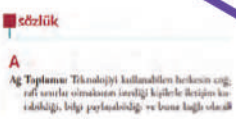
Öğrenme çıktıları
Bölüm içinde hangi bilgi, beceri ve yeterlikleri kazanacağınızı ifade eder.

Bölüm Özeti
Bölümün kısa özetini gösterir.

Tanım
Bölüm içinde geçen önemli kavramların tanımları verilir.



Sözlük
Bölüm içinde geçen önemli kavramlardan oluşan sözlük ünite sonunda paylaşılır.

Dikkat
Konuya ilişkin önemli uyarıları gösterir.

Karekod
Bölüm içinde verilen karekodlar, mobil cihazlarınız aracılığıyla sizi ek kaynaklara, videolara veya web adreslerine ulaştırır.

Neler Öğrendik ve Yanıt Anahtarı
Bölüm içeriğine ilişkin 10 adet çoktan seçmeli soru ve cevapları paylaşılır.

Öğrenme Çıktısı Tablosu
Araştır/İlişkilendir/Anlat-Paylaş
İlgili konuların altında cevaplayacağınız soruları, okuyabileceğiniz ek kaynakları ve konuyla ilgili yapabileceğiniz ekstra etkinlikleri gösterir.

Yaşamla İlişkilendir
Bölümün içeriğine uygun paylaşılan yaşama dair gerçek kesitler veya örnekleri gösterir.

Araştırmalarla İlişkilendir
Bölüm içeriği ile ilişkili araştırmaların ve bilimsel çalışmaları gösterir.

ANADOLU UNIVERSITY

Introduction to Law

Editör

Assoc.Prof.Dr. Gökhan GÜNEYSU

Authors

CHAPTER 1, 2 Asst.Prof.Dr. Ali Emrah BOZBAYINDIR

CHAPTER 3, 4 Asst.Prof.Dr. Nilay ARAT

CHAPTER 5 Asst.Prof.Dr. Gülşah BOSTANCI BOZBAYINDIR

CHAPTER 6 Prof.Dr. Şebnem AKİPEK ÖCAL

CHAPTER 7 Asst.Prof.Dr. Mustafa GÖKSU

CHAPTER 8 Assoc.Prof.Dr. Gamze AŞÇIOĞLU-ÖZ

ANADOLU UNIVERSITY

General Coordinator
Asst.Prof.Dr. Murat Akyıldız

Graphic Design Coordinator and Instructional Designer
Assoc.Prof.Dr. Halit Turgay Ünalan

Printing and Distribution Coordinator
Dr. Murat Doğan Şahin

Measurement and Evaluation Supervisor
Biriçim Altınordu

Graphic Designers
Ayşegül Dibek
Hilal Özcan
Özlem Çayırlı
Gülşah Karabulut

Cover Design
Assoc.Prof.Dr. Halit Turgay Ünalan

Typesetting and Composition
Mehmet Emin Yüksel
Murat Tambova
Süreyya Çelik
Nihal Sürücü
Gözde Soysever
Yasin Özkır

T.C. ANADOLU UNIVERSITY PUBLICATION NO: 3598

FACULTY OF OPEN EDUCATION PUBLICATION NO: 2429

INTRODUCTION TO LAW

E-ISBN: **978-975-06-2417-9**

Eskişehir, Republic of Turkey, October 2017

3181-0-0-0-1709-V01

Contents

CHAPTER 5 Criminal Law

CHAPTER 6 Introduction to Civil Law

CHAPTER 7 Law of Civil Procedure, Compulsory Enforcement and Bankruptcy

CHAPTER 8 Commercial Law inTurkey with Specific Reference to Rules Related to Competition in Turkish Legal System

Preface

Dear Students,

It is an honor and a privilege to introduce the very first edition of "The Introduction to Law" textbook. This book is the fruit of a collective effort of learned scholars from various Universities. It is an important contribution for the students enrolled in the programs offered by the Open Education Faculty of Anadolu University. Having said that, it will also be seen as an ideal textbook for the Introduction to Law courses offered by other Universities, as well as practicing lawyers, who would be willing to expand their knowledge on the Turkish Legal System.

It is always a burdensome task to organize and synchronize the cooperation among a high number of individuals. I, as the Editor of this book, have never experienced this frustrating challenge, since the authors devoted their time and knowledge to this project in an unyielding fashion, turning the whole process of preparing the book for print into a smooth and enjoyable experience. It has also been an illuminating experience for me to see the best legal minds of Turkey at their legal work. I am indebted for their professionalism and commitment. The book comprises eight chapters. The chapters are organized in such a way that the readers will be given a chance to be acquainted with basic terminology and reasoning of law. Following the first two chapters, each chapter deals with a specific legal area of specialization. We, as the authors and the editor, plan to cover essential points on legal matters. I enjoy this very opportunity to thank each and every one of the scholars, who were kind enough to allocate their time for the preparation of this book. I am sure, this book is going to assume the status of a reference book for years to come and will help students of other Colleges and Universities in their quest for perfection.

