shall be immediately secured and the public prosecutor shall be informed thereof.

(2) If during the performing of interception of correspondence through telecommunication, a piece of evidence has been obtained that is not related to the ongoing investigation or prosecution, but raises the suspicion that a crime that is listed in Article 135/6 has been committed, this evidence shall be secured and this circumstance shall be immediately notified to the office of Public Prosecution.

## **SIXTH PART**

### **UNDERCOVER INVESTIGATOR and**

### **SURVEILLANCE WITH TECHNICAL DEVICES**

## **Undercover Investigator**

**Article 139** – (1) In cases where there are strong indications of suspicion that the crime under investigation had been committed, and if there are no other available means of obtaining evidence, the judge, and in cases of peril in delay, the public prosecutor, may decide to empower a public servant to act as an undercover investigator.

(2) The identity of the investigator may be changed. He is entitled to make legal interactions with this identity. In cases where it is necessary to produce and maintain the identity, the needed documents may be prepared, altered and used.

(3) The decision related to the appointment of the undercover investigator and other documents shall be secured by the related office of the Public Prosecution. Even after the end of his mission, the identity of the undercover investigator shall be kept a secret.

(4) The undercover agent is obliged to conduct every kind of investigation related to the criminal organization, the activities for which he has been appointed, as well as investigations related to crimes committed within the activities of this criminal organization.

(5) The investigator shall not commit a crime while fulfilling his duty and shall not be held responsible for crimes being committed by the criminal organization, for which he has been appointed.

(6) Personal information obtained through appointing an investigator shall not be used except for during the criminal investigation or prosecution for which he has been appointed.

(7) The provisions of this article shall only be applicable for the crimes listed below:

a) The following crimes at the Turkish Criminal Code;

1. Producing and trading with narcotic or stimulating substances (Art. 188),

2. Forming an organization in order to commit crimes (Art. 220, except for subsections 2, 7 and 8),

3. Armed organizations (Art. 314) or supplying weapons for such organizations (Art. 315).

b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Art. 12),

c) Crimes as defined in the Act on Protection of Cultural and Natural Substances, Arts. 68 and 74.

## **Surveillance with technical means**

**Article 140** – (1) If there are strong indications of suspicion that crimes listed below have been committed, and if there is no other available means of obtaining evidence, the

activities of the suspect or the accused, conducted in fields open to the public and his working places, may be subject to surveillance by technical means, including voice and image recording;

a) Crimes regulated in the Turkish Criminal Code,

1. Smuggling migrants and human trafficking (Arts. 79, 80),
2. Killing with intent (Art. 81, 82, 83),
3. Trading in narcotic or stimulating substances (Art. 188),
4. Forgery in money (Art. 197),
5. Forming an organization with the aim of committing crimes (Art. 220, except for subsections 2, 7 and 8),
6. Prostitution (Art. 227, subsection 3) (as amended by Act No. 5353),
7. Cheating in bidding (Art. 235),
8. Bribery (Art. 252),
9. Laundering of property values emanating from crime (Art. 282),
10. Armed organization (Art. 314), or providing arms for such organizations (Art. 315),
11. Crimes against the secrets of the state and spying (Arts. 328, 329, 330, 331, 333, 334, 335, 336, 337),

b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Art. 12),

c) Crimes as defined in Combating Smuggling Act that require the punishment of imprisonment,

d) Crimes as defined in the Act on Protection of Cultural and Natural Resources, Arts. 68 and 74.

(2) Surveillance with technical means shall be ordered by judge, and in cases where there is peril in delay, by the public prosecutor. The decisions rendered by the public prosecutor shall be submitted for the approval of the judge within 24 hours.

(3) The decision related to the surveillances with technical means may be rendered for a maximum of four weeks. This time limit may be extended once, if needed. However, the judge is entitled to extend this period several times for not more than one week each, related to the crimes committed within the activities of an organization, if needed. (As amended by Act No. 5353)

(4) The evidence obtained shall only be used for investigations or prosecutions of the crimes listed above, and shall not be used outside of this scope; and the evidence shall be

immediately destroyed under the supervision of the public prosecutor, if it is not useful for the criminal prosecution.

(5) The provisions of this Article shall not be applied within the dwelling of an individual.

## **CHAPTER SEVEN**

### **Compensation related to the Measures of Protection**

#### **Motion for compensation**

**Article 141** – (1) Individuals who suffer losses during the investigation or prosecution and have been subject to the following interactions, may claim their material and emotional losses from the State: individuals who;

a) Have been arrested without or with an arrest warrant against the provisions foreseen by the statutes, or for whom the period of arrest has been extended against the regulations listed in statutes,

b) Have not been taken before a judge within the period of police detention, as foreseen in the statute,

c) Have been arrested with an arrest warrant without being told his legal rights, or who, after his rights have been told, his request to use such rights had not been fulfilled,

d) Even though they have been arrested legally, were not tried within a reasonable time before the court and did not receive a judgment within a reasonable time,

e) After having been arrested legally without or with an arrest warrant, a decision to not prosecute had been issued, or at the main trial had been acquitted,

f) Were convicted, but the period they has spent in custody and in pretrial arrest was longer than the period in the sentence, or were necessarily only fined, as the Criminal Code foresees a fine only for their conduct and no imprisonment,

g) Had not been given written documentation of grounds of arrest without or with an arrest warrant, nor the charges against them; or, in cases where the written documentation was not possible, there was failure to provide the individual oral explanation about the above mentioned grounds,

h) Have been arrested without or with an arrest warrant and their status had not been notified to their relatives,

i) Had been subject to a search based on a valid order, but the execution of the order was not proportional,

j) Had been subject to the seizure of their property or of their assets, although the requirements as foreseen in the code had not been present, or measures of protection of their property has not been taken, or their property or their assets had been used outside of the scope of seizure, or had not been returned to them timely.

(2) The authorities that render decisions mentioned in above (e) and (f) shall notify the interested party, that they have the right to file a motion for compensation and this notification shall be included in the decision.

#### **The requirements of a motion for compensation**

**Article 142** – (1) The motion for compensation may be filed either within 3 months

after the notification of the final decision, and at any case within one year after the final decision.

(2) The decision about the motion shall be rendered by the Court of Assizes, where the injured party is residing, and in cases where the decision of this court is related to the motion for compensation, and if there is no other Court of Assizes in the district, the closest shall rule.

(3) The individual who files a motion for compensation shall indicate in his petition his open identity and address, shall cite the interaction that caused his grievance, and the quality and quantity of losses suffered, and shall attach documents related to these submissions.

(4) If the court deems the filed motion as lacking explanation or documentation, it shall notify the individual that he must include the lacking points within one month, or his motion shall be denied. Where the motion is not supplemented within this period, the court shall deny the motion in a fashion, for which a remedy of opposition is available.

(5) The court shall examine the file and thereafter shall make a ruling on the admissibility of the motion, and in such cases shall send the petition and the copy of the attached documents to the respondent state treasury representative, notifying this authority to prepare his views and exceptions in writing within 15 days.

(6) The court shall be entitled to conduct any investigation in order to evaluate the motion and supporting documents as evidence, as well as investigation in order to determine the value of the compensation which shall be given according to the general principles of the law on compensation; this investigation may be conducted by the court, or the court may let one of the judges conduct the investigation.

(7) The court shall give its decision by conducting a trial. In case where the applicant and the representative of the State Treasury do not appear even if they had been notified through a letter of invitation, the decision may be rendered in their absence. (As amended by Act No. 5353)

(8) The plaintiff, the public prosecutor or the representative of the state treasury may launch a motion of appeal on facts and law against this decision; this motion shall have priority and be performed in a speedy fashion.

### **Revocation of compensation**

**Article 143** – (1) In cases where the decision of the public prosecutor to drop the prosecution was consequently lifted and there was an official claim filed against the individual, who was later convicted by this court, and in cases where the former judgment of acquittal had been lifted through revision in disfavour, and the individual is convicted in the subsequent trial, the compensation paid to the individual shall be collected; the public prosecutor shall issue a written motion to the same court and the compensation which has already been paid shall be collected in the rulings according to the provisions of the statutes on collecting public debts. This decision may be subject to a motion of opposition.

(2) In cases where the state had to pay a compensation, the state shall request this sum

from the public servants, who were at fault, as they had misused their duties by acting against the requirements of their duties related to the protection measures. (As amended by Act No. 5353)

(3) In cases where a police detention or pre-trial detention had occurred because of a false accusation or a false testimony, the state shall ask the individual who made a false accusation or gave a false testimony to pay back this sum as well.

#### **Individuals who are not entitled to ask for compensation**

**Article 144** – (1) In the following situations, individuals shall not be entitled to file a motion of compensation if their arrest with or without an arrest warrant was legal as listed below:

a) Situations in which individuals who had been convicted to a prison term by another crime have had their term of police detention and pre-trial detention deducted from this conviction,

b) Through a subsequent legislation, which is favorable, that became effective at a later time, the person shall become entitled for a compensation, although originally he had no right for a compensation,

c) In cases where the prosecution was dropped or the case has been dismissed, or the public claim was temporarily stayed, or the public claim was postponed or dismissed on the grounds such as amnesty or pardon, withdrawal of the claim, mediation,

d) In cases where the court decides not to punish the offender because of a lack of criminal capacity,

e) In cases where an individual made a false admission of guilt or had falsely declared participation in a crime in the presence of judicial authorities, and these submissions had led to his arrest with or without an arrest warrant.

### **PART FIVE**

#### **Interview and interrogation**

#### **CHAPTER ONE**

##### **Summons for interview or interrogation**

##### **Summons for interview or interrogation**

**Article 145** – (1) An individual who shall be interviewed or interrogated shall be summoned by a summons letter, in this written document the reason of his being summoned shall be openly declared, and indicated that if he fails to appear, he will be subpoenaed.

##### **Subpoena**

**Article 146** - (1) A subpoena may be issued for the suspect or accused, against whom there are sufficient grounds to issue an arrest warrant or an apprehension order, or who failed to appear, even though he was summoned according to Article 145.

(2) The subpoena shall contain open identities of the suspect or accused and charged crime, also, if necessary, a description of the individual and the grounds for the subpoena.



(3) A copy of the subpoena shall be handed to the suspect or accused.

(4) The suspect or accused who has been asked to appear by a subpoenae order shall be arraigned immediately, if that is not possible, then within 24 hours, excepting travel time, before the judge, court, or public prosecutor, who ordered him to appear and shall be interrogated or interviewed. (As amended by Act No. 2006-5560)

(5) The subpoena shall start at a justifiable time for this purpose, and lasts until the end of the interrogation by the judge or the court, or the interview by the public prosecutor.

(6) In cases where a subpoena could not be served, the reason for the inability to serve shall be documented and signed collectively by a district or county clerk and a member of the security forces.

(7) The witness, expert, victim and the claimant who failed to appear even though summoned, may also be subpoenaed. (As amended by Act No. 2006-5560)

## **CHAPTER TWO**

### **Procedure of interview or interrogation**

#### **The style of an interview or interrogation**

**Article 147** – (1) During the interview of a suspect or an accused the following rules apply:

a) The identity of the suspect or accused shall be established. The suspect or accused is obliged to provide correct answers to the questions related to his identity.

b) The charges against him shall be explained.

c) He shall be notified of his right to appoint a defense counsel, and that he may utilize his legal help, and that the defense counsel shall be permitted to be present during the interview or interrogation. If he is not able of retaining a defense counsel and he requests a defense counsel, a defense counsel shall be appointed on his behalf by the Bar Association.

d) The situation of arrest without a warrant of an individual shall be immediately notified to one of the relatives of his choice, unless Article 95 provides otherwise.

e) He shall be told that he has the legal right to not give any explanation about the charged crime.

f) He shall be reminded that he may request the collection of exculpatory evidence and shall be given the opportunity to invalidate the existing grounds of suspicions against him and to put forward issues in his favor.

g) The individual who is interviewed or interrogated shall be asked about information of his personal and economical status.

h) During the recording of the interview or interrogation, technical means shall be utilized.

i) A record of an interview or interrogation shall be produced and these minutes shall contain the following issues;

1. The place and date of the conducted interview or interrogation,

2. The name and function of the individuals present during the interview or interrogation, as well as the open identity of the individual who is being interviewed or interrogated,

3. Verification of whether the interactions listed above have been fulfilled during the interview or interrogation, if not, the grounds for non-compliance,

4. Verification that the contents of the minutes had been read by the individual interviewed or interrogated and his defense counsel who was present and then signed by them both.

If they refrain from signing, the grounds for not signing shall be noted.

### **Procedures forbidden during the interview and interrogation**

**Article 148** – (1) The submissions of the suspect or accused shall be stemming from his own free will. Any bodily or mental intervention that would impair the free will, such as misconduct, torture, administering medicines or drugs, exhausting, falsification, physical coercion or threatening, using certain equipment, is forbidden.

(2) Any advantage that would be against the law shall not be promised.

(3) Submissions obtained through the forbidden procedures shall not be used as evidence, even if the individual had consented.

(4) Submissions obtained by the police, without the defense counsel being present, shall not be used as a basis for the judgement, unless this submission had been verified by the suspect or the accused in front of the judge or the court.

(5) In cases where there is a need for a subsequent interview of the suspect in relation with the same happening, this interaction shall be conducted only by the public prosecutor.

## **PART SIX**

### **Defense**

## **CHAPTER ONE**

### **Choice, appointment, duties, and powers of the defense counsel**

#### **Choice of a defense counsel by a suspect or accused**

**Article 149** – (1) The suspect or accused may benefit from advice of one or more defense **counsels** at any stage during the investigation or prosecution; in cases where the suspect or accused has a legal representative, he may also choose a defense **counsel** on his behalf.

(2) In the investigation phase, during the interview, the maximum number of lawyers allowed to be present shall be three.

(3) The right of the lawyer to consult with the suspect or the accused, to be present during the interview or interrogation, and to provide legal assistance shall not be prevented, restricted at any stage of the investigation and prosecution phase.

### **Appointment of a defense counsel**

**Article 150** - (1) The suspect or the accused shall be asked to choose a defense counsel on his behalf. In cases where the suspect or accused declares that he is not able of choosing a defense counsel, a defense counsel shall be appointed on his behalf, if he requests such.

(2) If the suspect or the accused who does not have a defense counsel is a child, or an individual, who is disabled to that extend that he can not make his own defense, or deaf or mute, then a defense counsel shall be appointed without his request.

(3) During the investigation or prosecution for crimes that carry a punishment of imprisonment at the lower level of more than five years, the provision of subparagraph two shall be applied.

(4) Other details of the obligatory defense counseling shall be regulated by an internal regulation, that shall be put in force after consulting the Turkish Union of Bar Associations. (As amended by Act No. 2006-5560)

### **Interaction in cases where the defense counsel does not fulfill his duty and ban on the defense counsel**

**Article 151** – (1) In cases where the defense counsel who has been appointed according to Article 150 does not appear to the main trial, or steps out of the main trial inappropriately or fails to fulfill his duties, then the judge or trial court shall make the necessary interactions to appoint another defense counsel immediately. In such an event, the court may interrupt or adjourn the main trial to a later date.

(2) If the new defense counsel explains that he had not been given enough time to prepare a defense, then the main trial must be adjourned.

(3) In cases where there is a pending prosecution because of crimes listed in this subsection against a lawyer who has been selected according Art. 149, or has been appointed according Art. 150, and who is defending or representing an individual who has been arrested with a warrant because of crimes, or has been convicted of crimes as listed in Art. 220 and 314 Turkish Criminal Code, or terrorism crimes, may be banned from acting as a defense counsel or as a representative. (As amended by Act No. 5353)

(4) The court that is dealing with the prosecution against the defense counsel or representative shall make a decision related to the banning without any delay upon the request of the public prosecutor. These decisions may be subject to opposition. If at the end of the opposition proceedings the decision on banning has been lifted, the lawyer shall go on performing his duties. The decision on banning from being a defense counsel shall be limited to the subject matter crime that is under prosecution and be effective for one year. However, according to the nature of the prosecution, these time limits may be extended for not more than six months, a maximum of two times. If at the end of the prosecution there is a judgement outside of the scope of conviction, the decision on banning shall be automatically lifted, without waiting until the judgement is made final. (As amended by Act No. 5353)

(5) The decision on banning from the duty shall be notified to the Presidency of the related Bar Association, in order to achieve the appointment of a new defense counsel for the accused or convicted person. (As amended by Act No. 5353)

(6) The defense counsel or the representative is not entitled to visit the individual at the jail or correctional facility, whom he is defending or representing for the duration of ban, even if the visit is related to different cases. (As amended by Act No. 5353)

### **Defense, in cases where there is more than one suspect or accused**

**Article 152** – (1) In cases where there is more than one suspect or accused, and there is no conflict of interest, their defense may be delegated to the same defense counsel.

### **The power of the defense counsel for discovery of the file**

**Article 153** - (1) The defense counsel may review the full contents of the file related to the investigation phase and may take a copy of his choice of documents, and is not obliged to pay any fees for such.

(2) The power of the defense counsel may be restricted, upon request of the public prosecutor, by decision of the Justice of the Peace, if a review into the contents of the file, or copies taken, hinder the aim of the ongoing investigation.

(3) The records of the submissions provided by the individual or by suspect who was arrested without warrant, as well as the written expert opinions and the records of other judicial proceedings, during which the above mentioned individuals who are entitled to be present, are exempted from provisions of the second paragraph.

(4) The defense counsel may review the full contents of the court files and all secured pieces of evidence, beginning with the date of approval of the indictment by the court; he may take copies of all the records and documents without any fee. (As amended by Act No. 5353)

(5) The representative of the victim shall enjoy all the rights provided by this Article.

### **Interview with the defense counsel**

**Article 154** – (1) Any suspect or accused at any time shall have the right to an interview with a defense counsel in an environment where other individuals are unable to hear their conversation; a power of attorney is not required. Written correspondence by these individuals to their attorney are not subject to control.

### **The presence of the legal guardian or of the spouse during the main trial**

**Article 155** – (1) The legal representative of the accused shall be notified of the day and time of the main trial, and he shall be admitted to the main trial and be heard upon his

request.

(2) The provision of paragraph one shall also apply to the spouse of the accused, without any notification.

### **Procedure to be applied to the appointment of the defense counsel**

**Article 156** – (1) In cases where Article 150 applies; the defense counsel shall be appointed by the Bar Association;

a) During the investigation phase, upon the request of the authority that makes the interview or the judge who makes the interrogation,

b) During the prosecution phase, upon the request of the court.

(2) The defense counsel at the above - mentioned instances shall be appointed by the Bar Association, where the investigation or prosecution is pending.

(3) In cases where the suspect or accused subsequently chooses a defense counsel, the duty of the lawyer, who was formerly appointed by the Bar Association, shall be terminated.

## **Second book**

### **Investigation**

#### **First part**

#### **Reporting of crimes and investigation**

##### **Chapter 1**

#### **The secrecy of investigation, reporting of crimes**

##### **Secrecy of investigation**

**Article 157** - (1) Unless provided otherwise by the code and under the requirement to not harm the defense rights, procedural interactions during the investigations phase shall be kept as a secret.

##### **Report of crimes and claim**

**Article 158** - (1) Crimes may be reported to the office of the public prosecution, or the offices the security forces.

(2) Reports that are submitted to the governor's office, or to the office of the administrative chief of district, or to the court, shall be sent to the office of the Chief Public Prosecutor.

(3) Where a crime that was committed in a foreign country is to be prosecuted in Turkey, this may be reported to Turkish ambassadors and consulates.

(4) Any report of a crime or a claim that has been submitted to the administration of the related office or establishment, alleging that a crime has been committed that is in connection with the performing of a public duty, shall be sent to the Office of the Public Prosecution without any delay.

(5) The report of a crime or a claim may be declared in writing or orally, in order to produce a written document.

(6) In cases where, after the conducted investigation, the prosecution phase had started and at this stage it becomes evident that the crime requires a claim, the adjudication shall continue, unless the victim openly refrains from his right to claim.

### **Reporting of a suspicious death**

**Article 159** – (1) In cases where there are indications that support the suspicion that a person has died an unnatural death, or if the body/corps could not be identified, the officers of the security forces or communities or the elected head of a village or the individuals empowered with health or burial issues, shall inform the public prosecution office immediately.

(2) Burial in cases that are regulated by subparagraph one shall be done only upon a written permission of the public prosecutor.

## **CHAPTER TWO**

### **Interactions related to the investigation**

#### **Duty of public prosecutor informed of an offense**

**Article 160** - (1) As soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not.

(2) In order to investigate the factual truth and to secure a fair trial, the public prosecutor is obliged, through the judicial security forces, who are under his command, to collect and secure evidence in favor and in disfavor of the suspect, and to protect the rights of the suspect.

#### **Duties and powers of the public prosecutor**

**Article 161** - (1) The public prosecutor may conduct any kind of exploration either directly or through the judicial security forces under his command; in order to achieve the outcomes mentioned in the above Article, he may demand all kinds of information from all public servants. In cases where there is a need to make a judicial interaction outside of his

judicial district in the course of his judicial duties, the Public prosecutor shall ask the public prosecutor at an other district to conduct that interaction.

(2) The members of the judicial security forces are obliged to notify immediately of the incidences they have started to handle, of the individuals who have been arrested without a warrant, and of the measures initiated to the public prosecutor under whose command they have been given, and are obliged to execute all orders of this public prosecutor related to the administration of justice without any delay.

(3) The public prosecutor shall deliver the orders to the members of the judicial security forces in written form and in exigent cases orally. The oral order shall be notified in written form as well, within the shortest period possible. (As amended by Act No. 5353)

(4) The other public employees are also obliged to supply the knowledge and documents that are needed during a pending investigation to the requiring public prosecutor without any delay.

(5) Public employees who misuse or neglect their duties stemming from the statute, or duties required of them according to provisions in the statute, as well as superiors and officers of the security forces who misuse or neglect to execute the oral or written demands or orders of the public prosecutors, shall be prosecuted by the public prosecutors in a direct way. Governors and administrative chiefs of districts shall be subject to provisions of the Act on Adjudication of Civil Servants and Other Public Employees, dated 2 December 1999, No. 4483, and the highest degree superiors of the security forces shall be subject to the provisions of adjudication, which are applicable for judges while they are under adjudication for crimes related to their offices. (As amended by Act No. 5353)

(6) In cases where the crime requiring heavy imprisonment is detected in the act, under the requirement that the provisions of this Code be applied, the investigation of crimes committed for personal reasons by the administrative chief of district shall be conducted by the public prosecutor at that city, and investigation of crimes committed by the governor, by the chief public prosecutor at the nearest court district, applying the general provisions. The prosecution of the above mentioned crimes shall be conducted at the court that has subject matter jurisdiction where the investigation had been conducted.

### **Demand of the public prosecutor for a decision by the judge**

**Article 162** – (1) In cases where the public prosecutor deems it necessary to conduct an interaction of investigation, which can only be conducted by a judge, the public prosecutor shall notify his demands to the Justice of the Peace, where the interaction shall be conducted. The Justice of the Peace makes an inspection as to whether the requested interaction is legal or not, and acts accordingly.

### **Investigations conducted by the Justice of the Peace**

**Article 163** - (1) In cases where the offense is detected in the act, as well as where there is peril in delay, if the public prosecutor is out of reach or the event is broad and comprehensive and therefore would be beyond the scope of the duties of the public prosecutor, then the Justice of the Peace is also empowered to conduct all necessary interactions of investigation by its own motion.

(2) The superiors and officers of the security forces shall comply with the measures ordered by the Justice of the Peace and shall conduct the ordered investigations.

### **Judicial security forces and their duties**

**Article 164** - (1) “Judicial security force” means the members of the security forces who conduct the interactions related to the investigation, which are indicated in the following Acts: Arts. 8, 9 and 12 of the Act on the Organisation of the Security Forces, dated 4.6.1937, No. 3201; Art. 7 of the Act on the Organisation, Duties and Powers of the Gendarmery, dated 10.3.1983, No. 2803; Art. 8 of the Decree in Power of an Act on the Organisation and Duties of the State Secretary of Customs, dated 2.7.1993, No. 485; and Art. 4 of the Act on Command of Coast Security, dated 9.7.1982, No. 2692.

(2) The execution of the interactions related to the investigation shall be achieved according to the orders and directions of the public prosecutor, primarily by the judicial security forces. The members of the judicial security forces shall execute the orders of the public prosecutor, which are related to the judicial duties.

(3) Outside of the scope of judicial duties, the judicial security forces are under the command of their superiors.

### **Judicial duties of other units of security forces**

**Article 165** – Other units of the security forces are also obliged to fulfill the duties of judicial security forces, if needed, or the public prosecutor requests. In such cases, the provisions of this Code shall be applicable for the members of the security forces, because of their judicial duties.

### **The power of making an evaluation report**

**Article 166** – (1) Chief public prosecutors shall prepare an evaluation report about the responsible persons at the judicial security forces at that location, and send it to their administrative superiors.

### **Code of practice**

**Article 167** – (1) The Ministry of Justice shall issue together with the Ministry of Interior a Code of Practice within six months after this Code becomes enforceable, regulations of the following issues: the qualifications of the duties of the members of judicial security forces and requirements for their education prior the office, as well as in-service education; their relations with other entities; the procedure of the preparation of the evaluation reports, appointing of them in different sections according to their specialization, and other like issues.

### **Not complying with the measures of the member of the judicial security forces at the scene of event**



**Article 168** – (1) A member of the judicial security forces, who has started the interactions related to his duty at the scene of event, shall prevent the activities of the individuals who deliberately obstruct his duties, or who do not comply with the measures he issued within his power, until the completion of the interactions, and shall be entitled to use force if necessary.

#### **Recording the interactions conducted during the investigation phase**

**Article 169** - (1) During the interview or interrogation of the suspect or the accused, hearing witness or expert, or during a judicial inspection and bodily examination, the public prosecutor or the Justice of the Peace shall call in a court recorder. In urgent cases, any person may be called in, and sworn as court recorder.

(2) Any interaction of investigation shall be recorded. The record shall be signed by the public prosecutor or the Justice of the Peace, as well as by the court recorder, who had been present.

(3) Where the lawyer was present during an interaction in his capacity as defense counsel or representative, his name and signature shall be taken in to the records.

(4) The record shall contain the place, time and names of the individuals, who were present during or were related to the interactions.

(5) The related parts of the record shall be read out to them, or be submitted to them for reading, in order to get the approval of individuals who were present during the interaction. The record shall indicate that this happened and be signed by the participants.

(6) In cases where there was a waiver of signature, the record shall indicate the grounds for this as well.

## **PART TWO**

### **Filing a public prosecution**

#### **CHAPTER ONE**

##### **Filing a public prosecution,**

##### **The duty of filing a public prosecution**

**Article 170-** (1) The duty to file a public prosecution rests with the public prosecutor.

(2) In cases where, at the end of the investigation phase, collected evidence, support the suspicion of sufficient quantity and quality, that a crime has been committed, then the

public prosecutor shall prepare an indictment.

(3) The indictment, addressed to the court that has subject matter jurisdiction and venue, shall contain:

- a) The identity of the suspect,
- b) His defense counsel,
- c) Identity of the murdered person, victim or the injured party,
- d) The representative or legal representative of the victim or the injured party,
- e) In cases, where there is no danger of disclosure, the identity of the informant,
- f) The identity of the claimant,
- g) The date that the claim had been put forward,
- h) The crime charged and the related Articles of applicable Criminal Code,
- i) Place, date and the time period of the charged crime,
- j) Evidence of the offense,
- k) Explanation of whether the suspect is in pre-trial arrest or not, and if he is in pre-trial arrest, the date of taking him into custody, and pre-trial arrest, and their duration.

(4) The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence.

(5) The conclusion section of the indictment shall include not only the issues that are unfavorable to the suspect, but also issues in his favor.

(6) At the conclusion section of the indictment, the following issues shall be clearly stated: which punishment and measure of security as foreseen by the related Law is being requested to be inflicted at the end of the adjudication; in cases where the crime has been committed within the activities of a legal entity, the measure of security to be imposed upon that legal entity.

#### **The power of discretion in filing a public claim**

**Article 171** – (1) In cases where the requirements for the application of the provisions of “effective remorse, that lift the punishment as a personal ground”, or the provisions of personal impunity are present, the public prosecutor may render the decision that there is no ground for prosecution.

(2) Despite there being sufficient suspicion, the public prosecutor may render “the decision on postponing of the filing of the public claim” for a duration of five years for crimes, that are investigated and prosecuted only upon a claim and carry an imprisonment punishment at the upper level of one year or less; the provisions of Article 253, subparagraph 19 are reserved. The individual who suffered from the crime may oppose this decision according to the provisions of Article 173.

(3) All of the following requirements must have been fulfilled in order to be able to render “the decision on postponing of the filing of the public claim”; the provisions related to mediation are reserved:

- a) The suspect must not have been convicted for an intended crime priorly with an imprisonment term,

b) The investigation that has been conducted must have revealed the belief that, in case of “postponing of the filing of the public claim”, the suspect shall refrain from committing further crimes,

c) In regard to the suspect and the public, the “postponing of the filing of the public claim” is more beneficial than would the filing of the public claim,

d) The damage of the victim or the public, which has been occurred through the committed crime has been recovered to the full extent by giving back the same object, by restoring to the circumstances as it was before the crime has been committed, or by paying the damages.

(4) In cases where no crime has been committed during the period of postponement, “the decision on postponing of the filing of the public claim” shall be rendered. In cases where an intended crime has been committed during the period of postponement, the public claim shall be filed. During the period of postponement, time-limit prescriptions does not run.

(5) Decisions related to “the postponing of the filing of the public claim” shall be recorded in a specified data bank for this purpose. These recordings may only be utilized for the purpose mentioned in this Article, if it has been requested by the public prosecutor, judge, or the court, in relation to an investigation or prosecution.

## **CHAPTER TWO**

### **Decision on dropping the prosecution, opposition to such and returning of the indictment**

#### **The decision on dropping the prosecution**

**Article 172** – (1) In cases where at the end of the investigation phase there is no evidence with sufficient gravity to justify the suspicion which is required to open a public claim, or there is no legal possibility of prosecution, then the public prosecutor shall render a decision on dropping the prosecution. This decision shall be notified to the suspect, if interviewed or interrogated or there was an arrest warrant against the suspect, and the victim who had filed a claim shall also be notified. The decision shall contain the right to oppose, time limit of possible opposition and provisions on where to apply.

(2) An official claim because of the same conduct may not filed against a suspect for whom the decision on dropping the prosecution had been rendered, except if there is new evidence.

#### **Opposition against the decision of the public prosecutor**

**Article 173** – (1) The victim of the crime may file a motion of opposition within 15 days of the notification of the decision to not prosecute, with the president of the court related to heavy crimes, which is in the nearest location to the court of heavy crimes to which the public prosecutor who rendered this decision is attached.

(2) The motion of opposition shall contain the explanation of events and evidence that

would justify the opening of a public claim.

(3) If the president deems it necessary to broaden the investigation in order to render his decision, he may appoint a local Justice of the Peace giving him specific details; if at the end of the proceedings, sufficient grounds for opening a public claim was not discovered, the president shall deny the motion and give reasons for doing so, inflict the costs on the opposing party and shall send the file to the Public prosecutor. The public prosecutor shall notify the decision to the opposing party and to the suspect. (As amended by Act No. 5353)

(4) If the president determines that the petition was justified, then the public prosecutor shall prepare an indictment and submit it to the court. (As amended by Act No. 5353)

(5) In cases, where the public prosecutor had utilized the power of discretion on the issue of not bringing a public claim, the provisions of this Article are not applicable.

(6) If the motion of opposition was denied and there is new evidence of the offense, the public prosecutor shall only be entitled to file an official claim, if the president of the court of assizes, who had rendered a decision upon this petition, shall rule on opening a new claim.

#### **Return of indictment**

**Article 174** – (1) The trial court shall examine the whole document related to the investigation phase within fifteen days of the delivery of the indictment and investigation documents, and in cases where the following missing parts and errors are discovered, shall return the indictment with a decision thereof, describing them and returning it to the public prosecutors' office:

a) The indictment was produced in violation of the provisions of Article 170,

b) The indictment was produced without collecting evidence that would effect the proving the crime with certainty,

c) The indictment was produced in crimes that are according to the file of investigation, clearly falling under the provisions of “the settlement of the case on the payment of the fine”, or “mediation”, without applying these mentioned procedures.

(2) The indictment shall not be returned because of the legal description of the crime.

(3) In cases where the indictment had not been returned the latest at the end of the time limit as indicated in subsection one, it shall be considered as accepted.

(4) After the indictment has been returned, the public prosecutor shall complete the missing points and correct the errors as shown in the decision and if there is a no situation that requires the issuing of the decision to not prosecute, he shall issue a new indictment and send it to the court. The indictment shall not be returned again based on reasons that had not been indicated in the first decision.

(5) Public prosecutor may file a motion of opposition against the decision to return the indictment.

**BOOK THREE**  
**Prosecution Phase**

**PART ONE**  
**The running of the public claim**

**CHAPTER ONE**  
**Preparation of the main trial**

**Admissibility of indictment and interactions related to determination on the trial day**

**Article 175** – (1) As soon as the indictment has been approved, the public claim shall be considered as filed and the phase of prosecution starts.

(2) After the indictment has been approved, the court shall set a day for the main trial and summons the individuals who should be present during the main hearing.

**Notification of the indictment with the accused and summoning of the accused**

**Article 176** – (1) The indictment and summons shall be notified to the accused all together.

(2) The summons that shall be notified to the accused who is not under pre-trial arrest, shall contain a notice stating that if he does not appear without an excuse, he shall be subpoenaed.

(3) The accused under pre-trial arrest shall be summoned through notification of the date of the main trial. The accused shall be asked, whether he has any request in order to make his defense during the main trial and told to mention them if there are any; his defense counsel shall also be summoned together with the accused. This interaction shall be conducted in the correctional facility and the arrestee shall be arraigned in front of the clerk of the facility or of a personnel who is appointed to do this duty; a record of this interaction shall be produced.

(4) According to the paragraphs listed above, it is required that between the notification of the summons and trial day, there must be at least a period of one week.

**Request by the suspect in order to collect defense evidence**

**Article 177** – (1) In cases where the accused requests to summon the witness or expert to appear in the main trial, or requests defense evidence to be collected, he shall submit his petition thereof, indicating the events they are related to, at least five days prior to the day of the main hearing, with the president of the court, or the trial judge.

(2) The ruling thereof shall be notified to him immediately.

(3) The approved requests of the accused shall also be notified to the public prosecutor.

### **Directly bringing the witness and expert whose summons was denied**

**Article 178** – (1) In cases where the president of the court or the trial judge denies the motion of summoning the witness or the expert shown by the accused or the intervenig party, the accused or the intervening party may bring these individuals along to the main hearing. These individuals shall be heard at the main trial.

### **Notification of the names and addresses of summoned witnesses to the accused and to public prosecutor**

**Article 179** – (1) The accused shall give the names and addresses of the witnesses whom he is going to summons directly or bring them along with him to the main hearing to the public prosecutor in timely manner.

(2) Also if the public prosecutor is going to summons other individuals either upon the decision of the president of the court or the trial judge, or by its own motion directly, he shall as well give the names and addresses of these individuals who are not named in the indictment, or who are beyond the witnesses and experts invited upon the request of the accused, in a timely manner to the accused.

### **Hearing of witnesses and experts trough a delegated member of the court or the way of rogatory.**

**Article 180** – (1) In cases where a witness or a expert is not able to appear at the trial for a long time period, the duration of which is unknown beforehand, because of an illness, disability or because of another reason that cannot be overcome, then the court may rule that this shall be heard by a member of the court or by letter of the rogatory.

(2) This provision shall also apply in cases, where the witness and the expert are residing in a location outside of the jurisdiction of the competent court, and therefore it would be difficult to summons them.

(3) Within the borders of the metropolitan municipality, the trial court shall not rule on hearing the petitioner of claim, the intervening party, the accused, the defense counsel or the representative, witness and experts through an appointed member of the court, unless there is a necessity.

(4) If the appointed court is within the borders of the metropolitan municipality, than it shall conduct the necessary interactions within the borders of the metropolitan municipality without sending the files back, even if the related persons are not within his jurisdiction.

(5) If available, the witness or the expert shall be heard through a simultaneously vision and voice transmitting video-conference link. Principles and procedure of establishing the video-conference link and how to use this technology shall be regulated in an internal regulation.

### **Notification of the day that the witness and accused shall be heard**

**Article 181** – (1) The day that was appointed to hear the witness or the experts shall be notified to the public prosecutor, to the victim, to his representative, to the accused and to the defense counsel. A copy of the record thereon shall be handed out to the public prosecutor and the defense counsel, who were present.

(2) In cases where a repeat judicial inspection and bodily examination is needed, the provisions of the above mentioned paragraph shall be applied.

(3) The accused who is under pre-trial arrest, may only request to be present during such interactions that shall be conducted in the court where he is arrested. However, in cases where the judge or the court deems it necessary, it can be ruled that also the arrested suspect or accused be present during such interactions.

## **CHAPTER TWO**

### **Main hearing**

#### **Open trials**

**Article 182** – (1) Main hearing is open to the public.

(2) In cases, where it is strictly necessary in respect to public morale or public security, the court may rule that the main hearing be conducted partially or as a wholly closed to the public.

(3) The decision about exclusion of the public, which shall be furnished with reasons, as well as the judgment, shall be announced in the open main hearing.

#### **Ban of using voice and vision recording devices**

**Article 183** – (1) Except the provisions of the fifth paragraph of Article 180 and the fourth paragraph of Article 196, it is forbidden to use in the justice building and after the main hearing has started within the court room, any device that makes a voice or vision recording and transmits it. This provision shall also apply during the other judicial interactions enacted within the judicial building and outside of the building.

#### **Decision about excluding the public**

**Article 184** – (1) The session of the main hearing, which shall be conducted upon the request of excluding the public in cases as listed in Article 182, shall be conducted closed to the public, upon request or by the court's own motion.

### **Mandatory closed main hearing**

**Article 185** – (1) Main hearing related to the accused who has not attained the age of 18 shall be conducted closed to the public; the judgement shall be announced in a closed session as well.

### **Recording the decision on a closed session and its grounds**

**Article 186** – (1) The decision on closing the main hearing to the public shall be taken into the records, together with its grounds.

### **The right to be present at a closed session**

**Article 187** – (1) The court may permit some individuals to be present during a main hearing that is closed to the public. In such cases, these individuals shall be warned about not revealing the issues that required the main hearing to be closed and this issue shall be taken into the records.

(2) The content of a closed main hearing shall not be disseminated by any means of the media.

(3) If the content of an open main hearing impair the state security or public morale or would jeopardize the respect honor and rights of individuals or would influence individuals to commit crimes, then the court may put a ban on broadcasting such content, in order to prevent those harms and shall make this ruling adequately related to the whole or some parts of the contents and declare this decision in the open trial.

### **The individuals to be present at the main hearing**

**Article 188** – (1) During the main hearing, the presence of the judges who are going to render the judgement, and the public prosecutor, as well as the court recorder and in cases where the Statute accepts a mandatory defense counsel, the presence of the defense counsel, are required.

(2) There shall be no public prosecutor present during a main hearing conducted at the Courts of the Peace in criminal matters.

(3) If the main hearing shall not be concluded in one single session, a spare judge may be present during the hearings, who shall replace any member who would be unable to be present for any reason and vote.

### **Participation of more than one public prosecutor and lawyer to the main hearing**

**Article 189** – (1) More than one public prosecutor and more than one lawyer may take part in the main hearing at the same time; they may also share the work.



**Interruption**

**Article 190** – (1) The main hearing shall be conducted without interruption until the judgment is rendered. However, in indispensable circumstances the main hearing may be interrupted for the shortest possible period in a way that permits that the trial may be conducted within a reasonable time.

(2) If the time limit prescribed in Article 176 is not observed, the accused shall be reminded about his right of requesting the interruption of main hearing.

**Beginning of the main hearing**

**Article 191** – (1) Through establishing whether the accused and his defense counsel are present, if the witnesses and experts who had been summoned have appeared, the main hearing shall start. The accused shall not be handcuffed at the main hearing. The presiding judge or trial judge declares the beginning of the main hearing through reading out the decision on the admissibility of the indictment.

(2) The witnesses shall be asked to leave the courtroom.

(3) In the main trial the following interactions shall be conducted in the listed order:

- a) The detailed identity of the accused; shall be determined and knowledge about his personal and economic situation shall be obtained from him,
- b) The indictment or the document substituting indictment shall be read,
- c) The accused shall be notified of his legal right of silence related to the crime he is charged of, and of his other rights, which are listed in Article 147,
- d) In cases where the accused states that he is ready to give explanations, he shall be interrogated according to the rules.

**Duty of presiding judge or trial judge**

**Article 192** – (1) Presiding judge or trial judge conducts the main hearing, interrogates the accused and provides for the presentation of evidence.

(2) If one of the related parties objects on the grounds that the judge's order related to the administration of the main hearing is inadmissible, the court issues a ruling upon this point.

**Failure of the accused to appear**

**Article 193** – (1) The main hearing shall not be conducted if the accused fails to appear; the legal exceptions are reserved. If the accused fails to establish sufficient grounds for his absence, he shall be ordered to appear by subpoena.

(2) The main trial may be concluded in the absence of the accused, even if he has not been interrogated as to the merits of the case, if the collected evidence is sufficient to give a

judgment other than conviction. (As amended by 2005-5353)

**When the accused escape from the courtroom**

**Article 194** – (1) The presence of the accused who appears shall be secured during the main hearing and the court shall take necessary measures to prevent his escape.

(2) If the accused alludes or does not appear in the following hearing after the interruption, and if he was interrogated about the case, the main hearing may be conducted in the absence of the accused.

**Main hearing in the absence of accused**

**Article 195** – (1) If the crime requires as punishment a judicial fine or confiscation as a single punishment or in conjunction, then the main hearing shall be conducted, even if the accused fails to appear. In such cases, the summons sent to the accused shall include that the main hearing shall be conducted, even if he fails to appear.

**Accused exempted from the main hearing**

**Article 196** – (1) In cases where the accused, who has already been interrogated by the court, or his defense counsel, who has a power of attorney related to this case requests, the Court may exempt the accused from the obligation to be present during the main hearing.

(2) Except for the crimes that require imprisonment as upper level for five years and up, the accused may be interrogated by a judge in another court district about the basic facts of the prosecution. The day that is set for the interrogation shall be informed to public prosecutor, to the accused and to his defense counsel. There is no obligation for the public prosecutor and the defense counsel to be present during the interrogation. Before his interrogation, the accused shall be asked if he wishes to be interrogated in the competent court or not.

(3) The record of the interrogation shall be read during the main hearing.

(4) According to the contents of the above-mentioned paragraphs, if there is a possibility of broadcasting simultaneously vision and voice transmitting video conference, this technology shall be used for the interrogation of the accused.

(5) If as a result of some obligatory situations, such as illness or disciplinary measure or other necessary grounds, the arrested individual has been transferred to a hospital or to a jail, which is not in the same jurisdiction with the trial court, the court may decide, that the accused shall not be transferred to the main hearing for a hearing that the court deems the presence of the accused is not necessary, if the accused had been interrogated previously.

(6) If it is difficult to be present at the trial for the accused who is in a foreign country during the determined trial day, the trial may be conducted on an earlier date, or he can be interrogated by letter of rogatory.

#### **Ability of the accused to send a defense counsel**

**Article 197** – (1) Even if the accused is not present, his defense counsel has the power to be present in all sessions of the main hearing.

#### **Conditions of reinstatement in cases of conducted trial in the absence of the accused**

**Article 198** – (1) If the main hearing had been conducted while the accused was absent, the accused may claim reinstatement of the decisions and interactions of the court, supported by lawful causes, within one week after he is notified, in order to abolish the results that have occurred because of the expiring time limitation.

(2) However, if the accused was not present during the main hearing because he was excused from the obligation to be present at the main hearing upon his request, or he had benefited from the privilege to be represented by a defense counsel, in such cases he shall not have the right to request reinstatement.

#### **Subpoena of the accused**

**Article 199** – (1) The court may always decide that the accused be present during the main hearing and render a subpoena decision against the accused or an apprehension order at any time.

#### **When an accused may be excluded from court during the interrogation**

**Article 200** – (1) If there is a fear that one of the accomplices of the accused or a witness would not tell the truth in presence of the accused, then the court may decide to exclude that particular accused from courtroom during the interrogation and hearing.

(2) When the accused is brought in again, the records shall be read out and, if necessary, the content of the records shall be explained.

#### **Posing direct questions**

**Article 201** – (1) The public prosecutor, defense counsel or the lawyer who participates at the main hearing as a representative may ask direct questions to the accused, to the intervening party, to the witnesses, to experts, and to other summoned individuals, adhering to the rules of discipline at the main hearing. The accused and the intervening party may also direct questions with the help of the chief justice or judge. If there is an objection against the directed questions, then the president of the court renders a decision if the question may be asked or not. Empowered persons may re-ask questions, if it is useful.

(2) The members of a court, that is functioning as a panel, are entitled to ask questions to the individuals who are mentioned in the subparagraph one.

### **Cases where the presence of an interpreter is required**

**Article 202** – (1) If the accused or victim of the offense does not speak enough Turkish in order to express himself, the essential points of the accusation and the defense shall be translated by an interpreter appointed by the court.

(2) The essential points of the accusation and the defense shall be explained to the accused or to the victim, who is handicapped, in a manner that they may understand.

(3) The provisions of this article are also applicable at hearings of the suspect, victim and witnesses in the investigation phase. The interpreter shall be appointed by the judge or the public prosecutor at this phase.

## **THIRD CHAPTER**

### **The order and discipline at the main hearing**

#### **The power of the judge or the presiding judge**

**Article 203** – (1) The order at the main hearing shall be provided by the president of the court or judge.

(2) The president of the court or judge, without restricting his right of defense, shall order to exclude from the courtroom an individual who violates the order of the main hearing in any way.

(3) If the person excluded from the courtroom resists or causes any confusion, he shall be arrested without warrant and, except for the lawyers, shall be put immediately in a discipline imprisonment for up to four days upon the decision of judge or court. However, disciplinary imprisonment is not applicable for children.

#### **The exclusion of the accused**

**Article 204** – (1) The accused shall be excluded from the courtroom, if his behavior causes a danger of hampering the proper conducting of the main hearing. If the court deems the presence of the accused unnecessary after considering the situation of the file in respect to defense rights, then it shall continue to conduct the main hearing and conclude the case in the absence of the accused. However, if the accused has no defense counsel, the court shall ask the Bar Association to appoint a defense counsel on his behalf. When it has been decided to let the accused into the courtroom again, the proceedings conducted in his absence shall be explained to him.

### **The interactions related to offenses committed during the trial**

**Article 205** – (1) If an individual commits a crime during the main trial, the court shall establish this fact, and produce a record about it and shall send the record to the authority that has jurisdiction; it is also entitled to render a decision on pre-trial arrest of the perpetrator, if it deems it as necessary.

## **CHAPTER FOUR**

### **Submitting and evaluation of evidence**

#### **Submitting evidence and its rejection**

**Article 206** - (1) After the accused has been interrogated, submission of evidence shall start. However, the absence of the accused shall not bar the submission of evidence, if he had been notified and did not come without an excuse. The accused who appears later, shall be informed about the submitted evidence.

(2) The request of submission of any evidence shall be denied in the below mentioned cases:

- a) If the evidence is unlawfully obtained,
- b) If the fact to be proven by the evidence is irrelevant with respect to the decision,
- c) If the request of submission of evidence is made to delay the proceedings only.

(3) If there is a common consent of the public prosecutor, accused or his defense counsel, then hearing a witness, or presenting any other evidence may be omitted.

#### **Late notification of the evidence and facts**

**Article 207** – (1) The request of gathering evidence shall not be rejected on the ground that the evidence and the facts to be collected had not been notified timely.

#### **When the witness leaves the courtroom**

**Article 208** – (1) The witnesses may leave the courtroom after being interviewed only with the permission of chief justice or judge.

#### **Documents and records to be read mandatorily during the main hearing**

**Article 209** – (1) The records of interrogation of the accused conducted by a delegated member of the court or through the letter of rogatory, the records of hearing of the witness conducted by a delegated member of the court or through the letter of rogatory, as well as documents such as records of bodily examination and records related to the crime scene investigation that are to be used as evidence, and other written papers, excerpts from criminal records and personal status registers concerning the personal and economic state, shall be read during the main hearing.

(2) If there is an explicit request, documents containing personal data about the accused and the victim shall be read out in a closed trial session, upon the decision of the court.

### **Documents that are excluded from reading during the main hearing**

**Article 210** – (1) If the only evidence of a fact is just a witness testimony, this witness shall be definitely heard in the main hearing. Reading of the record or written explanation, which is produced during a previous hearing, shall not substitute a hearing.

(2) When a witness who has the right to refrain from testimony, refrains from testimony during the main hearing, the record of the previous statement shall not be read.

### **The documents, their reading during the main hearing suffice**

**Article 211** – (1) If;

a) A witness or accomplice of the accused is dead or mentally ill, or the place where he is staying can not be learned;

b) It is not possible for a witness or the accomplice of the accused to be present in the main hearing for an uncertain time because of an illness, a defect or any other difficulty, which can not be removed,

c) Taking into account the degree of his testimony, the presence of the witness during the main hearing is not considered as necessary,

then, instead of hearing these individuals, the records that were produced during a previous hearing and documents written by them may be read out.

(2) The public prosecutor, the intervening party or his representative, the accused or his defense counsel may altogether consent about the reading of records that are not included in the documents mentioned in subparagraph one.

### **Reading of the previous statement of the witness**

**Article 212** – (1) If the witness says that he cannot remember one issue, then the related part in the record of his previous statement shall be read in order to help him to remember.

(2) If there is a contradiction between the statement in the main hearing of a witness and his previous statement, the previous statement shall be, in order to help to solve the contradiction.

### **Reading of the previous statement of the accused**

**Article 213** – (1) If there is a contradiction, the statement of an accused included in the record produced by a judge or the court, as well as his testimony taken by the public prosecutor, or minutes of the police interview where his defense attorney has been present, may be read during the main hearing.

### **The reading of report, document and other writings**

**Article 214** – (1) After an official document and other documents which include an explanation and an opinion, a report of a scientific examination, a medical examination and medical doctor report, have been read out at the main hearing, the individuals who have signed the related document and other writings or report may be summoned in order to give an oral explanation, if it is deemed necessary.

(2) If the explanation and the opinion or the report had been produced by a commission, the court may suggest to the commission to delegate one of its members to explain the views of the commission.

(3) The explanations related to scientific opinions shall be submitted according to the provisions of Article 68 of this Code.

### **Questions about opinion after the hearing or reading**

**Article 215** – (1) After the accomplice, the witness or the expert has been heard and after any document has been read, the intervening party or his representative, the public prosecutor, the accused and his defense counsel shall be asked, if they have something to say against these.

### **Discussion of evidence**

**Article 216** – (1) In the discussion regarding the evidence that has been presented, the permission to speak in the following order shall be granted to the intervening party or his representative, the public prosecutor, the accused and his defense counsel or his legal representative.

(2) The public prosecutor, the intervening party or his representative may respond to the explanations of the accused, his defense counsel or his legal representative; the accused and his defense counsel or his legal representative also may respond to the explanations of the public prosecutor and the intervening party or his representative.

(3) Before the judgment the accused who is present shall be granted to have the very last word.

### **The power of discretion in relation to evidence**

**Article 217** – (1) The judge shall only rely upon evidence that is presented at the main hearing and has been discussed in his presence while forming his judgement. This evidence is subject to free discretion of the conscious opinion of the judge.

(2) The charged crime may be proven by using all kinds of legally obtained evidence.

### **Additional power of criminal courts**

**Article 218** – (1) If the proving of the charged crime depends on solving a problem that falls under the jurisdiction of courts other than criminal courts, then the Criminal Court may render its decision related to this problem also by utilizing the rules of this Code. However, it may suspend the main hearing in order to bring a lawsuit regarding this problem at the competent court, or in order to wait until a pending case is resolved.

(2) If during the prosecution there is a problem about the determination of the age of the victim or the accused in respect to the criminal provisions, then the court shall solve this problem through using the procedure that is mentioned in the related Act, and shall render its judgment.

## **CHAPTER FIVE**

### **Recording the Main Hearing**

#### **Recording the Main Hearing**

**Article 219** – (1) A record shall be produced of the main hearing. The chief justice or the judge together with the court recorder shall sign the record. In cases where the interactions during the main hearing have been recorded by technical equipments, written court records shall be produced afterwards without losing any time and be signed by the Chief justice or Judge together with recording clerk.

(2) If the chief justice is excused the most experienced member shall sign the record.

### **The heading of the record of the main hearing**

**Article 220** – (1) The heading of record of the main hearing shall contain the following:

- a) Name of the court where the main hearing was conducted;
  - b) The dates of court sessions;
- The name and last name of judge, public prosecutor and recording clerk.

### **Content of the record of the main hearing**

**Article 221** – (1) The record of the main hearing shall contain the following:

a) The name and last name of the accused his defense counsel, intervening party, his representative, his legal representative, expert, translator, the technical adviser who have been present in the sessions of the main hearing,

b) The record of the main hearing shall contain all elements that reflect the course and the main outcomes of the main trial, and that the main principles of procedural law had been observed,

- c) Explanations of the accused,
- d) Witness testimony,
- e) Explanations of the expert and technical advisor,
- f) Documents and writings that have been read out or those that were decided to be not read out at the main hearing,
- g) Motions, and in case of their denial, reasons for denial,
- h) Rendered decisions,
- i) The judgment.

### **Probative value of the record of the main trial**

**Article 222** – (1) Whether the procedural rules and formalities were observed during the main hearing or not, may only be proven by the record of the trial. Against the record of the main hearing, there is only one possibility to attack, which is by is motion that the document was false.

## **PART TWO**

### **Concluding of the public prosecution**

#### **CHAPTER ONE**



## **Concluding of the main hearing and the judgement**

## **Concluding of the main hearing and the judgement**

**Article 223** – (1) After the declaration that the main hearing is concluded, the judgment shall be produced. The following rulings are considered as a judgment: "acquittal"; "no need to inflict punishment"; "conviction"; "judgment related to a measure of security"; "inadmissibility of the law suit"; and "dismissal of the case".

(2) A judgment related to "acquittal of the accused" shall be rendered in the following cases:

- a) If the charged conduct has not been defined as a crime in criminal laws;
- b) If it has been proven that the charged crime has not been committed by the accused;
- c) If the perpetrator has no intent or negligence regarding the charged crime;
- d) Although the charged crime had been committed by the accused, if there is a ground that makes the conduct legal;
- e) If it has not been proven that the charged crime had been committed by the accused.

(3) In following cases a judgment related to "no need to inflict punishment because there has been no guilt" shall be rendered:

- a) If there are the circumstances present such as minority, mental illness deafness and muteness, or any temporary circumstances related to the charged crime,
- b) If the charged crime had been committed through the execution of an illegal, but binding order, or in cases of necessity or under the influence of force or threat (As amended by Act No. 5353),
- c) While acting during a legitimate self-defense, if the threshold had been violated by emotional stress, fear and hurrying up,
- d) If there had been a mistake on a ground that lifts the guilt.

(4) In following cases, a judgment related to "no need to inflict punishment" shall be rendered although the committed conduct keeps on the quality of a crime:

- a) Effective remorse;
- b) The presence of a ground of personal exemption from punishment;
- c) Reciprocal insult;
- d) In cases where the content of unjustness of the committed conduct was minor.

(5) In cases where it has been proven that the accused has committed the charged crime, the judgment of conviction shall be rendered.

(6) In cases where it has been proven that the accused has committed the charged crime, instead of, or along with, the conviction to a certain punishment, the judgment related to the security measure shall be rendered.

(7) The cases, where there is a previously rendered judgment, or a pending case against the same accused because of the same conduct, the case will be dismissed.

(8) If there are grounds that result in the "dismissal of the case" according to the Turkish Criminal Code, or the requirement of investigation or prosecution cannot be fulfilled, then the judgment on "dismissal of the case" shall be rendered. However, if the

opening of the investigation or prosecution was dependent upon the fulfillment of some requirements, and it comes out that this requirement was not met yet, then a decision on the stay of the proceedings shall be rendered, in order to await the fulfillment. This decision may be subject to opposition.

(9) In cases where a decision of acquittal may be rendered promptly at that stage of the proceedings, a decision on the stay of the proceedings, "dismissal of the case" or a judgment related to "no need to inflict punishment" must not be rendered.

(10) A decision related to non jurisdiction rendered towards a court outside of the regular court jurisdictions shall be regarded as a judgment in respect to the legal remedies.

### **Quorum of the votes at decisions and judgment.**

**Article 224** – (1) Decisions and judgments by the courts shall either be rendered unanimously or by a majority of votes.

(2) Dissenting opinion shall be included in the records; its reason shall be indicated in the records as well.

### **The subject matter of the judgment and power of discretion of the court while evaluating the crime**

**Article 225** - (1) The judgment shall only be rendered about the conduct in relation with the elements of the crime, and against its perpetrator that are written in the indictment.

(2) While evaluating the conduct, the court is not bound by the prosecution and the defense.

## **CHAPTER TWO**

### **Changes in the nature of the crime**

#### **Changes in the nature of the crime**

**Article 226** – (1) The accused shall not be convicted according to another provision of law that includes the crime the elements of which are written in the indictment, unless he had been priorly informed of the change of the legal definition of the crime, and had been put into a position to make his defense.

(2) If situations occur for the first time during the main hearing that would require the aggravation of the punishment, or would, in addition to the punishment, make a security measure applicable, then the same provision shall apply.

(3) In cases where an additional defense is necessary, the accused shall be given an additional time limit upon his request.

(4) Written notifications mentioned in the above paragraphs shall be made to the defense counsel, if there is any. The defense counsel shall enjoy the rights that are recognized for the accused, at the same extent.

## **CHAPTER THREE**

### **Decision and judgment**

#### **Judges, who must be present at the deliberations**

**Article 227** – (1) During the deliberations, only those judges shall be present who are going to participate at the decision and the judgment.

(2) The president of the court may permit the candidate judges or lawyers, who are making their apprehension at his court, to be present during the deliberation.

#### **Leading the deliberations**

**Article 228** – (1) The presiding judge shall lead the deliberations.

#### **Collecting of votes**

**Article 229** – (1) The presiding judge shall collect the votes separately, starting from the newest judge, and shall declare his vote as the last one.

(2) The presiding judge or the members of the court are not entitled to abstain from voting on any subject or problem, stating being in the minority.

(3) In cases where the votes are split, then the most unfavorable vote against the accused shall be added to the vote, which is closest to this opinion, until the majority is achieved.

### **Issues to be shown in the reasons for the judgment**

**Article 230** – (1) The reasons for the judgment on the conviction of the accused shall contain the following issues:

- a) The views submitted during the prosecution and defense;
- b) The discussion and evaluation of evidence; the description of the evidence on which the judgment is based, and those that had been rejected; in this sense, evidence obtained by illegal methods that are included in the file shall be indicated separately and clearly;
- c) The reached view, the criminal conduct of the accused, that had been deemed as proven, and the definition of it; fixing the punishment according to the order and principles which are defined in Articles 61 and 62 of the Turkish Penal Code, taking in to consideration the requests that had been put forward; again, according to the provisions of Art. 53 and following Articles of the Turkish Penal Code fixing the measure of the security instead of, or along with, the punishment.
- d) Grounds for suspending the punishment, admonition of the imprisonment into a judicial fine or measure, or decisions on applying additional measures instead of them, or grounds for the approval or denial of such petitions.

(2) The reasons for an acquittal shall contain an explanation thereof on which of the points that are indicated in Art. 223/2 the court's ruling is resting.

(3) The reasons for a judgment related to “no need to inflict punishment” shall contain an explanation thereof on which of the points that are indicated in Art. 223/3 and 4 the court's ruling is resting.

(4) In cases where a decision or a judgment has been rendered that is beyond the judgments mentioned in the above subparagraphs, then the grounds for this shall be included in the reasoning.

### **Pronouncement of the judgment and delaying the pronouncement of the judgment**

**Article 231** – (1) At the end of the main trial, the outcome of the judgment that has been taken into the records of the trial according to the rules as indicated in Article 232, shall be read out and the main outlines of the reasons shall be explained.

(2) To the accused who is present, additionally the legal remedies he may apply to, where to apply for them, and the time limits shall be notified.

(3) The accused who is acquitted shall be notified of a ground of asking for compensation if there is any.

(4) The outcome of the judgment shall be listened to by everybody while standing.

(5) In cases where at the end of the adjudication conducted related to the crime charged to the accused, if he shall be punished with imprisonment of two years or less or a judicial fine, the court may decide to delay the pronouncement of the judgment. The provisions related to mediation are preserved. Delaying the pronouncement of the judgment means that the judgment that has been produced shall not have legal effect for the accused. (As amended by Act 2006-5560)

(6) In order to be able to render “the decision on delaying the pronouncement of the judgment”, the following requirements must have been fulfilled:

- a) The accused must not have been convicted for an intended crime priorly,
- b) Considering the specialities of the personality of the accused and his behaviour during the main trial, the court has to reach the belief that the accused shall not commit further crimes,

The damage to the victim or the public, due to the committed crime has been recovered to the full extent by giving back the same object, by restoring the circumstances as they were before the crime had been committed, or by paying the damages. (As amended by Act 2006-5560) In cases where the accused does not consent, there shall be no decision on delaying the pronouncement of the judgment rendered. (Added by Act dated 22/7/2010, No. 6008, Article 7).

(7) In the judgment, of which the pronouncement has been delayed, the inflicted imprisonment term shall not be postponed, and in cases where the punishment is a short term imprisonment, it shall not be converted into the alternative sanctions. (As amended by Act 2006-5560)

(8) In cases where a decision on delaying the pronouncement of the judgment has been rendered, the accused shall be subject to a probation term for five years. The court may decide that the accused shall be subject to an obligation of probation, not exceeding one year:

- a) In cases where he has no profession or skill, the court may decide that he shall take part in an education program in order for him to obtain a profession or a skill,
- b) In cases where he has a profession or a skill, the court may decide that he shall work for a fee in a public institution or in a private place, under the supervision of another person who performs the same profession or skill,
- c) The court may decide that he shall be prohibited from going to certain places, that he shall be obliged to visit certain places, or to fulfill another obligation which shall be determined by the discretion of the court.

During the period of probation, the time limit prescription of prosecution shall lapse. (As amended by Act 2006-5560)

(9) In cases, where the accused is not able to fulfill the requirement that is mentioned in subsection (c) of subparagraph 6 immediately, the court may decide as well that the pronouncement of the judgement shall be delayed under the requirement that the accused pays the damages of the public or the victim in the full extent in monthly installments. (As amended by Act 2006-5560)

(10) In cases where there has been no intentional crime committed during the period of probation and the obligations related to the measures of controlled liberty (probation), the judgment, of which the pronouncement had been delayed, shall be annulled, and the court shall render the decision on dismissing the case. (As amended by Act 2006-5560)

(11) In cases where the accused has committed a new intentional crime during the period of controlled liberty (probation), or has violated the obligations related to the controlled liberty, the court shall pronounce the judgment. However, the court may evaluate the circumstances related to the accused who was not able to fulfill the obligations inflicted on him, and may decide that the portion of the punishment which may be determined up to the half of the original one shall not be executed, or if the requirements are present, to suspend the imprisonment (hapis cezasının ertelenmesi), or to convert the punishments in the judgment into alternative sanctions, thus forming a new judgement. (As amended by Act 2006-5560)

(12) The decision on delaying the pronouncement of the judgment may be subject to opposition. (As amended by Act 2006-5560)

(13) Decision related to “the delaying the pronouncement of the judgment” shall be recorded in a specified data bank for this purpose. These recordings may only be utilized for the purpose mentioned in this Article, if it has been requested by the public prosecutor, judge, or the court, in relation to an investigation or prosecution. (As amended by Act 2006-5560)

(14) The provisions of this Article related to the “the delaying the pronouncement of the judgment” shall not be applied for crimes that are mentioned in the “reform laws”, protected by the provisions of Article 174 of the Constitution. (As amended by Act No. 2008-5728)

#### **The reasons for the judgment and issues to be included into the final judgment (hüküm fıkrası)**

**Article 232** – (1) At the beginning of the judgment (hüküm başına), it shall be noted that the judgment had been rendered on behalf of the Turkish Nation.

(2) The header of the judgment (hüküm başında) shall contain:

- a) The name of court that has rendered the judgment:
  - b) The name and last name of the presiding judge and the members of the court who rendered the judgment, or the judge, the public prosecutor and the court recorder, the intervening party, victim, his representative, his legal representative and his defense counsel, as well as the open identity of the accused,
  - c) Place, where the crime has been committed, date and time interval, except for judgment on acquittal,
  - d) Date when the accused was in police custody or in pre-trial detention, and its duration as well as if he is still in detention or not.
- (3) In cases where the reasons of the judgment had not been taken into the records

completely, it shall be added into the files within fifteen days after the pronouncement of the judgment.

(4) Decisions and judgments shall be signed by the judges who had participated in the decisionmaking.

(5) If later on one of the judges is not able to sign, the presiding judge, or the most experienced judge who has participated to the decisionmaking shall note the reason for this under the judgment.

(6) The final judgment shall include; the decision has been rendered according article 223; the applied provisions of the law; the quantity of the punishment; whether there is a right to a appeal for legal remedies and to ask for compensation, and, if so, limits for application and where to apply shall shown in a way that would not cause any hesitation.

(7) Copies and summaries of the judgments shall be signed by the president of the court and the court recorder and shall be sealed.

## **BOOK FOUR**

**Victim, Claimant, Individual who is pecuniary responsible, intervening party**

### **PART ONE**

**The rights of the victim of the crime and the claimant**

**Summoning of the victim of the crime and of the claimant**

**Article 233** - (1) The victim, as well as the claimant, shall be summoned by the public prosecutor or the presiding judge or the judge by sending a summons and be heard.

(2) In respect to the summons, rules pertaining to the witnesses shall apply.

**The rights of the victim and the claimant**

**Article 234** – (1) The victim, as well as the claimant, shall have the following rights:

a) During the investigation phase:

1. A motion for evidence to be collected;
2. In cases where it would not jeopardize the secrecy and aim of the investigations, to demand from the public prosecutor copies of documents;

3. If he has no representative, to demand the appointment of a lawyer on his behalf by the Bar Association;

4. In cases where it is in accordance with Article 153, ask his representative to review the documents of investigation and items that have been seized and taken under protection,

5. To utilize his right of opposition against the decision of the public prosecutor to not prosecute as laid down in the Code.

b) During the prosecution phase:

1. To be notified about the main trial,

2. The right to intervene in the public claim;

3. To demand copies from the records and documents via his representative,

4. To demand the witnesses to be summoned,

5. If he has no representative, to demand the appointment of a lawyer on his behalf by the Bar Association,

6. Under the condition to have taken the position of intervening party in the lawsuit, to attack the decisions that end the lawsuit by legal remedies.

(2) In cases where the victim has not attained the age of 18, is deaf or dumb, or is handicapped so far that he cannot express himself, and has no representative, a representative shall be appointed on his behalf, without seeking his request.

(3) These rights shall be told and explained to the victims of the crime, as well as to the complainant and this issue shall be taken into the records.

### **Non-compliance with to the summons by the victim and the claimant**

**Article 235** – (1) The addresses of the victim, the complainant or the representative, which had been declared in their petitions or submissions that had been taken into the records, shall be regarded during the notifications.

(2) If the individual who was notified through a summons sent to this address does not appear, there shall be no renewed notification.

(3) If the notified address was wrong, insufficient or the change in the address not been notified and those were the reasons for failure, there shall be no further exploration conducted for the address.

(4) In cases where it is deemed necessary to take a submission from these individuals, the provision of subsection three shall not apply.

### **Hearing of the victim and the claimant**

**Article 236** – (1) In cases where the victim of the crime is heard as a witness, provisions related to witnesses shall apply, excluding the oath.

(2) A child or the victim who has suffered psychological damages from the committed



crime, shall be heard only one time in relation to the investigation or prosecution of the committed crime. Cases which pose a necessity with respect to revealing the factual truth are exceptions.

(3) During the hearing as a witness of a child victim or other victim who has suffered psychological damages in relation to the committed crime, there shall be an expert present who has expertise in the fields of psychology, psychiatry, medicine or education. The provisions related to the court appointed experts shall be applicable to these individuals.

## **SECOND CHAPTER**

### **INTERVENING THE PUBLIC CLAIM**

#### **Intervening the public claim**

**Article 237** – (1) The victim, real and juridical persons, who have been damaged by the crime, as well as the individuals who are liable due to their property, are entitled to intervene in the public prosecution during the prosecution phase at the court of the first instance at any stage, until the judgment has been rendered, announcing that they are putting forward their claim.

(2) It is not permitted to put forward a request for intervening in the public prosecution during the proceedings of legal remedies. However, if the request that has been put forward during the proceedings at the court of the first instance has been rejected, or if there was no decision rendered at that stage, this issue shall be decided, if there is an explicit request on this point at the application for the legal remedy.

#### **The procedure of intervening**

**Article 238** – (1) Intervening shall be accomplished through giving a petition to the court after the public prosecution has been opened, or including the oral request of intervening in the records of the main trial.

(2) Upon a declaration explaining the claim during the main hearing, the individual who has been damaged by the crime shall be asked if he is willing to intervene the prosecution or not.

(3) After hearing the public prosecutor, the accused, and if there is a defense counsel, after hearing the defense counsel, a decision shall be rendered on whether if the request of intervening the prosecution is suitable or not.

(4) In cases that are pending at the Court of the Peace, the opinion of the public prosecutor about the intervention to the prosecution shall not be asked.

### **The rights of the intervening party**

**Article 239** – (1) In cases where the victim or the individual who suffered damages from the crime has intervened the prosecution, a lawyer shall be appointed by the Bar Association, if he puts forward a request to the court.

(2) If the victim or the individual who suffered damages from the crime is a child, deaf or mute, or an individual who is mentally ill to the extent that he cannot make his own defense, then request is not needed in order to appoint a lawyer.

### **The effect of intervening in the pending case**

**Article 240** – (1) Intervening does not stop the prosecution.

(2) The main hearing and other interactions related to the adjudication procedure, for which the date has already been set, shall be conducted at that date, even if the intervening party could not be summoned or could not be notified because of the lack of time.

### **Opposition against the decisions prior to the intervention**

**Article 241** – (1) Decisions that have been rendered prior to the intervention shall not be served to the intervening party.

(2) If the time limits foreseen to the public prosecutor for applying for legal remedies against these decisions expire, the intervening party also loses his right for application.

### **Legal remedy application by the intervening party**

**Article 242** – (1) The intervening party may apply for legal remedies without being depending upon the public prosecutor.

(2) If the decision has been overturned upon the application of the intervening party, the public prosecutor shall pursue the case again from the beginning.

### **Cases when the intervention becomes void**

**Article 243** – (1) If the intervening party gives up or dies, the intervention shall be void. The heirs may intervene in the case in order to pursue the rights of the intervening party.

## **BOOK FIVE**

### **SPECIAL ADJUDICATION PROCEDURES**

#### **PART ONE**

**The adjudication of defaulters and fugitives, representation of legal entities during the investigation and prosecution, adjudication procedure for some crimes**

##### **CHAPTER ONE**

##### **The adjudication of defaulters**

##### **The definition of defaulter and interactions that may be conducted**

**Article 244** – (1) The accused, whose whereabouts are not known, or who is outside of the country and cannot be brought in, or it is not appropriate to bring him before the competent court, shall be considered as a defaulter.

(2) There shall be no main hearing opened against a defaulter; the court shall conduct necessary interactions with the aim of obtaining or protecting evidence.

(3) These interactions may also be conducted by the surrogate judge or by the rogatory court.

(4) During these interactions, the defense counsel of the accused or his legal representative or his spouse may be present. Should the occasion arise, the court shall ask the Bar Association to appoint a defense counsel.

##### **Warning to the defaulter**

**Article 245** – (1) The defaulter whose address is not known, shall be cautioned by a suitable communication means about the requirement of his appearing or declaring his address.

##### **Assurance document to be issued to the accused**

**Article 246** – (1) The court may issue, in respect to the defaulter accused, an assurance document stating that if he appears at the main hearing, he shall be immune from pre-trial

arrest; this assurance may be subject to conditions.

(2) In cases where the accused has been convicted by imprisonment, or makes some preparations to escape, or does not comply with the requirements of the assurance document, the assurance document shall be void.

## **CHAPTER TWO**

### **Adjudication of the fugitives**

#### **Definition of fugitive**

**Article 247** – (1) An individual who hides himself within the country in order to invalidate a pending prosecution against him, or is in a foreign country and for this reason the court cannot reach him, shall be called fugitive.

(2) In cases where an accused, against whom there is a pending prosecution because of crimes that are mentioned in Article 258, subparagraph 2, does not comply with the notification given by the competent court according to the procedural rules, and for this reason there has been rendered a subpoena, that also cannot be enforced, then the court shall render the following decisions:

a) The court shall render a decision on advertising the invitation in a newspaper, which shall be posted at the door of the accused's domicile; in the advertisements shall be additionally explained, that if the accused does not appear within 15 days, the court may consider inflicting the measures mentioned in Article 248,

b) After these interactions have been accomplished and a record on this circumstance has been produced, the court shall decide that the accused is a fugitive, if he does not appear within fifteen days.

(3) The prosecution may be conducted against the fugitive accused. However, if he has not been priorly interrogated by a judge, a judgment concerning his conviction shall not be rendered.

(4) In cases where the main hearing is conducted, if the fugitive accused has no defense counsel, the court shall ask the Bar Association to appoint a lawyer on his behalf.

### **Seizure in order to compel and certificate of guarantee**

**Article 248** – (1) With the aim of getting the fugitive accused to come to the main hearing, his belongings in Turkey and his rights and accounts receivables may be seized, proportional to the aim by a court decision and a procurator shall be appointed for their administration, if necessary. The decision on seizure and on appointing a procurator shall be notified to his defense counsel.

(2) *The provisions of subarticle one are applicable only for the following crimes as listed below:*

*a) Crimes regulated in the Turkish Criminal Code,*

- 1. Smuggling migrants and human trafficking (Arts. 79, 80),*
- 2. Producing and trading in narcotic or stimulating substances (Art. 188),*
- 3. Forgery in money (Art. 197),*
- 4. Prostitution (Art. 227),*
- 5. Providing place and opportunity for gambling (Art. 228),*
- 6. Embezzlement (Art. 247),*
- 7. Laundering of property values emanating from crime (Art. 282),*
- 8. Armed organization (Art. 314), or providing arms for such organizations (Art. 315), Crimes against the secrets of the state and spying (Arts. 328, 329, 330, 331, 333, 334, 335, 336, 337),*

*b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Art. 12),*

*c) Embezzlement as defined in Banking Act Art. 22, subsection (3) and (4),*

*d) Crimes as defined in Combating Smuggling Act that require the punishment of imprisonment,*

*e) Crimes as defined in the Act on Protection of Cultural and Natural Substances, Arts. 68 and 74.*

(3) Regarding the protection of seized property, rights and accounts receivables, provisions related to seizure shall be applicable. The court may decide that a summary of the decisions related to the measures shall be announced by a newspaper.

(4) In cases where the fugitive is apprehended, or comes by his own free will and surrenders, it shall be decided to lift the seizure.

(5) The justice of the Peace or the court may give a decision of pre-trial arrest according to the provisions of Art. 100 and the following in the absence of the fugitive.

(6) In cases where the court establishes that if the court rules on seizure, legal dependents under his care may fall into poverty, then the court shall give permission to the custodian to help those with an amount from the property holdings, proportional to their social standards, in order to secure their livelihood.

(7) The provision of Article 246 shall also be applicable for fugitives.

(8) These decisions may be subject to opposition.

## **CHAPTER THREE**

### **Representation of legal entities during the investigation and prosecution**

#### **Representation of a legal entity**

**Article 249** – (1) At the investigation and prosecution for crimes committed within the activities of a legal entity, the organ or the representative of the legal entity shall have the capacity of the party who is “in conjunction with the intervening party or the defense party” and shall be permitted to take the stand in the main hearing.

(2) In such cases, the organ or the representative of the legal entity shall utilize the rights furnished to the intervening party or to the accused by this Code.

(3) In cases where the accused has capacity of the organ or the representative of the legal entity at the same time, the provisions of subparagraph one shall not be applicable.

## **CHAPTER FOUR**

### **Adjudication procedure for some crimes**

#### **Jurisdiction and determining the circuit of adjudication**

**Article 250** – (1) Cases filed because of the following crimes as mentioned in the Turkish Penal Code shall be tried by the Court of Assizes, which by the offer of the Ministry of Justice, shall be nominated by the High Council of Judges and Prosecutors and the circuit of adjudication of this Court of Assize shall encompass more than one province:

a) Producing and trading with narcotic or stimulating substances committed within the activities of a criminal organization;

b) Crimes committed by using coercion and threat within an organization formed in order to obtain unjust economic gain;

c) Crimes as defined by the second book, section 4, chapters 4, 5, 6 and 7 (except for Articles 305, 318, 319, 323, 324, 325 and 332).

(2) The High Council of Judges and Prosecutors shall decide upon the offer of the Ministry of Justice to open more than one court of assizes at the same location, which shall have jurisdiction for crimes mentioned in subparagraph one, taking into consideration the numbers of the incoming cases. In such cases, the courts shall be numbered. Presidents and members of these courts shall not be appointed in other courts or shall not be charged with other duties by the Judicial Commission of the ordinary courts.

(3) The individuals who commit the crimes mentioned in the first subparagraph, shall be tried by the court of assizes that has been nominated by this Code, whatever their capacity and status as civil servant shall be. The provisions related to the individuals who are tried by the Court of Constitution and the Court of Cassation and provisions related to the jurisdiction of military courts, including the war time and martial law, are reserved.

## **Investigation**

**Article 251** – (1) The investigation of crimes, that are in the scope of Article 250 shall be conducted by the public prosecutors who have been entrusted with the task of investigation and prosecution of these crimes by the High Council of Judges and Prosecutors in propria persona. Even if these crimes had been committed during the duty or due to the duty, public prosecutors shall investigate directly. The public prosecutors shall not be appointed by the Office of the Chief Public Prosecutor to courts other than the courts that try crimes that are in the scope of Article 250, or shall not be entrusted with other tasks.

(2) During the investigation and prosecution of the crimes that are within the scope of Article 250, the public prosecutors may ask to render the decisions that must be given by a judge, if any, from the member of the court of assize who has been appointed by the High Council of Judges and Prosecutors; if not, from the competent judges of ordinary jurisdiction.

(3) In cases where the investigation makes it necessary, the investigation may be conducted while going to the crime scene or to the places where the evidence is located. If the crime has been committed outside of the place where the court of assize is located, the public prosecutor may request the public prosecutor at the crime scene to conduct the investigation.

(4) If the crime has been committed in a military quarter, the public prosecutor may ask the related office of the military prosecutor to conduct the investigation. The public prosecutors and offices of the military prosecutors who have been appointed to investigate

according to the provisions of subsection three, shall conduct this investigation with priority and urgency.

(5) The period of 24 hours, which is mentioned in Article 91, subparagraph one; shall be applied as 48 hours for individuals who have been arrested without a warrant for crimes that are under the scope of Article 250. The time limit, which is determined as 4 days in Article 91, subparagraph 3, upon the request of the public prosecutor and with the decision of the judge, may be extended up to 7 days for persons who have been arrested without a warrant in zones, where state of emergency has been declared according to the provisions of Art. 120 of the Constitution. The judge shall hear the person who has been arrested without or with the judge's order, before rendering a decision.

(6) During investigations or prosecutions related to crimes that are under the scope of Article 250, the security forces are obliged to bring and assure the presence of the suspect or the accused, the witness, the expert and the aggrieved person from the crime at the designated day, hour and place, upon the order of the court of assizes, or its president, the public prosecutor, surrogate judge, or rogatory judge.

(7) If, because of crimes that are specified in Art. 250 the investigation makes it necessary, the public prosecutors may request to temporarily utilize the buildings, appliances, material and manpower belonging to administrations with a general or a specified budget, public economic enterprises, special provincial administrations and municipalities.

(8) In cases where the request is addressed to the squads, headquarters and institutions of the Turkish Armed Forces, this request may be fulfilled upon the evaluation of the competent authority.

## **Prosecution**

**Article 252** – (1) The following provisions shall apply in court hearings of cases that are related to the crimes under the scope of Article 250:

a) These crimes are considered amongst urgent matters and cases related those shall also be tried during the judiciary recess period.

b) In cases where the number of the accused are very large and a portion of them are not involved in some sessions of the hearing of the court, the court may decide to conduct such sessions in their absence. However, if during the session conducted in their absence, a circumstance is revealed that affects them, the main points as well as affairs related to this, shall be notified to them in the following session.

c) In order to secure the safety, the court may make a decision to conduct the hearing at another location.

d) During these cases, a reasonable amount of time shall be granted to the public prosecutor, to the intervening party or to his representative in order to announce the charges; to the accused or to his defense counsel, in order to defend himself against the



charges. This period may be prolonged on its own initiative in cases where otherwise the right of defense would be restricted.

e) The court may issue a press embargo for oral or written statements and for conduct that breach the order and discipline of the hearing in court, as well as for speech and conducts that constitute insult or defamation to the court, to the president or to anyone of the members, to the public prosecutor, to the defense counsel, to the clerk of the court or to the functionaries.

f) The president of the court shall expell the accused or his defense counsel who is breaching the order of the hearing in court from the hearing room for the rest of the hearing to be conducted that day. The court may decide to continue the hearing in court in the absence of them, if it is determined that they might continue their conduct that may significantly hinder the hearing in court during the next sessions, and their presence is not deemed necessary. This decision shall not be applied in a form that would hinder the subject matter prosecution and defense, and the accused shall be granted the permission to let himself be represented by another defense counsel. If the accused or his defense counsel insist on violating the order of the hearing in court in the following sessions, a decision may be rendered that they shall not attend the following sessions of the same case entirely, or attend part of the sessions. In cases where this provision is applied in respect to a defense counsel, a notice of this circumstance shall be given to the concerned Bar Association. Also in this case, the accused shall be granted a suitable time, in order to let him be represented by another defense counsel. If the defense counsel, for whom it has been decided that he shall not be admitted to parts or all of the sessions, had been appointed according to Article 41 of the Lawyers' Act, this circumstance shall also be notified to the authority that appointed him. When the accused or the defense counsel, who has been removed from the courtroom, has been admitted again, the essential points of the interactions conducted in their absence shall be notified to them. If the accused or his defense lawyer demand, a copy of the records at their absence shall be given to them. The accused or defense counsels, who had been removed from the courtroom, or for whom there has been a decision rendered that they shall not be allowed to take part at the sessions, may make their written defense within a period as determined by the court.

g) Article 6 of this Code shall not apply for the court of assizes, which try crimes that are under the scope of Article 250.

h) In cases where the notification has not be conducted to him personally, or to persons who may receive notification on his behalf, the notification may be achieved by press or by other masscommunication means, according to the urgency of the case.

(2) The maximum duration of the pre-trial arrest as foreseen by the Code shall be applied doubly in relation to the crimes mentioned in Article 250, subparagraph one, subsection (c).

## **PART TWO**

### **Mediation and Confiscation**

#### **CHAPTER ONE**

##### **Mediation**

## **Mediation**

**Article 253** – (1) There shall be an attempt to mediate between the suspect and the victim or the real or juridical person of private law, who has suffered damages from the crime for the following crimes:

- a) Crimes, that are investigated and prosecuted only upon the claim;
- b) At the following crimes that are mentioned in the Turkish Penal Code with no regard to whether they require a claim or not:
  - 1. Intentional wounding (except for subparagraph 3, Art. 86 and Art. 88):
  - 2. Negligent wounding (Art. 89):
  - 3. Violation of tranquility of domicile (Art. 116):
  - 4. Kidnapping of a child and keeping him (Art. 234):
  - 5. Revealing the information or documents, that have the nature of commercial secrets, banking secrets or secrets of the customers (Article 239 except for subsection four).

(2) Except for crimes, that are investigated and prosecuted upon a claim, for crimes that are included in other statutes, there must be a special provision in that statute in order to apply the way of mediation.

(3) In crimes that allow the application of the provisions of effective remorse and crimes against the sexual inviolability, the way of mediation is excluded, even if their investigation and prosecution is dependant upon a claim.

(4) In cases where the crime under investigation is depending on mediation, the public prosecutor, or upon his orders, the official of judicial security forces, shall propose mediation to the suspect and to the victim or to the person who has suffered damages from the crime. In cases where the suspect, the victim or the person who has suffered damages from the crime is not an adult, the proposal of mediation shall be made to their legal representative. The public prosecutor is also entitled to make the proposal of mediation by a notification furnished with an explanation or rogatory letter. In cases where the suspect, the victim or the person who has suffered damages from the crime does not notify his decision about the mediation within 3 days after the proposal of mediation, it shall be considered that he has refused the mediation.

(5) In cases where a proposal for mediation has been made, the nature and legal consequences of accepting or refusing the mediation shall be explained to that person.

(6) If the victim, the person who has suffered damages from the crime, the suspect or their legal representatives cannot be reached because he is not present at the address that has been declared to the official authorities, or is outside of the country or for any other ground, then the investigation shall be concluded without applying the way of mediation.

(7) In order to apply the way of mediation in crimes where more than one person has been victimized or has been damaged, it is required that all of the victims or persons who have suffered damages from the crime have accepted the mediation.

(8) The proposal of mediation, or the acceptance of mediation, does not hinder the collection of evidence of the crime that is under investigation nor the application of the

measures of protection.

(9) In cases where the suspect and the victim or the person who has suffered damages from the crime has accepted the proposal of mediation, the public prosecutor is entitled to conduct the mediation himself, or may ask the Bar Association to appoint a lawyer as mediator, or may appoint a mediator from the list of persons who have obtained an education of law.

(10) The cases where a judge is excluded and the cases where a motion to reject a judge is valid in this Code, shall also provide grounds for the appointment of the mediator.

(11) The appointed mediator shall be given a copy of each document included in the case file that are estimated appropriate by the public prosecutor. The public prosecutor shall caution the mediator about the requirement of complying with principles of the confidentiality of the investigation.

(12) The mediator shall conclude the interactions of mediation within 30 days after he has received the copies of the documents included in the file of investigation. The public prosecutor may extend this period for a maximum of 20 days.

(13) The mediation conferences shall be conducted confidentially. The suspect, the victim or the person who has suffered damages from the crime, the legal representative, the defense counsel or the representative may be present during the mediation conferences. In cases where the suspect, the victim or the person who has suffered damages from the crime does not attend the mediation conference personally, or his legal representative, or representative, he shall be considered as if he has refused the mediation.

(14) The mediator is entitled to consult the public prosecutor the public prosecutor about the procedure to follow during the mediation conferences; the public prosecutor may give orders to the mediator.

(15) At the end of the mediation conferences, the mediator shall produce a report and submit it to the public prosecutor, together with the copies of the documents that have been handed over to him. If the mediation occurs, the details of the kind of mediation agreement shall be clearly explained in the report that shall be furnished with the signatures of the parties.

(16) The suspect and the victim or the person who has suffered damages from the crime may apply to the public prosecutor the latest until the indictment has been prepared, and produce the document that states that they have mediated their dispute, even if the proposal of mediation has been previously refused.

(17) If the public prosecutor establishes that the mediation has been achieved with the free will of the parties, and the subject of the contract is in conformity with law, then he shall put his seal and signature under the report or the document and keep it within the file of investigation.

(18) If the mediation ends without any positive result, the way of mediation shall not be applied again.

(19) If at the end of the mediation the suspect fulfills the subject of the contract at once, the decision on not prosecution shall be rendered. If fulfillment of the subject of the contract has been postponed to a future date, or to installments, or has the nature of continuity, the decision on “postponing the filing of public prosecution” shall be rendered, without checking the requirements that are listed in Art. 171. During the postponement, the time limitation shall rest. If the necessities of mediation shall not be fulfilled after the decision of the “postponing the filing of public prosecution”, the public prosecution shall be filed, without checking the requirements that are mentioned in Art. 171/4. In cases, where the mediation is achieved, no tort claim may be filed for the crime under prosecution; if there is a pending case, this case shall be considered as withdrawn. If the suspect does not fulfill the object of the contract, the report or the document of mediation shall be considered as a document that is listed in Art. 38 of the Act on Execution and Concurs, dated 9.6.1932, No. 2004.

(20) The assertions made during the mediation conferences shall not be used as evidence in any investigation and prosecution, or in any case.

(21) The time limitations of the prosecution and the duration of the case that is a requirement for prosecution shall not run from the date when the first mediation proposal has been made to the suspect, the victim or the person who has suffered damages from the crime, the latest until the date when the initiative of mediation was unsuccessful, or until the date when the mediator prepares and submits his report to the public prosecutor.

(22) The fee of the mediator that is proportional to his work and expenses, shall be estimated and paid by the public prosecutor. The fee of the mediator and other expenses of mediation shall be considered as court expenses. In cases where there is a mediation accomplished, these payments shall be compensated by the state treasury.

(23) Against the decisions rendered at the end of the mediation, the legal remedies which are foreseen in this Code are applicable.

(24) The details about the application of the mediation shall be regulated by an internal statute.

### **Mediation by the court**

**Article 254** – (1) In cases where it becomes evident after the public prosecution has been filed, that the crime under the prosecution is under the scope of the mediation, then the transactions of mediation shall be conducted by the court under the rules and procedures as specified in Art. 253.

(2) In cases where the mediation is materialized, the court shall decide to drop the prosecution if the accused has fulfilled the performance in one single payment. If the

fulfillment of the performance is delayed for a later date, or the payment is due on the installment plan, or has the nature of continuity, then the declaration of the judgment shall be postponed, without checking the requirements in Art. 231. During the period of postponement, time limits do not run. In cases where, after the decision on postponement of the declaration of the judgment has been rendered, the requirements of mediation are not fulfilled, the court shall announce the judgment, without checking the requirements that are mentioned in Art. 231/11.

### **Mediation in cases, where there is more than one perpetrator**

**Article 255** – (1) In crimes that are committed by more than one person, only the person who mediates shall draw benefit from mediation, even if there is participation connection between them or not.

## **CHAPTER TWO**

### **Procedure of confiscation**

#### **Petition**

**Article 256** – (1) In cases where a decision on confiscation has to be rendered, and if there has not been a public claim filed, or if a public claim has been filed, but there has not been a decision rendered together with the main accusation; the public prosecutor, or the intervening party, may file a petition with the court that has jurisdiction to try the case that it renders a decision.

(2) If the public claim has been filed already, and there has been no decision rendered in connection with the main accusation on the issues of property or property values that ought to be returned, then the court shall decide to return those by its own motion, or upon the request of concerned persons.

#### **Main hearing and decision**

**Article 257** – (1) Decisions, that are due to be rendered according to Art. 256, shall be rendered during an oral hearing at the trial.

(2) The individuals who have rights on the item or other property values that is subject to confiscation or return, shall be summoned to the main trial. These individuals may enjoy the rights of the accused.

(3) In case they fail to appear, the interaction shall not be suspended and rendering the judgment shall not be prevented.

### **Legal remedy**

**Article 258** – (1) The judgments to be rendered according to Article 256 can be subject to a motion of appeal on fact and law by the public prosecutor, the intervening party and by the individuals mentioned in Article 275.

### **Confiscation of items that are not contraband**

**Article 259** – (1) For the items that are not contraband and are only subject to confiscation, the decision of confiscation shall be rendered by the Justice of the Peace without conducting a main trial.

## **BOOK SIX**

### **Legal remedies**

## **PART ONE**

### **General provisions**

#### **Legal stand to file a motion of legal remedies**

**Article 260** – (1) The public prosecutor, suspect, accused and party who according to this Code has acquired the position of intervening party, as well as parties whose motion of intervening was not decided, was denied, or parties who were aggravated by the crime in that manner that the position of the intervening party would be possible may file a motion of legal remedies against the decisions of the judges and of the court.

(2) The public prosecutors at the Court of General Jurisdiction in Criminal Matters may file a motion against the Courts of Peace in Criminal Matters within the judicial district of the court; public prosecutors at the Court of Assizes, against the decisions of Courts of General Jurisdiction and Courts of the Peace in Criminal Matters in their judicial district; public prosecutors at the Regional Court of Appeal on Facts and Law, may file a motion against the decisions of the Regional Courts of Appeal on Facts and Law.

(3) The public prosecutor may also file motions of legal remedies in favor of the accused.

#### **Legal stand of lawyer to file a motion**

**Article 261** – (1) The lawyer may file motions of legal remedies, under the condition that this would not contradict the open will of the individuals for whom he is the defense counsel, or representative.

#### **Legal stand of the legal representative and the spouse to file a motion**

**Article 262** – (1) The legal representative and the spouse of the suspect or the accused may file a motion of legal remedy that is open to the suspect or the accused by their own motion within the foreseen time limit. Petitions by the mentioned individuals and the subsequent interactions are subject to the regulations that are applicable to the petition of the suspect or accused.

#### **Motion of legal remedy by the arrested individual**

**Article 263** – (1) The suspect or the accused who is under arrest may file a motion of legal remedy by making a declaration to the clerk of the court, or to the warden of the prison or the jail, where he is in custody, or by making a petition.

(2) If the motion has been filed with the clerk of the court, the declaration on filing the legal remedy or the petition shall be registered into the respective book and subsequently a record verifying these issues shall be produced and a copy of it shall be handed out to the suspect or accused who is under arrest.

(3) If the application was directed to the warden of the institution, interactions regulated in paragraph two shall be enacted and subsequently the minutes and the petition shall be immediately delivered to the related court. The clerk of the court shall register the application into the respective book.

(4) Any interaction done by the clerk of the court or the warden of the institution in accordance with paragraph two shall rest the periods of application set fourth in this Code in order to make an application for legal remedies.

### **Error in determine the applicable legal remedy**

**Article 264** – (1) In cases of an admissible motion, an error in determining the legal remedy or the authority shall not abolish the rights of the applicant.

(2) In such cases, the authority that received the application shall immediately send the petition to the authority that is competent and has the venue.

### **The scope of the outcome of application made by the public prosecutor**

**Article 265** – (1) A decision that had been subject of a motion of legal remedy against the suspect or accused by the public prosecutor, may be reversed in his favor or may be amended. If the public prosecutor had filed a motion in favor of the accused, the newly rendered judgement shall not contain heavier punishment than the punishment in the former judgment.

### **Withdrawal of the motion and its effect**

**Article 266** – (1) A motion may be withdrawn after it has been filed until the authority has decided upon this motion. However, if the motion has been filed in favor of the accused, the withdrawal requires his consent.

(2) The defense counsel or the representative is only entitled to withdraw the petition if there is a special authorization in the power of attorney.

(3) In cases, where there has been a petition of legal remedy filed in favor of the suspects or accused, for whom an appointment of defense counsel was conducted according to Article 150/2, or the petition of legal remedy has been withdrawn, if there is a contradiction between the declaration of the appointed defense counsel and the declaration of the suspect or accused, then the declaration of the defense counsel shall prevail.

## **PART TWO**

### **Ordinary legal remedies**

#### **CHAPTER ONE** **Opposition**



## **Decisions, which are subject to a motion of opposition**

**Article 267** – (1) Decisions rendered by a judge, and if the code opens this remedy, decisions rendered by a court may be subject to opposition.

## **The procedure of opposition and the inspection authorities**

**Article 268** – (1) If the Code did not regulate with a special regulation, opposition against the decision of a judge or a court shall be filed through rendering a petition or orally while the oral submission shall be taken into records with the authority that rendered the decision within seven days after the interested parties had learned about the decision, as ruled in Article 35. The president of the court or the judge shall approve the submission or the signature, which had been taken into the records. The provision of Article 263 is preserved.

(2) The judge or the court, whose decision had been subject to opposition, shall correct the decision, if he determines that the opposition is justified; otherwise shall send the application in at most three days, to the authority that has jurisdiction to make the inspection on the opposition.

(3) The competent authorities to inspect an opposition are listed below:

a) Oppositions to the decisions against the Judge of the Peace in Criminal Matters shall be investigated by the judge of the Court of General Jurisdiction in his district of jurisdiction.

b) In cases where the matters under the jurisdiction of the court of the Peace in Criminal Matters are tried by the Judge of General Jurisdiction in Criminal Matters, the authority of inspection on opposition shall rest with the President of the Court of Assizes.

a) Opposition to the decisions against the Judge of General Jurisdiction in Criminal Matters shall be inspected by the Court of Assizes in his district of jurisdiction, and oppositions to the decisions rendered by this court and its president, if there is more than one chamber of the Court of Assizes at that location shall be inspected by the subsequent numbered chamber of the Court of Assizes, and, for the last numbered chamber, by the first chamber; if there is only one chamber of the Court of Assizes, by the nearest Court of Assizes.

b) Oppositions to the decision of the member of the court, who was delegated to accomplish a certain interaction, shall be inspected by the president of the Court of Assizes, in the district of jurisdiction; oppositions to the decisions of the court that had been asked to perform an interaction by a letter of rogatory shall be inspected by the provisions in above mentioned numbers by the president or the court of their local jurisdiction.

c) The oppositions to the decisions of the criminal chambers of the Regional Court of Appeal on Facts and Law and to decisions of the chambers of Court of Cassation, where the Court of Cassation has ruled as a court of first instance, shall be inspected as follow: decision of the member shall be inspected by the president of the chamber to which he is attached; the decisions of the president of the chamber and the decisions of the chamber shall be inspected by the subsequent numbered chamber; the decision of the last numbered chamber shall be inspected by the first criminal chamber.

### **The effect of the opposition on the execution of decision**

**Article 269** – (1) Filing a motion of opposition does not suspend the execution of the decision.

(2) However, the authority whose decision was subject to opposition, or the authority who is going to inspect the decision, may make a ruling on suspension.

### **Notification of the opposition to the public prosecutor and the opposite party and inspection and exploration**

**Article 270** – (1) The authority who is going to inspect the opposition may notify the opposition to the public prosecutor and to the opposing party in order to give an opportunity of a written argument. The authority may conduct inspection and exploration and may give orders to those to be conducted, if it deems such necessary.

### **Decision**

**Article 271** – (1) Except cases laid down in the Code, a decision upon the motion of opposition shall be rendered without conducting a main trial. However, if deemed necessary, the public prosecutor, and subsequently the defense counsel or the representative shall be heard.

(2) If the opposition is deemed justified, the authority shall also rule on the subject matter of the opposition.

(3) The decision shall be rendered within the shortest possible period of time.

(4) Decisions rendered by the authority upon the opposition are final; however, if the authority renders pre-trial arrest decisions for the first time, these decisions may be subject to opposition.

## **CHAPTER TWO**

### **Appeal on fact and law**

### **Appeal on fact and law**

**Article 272** – (1) A motion of appeal on fact and law may be filed against the judgments rendered by the courts of first instance. However, judgments related to an imprisonment for fifteen years and more than that, shall be inspected by the Regional Court of Appeal on Facts and Law by its own motion.

(2) Decisions of the court that have been rendered prior to the judgment on which the judgment is being based, or decisions against which there is no other legal remedy foreseen by the Code, may also be attacked in connection with the judgment in the way of appeal on fact on law.

(3) However, the following judgments are exempted from the appeal on fact and law:

a) Judgments recognizing final judicial fines up to two thousand Liras (two thousand included);

b) Judgments of acquittal rendered for crimes that require a judicial fine not acceding five hundred days as the upper level of the punishment;

Judgments, for which the way of legal remedy had been closed by law.

### **Motion of appeal on fact and law and its time limit**

**Article 273** – (1) A motion of appeal on fact and law shall be lodged within seven days after the pronouncement of the judgment with a petition submitted to the court that rendered the judgment, or by making a declaration to the clerk of the court; this declaration shall be taken into the records and the record shall be approved by the judge. In respect to the accused who is under pre-trial arrest, the provisions of Article 263 shall apply.

(2) If the judgement had been pronounced in the absence of the individuals, who have the right to appeal on fact and law, the period starts running with the date of notification.

(3) Public prosecutors attached to the Criminal Courts of General Jurisdiction may appeal on fact and law against the decisions of Court of Peace in Criminal Matters in their district of jurisdiction; public prosecutors attached to the Courts of Assizes, against judgments of Criminal Courts of General Jurisdiction, and Courts of the Peace in their district of jurisdiction; the above mentioned public prosecutors may file a motion of appeal on fact and law within seven days after the judgment arrived to the office of the public prosecution in that judicial district.

(4) If the accused and the individuals who had acquired the status of the intervening party according the provisions of this Code, as well as individuals who had filed a petition of intervention and their request was not ruled upon, was denied; or the individuals who had suffered damages that would justify the status of the intervening party, had not submitted the grounds of their application in the petition or in their declaration, this shall not prevent the inspection.

(5) The public prosecutor shall submit the grounds of filing a motion of appeal on fact

and law together with the written petition, writing them clearly, together with the reasons. This petition shall be notified to the concerned individuals. The concerned individuals may submit their responses in this respect within seven days after the date of the notification.

#### **Running of the period of appeal on fact and law during the period of restitution**

**Article 274** – (1) The accused is entitled to ask restitution against the judgments that have been rendered against him in his absence. During the period of restitution, the period of appeal on fact and law runs as well. If the accused files a motion on restitution, he must file a separate motion of appeal on fact and law. In such cases, interactions related to the petition of appeal on fact on law shall be suspended until a decision about the request of restitution has been rendered.

#### **The effect of the petition of appeal on fact and law**

**Article 275** – (1) A petition of appeal on fact and law that has been submitted within the period of time, shall stop the finality judgment.

(2) If the judgment, including the reasons were not explained to the public prosecutor or to the parties who had filed the motion of appeal on facts and law, then the reasons shall be notified within seven days after obtaining the knowledge by the court, that the judgment has been attacked with a motion of appeal on fact and law.

#### **Denial of the motion by the court that rendered the judgment**

**Article 276** – (1) The court that rendered the attacked judgment shall deny the motion with a decision, if the petition of the appeal on fact and law had been submitted after the expiring of the legal period, or the judgment is not open to the way of appeal on fact on law, or the party who filed the motion has no stand.

(2) The public prosecutor or the concerned individuals who filed a motion of appeal on fact and law may ask the Regional Court of Appeal on Facts and Law to rule on this issue within seven days after the notification of the decision on denial. In such cases, the file shall be sent to the Regional Court of Appeal on Facts and Law. However, this shall not be a ground for suspending of the execution of the judgment.

#### **Notification of the motion of appeal on fact and law and the response**

**Article 277** – (1) If the petition of appeal on fact and law shall not be rejected in

accordance with Article 276 by the court which rendered the judgment, the petition of appeal or a copy of the record about the declaration shall be notified to the opposite party. The opposite party may give his response within seven days after the date of notification.

(2) If the opposite party is the accused, he may also give his response with a declaration, which shall be included in the record by the court recorder. After the response has been handed over or the fixed time limit for this purpose had expired, the file of the lawsuit shall be submitted by the office of the chief public prosecution, to the office of the chief public prosecution of the Regional Court of Appeal on Facts and Law, in order to be given to the Regional Court of Appeal on Facts and Law.

(3) The provisions of Articles 262 and 263 are reserved.

### **Duty of the public prosecutor at the Regional Court of Appeal on Facts and Law**

**Article 278** – (1) When the file of the lawsuit arrives to the office of the public prosecution of the Regional Court of Appeal on Facts and Law, this file shall be inspected, and be handed over to the criminal chamber of the Regional Court of Appeal on Facts and Law, together with the notification of the legal opinion that includes the written view and attached documents and evidence that are required to be given, if there are any, after the missing parts of the notification had been achieved, and after the documents and items of evidence, which are to be submitted, have been attached. The legal opinion, which has been prepared by the Office of the Chief Public Prosecution of the Regional Court of Appeal on Facts and Law, shall also be notified to the concerned individuals.

### **Pre-inspection of the file**

**Article 279** – (1) After the pre-inspection of the files:

a) If it comes out that the Regional Court of Appeal on Facts and Law is lacking jurisdiction, then it shall decide to submit the file to the competent Regional Court of Appeal on Facts and Law,

If the Court determines that the petition to the Regional Court of Appeal on Facts and Law was not timely; the decision to be inspected is not one of the decisions, which is to be inspected by the Regional Court of Appeal on Facts and Law; the petitioner does not have the right to file this motion, then it shall decide on the denial of the petition of the appeal on facts and law.

### **The inspection at the Regional Court of Appeal on Facts and Law and prosecution**

**Article 280** – (1) The Regional Court of Appeal on Facts and Law shall render the following decisions, after inspecting the notification of the legal opinion of the Office of the Chief Public Prosecution, the file and the evidence, which had been submitted together with the file:

a) If the court establishes that the judgment bears no illegality in respect to procedure or to substantive law, that there is no missing evidence or the interactions were complete, that the evaluation in respect to the proof is adequate, the court shall render a decision on denial of the petition of appeal on facts and law on the merits,

b) If the court establishes that there is a ground of illegality in the judgment of the court of the first instance as mentioned in Article 289, then the court shall render a decision to set aside the judgment and send the file to the court of first instance, the judgment of which has been set aside, or to a different court of first instance within his district of jurisdiction, which the court deems appropriate, in order to inspect the file again and to render a new judgment,

c) In other instances, the court shall render a decision to annul the judgment of the court of the first instance, to make a new trial, and to start with the preparations of the main hearing, after meeting all the necessary measures.

### **Preparation of the main hearing**

**Article 281** – (1) The president of the Regional Court of Appeal on Facts and Law or a member of the court appointed by him shall determine the day of the main hearing according to provisions of Article 175, makes the needed calls. The summons to the accused shall include a declaration containing the wording that if he fails to appear to the main hearing of the lawsuit that shall be opened upon his petition, it shall be denied on the grounds of inadmissibility.

(2) The court shall decide on hearing the witnesses, experts that are deemed necessary, and on conducting judicial inspection.

### **Exceptions**

**Article 282** – (1) When the main trial is opened, except the exceptions listed below, the provisions related to the preparation of the main hearing, main hearing and decision of this Code shall be applicable:

a) After the main hearing has started according to the provisions foreseen by this Code, the inspection-report of the member, who has been appointed shall be read.

b) The final judgment of the court of first instance, which is furnished with reasons shall be read as well.

c) The transcripts of the witnesses, which include the testimonies of the witnesses heard by the court of first instance, as well as the transcripts about the judicial inspections, evidence and documents, which have been collected during the preparation phase of the main trial by the Regional Court of Appeal on Facts and Law, if it has been conducted any,

the transcripts of the judicial inspection and submissions of the experts and reports shall be read.

Witnesses and experts, whose hearing at the main trial at the Regional Court of Appeal on Facts and Law are deemed necessary, shall be summoned.

### **Judgment to be rendered in cases where the petition was in favor of the accused**

**Article 283** – (1) If the petition of appeal on facts and law was in favor of the accused, the newly rendered judgment shall not contain a heavier sanction than the sanction determined by the former judgment.

### **Prohibition of insisting**

**Article 284** – (1) There shall be no insisting against the decisions and judgments rendered by the Regional Court of Appeal on Facts and Law; against those there is no legal remedy.

(2) Provisions related to opposition and appeal on law are reserved.

### **Provisions related to appeal on law contained in special statute**

**Article 285** – (1) Except for the provision of Art. 18/4 of the Turkish Penal Code, other decisions and judgments rendered by the courts of first instance, that fall under the jurisdiction of the Regional Court of Appeal on Facts and Law related to lawsuits and other cases that are declared in their special statutes that they may be appealed on law or that about them an application with the Court of Cassation may be put forward, are subject to an appeal on facts and law.

## **CHAPTER THREE**

### **Appeal on Law**

#### **Appeal on law**

**Article 286** – (1) With the exception of reversal judgments, judgments rendered by Criminal Chambers of the Regional Court of Appeal on Facts and Law may be appealed on law.

(2) However, the following decisions are exempted from appeal on law:

a) Decisions of Regional Court of Appeal on Facts and Law that are related to the rejecting the merits of the application of appeal on facts and law against the imprisonment penalties up to five years or less and decisions denying the merits of appeals on facts and law against any kind of judicial fines, rendered by the courts of first instance,

b) Decisions of Regional Court of Appeal on Facts and Law that do not increase the imprisonment penalties up to five years or less rendered by the courts of first instance,

c) All kinds of decisions of the Regional Court of Appeal on Facts and Law, that are related to the crimes that are within the jurisdiction of the Court of the Peace which have been rendered as the court of first instance,

d) Decisions of the Regional Court of Appeal on Facts and Law, which do not alter the nature of the crime in connection with the sentence rendered by the court of first instance, which require a judicial fine only,

e) Judgments rendered by the Regional Court of Appeal on Facts and Law, which do not alter the decision of the court of first instance in relation to confiscation or forfeiture or in relation to a judgment that deems it not necessary to rule so,

f) Where the judgment of the Regional Court of Appeal on Facts and Law was an acquittal on appeals on fact related to offenses that require imprisonment for ten years (including the tenth year) or decisions of denial of motions for appeals of facts,

g) Where the decision of the court of first instance was related to striking a lawsuit, or a decision not to punish, or to a security measure, and the Regional Court of Appeal on Facts and Law has rendered a judgment in agreement with that to strike the lawsuit, or a decision not to punish, or to a security measure or reversed the application for appeal on facts and law,

Decisions of the Regional Court of Appeal on Facts and Law that contain more than one sentencing and decision, as long as they stay within the limits of the above mentioned subsections.

### **Appealing the decisions rendered prior to the judgment**

**Article 287** – (1) Decisions given before the judgment, which form the basis for the judgment, or the decisions against which no other legal remedy had been foreseen, may be appealed together with the judgment.

### **Ground for appeal on law**

**Article 288** – (1) An appeal on law may be filed only on the grounds that the judgment has violated the law.

(2) The non application, or erroneous application of a legal rules is a violation of the law.

### **The absolute violation of the law**

**Article 289** – (1) Although it may not be mentioned in the petition or declaration of appeal on law, the following points are considered absolute violations of the law:

a) Failure to convene the court in accordance with the provisions of law;



- b) If a judge, who is by law prohibited from participation in the duty of judgeship, had participated in the process of the decision-making;
- c) Concurrence of a judge in passing judgment, although challenged, due to a substantial doubt, and although such a challenge is accepted, or concurrence of a challenged judge in passing judgment by way of unlawful rejection of the challenge;
- d) When, in violation of law, the court finds itself competent from the point of jurisdiction to hear a prosecution;
- e) Conducting the hearing in the absence of the public prosecutor or of individuals whose presence is required by law;
- f) Violation of the principles of open trial in a judgment passed as a result of an oral hearing;
- g) If the judgment does not include reasons according to the Article 230;
- h) The restriction of the right to defense by the decision of the court on points, that are relevant to the judgment;

In cases where the judgment is based on the evidence obtained in illegal methods.

### **Violation of rules, that are in favor of the accused**

**Article 290** – (1) Violation of the rules in favor of the accused do not give the public prosecutor the right to reverse the judgment.

### **Motion of appeal and the time limit**

**Article 291** – (1) A motion of appeal on law must be filed within seven days after the pronouncement of judgment by either submitting a petition to the court, or by making a declaration to the registration clerk and having him prepare the necessary documents; the declaration shall be included in the records and be approved by the judge. The provision of Article 263 related to the accused under pre-trial arrest has precedence.

(2) If the judgment has been pronounced in the absence of the individuals who have the right to appeal on law, the period for appeal begins to run by the date of the notification.

### **Running of the period of appeal during the period of restitution**

**Article 292** – (1) For judgments not in favor of the accused, pronounced in his absence, in connection with the motion for restitution, the provisions of Article 274 shall apply.

### **Consequences of the petition of appeal on law**

**Article 293** – (1) A petition of appeal on law, filed within the foreseen period, prevents the judgment from becoming final.

(2) If the judgment and its motives have not been explained to the appealing public prosecutor or the parties, the motives shall be notified within seven days, after the Regional Court of Appeal on Facts and Law has knowledge of the appeal on law.

**Petition of appeal on law and the points it will contain**

**Article 294** – (1) Whoever files a motion of appeal on law, that party must indicate in his petition on what ground he requests the judgment to be reversed.

(2) Ground for an appeal can only be the legal aspects of a judgment.

**Motives for an appeal on law**

**Article 295** – (1) If in the petition for appeal on law or in the declaration the grounds of appeal on law were not declared, the appealing party shall submit, within seven days, starting from the expiration of the period, that had been set in order to submit an petition of appeal on law, or within seven days starting from the notification of the decision of the judgment, that contains the motives, an additional petition to the Regional Court of Appeal on Facts and Law shall be submitted. The public prosecutor shall openly state in his petition of appeal, whether the appeal had been put forward in favor or against the accused.

(2) If the appeal on law is filed by the accused, the additional petition shall be signed by the accused or by his lawyer before it has been submitted.

(3) If the accused does not have a defense counsel, he may declare his grounds for appeal on law to the registration clerk, which shall be taken into record; and this record must be approved by the judge. With respect to the guardian or legal representative of the accused and his or her spouse, the provisions of Article 262 and about the accused under arrest, Article 263 has precedence.

**Denial of a motion of appeal on law by the court, that rendered the decision from the point of inadmissibility**

**Article 296** – (1) The Regional Court of Appeal on Facts and Law or the court of the first instance, whose judgment had been appealed, shall rule on denial of the petition of appeal on law, if the petition had been submitted after the expiration of the legal duration, or if a judgment that cannot be appealed had been appealed, or if the party who makes the appeal had no standing.

(2) The party who makes the appeal on law may request from the Court of Cassation, within seven days after the notification of the order of denial, a ruling on this issue. In this case, the file shall be sent to the Court of Cassation. However, the execution of the judgment shall not be postponed on this ground.

### **Notification and answer of petition of appeal and duties of Office of Chief Prosecutor at the Court of Cassation**

**Article 297** – (1) A copy of the petition of appeal on law or the appellate brief regarding the appellate request, which the Regional Court of Appeal on Facts and Law has not rejected under the provisions of Article 296, shall be issued to the opposing party. The opposing party may submit the written answer within seven days starting with the date of notification.

(2) After the answer has been submitted, or the time limit for an answer has expired, the file pertaining to the case shall be forwarded by the Office of Public Prosecution at the Regional Court of Appeal on Facts and Law, to the Office of the Chief Public Prosecution at the Court of Cassation.

(3) The legal opinion prepared by the Office of Chief Public Prosecution at the Court of Cassation, if the parties file a motion of appeal on law, or if it contains views that may result in an unfavorable outcome shall be notified to the accused or his defense counsel, as well as the intervening party or their representatives, by the related chamber. The related party may respond in writing within one week after the notification.

(4) The notifications to be conducted according to paragraph three shall be valid, if the notifications are made to the addresses that is included in the file.

(5) The provisions of Article 262 and 263 shall have precedence.

### **Rejection of the petition of appeal on law by the Court of Cassation**

**Article 298** – (1) If the Court of Cassation determines that the petition on appeal on law has not been submitted in time, that the judgment cannot be appealed on law, that the individual appealing does not have standing, or that the appellate petition does not include the grounds for appeal on law, the request for appeal on law shall be rejected.

### **Inspection conducted through a main hearing**

**Article 299** – (1) The Court of Cassation conducts its inspections pertaining to judgments of crimes require imprisonment sentences for 10 years or more, by conducting a hearing either upon the request made in the petition of appeal on law of the accused or the intervening party or on its own motion, if it deems it adequate. The day of the main hearing shall be notified to the accused, to the intervening party, to the defense counsel and to the representative. The accused has the right to be present at the main hearing or may be represented by his defense counsel.

(2) If the accused is under pre-trial arrest, he cannot request to be present at the main hearing.

### **The procedure during the main hearing**

**Article 300** – (1) Before the main hearing, the report prepared by the member of the court appointed for this mission or by the examination judge, shall be explained to the members. The members themselves shall examine the file additionally. The hearing shall start after these issues have been established.

(2) During the main hearing, the Chief Public Prosecutor at the Court of Cassation or the public prosecutor from the Court of Cassation in charge on his behalf, the accused, his defense counsel, the intervening party and his representative, shall present their claims and defenses. The party who made the request for appeal on law shall speak first. In any case, the accused shall have the last word.

#### **Points to be reviewed by the Court of Cassation**

**Article 301** – (1) The Court of Cassation shall only inspect the points indicated in the appellate petition and, if the appellate request is based on omissions regarding procedures, the facts declared in the appellate petition or appellate brief explaining them.

#### **Rejection of the appellate request on the merits, or reversal of judgment**

**Article 302** – (1) If the findings of the Court of Cassation about the judgment of the Regional Court of Appeal on Facts and Law are in accordance with the law, it shall be decided that the petition of appeal on law shall be rejected on substantiative grounds.

(2) The Court of Cassation reverses the contested judgment on the basis of violations of law effecting the judgment that are pointed out in the appellate petition and the appellate brief. Reasons for reversal shall be given separately in the written judgment.

(3) If the judgment is reversed because of the reasons shown in the appellate petition, even if they were not declared in the appellate petition, all other findings regarding the violations of law shall be shown in the written judgment.

(4) If the violation of law causing the judgment to be reversed stems from legal interactions that are regarded as the basis of the judgment, they also shall be reversed.

(5) Provisions of Article 289 shall have precedence.

#### **Circumstances in which the Court of Cassation decides on the merits of the case and the correction of the violation of law**

**Article 303** – (1) If the judgment was reversed because of a violation of law applied to the facts had been determined as the basis of the judgment, the Court of Cassation shall rule on the merit of the case and also shall correct the violations of law in the judgment in the following cases:

a) If a decision for an acquittal or for dismissal of the case or for a fixed punishment with no certain minimum or maximum limits is necessary and there is no need to conduct further investigation in order to reveal facts;

b) If the Court of Cassation concurs with the view of the Office of the Chief Prosecution at the Court of Cassation to apply the minimum degree of punishment prescribed by law;

c) If the number of the Article of the provision has been written incorrectly, even though the nature, the characteristics, and the punishment of the crime determined in court has been shown correctly;

d) If in situations where the law, which went into effect after the judgment, reduced the punishment and, in the determination of the courts, the punishment of the accused, the reason for the increase was not accepted, or according to a new law the act is no longer considered a crime, a reduced sentence of the crime in the first situation, and no punishment at all in the second situation, shall be required;

e) If no, or a wrong, deduction has been made in determining the punishment, which shall be determined according to the date of birth and the date of the crime that were established openly;

- f) If a material error has been made in determining the duration or the amount of the punishment, which shall be given at the end of increasing or decreasing of the punishment;
- g) If the sentencing was for less or for more because of non consideration of the lining of Article 61 of the Turkish Penal Code;
- h) If there is a violation of the Act on Levies, or a violation of the provisions related to the costs of the adjudication and a violation of the fee tariff of the lawyer, which is prepared according to the Act on Lawyers.

#### **The authority to which the decision of the Court of Cassation shall be referred**

**Article 304** – (1) The file regarding the decisions given according to paragraph one of Article 302 or Article 303 shall be forwarded by the Court of Cassation to the Office of Chief Public Prosecutor at the Court of Cassation, in order to be sent to the Regional Court of Appeal on Facts and Law, that has given the judgment. The Regional Court of Appeal on Facts and Law shall give the file within seven days from the date of the file's arrival from the Court of Cassation to the office of Chief Public Prosecutor of the Regional Court of Appeal on Facts and Law, in order to be forwarded to the court of the first instance in charge for necessary interactions.

(2) Except in cases of Article 303, the Court of Cassation shall forward the file to the Regional Court of Appeal on Facts and Law whose judgment had been reversed, or to another Regional Court of Appeal on Facts and Law, to be reviewed and to be decided again.

(3) If the judgment was reversed because the court, in violation of the law, considered itself having jurisdiction or venue, the Court of Cassation shall forward the file to the court that has jurisdiction or venue.

(4) The file shall be given to the Office of the Chief Public Prosecutor at the Court of Cassation, in order to be sent to the court of the first instance that has rendered the judgment, if the decision is related to a judgment of the court of the first instance that can be appealed on law directly.

#### **Pronouncement of judgment at the Court of Cassation**

**Article 305** – (1) The judgment shall be pronounced in accordance with the provisions of Article 231. If there is no possibility of doing so, the ruling shall be made within seven days from the ending of the hearing.

#### **Effect of the reversed judgment on other accused**

**Article 306** – (1) If the judgment has been reversed in favor of the accused, and if these factors are also applicable to the other accused who have not put forward a request for appeal on law, they also shall benefit from the reversal of judgment as if they had filed a motion for appeal on law.

#### **Procedures of the court that shall rehear the case**

**Article 307** – (1) The Regional Court of Appeal on Facts and Law or the court of the first instance, that is going to retry the case upon to the decision of reversal of the Court of Cassation, shall ask the related individuals their responses regarding the reversal.

(2) If the notification to the addresses shown in the file of the accused, his defense counsel, the intervening party and his representative was not possible, or even if the notification was achieved but their responses against the reversal could not be taken because they did not show up to the main hearing, then the main hearing shall continue and the case shall be concluded in their absence. However, if the punishment to be inflicted on the accused is more severe than it was in the reversed judgment, then they must be heard at any case.

(3) The Regional Court of Appeal on Facts and Law has the right to insist on its former judgment, if the Court of Cassation decides to reverse. However, the decisions rendered by the Penal General Assembly of the Court of Cassation shall be final.

(4) If the motion of appeal on law was filed only by the accused, or by the Office of Public Prosecution on his favor, or by individuals mentioned in Article 262, then the punishment included in the new judgment cannot be more severe than the previous judgment.

## **PART THREE**

### **Extraordinary legal remedies**

## **CHAPTER ONE**

### **The power of opposition by the Chief Public Prosecutor at the Court of Cassation**

#### **The power of opposition by the Chief Public Prosecutor at the Court of Cassation**

**Article 308** – (1) Against the decision of one of the penal chambers of the Court of Cassation, the Chief Public Prosecutor at the Court of Cassation is entitled to file a motion of opposition with the General Assembly of the Court of Cassation in Criminal Matters by its own motion or upon request, within thirty days after the date that the final judgement has been handed over to him. There is no time limit in case of opposition in favor of the accused.

## **CHAPTER TWO**

### **Reversal in favor of the administration of justice**

#### **Reversal in favor of the administration of justice**

**Article 309** – (1) The Office of the Ministry of Justice shall request a reversal of a decision or a judgment by the Court of Cassation, if it learns, that there is a illegality in a decision or a judgment, that had been made final without being inspected by an appeal on fact and law or an appeal on law only; the request shall be submitted to the Chief Public Prosecutor's Office at the Court of Cassation and the legal grounds shall be mentioned in the request.

(2) The Chief Public Prosecutor at the Court of Cassation shall write down these grounds as they had been submitted to him without altering, and submit his writing, which

includes a reversal petition about the decision or judgment, to the related penal chamber of the Court of Cassation.

(3) The penal chamber of the Court of Cassation shall reverse the decision or judgment in benefit of the administration of the justice, if the submitted grounds are justified according to his opinion.

(4) If the grounds of reversal are:

a) One of the reasons as described in Article 223, and which does not solve the essence of the dispute, then the judge or the court, that rendered the decision shall make the required inspection and exploration and consequently shall render a new decision;

b) Related to the procedural interactions that are connected to the aspects of the judgement of conviction, that do not solve the essence of the dispute, or interactions, that had lifted or restricted the rights of the defense, then the judge or the court shall rule adequately and render a judgment according the outcome of the new trial. This judgment shall not be heavier in punishment, when compared to the punishment set out in the former judgment;

c) On the points that are solving the essence of the dispute, but are related to the judgments, except the conviction judgement, this shall bring no unfavorable outcomes and shall not require a new adjudication.

d) Those that require the reversal of the punishment of the convict, or require inflicting a lighter punishment, then the Chamber of the Court of Cassation shall directly rule on either lifting the punishment, or on the lenient punishment.

(5) In cases where a judgment on reversal had been rendered under the provisions of this Article, there shall be no right to insist on reversal.

**Article 310** – (1) The Chief Public Prosecutor at the Court of Cassation is also entitled to file a motion of appeal on law in favor of the criminal justice system by his own motion only in cases as shown in Article 309, subparagraph four, subtitle (d).

(2) If the Office of the Ministry of Justice appealed in accordance with Article 309, this power may not subsequently be exercised by the Chief Public Prosecutor at the Court of Cassation.

## **CHAPTER THREE**

### **New trial**

#### **Grounds for a new trial in favor of the convicted individual**

**Article 311** – (1) A lawsuit that has been concluded with a final judgment shall be tried again in favor of the convicted individual through the way of a new trial, under the following circumstances:

a) If any document used in the main hearing and which had an effect on the judgment, is fraudulent;

b) If it is discovered that any witness or expert who has been heard under oath has testified or used his vote deliberately or negligently against the convicted individual, contrary to the facts, in a way that affected the judgment,

c) Except fault caused by the convicted individual personally, while performing his duty, if any of the judges who participated in the judgment had been in fault in executing his duties, in such a manner that would require a criminal prosecution or a conviction with a punishment;

d) If the judgment of the criminal court was based upon a judgment given by a civil court, and this judgment was reversed by another judgment which became final;

e) If new facts or new evidence have been produced, which when taken in to consideration solely or together with the evidence previously submitted, are of the nature to require the acquittal of the accused or the conviction of the accused because of a provision of the Criminal Code that require a lighter punishment;

f) If a final judgment of the European Court of Human Rights has established that the criminal judgment is violating the Convention on Protecting the Human Rights or its Protocols. In such cases, a motion for a new trial may be filed within one year after the date of the final judgment of the European Court of Human Rights.

(2) The provisions of paragraph one, subsection (f) shall be applicable for petitions related to the final judgments of the European Court of Human Rights that have been final by the date of 4 February 2003, and to those judgments that are rendered upon individual applications submitted to the European Court of Human Rights after 4 February 2003.

### **Postponement or stay of execution**

**Article 312** – (1) A motion for a new trial does not hinder the execution of the judgment. However, the court may rule on the postponement or stay of execution of the judgment.

### **Cases, which do not bar a new trial**

**Article 313** – (1) The execution of the judgment or the death of the convicted individual does not bar a motion for a new trial.

(2) The spouse of the deceased, his ascendants, descendants and his siblings are entitled to file a motion of a new trial.

(3) There are no such individuals as listed in the second paragraph, the Minister of Justice is also entitled to file a motion of a new trial.



### **The grounds for a new trial against the interests of the accused or the convict**

**Article 314** – (1) A lawsuit, that has concluded with a judgment that has become final may be retried against the interests of the accused or the convict by way of a new trial, as in the below listed cases:

- a) If a document, that had been submitted in favor of the accused or the convict during the main hearing and had been effective on the outcome of the judgment, is fraudulent.
- b) If any of the judges who had participated in the decision-making had been in fault in favor of the accused or the convict, while performing his duty, which qualifies a criminal prosecution or a conviction (with a punishment against him);
- c) If the accused had made a reliable confession in front of a judge, in relation to the crime, after he has been acquitted.

### **Cases, that makes a motion for a new trial inadmissible**

**Article 315** – (1) A new trial for the changing of punishment is inadmissible, if the change is to be made within the limits of the same Article of the Criminal Code.

(2) If there is any other possibility, that would cure the error, the way of a new trial shall not be admissible.

### **Conditions for admissibility of petitions of a new trial that rely on a crime**

**Article 316** – (1) A motion for a new trial, supported by a allegation of crime, shall only be admissible if there has been rendered a judgment of conviction because of this conduct, or, if a criminal prosecution could not be initiated or conducted because of a reason other than the fact that strong evidence supporting a conviction could not be obtained. The provisions of this Article shall not be applicable in cases as regulated in Article 311, subparagraph 1-e.

### **Provisions applicable to the motion of a new trial**

**Article 317** – (1) General provisions that are applicable to motions of legal remedies shall also be applicable to the motion of a new trial.

(2) The motion of a new trial shall include the legal grounds, as well as supporting evidence thereof.

### **Decision on admissibility or inadmissibility of the motion for a new trial and**

## **deciding authority**

**Article 318** – (1) The petition filing a motion of a new trial shall be submitted to the court which rendered the judgment. This court shall rule on the admissibility of the petition.

(2) In cases where the Court of Cassation also directly rules on the grounds of Article 303, the application shall be submitted to the court that had rendered the decision.

(3) Decision on the admissibility of the petition for a new trial shall be rendered without conducting a main hearing.

## **Grounds of inadmissibility of the petition for a new trial, and interactions to be conducted, if admissible**

**Article 319** – (1) If the petition for a new trial is not made in accordance with the procedures set forth by the statute, or if no legal ground for justification for a new trial has been submitted, or no supporting evidence had been produced, then the petition shall be denied as inadmissible.

(2) Otherwise, the petition for a new trial shall be notified to the public prosecutor and the interested party, in order to submit their answers, if any, within seven days.

(3) The decisions rendered on the basis of this Article may be subject to a motion of opposition.

## **Collection of evidence**

**Article 320** – (1) If the court declares that the petition of a new trial is admissible, then it may delegate a member of the court who was delegated to accomplish a certain interaction, or a court that had been asked to perform an interaction by a letter of rogatory, for collection of evidence; the court is also entitled to fulfill these issues on its own.

(2) During the collection of evidence by the court or by a member of the court who was delegated to accomplish a certain interaction, or a court that had been asked to perform an interaction by a letter of rogatory, rules related to investigation shall apply.

(3) After collection of the evidence is completed, the public prosecutor and the individual against whom there is a pending judgment, shall be invited to submit their opinions and considerations within seven days.

**Article 321** – (1) If the grounds submitted in the petition for a new trial are not

justified sufficiently, or in cases which are laid down in Article 311, subparagraph (1), subtitles (a) and (b), as well as in Article 314, subparagraph (1), subtitle (a), it comes out that, according to the situation of the given case, the submitted grounds had no influence on the outcome of the previously rendered judgment, then the motion for a new trial shall be denied, without conducting a main hearing, being of no legal basis.

(2) Otherwise, the court shall give a decision on granting a new trial and opening a main hearing.

(3) Decisions given according to this Article may be subject to a motion of opposition.

### **Inspection of the motion for a new trial without conducting a main hearing**

**Article 322** – (1) If the convicted individual is dead, the court shall not conduct a new main trial and shall decide after collecting all the necessary evidence on the acquittal of the convicted, or shall reject the petition for a new trial.

(2) In other cases, the court shall also rule immediately after obtaining the positive view of the public prosecutor on the acquittal of the convict, without conducting a main hearing, if there is sufficient evidence.

(3) The court shall annul the previous judgments at the same time, while ruling on acquittal.

(4) In cases where the individual who filed the motion for a new trial requests so, the decision on the annulment of the previous judgment may be published in the Official Gazette, as well as in other newspapers under the courts discretion, and the costs of the publication may be inflicted on the state treasury.

### **Judgment to be rendered at the end of the renewed main hearing**

**Article 323** – (1) At the conclusion of the main hearing that shall be conducted again, the court shall either approve the previous judgment, or annul the judgment and render a new decision on the lawsuit.

(2) If the motion for a new trial had been filed in favor of the convict, the new judgment shall not contain any heavier punishment than the punishment inflicted by the previous judgment.

(3) In cases where, at the end of the motion for a new trial, a judgment concerning an acquittal, or a judgment stating that there is no ground for punishing, has been rendered, the material and emotional damages suffered by the person, which have occurred because of the partial or full execution of the previous conviction, shall be recovered according to the provisions of Articles 141 – 144 of this Code.

## **BOOK SEVEN**

### **Court expenses and various provisions**

#### **PART ONE**

##### **Court expenses**

##### **Court expenses**

**Article 324** – (1) Court expenses are levies and fees of the lawyers, that shall be paid according to their schedule: all kinds of expenses paid by the state treasury in order to run the trial in the investigation and prosecution phases; payments made by the parties.

(2) Judgment and decision shall contain provisions about who is going to pay the court expenses.

(3) The president of the court or the judge shall determine the amount of the court expenses, as well as the amount of money that one party should pay to the other.

(4) Decisions related to court expenses due to be paid to the state shall be collected according to the provisions of the Act On Levies; decisions related to the collection of individual rights shall be executed under the provisions of Law Of Execution and Bankruptcy dated 9 June 1932, No. 2004.

(5) The expenses paid to an interpreter who has been appointed for a suspect, accused, victim or witness who does not speak Turkish, or who is a handicapped person, are not considered in the category of court expenses, and such expenses shall be borne by the state treasury.

##### **Liability of the accused**

**Article 325** – (1) If the accused is being sentenced to a punishment or measure of security, all court expenses shall be paid by him.

(2) In cases of delaying the pronouncement of the judgment and postponement of sentencing, the provisions of first paragraph shall apply also.

(3) If, during the various phases of the trial, the investigation or exploration caused some court expenses, but the end outcome was in favor of the accused, the court may decide to subscribe these costs to the state treasury in part or in whole, if it considers that such

court expenses being the accused's responsibility would be unfair.

(4) If the accused dies before the judgement becomes final, his heirs are not liable for the payment of the court expenses.

#### **Court expenses in cases of connected prosecutions**

**Article 326** – (1) If an individual who had been prosecuted for more than one crime, shall be convicted for a part of this offense, he shall not be liable for paying the court expenses stemming from the main hearing of the crimes for which he is acquitted.

(2) Individuals who were convicted as being accomplices to the same crime, shall be responsible for court expenses as joined sureties for each other's debts.

#### **Court expenses in cases of acquittal or no ground for punishment**

**Article 327** – (1) The individual, who shall be acquitted or a decision on no ground for punishment has been rendered, shall only be responsible for the court expenses caused by his own negligence.

(2) The expenses, which the acquitted person had previously been obliged to pay, shall be born by the state treasury.

#### **Court expenses in cases of counter actions of libel**

**Article 328** – (1) In cases of counter actions of libel, if the punishment for one party or for both parties was suspended this does not exclude a decision on covering the court expenses for one of them or for both parties.

#### **Court expenses in cases of aspersion of crime and malicious prosecution**

**Article 329** – (1) An individual who by aspersion of crime, or malicious prosecution, shall pay the court expenses stemming from this if this has been proven.

#### **Court expenses resulting from motions of legal remedies**

**Article 330** – (1) The party who files a motion of any kind of a legal remedy, shall be responsible for paying the court expenses stemming from his withdrawal, or expenses stemming from denial of the motion. If the public prosecutor has filed a motion, the state

treasury shall be liable for the expenses that would be paid by the accused.

(2) In cases where the request of the applicant for a legal remedy was partly accepted, the court shall divide the court expenses according to its discretion.

(3) The same provision shall be applicable to court expenses resulting from a motion of a new trial that concluded by a judgement rendered after opening a main hearing that is final.

(4) The court expenses, which are the consequence of a motion for restitution, shall be born by the applicant, unless they are caused by a baseless opposition of the opponent party.

## **PART TWO**

### **Various provisions**

#### **Judicial vacation**

**Article 331** – (1) Authorities and courts, that deal with criminal matters shall take a vacation each year from August 1 until September 5.

(2) The High Council for Judges and Public Prosecutors shall specify which investigations and prosecutions related to the arrested individuals and subject matters are going to be considered as urgent during the vacation period.

(3) During the vacation period, the Regional Court of Appeal on Facts and Law and the Court of Cassation shall only review matters related to arrests or matters tried under the Act on Adjudication of the Crimes Detected in the Act.

(4) Time limitations, are fall during the vacation period shall not run. These time limitations shall be considered as extended for three days after the vacation is terminated.

#### **Asking for information**

**Article 332** – (1) The request for to the information, given in a written form by the the public prosecutor, the judge, or the court during a pending investigation or prosecution, a response must be given within 10 days. If it is not possible to comply with the inquiry within this period, the ground for that shall be informed within the same period.

(2) The writing that asks for the information shall also contain the caution with a

statement about the provision of the previous subparagraph, and of non-compliance would mean the violation of Art. 257 of the Turkish Penal Code. In such cases, except for parliamentary immunities, the investigation regarding persons for whom the opening a public case requires an authoriation or a decision, shall be investigated directly.

### **Internal regulations**

**Article 333** – Internal regulations that are foreseen by this Code, shall be prepared and put in force by the Ministry of Justice by asking the advice of the related Ministry, if there is no exception.

### **Enforceability**

**Article 334** - This Code shall become enforceable on June 1, 2005.

### **Execution**

**Article 335** - The Board of Ministers shall execute the provisions of this Code.

# Turkey

by  
Feridun Yenisey  
Bahcesehir University, Istanbul



This monograph has been reviewed by the Author and is up-to-date  
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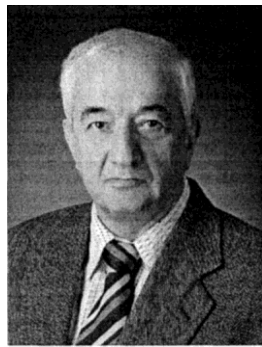
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## **The Author**

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## List of Abbreviations

ABD	Ankara Barosu Dergisi (Periodical)
AdD	Adalet Dergisi (Periodical)
ANAP	Anavatan Partisi
AP	Adalet Partisi
Art.	Article
AÜHFD	Ankara Üniversitesi Hukuk Fakültesi Dergisi (Periodical)
AÜSBFD	Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi (Periodical)
AY	Türkiye Cumhuriyeti Anayasası (The Constitution of the Republic of Turkey)
b.	Band (cilt)
BasK	Basın Kanunu (Press Act)
BK	Borçlar Kanunu (Code of Obligations)
BMTDY	Birleşmiş Milletler Tarih Yıllığı (Periodical)
Cass.	Court of Cassation (Yargıtay)
CD	Ceza Dairesi (Chamber of the Court of Cassation)
DYP	Doğru Yol Partisi
CGIK	Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun (Act on Execution of Punishments and Security Measures)
CGK	Ceza Genel Kurulu (General Assembly of the Court of Cassation)
CHP	Cumhuriyet Halk Partisi
CIK	Cezaların İnfazı Hakkında Kanun (Code of Enforcement of Punishments)
CMK	Ceza Muhakemesi Kanunu (The “new” Turkish Criminal Procedure Code)
CMUK	Ceza Muhakemeleri Usulü Kanunu (The “repealed” Turkish Criminal Procedure Code)
CMUKT	Ceza Muhakemeleri Usulü Kanunu Tasarısı (Criminal Procedure Code Bill)
ÇASÖMK	Çıkar Amaçlı Suç Örgütleri ile Mücadele Kanunu (The “repealed” Act on Combating Profit Oriented Organized Crime)
ÇKK	Çocuk Koruma Kanunu (Act on Protection of Child)

## List of Abbreviations

ÇMK	Çocuk Mahkemeleri Kanunu (The “repealed” Juvenile Courts Act)
CPI	Current Price Index
DGMK	Devlet Güvenlik Mahkemeleri Kanunu (The “repealed” State Security Court Act)
DP	Demokrat Parti
DYP	Doğru Yol Partisi
E.	Esas (Main Case)
EU	European Union
ECHR	European Convention on Human Rights
FP	Fazilet Partisi
GNP	Gross National Product
HP	Halkçı Parti
IBD	İstanbul Barosu Dergisi (Periodical)
IBM	İstanbul Barosu Mecmuası (Periodical)
İçBK	İçtihadı Birleştirme Kararı (United Decision of the Court of Cassation)
IHAS	İnsan Hakları Avrupa Sözleşmesi (European Convention on Human Rights)
IHFİM	İstanbul Üniversitesi Hukuk Fakültesi Mecmuası (Periodical)
İKİD	İlmi ve Kazai İçtihatlar Dergisi
IMF	International Monetary Fund
K.	Karar (Decision)
KaçK	Kaçakçılıkla Mücadele Kanunu (Act on combating Smuggling)
KHK	Kanun Kuvvetinde Kararname (Decree in Power or Act)
KK	Kabahatler Kanunu (Law on Misdemeanors)
KTK	Karayolları Trafik Kanunu (Road Traffic Act)
MDP	Milliyetçi Demokrat Parti
MK	Medeni Kanun (Civil Code)
MKYK	Memurlar ve Diğer Kamu Görevlilerinin Yargılanması Usulü Hakkında Kanun (Act on the Adjudication of Civil Servants)
n.	Paragraph Number
NATO	North Atlantic Treaty Organization
PVSK	Polis Vazife ve Salahiyet Kanunu (Police Act)
RG	Resmi Gazete (Official Gazette)
RP	Refah Partisi
SODEP	Sosyal Demokrasi Partisi
SHP	Sosyal Demokrat Halkçı Parti
TBMM	Türkiye Büyük Millet Meclisi (Turkish Grand National Assembly)
TC	Türkiye Cumhuriyeti (Republic of Turkey)
TCK	Türk Ceza Kanunu (The Turkish Penal Code)



### **List of Abbreviations**

TCKÖT	Türk Ceza Kanununun Ön Tasarısı (Draft Penal Code)
TCKT	Türk Ceza Kanunu Tasarısı (Penal Code Bill)
TESEV	Türkiye Ekonomik ve Sosyal Etüdler Vakfı
TL	Türk Lirası (Turkish Money)
TMK	Terörle Mücadele Kanunu (Anti Terror Act)
TRT	Türkiye Radyo Televizyon Kurumu
YD	Yargıtay Dergisi (Periodical)
WPI	Wholesale Price Index
YKD	Yargıtay Kararları Dergisi (Journal of the Decisions of the Court of Cassation)

## **List of Abbreviations**

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I hope that this book will provide its readers with a useful introduction to Turkish Criminal Law.

Prof. Dr. Feridun Yenisey

## **Acknowledgements**

## General Introduction

### §1. THE GENERAL BACKGROUND OF THE COUNTRY

#### I. Geography and Population

1. Turkey is a country situated between Europe and Asia. It covers an area of 779,452 km<sup>2</sup>: 755,688 km<sup>2</sup> in Asia and 23,764 km<sup>2</sup> in Europe.<sup>1</sup> Turkey's neighbors are: Greece, Bulgaria, Georgia, Armenia, Azerbaijan, the Islamic Republic of Iran, Iraq and the Syrian Arab Republic. Its capital is Ankara, and, for administrative purposes, Turkey comprises 81 provinces.

1. W. Huttenroth, "Geographische Grundlagen," in *Südosteuropa-Handbuch*, Band IV Türkei, ed. K.-D. Grothusen (Ruprecht in Göttingen: Vandenhoeck, 1985), 13.

2. The climate in Turkey varies widely. From east to west, Turkey is approximately 3,000 km wide. It has a continental climate in Middle Anatolia, while the climate on the southern and western coasts of Turkey is subtropical and Mediterranean.<sup>1</sup> The coast of the northern part of the Black Sea is always rainy. It is mountainous in the east, and while the high north-eastern plateaus have warm summers and severe winters, the central plateau has hot, dry summers and cold, wet winters. The average mean temperatures of summer and winter for Istanbul are 22°C and 6°C, Ankara 21°C and 1°C, Izmir 26°C and 9°C and Adana 26.5°C and 10°C.

1. Türkiye İstatistik Cep Yılığ, Statistical Pocketbook of Turkey 1990, TC Başbakanlık Devlet İstatistik Enstitüsü, Ankara 1991, 8.

3. The population of Turkey has been characterized by rapid growth. In 1927, the population was 13,648,000, with a density of 18 people per km<sup>2</sup>. In 1985, the population was 44,737,000, with a density of 56 people per km<sup>2</sup>. In 1990 the population of Turkey had grown to 56,969,000. According to official estimates at mid-year 1991, the population was 57,326,000, and the population density was 73.5 per km<sup>2</sup>. According to the 1990 census, the populations of the principal cities were: Ankara 2,559,471, İstanbul 6,620,241, and Izmir 1,757,414. According to the 1995 census, the national population had risen to 63,405,326.

Population in 2007 is estimated at 71,158,647, in 2009 estimation is at 74.815.707<sup>1</sup> (2007 growth rate: 1.0%; birth rate: 16.4/1,000; infant mortality rate: 38.3/1,000; life expectancy.

Although the principal language is Turkish, spoken by 90% of the population, there has been and remains no restriction on the rest of the population to speak their “different language” in their daily life. In 1928, Latin characters of written Turkish-language were introduced to replace the Arabic characters. The language of instruction in schools is Turkish. In 1988, the literacy rate in Turkey was 77%.<sup>2</sup> This rate increased to 93.89% in 2000.<sup>3</sup>

Islam is the religion of 99% of the population. However, Turkey is a secular State. Islam was entrenched in the 1924 Constitution as Turkey’s official religion, but an amendment in 1928 removed this provision.

In 1986, an estimated 100,000 Christians were living in Turkey. There is also a small Jewish Community in Turkey living chiefly in İstanbul and İzmir.<sup>4</sup>

1. <www.nvi.gov.tr>.

2. R. Keleş, “Population Structure,” in *Südosteuropa-Handbuch Band IV Türkei*, ed. K.-D. Grothusen (Ruprecht in Göttingen: Vandenhoeck, 1985), 473.

3. Statistical Yearbook 2009, 34.

4. The Europa World Year Book 1993, 34th edn, vol. II (London: Europa Publication Limited, 1993), 2847.

## II. Economic Orientations

4. In 1927, during the period of the new Turkish Republic, there was no industry in Turkey. Beginning in 1927, the State provided for new factories. Five-year plans were introduced under Soviet influence.<sup>1</sup> Between 1950 and 1960 there was a growth of 7.7% per year, but at the same time there was a high rate of inflation.

1. W. Gumpel, “Wirtschaftssystem und Wirtschaftsentwicklung,” in *Südosteuropa-Handbuch Band IV Türkei*, ed. K.-D. Grothusen (Ruprecht in Göttingen: Vandenhoeck, 1985), 327.

5. The political strife and labor strikes of the 1970s caused inflation to rise by more than 100%. At the request of International Monetary Fund (IMF), reforms relating to the Market Economy were made by the Demirel Government in January 1980, and these were continued by the military regime after September 12, 1980.<sup>1</sup> The program had positive effects on the Turkish economy.

In 1993, the economy grew between 7% and 8%. The Çiller administration had undertaken a privatization drive aimed at strengthening Turkey’s market orientation. Inflation was 71% in 1993.

The growing costs of combating the separatist movement often involved in organized crime in the southeast, and unfavorable external conditions related to the Gulf War, threatened Turkey’s economic gains. Negative developments in this light led the Turkish Government to introduce a Stabilization Package on April 5, 1995, focused on the reduction of deficits in the public sector. With the introduction of the Customs Union with the European Union (EU) and stabilization in political life after the 1995 Elections, the Turkish economy grew in 1996. In 1997, Gross National Product (GNP) increased by 8.3%; however, growth slowed in 1998 due to the investment contraction that resulted from the economic crisis in the Russian Federation, and again in 1999 due to the earthquakes of August 17 and November 12.

Thus, a fiscal adjustment program was initiated by the end of 1999 with the IMF. By the end of 2002, significant progress had been made toward achieving the goals

of the program, by means of lowering inflation rates for the 12 month Current Price Index (CPI) and Wholesale Price Index (WPI), to single digits (about 5%–7%).<sup>2</sup>

Economic summary of 2005: GDP/PPP: 552.7 billion USD; per capita USD 7,900; real growth rate: 5.1%; inflation: 7.7% (compared to 8.4 in 2007); unemployment: 10% (plus underemployment of 4.0%); arable land: 30%; agriculture: tobacco, cotton, grain, olives, sugar beets, pulse, citrus, livestock; labor force: 24.7 million; note: about 1.2 million Turks work abroad; agriculture 35.9%, industry 22.8%, services 41.2% (3rd quarter, 2004); industries: textiles, food processing, autos, electronics, mining (coal, chromite, copper, boron), steel, petroleum, construction, lumber, paper. Natural resources: antimony, coal, chromium, mercury, copper, borate, sulphur, iron ore, arable land, hydropower; exports: USD 72.49 billion f.o.b. (2005 est.): apparel, foodstuffs, textiles, metal manufactures, transport equipment; imports: USD 101.2 billion f.o.b. (2005 est.): machinery, chemicals, semi-finished goods, fuels, transport equipment; major trading partners: Germany, UK, US, Italy, France, Spain, Russia, China (2004).

1. Z.Y. Hershlag, "Economic Policies," in *Sudosteuropa-Handbuch Band IV Türkei* ed. K.-D. Grothusen (Ruprecht in Gottingen: Vandenhoeck, 1985), 353.
2. <[www.turkey.org/business/economy](http://www.turkey.org/business/economy)>.

### III. Political System

6. Turkey is a Republic (Article 1, AY). It is described in Article 2 of the Turkish Constitution<sup>1</sup> as "a democratic, secular and social state governed by the rule of law."<sup>2</sup> According to Article 3, the Turkish State is an indivisible whole with its territory and nation. The provision establishing the form of the State as a Republic cannot be amended, nor can such amendments be proposed.

Sovereignty is vested in the nation unconditionally and without reservation, and the nation exercises its sovereignty through the authorized organs as prescribed by the principles laid down in the Constitution. The right to exercise sovereignty cannot be delegated to an individual, group or class. No person or agency may exercise a State power that does not emanate from the Constitution.

Everyone possesses inherent fundamental rights and freedoms that are inviolable and inalienable.

The fundamental objectives and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace and happiness of the individual and society; and to strive to depoliticize them.

1. E. Özbudun, "Constitutional Law," in *Introduction to Turkish Law*, ed. Ansay, Tuğrul & Wallance, Don, Jr., 3rd edn, Ch. 2 (Deventer: Kluwer, 1987), 34.
2. C. Rumpf, *Das Rechtsstaatsprinzip in der türkischen Rechtsordnung* (Bonn, Berlin: Bouvier, 1992), 373 et seq.

7. The Turkish Grand National Assembly (TBMM) has legislative authority. There is no longer a second assembly, like the Senate, which existed under the 1924 Constitution.

The deputies are elected directly in accordance with the Electoral Law (No. 2839). Every Turkish citizen over the age of 25 (before the 2002–4777 amendment, it was 30) is eligible to be appointed deputy. Those who did not finish primary school are banned from public service. Also excluded are the following: people who have been sentenced to a prison term of one year or more or to lengthy imprisonment because of an intent crime; people convicted of dishonorable offenses such as embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust, fraudulent bankruptcy; or those convicted of smuggling, conspiracy in official bidding or purchasing, or of offenses related to the disclosure of State secrets. Finally, people are barred from office if they have been involved in terrorist (the words “ideological and” have been repealed by the Act 2002–4777) activities or inciting and encouraging such activities. If they have been convicted by the judgment of the court for such crimes, they are not eligible to be elected as a deputy, even if they have been granted amnesty or pardon (Article 76, AY).

The term of office in the Assembly is five years (Article 77, AY). The Turkish Grand National Assembly has control over the Executive Body through debate in Parliament and parliamentary investigation<sup>1</sup> (Article 98, AY).

1. E. Özbudun, “Constitutional Law,” in *Introduction to Turkish Law*, ed. Ansay, Tuğrul & Wallace, Don, Jr., 3rd edn, Ch. 2 (Deventer: Kluwer, 1987), 46.

#### IV. Form of Government

8. The Executive Body is composed of a President of the Republic (Article 104, AY) and a Council of Ministers (Article 109, AY). The President has no political or criminal responsibility (see *infra*, paragraph 93 for exceptions). According to the 2007 Amendment, the President shall be elected for five years, and his term shall be renewable.<sup>1</sup>

1. V. Bıçak & Z. Arslan, *Constitutional Law: Turkey* (Holland: Kluwer Law International, 2004).

#### V. The Constitution: Recent Amendments

9. After the approval by the Turkish Nation of a referendum on November 7, 1982, a new Constitution was put into force by the Law No. 2709. Meanwhile, there have been sixteen amendments until the most recent amendment in 2010.

The 1982 Constitution was drafted under the military regime and was generally regarded as an obstruction of Turkey’s democratization. For this reason there were no less than nine reform packages between 2002 and 2004, which brought important improvements.

Turkey’s aim of EU Membership has been an important motivation for many recent constitutional reforms. In fact, under the slogan of Democratization, the government<sup>1</sup> has started reforms in many areas of social life. However, in the long run, the main aim is to replace the current Constitution and make a new one.

1. M.S. Gemalmaz, *Türk Kiyafet Hukuku ve Türban: Tarihçe, İdeoloji, Mevzuat, İçtihat, Siyaset: AİHK ve AİHM Kararları ve Değerlendirilmesi* (Istanbul: Legal Yayıncılık, 2005).



10. In 2010 some provisions of the Constitution<sup>1</sup> were amended by the Law No. 5982 dated 7/5/2010, which was voted as a package and approved by referendum on September 12, 2010. The new provisions entered into force.

The amendment package consists of 26 articles. Last Article is the commencement article. Article 25 explains the application of the new regulations concerning the composition and competences of the Constitutional Court and the Supreme Council of the Judges and Prosecutors. Article 24 repeals the “Provisional Article 15,” which provided judicial immunity for the leaders and for civil or military bureaucrats serving under the military regime of the September 12, 1980 Military Intervention.<sup>2</sup> Articles 1–23 of the package result the following amendments in the Constitution:

Equality before the law (Article 10, AY):

The second paragraph of Article 10, which was amended in 2004, read as follows: “Men and women shall have equal rights. The state has the duty that this equality is put into practice”. With the reform of 2010 this paragraph has been complemented with the following sentence: “Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.” Furthermore, another paragraph has been added to this Article: “Measures taken for the children, the elderly and the disabled persons, widow spouses and orphans of persons who died in war or on duty and incapacitated persons and veterans cannot be considered as contrary to the principle of equality.” Thus this paragraph offers a constitutional basis for affirmative action for women, children and for widows of soldiers killed at war and for veterans.

Protection of personal data (Article 20, AY):

The reform of 2010 introduced a new constitutional right “to request the protection of personal data”: “Everyone shall have the right to obtain information about data concerning him, to access to or request the rectification and erasure of these data and to be informed about whether these data are used in conformity with envisaged purposes.” Personal data processing shall be achieved on the grounds provided by law or by the consent of the data subject. Thus access, alteration, erasure and processing of personal data<sup>3</sup> shall be aim oriented and regulated by law.

Freedom of movement (Article 23, AY):

The right to leave the country shall only be limited by the decision of a judge on account of a criminal investigation or prosecution only. Citizens of the Turkish Republic can not be prevented from leaving the country on the ground that they have not fulfilled their civic obligations. This amendment thus restricts the grounds for limitations to the freedom of movement of the Turkish citizens. For instance, persons accused of not having fulfilled their tax obligations can go to a foreign country without being stopped at the borders, unless there is a court order prohibiting them to leave the country.

Rights of children (Article 41, AY):

There is an enlargement in child’s rights: “Every child has the right to adequate protection and care and the right to have and maintain a personal and direct relation with his parents unless it is contrary to his high interests.”

Amendments related to the fundamental rights and duties in connection with labour relations and conditions: The first paragraph of Article 51 AY has been deleted and simultaneous membership in more than one labor union in the same sector has become possible (Article 51, AY).

Article 53, AY:

Civil servants and public officials gained the right of collective bargaining. However, in the case of rising a dispute between the civil servants and the government, the parties may apply to the “Public Officials Arbitration Board” whose decisions shall be final and have the force of a binding collective agreement.

Article 54, AY:

The Right to strike has been extended and the possibility of a lockout limited. The labor union shall no longer be liable for any material damage in a workplace, ensuing from deliberately negligent behavior of the workers and the labor union during a strike. “Politically motivated strikes and lockouts”, “solidarity strikes and lockouts”, “occupation of work premisses”, “labour go-slows” and “other forms of obstructions” are no longer prohibited.

Article 69, AY: A proposed amendment on making it difficult to dissolve a political party did not pass.

The creation of an “Ombudsman” (Article 74, AY):

The title of Article 74 has been changed into “Right to petition, right to information and appeal to the ombudsman”. The Ombudsman shall act as a mediator between state and citizens, and assess complaints about the functioning of the administration. The function of Ombudsman shall be created under the Turkish Grand National Assembly Presidency. The Chief Ombudsman shall be elected by the Parliament for four years. The Constitution also regulates the required votes during the election.

Loss of membership of Parliament (Article 84/5, AY):

This provision of the Constitution, entitled Loss of Membership had a fifth paragraph with the following wording, which has now been removed: “The membership of a deputy whose statements and acts are cited in a final judgment by the Court of Constitution as having caused the permanent dissolution of this party shall terminate on the date when the decision in question and its justification are published in the Official Gazette. The speaker of the Turkish Grand National Assembly shall immediately take the necessary action concerning such decision and shall inform the plenary of the Turkish Grand National Assembly accordingly.” If a political party is banned from the Parliament, the members of this party can still stay in the Parliament as independent members; only the individuals, who caused the dissolution of their party shall lose their membership.

Article 125 AY:

The amendment within the framework of the executive organ intends to strengthen the principle of the rule of law by expanding the scope of judicial review of the administration. Until 2010 Paragraph 2 of Article 125 read: “The acts of the President of the Republic on his or her own competence, and the decisions of the Supreme Military Council are outside the scope of judicial

review.” The new rule opens the way of legal remedies with respect to the decisions of the Supreme Military Council. This means that decisions of the Supreme Military Council regarding, for instance, expulsion from the Armed Forces are now open to judicial review.

Another change in this article concerns the limits of judicial review. The first sentence of Paragraph 4 of Article 125 originally stated that: “Judicial power is limited to the verification of the conformity of the actions and acts of the administration with the law.” With the 2010 constitutional amendment it now also provides that: “ ... , and in no case the judiciary can inquire into the expediency.”

Article 128:

Amendment to Article 128 is closely related with the amendment to Article 53, allowing public servants and other public employees to conclude collective agreements. Paragraph 2 of Article 128 provides that: “The qualifications of public servants and other public employees, procedures governing their appointments, duties and powers, their rights and responsibilities, salaries and allowances, and other manners related to their status shall be regulated by law.” The following sentence has been added: “ ... without prejudice to provisions of collective agreements concerning financial and social rights.”

Article 129/3, AY:

Paragraph 3 of Article 129 prohibited to apply to a legal remedy against disciplinary sanctions of “warning” and “reprimand” imposed against public servants. The amendment abolishes this exception.

Article 144, AY:

Supervision of the judiciary and public prosecutors by Ministry of Justice has now increased.

Jurisdiction of military courts and military disciplinary courts (Article 145, AY):

Military courts and military disciplinary courts shall only have jurisdiction for crimes committed by military personnel and related to military duties. By contrast, crimes against the security of state, the constitutional order and its functioning, allegedly committed by military personnel, shall be tried by civil courts only. Except in times of war, non-military persons shall not be tried by military courts.

Structure of the Court of Constitution (Article 146, AY):

The constitutional amendment also changes the composition of the Constitutional Court. The number of members of the Court increases from 11 to 17. Moreover, the draft no longer provided for substitute members, whereas originally the Court used to comprise 4 substitute members. According to the repealed provision, all 11 regular and 4 substitute members of the Court were elected by the President either among the candidates nominated by the high courts as well as the Council of Higher Education, or on its own discretion. Now, the new law provides that three judges of the Constitutional Court shall be elected by the Turkish Grand National Assembly, two of which from among the candidates nominated by the Court of Accounts and a third one from among the candidates nominated by the presidents of the bar associations. In addition, 14 members of Constitutional Court shall be elected by the President who shall

wield his appointing power directly for 4 members and indirectly for 10 members. In particular, the President shall elect the former 4 members of the Constitutional Court on his own discretion among senior administrative officers, lawyers, judges and public prosecutors of the first degree, and reporting judges of the Constitutional Court. He shall elect the other constitutional judges from among the three candidates nominated by the following institutions: the Court of Cassation (3 members), the Council of State (2 members), the Military Court of Cassation (1 member), the Supreme Military Administrative Court (1 member), and the Council of Higher Education (3 members). According to the new rules, the members of the Constitutional Court shall serve for a single term of 12 years, without possibility of renewal.

Furthermore, the constitutional amendment introduces a constitutional complaint procedure, which enables individuals to access to the Constitutional Court directly. There are three cumulative application conditions: a) One may apply to the Constitutional Court on the grounds that one of his fundamental rights and freedoms is violated by public authorities; (b) The concerned right or freedom, which is guaranteed by the Constitution, must be enumerated in the European Convention on Human Rights; (c) Before making the individual application, ordinary legal remedies must be exhausted.

Finally, the Constitutional Court, when functioning as Supreme Court, used to have the power to try high-ranking officials, including the President, members of the Council of Ministers, as well as judges and prosecutors of the high courts. According to the 2010 amendment, the Speaker of the Turkish Grand National Assembly and the Chief of Staff, the Commanders of the Land, Naval and Air Forces and the Commander of the Gendarmerie shall also be tried by the Constitutional Court in its capacity as the Supreme Court.

Article 154, AY:

The Military Court of Cassation shall be independent. The words the basis of “military needs” have been removed from the text.

The composition of the Supreme Council of Judges and Prosecutors (Article 159, AY):

According to the repealed provision the Supreme Council of Judges and Prosecutors consisted of the Minister of Justice, the Undersecretary of the Minister of Justice, 5 regular and 5 substitute members, chosen by the President from among candidates nominated by the Court of Cassation and the Council of State. The 2010 amendment increased the number of the members of the Supreme Council of Judges and Prosecutors up to 21 regular and 10 substitute members. 15 regular and 10 substitute members shall be elected by the Court of Cassation, the Council of State, the Justice Academy, ordinary and administrative judges as well as public prosecutors of the first instance. The President shall elect 4 members from amongst senior public servants, practising lawyers, and law professors. The position of the Minister of Justice as the Chairman of the High Council and the Undersecretary of the Minister of Justice as member has not been changed. Finally, the Supreme Council of Judges and Prosecutors has been divided into 3 chambers.

Decisions of the Supreme Council of Judges and Prosecutors regarding the prohibition of profession (infra, para. 19) shall be subject to judicial review,

whereas the repealed regulation did not provide any legal remedy against these decisions.

1. To be precise, the amendment concerned nine articles related to judiciary, seven related to fundamental rights, three related to the executive, two related to the legislature, one related to general provisions and one related to financial and economic rights.
2. The abolishment of the Provisional Art. 15 immunity has only a symbolic meaning and shall not result in criminal prosecutions as statute of limitations applicable to the alleged crimes has already expired. On the other hand, there is the principle of non retroactive application of criminal law (infra, para. 71), which applies in all legal systems that are based on the rule of law.
3. S. Atak, Kişisel Verilerin Korunmasına İlişkin Avrupa Birliği Yönergesinin Temel Özellikleri (Sayı: Bahçeşehir Üniversitesi Hukuk Fakültesi Kazancı Hakemli Hukuk Dergisi, Temmuz Ağustos 2009), 59–60, 200. A. Döner, Şeffaf Devlette Bilgi Edinme Hakkı ve Sınırları (İstanbul: Vedat Kitapçılık, 2010). S. Kili, Turkish Constitutional Developments and Assembly Debates on the Constitutions of 1924 and 1961 (İstanbul: Robert College Research Centre, 1971). N. Yüzbaşıoğlu, Anayasa Hukuku El Kitabı (İstanbul: Beta, 2006).

## §2. CRIMINAL LAW, CRIMINAL JUSTICE AND CRIMINAL SCIENCE

### I. Definitions and Forms of Criminal Law

#### A. General Criminal Law

11. Criminal law consists of substantive criminal law, criminal procedure law and law on execution of punishments. All these branches of general criminal law interact with each other and form a whole system (Ceza Adalet Sistemi; CAS).

#### B. Substantive Criminal Law

12. Substantive criminal law (maddi ceza hukuku) regulates the general principles of crime. The related principles are contained mainly in the First Book of the Turkish Penal Code (Articles 1–75, TCK). The crimes are defined in Book Two (Articles 76–345, TCK) (infra, paragraphs 177–195).

13. Until 2005 criminal offenses were divided into two categories: felonies (cürüm) and misdemeanors (kabahat). Since 2005, the new Penal Code regulates only crimes (suç). According to the principle of legality, offenses (and their penalties) must be provided and clearly defined by law. There is a general Penal Code and many special regulations in other laws, such as the Military Code and many penal statutes covering specialized fields.

The new Turkish Penal Code (TCK) applies to all penal legislation (Article 5, TCK).

### C. Criminal Procedure Law

14. Criminal procedure law (ceza muhakemesi hukuku) deals with the rights of the accused and the duties of the State to combat crime. It tries to reach a balance between these two requirements. The old Turkish Code of Penal Procedure (CMUK) was a translation of the German Code of Criminal Procedure as it was in 1929. This Code was repealed in 2005 and replaced by a new Penal Procedure Code (CMK), which entered into force on June 1, 2005.

### D. Law on Execution of Sanctions

15. The enforcement of criminal judgments is not a separate branch of criminal law. There were some provisions on the enforcement of criminal judgments in the repealed Code of Penal Procedure. There used to exist a Code on Enforcement of Punishments (CIK), which originated in 1965 and regulated the sanctioning system. However, the execution of prison penalties was not regulated in detail in this code. This field of law was subject to government ordinances.

In 2005, the old Code on Enforcement of Punishments and the existing government ordinances were replaced by the Bill on Corrections, prepared by Dönmezer Commission in 2002 (infra, paragraph 40). This law regulates inmates' rights and obligations, and has been in force since June 1, 2005 under the name "Code on Execution of Punishments and Security Measures" (CGIK).

## II. Overview of the Criminal Justice System

### A. Prosecution Services

#### 1. The Police and Gendarmerie

16. In Turkey, internal security and judicial duties are performed by the police and gendarmerie (infra, paragraph 309). With respect to the investigation of criminal offenses, both the police and the gendarmerie are under the supervision of the Public Prosecutor.

#### 2. The Public Prosecution Service

17. The Public Prosecutor has to prosecute or "bring a case" if there is sufficient evidence indicating that the accused individual (Article 160/1, CMK) committed a crime.<sup>1</sup>

1. The Public Prosecution Service was subject to the supervision of the Ministry of Justice (Art. 148/3, repealed CMUK). This provision is not included in the new Code. The Chief Public Prosecution Service is attached to the District Courts of General Jurisdiction.

## 3. Private Prosecution

18. There was a second procedure under the name of private claim (şahsi dava, Article 344, repealed CMUK) (infra, paragraph 320), whereby the injured party was entitled to bring both a civil and a criminal complaint against the offending party. This provision is not included in the new Code.

## B. Justices and Courts

19. The Supreme Council of Judges and Public Prosecutors is a Constitutional Council which decides all personnel matters relating to Judges and Prosecutors (Article 159, AY). It is presided over by the Minister of Justice. The undersecretary to the Minister of Justice is an ex officio member of the Council.

The recent 2010 amendment in the Constitution has changed the structure of the Supreme Council of Judges and Public Prosecutors (supra, paragraph 10). As indicated by the Council of Europe Recommendation R(94)12, the independence and impartiality of judges is a precondition of the fair trial under Article 6/1 of the European Convention on Human Rights (ECHR). An efficient separation of executive, legislative and judicial powers is an important issue: a tribunal must be independent from the executive.<sup>1</sup> Judicial independence requires liberty from any connection, tendency and prejudice, which may effect the fairness of the trial.<sup>2</sup>

1. ECHR Rigneisen v. Austria, para. 111.

2. B. Yakut, "The Independency of the Judiciary and Separation of Power: Evaluation of the Structure of the High Council in the Light of the Jurisprudence of the ECHR and International Documents," Law and Justice Review 1, no. 1 (2010): 217.

## 1. Justice of the Peace

20. The Justice of the Peace (sulh hakimi) has jurisdiction during the preliminary investigation of both civil and criminal actions if they involve the deprivation of the right to freedom and privacy.

There has been no judicial inquiry in Turkish Penal Procedure Law since 1985.

## 2. Trial Jurisdictions

21. The Court of Peace, the Court of General Jurisdiction and the (infra, paragraph 297) have trial jurisdiction over criminal matters in the first instance. There are no lay judges in the Turkish court system. "The chamber for organized crime of the court of assize" (Article 250, CMK) (previously the State Security Court) has jurisdiction over organized crime, crimes against the State and crimes of terror. Military trials are conducted by military and disciplinary courts. These courts are entitled to try the military offenses of military personnel and those offenses committed against military personnel or in military areas, or offenses connected with military service and duties.



As of January 2011, the Turkish court system does not include a Court of Appeal. Although regulated by the new laws, the regional appeals' courts have not been activated yet. The Court of Cassation deals with the legal side of a judgment. It does not examine the facts found by the trial judge. However, there is a wide variety of extraordinary post-trial remedies available (*infra*, paragraph 418).

### C. The Defense

#### 1. The Bar

22. In Turkey there is a Bar association in each province as well as a National Bar Association.<sup>1</sup> In addition to providing free legal assistance to the poor, the Bar has become a very important institution since the amendment of the Code of Criminal Procedure in 1992. Today, the Bar appoints a lawyer for the accused in the preliminary investigation before the police hearing should the accused request one (*infra*, paragraph 353).

1. On Dec. 31, 1992, there were 31,760 (8,548 female and 23,212 male) attorneys in Turkey (TC Maliye Bakanlığı, *supra*, 218). In 2008 there were 73,962 (26,716 female, 47,246 male) lawyers registered with the Bar Associations in Turkey (Judicial Statistics 2008, Ankara 2010, 24).

#### 2. The Defender of the Accused

23. The profession of attorneys is regulated by Act No. 1136 of 1969, which was amended in 2001 by Act No. 4667. The “independence” of attorneys from the government has been assured. An examination to obtain the right to exercise the profession was introduced. However, the examination was postponed until the first-year students in 2001 were to graduate (Act No. 4765 dated 2002), and it was abolished in 2006 because of the political pressure created by Bar Associations as the law did not foresee how the questions for this examination ought to be prepared.

The attorney for an accused has a special “defender status” in criminal cases. He is not the sole representative but has rights regulated in the Criminal Procedure Code (*infra*, paragraph 313).

### D. Assisting Institutions to the Criminal Justice

24. The Ministry of Justice (Adalet Bakanlığı) is responsible for the enforcement of Criminal Codes and supervises the Public Prosecution Service. According to the law, the Minister of Justice is entitled to give orders to the Public Prosecutor at the Court of Cassation to bring a case to the court (Article 309, CMK), but it may not give an order not to prosecute.

25. A centralized Institute of Legal Medicine, supervised by the Ministry of Justice (Adli Tıp Kurumu), gives scientific reports about evidence when a court asks for it.<sup>1</sup>



1. N. Alkan, 5237 Sayılı Türk Ceza Kanunu'nun Adli Tıp Yönünden Değerlendirilmesi (Sayı: Türkiye Barolar Birliği Dergisi, sayfa Mayıs/Haziran, 2005), 58, 149. M. Gönübol & T. Ataöv, Turkey in the United Nations, a Legal and Political Appraisal (Ankara: Ajans Turk Press, 1960). O. Polat, Klinik Adli Tıp-Adli Tıp Uygulamaları (Ankara: Seçkin Yayınları, 2004).

26. The Turkish prison system includes closed, half-closed, open and special penal institutions. After an inmate is classified as such, he is held under the supervision of the prison's staff (infra, paragraph 441).

27. Controlled liberty. There was formerly no organization for post-prison supervision in Turkey. If a prisoner was released from prison, he was not under any criminal justice control. Post-prison police supervision was abolished in 1987. Since June 1, 2005, the new Codes foresee a system of controlled liberty (denetimli serbestlik) (infra, paragraph 450) for several instances.

### III. Directions within Criminal Science

28. There has been a sharp rise in urbanization since the 1950s. The migration from rural areas to the cities still continues. The unplanned growth of cities has created new problems.<sup>1</sup> The numbers of police officers are insufficient to meet these new problems; moreover, not all are deployed with maximum efficiency.

Turkish criminal science is currently focusing a great deal on adjusting Turkish law to European standards. Many Turkish legal scholars study at European Universities. At the beginning of the century, the French influence was dominant. Today, in the field of criminal law, scholarly exchanges with German universities and institutions are prominent.<sup>2</sup> Books published in the Turkish-language expose Turkish lawyers to recent developments in the field of criminal law in Western Europe.<sup>3</sup> Since the Criminal Law Reform of 2005 there are plenty of new publications about the principles of the new criminal law. However, the new statutes have not yet been applied widely enough to form a new jurisprudence. Moreover, the expectation of a new Constitution after the election in June 2011 made the application of law uncertain. The directions of the principles of this "new Constitution" are not set by now.

The decisions of the ECHR have been affecting the development of law. US law also had some influence, as Turkey has adopted direct and cross-examination.

1. S. Dönmezer, "Criminology in a Small Community of Rapid Urbanization and Industrialization," in *Annales de la Faculté de Droit d'Istanbul* XXII, no. 38 (1972–1974): 55; N. Gürelli, "Urbanization and Crime," in *Annales De la Faculté De Droit D'Istanbul* XXII, no. 38 (1972–1974), 357.
2. S. Dönmezer, "Turkey," in *International Handbook of Contemporary Developments in Criminology*, ed. E.H. Johnson (Westport, Connecticut: Greenwood Press, 1983), 594.
3. H.-H. Jescheck, *Almanya Federal Cumhuriyeti Ceza Hukukuna Giriş* (İstanbul: Beta, 2007); A. Eser, *Son Yüzyıl İçinde Almanya'daki Ceza Düzenlemeleri, Geçmiş Bir Bakış ve Gelecekteki Eğilimler* (1989) Nos 1–2, 12.

## §3. HISTORICAL BACKGROUND

**I. Historical Development of Criminal Law****A. The Period of Islamic Law**

29. There is no evidence of the Islamic Law in the modern Turkey's Law today. However, during the Ottoman Empire (which lasted from 1300 until 1920), Islamic Law was the source of criminal law.<sup>1</sup> Rules were stipulated in a casuistic manner.<sup>2</sup> There was no complete and systematic penal code. Islamic law classified crimes into two groups.<sup>3</sup> Crimes listed in the first group (crimes against God) were defined and their punishments determined by the written sources of Islamic law. The second group comprised those crimes for which definitions and punishments were left to the discretion of the Sovereign. Judges or high-ranking officials were entitled to define and punish crimes in this category in their own names.<sup>4</sup>

During the later stage of the Ottoman Empire there were legislative efforts such as Mecelle (Civil Code) and the translation of Western codes. Reception was the main method of legislation at the time of the foundation of new Turkish Republic in 1920.<sup>5</sup>

During the period of Islamic Law, before 1839, the criminal justice system depended on courts with one judge (Kadı), and in principle no legal remedies existed. Only political pardon was possible. Even after the principles of Western European criminal law were introduced in the Ottoman Empire, secular law and Islamic law were applied side by side until Atatürk's legal reforms began in 1920. The court structure was based on the French model.

Turkey has a long history of political parties and elections. Mahmut II instituted a Consultative Assembly in 1838 in the form of a Supreme Council, which was charged with preparing new laws.<sup>6</sup>

1. F. Selle, *Prozessrecht des 16. Jahrhunderts im Osmanischen Reich* (Wiesbaden: Otto Harrossowitz, 1962), 9; F. Yenisey, "Ceza Yargılamalarında ve Adli Teşkilatta Cumhuriyet Öncesi Durum ve Cumhuriyetten Sonraki Gelişmeler," in *Atatürk Sempozyumu* (İstanbul: İstanbul Üniversitesi, 1981), 39; Atar, *İslam Adliye Teşkilatı, Ortaya Çıkışı ve İşleyişi* (Ankara: Diyanet İşleri Başkanlığı, 1982), 4; J. Krcmarik, *Beitraege zur Beleuchtung des islamischen Strafrechts* (Leipzig, 1904).
2. J. Starr, *Law As Metaphor: From Islamic Courts to the Palace of Justice* (Albany, US: State University of New York Press, 1992).
3. U. Heyd, *Studies in Old Ottoman Criminal Law* (Clarendon: Oxford, 1973), 18.
4. F. Yenisey, *Die Entwicklung im türkischen Strafrecht von 1960 bis 1983*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 96 (Berlin/Boston: Walter de Gruyter GmbH, 1984) Heft 1, 212.
5. G. Plagemann, *Von Allahs Gesetz zur Modernisierung per Gesetz, Gesetz und Gesetzgebungen im Osmanischen Reich und der Republik Türkei* (Berlin: Lit Verlag, 2009), 35.
6. E. Özbudun, "Political Parties and Elections," in *Südosteuropa-Handbuch Band IV Türkei*, ed. K.-D. Grothausen (Ruprecht in Göttingen: Vandenhoeck, 1985), 261.

## B. The Period of Secularization

30. The Decree of Reorganization (Tanzimat-i Hayriye Fermanı), known as the Noble Edict of Gülhane (Gülhane Hattı), of November 3, 1839, brought fundamental changes in the political structure of the Ottoman Empire.<sup>1</sup> Tanzimat (reorganization, literally “regulations”) began with the Edict of Gülhane and ended with the 1876 Ottoman Constitution. It was the period of centralization where the government in Istanbul began to influence more the provincial administration.<sup>2</sup> Following the reform movements in 1839, the Constitution of 1876 was adopted. After the founding of the Republic, the Constitutions of 1921, 1924, 1961 and 1982 were consecutively enacted.<sup>3</sup> At the time, family law was considered untouchable, but an attempt to prepare a criminal code was made.<sup>4</sup> The first modern Turkish Criminal Code was the Imperial Penal Code (Ceza Kanunname-i Hümayunu), published in 1858.<sup>5</sup> It was the Turkish translation of the French Penal Code of 1810 and it remained in force until 1926. This Code was the first systematic Western-styled code, and it contained a general theory of crime.<sup>6</sup>

1. N. Gürelli, “Introduction,” in *The Turkish Criminal Code* (London: Sweet and Maxwell, 1965), T. Ansay et al., (eds), *Nizamiye Mahkemelerinin Kuruluşu, Yapısı ve Hukuk Yargılama Usulü*, in *Argumentum* No. 3, 30; H.V. Velidedeoğlu, *Kurzer Überblick über das Strafrecht der alten und der neuen Türkei*, in: *Monatsschrift für Kriminal-psychologie und Strafrechtsreform*, Bd. XXVI, Heft 3-4 (Heidelberg, 1935), 158.
2. A. Miller, *Legislating Authority, Sin and Crime in the Ottoman Empire and Turkey* (New York, London: Routledge, 2005).
3. E. Özbudun, “Constitutional Law,” in *Introduction to Turkish Law*, ed. T. Ansay & D. Wallace, Jr., 3rd edn, Ch. 2 (Deventer: Kluwer, 1987), 31.
4. A. Akgündüz, *Mukayeseli İslam ve Osmanlı Hukuku Külliyyatı* (Diyarbakır: Dicle Üniversitesi Hukuk Fakültesi, 1986), 91 et seq.; W. Jaenecke, *Die Grundprobleme des türkischen Strafrechts* (Berlin, 1918).
5. E. Nord, *Das türkische Strafgesetzbuch vom (Aug. 9, 1858, Berlin, 1912).*
6. A. Gökçen, *Tanzimat Dönemi Osmanlı Ceza Kanunları ve Bu Kanunlardaki Ceza Mueyyideleri* (Istanbul, 1989).

## C. The Period of the Turkish Republic: 1921–1960

31. After the First World War, Turkey was occupied by several nations. The resistance against occupation evolved into a struggle for independence. Kemal Atatürk called for an organized, armed resistance. On January 20, 1921, a Constitution was ratified and the Turkish Grand National Assembly declared that it had the right to make laws and declare war. During the political development from Ottoman Empire into a nation State, Islam served as a source of national unity. After the establishment of the Republic in 1923, religion became a means of protest against the authoritarian one-party regime. There was latent opposition to the secularization program of the new government, and some armed rebellions by various sectarian groups took place. Since the 1960s religion has become less prominent an issue, as social and political conflicts revolved around the division between the political left and right.<sup>1</sup> However, in more recent years, extremist religious groups have gained political power again.

1. B. Toprak, *Islam and Political Development in Turkey* (Leiden: Brill, 1981), 124; C. Rumpf, “Laizismus und Religionsfreiheit in der Türkei,” *Forschungsinstitut für int. Politik u. Sicherheit* (Ebenhausen, 1987).

32. The Republic was founded in 1923 and the Constitution amended in 1924. Until 1946, Turkey was governed by a one-party parliamentary system. During the period of National Liberation two elections were held. After the second election, in 1920, Mustafa Kemal formed a majority group without opposition. The 1924 Constitution made the transition from a one-party system to a multi-party system possible. With a few changes, the 1924 Constitution laid down the guidelines for the organization of the whole Turkish State until 1960.

33. The secular Constitution of 1924, the passage of new legislation and the creation of a new Faculty of Law in Ankara were important changes for Turkey.<sup>1</sup> The new regime abolished the Sultanate in November 1922 and declared Turkey a Republic on October 29, 1923. The Ottoman Caliphate was abolished in March 1924. Atatürk<sup>2</sup> pursued a radical program of reform and introduced modernization that included the abolition of Islamic courts (in 1924), the secularization of the State (in 1928), religious instruction in schools, the emancipation of women, the introduction of a Latin alphabet and the adoption of the Gregorian calendar.<sup>3</sup>

The first Turkish Penal Code of the Turkish Republic, based almost entirely on the Italian Penal Code of 1889, was enacted on March 13, 1926 and put into effect on July 1, 1926 (Law No. 765). The Turkish Criminal Code has been amended many times, and more than half of its articles have been changed. After the last amendment was made on January 3, 2003, it was repealed by the new Turkish Penal Code in 2005.<sup>4</sup>

1. V. Versan, “The Kemalist Reform of Turkish Law and its Impact,” in *Atatürk and the Modernization of Turkey*, ed. J.M. Landau, Ch. 16 (Boulder, Colorado: Westview, 1984), 249.
2. J.M. Landau, *Atatürk and the Modernization of Turkey* (Colorado: Westview Press, 1984).
3. *The Europe World Year Book 199*, vol. II (Europa Publications Limited, 1993), 2835.
4. An English translation of the new Turkish Criminal Code may be found in Seçkin (publisher), V. Bıçak & E. Grieves, *Türkçe-İngilizce Türk Ceza Kanunu* (Ankara, 2007), and the translation of the repealed Penal Code in the American Series of Foreign Penal Codes, No. 9, *The Turkish Criminal Code* ed. Ansay, Yücel & Friedman (London: Sweet and Maxwell, 1965).

34. Until 1943 elections took place under a single party, the Republican Populist Party (Cumhuriyet Halk Partisi, CHP). After 1945, the multi-party system developed, and the Democratic Party (Demokrat Parti, DP) was founded. In 1950, the DP obtained 53.3% of the vote, and the CHP received 14.2%. In the period from 1950–1960, the DP lost its popularity.

#### D. Turkish Republic: 1960–2011

##### 1. Military Regime of 1960

35. The military “National Unity Committee” (Milli Birlik Komitesi), which took power<sup>1</sup> on May 27, 1960, appointed a commission to prepare the draft of a

new Constitution.<sup>2</sup> After the military intervention in 1960,<sup>3</sup> a new Electoral Law was adopted. In the elections of 1965, the newly formed Justice Party (Adalet Partisi, AP) won on absolute majority of the votes. From 1961–1980, eight parties were represented in the Turkish Grand National Assembly. However, the total percentage of the popular votes went to the two major parties, AP and CHP. The Constitution was approved by national referendum and adopted on July 20, 1961.<sup>4</sup> The objective of this Constitution was to safeguard the basic rights and liberties of the citizen.<sup>5</sup> This goal was achieved, in principle, by the adoption of the idea of supremacy of the Constitution, the review of the constitutionality of legislative Acts by a Constitutional Court, the bicameral legislature, an electoral system based on proportional representation and the separation of powers.<sup>6</sup> Freedom of broadcasting was one of the fundamental rights, and administrative status was given to the broadcasting service.<sup>7</sup>

The 1961 Constitution separated the Judicial Branch from the Legislative and Executive Branches and established a Supreme Council of Judges. The principle was adopted that only the law could restrict the fundamental rights and freedoms described in the Constitution.

1. W.F. Walter, *The Turkish Revolution 1960–1961* (Greenwood, 1963).
2. F. Yenisey & S. Tellenbach, *Zur strafrechtlichen Entwicklung in der Türkei* (Juristenzeitung, 1985), 378.
3. W.F. Weiker, *The Turkish Revolution 1960–1961* (Westport Connecticut: Greenwood, 1980), 1, et seq.
4. E. Hirsch, *Die Verfassung der Türkischen Republik* (Berlin: Frankfurt A.M., 1966).
5. W. Hale, “The Turkish Army in Politics, 1960–1973,” in *Turkish State, Turkish Society*, ed. A. Finkel & N. Sirman (London and New York, 1990), 53.
6. Y. Altuğ, “The Development of Constitutional Thought in Turkey,” in *Modern Turkey: Continuity and Change*, ed. A. Evin (Opladen: Leske Verlag, 1984), 231.
7. H. Şahin, *Broadcasting Autonomy in Turkey: 1961–1971* (Indiana University, 1974).

## 2. Military Regime of 1980

36. On September 12, 1980 the armed forces, led by General Kenan Evren, took over the government in a bloodless intervention.<sup>1</sup> They formed a National Security Council, which in 1982 introduced a new Constitution, approved in a popular referendum by a 91% majority. The Political Parties Law (Act No. 2820) was adopted in April 1983. The new political parties taking part in the elections were: the True Path Party (Doğru Yol Partisi, DYP), as the successor of AP; the Social Democracy Party (Sosyal Demokrasi Partisi, SODEP), which was transformed later into the Social Democratic Populist Party (Sosyal Demokrat Halkçı Parti, SHP) as the successor of CHP; the Motherland Party (Anavatan Partisi, ANAP); the Populist Party (Halkçı Parti, HP); and the Nationalist Democracy Party (Milliyetçi Demokrat Parti, MDP). The 1983 elections resulted in a victory for ANAP, with 45.15% of the votes.

Executive powers were assumed by the National Security Council with its President as Head of State.<sup>2</sup> The Consultative Assembly approved the new Constitution in September 1982, as did a referendum in November. It included provisions for a single-chamber legislature, a National Assembly with 400 deputies. In June 1987, a

constitutional amendment provided for an increase in the number of deputies from 400–450, and then in 1995 (Act No. 4121) up to 550. It also included the National Security Council (Milli Güvenlik Kurulu) (Article 118, AY as amended on December 3, 2001 by Act No. 4709). Before the 2001 amendment, the majority of the members were military and its decisions were binding.

During the period of the military regime and the ANAP Government, many essential laws were changed and new laws adopted. In April 1991, the Anti-Terror Act (Act No. 3713) was enacted.<sup>3</sup> This law (infra, paragraph 203) abolished Articles 140, 141, 142 and 163 of the (old) Turkish Penal Code, which forbade political propaganda activities. This Law also abolished the “Law About the Restrictions Related to the Use of Languages,” which prohibited the use in publications and demonstrations of foreign languages not recognized as official languages of the State. The Act on Education of Foreign Languages (Act No. 2923 of October 14, 1983) was amended by Article 11 of Act No. 4771, of August 3, 2002: “citizens of the Turkish Republic who speak a different language and dialect in their daily life are entitled to learn and teach this skill” without restriction.

Although (before the amendment in 2001) the Constitution prohibited amnesty for political crimes, the 1991 Anti-Terror Act tacitly granted amnesty (infra, paragraphs 213 and 454) for all crimes by means of a “conditional release from prison,” provided that the individual had served one-fifth of his prison term. As a result of the new bill, some 5,000 political prisoners have been released.

It is important to note that the amendments made in December 1992 to the Turkish Code of Penal Procedure have contributed to democracy and human rights. The accused now has the right to an attorney during police hearings, and his attorney has the unlimited right to see the accused’s files during the preliminary police investigation (infra, paragraph 314).

1. M.S. Gemalmaz, *The Institutionalization Process of the Turkish Type of Democracy* (İstanbul: Amaç Yayıncılık, 1989), 12. S. Tellenbach, “Zur Aenderung der türkischen Verfassung durch das Gesetz Nr. 4709 vom 3. Oktober 2001,” in *Verfassung und Recht in Übersee*, 35, Jahrgang, 4, Quartal (2002), 532–547. R. Akın, *Türk Siyasi Tarihi 1908–2000* (İstanbul: Vedat Kitapçılık, 2010). M. Aksoy, *Laikliğe Çağrı*; 2. (Ankara: Baskı, Gündoğan Yayınları, 1989). N. Anderson, *Law Reform in the Muslim World* (University of London: The Athlone Press, 1976), 235. T. Ateş, *Demokrasi, Siyasi Partiler ve Seçim* (İstanbul: Beta, 2007). N. Berkes, *The Development of Secularism in Turkey* (Montreal: McGill University Press, 537) J. Cousins, *Turkey: Torture and Political Persecution* (London: Pluto Press, 1973). M. Gemalmaz, *The Institutionalization Process of the “Turkish Type of Democracy” A Politico-Judicial Analysis of Human Rights* (1989). I. Giritli, *Fifty Years of Turkish Political Developments: 1919–1969* (İstanbul: Fakülteler Matbaası). I. Giritli, “Kemalism as an Ideology of Modernization,” in Landau, *Atatürk and Modernization of Turkey* (Colorado, 1984), 251.
2. In October 1981, a Consultative Assembly was formed to draft a new Constitution and to prepare plans for a return to parliamentary rule. It had 160 members (40 appointed directly by the National Security Council and 120 chosen by the National Security Council from candidates nominated by the governors of the 74 provinces). All former politicians were excluded.
3. S. Tellenbach, “Das türkische Antiterrorgesetz,” in *Zeitschrift für Ausländerrecht und Ausländerpolitik* (1991), 162.



## 3. Coalition Regimes After 1991

37. ANAP lost the elections in October 1991, and a coalition was formed with DYP and SHP.<sup>1</sup> President Turgut Özal died in April 1993 after completing a tour in Central Asia. Süleyman Demirel was elected President in May 1993, and Professor Tansu Çiller, chairperson of the True Path Party (DYP), became Turkey's first woman Prime Minister in July 1993.

Turkey's role in the post-cold war world has become important. In five former Soviet republics—Azerbaijan, Uzbekistan, Turkmenistan, Kazakhstan and Kyrgyzstan—Turkish is the spoken language. Georgia is the connection through the border at Sarp. Turkey is promoting itself to these republics as a model of a modern, democratic nation.<sup>2</sup> Turkey has formed an alliance on economic projects that joins the six nations bordering the Black Sea together.

The Welfare Party (Refah Partisi, RP) became the leading party, with 21% of the votes, in the December 1995 elections. An ANAP-DYP Anayol Coalition Government was formed on March 5, 1996 and lasted four months. Prime Minister Mesut Yılmaz submitted his resignation to President Süleyman Demirel on June 6, 1996, and Necmettin Erbakan formed the RP-DYP coalition Refahyol. The debates on fundamentalism in this period were the cause of social and political tension, and the National Security Council issued a warning in its meeting on February 28, 1997. Prime Minister Erbakan resigned on June 18, 1997, and Mesut Yılmaz, the ANAP Chairman, formed the new government on June 19, 1997, the ANAP-DSP-DTP Coalition, Anasol-D. An early election decision was taken with a majority at the Turkish Grand National Assembly, and a decision was taken for the general and local elections to be held together on April 18, 1999. The government was removed from power on November 25, 1998. Bülent Ecevit's minority government, winning a vote of confidence on January 17, 1999, worked until the election on April 18.

As a result of the election, Demokratik Sol Parti (DSP) increased its votes, and Nationalist Action Party (MHP) was the second party to get the greatest number of votes. The center-right parties such as ANAP and DYP suffered great losses of votes. In addition, the Virtue Party<sup>3</sup> (Fazilet Partisi, FP), which was founded after Welfare Party (RP) was abolished, could not maintain its percentage of votes. CHP could not enter the Parliament. The DSP-MHP-ANAP coalition government was formed on May 28, 1999. Under the chairman of Bülent Ecevit, the 57th Government handled important issues such as removing the military members of the State Security Courts, a constitutional amendment envisaging "International Arbitration" and the Social Security Reforms. This government has obtained noteworthy success in applying the economic stability program and initiating the harmonization process with the EU that was foreseen by the Helsinki Summit of 1999.

On August 17, 1999, western Turkey was devastated by an earthquake (magnitude 7.4) that left more than 17,000 dead and 200,000 homeless. Another huge earthquake struck in November.

There have been amendments in the Constitution and in the essential Laws to adjust the Turkish Law to EU standards.<sup>4</sup>

On June 18, 1999, by Act No. 4388, AY Article 143 was amended: military judge and prosecutor were removed from the panel of State Security Courts. Parallel to the amendment to the Constitution, "The Act on State Security Courts" was

amended (1999–4390) accordingly. The Act dated June 16, 2004, No. 5190 has abolished the State Security Courts.

In 2001, the Constitution was amended to include: the “right to a fair trial” (Article 36/1, AY as amended by “2001–4709”); a regulation on excluding factual findings obtained in violation of existing written Acts; a ban on the death penalty (except for war crimes, for crimes committed under circumstances of close threat of war and for acts of terrorism, which was later abolished in 2004); and a prohibition of deprivation of liberty for not being able to fulfill a contractual obligation (Article 38, AY as amended by “2001–4709”). The same provision already contained the principle of non-retroactivity of criminal Acts.

The independence of the judiciary (*infra*, paragraph 304) is a basic principle of Turkish constitutional law: no authority or individual may give orders to courts or judges relating to their judicial duties (Article 138, AY).

The Constitutional Court is independent of the legislative and executive bodies, and has judicial review over the constitutionality of enacted laws (Article 146, AY). During a pending trial, a plea of unconstitutionality of a law may be made to the court trying a case (Article 152, AY).

Ahmet Necdet Sezer, the President of the Constitutional Court, took over the presidency from Süleyman Demirel, whose term in office expired on May 16, 2000.

1. The Europa World Year Book 1993, vol. II (London: Europa Publications Limited, 1993), 2836.
2. T.B. Allen, “Turkey Struggles for Balance,” in *National Graphic*, vol. 185, no. 5 (May 1994), 12.
3. Virtue Party (FP) was also abolished later on June 22, 2001 (E. 1999/2, K. 2001/2, RG. Jan. 5, 2002/24631). In Turkey, parties are not allowed to advocate for the dictatorship of one social class. The Grand Chamber of the European Court of Human Rights ruled on Feb. 13, 2003 that there had been no violation of Art. 11 of the ECHR in dissolving Refah Partisi (The Welfare Party).
4. K. İçel, *Avrupa Birliğine Uyum Sürecinde Türk Ceza Hukuku* (2000). A National Program (Milli Program) on the way to EU was enacted on Mar. 19, 2001, RG. Mar. 24, 2001/24352.

#### 4. AK Party Regime After 2002

38. On August 2, 2002, the National Grand Assembly decided that early elections were to be held on November 3, 2002. At the outcome of the elections, the AK Party had 363 seats in the Grand National Assembly, CHP 178 had seats and independent representatives had nine seats. DSP, MHP, ANAP and DYP could not be represented. On November 28, 2002, AK Party formed the 58th Government under Prime Minister Abdullah Gül, who later submitted this post to Recep Tayyip Erdoğan and became the undersecretary for foreign affairs.<sup>1</sup>

In March 2003, US-Turkish relations were severely strained when Turkish Grand National Assembly narrowly failed to pass a resolution permitting the United States to use Turkish bases as a launching pad for the pending war against Iraq.<sup>2</sup> In November 2003, there were two terrorist attacks in Istanbul near two synagogues, and the British Consulate and a British bank were targeted as well.

In order to meet the standards of the EU membership, the Parliament passed laws in 2003 reducing the military’s role in political life and offered effective regret to the members of the terrorist organizations. With the reforms in 2004, Turkish State



television has broadcast the first local language programs and also abolished the death penalty in all cases.

By the Act No. 4709, other major changes were implemented. One such was the amendment to the Introductory article to the Constitution in order to ensure freedom of expression: the word “opinion” has been substituted by “actions.” Article 13, which generally regulated the limitations on civil rights, was limited to grounds to be listed in each related article of the Constitution. Article 36 AY was amended: “Illegally obtained factual findings may not be used as evidence at trial.” Article 38 AY was amended: “Death penalty has been abolished. Death penalty laws may be passed exceptionally only in times of war, or when there is a close threat of war, and for acts of terrorism.” “Individuals who are unable to pay a contractual debt may not be deprived of personal freedom.” The death penalty was removed from Turkish law in 2004 for every crime (Act dated May 7, 2004, No. 5170).

Provisional Article 15 placed an obstacle to bringing a lawsuit with respect to any decision or measure taken by the “National Security Council,” or any legislative activity from September 12, 1980 to the date of the formation of the “Bureau of the Turkish Grand National Assembly.” Act No. 4709 of 2001 abolished this exception.

Article 25 of the Act on the Constitutional Court brought in another obstacle prohibiting applications on the basis of unconstitutionality of Acts enacted during the September 12 Regime. The Constitutional Court abolished this provision on July 9, 2002.<sup>3</sup> Thus, the requirement of the ECHR that regulates free access to court is fulfilled.

In April 2007, Prime Minister Erdoğan nominated Foreign Minister Abdullah Gül as the ruling party’s candidate for president. Gül, however, failed to win the necessary two-thirds majority in the Parliament, and a constitutional court decision later nullified the vote, citing a lack of a quorum. The opposition boycotted the vote. Gül withdrew from the race in May. Gül was victorious in the third round of elections in August 2007.

1. Its leader, Recep Tayyip Erdoğan, was barred from becoming Prime Minister, however, because of a conviction for “inciting religious hatred” by reciting an Islamic poem at a rally in 1998. Another popular AKP leader, Abdullah Gül, served as Prime Minister until Turkish law was amended to permit Erdoğan to run for a seat in Parliament again, which he easily won. Gül resigned as Prime Minister, making way for Erdoğan.
2. The U.S. House Foreign Relations Committee passed a resolution labeling as genocide the incidents with Armenians in 1915 during World War I. President George Bush strongly urged members of the committee to vote against the resolution. In October 2007 terror attacks escalated in Turkey. In response, Parliament voted, 507 to 19, to allow the deployment of troops into northern Iraq. After a meeting of Prime Minister Erdoğan and President George Bush, Turkish fighter jets, with the help of the U.S. military intelligence, bombed areas in northern Iraq, targeting the terrorists in December 2007.
3. E. 2002/121, K. 2002/121, RG. Aug. 31, 2002.