Editor

Assoc.Prof.Dr. Gökhan GÜNEYSU

Chapter 5 Criminal Law

After completing this chapter, you will be able to:

Learning Outcomes

1. Explain the basic functions of criminal rules in a society
2. Differentiate among various excuses
3. Juxtapose different liability requirements

Chapter Outline

Introduction
Defining Crime and Criminal Law
Liability Requirements
Excuses

Key Terms

Crime
Criminal Law
The Principal of Personal Responsibility
The Principle of Legality, Presumption of Innocence
Actus Reus, Mens Rea

INTRODUCTION

As an omnipresent topic, criminal law is a part of our daily life, the examples of which we find from newsletters, literature and television programs. It seems to fascinate and awe us at the same time. This an introductory chapter on the basic concepts and foundations of criminal law. After studying this chapter you should understand the following main points:

- Definition of crime and criminal law
- What constitutes a crime?
- Elements of crime
- Basic knowledge with regard to criminalizaton theories
- Purposes of punishment
- Relationhip between criminal law and human rights law
- Reasons which would justify or excuse a criminal act

DEFINING CRIME AND CRIMINAL LAW

What is Crime

According to Herring, this is a question which is surprisingly difficult to answer. Most people would imagine that criminal law is related to murder, assault and theft, which, by all means, is. The scope of criminal law, however, is wider. Unlike the general opinion regarding the scope of crime, criminal law is wider than murder, theft, assault and rape. It also includes environmental offenses, crimes against public morals, as well as traffic offenses. It is the values and culture of a particular society which determine what conducts are regarded as criminal. It should be noted that a certain conduct which is contrary to criminal law at one point in time may not be regarded as criminal afterwards or in another country. Although there are a number of definitions concerning 'what crime is', the definition of Blackstone, a famous English jurist, stands out as the most remarkable and comprehensible. According to Blackstone, a crime is 'an act committed or omitted in violation of public law, either forbidding or commanding it'[1]. In other words, crimes are described and distinguished from other acts or omissions with respect to giving rise to judicial proceedings and the prospect of state punishment[2]. According to Williams, a crime is 'an act that is capable of being followed by criminal proceedings having one of the types of outcome (punishment etc.) known to follow these proceedings'. Although this may be the best definition, it is not useful, especially as it tends to be an ambigious one-What is criminal law? It is that part of the law which uses criminal procedures. What are criminal procedures? Those which apply to criminal law[3].

What is Criminal Law

Criminal liability is the strongest formal condemnation that society can inflict. Therefore, criminal law plays a distinctive role in society, including the following functions: to deter people from doing acts that harm others or society; to set out the conditions under which people who have performed such acts will be punished; and to provide guidance on the kinds of behaviours which are considered as acceptable by society[4].

The major concerns of criminal law may be expressed as follows:

The support of public interests in;

- preventing physical injury. This accounts for the crimes of murder, manslaughter, arson and other crimes of violence, as well as certain road traffic offenses and those relating to public health and safety.
- proscribing personal immorality deemed injurious to society's well-being. This accounts for the criminalisation of bigamy, incest, sado-masochism, bestiality and obscenity, drug possession and supply.
- preventing the moral corruption of the young through crimes such as gross indecency and unlawful sexual intercourse with children.
- maintaining the integrity of the state and the administration of justice through crimes such as treason, perjury, perverting the course of justice, tax evasion.
- maintaining public order and security through offenses such as riot, affray, breach of the peace, public drunkenness.

The support of private interests in remaining free from;

- undesired physical interference through crimes such as rape, assault, indecent assault, false imprisonment, harassment;
- offenses through crimes such as indecent exposure, indecency in public, solicitation;
- undesired interference with property through crimes such as theft, robbery, taking and driving away a road vehicle, fraud.

Where a behaviour is condemned as a crime, the values and culture of the society are considered to be the most decisive factors. For example, whilst abortion is permitted upon the woman's request in the early weeks of pregnancy and in the later periods of time under certain circumstances (time limitation) in some countries, including Turkey and the EU countries, others ban the abortion without any exception such as in Ireland (Only the life of the woman is at risk.) As previously mentioned, the nature of criminal law has a changing characteristic that varies over time and from one country to another. A good example of how criminal behaviours can change over time can be seen from the manner in which the law on adultery acts has changed.

- Adultery was a punishable criminal offense according to Article 440 (men adultery) and 441(woman adultery) of the Turkish Penal Code numbered 765 ('TPC'), which aimed to protect the institution of marriage and children. The crime of adultery damaged not only the institution of family, but also the public order.
- In 1996, the Turkish Constitutional Court decided that adultery would no longer constitute a criminal offense for men, while Article 441 regarding the woman adultery remained valid.
- In 1999, Article 441 of the TPC that required imprisonment for women convicted of adultery was repealed.
- From this date on, adultery would no longer constitute a criminal offense, while remaining as a cause of action for divorce under Article 161 of the Turkish Civil Code.