## 5. Elections in June 12, 2011

39. Elections for the members of the Parliament has been held on June 12, 2011 with the participation of 15 political parties and with independent candidates, most of them backed by the Peace and Democracy Party (in order to circumvent the 10%

threshold) and few by Republican Populist Party (CHP) and MHP. Among the 74 million population, over 50 million people were eligible to vote to choose 550 members of the Parliament. At the outcome; Justice and Development Party (AK Party) got 327 seats with 49.83% of the votes, CHP 135 seats with 25.98% of the votes, MHP 53 and independent candidates 35 seats with 6.57% of the votes.<sup>1</sup>

Recep Tayyip Erdoğan has been nominated by the President of the Republic, Abdullah Gül to form the Cabinet.

As of July 2011, there are efforts to frame a new Constitution for the Republic of Turkey (TC).

1. Decision of the High Council for Elections, dated June 23, 2011, decision No. 1070 (RG June 23, 2011, No. 27973).

## II. Recent Sketch of the Criminal Justice System

### A. Roots of 2005 Reform

#### 1. Drafts for New Codes

40. Atatürk abolished Islamic Law and its institutions and introduced new European<sup>1</sup> laws; however court organization was not changed. Drafts for a new court organization were submitted to the Parliament without any success.<sup>2</sup>

In 1985, a panel of legal experts worked out the first version of the Draft Turkish Penal Code (Türk Ceza Kanunu Öntasarısı). However, the government was changed and it did not become law. Still, many articles with new ideas taken from the Draft Code were later incorporated into the existing penal law. This Draft has been the core for further reform and has been expanded to a systematic restructuring of the administration of criminal justice. It was also a source of inspiration for the 2005 reform.

1. M. Feyzioğlu, 5271 Sayılı CMK Hakkında Bazı Tespit ve Değerlendirmeler (sayı: Türkiye Barolar Birliği Dergisi, Ocak/Şubat 2006), 62. M. Gökpınar, Türk Ceza Kanunu Bağlamında İçtihat mı, Reform mu? (sayfa: Türkiye Barolar Birliği Dergisi, 219), Mart & Nisan 2005. K. İçel, & Y. Ünver, Suç Politikası; Seçkin Yayıncılık (Ankara, 2006) E. Özbudun et al., Perspectives on Democracy in Turkey (1988). E. Özbudun, Social Change and Political Participation in Turkey (Princeton, 1977). E. Özbudun, The Role of the Military in Recent Turkish Politics (Cambridge: Centres for International Affairs, Harvard University, 1966), 54. Yücel, Mustafa Tören Yeni Ceza Muhakemesi Kanunu Karşısında Ceza Adaleti Sisteminin -de facto- Görünümü ve Sosyolojik Çıkmazlar (sayfa: Türkiye Barolar Birliği Dergisi, 29), Mart & Nisan 2005.
2. S. Dönmezer & F. Yenisey, Karşılaştırmalı Ceza Muhakemeleri Usulü Kanunu ve 1999 Tasarısı, Gerekçeler (İstanbul: Alkım, 1999).

#### 2. Reform Bills.

41. The 2002 Reform Package follows the idea of out-of-court dispute resolution for minor crimes, and it includes a new draft law on Court Organization, Draft Criminal Code, Draft Criminal Procedure Code and a Draft Code for Corrections.

Those proposals have been amended in many respects and are the core of the 2004 Criminal Law Reform, which became effective on June 1, 2005.

a. The Turkish Penal Code Bill 2002 (TCKT 2002)

42. Generally speaking, this Bill respects the principle of humanity and takes into account previous decisions of the European Court of Human Rights.

The principle of guilt in unintentional crimes is taken into consideration. If the guilt is minor and the loss of the suspect is significant, there will be no prosecution. Principle of guilt. That “ignorance of the law is no excuse” (*nemo censetur ignorare legem*) was already an established principle of Turkish Penal Law. The 2002 Bill did not make any amendments to this principle. It was discussed during the meetings of the subcommission at the Parliament to adjust this provision to the principle of guilt. It was argued that if an individual has no means to learn a domestic regulation, then he should be excused from criminal responsibility. But the majority of the Subcommission did not share this opinion. Instead, the 2004 Turkish Penal Code has included this concept in the form of “mistake.” The concept of “law” includes any administrative regulation, which has been made official, and the contravention of which is punishable.

Culpability. 2002 Bill regulated culpability as follows (for the regulations in the new TPC see *infra*, paragraph 126).

Article 19 of TCKT 2002 makes it clear that only an “act” may be the source of criminal liability, not “thoughts.”

Intent is the basis of all criminal responsibility for crimes (*cürüm*). Intent is defined in the Bill as “knowing the act and the possible effects of the act, as well as willing the result” (TCKT 2002, Article 20).

For negligent behavior to be punishable there must be an explicit legal provision, the act must be an “act of will” (*iradi*), the perpetrator must be able to foresee the result, and there must be a causal connection between the act and the result. Article 20 introduces a new concept to the Turkish Law: *Bilinçli taksir* (foreseeable negligence). In this new type of negligence, the accused will be punished more severely, as he should be able to foresee the result of his act, even if he had not wanted it to happen. This new concept has been incorporated in the present Criminal Code on January 8, 2003: “If the perpetrator was able to foresee the outcome of his act that results in a crime, which he did not wish to commit, the punishment will be aggravated by one third” (Article 45, TCK “2003–4785”).

Another new provision is the reduced punishment (or lack of punishment) in cases of severe losses by the perpetrator due to his own negligence (Article 21, TCKT 2002).

Criminal responsibility of legal entities. The Bill also adds new elements to the criminal responsibility of legal persons. The requirements of this kind of responsibility are: a) there must be a crime committed by a natural person who is a organ of the legal person, b) the crime must have been committed for the benefit of the legal person, c) there must be a provision in the criminal code authorizing the State to punish legal persons for this particular act. This new provision opens a new dimension, as previously the criminal responsibility of legal persons was not accepted

under the rule of *Societas delinquere non potest* (TCKT 2002, Article 25). However, the new Turkish Penal Code only provides security measures, not penalties (*infra*, paragraph 245).

Measures of protection and responsibility of minors are regulated under a new chapter.

The principles of *nullum crimen sine lege* and *nullum poena sine lege* are essential human rights laid down in Article 4 of the European Convention for Human Rights, as well as in Article 38 of the Turkish Constitution. TCK adopted this principle to every day life. This principle requires that the wording of crime definitions must be clear and understandable. Punishments and measures both underlie this principle.

Crimes. Crimes are divided into crimes and misdemeanors by the 2002 Bill. However, the new Penal Code would eliminate this classification.

International law. The 2002 Bill regulated the enforcement of criminal law statutes in relation to place as follows (for the regulations in the TCK, see *infra*, paragraph 73).

An individual who has committed a crime in Turkey can always be prosecuted in Turkey, even though he has already been prosecuted abroad and judgment has been rendered against this person. This does not bar a new trial in Turkey. But if the outcome of the trial is a conviction, the term of the domestic punishment will be reduced by the term served abroad. Moreover, if the individual is a foreigner, permission must be obtained from the Minister of Justice for a new trial in Turkey (TCKT 2002, Article 7). If a Turkish civil servant, serving abroad, commits crimes while carrying out his duties, such crimes will be prosecuted in Turkey even if they had been adjudicated in the foreign country. Again, the term of the domestic punishment will be reduced by any time served abroad (TCKT 2002, Article 8).

Turkish citizens who have committed crimes abroad may have been tried and served their time in a foreign country. In such cases there is no further prosecution in Turkey (*ne bis in idem*), so long as the crime is punishable by imprisonment (TCKT 2002, Article 12) under the Turkish Criminal Code and there is a bar to prosecution according to Turkish rules (TCKT 2002, Article 9).

A foreigner who has committed a crime abroad may be tried in Turkey under exceptional circumstances. The first set of circumstances is that the crime committed abroad is against the Turkish State and the punishment for the crime in Turkey is imprisonment for more than one year; this crime can be prosecuted in Turkey at the request of Minister of Justice. The second set of circumstances is that a foreigner committed a crime punishable with a term of imprisonment of more than three years abroad; such crimes are prosecuted in Turkey upon the complaint of the victim if Turkey cannot extradite this individual (TCKT 2002, Article 10). Hijacking an airplane will be prosecuted in Turkey, even if Turkey has no connection to the crime that has allegedly been committed. This provision is a reflection of Turkey's international obligations (TCKT 2002, Article 1).

The term of the punishment to be served in Turkey will be reduced by the term the offender has served in the foreign country (TCKT 2002, Article 14). The limitations of rights imposed by a foreign judgment are also valid in Turkey. There will be a decision of the Turkish court upon the request of the Public Prosecutor (TCKT 2002, Article 16).

Political crimes committed in a foreign country are excluded from extradition. Political crimes against Turkey will be prosecuted in Turkey, but if the political crime is aimed at a foreign country, Turkey will not extradite or prosecute the alleged offender. This new provision is designed to avoid a conflict. However, Turkey may expel this individual. There must be a special Act governing the extradition process. The last paragraph of Article 17 of TCKT 2002 opens the way to such legislation.

Any crime committed abroad with the collaboration of one or more people in Turkey will be prosecuted in Turkey. Adjudication of crimes committed abroad will be punished pursuant to the code that is of greatest benefit to the accused. This does not mean that the foreign criminal code will be applied in Turkey; rather, the punishment in the foreign code will be considered by a Turkish court (TCKT 2002, Article 18).

Special Part, “classical crimes.” This special part contains “classical” crimes, existing in every jurisdiction, and begins with crimes against individuals (not with crimes against the State). Criminal law is the very last measure (*ultimum remedium*): some crimes were eliminated (decriminalized), and punishments were reduced but are now executed more efficiently. Traditional criminal law, which emanated from nineteenth century, cannot deal with today’s crimes. At the time there were fewer felonies and there was no organized crime or mass media comparable to today’s standards.

A series of new offenses has emerged. Torture is an independent crime (TCKT 2002, Article 139) (according to the repealed Criminal Code, torture was an aggravating factor for several types of crimes). The private life of an individual will be protected: eavesdropping on a person’s conversations without his consent is a new crime now (TCKT 2002, Article 187). Apartheid is also a new crime (TCKT 2002, Article 167). Sexual crimes are considered crimes against “sexual liberty” and not against “morality.” Adultery is no longer a crime in Turkey. Contempt of court has been made a new crime in order to protect the court’s decision-making procedure (TCKT 2002, Article 454). Not reporting a crime, “which could be prevented by reporting,” is also a crime (TCKT 2002, Article 442). (For the regulations in the new Turkish Penal Code, see *infra*, paragraphs 177–190).

b. 2002 Draft of Turkish Criminal Procedure Code (CMUKT 2002)

43. General principles. The 2002 Bill introduced general principles of “fair trial” at the very beginning of the Code as the first Article: “While applying this code, principles of fair trial, adversarial proceedings and equality of arms between the parties will be respected.” The functions of investigation, prosecution and adjudication will be strictly distinguished. Individuals prosecuted for similar facts will be treated equally under the same rules and principles (principle of equality). The rights of victims will be observed at all stages of proceedings by investigators and judicial authorities. Individuals who are under suspicion of having committed a crime or who are prosecuted will be presumed innocent until their guilt has been proven. Any action against the presumption of innocence will be prevented and damages suffered will be repaired.

**Definitions.** CMUKT defines most commonly used concepts, such as “suspect,” “accused,” “lawyer,” “investigation,” “prosecution” and “serious offences” (Article 2, CMUKT 2002).

**Venue.** The place where the crime has been committed is the place of prosecution. A new exception has been added to this principle: if the suspect is in custody in a different place, the court of this district has jurisdiction to try the case. The *Zana v. Turkey* decision of the ECHR is the reason for this amendment. In that case, the accused was in custody in another jurisdiction on another charge and the trial court had asked this court to hear the accused on the merits of the case. ECHR found this practice to be a breach of Article 6 of the Convention (Article 13, CMUKT 2002).

If the individual is in custody, any decision of the court or judge will be served and read out to him, and explained to him if he so wishes (Article 37, CMUKT 2002). The presiding judge will be entitled to correspond directly with State authorities without the assistance of the public prosecutor (Article 38, CMUKT 2002).

Witnesses will also be summoned by telephone. The President of the Republic cannot be summoned to court; rather, he will give his testimony in his office. The Prime Minister will give his testimony in the courts in Ankara (Article 46, CMUKT 2002). Furthermore, this limitation on giving evidence in court has been extended to lawyers and to police officers working as undercover agents (Article 49, CMUKT 2002). Witness protection has been introduced (Article 61, CMUKT 2002). Direct and cross-examination of witnesses by the parties is assured (Article 62, CMUKT 2002).

**Expert witness.** Experts will be listed annually according to their expertise (Article 67, CMUKT 2002). The rules for examination have been clarified (Article 68, CMUKT 2002). The expert must give oral testimony at the hearing (Article 70, CMUKT 2002). The expert may occasionally be a witness (Article 73, CMUKT 2002).

**Bodily examination.** The medical examination of an individual for judicial purposes is regulated for the first time. Body searches can be conducted on individuals for evidence of crime. A distinction exists between an examination of a suspect and one of a non-suspect. A suspect may be medically examined if there is a court order for such examination (Article 79, CMUKT 2002). By contrast, it is more difficult to obtain justification to carry out a medical examination of someone who is not a suspect (Article 80, CMUKT 2002). A medical doctor will conduct the examinations of women (Article 81, CMUKT). Photographs, fingerprints and voice samples of the suspect for future identification is only permitted for crimes punishable by a prison term of more than two years. In case of non-prosecution or acquittal, the data will be destroyed (Article 82, CMUKT 2002).

**Search and seizure law.** There are now provisions governing search and seizure. Documents secured from official State authorities will be handed over to the prosecution upon the decision of the respected ministry (Article 91, CMUKT 2002). Reasonable grounds for suspicion are required to conduct a search (Article 95, CMUKT 2002). The judge must provide detailed information about the grounds for suspicion and the period of the warrant’s validity (CMUKT 2002, Article 98). The presence of the public prosecutor and the President of the Bar is required to search lawyers’ offices. Documents related to defense of any suspect will be placed in an



envelope and submitted to the judge to read; the public prosecutor is not entitled to read these documents (Article 99, CMUKT 2002). The defense lawyer may be present during the search of the premises if he was there for any reason (CMUKT 2002, Article 100). There is no obligation of the State to inform the lawyer of the suspect of a search that is to be conducted. But the lawyer is free to be present during a search.

New instruments. Judicial control of suspects (*adli kontrol*) and bail (Article 110, CMUKT 2002), and compensation for illegal arrest and detention (Article 135, CMUKT 2002) are new instruments in the Reform Bill.

### 3. 2005 Legislation.

44. The reform package of 2002 that contains the Turkish Criminal Code, Turkish Criminal Procedure Code and the Code on Enforcement of Sanctions and Security Measures, has been the main source for the legislation which entered into force in 2005.<sup>1</sup>

1. A. Söztür, "Prof. Dr. Hans Heinrich Jescheck'in Türk Ceza Hukuku Reformuna Katkıları," in *Criminal Law in the Global Risk Society*, ed. Yenisey, Feridun & Sieber, Ulrich Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group, Volume T 1 (Istanbul, 2011), 243. A. Söztür, "Das neue türkische Strafgesetzbuch," in *Das neue türkische Straf- und Strafprozessrecht*, ed. Tellenbach Silvia (Berlin: Berliner Wissenschaftsverlag, Band 6, 2008), 11; N. Centel, "Kritische Bemerken zum neuen türkischen Strafgesetzbuch und zur neuen Strafprozessordnung," in *Das neue türkische Straf- und Strafprozessrecht*, ed. Tellenbach Silvia (Berlin: Berliner Wissenschaftsverlag, Band 6, 2008); S. Tellenbach, "Zum neuen türkischen Strafgesetzbuch, ein Blick aus deutscher Sicht," in *Das neue türkische Straf- und Strafprozessrecht*, ed. Tellenbach Silvia (Berlin: Berliner Wissenschaftsverlag, Band 6, 2008); B. Öztürk, "Die neue stop der Türkei – Sicherheit und Freiheit," in *Das neue türkische Straf- und Strafprozessrecht*, ed. Tellenbach Silvia (Berlin: Berliner Wissenschaftsverlag, Band 6, 2008). E. Canak, 5237 Sayılı TCK, 5271 Sayılı CMK ve 5275 Sayılı CGTIHK ile Getirilen Yenilikler (sayı: Legal Hukuk Dergisi, 2005), 28. C. Taşkın, Yeni Türk Yasası'nın Anayasa'ya ve Hukuka Aykırılık Yönünden İncelenmesi (sayfa: Türkiye Barolar Birliği Dergisi), 224, Mart & Nisan 2005. F. Yaşamış, Çevre Ceza Hukukunda Son Gelişmeler; Yeni Türk Ceza Kanunu ve Kabahatler Kanunu (sayı: Türkiye Barolar Birliği Dergisi), 58 sayfa 137, Mayıs & Haziran 2005.

45. Legal education. One of Atatürk's most significant reforms was university reform. In addition to the Law Faculty of Istanbul, a second law faculty was set up in Ankara. Many German scholars of Jewish origin taught at Turkish Universities during the 1930s.<sup>1</sup>

After 1980 the number of law faculties increased. New faculties were established in Istanbul, Konya, Diyarbakır and İzmir. In 2002, there were about 25 law schools throughout Turkey. 19,886 students were attending State law schools and 3,231 were attending private law schools (Vakıf Üniversiteleri). The number of universities has continued to increase. Currently, there are concrete plans to found a German-Turkish University in Turkey.

Since 2001 there have also been trainings for judges and public prosecutors, provided by the Ministry of Justice in conjunction with universities focusing on Human Rights. The number of judges and prosecutors who speak a foreign language is increasing.

1. A. Önder, Der Einfluss des deutschen Rechts auf das türkische Strafprozessrecht, *Annales XXII*, no. 38 (Istanbul, 1974), 365; O. Oehring, *Bibliographie zum türkischen Recht* (Berlin, 1982).

#### §4. SOURCES AND CLASSIFICATIONS OF CRIMINAL LAW

### I. International and National Sources of Criminal Law

#### A. International Sources

46. International Treaties and Acts passed by the Turkish Grand National Assembly are sources of criminal law and will be applied directly by the Turkish criminal courts. The TC has signed many international treaties. These include:

#### UN CONVENTIONS

- Statute of the International Court of Justice RG August 24, 1945.
- Convention on the Prevention and Punishment of the Crime of Genocide RG March 29, 1950.
- Convention on the Prevention and Punishment of the Crime of Genocide RG March 29, 1950.
- Convention on the Privileges and Immunities of the United Nations RG March 21, 1950.
- Convention (IV) relative to the Protection of Civilian Persons in Time of War RG January 30, 1953.
- Convention on the Political Rights of Women RG June 02, 1959.
- Convention relating to the Status of Refugees RG September 5, 1961.
- Protocol relating to the Status of Refugees RG September 5, 1961.
- Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery RG January 6, 1964.
- Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 RG January 5, 1967.
- Convention for the Suppression of Unlawful Seizure of Aircraft RG March 31, 1973.
- Convention on the Reduction of Statelessness RG August 15, 1975.
- Convention relating to the Status of Stateless Persons RG August 15, 1975.
- Vienna Convention on Consular Relations RG September 27, 1975.
- The Convention on Crimes Committed in Airplanes of September 14, 1963 (RG May 4, 1975).
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property RG January 26, 1981.
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents RG May 1, 1981.
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents RG May 1, 1981.
- UN Convention on Psychotropic Substances RG March 7, 1981.
- Vienna Convention on Diplomatic Relations RG Tarih: December 24, 1984.



- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) RG October 13, 1985.
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment RG August 10, 1988.
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation RG May 17, 1989.
- International Convention Against the Taking of Hostages RG June 6, 1989.
- Convention on the Rights of the Child RG December 11, 1994.
- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances RG November 25, 1995.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction RG May 3, 1997.
- International Convention for the Suppression of Terrorist Bombings RG April 17, 2002.
- International Convention for the Suppression of the Financing of Terrorism RG April 17, 2002.
- International Convention on the Elimination of All Forms of Racial Discrimination RG June 16, 2002.
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. New York, October 6, 1999 RG September 18, 2002.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography RG June 28, 2002.
- International Covenant on Civil and Political Rights RG July 21, 2003.
- International Covenant on Economic Social and Cultural Rights RG August 11, 2003.
- United Nations Convention Against Transnational Organized Crime RG March 18, 2003.
- United Nations Convention against Transnational Organized Crime Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children RG March 18, 2003.
- United Nations Convention against Transnational Organized Crime Additional Protocol against the Smuggling of Migrants by Land, Sea and Air RG March 18, 2003.
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict RG March 18, 2004.
- International Convention for the Suppression of Acts of Nuclear Terrorism (Signed at September 14, 2005, not ratified).
- Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty RG December 27, 2005.
- Optional Protocol to the International Covenant on Civil and Political Rights RG August 5, 2006.

#### COUNCIL OF EUROPE CONVENTIONS

- The ECHR of November 4, 1950 (RG March 19, 1954).

- Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty—RG or date of Protocol? December 1, 2003.
- Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms—January 1, 1990.
- European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights—December 1, 2004.
- Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine—November 1, 2004.
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment—February 1, 1989.
- Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment—March 1, 2002.
- Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment—March 1, 2002.
- Criminal Law Convention on Corruption—July 1, 2004.
- Civil Law Convention on Corruption—January 1, 2004.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime—February 1, 2005.
- The European Convention on Extradition of December 13, 1957 (RG November 26, 1959).
- Second Additional Protocol to the European Convention on Extradition—October 8, 1992.
- The European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 (RG October 16, 1968).
- Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters—June 27, 1990.
- Convention on the Transfer of Sentenced Persons—January 1, 1988.
- European Convention on the International Validity of Criminal Judgments—January 28, 1979.
- European Convention on the Transfer of Proceedings in Criminal Matters—January 28, 1979.
- The European Convention on the Suppression of Terrorism of January 27, 1977 (RG March 26, 1981).
- European Social Charter—December 24, 1989.
- European Convention on the Exercise of Children’s Rights—October 1, 2002.
- Convention for the Protection of the Architectural Heritage of Europe—February 1, 1990.
- Convention on the Conservation of European Wildlife and Natural Habitats—September 1, 1984.
- European Convention on the Protection of the Archaeological Heritage (Revised)—May 30, 2000.
- Anti-Doping Convention—January 1, 1994.
- European Convention on Spectator Violence and Misbehavior at Sports Events and in Particular at Football Matches—January 1, 1991.

## B. National Sources

47. Turkish Criminal Law is based on social values. These values are called “substantive sources.” The principle of natural law influences the positive rules of law, which are valid for the political interest groups and for the government.<sup>1</sup> The criminal law restricts the fundamental rights of individuals. Therefore, this restriction should be defined as clearly as possible. This principle is called, the certainty of the sources or *lex certa*.<sup>2</sup>

1. D. Soyaslan, “Ceza Hukukunun Kaynakları,” in *Ceza Hukuku El Kitabı* (İstanbul: Beta, 1989), 111.
2. K. İçel & S. Donay, *Karışıkştırmalı ve Uygulamalı Ceza Hukuku 2* (İstanbul: Bası, Filiz, 1993), 58.

## 1. Direct Sources of Criminal Law

48. In Turkish criminal law, the Constitution, international treaties and Acts passed by the Turkish Grand National Assembly are direct sources of criminal law. Governmental decrees (*Kanun Kuvvetinde Kararname*) that are later ratified by Parliament and thus have the force of law, as well as administrative decisions are not considered sources of criminal law (Article 91, AY).<sup>1</sup>

The Constitution governs the general principles of criminal law and defines the boundaries of personal freedoms. No Act can be contrary to the Constitution. Because the criminal statutes can limit personal freedom, the principles of criminal law should be contained in the Constitution.<sup>2</sup> Many principles of criminal law are laid down in the Constitution of 1982, as an effort to bring the TC to the level of Western European standards.

“Acts” are objective and non-personal statutes made by the National Assembly and put into force after publication in the Official Gazette. However, some Acts enacted between May 27, 1960 and September 12, 1982 were not voted by the Turkish National Assembly due to a temporary exception to making laws which existed at that time.

The most important direct source of the Turkish Criminal Law is the new Turkish Penal Code. The special criminal laws are direct sources as well (Article 5, TCK). “Decrees in Power of Act” are not a source of criminal law (*infra*, paragraph 61).

The criminal statutes of foreign countries are not applied directly, but if the Turkish Criminal Code makes reference to a foreign criminal statute, it becomes a direct source for the Turkish judge pursuant to Article 19 of the new Turkish Penal Code.<sup>3</sup>

1. E. Artuk, *Ceza Hukukuna Giriş* (İstanbul: Üçdal, 1983), 111.
2. O. Tosun, *Suç Hukuku El Kitabı*, 2 (İstanbul: Bası, Ar Basım Yayım, 1982), 18.
3. If the crime is committed in a foreign country, the law of the place where the crime was committed is considered a source for the Turkish court (Art. 10a, repealed TCK). According to this 1991 rule, the punishment imposed by the Turkish court cannot be more severe than the punishment allowed by the law of the foreign country in question. Art. 10(a) of the repealed Code has been taken to the new Code as Art. 19 (*infra*, para. 85).

49. The Act of 1928, No. 1322 contains the principles applicable to the enforcement of Acts. An Act is in force within the whole of Turkey 45 days after its publication in the Official Gazette, so long as there is no provision in the act itself

providing otherwise. Some criminal acts are in effect for certain periods of time only. If there is no designated time period, the Act is in force for an unlimited period of time.

## 2. Indirect Sources of Criminal Law

50. In Turkish Law, customary law, morality, the judgments of the courts and doctrine are indirect sources of law; these cannot create criminal penalties and sanctions.<sup>1</sup> However, these indirect sources can be regarded as a (ground of) justification: for example, if custom allows taking some apples from a tree, it is not considered theft.<sup>2</sup> However, if there is a clear reference to a customary law in a criminal statute, then the customary law is considered a source of criminal law.

1. M. Kaban et al., *Yargıtay Ceza Genel Kurulu Kararları* (Ankara: Adalet Yayınevi, 2001). O. Şirin (ed.), *Yargıtay Ceza Genel Kurulu Kararları Kapsamında Yeni Ceza Mevzuatının Yorumu* (2008).
2. Cass. CGK Oct. 26, 1987, E. 6-406, K. 499; B. Öztürk, “Ceza Hukuku ve Emniyet Tedbirleri Hukuku,” *Gözden Geçirilmiş ve Genişletilmiş*, 2 (Ankara: Bası, Dokuz Eylül Üniversitesi, 1992), 31.

51. In Turkish Criminal Law, “Judgments of Unification of Opinions from the Different Court of Cassation Decisions” (içtihadı birleştirme kararı, in other words, the united decisions of the Court of Cassation) have the effect of a binding Act. According to Article 45 of the Act of the Court of Cassation, No. 2797, courts must apply the united decision of the Court of Cassation to cases with similar facts.

In order to be able to be promoted to a higher position in their profession, judges must earn points from decisions that are approved by the High Court (Article 28, Judges and Public Prosecutors Act, No. 2803, of February 24, 1983). Because of this regulation, the decisions of the General Assembly of the Court of Cassation (CGK) are very important for Turkish judges.

## II. General and Specific Criminal Law

### A. General Criminal Law

52. The Turkish Criminal Code and Code of Criminal Procedure govern General Criminal Law.

### B. Specific Criminal Law

53. Specific criminal law (infra, paragraph 192) is composed of military criminal law (Military Criminal Code, Act No. 1632, dated May 22, 1930; Code for Military Discipline Jurisdiction, Act No. 477, dated June 16, 1964 (infra, paragraph 299-II),

## **General Introduction**

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Criminal Law for State Officials (infra, paragraph 174), Juvenile Criminal Law (infra, paragraph 238), Economic Criminal Law (infra, paragraph 199) and Environmental Criminal Law (infra, paragraph 197).<sup>1</sup>

1. I. Polatcan, İç Hizmet Kanunu ve Yönetmeliği, Askeri Ceza Kanunu, Disiplin Mahkemeleri Kanunu (İstanbul: Doğ



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## Part I. Substantive Criminal Law

### Chapter 1. General Principles of the Turkish Criminal Law

#### §1. THE PRINCIPLE OF A STATE GOVERNED BY THE RULE OF LAW

54. According to the Constitution, the TC is a democratic, secular and social State “governed by the rule of law” (Article 2, AY). This principle has two meanings in the application of criminal law. As a formal principle, the principle of a State governed by the rule of law prevents the misuse of criminal law. The principle of legality is derived from this principle.

As a substantive principle, the principle of a State governed by the rule of law determines the structure of the criminal statutes.<sup>1</sup> Article 38 of the Constitution governs the formal side, and Article 17 of the Constitution regulates the substantive side of this principle; to wit: “no one shall be subjected to penalty or treatment incompatible with human dignity.”

1. K. İçel, & S. Donay, *Karşılaştırmalı ve Uygulamalı Ceza Hukuku*, 2. Bası (İstanbul: Filiz, 1993).  
I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5.* (Ankara: Bası, Seçkin, 2010), 42.

55. Another important duty of the “state governed by the rule of law” is to secure domestic order. The State has “ius puniendi” over acts that have been committed in its territory.<sup>1</sup>

1. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 10 (Bası, İstanbul: Beta, 1985), n. 1139.

#### §2. THE PRINCIPLE OF HUMANITY

56. Under the principle of humanity, the human being is accepted as the main value in all legal affairs.<sup>1</sup> Human dignity and pride are sacred. The idea of equality also corresponds to the above concept (Article 10, AY). The free will of human beings should be protected.<sup>2</sup> Torture is banned in accordance with this view.

There are institutions to safeguard human rights in Turkey. For example, the “Human Rights Undersecretaries” and a “High Council for Human Rights” have been established by a Decree in Power of Act (KHK) No. 506, dated August 20, 1993.<sup>3</sup>

1. K. İçel & K. Bayraktar, “Türk Ceza Hukukuna İlişkin Açıklamalar,” in *Almanya Federal Cumhuriyeti Ceza Hukukuna Giriş*, ed. H.-H. Jescheck (İstanbul: Beta, 1989), 135. A. Gündüz, “Security and Human Rights in Europe” (European Community Institute, İstanbul: University of Marmara, 1994).
2. “İnsancılık ilkesi”; N. Centel, *Türk Ceza Hukukuna Giriş* (İstanbul: Beta, 2001), 12; “İnsan haysiyetinin korunması ilkesi”; B. Öztürk, M.R. Erdem & V.Ö. Özbek, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genikletilmiş 5* (Ankara: Bası, Seçkin, 2001), 40.
3. The aim of this organization was to institutionalize human rights in Turkey and to prepare the draft laws on changes in Turkish Law in accordance with human rights standards. 69,200 billion TL was foreseen for this purpose (T.C. Maliye Bakanlığı, Genel ve Adalet Hizmetleri 1980–1993 (Ankara, 1993), 141).

### §3. THE PRINCIPLE OF LEGALITY

57. The concept of the principle of legality: written and clear regulations. No one can be punished for an act that is not expressly defined by law as a crime. No one can be subject to punishment or “measures of security” (detained or committed to an institution or asylum) when not prescribed by law in force at the time the alleged criminal act was committed. Also, no one shall be given a harsher penalty for an action than the penalty applicable at the time when the offense was committed.

The principle of legality (legality in the definition of crimes and legality of definition of penalties) is the main rule in Turkish criminal law and is considered a basic element of criminal offenses (the Element of Law) (infra, paragraph 99). This rule is laid down in the current Constitution (Article 38, AY) as a protection of individuals from the State<sup>1</sup> and is the basis of Article 2 of TCK.

Accordingly, a crime can only be created by a statute at the level of a “law,” and this law should also regulate the penalty for such a crime. The legislature must define every crime and its penalty as clearly<sup>2</sup> as possible in the statutes, and a judge can apply a law to an act only if it is exactly the same as the one defined in the law (nullum crimen sine lege certa). No one can be punished for a deed that had not been identified as a crime at the time of its commission (Article 7/1, TCK) (nullum crimen sine lege praevia).<sup>3</sup> However, a milder statute (infra, paragraph 73) shall be applied retroactively (infra, paragraph 69).

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 108; I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 102.
2. Turkish Criminal Code regulates now clearly the acts of the crime of fraudulent bankruptcy (Arts. 161, 162, TCK) (I. Özgenç *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 4* (Ankara: Bası, Seçkin, 2009), 112).
3. S. Tellenbach, “Das Gesetzlichkeitsprinzip in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung, Teilband 2*, ed. Sieber & Cornils (Berlin, 2008), 147.

58. Development of the principle of legality. The principle of legality was adopted in the eighteenth century to prevent arbitrary judicial behavior. Therefore, an individual’s act may not be prohibited or subject to punishment except under the conditions openly regulated by written and published legislation.

Islamic law, which identifies some crimes and punishment and also sets the limits of certain punishment, has a different outlook on the principle of legality. For

“divine” crimes (i.e., crimes against God) as defined by the Koran, the principle of legality is applied in a strict sense. However, for crimes committed against individuals (worldly affairs), the judicial authority has the power to determine and inflict the punishment.<sup>1</sup>

The first Turkish constitutional Act to consider the principle of legality is the Decree of Tanzimat of 1839.<sup>2</sup> The 1924 Constitution does not explicitly mention this principle.<sup>3</sup> But the 1961 Constitution (Article 33) and the 1982 Constitution (Article 38) do mention it.

1. S. Dönmezer & Erman Sahir (I), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I*, 10. (Bası, İstanbul: Beta, 1986), n. 49.
2. E. Artuk, “Suç ve Cezaların Kanuniliği Prensibi,” in *Ceza Hukuku El Kitabı* (İstanbul: Beta, 1989), 101. S. Tellenbach, “Das Gesetzlichkeitsprinzip in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung*, ed. Sieber & Cornils Teilband 2 (Berlin, 2008), 142.
3. S. Dönmezer, & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I*, 10 Bası (Beta, İstanbul, 1986), n. 50.

59. Turkish criminal law is a written, positive law. In Turkish law a crime can only be created by written Acts of the Turkish Grand National Assembly (TBMM) and put into effect accordingly. Therefore, in Turkish law a crime cannot be created, nor may the punishment be assessed, by the case law (*nullum crimen sine lege scripta*).

60. Restrictive interpretation of criminal statutes. For a perfect application of the principle of legality, the rules of interpreting statutes must also be applied strictly.<sup>1</sup> In cases where the meaning is explicitly explained by the wording of the Act, there is no problem. However, if the meaning of words needs to be interpreted, such an interpretation should, as a result of the principle of legality, be narrowly considered. The meaning of a word cannot be extended, and the field of punishment cannot be expanded. Interpretation should favor the accused. The rule is that the accused benefits from any doubt (*in dubio pro reo*). To this end, analogy is explicitly prohibited by the Criminal Code (Article 2/3, TCK). In the interpretation of penal norms, the intention and the motives of the legislation should be studied.<sup>2</sup> The legislator’s aim cannot be expanded by verbal interpretations. However, in cases where the analogy benefits the accused, it can be accepted. Analogy is restricted only under the circumstances where the penal liability is expanded (Article 2/3, TCK) (*nullum crimen sine lege stricta*). Because of the restriction of analogy, legal provisions are not retroactive. The only exceptions to this rule are more lenient statutes.<sup>3</sup>

1. B. Öztürk, M.R. Erdem & V.Ö. Özbek, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş 5* (Bası, Ankara: Seçkin, 2001), 61.
2. Cass. CGK Oktober, 22. 1984: K. İçel & K. Bayraktar, “Türk Ceza Hukukuna İlişkin Açıklamalar,” in *Almanya Federal Cumhuriyeti Ceza Hukukuna Giriş*, ed. H.-H. Jescheck (İstanbul: Beta, 1989), 134.
3. A. Önder (I), *Ceza Hukuku Genel Hükümler, Cilt 1* (Beta, İstanbul, 1991), 112.

61. The application of the principle of legality in measures and misdemeanors. The principle of legality only covers the field of substantive criminal law. This rule



is not strictly applied in administrative law and other related fields. However, protective and educational measures are also considered in the sphere of criminal penalties.

There has been a debate in Turkish Law about the authority of administrative sources to create crimes and punishment. According to Article 91 of the Constitution, fundamental rights and political rights cannot be regulated through decrees with the force of law (*supra*, paragraph 48); therefore, “Decrees with the force of law” cannot create a crime.<sup>1</sup> This principle is now openly stated by the new Criminal Code (Article 2/2).

In this sense, although an act of a criminal nature cannot be created, unlawful conduct may nevertheless be prohibited. Administrative provisions are expected to regulate police and administrative enforcement entities. The Constitutional Court held that the Council of Ministers has the authority to set maximum and minimum limits on fines for tax violations that are provided by criminal law. On March 28, 1983, the Constitutional Court ruled by way of Decision No. 4/71 that the administrative organ can create crimes by administrative regulations. This decision was criticized, as it does not comply with Article 91/1 of the Constitution.<sup>2</sup> The administrative organ is entitled to apply any measures that do not restrict freedoms.<sup>3</sup> However, the administrative organ may declare crimes so long as the law provides for it.

The principle of legality does not affect the law of disciplinary punishment. However, it will be applied to “security measures” (*infra*, paragraph 234) (Article 38 AY, Article 2/1 TCK).

There are some petty offenses for which the law does not provide a penalty. Article 526 of the old Turkish Criminal Code was the general rule applied to such cases.<sup>4</sup>

The new Criminal Justice System now foresees a special act for misdemeanors (*Kabahatler Kanunu* (KK); Act No. 2005–5326, Article 32), which shall be applied as a general provision if an act openly refers to this Code (Article 32/2, Act No. 2005–5326). The principle of legality in the field of misdemeanors are provided by the Code (Article 4, KK), but is not as strict as in the field of crimes.<sup>5</sup> The legislator may give a very open definition to a certain offense, while the details are consequently worked out by the Executive. However, the sanction must be determined by the law itself.<sup>6</sup>

1. B. Öztürk, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku*, Gözden Geçirilmiş ve Genişletilmiş 2. Bası (Ankara: Dokuz Eylül Üniversitesi, 1992), 10; Artuk, M.Emin, Gökçen, Ahmet & Yenidünya, A.Caner, *Ceza Hukuku Genel Hükümler* (Ankara: Birinci Kitap, Seçkin, 2002), 191.
2. K. İçel, Kayhan & K. Bayraktar, “Türk Ceza Hukukuna İlişkin Açıklamalar,” in *Almanya Federal Cumhuriyeti Ceza Hukukuna Giriş*, ed. H.-H. Jescheck (İstanbul: Beta, 1989), 134.
3. K. İçel & S. Donay, *Karşılaştırmalı ve Uygulamalı Ceza Hukuku*, 2. Bası (İstanbul: Filiz, 1993), 81.
4. D. Soyaslan, “Ceza Hukukunun Kaynakları,” in *Ceza Hukuku El Kitabı* (İstanbul: Beta, 1989), 122.
5. Here we use the term “crimes” in the meaning of very serious and petty offenses, as opposed to misdemeanors. We can not use the term felonies, as the distinction between misdemeanors and felonies has been abandoned by 2005 legislation.
6. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler*, Gözden Geçirilmiş ve Güncellenmiş 4 (Ankara: Bası, Seçkin, 2009), 120.



## §4. THE PRINCIPLE OF GUILT

62. The principle of guilt is an important aspect in Turkish criminal law. No one can be punished if there is no intentional guilt that can be condemned by law; for some crimes negligence suffices. In the past, objective liability was applicable, and only the negative result was considered for the outcome of the crime and thus at objective liability. Today, in addition to the negative results, the accused's initial motive or ill intent is considered to determine the existence of the crime (resulting or, objective liability). In other words, the existence of the individual's guilty mind is now an essential condition of criminal liability.<sup>1</sup>

For this reason, only individuals can be held criminally liable for the offenses committed by legal persons (corporations, organizations and associations), in particular the individuals who constitute or make up the representative organs of such entities. Legal persons cannot be punished with criminal penalties (ceza yaptırımı), but they may be subject to other types of sanctions such as "security measures" (güvenlik tedbiri niteliğindeki yaptırımlar) (Article 20/2, TCK).<sup>2</sup>

1. The new generation of Turkish legal experts consider "guilt" not as a characteristic element of the crime, but is a value judgment about the offender, who has committed an illegal act (I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 4* (Ankara: Bası, Seçkin, 2009), 344).
2. Öztürk, Bahri, Erdem, M. Ruhan & Özbek, V. Özer. *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş 5* (Bası, Ankara: Seçkin, 2001), 46.

63. Individual responsibility. Article 38 of the Constitution provides that "penal liability is personal," and it accordingly adopts the principle of guilt.<sup>1</sup> Ignorance of the law was not accepted as a defense according to the previous Criminal Code (TCK, Article 44). For perfect application of the principle of guilt, Article 44 of the repealed Criminal Code had to be interpreted broadly.<sup>2</sup> The current Turkish Criminal Code adopted a new approach in this regard: the new version of Article 4/1, TCK states that "Ignorance of the criminal statutes is not an excuse." However there is one exception to this rule in the chapter about "mistake": The person who made an unavoidable mistake about the unjustness of his deed shall not be punished (Article "2005–5377" 30/4, TCK).<sup>3</sup>

A person who is not guilty cannot be punished. Likewise, a perpetrator cannot be punished with a penalty that is disproportionate to the degree of his guilt for the offense (infra, paragraph 64). Guilt should be identified in terms of the particular act of the accused, but not according to his general life style and behavior.

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6. (Ankara: Bası, Seçkin, 2009), 63.
2. B. Öztürk, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş 2*. Bası (Ankara: Dokuz Eylül Üniversitesi, 1992), 21.
3. K. İçel & K. Bayraktar, "Türk Ceza Hukukuna İlişkin Açıklamalar," in *Almanya Federal Cumhuriyeti Ceza Hukukuna Giriş*, ed. H.-H. Jescheck (İstanbul: Beta, 1989), 136.

## §5. THE PRINCIPLES OF PROPORTIONALITY AND EQUALITY

64. Proportionality and equality. Since 2001, the Constitution applies the principle of proportionality (ölçülülük ilkesi) to determine whether limitations on fundamental principles are justified (Article 13, AY “2001–4709”).

**I. Proportionality**

65. The principle of proportionality is an important principle of Turkish Criminal Law. This principle is now explicitly laid down in the Penal Code: “Penalties and security measures to be imposed on the perpetrator shall be proportional to the ‘gravity’ of his deed” (Article 3/1, TCK).<sup>1</sup>

Accordingly, the punishment should be in proportion to the degree of guilt and the importance of the result or harm. In 1965, the old Turkish Penal Code had accepted a rule that reduced the punishment of the offenses committed through negligence by one-eighth (1/8) (Article 455, repealed TCK). Thus it accepted the principle of proportionality. The Turkish Criminal Code does not make “a scaling of negligence,” and rules that each offender shall be punished according to the degree of his guilt (Article 22/4, 5, TCK). If the offender was victimized himself personally or in regard to his family through his own negligent deed, he shall not be punished if the infliction of a sanction is unnecessary (Article 22/6, TCK).

The old Criminal Procedure Code (Article 104/3, repealed CMUK, as amended by Code No. 3842 of December 1, 1992), explicitly regulated the principle of proportionality with respect to the investigative stage. Accordingly, if the relationship between the probable punishment and the deprivation of liberty was disproportionate, then the examining judge would not order the arrest of the suspect. The new Criminal Procedure Code does not include this specific provision, but instead excludes pre-trial detention for crimes punished only with a fine or with imprisonment of no more than one year. Additionally, the Code has introduced a new institute of “judicial control”: the suspect may be put under judicial control for crimes that are punished with imprisonment of maximum three years or less, if the requirements of pre-trial detention as laid down at Article 100 CMK are met (Article 109/1, CMK). If the suspect does not comply with the obligations put on him by the judge, then there may be a new judicial order rendered on his pre-trial detention (Article 112, CMK).

1. This provision also entails the principles of justice and equality. Some legal experts argue that the notion of gravity rather belongs to the determination of the sentence and should have been included in Art. 61 TCK (Özbek & Veli Özer, TCK İzmir Şerhi, Türk Ceza Kanununun Anlamı, Genel Hükümler (Madde 1-75); Gözden Geçirilmiş, Genişletilmiş 4 (Ankara: Bası, Seçkin, 2010), 88; Artuk, YÜHFD, 2005 II/2, 336).

**II. The Principle of Equality**

66. In addition to the Constitution (Article 10, AY), the Turkish Criminal Code now explicitly mentions the principle of equality (Article 3/2, TCK). The Court of

Constitution applied this principle for abolishing the regulation in Article 104/2, which had criminalized this kind of behavior and aggravating the punishment for consensual sexual intercourse with a minor who has attained the age of 15, if the suspect was 5 or more years older than the victim.<sup>1</sup>

1. Decision of the Court of Constitution dated Nov. 23, 2005, 103/89, RG: Feb. 25, 2006/26091.

## Chapter 2. Application of Criminal Law

### §1. PRINCIPLES CONCERNING THE APPLICATION OF CRIMINAL LAW IN RELATION TO TIME

67. It is possible for criminal law to be amended after an offense has been committed and before the judgment is rendered. Under such circumstances, the problem arises as regards the time of applicability of criminal statutes.<sup>1</sup> The first rule is the immediate application of criminal statutes. However, a more lenient statute may be applied retroactively if it favors the accused. In cases where there have been several changes in criminal law provisions between the time of commission of the crime and the time of the judgment, the court has to apply the most lenient provision of all (Article 7/2, TCK).

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 117. T. Katoğlu, *Ceza Kanunlarının Zaman Yönünden Uygulanması* (Ankara: Seçkin, 2008).

#### I. The Rule of Immediate Application

68. The legal provisions contained in acts in force are automatically applicable as of the date of enforcement.<sup>1</sup>

Retroactive criminal law is constitutionally prohibited (Article 38, AY) (supra, paragraph 57). Furthermore, according to Article 7 of the Turkish Criminal Code, no one can be punished for actions that are not identified as a “crime” at the time the action was performed. There must be a legal rule that identifies the act as a crime before it occurs. This rule underlines the prohibition on retroactive criminal law under Turkish Law.

There must be a legal provision defining the offense when the punishable act is committed, and the person should be informed and aware of the restricted and prohibited acts. Therefore, acts that fall outside such limits do not constitute crimes. It would be unfair and unjust to punish the accused for an act that was not legally defined as a crime when he carried it out.<sup>2</sup>

1. Z. Hafizoğulları & M. Özen, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş, İşlenmiş ve Yenilenmiş 2*. (Ankara: Baskı, US-A Yayıncılık, 2010), 29.
2. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I*, 10 (Bası, İstanbul: Beta, 1987), n. 327.

#### II. Retroactivity of the Milder Statute

69. If the provision of a law in force when a crime is committed differs from the provision of a law enacted after it was committed, the law that benefits the accused is applied and executed (Article 7/2, TCK).<sup>1</sup> Likewise, if a law that favors the accused comes into force during a trial, then that criminal law shall be applied.

However, if a procedural rule that applies in a case is abolished during trial, then the new procedural rule shall immediately apply in the case.

After June 1, 2005, when the Turkish Criminal Code came into force, there were many disputes about the distinction (infra, paragraph 73) and retroactive application of milder statute, as all crime definitions and punishments in the repealed Criminal Code had been amended by the new Code. Different legal reasonings led to the reversal of the judgments of the first instance courts which caused significant delays in the criminal justice system.

The rules regarding measures of security were also immediately applicable under the same rules under the old Criminal Code (Article 2/1, repealed TCK). The current Criminal Code has a different approach as a result of ECHR case law: measures of security shall also be applied and executed retroactively if they are in favor of the accused (Article 7/1, TCK).

In cases where a criminal law has been annulled by the Constitutional Court, the annulment of this criminal law provision shall be applied retroactively, although the decisions of this court have no effect to the past.<sup>2</sup>

1. I. Özgenç, Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5 (Ankara: Bası, Seçkin, 2010), 130. N. Kaçak, Sanık Lehine Kanunun Tespitine İlişkin Emsal İçtihatlar (Ankara: Seçkin Yayınları, 2005).
2. 5. CD 9.3.1998, E. 1998/82, K. 854; YKD 24 (1998), 455.

70. Article 7/2 of the Criminal Code is not applied to the amendments of acts that are not criminal law acts.<sup>1</sup> For example, administrative regulations of the Council of Ministers<sup>2</sup> do not have force of law, and, therefore, Article 7/2 of TCK does not apply.

However, if a “United Decision of the Court of Cassation” (supra, paragraph 51) is changed, this change in opinion does not have retroactive effect.<sup>3</sup>

1. A. Önder (I), Ceza Hukuku Genel Hükümler, Cilt 1 (İstanbul: Beta, 1991), 153.
2. Cass. CGK Oct. 1, 1984, 7-424/290, YKD 1984/12, 1837.
3. Cass. İçBK June 15, 1949/11: Official Gazette, Sept. 20, 1949; B. Öztürk, Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş 2 (Bası Ankara: Dokuz Eylül Üniversitesi, 1992), 49.

71. Scope of the application of criminal law with respect to time. According to the repealed Turkish Criminal Code and, at the time of coming into force, according to the Turkish Criminal Code (Article 7/3), acts concerning the execution of penalties were not applied retroactively.<sup>1</sup> Meanwhile the Turkish Criminal Code has been amended. It now makes the following distinction. On the one hand, statutes related to suspended imprisonment (infra, paragraph 283), conditional release (infra, paragraph 444) and recidivism (infra, paragraph 242) shall be applied retroactively if in favor of the accused. On the other hand, legal provisions related to the “regime of execution” (of a prison sentence) shall be applied immediately (Article 7/3, TCK as amended by “2005–5377”).

The application of temporary statutes (geçici veya süreli kanunlar) shall continue for crimes committed within the period when they were in force (Article 7/4, TCK).

Procedural rules are automatically applicable after their enactment. However, after the amendment of the old Criminal Procedure Code of November 18, 1992 by Act No. 3842 (RG December 1, 1992), there was a discussion about the retroactive application of the procedural statutes. Act No. 3842 introduced new rights for the accused, such as mandatory legal representation for an accused under the age of 18 (Article 138 CMUK), and it forbade certain methods of investigation (Article 135a, CMUK). When this new law came into effect, there were some cases at the Court of Cassation for appellate review. The Military Court of Cassation decided on December 10, 1992<sup>2</sup> that new amendments in the Code of Penal Procedure were related to the public order and were regulations in favor of the accused. Therefore, new articles are to be applied to offenses committed before the law was enacted.<sup>3</sup>

If a crime was prosecuted directly by the prosecutor, but a new law makes this crime prosecutable only upon the complaint, the new law shall not apply until the new time limit for putting forward a complaint under the new law had expired.<sup>4</sup>

With respect to the statute of limitations period, an act that favors the accused was applicable only during a pending trial, according to the Old Code of Application of Penal Code, Article 22. The new criminal justice system takes a different approach. A milder criminal statute is also retroactively applicable, even if there is a final judgment and the sentence is being executed. In that case, the court of the first instance has to decide which is the “milder criminal statute” in that specific case. While judging again, the court does not take into account the provisions of statute of limitations regarding prosecution (Act on the Application of the Turkish Criminal Code 2004–5252, Article “2005–5349” 9/4).

By contrast, the rules concerning the interruption of the statute of limitations and its lapsing should be applied immediately.<sup>5</sup>

1. Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (Bası İstanbul: Beta, 2010), n. 313; Dönmezer & Erman (I), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I*, 10 (Bası, İstanbul: Beta, 1987), n. 344.
2. E. 1992/119, K. 1992/140.
3. The General Assembly of the Court of Cassation has a different view of this legal point: if the amendment has been made after the court of first instance has ruled, the appellate court is not entitled to retroactively apply procedural rules in favor of the accused (CGK Apr. 12, 1993, E. 93/6-62, K. 93/94).
4. Dönmezer & Erman (I), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I*, 10 (Bası, İstanbul: Beta, 1987), n. 349.
5. Dönmezer & Erman (I), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I*, 10 (Bası, İstanbul: Beta, 1987), n. 352.

### III. The Time of Commission of the Crime

72. The time when the crime is committed plays an important role in deciding which rule favors the suspect. There are no difficulties for “instant crimes,” that is, where the action and the result occur at the same time. However, with crimes where the action and the result are separate, the crime is committed at the time when the action is committed, and not at the time of the result.<sup>1</sup> An example of this is when an offender wounds an individual who later dies because of the act (at a different time and place).

In case of “ongoing, continuing offences” (kesintisiz suç), such as carrying a weapon, or a “chain of crimes” (zincirleme suç), for instance an employee of a bank who regularly steals some of the bank’s cash (Article 43, TCK), the offense is considered to be committed at the time of the termination of the ongoing act or the very last act. This determines the venue of the court as well (Article 12/2, CMK).<sup>2</sup>

1. M. Koca, I. Üzülmöz, *Türk Ceza Hukuku Genel Hükümler, Genişletilmiş 2.* (Ankara: Baskı, Seçkin, 2009), 66.
2. A. Önder (I), *Ceza Hukuku Genel Hükümler, Cilt 1* (İstanbul: Beta, 1991), 141. V. Özbek et al., *Türk Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2010), 131. However, Koca & Üzülmöz have a different approach for chain of crimes and argue that each crime committed during this period should be considered separately (M. Koca & I. Üzülmöz, *Türk Ceza Hukuku Genel Hükümler, Genişletilmiş 2* (Ankara: Baskı, Seçkin, 2009), 67).

#### IV. Determining the Milder Statute

73. A new law that abolishes a crime or results in more lenient penalties favors the accused.<sup>1</sup> But if the new law entails a shorter period of punishment than the old law, the former is also considered a “more lenient” statute.<sup>2</sup>

Formerly, if there were several punishments, such as a fine and imprisonment, contained in an old law, as well as others in a new law, the Supreme Court of Cassation would extract from each law the rules most favorable to the accused. Thus, favorable rules in different legislation were all applicable.<sup>3</sup> The Court changed its opinion in 1999 and regards now the favorable total outcome as the punishment than the other.<sup>4</sup>

According to the provisions of the old Criminal Procedure Code, if there was an amendment of the law in favor of the convict after the conviction had become final and enforceable, the prosecutor must request the Court of the first instance to reopen the case and decide on this matter and clear up the uncertainty (Article 402, repealed CMUK). The new criminal justice system has transferred this legal rule into the “Code on Execution of Penalties and Security Measures,” Act 2004–5275, Article 98: “If there are changes in criminal law statutes in favor of the convicted individual or there are some legal problems related to the interpretation of conviction, then the court which had rendered the disputed judgment shall reopen the file and reconsider” (Act 2004–5275, Article 98/1).

1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş, Dördüncü* (İstanbul: Bası, Beta, 2006), 102.
2. B. Öztürk, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş 2* (Bası, Ankara: Dokuz Eylül Üniversitesi, 1992), 51.
3. Cass. CGK Oct. 18, 1980, E. 8-268 / K. 361: A. Önder (I), *Ceza Hukuku Genel Hükümler, Cilt 1* (İstanbul: Beta, 1991), 145.
4. Cass. CGK May 25, 1999, E. 1999/10–133, K. 1999/142.

§2. PRINCIPLES CONCERNING THE APPLICATION OF CRIMINAL LAW  
IN RELATION TO PLACE

**I. Territorial Principle**

74. A crime may be committed on or outside Turkish territory. Because of growing international interactions, human beings are more mobile. Accordingly, their crimes have become international.<sup>1</sup>

According to Article 8/1 new Turkish Penal Code, Turkish laws shall be applied for crimes committed within the territory of Turkey.<sup>2</sup> The crime shall also be considered as “committed within the territory of Turkey” if the criminal behavior was totally or partly conducted in Turkish territory, or if the result of an action outside of Turkey had some results within Turkish territory (Article 8/1 TCK).<sup>3</sup>

A Turk sentenced in a foreign country for a crime committed in Turkey may be retried in Turkey (infra, paragraph 77). A foreigner (heimatlos) who has been sentenced in a foreign country for a crime committed in Turkey according to local legislation may be tried in Turkey (infra, paragraph 84).

The Turkish Criminal Code adopts the principle of territoriality as a general rule, with a few exceptions. In order not to let criminals go unpunished, a crime committed outside Turkish territory, by foreigners or against them, will be prosecuted (aut dedere aut judicare) and punished in accordance with the Turkish Criminal Code.

1. M. Sur, *Uluslar Arası Hukukun Esasları* (İstanbul: Beta, 2007). F. Yenisey, “Milletlerarası Ceza Hukukunda Yeni Gelişmeler,” in *Ceza Hukuku Günleri* (İstanbul, 1998), 47.
2. K. İçel & S. Donay, *Karşılaştırmalı ve Uygulamalı Ceza Hukuku*, 2 (Bası, İstanbul: Filiz, 1993), 157. For explanations of the meaning and the evaluation of the concept of sovereignty, see; A. Gündüz, “Eroding Concept of National Sovereignty: The Turkish Example,” *Marmara Journal of European Studies* 1, nos 1–2 (1991): 99–154.
3. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 140.

75. In terms of geography, the application of TCK reflects the system of territoriality as a basic rule. The land within the frontiers is considered a country’s territory. The territorial application of criminal law comprises the rivers, lakes and the internal waters of the State. According to Act No. 2674 of May 20, 1982, the internal waters of Turkey extend six miles out to sea.

Some provisions of the old Criminal Procedure Code (Articles 14 and 15 repealed CMUK) related to the “fiction of territory.” This fiction has been copied into the new Criminal Code and has been enlarged. Crimes are considered committed in the territory of Turkey when they are perpetrated: (1) in Turkish territory, air space and internal waters; (2) on board of a ship or an airplane that flies under Turkish flag, when that ship or airplane is in international waters or airspace; (3) in Turkish warships and military airplanes, if they are actually in international waters or international airspace; and (4) within the Turkish continent shelf (kıta sahanlığı), in or against the platforms within Turkish economic space (Türkiye’nin münhasır ekonomik bölgesinde tesis edilmiş sabit platform) (Article 8/2, TCK).<sup>1</sup>



1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş, Dördüncü* (İstanbul: Bası, Beta, 2006), 124. K. İçel & S. Donay, *Karşılaştırmalı ve Uygulamalı Ceza Hukuku*, 2 (Bası, İstanbul: Filiz, 1993), 158.

76. A crime can be described as international<sup>1</sup> when it is committed in more than one State. The Court of Cassation decided in a case in which an airplane was hijacked from Bulgaria that the crime was committed in the State where the act was committed.<sup>2</sup> This ruling was included in the Criminal Code in 2004 (Article 8/1, TCK): “partly or wholly conducted actions in Turkey and actions in a foreign country causing any result in Turkey shall be considered as a crime committed in Turkey,” even if they are attempted. For example, a parcel containing explosives, which is addressed to a receiver in Turkey but discovered and seized in Germany, shall be considered as a crime committed in Turkey.<sup>3</sup>

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 4* (Ankara: Bası, Seçkin, 2009), 761.
2. D. Tezcan, “Ceza Kanununun Yer İtibariyle Uygulanması: Milletlerarası Ceza Hukuku,” in *Ceza Hukuku El Kitabı* (İstanbul: Beta, 1989), 179.
3. S. Tellenbach, “Internationaler Geltungsbereich des Strafrechts in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung, Teilband 2*, ed. Sieber & Cornils (Berlin, 2008), 341.

## **II. The Principle of Personality**

### **A. The Active Principle of Personality**

77. The State follows its citizens in foreign countries. The Turkish State punishes crimes committed against its citizens and crimes committed against the Turkish State. In Turkish criminal law, the principle of personality<sup>1</sup> is not applied as a single rule. It is also supported by other principles.<sup>2</sup>

1. V. Özbek et al., *Türk Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2010), 144.
2. K. İçel & S. Donay, *Karşılaştırmalı ve Uygulamalı Ceza Hukuku*, 2 (Bası, İstanbul: Filiz, 1993), 159.

### **1. Crimes Committed by Turkish Civil Servants in a Foreign Country**

78. Civil servants who carry out a duty in the name of Turkish Republic in a foreign country, shall be tried in Turkey for crimes committed within their capacity as civil servant, even if they had been tried and convicted there (Article 10, TCK).

### **2. Crimes Committed by Turkish Citizens in a Foreign Country**

79. If a Turkish citizen commits a crime outside Turkey that requires imprisonment for more than one year (previously this was three years), upon his return to Turkey he will automatically be prosecuted by the Public Prosecutor at the lower level of the punishment, if the imprisonment is furnished with upper and lower levels (Article 11/1, TCK).

If the crime is punished by imprisonment for less than one year, the prosecution may be initiated upon the complaint of the injured party or the foreign government. The complaint must be filed within six months after the suspected Turkish citizen returned to Turkish territory (Article 11/2, TCK).

Under Article 38 of the Constitution, as amended by Act 2004–5170 and the provisions of the Criminal Code (Article 18/2, TCK), the TC does not extradite (infra, paragraph 89) its citizens, except in response to its obligations consequent to accession to the Statute of International Criminal Court.<sup>1</sup> Therefore, if a citizen commits a crime outside Turkey, he will be tried in Turkey (Article 11, TCK) if the act is considered a crime according to Turkish Law.<sup>2</sup>

1. M.E. Artuk, A. Gökcen & A.C. Yenidünya, *Ceza Hukuku Genel Hükümler* (Seçkin, Ankara: Birinci Kitap, 2002), 357.
2. According to the repealed Criminal Code, if the act was a crime in Turkey, but not in the country where it was committed, the perpetrator could not be punished in Turkey (Art. 10a, repealed TCK). The current Criminal Code contains a different regulation in this regard, and now there is a border of punishment which cannot be exceeded; this border is the high level of the punishment foreseen by the foreign criminal provision (Art. 19, TCK) (infra, para. 87). The possibility of trying the Turkish offender was subject to the requirement of double criminality?.

#### B. The Passive Principle of Personality (Principle of Protection)

80. The State naturally protects itself. Articles 12 and 13 of the new Turkish Penal Code lay down the “principle of self protection.”

##### 1. Crimes Committed by a Foreigner in a Foreign Country against Turkey

81. A foreigner in a foreign country who commits a crime other than those mentioned in Article 13, against Turkey, which entails punishment restricting liberty for a minimum period of one year under Turkish law, shall be punished in accordance with the Turkish Criminal Code, if the offender is present in Turkey. The prosecution can be made upon request (istem) of the Minister of Justice (Article 12/1, TCK).

##### 2. Crimes Committed by a Foreigner in a Foreign Country against Turkish Citizen or Legal Entity

82. A foreigner in a foreign country who commits a crime other than one mentioned in Article 13, against a Turk or a legal person founded in accordance with Turkish laws, and which entails punishment restricting liberty for a minimum period of one year under Turkish law, shall be punished in accordance with the Turkish Criminal Code, if the offender is present in Turkey (Article 12/2, TCK). The prosecution can be made upon request (istem) of the Minister of Justice (Article 12/1 TCK).

3. Crimes Committed by a Foreigner in a Foreign Country against a Foreigner  
(Prosecution on Behalf of Another State)

83. If the victim of a crime committed outside of Turkey is a foreigner, the offender will be prosecuted in Turkey at the request of the Minister of Justice, provided that the punishment for the act is not less than three years of imprisonment according to the Turkish law, and that there is no extradition treaty between Turkey and the country concerned, or that extradition was refused by the government of the territory where the crime was committed or by the State where the offender is a citizen (Article 12/3, TCK).

### III. The Principle of Universality

84. The new Penal Code has adopted a new principle of “universality” (evrensellik ilkesi), taking into consideration certain types of crimes (Article 13, TCK):

- (I) The following serious crimes committed by a Turkish citizen or a foreigner in a foreign country shall be prosecuted ex officio (Article 13/1-a): genocide, crimes against humanity (Articles 76, 77, TCK), smuggling of immigrants and human trafficking (Articles 79, 80, TCK).
- (II) The following serious crimes committed by a Turkish citizen or a foreigner in a foreign country against Turkey, shall be prosecuted ex officio (Article 13/1-b, TCK).
  - (1) Crimes against the symbols of sovereignty of the state and crimes against the reputation of its organs (Part 4. Subsection 3. Articles 299–301):
    - (a) Insulting the President of the Republic (Article 299, TCK),
    - (b) Discrediting the symbols of the state sovereignty (Article 300, TCK)
    - (c) Discrediting the Turkish nation, the republic, the organs and institutions of the state (Article 301, TCK).
    - (d) Defamation of the Turkish nation, Republic, Grand National Assembly, government, ministries, army, security forces or judiciary (Article 301, TCK).
  - (2) Crimes against the security of the state (Part 4. Subsection 3. Articles 302–308, TCK):
    - (a) Acts aimed to place the land of the State, partly or as a whole, under the sovereignty of a foreign state (Article 302/1, TCK).
    - (b) Alliance with the enemy (Article 303, TCK),
    - (c) Incitement to war against a state (Article 304, TCK),
    - (d) Activities against the fundamental national interests for benefit (Article 305, TCK),
    - (e) Recruitment soldiers against a foreign state (Article 306, TCK),
    - (f) Destruction of military facilities (Article 307, TCK),
    - (g) Material, financial aid to enemy states (Article 308, TCK).
  - (3) Crimes against the constitutional order and the well functioning of this order (Part 4. Subsection 5. Articles 309–316):

- (a) Attempting to abolish, replace or prevent the implementation, through force and violence, of the constitutional order of the Republic of Turkey (Article 309/1, TCK).
- (b) Assassination of and physical attack on the President (Article 310, TCK),
- (c) Offence against a legislative body (Article 311, TCK),
- (d) Offences against the government (Article 312, TCK),
- (e) Armed revolt against the government of the Turkish Republic (Article 313, TCK),
- (f) Armed organization (Article 314, TCK),
- (g) Supplying arms (Article 315, TCK),
- (h) Agreement to commit an offence (Article 316).
- (4) Crimes against national defence (Part 4. Subsection 6. Articles 317–325, TCK):
  - (a) Usurping military command (Article 317, TCK),
  - (b) Discouraging people from performing military service (Article 318, TCK),
  - (c) Encouraging soldiers to disobey (Article 319, TCK),
  - (d) Enlistment of soldiers in foreign service (Article 320, TCK),
  - (e) Disobeying orders in a time of war (Article 321, TCK),
  - (f) Obligations during wartime (Article 322, TCK),
  - (g) Dissemination of false information in wartime (Article 323, TCK),
  - (h) Failure in the performance of a duty during mobilization (Article 324, TCK),
  - (i) Acceptance of title and similar awards from the enemy (Article 325, TCK).
- (5) Crimes against state secrets and spying (Part 4. Subsection 7. Articles 326–339, TCK):
  - (a) Revealing documents relating to state security (Article 326, TCK),
  - (b) Securing information relating to state security (Article 327, TCK),
  - (c) Political or military espionage (Article 328, TCK),
  - (d) Disclosure of information relating to the security and political interests of the state (Article 329, TCK),
  - (e) Disclosure of information which must be kept confidential (Article 330, TCK),
  - (f) Entering military zones (Article 332, TCK),
  - (g) Exploitation of state secrets and disloyalty in government services (Article 333, TCK),
  - (h) Securing prohibited information (Article 334, TCK),
  - (i) Securing prohibited information for espionage (Article 335, TCK),
  - (j) Disclosure of prohibited information (Article 336, TCK),
  - (k) Disclosure of prohibited information for political or military espionage (Article 337, TCK),
  - (l) Espionage through recklessness (Article 338, TCK),
  - (m) Possession of documents concerning state security (Article 339, TCK).
- (6) Crimes against the relationships with foreign countries (Part 4. Subsection 8. Articles 340–343, TCK):

- (a) Offences against the head of a foreign state (Article 340, TCK),
  - (b) Offences against the flag of a foreign state (Article 341, TCK),
  - (c) Offences against the representative of a foreign state (Article 342, TCK).
- (III) The following serious crimes committed by a Turkish citizen or a foreigner in a foreign country shall be prosecuted in Turkey upon the request of the Minister of Justice (Article 13/2, TCK).
- (1) Torture (Article 94–95, TCK),
  - (2) Intentional pollution of environment (Article 181, TCK),
  - (3) Production and trafficking of narcotic substances (Article 188, TCK); promoting the consumption of narcotic substances (Article 190, TCK),
  - (4) Counterfeiting money (Article 197, TCK); production of and trading with material used for production of money and valuable seals (Article 200, TCK); counterfeiting government seal (Article 202, TCK),
  - (5) Prostitution (Article 227, TCK),
  - (6) Hijacking or seizure of transport vehicles (Article 223/2,3, TCK) or damaging such vehicles (Article 152, TCK).

#### IV. Validity of Foreign Judgments and ne bis in idem

85. Judgments delivered by a foreign State have a limited validity compared to judgments of Turkish courts.<sup>1</sup> Foreign judgments shall be taken into account, and under some circumstances shall bar a new trial in Turkey (ne bis in idem).

Foreign judgments have different effects in Turkey.

- (1) For Crimes Committed in Turkey: If anybody (a Turk or foreigner) commits a crime in Turkey and is adjudicated in a foreign country, the judgment of the foreign court has no legal value in Turkey: there shall be a new trial in Turkey (Article 9, TCK) (supra, paragraph 74).
- (2) For Crimes Committed in a Foreign Country
  - (a) Crimes committed by a civil servant shall be retried in Turkey, even if there has been a conviction (Article 10, TCK).
  - (b) Crimes committed by a Turkish citizen. If a Turkish citizen commits a crime in a foreign country and has not been tried there, he shall be tried in Turkey. However, if there has been a final judgment rendered against him in the foreign country, there shall be no second trial in Turkey, if he is present in Turkey (Article 11/1, TCK). For the prosecution of crimes requiring imprisonment of less than one year, there must be a complaint (Article 11/2, TCK).
  - (c) Crimes committed by a foreigner. (Article 12, TCK). A foreigner in a foreign country who commits a crime other than those mentioned in Article 13, against Turkey, which entails punishment restricting liberty for a minimum period of one year under Turkish law, shall be punished in accordance with the Turkish Criminal Code, if the offender is present in Turkey. The prosecution can be made upon request of the Minister of Justice (Article 12/1, TCK). In cases where the foreigner had been convicted in the foreign

country, the Minister of Justice may request a new trial in Turkey (Article 12/4, TCK).

- (3) A foreigner in a foreign country who commits a crime other than those mentioned in Article 13, against a Turk or a legal person founded according to Turkish laws, and which entails punishment restricting liberty for a minimum period of one year under Turkish law, shall be punished in accordance with the Turkish Criminal Code, if the offender is present in Turkey (Article 12/2, TCK). The prosecution can be made upon request of the Minister of Justice (Article 12/1 TCK).
- (4) If the victim of a crime committed outside of Turkey is a foreigner, the offender will be prosecuted in Turkey at the request of the Minister of Justice, provided the punishment for the act is not less than three years of imprisonment according to the Turkish law, and that there is no extradition treaty between Turkey and the country concerned, or that extradition was refused by the government of the territory where the crime was committed or by the State where the offender is a citizen (Article 12/3, TCK).
- (5) Other Serious Crimes Committed in a Foreign Country: Those who commit any of the crimes listed under Article 13 of TCK, except those crimes mentioned in Article 13/2, TCK, will, at the request of the Minister of Justice, be retried in Turkey even if the offender had previously been convicted in a foreign country.
- (6) Cases of counterfeiting foreign currency and bribing foreign officials are exceptions. Only in these cases was the principle of “ne bis in idem” explicitly accepted by the old Law (Article 4, TCK as amended by “2003–4782”).
- (7) There is always a new trial upon the request of the Minister of Justice in Turkey for crimes committed abroad for crimes mentioned in Article 13/3, even if the foreign judgment was a conviction or an acquittal and the principle of “ne bis in idem” does not apply.
- (8) Under the previous Criminal Code, there was no written law regarding second prosecutions in Turkey with respect to Turkish citizens sentenced for a crime committed in a foreign country (Article 5, repealed TCK). Consequently, there was no possibility for an individual to be retried in Turkey. In addition, the decisions of the Court of Cassation demonstrate full acceptance of the “ne bis in idem” principle, except in cases of drug smuggling from Turkey to foreign countries.<sup>2</sup>
- (9) The Criminal Code now openly states that a judgment (hüküm) rendered in a foreign country constitutes an obstacle to Turkish prosecution (Articles 11/1, 12/1, TCK).

1. F. Yenisey, “Die Rechtliche Stellung des im Ausland straffällig gewordenen Türken in der Türkei,” Informationsbrief Ausländerrecht Heft 4 (April, 1988), s. 125.
2. F. Yenisey, *Millîterarası Ceza Hukuku: Ceza Yargılarının Millîterarası Değeri ve Mevzuat* (İstanbul: Beta, 1988), 225. In cases of drug smuggling from Turkey to foreign countries, the High Court of Cassation regarded the offense an act committed in Turkey and applied Art. 3 of the repealed Criminal Code, even if the perpetrator had already been convicted in the foreign country. Art. 3 of the repealed Criminal Code stipulated that a Turkish citizen, sentenced in a foreign country for the commission of a crime, should be retried in Turkey. A foreigner who had been sentenced in a foreign country for a crime that he had committed in Turkey would be tried in Turkey upon the request of the Minister of the Justice (Art. 3/2, repealed TCK).

## V. Problems Related to the Application of Foreign Criminal Law to Crimes Committed in Foreign Countries

86. In Turkish Criminal Law, crimes committed outside Turkey make up a special category,<sup>1</sup> and the development in this field began in 1965. Article 18/1 of the repealed Code on Enforcement of Punishments had provided that a foreigner sentenced in Turkey was liable to serve his sentence in his own country if the principle of reciprocity and the execution of the full sentence were guaranteed.

In 1984, Act No. 3002 abolished the above-mentioned regulation and substituted it with a larger Act: the judgments of the foreign countries are to be applied in Turkish prosecutions. To this end there is a procedure contained in the Act: the factual findings of the foreign judgment are considered final. Upon this, the Turkish Court crafts a new Turkish judgment and renders a punishment according Turkish Criminal Code that will be executed in Turkey. However, the final punishment cannot be more severe than the upper level punishment as foreseen in the law of the foreign country where the crime had been committed (Article 19/1, TCK). However, the foreign judgment is still valid from the perspective of that foreign country. Foreigners who have committed crimes in Turkey and have been sentenced by a Turkish Court can serve the sentence in their own countries under the condition of reciprocity (*infra*, paragraph 443).

1. F. Yenisey, “Die Rechtliche Stellung des im Ausland straffällig gewordenen Türken in der Türkei,” Informationsbrief Ausländerrecht, Heft 4 (April, 1988), s. 125. D. Tezcan, M.R. Erdem & M. Önok, *Uluslararası Ceza Hukuku* (2009).

### A. Regulations in the Repealed Criminal Code

87. Considering foreign law. In 1991, Article 10(a) was taken from the 1989 Draft Criminal Code and added to the now repealed Turkish Criminal Code. According to this regulation, if a Turkish citizen or a foreigner committed a crime in a foreign country and was subject to Turkish criminal jurisdiction according to the regulations of the First Book, Part I of the repealed Turkish Criminal Code, then the law favoring the accused was applicable. The Turkish Judge had to choose the more lenient of the Turkish Code and the code of the place where the crime was committed.<sup>1</sup>

The provisions of Article 10a of the repealed Penal Code were not applied to crimes that had been committed against and damaged the TC.

The second exception held that if the law of the place where the crime was committed infringes Turkish public order or violates Turkey’s international obligations, that law would not be applied in Turkey. In Article 10a, the words “public order” meant the basic principles of Turkish procedural law and the basic principles of Turkish Criminal Law. For example, if there is an international agreement where a principle of Islamic Law favoring the accused had been foreseen, the foreign rule would not be applied in Turkey.<sup>2</sup>

1. F. Yenisey, “Die Rechtliche Stellung des im Ausland straffällig gewordenen Türken in der Türkei,” Informationsbrief Ausländerrecht, Heft 4 (April, 1988), s. 125.



2. K. İçel & S. Donay, *Karşılaştırmalı? ve Uygulamalı Ceza Hukuku*, 2 (Bası, İstanbul: Filiz, 1993), 175; F. Yenisey, “Ausländische Strafmasse im türkischen Strafrecht,” in *Informationsbrief Ausländerrecht* (1994/1), 9.

#### B. Provisions in the Recent Criminal Code

88. The Criminal Code simplified<sup>1</sup> this provision. Turkish courts have now to “consider”<sup>2</sup> (göz önünde bulundurmak) the upper level of the punishment in the Criminal Code of the country where the crime has been committed, and the punishment in the Turkish judgment shall not exceed this limit (Article 19/1, TCK). This consideration does not apply if the crime was committed against the security or to the disadvantage (zararına) of Turkey, or against the interests of a Turkish citizen or a legal person formed under Turkish Law (Article 19/2, TCK).

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 4* (Ankara: Bası, Seçkin, 2009), 813.
2. As a consequence of the previous legislation of the repealed TCK 10a, the Turkish court was “applying” the foreign criminal law (F. Yenisey, “Milletlerarası Ceza Hukukunda Yeni Gelişmeler,” in *Ceza Hukuku Günleri* (İstanbul, 1998), 47). K. Özdemir, *Ceza Hukukunda Yabancı Kanunun Göz Önünde Bulundurulması* (sayfaTürkiye Barolar Birliği Dergisi, 2005) 29, Temmuz & Ağ

#### VI. Extradition

89. Extradition<sup>1</sup> of a Turkish citizen to a foreign State for a crime committed there is not allowed (Article 18, TCK).<sup>2</sup>

The old Criminal Code did not foresee the extradition of a foreigner to a foreign State for political or related crimes.<sup>3</sup> The new Criminal Code now uses a different terminology (“geri verme” instead of “iade”) and extends the grounds of non-extradition (Article 18/1). If the act that is the subject of the request:

- is not a “crime” under Turkish Criminal Law;
- is a crime of the nature of a “freedom of expression crime” (düşünce suçu) or a political or military crime;
- is a crime against the security of Turkey or a crime against a Turk or against a legal person founded according to Turkish Law;
- is a crime that does not fall under the jurisdiction of Turkey; or
- is such that the statute of limitations for prosecution has expired or there has been an amnesty or pardon;

then Turkey shall not accept the request of extradition. Additionally, if there are strong grounds to suspect (kuvvetli şüphe sebepleri) that the individual, if extradited, will be subject to torture or shall be prosecuted because of his political views, the request of extradition shall not be accepted (Article 18/3, TCK).

Extradition of Turkish citizens to the “International Criminal Court” is permitted under the contractual obligations (Article 38, AY as amended by the Act 2004–5170 and Article 18/2, TCK).



If a foreign State requests extradition, the (formerly known as the “Court of General Criminal Jurisdiction”; repealed Article 9, TCK) of the area in which the requested person is present at the moment (bulunduğu yer ağır ceza mahkemesi) determines the citizenship of the requested person and the nature of the crime allegedly committed. The decision of the Court may be contested by way of cassation (temyiz) at the Court of Cassation. If upheld, the decision of the Court “not to extradite” is final and the government has no discretion in this matter. If it is determined that the extradition request is acceptable, the government (Board of Ministers) still has discretion over whether the court decision shall indeed be executed or not (Article 18/5, TCK). If the request is accepted, a warrant of arrest against the requested person may be issued, according the related provisions of the Criminal Procedure Code (Article 18/7, TCK).<sup>4</sup>

If extradited, this person may only be prosecuted abroad for the crimes that are the subject matter of the extradition decision (Article 18/8, TCK).

The TC is party to the European Convention on Extradition. The punishment that the offender faces in the requesting State should be at least one year of imprisonment.<sup>5</sup>

1. F. Yenisey, “Suçluların Geri Verilmesi ve Ceza İşlerinde Adli Yardımlaşma,” in *Adalet Dergisi* (1981), sayı 4, sh. 590.
2. E. Özgen, *Suçluların Geri Verilmesi* (Ankara, 1962), 3; N. Centel, H. Zafer & O. Çakmut *Türk Ceza Hukukuna Giriş* (İstanbul: Beşinci Bası, Beta, 2008), 176.
3. K. Bayraktar, *Siyasal Suç* (İstanbul, 1982).
4. D. Tezcan, “Ceza Kanununun Yer İtibariyle Uygulanması: Milletlerarası Ceza Hukuku,” in *Ceza Hukuku El Kitabı* (İstanbul: Beta, 1989), 187; S. Donay, “Suçluların İadesinde Yeni Gelişmeler,” *IHF* (1984): 241.
5. K. İçel & S. Donay, *Karşılaştırmalı ve Uygulamalı Ceza Hukuku*, 2 (Bası, İstanbul: Filiz, 1993), 216.

## VII. Procedures of the Transnational Criminal Law

90. “Transfer of proceedings” and “transfer of prisoners” are regulated under international criminal law.<sup>1</sup> Turkey has ratified the European Convention on Transfer of Proceedings of March 1, 1977 (RG December 27, 1977) and the European Convention on Transfer of Prisoners of March 26, 1987 (RG June 13, 1987).

However, problems arise with the transfer of the Turkish prisoners to such Western European countries as Germany, Austria and Switzerland, on account of the “conditional release” regulation (infra, paragraph 444) under Turkish Law.<sup>2</sup>

1. Eser & Lagodny, *Principles and Procedures for a New Transnational Law* (Eigenverlag Max-Planck-Institut für ausl. u. int. StR., Freiburg i.Br., 1992); F. Yenisey, *Milletlerarası Ceza Hukuku: Ceza Yargılarının Milletlerarası Değeri ve Mevzuat* (İstanbul: Beta, 1988), 220.
2. According to Art. 19 and added Art. 2 of the repealed Code on Enforcement of Criminal Judgments, a prisoner was conditionally released after serving 40% of the prison term. However, according to Provisional Art. 1 of Anti-Terrorism Act Number 3713 (RG Apr. 12, 1991), there was a possibility of release after serving 20% of the prison term if the act was committed before Apr. 8, 1991. In most cases, prisoners have been released in Turkey pursuant to the above-mentioned regulations. The new criminal justice system abolished such exceptions as of June 1, 2005.

§3. PRINCIPLES CONCERNING THE ENFORCEMENT OF CRIMINAL LAW IN  
RELATION TO PERSONS

91. Criminal statutes apply either from the moment they are published in the official gazette or from the date specified in the law. However, there are some exceptions related to the inviolability of the State President and the members of the House of National Assembly. In addition to these exceptions, there are some immunities based on national and international public law.

### I. Inviolability of the State President

92. Article 105/2 of the Turkish Constitution states that the State President is inviolable.<sup>1</sup> All presidential decrees must be signed by the Prime Minister and the ministers concerned, unless otherwise provided by the provisions of the Constitution and other laws. The Prime Minister and the ministers concerned are accountable for these decrees. No appeal shall be made to any legal authority, including the Constitutional Court, against the decisions and orders signed by the President of the Republic on his own initiative.

Presidents of foreign States are immune from Turkish jurisdiction.

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 143.

93. The President of the Republic may be impeached for high treason on the recommendation of at least one-third of all members of the Grand National Assembly of Turkey, and by the decision of at least three-quarters of all the members (Article 105/3, AY). The criminal responsibility of the President of the Republic is not clearly regulated in the Turkish Laws.

However, for offenses that have no official character, there is an obstacle to prosecution during the presidential term. Prosecution is only possible after the presidential office has terminated.<sup>1</sup>

There is no regulation that prevents a civil action against the President of the Republic, but executing the judgment is not possible.

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 144. M. Koca & I. Üzülmüş, *Türk Ceza Hukuku Genel Hükümler, Genişletilmiş 2* (Ankara: Baskı, Seçkin, 2009), 94.

### II. Inviolability of the Members of the Grand National Assembly

94. Inviolability. Turkish Law differentiates between “inviolability” (*mutlak dokunulmazlık*) and “immunity” (*nisbi dokunulmazlık*) (*infra*, paragraph 95). According to Article 83/1 of the Constitution, members of the Grand National Assembly of Turkey are not criminally responsible, unless the Assembly decides otherwise, for their votes and statements concerning parliamentary functions, for the ideas they express before the Assembly and for repeating these ideas outside of the Assembly.<sup>1</sup>

1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (Beta, İstanbul: Beşinci Bası, 2008), 149.

### III. Parliamentary Immunity

95. According to the Constitution, members of the National Grand Assembly are not subject to public prosecution during their office: “A deputy who is alleged to have committed a crime before or after the election shall not be arrested, interrogated, detained or tried unless the Assembly decides otherwise” (Article 83/2, AY).<sup>1</sup>

This provision shall not apply in cases where a member is caught in the act of committing a crime punishable by a lengthy penalty (ağır cezayı gerektiren suçüstü hali) or in cases subject to Article 14 of the Constitution<sup>2</sup> if an investigation (soruşturma) has been initiated before the election. However, in such situations the competent authority shall notify the Grand National Assembly of Turkey immediately and directly (Article 83/2, AY).

1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (Beta, İstanbul: Beşinci Bası, 2008), 155.
2. During the recent elections in June 2011, some political parties have named candidates, who have been charged with crimes under Art. 14 of the Constitution and had been deprived of their liberties, waiting for trial in pre-trial detention. Some of those candidates have been elected by the nation and have received the documents about the outcome of the election through their lawyers. But as they are still incarcerated, they are not able to go to the Parliament in Ankara and take their oath in order to be a full member of the Parliament. This situation created a crisis in politics and as a protest, the rest of the elected members of two political parties refused to take oath.

### IV. The Immunities of Diplomatic Corps

96. Since 1961, the TC has been party to the Convention of Vienna on the Immunities of the Diplomatic Corps. Consuls are not considered diplomats, but according to the Vienna Convention of March 19, 1967 Concerning Consular Relationships, consuls are subject to Turkish jurisdiction only if they have committed an act that is tried by the court dealing with the most serious offenses.<sup>1</sup>

1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (Beta, İstanbul: Beşinci Bası, 2008), 168.

### V. Immunities Based on the International Treaties

97. According to Article 23 of the Treaty on Prevention of Torture, accepted by Turkey in 1988 pursuant to Act No. 3441, the members of the European Committee for Prevention of Torture have immunities for the duration of their tasks in Turkey.

98. Certain agreements between Turkey and other countries regulate the extent of Turkish criminal jurisdiction over foreign military personnel in Turkey. According to the North Atlantic Treaty, members of foreign military forces have a special status in regard to jurisdiction. Article 7 of the Treaty states that military forces exercise their own national civil and criminal jurisdiction over military personnel who

understand their own laws. If a foreign country (the sending State) has final jurisdiction in cases of high treason, sabotage, spying and offenses related to State secrets, the case will be tried by that State and its laws will be applied.<sup>1</sup>

If that State has privileged jurisdiction, pursuant to Article 7/3 of the North Atlantic Treaty Organization (NATO) Treaty, it may refuse to exercise its right of jurisdiction. Special treaties between the foreign State and Turkey will govern the principles of the application of this right.

1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (Beta, İstanbul: Beşinci Bası, 2008), 174.

## Chapter 3. General Principles of Criminal Responsibility or Liability

### §1. INTRODUCTION: THE BASIC ELEMENTS OR REQUIREMENTS OF CRIMINAL OFFENSES

#### I. The Basic Elements of Criminal Offenses

99. The theory of the “General Principles of Criminal Liability” deals with the basic elements of criminal offenses.

TCK does not define crime. However, there are “general elements of crime” that are common to all crimes. For certain crimes such as murder or theft, the law has provided some specific elements. From the perspective of positive law, any action that is punishable by criminal law is a crime.

Turkish doctrine divides the basic elements differently. Taner<sup>1</sup> speaks of three elements: “the element of law,” “the material element” and “the mental element.”

Kunter<sup>2</sup> divides the elements into two groups: “the elements demonstrated by the act” (requirement to be shown in the law, unlawfulness and punishability) and “the material element” (action, result and causation).

Dönmezer and Erman<sup>3</sup> suggest four groups: “the element of law” (supra, paragraph 57) “the material element,” (infra, paragraph 107) “the element of unlawfulness” (infra, paragraph 134) and “the mental element” (infra, paragraph 116). The material element consists of human acts or omissions, physical results of human conduct that are defined by the penal code, and the causal link.

The new generation of legal experts consider illegal human conduct as material element of the crime. Other elements are the mental element and unlawfulness.<sup>4</sup>

The perpetrator (infra, paragraph 247), who commits the crime (Tatsubjekt),<sup>5</sup> is a natural, living person may act alone, or together with other actors. However where civil servants collectively leave their work illegally, there must be at least four of them acting together, in order being punishable (Article 260/1, TCK).

Certain crimes have special characteristics. For example, there are those in which the perpetrator must be a civil servant (bribery; Article 252, TCK) or a soldier. Only persons placed in pre-trial arrest or inmates are eligible to commit the crime of escaping from prison (Article 292, TCK). In Turkish criminal law these are called special crimes (özgü suçlar).

In some crimes, however, the position of the perpetrator is a ground for the aggravation of the punishment, such as forgery at documents conducted by a civil servant (Article 204/2, TCK), or a drug offense committed by a medical doctor (Article 188/8, TCK).

1. T. Taner, *Ceza Hukuku, Umumi Kısım* (İstanbul: Üçüncü Basım, İstanbul Üniversitesi Hukuk Fakültesi, 1955), 131.
2. N. Kunter, *Suçun Maddi Unsurları Nazariyesi* (İstanbul: İstanbul Hukuk Fakültesi, 1954), N. Kunter, *Suçun Kanuni Unsurları Nazariyesi* (İstanbul: İstanbul Hukuk Fakültesi, 1949).
3. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), n. 500.
4. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 147.

5. S. Tellenbach, “Objektive Tatseite in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung*, Teilband 3, ed. Sieber & Cornils (Berlin, 2008), 623.

## II. Subjects in Addition to the Basic Elements of Criminal Offenses

100. Subjects in addition to the basic elements of criminal offense are “preconditions,” “the conditions of punishability,” “the conditions of criminal prosecution” and “the reasons for setting aside the sanction.”<sup>1</sup>

1. S. Dönmezer & S. Erman, Sahir (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), n. 454.

101. “The preconditions of criminal offences” (ön şartlar) have to be present at the time of the commission of the act. An act does not constitute a criminal offense if not all specifically required preconditions are fulfilled.<sup>1</sup> For example, in abortion the woman should be pregnant. In reality, the basic elements and preconditions of criminal offenses are not different subjects, but the Turkish doctrine makes this differentiation only for the sake of practicability.<sup>2</sup>

1. S. Dönmezer, Sulhi & S. Erman, Sahir (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), n. 454.
2. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (İstanbul: Beşinci Bası, Beta, 2008), 207.

102. “Conditions of punishability” (cezalandırılabilme şartları) must be present after the act has been carried out.<sup>1</sup> If the conditions of punishability are not met, the perpetrator will not be punished. For example, a Turk in a foreign country who commits a crime punishable under Turkish law that restricts personal liberty for a minimum period of one year, shall be punished according to Turkish laws. However, this is only true “if he is in Turkey,” if there is no conviction by the foreign country and if the crime can be prosecuted in Turkey (Article 11/1, TCK). In this case, the presence of the perpetrator in Turkey is a condition of punishability. There are no such conditions for the intent of the accused<sup>2</sup>

1. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), n. 455.
2. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (İstanbul: Beşinci Bası, Beta, 2008), 209.

103. “Preconditions of criminal prosecution” (ceza muhakemesi şartları) (infra, paragraph 362) are not related to the basic elements of the criminal offense such as immunities (supra, paragraph 95). They only prevent the criminal investigation or prosecution if they are not present.<sup>1</sup>

1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (İstanbul: Beşinci Bası, Beta, 2008), 209.

104. “The reasons for setting aside the prosecution and the sanction” (dava ve cezanın düşürülmesi) (infra, paragraph 452) are not one of the basic elements of

criminal offenses. These include death of the accused or the convicted person (Article 64, TCK), amnesty (Article 65/1, TCK), pardon (Article 65/2, TCK), expiry of the period set by the statute of limitations for prosecution (Article 66, TCK) and expiry of the period set by the statute of limitations for punishment (Article 68, TCK).

## §2. ACTUS REUS: THE MATERIAL ELEMENT OF THE OFFENSES

### I. Forbidden Act

105. The Penal Code defines the forbidden human conduct that violates a protected legal value<sup>1</sup> (korunan hukuksal değer). As a result of the principle of legality (supra, paragraph 57) (Article 2, TCK), the legislature has created certain types of offenses.

Everything that may be an expression of will is considered human conduct;<sup>2</sup> human conduct is manifested in the form of either an act or omission.

The repealed Criminal Code defined some offenses as “offences without movement, which do not require a result to occur in the world.”<sup>3</sup> Under the current law, human conduct that creates a danger may be punished before any harm has resulted (Articles 125 and 176, TCK) (tehlike suçları).

Offenses that can be committed only with an action are divided into groups. The first group of these offenses consists of “offences with limited actions” and “offences with free-typed actions.” If the offense can be committed only by means of the type of action described in the law itself, there is “an offense with limited actions,” as described in Article 225 of the Turkish Criminal Code (sexual intercourse or exhibitionism in public places).

1. Y. Ünver, *Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer* (Ankara: Seçkin Yayınları, 2003).
2. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), n. 503; N. Centel, *Türk Ceza Hukukuna Giriş* (İstanbul: Beta, 2001), 172.
3. Such offenses were called “offences of suspicion” (N. Toroslu, *Ceza Hukuku*, 2 (Ankara: Bası, Savaş, 1990), 56). For example, if a person is convicted of larceny or plunder and money is found in his possession of such value as to be incompatible with his social standing and if this person fails to prove legal title to possess such money, he was liable of a misdemeanor (Art. 578, repealed TCK). The Criminal Code does not include such crimes.

106. Offenses of action<sup>1</sup> require a positive effort on the part of the offender, whereas with offenses of omission (ihmalî davranışla işlenen suçlar), the offender does not act when he is obliged<sup>2</sup> to do so (Articles 83 and 88, TCK).<sup>3</sup> By offenses of commission by omission, the offender commits a crime that can be made by an action with his non-action, such as not helping a wounded person (Article 98, TCK), failing to report a crime that is being committed (Article 278, TCK), or failing to report hidden evidence, even if he knew where the evidence was located (Article 284/2, TCK).

If only one action is sufficient to fulfill the requirements of the offense, then there is a “one-action offence.” However, if the perpetrator must carry out more than one action, then there is an “offence that is committed through more than one action.”

For example, in forgery of private documents, the perpetrator has to “change” the contents of the document and also “use” that forged private document (Article 207/1, TCK).

In some offenses there is more than one action described in the law, but carrying out only one of the actions is enough. Then there is an “offence of selecting action” (Article 155, TCK).

Perpetrators who repeat the same intentional offense more than twice within one year and at different times, are “habitual offenders” (itiyadi suçlu) (Article 6/1-h, TCK). But offenders who make a living, even if partially, out of committing crimes, are called “professional offenders” (suçu meslek edinen kişi) (Article 6/1-i, TCK). Both of them are subject to security measures (güvenlik tedbirleri) (Article 58/9, TCK) (infra, paragraph 234).

1. H. Hakeri, İhmal Kavramı ve İhmali Suçların Çeşitleri (Ankara: Seçkin Yayınları, 2003).
2. This legal position of obligation (garantörlük) may emanate from a contract, or it may be a legal obligation.
3. For example, the superior of the civil servant, who neglects to act to prevent torture, shall be liable and his punishment shall not be reduced on this ground (Art. 95/5, TCK).

## II. Physical Results of the Human Conduct

### A. Introduction

107. The effect of the action is some change in the world, which is separate from the action but caused by that action. This change can be either physical or psychological.

Some offenses require that the perpetrator’s action have an effect. The acts or omissions (supra, paragraph 106) have to be the cause of the result that is forbidden by the law.<sup>1</sup> If the effect did not occur, there may still be an attempt to commit a crime (Article 35, TCK).

For some offenses, the fulfillment of result is not required.<sup>2</sup> Provocation to commit a crime (Article 214/1, TCK) shall be punished, even if the person in question does not commit the crime eventually.

For crimes related to a foreign country (supra, paragraph 74), the crime shall be considered as committed in Turkey, if the physical behavior was attempted or committed totally or partly in Turkey, or an action outside of Turkey had some results in Turkish territory.

1. S. Dönmezer & S. Erman (I), Nazari ve Tatbiki Ceza Hukuku Genel Kısım, Cilt I, 10 (İstanbul: Bası, Beta, 1987), n. 514; N. Centel, Türk Ceza Hukukuna Giriş (İstanbul: Beta, 2001), 196.
2. For example, when escaping from prison or a detention center, carrying out the actions for escaping was enough for the offense. Successfully escaping would not be regarded as a requirement (Art. 298, repealed TCK). The New Criminal Code does not include such a crime. A person under preliminary custody or an inmate must have successfully escaped in order to commit this crime (Art. 292, TCK).



## B. Classification of Crimes According to the Physical Behavior or the Results

108. Crimes are classified in Turkish Criminal Law with regard to the changes caused in the outside world. Momentary or immediate offenses are committed at one moment. If the criminal behavior concerns an enduring situation, then there is a continuing offense (mütemadi suç); unlawful possession of a weapon and transporting illegal drugs are continuing offenses.<sup>1</sup>

Offenses by which the effect is close to the action (ani suç) are carried out at the time and place where and when the action takes place; if someone violates the personal dignity of another person in his presence, it is a crime. If the victim is not present, at least three other persons must have received the information (Article 125/1, TCK). If the action is carried out at a place and the effect occurs at another place, then an offense of distance (mesafe suçu) has occurred.<sup>2</sup>

The chain of crimes (“zincirleme suç,” previous “müteselsil suç”: concerns the repeated violation of a provision of the law against the same person under the same intent. Although such violations occur at different times, they are considered a single crime.<sup>3</sup> This principle also applies to the crimes whereby the victim is not an identified individual (Article “2005–5377” 43/1, TCK).

Two different offenses combined constitute a new offense. If one of the offenses is, pursuant to the law, an element of the principal crime, or if it constitutes an aggravating circumstance, then it is a combined offense (bileşik suç: Article 42, TCK), which is also considered a single offense (Articles 108 and 148, TCK). In contrast to the repealed Criminal Code (Articles 495, 191/4, repealed TCK), the new Criminal Code foresees two separate crimes in a case where the perpetrator kills, wounds or inflicts damage to the property during the commission of threat (Article 106/3, TCK) or robbery (Article 149/2, TCK). If there is no connection in the element of the crime or aggravating ground, each act is a separate offense and additional punishments will be added (Article 42, TCK).

If the action defined by the law necessarily includes a less serious offense (e.g., rape in Article 102/2 includes Article 108, compelling an individual by using force), then there is a mixed offense.<sup>4</sup>

If the perpetrator has unavoidably committed a less serious crime in order to be able to commit a more serious offense, then there is an offense of passage. For example, to commit a homicide (Article 81, TCK) the perpetrator must first commit battery (Article 86, TCK). In such cases, the perpetrator will be punished with the most severe punishment.<sup>5</sup>

1. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), n. 519. C. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (İstanbul: Beşinci Bası, Beta, 2008), 258.
2. N. Toroslu, *Ceza Hukuku*, 2 (Ankara: Bası, Savaş, 1990), 64.
3. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 525; T.Y. Sancar, *Müteselsil Suç* (1995).
4. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 538.
5. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 540.

109. Any individual who violates several provisions of law by a single act, shall be considered to have committed one offense (*infra*, paragraph 280) and will be sentenced for the offense with the heaviest penalty (concurrency of laws) (Article 44, TCK).

### III. Causation

#### A. Introduction

110. There should be a causal connection between the act committed by the perpetrator and the result of the act.<sup>1</sup> If there is one certain cause of the result, it is easy to find the link of causation. However, if more than one cause has influenced the result, it is important to discover which cause had the effect.

There is no definition of causation in the law, but some crimes do mention the concept of causation (such as Articles 87, 95, 103). Turkish case law has developed some theories to solve the problem of defining causation under criminal law.<sup>2</sup>

1. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 606.
2. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 608.

#### B. Theories of Causation

##### 1. Causation in Crimes Committed with Intent

111. Theories of causation. Under the Theory of Equivalence, each condition that is necessary for carrying out an action is considered a “cause” (*conditio sine qua non*). According to this theory there is no distinction between an important cause and a less important cause. The perpetrator who produces such a cause is responsible.<sup>1</sup>

The Theory of the “Last Cause” considers the actor of the last cause as criminally responsible. If there is another act between the behavior and its effect, then the link of causation is broken.<sup>2</sup> In 1983, the Court of Cassation decided that there was no causal link between the accused’s act of pushing the victim and the victim’s subsequent death three days after the incident, because shortly after the incident the victim was not bleeding.<sup>3</sup>

The Theory of Adequate Causation considers some acts as effective means for carrying out the crime, whereas some acts create a greater possibility. In such cases there must be a general link between the action and its result; this is what is required to be an adequate cause. In this respect, not each condition is considered a “cause.”

1. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 628. E. Art uk, A. Gökçen & C. Yenidünya, *Ceza Hukuku Genel Hükümler*, 3 (Ankara: Bası, Turhan Kitabevi, 2007), 412.
2. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 637.

3. Cass., 1 CD Apr. 5, 1983; IKID 1983, 5.

## 2. Causation in Crimes Committed with Negligence.

112. Negligence (*infra*, paragraph 130) shall be punished, if the result occurs.<sup>1</sup> There must be an act without foreseeing the consequences, that resulted in a harm and there must be a direct connection between the conduct and the harm (Article 22/2, TCK). If there is more than one factor that influences the result, each factor is responsible according to his contribution (*infra*, paragraph 131).

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6. (Ankara: Bası, Seçkin, 2009), 244.

113. Turkish case law generally favors the Theory of Equivalence.<sup>1</sup> The Court of Cassation examines the causal link first objectively and then subjectively. If the action is objectively effective for carrying out the crime, then the personality of the perpetrator becomes important. The judge considers whether adequate legal causation is fulfilled according to the mental status of the perpetrator and to the personal relationships.<sup>2</sup>

The Court of Cassation sometimes views “the last cause” as important.<sup>3</sup>

In cases where an intentional conduct causes severe results beyond the intent of the accused, the Code requires now a status of negligence for the excess outcome (Article 23, TCK).<sup>4</sup>

1. Some legal experts have different opinion (E. Art uk, A. Gökcen & C. Yenidünya, *Ceza Hukuku Genel Hükümler*, 3. (Ankara: Bası, Turhan Kitabevi, 2007), 425).
2. S. Dönmezer & S. Erman (I), *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 643; Cass., CGK Apr. 27, 1992, E. 92/1-109, K. 92/126.
3. Cass., 1 CD Nov. 17, 1987, E. 1987/3243, K. 1987/4006; YKD 1988, 554.
4. Articles 451 and 452 of the repealed Criminal Code provided that where death occurs as a result of additional circumstances that were not known to the offender and that were present before the offender’s act, the causal link is still accepted. In these special cases the subjective situation of the offender was not taken into account, and the theory of equivalence was applied.

## C. Interruption of the Causal Link

114. If there is another cause between the offender’s act and the result, then the link of causation is broken.<sup>1</sup>

1. Cass., 9 CD Nov. 30, 1982, E. 1982/4226 K. 1982/4456; YKD 1983/3, 452: B had wounded A. The injury was not fatal, but A died because of a mistake in medical treatment; the negligence of the doctors broke the link of causation. However, according to the repealed Criminal Code, the offender would be punished with a lesser punishment if the act of wounding was not committed with the intention to kill, but nonetheless results in the death of the victim (Art. 452, repealed TCK). The Criminal Code does not accept “objective responsibility” (*infra*, para. 16). The perpetrator is only accountable for killing if the death of the victim was due to his negligent behavior. Otherwise, he is only responsible for wounding the victim (Art. 23 and Art. 87/4, TCK) (T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6. (Ankara: Bası, Seçkin, 2009), 241).

115. Causal link in case of an omission. Negligence may cause a physical result. In cases of omission, if the act that should have been carried out by the accused is the necessary condition of the result, then the link of causation is present. Foreseeability is another important criterion of negligence.<sup>1</sup>

1. N. Toroslu, *Ceza Hukuku*, 2 (Ankara: Bası, Savaş, 1990), 76.

### §3. MENS REA: THE MENTAL ELEMENT

116. Personal liability and moral responsibility are important principles in modern criminal law. No one can be punished for an act he did not commit, because criminal liability is personal (Article 38, AY). Free will and the ability to distinguish right from wrong are the basic elements of moral responsibility.<sup>1</sup>

The majority of Turkish scholars consider, like we do, the mental element as a form of culpability (*infra*, paragraph 125), whereas a minority classifies it under the subjective part of the elements of the crime.<sup>2</sup>

Subjective responsibility means that the offender must answer for his unlawful conduct. Criminal responsibility cannot be based on his life style.

The existence of intent is required for all types of crimes and should be proven by the prosecution.

Formerly, the proof of intent was not necessary for misdemeanors (Article 45, repealed TCK). The Code on misdemeanors (Article 9, Act No. 2005–5326) stipulates that, if there is no special regulation by an Act, misdemeanors can only be committed with intent or negligence, and the prosecution has to prove this.

Turkish criminal law divides the mental element into two parts: “criminal capacity” (*ceza sorumluluğu*), which means that the offender is able to act in a guilty state of mind, and “culpability” (*kusurluluk*), which means that the accused was guilty in a certain situation (Articles 20–34, TCK).

1. Z. Hafizoğulları & M. Özen, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş, İşlenmiş ve Yenilenmiş* 2. (Ankara: Baskı, US-A Yayıncılık, 2010), 264. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (İstanbul:Beşinci Bası, Beta, 2008), 342. K. İçel et al., *İçel Suç Teorisi*, 2. (Beta, İstanbul: Kitap, İkinci Bası, 2000), 198.
2. S. Tellenbach, “Subjektive Tatseite in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung*, Teilband 3, ed. Sieber & Cornils (Berlin, 2008), 787. A. Artuk, A. Gökçen & C. Yenidünya, *Ceza Hukuku Genel Hükümler*, 3 (Ankara: Bası, Turhan Kitabevi, 2007), 450.

### I. Criminal Capacity

117. Criminal capacity<sup>1</sup> is the ability of the offender to know or understand the results caused by his action and the ability to will the results of his action. Therefore, the capacity to be guilty consists of two elements: the ability to distinguish between good and bad (*temyiz kabiliyeti*), and the ability to act accordingly.<sup>2</sup> In other words, criminal responsibility requires both criminal capacity and criminal intent.<sup>3</sup>

An action that is committed knowingly and willingly by a person who has criminal capacity is important for criminal liability. If there is no guilt, the action cannot

be punished. The punishment cannot be more severe than the degree of guilt and cannot be less than what the perpetrator deserves.

Minority, mental disorder of the offender and deaf-muteness are factors that influence the criminal capacity or eliminate it.

Legal entities have no real criminal responsibility in Turkey. The law only provides measures for legal persons, no penalties (*infra*, paragraph 245).

1. N. Toroslu, *Ceza Hukuku Genel Kısım* (Ankara: Savaş, 2009), 171.
2. T.T. Yüce, *Ceza Hukukunun Temel Kavramları* (Ankara: Turhan, 1985), 54; N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (Beta, İstanbul: Beşinci Bası, 2008), 342.
3. Intent and negligence are modalities of commission of a crime (E. Artuk, A. Gökçen & C. Yenidünya, *Ceza Hukuku Genel Hükümler*, 3. (Ankara: Bası, Turhan Kitabevi, 2007), 450).

118. Anyone who has not attained the age of 12 at the time the act is committed (Article 31/1, TCK) shall not be prosecuted or punished.<sup>1</sup> The “Child Protection Act” (ÇKK) No. 2005–5395 considers any individual under the age of 18 a “child” (Article 3, ÇKK).<sup>2</sup>

1. E. Yurtcan, “Child in Turkish Criminal Law and Criminal Procedure Law,” *Annales de La Faculte De Droit D’İstanbul XXVII*, no. 43 (1980): 237. S. Tellenbach & Ö.D. Aydın, “Türkei,” in *Jugendstrafrecht in Europa*, edition iuscrim (Freiburg i. Br. 2002).
2. According to the repealed Criminal Code, if the act is a crime punishable by imprisonment for more than one year, the Chief of the Court issued an order placing the child in an institution under government administration (Art. 53, repealed TCK) for his education and treatment, or into the custody of his parents. If they neglected their duty of supervision, they were fined. The Protection of Child Act changed this system (*infra*, para. 238).

119. Criminal capacity of children. Between the ages of (over) 12 and (under) 18, criminal capacity may vary according to mental development and age.<sup>1</sup> The punishment will be reduced in accordance with TCK, and some measures will be imposed.

I - Age 12–15. Whoever has attained the age of 12 but has not attained the age of 15 at the time the act was carried out, shall not be punished if he lacks discretion or if he has the capability to comprehend the legal meaning and the result of the act and to control his behavior in this respect. Where the child was capable of knowing that his act was a crime, the punishment shall be reduced (Article 31/2, TCK). According to the previous law, only this age group was subject to the Juvenile Courts. The Protection of Child Act defines the concept of “child” as an individual who has not attained the age of 18, even if he was legally considered an “adult” at an earlier age (Article 3/1-a, TCK as amended by Act No. 2005–5395). So any person under the age of 18 is under the jurisdiction of “Juvenile Criminal Courts” (Articles 25–32, Act No. 2005–5395).

II - Age 15–18. Children between (over) 15 and (under) 18 years of age at the time of commission of an act are considered to have full criminal responsibility; however, the punishment will be reduced in accordance with Article 31/3 of the Turkish Criminal Code. The prosecution has no obligation to prove the capacity to distinguish right from wrong.<sup>2</sup> The Criminal Code did not improve the legal status of an offending juvenile at this point. The delinquent juvenile shall only be punished with a reduced sanction; but the Criminal Code (Article 31/3) and the Protection of the Child Act do not allow the judge to apply any security measures (as

a sanction) on the “child” who is over 15 years of age (Article 11, as amended by Act No. 2005–5395). It is still possible to apply “protective and supporting measures”<sup>3</sup> (koruyucu ve destekleyici tedbir) to this group of children while the investigation and prosecution are pending (Articles 5, 7 and 13, TCK as amended by Act No. 2005–5395), but not after the conviction.

1. Y.S. Balo, *Teori ve Uygulamada Çocuk Ceza Hukuku* (2005).
2. F. Yenisey, *Juvenile Delinquency in Turkey* (Messmer & Otto); *Restorative Justice on Trial* (Dordrecht, Boston, London: Kluwer Academic Publishers, 1992) 409.
3. B. Öztürk & M.R. Erdem, Öztürk, *Uygulamalı Ceza Hukuku ve Emniyet Tedbirleri Hukuku*; *Yeni TCK’ya göre Yenilenmiş 10* (Ankara: Baskı, Seçkin, 2008), 396.

#### A. Deaf-Mute Persons

120. Deaf-mute persons are considered less capable of understanding the consequences of their actions. Therefore, age limits for this group of children are raised. No prosecution shall be conducted against deaf-mute persons who have not attained the age of 15 years at the time of commission of the act. The provision of Article 31, subparagraph 1 may be applied to such persons (Article 33, TCK).

The new Criminal Code simplified the former regulation<sup>1</sup> by explicitly making the provisions related to children (Article 31, TCK) applicable to deaf-mute persons. With respect to deaf-mute persons, however, the age limit is 21 (Article 33, TCK). If it is understood that the deaf-mute person acted with the capacity to discern the nature of his crime, and if he had not attained the age of 18 years at the time of the commission of the crime, the provisions of Article 31/2, shall apply. A deaf-mute person who has not attained the age of 21 years, shall be subject to the provisions of Article 31/3,

1. The repealed Criminal Code had the following regulation: If it could not be ascertained that such person was capable of discriminating whether his act was an offense, and he was older than 15 years of age at the time of the commission of the act, he would not be punished (Art. 58/1, repealed TCK). However, if the act was a felony punishable by imprisonment for more than one year or by more severe punishment, the provisions of repealed Art. 53/2 would be applied to a deaf-mute person who had not attained the age of 24 (Art. 58/1, repealed TCK). If the deaf-mute perpetrator had attained the age of 24 years, the court would order him to be turned over to the proper authority, for action under the provisions of Art. 46 (Art. 58/2, repealed TCK).

#### B. Mental Disorder of the Offender

121. Complete loss of the ability of discretion. A mental disease either reduces or eliminates the ability of discretion or it does not play any role concerning criminal liability.

Anyone afflicted with a mental disease in the medical sense, or rather, a mental disease that, at the time of commission of the act causes a complete loss of his ability of sensing the legal consequences of the act (işlediği fiilin hukuki anlam ve sonuçlarını algılayamayan veya), or considerably reduces his ability to control his actions<sup>1</sup> (bu fiille ilgili olarak davranışlarını yönlendirme yeteneği önemli derecede azalmış olan kişiye ceza verilmez), cannot be held “criminally liable” and shall not

be punished (Article 32/1, TCK). However, security measures may apply (Article 57, TCK). The mentally ill criminal will be put into custody and treated until he is cured.

The Turkish Criminal Code made a significant change compared to the situation under the old Criminal Code. Under the old regime, “the considerably reduced ability of discretion” (Article 46/2, repealed TCK) was a ground for reducing the punishment. The new Code considers this situation a ground of impunity (Article 32/1, TCK). By contrast, the “reduced ability of discretion” is now a ground of reducing the punishment (Article 32/2, TCK).

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 4.* (Ankara: Bası, Seçkin, 2009), 364.

122. Reduced ability of discretion. If the mental disease considerably reduces the ability of discretion (his ability to control his actions concerning the act he is committing) (birinci fıkrada yazılı derecede olmamakla birlikte, işlediği fiille ilgili olarak davranışlarını yönlendirme yeteneği azalmış olan kişiye verilecek ceza indirilir), the accused is subject to Article 32(2) of the Turkish Criminal Code.

The punishment shall be reduced in the following manner: aggravated life imprisonment shall be reduced to imprisonment of 25 years; life imprisonment shall be reduced to 20 years. Other punishments shall be reduced by not more than one sixth. The punishment may also be inflicted partly or as a whole as a security measure for mentally ill persons; the duration of the measure has to be the same as the prison term (Article 32/2, TCK).

123. Procedural aspects of mental disorder. The accused must have had criminal capacity at the time of committing the crime. Any person who was criminally responsible at the moment of the commission of the crime but later loses this capacity can be punished. However, in order to defend himself, he should be mentally competent during the court proceedings.<sup>1</sup>

1. N. Kunter, F. Yenisey Feridun & A. Ayşe, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*; 18 (İstanbul: Bası, Beta Yayınevi, 2010), 695.

### C. Extraneous Matters

124. A person who is criminally responsible may lose his criminal capacity for a certain period of time because of extraneous circumstances or alcohol. The provision of Article 34/1, TCK shall apply to anyone who during the commission of a crime was not in a state of capacity of guilt (a complete loss of his ability of sensing the legal consequences of the act he is committing or a considerably reduced ability to control his actions (işlediği fiilin hukuki anlam ve sonuçlarını algılamayan veya bu fiille ilgili olarak davranışlarını yönlendirme yeteneği önemli derecede azalmış olan kişi) for extraneous reasons, or for involuntarily consumed alcohol or narcotic substances.

Acts committed under the influence of voluntary intoxication or under the influence of narcotics taken voluntarily are excluded from this rule (Article 34/2, TCK).



Any person who has deliberately (*actiones liberae in causa*)<sup>1</sup> put himself in a state of losing his criminal capacity will be punished accordingly.

1. Demirbaş, Timur, *Ceza Hukuku Genel Hükümler*, 6. (Ankara: Bası, Seçkin, 2009), 319.

## II. Culpability

125. Culpability (*kusurluluk*) is the mental relationship between the offender and his prohibited act. Anyone who acts knowingly and willingly to commit a crime is criminally responsible. “Knowing” and “willing” are physiological matters.

However, besides this physiological relationship, the act should be legally condemnable. This aspect of culpability is called “the normative theory of culpability.”<sup>1</sup> This form of guilt is considered either “intent” or “negligence.”

Strict liability is not conformable to the principles of modern criminal law. However, it still exists in some exceptional cases in Turkish criminal law (*infra*, paragraph 133).

1. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku*, Genel Kısım, Cilt II, 9. (İstanbul: Bası, Beta, 1986), 912. T. Demirbaş *Ceza Hukuku Genel Hükümler*, 6. (Ankara: Bası, Seçkin, 2009), 338. Özbek 2010, Veli Özer et al., *Türk Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2010), 331.

### A. Criminal Intent and knowledge of injustice

126. Intent and probable intent. The presence of intent is a requirement for an act to constitute a “crime” (Article 21/1, TCK).<sup>1</sup>

I - Intent. There was no definition of intent in the repealed Code. However, the Draft Criminal Code (TCKT 2002) provided a description: “Intent is the will of knowing the act and willing the unlawful result of this act” (TCKT 2002 Article 21). The Penal Code gives a different definition: “Intent is accomplishing the elements of the crime as defined in the statute, knowingly and willingly.” (Article 21/1, TCK).<sup>2</sup>

Knowledge of injustice (*haksızlık bilinci*)<sup>3</sup> belongs to the concept of intent. But ignorance of law is no excuse (*infra*, paragraph 154/I).

II - Probable intent (*dolus eventualis*). The Penal Code has also defined a new concept of intent: “probable intent” (*olası kast*).<sup>4</sup> If the individual has committed the act though he had foreseen that the elements of the crime as defined in the statute could occur, this kind of state of mind is called “probable intent” (Article 21/2, TCK). In such cases, the punishment shall be reduced.

1. According to Art. 45 of the repealed Turkish Penal Code, “absence of criminal intent precluded punishment of felonies.” However, where the law prescribed a punishment for consequences of the perpetrator’s acts or omissions, there was an exception to this rule. Criminal intent was not essential for misdemeanors. The offender was responsible for his act or omission (Art. 45/2, repealed TCK).
2. E. Günay, *Teori ve Uygulamada Olası Kast - Bilinçli Taksir, Öldürme ve Yaralama Kastı* (Seçkin Yayınları, 2005).



3. The ability of an individual of observing his social environment is called the ability of perception (algılama yeteneği); the ability of making a judgment about the illegality of his conduct is called knowledge of injustice (haksızlık bilinci) I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş* 4. (Ankara: Bası, Seçkin, 2009), 348.
4. B. Öztürk, M.R. Erdem & O. Ruhan, *Öztürk, Uygulamalı Ceza Hukuku ve Emniyet Tedbirleri Hukuku; Yeni TCK'ya göre Yenilenmiş* 10. (Ankara: Bası, Seçkin, 2008), 246. Düzgün, Nuri & Şerafettin Elmacı, 3257 sayılı Türk Ceza Kanununa Göre Olası Kast – bilinçli Taksir ve Taksirle İşlenen Suçlar (2009).

127. Theories explaining the concept of intent. In Turkish case law there are two theories that explain the concept of intent. According to “the theory of foreseeability”<sup>1</sup> (tasavvur teorisi) it is important that the offender be able to foresee his act before he committed it. According to “the theory of will” (irade teorisi), however, it is important that the offender wanted the result. Mainstream Turkish doctrine accepts a mixed theory. “Intent is the will that is directed to accomplish unlawful conduct.”<sup>2</sup> However, the Criminal Code is closer to the theory of foreseeability.<sup>3</sup>

In Turkish terminology there are some concepts that are related to intent: “Aim” (maksat) is the result that is shown in the legal description. “Purpose” (gaye) is the interest of the offender that is beyond the legal description. “Leading purpose or motive” (saik) is the aim that causes the offender to act.

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6. (Ankara: Bası, Seçkin, 2009), 341.
2. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 925; N. Centel, *Türk Ceza Hukukuna Giriş* (İstanbul: Beta, 2001), 305.
3. The new approach does not consider intent as a part of culpability (I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş* 4. (Ankara: Bası, Seçkin, 2009), 233).

128. Kinds of intent. There are two main kinds of intent: general and specific. If the “leading purpose” is important according to the law, then a specific intent of the accused is required.<sup>1</sup> Furthermore, Turkish criminal law distinguishes between definite and indefinite intent on the one hand, and direct and indirect intent on the other. Definite intent is present when the offender is acting with knowledge of the consequences of his act or omission. When the offender is shooting towards a crowd, he is acting with an indefinite intent.<sup>2</sup> There is direct intent if the result had been within the limits of the will of the offender. However, the results that could be foreseen by the offender are considered indirect intent or probable intent (*dolus eventualis*; *supra*, paragraph 126/II).

If there is a short period of time between the decision to carry out a crime and the act itself, the form of the intent is a momentary intent. If the perpetrator had acted after thinking the case over and after having made plans, then he is acting with premeditation.<sup>3</sup> The Turkish Court of Cassation considers the intent premeditated if the offender had acted “calmly.”<sup>4</sup>

1. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 940.
2. Cass., CGK Apr. 19, 1982, IKID 1982, 1093; B. Öztürk, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş* 2 (Ankara: Bası, Dokuz Eylül Üniversitesi, 1992), 198.
3. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 947.
4. Cass., CGK Nov. 29, 1983, E. 1-244/K. 383; IKID 1984, 2434; B. Öztürk, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş* 2 (Ankara: Bası, Dokuz Eylül Üniversitesi, 1992), 201.

129. Proof of intent. The decision on the presence of intent must be made by the court of first instance. The Court of Cassation has no competence to consider this issue.

The principle of *in dubio pro reo* will be applied if the judge cannot come to a decision about the proof of intent.

## B. Negligence

130. Negligence and foreseeable negligence. In principle, a crime cannot be punished if the offender had not acted with intent. However, there is an exception for those cases where the law clearly prescribes a punishment for consequences of the perpetrator's negligent acts or omissions (Article 22/1, TCK).<sup>1</sup>

I - Negligence. Turkish Criminal Law previously did not define negligence.<sup>2</sup> The Criminal Code now provides a definition of negligence: "not foreseeing the result, which is described in the legal definition of an action, as a consequence of his carelessness or lack of diligence" (Article 22/2, TCK).<sup>3</sup>

Punishability of intent requires that there be an open regulation that punishes the negligence and that the act must have been carried out willingly by the offender. In addition to these requirements, the offender must have been able to foresee the consequences of his action and must have been able to prevent them.

Foreseeability differs from offender to offender. In a situation where a child was drowned in an open lake, the Court of Cassation decided that a woman living in a small village is not able to foresee that the child could fall into it.<sup>4</sup>

II - Foreseeable negligence. The notion of "foreseeable negligence" (*bilinçli tak-sir*) was first incorporated into the repealed Turkish Criminal Code on January 8, 2003 with the expectation of preventing traffic accidents, as some drivers were acting with gross negligence at high risk of accidents: "If the perpetrator was able to foresee the outcome of his act that results in a crime, which he did not wish to commit, the punishment will be aggravated by one third" (Article "2003–4785" 45, repealed TCK).<sup>5</sup>

This new concept of negligence has been carried over to the Criminal Code with a different language: "If the result, which the perpetrator had foreseen, realizes, although he did not want it to happen, then there is a foreseeable negligence; in such cases the punishment attached to the negligent crime shall be aggravated by one third up to half." (Article 22/3, TCK).

III - Negligent harm to family members. The repealed Criminal Code did not contemplate a lenient punishment if the suspect himself or his family members suffered harm by his negligence. However, already the Draft Criminal Code made an exception in such cases (Article 22, TCKT 2002).<sup>6</sup> According to present legislation, the punishment of the offender will be excluded if he has himself or his family suffered any harm by his negligence, after the court has established the seriousness of the harm the offender caused to himself. This regulation is to the extent that this inclusive personal or family-related harm has made him a victim, so that an infliction of a punishment is unnecessary (Article 22/6, TCK).<sup>7</sup> For example, if the father had negligently caused the death of his child, an imprisonment punishment would put his family into additional difficulties.<sup>8</sup>

1. Negligence is considered as a concept belonging to culpability in Turkish Criminal Law doctrine. After the reforms in 2005, some authors classify negligence as a part of the definition of the crime (tipiklik; Tatbestand) S. Tellenbach, “Objektive Tatseite in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung*, Teilband 3, ed. Sieber & Cornils (Berlin, 2008), 629.
2. However, repealed Arts. 455 and 459, dealing with unintentional wounding and killing, provided some guidance (Y. Altuğ, “The Damages for Wrongful Death under Turkish Law,” *Annales de la Faculté de Droit d’Istanbul* XXIV, no. 40 (1977): 201. Whoever causes the death of a person through negligence, carelessness or inexperience in his profession or trade or disobedience to regulations, orders or instructions, shall be punished by imprisonment for two to five years and by a heavy fine. The punishment may be reduced by one eighth according to the degree of the negligence.
3. K. Bayraktar, *Hekimin Tedavi Nedeniyle Cezai Sorumluluğu* (Istanbul, 1971). Y. Ünver, *Ceza Hukukunda İzin Verilen Risk* (Istanbul: Beta Basım Yayın Dağıtım, 1998).
4. Cass., 9 CD Feb. 17, 1983, E. 1983/K. 194/278; IKID 1983, 2124; B. Öztürk, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş 2* (Ankara: Bası, Dokuz Eylül Üniversitesi, 1992), 204.
5. T.T. Yüce, *supra*.
6. Y. Ünver, *Ceza Hukukunda İzin Verilen Risk* (1998).
7. M. Koca & I. Üzülmüş, *Türk Ceza Hukuku Genel Hükümler, Genişletilmiş 2*. (Ankara: Baskı, Seçkin, 2009), 230.
8. E. Artuk, A. Gökçen & C. Yenidünya, *Türk Ceza Hukuku Şerhi*, 1. Cilt (Ankara: Turhan Kitabevi, 2009), 457.

131. Concurrent negligence. According to the former Code, if there were two or more causes influencing a result (*supra*, paragraph 130), negligence would be divided by one-eighth and each perpetrator would be penalized according to the degree of his negligence. The sum of all points could not be more than eight eighths. Turkish Criminal Code abandoned this rule; each perpetrator is now responsible according to the degree of his own guilt personally (Article 22/5, TCK).<sup>1</sup>

The presence of the link of causation is another requirement.

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 369. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 4*. (Ankara: Bası, Seçkin, 2009), 261.

### C. Culpability by Misdemeanors

132. The Criminal Code does not include misdemeanors. Misdemeanors are now regulated in a specific Act (KK, Act No. 2005–5326). This Act defines general principles that rule the principle of legality (Article 4), application of the Act in relation to the time (Article 5) and place (Article 6), as well as rules of the legal responsibility (between Articles 7 and 15).

According to the repealed Criminal Code, in the field of misdemeanors, everyone was responsible for his act or omission even in the absence of criminal intent (Article 45/2, repealed TCK). If a misdemeanor was committed by a person under the authority, administration or supervision of a third party, and the act was within the area of authority of the latter and against rules which the latter should enforce, and if the commission of the act could have been prevented by the latter’s care and prudence, then he as well as the (physical) perpetrator were to be punished (Article 60/1, repealed TCK).

The Act on Misdemeanors regulates merely administrative sanctions (idari yaptırım) as administrative fines (idari para yaptırımı) and administrative measures (idari tedbir) (Article 16, KK). Misdemeanors can be committed both with intent and negligence if not regulated otherwise in the statute (Article 9, KK). If the representative of a legal person commits a misdemeanor, the legal person may also be held responsible (Article 8/1, KK).<sup>1</sup> If a real person owns a business and the person working for him commits a misdemeanor related to that activity, the owner may be held liable for the administrative sanction imposed on his employee (Article 8/2, KK).

1. Z. Kangal, *Kabahatler Hukuku*, XII Levha (İstanbul, 2011), 216.

### III. Strict Liability

133. Turkish criminal law applies the principle of subjective responsibility. There were formerly some exceptions to this rule in matters of unintended physical consequences,<sup>1</sup> crimes aggravated because of the physical consequence<sup>2</sup> and offenses committed by the press. The Criminal Code made changes in this respect, except in the field of the press.

I - Strict liability by offenses committed by the press: Article 16 of the repealed Press Code made the author and the responsible editor for periodical publications criminally responsible for offenses committed by their periodical publications (infra, paragraph 175). The editor was punished with the same punishment as the author. Turkish literature criticized this form of strict liability.<sup>3</sup>

However, the Press Code (Article 11, Act No. 2004–5187) did not deviate further from the principle of individual responsibility; the author has the principal criminal responsibility. But if the author cannot be punished, for various reasons, the Press Act holds another person responsible as defined in the Act. It would help to restore, if this person would be liable of his own deed, which is not preventing the publication. But the new Press Act, like the old Press Act, inflicts on this person the same punishment that is foreseen for the author.<sup>4</sup>

II - Strict liability for misdemeanors. The repealed Criminal Code made an individual in a supervisory capacity liable for the consequences that were beyond his intention if, through his own fault, he did not prevent them from occurring (Article 60, repealed TCK). Turkish scholars were opposed to this regulation. However, the new Act on Misdemeanors did not improve the situation, it made it worse: the clause on the “obligation of preventing” was incorporated in the new Act (Article 8, KK). Thus a clear example of strict liability has been created.<sup>5</sup>

1. Where an act of wounding or battery, committed without the intent to killing, resulted in the death of a person, the perpetrator was punished for murder but with a reduced punishment (Art. 452/1, repealed TCK). The New Code did not regulate this provision.
2. When an abducted person was injured during or as a result of abduction, the punishment was increased. If the victim died, the offender was sentenced to lifelong imprisonment (Art. 439, repealed TCK). The Turkish Criminal Code makes the perpetrator accountable for unintended consequences only if the excessive consequence happened because of his negligence (Art. 23, TCK).
3. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku*, Genel Kısım, Cilt II, 9. (İstanbul: Bası, Beta, 1986), 1221. M. Özen, *Ceza Hukukunda Objektif Sorumluluk* (1998); M.E. Artuk, A. Gökçen & A.C. Yenidünya, *Ceza Hukuku Genel Hükümler* (Ankara: Birinci Kitap, Seçkin, 2002), 655.

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4. S. Tellenbach, “Subjektive Tatseite in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung*, Teilband 3, ed. Sieber & Cornils (Berlin, 2008), 791.
5. There are attempts to insert the principle of guilt by requiring at least the negligence (Z. Kangal Kabahatler Hukuku, XII Levha (İstanbul, 2011), 116).

## Chapter 4. Grounds for Justification of Criminal Offenses and Defenses that Diminish or Excuse Criminal Responsibility or Liability

### §1. GENERAL PRINCIPLES

134. Grounds for justification. In order to constitute a crime, the act or omission should be unlawful. If there are grounds of justification,<sup>1</sup> then the material element is not considered a crime.<sup>2</sup>

The presence of justification is determined objectively; it is not dependent on the perpetrator being aware of the justification,<sup>3</sup> and the subjective thoughts of the offender are not relevant.

The element of unlawfulness (supra, paragraph 99) is a unified concept. If an act is justified by one branch of law, then it cannot be considered illegal by another branch of law.<sup>4</sup>

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 395.
2. T. Katoğlu, *Ceza Hukukunda Hukuka Aykırılık* (Ankara: Seçkin Yayınları, 2003). A. Parlar & M. Hatipoğlu, 5237 Sayılı TCK'da Ceza Sorumluluğunu Kaldıran veya Azaltan Nedenler (2010).
3. N. Toroslu, *Ceza Hukuku Genel Kısım* (Ankara: Savaş, 2009), 135.
4. S. Dönmezer S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 679.

### §2. NECESSITY

135. Necessity. The law does not punish persons who are faced with serious harm that can only be avoided by violating the criminal Acts. No punishment shall be imposed if an individual acted out of necessity (zorunluluk hali), and if there was no other way to protect himself, or another person, against a grave and certain danger (Article 25/2, TCK).<sup>1</sup>

Property damaged in cases of necessity will be restored. However, a judge has discretion on this matter (Article 52/2, BK).

1. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (İstanbul: Beşinci Bası, Beta, 2008), 314.

136. The danger must not be knowingly caused by the person himself. If the perpetrator had caused the danger with intent, then the provisions of necessity are not applied. The means used to rescue must be proportional to the gravity of the danger and the protected right (Article 25/2, TCK). However, in a case of negligence it is possible to consider the case as one of necessity.

The person should not be obliged to expose himself to danger.

The necessary act to prevent the danger should be the only way to escape the harm. If actions could have been taken which would have resulted in lesser damage or emergencies, but were not taken as such, then the perpetrator will be punished.

## §3. DEFENSE AGAINST CRIME

137. The Criminal Code (Article 25/1, TCK) changed<sup>1</sup> the definition of self-defense<sup>2</sup> (meşru savunma):

Whoever commits any act within the necessity of defending against an unjust assault directed against his or a third party's right shall not be punished, if his action was proportionate according to the circumstances at the moment of the assault and the assault was about to happen, happening or it was certain that it would happen again.

The first condition of self-defense<sup>3</sup> is an unlawful assault. "Unlawful" means that the law does not permit that type of act. It is not required that the act constitutes a crime itself.<sup>4</sup>

The second condition of self-defense is an assault caused by a human being that is directed at a "legal good." In contrast to the previous legislation, where only life and chastity was protected, now property is also protected.

The third condition of self-defense has also been extended by the Criminal Code: previously it was the rule that "the unlawful attack had already taken place and did not come to an end" (Article 49/2, repealed TCK). Now the Criminal Code has made it also possible to "prevent" a certainly coming or re-attacking unlawful assault (Article 25/1, TCK).

Self-defense against attack must have been necessary. If it was possible to escape without danger, self-defense is not allowed. Only the court of first instance has discretion on this issue. The Court of Cassation is not competent to exercise this discretion.<sup>5</sup>

There should be a causal connection between the attack and the defense.

Where the attacked person endangers or harms the property of the perpetrator, there can be no demand for restitution or damages.

1. The previous definition was as follows: "No punishment shall be imposed if an individual acted out of immediate necessity to fend off an unjust assault against him or another person, or if he acted to protect his or another's chastity (repealed TCK, Art. 49/2)." The lawmaker extended the protection of self-defense to any right. Before, it was only life and chastity.
2. M. Özen, *Meşru Müdafaa* (Ankara: Seçkin Yayınları, 1995). F. Yenisey, "Kolluğun Zor ve Silah Kullanma Yetkisi, Mukayeseli Hukuk, AIHM Kararları," in *Kolluğun Silah Kullanma Yetkisi* (İstanbul, 2005), 95.
3. N. Toroslu, *Ceza Hukuku Genel Kısım* (Ankara: Savaş, 2009), 141.
4. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 798.
5. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 810. M. Özen, *Türk Ceza Hukukunda Meşru Müdafaa* (1995).

138. Defense of property was regulated separately (Article 461, repealed TCK). If the defender had taken extreme measures to defend his property, then the punishment for the offender was reduced. The new Criminal Code does not include this provision, as the definition of self-defense has been extended to "any endangered legal good" (Article 25/1, TCK).



## §4. CONSENT OF THE VICTIM

139. A victim is a person who has been directly injured by the criminal act. It is possible that the victim gave his consent<sup>1</sup> to the illegal acts directed against him.<sup>2</sup> If the protection of public interest is not very important and the assault is directed at a right of the victim, one that he can dispose of without limitation, the consent of the victim (Article 26/2, TCK) (ilgilinin rızası) is considered a ground of justification.<sup>3</sup>

The Criminal Code now provides a definition of the “consent of the interested person” (it does not use the terminology of “victim”): “No one shall be punished if he acts within the scope of the consent that has been declared by an individual concerning a right, on which this he has an unrestricted right of usage.” (Article 26/2, TCK).<sup>4</sup>

The consent of the victim is not valid for offenses directed against the State.

1. O. Çakmut, *Tıbbi Müdahaleye Rızanın Ceza Hukuku Açısından İncelenmesi*; Legal Yayıncılık (2003).
2. N. Centel, H. Zafer & O. Çakmut, *Türk Ceza Hukukuna Giriş* (Beta, İstanbul: Beşinci Bası, 2008), 317.
3. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9. (İstanbul: Bası, Beta, 1986), 736; B. Öztürk, M.R. Erdem V.O. Özbek, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş*, 5 (Ankara: Bası, Seçkin, 2001), 185. The practice of “consent search,” which was regulated by the Internal Regulation on the Search Powers of the Police of 2003, was stopped after the Council of State rule that it did not have a legal ground (Danıştay 10. Dairesi Nov. 23, 2003).
4. T. Demirbaş *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 303.

140. Suicide is not a crime under Turkish Criminal Law. But an individual cannot rely on the will of someone to be killed as a defense, and if a doctor kills his patient upon his request, then he is responsible for intentional murder. Euthanasia is not allowed under Turkish Criminal Law.

## §5. EXECUTION OF THE PROVISIONS OF A STATUTE AND OBEYING ORDERS

141. Execution of the provisions of a statute. No punishment shall be imposed if the perpetrator acts in order to execute the provision of a statute (Article 24/1, TCK). The term “statute” includes all forms of acts, and not only criminal statutes.<sup>1</sup>

1. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 764. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 259.

142. Obeying orders. The perpetrator shall not be punished if he acted to execute an order given by a responsible authority, the execution of which is within his duty (Article 24/2 TCK). But if the order given by the superior violates provisions of the law, regulations or the Constitution, a person employed in public services shall not carry it out and shall inform the person giving the order of the violation. However, if his superior insists that the order be carried out and reissues



it in writing, this order shall be executed. In this case the person executing the order shall not be held responsible.<sup>1</sup>

There are exceptions to this rule in the military and police branches. If the statute prohibits the examination of the lawfulness of the order, the superior giving the order shall be held responsible (Article 24/4, TCK).

An order which in itself constitutes an offense shall under no circumstances be executed (Article 137, AY; Article 24/3, TCK).

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 260.

143. Military orders. According to the “Internal Regulations of the Army,” (Article 3), soldiers must obey their superiors without hesitation. The responsibility of the execution belongs to the superior (Article 14). However, it is forbidden to execute an order that itself constitutes a crime (Article 24/3, TCK).

144. Orders in police. In 1963, the Constitutional Court abolished the requirement of obeying all orders without hesitation.<sup>1</sup> According to the current provisions of the Police Act (PVSK), Article 2/2, when a police officer believes an order given by his superior is contrary to the law, he shall not carry it out. However, he must execute the order if it is reissued in writing. In cases regulated by Article 2/3 of the Police Act, he must obey without delay and is not entitled to ask for a written order.

1. Official Gazette, Nov. 13, 1963.

145. Orders given to civil servants. There are no special regulations in the Act on State officials (*Devlet Memurları Kanunu*), Article 11 relating to the execution of orders given to regular officials.

The Ministry of Justice is entitled to ask the Attorney General at the Court of Cassation to file a lawsuit for legal errors in cases that did not reach the inspection of the Court of Appeals or Cassation (Article 309, CMK).

## §6. EXERCISING A GIVEN RIGHT

146. Exercising a right. “An individual who exercises his legal right<sup>1</sup> shall not be punished for that” (Article 26/1, TCK).<sup>2</sup> If the law or case law has recognized a subjective right to an individual that can be exercised directly, there is no penal responsibility if this right has been used in a proper way and within its limits.<sup>3</sup>

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 290. U. Uruşak, *Ceza Hukukunda Hukuka Uygunluk Sebebi Olarak Bir Hakkın Kullanılması* (İstanbul: Vedat Kitapçılık, 2010).

2. This ground of justification was not mentioned in the repealed Penal Code, Art. 49, but was accepted by the Criminal Law in the following cases: the owner of goods has the right to prevent unjustified assaults by using force (Art. 981, MK “2001–4721”); the owner of goods may protect his property with some automatic mechanisms such as a fence, or flashig light.

3. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku*, Genel Kısım, Cilt II, 9 (İstanbul: Bası, Beta, 1986), 702; B. Öztürk, M.R. Erdem V.O. Özbek, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku*, Gözden Geçirilmiş ve Genişletilmiş 5 (Ankara: Bası, Seçkin, 2001), 175.

147. Exercising a profession. Within the limits of exercising one's profession, medical interventions<sup>1</sup> are considered "exercising a right" and are justified, so long as there is consent (Article 26/2, TCK) or necessity to do so (Article 17/2, AY).

1. B. Erman, *Tıbbi Müdahalelerin Hukuka Uygunluğu* (Ankara: Seçkin Yayınları, 2003).

148. Freedom of press. In the context of freedom of speech (Article 28, AY), the press has the right to inform the public. Within limits, newspaper publications (infra, paragraph 175) do not constitute a crime.

149. Exceeding the limits. Anyone who exceeds the limits of the grounds for setting aside "criminal responsibility"<sup>1</sup> shall be punished with a reduced punishment pursuant to Article 27/1 of the Penal Code if the limits were exceeded without intent and the crime may be sanctioned if committed with negligence and the perpetrator exceeded the limits of justification through negligence. The punishment stated by the Code will be reduced from one sixth up to one-third (Article 27/1, TCK). Thus, there is no exclusion of penalty if the limits are exceeded.

However, in cases of an unavoidable mistake without guilt, there is no punishment (Article 30/3, TCK).

Further, if the limits are exceeded, only within the "legitimate defence" (Article 25/1, TCK) is there a new exception to the reduced punishment. If the limits of a legitimate defense (*meşru savunma*) were exceeded as a result of excitement, fear or agitation, and this can be regarded as excusable, then the perpetrator shall not be punished (Article 27/2, TCK).<sup>2</sup>

1. The repealed Penal Code used the term "grounds of justification" (Art. 50, repealed TCK).
2. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 308.

#### §7. GROUNDS OF EXCUSE (GROUNDS THAT EXCLUDE THE GUILTY MIND)

150. Grounds of excuse. Where the will of the offender cannot be considered free, he cannot be held criminally responsible. In cases of accident, force majeure, coercion and mistake, the offender's will is not a guilty one. Coercion exempts one from guilt because there cannot be blameworthy conduct. The offender is not acting voluntarily, as he has lost his freedom of choice.<sup>1</sup>

No penalty shall be imposed on the individual if the crime is committed as a result of intolerable or inevitable violence, or serious menace or gross threat. However, the person involved in the use of force and violence, menace and threat shall be considered the perpetrator of the crime (Article 28, TCK).

1. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım*, Cilt II, 9 (İstanbul: Bası, Beta, 1986), 1040. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 395.

151. Accident. There are some major events in life that cannot be foreseen, or if foreseen, cannot be prevented.<sup>1</sup> In such cases there is no criminal responsibility.<sup>2</sup>

1. R. Gülşen, *Ceza Hukukunda Sorumluluğu Kaldıran Nedenlerden Kaza, Mücbir Sebep, Cebir ve Tehdit* (Ankara: Seçkin, 2007).
2. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası, Beta, 1986), 1027; M.E. Artuk, A. Gökçen & A.C. Yenidünya, *Ceza Hukuku Genel Hükümler* (Ankara: Birinci Kitap, Seçkin, 2002), 699. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 396.

152. Force majeure requires the perpetrator to act against his own will. He has no other choice. In such cases he is not responsible. This ground for excuse that excludes the guilty mind is not mentioned in the Penal Code as general principle, but it is accepted as a general principle of criminal law. For example, a strike during the wartime, may be considered as a force majeure under Article 322, TCK.<sup>1</sup>

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 397.

153. Suppression of the free will. In cases in which the free will of an individual is suppressed by force, violence, menace or threat (Article 28, TCK), or in cases of a mistake of facts (Article 30/1), that person is not considered to have acted intentionally.

154. Mistake. Mistake means ignorance, lack of knowledge or wrong knowledge.

I - Ignorance of Law. Ignorance of law is no defense under Turkish criminal law (Article 4, TCK). However, an individual who makes an inevitable mistake about the unlawfulness of his act shall not be punished (Article 30/4, TCK).

The provisions of the Turkish Criminal Code related to the ignorance of law have been in the focus of discussions during preparations of the Code, and have been amended just after the Code came into force, by removing its exceptions from Article 4/2, TCK into the chapter related to mistake (Article 30/4, TCK). The knowledge of injustice (supra, paragraph 126) shall effect the punishment of the accused, if the ignorance of law unavoidable. An unavoidable ignorance of law shall exclude the punishment.<sup>1</sup>

II - Ignorance of facts. A “factual mistake” may exclude intent. Any individual who is unaware of facts that are the elements of the crime while committing his act shall not be considered as having acted intentionally (Article 30/1, TCK).

If a person commits a crime against a person other than the one he intended, as a result of a mistake or defect, the matters of aggravation arising from the status of the injured party shall not be imputed to the perpetrator. Such cases may be dealt with as if the crime had been committed against the person intended, but the perpetrator shall benefit from any mitigating factor applicable to the felony (Article 30/2, TCK).<sup>2</sup>

1. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 382.
2. K. İçel et al., *İçel Suç Teorisi*, 2 (Beta, İstanbul: Kitap, İkinci Bası, 2000), 278.

## Chapter 5. Criminal Attempt and Participation in Criminal Offenses

### §1. CRIMINAL ATTEMPT

#### I. Punishment for Attempted Crime

155. Attempt. Criminal thoughts, in and of themselves, are not punishable.

I - Attempt to commit a crime. To be punishable there must also be a completed criminal act. However, an unsuccessful attempt to commit a crime can be a crime in itself.<sup>1</sup> Attempt is a special form of crime as compared to the completed offense.<sup>2</sup>

An individual who is unable to complete the crime he had intended to commit due to circumstances beyond his control, but who has begun directly with the appropriate acts of commission (icraya başlamak), shall be liable for an attempted crime (Article 35/1, TCK).

There are some crimes that are not suitable for attempt. For example, undertaking a coup against the government (Article 312, TCK) shall be an accomplished crime, as soon as the perpetrators attempt to overthrow the regime.

The type of punishment depends upon the nature<sup>3</sup> of the attempt, that is to say, upon the seriousness of the harm or danger that was realized (Article 35/2, TCK).<sup>4</sup>

II - Attempt to commit a misdemeanor. As mentioned earlier (supra, paragraph 42), the rules on misdemeanors are laid down in the Act on Misdemeanors (KK). Therefore, the perpetrator will not be sanctioned if his deeds constitute an attempted misdemeanor, unless the statute foresees the contrary (Article 13, KK). If there is such explicit regulation<sup>5</sup> about the punishable attempt of a misdemeanor, then the provisions of the Criminal Code about criminal attempt (Article 35, TCK) and voluntary abandonment (Article 36, TCK) shall apply.

1. R.A. İpeçoğlu, *Yeni Ceza Hukukunda Suça Teşebbüs* (2009). S. Balcı, *Suç (Cürme) Teşebbüsün Eski ve Yeni Ceza Kanunu'na Göre Karşılaştırmalı İncelenmesi* Legal Hukuk Dergisi sayı: 25, Ocak 2005. A. Parlar M. Hatipoğlu, 5237 Sayılı TCK'da Suça Teşebbüs, İştirak - İltima ve Yaptırımlar (2010). S. Tellenbach, "Staflbares Verhalten im Vorfeld der Tatvollendung in der Türkei," in *Nationales Strafrecht in rechtsvergleichender Darstellung*, Teilband 3, ed. Sieber & Cornils (Berlin, 2008), 949.
2. K. İçel et al., *İçel Suç Teorisi*, 2 (Beta, İstanbul: Kitap, İkinci Bası, 2000), 295. E. Artuk, A. Gökçen & C. Yenidünya, *Türk Ceza Kanunu Şerhi* (1. Cilt) (Ankara: Turhan Kitabevi, 2009), 854. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 4* (Ankara: Bası, Seçkin, 2009), 421.
3. The Criminal Code does not make the distinction between the "completed attempt" and the "incomplete attempt," as it was defined in the repealed Code (Arts. 61, 62 TCK).
4. D. Soyaslan, *Teşebbüs Suçu* (1994); A. Sözüer, *Suç Teşebbüs* (1994); N. Centel, *Türk Ceza Hukukuna Giriş* (İstanbul: Beta, 2001), 363; B. Öztürk, M.R. Erdem & V.O. Özbek, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş*, 5 (Ankara: Bası, Seçkin, 2001), 232.
5. For example, *Smuggling Act* (2007–5607), Art. 3/18 rules that, attempted misdemeanors in Art. 3/10 shall be punished as a completed misdemeanor.

156. Degree of danger. Anyone, who directly (doğrudan doğruya) starts the execution of an intended crime by appropriate acts (elverişli hareketler), and cannot complete the acts necessary to commit the crime for reasons beyond his control, is placed in the position of "attempt" (Article 35/1, TCK).<sup>1</sup> In such cases, depending

on the degree of the harm or danger, the perpetrator shall be sanctioned with imprisonment for a term of 13–20 years where the committed crime required a penalty of aggravated life imprisonment, or with imprisonment for a term of 9–15 years where the committed crime required a penalty of life imprisonment. In other cases, the penalty shall be reduced by one-quarter to three-quarters (Article 35/2, TCK).<sup>2</sup>

1. This definition was the definition for “incomplete attempt” according to the repealed Code and the punishment would be reduced pursuant to Art. 61. If the offender completed all the acts for the execution of the felony he intended to commit, but for reasons beyond his control the felony did not materialize, he was placed in the position of “completed attempt” and his punishment would be reduced pursuant to repealed Art. 62.
2. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 427.

157. Voluntarily withdrawal. If the perpetrator voluntarily withdraws from the completion of the intended criminal act, or prevents the completion of the crime or its consequences, he will not be punished (voluntary abandonment as defined in Article 36, TCK).

However, if the completed part of an action does constitute a crime, he shall be liable for the sanction of this part of his acts.

## **II. Conditions of Criminal Attempt**

158. Intent. The intention of the perpetrator must be to commit a crime (Article 35/1, TCK). This intent is not the intent to attempt, but the intent to commit a certain crime.

In cases of negligence and strict liability, attempt is not punished.

159. Preparatory acts. “The preparatory acts” are acts that are shown in the legal definition of the crime. These activities are in preparation of the forbidden action. “The preparatory acts” made before the commencement of the execution shall not be punished.

However, Article 316, TCK makes it a special crime to make an agreement by two or more persons to commit a crime against State security or constitutional order of the State by suitable means, thus incriminating planning of such crimes. In the field of organized crime, just forming an organization is an independent crime, if the organization is furnished with suitable means and personnel (at least three) in order to commit the aimed crimes (Article 220/1, TCK)

160. Acts of direct execution. The perpetrator should have directly started to execute an intentional crime by appropriate acts<sup>1</sup> of commission.

“The acts of direct execution” (*doğrudan doğruya icraya başlamak*) (Article 35/1) have begun where the perpetrator had undertaken the actions described by the statute as the last act, openly indicating his intent to commit a crime.

1. Previously, the wording was “effective means” (*vesaiti mahsusa*) (Art. 61/1, TCK). For example, a toy gun was not an effective means for murder but could be considered as an effective means for a threat: Cass., 4. CD June 21, 1991; E. 1991/2956, K. 1991/4226; IKİD October 1991, 1867;

B. Öztürk, Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş 2 (Ankara: Bası, Dokuz Eylül Üniversitesi, 1992), 126.

161. Circumstances independent of the perpetrator's will of control must cause the acts of execution<sup>1</sup> of the intended crime to remain incomplete.

1. For the now abolished distinction between incomplete attempt and completed attempt, it was important to discover when the acts of execution were completed. If the perpetrator had fulfilled all the necessary acts to commit the intended result, and he had lost all possibility of withdrawal, the acts of execution were considered as completed (S. Dönmezer & S. Erman (I), Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 569).

### III. Attempting the Impossible

162. Sometimes it is impossible to complete the acts of execution because of ineffectiveness of means of execution or of the unsuitability of the object.<sup>1</sup> TCK does not regulate the attempt of the impossible. However, the Court of Cassation considered a case as attempted crime where the perpetrator stole an invalid traveler's check and brought it to the bank.<sup>2</sup>

1. S. Dönmezer & S. Erman (I), Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt I, 10 (İstanbul: Bası, Beta, 1987), 539. N. Centel, H. Zafer & O. Çakmut, Türk Ceza Hukukuna Giriş (Beta, İstanbul: Beşinci Bası, 2008), 471.
2. Cass., CGK June 25, 1990; E. 1990/157, K. 1990/200, YKD 1990, 1381.

## §2. PARTICIPATION

### I. Conditions of Participation

163. When an offense that can be committed only by one person was committed with the cooperation of several persons, the principle of "participation" will be applied (Articles 37–41, TCK).<sup>1</sup> The first condition of participation is the presence of a crime (Article 37/1, TCK) or a misdemeanor (Article 14, KK).<sup>2</sup>

The second condition of participation is that the plurality of the offenders agreed upon the act before or during the commission of the act and they started performing the act.

The agreement between the offenders should have been made before committing the crime or at least during the commission of the act.

Anyone who takes part in a crime knowingly and willingly, either before or during the commission of the act, is called a "participant" (suça iştirak) (Article 37, TCK).<sup>3</sup>

1. N. Centel, Türk Ceza Hukukuna Giriş (İstanbul: Beta, 2001), 396.
2. M.V. Dülger, Yeni Türk Ceza Kanunu'nda Suç Ortaklığı (sayı: 2, Yeditepe Üniversitesi Hukuk Fakültesi Dergisi cilt: 1, 2005). F.S. Mahmutoglu, Kusurluluk Prensibi Açısından Azmettirenin Ceza Sorumluluğu (Hukuk Fakültesi: İstanbul Üniv., 2005) Ayrı Bası; Hukuk Fakültesi Mecmuası; vol. 63, H. 1/2.2005.
3. If the offender plays a role in revealing the unknown identity of the instigator, his punishment may be reduced.

164. However, certain offenses presuppose the cooperation of several persons. In such cases there is no participation and the plurality of offenders constitute an element of offense. For example, in organized crime there must be at least three or more members of the gang (Article 220/1, repealed TCK).

In jointly committed crimes, the accomplice who voluntarily abandons the attempt to commit a crime may benefit from the voluntary abandonment (Article 36, TCK) provisions (Article 41/1, TCK). The voluntary abandonment provisions shall only apply to the person who voluntarily abandons, and the crime was not committed because of his efforts, and not for any other ground; or if the crime was committed despite his efforts to prevent the commission of that crime (Article 41/2, TCK).

This is another provision parallel to Article 38/3, TCK, which is designed to combat organized crime.

## II. Forms of Participation

165. The new Penal Code foresees for jointly committed crimes three classifications:

- (a) “joint offenders” (fiili birlikte gerçekleştiren failler) (Article 37/1, TCK);
- (b) “incitement” (azmettiren kişi) (Article 38/1, TCK); and
- (c) “a person who assists” (yardım eden kişi) (Article 39/1, TCK).

Those who perform the act jointly are named (fail), and those who incite or assist are named (suç ortağı) within the language of the new Code (Article 38/3, TCK).

The old Turkish Criminal Law doctrine classified participation<sup>1</sup> into four categories: principal, secondary, material and moral.

1. I. Özgenc, Suça İştirakin Hukuki Esası ve Faillik (1996). T.Y. Sancar, Çok Failli Suçlar (1998).

166. If several persons participate in a crime and perform the act prescribed by law jointly, each of them shall be considered “principal offenders,” and each shall be subject to the punishment prescribed for that act (Article 37/1, TCK).

Any person who has cooperated by committing the acts of execution (fiili birlikte gerçekleştiren fail), is an “offender of that act.” For example, in a homicide, when two people acting together fire fatal shots, both are principal actors.

A person who does not commit the acts of execution but aids in the execution of the crime in such a way that the crime could not have been committed without his assistance is considered as committing the crime directly together with the perpetrator. For example, the driver of a car involved in the abduction of a woman is in this position and can be subject to the punishment prescribed for abduction as well.<sup>1</sup>

The Criminal Code has introduced the concept of “using another as an instrument” (suçun işlenmesinde başkasını araç olarak kullanan kişi) (Article 37/2, TCK): in such cases, that individual who uses another as an instrument for the commission of a crime remains liable as “offender,” even if he did not perform the act by his own hand. The second conduct is “attacking his honor, dignity and



In order to prevent children from being misused in committing crimes, the punishment is increased by one-third to one-half if the “offender behind the acting offender” had used those who do not have the ability of discretion, and therefore have no criminal liability (Article 37/2, TCK).

1. This situation was called as “principal material participation” by the old doctrine.

167. Anyone who incites another to commit a crime shall be subject to the same punishment of the crime that is committed (Article 38/1, TCK).<sup>1</sup>

However, the provision of the repealed Penal Code (Article 64/2, TCK), which regulated that “if it is ascertained that the person who perpetrated the act had a personal interest in its execution, the punishment of the abettor shall be reduced,” is not included into the Criminal Code.

Where the incitement was conducted by using the influence arising from a kinship as direct ascendant or descendent (üstsoy ve altsoy ilişkisinden doğan nüfuzun kullanılması), the punishment of the instigator shall be increased by one-third to one-half (Article 38/2, TCK).

If a “child” has been incited to commit a crime, kinship is not necessary for the application of Article 38/2, TCK.

The new Penal Code has introduced a general rule of “effective remorse” for jointly committed crimes. Those who perform the act jointly (fail), and those who incite or assist (suç ortağı) shall receive a reduced<sup>2</sup> prison sentence if they reveal the identity of the unknown instigator (Article 38/3, TCK).

1. This situation was described as “principal moral participation” by the old Turkish doctrine.
2. The punishment is “imprisonment for 20 up to 25 years” instead of aggravated life imprisonment, and “imprisonment for 15 up to 20 years” instead of life imprisonment. For other prison terms, the penalty to be imposed may be reduced by one-third (Art. 38/3, TCK).

168. Whoever participates in the crime of the principal offender with some material activities is considered as being in the position of “a person who assists” (suçun işlenmesine yardım eden kişi; suç ortağı) (Article 39/1; 38/3, TCK).<sup>1</sup>

The Criminal Code has furnished a definition of “the person who assists” (Article 39/2, TCK). Anyone participating in a crime by: (a) abetting (teşvik etmek) or encouraging (suç işleme kararını kuvvetlendirmek) another toward the commission of crime, or by promising him aid and assistance after commission of the act (fiilin işlenmesinden sonra yardımda bulunacağını vaat etmek); (b) giving instruction as to the manner of commission of the crime, or providing the means which are used by the commission of the act; or (c) facilitating the commission of the crime through rendering aid and assistance before or during the commission of the crime shall be liable as “the person who assists.”

The person who assists shall be punished by a maximum of eight years of imprisonment; if the committed crime requires aggravated life imprisonment, he shall be sanctioned with an imprisonment term of 15–20 years; if the committed crime requires life imprisonment, he shall be sanctioned with an imprisonment term of 10–15 years. Other imprisonment terms may be reduced by one-half (Article 39/1, TCK).



In the previous of the repealed Criminal Code (Article 65/2, repealed TCK), the assistor's punishment was not reduced if the commission of the crime was not possible without his participation. The Criminal Code does not include this provision, as the assisting person shall be regarded as a "principal offender" according Article 37/1, TCK if he has "control on the commission of the crime."

1. Earlier, this case was described as "secondary material participation"; A. Önder (I), *Ceza Hukuku Genel Hükümler*, Cilt 1 (Istanbul: Beta, 1991), 511.

169. Under the dependency rule (bağıllık kuralı), the participation in a crime requires the commission of an act that is unlawful and committed intentionally (Article 40/1, TCK). There is no criminal liability if at least an attempted crime does not exist (Article 40/3).<sup>1</sup>

Each individual who participates in the commission of a crime shall be liable according to his guilty act, irrespective of the individual circumstances that may prevent the imposition of a penalty on the other offender (diğerinin cezalandırılmasını önleyen kişisel nedenler) (Article 40/1, TCK).<sup>2</sup>

Facts requiring aggravation of the punishment, even though of such a nature as to change the classification of the felony or misdemeanor, shall also aggravate the punishment for all accomplices who knew such facts at the time of the commission of the act (TCK Article 67).

Participation in a previous crime is not a general ground for a more severe penalty. In some cases there are exceptions to this rule (e.g., TCK Articles 417, 479, 491).

1. In order to constitute a jointly committed offense, it is sufficient that the act be unlawful and committed intentionally (Art. 40/1, TCK). In order to be culpable for a jointly committed offense, there must have been at least an attempt to commit the offense (Art. 40/3, TCK) (V. Bıçak & E. Grieves, *Mukayeseli Gerekçeli Türkçe-İngilizce Türk Ceza Kanunu*, 2 (Ankara: Bası, Seçkin, 2007), 127).
2. According to the repealed Criminal Code, permanent or incidental reasons of a personal nature requiring aggravation of the punishment for one of the persons who have committed a felony or misdemeanor jointly or assisted in facilitating the commission thereof, shall also require aggravation of the punishment for the others, if they knew of these reasons at the time they participated in the felony or misdemeanor. However, their punishments may be reduced by one sixth (Art. 66, repealed TCK).

170. Participation in misdemeanors has been regulated explicitly in the Act on Misdemeanors (KK 14).

veya olgu isnat etmek). The second conduct is "attacking his honor, dignity and

## Chapter 6. Classification of Criminal Offenses

## §1. GENERAL CLASSIFICATION OF CRIMINAL OFFENSES

171. Crime. The Criminal Code regulates “crimes.”<sup>1</sup> Misdemeanors are not included. From a procedural point of view there are some differences between ordinary crimes punished with imprisonment, misdemeanors punished with administrative sanctions imposed by administrative authorities, crimes dealing with State security, crimes committed by State officials and crimes committed by the press.

The repealed Turkish Criminal Code distinguished between felonies (cürümler) and misdemeanors (kabahatler).<sup>2</sup> The category of offenses that were called contraventions (cünha) existed in the 1858 Criminal Act of the Ottoman Empire but were not carried over into new legislation during Atatürk’s Law Reform (supra, paragraph 33) of 1926. Felonies and misdemeanors were defined by reference to the penalty. Punishments for felonies were: death, lengthy imprisonment (requiring the Court of Assize and imprisonment under more severe conditions), light imprisonment, heavy fine and disqualification from a profession or trade (Article 11/1, repealed TCK). “Banishment” (sürgün) was abolished in 1965. Punishments for misdemeanors were: light imprisonment, light fine and disqualification from a profession or trade (Article 11/2, repealed TCK).

The Criminal Code introduced a unified concept of “crime” (suç) for petty or severe offenses altogether.

1. B. Öztürk, *Hukuk Devletinde Suç Yaratılmasının ve Suçun Aydınlatılmasının Sınırları Sempozyumu* (Yeşilköy & İstanbul 1-3 Haziran 2008, 2009). N. Toroslu, *Cürümlerin Tasnifi Bakımından Suçun Hukuki Konusu* (Ankara, 1970). Y. Ünver, *Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer* (Ankara: Seçkin Yayınları, 2003). A. Polat, & S.K. Gül, *Suçun Ölçümü* (Ankara: Adalet, 2010).
2. N. Toroslu, *Cürümlerin Tasnifi Bakımından Suçun Hukuki Konusu* (Ankara, 1970), 87.

172. Ordinary crimes. Ordinary crimes are offenses tried by the regular criminal courts (infra, paragraph 294) according to regular criminal legislation. This distinction is made because of the existence of deviating regulations for organized crime, tried by a special section of the (infra, paragraph 299-II).

173. Organized crimes. Offenses listed under Article 250 of the Criminal Procedure Code and in the Anti-Terrorism Act are not only tried by a special section of the Court of Assize, they are also subject to a special procedure as far as the pre-trial detention period and the examination of witnesses during the trial are concerned (infra, paragraph 204).<sup>1</sup>

1. Previously, only the State Security Courts were competent to deal with political offenses. The amendments of Turkish Penal Procedure that had been made by Act Number 3842, dated 1992 were not valid during the preliminary investigation, and the provisions of the CMUK before the amendment would apply until 2003 (these exceptions were listed under Art. 31 of Act No. 3842) (infra, para. 203). These restrictions have been abolished by the 2004 legislation.

174. Crimes committed by State officials. Preliminary investigation of offenses committed by State officials<sup>1</sup> while on duty will be made by a high official in his

official capacity, and not by the public prosecutor.<sup>2</sup> The final investigation, however, will be tried by the competent ordinary court (Article 1, MKYK).<sup>3</sup>

Law enforcement officers using firearms in situations of terror as described in Act No. 1481, dated September 15, 1971 (Article 3) will be investigated by the public prosecutor directly (instead of an investigation by their superiors).

Allegations of breach of TCK Article 94 (torture), as well as of CMK Article 160 (not obeying the orders of public prosecutor) are exempted from the privileges of initial investigation by the superior (MKYK “2003–4778,” Article 2). The public prosecutor explores and prosecutes such allegations directly.

1. The Constitutional Court has abolished Art. 102 of Act No. 1580 (Decision dated Feb. 2, 1993 E. 1992/44, K. 1993/7: RG. June 19, 1993). Hence, employees of municipalities are not considered as “state officials” any more.
2. E. Çetin, Açıklamalı-İçtihatlı Ceza Hukukunda ve Özel Yasalarda Memur, Memurlar ve Diğer Kamu Görevlilerinin Yargılanma Usulü ve Memur Suçları (Ankara:Seçkin Yayınları, 2003).
3. E. Çetin, Açıklamalı, İçtihatlı Ceza Hukukunda ve Özel Yasalarda Memur, Memurlar ve Diğer Kamu Görevlilerinin Yargılanma Usulü ve Memur Suçları (2000). H. Gökcan & A. Tahsin Mustafa, Kamu Görevlisi ve Özel Soruşturma Usulleri (2008).

175. Crimes committed by the press. Article 28 of the Turkish Constitution guarantees the freedom of press.<sup>1</sup> There is a ground of justification for publication in the mass media. According to the special status of the press, offenses committed through publication are subject to the Press Courts.

The repealed Criminal Code provided aggravated penalties for those who insulted the President, the Parliament, or the army by means of publication (Articles 158 and 159, repealed TCK). The Criminal Code does not include this aggravating factor (Articles 299, 300, 301, TCK). However, the penalty for discouraging people from performing military service shall be increased by one-half if the act is committed through the press or broadcasting (Article 318/2, TCK).

The Culture Minister lifted bans against all formerly prohibited books at the end of 1991.<sup>2</sup>

The Press Act (Basın Kanunu) (BasK 1950–5680) has been amended several times in recent years. This Act was repealed by Act No. 5187, dated June 9, 2004.

Until 1993, Turkish Radio and Television (TRT) had a legal monopoly over broadcasting. However, with the increasing availability of satellite dishes and cable, many Turkish viewers may now watch foreign broadcasts, including several Turkish-language private channels. The constitutional rule of monopoly of the State over broadcasting (Article 133, AY) was abolished July 8, 1993 by Act No. 3913 (RG. July 10, 1993). The way for private radio and television broadcasting was thereby opened.

1. E. Çetin, Erol İçtihatlı Basın Hukuku (Ankara: Seçkin Yayınları, 2004). Ceza Hukuku Derneği Yayınları, İfade Özgürlüğü ve Türk Ceza Hukuku (İstanbul: Beta Yayınları, 2003). E. Günay, Yayın Yoluyla Kişilik Haklarına Saldırı ve Basında Sorumluluk (Ankara: Seçkin Yayınları, 1999). K. İçel & Y. Ünver, Kitle Haberleşme Hukuku (İstanbul: Beta, 2007).
2. In October, the film “Yol” which had been banned for years, was permitted to be shown for the first time.

veya olgu isnat etmek). The second conduct is “attacking his honor, dignity and

## §2. CRIMES

176. Crimes are regulated by the Turkish Criminal Code<sup>1</sup> and by some Special Criminal Laws.

1. M. Özen, 5237 Sayılı Türk Ceza Kanunu’nun Özel Hükümlerine İlişkin Düşünceler (sayı: Türkiye Barolar Birliği Dergisi, Mart/Nisan 2006), 63.

## I. Crimes of the Criminal Code

177. The structure of the Turkish Criminal Code. The Turkish Criminal Code (dated September 26, 2004, No. 5237<sup>1</sup>) has been effective since June 1, 2005. For the contents of the repealed Turkish Criminal Code, please refer to sources shown below in the footnote.<sup>2</sup>

Book One of the Criminal Code includes a General Part (Articles 1–75), which deals with the basic institutions of criminal law.

Book Two of the Criminal Code (Articles 76–345) deals with specific crimes. The first part deals with “international crimes” (uluslararası suçlar) (Articles 76–80) (infra, paragraph 178). The second part deals with “crimes against individuals” (kişilere karşı suçlar) (Articles 81–169). In order to demonstrate the importance of individual protection, crimes against persons precede the crimes protecting State, which have been placed at the end of Book Two.<sup>3</sup>

This part dealing with “crimes against individuals” is divided into ten subchapters:

- (1) crimes against life (hayata karşı suçlar) (Articles 81–85) (infra, paragraph 179);
- (2) crimes against the integrity of the body (vücüt dokunulmazlığına karşı suçlar) (Articles 86–93) (infra, paragraph 180);
- (3) torture by public servants and torture by civilians (işkence ve eziyet) (Articles 94–96) (infra, paragraph 181);
- (4) violation of the protection, help and notification obligations (koruma, gözetim, yardım veya bildirim yükümlülüğünün ihlali) (Articles 97–98) (infra, paragraph 182);
- (5) abortion (çocuk düşürme, düşürme veya kısırlaştırma) (Articles 99–101) (infra, paragraph 183);
- (6) crimes against sexual inviolability (cinsel dokunulmazlığa karşı suçlar) (Articles 102–105) (infra, paragraph 184);
- (7) crimes against the liberties (hürriyete karşı suçlar) (Articles 106–124) (infra, paragraph 185);
- (8) crimes against honor (şerefe karşı suçlar) (Articles 125–131) (infra, paragraph 186);
- (9) crimes against the private life and the confidential sphere of life (özel hayata ve hayatın gizli alanına karşı suçlar) (Articles 132–140) (infra, paragraph 187); and
- (10) crimes against property (malvarlığına karşı suçlar) (Articles 141–169) (infra, paragraph 188).

The third part of Book Two regulates the “crimes against the public” (topluma karşı suçlar) (Articles 170–246) (infra, paragraph 189).

The fourth and last part of Book Two deals with “crimes against the nation and the state” (millete ve Devlete karşı suçlar) (Articles 247–345) (infra, paragraph 190).

1. RG October 12, 2004/25611.
2. The specific crimes of the repealed Penal Code were subdivided into eleven parts. Part 11 was introduced in 1991 and dealt with felonies concerning the use of computers and computer programs. Book Three dealt with misdemeanors. For the definitions of the crimes in the repealed Penal Code; see Ed. T. Ansay, M.T. Yücel & M. Friedman, *The Turkish Criminal Code* (London: Sweet and Maxwell, 1965); For a German translation of the repealed Turkish Penal Code, see Şensoy & Tolun, *Das türkische Strafrecht, edition iuscrim* (Freiburg i. Br., 2003).
3. The 2002 Bill of Criminal Code was based on two sections. The first section dealt with general principles and the second section with specific crimes. The second section started with crimes against individuals and ended with crimes against the State, which included respect for human rights. The specific part contained some “new crimes,” and some of the “classical crimes” had new definition in light of developments in human rights law (supra, para. 40).

178. International crimes, (Book Two, Specific Provisions; Part 1. Subsection 1. Articles 76–80, TCK). Part 1 is subdivided into two subsections: genocide and crimes against humanity<sup>1</sup> (Articles 76, 77, TCK), and smuggling of immigrants and human trafficking (Articles 79, 80, TCK).<sup>2</sup>

“Genocide” (soykırım) is defined as “committing crimes that are listed in the statute with the aim (maksat) of the totally or partial destruction (yok edilmesi) of individuals who comprise a national, ethnical, racial or religious group, with the means of executing a plan” (Article 76/1, TCK).

“Crimes against humanity” (insanlığa karşı suçlar)<sup>3</sup> are defined as “committing crimes that are listed in the statute against one part of the population (toplumun bir kesimi) with political, philosophical, racial or religious motives (saik), systematically in order to execute a plan.” (Article 77/1, TCK).<sup>4</sup>

1. Y. Aksar, *Uluslararası Ceza Mahkemesi ve Uluslararası Ceza Usul Hukuku* (Seçkin Yayınları, 2003). C.A. Eksiş, *Uluslararası Ceza Mahkemesinin İnsanlığa Karşı Suçlar Üzerindeki Yargı Yetkisi* (Ankara: Seçkin Yayınları, 2004). A.N. Tütüncü, *İnsancıl Hukuka Giriş* (İstanbul: Beta, 2006). F. Yenisey (ed.), *Uluslararası Ceza Divanı* (İstanbul: Arkan Yayınları, 2007). Şen Ersan, *Uluslararası Ceza Mahkemesi* (2009).
2. TCKT 2002 elaborated by Dönmezer-Commission had initiated this modern approach: the first chapter of the special part was “crimes against individuals.” Genocide, trafficking in human beings and “torture” were new crimes introduced by the 2002 Bill (supra, para. 40).
3. S. Erman, “The Problem of the Procedural Rights of War Criminals and International Law,” *Annales de la Faculte De Droit D’İstanbul XXII*, no. 38 (1972–1974): 287.
4. F. Yenisey (ed.), *Uluslararası Ceza Divanı* (İstanbul: Arkan Yayınları, 2007).

179. Crimes against life. Subsection 1 is the first subsection of Part Two to deal with crimes against individuals (kişilere karşı suçlar) (Articles 81–169, TCK).<sup>1</sup>

This subsection deals with “intentional killing” (manslaughter) (kasten öldürme) (Article 81, TCK), “aggravated intentional killing” (murder) (nitelikli haller) (Article 82, TCK), “committing an intentional killing by omitting a conduct” (kasten öldürmenin ihmali davranışla işlenmesi) (Article 83, TCK), “leading to suicide” (ölümüne sebep olmak) (Article 84, TCK), “attacking his honor and dignifying killing” (taksirle öldürme) (Article 85, TCK).<sup>2</sup>

Euthanasia is not regulated by the new Turkish Penal Code, as all forms of assisted suicide<sup>3</sup> are considered as intentional killings. The judge may, however, reduce the punishment according Article 62, TCK (infra, paragraph 256).

The repealed Penal Code had a different system: homicide<sup>4</sup> (Articles 448–455, repealed TCK), battery<sup>5</sup> (Articles 456–460, repealed TCK), provisions jointly applicable to the foregoing chapters (Articles 461–467, repealed TCK), abortion (Articles 468–472, repealed TCK), the felonies of abandoning children, persons unable to take care of themselves and persons who are in danger (Articles 473–476, repealed TCK), abuse of the right of correction and maltreatment of one's family members (Articles 477–479, repealed TCK) and felonies of defamation and cursing (Articles 480–490, repealed TCK).

Within this part, the provisions regarding abortion (1983 Act No. 2827) and defamation (1991 Act No. 3756) were subject to amendments. Act No. 3756 of 1991 reduced the punishment of “privileged persons” (father of the mother and her close relatives) for killing a newborn illegitimate child to punishment of the mother alone. This kind of privilege does not exist in the new Penal Code.

1. I. Akbulut, Kan Gütme Saiki ile Adam Öldürme (İstanbul: Kazancı Hukuk Yayınevi, 2006). N. Centel, H. Zafer & O. Çakmut, Kişilere Karşı İşlenen Suçlar (İstanbul: Beta, 2007). S. Dönmezer, Kişilere ve Mala Karşı Cürümler, 16 (Bası, İstanbul, 2001). A. Erdoğan, Ahmet Sevinç & Özkepir Ramazan, Kasten Adam Öldürme Suçları (Ankara: Seçkin Yayınları, 1996). E. Göztepe, Namus Cinayetlerinin Hukuki Boyutu: Yeni Türk Ceza Kanunu'nun Bir Değerlendirmesi (Türkiye Barolar Birliği Dergisi, sayfa 29 Temmuz & Ağustos 2005). H. Hakeri, Kasten Öldürme Suçları (Seçkin Yayınları, Gözden Geçirilmiş 2. Baskı, Ankara 2007). M. Kaygısız & Seri Katiller, Paralel Cinayetler (2009). O.K. Keskin, Taksirle Ölüme ve Yaralanmaya Neden Olma (Ankara: Seçkin Yayınları, 1994). N. Meran, Kişilere Karşı Suçlar; Genişletilmiş ve gözden geçirilmiş 2 (Ankara: Baskı, Seçkin, 2008). N. Meran, Yeni Türk Ceza Kanununda Kişilere Karşı Suçlar (Ankara: Seçkin Yayınları, 2005). C. Öztürkler, Ölüm ve Bedeni Zarar Hallerinde Maddi Tazminatın Hesaplanması Teknikleri (Ankara: Seçkin Yayınları, 2003).
2. H. Hakeri, Kasten Öldürme Suçları (Gözden Geçirilmiş İkinci Baskı, Seçkin, Ankara 2007).
3. S. Dönmezer, Kişilere ve Mala Karşı Cürümler, 16 (İstanbul: Bası, 2001), 39.
4. C.N. Bozkurt, Adam Öldürme Cürümleri (1996); A.S. Erdoğan & R. Özkepir, Kasten Adam Öldürme Suçları (1996); H. Hakeri, Die türkische Strafbestimmungen zum Schutz des Lebens der Person im Vergleich mit dem deutschen Recht (1997); A.Z. Polat, Adam Öldürme Suçları (1999).
5. O.K. Keskin, Taksirle Ölüme ve Yaralanmaya Neden Olma (1994).

180. Crimes against the integrity of the body (vücüt dokunulmazlığına karşı suçlar) include fatal and non-fatal crimes (Part 2. Subsection 2. Articles 86–93, TCK).<sup>1</sup> Non-fatal crimes against the person include the following: “intentional wounding” (battery) (kasten yaralama) (Article 86, TCK), “aggravated intentional wounding as regard to consequences” (neticesi sebebiyle ağırlaşmış yaralama) (Article 87, TCK) (where the perpetrator is only responsible for excess consequences, if he is liable at least by his negligence for this result beyond his intent (Article 23, TCK), “committing an intentional wounding by omitting a conduct” (kasten yaralamanın ihmali davranışla işlenmesi) (Article 83, TCK), “negligent wounding” (taksirle yaralama) (Article 89, TCK) and trading with human organs or skin (organ veya doku ticareti) (Articles 91–93, TCK).

1. M.R. Erdem, Cinsel İlişki Yoluyla Başkasına HIV Bulaştırmanın Cezalandırılabilirliği Sorunu (Erzincan Hukuk Fakültesi Dergisi Cilt 8 sayı: 1-2 sayfa 73, Erzincan 2004). S. Kaymaz, 5237



Sayı 1 Türk Ceza Kanunu'nun 87/4 Maddesinde Düzenlenen Neticesi Sebebiyle Ağırlaşmış Yaralama Suçu (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 73, Mayıs & Haziran 2005).

181. Torture. Torture<sup>1</sup> by State officials and torture by civilians (işkence ve eziyet) (Part 2. Subsection 3. Articles 94–96, TCK) has been separated. The Criminal Code has a new approach to the crimes of torture.<sup>2</sup> In contrast to international regulations, “torture” is not a crime that can only be committed by State officials. Civilians may also be offenders.

A State official (kamu görevlisi) who commits acts that are incompatible with human dignity and lead to suffering bodily or mental pain, which influence the perception capabilities or the abilities of forming will by the victim, and which degrade him (aşağılanmasına yol açmak), shall be liable for “torture” (işkence) (Article 94, TCK).

“Aggravated torture as regard to consequences” (neticesi sebebiyle ağırlaşmış işkence) (Article 95, TCK) is a new crime; the perpetrator is only responsible for excess consequences if he is liable at least by negligence of the result beyond his intent (Article 23, TCK).

Torture by civilians (harassment) is also a new crime (eziyet) (Article 96, TCK). Any conduct that leads to the suffering of heavy pain is considered a crime.

1. V. Akay, Folter und die türkische Gerichtsbarkeit Zambon, Frankfurt a. M. 2001. Giffard, Camile, İşkencenin Rapor Edilmesi (2001).

2. M. Önok, Uluslararası Boyutuyla İşkence Suçu (2006).

182. Violation of the obligations of protection, help and notification (koruma, gözetim, yardım veya bildirim yükümlülüğünün ihlali) (Part 2. Subsection 4. Articles 97, 98, TCK). A person who abandons any other individual for whom he has an obligation of care has committed the crime of abandonment. (terk) (Article 97, TCK). If the abandoned individual suffers an illness or dies, the perpetrator is responsible for these excessive consequences under the provisions of Article 23, TCK.

Whoever omits to help an individual who was not able to rescue himself, as he was in a state of helplessness because of his age, illness or as he was wounded; or whoever does not notify this state of affairs to the respected authorities, shall be punished by imprisonment of up to one year or with a criminal fine (yardım veya bildirim yükümlülüğünün yerine getirilmemesi) (Article 98, TCK).

183. Abortion (çocuk düşürme, düşürme veya kısırlaştırma) (Part 2. Subsection 5. Articles 99–101). The person who conducts an abortion without having received the consent of the women shall be punished by imprisonment for between 5 and 10 years (Article 99, TCK). If the pregnant woman wanted the abortion, and the duration of the pregnancy was more than 10 weeks, she shall be punished with imprisonment for up to one year or a criminal fine, (Article 100, TCK).

Sterilization (Article 101, TCK) without receiving the consent of the subject is punishable by imprisonment for between three and six years.

veya olgu isnat etmek). The second conduct is “attacking his honor, dignity and

184. Crimes against the sexual inviolability (cinsel dokunulmazlığa karşı suçlar) (Part 2, Subsection 6, Articles 102–105, TCK). The title of subsection 6 indicates a significant change in the approach of the lawmaker.<sup>1</sup> Instead of protecting public decency, the protection is now on sexual<sup>2</sup> liberties.

The main crime in this area is sexual assault (cinsel saldırı) (Article 102, TCK), which can only be committed by at least touching the victim. Child abuse (çocukların cinsel istismarı) (Article 103, TCK), sexual intercourse with a minor (reşit olmayanla cinsel ilişki) (Article 104, TCK) and sexual molestation (cinsel taciz) (Article 105, TCK) are other sexual crimes.

The repealed Penal Code had regulated felonies against public decency and family order (Articles 414–447, repealed TCK) differently. Part 8 was subdivided into six chapters: offenses of rape;<sup>3</sup> seduction of children and assault on chastity<sup>4</sup> (Articles 414–428, repealed TCK); abduction of girls, boys, women and men (Articles 429–434, repealed TCK); instigation to prostitution (Articles 435–436, repealed TCK); joint provisions applicable to the foregoing chapters (Articles 437–439, repealed TCK); adultery (Articles 440–444, repealed TCK); and felonies regarding lineage (Articles 445–447, repealed TCK).

The Criminal Code has divided the former provisions related to public decency in two parts. Some of the crimes are considered more “individual related” and, therefore, have been regulated in Part 2, Subsection 6. But pornography<sup>5</sup> is deemed more “public related” and has been taken to Part 3, Subsection 7 (infra, paragraph 189–VI).

Child pornography is a new type of crime, in which children are used in the production of pornographic material (Article 226/3, TCK).

Raping a prostitute (Article 438, repealed TCK) formerly was subject to a mitigated penalty. This provision was abolished in 1990 by Act No. 3679.

Formerly, the Constitutional Court had abolished adultery (Articles 440–444, repealed TCK) on the basis of being against the principle of equality. The Criminal Code does not include adultery. However, there have been some efforts to make it a crime again. This caused big discussions during the promulgation of the Criminal Code.

Rape within a marriage was not considered a crime according to Turkish case law. However, if the husband forced anal intercourse on his wife, this act was considered an “illegal act against family members” and was punishable under Article 478, repealed TCK.<sup>6</sup> The Criminal Code considers rape the commission of a violation of bodily integrity of an individual, the insertion of an organ or of any other object into the body (though it does not expressly use such wording). Punishment is imprisonment for between 7 and 12 years. If this conduct was committed against the spouse, the investigation of the crime and the prosecution can only be done if the spouse files a complaint (Article 102/2, TCK). Under the current Law (in July 2011), complaint crimes are subject to “mediation” (uzlaşma) and cannot be prosecuted before an unsuccessful attempt to mediate. However, complaint crimes against sexual inviolability are exempted (Article 253/3, CMK, as amended by Act 2009–5918).

1. N. Abadan, *Social Change and Turkish Women* (Basımevi, Ankara: Ankara Üniv. 1963). M.E. Artuk & A.C. Yenidünya *Türk Ceza Hukukunda Kız, Kadın ve Erkek Kaçırma Suçları* (Türkiye Barolar Birliği Dergisi sayı 54 Eylül & Ekim 2004). E. Doğramacı, *Rights of Women in Turkey*



- (Ankara: Universal Bookstore, 1982). E. Doğramacı, Status of Women in Turkey, 2nd edn (Ankara, 1984). Evik, Ali Hakan, Ceza Kanunumuz ve Kadın (İstanbul: Prof. Dr. Çetin Özek Armağanı, Galatasaray Üniversitesi Yayını, 2004). H.Y. Sevik, 5237 Sayılı Türk Ceza Kanunu'nda Cinsel Saldırı ve Cinsel Taciz Suçları (Türkiye Barolar Birliği Dergisi, sayı 57, Mart & Nisan 2005). A.C. Yenidünya, 5237 Sayılı Yeni Türk Ceza Kanunu'nda Cinsel Dokunulmazlığa Karşı Suçlar (Legal Hukuk Dergisi sayı: 33, Eylül 2005).
2. N. Karadağ, Cinsel Azınlıkların Bireysel Hakları (2008).
  3. S. Bakıcı, Açıklamalı, İçtihatlı Genel Adap ve Aile Düzenine Karşı Cürümler (1994); C. Otacı, Genel Adap ve Aile Düzenine Karşı İşlenen Suçlar (2000).
  4. S. Selçuk, Kızlık Bozma Suçu (1996).
  5. Pornography was forbidden by Art. 426 of the repealed Turkish Criminal Code, Act No. 3266 of Mar. 3, 1986; Act No. 3506 of 1988 had amended this article, increasing the applicable fines.
  6. S. Dönmezer, Kişilere ve Mala Karşı Cürümler, 16 (İstanbul: Bası, Beta, 2001), 260.

185. Crimes against liberty (Part 2. Subsection 7. Articles 106–124, TCK)<sup>1</sup> are restructured within the new Code in the following manner: threat (tehdit; Article 106, TCK), extortion (Şantaj; Article 107, TCK), deprivation of personal liberty (Article 109, TCK), obstructing of education (Article 112, TCK), obstructing the use of political rights (Article 114, TCK), obstructing the use of the rights of religion (inanç), thought (düşünce) and belief (kanaat) (Article 115, TCK), violation of dwelling immunity<sup>2</sup> (Article 116, TCK), violation of the freedom of labor (Article 117, TCK), conducting an illegal search on a person (Article 120, TCK), apartheid (Article 122, TCK), disturbing the tranquility of an individual (Article 123, TCK) and obstructing the communication between individuals<sup>3</sup> (Article 124, TCK).<sup>4</sup> These are regulated in the seventh subsection of Part 2.

Crimes against freedom of religion were changed on January 9, 1986, Act No. 3255, and the penalties were made more severe. The Constitutional Court abolished Articles 175 and 176 of the repealed Turkish Penal Code on November 4, 1986.<sup>5</sup> After this, Articles 175 and 176 had been reformulated on May 5, 1987 by Act No. 3369.

1. O. Yaşar, Uygulamada ve Öğretide Hürriyet Aleyhinde İşlenen Suçlar (2001); M. Artuk, M.E. Gökçen & A.C. Yenidünya Ceza Hukuku Özel Hükümler, 2 (Ankara, 2000), 47. Smuggling immigrants (Art. 201(a) repealed TCK “2002–4771”) and forcing them to work (or slavery), organ donations under duress, gaining consent of vulnerable individuals (Art. 201(b) repealed TCK “2002–4771”) were introduced to the Turkish Criminal Code on Aug. 3, 2002 and regulated within the group of crimes against liberty. However, these new types of crimes have now been regulated in the first Part of the Criminal Code as “international crimes” (Arts. 79 and 80, TCK).
2. A.R. Çınar, Konut Dokunulmazlığını İhlal Suçları (1999).
3. E. Şen, Devlet ve Kitle İletişim Araçları Karşısında Özel Hayatın Gizliliği ve Korunması (1996).
4. S. Keskin-Kızıroğlu, Konut Dokunulmazlığının İhlali Suçu (Ankara: Adalet Yayınevi, 2010). I. Üzülmüş, Şantaj Suçu (Erzincan Hukuk Fakültesi Dergisi, Cilt 8 sayı: 1–2, Erzincan 2004), 173. O. Yaşar, Hürriyet Aleyhinde Cürümler (Ankara: Seçkin Yayınları, 2001).
5. Decision of the Constitutional Court, Nov. 4, 1986, E. 1986/11, K. 1986/267.

186. Crimes against honor (Part 2. Subsection 8. Articles 125–131, TCK) include several categories.<sup>1</sup> The criminal law of defamation (hakaret) (Article 125, TCK) includes two types of actus reus. The first conduct is “attaching a concrete act or state of affairs to an individual, which is eligible to disrupt his honor, dignity and reputation” (onur, şeref ve saygınlığını rencide edebilecek nitelikte somut bir fiil veya olgu isnat etmek). The second conduct is “attacking his honor, dignity and

reputation by cursing” (sövmek suretiyle onur, şeref ve saygınlığına saldırmak). The repealed Penal Code considered these two types of conducts as two separate crimes, and punished them differently (Articles 480 and 482, repealed TCK). The Turkish Criminal Code foresees the same punishment.

Defamation of a deceased person is a crime if at least three persons were present at the time of the act (kişinin hatırasına hakaret) (Article 130, TCK).

There is a special Act for Protection of Atatürk Against Defamation.

Crimes of defamation can only be investigated and prosecuted if the victim files a criminal complaint (Article 131, TCK). They are subject to mediation (Article 253, CMK). However, defamation of a public servant with regard to his office shall be prosecuted *ex officio*.

1. H. Bulut, *Kişilik Hakları ve Kişilik Haklarına Saldırıdan Kaynaklanan Hukuk Davaları* (Beta, İstanbul, 2006). E. Çetin, *Yeni Türk Ceza Yasasındaki Hakaret Suçları* (Ankara: Seçkin Yayınları, 2005). A. Gündel, *Atatürk’e ve Cumhurbaşkanı’na, Cumhuriyete, Hükümete Hakaret Suçları-Yasadışı Yakalanan ve Tutuklananlara Tazminat Verilmesi Davaları* (Ankara: Seçkin Yayınları, 1997). Sancar, *Türkan Yalçın, Alenen Tahkir ve Tezyif Suçları* (Ankara: Seçkin Yayınları, 2004).

187. Crimes protecting private life. Crimes against the private life and the confidential sphere of life (özel hayata ve hayatın gizli alanına karşı suçlar) are found in Part 2. Subsection 9. Articles 132–140, TCK. Crimes against property (malvarlığına karşı suçlar) are found in Part 2. Subsection 10. Articles 141–169.

Turkish Criminal Code introduced some new types of crimes in the field of protection of private life.

Violation of the confidentiality of communications between individuals is a crime (haberleşmenin gizliliğini ihlal) (Article 132, TCK). Recording and revealing the content of the communication are aggravated forms of this crime.

Listening to non-public oral conversations without the consent of either one of the parties of the conversation, using a device or recording the voice, is a crime (kişiler arasındaki konuşmaların dinlenmesi ve kayda alınması) (Article 133, TCK). It shall nevertheless be investigated or prosecuted only upon the complaint of the victim, and it is subject to mediation (Article 253, CMK).

Violation of the confidentiality of private life (özel hayatın gizliliğini ihlal) (Article 134, TCK) is a crime. If the confidentiality of an individual’s private life had been violated by taking pictures or recording the voice, imprisonment is from one year up to two years.

Collecting and storing personal data in an illegal way is a crime (kişisel verilerin kaydedilmesi) (Article 135, TCK). The person who neglects his legal obligation of deleting stored personal data, after the term as foreseen in an Act has expired, is criminally responsible (verileri yok etmeme) (Article 138, TCK).

188. Crimes against property. The Turkish Criminal Code has made changes in the field of crimes against property.<sup>1</sup> The crimes against property are as follows: theft (Article 141), qualified theft (Article 142), theft during night-time hours (Article 142), theft for use (Article 146), robbery (Article 148), qualified robbery (Article 149), damage to property (Article 151), qualified damage to property (Article 152), damaging places of worship and cemeteries (Article 153), trespass (Article 154), abuse of trust (Article 155), fraud (dolandırıcılık; Article 157),

qualified fraud (Article 158), bankruptcy (Article 161), bankruptcy by negligence (Article 162) and benefiting without payment (Article 163). Also discussed are personal grounds that reduce or abolish the punishment (Article 167), effective regret (Article 168) and security measures on legal entities (Article 169).

The repealed Code had divided the felonies against property<sup>2</sup> into nine chapters: larceny<sup>3</sup> (Articles 491–494, repealed TCK as amended June 6, 1991 by Act No. 3756); plundering, highway robbery and kidnapping (Articles 495–502, repealed TCK); fraud<sup>4</sup> and bankruptcy<sup>5</sup> (Articles 503–507, repealed TCK as amended November 21, 1990 by Act No. 3679); breach of trust<sup>6</sup> (Articles 508–511, repealed TCK); buying or concealing property obtained through felony (Article 512, repealed TCK); trespass on places owned by others<sup>7</sup> (Articles 513–515, repealed TCK); inflicting damage to property (Articles 516–521, repealed TCK); using services without paying<sup>8</sup> (Articles 521(a)–521, repealed TCK; added articles of June 6, 1991, Act No. 3756); and provisions jointly applicable to the foregoing chapters (Articles 522–524, repealed TCK).

1. M.E. Alşahin, Yargıtay Kararları Işığında Mala Zarar Verme Suçları (5237 Sayılı TCK. m. 151 vd.) (Ankara: Turhan Kitabevi, 2010). M. Ekinci & S. Esen, Hırsızlık, Yağma, Güveni Kötüye Kullanma, Dolandırıcılık, Hileli ve Taksirli İflas, Karkılıksız Yararlanma, Belgelerde Sahtecilik ve Bilişim Alanında Suçlar (Ankara: Yetkin Yayınları, 2005). A. Gündel, Açıklamalı İçtihatlı 765 ve 5237 Sayılı Türk Ceza Kanunlarındaki Hırsızlık ve Dolandırıcılık Suçları (Ankara: Seçkin Yayınları, 2005). K. İçel Y. Ünver, Yener (ed.), Malvarlığına Karşı Suçlar ve Ekonomik Suçluluk (Ankara: Seçkin, 2009). N. Meran, Sahtecilik – Malvarlığı, Bilişim Suçları ile Ekonomi ve Ticaret Alanında Suçlar; Genişletilmiş ve gözden geçirilmiş 2 (Ankara: Baskı, Seçkin, 2008). N. Meran, Yeni Türk Ceza Kanununda Sahtecilik-Malvarlığı Bilişim Suçları ile Ekonomi ve Ticaret Alanında Suçlar (Ankara: Seçkin Yayınları, 2005). S. Selçuk, Dolandırıcılığın Kimi Suçlardan Ayrımı (Ankara, 1993).
2. K. Taşdemir & R. Özkepir, Mala Karşı Suçlar (1993).
3. K. Taşdemir & R. Özkepir, Hırsızlık Suçları (1996).
4. I. Özgenç, Ekonomik Çıkar Nedeniyle İşlenen Suçlar (Ankara: Seçkin, 2002), 15.
5. M.K. Yıldırım, Hileli İflas Suçları (2001).
6. E. Şafak & A. Gündel, En Son Yargıtay İçtihatlarıyla Zimmet, Sahtekarlık, Hırsızlık, Gasp, Dolandırıcılık ve Emniyeti Suistimal Suçları (1993); A. Gündel, İçtihatlı Açıklamalı Zimmet, Sahtecilik, Hırsızlık, Gasp, Dolandırıcılık ve Emniyeti Suistimal Suçları (1998); I. Özgenç, Ekonomik Çıkar Nedeniyle İşlenen Suçlar (Ankara: Seçkin, 2002), 71.
7. Y. Alasu, Hakkı Olmayan Yerlere Tecavüz (1993).
8. M.R. Erdem, Türk Hukukunda Karşılıksız Yararlanma Suçları (1996).

189. Crimes against the public. Turkish Criminal Code has changed the listing of the crimes; in order to indicate the value of the individual, crimes against persons are at the beginning of the special part of the Penal Code. Crimes against the public and the State are in the second half of the Penal Code, as described below:

- (1) Crimes creating a general danger for the public. These crimes<sup>1</sup> (Part 3. Subsection 1. Articles 170–180, TCK) include the following: intended endangering public security in regard fires, floods and other serious dangers (genel güvenliğin kasten tehlikeye sokulması) (Article 170, TCK, Articles 369–383, repealed TCK); negligent endangering public security (genel güvenliğin taksirle tehlikeye sokulması) (Article 171, TCK); causing radiation (radyasyon yayma) (Article 172, TCK); causing an atomic energy explosion (atom enerjisi ile patlamaya sebebiyet verme) (Article 173, TCK); unauthorized possession of dangerous substances (tehlikeli maddelerin

izinsiz olarak bulundurulması) (Article 174, TCK); neglecting the custody obligations on a mentally ill person (akıl hastası üzerindeki bakım ve gözetim yükümlülüğünün ihlali) (Article 175, TCK); endangering the safety in traffic (trafik güvenliğini tehlikeye sokma) (Article 170, TCK); and negligently endangering the traffic (trafik güvenliğini taksirle tehlikeye sokma) (Article 180, TCK).

- (2) Crimes against the environment (çevreye karşı suçlar). These crimes (Part 3. Subsection 2. Articles 181–184, TCK) include the new crime of intended pollution of the environment, punishable by imprisonment (Article 181, TCK). Negligent pollution is also a crime (Article 182, TCK). Causing a noise that is suitable to harm the health is a new crime (gürültüye neden olma) (Article 183, TCK). There are also specific laws on the protection of the environment (infra, paragraph 195).
- (3) Any person who builds a building without getting the necessary permissions shall be punished with imprisonment. Supplying such buildings with city water or electricity is also a crime. The lawmaker intended here to prevent “construction pollution”<sup>2</sup> (imar kirliliğine neden olma) (Article 184, TCK).<sup>3</sup>
- (4) Crimes against public health (kamunun sağlığına karşı suçlar) (Part 3. Subsection 3. Articles 185–196, TCK) include contaminating the drinking water or food with poison (zehirli madde katma) (Article 185, TCK) and trading in decayed food or falsified medicaments (Article 186, TCK), or production of such medicaments (Article 187, TCK). Production of and trading with narcotic substances (Article 188), promoting the consumption of it (Article 190, TCK) and possession of narcotics for personal use (Article 191, TCK) are regulated in more detail in the Turkish Criminal Code.<sup>4</sup>
- (5) The felonies with respect to public health were changed by Act No. 2891 of September 22, 1983, and penalties were increased.
- (6) In addition to the 1981 and 1990 amendments, Articles 403–406 of the repealed TCK were completely changed in 1991 to prevent double jeopardy for drug-related crimes committed in foreign countries. The greater punishments were reduced to be in conformity with European standards (Act No. 2370, of January 7, 1981; Act No. 3679, of 1990 and Act No. 3756, of June 6, 1991).
- (7) Crimes against public confidence (kamu güvenine karşı suçlar) (Part 3. Subsection 3. Articles 197–212, TCK) include the following: counterfeiting money (parada sahtecilik) (Article 197, TCK), counterfeiting valuable seals (kıymetli damgada sahtecilik) (Article 199, TCK), counterfeiting government seals (Article 202, TCK), breaking a seal<sup>5</sup> (mühür bozma) (Article 203, TCK), forgery of official documents (resmi belgede sahtecilik)<sup>6</sup> (Articles 204–206, TCK), forgery of private documents (özel belgede sahtecilik) (Articles 207–208) and misusing a blank signature (açığa imzanın kötüye kullanılması) (Article 209, TCK). Forgery of identification cards, passports, and so forth were explicitly regulated in the repealed Penal Code (Articles 350–357, TCK). They are now partly existing (Articles 204, 207, 210 and 268, TCK). The provisions of the repealed Code related to the using fraud or deceit in commerce, industry and auctions (Articles 358–368, TCK) are partly regulated in the new Code (Articles 235–239, TCK).
- (8) Crimes against the public peace (kamu barışına karşı suçlar) (Part 3. Subsection 5. Articles 213–222, TCK) include such crimes as: threat with the aim of creating fear and panic in the public (halk arasında korku ve panik yaratmak amacıyla

tehdit) (Article 213, TCK), inciting to commit a crime<sup>7</sup> (Article 214, TCK, Article 312, repealed TCK),<sup>8</sup> praising a committed crime or the perpetrator (suçu ve suçluyu övme) (Article 215, TCK), incitement of hate and enmity between the different groups in the society and degrading (aşağılama) some sections of the population<sup>9</sup> (halkı kin ve düşmanlığa tahrik ve aşağılama) (Article 216, TCK), incitement not to obey the rules of a statute (kanunlara uymamaya tahrik) (Article 217, TCK), misusing the religious services while in office (görev sırasında din hizmetlerini kötüye kullanma) (Article 219, TCK), forming groups for the purpose of committing crimes (suç işlemek amacıyla örgüt kurma) (Articles 220–221, TCK, Articles 313–314, repealed TCK), violating the reform laws of the Turkish Republic related to wearing a hat and writing with Latin alphabet (şapka ve Türk harfleri) (Article 222, TCK).

- (9) Crimes against means of transportation and platforms (ulaşım araçlarına ve sabit platformlara karşı suçlar) (Part 3. Subsection 6. Articles 223, 224, TCK) includes hijacking or seizure of transport vehicles (Article 223), and occupation of a platform on territorial land or industrial zone (Article 224). The repealed Penal Code had regulated felonies against means of transportation and communication in the subsection against public health (Articles 384–393). Some important changes had been made to this section. Article 384 was rewritten in 1979 and incorporated into Chapter 2 to regulate hijacking airplanes (Act No. 2245 of 1979 and Act No. 2248 of 1992).
- (10) Turkish Criminal Code has now a new subsection for crimes against means of transportation and Platforms.
- (11) Crimes against public morals (genel ahlaka karşı suçlar) (Part 3. Subsection 7. Articles 225–229, TCK) include: indecent acts (Article 225), obscenity<sup>10</sup> (Article 226), prostitution (Article 227), providing an environment for gambling (Article 228) and begging (Article 229).
- (12) Crimes against the family order (aile düzenine karşı suçlar) (Part 3. Subsection 8. Articles 230–234, TCK) include: polygamy, marriage by deception and religious ceremonies (Article 230), altering the lineage of a child (Article 231), maltreatment (Article 232), breach of obligations derived from family law (Article 233), and kidnapping and detention of a child (Article 234).<sup>11</sup>
- (13) Crimes against economy, industry and commerce (ekonomi, sanayi ve ticarete ilişkin suçlar) (Part 3. Subsection 9. Articles 235–242, TCK) include: fraud during a tender (Article 235); fraud during the discharge of contractual obligations (Article 236); manipulation of the price (Article 237), causing shortage of items required by the public (Article 238); disclosure of confidential documents relating to commerce, banking or private customers (Article 239); restriction of supply of goods and services (Article 240); and unlawful money lending (Article 241).<sup>12</sup>
- (14) Crimes in the field of computers (bilgi işlem alanında suçlar) (Part 3. Subsection 10. Articles 243–246, TCK) include:<sup>13</sup> accessing a data processing system (Article 243), preventing the functioning of a system and deletion, alteration or corrupting of data (Article 244), misusing of bank or credit cards (Article 245) and implementation of security measures on legal entities (Article 246). Computer crimes had been incorporated into the repealed Penal Code (Articles 525(a)–525(d)) by Act No. 3756 of 1991 due to the technological developments.<sup>14</sup>



1. M.E. Artuk & I. Üzülmaz, Yangına, İnfilaka, Batmaya, Deniz Kazasına veya Bir Tehlikeye Taksirle Sebebiyet Verme Suçu (Türkiye Barolar Birliği Dergisi, sayfa 181, Mart & Nisan 2005).
2. N. Meran, İmar Kirliliğine Neden Olma (Ankara: Adalet Yayınevi, 2010).
3. M.A. Karasu, Kente Karşı Suç: İmar Uygulamaları Bağlamında Kente Karşı İşlenen Suçlar (2009). Orta Elif, İmar Hukukunda Plan Hiyerarşisi ve Planların Çatışması (2006).
4. O. Çakmut, Türk Ceza Kanununa Göre Uyuşturucu Madde Kullanımının Yasal Sonuçları ve İptila Halinde Verilecek Hüküm (Yayın: Prof. Dr. Çetin Özek Armağanı, Galatasaray Üniversitesi, 2004). S.N. Deda, Gıda Mevzuatı ve Tatbikatı (Ankara: Seçkin Yayınları, 1994). E. Günay, Uygulamalı Uyuşturucu veya Uyarıcı Madde Suçları ve İlgili Mevzuat (Ankara: Seçkin Yayınları, 2005). E. Günay, Uyuşturucu Madde Suçları ve Cezaları (Ankara: Seçkin Yayınları, 1999). S. Kaymaz & H.T. Gökcan, Gıda Suçları ve Yeni Gıda Mevzuatı (Ankara: Seçkin Yayınları, 2002).
5. H.T. Gökcan, Mühür Bozma, Yedimlilik Yükümlülüğüne Uymama, İhtiyati Tedbir Kararlarına Aykırılık Suçları ve Zarara Yol Açan Yedimin ile Haksız Tedbir Uygulatana Karşı Tazminat Davaları (2001).
6. G.Ö. Dörtgöz, Tapu ve Kadastro İşlemlerinde Sahtecilik Suçları ve Alınması Gerekli Tedbirler (1993).
7. A. Gökçen, Halkı Kin ve Düşmanlığa Açıkça Tahrik Cürmü (2001).
8. Due to the frequency of crimes of terrorism in Turkey, many provisions of Part 5 of the repealed Penal Code were changed previously and Art. 312(a) was added (Act No. 3679 of 1990), while Art. 315 of the repealed TCK was abolished (Act No. 3756 of 1991). Art. 312/2 repealed TCK as amended by the Act “2001–4744” required a “clear and present danger” to public order (kamu düzeni için tehlikeli olabilecek şekilde) resulting from speech. Under the current Criminal Code the penalty was reduced to “imprisonment” for one to three years and the “heavy fine” has been abolished. A new type of crime was introduced in Art. 312/3 repealed TCK by the Act “2001–4744”: anyone who insults (tahkir etmek) a segment of the population in a manner that degrades them and thus violates their human dignity will be punished.
9. U. Karan, Yeni Türk Ceza Kanunu 216. Maddesi ve Anlatım Özgürlüğü (İstanbul Barosu Dergisi, cilt: 79, sayı: 2005/5).
10. V.O. Özbek, Müstehcenlik Suçu (TCK m. 226) (Ankara: Seçkin, 2009).
11. A. Nuhoğlu, Aile Düzenine Karşı Suçlar (İstanbul: Beta, 2009). I. Andrejew, Ailenin Ceza Hukuku Yönünden Korunması; (İstanbul Üniversitesi Mukayeseli Hukuk Enstitüsü Mukayeseli Hukuk Araştırmaları Dergisi, Yeni seri, Yıl 3, no. 4), Garanti Matbaası, İstanbul 1969. C. Otacı, Genel Adap ve Aile Düzenine Karşı Suçlar (Ankara: Seçkin Yayınları, 2000).
12. Y. Aslan, Rekabet Hukuku Dersleri (İstanbul: Vedat Kitapçılık, 2010). D. Cengiz, Türk Rekabet Hukukundaki Uyumlu Eylem ve bu Eylemin Hukuki Sonuçları (İstanbul: Beta, 2006). Delmas-Marty, Mireille (eds) Çevirenler, Keskin, Serap ... , Avrupa Birliğinin Mali Çıkarlarının Korunmasına İlişkin Ceza Hukuku Kuralları (Corpus juris) (Ankara: Seçkin, 2001). H. Dursun, Ekonomik Suçlar ve Türkiye’deki Sürdürülebilir Kalkınmaya Etkileri (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 215, Mayıs & Haziran, 2005). Y. Ersoy, Çalışma Hürriyetine Karşı Suçlar (Ankara, 1973). Hatipoğlu, Ali Parlar, Özel Ceza Yasaları Uygulamalarında Ekonomik ve Ticari Suçlar (Ankara: Yetkin Yayınları, 2005). S. Keskin, H. Zafer & U. Kocasakal, Avrupa Birliğinin Mali Çıkarlarının Korunmasına İlişkin Ceza Hukuku Kuralları (Ankara: Seçkin Yayınları, 2001).
13. O. Değirmenci, Türk Ceza Kanunu’nun Bilişim Suçları Bakımından Değerlendirilmesi (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 195, Mayıs & Haziran, 2005). M.V. Dülger, Bilişim Suçları (Seçkin Yayınları, 2004). Eker, Ö. Umut, Türk Ceza Hukukunda Bilişim Suçları – Eski TCK Bağlamında Hukukumuzda Yer Alan İlk Düzenlemeler ve 5237 Sayılı TCK’nın İlgili Hükümlerinin Yorumu (Türkiye Barolar Birliği Dergisi sayı 62, Ocak & Şubat 2006). A. Karagülmez, Bilişim Suçları ve Soruşturma Kovuşturma Evreleri (Seçkin Yayınları, 2005). L. Kurt, Açıklamalı İçtihatlı Tüm Yönleriyle Bilişim Suçları ve Türk Ceza Kanunundaki Uygulaması (Ankara: Seçkin Yayınları, 2005). A. Önder, Şahıslara ve Mala Karşı Cürümler ve Bilişim Alanında Suçlar (İstanbul: Filiz Kitabevi, 1994). A. Parlar, Türk Ceza Hukukunda Bilişim Suçları (İstanbul: Vedat Kitapçılık, 2010).
14. A. Önder, Şahıslara ve Mala Karşı Cürümler ve Bilişim Alanında Suçlar (1994); K. Taşdemir & R. Özkepir, Uygulamada Öğretide Belgelerde Sahtecilik, Mala Karşı Suçlar ve Bilişim

Alanında Suçlar (1998); R.Y. Yazıcıoğlu, Bilgisayar Suçları (1997); H. Sınar, İnternet ve Ceza Hukuku (2001).

190. Crimes against the nation and the State. Part 4 of the Turkish Criminal Code (Articles 247–343)<sup>1</sup> are subdivided into nine subsections.

I - Crimes against the administration of government<sup>2</sup> (Part 4. Subsection 1. Articles 247–266, TCK) (supra, paragraph 175) include: embezzlement (zimmet)<sup>3</sup> (Article 247, TCK), extortion (irtikap) (Article 250, TCK), bribery (rüşvet)<sup>4</sup> (Articles 252–254, TCK), exceeding the power of use of force (zor kullanma yetkisine ilişkin sınırın aşılması; Article 256, TCK), misconduct in office (görevi kötüye kullanma) (Article 257, TCK), revealing a secret of the office (göreve ilişkin sırrın açıklanması) (Article 258), trade by a public official (kamu görevlisinin ticareti) (Article 259, TCK), abandoning or not fulfilling a public duty (kamu görevinin terki veya yapılmaması) (Article 260, TCK), usurpation of public office or title or reputation (Article 262, TCK), resistance to government forces (Article 265, TCK) and the use of material preserved for official use while committing a crime (kamu görevine ait araç ve gereçleri suçta kullanma) (Article 266, TCK).<sup>5</sup>

The offenses in the repealed Penal Code involving imams, religious orators or preachers and spiritual leaders (Articles 241–242, repealed TCK) have been transferred to Article 219, TCK. Maltreatment of individuals by public officers (Articles 243–251, repealed TCK)<sup>6</sup> has been abolished and regulated as regular injury (Articles 94, 95, TCK). Offenses against persons having official titles (Articles 266–273, repealed TCK) were abolished and not substituted. Breaking seals and stealing property in government custody (Articles 274–277, repealed TCK) has been transferred to Articles 203, 205, 281, 289 and 290, TCK. Securing benefit through influencing government officials (Article 278, repealed TCK) has been transferred to Article 158, TCK.

Crimes against the administration of the government was changed in 1990 by Act No. 3679 in order to combat corruption. Articles 220–227 of the repealed Turkish Penal Code were abolished.

Bribing civil servants is regulated in Article 252(5), TCK.<sup>7</sup> This provision was amended right after the enactment of the Penal Code by Act No. 2005–5377, aiming to extend the scope of the provision to include the public officials of international organizations.

II - Crimes against judicial administration<sup>8</sup> (Part 4. Subsection 2. Articles 267–298, TCK) include: false accusation (Articles 267–271, TCK); perjury (yalan tanıklık) (Articles 272–274, TCK), false swearing (yalan yere yemin) (Article 275, TCK); influencing a person who is fulfilling a judicial duty (yargı görevi yapanı etkileme) (Article 277, TCK); failing to report a crime while it is committed (işlenmekte olan suçu bildirmeme) (Article 278, TCK); public servants failure of reporting crimes (kamu görevlisinin suçu bildirmemesi) (Article 279, TCK); harboring felons and removing evidence of felonies (Article 281, TCK); money laundering (suçtan kaynaklanan malvarlığı değerlerini aklama) (Article 282, TCK); protecting an offender (suçluyu kayırma) (Article 283, TCK); not reporting where a wanted arrested suspect or an evidence of the crime is (tutuklu, hükümlü veya suç delillerini bildirmeme) (Article 284, TCK); violation of the confidentiality of investigations

(soruşturmanın gizliliğini ihlal) (Article 285, TCK); video or audio recording during investigation or trial (ses ve görüntülerin kayda alınması) (Article 286, TCK); genital medical examination without a judge order (genital muayene) (Article 287, TCK); public submissions with the aim of tampering with the fairness of the procedures (adil yargılamayı etkilemeye teşebbüs) (Article 288, TCK); misusing the powers in custody (muhafaza görevini kötüye kullanma) (Article 289, TCK); escape from prison or detention house (Article 292, TCK); importing forbidden goods into a correctional facility (infaz kurumuna veya tutukevine yasak ekya sokmak) (Article 297, TCK); and preventing the inmates from using their rights and from taking nutrition (hak kullanımı ve beslenmeyi engelleme) (Article 298, TCK).

The felonies of the repealed Penal Code including refusal to perform a service required by law (Article 282, repealed TCK), misconduct by lawyers and defense counsels.<sup>9</sup> (Articles 294–295, repealed TCK), taking the law into one's own hands (ihkakı hak) (Articles 308–310, repealed TCK), were abolished and not substituted by other articles in the new Penal Code.

III - Crimes against the symbols of sovereignty of the State and crimes against the reputation of its organs (Part 4. Subsection 3. Article 299–301) include crimes that permit the State to limit the freedom of expression, such as “insulting” (hakaret) the President of the Republic (Article 299), “discrediting” (aşağılamak) the symbols of the State sovereignty (Article 300) and discrediting the Turkish nation, the Republic, the organs and institutions of the State (Article 301).<sup>10</sup>

“Defamation” (tahkir ve tezyif) of the Turkish nation, Republic, Grand National Assembly, government,<sup>11</sup> ministries, army, security forces or judiciary was already penalized by the Article 159 of the repealed Penal Code. Previously, the punishment for such “defamation” was lengthy imprisonment for one to six years. Act No. 2002-4744 reduced the punishment to imprisonment for one to three years, and Act No. 2002.4771 made it clear that “critics” are not to be punished if there is no specific intent of defamation (Article 2, Act No. 4771 of August 3, 2002).<sup>12</sup> The equivalent provision of the new Penal Code (Article 301, TCK) has now the following wording: (1) Whoever publicly discredits the Turkish Nation, the Republic of Turkey, the Turkish Grand National Assembly, the Government of the Republic of Turkey and the judicial organs of the State shall be punished with imprisonment from six months up to two years. (2) Whoever publicly discredits the military or the security organizations of the State shall be punished according to the provisions of the subsection 1. (3) Expressing ideas with the aim of critics does not constitute a crime. (4) The investigation of this crime requires the permission of the Minister of Justice.

IV - Crimes against the security of the State (devletin güvenliğine karşı suçlar; (Part 4. Subsection 3. Articles 302–308) Any person who commits an act aimed to place the land of the State, partly or as a whole, under the sovereignty of a foreign State; or aimed to disrupt the unity of the State or to weaken the independence of the State; or aimed to separate part of the territory of the State that is under the sovereignty of the State from the State administration, shall be punished by aggravated life imprisonment (Article 302/1, TCK).

Alliance with the enemy (Article 303), incitement to war against a State (Article 304), activities against the fundamental national interests for benefit (Article 305), recruitment soldiers against a foreign State (Article 306), destruction of military



facilities (Article 307) and material, financial aid to enemy States (Article 308) are the other crimes in this subsection.

V - Crimes against the constitutional order and the well functioning of this order (Anayasal düzene ve bu düzenin işleyişine karşı suçlar) (Part 4. Subsection 5. Articles 309–316). Whoever attempts to abolish, replace or prevent the implementation, through force and violence, of the constitutional order<sup>13</sup> of the TC, shall be sentenced to a penalty of aggravated life imprisonment (Article 309/1, TCK).<sup>14</sup>

Assassination of and physical attack on the President (Article 310), offense against a legislative body (Article 311), offenses against the government (Article 312), armed revolt against the government of the Turkish Republic (Article 313), armed organization (Article 314), supplying arms (Article 315) and agreement to commit an offense (Article 316) are crimes regulated in this subsection.

VI - Crimes against national defense (Milli savunmaya karşı suçlar; Part 4. Subsection 6. Articles 317–325) include: usurping military command (Article 317), discouraging people from performing military service (Article 318), encouraging soldiers to disobey (Article 319), enlistment of soldiers in foreign service (Article 320), disobeying orders in a time of war (Article 321), obligations during wartime (Article 322), dissemination of false information in wartime (Article 323), failure in the performance of a duty during mobilization (Article 324), acceptance of title and similar awards from the enemy (Article 325).

VII - Crimes against State secrets and spying<sup>15</sup> (Devlet sırlarına karşı suçlar ve cusuluk; Part 4. Subsection 7. Articles 326–339) include: revealing documents relating to State security (Article 326), securing information relating to State security (Article 327), political or military espionage (Article 328), disclosure of information relating to the security and political interests of the State (Article 329), disclosure of information which must be kept confidential (Article 330), entering military zones (Article 332), exploitation of State secrets and disloyalty in government services (Article 333), securing prohibited information (Article 334), securing prohibited information for espionage (Article 335), disclosure of prohibited information (Article 336), disclosure of prohibited information for political or military espionage (Article 337), espionage through recklessness (Article 338) and possession of documents concerning State security (Article 339).

VIII - Crimes against the relationships with foreign countries (Yabancı devletlerle olan ilişkilere karşı suçlar); (Part 4. Subsection 8. Articles 340–343). Crimes under this subsection are: offenses against the head of a foreign State (Article 340), offenses against the flag of a foreign State (Article 341) and offenses against the representative of a foreign State (Article 342). Reciprocal conditions (Article 343), entering into force (Article 344) and execution (Article 345) are also discussed.

1. The subdivisions in the repealed Penal Code was as follows: crimes involving international relations of the State (Arts. 125–145), felonies against the authority of the State (Arts. 146–163), felonies against the heads or ambassadors of foreign States (Arts. 164–167) and joint provisions applicable to the foregoing chapters (Arts. 168–173).
2. C. Alver, *Memur Suçları ve Memur Soruşturması* (Açıklamalı, İçtihatlı, 1997).
3. I. Özgenç, *Zimmet Suçu* (2009).
4. I. Malkoç, M. Güler & I. Zimmet, *Rüşvet ve Başlıca Memur Suçları* (1993); I. Malkoç & M. Güler, *Memurlar – Suçlar* (1998); M.E. Artuk, A. Gökçen & A.C. Yenidünya, *Ceza Hukuku Özel Hükümler*, 2 (Ankara: Baskı, Seçkin, 2000), 291.

5. I. Akçin, Kamu İdaresinin Güvenilirliğine ve İşleyişine Karşı Suçlar (Ankara: Seçkin, 2007). H.T. Gökcan, Avukatlık Yasası, Görev Suçları, Kovuşturma ve Hukuki Sorumluluk (Ankara: Seçkin Yayınları, 2001). E. Günay, Hakim, Savcı, Avukatlar ve Diğer Adli Personelin İşlediği Suçlar ve Soruşturmalar (Seçkin Yayınları, 1997). A. Gündel, Zimmet, Sahtecilik, Hırsızlık, Gasp, Dolandırıcılık ve Emniyeti Suistimal Suçları (Ankara: Seçkin Yayınları, 2002). N. Meran, Zimmet-Rüşvet-İrtikap ve Görevi Kötüye Kullanma Suçları, Kamu Görevlisi Kavramı, Kamu İdaresine Karşı İşlenen Diğer Suçlar (Ankara: Seçkin, 2008).
6. In order to combat torture, Arts. 243 and 245 repealed TCK had been amended several times; the amendment excluded the commutation of penalties into fines (Arts. 243 and 245, repealed TCK) and the suspension of those penalties (Art. 245 repealed TCK “2003–4778”).
7. Bribing foreign civil servants in international transactions was introduced as a new crime on Jan. 2, 2003 by Act No. 4782. This Act amended also Art. 4 repealed TCK. If the accused has been tried in a foreign country, there will be no new trial in Turkey; legal persons face a fine even if the individual representative has been punished separately (Art. 220, repealed TCK).
8. I. Döner, Suçu Bildirmeme Suçu TCK 278 (Erzincan Hukuk Fakültesi Dergisi Cilt 9 sayı 3–4 sayfa 63, Erzincan, 2005). H.T. Gökcan, Mühür Bozma, Yedieminlik Yükümlülüğüne Uymama, İhtiyati Tedbir Kararına Aykırılık Suçları ve Zarara Yol Açan Yediemin ile Haksız Tedbir Uygulatana Karşı Tazminat Davaları (Ankara: Seçkin Yayınları, 2001). S.A. Hızal, Türk Ceza Hukukunda Sağlık Personelinin İhbar Yükümlülüğü (İzmir: İzmir Tabip Odası Yayını, 2010). N. Meran, Hakaret – İftira, Yargılamayı Etkilemeye Teşebbüs ve Soruşturmanın Gizliliğini İhal Suçları (Ankara: Seçkin, 2009). N. Meran, Kamu Görevlisine ve Adliye İlişkin Suçlar (Ankara: Seçkin, 2006). Y. Ünver, Adliye Karşı Suçlar (TCK. m. 267 - 298); 2 (Ankara: Bası, Seçkin, 2010).
9. E. Günay, Uygulamada Hakim, Savcı, Avukatlar ile Diğer Adli Personelin İşledikleri Suçlar ve Soruşturmalar (1997).
10. A. Gökçen, Halkı Kin ve Düşmanlığa Açıkça Tahrik Cürmü (2001). O.D. Aydın, Üç Demokraside Düşünce İfade Özgürlüğü (Ankara: Seçkin Yayınları, 2004).
11. Belli, Doğan, Bülent, Basın Yoluyla Kişilik Hakkına Saldırıdan Doğan Hukuki Sorumluluk (2008).
12. A. Gündel, Açıklamalı, İçtihatlı Atatürk’e, Cumhurbaşkanına, Cumhuriyet’e, Hükümete Hakaret Suçları (1997); T. Senkeri, Anayasal Kuruluşları Tahkir ve Tezyif.
13. It is important to note that Arts. 140, 141, 142 and 163 of the repealed Turkish Criminal Code were already abolished in 1991 by the Anti-Terrorism Act. These provisions punished acts that damaged the state reputation of foreign countries (Art. 140, TCK) and activities such as establishing associations for the purpose of imposing one social class over another (Art. 141, TCK), drafting and publishing propaganda to that end (Art. 142, TCK) and forming fundamentalist groups (TCK Art. 163). The abolition of Art. 163 created a loophole in the prosecution of fundamentalists and Art. 312 would apply instead (infra, para. 184). The amendment to AY Art. 13, which places restrictions on the limits to the Constitution, opened the possibility to creating new legislation.
14. E. Grieves & V. Bıçak, The Turkish Penal Code, Translation of the Turkish Penal Code Has Been Realised with Funding from the Foreign and Commonwealth Office Global Opportunities Fund (Re-Uniting Europe Programme, Sept. 2007).
15. V.S. Evik A. Evik, Devlet Sırrını ve Yayılması Yasaklanan Bilgileri Açıklama ve Elde Etme Suçları (Erzincan Hukuk Fakültesi Dergisi Cilt 8 sayı 3–4, Erzincan, 2004).

191. Misdemeanors. As mentioned earlier, the Turkish Criminal Code does not include misdemeanors.<sup>1</sup> There is a specific Act on Misdemeanors (KK).<sup>2</sup>

1. Book Three of the repealed Turkish Penal Code was related to misdemeanors and was subdivided into four parts: misdemeanors related to public order (Arts. 526–548, repealed TCK), misdemeanors related to public welfare (Arts. 549–566, repealed TCK), misdemeanors related to public morals (Arts. 567–577, repealed TCK), misdemeanors related to the protection of property (Arts. 578–584, repealed TCK) and other final articles (provisional, etc.) (Arts. 585–592, repealed TCK).

2. A. Karagülmez, *Adli İdari Para Cezaları* (Seçkin Yayınları, 2001). Mahmutoglu, Fatih Selami (ed.), *Türk Ceza ve Ceza Muhakemesi Hukuku* [idari işlemle suç ve ceza konulup konulamayacağı ile kabahatli suç olmaktan çıkarma ... ] proje yöneticisi: F.S. Mahmutoglu, Avrupa Birliği'ne Uyum Sürecinde Türk Ceza ve Ceza Muhakemesi Hukuku (İstanbul Barosu, 2008). F.S. Mahmutoglu, *Ekonomik Suçlar Bağlamında Kredi Hukukundan Kaynaklanan Suç ve İdari Suçlar* (Ankara: Seçkin, 2003). F.S. Mahmutoglu, *Kabahatleri Suç Olmaktan Çıkarma Eğilimi ve Düzene Aykırılıklar Hukukunda* (İdari Ceza Hukukunda) Yaptırım Rejimi (İstanbul: Kazancı Kitap Ticaret, 1995). N. Meran, *Kabahatler Kanunu ve Kabahat İçeren Kanunlar* (Ankara: Adalet, 2008). C. Otacı & I. Keskin, *Türk Kabahatler Hukuku*, 2. (Ankara: Bası, Adalet Yayınevi, 2010). C. Taşkın, 5236 Sayılı Kabahatler Yasası'nın Anayasa'ya ve Hukuka Aykırılık Yönünden İncelenmesi (Türkiye Barolar Birliği Dergisi, sayı 61, Kasım & Aralık 2005). H. Yılmaz, Yetkili Mercilerin Kararlarına Uymama (Ankara: Seçkin Yayınları, 1999).

## II. Crimes in the Specific Criminal Law

192. Specific criminal law. There are a large number of special laws outside the Code that deal with criminal offenses. Some of them deal with minor offenses, if compared to offenses under TCK.<sup>1</sup> These minor offenses make up the majority of pending cases. Few of the criminal offenses in the specific criminal law are of great importance.<sup>2</sup> We will review only those specific laws that have been changed recently.

Article 5, TCK indicates that general principles laid down in the Turkish Criminal Code apply to specific criminal law as well.

1. A.A. Küçükbayrak, *Sulh Ceza Davaları* (1998); S. Kaymaz & H.T. Gökcan, *Uygulamada Sulh Ceza Davaları* (1998); H.T. Gökcan & S. Kaymaz, *Türk Ceza Kanunu ve Özel Yasalardaki Önödemeğe Bağlı Suçlar* (1998).
2. V. Gültaş, *Uygulamada Türk Ceza Kanunu ve Özel Kanunlarda Ağır Cezalık Suçlar* (1998).

193. Drug control legislation<sup>1</sup> was amended by Code No. 2236, of May 22, 1979, and planting cannabis was forbidden (Article 3). The Penal Code Articles (Articles 190–192, TCK) (supra, paragraph 189-III) were amended accordingly.

1. E. Ergül, *Uyusturucu Madde Alışkanlığının Hukuki ve Cezai Yönleri* (1993); E. Ergül, *Hukuki, Adli, Tıbbi, Kriminolojik, Aktüel Boyutları ve İlgili Mevzuatıyla Uyusturucu Maddeler ve Suçları* (1997); E. Günay, *Uyusturucu Madde Suçları ve Cezaları* (1999).

194. Pornography. Act No. 1117, of June 21, 1927, protects children against pornography. This Act was amended by Act No. 3266 on March 6, 1986, and by Act No. 3445 on May 11, 1988. Fines relating to pornographic printings were increased. The related Articles (Article 226, TCK) of TCK (supra, paragraph 184) were amended accordingly.

195. The Criminal Law of Environment. The Environmental Law was enacted on September 8, 1983 by Act No. 2872, and introduced administrative sanctions against pollution.<sup>1</sup> This Code was amended on June 4, 1986, Act No. 3416 and in 1988, Act No. 3416 (RG. March 4, 1988). The related ordinances were put in force in 1993 (RG. February 7, 1993).<sup>2</sup>

Penalties in the Code on Water Resources and Marine Life (of March 22, 1971, Act No. 1380) were increased on May 15, 1986 (Act No. 3288).<sup>3</sup>

The Act concerning the Protection of the Coast, of April 4, 1990 (Act No. 3621) was amended on July 1, 1992 (Act No. 3830) and the protected coastline was extended by one hundred meters from the shore.

Environment is also protected by the Criminal Code (supra, paragraph 189-III).

1. K. Anadol, Termik, Santrallere Hayır (1991). İ.Ö. Kaboğlu, Çevre Hakkı (1992, 1996); R. Keleş & E. Uluğ, İnsan, Çevre, Toplum (1992); Çevre Eğitimi (1993); Gap ve Çevre (1993); Türkiye'nin Sulak Alanları (1993); O. Uslu, Çevresel Etki Değerlendirmesi (1993); E. Şen, Çevre Ceza Hukuku (1994); N. Erdoğan, E. Önen & B. Balkız, Kırdaki Demografik Hareketlilik, Toplumsal Değişme ve Bergama Köylerinde Çevre Bilinci (1994); M. Abacıoğlu, Açıklamalı İçtihatlı Çevre Kanunu ve Çevre Sağlığı Mevzuatı (1995); S. Güneş, Orta Bakırçay Havzasında Pamuk, Tütün Tarımının Toprak ve İklim Sorunları (1995); F.D. Yaşamış, Çevre Yönetiminin Temel Araçları (1995); B. Cantürk, Çevre Kanunu ve İlgili Mevzuat (1996); O.S. Kocahanoğlu, Türk Çevre Mevzuatı, Çevre Sağlığı ve Çevre Güvenliği (1996); S. Tellenbach, "Türkei," in Umweltstrafrecht in mittel- und südeuropäischen Ländern, edition iuscrim, Freiburg i.Br. (1997).
2. E. Memiş, Çevre ve Çevre İdare Hukuku (2006). S. Boşça & S. C. Çiğdem, Enerji Hukuku ve Mevzuatı (2005). I. Aslan, Yılmaz, Enerji Hukuku (2009).
3. A.M. Acabey, Sınıraşan Sular (İstanbul: Beta, 2006). S.N. Deda, Orman Kanunu ve Tatbikatı (Ankara: Seçkin Yayınları, 1994).

196. Protection of cultural and natural property. There is a High Council for Protection of Cultural Property, attached to the Ministry of Culture and Tourism. The Act on Protection of Cultural and Natural Property dated July 21, 1983, No. 2683 contains as well regulatory as well as criminal provisions.<sup>1</sup>

1. S. Kanadoğlu, Kültür ve Tabiat Varlıklarını Koruma Kanunu (Ankara: Seçkin Yayınları, 2003).

197. Check-related Crimes. Check crimes<sup>1</sup> and other economic crimes are the most frequently committed crimes in Turkey.<sup>2</sup> There is a new Check Act (Çek Kanunu) since December 14, 2009 (Act No. 5941).<sup>3</sup> The aim of the legislation is to prevent uncovered checks (Article 1). Banks have to make an investigation about the ability of payment of their customers, before issuing a check-book, printed only for that customer (Article 2). In cases where the check is not covered, the bank has the responsibility of paying certain sum (Article 3).<sup>4</sup>

The customer who has issued the uncovered check shall be punished with a judicial fine, if there is a complaint against him (Article 5). There is a new procedural institution: the judge at the investigation phase and the court at the prosecution phase are entitled to rule on a prohibition on issuing checks, upon the request of the Public Prosecutor (Article 5/4).

Where a merchant uses the check-book of a non-merchant person for the commercial purposes of his business, shall be punished with imprisonment from six months up to two years (Article 7/1).

Bank personnel, who does not register the uncovered check upon request, shall be punished with imprisonment up to one year, if there is a complaint (Article 7/4).

1. Y. Aker, Çekten Cayma ve Ödeme Yasağı (İstanbul: Beta, 2006). G. Erik, Çek Hukuku (Ankara: Seçkin Yayınları, 2004). S. Selçuk, Çek Suçları, Öğreti, Mevzuat İçtihat (Ankara: Hatiboğlu Yayınları, 1993).
2. T. Uyar, Gerekçeli, Notlu, İçtihatlı İcra ve İflas Kanunu, 2 cilt.; M.N. Ünver, İcra ve İflas Kanununda Suç Sayılan Fiiller (1997). E. Çetin, Kamu İktisadi Teşebbüsleri Personelinin ve Kooperatif Görevlilerinin Ceza Sorumluluğu (1994). Kendigelen, Abuzer, Çek Hukuku (2007).

3. Prior this legislation Act No. 3167 of Mar. 19, 1985 regulated protection of recipients of checks. Anyone who issued an uncovered check was punished with a prison term of up to five years (Art. 16, Act No. 3167). Amendments of Jan. 14, 1993 and of 2003 state that this crime would only be prosecuted if the victim filed a complaint and the accused may not be present at the trial.
4. G.S. Soyer, Borç İçin Hapis Yasağı ve Karşılıksız Çek Keşide Etme Suçu (2007).

198. Tax related crimes. There are some crimes that are related to taxation.<sup>1</sup>

1. B. Baykara, Teori v. ePratik Yönleriyle Vergi ve Vergi Ceza Hukuku (2008). Ok, Nuri & Gündel Ahmet, Ceza Mahkemeleri Görevine Giren Vergi Suçları (Ankara: Seçkin Yayınları, 2002). D. Şenyüz, Vergi Ceza Hukuku: (Vergi Kabahatleri ve Suçları) (2008).

199. Corruption. the high officers of the State and the leaders of the political parties are obliged to submit information about their property holdings.<sup>1</sup> According to Act No. 3628, of April 19, 1990, anyone who fails to do so shall be punished by imprisonment (Article 10, Act No. 3628). As mentioned earlier, bribery of foreign civil servants is a new crime in the Criminal Code (supra, paragraph 190/I).

1. H. Ökçeşiz, İstanbul Barosu Çevresi Adli Yargıda Yolsuzluk Araştırması (2001).

200. Law and Medicine. Medical law has been an important issue in recent years.<sup>1</sup>

Organ Transplantation. Act No. 2238, of 1979, governs taking human organs from a corpse and lists penalties for violations.<sup>2</sup>

1. H. Petek, İlaç Üreticisinin Hukuki Sorumluluğu (2009); H. Sarıtaş, Hasta Hakları Açısından Hekimin Sorumluluğu (2005). K. İçel, Y. Ünver & B. Tag (ed. Yener Ünver), Organ Nakli ve Organ Ticareti Suçu (Ankara: Prof. Dr. Utr. Brigitte Tag'a Armağan, Seçkin, 2009). K. İçel, Tıp ve Ceza Hukuku (Seçkin Yayınları, 2004). H. Özkan & Sunay Öner Akyıldız, Hasta-Hekim Hakları ve Davaları (2008). O. Polat, Tıbbi Uygulama Hataları (Ankara: Seçkin Yayınları, 2005). M. Sevtap, Biyo-Tıp Etiği ve Hukuk (2010). Y. Ünver, Tıp ve Ceza Hukuku (Ankara: Seçkin Yayınları, 2004).
2. A. Taşkın, Organ ve Doku Nakillerinde Hekimin Cezai Sorumluluğu (1997).

201. Banking Crimes. The Bank Code (Act No. 7129 of June 23, 1958) was abolished by a new Code of April 25, 1985, which regulates crimes related to banking transactions.<sup>1</sup> The Bank Code was renewed in 1999. There was a loophole in the law and private banks were excluded from the scope of criminal responsibility. This Code has been replaced by Banking Act (Bankacılık Kanunu) in October 19, 2005, Act No. 5411.<sup>2</sup>

1. Y. Alıcı, Bankacılık Kanunu Şerhi (İstanbul: Beta, 2007). S. Donay, Bankacılık Ceza Hukuku (İstanbul: Beta, 2007). S. Dursun, Ekonomik ve Suçlar ve Bankacılık Suçları Bağlamında, Bankacılık Düzenine Karşı İşlenen Suçlar (Ankara: Yetkin Yayınları, 2006). S. Erman, Bankacılık Suçları (İstanbul, 1984). S. Erman, Döviz Suçları (İstanbul, 1983). A.H. Evik, Sermaye Piyasası Araçlarının Değerini Etkileyebilecek Aldatıcı Hareketler Yapma (Manipülasyon) Suçları (Ankara: Seçkin Yayınları, 2004).
2. RG. 1.11.2005/25983. H. Yasaman, Banka Hukuku ile İlgili Makaleler, Hukuki Mütalaalar, Bilirkişi Raporları (2005).

202. Smuggling and protection of Turkish money. I - Smuggling. The repealed Code on Prohibiting of Smuggling dated January 7, 1932, Act No. 1918 was amended accordingly. Act No. 2867 of July 26, 1983 changed some of the imprisonment penalties into fines. Act No. 3217, of June 9, 1985 abolished some more of the custodial penalties of that code.<sup>1</sup> The following Law on Combating Smuggling (Kaçakçılıkla Mücadele Kanunu), effective July 10, 2003 (No. 4926) abolished the 1932 Act, with the exception of prison terms.<sup>2</sup>

However, this “new” act was also repealed by 2007–5607 “Combating Smuggling Act.” This Act defines crimes and misdemeanors in the field of smuggling (Article 3/1-16) and puts the “intent” requirement for those misdemeanors (except for Article 3/16), but punishes the attempted conduct as if finalized (Article 3/18, as amended in 2009 by Act No. 5911).

II - Protection of Turkish Currency. The Act for Protection of the Value of Turkish Money, Act No. 1567 was amended on May 5, 1985, Act No. 3196. The custodial penalties were abolished and only criminal fines remain.<sup>3</sup> According to these regulations, possessing foreign currency, which required imprisonment, is no longer a crime. This amendment has been an important step on the way to privatization.

1. E. Günay, *Uygulamalı Kaçakçılık Suçları* (1996); M. Ertuğrul, *Kaçakçılık Suçları 1918; sayılı Kaçakçılığın Men ve Takibine Dair Kanun* (1998). M. Danışman, *Açıklamalı Kaçakçılıkla Mücadele Kanunu, Kaçak Petrol ve Ulusal Marker: 5607 Sayılı Kaçakçılıkla Mücadele Kanunu, 5015 Sayılı Petrol Piyasası Kanunu, Yönetmelikler - Tutanak Örnekleri* (2010). E. Günay, *Kaçakçılıkla Mücadele Kanunu* (Ankara: Seçkin Yayınları, 2004). E. Yurtcan, *Yeni Kaçakçılıkla Mücadele Kanunun Şerhi* (İstanbul: Beta, 2007).
2. L. Başöz & R. Çakmakçı, *Gerekçeli Kaçakçılıkla Mücadele Kanunu ve İlgili Mevzuat* (2003).
3. K. Bakal & I. Kürümoğlu, *Açıklamalı - İçtihatlı Türk Parasının Kıymetini Koruma ve Kambyo Mevzuatı* (Ankara: Seçkin Yayınları, 2002).

203. Terrorism and weapons. I - Anti-Terrorism Act. Within the area of special criminal laws, there are some acts that deal with combating terrorism.<sup>1</sup> The Anti-Terrorism Act of April 12, 1991 (Act No. 3713) introduced several types of crimes (Articles 6, 7, 8, TMK).

Article 8 was repealed in 2003. The Anti-Terrorism Act is used to detain terrorists and people who “threaten the indivisible unity of the State.” The Constitutional Court, upon examination of the constitutionality of several provisions of the Anti-Terrorism Act, reduced the fines imposed on the press, returned the assets and properties of the Turkish Confederation of Revolutionary Workers Unions (DISK) on March 31, 1992, struck down a regulation concerning the ban on communication between prisoners involved in acts of terror and their lawyers, and annulled a provision which limited to three the number of attorneys permitted to follow a given case in the State Security Court (*infra*, paragraph 298).<sup>2</sup>

Subsequent to the 2001–4709 amendments to the Constitution, the Anti-Terrorism Act was amended: Article 7(2) TMK “2003–4963” now provides that incitement to terrorism is only punishable if the declaration is a “call to use terrorist methods” that can incite violent action or applying methods of terrorism. Article 8 TMK “2002–4744,” which was abolished in 2003 by Act No. 4928, punished inciting violations of the indivisible integrity of the State with its territory and nation, and made “the call to use terrorist methods” an aggravating factor. However, the basic crime did not require an incitement to use of force and weapons.



II - Law on weapons. There is a special Act on Weapons (1953–6136: Ateşli Silahlar ve Bıçaklar ile Diğer Aletler Hakkında Kanun).<sup>3</sup>

1. E. Akin, *Terör ve Terörün Finansmanı Suçu* (Ankara: Adalet, 2009). C. Akkaya, *Terör Suçları ve Cezalarının İnfazı* (Ankara: Adalet, 2009). Y. Alexander, E. Brenner & S.T. Krause, *Turkey, Terrorism, Civil Rights, and the European Union* (London and New York: Routledge, 2008). H. Çakmak & Atunok Taner, *Terörizmin Finansmanı ve Ekonomisi* (2009). M. Gemalmaz, *Historical Roots of Martial Law within the Turkish Legal System* (1991). K. İçel & Y. Ünver, *Terör ve Düşman Ceza Hukuku* (Ankara: Seçkin, 2008). Keskin, O. Kadri, *Devlet Güvenlik Mahkemelerinin Yapısı, Görevleri ve Yargılama Usulleri* (Ankara: Kazancı Matbaacılık Sanayii, 1987). S. Kurt, *Terör Suçları* (Ankara: Seçkin Yayınları, 1998).
2. I. Akbulut, *Gerekçeli Terörle Mücadele Kanunu ve Açıklaması* (1993); C. Bardak, *Açıklamalı İçtihatlı Terörle Mücadele Kanunu ve Devlet Güvenlik Mahkemeleri Kanunu* (1997); S. Kurt, *Uygulamada Terör Suçları ve İlgili Mevzuat* (1998); H. Zafer, *Ceza Hukukunda Terörizm* (1999); S. Tellenbach, *Einige Betrachtungen zu den Staatsschutzdelikten im Entwurf eines türkischen Strafgesetzbuches* (2001); E. Bose, *Terörizm, Avrupa Birliği ve İnsan Hakları* (2002).
3. A number of books consider the law on weapons, such as: K. Ekşioğlu, *Açıklamalı – Yorumlu – İçtihatlı Bütün Boyutlarıyla Uygulamalı Silah Hukuku* (1993); Y. Alasu, *Hukukumuzda Ateşli Silahlar Bıçaklar ve Patlayıcı Maddeler* (1995); N. Tankut, *Ateşli Silahlar, Bıçaklar Patlayıcı Maddeler, Av Tüfekleri* (1997); M. Güler, *Ateşli Silahlar ve Bıçaklar Hakkında Kanun* (1998); B. Özer, *Silah Hukuku ve Mevzuatı* (1998); E. Doğan, *Tabanca ve Tüfek Ruhsatları* (1998).

204. Organized crime. Since 2005 Law Reforms, organized crimes,<sup>1</sup> both profit-oriented and political oriented, are tried now by the specialized section of the Court of Assize, which has a wide jurisdiction as regard to the venue (Article 250, CMK).<sup>2</sup>

1. E. Canak, *Suç İşlemek Amacıyla Örgüt Kurma ve Çıkar Amaçlı Örgütlenme Suçları*; (Ankara: Yetkin Yayınları, 2005). A. Geleri & H. İleri, *Organize Suçlarla Mücadelede Gizli ve Örtülü Yaklaşımlar* (Ankara: Seçkin Yayınları, 2003). A. Coşkun, *Örgütlü Suçlar ve Çıkar Amaçlı Suç Örgütleriyle Mücadele Kanunu* (2002).
2. The first Act No. 4422 on Combating Organized Crime (Çıkar Amaçlı Suç Örgütleri ile Mücadele Kanunu: ÇASÖMK) of July 30, 1999, which has been replaced by Turkish Criminal Code Art. 220 and the provisions in Criminal Procedure Code, gave a definition of organized crime and establishes the outlines of applying procedural measurements such as wire-tapping, using undercover agents and so on. Originally, the first Chamber of State Security Court had jurisdiction to order these investigative tools. However, after the amendment of Dec. 21, 2001 by Act No. 4723, all Chambers were competent (H. Köroğlu, *Örgütlü Suçluluk, Çıkar Amaçlı Suç Örgütleriyle Mücadele ve Cürüm İşlemek İçin Teşekkül Oluşturmak* (2001); I. Özgenç, *Ekonomik Çıkar Nedeniyle İşlenen Suçlar* (Ankara: Seçkin, 2002), 271.

205. Money Laundering. Money laundering was introduced as a new crime in Turkey on November 13, 1996 by Act No. 4208.<sup>1</sup> The Turkish Criminal Code regulates “laundering assets emanating from a crime” (suçtan kaynaklanan malvarlığı değerlerini aklama) (Article 282, TCK) and has altered the definition of this crime.

Since October 11, 2006 there is a special Act on Laundering Assets Emanating from Crime (Act No. 5549), which regulates the preventive measures against money laundering such as identifying and reporting of suspicious money transfers (Article 4). The Act also provides administrative or criminal fines, imprisonment or security measures for violation of its rules (Articles 13, 14, 15).

Turkey has signed and ratified the 2000 UN Convention on Prevention of Financing of Terrorism.

1. O. Değirmenci, Mukayeseli Hukukta ve Türk Hukukunda Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçu (Ankara: Turhan, 2007); E. Ergül, Kara Ekonomi ve Aklama Suçları (Ankara: Yetkin Yayınları, 2005). E. Ergül, Hukuki, Mali, Ekonomik, Aktüel Boyutları ve İlgili Mevzuatıyla Karaparanın Aklanması ve Suçları (1998); H. İpek, Önemli Bir Sorun: Karapara ve Karaparanın Aklanması (2000); E. Ergül, Karapara Endüstrisi ve Aklama Suçu (2001).

206. Military crimes. Military Criminal Code regulates special crimes for military personnel.<sup>1</sup>

1. D. Karaca, Askeri Personel için Hukuk Rehberi (2007). U. Kardaş & M. Çingir, Disiplin Mahkemesi Kuruluşu, Yargılama Usulü ve Disiplin Suç ve Cezaları Hakkında Kanun (2005). M. Akkurt, Er, Erbaş ve Yedek Subaylar İçin Ceza Hukuku Rehberi (Ankara: Adalet Yayınevi, 2010).

207. Sport Law. Sport has many aspects of law, some of which are enforced under criminal law.<sup>1</sup>

1. K. Erkiner, Uluslararası Spor Tahkim Mahkemesi C.A.S. (İstanbul: Vedat Kitapçılık, 2010). Y. Ünver, Çocuklar ve Spor – Ceza (Ankara: Seçkin Yayınları, 2005). Y. Ünver, Spor ve Ceza Hukuku (Ankara: Seçkin Yayınları, 2004).

208. Traffic offenses. The Road Traffic Act and related regulations have created a “traffic law.”<sup>1</sup>

1. Gökcan, Hasan, Tahsin & Kaymaz, Seydi, Trafik Suçları ve Trafik Mevzuatı (Ankara: Seçkin Yayınları, 2000). E. Günay, Uygulamada Trafik Kazalarında Kusur (Ankara: Seçkin Yayınları, 2004). B. Karakaş, Karayolları Trafik Kanunu’ndaki Ceza Hükümleri ve Uygulaması (Ankara: Seçkin Yayınları, 2002). S. Kaymaz & Gökcan Hasan Tahsin, Trafik Suçları ve Trafik Mevzuatı (Ankara: Seçkin Yayınları, 2000). C. Ülgen, Plakaya Düzenlenen Trafik Para Cezalarının İptali Davaları (İstanbul: Beta, 2007).

209. Crimes against intellectual property.<sup>1</sup>

1. M. Aksu, Bilgisayar Programlarının Fikri Mülkiyet Hukukunda Korunması (İstanbul: Beta, 2006). S. Keskin, Patent ve Markanın Ceza Normları ile Korunması, Fikri (Düşünsel) Mülkiyet Hakları (Ankara: Seçkin, 2003). O. Öncü, Fikir ve Sanat Eserleri Hukukunda İktibas Serbestisi ve Sınırları (İstanbul: Vedat Kitapçılık, 2010).



## Chapter 7. The Sanctioning System

### §1. THE GENERAL SYSTEM

210. Principles of sanctions. The principles of the sanctioning<sup>1</sup> system (crimes and penalties) are provided by Article 38 of the Constitution:

- (1) No one shall be punished for any act which does not constitute a criminal offense under the law in force at the time committed; no one shall be punished with a more severe punishment for any act which is heavier than the punishment at the time it was committed.
- (2) Same principle applies to the statute of limitations for prosecution and punishment and as well as to the consequences of the criminal conviction.
- (3) Punishments and security measures that substitute punishments can only be imposed by an Act.
- (4) No one can be considered as guilty until proven by a final court decision.
- (5) No one shall be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence.
- (6) Findings that have been obtained in violation of an Act, cannot be used as evidence (as amended by Act No. 4709 in 2001).
- (7) Criminal responsibility is personal.
- (8) No one can be deprived of his personal liberty because he was not able to fulfill a contractual obligation (as amended by Act No. 4707 in 2001).
- (9) (This subsection has been repealed by Act No. 5170 in 2004.)
- (10) The death penalty and general confiscation are forbidden (as amended by Act No. 5170 in 2004). The administration shall not impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding the internal order of the Armed Forces.
- (11) No citizen shall be extradited to a foreign country on account of an offense, except the obligations that are put on the State by the Statute of International Criminal Code (as amended by Act No. 5170 in 2004).

The Constitution regulates the personal inviolability in relation to punishment as well. Article 17 reads as follows:

- (1) Everyone has the right to life and the right to protect and develop his material and spiritual entity.
- (2) The physical integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; he shall not be subject to scientific or medical experiments without his consent.
- (3) No individual shall be subjected to ill-treatment or torture; no punishment incompatible with human dignity shall be imposed.
- (4) The act of killing in self defense, the occurrences of death as a result of the use of a weapon permitted by law as a necessary measure in cases of; apprehension, or executing of warrants of arrest, the prevention of escape of lawfully arrested or convicted persons, the quelling of a riot or insurrection, the execution of

the orders of authorized bodies during martial law or state of emergency are outside of the provision of paragraph 1.

The Constitutional Court advanced the idea of the sanctioning system in its judgment of December 22, 1964 as follows: “Criminal penalties are sanctions for acts that are disturbing the peace of the public.”<sup>2</sup>

Sanctions (yaptırım) are divided into two sections: penalties (cezalar) (Articles 45–52, TCK) and measures (güvenlik tedbirleri) (Articles 53–60, TCK). The penalties (or punishments) and security measures of the Turkish sanctioning system are governed by two sources: the “(new) Turkish Criminal Code” and the “Code of Enforcement of Punishments and Security Measures” (Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun, CGIK).<sup>3</sup>

Committed crimes require penalties, either “imprisonment” (hapis cezası) or a “criminal fine” (adli para cezası) (Article 45, TCK). Criminal fines are always imposed by a criminal court, whereas administrative fines are always imposed by an administrative authority. According to the principle of legality of punishment (Article 2, TCK), these two penalties are the only applicable punishment under contemporary Turkish criminal law.

The repealed Turkish Criminal Code provided different penalties for crimes (cürüm) and misdemeanors (kabahat), but the new Criminal Code regulates only “crimes” (suç) and no longer includes misdemeanors. Some of the previous misdemeanors were transferred into the “Misdemeanor Act” of 2005.

1. K. Grzybowski, *Penalties Under Turkish Criminal Law* (Washington, 1954).
2. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II*, 9 (İstanbul: Bası Beta, 1985), 1314. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 563.
3. K. İçel et al., *İçel Yaptırım Teorisi*, 3 (İstanbul: Kitap, Beta, 2000), 3.

211. Classification of the repealed Code. The repealed Criminal Code divided the penalties into “principal,” “accessory” and “auxiliary” penalties. Accessory penalties were automatically added to the principal penalty: lengthy imprisonment for more than five years disqualified (infra, paragraph 235) the convicted person from holding public office for life (Article 31, repealed TCK). Auxiliary penalties were added to the principal penalty at the discretion of the judge. For example, if a public officer learned of the occurrence of an offense related to his duty, he had to proceed ex officio. If he failed or neglected to report it, a fine would be imposed and he would face possible disqualification from holding public office (Article 235, repealed TCK).

The Criminal Code does not make any distinction in this regard. The previous accessory or auxiliary penalties are considered “security measures” in the new criminal justice system (infra, paragraph 234).

212. Classification in Code of Enforcement of Penalties. The Turkish Criminal Code identifies the punishments (Articles 45–52) and security measures (Articles 53–60, TCK), while the Code on the Execution of Penalties and Security Measures (Act No. 5275, dated December 13, 2004) (Articles 109, 110 CGIK) and the Act on Controlled Liberty (2005–5402) regulate the mode of application thereof.<sup>1</sup>

1. The repealed “Code of Enforcement of Penalties” (Art. 1, repealed CIK) made a different classification: the death penalty, short-term and long-term imprisonment, and fines. The Turkish Criminal Code and the Code of Enforcement of Punishments created a mixed system. Both acts regulated many legal concepts. In practice it was difficult to determine which regulation to apply.

## §2. PENALTIES

### I. Death Penalty

213. There is no death penalty in Turkey.<sup>1</sup> In practice, the death penalty has not been used in Turkey since 1984. After being the subject of debate,<sup>2</sup> the death penalty existed in the Constitution until 2004 for “wartime crimes,” “crimes committed in the status of clear and present threat of war” and “crimes of terrorism” (AY “2001–4709” Article 38). The Act of August 3, 2002–4771 accepted a narrower concept and abolished the death penalty for crimes of terrorism as well. The Act No. 5170, dated 2004, repealed the death penalty from the Constitution.

A short legislative story of the abolition of the death penalty in Turkey may be summarized as follows. The Legislation of 1990 (Act No. 3679) abolished most death penalties in the related articles of the Penal Code.<sup>3</sup> A tacit amnesty was implemented in 1991 by Provisory Article 1 of the Anti-Terrorism Act. Death penalties imposed for felonies committed before April 8, 1991 were not to be carried out, and the convicted person was to be conditionally released if he had served 10 years of the sentence.

After the 2001 amendment of Article 38 of the Constitution (supra, paragraph 35), the death penalty for crimes of terrorism was abolished by Article 1, Act No. 4771 of August 3, 2002. The National Grand Assembly considered the limits laid down in the Constitution by drafting this Act. Consequently, “death penalties” for crimes in the “Turkish Penal Code,” “Act on Smuggling” and “Act for Protecting the Forests” has been replaced by “life sentence,” which are “peacetime crimes.” Thus the death penalty was maintained for “wartime crimes” and for “crimes committed in the status of clear and present threat of war.”

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş* 4 (Ankara: Bası, Seçkin, 2009), 581. T. Demirbaş, *Ceza Hukuku Genel Hükümler*, 6 (Ankara: Bası, Seçkin, 2009), 522.
2. Yüce, Turan, Tufan, *Ceza Hukukunun Temel Kavramları* (Ankara: Turhan, 1985), 111. S. Tellenbach, “Todesstrafe in der Türkei,” ZAR (1991): 87–89; Kleinjahns & Artuk, “Das türkische Strafvollzugssystem,” ZStW 107 (1995): 662. In 1963, the Constitutional Court refused to hear a death penalty case (Decision of the Constitutional Court, July 1, 1963, E. 1963/207, K. 1963/175.)
3. As of October 2002, the following articles of the Turkish Penal Code provided for the death penalty: Arts. 126, 127, 129, 131, 133, 136 and 137. There were some other wartime offenses in the Military Penal Code that are punishable by death. N. Gürelli, *Ceza Kanunumuzun 50 Yıllık Uygulamasında Ölüm Cezasının ve Hürriyeti Bağlayıcı Cezaların Değerlendirilmesi*, TCK’nun 50 Yılı Sempozyumu (İstanbul: İstanbul Üniversitesi, 1977), 183–219; M.S. Gemalmaz, *Avrupa Konseyinin Ölüm Cezasının Kaldırılmasına İlişkin 6 No’lu Protokolünün Düşündürdükleri* (Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1988/5), 117–122; S. Tellenbach, *Zur Anwendung der Todesstrafe in der Türkei* (1994); S. Gemalmaz, *Türkiye’de Ölüm Cezası*

(1920–2000) (2001). S. Gemalmaz, “The Death Penalty in Turkey (1920–2001),” *Criminal Law Forum* 13 (2002): 91–122.

214. Turkey ratified the sixth Protocol to the ECHR on January 15, 2003. An amendment to the Constitution was made (Act No. 5170, dated 2004) to bring Turkish law in line with the 13th Additional Protocol of the ECHR, which Turkey signed on January 9, 2004. This Protocol was ratified on October 12, 2005 and has been in force for Turkey since June 1, 2006.

Article 6 of the United Nations Convention on Political and Cultural Rights recognizes the death penalty exception. Additional optional Protocol 2, adopted by Resolution 44/128 on December 15, 1989, however, has abolished the death penalty. Turkey ratified this Protocol on December 27, 2005 but did not put any reservation for the death penalty in wartime military crimes. This Protocol has been in force for Turkey since June 2, 2006. Thus, there is no exception for the death penalty ban in Turkey.

215. Consequently, the current Turkish Criminal Code does not include the death penalty.<sup>1</sup> The Military Courts Act has also been amended by Act No. 2006–5530. However, sometimes after children have been raped and killed, there have been voices loud, urging reintroduction of the death penalty.

1. According to Art. 87 of the 1982 Constitution, a specific act was needed for the execution of each death penalty decision of any court. There was a possible constitutional challenge of the “Execution Act.” The promulgation of this Act was a requirement for the execution of the death penalty (Art. 2/4, repealed CIK). Act No. 5170 dated 2004 repealed these words from the text of Art. 87 of the Constitution while abolishing the death penalty.

## II. Imprisonment and Alternatives to Imprisonment

216. Turkish Criminal Code contains two categories of penalties as sanctions for “crimes”: imprisonment (hapis) and criminal fine (adli para cezası) (TCK 45).

There are three types of imprisonment: “aggravated imprisonment for life” (ağırlaştırılmış müebbet hapis cezası), “imprisonment for life” (müebbet hapis cezası) and “temporary imprisonment” (sürelî hapis cezası) (TCK 46).

Temporary imprisonment cannot be shorter than one month nor longer than 20 years if not regulated otherwise (TCK 49/1).

“Short-term imprisonment” is now regulated in Penal Code (not in the Act of Execution of Punishments and Measures, as it was before): if the final judgment of the court carries a term of imprisonment of one year or less, this imprisonment is considered as “short-term imprisonment” (TCK 49/2).

The alternatives to “short-term imprisonment” (infra, paragraph 219) are shown in the Criminal Code (Article 50, TCK).

Article 11 of the repealed Turkish Criminal Code contained four categories of custodial punishment: lengthy imprisonment, imprisonment, banishment and light

imprisonment. The distinctions between these forms of punishment were only technical for suspension of punishments, recidivism, periods of limitation, the jurisdiction of the courts and so on, and were not significant as regards the prison system.

Banishment was abolished in 1965 by Provisional Article 2 of the repealed “Code of Enforcement of Punishments.”<sup>1</sup> The same Act (Article 1, repealed CİK) created a new regulation regarding the execution of custodial punishments (infra, paragraph 434) and created a distinction between “long-term custodial punishment” (more than one year) and “short-term custodial punishment” (one year and less) (Article 3, repealed CİK).<sup>2</sup> This distinction was and is relevant for the suspension of the punishment (infra, paragraph 283) and for conditional release (infra, paragraph 444), as well as for the commutation of punishments into measures (infra, paragraph 268) or into a fine (infra, paragraph 220).

During the transition period after the new Penal Code came into force (June 1, 2005), the former “lengthy imprisonment” has been transformed into “imprisonment,” and the former light imprisonment has been transformed into “administrative fine.” (Article 6, Act on Application of Penal Code No. 2004–5252, as amended in 2005 by Act No. 5349).

1. In 1990, the government granted the south-east regional governor (Bölge Valisi) the authority to remove from the region, for a period not to exceed the duration of the state of emergency, citizens under his administration whose activities “give an impression that they are prone to disturb general security and public order” (Decree “KHK” 430, Dec. 15, 1990, RG Dec. 16, 1990). However, this broad authority has not been widely used, and as of Dec. 2007, there is no “state of emergency” in Turkey. This exceptional power can only be exercised if the Parliament declares the “state of emergency” in a certain province.
2. For detailed explanations, see T. Demirbaş, *Ceza Hukuku Genel Hükümler* (Seçkin, Ankara 2002) 501 (long-term custodial punishments) and 519 (short-term custodial punishments); I. Özgeng, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5.* (Ankara: Bası, Seçkin, 2010), 608.

#### A. Aggravated Imprisonment for Life

217. Aggravated imprisonment for life is the most severe modality and has replaced the “death penalty” of the previous legislation.

This type of imprisonment lasts as long as the inmate lives and shall be enforced under the “tight security regime” as regulated in the Act No. 5275, Article 25 (Article 47, TCK): The prisoner shall be placed into a cell, in solitary confinement, but shall be given the right to stay at least one hour in the open air during his period of cell term, while later on, the convicted prisoner may talk on the telephone to the people mentioned in Article 25, paragraph f. Once in 15 days, for a 10 minutes period of time, the prisoner shall enjoy the right to receive a visit by his spouse, his lineal consanguinity, his brothers and sisters and his tutor. The convicted prisoner shall not be allowed to leave the institution. The enforcement of the sentence shall not be interrupted by any means. Treatment of the ill shall be conducted in high-security institutions.

The current Turkish Criminal Code does not include the type of incarceration of “lengthy imprisonment.”<sup>1</sup> There is a single type of custodial punishment but different modalities of enforcement.

1. The repealed Penal Code had provided “lengthy imprisonment” for “crimes” that could be for life or temporary. A “temporary” lengthy imprisonment sentence was imprisonment from one to 20 years, unless otherwise provided for by the Code; “a life sentence” was imprisonment until death (repealed TCK, Art. 13). However, according to Art. 19 of the repealed “Code of Enforcement of Punishments,” the convicted person would be conditionally released and the life imprisonment would be changed to a shorter term. After the 2002 amendment by Act 4771, four different types of life sentence had been created in Turkish Criminal Law.

#### B. “Imprisonment for Life”

218. The new Penal Code includes imprisonment for life, which lasts as long as the inmate lives (Article 48, TCK).<sup>1</sup> The inmate displaying good behavior may be eligible for parole (paragraph 445) after at least 24 years (Article 107/1, CGIK).

1. According to the repealed Penal Code, “crimes” (cürüm) would be punished by “imprisonment” for a term of 7 days to 20 years. If the law did not prescribe a maximum limit, it would be five years (Art. 15, repealed TCK).

#### C. Imprisonment for a Specific Term and Alternative Sanctions for Short-Time Imprisonment

219. Imprisonment for a specific term is regulated in various articles of the Criminal Code. If the Code does not indicate the length of imprisonment, it cannot be shorter than one month or longer than 20 years (Article 49/1, TCK).<sup>1</sup>

An inmate’s good behavior may make him eligible for parole (*infra*, paragraph 445) after serving at least one-third of his prison term (Article 107/2, CGIK).

If the imprisonment term as decided in the judgment of the court is one year, or less than one year, this is considered as a short-term imprisonment (Article 49/2, TCK) and may be converted into an alternative sanction as regulated in Article 50 TCK.

1. The repealed Criminal Code also included “light imprisonment,” which was foreseen for misdemeanors. “Light imprisonment” was imprisonment from one day up to two years (repealed TCK, Art. 21). The current Turkish Criminal Code does not include “light imprisonment.” Formerly imposed light imprisonment penalties have been converted into “administrative fine.”

#### 1. Commutation of Short-Time Imprisonment into Alternative Sanctions

220. According to Article 50 of Criminal Code,<sup>1</sup> the court may commute a short-time imprisonment by taking into account the personality<sup>2</sup> of the individual, his social and economic situation, his feelings of regret expressed during the trial and the manner of the commission of the crime.<sup>3</sup> In the further legal application, the commuted criminal fine or measure is considered as the final conviction (Article 50/5).<sup>4</sup>

A long-term imprisonment may also be commuted if the crime has been committed by negligence. However, if the accused acted with foreseeable negligence (*bilinçli taksir*), this provision does not apply (Article 50/4).

Although it has been argued that commutation of imprisonment to other punishments or measures is an infringement of the Constitution, the Constitutional Court decided otherwise.<sup>5</sup>

If the convicted individual is punished with imprisonment for the first time and his term is not more than 30 days; and if the convicted individual had not attained 18 years of age or had attained the age of 60 when he committed the crime (Article 50/3, TCK), a commutation is obligatory.

The commutation of punishments is within the competence of the court and, as such, it is a means of individualization of punishment. The judge must fix a custodial punishment and then determine whether it should be commuted into another punishment or measure. Even if there is no request for such a commutation, the judge must consider this matter *ex officio*. The judge must explain his decision in the reasons for judgment.

In cases of commutation to alternative sanctions, short- (or long-) term imprisonment is considered as the fundamental conviction (*asıl mahkumiyet*) (*infra*, paragraphs 261 and 262) (Article 50/5, TCK). After the commuted criminal fine or alternative measure is finalized, public prosecutor's office notifies the convicted person about his obligations to fulfill the sanction within 30 days. If the individual does not oblige or interrupts, the court that rendered the judgment makes a new decision about the execution of the short-term imprisonment, which shall be executed immediately (Article 50/6). In such cases, "imprisonment" is considered as the "final punishment," and Article 50/5 does not apply.

The Criminal Code included a special crime for not obeying the alternative measures (Article 292/6, TCK). This crime has been repealed (Article 33, Act No. 5377).

1. According to the repealed legislation, Art. 4 of the Code of Enforcement of Punishments regulated commutation of short-term imprisonment into fine and alternative sanctions.
2. I. Özgeç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 613.
3. For example, commuting imprisonment to a fine contravenes the law when the convicted individual had negligently killed another person while using a gun that he possessed without permission: Cass. 1 CD Dec. 26, 1977; YKD 1987/7, 1202.
4. According to the repealed law, exceptionally, long-term custodial punishments imposed on the perpetrator because of an unintentional crime (*infra*, para. 272) could also be commuted into fines or measures. However, if the perpetrator was acting negligently and the result was foreseeable, the commutation was forbidden (Art. 4 CIK as amended by the Act of Jan. 8, 2003, No. 4785) (*supra*, para. 131).
5. Decision of the Constitutional Court dated 1971, E. 42/K. 30; Dönmezer & Erman I, *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım*, Cilt I, 11 (İstanbul: Bası Beta, 1994), 76.

221. Commutation of short-term imprisonment inflicted for military crimes is forbidden.<sup>1</sup>

There is another ban on commutation of short-time imprisonment to alternatives in the special criminal law (Act No. 3628, Article 16; Act on Combating Bribery and Corruption).



The court can choose a fine (Article 50/1-a), or one of the five measures (Article 50/1-b, c, d, e, f) as listed below (*infra*, paragraphs 223–228). However, if the definition of the crime indicates imprisonment or judicial fine as alternative punishment, and the court had inflicted a short-term imprisonment, commutation into a fine is no longer permitted (Article 50/2, TCK).<sup>2</sup>

In cases of recidivism, if the statute foresees the option of imprisonment and a fine, the court is not entitled to choose judicial fine (Article 58/3, TCK).

When the alternative sentence has not been complied with due to reasons beyond the control of the convicted person, the court which imposed the sanction shall amend the alternative measure (Article 50/7, TCK).

1. During the repealed laws, the commutation was prohibited in cases relating to military offenses and military disciplinary sanctions (Art. 4/9, repealed CIK). Turkish Criminal Code does not regulate this ban. As a consequence, according to the regulation in Art. 5, TCK, which foresees the application of general provisions of the Criminal Code for criminal law regulated by specific laws, commutation of a military short-term imprisonment into an alternative measure would be possible; therefore, the Act No. 2005–5329 has introduced an exception for military crimes.
2. Prior to this regulation, the High Court of Cassation ruled that it was possible to commute the imprisonment term into a fine, even if the judge had decided the option of imprisonment (İçBK 4.2.1974, No. 3/5; A. Çınar, *Türk Ceza Hukukunda Cezalar* (Ankara, 2005), 46).

222. Commutation of short-term imprisonment to a fine. Short-time imprisonment (imprisonment of a duration of one year or no more than one year) and long-term imprisonment imposed for crimes committed negligently may be commuted into criminal fines.<sup>1</sup> The judge may commute imprisonment, without asking the consent of the convicted individual, into a fine, by multiplying the identified number of days by the daily amount (Article 52/1, TCK). The daily amount shall be determined having regard to the personal and economic conditions of the individual.

Commutation of short-term imprisonment to a fine in crimes committed with intent (Article 50/1-a), and crimes committed with negligence (Article 50/4), are different from one another: long-term imprisonment imposed for crimes committed negligently may also be commuted into a judicial fine. This provision does not apply if the perpetrator had acted with “foreseeable intent” (Article 50/4, TCK).

If the accused had suffered terms of deprivation of freedom prior to commutation of his conviction of imprisonment to a fine, each day shall be calculated for 100 TL and reduced from the imprisonment term (Article 63, TCK).

If the law provides for short-term custodial punishment or a fine at the discretion of the judge and the judge prefers short-term custodial punishment, then he cannot later commute it to a fine (Article 50/2, TCK).

Some Turkish laws prohibit commuting imprisonment into fines, such as those relating to military crimes committed by officers.<sup>2</sup> Furthermore, prison terms cannot be commuted to disciplinary punishments.

1. According to the repealed laws, in cases of misdemeanors a one to two million TL light fine, and in cases of crimes a 2–3million TL heavy fine was to be paid for every day (Art. 4(1) CIK “1999–4421”). Before the 1999–4421 amendment, the amount of money was set by the Code and was not subject to any change. As a result of the high inflation rates, one year’s imprisonment would be commuted into approximately 8–16 DM. (S. Tellenbach, *Einführung*



in das Türkische Strafrecht (Freiburg im Breisgau, 2003), 56.) Additionally, Art. 6, repealed TCK, which was introduced by the Act 1999–4421 applied the principles of adjustment according to the “taxation index.”

2. Article 16, Act No. 3628, dated Apr. 19, 1990.

223. A short-term imprisonment may be commuted into an “alternative measure,” as indicated in Article 50/1-b, c, d, e, f, such as restitution or compensation. These are “measures,” in contrast to the fine in Article 50/1-a, which is a “penalty.”

The first alternative measure is restitution or compensation. The law provides rules for restitution of damages or “full” compensation for losses (Article 50/1-b). Restitution is limited to offenses involving property. Damage compensation can be for physical and non-physical damage.

However, the suspect is not under supervision (*denetim*). The ideas of restitution and compensation are also regulated by the concept of mediation (CMK 253) (*infra*, paragraph 274).

224. Commutation to education. The offender may be ordered to attend a school or an educational institution, which may be a boarding school, for at least two years (Article 50/1-c, TCK).<sup>1</sup>

1. According to the previous legislation, the duration was no more than six months (Art. 4/1, No. 3, repealed CIK). Institutions for mental development and juvenile correction must be public and free. It would constitute a second fine if the delinquent had to pay the costs of attendance at such an institution.

225. Commutation to restrictions. Restrictions like prohibition from visiting certain places or carrying on certain activities or occupations (Article 50/1-d, TCK), which may not exceed half of the imposed imprisonment term, serve the purpose of improving the delinquent. The judge fixes the details of these prohibitions. In this way, the judge can prepare an educational curriculum for the delinquent. If the delinquent does not act according to the prohibitions, he will be forced to do so, and the general principles of penal law will be applied.

226. Commutation to limitations. The law provides for revocation of driving licenses and other licenses, or deprivation of the right to carry out a profession or to operate in a certain area of activity (Article 50/1-e, TCK). Any license or right can be withdrawn for a period of half of the imposed imprisonment term up to double of the imprisonment term. Such a withdrawal is imposed if the crime was committed by failing to discharge a duty of care and attention or by abusing authority or a right.<sup>1</sup>

1. This measure was applied only to cases where the crimes were committed by means of transportation (Art. 4, repealed CIK). The law provided for temporary withdrawal of driving licenses and other licenses (Art. 4(1) No. 5, repealed CIK). Any license could be withdrawn for a period of one month to one year. This measure can be applied in two forms: (a) it could be applied as a kind of penalty that aims to rehabilitate the convicted individual, or (b) it could be applied if a car was used in the commission of a crime. This measure can be applied only to cases where the crimes are committed by means of transportation. Turkish Criminal Code has extended its application.

227. Commutation to publicly beneficial work (or community service). A short-time imprisonment may be commuted into a measure of “publicly beneficial work” for a minimum term of between half and two times the terms of imprisonment, though only with the consent of the offender (Article 50/1-f, TCK).

The execution of this measure is regulated in the Code on Corrections (Article 105/2, CGIK). Parole Centers (Denetimli Serbestlik ve Yardım Merkezi) make a list of the institutions that have available works, and the court chooses a workplace from this list. The convict shall be cautioned that this work is not mandatory. However, if the same individual has been convicted to imprisonment for another crime, the measure of publicly beneficial work does not apply (Article 105/3, CGIK).

An inmate who has been sentenced to a prison term of two years or less may serve the rest of his term by working towards a publicly beneficial work, after serving the half of his sentence with good behavior (Article 105/4, CGIK). The court decides upon the request of the convict. If the inmate does not comply with the working conditions as required in the court decision, the rest of the imprisonment term shall be executed (Article 105/5, CGIK).

228. Suspension of imprisonment. In order to avoid restriction of liberty for relatively short periods, Turkish Criminal Code foresees another legal institution: an imprisonment term of two years or less may be suspended if the accused has not been sentenced to a penalty for a term of more than three-months imprisonment for an intentional crime, and the court is convinced that, as a result of remorse seen at the time of the trial, he will not commit further crimes in the future (infra, paragraph 283) (Article 51, TCK).

### III. Criminal Fine

229. Criminal fine,<sup>1</sup> or the so-called day-fine system, is a sum of money that the offender pays to the State Treasury.<sup>2</sup> The court calculates this sum by multiplying the number of days as indicated by the code by a daily amount. The number of days shall be more than five but not more than 730 (Article 52/1, TCK).

The daily amount, which shall be at least twenty and at most 100 Turkish CK). The number of full days (tam gün sayısı) and the daily amount (bir gün için takdir edilen miktar) shall be stated separately in the judgment (Article 52/3, TCK).

It is permitted to pay the fine within one year or by installments (infra, paragraph 266). By taking into account the personal and economic conditions of the convicted person, the judge may decide upon an installment period of up to two years and upon the number of installments. For the sake of caution, if any installment has not been paid on time, the full amount of the remaining unpaid fine shall be due immediately and shall be converted into imprisonment (Article 52/4, TCK).

As the new Penal Code has adopted the day-fine system and regulated “confiscation of gains” (kazanç müsaderesi), it does not include relative fines (e.g., the sum of the fine for smuggling was five times the value of the smuggled goods; Article 18, repealed Act No. 1918).<sup>3</sup> In contrast, Banking Act No. 5411, Article 160/2 foresees a “relative fine” for bribery in bank transactions.

1. Erdoğan (O), Oktay, Para Cezaları ve İnfazı (İstanbul: Beta, 2007). Keskin, O. Kadri, Para Cezaları, Ön Ödeme Ceza Tabloları, Erteleme, Paraya Çevirme, Harçlar (Ankara: Desen Ofset, 1996).
2. Articles 11, 19 and 24 of the repealed Turkish Penal Code and Arts. 1 and 5 of the repealed Code of Enforcement of Punishments included the “classical fine system.” There were two categories: heavy fine (ağır cezayı nakdi) and light fine (hafif cezayı nakdi) (Art. 11, repealed TCK). Light fines, which were provided for misdemeanors, consisted of the payment of an amount of from 15 million to 1.5 billion TL to the Treasury (repealed TCK, “1999–4421” Art. 24/1). A heavy fine was the payment to the Treasury of a sum of money ranging from 60 million up to 15 billion TL (Art. “1999–4421” 24/1, repealed TCK). However, there was no maximum limit for relative fines (nispi para cezası) (Art. 19/1, repealed TCK).
3. I. Özgenç, Türk Ceza Hukuku Genel Hükümler, 2 (Ankara: Bası, Seçkin, 2007), 641. The previous law did not fix the upper limit of certain fines. These were so-called relative fines.

230. Fines of the repealed Code. According to the repealed Criminal Code, fines were adjusted annually. Due to inflation, a system of adjustment of fines was introduced to Turkish Criminal Law in 1988. A basic multiplier applied to the salary of State officials, which was set every year with the budget, has been taken as a constant value. In 1988, the multiplier was eighty-four. According to the this regulation, every 75 points over this multiplier was considered one unit, and the fine shown in the related article of the code would be multiplied by this unit (added Articles 1–5 repealed TCK as amended by Act No. 3506, of 1988).

In 1999, however, the former multiplier for the salaries was substituted by Act No. 4421 with the “taxation index” (yeniden değerlendirme oranı).<sup>1</sup>

The Criminal Code has abolished this difficult way of calculation and introduced the day-fine system, similar to that of the German Penal Code (supra, paragraph 229).

1. I. Malkoç, Açıklamalı Türk Ceza Kanunu – son Değişiklikler ve İçtihatlarla (Ankara, 2002), 180. The author gives examples of the amount of fines relating to years 2000, 2001 and 2002, which are relevant to the application of Art. 7/2, TCK, as the judge is not entitled to impose a more severe punishment at the time of the judgment compared to the punishment when the crime was committed.

231. Fixing the criminal fine. Some fines are listed in the related articles and are set. There are other fines having upper and lower limits. The court has discretion in these cases and decides the amount of the fine according to the accused’s financial situation and other personal status such as his family responsibilities, his profession, age, health and the social effects of the fine, in accordance with the circumstances of the offense, or the offender’s blameworthiness (Article 52/2, 61/8 TCK).

232. Administrative fines. There was another category of fines in Turkish Law, namely “compensatory fines” (tazminat kabilinden olan cezayı nakdi).<sup>1</sup> The new Penal Code does not include this type of fine, but the Act of Misdemeanors (KK 17) does under the form of administrative fines.<sup>2</sup>

Technically, administrative fines are not considered a “punishment”; rather, they are designed as a warning to the wrongdoer. Therefore, administrative fine may also be used to compensate the losses of the public.<sup>3</sup>

1. Compensatory fines that have the function of compensating for damages of the Treasury were not be suspended (Art. 92, repealed TCK).

2. R. Çağlayan, *İdari Yaptırımlar Hukuku* (2006). M. Karabulut, *İdari Yaptırımların Hukuki Rejimi* (2008).
3. TBMM Adalet Komisyonu Kabahatler Kanunu Tasarısı hakkında Mar. 23, 2005 tarih ve Esas 1/993, Karar 72 sayılı Raporu, TBMM, Dönem 22, Yasama Yılı 3, Sıra Sayısı 840.

#### IV. Other Penalties of the Repealed Criminal Code

233. The New Criminal Code has changed the system of punishments and reduced the number of penalties to two: imprisonment and judicial fine (Article 49, TCK).<sup>1</sup> All other penalties have been abolished: disqualification to hold public office (either for life or temporary), temporary disqualification from exercising a profession or trade that requires an official license or certification, revocation of a driving license, civil disqualification<sup>2</sup> of persons sentenced to more than five years' lengthy imprisonment during the period of punishment, public announcement of judgments, confiscation and forfeiture as a penalty, judicial admonition (*adli tevbih*) instead of a penalty that does not exceed one month of imprisonment, and light imprisonment or a heavy or a light fine of TRY 3,000.

1. F. Erem, *Memnu Hakların İadesi* (Ankara, 1948); H.H. Sümer, "Sakat ve Eski Hükümlü Çalıştırma Yükümlülüğü," in *AdD*, no. 3 (1989), 22; E. Günay, *Dava ve Ceza Zamanasımı, Memnu Hakların İadesi, Adli Sicil Kayıtlarının Silinmesi* (1998).
2. This provision played a central role in political life. Mr. Erdoğan, who was convicted and who served a prison term for violating Art. 312/2, repealed TCK, was banned from political life according to the Act on Political Parties. His rights were restored on Se 2002 by State Security Court of Diyarbakır, but this decision was annulled by the Court of Cassation. Due to the change in the law, he was subsequently eligible to take part in the elections.

#### §3. MEASURES OF SECURITY

234. Security measures (*güvenlik tedbirleri*) do not have the repressive function of penalties, but they are subject to the principle of legality (Article 38, AY).<sup>1</sup> Security measures relate to dangerous offenders and the purpose is to protect society against dangerous individuals and to reform offenders.<sup>2</sup> However, administrative authorities may apply any type of preventive police measures that do not restrict basic personal freedoms.<sup>3</sup>

Certain measures are designed to prevent crime. These include: confiscation (Article 54 and 55, TCK); custody and treatment of mentally ill persons (*müessesede muhafaza ve tedavi altına alma*) (Article 57, TCK); commitment to an institution (*müesseseye konma*) or placing children who do not have criminal capacity into the custody of their parents (*ana, baba veya vasiye teslim*) (Article 56, TCK); and custody and treatment of drug addicts and alcoholics (Article 191, TCK).

The Penal Code has introduced the criminal fine and alternative measures as potential substitutes for short-term imprisonment (*supra*, paragraph 220).

Security measures are not sufficiently regulated by the new Turkish Criminal Code. In the repealed Turkish Criminal Code the expression "security measure" was not even mentioned. The existing regulations are considered below.

1. I. Özgenc, Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5 (Ankara: Bası, Seçkin, 2010), 679.
2. S. Dönmezer & S. Erman (II), Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II, 9 (İstanbul: Bası, Beta, 1985), 1343; Z. Hafizoğulları, “Emniyet Tedbirleri,” AUSBFD (1991/3–4), 45; E. Artuk, Sinn und Zweck der Strafe und die Massnahmen zur Sicherung und Besserung im türkischen Strafrecht, T.S. Königstein (1979); A. Nuhoğlu, Ceza Hukukunda Emniyet Tedbirleri (1997).
3. K. İçel & S. Donay, Karşılaştırmalı ve Uygulamalı Ceza Hukuku, 2 (İstanbul: Bası, Filiz, 1993), 81.

235. Deprivation of exercising certain rights. The Turkish Criminal Code regulates now two categories of deprivation of rights: (1) deprivation of exercising rights for the duration of execution of the imprisonment as a legal consequence; and (2) deprivation of exercising rights after the completion of the prison sentence, if the sentence of imprisonment had been imposed for a crime related to the abuse of that right.

I - The deprivation of the exercise of certain rights as a legal consequence. The deprivation of the exercise of certain rights is a legal consequence for convicts who have been sentenced to an imprisonment term for an intentional crime (Article 53/1, TCK). It shall be applied until the completion of his prison term (Article 53/2, TCK).

Until the completion of the term of his imprisonment term (Article 53/2, TCK), the following rights shall be restricted as the legal consequence of a conviction to imprisonment:

- (1) The right to serve as a civil servant. The right to serve as a civil servant permanently, temporarily or for a fixed period of time. This includes becoming a member<sup>1</sup> of the Turkish Grand National Assembly; serving as a civil servant; serving as an employee at an undertaking; and serving as an appointed or elected public officer within the administration of the State, a province, a municipality or a village, or as one at an institution or entity under their control or supervision (Article 53/1-a, TCK).
- (2) Political rights. The eligibility to vote or to be elected, and to exercise other political rights (Article 53/1-b, TCK). This restriction is not applicable to a convict whose sentence of imprisonment has been suspended, or who has been conditionally released, in respect of acting as a guardian or being appointed in the role of guardianship or as a trustee (Article 53/3, TCK).
- (3) The right to act as a guardian: the right to serve in the role of guardianship or as a trustee (Article 53/1-c, TCK).
- (4) The right to be the administrator or inspector of a legal person, namely, of a foundation, association, labor union, company, cooperative or political party (Article 53/1-d, TCK).
- (5) The right to conduct any profession or trade in which conducting in general is subject to the permission of a professional organization (which is in the nature of a public institution or organization), under his own responsibility as a professional or a tradesman (Article 53/1-e, TCK).<sup>2</sup> Where an offender has been subject to a suspended prison sentence, this prohibition may not apply (Article 53/3, TCK).

II - The deprivation of the exercise of certain rights as an additional prohibition. Where a sentence of imprisonment has been imposed for a crime related to the abuse of one of the rights or authority defined in Article 53/1, the convict shall be prohibited from exercising such right for a period of one half to two times the length of imprisonment imposed.<sup>3</sup>

This restriction comes into effect after the prison term is served. Where only a fine has been imposed for a crime related to the abuse of one of these rights or authority, the exercise of this right shall be prohibited for a period of one-half to double the number of days stated in the judgment.

The prohibition comes into effect once the judgment is finalized and the duration of the prohibition period starts, when the judicial fine has been completely executed (Article 53/5, TCK).

III - Restoration of prohibited rights. The provisions of the repealed Penal Code related to the restoration of rights are not included in the New Code because of the regulations in Article 53, subsections 2 and 5, TCK. As a consequence, all previously convicted individuals should be able to enjoy full rights in political and social life. However, the provisions of Article 76/2 require to be not have been convicted in order to be eligible for running as a candidate in parliamentary elections.<sup>4</sup>

However, the Act on Judicial Register (Adli Sicil Kanunu) has been amended by Act 2006–5560, and restoration of rights for penalties imposed for crimes regulated in special criminal statutes has been regulated by the newly added Article 13A.

1. Before the elections in June 2011, one of the independent candidates Hatip Dicle, who was detained for another crime against the State, was convicted with more than one year imprisonment because of making propaganda of a terrorist organization and the conviction has been approved by the Court of Cassation, just before the election and the verdict got final. However, this final conviction has not been notified to the High Council for Elections. The candidate has been elected by the notion, but after the elections his status as an unsworn member of the Parliament has been lifted according Art. 76 of the Constitution. There are lively political discussions about this happening.
2. Disqualification of paternal rights was regulated in the repealed Criminal Code. Persons sentenced to more than five years of lengthy imprisonment may be deprived of parental rights and the legal rights of a spouse during the period of the punishment (Art. 33/2, repealed TCK).
3. Disqualification from exercising a profession or trade according to the repealed Turkish Penal Code was temporary disqualification from exercising a profession or trade for a duration from three days to two years (Art. 25, repealed TCK). The professions and trades from which an individual could be temporarily disqualified included only those professions that required an official license or certification. If the offense was of misusing a profession, the offender might be disqualified (Art. 35, repealed TCK). The law determined (as regulated in Art. 402 TCK) the cases in which the exercise of other professions shall be prohibited (Art. 35/2, repealed TCK). The terms of disqualification for additional penalties started on the date on which the principal punishment was completed (Art. 41/2, repealed TCK).
4. During the June 2011 elections there has been disputes about this contradiction between the Turkish Criminal Code and the Constitution. This is a legal problem which can only be solved by an amendment of the Constitution.

236. Suspension of licenses. Where an offender is convicted of a reckless offense on the grounds of failing to discharge a duty of care and attention while performing a certain profession or trade, or while observing the necessities of traffic safety, it may be determined that the offender shall be prohibited from performing such profession or trade, or that his driver's license shall be suspended for a period



of not less than three months and not more three years as a measure of security<sup>1</sup> (Article 53/6, TCK).

The prohibition or the suspension shall be enforced once the judgment is finalized, and such period starts once any sentence is completely served.

1. Revocation of driving license and ban of professional activities may also be utilized in cases of commutation of short-term imprisonment as an alternative sanction (Art. 50/1-e, TCK) (supra, para. 226).

237. Confiscation. The legal nature of confiscation has been totally changed in the Turkish Criminal Code:<sup>1</sup> confiscation is one of the security measures, and not a “penalty.”<sup>2</sup> There are two categories of confiscation: (I) confiscation of property (Article 54, TCK); and (II) confiscation of gains (Article 55, TCK).

I - Confiscation of property. On the condition that the property does not belong to any third party acting in good faith, property that is used for committing an intentional offense or is allocated for the purpose of committing an offense, or property that has emerged as a result of an offense shall be confiscated. Property that is prepared for the purpose of committing a crime shall be confiscated if it presents a danger to public security, public health or public morality.

Where the property defined in section 1 cannot be confiscated because it has been destroyed, given to another, consumed, or because of any other reason, an amount of money equal to the value of this particular property shall be confiscated.

Where the confiscation of property used in an offense would lead to more serious consequences than the offense itself, and these would be unfair, confiscation may not be ordered.

Any property the production, possession, usage, transportation, buying and selling of which has constituted an offense shall be confiscated.

When only a certain part of a property needs to be confiscated, then only that part shall be confiscated, if it is possible to do so without harming the whole, or if it is possible to separate that part of it.

Where property is shared by more than one person, only the share of the person who has taken part in the crime shall be confiscated (Article 54, TCK).

II - Confiscation of gains. Material gain obtained through the commission of a crime, forming the subject of a crime, or obtained for the commission of a crime, and the economic earnings obtained as a result of its investment or conversion, shall be confiscated. Confiscation under this section should only be ordered where it is possible to return the material gain to the victim of the crime.

Where property and material gain subject to confiscation cannot be seized or provided to the authorities, then the value corresponding to such property and gains shall be confiscated (Article 55, TCK).

1. According the repealed Penal Code, regarding the use and manufacture of articles: If carrying or possessing certain articles constitutes a crime, these articles were subject to seizure and confiscation, even if there was no criminal conviction or they did not belong to the offender. At the time there was a discussion in the Turkish doctrine on the nature of confiscation. Some authors regarded it as a “punishment” (Dönmezer & Erman, *Nazari ve Tatbiki Ceza Hukuku*, Genel Kısım, Cilt II, 9 (İstanbul: Bası, Beta, 1985), II, no. 712; Öztürk, Erdem & Özbek, *Uygulamalı Ceza Hukuku ve Emniyet Tedbirleri Hukuku*, 6 (Ankara: Bası Seçkin, 2002), 328) and some as a “measure” (Erem, Danışman & Artuk, *Türk Ceza Hukuku Genel Hükümler*, 14 (Ankara: Bası, 1997), 906; K. İçel, and others, *Yaptırım Teorisi*, 2 (İstanbul: Bası, Beta,

2002), 123). Weapons that may not be lawfully carried without a license would be seized and confiscated (Art. 36/2, repealed TCK). In case of conviction, articles used in the commission of the crime were confiscated as a penalty (Art. 36/1, repealed TCK).

2. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 695.

238. Measures of security against children. Children who have not reached the age of 12 are not capable of being criminally responsible (*supra*, paragraph 118), and they cannot be punished for a crime.<sup>1</sup> Children under the age of 12 will be placed in an institution under government administration or supervision, until they reach 18 years of age.

Children who have attained the age of 12, but have not yet attained the age of 15 at the time of the commission of an act (*supra*, paragraph 119), are nevertheless criminally responsible if they have the capability to comprehend the legal meaning and the result of the act and to control their behavior in respective of their action (Article 31/2, TCK).

Children and adolescents who have attained the age of 15, but not yet attained the age of 18 at the time of commission of an act, shall be punished with a reduced penalty pursuant to Article 55/1 of the Turkish Criminal Code.

The legal status of minors is regulated under Article 31, TCK. Minors under the age of 12 are exempt from criminal responsibility. The Criminal Code does not include “Measures against Children,” though it gives a direction to the legislator: “Types of security measures and their enforcement procedures, specific to children shall be defined in relevant statute.” (Article 56, TCK).

The Child Protection Act (*Çocuk Koruma Kanunu*; ÇKK) No. 2005–5395 incorporates protective and supportive measures for children (*koruyucu ve destekleyici tedbirler*).<sup>2</sup> These measures are considered as “Measures against Children” (Article 11, ÇKK).<sup>3</sup> The Child Protection Act (ÇKK)<sup>4</sup> is applicable to all “children” (until the age of 18).

1. B. Aksay, *Ceza Hukukunda Yaş Küçüklüğü, Kusur Yeteneğine ve Sorumluluğa Etkisi* (İstanbul, 1990); Kurşun, *Jugendkriminalität in der Türkei* (München, 1957).
2. H.Y. Sevik, *Çocuk Yargılaması Hukukunda Hazırlık Soruşturması* (Erzincan Hukuk Fakültesi Dergisi Cilt 8 sayı: 1–2 199, Erzincan, 2004). E. Yurtcan, *Çocuk Koruma Kanunu ve Yorumu* (2006).
3. There were two Acts in the repealed legislation dealing with measures against minors: Arts. 53–55 of the repealed Turkish Penal Code and the repealed Code on Juvenile Courts (ÇMK): *Facultatis Decima Anniversaria*, Marmara Üniversitesi’nin Kuruluşunun Onuncu Yılı Dolayısıyla M.Ü. Hukuk Fakültesi ve Ceza Hukuku ve Kriminoloji Araştırma ve Uygulama Merkezi tarafından Türk Hukukçu Kadınlar Derneği’nin katılımı ile tertiplenen Adliye ve Çocuk Suçluluğu Sempozyumu (İstanbul: Marmara Üniversitesi, Hukuk Fakültesi, 1993).
4. The repealed Juvenile Courts Act (*Çocuk Mahkemelerinin Kuruluşu, Görev ve Yargılama Usulleri Hakkında Kanun*, 1979–2253, ÇMK) was only applied to children who had not attained the age of 15 (the age of 18 in Art. 6, ÇMK as amended by Act 2003–4963 is considered only for the purposes of the jurisdiction of the court). If a child who had attained the age of 11 committed a crime, the Juvenile Court asked experts to prepare a report about the mental maturity of the suspect as well as about his social environment if necessary (Art. Art. 20, ÇMK). Based on the outcome of this report, the court could order one of the measures provided by Art. 10, ÇMK if the child was not capable of understanding the importance of his deed (ÇMK Art. 12/1, ÇMK). A juvenile who was criminally responsible would be subject to a reduced punishment as laid down in Art. 12/2, ÇMK. Measures laid down by the Juvenile Courts Act were: delivering the delinquent child back to the parents or to a relative; releasing



the child into the care of a trustworthy family member; ordering transfer to a special care institution; accommodation in a work place; or releasing the child into the care of a special hospital for difficult children (ÇMK, Art. 10).

239. A deaf-mute person who was not capable of understanding that his act was an offense and who was older than 15 years of age (supra, paragraph 120) at the time of the commission of an act shall not be punished (Article 33, TCK).

240. Protective measures against mentally ill offenders. If the offender is afflicted by a mental disease that causes a complete loss of consciousness or of freedom of action at the time of the act (completely mentally ill offenders) (supra, paragraph 121), he shall not be punished (Article 32/1, TCK). The custody and medical treatment will continue until the offender is cured. There is no mandatory term of treatment under the new Penal Code, which was the case according to the repealed Code. If the defendant was accused of a crime that entailed lengthy imprisonment, he was not released before one year of custody in a medical institute<sup>1</sup> (Article 46/3, repealed TCK).

If the offender was afflicted with a mental disease that considerably reduced his awareness or his freedom of action (partially mentally ill offenders), his punishment shall be reduced pursuant to Article 32/2 of TCK (supra, paragraph 123).

1. O. Tosun, *Suçluların Gözlemi* (İstanbul: İstanbul Üniversitesi, 1958).

241. Measures of security against drug addicts and alcoholics. In respect of any criminal proceedings initiated as a result of the crime of buying narcotic or psychotropic substances (Article 191/1, TCK) the court, before giving its judgment, may determine (in the case of a person who uses narcotics or psychotropic substances) whether the offender should be subject to a measure to undergo treatment and a probationary period (Article 191/2, TCK). In respect of any criminal proceedings initiated as a result of this offense, the court, before giving its judgment, may determine (in the case of a person who has not yet used narcotics or psychotropic substances but has purchased, received or possessed such, with the intention of using such) whether the offender should be subject to a probationary period.

Any person who has been subject to a decision to impose a measure to undergo treatment in a named institution is obliged to comply with the requirements imposed by this institution for the purposes of that treatment. A person who has been subject to a measure of probation is obliged to comply with any conditions imposed by such. An expert shall be assigned to guide a person subject to a probationary measure. This expert shall inform the person of the harmful effects and results of using narcotics and psychotropic substances and give guidance and advice designed to aid the person to act responsibly. The expert shall prepare a report every three months during the probationary period on the development and behavior of such person, and provide such report to the judge during the period of probation.

A probationary measure applied to a person shall continue for one year after the completion of any treatment. An extension of the probationary period may be ordered. However, such extension shall not exceed a total length of three years.

A decision to discontinue the criminal proceedings shall be taken where an offender complies with the requirements of any measure imposed to undergo treatment or a probationary period. Otherwise, criminal proceedings will proceed and judgment given.

A measure to undergo treatment and a probationary period may be implemented in compliance with the provisions of section two and four after a penalty is imposed upon a person for the offense of purchasing, receiving or possession of narcotics or psychotropic substances for personal use. In such a case, the imposition of the penalty shall be suspended. However, in order to suspend the imposition of the death penalty, the offender should not have been subject to any prior decision to impose a measure to undergo treatment or probationary period on account of an offense under this article.

The penalty to be imposed upon the offender is presumed to be executed when he complies with the requirements of the measure to undergo treatment and a probationary period. Otherwise, the penalty shall be executed immediately (Article 191, TCK).

Alcoholics who are habitually drunk, according to Articles 571 and 572 of the repealed Turkish Penal Code, were kept and treated in a hospital until it was medically ascertained that they were completely recovered (Article 573, repealed TCK).<sup>1</sup>

1. Drug addicts were kept and treated in a hospital until it was medically ascertained that they had recovered (Art. 404, repealed TCK). If there was no hospital in the district or town where the crime was committed, the addicts were sent to a place where there was one.

242. Probationary measure which is applied in case of recidivism. Recidivism is a “security measure” under the Turkish Criminal Code for repeating offenders and dangerous criminals (Article 58, TCK). Previously, recidivism (*tekerrür*) was a general aggravating circumstance<sup>1</sup> (Article 81, repealed TCK).<sup>2</sup>

The provisions regarding the repeat offender shall be applied where there has been a commission of an offense subsequent to a previous finalized conviction. For this provision to apply it is not necessary that any penalty has been enforced.

The repeat offending provisions shall not apply to offenses committed: five years after the completion date of the sentence for the previous conviction, where such sentence was for a period greater than five years; and three years after the completion date of the sentence for the previous conviction, where such sentence was for a period of imprisonment of five years or less or was a criminal fine.

In cases of repeat offending, if penalties of imprisonment or a fine are prescribed as alternatives in respect of the most recent offense committed, a penalty of imprisonment shall be given. It is not possible to commute imprisonment to a fine (*supra*, paragraph 222) in case of repeat offending.

The sentence, in cases of repeat offending, shall be enforced in accordance with the Enforcement Code. Furthermore, for the repeat offender a probationary measure shall be applied following the completion of the term of imprisonment.

The judgment of the court should clearly state what the applicable enforcement regime for repeat offenders is and should state that the repeat offender’s probationary measure is applicable following the completion of the term of imprisonment.

The provisions in TCK pertaining to repeat offenders, including the aforementioned probationary measure, shall also apply to habitual offenders, career offenders or members of a criminal organization.

1. In some cases, even participation of more than one person can be classified as this kind of aggravating circumstance (Arts. 417, 492 and 493, repealed TCK). If a person committed a crime within ten years of having served a term of more than five years (and within five years in case of other punishments to be imposed for the new offense), then the punishment would be increased by 1/6 (Art. 81, repealed TCK). The contradiction in the wording of Art. 81 (served punishment) and Art. 94 (not served punishment) was subject of the Unified Decision of the Court of Cassation of May 20, 1942, 31/14 that decided in favor of the “served punishment” (E. Günay, *Cezada Tekerrür Uygulaması* (Ankara, 1996), 63; S. Tellenbach, *Einführung in das türkische Recht* (Freiburg im Breisgau, 2003, 62). A condition for increasing punishment for recidivism was that the punishment for the first crime had been served (T. Demirbaş, *Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2002), 558). If this was not the case, the provisions regarding recidivism could not be applied to the second punishment. The punishment that had to be served was the principal penalty (T.T. Yüce, *Ceza Hukukunun Temel Kavramları* (Ankara: Turhan, 1985), 111. S. Tellenbach, “Todesstrafe in der Türkei,” *ZAR* (1991): 97.
2. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 710. M.S. Altunç, *Ceza Hukukunda Tekerrür* (İstanbul: Yayınlanmamış Doktora Tezi, 2010). C. Arslan & M. Kayaççek, *Suçta Tekerrür* (Ankara: Seçkin, 2009). I. Üzülmüş, *Türk Hukukunda Tekerrür* (Ankara: Turhan, 2003).

243. As we see above, the Turkish Criminal Code<sup>1</sup> has abolished the old understanding of “recidivism,” but keeping the same terminology, it has introduced a new “measure” (Article 58, TCK) based on the danger posed by the repeat offender and has applied special rules for conditional release and forms of execution of imprisonment for repeat offenders and dangerous offenders (Articles 107/12, 108, CGIK).

The repeat offender provisions shall not be applied where an offense of negligence (supra. paragraph 130) follows an offense of intent or vice versa, and where a strict military offense follows any other offense or vice versa (Article 58/4, TCK). The judgments of foreign courts shall not be subject to recidivism, excluding the offenses of intentional killing, intentional injury, robbery, deception, production and trade of narcotics or psychotropic substances, counterfeiting money or valuable stamps (Article 58/4, TCK).

The repeat offender provisions shall not be applicable to offenses committed by any person who was under 18 years old at the time of the commission of the act.

The measure of police supervision provided for by Articles 28 and 42 TCK was abolished in 1987.<sup>2</sup> The Turkish Criminal Code does not include this measure, but rather has introduced modalities of “controlled liberty” (*denetimli serbestlik*).

1. According to the repealed Penal Code, recidivism was a ground for aggravating the punishment (Arts. 81, 82, 84–88, repealed TCK). The recidivism provisions with respect to misdemeanors were limited, and punishments for petty offenses could not be the basis for applying the provisions on recidivism to crimes and vice versa. Military crimes and, with some exceptions (crimes listed under Arts. 316, 317, 318, 319, 320, 324, 331, 332, 333, 404 and 404, repealed TCK), crimes committed abroad could not be the basis of a penalty for recidivism (Art. 87, repealed TCK). Punishments imposed on juveniles between the ages of 11 and 15 were not taken into consideration when establishing recidivism (Art. 54, repealed TCK).
2. Act dated 1987, No. 3352; RG Apr. 24, 1987.

244. Deportation as security measure. Deportation is a “measure” under the Criminal Code (Article 59, TCK). Foreigners who have been convicted to a period of imprisonment in Turkey shall be deported after completing their sentence, should the Ministry of Interior decide in this respect. Deportation was mandatory when the Penal Code came into force in 2005, but since then this provision has been amended by Act No. 2005–5328, and the decision by discretion of the Ministry of Interior has been added.

245. Security measures for legal entities. The Turkish Criminal Code does not inflict any “punishment” on legal entities (Article 20/2, TCK), but has foreseen “security measures special to legal entities” (Article 60, TCK).<sup>1</sup> Security measures for legal entities are only applicable if the definition of that specific crime specifically states it (Article 60/4, TCK).

In cases where an intentional crime has been committed for the benefit of a legal person jointly by the organs of the legal person by misusing the power granted by the permission, the license shall be cancelled. This provision applies only to those legal entities that are incorporated under Turkish civil law (thus excluding public law legal entities) and operating under a license granted by a public institution.

The provisions on confiscation (Articles 55, 56, TCK) are also applicable for legal entities of civil law when the crime has been committed for their benefit (Article 60/2, TCK).

However, if the application of a security measure leads to consequences more serious than the crime itself, the judge under his discretion may, or may not impose this measure (Article 60/3, TCK).

1. Z.T. Kangal, *Tüzel Kişilerin Cezai Sorumluluğu* (Ankara: Seçkin Yayınları, 2003).

246. Procedure for Measures. Measures restricting personal freedom are only valid if a judge has ordered their enforcement. During the preliminary investigation, the decision regarding measures must be rendered by the Justice of the Peace (Article 74/1 CMK) (infra, paragraphs 295 and 328-I), and, during the final investigation, by a competent court (Article 57, TCK).

The Juvenile Judge and Juvenile Courts have jurisdiction over measures for children who have not attained 18 years of age (Article 3/1-c, 25) (ÇKK (supra, paragraph 238).

#### §4. SENTENCING

##### I. The Perpetrator

247. The perpetrator. The person committing a crime is called a perpetrator.<sup>1</sup> In the terminology of Turkish criminal law, this term originally meant a convicted person only. However, it is used for the defendant as well. This is the correct term, and it should be used before the judgment becomes final.

Because of the constitutional principle of the individuality of punishments, only a living, natural person can be brought to trial. The mental element that must be present in a crime is criminal intent, and only living persons can have such intent.

The criminal responsibility of legal persons has been debated.<sup>2</sup> There are sanctions that can be imposed on legal persons, such as closing an association or a political party. However, these are more administrative punishments, whereas most criminal punishments cannot be applied to legal persons. An association cannot be put into prison. The New Penal Code does not include punishments for legal entities; only “security measures special to legal entities” (infra, paragraph 269) are applicable (Article 60, TCK).

1. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II, 9* (İstanbul: Bası Beta, 1985), 1145.
2. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II, 9* (İstanbul: Bası, Beta, 1985), 1148.

## II. Determining the Sentence

### A. Principles

248. Discretion of judge. Unless the law explicitly provides, punishments can be neither decreased nor changed (Article 61/10, TCK).<sup>1</sup> However, a judge can set<sup>2</sup> the punishment<sup>3</sup> at the level that seems to be appropriate for the convicted individual. Apart from increasing or decreasing the punishment, the question of suspension of the punishment (infra, paragraph 283) must be considered as well.<sup>4</sup>

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 730.
2. C. Akkaya, *Cezaların Belirlenmesi ve Ceza ve Güvenlik Tedbirlerinin İnfazı ve İnfaz Hukuku*, 2 (Ankara: Baskı, Kartal Yayınevi, 2007).
3. M. Artuç & T. Hırslı, *Hüküm Kurma Esasları* (Ankara: Adalet Yayınevi, 2010).
4. E. Günay, *Uygulamada Suçların Tesbiti ve Cezaların Tayini* (Ankara: Adil Yayınevi, 1995).

249. Range of punishments. There are some cases in which the law does not provide for a definite punishment, but it sets a range of punishments. The provision that a crime must be punished with a prison terms of between 24 and 30 years is an example of a range of punishments. The power of the judge to impose punishment within certain limits is to some extent controlled by the obligation to give the reasons for judgment (Article 34, CMK).

There is no judgment without certain limits on the penalty in Turkish law.<sup>1</sup> Only security measures against mentally ill offenders can be fixed without a time limitation (Article 57/2, TCK).<sup>2</sup>

1. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II, 9* (İstanbul: Bası, Beta, 1985), 1359.
2. T.T. Yüce, *Hukukunun Temel Kavramları* (Ankara: Turhan, 1985), 111. S. Tellenbach, “Todesstrafe in der Türkei,” *ZAR* (1991): 135.

250. Individualization of punishment. To reach the goal of criminal law, the sanction against the perpetrator must be a punishment appropriate to his personality. Therefore, the judge should have an informed idea of the criminal's personality. The legislature has provided different punishments for the same crime (i.e., imprisonment and fine, from which the judge can choose the punishment that seems more suitable to the personality of the perpetrator). Unfortunately, psychological explorations that serve that purpose are very rare in Turkey.

If the law contains provisions that require an aggravated or mitigated punishment, the general punishment will first be fixed, and then it will be aggravated or mitigated (Article 61/4, TCK).

251. Unjust provocation. Unjust provocation (haksız tahrik) is a general mitigating factor. If a person commits a crime in the heat of anger caused by an unjust action against him, we speak of provocation (Article 29, TCK).<sup>1</sup> Provocation is a personal and general mitigating ground. It is, however, not a ground of justification. A crime committed by a person as a result of a provocation always remains illegal.

1. T. Demirbaş, *Türk Ceza Hukukunda Özel Haksız Tahrik Halleri* (İstanbul, 1985); M.H. Tutumlu, *Türk Ceza Hukukunda Haksız Tahrik* (1999).

252. Simple and serious provocation. In cases where the offender has committed the crime in a state of anger or severe distress caused by an unjust act, the penalty shall be 18–20 years imprisonment instead of aggravated life imprisonment; or 12–18 years instead of life imprisonment. Other punishments shall be reduced by one-quarter to three-quarters (Article 29, TCK).

The Court of Cassation has accepted the existence of provocation even if the crime was premeditated.<sup>1</sup>

The repealed Criminal Code had divided the unjust provocation into “simple” provocation (adi tahrik),<sup>2</sup> and grievous and serious unjust provocation (ağır tahrik).<sup>3</sup> The current Turkish Criminal Code does not make this distinction.<sup>4</sup>

1. Cass., 1. CD Apr. 19, 1988; E. 1779/K. 1697, YKD 1988, 1285.
2. The criminal was sentenced to life imprisonment instead of with the death penalty. If life imprisonment is provided by law, sentencing is to lengthy imprisonment for 24 years; other penalties shall be reduced by one fourth (Art. 51/1, repealed TCK).
3. The criminal was sentenced to 24 years lengthy imprisonment instead of with the death penalty; other punishment prescribed for the crime shall be reduced by one half to two-thirds (Art. 51/2, repealed TCK).
4. I. Üzülmüş, *Yeni Ceza Kanunun Sisteminde Cezanın Belirlenmesi ve Bireyselleştirilmesi* (Erzincan Üniversitesi Hukuk Fakültesi Dergisi, cilt X, sayı 3–4, yıl 2006), 203.

253. A judge at the court of first instance has the discretion to decide whether a crime was provoked. A provocation can consist of an action against a person as well as an animal or any other object.<sup>1</sup>

1. Cass., CGK May 22, 1989; YKD 1989, 2468.

254. Reduced punishments for minority, deaf-muteness and mental disease. Persons of diminished criminal capacity who commit crimes are punished by a reduced punishment (Articles 49, 57 and 61, TCK).



255. Punishment for attempt. For incomplete crimes (*supra*, paragraph 155), the punishment will be reduced (Article 35, TCK).

256. Grounds for discretionary mitigation. Discretionary grounds of mitigation (*takdiri indirim nedenleri*) (Article 62, TCK) are recognized but not listed in the Criminal Code. These are left to the discretion of the judge, who is competent to consider special circumstances as grounds for a reduction of punishment.<sup>1</sup>

If the court accepts the existence of mitigating factors, then it imposes life imprisonment instead of aggravated life imprisonment, or 20 years imprisonment instead of life imprisonment. Other punishments shall be reduced by up to one-sixth.<sup>2</sup>

This legal institution is used in Turkey in order to reduce the high number of prison sentences provided in the repealed Criminal Code, and it was used to avoid the death penalty before it was abolished.<sup>3</sup> Some examples of the factors considered by courts to mitigate the punishment may be cited as follow: confession of the offender,<sup>4</sup> or the amount of the confiscated drug being minor.<sup>5</sup> Now, however, the Turkish Criminal Code openly lists the grounds for discretionary mitigation as follows: background of the offender, his social relations, his behavior after the commission of the crime and during the trial, and the potential effects of the penalty on the future of the offender (Article 62/2, TCK).

Even if every factor has the potential to be a mitigating ground in Turkish Criminal law, the court must explain the reasons for its decision (Article 62/2, TCK). The scope of the control of the Court of Cassation has been extended in issues of discretionary mitigation since 1998. Formerly, the Court of Cassation would accept proper application of law;<sup>6</sup> the court now inspects whether (*infra*, paragraph 386), by allowing the grounds of discretionary mitigation, the motives are also “logical,” “admissible” and “fair,” and whether the aim of this legal concept has been met.<sup>7</sup>

A mitigating factor that is provided for by the law (*kanuni hafifletici sebep*) cannot be a discretionary mitigating ground.<sup>8</sup> Furthermore, the Court of Cassation does not allow both mitigating factors and provocation (*supra*, paragraph 251) at the same time.<sup>9</sup>

1. Originally it was reduced by up to one-fifth; however, the Act No. 2005–5328 amended the rule.
2. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım*, Cilt II, 9. (İstanbul: Bası, Beta, 1985), 1106.
3. Öztürk, Erdem & Özbek, *Uygulamalı Ceza Hukuku ve Emniyet Tedbirleri Hukuku*, 6 (Ankara: Bası, Seçkin, 2002), 339.
4. CGK Nov. 12, 1987, 1-329/506; Savaş & Mollamahmutoğlu, *Türk Ceza Kanununun Yorumu*, 4 Cilt, 3 (Ankara: Bası, 1999), 1123.
5. CGK Apr. 24, 1972, 175/205; Savaş & Mollamahmutoğlu, *Türk Ceza Kanununun Yorumu*, 4 Cilt, 3 (Ankara: Bası, 1999), 1135.
6. CGK Apr. 26, 1976, 204/208, Savaş & Mollamahmutoğlu, *Türk Ceza Kanununun Yorumu*, 4 Cilt, 3 (Ankara: Bası, 1999), 1134.
7. CGK June 9, 1998, 8-163/216; Savaş & Mollamahmutoğlu, *Türk Ceza Kanununun Yorumu*, 4 Cilt, 3 (Ankara: Bası, 1999), 1129.
8. S. Dönmezer & S. Erman (II), *Nazari ve Tatbiki Ceza Hukuku, Genel Kısım*, Cilt II, 9 (İstanbul: Bası, Beta, 1985), 1110. For detailed explanations of mitigating factors provided by the law, such as in Art. 485 TPC (unjust behavior of the victim in defamation), see T. Demirbaş, *Türk Ceza Kanununda Özel Tahrik Halleri* (İstanbul, 1985).
9. Cass., CGK Nov. 16, 1988; B. Öztürk, *Uygulamalı Ceza Muhakemesi Hukuku* (Ankara, 1994), 222.

257. Effective remorse; punishments of the crown witnesses. Turkish Criminal Code has openly<sup>1</sup> regulated “voluntary abandonment” (gönüllü vazgeçme) (Article 36, TCK) as a ground for not punishing attempted crimes if the offender voluntarily abandons the performance of the acts necessary to commit the crime, or prevents the completion of the crime or its consequences. As far as the accomplished crimes are concerned, the New Penal Code has incorporated several provisions of “effective remorse,”<sup>2</sup> such as Article 221, TCK, which is either a “ground of personal impunity” (şahsi cezasızlık sebebi) or a “ground for mitigation of punishment.”

Grounds of personal impunity in cases of effective remorse give the public prosecutor the discretion of prosecution (Article 171/1, CMK). If the prosecutor drops the case under his discretion, there is no opposition to this decision (Article 173/5, CMK).

1. The government offered the members of political and ordinary organized crime groups an opportunity to withdraw from their illegal groups. Act No. 3419 of Mar. 25, 1988, the application of which has been extended several times (the last extension was by Act No. 4450 of Aug. 26, 1999), allowed for reduction of or even exemption from punishment for those gang members who did not participate in crimes committed by the gang under certain circumstances (such as surrendering without resistance or providing information). The legislation is Act No. 4959, called the “Act on Reintegration into the Society (Topluma Kazandırma Kanunu) of July 29, 2003, expired in March 2004.”
2. E. Günay, *Öğreti ve Uygulamada Yeni Türk Ceza Kanunundaki Etkin Pişmanlık ve Gönüllü Vazgeçme* (Ankara: Yetkin Yayınları, 2005).

#### B. The Authority of the Judge to Determine the Sentence

258. Limits of the discretion of the judge. The judge must fix the punishment within the limits prescribed by the law. He must consider such circumstances as the way in which the crime had been committed, the means used, its importance, the time and scene of the crime, the gravity of damage and danger, the degree of intention or negligence, and the motives and reasons for the crime; and the perpetrator’s goals, his background, his personal and social situation, his behavior after the commission of the crime, and so on (Article 61, TCK). The reasons for the punishment ordered must be explained in the judgment, even if only a minimum penalty was ordered (Article 34, CMK).

259. Discretion in fixing fines. Article 52/4 of the Penal Code offers guidance for judges imposing fines on the convicted individual according to the latter’s ability to pay. Thus, the judge will take into account the economic and personal status of the convicted individual.

260. Fundamental punishment. In some articles, the law provides for only the minimum or the maximum penalty. In these cases the minimum penalty results from the general provisions of Articles 13 and 15 of TCK. Most of the penal provisions prescribe a minimum and a maximum penalty. If the punishment has to be set between two limits, then this the judge will do. This punishment is called the “principal” or “fundamental” punishment (temel ceza) (Article 61/1, TCK), which is the first step of the commutation of punishments (infra, paragraph 220), if it applies.



261. Determining the fundamental punishment. The judge considers the following factors while determining the fundamental punishment: the manner in which the crime has been committed, the means used while committing the crime, time and place where the crime has been committed, the importance and value of the subject of the crime, the gravity of the damage or danger, the degree of intent or negligence, and the motives and aim of the offender (Article 61/1, TCK). However, if one of these factors is the element of the crime, this factor shall not be taken into account while determining the fundamental punishment (Article 61/3).

The punishment determined according to these factors shall be mitigated or increased if the offender acted with probable intent (*olası kast*) or foreseeable negligence (*bilinçli taksir*) (Article 61/2, TCK).

Once the fundamental punishment has been determined, the aggravating and then mitigating grounds are considered (Article 61/4, TCK).

262. Final punishment. After the punishment has been determined according to the above-mentioned rules, the “final punishment” (*sonuç ceza*) shall be fixed, taking account the following factors in this order:<sup>1</sup> attempt, conspiracy, successive committed crimes, unjust provocation, the age of minority, mental illness, personal circumstances that require the reduction of penalty and, lastly, the grounds for discretionary mitigation (Article 61/5, TCK).

The “final punishment” determined under Article 61 shall not exceed 30 years (Article 61/7, TCK) for a crime that requires a specific term of imprisonment (Article 49/1, TCK).

The duration of the final punishment plays a significant role in Turkish Criminal Procedure Law since the amendment of Article 231 CMK in 2010, which has opened the possibility of the delayed announcement of the judgment, if the final punishment is imprisonment of two years or less, or is a criminal fine (*infra*, paragraph 397-II).

Another important consequence of the final punishment is related to the right to appeal for convictions involving criminal fines commuted from a short-term imprisonment: whereas there is no right to appeal against some criminal fines, the legislation in 2011 opened it for such commuted sentences (*infra*, paragraph 409).

1. The order under the repealed Criminal Code (Art. 29) was different: firstly age, state of mind, discretionary mitigating grounds were considered, and recidivism was considered afterwards. But the punishment, which was determined on these grounds, was not yet the punishment that had to be served. The punishment of prisoners who served their prison terms in open or half-open prisons was reduced by six days per month (added Art. 2/1, repealed CİK). These regulations were designed to reduce the prison population indirectly and, in reality, only 40% of the prison terms written in the judgment were served completely.

263. Individualization of criminal fine. In cases of determining the fine, increase and decrease of punishment in order to individualize the sanction shall be conducted according to the amount of days, as indicated at the relevant article; the final fine shall be calculated by multiplying the designated final number of days by the amount the convict is able to pay (Article 61/8, TCK) (*supra*, paragraph 231).

If the criminal fine is to be imposed as an alternative sanction (*supra*, paragraph 222), the minimum days related to such penalty shall not be less than the minimum

imprisonment term for that crime, and the maximum limit of such shall not exceed the maximum imprisonment penalty for such a crime (Article 61/9, TCK).

264. **Suspension of Imprisonment.** Suspension of imprisonment (*infra*, paragraph 283) means that at the time of sentencing the judge decides that the imprisonment shall not be executed at once. If during the probationary period the convicted individual commits another crime, probation will be revoked and both sentences (*i.e.*, the suspended one and the one imposed for the new offense) will have to be served (Article 51, TCK).

265. **Deduction of Periods of Detention.** Article 63 of the Penal Code provides that prison terms will be reduced by any period of detention and all cases limiting personal freedom before the final judgment.

Reduction of periods of custody from criminal fine shall be made with the assumption that one day corresponds to 100 TL (Article 63, TCK).

266. **Paying Fines by Installments.** Fines can be paid in installments (*infra*, paragraph 451/II) over a period of no more than two years, or the court may grant a period of payment, not exceeding one year from the date of the finalization of the judgment (Article 52/4, TCK).

It is a ground for reversing the judgment if the convicted individual requested installment payment and the court did not consider it. An individual convicted of a crime can also request installment payment at a later time.

The decision of the court should also contain a statement indicating that if any of the installments have not been paid when due, the entire balance of the criminal fine becomes due immediately (Article 52/4, TCK).

267. **Imprisonment in Default of Payment of Fine.** If the convicted individual does not pay the fine, it can be converted to prison time as long as the equivalent “full days” of fine (Article 52/1, TCK),<sup>1</sup> by the decision of the public prosecutor (Article 106/3, CGIK).

This kind of imprisonment, however, cannot exceed three years; in cases of convictions to more than one criminal fine however, it cannot exceed five years (Article 106/7, CGIK).<sup>2</sup>

Fines imposed on minors cannot be converted to prison time (Article 106/4, CGIK).

1. Repealed legislation had foreseen (1 day 3 million TL) (Art. 5, repealed CIK).
2. Repealed legislation had foreseen five years in cases of recidivism (Art. 19/7, repealed TCK, Art. 5/10, repealed CIK).

### C. Commuting Punishments to Other Punishments

268. In some cases punishment can be commuted to another punishment if it is provided for in the law or if the judge has the authority to commute the punishment.

269. Regulations of the repealed Criminal Code. Transforming the Death Penalty to a Custodial Penalty. Before the death penalty was abolished in Turkey (supra, paragraph 214), transforming the death penalty into a custodial penalty<sup>1</sup> was regulated by various provisions. For example, death penalties imposed for felonies committed before April 8, 1991, which had not yet been carried out, were transformed (Provisory Article 1 TMK). The final death sentence confirmed by the Court of Cassation could only be carried out after the promulgation of a special Act on the execution of the death penalty. If the Grand National Assembly decided that the punishment was to be transformed to life imprisonment, then there was a possibility of conditional release after 30 years (Article 19/1, repealed CIK).

1. The provision that a double punishment of lifelong imprisonment must be converted to the death penalty (Art. 70, repealed TCK) was abolished by Act No. 3679 in 1990.

270. Commutation of short-term imprisonment. As a rule, the commutation of short-term imprisonment into measures (supra, paragraph 220) is optional. The discretion of the judge in this respect is very important.

271. Commutation of long-term custodial sentences. According to Article 50/4 of Penal Code, long-term imprisonment for crimes committed through negligence (except “foreseeable negligence”; supra, paragraph 130) may be exceptionally commuted to other measures in Article 50/1, TCK (supra, paragraph 220).

Commutation to Admonition. Commutation to admonition is no longer permitted under the New Penal Code. However, the repealed Code had included this legal concept.<sup>1</sup>

1. Under the old regime, if the maximum punishment provided by the law did not exceed one month of imprisonment or light imprisonment, or a 3,000 TL light or heavy fine, the delinquent was not considered a recidivist and was not convicted of a crime or a misdemeanor that was punishable by more than one month light imprisonment. In that case the punishment provided by the law could be replaced by an admonition (Art. 6, repealed TCK). Admonition (*adli tevbih*) is a rebuke given by the judge to the convicted individual that explains the ethical context of the law and the consequences of the crime. If the convicted individual did not appear in court when summoned for the admonition, or did not accept it respectfully, the sentence that had been originally set by the court would be executed.

#### D. Friendly Settlement: Settlement upon the “In-Advance” Payment of a Fine and Mediation

272. In-advance payment of fine. A statutory criminal fine and statutory upper limit of imprisonment not exceeding three months shall be commuted to a kind of “friendly settlement” upon the in-advance payment of a fine (*önödeme*), according Article 75 of the Turkish Criminal Code.<sup>1</sup> Crimes falling within the scope of mediation (infra, paragraph

368/I) are an exception.

If the perpetrator of a crime pays the minimum fine provided by the law, or the amount of money that corresponds to the minimum imprisonment (multiplying TRY 20 per each day of imprisonment) or, the aforesaid amount and the minimum fine if

the two are combined by the law, together with the costs of proceedings within 10 days after having been requested to do so by the public prosecutor, then the perpetrator will not be indicted and the prosecution will be dropped (Article 75/1, TCK) (infra, paragraph 368/II).

1. H.T. Gökcan & S. Kaymaz, Türk Ceza Kanunu ve Özel Yasalardaki Önödeme Bağı Suçlar (1998); T. Demirbaş, Ceza Hukuku Genel Hükümler (Ankara: Seçkin, 2002), 603. A. Karagülmez, Açıklamalı-Uygulamalı İçtihatlı Ceza Kararnamesi ve Ön Ödeme; Seçkin Yayınları (2002). A. Karagülmez, Suç Olmaktan Çıkarma – İdari Para Cezaları – Açıklamalı Kabahatler Kanunu (Seçkin Yayınları, 2005). H.Y. Sevik, Çocuk Yargılamasında Ön Ödeme ve Sulh Hakiminin Ceza Kararnamesi (Türkiye Barolar Birliği Dergisi, sayı 52 sayfa 66, Mayıs & Haziran 2004). Some legal experts are of the opinion that in-advance payment of a fine is no longer needed, as criminal fines are based on day-fine system in the Turkish Criminal Code (I. Özgenç, Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5 (Ankara: Basi, Seçkin, 2010), 605).

273. Damages. Civil rights claim, recovery of property or confiscation shall not be affected in cases where the criminal proceedings are not initiated or discontinued on the grounds of in-advance payment (Article 75/5, TCK).

274. Mediation. The Criminal Procedure Code regulates mediation in criminal matters (Article 253, CMK).<sup>1</sup> In the field of “complaint-crimes” (soruşturulması ve kovuşturulması şikayete bağlı olan suçlar), if the victim files a complaint, the public prosecutor asks both parties if they agree on mediation (uzlaşma).<sup>2</sup> There are also a few crimes that are ex officio prosecuted, included to mediation. The following crimes are mentioned in TCK with no regard to whether they require a claim or not: intentional wounding (except for subparagraph 3, Article 86 and Article 88), negligent wounding (Article 89), violation of tranquility of domicile (Article 116), kidnapping of a child and keeping him (Article 234), revealing the information or documents, that have the nature of commercial secrets, banking secrets or secrets of the customers (Article 239 except for subsection 4).

Except for crimes, that are investigated and prosecuted upon a complaint, for crimes that are included in other statutes, there must be a special provision in that statute in order to apply mediation.

In crimes that allow the application of the provisions of effective remorse and crimes against the sexual inviolability, mediation is excluded, even if their investigation and prosecution is dependent upon a complaint.

In crimes that are committed by more than one person, only the person who mediates shall draw benefit from mediation, even if the offenders have participated in the same offense (Article 255, CMK).

Where both of the parties agree, a mediator shall be appointed. If the parties agree on the compensation, then there is no criminal prosecution so long as the losses of the victim are fully recovered (Article 253/19, CMK).

1. F. Yenisey (ed.), Uzlaşma Özel Sayı (Bahçeşehir Üniversitesi Hukuk Fakültesi Hakemli Hukuk Dergisi, 2010, Özel Sayı: 1., H. Çolak, Yeni TCK ve CMK’da Cezai Uyuşmazlıkların Alternatif Çözüm Yolu Olarak, Uzlaşma (Türkiye Barolar Birliği Dergisi sayı 63, Mart & Nisan 2006). S. Kaymaz & H.T. Gökcan, Türk Ceza ve Ceza Muhakemesi Hukukunda Uzlaşma ve Önödeme, Yeni Türk Ceza Kanunu ve Özel Kanunlardaki Uzlaşmaya ve Önödeme Bağı Suçlar (Ankara: Seçkin Yayınları, 2005). J. Starr, Dispute and Settlement in Rural Turkey: An Ethnography

- of Law (Netherlands: Leiden, 1978), E.J. Brill & E. Yurtcan, CMK Avukatının ve Uzlaşma Avukatının Başvuru Kitabı (İstanbul: Beta, 2007).
2. F. Yenisey (ed.), Uzlaşma Özel Sayı (Bahçeşehir Üniversitesi Hukuk Fakültesi Hakemli Hukuk Dergisi, 2010, Özel Sayı: 1). N. Centel & H. Zafer, Ceza Muhakemesi Hukuku, 7 (İstanbul: Bası, Beta, 2010), 472.

275. Mediation procedure. In cases where the crime under investigation is depending on mediation, the public prosecutor, or upon his orders, an official of the judicial security forces, shall propose mediation to the suspect and to the victim or to the person who has suffered damage from the crime (infra, paragraph 317). In cases where the suspect, the victim or the person who has suffered damages from the crime is not an adult, the proposal of mediation shall be made to their legal representative. The public prosecutor is entitled to make the proposal of mediation by a notification including the reasons for this proposal, or in case the suspect lives abroad, a rogatory letter. In cases where the suspect, the victim or the person who has suffered damages from the crime does not notify his decision about the mediation within three days after the proposal of mediation, it shall be considered that he has refused the mediation (Article 253/4, CMK).

In cases where a proposal for mediation has been made, the nature and legal consequences of accepting or refusing the mediation shall be explained to that person.

If the victim, the person who has suffered damages from the crime, the suspect or their legal representatives cannot be reached because he is not present at the address that has been declared to the official authorities, or is outside of the country or for any other ground, then the investigation shall be concluded without applying the way of mediation.

In order to apply the way of mediation in crimes where more than one person has been victimized or has been damaged, it is required that all of the victims or persons who have suffered damages from the crime have accepted the mediation.

The proposal of mediation, or the acceptance of mediation, does not hinder the collection of evidence of the crime that is under investigation nor the application of the measures of protection.

In cases where the suspect and the victim or the person who has suffered damages from the crime has accepted the proposal of mediation, the public prosecutor is entitled to conduct the mediation himself, or may ask the Bar Association to appoint a lawyer as mediator, or may appoint a mediator from the list of persons who have obtained a law degree.

The cases where a judge is excluded and the cases where a motion to reject a judge is valid in this Code (Articles 22, 23 CMK; infra, paragraph 305), shall also provide grounds for the appointment of the mediator.

The appointed mediator shall be given a copy of each document included in the case file that are estimated appropriate by the public prosecutor. The public prosecutor shall caution the mediator about the requirement of complying with principles of the confidentiality of the investigation (Article 253/11, CMK).

The mediator shall conclude the interactions of mediation within 30 days after he received the copies of the documents included in the file of investigation. The public prosecutor may extend this period for a maximum of 20 days.

The mediation conferences shall be conducted confidentially. The suspect, the victim or the person who has suffered damages from the crime, the legal representative, the defense counsel or the representative may be present during the mediation conferences. In cases where the suspect, the victim or the person who has suffered damages from the crime does not attend the mediation conference personally, or his legal representative, or representative, he shall be considered as having refused the mediation.

The mediator is entitled to consult the public prosecutor about the procedure to follow during the mediation conferences; the public prosecutor may give orders to the mediator.

276. Mediation agreement. At the end of the mediation conferences, the mediator shall produce a report and submit it to the public prosecutor, together with the copies of the documents that have been handed over to him. If the mediation results in an agreement, the details of the kind of mediation agreement shall be clearly explained in the report that shall be furnished with the signatures of the parties (Article 253/15, CMK).

The suspect and the victim or the person who has suffered damages from the crime may apply to the public prosecutor at the latest until the indictment has been prepared (see also *infra*, paragraph 277), and produce the document that states that they have mediated their dispute, even if the proposal of mediation has been previously refused.

If the public prosecutor establishes that the mediation has been achieved with the free will of the parties, and the subject of the contract is in conformity with law, then he shall put his seal and signature under the report or the document, and add it to the file of investigation.

If the mediation ends without any positive result, the option of mediation shall not be applied again.

If at the end of the mediation the suspect fulfills the subject of the contract at once, the decision on not prosecution shall be rendered. If fulfillment of the subject of the contract has been postponed to a future date, is subject to installments, or extends over a certain period of time, the public prosecutor will render a decision on “postponing the filing of public prosecution,” without checking the requirements that are listed in Article 171 (*infra*, paragraph 372). During the postponement, the statute of limitations shall be interrupted. If the necessities of mediation are not fulfilled after the postponement period provided in that decision has come to an end, the public prosecution shall be filed, without checking the requirements (not have been convicted before, refraining from committing further crimes, favorableness; *infra*, paragraph 372) that are mentioned in Article 171/4.

In cases, where the mediation is successful, no tort claim may be filed for the crime under prosecution; if there is a pending case, this case shall be considered as withdrawn. If the suspect does not fulfill the object of the contract, the report or the document of mediation shall be considered as a judgment of a civil court or a document that is listed in Article 38 of the Act on Execution and Concurs, dated June 9, 1932, No. 2004 (Article 253/19, CMK) and shall be executed by bailiff.

The assertions made during the mediation conferences shall not be used as evidence in any investigation and prosecution, or in any case.

The statute of limitations for the prosecution and the duration of the case that is a requirement for prosecution shall not run from the date when the first mediation proposal has been made to the suspect, the victim or the person who has suffered damages from the crime, until the date when the initiative of mediation was unsuccessful, or until the date when the mediator prepares and submits his report to the public prosecutor.

The fee of the mediator that is proportional to his work and expenses, shall be estimated and paid by the public prosecutor. The fee of the mediator and other expenses of mediation shall be considered as court expenses. In cases where there is a successful mediation, these payments shall be compensated by the State Treasury.

Against the decisions rendered at the end of the mediation, the legal remedies which are foreseen in this Code are applicable (infra, paragraphs 401 and following).

277. Mediation by court. In cases where it becomes evident after the public prosecution has been filed, that the crime under the prosecution is under the scope of the mediation, then the transactions of mediation shall be conducted by the court under the rules and procedures as specified in Article 253 (Article 254/1, CMK).

In cases where the mediation results in an agreement, the court shall decide to drop the prosecution if the accused has fulfilled the obligation in one single payment. If the fulfillment of the obligation is delayed for a later date, or the payment is due on the installment plan, then the declaration of the judgment shall be postponed, without checking the requirements in Article 231. During the period of postponement, the statute of limitations does not run. In cases where, after the decision on postponement of the declaration of the judgment has been rendered, the requirements of mediation are not fulfilled, the court shall announce the judgment, without checking the requirements that are mentioned in Article 231/11 (Article 254/2, CMK) (infra, paragraph 397-II).

### III. Multiplicity of Crimes and Punishments

#### A. Multiplicity of Crimes

278. In penal law, each effect of a human conduct is an independent crime. But if a punishable act violates more than one law or if several punishable acts violate one law, there are special regulations.

If more than one act is combined, we speak of a multiplicity of crimes (*suçların içtimai*). Multiplicity of crimes was dealt with in Articles 42–44 of the repealed Turkish Penal Code: if a person was convicted of several crimes, or if the same person was convicted of another crime after a judgment, all the punishments had to be added up (Articles 68 and 69, repealed TCK). However, the current Turkish Criminal Code does not include provisions in this respect.

279. Concurrence of Laws. If someone commits a crime to commit or conceal another crime, each crime is an independent crime and the punishments are joined.



But if such a crime is an element or a ground of aggravation of another crime, only one penalty is imposed on the perpetrator<sup>1</sup> (Article 42, TCK). This collection is called a “compound crime” (bileşik suç) or concurrence of laws (gerçek içtima).<sup>2</sup>

1. K. İçel et al., İçel Suç Teorisi, 2 (İstanbul: Kitap, İkinci Bası, Beta, 2000), 414.
2. A. Önder (II), Ceza Hukuku Genel Hükümler, Cilt 2 (İstanbul: Beta, 1989), 524.

280. Concurrence of Offenses. If a single act constitutes several crimes, the most severe punishment of those provided by law (fikri içtima) will be imposed on the perpetrator (Article 44, TCK): for example, imprisonment is more severe than criminal fine, and aggravated imprisonment for life is the most severe punishment.<sup>1</sup> The number of acts is important. If there is more than one physical result, criminal liability will be assessed according to the most severe result.<sup>2</sup>

1. O. Keskinsoy, Yeni Ceza Kanunu’ndaki Düzenlemeler Doğrultusunda Fikri İçtima Müessesesinin Analizi (sayı: Ankara Barosu Dergisi, 2005/3). S. Dönmezer & S. Erman (II), Nazari ve Tatbiki Ceza Hukuku, Genel Kısım, Cilt II, 9 (İstanbul: Bası, Beta, 1985), 1129.
2. A. Önder (II), Ceza Hukuku Genel Hükümler, Cilt 2 (İstanbul: Beta, 1989), 533.

281. Continuation of Offenses. If various punishable acts are committed against the same individual, violate the same law and are the result of the same intent, we speak of a continuation of offenses (now: zincirleme suç Article 43/1, TCK, previously: müteselsil suç Article 80, repealed TCK).<sup>1</sup> The punishment provided for such a crime is increased by one fourth up to three fourth (previously one sixth).

The principle form of a crime and its aggravated form shall be considered as the same law (Article 43/1, TCK).

This provision is also applicable, if there is no identified victim of the crime (Article 43/1, TCK), and also in cases where there have been committed several crimes against more than one person through one action (Article 43/2, TCK).

Crimes of intended killing, intended wounding, torture and plundering are exempted from the privilege of punishment reduction by considering them as a continuation of offenses (Article 43/3, TCK), and the punishments of these crimes shall be added up.

1. O. Keskinsoy, Yeni Türk Ceza Kanunu’nun Müteselsil Suçla Alakalı Hükümlerinin Değerlendirilmesi (Türkiye Barolar Birliği Dergisi, sayı 61, Kasım & Aralık 2005). T.Y. Sancar, Müteselsil Suç (Seçkin Yayınları, 1995).

## B. Multiplicity of Punishments

282. Joining punishments for more than one crime was called multiplicity of punishments (cezaların ictimai) (Articles 68–78, repealed TCK),<sup>1</sup> a legal concept that was not included in the current Turkish Criminal Code.

In cases where one accused has committed several crimes, all punishments shall added up during the execution of the punishment, for the purposes of determining the day of conditional release (infra, paragraph 444).

1. More than one sentence to life imprisonment used to result in the death penalty. However, in 1990, Act No. 3679 amended this provision. Now, if there is more than one sentence to life



imprisonment, the custodial penalty will be executed for a period of six months to three years in solitary confinement. The prisoner will be isolated day and night (Art. 70, repealed TCK).

If the person is sentenced to identical kinds of temporary custodial punishments or fines (Art. 72, repealed TCK), the entire punishment will be executed (Art. 71, repealed TCK).

Formerly Turkish criminal law adopted the system of multiplicity of punishments. Punishments of the same type were joined (Arts. 71/1 and 72 repealed TCK). If they were not the same type, they are executed separately (Art. 71, repealed TCK). Though custodial punishments of the same type were united. The total duration of lengthy imprisonment may not exceed 36 years, or 25 years of imprisonment and 10 years of light imprisonment (Arts. 71 and 77, repealed TCK). The duration of joined custodial punishments of different types may not exceed 30 years (Art. 77/2, repealed TCK).

#### §5. SUSPENSION OF THE IMPRISONMENT

283. Suspension of imprisonment. Suspension of punishment (*cezaların ertelenmesi*) is understood to mean suspending the execution of a punishment for a certain time.<sup>1</sup> It is a completely different measure from “conditional release” (*koşullu salıverme*) (*infra*, paragraph 444).

The Turkish Criminal Code<sup>2</sup> regulates “suspending sentences of imprisonment” only; criminal fines are excluded (Article 51/1, TCK) (see however *infra*, paragraph 286).

A sentence of imprisonment for a term of two years or less may be suspended. The upper limit of this term is three years for those under 18 years of age or above 60 years at the time of the commission of the offense.

However, in order to decide to suspend the sentence, the person may not have been sentenced to a penalty for a term of more than three-months imprisonment for an intentional offense, and the court should be convinced, as a result of hearing the remorse he expressed during trial, that the offender will not commit new crimes in the future (Article 51/1, TCK).

The suspension of the penalty may depend upon the condition that compensation is provided to the victim or public. This restores property harmed by the crime to the previous condition before the crime was committed (*in integrum restitutio*) or restores all damage caused. In such case, the enforcement of the penalty shall continue until the requirements are fulfilled. Once the condition is met, the offender shall be released immediately, upon the decision of a judge (Article 51/2, TCK).

For an offender whose sentence has been suspended, a probation period shall be imposed that shall not be less than one year and not more than three years. The lower limit of this period shall not be less than the term of sentence (Article 51/3, TCK).

The court may decide that an offender, who does not have a profession or trade, shall attend an educational program for educational purposes during the probation period. An offender who possesses a profession or trade shall work in a public or private institution under the supervision of another person who has the same profession or trade in return for remuneration. An offender under the age of 18 shall attend an educational institution, which provides accommodation when necessary, in order to acquire a profession or trade (Article 51/4, TCK). The court may decide not to impose any obligation or may authorize an expert for the probation period (Article 51/6, TCK).

The court may appoint an expert to counsel the offender within the probation period. This expert shall guide the offender, confer with the authorities of the educational institution or workplace of the offender and prepare a report for the judge, every three months, on the development of the offender (Article 51/5, TCK).

In cases where the convict commits an intentional offense or does not follow his obligations within the probation period, despite the warning of the judge, the court shall decide to fully or partly enforce the suspended sentence in an enforcement institution (Article 51/7, TCK).

If a period of probation has been spent in compliance with the requirements and in a good manner, the sentence shall be regarded as served (Article 51/8, TCK). At this point, there is an important change. According to the repealed law, if the convicted individual did not commit another punishable act during the probation period (one year for a misdemeanor, five years for a crime) (Article 95, repealed TCK), the first effect of the suspension was that the punishment was not executed, and the second effect was that the convicted individual was regarded as though he had never been punished. If he did commit another crime, the punishments for both crimes would be executed.

1. A. Önder, *Ceza Hukukunda Tecil ve Benzeri Müesseseler* (İstanbul, 1963). F. Turhan, *Yeni Türk Ceza Kanununa Göre Cezaların Ertelenmesi ve Uygulamada Ortaya Çıkan Bazı Sorunlar* (Erzincan Üniversitesi Hukuk Fakültesi Dergisi, cilt X, sayı 3–4, yıl 2006), 28.
2. According to the repealed laws, if the convicted individual committed another crime during this time, the punishment would be executed. A suspension of the punishment was possible if the offender's sanction did not exceed one year of lengthy imprisonment or two years of imprisonment or light imprisonment or if it is a fine (Art. 6/1, repealed CİK). According to the repealed Turkish Penal Code, the duration of the period of the suspension was one year after a misdemeanor conviction and five years after a criminal conviction. Originally, the suspension of the punishment was provided for in Arts. 89–95 of the Turkish Penal Code. In 1965, it was amended and completed by Art. 6 of the Code of Enforcement of Punishments. The Juvenile Courts Act (Art. 38, repealed ÇMK) and in the Code of Enforcement of Punishments (Art. 6, repealed CİK) contained special provisions for minors. T. Demirbaş, *Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2002), 576; K. İçel et al., *İçel Yaptırım Teorisi*, 3 (İstanbul: Kitap, Beta, 2000), 381.

284. Previous provisions. According to the repealed law, the condition for suspension of a punishment was that the court expected that the offender would not re-offend in the future. The execution of the decision regarding the suspension of punishment could be postponed until the victim had recovered his damages (93, repealed TCK). If all these conditions were met, the sentence could be suspended.

The reasons for suspension were to be given in the decision. All decisions of a court were to be given the reasons for suspension (Article 32, repealed CMUK). Repeating the facts of the law is not accepted as reasons.

285. The sanction to be suspended refers to the fundamental punishment (supra, paragraph 260).<sup>1</sup>

1. In practice, however, the fine or measure that resulted from a commutation according to Art. 4/4 of the repealed Code of Enforcement of Punishments was regarded as “principal or fundamental punishment.” When the fundamental punishment was suspended, the accessory punishment was automatically suspended as well. The court could, however, decide that this would not be suspended.

286. According to prevailing opinion, fines that are commutations from imprisonment (*supra*, paragraph 222) can be suspended. If a total punishment, which was combined from various single punishments, exceeds the maximum period of imprisonment that can be suspended, then every single punishment must be regarded and can be suspended independently from the others, so long as they do not exceed the maximum period that can be suspended.<sup>1</sup>

1. F. Erem, A. Danişman & E. Artuk, *Ceza Hukuku Genel Hükümler*, 14 (Ankara: Baskı, Seçkin, 1997), 818.

287. Exceptions to the suspension of punishments. Turkish Criminal Code<sup>1</sup> takes into account the concrete term of imprisonment in order to give way to its suspension. Criminal fines are excluded from suspension, unless they are commuted prison sentences (*supra*, paragraph 286).

There are some other exceptions: punishments for military offenses in Military Penal Code (AsCK) (Article 47/1, AsCK) and sanctions for disciplinary violations are excluded from suspension.

In cases of a conviction based on a crime in Anti-Terror Act, imprisonment shall not be suspended and the duration of the imprisonment term shall not be taken into account (Article 13, TMK). This exception has recently been lifted for children who did not attain the age of 18 while committing a crime under Anti-Terror Act (Act of July 22, 2010, No. 6008).<sup>2</sup>

A judgment issued by a foreign court did not prevent the suspension of another sentence in Turkey. Provisions in international conventions are reserved.

1. According to the repealed law, there were some punishments and measures which could not be suspended: the death penalty (*supra*, para. 212); compensatory fines; seizure and confiscation of items mandated by law; court fees (Art. 92, repealed TCK); measures resulting from a commutation of short-term imprisonment (*supra*, paras. 272–275); and other situations explicitly provided by the law (e.g., Art. 243 “2003–4778,” repealed TCK).
2. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 627.

288. Exceptions related to the age. A sentence of imprisonment for a term of two years or less may be suspended. The upper limit of this term is three years for those under 18 years of age or above 60 years at the time of the commission of the offense (Article 51/1, TCK).<sup>1</sup>

Imprisonment of children who did not attain the age of 18 while committing a crime based on Anti-Terror Act, may be suspended exceptionally (Article 13, TMK, as amended by the Act of July 22, 2010, No. 6008).<sup>2</sup>

1. According to the repealed law, there were special provisions regarding the suspension of punishment if the convicted was a minor or older than age 65 (Art. 6/2, repealed CİK). The Juvenile Courts Act contains special provisions for the suspension of punishments imposed on minors younger than age 15. In these cases, fines and imprisonment up to three years can be suspended on probation (Art. 38, repealed ÇMK).
2. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 627.



## Part II. Criminal Procedure

### Chapter 1. Organization of Criminal Justice in Turkey

289. The rules of criminal procedure law (ceza muhakemesi hukuku), substantive criminal law, the administration of justice, the rights of the accused and the powers of the prosecution services are interconnected with each other; thus they constitute a “system of criminal justice” (ceza adalet sistemi).

The Turkish Code of Criminal Procedure (Ceza Muhakemeleri Usulü Kanunu CMUK) was enacted on April 20, 1929, Act No. 1412. It was a translation of the 1872 German Code of Criminal Procedure, adopted with few changes. This Code was substituted by the Code of Criminal Procedure in 2005 (CMK).<sup>1</sup>

The Turkish Criminal Procedure Code adopted the “mixed system” of criminal procedure: the preliminary investigation and the preparation of the public prosecution are conducted in camera (Article 157, CMK), in accordance with the “inquisitorial system.” The trial inquiry stage is conducted publicly, in the presence of the accused, and orally, according to the accusatorial system.<sup>2</sup>

1. A separate Law, of June 8, 1936, Act No. 3005, did provide a special procedure for “flagrant offences” (Meşhut Suçların Muhakemesi Kanunu). This Law was also abolished in 2005. Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (İstanbul: Bası, Beta, 2010), 1198; K. Gülen, *Günümüzde Polis Vazife ve Salahiyet Kanununun Tatbiki* (Ankara. 1977), 215. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 500.
2. N. Gürelli, “The Recent Development of Turkish Criminal Procedure and the Practice of the Turkish Judiciary,” *Annales de la Faculte De Droit D’Istanbul XXIX*, no. 45, Tome (1983): 113 149.

#### §1. CRIMINAL COURTS

##### I. Introduction

290. A sovereign country has three branches of power, one of which is the jurisdiction of independent courts. The jurisdictions of the courts cover the territory of Turkey, with a few exceptions (supra, paragraph 86).

There exists a unity of jurisdiction (yargılama birliği prensibi). Within the State there is a single jurisdiction divided into branches: constitutional, civil and criminal. The law governs the field of jurisdiction of each court.

The structure of the courts was designed along the French Model in 1879. There have been unsuccessful efforts for decades to change this system. Finally, in 2005,

a new Code on Courts brought a major reform (Adli Yargı İlk Derece Mahkemeleri ile Bölge Adliye Mahkemelerinin Kuruluş, Görev ve Yetkileri Hakkında Kanun; 2004–5235).

The courts in Turkey are divided into ordinary courts and administrative courts. The Courts of ordinary jurisdiction (adliye mahkemeleri) are divided into two branches: civil<sup>1</sup> (hukuk mahkemeleri) and criminal courts (ceza mahkemeleri). The civil and criminal courts are different and separate.

Distinguishing the competence of the administrative courts (idare mahkemeleri) and that of the ordinary civil courts is not easy. A special court, the Court of Conflicts (uymazlık mahkemesi), resolves conflicts between ordinary civil courts and administrative courts (infra, paragraph 299-I).

1. The lower courts of civil jurisdiction are the Courts of First Instance, Court of Peace in Civil Matters (Justice of the Peace) and Commercial Courts, Execution Officers (icra memurları), Bankruptcy Officers (iflâs memurları, iflâs dairesi) and Investigation Authorities. The Investigation Authorities (tetkik mercileri) also act as judges in certain cases with the capacity to settle monetary disputes by means of summary procedures (T. Ansay & D. Wallace, Introduction to Turkish Law, 2nd edn (Oceana New York, 1978).

291. The Constitutional Court (Anayasa Mahkemesi) has several functions. Besides its powers as the court that controls the laws adopted by Parliament, it may function as a criminal court of the first instance.

The Constitutional Court functions as the “Highest Criminal Court” (Yüce Divan) if the accused is a high official (Article 148/3, AY) or if the case deals with the closing down of a political party.<sup>1</sup>

1. In August 1993 the Constitutional Court closed down the People’s Labor Party (HEP), a pro-Kurdish political party, on the grounds that it advocated separatism. Its successor Democracy Party (DEP) was investigated on the same charges.

292. Turkey has accepted the jurisdiction of the European Court of Human Rights<sup>1</sup> with respect to the ECHR (Article 25/2, IHAS).<sup>2</sup>

According to the amendment in the Article 90 of the Turkish Constitution (2004–5170), International Conventions related to the substantive human rights are superior if there is a conflict with the internal codifications.<sup>3</sup>

1. Yenisey & Cihan, Menschenrechte im Strafverfahren, AIDP National Report (Spain, 1993).
2. Kunter, Yenisey & Nuhoğlu, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 18 (İstanbul: Bası, Beta, 2010), 1864.
3. O. Doğru, Anayasa ile Karşılaştırmalı İnsan Hakları Avrupa Sözleşmesi ve Mahkeme Uç Tüzüğü (İstanbul: Vedat Kitapçılık, 2010). O. Doğru, İnsan Hakları Avrupa Mahkemesi İçtihatları (2004–2008). M.S. Gemalmaz, Ulusalüstü İnsan Hakları Belgeleri (2010). R. Özmen, İnsan Hakları Mevzuatı (2010). S. Unal, Turkish Legal System and the protection of Human Rights (Ministry of Foreign Affairs Center for Strategic Research, Sam Papers No: 3/99, Ankara, 1999). Y. Ünver, Adil Yargılanma Hakkı ve Ceza Hukuku (Ankara: Seçkin Yayınları, 2004).

## II. Categories of Criminal Courts

293. The criminal courts of first instance fall into three categories: general criminal courts, special chambers (or sections) of the general courts and the criminal courts founded on a special statute. Investigating judges (*sorgu hakimi*) no longer exist in Turkey, as judicial inquiries were abolished in 1985.

### A. General Criminal Courts

294. There are three categories of general criminal courts: the Court of Peace in Criminal Matters, Court of General Jurisdiction in Criminal Matters and Court of Assizes.<sup>1</sup>

1. The jurisdiction of the courts was regulated by the Code of Application of the Penal Procedure Code Art. 25. However in 2004 a law abolished this code and substituted it with the new Act on the Structure of Courts “2004–5235.”

295. Courts of peace. The Code on Courts (2004–5235) Article 10, has widened the jurisdiction of this court to cases that deal with crimes carrying imprisonment up to two years (two years are included), and they can impose criminal fines and security measures (*güvenlik tedbirleri*) as well.<sup>1</sup>

Only one judge sits in the Court of Peace (Article 9/2, Law 2004–5235) and there is no public prosecutor present (*infra*, paragraph 307).<sup>2</sup>

1. Priorly, the jurisdiction of the Court of Peace in Criminal Matters (*sulh ceza mahkemesi*) was limited to cases of misdemeanors and some petty offenses listed by the repealed Code of Application of the Penal Procedure Code (Art. 29).
2. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 509. A. Parlar & M. Hatipoğlu, *Sulh Ceza Davaları* (2009). A. Gündel, *Sulh Ceza, Ağır Ceza ve D.G.M. Davaları* (Ankara: Seçkin Yayınları, 1999).

296. The Court of General Jurisdiction (*asliye ceza mahkemesi*) is competent to hear cases that do not fall under the jurisdiction of other criminal courts (Article 11, Act of 2004–5235).<sup>1</sup>

There is a Court of General Jurisdiction in each district and the court has one judge (Article 9/2, Law 2004–5235).<sup>2</sup> There shall be no public prosecutor present in the Court of General Jurisdiction for two years, beginning from May 2011, in order to speed up the procedure (trial prosecutors shall act in investigation phase for collecting evidence and trial at the prosecution phase shall be conducted in a speedy way!!!).

1. A. Parlar & M. Hatipoğlu, *Muzaffer, Asliye Ceza Davaları*, 2008. Gündel, Ahmet, *Asliye Ceza Davaları* (Ankara: Seçkin Yayınları, 2000).
2. M. Görgün, *Uygulamada Asliye Ceza Davaları* (1999).

297. Court of Assize. The 2005 amendment has made a mixed system of jurisdiction of the (Article 12, Act 2004–5235 as amended by the Law 2005–5328). This court has jurisdiction on crimes that bring “aggravated life imprisonment,” “life

imprisonment” and “imprisonment more than ten years.” Additionally, it has jurisdiction over certain crimes, which are listed in the Code: theft by force (yağma) (TCK 148), bribery by force (irtikap) (TCK 250/1 and 2), forgery at official documents (resmi belgede sahtecilik) (TCK 204/2), qualified swindling (nitelikli dolandırıcılık) (TCK 158) and fraudulent bankruptcy (hileli iflas) (TCK 161).

There are two associate justices and one president in this court (Article 9/3, Law 2004–5235).

Organized crimes and terror crimes are tried at a specialized chamber of the Court of Assize, which has a wider venue (*infra*, paragraph 298-III).

#### B. Special Chambers of the General Criminal Courts

298. The Special Chambers of the General Courts include “press courts” (*infra*, I), “smuggling courts” (*infra*, II), “organized crime courts” (*infra*, III), and “traffic courts” (*infra*, IV).

I - Press Courts (*basın mahkemesi*). Within the Organization of Turkish Courts<sup>1</sup> there are special chambers of the general courts that have subject matter expertise (specialists) in some fields. For example, according to the new Press Code, the second chamber of the or the Court of General Jurisdiction is competent for offenses committed by the press (Article 27/2, Act 2004–5187) (*supra*, paragraph 178).

II - Smuggling Courts (*kaçakçılık mahkemesi*). Since March 21, 2007, with the implementation of the “Combating Smuggling Act 2007” No. 5607 (KaçK), new courts dealing with smuggling have been operational. In cases of misdemeanors, the public prosecutor is empowered to rule on administrative fines. If the case is dealing with administrative confiscation in Article 14, KK (*mülkiyetin devlete geçirilmesi*), the Court of Peace has jurisdiction upon the request of the public prosecutor. Legal remedies against these decisions are governed by the Act on Misdemeanors (Article 17/1, KaçK). In cases of “crimes” regulated in the “Combating Smuggling Act 2007,” cases shall be tried by “smuggling courts,” established by the “High Council of Judges and Prosecutors,” upon the request of the Ministry of Justice (Article 17/2, KaçK). If the crime is forgery of official documents in relation with smuggling, then the general section of the Court of Assize has jurisdiction. But if the crime is organized smuggling of narcotics, jurisdiction goes over to the organized crime court (Article 250/1, CMK). Thus the scope of smuggling crimes is quite limited.

Under the previously repealed legislation (Anti-Smuggling Act No. 1918), smuggling of any good by an organized group would fall under the jurisdiction of the State Security Courts. The new criminal justice system does not incorporate State Security Courts. There are now “specialized courts dealing with profit-oriented organized crime,” or in short, the Organized Crime Courts (Article 250/1-a and b, CMK).

III - The “Organized Crime Court” of Article 250, CMK is a product of Act No. 5190, dated June 16, 2004, which repealed the State Security Courts and created a specialized Chamber of the Court of Assize. This court had collective jurisdiction



in several cities over terror crimes, crimes against the integrity of the State and organized crimes. This structure has been transferred into the Criminal Procedure Code as Articles 250, 251 and 252.

IV - Traffic Courts (trafik mahkemesi). Some traffic offenses are subject to the jurisdiction of the Court of Peace. In each district, one chamber of the Court of Peace is appointed to deal with these offenses (Article 112, Act No. 2918 dated 1983).<sup>2</sup>

1. F. Yenisey, *Ceza Muhakemesi Hukukunda İstinaf ve Tekrar Kabulü Sorunu*, (İstanbul: İstanbul Üniversitesi, 1989), 9.
2. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 533.

### C. Criminal Courts that Depend on a Special Statute

299. Some courts of special jurisdiction, such as the Constitutional Court, are formed by a specific Act.<sup>1</sup>

I - Court of Conflicts. If there is a conflict of competence between the ordinary courts and the military courts or administrative courts, the Court of Conflicts (uyuşmazlık mahkemesi) decides which court is competent.

II - Military Courts<sup>2</sup> are formed according to Article 145 of the Constitution for military offenses.<sup>3</sup> The Military Court of Cassation monitors their decisions.

III - Juvenile Courts (Çocuk Mahkemeleri) were restructured in 2005. There are “Juvenile Courts” (Çocuk Mahkemeleri) and “Juvenile Courts of Assize” (Çocuk Ağır Ceza Mahkemeleri).

The Juvenile Courts are established in the center of each village (il merkezi), where there is one judge. The public prosecutor is not present at the court (Article 25/1, Act No. 2005–5395). This court acts as a “Court of General Jurisdiction” (asliye ceza mahkemesi), and as the “Court of Peace” (sulh ceza mahkemesi) in juvenile matters (Article 26, Act No. 2005–5395).

“Juvenile Courts of Assize” consist of one president and a sufficient number of members. The court hears cases with one president and two members, and it has regional jurisdiction (Article 25/2, Act No. 2005–5395) within the same village (Article 27/2, Act No. 2005–5395) in cases that would originally fall under the competence of the Court of Assize (Article 26/2, Act No. 2005–5395).

Juvenile Courts were formerly regulated by the 1979 Act No. 2253. However, the actual functioning throughout the whole of Turkey was not complete. Only in five big cities Juvenile Courts had been established. Suspects from 11–15 years of age were tried in Juvenile Courts.

The “Protection of the Child Act” (Çocuk Koruma Kanunu) (Act No. 2005–5395) has extended the jurisdiction of the Juvenile Court up to the end of age 18 (Article 3/1, Act No. 2005–5395).

Suspects under 18 years of age must have a lawyer (Article 150/2 CMK). Pre-trial detention of a child is forbidden if the child is under the age of 15 and the alleged crime carries an imprisonment of less than five-year as the upper level of punishment (Article 21, Act No. 2005–5395). The former Act of Juvenile Courts had foreseen a similar provision: the pre-trial detention of a child under 18 years of

age was forbidden if the committed crime was punished by custody of less than three years (repealed Article 19/3 ÇMK).

IV - Family Courts (Aile Mahkemeleri) are competent civil courts to handle all matters arising from divorce applications, including settling the disputes. This new institution was established on January 9, 2003, by Act No. 4787, in order to strengthen the family unit and thereby prevent juvenile delinquency. If the settlement attempt fails, only then the Family Court decides on the merits of the case (Article 7 Act No. 4787). Family Court may order a child to be placed in another family if the members of his family are not fulfilling their duties toward their child (Article 6 Act No. 4787).

1. The State Security Court (Devlet Güvenlik Mahkemesi), which has been repealed by Act 2004–5190, was created in 1983. The jurisdiction of this court was explained in Art. 9 of the State Security Court Act (No. 2845). After the last amendment in 2001, there were only a few crimes that were subject to the State Security Court. The ordinary Court of Cassation was monitoring the judgments of the State Security Courts. There are no State Security Courts within the Turkish Criminal Justice System as of today.
2. Before this legislation, the first chamber of the Court of General Jurisdiction was appointed to deal with smuggling offenses (Art. 26/2, repealed Act 2003.4926).
3. In cases where Parliament declares Martial Law, the Military Courts have jurisdiction as Martial Law Courts.

#### D. High Courts of Legal Remedies

300. High Courts of Legal Remedies. The Turkish Criminal Justice System “factually” recognizes only one ordinary legal remedy: that is “cassation” (temyiz) (infra, II) against the final decisions (hüküm) of the trial courts (Act of Court of Cassation, No. 2797). The “legally” existing “Courts of Appeal” (infra, I) have not been formed yet as of July 2011.

I - Regional Courts of Appeal. The Turkish Law did not recognize the remedy of appeal (istinaf) (infra, paragraph 408) in relation to the facts of the case.<sup>1</sup> The new “Law on the Establishment, Duties and Powers of the Ordinary Courts of the First Instance and the Regional Courts” (2004–5235) intends to create such courts (supra, paragraphs 40, 294). The Courts of Appeal (istinaf mahkemeleri) had been established during the Ottoman Empire in 1879, but were abolished in 1924. Since that time, there have been plenty of unsuccessful attempts to create these intermediate courts. Parliament, through the 2004 Reform, decided to establish the appeals courts, and it has regulated their structure in a separate Code (Law 2004–5235) and their rules of procedure in the new Criminal Procedure Code (between Articles 272 and 285, CMK).

According to the “Law on the Establishment, Duties and Powers of the Ordinary Courts of the First Instance and the Regional Courts” (2004–5235), Ordinary Regional Courts (bölge adliye mahkemeleri) shall be founded regionally, as to the geographical location and the case load, upon the decision of the High Council of Judges and Prosecutors (Hakimler ve Savcılar Yüksek Kurulu), by the Ministry of Justice (Article 25, Act No. 2004–5235). Ordinary Regional Courts consist of an Office of Presidency (Başkanlık), Assembly of Presidents (Başkanlar Kurulu),

Chambers (Daireler), Office of Public Prosecutor (Cumhuriyet başsavcılığı), Justice Commission of the Ordinary Regional Court (bölge adliye mahkemesi adalet komisyonu) and Directorships (müdürlükler) (Article 26, Act No. 2004–5235).

The Chambers of the Ordinary Regional Courts are divided into “civil chambers” and “criminal chambers.” There are at least three civil chambers and two criminal chambers at each Ordinary Regional Court. The High Council of Judges and Prosecutors is entitled to increase or decrease the number of the chambers according to the proposal of the Ministry of Justice. The Chambers consist of one president and a sufficient number of members (Article 29, Act No. 2004–5235).

As the restructuring of the courts requires a number of new highly qualified judges and personnel, as well as new buildings, the application of this new remedy (appeal; istinaf) within the Criminal Procedure Code has been postponed until the courts are factually founded by the Code on the Application of Criminal Procedure Code. It is not certain by now (July 2011) when the courts shall be founded and when the appeal procedure (infra, paragraph 409) shall be applicable. As of today, the provisions on revision (temyiz) (Articles 305–322) of the abolished Code of Criminal Procedure dated 1929–1412 are still applicable in criminal matters (infra, paragraphs 410–418).

II - Court of Cassation. At the present time, the Court of Cassation (Yargıtay) reviews all the petitions related to mistakes in the application of the law in final judgments of all trial courts in Turkey. The Supreme Council of Judges and Prosecutors elects the members.

The Court of Cassation is comprised of twenty-one chambers for civil matters, and eleven chambers are responsible for criminal matters.

The CGK acts as the high commission of the Court of Cassation. If, for example, the Attorney General (the Chief Prosecutor at the Court of Cassation; Yargıtay Cumhuriyet Başsavcısı) disagrees with the decision of the Chamber of the Court of Cassation, then the case is brought before the General Assembly.

III - Military Court of Cassation. There is a Military Court of Cassation (Askerî Yargıtay) to review decisions and judgments rendered by the Military Courts (Article 156, AY). Members are selected by the President of the Republic from three candidates nominated by the Military Court of Cassation.

1. F. Yenisey, *Ceza Muhakemesi Hukukunda İstinaf ve Tekrar Kabulü Sorunu* (İstanbul: İstanbul Üniversitesi, 1989), 9.

### **III. Subject Matter Jurisdiction of the Courts**

301. The courts cannot hear cases that are outside of their jurisdiction (görev).<sup>1</sup> The jurisdiction of the court is related to the public order, and its application is compulsory. Exceptionally, as a matter of procedural economy, a court of higher jurisdiction may not reverse a case from a lower court when the indictment had been approved (Article 5/1, CMK) under the belief that the higher court is powerful enough to furnish the accused from a lower court with sufficient protection.

Exceptionally, as a result of the joinder of cases (davaların birleştirilmesi), connected offenses are tried by a court of higher jurisdiction (Article 16, CMK).<sup>2</sup>

In cases of organized crime, the jurisdiction of the specialized chamber of the (supra, paragraph 298-III) is limited to the organized form of crimes; this court must refer cases of ordinary criminality at any stage of the procedure to the competent court (Article 252/1-g, CMK).

1. E. Yurtcan, *Ceza Yargılaması Hukuku*, 4 (İstanbul: Bası, Kazancı, 1991), 85. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 508.
2. N. Kunter, “Fikri İctima Sebebiyle Suçların Birleştirilmesi,” *İHFM* (1948): I, II, 369.

#### IV. Venue

302. The courts of the Turkish Republic are competent (yer bakımından uygulama) for crimes committed in Turkish territory (Article 8, TCK). There are some exceptions for crimes committed outside of Turkish territory (supra, paragraph 87).<sup>1</sup>

The Turkish Penal Procedure Code grants jurisdiction to only one court: “The trial of a criminal action shall be held in the place where the offense was committed” (Article 12/1, CMK). In cases of attempted offenses, the court of the place where the last act was committed has jurisdiction, and in cases of continuing offenses (kesintisiz suç, mütemadi suç) and of successive offenses (Article 43, TCK) (zincirleme suç, müteselsil suç), the court of the place where the last crime was committed has jurisdiction.<sup>2</sup>

If the place where the crime was committed is not known, the court of the place where the accused was arrested, or, if he is not arrested, the court of the place of his domicile will have venue. If the accused does not reside in Turkey, the court where he last resided in Turkey will act as the venue (Article 13, CMK).

There are some exceptions to this rule. The Collective Jurisdictional Chambers of the (Article 250, CMK) (supra, paragraph 298-III) and Juvenile Courts (ÇKK 25) (supra, paragraph 299-III) have a collective venue, as these courts have many cities under their jurisdiction. Therefore, a crime committed in one city may be tried in another location if there is no Juvenile Court in that particular city.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 516.
2. Aydın Okur, Derya, *Deniz hukukunda liman devleti yetkisi ve denetimi: gemi kaynaklı deniz kirliliğinin önlenmesinde değişen yetki dengeleri bağlamında liman devleti yetkisinin artan önemi* (2009).

303. Some special courts might have jurisdiction according to the status of the accused in the society. For example, if the State President must be tried, he or she will be tried by the Constitutional Court (Article 148/3, AY) (supra, paragraph 291) in its function as the “Highest Criminal Court” (Yüce Divan).

Crimes committed by State officials (supra, paragraph 174) form another exception. Under the “Act on the Adjudication of Civil Servants” (Memurlar ve Diğer Kamu Görevlilerinin Yargılanması Hakkında Kanun) of April 12, 1999 (No. 4483), the public prosecutor is not directly competent in such cases.<sup>1</sup> The supervisor of the alleged official makes the preliminary investigation (ön inceleme) and decides whether to give the public prosecutor permission (izin) to bring the case to the competent criminal court for that specific crime.

1. Formerly, local governmental commissions, and not the public prosecutor, were competent to bring the case to court under the 1913 Act, abolished in 1999 (Memurin Muhakematı Kanunu); S. Pınar, *Memur Suçlarında İdari ve Adli Soruşturma Yöntemi* (Ankara, 1984), 43. Ö. Tosun, *Memurların Suçlarında Özel Muhakeme Kuralları* (YD, January 1984), 9-32; A. Gökçe, *Memurların Yargılanmalarına İlişkin Yasada Öngörülen İtiraz Süresi ve Danıştayın İlginç Kararları* (YD 1981), no. 3, 255.

## §2. LEGAL POSITION OF THE JUDGE

304. All judges are professionals.<sup>1</sup> There are no juries or laymen in the Turkish court organization.<sup>2</sup> Candidate judges and public prosecutors must complete a two-year training course (Act No. 3221, dated June 6, 1985). At the end of the training course, they must now pass a written examination (Act No. 3221 “2003–4781,” Article 10). Candidates who have passed the exam will be appointed according to the provisions of the Act on Judges and Prosecutors (Act No. 3221 “2003–4781,” Article 11).<sup>3</sup>

The judge has an active role in the criminal proceedings.<sup>4</sup> The aim of criminal proceedings is to reveal the factual truth. The judge takes the initiative in finding the factual truth and is not bound by the evidence submitted by the parties. The judge has the right to interrogate the accused and the civil party (claimant), appoint experts and call for witnesses if he considers it necessary.

The Turkish Judiciary is independent.<sup>5</sup> Article 132 of the Constitution provides that “no organ, office, agency or individual may give orders or instructions in connection with the discharge of the judicial power concerning a case on trial.” The Supreme Council of Judges and Prosecutors (Article 159, AY) provides for the independency (supra, paragraph 27). In its *Çıraklar* and *Incal* decision, the European Court of Human Rights regarded the participation of a military judge on the panel and a military public prosecutor as a violation of the independence of judges. These judgments resulted in an amendment to the Constitution and to the Act on State Security Courts (DGMK), but did not prevent further judgments finding that Article 6 had been violated, such as the ECHR decision *Sadak and others v. Turkey* of July 17, 2001. Upon this decision, Constitution and procedural laws has been amended as well (supra, paragraph 298-III).

Judges may not be dismissed but may resign. They need not retire until they reach the age of 65.

1. Hancı, İ. Hamit, *Hekimin Yasal Sorumlulukları ve Hakları* (Toprak Ofset Matbaacılık, 1999). M. Özen, *Hakimin Ceza Sorumluluğu* (Ankara: Seçkin Yayınları, 2004).
2. M. Kapani, *İcra Organı Karşısında Hakimlerin İstiklali* (Ankara, 1956), 7; N. Kunter, “Türkiye’de Kaza Kuvveti,” *IHF* XXV (1960): sy 1–4; U. “Azrak, Yargı ve İdare,” *IHF* XXXIV (1969): Sy. 1–4.
3. Examinations for attorneys were due to begin in 2006, but have been repealed before entering in force (supra, para. 23). As for the year 2007, there were 6260 Judges and 3860 Prosecutors in Turkey. The number for 2008 is: 6444 Judges and 4003 Prosecutors (Turkey’s Statistical Yearbook 2008, 145). In order to increase the number of judges and prosecutors, the government made an amendment in Law No. 4954 by “the Decree in Force of Law” (Kanun Hükmünde Kararname KHK/650), dated 26 Aug. 2011, and made it possible to be appointed as a judge or prosecutor, after a one-year training course; this provision shall be applicable for five years.
4. E. Cihan, *Hakim Unsuru Açısından Ceza Davalarının Uzamasının Sebepleri* (İstanbul: Atatürk Sempozyumu, İstanbul Üniversitesi, 1981), 73.
5. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 538.

305. Impartiality. The Turkish Penal Procedure Code provides some specific rules to safeguard the impartiality (tarafsızlık) of judges.<sup>1</sup> The offices of prosecution and the trial are separate.<sup>2</sup> CMK Article 22 forbids the judge from judging his own case if he was injured by the accused or if he is a relative of the parties; if he has been active in the same case as a prosecutor, an investigative police officer, a defender of the accused or of the victim; or if he was summoned as a witness or has delivered an opinion as an expert (Article 22, CMK).<sup>3</sup> If the judge was active during the trial at the first instance, he is barred (hakimin davadan yasaklanması) from acting in the high courts trial either during the opposition examination or during the appeal procedure at the Court of Cassation (Article 23, CMK). However, according to the case law of the Court of Cassation, the judge who has decided to arrest the accused during the preliminary investigation is not considered as having made an opinion about the innocence or guilt of the accused.<sup>4</sup>

There is a new ground for exclusion of the judge: If the judge had participated in the decision-making of the first instance judgment, of someone who is subsequently subject to a retrial (CMK 311), he cannot be on the court panel deciding the merits of the case (Article 23/3, CMK).

1. E. Günay, Yargısal Görevlerinden Dolayı Hakimlerin “Tazminat” Sorumluluğu ile Hakimlere, C. Savcılarına ve Avukatlara Karşı İşlenen Hakaret Suçları (Ankara: Seçkin Yayınları, 2000).
2. N. Centel & H. Zafer, Ceza Muhakemesi Hukuku, 7 (İstanbul: Bası, Beta, 2010), 548.
3. The exclusion of the Public Prosecutor is not regulated in Turkish Law (E. Yurtcan, Ceza Yargılaması Hukuku, 3 (İstanbul: Bası, Beta, 1987), 109).
4. F. Yenisey, Uygulanan ve Olması Gereken Ceza Muhakemesi Hukuku, Hazırlık Soruşturması ve Polis, 3 (İstanbul: Baskı, Beta, 1993), 62.

### §3. THE PUBLIC PROSECUTION SERVICE

306. The Public Prosecution Service has a quasi-judicial, quasi-administrative function.<sup>1</sup> According to regulations relating to the organization of the courts, there is a Chief Public Prosecution Office attached to each Court of General Jurisdiction in every district, with a Chief and public prosecutors under his supervision (Article 30, Act 2004–5235). There shall also be a separate Chief Public Prosecutor at the level of the Appeal Courts after the Court of Appeal on facts and law shall be running (Article 40, Act 2004–5235).

All offenses are prosecuted in the name of the State. The Public Prosecution Office represents the executive branch of the government.<sup>2</sup>

The private prosecution<sup>3</sup> of offenses laid down by Article 344 of the repealed Criminal Procedure Code has not been incorporated into the New Code. For these crimes only the injured party could prosecute; the public prosecutor did not have any power.

The public prosecutor has the duty of making the necessary investigation in order to decide whether it is necessary to file a public prosecution, and if there are “factual findings which indicate that a crime has been committed” (suç işlendiği izlenimini veren hal; Article 160/1, CMK).



If the preliminary investigation, based on sufficient evidence, justifies the opening of a public prosecution, the public prosecutor submits an indictment to the competent court by making an accusation (Article 170, CMK). However, the case shall be opened only if the court accepts the indictment (Article 175/1, CMK).

According to the old law, the Minister of Justice was entitled to give an order to the Chief Public Prosecutor to initiate a public prosecution for a certain case (Article 148/3, CMUK), and the Provincial Governor (vali) would request the Public Prosecutor to initiate a public prosecution. This nevertheless did not oblige the Public Prosecutor to sue. These powers have not been included in the new Criminal Procedure Code.

1. M. Önder & S. Önder, *Savcıların Teskilat İçindeki Yerleri ve Görevleri* (Ankara: Yarı Açık Cezaevi Basımevi, 1968).
2. O. Tosun, *Türk Suç Muhakemesi Hukuku Dersleri, Muhakemenin Yürüyüşü*, Cilt 2 (İstanbul, 1976), 10.
3. Z. Özbulak, *Şahsi Dava ve Savcı*, AdD (1936), 565.

307. There is no Public Prosecution Office attached to the Court of Peace<sup>1</sup> (Article 188/2, CMK) and to the Court of General Jurisdiction since March 2011.

The Chief Public Prosecutions Office of the Organized Crime Courts (CMK 250) has special jurisdiction with respect to organized crime.

The Attorney General at the Court of Cassation brings cases at this court. He is not the superior of the other public prosecutors (*supra*, paragraph 299-II).

1. S. Keyman, *Ceza Muhakemesinde Savcılık* (Ankara, 1970), 216; O. Tosun, *Hazırlık Soruşturması* (İstanbul: Ümit Doğanay Armağanı, 1983), 91; C. Koyuncu, *Savcısının Takdir Yetkisi*, AdD (1985/4), 87.

308. According to the old Law, the public prosecutor had to be the leading person during the Preliminary Investigation (Article 154, repealed CMUK).<sup>1</sup> However, in reality, the police played the dominant role. The police learned of the offenses by denunciation or complaint of the victim and made all the necessary investigations. The Public Prosecution's Office was informed of these offenses when the police submitted their reports to the Prosecutor.<sup>2</sup> The 1992 amendment had the purpose of redressing this situation. The police had the obligation to report all offenses immediately (Article 154/2, repealed CMUK).

As this situation did not render control over the police investigation effective, the 2004 Legislature decided to put the judicial police under the orders of the public prosecutor. According to the new Criminal Procedure Code, the police have no authority to conduct any investigation unless there is a specific order of the Public Prosecutor (Article 160/1, CMK). The provision of the old Criminal Procedure Code, which entitled the police to investigate in urgent cases (Article 156, CMUK) does not feature in the new Code.

1. The Ministry of Justice issued an Ordinance on Jan. 12, 1978, ordering the Public Prosecutors to make the necessary investigations personally (Alikasıfoğlu & Doğu, *Son Değişiklikleriyle İçtihatlı Notlu Türk Ceza Kanunu ve Ceza Muhakemeleri Usulü Kanunu ile Polis Mevzuatı* (Ankara: Seçkin, 1983), 194). There are also as today regulations about personal investigation by the public prosecutor for organized crimes Art. 251, CMK) and for crimes committed by children (Art. 15, ÇKK).

2. Y.C. Biçer, Savcılarının Zabıta ile İlişkileri Üzerine, AdD (1971/12), 769–799.

#### §4. POLICE ORGANIZATION

309. The Police, in the broader sense of the word, are divided into two groups in Turkey: general police, and special police such as “traffic police” or “village look-outs” (köy korucuları).<sup>1</sup> General police consist of those who are under the supervision of the Ministry of Interior, that is, the “military police” (jandarma) and “watchmen” (bekçi) or security men.<sup>2</sup>

The military branch of the police is regulated by the Act on the Gendarmerie (1983). It functions in places where the “municipalities” have not yet been formed. Ninety per cent of the geography and 50% of population are served by the Gendarmes. This percentage increases in summer months, when the populations of sea-coast resorts increases significantly because of tourist influx.

Private security has been a new sector in Turkey since 2004 after the Act on Private Security Services No. 5188. There are 1270 security firms which give service to 46.688 private business establishments with 415.487 certified personnel.<sup>3</sup>

1. F. Yenisey, Kolluk Hukuku (İstanbul: Beta, 2009).
2. Kunter, Yenisey & Nuhoğlu, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 18 (İstanbul: Bası, Beta, 2010), 347. S. Bakıcı, Kolluk Mevzuatı (2007). Gündoğan, Koç & Özbülak, Kolluk Görev ve Yetkileri Mevzuatı (2007). A. Yıldız & S. Şimşek, Ceza Yargılama ve Kolluk Mevzuatı (2006).
3. C. Derdiman, Tüm Yönleriyle Özel Güvenlik Hukuku ve Kişi Hakları (İstanbul: Vedat Kitapçılık, 2010). A. Geleri, Önleyici Polislik (2009).

310. The police function in two capacities: as administrative police and as judicial police.<sup>1</sup>

In their duties as administrative police, they are under supervision of the Ministry of Interior.<sup>2</sup> In events when the police and gendarmerie are not able to suppress riots, the governor is entitled to ask for backup from the army (Act on the Administration of Cities, “İl İdaresi Kanunu” dated June 18, 1949, No. 5443, Article 11/d). In the exercise of their judicial duties, the police were under the supervision of the Public Prosecutor (Article 154, repealed CMUK). The Criminal Procedure Code has put them under the order of the Public Prosecutor (Articles 160/1, 164, CMK).<sup>3</sup> However, there are no special Criminal Police units (adli kolluk) within the police to make preliminary investigations. In Turkey, all the police forces are competent to fulfill judicial duties.<sup>4</sup>

1. F. Yenisey, Kolluk Hukuku (İstanbul: Beta, 2009).
2. There is a branch of Turkish Police that is affiliated with INTERPOL (N. Bilecen, Ceza Davalarında Usul ve Tatbikat, 4 (Ankara: Bası, Seçkin, 1982), 233.
3. Kunter, Yenisey & Nuhoğlu, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 18 (İstanbul: Bası, Beta, 2010), 353.
4. B. İçişleri, Polis 1991, Emniyet Genel Müdürlüğü Çalışmaları (Ankara: Araştırma Planlama, Koordinasyon Daire Başkanlığı, 1993), 21. F. Erem, Ceza Usul Hukuku, 5 (Ankara: Bası, 1978), 235.



311. In the Turkish police force, there are no “auxiliary officers of the public prosecutor” that occupy a special position between the police and the public prosecutor.<sup>1</sup> The current 2004 Court Organization Act does not include this office.

1. F. Yenisey, *Uygulanan ve Olması Gereken Ceza Muhakemesi Hukuku*, 3 (İstanbul: Bası, Beta, 1993), 66. While Western European codes were being adopted, the German Code of Criminal Procedure was used, but the German Code on the Organization of the Courts was not. The old Code, which was applied in Turkey until June 1, 2005, that regulated the organization of the courts, was a translation of the French Code. It did not contain the institution of “auxiliary officers of the public prosecutor.”

## **§5. ACCUSED AND CIVIL PARTY**

### **I. Introduction**

312. The rights of the suspect or the accused and the rights of the victim (*mağdur*) are the backbone of criminal procedure.<sup>1</sup> The focus on the rights of the suspect or accused was reflected by the December 1992 amendment of the Turkish Code of Penal Procedure. This approach has been broadened by the legislature in 2004.

The victim may intervene in the public prosecution. The public criminal prosecution (Article 160, CMK) is a criminal claim; the “Private Rights Claim” (*infra*, paragraph 317) was an independent private claim but has not been copied into the new Code.<sup>2</sup>

1. F. Yenisey & E. Cihan, *Menschenrechte im Strafverfahren* (Spain: AIDP National Report, 1993); T. Demirbaş, *Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2002), 463.
2. The previously existing right to commence an individual private prosecution (Art. 344, CMUK), or private rights claim (Art. 365, CMUK), was abolished by the Criminal Procedure Code.

## **II. Legal Status of the Suspect, Accused and the Defense Counsel**

313. The present Turkish Code of Criminal Procedure regulates the suspect’s rights during the preliminary investigation.<sup>1</sup> For example, the owner of the place or the possessor of the movable thing has the right to be present at searches and seizures (Article 120, CMK), and the lawyer of the person to be searched may not be prevented from being present during the search (Article 120/3, CMK). Suspects are entitled to have a defense lawyer present<sup>2</sup> during the police interview (Article 147, CMK) as well as to be interrogated by a judge and to have their lawyer present during the interrogation in cases of arrest (Article 91/6, CMK).<sup>3</sup>

The accused has a stronger position during the phase of inquiry in court. For example, he has the right to bring witnesses with him, the right to have a non-public hearing and the right of having the “last word” at the end of the inquiry.<sup>4</sup> Also, the trial is public, and the impartiality of the judge is guaranteed by the Code (Articles 22/1, 23, CMK).

The statute of December 1992 (Act No. 3842) aimed at giving the accused’s rights power with respect to Articles 5 and 6 of the ECHR.<sup>5</sup> In 1999, Act No. 4422<sup>6</sup>

brought in regulations on investigations related to profit-oriented organized crime (infra, paragraph 323). The Code of the repealed Penal Procedure did not contain any regulations relating to wire-tapping at that time. This Act has been repealed by the Criminal Procedure Code that included provisions on inception of telecommunications (Article 135, CMK).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 141. C. Altıparmak, *AIHS ve İç Hukukumuz Çerçevesinde Müdafilik Kurumumuz* (İstanbul Barosu Dergisi cilt: 79, sayı: 2005/5). E. Doğan, *Sanık Hakları ve Müdafilik* (İstanbul: Beta, 2007). F.S. Mahmutoglu & S. Dursun, *Türk Hukuku'nda Müdafinin Yasaklılık Halleri* (Ankara: Seçkin, 2004).
2. P. Ölçer, “New Rules Regarding the Pre-Trial Right to Assistance in Article 6 ECHR: Salduz v. Turkey and 72 Further Decisions,” in *Criminal Law in the Global Risk Society*, ed. F. Yenisey & U. Sieber (Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group, Volume T 1, İstanbul 2011), 374.
3. N. Centel, *Ceza Muhakemesi Hukukunda Müdafî* (İstanbul: Kazancı, 1984), 127; Erem & Toroslu, *Türk Ceza Hukuku, Özel Hükümler*, 3 (Ankara: Bası, 1978), 573; F. Erem, *Adalet Önünde Eşitlik* (YD 1981), 485.
4. S. Donay, *İnsan Hakları Açısından Sanığın Hakları ve Türk Hukuku* (İstanbul: İstanbul Üniversitesi, 1982), 28.
5. B. Öztürk, *Ceza Muhakemesi Hukukunda Koğuşurma Mecburiyeti, Hazırlık Soruşturması*, 9 (Ankara: Eylül Üniversitesi, 1991), 54.
6. E. Cihan, “50. Yılda Ceza Muhakemesi Sijesi Olarak Sanığın Durumu ve Sorgusu,” *IHF* (1984/1–4): 133.

314. According to Article 160, CMK, the public prosecutor has to conduct the investigations and give orders to the judicial police in order to search the factual truth as the basis of a fair trial. The police must report to the public prosecutor all arrests and interrogations of and interviews with the suspect (Article 90/5, CMK). The regulations concerning pre-trial detention (infra, paragraph 345) and interrogation by the police are joined with the provisions of Article 5 of the ECHR.

315. The new Penal Code does not include criminal responsibility for legal persons, but only a liability which can result in measures (Article 60, TCK) (supra, paragraph 245). However, special legislation provides some provisions that allow sanctioning by closing down some “legal persons,” such as associations and political parties. In such cases, the public prosecutor is entitled to prosecute the “legal persons.” Accordingly, natural persons and persons in special circumstances and the legal persons have criminal liability.<sup>1</sup>

1. M.E. Artuk, A. Gökcen & A. C. Yenidünya, *Ceza Hukuku Genel Hükümler, Birinci Kitap* (Ankara: Seçkin, 2002), 743; *İçel Suç Teorisi*, 2 (Beta, İstanbul: Kitap, İkinci Bası, 2000), 59.

316. Some high State officials and attorneys<sup>1</sup> have the privilege of being tried in a higher court. While prosecuting a case, the public prosecutor must acknowledge this privilege (supra, paragraph 92).

1. N. Kunter, “Ceza Tatbikatında Amme Vazifesi ve Amme Hizmeti Tefriki ve Avukatın Durumu,” *IHF* (1947): XIII/2, 755–772; F. Erem, *Avukatlar Hakkında Soruşturma İzni, ABD* (1977/2) 264–265.

### III. Legal Status of the Victim and Injured Person As Civil Party

317. The rights of the victim<sup>1</sup> as a civil party were not defined by the repealed Code. The victim of a criminal offense had only the right to intervene the prosecution as a civil party during criminal proceedings. However, the civil party was entitled to claim damages during the criminal proceedings as well. This provision is not included in the new Code.<sup>2</sup>

The new Penal Code includes a special subsection for the rights of the victim (mağdur) and person injured by the crime (suçtan zarar gören) (Articles 233–236, CMK).

The civil party has the right to report the crime (ihbar) or to file a complaint (şikayet) about the committed crime (Article 158, CMK). Turkish Law differentiates between the informant (denouncer), who is reporting a criminal offense, and the civil party, who is the victim of or is injured by the crime. The victim and the person reporting the crime have the right to give a testimony about the crime and shall be summoned by the prosecutor, judge or the court (Article 233/1, CMK).

The victim and the person who filed a complaint have the right to ask to collect evidence of the crime, to ask the public prosecutor to furnish them with copies of the documents included in the file of investigation (without tampering the rule of secrets of the investigation) and to ask a lawyer appointed by the Bar Association to assist them if they do not have an attorney. This lawyer has access to the file under Article 153, CMK and the right to oppose the decision of the public prosecutor to drop the case (Article 234/1-a, TCK).

1. F.A. Sokullu, *Viktimoloji* (İstanbul: Beta, 2007), M. Açıkgözoğlu, *Ceza Hukuku Açısından Teori ve Uygulamada Mağdur Kavramı* (Ankara: Adil Yayınevi, 2000). S. Akdemir, *Ceza Hukukunda Mağdurun Korunması* (İzmir: Anadolu Matbaacılık, 1988). A.E. Akyazan, *Mağdurun Kovuşturma Evresindeki Hakları Kapsamında Soru Yönelme Hakkı* (Ankara, 2009). V.O. Özbek, *Ceza Hukukunda Suçtan Doğan Mağduriyetin Giderilmesi* (Ankara: Seçkin Yayınevi, 1999).
2. Compensation would only be awarded if the accused was convicted and the proceedings would not be prolonged by the order of compensation. A judge could not impose a compensation order on the accused that exceeded the claim of the victim (or injured party). The legal position of the injured party was inadequately regulated by the repealed Turkish Code. Neither the injured party nor his counsel could attend the hearing of the accused carried out by the police or by the prosecutor. The injured party could file a “Private Claim” (private criminal prosecution) (infra, para. 320) for offenses enumerated under Art. 344 of the Criminal Procedure Code. He could intervene in the public claim of the prosecutor as a “civil party” (infra, para. 320) pursuant to Art. 365 of the Code of Penal Procedure (V.O. Özbek, *Ceza Hukukunda Suçtan Doğan Mağduriyetin Giderilmesi* (1999)).

318. “The Private Criminal Prosecution” (şahsi dava) was a formal complaint filed by the victim or his legal representative against the commission of a crime. This private prosecution was only possible for the offenses listed in the Code. The civil party claim could demand the punishment of the accused or compensation for the loss he had suffered as a result of the crime (Article 344, CMUK).<sup>1</sup>

The new Penal Code has abolished this legal institution. There are other means of achieving compensation for the losses of the victim within the new Criminal Justice System, such as mediation (Article 253, CMK) (supra, paragraph 274). For this

reason, other ways of asking compensation during a pending criminal trial have not been included.

1. The additional requirements (having suffered a loss and having reported the crime) are not included in the new Code.

319. The Intervention of the Public Claim (kamu davasına katılma) as an injured party is only possible during the inquiry in the court, and not during the preliminary investigation, as the intervention requires the existence of an official claim (Article 237, CMK).<sup>1</sup>

1. S. Onursal, Kamu Davasına Müdahale (İstanbul, 1968). I. Şahbaz, Ceza Yargılamasında Katılanın Temyiz Duruşmasında Yer Almaması (Türkiye Barolar Birliği Dergisi sayı 51 Mart & Nisan 2004).

320. Private rights claim. Every offense is an illegal act (tort, haksız fiil). Furthermore, the wrongdoer bears civil responsibility and may be sued through a private claim. However, the Criminal Procedure Code does not allow the civil party to claim compensation during a pending criminal case. Under the previous legislation, the injured party had the right to claim compensation as well.

## Chapter 2. Powers of the State within the Criminal Investigation

### §1. INTRODUCTION

321. The Public Prosecutor has the duty to investigate crimes (Article 160, CMK). There is an obligation to investigate if the Prosecution Service obtains information supported by facts. If the results of the investigation show that there is sufficient evidence, he must prosecute (Article 170/2). “Prosecutorial discretion” (kamu davasını açmada takdir yetkisi) is a new concept of the new Code (Article 171, CMK).<sup>1</sup>

A police officer investigates cases only when the prosecutor has ordered him to do so (Article 161/1, CMK).<sup>2</sup>

The duties and powers of the Public Prosecutor and Judicial Police begin at the same time as the preliminary inquiry, and they end with its closing. However, when an arrest has been made, a judge must decide on the limitation of individual liberty. Although the Public Prosecutor is in charge during the preliminary investigation, all investigative powers revert to the court when he submits the indictment to the court.

Before the 2004 legislation, police and prosecution powers to investigate offenders caught in the act or in flagrante delicto were broader. The new Criminal Procedure Code does not include special powers for such crimes.

1. Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (İstanbul: Bası, Beta, 2010), 724.
2. Çalışkur, *Suç Koğuşturması ve Teknik Yazılar*, İstanbul (1982), 41. According to the repealed legislation, exceptionally, the police officer had to undertake a prompt investigation, which he could not delay, and which was not contingent on any order from Prosecution Office (Art. 156, CMUK). This issue is not regulated in the Criminal Procedure Code, but still happens in practice.

### §2. COVERT POLICING METHODS

322. Interception of correspondence through telecommunication. Covert policing methods and operations are known and used in Turkey. In 1999 Act No. 4422 introduced regulations related to wire-tapping when the repealed Code on Criminal Procedure did not contain any ruling on this subject. The Criminal Procedure Code includes now provisions for interception of correspondence through telecommunication, the use of undercover agents and surveillance (infra, paragraph 323).<sup>1</sup>

I - Location, listening and recording of correspondence. The Judge of the Court of Peace or, in cases of peril in delay, the public prosecutor, may decide to locate, listen to or record the correspondence through telecommunication or to evaluate the information about the signals of the suspect or the accused, if during an investigation or prosecution conducted in relation to a crime there are strong grounds of suspicion indicating that the crime has been committed and there is no other possibility to obtain evidence. No one may listen and record the communication through telecommunication of another person except under the principles and procedures as determined in this article.<sup>2</sup>

In the aforementioned cases of peril in delay, the public prosecutor shall submit his decision immediately to the judge for his approval and the judge shall make a decision within 24 hours. In cases where the duration expires or the judge decides the opposite way, the measure shall be lifted by the public prosecutor immediately (Article 135/1, CMK; as amended by Act 2005–5353).

The correspondence of the suspect or the accused with individuals who enjoy the privilege of refraining from testimony as a witness shall not be recorded. In cases where this circumstance is revealed after the recording has been conducted, the conducted recordings shall be destroyed immediately (Article 135/2, CMK, as amended by Act 2005–5353).

The decision that shall be rendered according to the provisions of CMK 135/1 shall include the nature of the charged crime, the identity of the individual, upon whom the measure is going to be applied, the nature of the tool of communication, the number of the telephone, or the code that makes it possible to identify the connection of the communication, the nature of the measure, its extent and its duration. The decision of the measure may be given for maximum duration of three months; this period may be extended once. However, for crimes committed within the activities of a criminal organization, the judge may decide to extend the period several times, each time for no longer than one month, if deemed necessary (Article 135/3, CMK) (as amended by Act 2005–5353).

The location of a mobile phone may be established upon the decision of the judge, or in cases of peril in delay, by the decision of the public prosecutor, in order to be able to apprehend the suspect or the accused. The decision related to this matter shall include the number of the mobile phone and the duration of the interaction of the establishment. The interaction of establishment shall be conducted for maximum of three months; this period may be extended one more time (Article 135/4, CMK).

Decisions rendered and interactions conducted according to the provisions of this article shall be kept confidential while the measure is pending.

The provisions contained in this article related to listening, recording and evaluating the information about the signals shall only be applicable for the crimes as listed below:

- (a) The following crimes in the Turkish Criminal Code; smuggling with migrants and human trafficking (Articles 79, 80), killing with intent (Articles 81–83), torture (Articles 94–95), sexual assault (Article 102, except for subsection 1), sexual abuse of children (Article 103), producing and trading with narcotic or stimulating substances (Article 188), forgery in money (Article 197), forming an organization in order to commit crimes (Article 220, except for subsections 2, 7 and 8), prostitution (Article 227, subsection 3) (as amended by Act No. 5353), cheating in bidding (Article 235), bribery (Article 252), laundering of values stemming from crime (Article 282), armed criminal organization (Article 314) or supplying such organizations with weapons (Article 315), crimes against the secrets of the State and spying (Articles 328, 329, 330, 331, 333, 334, 335, 336, 337).
- (b) Smuggling with guns, as defined in Act on Guns and Knives and other Tools, dated July 10, 1953, No. 6136, (Article 12).

- (c) The crime of embezzlement as defined in Act on Banks, Article 22, subsections (3) and (4).
- (d) Crimes as defined in Combating Smuggling Act, which carry imprisonment as punishment.
- (e) Crimes as defined in Act on Protection of Cultural and Natural Substances, Articles 68 and 74 (Article 135/6, CMK).

II - Office and domicile of a defense attorney. In connection with investigations related to the suspect or the accused, Article 135 shall not be applied for telecommunication devices in the office, dwelling and domicile of a defense counsel (Article 136, CMK).

III - Enforcement of decisions, destroying the contents of the communication. The decision rendered according to Article 135 shall be enforced by the officials of the institutions that provide the service of telecommunication immediately, in cases where it is requested in writing by the public prosecutor or by the judicial police official who has been empowered by the public prosecutor to locate, listen to or record the correspondence through telecommunication and to implant the relevant devices; if this request is not fulfilled, use of force is permitted. The beginning and ending date and time of the interaction and the identity of the individual who is enforcing the decision shall be put into the records (Article 137/1, CMK).

The recordings that are produced according to Article 135 shall be decoded by individuals who are been appointed by the public prosecutor and shall be transcribed into written form. Recordings in a foreign language shall be translated by a translator into the Turkish language.

In cases where there is a decision rendered about not prosecuting the suspect, or where the judge does not give his approval according to the first subsection of Article 135, the application shall be terminated immediately by the public prosecutor. In such cases the recordings shall be destroyed within 10 days under the supervision of the public prosecutor and this event shall be recorded into the files.

The office of the public prosecution shall inform in written form the related individual within 15 days the latest, beginning from the date of the end of the investigation phase, about the reasons, context, duration and the outcomes of the measure, if the recordings related to locating and listening have been destroyed (Article 137/4, CMK).

IV - Coincidental evidence. If a search or seizure reveals an evidence that is not connected to the current investigation or prosecution, but there are reasonable grounds of suspicion that another criminal offense was committed, those items shall be immediately secured and the public prosecutor shall be informed there of.

If during the interception of correspondence through telecommunication, a piece of evidence has been obtained that is not related to the ongoing investigation or prosecution, but raises the suspicion that a crime that is listed in Article 135/6 has been committed, this evidence shall be secured and this circumstance shall be immediately notified to the office of Public Prosecution (Article 138, CMK).

V - Blocking of Internet Access. Act on Regulation of Internet Publications and Combating Crimes Committed by Publications on Internet, dated May 4, 2007, No. 5651, aims to rule the obligations and responsibilities of internet service providers.



In cases where there is sufficient suspicion that crimes listed in Article 8 of this Act has been committed, a judge may order a restriction of internet access.<sup>3</sup>

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7. (İstanbul: Bası, Beta, 2010), 404.
2. N. Meran, *Adli ve Önleme Amaçlı İletişimin Denetlenmesi (Telefon Dinleme, SMS, MMS, e-mail İzleme), Gizli Soruşturmacı, Teknik Takip* (Ankara: Adalet Yayınevi, 2009).
3. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 425.

323. Undercover investigator and surveillance. I - Undercover Investigator. As long as it is not a provocation to crime, the Court of Cassation tolerates covert police methods (Article 139, CMK).<sup>1</sup> Pseudo-buying of narcotics (a drug-sting operation), for example, is allowed if the seller has already committed such crimes before. But if a person would be committing this crime for the first time upon the offer of the secret agent, such a method is illegal because it amounts to entrapment.<sup>2</sup> In cases where there are strong indications of suspicion that the crime under investigation had been committed, and if there are no other available means of obtaining evidence, the judge, and in cases of peril in delay, the public prosecutor, may decide to empower a public servant to act as an undercover investigator (Article 139/1, CMK).

The identity of the investigator may be changed. He is entitled to make legal interactions with this identity. In cases where it is necessary to produce and maintain the identity, the needed documents may be prepared, altered and used.

The decision related to the appointment of the undercover investigator and other documents shall be secured by the related office of the Public Prosecution. Even after the end of his mission, the identity of the undercover investigator shall be kept a secret.

The undercover agent is obliged to conduct every kind of investigation related to the criminal organization, the activities for which he has been appointed, as well as investigations related to crimes committed within the activities of this criminal organization.

The investigator shall not commit a crime while fulfilling his duty and shall not be held responsible for crimes being committed by the criminal organization, for which he has been appointed.

Personal information obtained through appointing an investigator shall not be used except for during the criminal investigation or prosecution for which he has been appointed.

The provisions of this article shall only be applicable for the crimes listed below:

- (a) The following crimes at the Turkish Criminal Code; producing and trading with narcotic or stimulating substances (Article 188), forming an organization in order to commit crimes (Article 220, except for subsections 2, 7 and 8), armed organizations (Article 314) or supplying weapons for such organizations (Article 315).
- (b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Article 12).
- (c) Crimes as defined in the Act on Protection of Cultural and Natural Substances, Articles 68 and 74 (Article 139/7, CMK).



II - Surveillance with technical means. If there are strong indications of suspicion that crimes listed below have been committed, and if there is no other available means of obtaining evidence, the activities of the suspect or the accused, conducted in fields open to the public and his working places, may be subject to surveillance by technical means, including voice and image recording:

- (a) Crimes regulated in the Turkish Criminal Code; smuggling migrants and human trafficking (Articles 79, 80), killing with intent (Article 81, 82, 83), trading in narcotic or stimulating substances (Article 188), forgery in money (Article 197), forming an organization with the aim of committing crimes (Article 220, except for subsections 2, 7 and 8), prostitution (Article 227, subsection 3) (as amended by Act No. 5353), cheating in bidding (Article 235), bribery (Article 252), laundering of property values stemming from crime (Article 282), armed organization (Article 314), or providing arms for such organizations (Article 315), crimes against the secrets of the State and spying (Articles 328, 329, 330, 331, 333, 334, 335, 336, 337).
- (b) Smuggling weapons as defined in the Act on Fire Arms and Knives as well as Other Tools (Article 12).
- (c) Crimes as defined in Combating Smuggling Act that require the punishment of imprisonment.
- (d) Crimes as defined in the Act on Protection of Cultural and Natural Resources, Articles 68 and 74 (Article 140/1, CMK).

Surveillance with technical means shall be ordered by judge, and in cases where there is peril in delay, by the public prosecutor.<sup>3</sup> The decisions rendered by the public prosecutor shall be submitted for the approval of the judge within 24 hours.

The decision related to the surveillances with technical means may be rendered for a maximum of four weeks. This time limit may be extended once, if needed. However, the judge is entitled to extend this period several times for not more than one week each, related to the crimes committed within the activities of an organization, if needed.

The evidence obtained shall only be used for investigations or prosecutions of the crimes listed above, and shall not be used outside of this scope; and the evidence shall be immediately destroyed under the supervision of the public prosecutor, if it is not useful for the criminal prosecution.

The provisions of this article shall not be applied within the dwelling of an individual (Article 140/5, CMK).

1. A.E. Akyazan, 5271 Sayılı CMK'da Yeni Müesseseler: Gizli Soruşturmacı ve Teknik Araçlarla İzleme (Türkiye Barolar Birliği Dergisi sayı 62, Ocak & Şubat 2006). V.O. Özbek, Organize Suçlulukla Mücadelede Kullanılan Gizli Görevlinin Görevin Gerektirdiği Suçlar Bakımından Cezalandırılabilirliği (Ankara: Yetkin, 2003). N. Centel & H. Zafer, Ceza Muhakemesi Hukuku, 7 (İstanbul: Bası, Beta, 2010), 416.
2. F.S. Akıncı, Polis, Toplumsal Bir Kurum Olarak Gelişmesi (İstanbul: Polis Alt Kültürü ve İnsan Hakları, 1990), 168. Since 1999 and even more so since 2005, the Turkish Police have legal tools to combat organized crime. These include wire tapping (Art. 135, CMK; repealed ÇASÖMK Art. 2) and surveillance (Art. 140, CMK) and the use of undercover agents (Art. 139, CMK). Not included are the criminal investigation of registers and computer data, which was recognized by repealed ÇASÖMK Art. 4, but was not included in the new CMK. If

there are strong indications that assets belonging to individuals who are under suspicion of being involved in organized crime, have also been involved, then many kinds of movable and immovable goods may be seized (Art. 138, CMK).

3. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 418.

### §3. THE POWERS TO STOP AND SEARCH

#### I. The Powers to Stop and Check

324. There is no special provision in the Code of Penal Procedure that gives the police the power to stop and check people.<sup>1</sup> However, there is a provision in the Police Act (Article 4A, PVSK) that permits the police to stop and ask someone for identification (*durdurma ve kimlik sorma*). If the person is without identification or there is suspicion that a false identity is being used, the police have the power to arrest this person until his identity is cleared up or to detain him for up to 24 hours.

1. Eryılmaz, M. Bedri, *Türk ve İngiliz Hukukunda ve Uygulamasında Durdurma ve Arama* (Ankara, Seçkin Yayınları, 2003).

325. The power to stop and ask for identification arises when there are reasons to believe that a crime has been committed or that a danger must be averted (administrative or judicial police function).

In cases of alleged breach of duty by the police, if they are acting in an administrative capacity, such as regulating traffic on a highway, they are subject to the special procedure (*supra*, paragraph 174) applied to State officials. However, if the police duty was related to a judicial police function, such as arresting a suspect, then the Public Prosecutor prosecutes them *ex officio*.

#### II. The Powers to Search Persons, to Perform a Bodily Examination, and to Inspect the Crime Scene

326. Search and seizure law is closely related to the right to privacy and to family life.<sup>1</sup> Amendments to the Constitution by Act 4709 require a written court order, or in urgent cases a written order of the superior, authorized by an Act (AY “2001–4709,” Articles 20 and 21). The grounds on which to issue a search warrant are listed in the Constitution. The written order of the superior must be approved by a judge within 24 hours.

1. S. Aksoy, *Önleme ve Koruma Tedbiri Olarak Arama* (Ankara: Seçkin, 2007). V.O. Özbek, *Ceza Muhakemesi Hukukunda Koruma Tedbiri Olarak Arama* (Ankara: Seçkin Yayınevi, 1999).

327. Preventive search Preventive searches (*önleme araması*) are governed by the Police Act (Article 9 PVSK as amended in “2002–4771” and in “2007–5681”).<sup>1</sup> Before conducting the preventive search the decision of the judge must be obtained; in case of emergency, the superior administrative authority has jurisdiction to give a written order for a preventive search. This does not include the chief of the police; only the governor of a city is entitled to give orders to take such steps.

Searching individuals and their luggage in airports is an exception and is considered a preventive measure necessary to avert danger at airports and borders (Act No. 5442 dated 1949, added Article 2 on August 29, 1996, by Act No. 4178).

Search during an arrest is another exception. The police may conduct a search of the individual for the sake of his or her own protection.<sup>2</sup>

1. The governor was entitled to give orders to the police to conduct preventive searches in necessary cases when the public order or rights of individuals were at risk (Art. 9/1, PVSK “1980–2261”). Since 1985, the police have had the power to search persons in order to prevent harm to others. According to an amendment to Art. 9 of the Police Act, a highly ranked police official may order a search of the person if there are facts that indicate that danger exists or that violent acts will be committed. However, after the 2001 amendment to Art. 20 of the Constitution by Act Number 4709, the Police Act is restricted. Today, any search without a court order or, in urgent cases, a written order of the provincial governor, is illegal (Art. 9, PVSK “2002–4771”).
2. If offender were caught in the act, the repealed Code No. 3005 allowed the police to carry out searches. This power to search during arrest is now regulated at the Search Regulations for the Police (Art. 6/3, Arama Yönetmeliği).

328. Physical bodily examination, molecular-genetic tests and related investigations.

#### A. Physical Bodily Examination

329.

- (1) Mental examination of the suspect. When an expert has recommended that the accused be given a mental examination during the preliminary investigation, the Justice of the Peace (and, where the proceedings are more advanced, the competent court) may order the accused to be placed under examination in an official institution. A warrant against drug and alcohol addicts can be issued at any stage of the proceedings.  
Where the accused has no legal representation, legal representation must be appointed for him by the Court (Article 74/2, CMK).<sup>1</sup>
- (2) Physical bodily examination of the suspect or the accused, and taking samples.  
In order to obtain evidence of a committed crime, the judge or the trial court by its own motion, or upon the request of the public prosecutor or the victim; and in cases where there is peril in delay, the public prosecutor, may issue an order to conduct an internal physical bodily examination on the suspect or the accused, or to take sample from his body, such as blood or alike biological samples, as well as hair, saliva, nail.<sup>2</sup> It is also possible to utilize these provisions after the suspect has been officially accused and got into the legal status of an accused. The decision of the public prosecutor shall be submitted to the approval of the judge or the court within 24 hours. The judge or the court shall issue its decision within 24 hours. Unapproved decisions shall be invalid, and evidence so obtained shall not be used (Article 75/1, CMK).

- (3) The internal physical bodily examination or an intervention in order to take blood or similar biological samples from the body may only be conducted, if it shall not create a danger of harm to the subject's health.
- (4) The internal physical bodily examination or taking blood or similar biological samples from the body shall only be undertaken by a medical doctor or by another member of medical profession.
- (5) Any examination of the genital organs or anus shall be deemed as internal physical bodily examination.
- (6) There shall be no internal physical bodily examination undertaken related to crimes that carry imprisonment of less than two years; in these instances, it is also forbidden to take blood or similar biological samples from the body, as well as hair, saliva, nail.
- (7) The decisions ruled according to this article by a judge or the court may be subject to a motion of opposition.
- (8) Alcohol tests and taking blood samples according to special laws shall not be prevented by this regulation in Police Act.
- (9) The physical bodily examination on, and taking samples from third parties. The judge or the court upon the request of the public prosecutor or on their own motion or, in cases of peril in delay, the public prosecutor, may decide to conduct external or internal physical bodily examination on the victim or taking blood or similar biological samples from the body of the victim, as well as hair, saliva, nail in order to obtain evidence of a crime, so long as this shall not create a danger to the subject's health and there is no surgical intervention. The decision of the public prosecutor shall be forwarded to the judge or the court for approval within 24 hours. The judge or the court shall give their decision within 24 hours after it has been submitted to him. This period is not applicable for other investigative measures that are submitted for approval. Unapproved decisions shall be invalid, and evidence so obtained shall not be used (Article 76/1, CMK).

In cases where there is the consent of the victim, obtaining a decision according to the rules as mentioned in the subparagraph one is not required.

Where there is a need to determine the parentage of a child, a decision according to the rules in subparagraph one is required, in order to conduct this research.

The witness may refrain from bodily examination or giving body samples under the grounds of refraining from testimony. If the individual is a child or mentally ill, the decision to refrain shall be made by his legal representative. In cases where the child or the mentally ill person is capable of understanding the legal meaning and consequences of taking the witness-stand, his view on the subject shall also be asked. In cases where the legal representative is the suspect or accused, then the judge must make the decision. However, evidence of the crime obtained in this way shall not be used as evidence in the further stages of the lawsuit unless the legal representative who is not under criminal charges as a suspect or an accused gives his consent.

Judge or court decisions rendered under this provision may be subject to opposition.

Upon her request and if it is possible, the physical bodily examination of a female shall be conducted by a female medical doctor.

1. Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (İstanbul: Bası, Beta, 2010), 1569.
2. F.S. Mahmutoglu, “Beden Muayenesi ve Vücuttan Örnek Alınması,” in *Criminal Law in the Global Risk Society*, ed. F. Yenisey & U. Sieber (Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group, Volume T 1, Istanbul 2011), 393.

#### B. Molecular-genetic Tests

330. Molecular-genetic tests shall be conducted on the material obtained through interactions described in Articles 75 and 76, only if it is necessary to determine the family connections or to determine if those body samples are related to the suspect or to the accused or to the victim. Tests that are outside of the scope of these aims are forbidden (Article 78/1, CMK).<sup>1</sup>

Permitted tests mentioned in paragraph one may also be conducted on other body parts, that had been found and seized, and their owner’s identity is not known. The second sentence of the paragraph one shall apply accordingly.

Molecular genetic-tests according to Article 78 shall only be conducted upon a judge’s order. The ruling shall also contain the name of the expert appointed to conduct the test (Article 79, CMK).

Expert may be selected from the officially appointed experts or from the individuals who are required to act as an expert or from officials who are not attached to the investigating or prosecuting authorities, or from officials belonging to an objectively separate structural branch of the investigating or prosecuting authority. These individuals are obliged to take all suitable organizational and technical precautions in order to prevent illegal conduct of molecular-genetic tests and so that unauthorized third parties may not obtain knowledge about the outcomes. The items subject to test shall be delivered to the experts without labeling them with the name, family name, address and date of birth of the person from whom the items originate.

The outcome of the analysis on samples obtained according to Articles 75, 76 and 78 are considered as personal data and shall not be used for another purpose. The individuals, who have access to the files, shall not disclose the information to unauthorized persons (Article 80/1, CMK).

As soon as the prosecution ends (the time limit for opposing the decision to drop the prosecution is exhausted, or the opposition has been overturned, or the court gives a final judgment on acquittal, or a judgment is rendered on not punishing the accused and those judgments are made final), the samples and information shall be destroyed immediately in the presence of the public prosecutor. This destruction shall be documented and its document shall be kept in the file.

1. V.O. Özbek, *Ceza Muhakemesi Hukukunda DNA Analizi*; <www.hukukinet.net 2005>.

## C. Fixing the Identity in a Physical Way

331. If the committed crime requires a maximum prison term of two years or a more severe punishment, upon the order of the public prosecutor, a picture shall be taken, measurement of the body shall be made, fingerprints or palm prints shall be taken, special marks on the body, that would enable the recognition of the suspect, shall be made or the accused shall be registered. A voice sample and a video film shall be produced as well, and inserted into the file where the interactions related to the investigation and prosecution are kept (Article 81, CMK).

In cases where the prosecution ends (time limit for opposing the decision to drop the prosecution is exhausted, or the opposition has been overturned, or the court gives a final judgment on acquittal or a judgment is rendered on not punishing the accused and those judgments are made final), related records shall be removed from the files and be destroyed in the presence of the public prosecutor and this action shall be documented.

## D. Judicial Inspection of the Crime Scene

332. Judicial inspection of the crime scene (keşif) shall be conducted by the trial court or by member of the court who was delegated to accomplish a certain interaction, or by the court that has been asked to perform an interaction by a letter of rogatory, and if there is peril in delay, by the public prosecutor (Article 83, CMK). The minutes of the judicial inspection shall contain information about the existing facts and the absence of the evidence of the crime that ought to be expected to exist according to the special circumstances of the conduct.

The suspect, the accused and the victim and their defense counsel and representative may be present during the judicial inspection (Article 84, CMK).

In the event that a witness or expert is unable to be present at the trial, or it would be difficult for him to appear because he is living a far distance away, the provisions of CMK 180, first paragraph about delegating another court shall apply during his hearing. If the presence of the suspect or the accused may prevent one of the witnesses from testifying truthfully, it may be ruled that the suspect or the accused shall be removed from the courtroom during this interaction.

The individuals who have the right to be present during this interaction shall be informed of the date of the interaction in advance of the due day. If the suspect or the accused is in custody, the trial court may decide that he may be present during the judicial inspection only if it is necessary. This includes the case where the court consists of a single judge.

## E. Showing the Crime Scene

333. The public prosecutor is entitled to conduct a crime scene visit with the suspect, if the suspect has already given some information about the crime of which he is suspected.<sup>1</sup> The chief of the judicial police is also empowered to conduct a

crime scene visit with the suspect, if the crime is related to a crime that is mentioned in Article 250 Subsection 1 (Article 85, CMK).

The defense counsel may also be present during the crime scene visit by the suspect, if this does not delay the investigation. Crime scene visit by the suspect shall be documented as regulated in Article 169, CMK.

1. A. Karagülmez, Yer Gösterme İşlemi ve 5271 Sayılı Ceza Muhakemesi Kanunu'nun 85. Maddesinin İncelenmesi (Türkiye Barolar Birliği Dergisi, sayfa 62, Mart & Nisan 2005).

#### §4. THE POWERS OF ENTRY, SEARCH AND SEIZURE

##### I. The Powers of Entry and Search

334. Judicial search. When there are reasonable grounds for suspecting that the person is carrying or hiding evidence of an offense or that he has committed a crime, he and his premises may be searched (Article 116, CMK).

Consent search is forbidden. Even if an occupant grants permission, the police are not entitled to enter the house and conduct a search. On November 23, 2003, the 10th Chamber of the High Administrative Court held that the right to privacy cannot be waived by the individual, and consequently consent to a search is not valid.

335. Search conducted in a domicile. Only a court may order entry into a domicile. Entering the domicile of the suspect and conducting a search therein is regulated by two factors: first, to arrest the suspect, and secondly to seize evidence (Article 116, CMK). Search at night is exceptional.

The Code provides the limited power of entry to search the domiciles of persons who are not under suspicion (Article 117, CMK).

If there are reasonable grounds to believe that the person to be arrested or the evidence to be seized are in the domicile, then the police are entitled to enter, after a written order of the public prosecutor or judge. In this case the order of the public prosecutor must be submitted for subsequent approval to the justice of peace. This limitation does not apply if the suspect is arrested in the domicile of a third party or if he enters it during hot pursuit (Article 118/2, CMK).<sup>1</sup>

However, if the offender is caught in the act, the police have a duty to enter the domicile (Articles 13 and 20, PVSK).

Formerly, universities were considered immune from police entry. In 1973, however, there was an amendment to the Police Act that gave the Police the right to enter university buildings if there was a report of crimes being committed there (Article 20 PVSK).

1. T.T. Yüce, Ceza Muhakemesi Hukukunda Hukuk Devleti Esasları (Erzurum, 1968); A. Danışman, Ceza Hukuku Açısından Özel Hayatın Korunması (Konya, 1991).

336. The power to enter public buildings and search therein is larger. However, at night this power is limited. There is an exception to the rule only if the offender is caught in the act, or if entry is necessary to recapture an escaped arrestee or prisoner (Article 118/2, CMK).



337. A written report is to be made upon entry into a domicile or other premises. The report should provide the place and time of the entry if seizure was made and a detailed description of the seized items (Article 121, CMK).

## II. The Powers of Seizure

338. Two kinds of goods may be seized: anything that can serve as evidence, and goods to be confiscated (e.g., weapons that were used in committing the offense, or goods that are prohibited, like illegal drugs).<sup>1</sup> If the possessor gives up such goods with his consent, they will be kept in custody (*muhafaza altına alma*). If there is no consent, the State has the power to seize them through use of adequate force (*zapt*) (Article 123, CMK).

1. H. Hakeri, *Yeni Ceza Muhakemesi Kanunu'na Göre El Koyma Koruma Tedbiri* (Eylül & Ekim: Türkiye Barolar Birliği Dergisi, 2005).

339. Some items are exempted from seizure. The State is not empowered to seize goods that are in possession of persons who have the right to withhold information about such goods and testimony according to Articles 45 and 46 of the Code of Penal Procedure (Article 126, CMK). Communications between defense counsel and client (Article 154, CMK) and printing machines used by the press (Article 30, AY) are also exempt from seizure.

Only a judge is entitled to order the seizure of goods. During the preliminary investigation, a Justice of the Peace is entitled to give an order for seizure of goods. After prosecution has begun (i.e., the approval of indictment according Article 175, CMK), the court decides. If the prosecutor or his assistants have seized the items without a court order, the judicial approval must have been obtained within 24 hours (before 2001 it was three days) (Article 127/3, CMK). If the ruling of the judge cannot be obtained within 48 hours, the seizure becomes null and void (Articles 20, 21, AY).

## §5. THE POWERS OF ARREST

340. An arrest (*yakalama*) deprives the accused of his personal freedom when he is caught red-handed.<sup>1</sup> It can be made without a written order of a court.<sup>2</sup> Turkish law sharply distinguishes between “arrest” and “pre-trial detention” (*tutuklama*). Pre-trial detention always requires a written order of a magistrate.<sup>3</sup>

The powers of arrest are now regulated by Article 90, CMK which contains quite detailed provisions. Any citizen may arrest an offender during the commission of the crime, or during hot pursuit, if in the meantime the offender might escape or not be identifiable (Article 90/1, CMK).

Additionally, the public prosecutor and the police have the power to order an arrest in cases where the judge might have given an order of pre-trial detention and there is a danger of undue delay in issuing such an order by a judge (Article 90/2, CMK).



1. M.B. Eryılmaz, Arrest and Detention Powers in Turkish and English Law and Practice in the Light of the European Convention on Human Rights (Boston: Martinus Nijhoff Publishing, 1999). A. Karagülmez, Tutuklama Nedenleri ve Tutuklama İsteminin Reddi Kararına İtiraz Konusunda 5271 Sayılı CMK'nın İncelenmesi (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 120, Mayıs & Haziran 2005). I. Şahbaz, Avrupa İnsan Hakları Sözleşmesinde Kişi Özgürlüğü ve Güvenliği (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 163, Mayıs & Haziran 2005).
2. N. Centel, Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama (İstanbul: Beta, 1992), 17; O. Apaydın, "Kişi Güvenliğine İlişkin Sorunlar, Habeas Corpus," İBD (1980/54): 12.
3. N. Centel & H. Zafer, Ceza Muhakemesi Hukuku, 7 (İstanbul: Bası, Beta, 2010), 316.

341. Police custody. If the arrest is related to a crime while the offender was committing it, the arrested person will be brought to a Justice of the Peace within 24 hours for interrogation. He will be immediately taken to the appropriate court if a prosecution has already been instituted (Article 91/1, CMK).

The time necessary to bring him before the judge is not included in the twenty-four-hour requirement, but it may not exceed 12 hours (Article 91/1, CMK, as amended in 2005–5353). The 24-hour period of deprivation of liberty for crimes committed by three or more persons may be prolonged up to four days by a written order of the public prosecutor if the collection of evidence becomes difficult. However, the prolongation shall be given for one day each time and may not exceed four days altogether (Article 91/3, CMK).

The suspect must be informed of his rights by the police during the arrest and if he requests so, he has the right to have his counsel present during the interrogation (Article 150/1, CMK). For children and for suspects of crimes carrying imprisonment at the lower level of more than five years, there is an obligation to appoint a lawyer if the suspect does not already have one (Article 150/2, and 3).

The Justice of the Peace interrogates and can release the arrested person if he or she determines that pre-trial detention was not necessary or if the reasons for arrest no longer exist. There is a requirement that an appointed defense lawyer be present during this interrogation (Article 91/6, CMK).

342. A remedy against arrest (Article 91/4, CMK) was introduced in 1992: the arrested person or his lawyer, his legal representative, his first and second degree relatives or his spouse have the right to demand a decision from the Justice of the Peace against the written order from the public prosecutor relating to the prolongation of the arrest period or on the legality of the arrest as such.

The Justice of the Peace reviews the file and gives his decision immediately or, at the latest, within 24 hours. He may reject the application if he considers the arrest or prolongation period to be justified, or he may order that the arrested person be brought to the public prosecutor together with the documents relating to his investigation (Article 91/4, CMK).

If the arrest (or the pre-trial detention) was unconstitutional, the arrested individual may claim damages under Article 141, CMK.<sup>1</sup> The State is responsible for compensation, but it may recover the cost from the officer who had conducted the illegal arrest according the rules of a civil claim now (AY "2001–4709," Article 19).

1. A. Parlar & F. Yıldırım, Açıklamalı – İçtihatlı Silahlı Çeteler ve Terör Suçları ile Haksız Yakalama ve Tutuklamaya İlişkin Tazminat Davaları (2001).

343. If the arrested person is to be released because the time limit on the arrest has run out or because the Justice of Peace has ordered his release, the same person may not be arrested for the same actions again, unless there is new and sufficient evidence against him. To arrest the suspect again, the public prosecutor must provide a written order (Article 91/5, CMK).

#### §6. JUDICIAL CONTROL, SECURITY DEPOSIT AND PRE-TRIAL DETENTION

##### I. Judicial Control and Security Deposit

344. Judicial control and security deposit. The Turkish Criminal Procedure Code has initiated a new legal barrier to deprivation of liberty through pre-trial arrest in the form of judicial control and security deposit (IV).

I - Judicial Control. In cases where the grounds as regulated in Article 100 are present, which would have resulted in arrest, a decision to put the suspect under judicial control may be rendered, instead of arresting him, if the conducted investigation is about a crime that carries a punishment of imprisonment of maximum three years or less (Article 109/1, CMK).<sup>1</sup>

Also in cases where the Code regulates a restriction of pre-trial arrest, the provisions of judicial control may still be applicable.

Judicial control includes one or more obligations inflicted on the suspect as stated below:

- (a) to not travel outside of the country;
- (b) to regularly apply to places under periods that will be specified by the judge;
- (c) to obey the calls of authorities or persons specified by the judge and, when necessary, fulfilling the measures of control with respect to the professional activities or issues of continuing education;
- (d) not being able to drive any or some of the vehicles and, when necessary, leaving his driving license to the office of registry in return for a receipt;
- (e) obeying and accepting the measures of medical diligence, treatment or examination, including being hospitalized for purification from dependency on narcotics, stimulating or evaporating substances and alcohol;
- (f) to deposit an amount of the money as a safeguard, which shall be determined by the judge upon the request of the public prosecutor, after taking into account the financial conditions of the suspect, and whether it shall be paid by more than one installments and the period of payment;
- (g) no to be permitted to have or to carry weapons and, when necessary, to leave the guns to the judicial depositary in return for a receipt;
- (h) providing real and personal guarantee for the money to assure rights of the injured party; the judge upon the request of the public prosecutor shall specify the amount and the payment period of the money;
- (i) providing assurance that he shall pay alimony regularly, pursuant to the judicial decisions, and that he shall fulfill the obligations towards his family (Article 109/3, CMK);

- (j) In cases where the suspect is subject to the measures mentioned in subparagraph 3(a) and (f), the upper limit mentioned in subparagraph one shall not apply.

In the application of the obligation mentioned in subsection (d), the judge or the prosecutor may permanently or temporarily allow the suspect to drive vehicles in his professional activities.

Time periods that are spent under judicial control are not considered as restriction of freedom and shall not be subtracted from the punishment. This provision shall not apply to subparagraph 3, subsection (e).

In cases where the arrested individual has been released because the upper limits of pre-trial detention have been exceeded, provisions about judicial control may be applied without taking into account the time limits requirement mentioned in subparagraph one (Article 109/7, CMK).

II - Judicial control decision and the competent authorities to issue the decision. The suspect may be taken under judicial control in every phase of investigation upon the request of the public prosecutor and with the decision of the Judge of the Peace in Criminal Matters (Article 110/1, CMK).

During the application of judicial control, upon the request of the public prosecutor, the judge may put the suspect under one or more new obligations, may partly or completely revoke the obligations that constitute the content of the control, or may alter the obligations or temporarily exempt the suspect from obeying some of them.

The provisions of this article and Article 109 are applicable at every stage of the prosecution phase by the judicial authorities with subject matter jurisdiction and venue, when it is deemed necessary.

III - Repealing of the judicial control order. Upon the request of the suspect or the accused, the judge or the court may render a decision under the second paragraph of Article 110 within five days, pursuant to obtaining the opinion of the public prosecutor (Article 111/1, CMK). The decision on the judicial control may be subject to a motion of opposition.

The judicial authority with venue may immediately issue an pre-trial arrest warrant with respect to the suspect or the accused who voluntarily fails to comply with the conditions of judicial control, regardless of the duration of the custodial penalty that may be inflicted upon him (Article 112, CMK).

IV - Security deposit. The security that shall be deposited by the suspect or accused shall guarantee the following points. First, it shall ensure the presence of the suspect or accused during all the procedural interactions, during the execution of the judgment or during the fulfillment of other obligations he may be required to fulfill. Second, the security shall be used to make the following payments in the following order: the expenditures that the intervening party has made, security for compensating the damages occurred through the offense and for restitution; in cases where the suspect or the accused are prosecuted because they did not pay the alimony, public expenses, criminal fines. (Article 113, CMK).

The decision that obliges the suspect or the accused to deposit a security shall include each portion separately covered by the security.

In cases where the suspect or the accused consents, the court or public prosecutor may issue an order upon the request of the victim or recipient of the alimony, the

portion of the security to be paid to them in advance that would cover the losses of the victim or the sum that constitutes the alimony (Article 114/1, CMK).

If there is a final court judgment in favor of the victim or the alimony recipient, related to the events that constitute the substance of the investigation or prosecution, then the payment may be ordered even if there is no consent of the suspect or the accused.

In cases where a convict had fulfilled all the requirements as laid down in paragraph (1) of Article 113, then the security deposit that would guarantee the obligations listed in said Article 113 paragraph one, subsection (a) and the portion of the security that is specified in the decision, which is to be rendered according to the second paragraph of the same Article, shall be returned to him (Article 115/1, CMK).

The second portion of the remaining security that was not paid to the victim of the crime or alimony recipient shall be returned to the suspect or accused, as well as in cases where a decision of non-prosecution or acquittal had been rendered. Otherwise, except in the absence of a good reason, the security shall be transferred to the State treasury as income.

In cases of a conviction, the security shall be used in accordance with the first paragraph of the subsection (b) of Article 113, the remainder shall be returned.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 366.

## II. Pre-trial Detention

345. Pre-trial detention (*tutuklama*) is the accused's deprivation of liberty upon a "warrant of pre-trial detention" issued by a judge. There is no compulsory detention in Turkish Law, and the public prosecutor has no authority to issue a decision about the pre-trial detention of the accused.<sup>1</sup>

The provisions of the Code of Penal Procedure relating to the pre-trial detention were altered in 1992 (Act No. 3842). These regulations have applied to every suspect since the August 2003 amendment by Act No. 4928.<sup>2</sup>

The Justice of the Peace during the preliminary investigation (Article 94, CMK) or the court of competent jurisdiction during the trial stage (Article 101, CMK) is entitled to issue a warrant of pre-trial detention if there is persuasive evidence<sup>3</sup> of a person's guilt and sufficient facts indicating that he will escape, or facts regarding prior behavior sufficient to conclude that he will try to destroy evidence, influence witnesses to give false testimony, or unjustifiably influence or bribe experts (Article 100/1, CMK).<sup>4</sup>

However, in some cases the Code allows the judge to issue a warrant of pre-trial detention on a strong suspicion of guilt and presumption that the other requirements are self-evident. This is only possible if the investigated crime is one of the crimes as listed in the Code (Article 100/3, CMK).<sup>5</sup> This method of listing only very severe crimes in this provision aimed to reduce the incarceration rates. However, the application of this catalog crimes went the other direction and in cases of a suspicion of such a crime, judges started to rule only on the strong suspicion without considering the danger of fleeing or obscuring evidence. Now, after the June 2011 elections,

there are chosen members of Parliament, who were under custody before and during the elections, but courts do not release them. There are ongoing political discussions for reaching consensus to change the regulations related to pre-trial detention.

The legal presumption that foreigners tend to escape has been abolished.

1. F. Yenisey, “Vorläufige Festnahme und Untersuchungshaft im türkischen Strafrecht,” Report submitted to the Symposium held Sept. 24–28, 1990, in Poland: Human Rights and Pre-Trial Detention, in F. Dinkel & J. Vagg, “Untersuchungshaft und Untersuchungshaftvollzug,” *Waiting for Trial*, Freiburg i.Br. (1994): 729–748. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 337. F. Gölcüklü, *Ceza Davasında Şahıs Hürriyeti* (Ankara, 1958), 27. A.K. Yıldız, “Ceza Muhakemesi Hukukunda Tutuklama ve Adli Kontrol,” in *Criminal Law in the Global Risk Society*, ed. F. Yenisey & U. Sieber (Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group, Volume T 1, İstanbul 2011), 631. V. Gültaş, 5271 sayılı Ceza Muhakemesi Kanununun İşığı Altına Tutuklama (2006).
2. The crimes mentioned in the Anti-Terrorism Act of 1991 were subject to the provisions of the Code of Penal Procedure before the 1992 amendment. For those detained under the Anti-Terrorism Act, and those detained within the region under a state of emergency, falling under the jurisdiction of State Security Courts, these regulations did not apply (Art. 31, Act No. 3842 dated 1992).
3. This legal obligation foreseen by the Code shall not be fulfilled in general by judges while deciding the pre-trial arrest. The reason for this neglect is preserving the impartiality, as explained by many judges: if a judge writes detailed motives of his pre-trial decision, furnished with accompanying facts, they fear to be rejected as a judge who has formed an opinion against the suspect, if the same judge is acting in the trial as well. However, we do not share this explanation, as it is a Constitutional provision that all decisions of judiciary must be furnished with motives based on facts (Art. 141/3, AY).
4. M. Albayrak, *Tutuklu ve Hükümlü El Kitabı* (Ankara: Adalet Yayınevi, 2007). V. Gültaş, 5271 Sayılı Ceza Muhakemesi Kanununun İşığı Altına Tutuklama ve Kanun Yolları (2008). A.S. Sürücü, *İnsan Hakları Avrupa Mahkemesi Kararlarında ve Türkiye’de Tutuklama* (2010), N. Centel, *Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama* (İstanbul: Beta, 1992), 38.
5. According to the repealed Code, if the crime carried a penalty of not less than seven years imprisonment, or if the accused had no domicile or home or could not identify himself, there was no need of proving the other grounds of pre-trial arrest.

346. The deprivation of liberty through pre-trial detention for crimes carrying judicial fines, or imprisonment of not more than one year is forbidden (Article 100/4, CMK, as amended by Act 2005–5353). Children under the age of 15 may not be arrested for crimes carrying imprisonment up to five years at the upper level (Article 21, ÇKK).<sup>1</sup>

1. According to the repealed Penal Procedure Code, crimes involving punishment up to six months imprisonment was prohibited on this age group. However, if the crime provoked public anger or if the accused had no domicile or no home or could not identify him, he was arrested and placed in pre-trial detention (Art. 104/3, repealed CMUK).

347. Rights of the suspect. The requirement of proportionality of the pre-trial detention to the probable punishment (Article 104/4 CMUK) has been added by 1992 legislation (Act No. 3842), and is still one of requirements of pre-trial arrest: “in cases where the pre-trial-arrest is not proportional to the punishment or security measure, the judge may not render a decision on this respect” (Article 100/1, CMK).

Before the Justice of the Peace issues a warrant for pre-trial detention, he may consult the file<sup>1</sup> and must interview the suspect, who must be present. A pre-trial detention warrant in absentia has been excluded by the current Code. If the suspect requests it, his counsel may be present during this interview without the need for a prior written power of attorney. But even if the suspect did not ask for a lawyer, there is a mandatory defense lawyer appointed on his behalf (Article 101/3, CMK).<sup>2</sup> The public prosecutor and the defense lawyer have the right to make arguments before the decision.

The police must inform the relatives (yakınları) of the person in detention about the fact that he was placed in police custody (Article 13, “2002–4771”).<sup>3</sup> Before so informing the relatives, the police must check with the public prosecutor (Article 95, CMK; Article 128, repealed CMUK “2002–4744”). If the accused has been taken before the judge, he can immediately inform his relatives or “any other individual” (belirlediği bir kişi) and talk individually, if the judge so orders (Article 107/2, CMK; Article 107, repealed CMUK “2002–4744”).

1. M.R. Erdem, *AIHM Kararları İçerisinde Tutuklu Sanık Bakımından Hazırlık Soruşturması Dosyasını İnceleme Hakkı* (Dokuz Eylül Hukuk Fakültesi Dergisi Cilt 6 sayı: 1, sayfa 67, 1).
2. According to the repealed Code, if the accused was not present, the judge decided upon the request for pre-trial detention submitted by the prosecutor in a closed session, after a review of the report in the absence of the accused (Art. 106, repealed CMUK). In such cases, the public prosecutor issued a warrant of arrest on the decision of pre-trial detention of the magistrate (Art. 131, repealed CMUK) and the police would arrest the accused when executing the court decision. The new Code does not include a court decision in order to arrest the suspect if he is not present. At the moment of arrest, the decision of the judge would be handed to the accused (Art. 106/3, repealed CMUK) and he would be informed that he has the right to contest the court decision (Art. 106/4, repealed CMUK).
3. The exception of “danger to the investigation if relatives are informed” was abolished in 2002.

348. Arrest order. Since the “pre-trial-arrest decision” in the absence of the suspect has been abolished by the new Penal Procedure Code, there is a substitute decision: the arrest order (yakalama emri) (Article 98, CMK).<sup>1</sup>

The competent judge informs the accused during the interview of the accusations against him. He may not prevent him from presenting evidence in his favor. The public prosecutor and the defense lawyer have the right to be present during this interview, and if present, they will be heard (Article 108/6, repealed CMUK). The provisions of Article 135 of the Criminal Procedure Code (infra, paragraph 353) govern this interview. If it is not possible for him to appear before the competent judge, the detained person will be brought to the nearest Justice of the Peace (Article 109/1, CMK). The nearest judge has limited competence to release the accused. He can only release him if the warrant of pre-trial detention had been sustained or the arrested person was not the person named in the warrant (Article 109/2, repealed CMUK).

1. If the accused had been taken into custody pursuant to the warrant of pre-trial detention of the judge, he was brought immediately, or at the latest, within 24 hours, before a competent judge. This judge interviewed him and determined whether to continue the detention (Art. 108/1, repealed CMUK). The time required to bring the accused to the nearest court was not included in this 24-hour period (Art. 108/2, repealed CMUK).



### III. The Continuation of Pre-trial Detention

349. Since 1992, there has been a time limit for pre-trial detention. The maximum time for the preliminary investigation was originally six months.<sup>1</sup> This period has been extended up to one year for crimes outside of the jurisdiction of the Court of Assize, but it may be extended for six months if necessary (Article 102/1, CMK). In cases where the crime is under the jurisdiction of the Court of Assize, the maximum period of detention is two years, but it may be extended to a maximum of three years (Article 102/2, CMK). The decision regarding the extension shall be rendered after taking the opinions of the public prosecutor, the suspect or the accused, and of the defense counsel (Article 102/3, CMK).

In cases of political organized crime (crimes against the security of the State as defined in Article 250/1-c, CMK), the period of detention is longer (Article 252/2, CMK).<sup>2</sup>

1. According to the repealed legislation, if the official claim had been put forward, the time limit was two years or until the decision of the court (Art. 110/1, repealed CMUK). According to this regulation, the decision of pre-trial detention lost its legal value when the requisite time had run out. However, for crimes carrying penalties of imprisonment of more than seven years or of the death penalty, if the official claim was not put forward or the final judgment was not given within the time limitations, the accused could be further kept in pre-trial detention, or he could be released on bail (Art. 110/2, repealed CMUK).
2. Regulating a maximum duration of the pre-trial arrest in Criminal Procedure Code causes problems for crimes against the state or against the constitutional order of the state. Due to the difficulties in conducting the trial within a reasonable time, the judgment could not have been rendered for many years, or in many cases, after the judgment of the court of the first instance has been rendered, the case is still pending at the Court of Cassation since several years because of the heavy caseload of this court. In order not to release dangerous accuseds, the maximum duration of pre-trial arrest as regulated in Art. 102, CMK, shall be applied double for such crimes. For practical reasons, the application of this provision on maximum duration of pre-trial arrest (Art. 102, CMK) had been suspended until Dec. 31, 2010. As for the beginning of January 2011 the time limitation for pre-trial arrest is in force and some 100 very dangerous convicted accuseds waiting for the decision of the Court of Cassation upon an appeal since 10 years, have been released under judicial control.

350. During the preliminary investigation, the continuation of pre-trial detention<sup>1</sup> will be examined every 30 days by the Justice of the Peace at the request of the Public Prosecutor (Article 108/1, CMK). During the trial, the court must make this examination during each session on its own initiative (Article 108/3, CMK).

1. N. Centel, *Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama* (İstanbul: Beta, 1992), 107.

### IV. Challenging the Decisions in Pre-trial Detention

351. The accused person and the Public Prosecutor may object (itiraz) to a higher court against the judge's order or the court's decisions related to detention or maintenance of pre-trial detention (Article 267, CMK). The decisions rendered on opposition are final. However, if the higher court decided to place the accused in pre-trial detention on the opposition, there is a further remedy of opposition (infra, paragraph 406) against this decision (Article 271/4, CMK).

Unlawful detention may lead to a compensation (Article 141, CMK).<sup>1</sup>

1. S. Baytar, Koruma Tedbirlerinden Doğan Zararın Karşlanması (Türkiye Barolar Birliği Dergisi, sayı 61, Kasım & Aralık, 2005).

#### §7. THE WARRANT OF ATTACHMENT

352. The suspect, the victim or the witness must be present during an interview by the judge, the prosecutor or the police. Only the judge has the power to issue a warrant of attachment (zorla getirme kararı), which he may do if there are sufficient reasons to issue a warrant of pre-trial detention for the accused (Article 146/1, CMK). However, the public prosecutor can issue a written order to the police to bring the arrested person and the accused together with relevant documents to the office of the public prosecutor (Article 146/5, CMK as amended 2006–5560).

#### §8. POWERS TO INTERVIEW THE ACCUSED AND WITNESSES

##### I. Interviewing the Accused

353. According to the 1992 regulations, special provisions apply during the interview of the accused by the police and the public prosecutor, as well as during the interrogation by the judge (Article 148, CMK):<sup>1</sup>

- (1) The interviewer must ask for and write down the person's identity. The interviewed person must give correct answers regarding his identity.
- (2) The accused must be charged.
- (3) The accused's right to counsel will be acknowledged: he has the right to engage counsel on his behalf. If he cannot afford to retain counsel, he may demand a lawyer appointed by the Bar Association of that district.  
If the accused demands a lawyer appointed by the Bar Association, that lawyer may be present during the interview on the condition that this causes no delay in the investigation. There is no requirement for a written power of attorney for the requested lawyer. Furthermore, the interviewed person is entitled to inform his or her relatives about the arrest if he wishes to do so. He must also be advised of this right (supra, paragraph 347).
- (4) The interviewed person must be advised that he has the legal right to be silent.
- (5) He will be given notice that he may demand collection of exculpatory evidence that would favor him.
- (6) Questions about his personal status will be asked.
- (7) An official report of the interview will be prepared. This report must contain the following: (a) the place and date where the interview took place; (b) the names and positions of the persons who were present during the interview, including the identity of the interviewed person; (c) a statement about carrying out the above-mentioned requirements of the interview and whether any were



not completed along with the reasons for that; (d) a statement of the facts and a statement that the official report has been read by the interviewed person and by his defense lawyer, if he was present, and that they have signed the report; and (e) if they did not sign the report, the reasons for their refusal (Article 147, CMK).

1. E. Cihan, “Ellinci Yılda Ceza Muhakemesi Süjesi Olarak Sanığın Sorgusu,” IHFM (1984/1–4): 139–146; F. Gölcüklü, “Sanık Gerçeği Söylemeye Mecbur mudur?,” AUSBFD (1954/4): no. IX, 121–146; C. Şahin, *Hazırlık Soruşturmasında Sanığın Kolluk Tarafından Sorgulanması* (Konya: Doktora Tezi, 1993). T. Demirbaş, *Sanığın Hazırlık Soruşturmasında İfadesinin Alınması* (İzmir, 1996).

354. Illegal methods of interview. The Turkish Code of Criminal Procedure lists the methods of interviewing suspects that are not allowed (Article 148, CMK). The testimony during the interview must be given freely. The use of torture, drugs given by force, stress or pressure tactics, fraud, physical violence or force, and devices that influence free will are forbidden (Article 148/1, CMK).<sup>1</sup> The person being interviewed may not be offered illegal promises (Article 148/2, CMK).

Evidence that has been obtained through illegal means is excluded, even if the individual gives his consent (Article 148/3, CMK) (*infra*, paragraph 394).

There are two newly illegal interview methods:

- (1) If, during the police questioning, there is no defense counsel present, and the accused denies his testimony later at court, such testimony cannot be taken into account as evidence for forming the judgment (Article 148/4, CMK). This provision is an invention of Turkish LawMaker, which has been enacted prior to *Salduz v. Turkey* decision of ECHR. However, in cases where the defense attorney is not experienced, or did not provided the suspect with sufficient legal advice, a confession in the presence of the lawyer at the police station shall be a very strong evidence against the accused later at the trial.
- (2) If the police have interviewed a suspect once, and later there is a need for further questioning, the police are not empowered to re-interview the same person for the same investigation (Article 148/5, CMK).

1. O. Tosun & N. Güreli, “Heyecan Göstergesiyle Yalanın Bulunması ve Ceza Hukuku,” IHFM, no. XXX (1964): 3; S. Kaymaz, *Yasak Sorgu Yöntemi Olarak Aldatma* (Yargıtay Dergisi, Cilt 24, 1998), 73.

## II. The Interviewing of Witnesses

355. Individuals have a public duty to testify if they have been summoned.<sup>1</sup> Witnesses served with a summons are obliged to comply. They must appear and

give testimony. An individual who refuses to do so without reason has to pay the costs<sup>2</sup> as estimated by the judge (Article 44/1, CMK) (infra, paragraph 391-I).<sup>3</sup>

1. N. Şensoy, *Cezada ve Hukukta Şahitlik* (İstanbul, 1952), 8.
2. According to the repealed legislation, it was a light fine (Art. 45, repealed CMUK).
3. A. Önder, “Ceza Muhakemeleri Usulü Hukukunda Şahitlikten Çekinme Hakkı,” *IHF* XXIX, no. 4 (1963): 4, 876–932; T.T. Yüce, *Meslek Adamının Tanıklıktan Çekinme Hakkı* (YD 1980/VI, 1–2), 51–62; K. İçel, *Gazetecilerin Tanıklıktan Çekinme Hakları* (Ceza Hukuku ve Kriminoloji Mecmuası, Cilt 1, sayı 1), 37.

## Chapter 3. Phases of the Penal Process

### §1. PHASES AND SECTIONS OF THE TURKISH PENAL PROCESS

356. The Criminal Procedure Code foresees a penal process in two phases (Article 2/1-e and f, CMK): the investigation phase (*soruşturma evresi*) and the prosecution phase during the court inquiry (*kovuşturma evresi*). German Law allows a phase in the criminal court proceedings where a decision about opening the trial session is made (*Zwischenverfahren*). There is no such phase under Turkish Law, but this decision is integrated into the first phase: the indictment submitted to the court must be approved by the same court (Article 175/1, CMK).

The preparatory inquiry, until 1985, was divided into two parts: the preliminary investigation (*hazırlık soruşturması*) and the judicial inquiry (*ilk soruşturma*). The judicial inquiry<sup>1</sup> was abolished in 1985.

Turkish legal theory divides the preliminary investigation into two parts: the “Initial Investigation” (*başlangıç soruşturması*) and the “Short Investigation” (*kısa soruşturma*). At the moment the public prosecutor issues an official charge (*suç isnadı*) against the accused by a written indictment or a warrant of arrest from a magistrate, the Initial Investigation ends and the Short Investigation begins.<sup>2</sup>

Between the “investigation phase” and the “prosecution phase,” there is an “intermediate phase” (*ara soruşturma*), which is consisted of a decision-making about the admission of the charges (Article 174, CMK). This “intermediate phase” starts with the submission of the indictment to the court, and ends when the court makes a decision on admitting the case to go to the trial (Article 175/1, CMK). The court is also entitled to reverse the indictment (Article 174, CMK).

The court inquiry is divided into three parts: “Preparation of the Trial Session,” “Course of the Trial” and “Conclusion of the Final Judgment.”

1. A. Önder, *Die Gerichtliche Voruntersuchung im Türkischen Strafverfahrensrecht* (Münster, 1955).
2. Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (İstanbul: Bası, Beta, 2010), 1181.

### §2. THE PREPARATORY INQUIRY: INVESTIGATION PHASE

#### I. Characteristics

357. The Code calls the first phase of criminal process the “investigation phase” (Article 160, CMK). Investigations during the preparatory inquiry are written, non-adversarial and, in principle, secret (Article 157, CMK). However, the attorney of the accused is entitled to see all the records in the file and make free copies of them (Article 153, CMK).

## II. The Beginning of the Preliminary Investigation

358. When a public prosecutor is informed of the occurrence of a crime, he is required to undertake an investigation in order to determine whether there is a necessity for commencing a prosecution (Article 160/1, CMK). According to these rules, the preliminary inquiry begins when the public prosecutor or the police start to investigate a case.<sup>1</sup> The police must investigate upon the order of the public prosecutor, and even in urgent cases they have no power to begin an investigation on their own initiative. According to Article 332 of the Turkish Penal Procedure Code, there is an obligation to answer, within 10 days, the written questions of the public prosecutor related to matters of investigation. If a civil servant fails to do so, he or she can be punished (Article 257, Penal Code).

1. B. Öztürk, *Ceza Muhakemesi Hukukunda Koğuşturma Mecburiyeti*, Hazırlık Soruşturması, 9 (Ankara: Eylül Üniversitesi, 1991), 52.

359. Under Turkish Law, private individuals are not obliged to report a criminal offense (ihbar). However, there are some exceptions to this rule. It is a crime not to report a crime that is presently being committed (Article 278/1, TCK); it is as well with regard to a crime already committed, in which there are still consequences that could be minimized upon the reporting of it (Article 278/2, TCK). State officials must report criminal offenses they have learned of that relate to their duties. Failing to do so is a crime (Article 279, TCK).

The identity of the person who gives information to the police may not be kept secret from the accused. Since it is not mentioned in the Code of Penal Procedure, Turkish scholars are of the opinion that the police must reveal the identity of the informant to the accused.<sup>1</sup>

However, there are some provisions in the field of crimes against the State and profit-oriented organized crime (infra, paragraph 381) that give the judge discretion to keep the identity of the witness out of the court records (Article 58/2, CMK; Article 20, TMK). Informants and investigators are also protected.

1. O. Tosun, *Türk Suç Muhakemesi Hukuku Dersleri*, Muhakemenin Yürüyüşü, 2. Cilt (İstanbul, 1976), 13.

## III. The Right to Prosecute

360. In the Turkish system of Penal Procedure, the public prosecutor has a duty to prosecute criminal cases (kamu davasının mecburiliği ilkesi) (Article 170/2, CMK), however there are some recent exceptions to this rule (Article 171, CMK) (infra, paragraph 372).<sup>1</sup>

The public prosecutor does not have a monopoly on prosecution. The Treasury and some other agency officials are also competent to prosecute.<sup>2</sup> Private individuals who have been injured through crimes may intervene in a criminal case (Article 237, CMK).

The Prosecutor's Office is a hierarchical institution under the Ministry of Justice (supra, paragraph 306); however the Prosecutor's Office conducts investigations

independently. The use of personnel in the Prosecutor's Office is interchangeable, with one prosecutor being easily substituted by another. The public prosecutor attached to the Court of Cassation is designated the Attorney General. However, the Minister of Justice, by a "written order," can ask him to make an "extraordinary appeal by way of Cassation" (infra, paragraph 421) to the Court of Cassation (Article 309, CMK).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 444.
2. Y. Hızlı, *Türk Vergi Hukukunda Kaçakçılık Suçu* (Ankara, 1984), 20; K. Mutluer, *Vergi Ceza Hukuku* (Eskişehir, 1979), 5.

361. Public prosecutors have jurisdiction over investigations related to offenses committed within the local district of the Court of First Instance (Article 12, CMK). If that court does not have jurisdiction over a specific case, the prosecutor also has no jurisdiction to prosecute. There is no Article in the Penal Procedure Code that allows the public prosecutor to decide that he does not have jurisdiction over that case. In practice, however, public prosecutors take such jurisdiction under Article 12 of the Code of Penal Procedure, which relates primarily to the venue of the Court of First Instance.

#### IV. Conditions of Criminal Prosecution

362. The public prosecutor may only bring a case to the court of competent jurisdiction if the conditions of the criminal prosecution required by law (*ceza muhakemesi şartları*) are present. For example, some offenses can only be prosecuted upon the complaint of the injured person or with the permission of the authorized State office.<sup>1</sup>

Furthermore, immunities (*supra*, paragraphs 92–98) are obstacles to prosecution. In such cases, the prosecution depends on the fulfillment of the precondition that the complaint has been made or permission has been obtained, or that parliamentary immunity has been lifted by the Parliament.<sup>2</sup>

1. N. Kunter, *Şikayetin Mevzuu*, IHFM (1950), 460; T. Taner, *Ceza Muhakemeleri Usulü*, 3 (Bası, İstanbul, 1955), 94; D. Tezcan, "Türk Hukukunda Diplomatik Yargı Bağışıklığı," BMTDY (1985): 141; B. Öztürk, *Uygulamalı Suç Muhakemesi Hukuku*, Cilt 1, 9 (Ankara: Eylül Üniversitesi, 1987), 25.
2. Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (İstanbul: Bası, Beta, 2010), 650.

#### V. Closing of the Preliminary Investigation

363. The public prosecutor concludes the preliminary investigations as soon as the level of information is sufficient to enable prosecution. Only the public prosecutor has the discretion to decide whether the investigations are complete.<sup>1</sup> The public prosecutor must be satisfied with the outcome of investigations. There is no direct

review of this decision. The lawyer for the accused, during the preliminary investigation, has had the right to consult the file with no limitation (Article 153, CMK). In this indirect way, the defense has gained a measure of control over the situation.

If the public prosecutor considers that additional investigations should be undertaken in a given case, he may order the police to conduct further investigations.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 442.

364. For closing the preliminary investigation, there are four options:

- (1) The public prosecutor may decide to drop the prosecution (infra, paragraph 365).
- (2) He may prepare an indictment (infra, paragraph 373) for the appropriate court if it appears that there is sufficient evidence against the accused.
- (3) For crimes prosecuted upon the claim of the victim and that carry imprisonment of less than one year, he may suspend the opening of the public case (kamu davasının açılmasının ertelenmesi) for five years (Article 171/2, CMK) (infra, paragraph 372).
- (4) He may also consider his own subject matter jurisdiction (supra, paragraph 301) or venue (supra, paragraph 302) and the existence of a preliminary dispute. If he arrives at a negative conclusion, he may temporarily stop the prosecution. In such cases, the file will be sent to the competent district or court (yetkisizlik veya görevsizlik kararı).

#### A. Dropping the Prosecution

365. If no criminal offense was committed, if there was insufficient evidence or if the right to prosecute was dismissed, the Public Prosecutor may decide to drop the prosecution (kovuşturmaya yer olmadığına dair karar) (Article 172, CMK).<sup>1</sup>

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 485.

366. Dropping the prosecution under the principle of opportunity. When it came into force in 2005, the Turkish Penal Procedure Code did not allow the prosecutor to suspend the prosecution under certain conditions.<sup>1</sup> There was only the possibility to have a discretion on prosecuting. In cases where the requirements for the application of the provisions of effective remorse, that lift the punishment as a personal ground” (e.g., Article 221/2, TCK), or the provisions of personal impunity” (e.g., Article 22/6, TCK) are present, the public prosecutor may render the decision that there is no ground for prosecution (Article 171/1, CMK). In such cases, where the public prosecutor has utilized the power of discretion on the issue of not bringing a public claim, opposition against the decision of the public prosecutor is not admitted (Article 173/5, CMK). The 2006–5560 legislation broadened this provision (infra, paragraph 372).

1. The only example under the repealed Penal Code was that of the kidnapper who married the girl he kidnapped. He could only have been prosecuted after the marriage was abolished and after being found at fault (Art. 434, repealed TCK).

367. End of the right to prosecute; Statute of limitations for prosecution. I - If the State has lost the right to prosecute, the public prosecutor may not proceed. Some of the causes that end the right of prosecution or set aside punishments (infra, paragraph 452) are contained in the Penal Code. These include: death of the accused, amnesty, statute of limitations, withdrawal of the complaint<sup>1</sup> and friendly settlement by the way of mediation (accused pays all losses and fines) (infra, paragraphs 272, 274).

The death of the accused terminates public prosecution (Article 64, TCK). Amnesty (infra, paragraph 454) terminates public prosecution and sets aside the punishment together with all its consequences (Article 65/1, TCK). A pardon sets aside, reduces or changes the punishment (Article 65/2, TCK). Where initiation of legal prosecution for an offense is subject to the injured party filing a complaint, the public prosecution shall be discontinued if the injured party waives his complaint (Article 73, TCK). According to Article 7/1 of TCK, no one may be punished for an act that, although a felony or misdemeanor at the time of its commission, is no longer such under subsequent law. In this case, if a punishment has been already imposed, it shall not be executed.

I - Statute of limitations for prosecution. Statute of limitations for prosecution (dava zamanasımı) implies that the duty (and even the right) of the State to prosecute a perpetrator expires after a certain lapse of time.

(1) Exceptions. With the exception of some very serious crimes, all crimes are subject to the statute of limitations.<sup>2</sup> These serious crimes include: crimes committed abroad against the Turkish nation and State (Articles 247–345, TCK) carrying aggravated life imprisonment, or life imprisonment or a prison term of more than 10 years (only statute of limitation for prosecution is exempted; Article 66/7, TCK); genocide (Article 76/4, TCK); crimes against humanity (Article 77/4, TCK); organized crime of genocide and crimes against humanity (Article 78/3, TCK); and military high treason (Article 49/B, Military Penal Code).

(2) Time Limits. The time limits for the prosecution of crimes depend on the seriousness of the crime (Article 66/1, TCK), where the maximum imprisonment term shall be taken into account. The court takes them into consideration ex officio (Article 72/2, TCK).

The statute of limitations applies the following system (Article 68/1, TCK):<sup>3</sup> Crimes for which the law imposes the aggravated life imprisonment become statute-barred after 40 years (Article 68/1-a, TCK); crimes for which the law imposes life imprisonment become statute-barred after 30 years (Article 68/1-b, TCK); crimes for which the law imposes 20 years or more of imprisonment become statute-barred after 24 years (Article 68/1-c, TCK); crimes for which the law imposes imprisonment of more than five but less than 20 years become statute-barred after 20 years (Article 68/1-d, TCK); crimes for which the law imposes up to five years imprisonment or judicial fine become statute-barred after 10 years (Article 68/1-e, TCK).

There are special regulations for children who have been taught to commit crimes; if the child was in the age group of 12–15 when the crime was committed, time limits in the statute shall be discounted by half; if the child was in the age group of 15–18, by two-thirds (Article 66/2, TCK).



(3) Statute of Limitations for Misdemeanors. The special Act for Misdemeanors (Articles 20–21, KK)<sup>4</sup> sets time limits for prosecution: five years for misdemeanors carrying an administrative fine (*idari para cezası*) of 100,000 TL and more (Article 20/2-a, KK); four years for misdemeanors carrying an administrative fine of 50,000 TL and more (Article 20/2-b, KK); three years for misdemeanors carrying an administrative fine of less than 50,000 TL (Article 20/2-c, KK); eight years for misdemeanors carrying an administrative fine depending on the seriousness of the deed (*nispi idari para cezası*) (Article 20/3, KK).

If the misdemeanor at the same time constitutes a crime, the statute of limitations for prosecution of crimes applies (Article 20/5, KK).

Time starts to run when the act as defined as misdemeanor has been committed or the result of this act had occurred (Article 20/4, KK).

(4) Beginning Point of Time Limit for Prosecution. For completed crimes (*tamamlanmış suç*), time begins to run on the date of the commission of the crime; for attempted crimes (*teşebbüs halinde kalan suç*), on the date of perpetration of the last criminal act; and for continuing (*kesintisiz suç*) and successive (continued) crimes (*zincirleme suç*), on the date when the last crime was committed (Article 66/6, TCK). If there are several crimes committed by the accused, the statute of limitations for prosecution shall be determined according to the existing evidence in the file, regarding the reasons for aggravating the punishment (Article 66/3, TCK).

For crimes committed against children by their parents or by a person who has oversight of this child, the period indicated in the statute of limitations starts when the child attains 18 years of age (Article 66/6, TCK). There is a special regulation related to marriage: the time limit for prosecution shall start to run from the final judgment on the annulment of the wrongful marriage (Article 230/4, TCK).

The provision in the Penal Code applies to retrials: if there are grounds for re-opening of a trial (Article 311, CMK), and the competent court gives a decision about giving leave to the request of re-opening (Article 318, CMK), then the time for prosecution for that particular crime starts to run *de novo* (Article 66/5, TCK, as amended by Act 2005–5377).

(5) Suspension of Statute of Limitations. In cases where initiating an investigation or prosecution depends on the permission or decision of another organ (e.g., in cases of discrediting Turkish Nation, etc. the investigation shall rest until the permission of the Minister of Justice; Article 301/4, TCK), or if the suspect is a fugitive and there is a decision about his status (Article 247, CMK), time limits for prosecution rest until this obstacle has been lifted (Article 67/1, TCK). There are other examples of resting of statute of limitations, such as prosecution of members of the Parliament (Article 83/3, AY); of soldiers for alleged crimes carrying imprisonment up to two years (Article 20/1, 5, AsCK), until the end of the office. In case of delay of payment of mediated damages (Article 253/19, CMK); suspended prosecution (Article 171/2, CMK) and delayed announcement of the judgment (Article 231/5, CMK), the statute of limitation shall rest.

(6) Interruption of Statute of Limitations. The time period mentioned in the statute of limitations is interrupted (*zamanaşımının kesilmesi*) upon: the interview by the public prosecutor or questioning<sup>5</sup> by the judge of one of the suspects or accused (Article 67/2-a, TCK); the issuance of a pre-trial arrest warrant<sup>6</sup> against one of the suspects or accused (Article 67/2-b, TCK); the preparation of an indictment related



to a crime (Article 67/2-c, TCK); and the judgment of conviction against at least one of the accused (Article 67/2-d, TCK).<sup>7</sup>

In cases where the statute of limitations period has been interrupted, the time for prosecution starts to run again but may be extended compared to half the amount of the time limit as foreseen in the law for this particular crime (Article 67/4, TCK). If there is more than one ground for interruption, the last one will be taken into account (Article 67/3, TCK).

1. If the person who is authorized to put forward a claim because of the crime (suç hakkında yetkili olan kimse) does not demand prosecution (şikayette bulunmama) within six months, no investigation and prosecution can be started (Art. 73/1, TCK). If the claimant who was injured by the crime (suçtan zarar gören) withdraws his claim (Şikayetten vazgeçme), the case is dismissed (Art. 73/4, TCK). In such cases, the consent of the accused is required (Art. 73/6, TCK). However, if the withdrawal occurs after the judgment has become final, this does not affect the execution of the penalty. Individuals who have suffered losses because of the crime cannot file a civil claim if they had explicitly declared, while withdrawing the claim in view of prosecution, that they would not enforce their personal rights (Art. 73/7, TCK).
2. T. Demirbaş, *Ceza Hukuku Genel Hükümler* (Ankara: Seçkin, 2002), 627.
3. According to the repealed Penal Code, crimes for which the law imposed the death penalty and lifelong imprisonment became statute-barred after twenty years. Crimes for which the law imposed at least 20 years of imprisonment became statute-barred after 20 years. Crimes for which the law imposed imprisonment of more than five but less than twenty years became statute-barred after 20 years. Crimes for which the law imposed not more than 20 years or fine provided for imprisonment became statute-barred after twenty years. Crimes for which the law imposed more than one month light imprisonment or more than 30 TL light fine became statute-barred after two years. All other punishable acts were statute-barred after six months (Art. 102, repealed TCK).
4. According to the repealed Penal Code, which did include misdemeanors, crimes for which the law imposed more than one month light imprisonment or more than 30 TL light fine became statute-barred after two years. All other punishable acts were statute-barred after six months (Art. 102, repealed TCK).
5. The questioning by the judge after the judgment has been reversed by the Court of Cassation is not considered as a ground for interruption of statute of limitation.
6. An arrest warrant issued by a foreign court based on Interpol request of Turkish authorities shall interrupt the statute of limitation (S. Tellenbach, "Begnadigung, Amnestie, Aufhebung der Strafbarkeit in der Türkei," in *Nationales Strafrecht in rechtsvergleichender Darstellung*, Teilband 5, ed. Sieber & Cornils (Berlin, 2010), 709).
7. Time started to run on the date of the perpetration of the last criminal act, and for continuing and successive offenses on the date the situation ended or the series of successive offenses ended (Art. 103, repealed TCK).

368. Mediation, pre-payment of a criminal fine and suspended prosecution. I - Mediation was regulated in Criminal Code, as one of the grounds for dismissal of a case (Article 73, TCK). The amendment in 2006 repealed this provision. However, an agreement on mediation leads to dropping of a criminal investigation and bars prosecution, if the losses of the victim are compensated in the full extend (Article 253, CMK) (supra, paragraph 274).

II - Pre-payment of criminal fine. According to Article 75 of TCK, save for crimes that fall under the procedure of mediation, the public prosecutor must offer to an accused of any offense punishable by a fine, or by imprisonment of not more than

three months, a friendly settlement order on pre-payment of a judicial fine (önödeme) (supra, paragraph 272).<sup>1</sup> If the accused pays the proposed fine, the prosecution must be dismissed.<sup>2</sup> If the accused does not pay the fine, then the prosecutor may prosecute.<sup>3</sup> If an offense subject to friendly settlement comes to the court by mistake, then the court must offer the accused an opportunity to pay the fine before proceeding to trial.

III - Suspended prosecution and delayed announcement of judgment. In cases of “suspended prosecution” under Article 171/2 CMK, if the suspect fulfills the requirements and obligations inflicted on him by the Public Prosecutor, there shall be no prosecution and the case shall be dropped. The same effect of “dropping the prosecution” is achieved under the “delayed announcement of the judgment” (Article 231/2, CMK), if the accused cooperates with the court ordered obligations (infra, paragraph 366).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 462.
2. Unifying decision of Court of Cassation Apr. 11, 1983, 2/2, Savaş – Mollamahmutoğlu, TCK Yorumu, 1677.
3. K. İçel et al., *İçel Yaptırım Teorisi*, 3 (İstanbul: Kitap, Beta, 2000), 430.

369. According to Article 66 of TCK, the prosecution will be dismissed upon the lapse of the time periods (infra, paragraph 455) provided by the Code.<sup>1</sup> If the punishment was set aside due to a lapse of time pursuant to the Code, the right to prosecute ends.

1. N. Kunter, *Ceza Davası Zamanışımının Durması*, IBM (1948/IV), 178.

370. According to Article 223/7 of the Turkish Code of Penal Procedure, a final judgment of a criminal court bars further prosecution for the same crime against the same person. A second case will not be admitted. Generally, the final decisions of the Turkish courts, as well as the final decisions of foreign courts, have the same effect. In cases of illegal drug exportation from Turkey, if the offender was tried by a foreign court, the Court of Cassation will not apply the ne bis in idem rule (supra, paragraph 85), and it will consider the crime as committed in Turkey through application of Article 3 of TCK.<sup>1</sup>

1. F. Yenisey, *Milletlerarası Ceza Hukuku*, *Ceza Yargılarının Milletlerarası Değeri ve Mevzuatı* (İstanbul: Beta, 1988), 245.

## B. Objection to Dropping Prosecution

371. If the public prosecutor decides to drop the prosecution, and new evidence surfaces, the injured party who had filed the complaint of the crime to the Prosecution Office has the right to seek a decision of the President of the nearest by means of an objection (Cumhuriyet savcısının kararına itiraz) (Article 173, CMK), (Article 172/2, CMK). Facts and proof that justify the opening of an official claim must accompany the objection (Article 173/2, CMK). The requirement that the petition must be signed by an attorney has been repealed.

If the grounds set out in the petition are not sufficient to justify the commencement of a public prosecution, the President of the will refuse the petition. After such a refusal, a public prosecution may only be opened if there are newly discovered facts or new evidence, and the President of the has rendered a decision in this respect (Article 173/6, CMK).

If the President of the is of the opinion that the petition is valid, he will order the commencement of a public prosecution. The Public Prosecutor must comply with this decision (Article 173/4, CMK).

#### C. Suspension of Prosecution under Some Conditions

372. Suspension of prosecution. Under the Turkish Criminal Procedure Code the prosecutor may now suspend the prosecution under certain conditions for crimes that prosecuted upon the claim of the victim and are punished with imprisonment by up to one year (Article 171/2, CMK). Crimes that fall under the mediation procedure, are an exception.

In order to suspend the prosecution, the following requirements have all to be fulfilled:

- the suspect has not been convicted before with an imprisonment;
- the conducted investigation reveals that in case of a non-prosecution, the suspect shall refrain from committing further crimes;
- that the suspension of prosecution is more in favor of the society and of the suspect, if compared to a prosecution;
- the losses of the victim or society may be recovered to the full extent (Article 171/3, CMK).

Furthermore, the public prosecutor is entitled to stop the prosecution only when the conditions of criminal prosecution (*supra*, paragraph 362) are nonexistent and there is no possibility that they will be fulfilled.

#### D. Bill of Indictment: Approval and Reversal of Indictment

373. The public prosecutor must prosecute (with few exceptions) if there is sufficient evidence of a crime. The principle of legality (*kamu davasının mecburiliği prensibi*) forces the prosecutor to do so, with a few minor exceptions (Article 170/2, CMK). If the Prosecutor is of the opinion that there are sufficient grounds for commencement of a public prosecution, he prepares a Bill of Indictment (*iddianame*) and submits it to the court (Article 170, CMK). When the Bill of Indictment is ready and is signed by the authorized prosecutor, then the court that shall decide on the merits of the case, shall investigate the validity of the indictment and rules to approve it (*iddianamenin kabulü kararı*) (Article 175/1, CMK). Thus the prosecution of the official case (*kamu davası*) begins. At the same time, an inquiry in court begins as well (*supra*, paragraph 358).

The Bill of Indictment must contain a description of the relevant offense and should describe the facts and circumstances that may increase or reduce the punishment. The identity of the accused must also be mentioned (Article 170, CMK); if not, it may be reversed by the court (Article 174, CMK).

374. Return of indictment. Since 2005, the court is entitled to return an indictment under the provisions of Criminal Procedure Code.<sup>1</sup> The trial court shall examine the whole document related to the investigation phase within 15 days of the delivery of the indictment and investigation documents, and in cases where the following missing parts and errors are discovered, shall return the indictment with a decision thereof, describing them and returning it to the public prosecutors' office:

- (a) The indictment was produced in violation of the provisions of Article 170 CMK.
- (b) The indictment was produced without collecting evidence that would prove the crime with certainty.
- (c) The indictment was produced in crimes that are according to the file of investigation, clearly falling under the provisions of “the settlement of the case on the payment of the fine,” or “mediation,” without applying these mentioned procedures (Article 174, CMK).

The indictment shall not be returned because of errors in the legal description of the crime.

In cases where the indictment has not been returned at the latest at the end of the time limit of 15 days, as indicated in subsection one of Article 174, it shall be considered as accepted.

After the indictment has been returned, the public prosecutor shall complete the missing points and correct the errors as shown in the decision and if there is a no situation that requires the issuing of the decision to not prosecute, he shall issue a new indictment and send it to the court. The indictment shall not be returned again based on reasons that had not been indicated in the first decision.

Public prosecutor may file a motion of opposition against the decision to return the indictment.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 489.

### §3. THE INQUIRY IN COURT

#### I. General Characteristics

375. The inquiry in court is public and adversarial. During the trial, all procedural transactions are submitted orally, and the court examines the accused, witnesses and experts.<sup>1</sup> The Judge has an active role in the inquiry in court, and he must have direct access to all evidence. The trial is held without interruption in the presence of the judges who will formulate the judgment of the court, but it may be interrupted for a reasonable time (Article 190/1, CMK). The trial is conducted in the

presence of the accused (Article 193/1, CMK). There are some exceptions to this rule if the crime is punishable by judicial fine or confiscation (Article 195, CMK).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 617.

376. The court must give its opinion on the facts directly and immediately. All the proceedings conducted in the preliminary investigation should be repeated in court and are open to the parties' criticism. A confession from the accused to the police where his lawyer was not present is not considered evidence if he revokes it (Article 148/4, CMK). In reality, however, the court relies to a great extent on the file prepared during the preliminary investigation, and it only makes further investigation if there are some discrepancies in the testimony or proffered evidence.

377. The inquiry in court is public (Article 182, CMK). However, in cases involving public morals or public security, the whole trial or a part thereof may be held in closed session. The court has discretion to decide whether the inquiry shall be public or not, and this decision will be declared in a public session (Article 182/2, CMK). The decision on a closed inquiry and the final judgment of the court will always be declared in a public session (Article 182/3, CMK). In such cases, the verdict will be pronounced in an open session (Article 182/3, CMK).

There is an obligation to hold a closed session if the case involves a child under 18 years of age. In such cases, the verdict will be pronounced in a closed session (Article 185, CMK).

Publication of trials conducted in closed sessions is forbidden (Article 187/2, CMK; Article 19, BasK). Publication of the contents of an open trial may also be forbidden by a decision of the court, if it is against national interests, or if it is of a nature that may provoke the committing of crimes, etc. (Article 187/3, CMK).

There is a new restriction of voice and image recordings at the court buildings and within the court room (Article 183, CMK).

378. The rules that govern the procedures of different criminal courts are generally the same. For Military Courts, however, there is a special Code of Criminal Procedure (Act No. 353). There are slight differences between the procedures in courts dealing with serious crimes (*supra*, paragraph 298-III) and the procedures in the Court of Peace. In addition, the structures of the courts are different. An indictment was not served on the accused by the Court of Peace before 1999 (Article 208/2, repealed CMUK). The Constitutional Court abolished this provision.<sup>1</sup>

1. Decision of the Constitutional Court dated July 14, 1998, E. 1997/41, K. 1997/47, RG. Mar. 24, 1999/ No. 23649.

## **II. The Procedure of “Penal Order of the Justice of the Peace”**

379. Formerly the Justice of the Peace was entitled to order a sanction directly if the crime was within the jurisdiction of the Court of Peace (Article 386, repealed CMUK). This power of the “Penal Order of the Justice of the Peace” (*sulh hakimi-nin ceza kararnamesi*) was limited to fines, light imprisonment up to three months,

prohibition from exercising a profession and confiscation of goods, whether as single sanctions or all at once.

The new Penal Procedure Code does not include this legal concept.<sup>1</sup> Rather, there are other new legal concepts in the field of minor crimes, such as mediation (Article 253, CMK; *supra*, paragraph 274), suspension of prosecution (Article 171/2, CMK; *supra*, paragraph 372), delayed announcement of the judgment (Article 231/2, CMK; *infra*, paragraph 397-II) and suspension of imprisonment (Article 51, TCK; *supra*, paragraph 283).

1. Light imprisonment was to be turned into a fine (*supra*, para. 267) according to the “Code of Enforcement of Punishments” (Art. 386, repealed CMUK). The Justice of the Peace ordered the sanction in the form of a judgment of the court. In the “judgment,” he mentioned that the accused had the right to appeal this written penal order within eight days (Art. 388, CMUK). If there was an appeal, the procedure required a trial inquiry. Only if the inflicted sanction was “light imprisonment” did the court make a public inquiry applying the general rules of trial sessions (Art. 390/1, repealed CMUK). The defense attorney of the accused could be present in the sessions (Art. 390/2, repealed CMUK). If the sanction was other than “light imprisonment,” the court decided the appeal in closed session and upon the file. The court that had jurisdiction in this matter was the President of the Court of General Jurisdiction, and the rules applied during this procedure were set out in Arts. 301, 302 and 303 of the repealed Penal Procedure Code (Art. 390/3, repealed CMUK).

### III. Inquiry in the Absence of the Accused’ and Fugitives’: Default Judgment (in *absentia* Proceedings)

380. Book 5, section 1 of the Turkish Code of Penal Procedure deals with the “Inquiry in the Absence of the Accused and Fugitives” (*gaip*lerin ve kaçakların yargılanması), (Articles 244–248). The new provisions do not allow the court to render a judgment against the absent accused or fugitive, but only to force him to appear before the court. However, if the accused has been questioned by the court once, the court may come to a judgment even if the accused does not appear at the later phases of the trial (Article 194/2, CMK).

I - Inquiry in the absence of the accused. This legal instrument has been criticized by academics and is now restricted, but is also extended to “fugitives” (*infra*, II) by the recent legislation.<sup>1</sup>

In criminal procedure, the word “absence” (*gaip*) has a technical meaning. The accused is considered absent<sup>2</sup> if his whereabouts are not known or if he is in a foreign country and summoning him to a competent jurisdiction appears not possible or inappropriate (Article 244/1, CMK). In such cases, the Turkish criminal law no longer allows an inquiry in the absence of the accused,<sup>3</sup> and the court only may conduct investigation in order to collect and preserve evidence (Article 244/2, CMK). The defense counsel or the spouse of the accused has the right of presence during such an investigation.

In such cases, the court publicly announces the accused’s obligation to appear (Article 245, CMK) and may grant him immunity from pre-trial arrest (*garanti belgesi*) (Article 246/1, CMK). There is no immunity if the accused is convicted, imprisoned, and tries to escape (Article 246/2, CMK).

II - Inquiry in Absence of the Fugitives. The new law has introduced a new legal concept: an individual who hides himself in Turkey or abroad in order to escape a prosecution pending against him is called fugitive (Article 247/1, CMK).

There are some crimes, listed in Article 248, CMK, where the court serves a summons to the known address of the accused against whom there is a prosecution pending. If the accused does not comply with the summons, the court can order his arrest. If this does not help, then the court may decide to publish in a newspaper that if he does not appear within 15 days, his belongings and rights within Turkey shall be seized temporarily (Article 246/2, CMK).

The court may render a pre-trial arrest warrant in absentia<sup>4</sup> against the fugitive accused (Article 248/5, CMK), but may also grant him an immunity from pre-trial arrest (*garanti belgesi*) (Article 246/1, CMK). Of course, such immunity loses its effect if the accused is convicted of an imprisonment or tries to escape (Article 246/2, CMK).

1. Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (İstanbul: Bası, Beta, 2010), 1275; B. Öztürk, *Suç Muhakemesi Hukukunda Gaiplik ve Gaipilerin Muhakemesi* (İstanbul, 1984) 137; E. Yurtcan, *Tutuk Sanığın Varestesine Tutulmuş Olması Durumunda Gıyabında Hüküm Verilmesi Yasaya Aykırı Değildir* (Yasa Hukuk Dergisi, 1978), 1185; Akın, *Gaipilerin Yargılanması*, AdD (1983/3), 473.
2. The accused was considered absent if his domicile was not known, if he was in a foreign country and summoning him to a competent jurisdiction appeared not possible or if it was strongly believed that a summons would not have a positive result (Art. 269, repealed CMUK).
3. In the past it was possible to make a trial inquiry if the subject of the litigation was a crime that might be punished with a fine, confiscation of goods or both (Art. 270/1, repealed CMUK).
4. This is an exception to the new rule, that the suspect or the accused must be present if the decision on pre-trial arrest is rendered (Art. 101, CMK).

#### IV. The Inquiry in Court of Assize and the Inquiry in Court of General Jurisdiction

381. The general Code of Penal Procedure is valid for all types of courts. Only a few exceptions have been adopted relating to crime or the status of the accused. In Turkish law, there are slightly different procedural rules to be applied according to the various courts dealing with organized crime (Article 250, CMK).

The inquiry in court is divided into three phases: preparation of trial session (*duruşma hazırlığı*) (infra, paragraph 382), the trial itself (*duruşma*) (infra, paragraph 383) and the conclusion of the trial with a judgment (*duruşmadan sonuç çıkarma*) (infra, paragraph 395).

##### A. Preparation of Trial Session

382. For the preparation of the trial session, the President of the Court schedules a date for the inquiry (Article 175/2, CMK). There must be at least one week between the day on which the summons was served and the day on which the



accused must appear (Article 176/4, CMK). The court (no longer the public prosecutor) sends the summons to the accused (Article 36, 176/1, CMK) and to his counsel (Article 176/3) to appear on the given date.

An indictment together with the summons shall be served on the accused (Article 176/1, CMK).<sup>1</sup>

If the accused is not under arrest, there must be a notice of the trial date in the served summons. In this notice, the court mentions that the accused will be brought by force or be arrested if he does not appear at the trial (Article 176/2, CMK).

If the accused is in pre-trial detention, he will be summoned to the trial according to Article 35/3 of the Criminal Procedure Code. If the accused is arrested he will be brought to the Court Clerk's room, where the Clerk has the duty to ask him if he requires defense counsel during the trial (Article 176/3, CMK).

The President of the Court has the right to subpoena witnesses, call experts or make further investigation of facts of the case at this stage (Article 180/2, CMK).

1. The indictment was not served in matters tried by the Court of Peace (Art. 208/2, repealed CMK). This regulation of the Code was criticized and was abolished in 1999.

## B. Trial Session

383. The inquiry begins with checking whether the witnesses and experts are present.<sup>1</sup> After that, the identity and personal status of the accused is verified. Then the indictment is read, and the accused is questioned according to Article 147 of the Turkish Code of Penal Procedure (Article 191/2-c, CMK). During the reading of the indictment and questioning of the accused, the witnesses are not allowed to be present in the courtroom.

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 631.

384. During the trial procedure at the Court of General Jurisdiction and at the Court of Assize, the prosecution must be present (Article 188, CMK). The accused is in principle obliged to be present (Article 193/1, CMK), but there are some exceptions to this rule.

All phases of final investigation (trial) are conducted in the presence of the defendant, including all formalities of procedure, especially the proof of guilt (Article 216, CMK). The Turkish Code provides for an exception only in cases where light sentences are involved, that is, where the offense is punishable by confiscation or any combination thereof (Article 195, CMK); the trial may proceed even if the defendant does not appear in court.

A defendant may be excused from attending trial, except where the crime carries a serious punishment (five years of imprisonment at the lower level) (Article 196/2, CMK). If such motion is granted, and the defendant has not been questioned as to the principal facts of the case, then he must be questioned by letters rogatory (Article 196, CMK). If the punishment at the Penal Code for this crime is more than five years of imprisonment at the lower level, the accused must be present at the courtroom.<sup>1</sup>



In addition, the defendant may send defense counsel in cases where the defendant's presence is not necessary (Article 197, CMK).

1. Cass. CGK Mar. 23, 2010 (2009/10–245-2010/62).

385. After the accused has been questioned, evidence is presented to the court (*infra*, paragraph 387). If the accused was not present, and he was not questioned, the presentation of the evidence is nevertheless not postponed.<sup>1</sup> The presented evidence will be explained to the accused when he returns (Article 200, CMK).

After each presentation of evidence or after hearing a witness, the public prosecutor, defense counsel and the lawyer representing the victim (*vekil*) may ask direct questions (*doğrudan soru yöneltme*) to the accused, to the intervening person (*katılan*), to the witness and to the expert (Article 201, CMK). This is a new approach of the new Penal Procedure Code, to give leave to ask questions directly. The repealed legislation allowed only questions suggested to and posed by the presiding judge. When direct questions have been asked, the President of the Court asks the accused whether he has anything to say (Article 215, CMK).<sup>2</sup> This type of questioning is a kind of cross-examination.<sup>3</sup>

When the presentation and discussion of evidence is complete, the public prosecutor, the injured (civil) party and the accused have the right to be heard. The public prosecutor has the right to respond to the accused and the accused and his attorney have the right to reply to the public prosecutor. The accused always has the right of the last word (Article 216/3, CMK). Even if the accused has a defense attorney, he personally has the right to the last word.

The trial ends with the issuing of the judgment.

1. A. Önder, HUMK 150 ve CMUK 378, 379 ve 380. Maddeleri Muvacehesinde Tarafların, Avukatın ve Mudafinin Söz Söyleme ve Savunma Serbestliği, AdD (1948), IXL, 1034–1051; S. Alpaslan, Anglo-Amerikan Hukukunda Mahkemeye Saygısızlık Suçu ve Türk Hukukundaki Durum, IHFM 1974/XL, 1–4, 243–287.
2. T.T. Yüce, Alman ve Türk Ceza Muhakemeleri Usulünde Savunma Hakkı, AdD (1960/11), 1017–1028.
3. A.E. Akyazan, Karşılaştırmalı Hukukta ve Türk Hukukunda Doğrudan Soru Yöneltme (Çapraz Soru) (Ankara, 2009). G. Arıkan, Çapraz Soru İçin Hazır mıyız? (Ankara Barosu Dergisi sayı, 2005/4).

## C. Evidence

### 1. Principles of Evidence Law

386. The main principles of evidence<sup>1</sup> are based on the Continental European system.<sup>2</sup> The court must undertake a complete investigation to determine the factual truth. The court is not dependent on the evidence of the prosecutor, the accused, or the other parties. Witnesses can also be called on the court's own initiative.

The court is obliged to explain the means of proof included in the verdict, as well as to provide the analysis used to include or exclude such proof (Article 230, CMK).

1. A. Parlar, M. Hatipoğlu & Y.E. Güngör, Açıklamalı – İçtihatlı Ceza Muhakemesi Hukukunda Deliller Çapraz Soru ve İspat (2005).

2. S. Belgesay, *Kanuni ve Takdiri Deliller ve Temyiz Mahkemesinin Delilleri Takdiri* (Ankara, 1938), 11; S. Belgesay, *Hukuk ve Ceza Mahkemesinde Deliller* (İstanbul, 1960), 7. I. Üzülmöz, *Türk Hukukunda Suçsuzluk Karinesi ve Sonuçları* (Türkiye Barolar Birliği Dergisi, sayı 58 sayfa 41, Mayıs & Haziran 2005).

387. The accused is presumed innocent (suçsuzluk karinesi). As a consequence, there is no obligation for him to prove that he is innocent. In contrast, the judge has the obligation to search for the factual truth, and only if he is convinced that the accused is guilty may he convict him. Thus, neither the public prosecutor nor the accused has the burden of proof in Turkish Law. If the accused or the public prosecutor points out one aspect during the course of criminal proceedings, the trial court has the obligation to determine the factual truth.

A defendant can never be under a duty of self-incrimination; the right to remain silent is guaranteed (supra, paragraph 353).

388. Law does not define the means of proof. Everything may be considered as evidence insofar as it is reasonable to assume so. The court considers the evidence freely in order to discover the factual truth. There is a “freedom of evidence.” However, that evidence should have been obtained lawfully (Article “2001–4709” 38, AY; Article 217/2, CMK) (infra, paragraph 394), and the concerned parties should discuss all the evidence during trial.

389. Only the direct conclusions of the presiding judge are subject to the court’s judgment.

Judicial presumptions (karine) are not accepted in Turkish Criminal Procedure.

## 2. Means of Proof

390. Physical evidence. Official police reports of the interrogation of the accused are not considered evidence in court. Only the written record during the hearing before the judge may be considered evidence (Article 209, CMK).<sup>1</sup> However, some special codes (e.g., Article 119, KTK) give the police the right to make some drawings of the scene of the crime. In such cases, the official police reports acquire the character of evidence.

1. Kunter, Yenisey & Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (İstanbul: Bası Beta, 2010), 1392.

391. Witness. I - The testimony of witnesses in court is considered evidence.<sup>1</sup> There is no age limit for a witness in Turkish Criminal Procedure Law. However, the accused is not entitled to give testimony as a witness on his own behalf.

Eyewitnesses to a crime have a duty to testify. However, the law provides that the family members of the accused may refuse to act as witnesses (Article 45, CMK).

The President of the Court has the right to question witnesses (Article 59, CMK). The accused and the parties may also directly ask a specific question to the witness (Article 201, CMK). The President has discretion over such requests. There is now

a possibility of direct examination and cross-examination of witnesses by the defense lawyer and the public prosecutor; however, so far this provision is rarely applied.<sup>2</sup>

Informers who give testimony about individuals attempting to endanger the constitutional order of the State will be rewarded, and their identity will be kept secret during the trial (Article 58/2, CMK; Added Article 1 of Act No. 1481, dated August 15, 1971). Statements of anonymous witnesses are permitted in some cases, for example by Article 19/4 the Combating Smuggling Act 2007.<sup>3</sup>

A scientific expert<sup>4</sup> (bilirkişi) is considered a witness; his scientific opinion is not a witness testimony, but an explanation of factual findings (infra, paragraph 393).

II - Witness protection. There is a Witness Protection Act since 2007, Act No. 5726.<sup>5</sup> Witnesses of crimes carrying punishment of more than 10 years of imprisonment and more than two years imprisonment of organized crimes as well as all kind of terror crimes may be protected (Article 3, Act 2007–5726).

1. Kunter, Yenisey & Nuhoglu, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 18 (İstanbul: Bası, Beta, 2010), 1346.
2. The European Court of Human Rights found in the Sadak and Others Judgment of July 17, 2001 that the accused having no opportunity to ask questions of a witness who made statements against them during the preliminary investigation was a violation of Art. 6.
3. S. Erman, Kaçakçılık (İstanbul, 1981), 616; Gökçe, Cezada Kanıt Değerlendirmesi (Yasa Hukuk Dergisi, 1979), 520; S. Selçuk, Kanıtların Toplanması (YD 1977/3), 57.
4. Y. Deryal, Türk Hukukunda Bilirkişilik (2004).
5. A.E. Akyazan, Türk Hukukunda Tanıkların Korunması (Ankara: Afşaroğlu Matbaası, 2010).

392. The confession (ikrar) of the accused is generally considered a ground for mitigated punishment. Some special legislation contains provisions about not punishing or mitigating the punishment of the accused (etkin pişmanlık) if the confession was useful in solving the crime (Articles 93, 110, 168, etc., TCK).

393. Expert opinion is not considered evidence in Turkish Law.<sup>1</sup> According to the Code of Penal Procedure, the court must ask the opinion of the scientific expert if the matter relates to technical points or to special knowledge (Article 62, CMK). It is forbidden for the court to ask experts their opinion about matters related to law.<sup>2</sup>

1. Kunter, Yenisey & Nuhoglu, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 18 (İstanbul: Bası, Beta, 2010), 1397; N. Gürelli, Türk Ceza Muhakemesi Hukukunda Bilirkişilik (İstanbul: İstanbul Üniversitesi, 1967), 95.
2. N. Gürelli, Ceza Muhakemesinde Bilirkişilik Kurumuna İlişkin Meseleler (İstanbul: Doğanay Armağanı, İstanbul Üniversitesi, 1982), 65; S. Dönmezer, Mecburi Ehlihibre, IHFM.X, 1–2, 415.

### 3. Exclusion of Evidence

394. The exclusionary rule did not exist in Turkish Penal Law until 1992. This deficiency in Turkish Law was much criticized by scholars.<sup>1</sup> According to the repealed Turkish Code of Penal Procedure (Article 254/2, CMUK as amended in

“1992–3842”) “illegally obtained evidence by investigating and prosecuting authorities would be disregarded when reaching a verdict”; it was thus “excluded.”<sup>2</sup>

The concept of the exclusionary rule<sup>3</sup> was broadened in 2001 by adding a subparagraph to the Constitution: “Items obtained in violation of an Act, may not be used as evidence at court” (Article 38/7, AY “2001–4709”).

The new Penal Procedure Code also includes provisions in this respect, but the wording is slightly different: “The court may only use legally obtained evidence while making a decision on the guilt” (Article 217/2, CMK). Illegally obtained evidence may not be put forward during the discussions at the main trial (Article 206/2-a, CMK), and the court has to dismiss such evidence, furnishing reasoning for exclusion (Article 230/1-b, CMK). If any illegally obtained evidence has been used to form the judgment, the Court of Cassation will overrule the verdict (Article 289, CMK).

As a result of these regulations, even the slightest breach of a “law” or “act” will result in the exclusion of evidence.<sup>4</sup>

If forbidden interviewing methods (*supra*, paragraph 354) were used, the statement or confession obtained as a result of such methods is excluded by the Code. The consent of the interviewed person does not cure the illegality (Article 148, CMK; Article 135a/2, repealed CMUK as amended in “1992–3842”).

1. O. Tosun, *Ceza ve Medeni Muhakeme Hukuku Açısından Hukuka Aykırı Yollarla Elde Edilen Delillerin İspat Kuvveti* (İstanbul, 1976), 12; Bıyıklı, *Ceza Muhakemesi Hukuku ve Kanıtların Toplanması Doğruluk Kuralı* (YD 1977/III), 85; F. Erem, *Usul Hiylesi* (YD 1977/III), 171; S. Selçuk, *Kanıtların Toplanması Yasallık, Dürüstlük ve Total Ceza Adaleti* (YD 1977/3), 113.
2. O. Gürakar, *Ses ve Görüntü Kayıtlarının Delil Değeri* (Prof. Dr. Çetin Özek Armağanı, Galatasaray Üniversitesi Yayını, 2004). V. Bıçak, *Improperly Obtained Evidence: A Comparison of Turkish and English Laws* (Ankara: Yardımcı, 1996). V. Bıçak, *Usulsüz Ulaşılan Delillerin Akıbeti*; <www.bilkent.edu.tr>, 2005.
3. B. Öztürk, *Yeni Yargıtay Kararları Işığında Delil Yasakları* (Ankara, 1995); V. Bıçak, *Improperly Obtained Evidence* (Ankara, 1996); S. Kaymaz, *Ceza Muhakemesinde Hukuka Yıkırı (Yasak) Deliller* (Ankara, 1997); Kunter, Yenisey & Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18 (Bası, İstanbul, 2010), 1411.
4. E. Şen, *Türk Ceza Yargılaması Hukukunda Hukuka Aykırı Deliller Sorunu* (İstanbul, 1998).

#### D. Conclusion of Trial and Judgment of the Court

395. After conducting the inquiry according to regulations (*supra*, paragraph 382) as prescribed by the Code, the President of the Court announces that the inquiry is completed and concludes the session (Article 223/1, CMK). Afterwards, the court holds a closed session in private chambers to discuss the outcome of the inquiry.

There is no jury in Turkish Criminal Law, not even in the Court of Assize. Therefore, there is no distinction between the verdict and the sentence. Before reaching the judgment, the court must decide whether the proven facts constitute a criminal offense. If not, the accused will be acquitted. If the court decides that it has been proven that the accused committed a crime, and there are no grounds to justify the acts, the accused is pronounced guilty and convicted. Afterwards, the court determines (*supra*, paragraph 248) the punishment.

## E. The Categories of the Judgments of the Trial Court

396. The trial court may issue the following categories of judgments<sup>1</sup> at the end of the trial: “acquittal” (beraat kararı) (Article 223/2, CMK); “no ground for punishing on the grounds of lacking culpability” (kusurun bulunmaması dolayısıyla ceza verilmesine yer olmadığı kararı) (Article 223/3, CMK); “no ground for punishing” (ceza verilmesine yer olmadığı kararı) (Article 223/4, CMK); “conviction,” in cases the facts are proven (mahkûmiyet kararı) (Article 223/5, CMK); conviction to a punishment and (or instead of conviction) a “security measure” in cases in which the facts are proven (suçun işlendiğinin sabit olması halinde belli bir cezaya mahkûmiyet yerine veya mahkûmiyetin yanı sıra güvenlik tedbiri) (Article 223/6, CMK); “rejection of the case,”<sup>2</sup> (davanın reddi) (Article 223/7, CMK); and dismissal or “dropping of the case” (düşme kararı) (Article 223/8, CMK). If there is a ground for dismissing the case or setting the punishments aside pursuant to the Penal Code, (infra, paragraph 452), or if it is obvious that the conditions of criminal prosecution will not be realized, the court dismisses the case.

“Suspension of proceedings” (durma kararı) is no longer considered a “judgment.” If the prosecution depends on a precondition to proceed with the prosecution (supra, paragraph 362), and this precondition has not been fulfilled, the court may suspend the proceedings and wait until the fulfillment of the precondition according to the repealed law (Article 253/4, repealed CMUK).

1. E. Günay, Uygulamalı Ceza Davalarında Hüküm Kurma Esasları ve Hükümün Bozdurulması (2006).
2. Kunter, Yenisey & Nuhoğlu, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 18 (İstanbul: Bası, Beta, 2010), 1489.

397. Conviction and “delayed announcement of the judgment.” I - Conviction. A “conviction” (mahkûmiyet kararı) is comprised of two parts: the decision of the court (hüküm fıkrası) and the reasons for this decision (gerekçe). Normally, the decision of the court and its reasons will be read aloud at the same time and written into the minutes of the proceedings.<sup>1</sup> However, sometimes the reasons may be read afterwards. The law permits the court to prepare it for three days (Article 231, CMK).

The judgment must contain the category of the decision, the numbers of the Articles of the Penal Code that were applied, the duration or extent of the sanction and notice about the possible legal remedies provided by law against the judgment (Article 232, CMK).

According to Article 230 of the Code of Criminal Procedure and Article 61 of the Penal Code, the reasons for the decision must be laid down accurately. Here, the proven facts should be discussed. The mere mentioning of the related article of the Penal Code is not considered a valid reason.

II - “Delayed announcement of the judgment” (Article 231/5-14, CMK) is a new concept in Turkish Criminal Procedure Law since 2006. Act of 2006–5560 added new subsections to Article 231, which were amended in 2008 by the Act No. 5728 and in 2010 by the Act No. 6008.

In cases where at the end of the adjudication conducted related to the crime charged to the accused, if he shall be punished with imprisonment of two years or less or a fine, the court may decide to delay the pronouncement of the judgment.

The provisions related to mediation are preserved. Delaying the pronouncement of the judgment means that the judgment that has been produced shall not have legal effect for the accused (Article 231/5, CMK, as amended by Act 2006–5560).

In order to be able to render “the decision on delaying the pronouncement of the judgment,” the following requirements must have been fulfilled: the accused must not have been convicted for an intended crime previously, considering the specialties of the personality of the accused and his behavior during the main trial, the court has to reach the belief that the accused shall not commit further crimes.

The damage to the victim or the public, due to the committed crime has been recovered to the full extent by giving back the same object, by restoring the circumstances as they were before the crime had been committed, or by paying the damages (Article 231, CMK as amended by Act 2006–5560). In cases where the accused does not consent, there shall be no decision on delaying the pronouncement of the judgment rendered (Article 231/6, CMK, added by Article 7 of Act dated July 22, 2010, No. 6008).

In the judgment, of which the pronouncement has been delayed, the inflicted imprisonment term shall not be postponed, and in cases where the punishment is a short-term imprisonment, it shall not be converted into the alternative sanctions (Article 231/7, CMK, as amended by Act 2006–5560).

In cases where a decision on delaying the pronouncement of the judgment has been rendered, the accused shall be subject to a probation term for five years. The court may decide that the accused shall be subject to an obligation of probation, not exceeding one year:

- (1) In cases where he has no profession or skill, the court may decide that he shall take part in an education program in order for him to obtain a profession or a skill.
- (2) In cases where he has a profession or a skill, the court may decide that he shall work for a fee in a public institution or in a private place, under the supervision of another person who performs the same profession or skill.

The court may decide that he shall be prohibited from going to certain places, that he shall be obliged to visit certain places, or to fulfill another obligation which shall be determined by the discretion of the court.

During the period of probation, the statute of limitations for prosecution shall be interrupted by the probation measure (Article 231/8, CMK, as amended by Act 2006–5560).

In cases, where the accused is not able to fulfill the requirement that is mentioned in subsection (c) of subparagraph 6 immediately, the court may decide as well that the pronouncement of the judgment shall be delayed under the requirement that the accused pays the damages of the public or the victim to the full extent in monthly installments. (Article 231/9, CMK, as amended by Act 2006–5560).

In cases where there has been no intentional crime committed during the period of probation and the obligations related to the measures of controlled liberty (probation), the judgment, of which the pronouncement had been delayed, shall be annulled, and the court shall render the decision on dismissing the case (Article 231/10, CMK).



In cases where the accused has committed a new intentional crime during the period of controlled liberty (probation), or has violated the obligations related to the controlled liberty, the court shall pronounce the judgment. However, the court may evaluate the circumstances related to the accused who was not able to fulfill the obligations inflicted on him, and may decide that the portion of the punishment which may be determined up to the half of the original one shall not be executed, or if the requirements are present, to suspend the imprisonment (hapis cezasının ertelenmesi), or to convert the punishments in the judgment into alternative sanctions, thus forming a new judgment (Article 231/11, CMK).

The decision on delaying the pronouncement of the judgment may be subject to opposition.

Decision related to “the delaying the pronouncement of the judgment” shall be recorded in a specified data bank for this purpose. These recordings may only be utilized for the purpose mentioned in this article, if it has been requested by the public prosecutor, judge, or the court, in relation to an investigation or prosecution (Article 231/13, CMK).

The provisions of this article related to the “the delaying the pronouncement of the judgment” shall not be applied for crimes that are mentioned in the “reform laws,” protected by the provisions of Article 174 of the Constitution (Article 231/14, CMK, as amended by Act No. 2008–5728) (*supra*, paragraph 10).

1. N. Kunter, Yargılama Makamlarında Dağılan Oyların Toplanması Sorunu (YD 1983/ Temmuz, 354); Duman, Savcının Müzakereye Katılması, IBD (1983/57), 471; Metin, Ceza Mahkemelerinde Gerekçeli Hüküm Sorunu ve Tekniği, AdD (1985/5), 68.

#### §4. ENFORCEMENT OF FINAL CRIMINAL JUDGMENTS

398. The enforcement of criminal judgments was regulated in Book Eight of the repealed Criminal Procedure Code. These provisions have been transferred into the Code on Enforcement of Punishments and Security Measures (CGIK).

Only final convictions (*res judicata*) may be enforced (Article 20, CGIK). The public prosecutor enforces final judgments. The President of the Court or the judge that handed down the conviction approves the final judgment by his signature.

Enforcement of foreign judgments is regulated by Act No. 3002 (*infra*, paragraph 443).

399. The enforcement of custodial punishments (*infra*, paragraph 441) will be postponed if the convicted person is mentally ill (Article 16, CGIK). Other illnesses constitute a ground for postponing the execution of the custodial punishment if they are likely to place the sentenced person in a life-threatening situation (Article 16/2, CGIK).

Except for imprisonment longer than three years, the execution of custodial punishments may be postponed at the request of the sentenced person if its immediate execution would harm him or his family, as this is outside the purpose of the punishment (Article 17/1, CGIK).

400. If the convicted person does not appear at the request of the Public Prosecutor, or if there is suspicion that he will flee, then the Public Prosecutor will issue an arrest warrant (Article 20/1, CGIK).



## Chapter 4. Legal Remedies

### §1. GENERAL PRINCIPLES

401. According to Turkish doctrine, legal remedies in Turkish criminal procedure are divided into two categories: ordinary legal remedies and extraordinary legal remedies.<sup>1</sup>

Ordinary legal remedies are based on court judgments that are not final (not *res judicata*). Extraordinary legal remedies apply against court judgments that are final and enforceable (*res judicata*).<sup>2</sup>

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 735.
2. E. Yurtcan, *Kesin Hüküm* (İstanbul, 1987), 25.

402. Legal remedies can be divided according to the categories of judicial decisions. There are no legal remedies against measures taken by the public prosecutor and police.<sup>1</sup> The only exception to this rule is petitioning the Justice of the Peace (*supra*, paragraph 343) to overturn or check an arrest or rule against the prolongation of police custody. This was introduced into Turkish Law in 1992 (Article 91/3, CMK; Article 128, repealed CMUK).

With respect to decisions of magistrates, there is the legal remedy of “opposition” (*itiraz*). With respect to judgments of the trial courts, one can seek relief from the Court of Cassation. If the Code provides no exceptions, there is no legal remedy against court orders rendered during the course of the trial.

1. C. Özek, “Yargının İdari Denetimi,” in *Atatürk’ün 100* (İstanbul: Doğum Yılı Kutlama Kolokiyumu, İstanbul Üniversitesi, 1981), 115.

403. Some general requirements apply to all legal remedies. The first one is interest. Only the party who has interest in the review of the decision may apply for a remedy: the acquitted person has no interest in a legal remedy if the acquittal is based on the facts of the case.

Ordinary legal remedies have devolutive effect. A different court must try the action of a legal remedy case.

The petition for a legal remedy has a suspensive effect, and the original judgment of the trial court does not become final or *res judicata*.

There are requirements for applications for legal remedies. The appropriate court may only judge the case on the request of parties. Exceptionally, in the Court of Appeal or the Court of Cassation (for the time being), there is an automatic review if the court has ordered imprisonment exceeding 15 years (Article 272, CMK; Article 305/1, repealed CMUK).

404. If a party does not apply for a legal remedy (review), the judgment becomes final. However, if the Court of Cassation quashes the last judgment of the trial court because of a mistake in punishment, then the non-appealing party benefits from the decision (Article 306, CMK; Article 325, repealed CMUK).

405. If the accused alone had requested the petition for review to the Court of Cassation, or if the Public Prosecutor put one forward on his behalf, and the judgment of the trial court is quashed by the Court of Cassation, then the trial court is not empowered to increase the sentence in the new trial (Article 307/4, CMK; Article 326, repealed CMUK).

## §2. ORDINARY LEGAL REMEDIES

### I. Opposition

406. Opposition (*itiraz*) is generally applicable against magistrates' decisions if it is not excluded by regulation. Opposition is not available against the judgments of the court, however. Challenging decisions of the court is only possible in instances where explicitly provided by the Code.<sup>1</sup>

The high magistrate (the judge of the Court of General Jurisdiction for the decisions of the Justice of Peace) who hears the opposition has the power to examine both the facts and the applicable law and will give his opinion in the form of a new decision on the case.

1. N. Gürelli, *İtiraz Kanunyonu* (İstanbul: Ceza Adaleti İlkeleri Sempozyumu, İstanbul Üniversitesi, 1973), 63.

407. In case of an opposition, the magistrate may change his previous decision (Article 268/1, CMK).<sup>1</sup>

The decisions of the following magistrates, if not contrary to the Code and not rendered during the trial session, are subject to opposition: the judge who is representing the court for a certain action, the judge of another venue who had been asked by the court to take some action (such as witness hearing), the President or a member of the Court of General Jurisdiction and the Justice of the Peace (Article 268/3, CMK).

The decision of the court that is exceptionally subject to opposition is that which “ordered the pre-trial detention” (Article 271/4, CMK).<sup>2</sup>

1. According to the repealed legislation, if the remedy provided is so-called urgent opposition (within a week), the judge who rendered the opposed decision did not have the power to give a new decision on the related case (Art. 304/4, repealed CMUK). In such cases, only the high magistrate could give a new decision if the former decision was illegal.
2. Under prior laws “continuation of the pre-trial detention” (added in 1992), “decisions related to confiscation” (*haciz*) and “court decisions related to third parties” (Art. 298, repealed CMUK) were also subject to opposition. The new Code does not include these provisions.

## II. Appeal on Fact and Law

408. Appeal on fact and law (*istinaf*). The motion of appeal on fact and law has not entered into force as of July 2011, but is envisaged to be filed against the judgments rendered by the courts of first instance. However, judgments related to a custodial penalty of 15 years and more shall be inspected by the Regional Court of Appeal on Facts and Law by its own motion (Article 272/1, CMK).

Decisions of the court rendered prior to the judgment and constituting a basis for the judgment, or decisions against which no other legal remedy has been foreseen by the Code, may be attacked in connection with the appealed judgment on fact and law (Article 272/2, CMK).

For judgments recognizing judicial fines up to two TRY 2,000 (TRY 2,000 included), judgments of acquittal rendered for crimes that require a criminal fine not above 500 days as the upper level of the punishment, the law does not provide a legal remedy (Article 273, CMK) (for the current situation, see *infra*, paragraph 409).

I - Motion of appeal on fact and law and its time limit. A motion of appeal on fact and law shall be lodged within seven days after the pronouncement of the judgment with a petition submitted to the court that rendered the judgment, or by making a declaration to the clerk of the court. This declaration shall be taken into records, and the record shall be approved by the judge. In respect of the accused who is under arrest, the provisions of Article 263 shall apply.

If the judgment has been pronounced in the absence of the individuals who have the stand of appeal on fact and law, the period starts running on the date of notification.

Public prosecutors attached to the Criminal Courts of General Jurisdiction may appeal on fact and law against the decisions of Court of Peace in Criminal Matters in their district of jurisdiction; public prosecutors attached to the Courts of Assizes may appeal against judgments of Criminal Courts of General Jurisdiction and of Courts of the Peace in their district of jurisdiction. The above-mentioned public prosecutors may file a motion of appeal on fact and law within seven days after the judgment arrives to the office of the public prosecution in that judicial district.

Failure to submit the grounds of the application in the petition or declaration shall not prevent the admissibility of the application of the accused; of the intervening parties; of individuals who had filed a petition of intervention and their request was not ruled upon or was denied; or, finally, of the individuals who had suffered damages that would entitle them to intervening party status.

The public prosecutor shall submit the grounds for filing a motion of appeal on fact and law together with the written petition, writing them clearly, together with the motives. The petition of the public prosecutor shall be notified to the parties (*tarafklar*). The parties may submit their responses in this respect within seven days after the date of the notification (Article 273, CMK).

II - Running of the period of appeal on fact and law during the period of restitution (*eski hale getirme*). The accused is entitled to ask restitution against judgments rendered against him in his absence. During the period of restitution, the period of appeal on fact and law runs as well. If the accused files a motion on restitution, he must file a separate motion of appeal on fact and law. In such cases,

interactions related to the petition of appeal on fact and law shall be suspended until a decision about the request of restitution has been rendered (Article 274, CMK).

III - Denial of the motion by the court that rendered the judgment. The court that has rendered the attacked judgment is entitled to deny the motion with a decision if the petition was submitted after the expiry of the legal period, if the judgment is not open to appeal and if the party that had filed the motion lacks standing.

The public prosecutor or the parties who filed a motion of appeal on fact and law may ask the Regional Court of Appeal on Facts and Law to rule on this issue within seven days after the notification of the decision on denial. In such cases, the file shall be sent to the Regional Court of Appeal on Facts and Law. However, this shall not be a ground to suspend of the execution of the judgment (Article 276, CMK). If the petition of appeal on fact and law is not rejected by the court that rendered the judgment in accordance with the Article 307, then the petition of appeal or a copy of the record about the application will be given to the other party. The opposite party is entitled to give its response within seven days after the date of notification.

If the opposite party is the accused, then he may give his response with a declaration, which shall be included in the record by the court recorder. After the response has been handed over or the fixed time limit for this purpose has expired, the file of the lawsuit shall be submitted to the Office of the Chief Public Prosecution of the Regional Court of Appeal on Facts and Law, in order to be given to the Regional Court of Appeal on Facts and Law. The provisions of Articles 262 and 263 are reserved (Article 277, CMK).

IV - Duties of the public prosecutor at the Regional Court of Appeal on Facts and Law. When the file arrives to the Office of the Public Prosecution of the Regional Court of Appeal on Facts and Law, it is inspected and handed over to the criminal chamber of that court. Also handed over is the notification of the legal opinion that includes the written view, and attached documents and evidence required to be given if there are any, after the missing parts of the notification have been achieved, and after the documents and items of evidence which have been submitted have been attached. The legal opinion, which has been prepared by the Office of the Chief Public Prosecution of the Regional Court of Appeal on Facts and Law, shall also be given to the parties (Article 278, CMK).

If the Regional Court of Appeal on Facts and Law considers after the pre-inspection of the file that it lacks jurisdiction, it makes a formal decision to submit the file to the competent court. If it considers that the petition was not timely or the decision could not be appealed, or if the petitioner does not have the right to file this motion, the court denies the petition of the appeal on facts and law (Article 279, CMK).

V - The inspection at the Regional Court of Appeal on Facts and Law and prosecution. The Regional Court of Appeal on Facts and Law, after inspecting the notification of the legal opinion of the Office of the Chief Public Prosecution, the file and the evidence submitted together with the file, renders the following decisions:

- to deny the petition of appeal on facts and law on the merits (istinaf başvurusunun esastan reddi kararı), if it establishes that the judgment bears no illegality in respect to procedure or to substantive law, that there is no missing evidence or

the interactions were complete, and that the evaluation in respect to the proof is adequate;

- to set aside the judgment and send the file to the court of first instance whose judgment has been set aside, or to a different court of first instance within its district of jurisdiction, which the court deems appropriate, if it establishes that there is a ground of illegality in the judgment of the court of the first instance; and
- to annul the judgment of the court of the first instance, to make a new trial and to start with the preparations of the main hearing in other instances (Article 280, CMK).

The president of the Regional Court of Appeal on Facts and Law, or a member of the court appointed by him, shall determine the day of the main hearing (Article 175, CMK) and make the necessary calls. The summons to the accused shall include the warning that failure to appear at the main hearing of the lawsuit opened upon his petition will lead to inadmissibility.

The court decides on hearing the witnesses and experts that are deemed necessary and conducts judicial inspection (Article 281, CMK).

VI - Exceptions during the main hearing. If the main trial is opened, the provisions related to the main hearing and judgment of this Code apply:

The inspection report of the member who has been appointed for this purpose shall be read, as well as the final judgment of the court of first instance, which is provided with reasons. The transcripts of the witnesses, the transcripts of the preparatory works by the Regional Court of Appeal on Facts and Law itself if it has conducted such investigation, the transcripts of the judicial inspection, and submissions and reports of experts will also be read. Witnesses and experts whose hearing at the main trial at the Regional Court of Appeal on Facts and Law are deemed necessary shall be summoned (Article 282, CMK).

If the petition of appeal on facts on law was in favor of the accused, the newly rendered judgment shall not contain a heavier sanction than that determined by the former judgment (Article 283, CMK).

Against the decisions and judgments rendered by the Regional Court of Appeal on Facts and Law, there is no right to insist, which is given against decisions of the Court of Cassation (infra, paragraph 418-X). Provisions related to opposition and appeal on law are reserved (Article 284, CMK).

### III. Ordinary Way of Cassation

#### A. Provisions of the Repealed Penal Procedure Code Still Applicable in July 2011

409. “The Ordinary Way of Cassation” (temyiz) regulates the party’s petition to the Court of Cassation for quashing the last judgment (hüküm) of the trial court.<sup>1</sup> Only violation of the law can be argued in this legal remedy (Article 307, repealed CMUK).

Since there are no “appeals” courts, hearing cases on fact and law, an interesting state of affairs has existed in Turkish Law since June 1, 2005: the provisions of the repealed Penal Procedure Code related to the ordinary way of cassation are applicable as the only legal remedy against judgments rendered by the courts. We shall first explain (*infra*, paragraphs 410–417) the provisions of the repealed law, then (*infra*, paragraph 418) the provisions of the new Code.

According to the repealed but still applicable provisions of CMUK, the cassation appeal is regulated as follows. At the request of any party involved in a case, the Ordinary Way of Cassation is awarded against the last decisions of trial courts, as listed in Article 253 of repealed the Turkish Code of Penal Procedure. However, if the conviction is related to deprivation of liberty for 15 years or more or to the death penalty, then the Court of Cassation examines the case automatically (Article 305/1, repealed CMUK).

Some trial court final judgments cannot be brought up for review to the Court of Cassation: these include convictions involving fines up to TRY 2 million,<sup>2</sup> acquittal judgments requiring a maximum fine of TRY 15 million and judgments for which a review has been precluded by the Criminal Procedure Code or other Law (Article 305/2, repealed CMUK). In such cases, ordinary review to the Court of Cassation does not apply. However, there is the possibility of an Extraordinary Appeal (*infra*, paragraph 421) pursuant to Article 343 of the Criminal Procedure Code (Article 305/3, repealed CMUK).

1. S. Keskin, *Ceza Muhakemesi Hukukunda Temyiz Nedeni Olarak Hukuka Aykırılık* (İstanbul: Alfa Basım Yayım Dağıtım, 1997).
2. There is no right to appeal against criminal fines upto 2,000.000 lira according Art. 305/1 of the repealed CMUK, which is currently applicable as of July 2011. Closing the way of appeal against convictions involving criminal fines commuted from a short-term imprisonment has been considered against the principles of the Constitution and been abolished in 2009 (Decision of the Court of Constitution dated July 23, 2009, E. 2006/65, K. 2009/114). The Law dated Mar. 31, 2011, No. 6217 opened the way of appeal in law for criminal fines commuted from imprisonment (*supra*, para. 222) regardless of the amount of it. However, there shall be a soon similar problem under the way of appeal in fact and law (Art. 272/3-a), when its application shall start (*infra*, para. 408).

410. The ordinary petition for review must be made within one week of the decision given to the Clerk of the Court where the judgment was rendered (Article 310, repealed CMUK).<sup>1</sup>

Exceptionally, the Public Prosecutor attached to the Court of General Jurisdiction and may appeal judgments of the Court of Peace within a month after receipt of the judgment by the Clerk of Court (Article 310/3, repealed CMUK).

1. N. Centel, “Ceza Muhakemesi Hukukunda Eski Hale Getirme,” *IHF*M (1985): 197; Dalamanlı, *Kanunlarda Süreler ve Mahkemelerin Görevleri* (İstanbul: Kazancı, 1984), 10.

411. The petition should be directed to the Registrar in writing or orally, upon which a record will be made and signed by the petitioner. According to Turkish law, there is no obligation to state the grounds for the petition. Two words are sufficient: “I appeal.”

412. The trial court determines whether the requirements for an appeal are sufficient, and rejects them if they are not. If admissible, it sends the entire record (or file) to the Court of Cassation after asking the opinion of the other parties (Article 315, repealed CMUK).

The Court of Cassation also examines the necessary requirements for a review and the subject (the main objection) if all the requirements are fulfilled (Article 317, repealed CMUK).

The Court of Cassation will only examine the file. An adversary session will be allowed only if the crime is an offense to be tried by the and the Court of Cassation orders it on its own initiative, or if the accused applies for it (Article 318/1, repealed CMUK).

413. The examination by the Court of Cassation is not limited to the issues raised by the appellant. The court has the power to examine the whole file and may quash the judgment because of a fundamental error in law made by the trial court that could have changed the outcome of the judgment and that was not known to the parties (Article 320, repealed CMUK).

The problem of *res judicata* on those matters not objected to in the petition for review does not exist in Turkish Law.

The second limitation to examination is critical: only the mistakes in the application of the law are reviewed. The factual findings are excluded from examination.

414. There are four types of decisions of the Court of Cassation: quashing the judgment of the trial court, rejecting the petition, rendering a new judgment and dismissing the case.

415. The Court of Cassation has the power to quash the judgment of the trial court (Article 321, repealed CMUK) and return the record to the same trial court or to another court of equal jurisdiction (Article 322/2, repealed CMUK).

Once the record is sent back, the trial court must seek the opinion of the parties concerned about the quashed decision (Article 326/1, repealed CMUK). It then has two options. The first is to accept the error and begin a new trial. Since the first judgment is invalid, at the end of the second trial, a new judgment will be given by the trial court that is subject to ordinary review in the Court of Cassation. The authorized chamber of the Court of Cassation will examine this decision.

The second option is to “insist” on the first judgment, arguing that there was no mistake in law.<sup>1</sup> This “insisting” decision on the first judgment may be appealed again. If not appealed, the first judgment rendered by the trial court becomes final and *res judicata*.

If the parties appeal the “insisting” decision to the Court of Cassation, the General Criminal Assembly of the Court of the Cassation (Yargıtay Ceza Genel Kurulu) will examine this case. The decisions of the General Criminal Assembly are final and the trial court has no further right of “insisting” upon the original judgment (Article 326, repealed CMUK).

1. N. Kunter, “Türk Muhakeme Hukukunda İsrar Hakkı,” *IHF*M, no. 455-47 (1981): 173.



416. The Court of Cassation can reject a petition if it does not meet the necessary legal requirements. In this case, the judgment of the trial court becomes final and *res judicata*. However, the Public Prosecutor of the Court of Cassation, the Attorney General, has the power of an “extraordinary opposition” (*infra*, paragraph 420) to the decision of the Court of Cassation.

417. The Court of Cassation does not have the power to deal with factual findings of the case, and for this reason it may not interfere with the judgment itself. The Court of Cassation may only quash the judgment of the trial Court if it determines that there are mistakes of law. However, in exceptional cases, as provided by the Code, where the mistake can be set aside without considering the facts, the Court of Cassation can correct the judgment on its own initiative without quashing the decision (Article 322, repealed CMUK).

If the grounds for dismissal and setting aside of punishments (*infra*, paragraph 450) are present, the Court of Cassation is entitled to dismiss the case (*düşme kararı*).

#### B. Provisions of the New Criminal Procedure Code Related to the appeal on law

418. The provisions of the new Criminal Procedure Code are not in force yet (July 2011). When the Regional Courts of Appeal are formed, the provisions regarding legal remedies are to change. Below are the future regulations on appeal on point of law.

I - Judgments which may be appealed on law. With the exception of reversal judgments, judgments rendered by Criminal Chambers of the Regional Court of Appeal on Facts and Law may be appealed on law.

The following decisions are exempted from appeal on law:

- (1) decisions of custodial penalties of up to five years, and decisions denying appeals on facts and law against any kind of fines;
- (2) judgments rendered by criminal chambers of the Regional Court of Appeal on Facts and Law related to punishments of up to five years custodial penalty, that do not alter the characteristics of the offense and the final punishment as described in the judgment of the court of first instance;
- (3) all kinds of decisions of the Regional Court of Appeal on Facts and Law confirming decisions of the court of first instance, that are in agreement with the nature of the offense and impose a custodial penalty of up to two years;
- (4) decisions of the Regional Court of Appeal on Facts and Law that do not alter the nature of the offense in connection with the sentence rendered by the court of first instance, which only imposed a fine;
- (5) judgments rendered by the Regional Court of Appeal on Facts and Law, that do not alter the decision of the court of first instance in relation to confiscation or forfeiture or in relation to a judgment that deems it not necessary to rule so;
- (6) where the judgment of the Regional Court of Appeal on Facts and Law was an acquittal on appeals on facts related to offenses that require custodial penalty



for 10 years (including the 10th year), or that require various fines in connection with the decisions of acquittal rendered by the court of first instance and decisions of denial of motions for appeals of facts;

- (7) decisions of the court of first instance reversed by the Regional Court of Appeal on Facts and Law, in relation to striking a law suit, or dismissal of a law suit, or a decision not to punish, or a postponement of the prosecution or sentencing, because of marriage; and
- (8) decisions of the Regional Court of Appeal on Facts and Law, which contain more than one sentencing decision, as long as they stay within the limits of the above-mentioned articles (Article 286, CMK).

Decisions given before the judgment, which form the basis for the judgment, or the decisions against which no other legal remedy had been unforeseen, may be appealed together with the judgment (Article 287, CMK).

II - Ground for appeal on law. An appeal on law may be filed only on the ground that the judgment has violated the law. The failure to apply a legal rule, or its erroneous application, is a violation of the law (Article 288, CMK).

Although they may not have been mentioned in the petition or declaration of appeal on law, the following points are considered absolute violations of the law and will be invoked ex officio:

- (1) The court did not convene in the way prescribed by law.
- (2) A judge who is by law prohibited from participation in judicial functions participated in the decision-making process.
- (3) A judge concurred in passing judgment, though he had been challenged because of substantial doubt concerning his impartiality, and the challenge was accepted or unlawfully rejected.
- (4) The court established its jurisdiction to hear a prosecution case in violation of the law.
- (5) Court hearings occurred in the absence of the public prosecutor or of individuals whose presence is required by law.
- (6) There occurred a violation of the principles of an open trial in a judgment passed, as a result of an oral hearing.
- (7) The judgment did not include good reasons (Article 242).
- (8) The decision of the court restricted the right of the defense on points that were relevant to the judgment.
- (9) The judgment was based on illegally obtained evidence (Article 289, CMK).

Violation of the rules in favor of the accused does not give the public prosecutor the right to have the judgment reversed (Article 290, CMK).

III - Motion of appeal and the time limit. A motion of appeal on law must be filed within seven days of the pronouncement of judgment, either by submitting a petition to the court or by making a declaration to the registrar and having him prepare the necessary documents. The declaration will be included in the records and approved by the judge. The provision of Article 293 related to the accused under arrest takes precedence.

If the judgment has been pronounced in the absence of the individuals who have the right to appeal on law, the period for appeal begins to run from the date of the notification (Article 291, CMK).

For judgments not in favor of the accused, pronounced in his absence, in connection with the motion for restitution, the provisions of Article 305 shall apply. (Article 292, CMK).

A petition of appeal on law, filed within the foreseen period, prevents the judgment from becoming final. If the judgment and its motives have not been explained to the appealing public prosecutor or the parties, the motives shall be communicated within seven days after the Regional Court of Appeal on Facts and Law has knowledge of the appeal on law (Article 293, CMK).

IV - Motives for an appeal on law. The public prosecutor or the parties filing a motion of appeal on law must indicate in their petition or declaration the legal aspects (Article 294, CMK) on which they base their request for the judgment to be reversed.

If the petition for appeal on law or the declaration do not contain the grounds, the appealing party shall submit an additional petition to the Regional Court of Appeal on Facts and Law within seven days. This term starts with the expiry of the period set for submission of a petition or with the notification of the decision of the judgment. The public prosecutor shall openly state in his petition of appeal whether the appeal had been put forward in favor or against the accused.

If the appeal is filed by the accused, the additional petition must be signed by the accused or by his lawyer before submission. If the accused does not have a lawyer, he may declare his motives for appeal on law to the registration clerk, who will take them on record. The record must be approved by the judge.

V - Denial of a motion of appeal by the court that rendered the decision on grounds of inadmissibility. The Regional Court of Appeal on Facts and Law whose judgment has been appealed shall rule on denial of the petition of appeal if the petition was submitted after the expiration of the legal limit, if a judgment that cannot be appealed was appealed, or if the person had no standing.

The public prosecutor or the parties who make the appeal may request from the Court of Cassation within seven days after the notification of the order, a ruling on this issue. In these cases, the file shall be sent to the Court of Cassation. However the execution of the judgment shall not be postponed on this ground (Article 296, CMK).

Notification and answer pertaining to appellate and appellate brief, duties of Office of Chief Prosecutor, occur at the Court of Cassation. A copy of the petition of appeal on law or the appellate brief regarding the appellate request, which the Regional Court of Appeal on Facts and Law has not rejected, under the provisions of Article 296 shall be issued to the opposing party. The opposing party shall submit the written answer within seven days.

If the opposing party is the accused, he may also submit his answer of declaration to the Court Registrar who prepares the record accordingly. After the answer has been submitted, or the time limit for an answer has expired, files pertaining to the case shall be forwarded by the Office of Public Prosecution at the Regional Court of Appeal on Facts and Law to the Office of the Chief Public Prosecution at the Court of Cassation.

If the legal opinion of the Chief Public Prosecution at the Court of Cassation contains views that may be unfavorable, or if the parties file a motion of appeal on law, the related chamber will notify the accused or his defense lawyer, as well as the intervening parties or their representatives. The related party may respond in writing within one week after the notification. The notifications will be valid (according to the rule in Article 35 of the Act on Notifications) if they are to the address that is included in the file.

VI - Rejection petitions of appeal on law by the Court of Cassation. If the Court of Cassation determines that the petition appeal has not been submitted in time, a declaration has not been made, the judgment cannot be appealed, the individual appealing does not have standing, or the appellate petition or the appellate declaration does not have grounds for appeal, then the request for appeal shall be rejected (Article 298, CMK).

VII - Inspection conducted through a main hearing. The Court of Cassation inspects judgments of offenses that impose custodial punishment for 15 years or more and the death penalty by conducting a hearing either upon the request made in the petition of appeal of the accused or on its own motion if it deems that adequate. The day of the main hearing shall be notified to the accused and to his lawyer, if he so requests. The accused has the right to be present at the main hearing or may be represented by his lawyer.

If the accused is under arrest, he cannot request to be present at the main hearing (Article 299, CMK).

Before the main hearing, the report prepared by the member of the court appointed for this mission or by the examination judge shall be explained to the members. If necessary, the members may examine the files additionally. The hearing shall start after these issues have been established.

During the main hearing, the Chief Public Prosecutor at the Court of Cassation or the Public Prosecutor from the Court of Cassation in charge on his behalf, the accused, the intervening party and their counsels, will present their claims and defenses. The party who made the request for appeal speaks first. In any case, the accused has the last word (Article 300, CMK).

The Court of Cassation inspects only the points indicated in the appellate petition or in the appellate brief, and the facts declared in the appellate petition or appellate brief, if the appellate request is based on procedural matters (Article 301, CMK).

VIII - Rejection of the appellate request upon merits, or reversal of judgment, by the Court of Cassation:

- If the findings of the Court of Cassation about the judgment of the Regional Court of Appeal on Facts and Law are in accordance with the law, the petition of appeal shall be rejected.
- Otherwise, the Court of Cassation may reverse the contested judgment on the basis of violations of law affecting the judgment that are pointed out in the appellate petition and the appellate brief. Reasons for reversal shall be shown separately in the written judgment.

If the judgment is quashed because of the reasons shown in the appellate petition or the appellate brief, even if they were not declared in the appellate petition and

the appellate brief, all the findings regarding the violations of law regarded by the Court of Cassation shall be shown in the written judgment.

If the violation of law causing the judgment to be quashed stems from procedures that are regarded as the basis of the judgment, they shall also be quashed.

Provisions of Article 289 shall have precedence (Article 302, CMK).

If a judgment was reversed because a violation of law applied to the facts had been determined as the basis of the judgment, the Court of Cassation shall rule on the merit of the case and also shall correct the violations of law in the judgment. This occurs in the following cases:

- A decision for an acquittal or dismissal of the case, or for a fixed punishment with no certain minimum or maximum limits, is necessary.
- The Court of Cassation concurs with the view of the Office of the Chief Prosecution at the Court of Cassation to apply the minimum degree of punishment prescribed by law.
- The number of the article of the provision was written incorrectly, even though the nature, characteristics and punishment of the crime determined in court was correct.
- In situations where a law that went into effect after the judgment reduces the punishment, and in the determination of the court's punishment of the accused, the reason for the increase was not accepted, then a reduced sentence of the crime shall be required. In situations where according to a new law the act is no longer considered a crime, no punishment at all shall be required.
- No deduction, or a wrong deduction, was made in determining the punishment, which is to be given according to the suspect's date of birth and the date of the crime, which were established openly.
- A material error was made in determining the duration or the amount of the crime, which is to be given at the end of maximizing and minimizing.
- The sentencing was for less or more because of non-consideration of the provisions of Article 61 of TCK (Article 303, CMK).

The file regarding the decisions given according to the first paragraph of Article 333 or Article 334 shall be forwarded by the Court of Cassation to the Office of Court of Cassation Chief Prosecutor, in order to be send to the Regional Court of Appeal on Facts and Law that gave the judgment.

The Regional Court of Appeal on Facts and Law shall give the file, within seven days from the date of the file's arrival from the Court of Cassation, to the Office of Chief Prosecutor of the Regional Court of Appeal on Facts and Law, in order to be forwarded to the court of the first instance in charge of necessary interactions.

Except in cases of Article 334, the Court of Cassation shall forward the file to the Regional Court of Appeal on Facts and Law whose judgment had been quashed, or to another Regional Court of Appeal on Facts and Law, to be reviewed and decided again.

If the judgment was quashed because the court, in violation of the law, considered itself in charge or having authority, then the Court of Cassation forwards the file to the court that effectively is in charge and having authority (Article 304, CMK).

IX - Pronouncement of judgment by the Court of Cassation. The judgment shall be pronounced in accordance with the provisions of Article 243. If there is no possibility to do so, the ruling shall be made within seven days from the ending of the hearing (Article 305, CMK).

If the judgment was quashed in favor of the accused, because of a violation of sentencing law (cezanın belirlenmesindeki hukuka aykırılık), and this is applicable to the other defendants who have not put forward a request for appeal, they also shall benefit from the reversal of judgment, as if they themselves had filed the motion for appeal (Article 306, CMK).

X - Procedures of the court to which the case is referred. The Regional Court of Appeal on Facts and Law that is to retry the case upon the decision of reversal of the Court of Cassation shall ask the related individuals for their responses regarding the reversal.

If notification to the addresses shown in the file of the accused or of the intervening party and their lawyers was not possible, or even if the notification was achieved but their arguments against the reversal could not be taken because they did not show up to the main hearing, then the main hearing will continue, and the case will be concluded in their absence. However, if the punishment to be inflicted on the accused is more severe than it was in the quashed judgment, then the accused must be heard in any case.

The Regional Court of Appeal on Facts and Law has the right to insist on its former judgment if the Court of Cassation decides to quash. However, the decisions rendered by the Penal CGK are not subject to such insistence (shall be final).

If the motion of appeal on law was filed only by the accused, or by the Office of Public Prosecution on his behalf or by individuals mentioned in Article 292, then the punishment included in the new judgment cannot be more severe than the previous judgment (Article 307, CMK).

### §3. EXTRAORDINARY LEGAL REMEDIES

419. The new Penal Procedure Code includes three extraordinary legal remedies: opposition of the Attorney General (infra, paragraph 420), “reversal in the interest of the administration of justice” (infra, paragraph 421) and “re-opening of a trial” (infra, paragraph 422).

#### I. Extraordinary Opposition of the Attorney General

420. The Chief Public Prosecutor at the Court of Cassation is entitled to file a motion of opposition (Yargıtay Cumhuriyet Başsavcısının itiraz yetkisi) with the CGK in Criminal Matters within 30 days after the date when the final judgment was rendered. He may also do so if he had filed a request on the correction of the judgment after the related decision of the chamber had been handed over to him (Article 308, CMK).<sup>1</sup>

1. U. Alacakaptan, “Temyiz Mahkemesi Başsavcılığının Ceza Genel Kuruluna Yaptığı İtiraz Hükümün Kesinleşmesine Engel Olur mu,” AUHFD (1967/47), 1–4, 287–292.

## II. Extraordinary Appeal by Way of Cassation

421. The Minister of Justice has the power to give a written order (yazılı emir) to the Attorney General to proceed against a final judgment of the court of first instance, or any decision of a magistrate that is *res judicata*, if this judgment of the court or judicial decision was not affected in any way by the Court of Cassation.<sup>1</sup>

This extraordinary legal remedy is accepted in the best interest of the law and does not go against the interests of the accused.<sup>2</sup>

I - Reversal in the interest of justice (*kanun yararına bozma*). If the Minister of Justice finds out there has been an illegality in a decision or a judgment that had been final without being inspected by an appeal on fact and law or an appeal on law only, he will request a reversal by the Court of Cassation.<sup>3</sup> The request shall be submitted to the Chief Public Prosecutor's Office at the Court of Cassation and shall mention the legal grounds.<sup>4</sup>

The Chief Public Prosecutor at the Court of Cassation will write down these grounds without altering them. He shall submit his writing, which includes a reversal petition, to the related penal chamber of the Court of Cassation. The penal chamber of the Court of Cassation shall reverse the decision or judgment in benefit of the administration of the justice if the submitted grounds are founded:

- If one of the reasons described in Article 223, and the essence of the dispute, is not solved (*davanın esasını çözmeyen karar*), the judge or the court that rendered the decision will do the required inspection and exploration and consequently render the adequate decision.
- If the grounds of reversal are related to the procedural interactions regarding aspects of the judgment that do not solve the essence of the dispute, or to interactions affecting the rights of the defense, then the judge or the court shall rule adequately and render a judgment according the outcome of the new trial. This judgment shall not impose a penalty which is heavier than the one in the original judgment.
- If the grounds of reversal are related to the points that solve the essence of the dispute, but are related to one of the intermediate judgments and not to the conviction judgment, this does not have an unfavorable outcome and does not require new adjudication.
- If the grounds of reversal require the reversal of the penalty or require a lighter penalty, then the Chamber of the Court of Cassation directly rules on either lifting the punishment or on the more lenient punishment.

In cases where a judgment on reversal had been rendered under the provisions of this Article, there shall be no right to insist (*direnme*) (Article 309, CMK).

II - Motion by the Chief Public Prosecutor at the Court of Cassation in favor of the criminal justice system. The Chief Public Prosecutor at the Court of Cassation is entitled to file a motion of appeal in favor of the criminal justice system by his own motion only in cases as shown in Article 309. If the Minister of Justice appealed in accordance with Article 309, this power may not subsequently be exercised by the Chief Public Prosecutor at the Court of Cassation repeatedly (Article 310, CMK).

1. N. Centel & H. Zafer, *Ceza Muhakemesi Hukuku*, 7 (İstanbul: Bası, Beta, 2010), 771.
2. N. Kunter, “Olağanüstü Kanun yolunda Reform,” in *Ceza Adaleti Reformu İlkeleri Sempozyumu* (İstanbul: İstanbul Üniversitesi, 1973), 110; O. Tosun, “Temyiz Kararlarına Karşı Kanun yolları,” in *Ceza Adaleti Reformu İlkeleri Sempozyumu* (İstanbul: İstanbul Üniversitesi, 1973), 123–151.
3. C. Akkaya, *Kanun Yazarına Bozma ve Yargıtay C. Başsavcısının İtiraz Yetkisi* (Ankara: Kartal Yayınevi, 2007).
4. C. Akkaya, *Kanun Yazarına Bozma ve Yargıtay C. Başsavcısının İtiraz Yetkisi* (2007).

### III. Re-opening a Trial that Had Concluded with a Final Judgment

422. In cases of major miscarriages of justice, the Code provides for the possibility of commencing a new trial in order to revise the sentence (“revision of sentences”).<sup>1</sup> If there is new evidence or a substantial error in fact, then a trial that had ended with a final judgment may be re-opened (*muhakemenin iadesi*) (Article 327, repealed CMUK).

1. A. Önder, “Muhakemenin Yenilenmesi ve Dirilmesi,” in *Ceza Adaleti Reformu İlkeleri Sempozyumu* (İstanbul Üniversitesi, 1973), 7–62; A. Önder, *Muhakemenin İadesinde Yeni Olay*, IHFM, XXXI, s. 1–4; E. Özgen, *Ceza Muhakemesinin Yenilenmesi* (Ankara, 1968).

423. There are two categories of reasons for a new trial. The first is related to the re-opening of the trial in favor of the sentenced person. The second is related to the grounds for a re-opening against the interest of the convicted (Article 330, repealed CMUK).

In 2003, a specific ground for a new trial in favor of the convicted individual was created following a judgment of the European Court of Human Rights (Article 327(a), repealed CMUK, as amended “2002–4771”). Before the 2003 amendment, if the gravity of the violation of Convention rights required a new trial (*muhakemenin iadesi*), the CGK would decide to open a new trial based on the same subject matter if monetary compensation could not restore the damages resulting from the violation. The new remedy came into force on August 3, 2003 (Article 7, Act No. 4771 of August 3, 2002).

Act No. 4763 of 2003 repealed Article 327/a CMUK and added a new paragraph (6) to Article 327 repealed CMUK. This amendment introduced an automatic ground to reopen if the European Court of Human Right found a violation of convention rights. The applicant at the ECHR must file the petition with the Turkish courts within a year of the ECHR’s final decision. The re-opening of the trial on this ground is applicable to final decisions of ECHR at the time when this Act was put into force (January 23, 2003) and to those future decisions related to petitions filed with ECHR after January 23, 2003.

424. The petition to reopen the trial must be filed with the court that has rendered the final decision. This court investigates the petition and re-opens the trial if it determines that there are sufficient grounds for factual mistakes. At the end of the new trial, the court is empowered to cancel its first judgment (Article 341, repealed CMUK). The new sanction may be more severe than the first one. However, if the petition was submitted by the convicted person alone, the penalties cannot be increased.



425. The provisions on the “new trial” under the new Penal Procedure Code are explained below:

I - Grounds for a new trial in favor of the convicted individual. A lawsuit concluded with a final judgment must be tried again in favor of the convicted individual, by granting him a new trial (yargılamanın yenilenmesi), in the following situations:

- if any document used at the main hearing that had an effect on the judgment was false (sahte);
- if it is discovered that any witness or expert heard under oath (yemin verilerek) testified or used his vote deliberately or negligently against the convicted individual, contrary to the facts, in a way that affected the judgment;
- save for fault (kusur) caused by the convicted individual personally, if any of the judges who participated in the judgment had been in fault in executing his duties, and this requires a criminal prosecution or conviction;
- if the judgment of the criminal court was based upon a judgment given by a civil court, and this judgment was reversed by another judgment which became final;
- if new facts or new evidence have been produced, which when taken in to consideration solely or together with the evidence previously submitted, are of the nature to require the acquittal of the accused or the conviction to a lighter penalty because of different legal provision would apply; or
- if a final judgment of the European Court of Human Rights has established that the criminal judgment violated the Convention on Protecting the Human Rights or its Protocols.

In such cases, a motion for a new trial may be filed within one year after the date of the final judgment of the European Court of Human Rights. This provision is only applicable for the finalized judgments of the European Court on Human Rights on or after the date of February 4, 2003 (Article 311, CMK).

II - Postponement or stay of execution. A motion for a new trial does not hinder (ertelemez) the execution of the judgment. However, the court may rule on the postponement or stay of execution of the judgment (Article 312, CMK).

III - Events (haller) that do not bar a new trial. The execution of the judgment or the death of the convicted individual does not bar a motion for a new trial. The spouse of the deceased, his ascendants, descendants and siblings are entitled to file a motion for a new trial. If there are no such individuals, the Minister of Justice is also entitled to file a motion for a new trial (Article 313, CMK).

IV - The grounds for a new trial against the interests of the accused or the convict. A lawsuit that has concluded with a final judgment may be retried against the interests of the accused or convicted person by way of a new trial in the following situations:

- if a document submitted in favor of the accused during the main hearing that had affected the outcome of the judgment was false;



- if any of the judges who had participated in the decision-making had been in (criminal) fault in favor of the accused or convict person while performing his judicial duties; or
- if the accused, after being acquitted, has made a reliable confession in front of a judge (Article 314, CMK).

V - Motion for a new trial inadmissible. A new trial for the changing of the penalty is inadmissible if the change is to be made within the limits of the same article of the Criminal Code.

If there is any other possibility to cure an error, the new trial will not be admitted (Article 315, CMK).

VI - Conditions for admissibility of petitions of a new trial that rely on a crime. A motion for a new trial, supported by an allegation of crime, is only admissible if there has been a conviction because of this conduct. Exceptionally, a motion is admissible when existing strong evidence supporting a conviction was not obtained or when lodging of a criminal prosecution was impossible, or actions were discontinued. The provisions of this article do not apply in cases as regulated in Article 311, subparagraph No. (5) (Article 316, CMK).

VII - Provisions applicable to the motion of a new trial. The general provisions applicable to motions of legal remedies are also applicable on the motion of a new trial. Decisions on the admissibility of the petition for a new trial are rendered without opening a main hearing (*duruşma yapılmaksızın*) (Article 318, CMK).

VIII - Inadmissibility of the petition for a new trial, and interactions to be conducted, if admissible. The petition for a new trial is denied as inadmissible if it is not made in accordance with the procedures set forth by the statute, or if no legal ground to justify a new trial has been submitted, or if no supporting evidence had been produced.

Admissible petitions for a new trial are notified to the public prosecutor and the other interested party. They can submit their answers, if they have any, within seven days.

The decisions rendered on the basis of this article may be subject to a motion of opposition (Article 319, CMK).

IX - Collection of evidence. If the court declares that the petition for a new trial is admissible, it may delegate a member of the court to collect evidence. He may interact with courts or use letters rogatory. The court is also entitled to do this on its own.

During the collection of evidence by the court or by a member of the court delegated to accomplish a certain mission or when a court has been asked to perform an action by a letter of rogatory, rules related to investigation apply.

When the collection of the evidence is complete, the public prosecutor and the individual, against whom there is a pending judgment, are invited to submit their opinions and considerations within seven days (Article 320, CMK).

X - Denial of the petition for a new trial on the basis of having no ground, otherwise declaring inadmissible. If the grounds for a new trial are not sufficiently justified, or if it turns out that in the specific case they had no influence on the outcome of the judgment, the motion for a new trial is denied without opening a main hearing. In the other event, the court grants a new trial and opens a main hearing.

Decisions given according to this article may be subject to a motion of opposition (Article 321, CMK).

XI - Inspection of the motion for a new trial without opening a main hearing. If the convicted individual is dead, the court does not open a new main trial. It decides after collecting all the necessary evidence on the acquittal of the convicted, or rejects the petition for a new trial. In other cases, the court also acquits immediately, without opening a main hearing, upon positive advice of the public prosecutor.

When it acquits, the court at the same time annuls the previous judgments.

If the individual who filed the motion for a new trial so requests, the decision on the annulment of the previous judgment may be published in the Official Gazette, as well as in other newspapers under the courts discretion, and the costs of the publication may be borne by the State treasury (Article 322, CMK).

XII - Judgment to be rendered at the end of the renewed main hearing. At the conclusion of the main hearings, the court either approves the previous judgment, or it annuls the judgment and renders a new decision about the lawsuit.

If the motion for a new trial had been filed in favor of the convict, the new judgment cannot impose a heavier penalty than the previous judgment.

In case of acquittal at the end of the proceedings, damages will be recovered according the provisions in Articles 141–144, CMK (Article 323, CMK).

## Part III. Execution of Penalties and Setting Aside of Punishments

### Chapter 1. Nature and Sources of Penitentiary Law

426. Although the Penitentiary Law (*infaz hukuku*) is related to the enforcement of criminal judgments (*supra*, paragraph 398), it is nevertheless a separate branch of law. It regulates the relationship between the convicted individual and the State, from the beginning of the custodial penalty until the end of the execution of a final judgment.<sup>1</sup>

There are special rights and powers resulting from this unique relationship.<sup>2</sup> Only a judge is entitled to decide under which conditions a person may be punished. Therefore, the individual rights of the convicted person are to be considered. If the enforcement agencies violate these rights, civil, penal and disciplinary consequences will result.<sup>3</sup>

427. Sources of Penitentiary Law in Turkish Law were mainly derived from administrative regulations. There was no “Act” in the strict sense of the word. Though the procedure for enforcement of punishments was regulated in the repealed “Turkish Code of Penal Procedure” and in the repealed “Code of Enforcement of Punishments,” the execution of custodial penalties was not regulated by a law, but only by ordinances.

This has been remedied by a new Code on “Execution of Punishments and Measures” (*Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*: CGIK; 2004–5275: RG December 29, 2004), in force since June 1, 2005.

428. The main aim of the execution of custodial punishments is the rehabilitation of the offender and his reintegration into society.

The following principles govern the execution of custodial sentences.

The main rule is that human rights must be respected. However, certain rights of the convicted individual are limited by the judgment, and this limitation will also influence other rights to a certain degree. It cannot be argued that the convicted person has lost all his civil rights. A minimum standard of humane treatment is guaranteed: the protection against abuse, the right to medical treatment and education, to get information from newspapers, and to contact close relatives, as well as other fundamental rights.

Confidentiality is an important aspect of the execution of the judgments. The execution of punishment is not made public, in order to protect the convicted person from harmful public exposure, which might lead to mistreatment of his family by others.

1. V.O. Özbek, *İnfaz Hukuku, İnfaz Hukunum Temel Kavramları* (Ankara: Orion, 2007).
2. O. Tosun, *Suçluların Cezaevinde İyileştirilmesinde Yeni Yöntemler* (İstanbul, 1967); R. Erkilet & S. Coşarcan, *Tatbikatımızda C. Müddeiumumileriyle Münferit Sulh Hakimlerinin Vazifeleri* (Ankara, 1955); M.A. Sebük, *Ceza Evlerinde İşlenen Cürümler ve Firar Hadiseleri* (İstanbul, 1945).
3. F. Erem, *Diyalektik Açısından Ceza Yargılaması Hukuku* (Ankara: Altıncı Bası, 1986).

## Chapter 2. Execution of Custodial Sentences

### §1. ORGANIZATION OF PENAL ENFORCEMENT INSTITUTIONS

429. The different categories of Penal Enforcement Institutions are regulated in Articles 8–15, Code 2004–5275 (CGIK): Closed Penal Enforcement Institutions (Article 8, CGIK), High-Security Closed Penal Enforcement Institutions (CGIK 9), Closed Penal Enforcement Institutions particularly for women (Article 10, CGIK), Closed Penal Enforcement Institutions for Children (Article 11, CGIK), Closed Penal Enforcement Institutions for Young Females and Males (Article 12, CGIK), Observation and Classification Centers (Article 13, CGIK), Open Penal Enforcement Institutions (Article 14, CGIK), Child Education Institutions (Article 15, CGIK).

I - Closed penal enforcement institutions. The closed penal enforcement institutions have interior and exterior security officers and are set up with technical, mechanical, electronic and physical prevention tools against escape. The doors of rooms and of all corridors are closed. The Code stipulates, however, that situations in which contact with prisoners in other rooms and with the outside environment are possible, so long as sufficient security is provided to work on individual and collective rehabilitation procedure. Inmates who break the rules can be sent to strictly-secured penal enforcement institutions (Article 8, CGIK).

II - High-security closed penal enforcement institutions. The high-security closed penal enforcement institutions have similar security measures, but the prisoners are accommodated in cells for one or three persons. Individual or group treatment procedures will be applied (Article 9, CGIK).

Prisoners who have been sentenced to an aggravated life imprisonment term, and those who have committed the crimes against humanity (Articles 77, 78, TCK); intentionally killing (Articles 81, 82, TCK); producing or trading with narcotic substances (Article 188, TCK); crimes against the State security (Articles 302, 303, 304, 307, 308, TCK); and crimes against the constitutional order and its functions (Articles 309, 310, 311, 312, 313, 314, 315, TCK) in the context of a criminal organization, shall be sent to these institutions irrespective of the duration of imprisonment term (Article 9/2, CGIK).

If the high-security penal enforcement institutions have not sufficient possibilities, then high-security sections of other closed penal enforcement institutions, which are available for the convicted prisoners, who necessarily shall be under private custody and control, shall be used (Article 9/4, CGIK).

430. Inmates convicted for anarchistic acts and acts of terrorism, for disturbing public order, or robbery and killing with the purpose of political separatism are put together in special closed prisons (Article 9, CGIK) that have special penal measures and special security devices.<sup>1</sup>

Strict (or aggravated) life imprisonment will be enforced according the following guidelines (Article 25, CGIK):

- The prisoner shall be placed into a single room.<sup>2</sup> He has the right to stay at least one hour in the open air and to practice sports.

- Depending on the risk he poses, these time limits may be extended. During this period, the prisoner may perform an art or a professional activity, if the conditions of the institution allow it.
- The prisoner is entitled to receive a visit by his spouse, his lineal consanguinity, his brothers and sisters and his tutor. They may visit the convicted prisoner one by one, with an interval of 15 days, at most for one hour daily. The governor of the institution determines the day, hour and conditions. The prisoner may talk on the telephone to these people, once in 15 days for a ten-minute period of time under the conditions that the governor of the institution deems appropriate.
- Convicts are not allowed to work outside of the institution and cannot obtain temporary release or leave. They may not participate in any sport activities unless the governor of the institution gives specific permission.
- The enforcement of the sentence shall not be interrupted by any means, except for mental illness and necessary medical causes.

1. According to the repealed statutes, inmates who did not try to rehabilitate, who organized illegal prison groups or who threatened the lives of other persons were transferred to special prisons where they were held in cells designed for one to three people. The Observation and Classification Center would decide on the transfer, and the Ministry of Justice took the final decision on such transfer (Art. 78/B, CIT).
2. A. Taşkın, Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun'da Beslenmenin Reddi (Türkiye Barolar Birliği Dergisi sayı 62 Ocak & Şubat 2006).

431. Closed Penal Enforcement Institutions for Women and Children. I - Closed penal enforcement institutions for women. Closed penal enforcement institutions for women are the establishments in which the women prisoners serve their custodial penalties. The interior security officers are women.

If no special women's prison is available, women prisoners will serve their term in a special section of another penitentiary: separated from the rest, with different doors, windows, corridors, rooms, entrances and exits (Article 10, CGIK).

II - Closed enforcement institutions for children. Minors between ages 12 and 18 year are scrutinized according to their gender and physical body status and sheltered in separated sections of these institutions (Article 11/2, CGIK). They can shelter the children and minors transferred from education institutions because of the discipline and other matters. They have special measures to prevent escapes, with interior and exterior security officers, but the main focus remains on education and instruction (Article 11/1, CGIK). Closed enforcement institutions for children are where they are kept for pre-trial arrest.

The lack of sufficient purpose-specific institutions for children, forces the authorities to accommodate the children and minors in closed penal enforcement institutions for adults. However, if there is no section for minors, girls will be sheltered in the women's section of closed penal enforcement institutions, and boys will be accommodated in the special section of other closed penal enforcement institutions. All institutions should provide education and instruction to the children and minors (Article 11/4, CGIK).

III - Closed penal enforcement institutions for young females and males. These are establishments for young convicted prisoners who have attained the age of

between 18 and 21 by the beginning of the enforcement of the sentence. The regime is oriented around education and instruction, but outside and inside security personnel prevent escape (Article 12/1, CGIK).

IV - Child and Minor Educational Institutions. Child and Minor Educational Institutions are establishments where the penalty is enforced with the aim of educating the children, teaching them professional skills and reintegrating them into society. There is no specific prevention of escape attempts in these institutions: the security of the institution shall be provided by the supervision and responsibility of the interior security staff.

Minors who are attending an educational or learning program when reaching the age of 18 can stay in these institutions until they have attained their age of 21, in order to complete the program.

Children who are detained in these institutions may not be transferred to the closed penal enforcement institutions (Article 15, CGIK).

432. In open penal enforcement institutions, priority is given to the rehabilitation of the convicted prisoners and teaching them a profession. There is no prevention against escape and no exterior security staff. The supervision of the personnel in the institution is deemed to provide sufficient security.

According to need, open penal enforcement institutions for young women offenders may be established.

The basic principles and the procedure of allocation of convicted prisoners into the open penal enforcement institutions is laid down in a directive.

First-time offenders serving a term of two years or less may be allocated directly to an open penal enforcement institution (Article 14/3, CGIK).

433. Prisoners in open penal enforcement institutions can be sent back to a closed penal enforcement institution upon the decision of the board of the related institution. This will happen if the prisoner has been punished with a discipline action higher than caution (kinama), if there is an arrest warrant beyond the crime for which he is serving the sentence and if his age, health status, bodily and mental abilities make them unsuitable for work. This resolution shall be submitted to the approval of the Judge of Enforcement of Penalties (Article 14/4, CGIK).<sup>1</sup>

1. Before 2005 Legal Reforms, the repealed Code of Enforcement of Punishments (Cezaların İnfazı Hakkında Kanun, CIK), and “The Execution Ordinance” (CIT) provided the basis for the classification of prisons: K. İçel et al., *İçel Yaptırım Teorisi*, 3 (İstanbul: Kitap, Beta, 2000), 78.

## §2. EXECUTION OF SHORT-TERM IMPRISONMENT

434. Short-term custodial punishments and special kinds of enforcement. Custodial punishments of one year or less, having been decided by the judgment of the court, are called “short-term custodial punishments” (kısa süreli hapis cezası) (Article 49/2, TCK) and may be commuted into an alternative sanction as indicated in Article 50, TCK (supra, paragraph 220).

If a penalty is composed of various other penalties, it will depend on the duration of every single penalty whether the overall penalty can be regarded as a short-term penalty.

The repealed Code of Enforcement reduced the duration of the term of imprisonment for inmates serving short-term custodial punishments by six days per month (Added Article 2). This provision is not included in the new Code. However, it has been preserved for inmates younger than 15 years of age. Every day will be regarded as two days to count the term to be served before conditional release (Article 107/5, CGIK).

435. Commutation of Short-term Custodial Sentences. Short-term custodial punishments may be commuted (*supra*, paragraph 220) into criminal fines and can be replaced by reconstitution, attendance at a school or educational center, prohibition of access to certain places or association with certain people, the suspension of a driving license or other licenses or by community service (Article 50, TCK).

If a short-term imprisonment has been commuted into a fine or another form of alternative sanction, that sanction is regarded as the “principal” or fundamental conviction (*asıl mahkumiyet*) (*supra*, paragraph 260) (Article 50/5, TCK).<sup>1</sup> Execution of short-term imprisonment may take one of several forms, and which form it will take will depend on the applications made by the convicted individual (Article 109, CGIK).

1. However, a review in the Court of Cassation depended on the amount (*supra*, para. 407) of the fine (CMUK Art. 305), which often would not be reached in the case of a commutation. Fines resulting from a commutation would be barred from such a review. The amended Art. 4/4 of the repealed Code of Enforcement of Punishments provided that this is not an obstacle for such a review. The new Criminal Code has adopted the same approach.

436. Special Forms of Execution of Short-Term Imprisonment. The following special forms are provided by Law (Article 110, CGIK): Execution of Penalty in the Home of the Convicted (*infra*, paragraph 437), Weekend and Night-time Execution (*infra*, paragraph 439), Custodial punishments of (one) three years and less than (one) three years for convicted persons who have attained the age of (70) 75 (*infra*, paragraph 438).

437. Execution of Penalty in the Home of the Convicted Person. The decision of “enforcement at the residence” may be rendered for a custodial penalty of six months or less, if the convicted person is a woman or has attained the age of 65 (Article 110/2-a, CGIK). The civil responsibility for the damages caused by the crime remains.<sup>1</sup>

1. According to the repealed legislation, if the convicted individual was at least 65 years old, or if a medical certificate confirmed that his health would be endangered by staying in prison, the convicted individual could serve his term at home on condition that the term was no longer than 60 days (Art. 8/1, No. 1, repealed CIK). The Public Prosecutor would define the boundaries of the “home” and caution him to stay within those boundaries. If the individual did not comply with these restrictions, he had to serve his term in prison. A copy of the judgment would be sent to the local police indicating the beginning and the end of the prison term.



438. Special forms of execution of imprisonment for convicted persons who have attained the age of (70) 75. I - Enforcement at the residence. An “enforcement at the residence” decision may be rendered for a custodial punishment of one year or less if the convicted person has attained the age of 70. The civil responsibility for the damage caused by the crime remains (Article 110/2-b, CGIK).

Enforcement at the residence is possible for a custodial penalty of up to three years if the convicted person has attained the age of 75. The civil responsibility for the damages caused by the crime remains (Article 110/2-c, CGIK).

II - Special kind of enforcement for ill and old individuals. Enforcement at the residence is also available for a custodial punishment of three years or less if the convicted person has attained the age of 75 and his health situation is not suitable to stay in an enforcement institution. This has to be certified by a State or University hospital. In such cases, the damages caused by the crime must be fully compensated (Article 110/2, CGIK, as amended in 2006 by Act No. 5485 in order to give relief for a former politician).

Penalties in the case of a prisoner who did not comply with the requirements of the special form of execution were laid down in Article 8/2 of the repealed Code of Enforcement of Punishments. If the prisoner intentionally or negligently violated those provisions, he was punished with additional imprisonment for up to one month. The remainder had also to be served.

439. Weekend and Night-time Execution. Custodial punishments of six months or less may be enforced in a special way, according to the discretion of the court that decided the case or by the court of the same level where the convicted person is present at that time (Article 110/1, CGtK): The decision of “enforcement during the weekend” will be enforced by entering the enforcement institution until 7.00 p.m. of every Friday and leaving at the same hour of every Sunday.

The decision of “enforcement at night” shall be enforced by entering the enforcement institution at 7.00 p.m. every day and leaving at 7.00 a.m. in the morning (Article 110/1, CGtK).<sup>1</sup> This kind of sentence allows the convicted individual to serve a prison term without losing work and help prisoners and their families financially.

1. According to the repealed legislation, if the short-term imprisonment did not exceed 60 days, the convicted individual might stay in prison from 7 p.m. Friday to 7 p.m. Sunday (Art. Art. 8/1, No. 2, repealed CIK). If the short-term imprisonment did not exceed four months, the court might decide that the convicted individual may serve his term by staying in prison daily from 7 p.m. to 7 a.m., which would count as one day and allow him to continue to work (Art. 8/1, No. 3, repealed CIK). These prisoners were separated from the others.

### §3. RULES OF EXECUTION OF LONG-TERM CUSTODIAL PUNISHMENTS

440. The Penal Code has divided long-term custodial punishments (more than one year imprisonment) into two categories: lifelong imprisonment and imprisonment of limited duration (Article 49, TCK) (supra, paragraph 216).

441. The individualized final punishment (supra, paragraph 262) is the penalty to be served in the correction facility. The Criminal Code does not include privileges<sup>1</sup> for adults, but only for children under 15 years of age (Article 107/5, CGIK).

1. Prior to 2005 Criminal Law Reform, penalties for prisoners who are to serve their sentence in open and half-open prisons were reduced by six days per month (added Art. 2, repealed CIK). Escaped prisoners (added Art. 2/6, repealed CIK) and convicted persons for whom the Grand National Assembly had decided that the death penalty would not be executed (added Art. 2/8, repealed CIK) were excluded from this privilege.

442. Observation and Classification of Convicted Prisoners. A new-coming prisoner shall be observed and classified in the Observation and Classification Center (Article 23, CGIK), prior to allocating him.

Firstly, the individual characteristics of the convicted prisoners, their body, mental and health circumstances, their prior life before the committing the crime, their social environment and relationships, their artistic and professional activities, moral tendencies, their concept of crime, the duration of their sentence and the crimes they have committed shall be established. Subsequently, they will be selected and the enforcement and rehabilitation regime established. This will happen either in the “Observation and Classification Centres,” which work with the observation, inspection and evaluation method, or in the special departments of the Closed Enforcement Penal Institutions, which are reserved for this purpose. The prisoners shall be sent to the “high-security enforcement penal institutions,” to regular enforcement penal institutions, or open enforcement penal institutions, depending on the type of the crime they have committed, their tendencies and their behavior.

Prisoners will be sent to strictly secure penal enforcement institutions or to normally secured penal enforcement institutions according to the type of crime committed and whether they have to be strictly observed and supervised because of their attitudes and behavior. In these institutions, if possible, there must be present specialized personnel with expertise and experience in the field of criminology, penology or criminal law, along with medical doctors, experts in the field of legal medicine, social workers, experts in the field of guidance and other personnel.

Women, child and young convicted prisoners shall be observed and classified in a separate Observation and Classification Center, which shall be established in places deemed necessary. If no such institution exists, they shall be established in the special departments of enforcement penal institutions reserved for women, child and young convicted prisoners.

The observation of the convicted prisoners must be conducted by the observation committee, in observation rooms reserved for single persons. The duration of the observation of convicts deserving of a prison term of more than two years shall not exceed 60 days. This shall be determined in regard to the qualification of the crime and to the type and duration of the punishment (Article 23, CGIK).

Convicted prisoners shall be classified into the below-mentioned groups (Article 24, CGIK): prisoners who are first-time offenders, recidivists, habitual offenders or professional criminals; prisoners who need to have a special enforcement regime because of their mental and bodily conditions or age; dangerous prisoners; terrorist offenders;<sup>1</sup> and members of a profit-oriented criminal organization. Furthermore,

the convicted prisoners are classified according to their ages, the duration of their sentence and the type of the crime.

Inmates convicted for anarchistic acts and acts of terrorism or disturbing public order, or robbery and killing with the purpose of political separatism, are put together in special closed prisons (Article 9, CGIK) with special penal measures and special security devices.<sup>2</sup>

Enforcement of strict (or aggravated) life imprisonment happens along the following guidelines (Article 25, CGIK): The prisoner is placed in an individual cell. He has the right to stay at least one hour in the open air and to practice sports. Depending on the risk the prisoner poses, these time limits may be extended. During this period, the prisoner may perform an art or a professional activity if the conditions of the institution allow it. The prisoner is entitled to receive a visit by his spouse, his lineal consanguinity, his brothers and sisters and his tutor. They may visit the convicted prisoner one by one, with an interval of 15 days, at most for one hour daily. The governor of the institution determines the day, hour and conditions. The prisoner may talk on the telephone to these people once in 15 days for a 10-minute period of time under conditions that the governor of the institution deems appropriate.

Convicts are not allowed to work outside of the institution and cannot obtain temporary release or leave. They may not participate in any sport activities unless the governor of the institution gives specific permission.

The enforcement of the sentence shall not be interrupted by any means, except in cases of mental illness or for reasons of medical necessity.<sup>3</sup>

1. Under the previous statutes, Arts. 10 and 11 of the Code of Enforcement of Punishments, regulating the establishment of Classification Centres, was abolished by the Decree in Power of Act, No. 524 (RG Sept. 17, 1993). However, the Constitutional Court annulled this decree.
2. According to the repealed statutes, inmates who did not try to rehabilitate, who organized illegal prison groups or who threatened the lives of other persons, were transferred to special prisons where they were held in cells designed for one to three people. The Observation and Classification Center would decide on the transfer and the Ministry of Justice took the final decision on such transfer (Art. 78/B, CIT).
3. Under the repealed statutes, enforcement of long-term custodial punishment began with the observation of the prisoners (Art. 9, repealed CIK). Through this method of inspection, the regimen determined the appropriate kind of the prison in which to serve the sentence. The Ministry of Justice ultimately decided which prison the prisoner was sent to (Art. 9 and Added Art. 2, repealed CIK). The observation of prisoners used to be conducted in special institutions established for this purpose. However, by an amendment dated June 11, 1978 (Act No. 2148), it was held that each prison was capable of conducting its own observation. Prisoners were classified into different enforcement institutions according to recidivism, mental or physical ability, age, or the political nature of the crime.

443. Act No. 3002 of May 8, 1984 regulates the enforcement of penalties by Turkish courts against foreigners and execution of penalties of foreign courts (supra, paragraph 86) against Turkish citizens.<sup>1</sup> Ankara courts will commute foreign judgments against Turkish citizens into a Turkish judgment. The enforcement of Turkish criminal judgments against foreigners will be transferred to their native countries under the procedure provided by this Act.

The Minister of Justice has the discretion to decide whether a foreign judgment will be executed in Turkey (Article 4, Act 3002, as amended by Act No.

“2003–4780”), and on the execution of a Turkish judgment in a foreign country (Article 12, Act No. 3002, as amended by Act No. “2003–4780”). Before the 2003–4780 amendment, the power to decide rested with the Council of Ministers (Bakanlar Kurulu), and the Minister of Justice would only “propose” the execution to the Council of Ministers.

The foreign prisoner will only be transferred to his country if that country guarantees the execution of the Turkish judgment or executes an equivalent of those penalties (Article 11, Act No. 3002).

If the foreign country does not comply with the Turkish judgment, Turkey remains competent to execute its original judgment (Article 13, Act No. 3002).

1. F. Yenisey, *Ceza Yargılarının Milletlerarası Değeri ve Mevzuatı* (İstanbul: Beta, 1988), 65.

#### §4. CONDITIONAL RELEASE

444. The conditional release (koşullu salıverilme) of a prisoner<sup>1</sup> who is serving a custodial penalty is now governed by Article 107 of the Code of Enforcement of Punishments and Measures (CGIK).<sup>2</sup> Originally this provision was the subject of Articles 16 and 17 of the repealed Turkish Penal Code, but the Code of Enforcement of Punishments, Article 19 abolished those provisions.

The duration of minimum custodial punishment that is compulsory before conditional release may be granted varies according to the type of punishment or crime.<sup>3</sup>

1. V. Kafes, *TCK Öntasarıları ve İçtihatlar Işığında Hukukumuzda Şartla Salıverilme, Uygulamadaki Sorunlar* (1998); E. Günay, *Uygulamada Tutukluğun Ceza Mahkumiyetinden Mahsubu, Şartla Tahliye ile Müddetname Tanzimi* (2001); K. İçel et al., *İçel Yaptırım Teorisi*, 3 (İstanbul: Kitap, Beta, 2000), 415.
2. A.C. Yenidünya, *Mukayeseli Hukukta ve Türk hukukunda Şartla Salıverme* (2002).
3. N. Gürelli, “Introduction,” in *Turkish Criminal Code* (London: Sweet and Maxwell, 1965), 4; B. Öztürk, M.R. Erdem & V.O. Özbek, *Ceza Hukuku ve Emniyet Tedbirleri Hukuku, Gözden Geçirilmiş ve Genişletilmiş 5* (Ankara: Bası, Seçkin, 2001), 393.

445. The duration of custodial punishment to be served in case of conviction to an aggravated life imprisonment is 30 years; in case of a conviction to life imprisonment, it is 20 years (Article 107/2, CGIK).

The time to be served in prison in case of conviction of more than one aggravated life imprisonment or conviction of an aggravated life imprisonment and life imprisonment is 36 years (Article 107/3-a, CGIK).<sup>1</sup>

1. The repealed Codes still employed the death penalty. In cases of a conviction to a death penalty, The Grand National Assembly had the power to decide (supra, para. 213) that a death penalty imposed on an individual should not be executed. In such cases, the prisoner was conditionally released if he had served 30 years of custody and if he was considered a “good behavior” prisoner according to the rules of the repealed Execution Ordinance (Art. 19/1, repealed CIK). If a prisoner in this category had escaped from pre-trial detention or from prison, or had been convicted because he had tried to escape or had revolted against the prison administration, or if he had been put into a disciplinary sanction cell four times, then the period of custodial punishment to be served before conditional release was 33 years (Art. 19/2, repealed CIK). If the prisoner was serving a commuted death sentence and had

escaped twice when he was in pre-trial detention or in prison, or had been convicted twice because of trying to escape or because of revolt against prison administration, then the period to be served was 36 years. The Law Number 3653 of 1990 abolished Art. 19/10 of the repealed Code of Enforcement of Punishments, which prohibited conditional release if the prisoner had escaped or was convicted of trying to escape from prison.

446. The part of the custodial penalty to be served in prison in case of conviction of more than one life imprisonment is 30 years (Article 107/3-b, CGIK).<sup>1</sup>

If the convict has been sentenced to one aggravated life imprisonment term and to an imprisonment of limited duration, the maximum time to be spent in the correctional center is 36 years (Article 107/1-c, CGIK).

If the convict has been sentenced to one life imprisonment term and to an imprisonment of limited duration, the maximum time to be spent in the correctional center is 30 years (Article 107/1-d, CGIK).

If the convict has been sentenced to more than one imprisonment term of limited duration, the maximum time to be spent in the correctional center is 28 years (Article 107/1-e, CGIK).

1. According to the repealed provisions, prisoners sentenced to life imprisonment were conditionally released if they had served 20 years of the custodial penalty and were considered to be “good behavior” prisoners according to the Execution Ordinance. A request of the prisoner was not necessary. The release operated automatically (Art. 19/1, repealed CIK). If the prisoner had escaped once, the period to be served increased to 25 years. If he had escaped twice, then the period to be served increases to 28 years (Art. 19/2, repealed CIK).

447. The duration of custody in case of conviction to other kinds of custodial penalties is one-third of the prison term (Article 107/2, CGIK). The prisoner has to be of good behavior during this time (Article 107/1, CGIK).<sup>1</sup>

1. According to the repealed codes, prisoners sentenced to other kinds of custodial penalties had to serve half of the penalty. They were automatically released and no request was required if they are considered “good behavior” prisoners (Art. 19/1, CIK). Exceptionally, a conditional release was not granted if a special type of enforcement of short-term custodial penalties (Art. 8/1, repealed CIK) was applied (Art. 19/7, CIK). If the prisoner had escaped once, then he had to serve two-thirds of the prison term. If the prisoner had escaped twice, then he had to serve three-quarters of the sentence (CIK Art. 19/2, CIK).

448. Special rules of conditional release. There are special rules on the minimum duration of imprisonment in organized crime cases, the special regulation for terrorist crimes and the decision on conditional release in these cases.

I - Convicts of organized crime. In cases of imprisonment for forming an organization to commit crimes (suç işlemek için örgüt kurmak) or leading such an organization (örgütü yönetmek), or in cases of a crime committed within the activities of such an crime organization (Article 107/4, CGIK), the duration of minimum imprisonment term to be eligible to be conditionally released differs according to the number or type of convictions:

If he has been sentenced to an aggravated life imprisonment, he has to serve 36 years to be eligible for conditionally release; if sentenced to life imprisonment, 30 years; if the sentence is a time-limited imprisonment, 3/4 of his term in good behavior (Article 107/4, CGIK).

If the organized crime figure has been sentenced to more than one imprisonment term, the minimum time limits for conditional release are longer: 40 years in case of conviction to more than one aggravated life imprisonment, or conviction to an aggravated life imprisonment and life imprisonment (Article 107/4-a, CGIK).

In case of conviction to more than one life imprisonment, 34 years have to be served (Article 107/4-b, CGIK).

In case of conviction to one aggravated life imprisonment term and to a imprisonment of limited duration, the maximum time to be spent in the correctional center is 40 years (Article 107/4-c, CGIK).

In case of conviction to one life imprisonment term and to an imprisonment of limited duration, the maximum time to be spent in the correctional center is 34 years (Article 107/4-d, CGIK).

If the organized-crime-convict has been sentenced to more than one imprisonment term of limited duration, the maximum time to be spent in the correctional center is 32 years (Article 107/4-e, CGIK).

II - Death penalty convicts. When the death penalty was abolished, death penalties against the convicts of terrorism were commuted to aggravated life imprisonment by Act No. 2002-4771. This Act was later amended by the Act No. 2004-5218. Terrorists convicted of aggravated life imprisonment directly or by commutation of a death penalty are not eligible for conditional release, and they stay in prison until they die (provisional Article 2 of the Code on the Execution of Punishments and Measures (CGIK)).<sup>1</sup>

III - Recidivists. Recidivism is no longer a ground for aggravating the punishment. However, conditional release for recidivists requires a longer stay in the correctional facility if convicted of aggravated life imprisonment, they have to spend 39 years in prison before being eligible to parole; if convicted to life imprisonment, 33 years; and if convicted to a specific term of imprisonment, they have to spend 3/4 of the prison term (Article 108/1, CGIK).

Recidivists remain under supervision after the execution of the prison term. The duration of the supervision is determined by the judge and shall not be less than one year (Article 108/4, CGIK). This period may be prolonged up to five years (Article 108/6, CGIK).

IV - The decision on conditional release. When an inmate is eligible for conditional release, the administration of the correctional facility prepares a detailed report for the court that rendered the initial sentence. The court has discretion in this respect and decides to release the convict if it deems appropriate. This decision is rendered on the basis of the file, and there is no open trial. If the court does not find it suitable to release the inmate at that point, it has to make its motives explicit. The court decision on denial of release may be subject to opposition (Article 107/11, CGIK).

The judge may decide to impose a measure of controlled liberty (*denetimli serbestlik tedbiri*) on the released person, which shall be effective during the period of conditional release (Article 107/10, CGIK).

1. The Anti-Terrorism Act of Apr. 8, 1991 (No. 3713) provided special regulations for conditional release. "Good behavior" prisoners sentenced to the death penalty pursuant to acts of terrorism, if the Grand National Assembly held that the death penalty was not to be enforced, had to serve 36 years. Prisoners sentenced to life imprisonment had to serve 30 years, and prisoner



sentenced to prison had to serve three-quarters of the full time (Art. 17/1, TMK). These prisoners did not benefit from the six-day reduction as provided by the Act of Enforcement of Punishments, and Art. 19/1,2 did not apply. A request of the prisoner was not required. Prisoners who attempted to escape (Art. 17/2) and those who were recidivists (Art. 17/3, TMK) were denied conditional release. The Anti-Terrorism legislation introduced a tacit amnesty for crimes committed up to Apr. 8, 1991. The amnesty took the form of the “conditional release.” The Constitution had put a ban on amnesty for political crimes (Art. 87, AY) until the 2002–4771 amendment. In order to release political offenders, the government added some Arts to the Anti-Terrorism Act. According to Provisory Art. 1, death penalties imposed for crimes committed before Apr. 8, 1991 were not executed, and the offender was conditionally released after serving 10 years of imprisonment. Offenders sentenced to life imprisonment had to serve eight years. Other inmates had to serve one-fifth of their sentences. Provisory Art. 4, which provided some exceptions to these terms, was abolished by the decisions of the Court of Cassation of July 19, 1991 and Feb. 28, 1992. In 2002, the death penalty for peacetime acts of terrorism was replaced by another type of lifelong imprisonment: for people convicted for acts of terrorism, the lifelong prison term was tripled and convicts could not be conditionally released. Lifelong imprisonment for terrorists means that they will in fact remain in prison until they die (Art. 1(B) Act No. 4771 of Aug. 3, 2002). This provision has been taken into the Code on Execution of Punishments and Measures as Provisory Art. 2.

#### §5. CONTROLLED LIBERTY

449. Controlled liberty (*denetimli serbestlik*) was a new concept when the new Penal Code introduced it for (a) conditionally release (*infra*, I) and (b) suspended imprisonment and similar institutions (*infra*, paragraph 450).

I - The obligations of the conditionally released inmate. The conditionally released inmate must not commit any intentional crime (*kasıtlı suç*) during the period of controlled liberty.

If the conditionally released person is of good behavior during this period, “the inflicted punishment shall be considered as served” (*ceza infaz edilmiş sayılır*) (Article 107/14, CGIK). Under the repealed law, “the conviction was regarded as if not imposed at all”; under the new regime the legal consequences of the completed sentence will apply.

II - The duration of controlled liberty in cases of conditionally release. The period of controlled liberty (*denetim süresi*) is as long as the period the inmate has to spend in the correction center, according Article 107/2 and 3, CGIK, to be eligible to parole (Article 107/6, CGIK).

III - Tutor for the conditionally released inmate. The judge may appoint an expert who will accompany the conditionally released person during the period of controlled liberty. The expert reports to the judge about the released prisoner’s social developments every three months.

IV - Revocation of conditional release. If the conditionally released inmate commits a new intentional crime, or does not insistently fulfill the obligations imposed on him in spite of judicial warning, the conditional release can be revoked (Article 107/13, CGIK).

The court that tries the newly committed intentional crime makes the decision on revocation, if it gives a conviction to imprisonment (Article 107/15-a, CGIK). If the conditionally released person did not fulfill the imposed obligations, it will be the

court that rendered the initial conviction (Article 107/15-b, CGIK) that decides on revocation. It will be rendered on the file and is subject to opposition.

Upon revocation of conditional release, the court also decides on the execution of the remaining part of the imprisonment term, beginning from the date when the new crime was committed (Article 107/13-a, CGIK). If the revocation is based on not fulfilling the obligations, the court may render a new decision regarding the imprisonment term (Article 107/13-b, CGIK).

If the decision on conditional release has been revoked once, the inmate is no longer eligible for conditional release with respect to that particular sentence (Article 107/13, CGIK).

450. Controlled liberty in cases of suspension of imprisonment and similar cases. The new criminal law system foresees “controlled liberty” in some other instances, such as suspended imprisonment (hapis cezasının ertelenmesinde denetimli serbestlik) (Article 51/3, TCK), judicial control (adli kontrol halindeki denetimli serbestlik) (Article 109, CMK), suspension of prosecution (kamu davasının açılmasının ertelenmesindeki denetimli serbestlik) (Article 171/2, CMK) and delayed announcement of the judgment (hükmün açıklanmasının geri bırakılmasındaki denetimli serbestlik) (Article 231/2, CMK) and for children who were perverted to commit crimes (suça sürüklenen çocuklar hakkındaki denetimli serbestlik hükümleri) (Articles 5, 11, ÇKK).



### Chapter 3. Enforcement of Community Service and Criminal Fines

451. Enforcement of community service. Penalties' and "security measures" are the "sanctions" in the criminal justice system. The new Turkish judicial system includes imprisonment and "other penalties" (community service and criminal fines).

I - Execution of community service. Community service, formally called "public beneficiary work," is one of the alternative sanctions regulated by Article 50/1-f, TCK, as a substitute for short-term imprisonment. It cannot be used if the same individual has been convicted to another prison term (Article 105/3, CGIK).

The convict has to work for a public institution or a private institution that provides public services without getting any compensation for his work (Article 105/1, CGIK). The court distributes lists of available work places and proposes a certain type of work to the convict. It reminds the convicted person that he has the right to refuse to work (Article 105/2, CGIK).

Community service may also be applied during the execution of the imprisonment term for conviction up to two years. In such cases, the inmate must have served half of his term on good behavior and apply for community service. The request may also be put forward by his legal representative or by the office of public prosecution. The court decides about this application upon its discretion (Article 105/4, CGIK) and gives permission for community service.

If the inmate fails to fulfill the principles and procedure of work as indicated in the court decision, he has to serve the rest of his prison time (Article 105/6, CGIK).

II - Execution of criminal fine. The criminal fine is an amount of money determined according to the rules as foreseen in Article 52 of TCK (Article 106/1, CGIK):

- (1) After a fine is set, the court hands out the judgment, which includes the fine to the office of the public prosecution. The office of public prosecution serves a payment order (ödeme emri) to the convict and sets a time limit for payment. The rules about notification in Article 20/3 CGIK apply.
- (2) If the convicted person fails to pay the fine within the time limit set in the payment order, the public prosecutor can decide to imprison that individual for the equivalent in days of his fine (Article 106/4, CGIK). This conversion into a prison term is automatic, there is no need for renewed judicial intervention (Article 106/5, CGIK) and it shall not exceed three years. In cases of several convictions to fines, it shall not exceed five years (Article 106/7, CGIK). This imprisonment cannot be suspended, and the inmate cannot be conditionally released, except in cases indicated in Article 50/1-c, TCK (Article 106/9, CGIK). If the imprisoned convict who was originally sentenced to a fine pays the equivalent days of his fine, with the exception of the days he has spent in prison, he will be freed (Article 106/8, CGIK). However, this imprisonment term, converted from fine is not considered as "short-term imprisonment" in the technical meaning and therefore it is not possible to apply<sup>1</sup> the "special forms of execution of short-term imprisonment" as regulated in Article 110 CGIK (supra, paragraph 436).

- (3) It is forbidden to convert a criminal fine against a child into imprisonment (Article 106/4, CGIK).
- (4) Criminal fines may be paid by installments if the judgment of the court so decides (Article 106/5, CGIK). If there is no such decision, the convicted person who has paid 1/3 of the fine may file a request to pay the rest in installments. The public prosecutor can allow him to pay the rest in two installments: two equal payments with a one month interval (Article 106/6, CGIK). If the first installment is not paid, the second one shall be void.

1. C. CD Mae. 10, 2010, K. 2010/7351; <[www.hukukturk.com](http://www.hukukturk.com)>.

## Chapter 4. Setting Aside of Punishments

452. Grounds for dismissing actions and setting aside of punishments. Part I of Chapter 4 of TCK contains provisions regarding dismissing actions and setting aside punishments (dava ve cezanın düşürülmesi), where the legal link between the State and the accused person are no longer existing.<sup>1</sup> The grounds for the dismissal are: death of the accused or the sentenced person (sanığın veya hükümlünün ölümü) (Article 64, TCK), amnesty and pardon (af) (Article 65, TCK), statute of limitations for prosecution (dava zaman aşımı) (Articles 66–67, TCK) (infra, paragraph 367), statute of limitations for punishments (ceza zaman aşımı) (Articles 68–71, TCK) (supra, paragraph 455), withdrawal of the claim by the injured party (soruşturulması ve kovuşturulması şikayete bağlı suçlarda şikayetten vazgeçme) (Article 73, TCK) and the pre-payment of the fine (önödeme) (Article 75, TCK).

Mediation (Article 253, CMK) (supra, paragraph 274), suspended prosecution (Article 171/2, CMK) (supra, paragraph 274) and delayed announcement of the judgment (Article 231, CMK) (supra, paragraph 397-II), have an effect of dismissing public prosecution, if the suspect or the accused complies with the legal obligations. The Court of Cassation regards the delayed announcement of the judgment as a suspended dismissal decision. There are some crimes, such as giving information about an illegal organization (Article 221, TCK), where the effective remorse results in “no grounds for punishing” judgment of the trial court (Article 223/3, CMK).

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 751.

453. Death of the accused. The death of the accused shall terminate (supra, paragraph 363) public prosecution. However, if the prosecution is related to confiscation, that part of the prosecution may continue, and the court may order confiscation (Article 64/1, TCK).

The death of a convicted person will set aside the imprisonment and the fine that has not been paid yet. However, if the judgment includes a confiscation and an order to pay court expenditures (muhakeme masrafları), and has become final before the moment of death, this judgment must be executed upon the convict’s family/legal successors (Article 64/2, TCK).

454. Amnesty and pardon. Amnesty (genel af) terminates public prosecutions and sets aside punishments together with all their penal consequences (Article 65/1, TCK).<sup>1</sup> Pardon (özel af) only sets aside or reduces the imprisonment term, or commutes it into a fine. It will not affect the consequences of the conviction or those mentioned in the judgment (Article 65/2 and 3, TCK).<sup>2</sup>

I - Amnesty. According to Article 87 of the Constitution, the Grand National Assembly has the power to grant amnesty or pardon. This power of the Grand National Assembly was limited to ordinary crimes. Political crimes as defined in Article 14 of the Constitution were exempted.<sup>3</sup> The 2001 Act No. 4709 abolished this restriction, valid for crimes committed in the future. The Grand National

Assembly has now to vote for amnesty or pardon with a three-fifths majority of the full members. The same Act amended Article 14 AY (supra, paragraph 35).

II - Pardon. The Constitution (Article 104/2-b, AY) grants the president of the republic the right to grant pardon and reduce the penalty, or even to lift it under certain circumstances.<sup>4</sup>

1. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 766.
2. S. Keyman, *Türk Hukukunda Af* (Ankara: Ankara Üniversitesi Basımevi, 1965).
3. The 1991 “Anti-Terrorism” legislation has therefore implemented a tacit amnesty for political offenses through extending the application of conditional release (supra, paras. 7, 213 and 441). A. Sözüer, *Amnestien in der Türkei*, ZAR (2002), s. 100.
4. A 15 year lengthy imprisonment of a convicted terrorist inmate was lifted on the expert evidence of the Legal Medicine Institute (Adli Tıp Kurumu), upon diagnosis of an “incurable disease” (RG. Jan. 8, 2003/624,987). There are some hundred examples of such “pardon” decisions in the last years.

455. Statute of limitations for execution of punishments. There are two kinds of statute of limitations:<sup>1</sup> for prosecution (supra, paragraph 367) and for execution of punishment.<sup>2</sup> With the lapse of time, the consequences of a crime shall be forgotten and the probative value of the evidence shall be less. The majority of the Turkish legal experts consider the statute of limitations as a figure belonging to substantive criminal law; some experts however, regard this concept as a procedural obstacle for prosecution.<sup>3</sup> The accused or the convicted person cannot waive the application of the statute of limitation; the court has to consider both types of statute of limitations by its own motion (Article 72/2, TCK).<sup>4</sup>

There is a new regulation with regard to the setting aside of penalties: Article 68, TCK.<sup>5</sup> The period of time mentioned in the statute of limitations begins to run when the sentence becomes final or the execution of the penalty is interrupted for any reason such as when the execution of the penalty lapses. In such cases, the rest of the punishment shall be taken into account (Article 68/5, TCK). The court has to act *ex officio*, and the suspect, the accused or the convicted person cannot waive this right (Article 72/2, TCK).

(1)Time Limits for Punishments. Punishments are set aside (ceza zamanasımı) with the lapse of: 40 years for the aggravated life imprisonment (Article 68/1-a, TCK), 30 years for life imprisonment (Article 68/1-b, TCK), 24 years for imprisonment of 20 years or more (Article 68/1-c, TCK), 20 years for imprisonment of more than five years (Article 68/1-d, TCK), 10 years for imprisonment of up to five years (Article 68/1-e, TCK) and 20 years from the date of finalization of the judgment for confiscation (Article 70, TCK).

Deprivation of rights is either a consequence of the punishment (cezaya bağlı hak yoksunlukları) or is based on additional decision of the court (hükümde belirtilen hak yoksunlukları). It has effect until the end of the period mentioned in the statute of limitations (Article 69, TCK).

(2)Suspension and Interruption of Time Limit for Punishment. The execution of final judgments against a Member of Parliament shall rest until the end of his term (Article 83/3, AY). In cases where a convicted inmate commits a crime with intent that is punishable with a maximum imprisonment term of more than two years, the statute of limitation for execution of punishments shall be suspended (Article 71/2,

TCK). The execution of final punishments of an inmate shall be suspended as long as he is serving an imprisonment term inflicted for another crime (Article 15, Act No. 2005–5320). Soldiers shall serve short-term imprisonment punishment for crimes committed prior their drafting after their military service; during this period the statute of limitation for execution of punishments is suspended (Article 118/1, CGIK).

Time is interrupted (ceza zamanasımının kesilmesi) by a notification by a competent authority to the convicted person in order to execute the sentence (Article 20/2, CGIK), or by an arrest for this purpose (Article 71/1, TCK). It is interrupted as well if the convicted individual commits another intentional crime that is punishable with a maximum of more than two years imprisonment (Article 71/2, TCK).

(3)Special Regulation for Children. If the child was in the age group of 12–15 when the crime was committed, the time limit for setting aside the punishment in the statute shall be discounted by half; if the child was in the age group of 15–18, by 2/3 (Article 68/2, TCK).

1. F.G. Taner, *Ceza Hukukunda Zamanasımı* (2008).
2. I. Özgenç, *Türk Ceza Hukuku Genel Hükümler, Gözden Geçirilmiş ve Güncellenmiş 5* (Ankara: Bası, Seçkin, 2010), 751.
3. S. Tellenbach, “Verjaehrung in der Türkei,” in *Nationales Strafrecht in rechtsvergleichender Darstellung, Teilband 5*, ed. Sieber & Cornils (Berlin, 2010), 705.
4. I. Döner, *Ceza Zamanasımı* (Erzincan Hukuk Fakültesi Dergisi, Cilt 9, sayı 3–4, sayfa 35, Erzincan 2005). E. Günay, *Dava ve Ceza Zamanasımı, Memnu Hakları İadesi, Adli Sicil Kayıtlarının Silinmesi* (Ankara: Seçkin Yayınları, 2003). T. Soysal, 5237 Sayılı TCK’nın 104/2 Maddesinin Anayasaya Aykırılığı Savıyla Anayasa Mahkemesi’ne Başvuru ve Bir Değerlendirme (Legal Hukuk Dergisi, sayı 36 sayfa 4235, Aralık 2005).
5. According to the repealed Penal Code, penalties were set aside with the lapse of the following periods: 30 years for the death penalty or lifelong imprisonment, 24 years for lengthy imprisonment of 20 years or more, 20 years for lengthy imprisonment of more than five years, 10 years for lengthy imprisonment or imprisonment of not more than five years, four years for light imprisonment of more than one month or light fine up to 5,400 Liras, 18 months for all the other punishments (Art. 112, repealed TCK). The statute of limitations regarding sentences began to run on the date the sentence became final or the execution was interrupted (Art. 113, repealed TCK). Time was interrupted by all types of procedures regarding the execution of a sentence lawfully issued by a competent authority, apart from some other cases provided by the law (Art. 114, repealed TCK). It was also interrupted if the convicted individual committed another crime.

456. Statute of limitations for execution of administrative sanctions. In cases where time limits for execution (yerine getirme zamanasımı) have expired, a decision that includes an administrative fine or administrative confiscation (mülkiyetin kamuya geçirilmesi) will no longer have to be fulfilled.<sup>1</sup>

Time starts to run when the decision becomes final (Article 21/4, KK). However, time does not run if the execution of the administrative sanction did not start because of some legal requirements, or if it was impossible to execute it (Article 21/5, KK).

Administrative sanctions are set aside with the lapse of the following periods: seven years for the administrative fine of 50,000 TL and upwards (Article 21/2-a, KK), five years for the administrative fine of 20,000 and upwards (Article 21/2-b, KK), four years for the administrative fine of 10,000 TL or more (Article 21/2-c, KK), three years for administrative fine of less than 10,000 TL (Article 21/2-d, KK) and 10 years for administrative confiscation (Article 21/3, KK).

1. According to the repealed Penal Code, in cases of misdemeanors, the time limit was four years for light imprisonment of more than one month or light fine up to 5,400 Liras, 18 months for all the other punishments (Art. 112, repealed TCK).

457. Withdrawal of the claim. In some cases, the prosecution of a crime depends on the victim. Such crimes are subject to mediation (Article 253, CMK), to suspension of prosecution (Article 171/2, CMK) and to delaying the announcement of the judgment (CMK 231/2, CMK) as well. The first step is issuing of the claim (Article 73/1, TCK). If there is a claim, then mediation and other procedures can start (supra, paragraph 367).

458. Pre-payment of criminal fines. Crimes which carry only a criminal fine or imprisonment not exceeding three months are subject to “pre-payment” (önödeme) (Article 75, TCK). Crimes within mediation are excluded.

The office of the public prosecution notifies the perpetrator that he has to pay the (lower level) of a criminal fine within 10 days and that no prosecution will ensue if it is promptly paid (Article 75/1-a, TCK). If the statutory penalty is imprisonment not exceeding three months, each day of imprisonment shall be calculated as 20 TL (Article 75/1-b, TCK). If the statute foresees imprisonment and a criminal fine, both shall be applied at the lower level (Article 75/1-c, TCK).

## General Conclusion

459. The Turkish criminal justice system is a mixture of some continental European legal orders. General criminal law is based on Italian law and criminal procedure on German law. The court structure is based on the French model. In the 1920s, the abolition of the Islamic law system was a great accomplishment, but the Oriental ways of thinking have subsisted in Turkish consciousness.

Modern Turkey places great effort on setting aside the difference between the formal written rules and the actual application of such rules. In order to apply such rules in conformity with European Human Rights standards, new regulations were promulgated in 1992. The decisions of the Constitutional Court, the European Court of Human Rights and the Court of Cassation have heavily contributed in this respect. The government, universities and all constitutional institutions are working in the same direction. At present, Turkish scholars are working to reform the entire criminal justice and judicial systems.

Turkish Law is in evolution. There are new Codes in 2010, such as Code on Commerce, Code on Obligations and Civil Procedure Code. There is an expectation of a new Constitution in 2011.

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