The governing principles which lie at the core of modern criminal law are as follows:

- The principle of welfare and upholding the common good,
- The principle of prevention of harm to others,
- The principle of minimal intervention: Law should not criminalize too much behaviour,
- The principle of social responsibility: Society requires a certain level of cooperation between citizens,
- The principle of proportionate response: The response of criminal law should be reasonably in proportion to the harm committed or threatened to be committed,
- The non-retroactivity principle: A person should not be convicted or punished except in accordance with a previously declared offense,
- The thin-ice principle: Those who skate on thin ice can hardly expect to find a sign denoting the precise spot where they will fall in,
- The principle of maximum certainty: People should have sufficiently certain and clear warnings about the forbidden conducts,
- The principle of fair labelling: Offenses should be labelled in a manner to reflect the seriousness of the law violated,
- The principle of strict construction: Ambiguities in criminal law should be construed in favour of the defendant,
- The presumption of innocence: A principle of procedural fairness that the defendant should be presumed innocent until proved guilty[5].

Purposes of Criminal Law

The purpose of criminal law is to protect society so that its members can be reasonably secure in carrying out constructive activities. Only behaviors that are detrimental to the welfare of society should be made criminal. A balance is always to be achieved between the rights of the individual and the protection of society. In the social contract, a concept originating with Thomas Hobbes and John Locke, individuals give up certain liberties in return for being protected by society. We give up the "right" to steal what we want in return for society's protection against being victimized by others. We also give up other liberties as members of a lawful society, however, society must, in return, impose only laws that have a purpose consistent with the protection of and minimally intrusive on our individual liberties[6].

These fundamental principles are invaluable, yet it remains important to try and work out the purpose of criminal law. When you have read about people being prosecuted for anything from aiding and abetting suicide to outraging public decency, you may well want to ask some fundamental questions about what the criminal law is seeking to achieve. Criminal law seeks:

- to enforce moral values;
- to punish those who deserve punishment;
- to protect the public from harm;
- to reform the offender;
- to deter offenders and potential offenders;
- to educate people about appropriate conduct and behaviour;
- to preserve order;
- to protect vulnerable people from exploitation and corruption[7].

According to prevailing legal theories, the general purpose of criminal law is the protection of certain individual and collective interests. The threat of punishment is expected to deter potential violators from committing offenses; the general purpose of criminal law is thus to prevent crime. Whenever someone has nevertheless committed a criminal act and the issue of punishing that person arises, the main purpose of imposing a criminal sanction is not preventive but retributive[8]. On the basis of these arguments, it is said that theories of punishment regarding the purposes of criminal law, are divided into absolute and relative theories. Absolute theories look back to the past and relative theories look to the future. The difference of the theories arise from the difference between the punishment and prevention perspectives[9].

Absolute Theories of Punishment

Absolute theories of punishment –revenge, retribution, atonement- look back to the past, to the criminal deed and aim at balancing the harm done. The legitimacy of the theories are based on the idea of justice and punishment is directly related to the guilty. Deliberately doing harm to a perpetrator reimburses harm done by him and thus tries to re-establish the balance of justice. For that matter punishment does not serve any social purpose or goal apart from the re-establishment of equivalence by punishing neither harsher nor lighter than the perpetrator's quilt. Although retribution can not heal wounds or repair damages, and can only re-establish the claim of law for integrity, it can reinforce the expectation of law-abiding behaviour[10]. Society feels satisfied by paying back perpetrators. Society pays back perpetrators by retaliation; perpetrators pay back society by accepting responsibility through punishment[11].

Relative Theories of Punishment

Relative theories of punishment, namely the prevention theories, focus on preventing the repetitive behaviours rather than on what has happened before. The legitimacy of these theories is based on the idea of its social benefit. In regard to the goal of the theories, two distinctions are usually made under the name of deterrence: In general, deterrence prevents future crime by frightening the perpetrator or the public. The so-called specific deterrence aims at the individual perpetrator. Punishment serves as a means of deterring the perpetrator. When the government punishes an individual perpetrator, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment[12]. In response to this, general deterrence applies to the public at large. When the public learns of a perpetrator's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. When the public learns, for example, that a perpetrator was severely punished by a sentence of life in prison or the death penalty, this knowledge can inspire a deep fear of criminal prosecution. In another words, general deterrence addresses everybody as a potential law breaker that can be deterred by the threat of punishment. On the other hand punishment addresses everybody as law-abiding citizens who are confirmed in their common beliefs in the law.

Unified Theories of Punishment

Trying to unite ideas of retribution with ideas of prevention in different variants, absolute and relative theories of punishment have led to so-called unified theories of punishment. According to the unification, society shall threaten to punish and the penalty shall be pronounced and executed with the aim of protecting society against further offenses but all this shall be done in a way adequate to the wrongdoers' guilt[13]. One of the reasons of punishment is based upon the idea that public interest can be satisfied through punishment. Punishment as a reaction to individual wrong delimited by general common interests is not distinguishable from punishment delimited by guilt. In this view, punishment is simultaneously retrospective and prospective, looks backward and forward[14].

Here are other forms of punishmet in a variety of ways:

1. *Incapacitation/restraint:* Executing a criminal is the most extreme form of rendering a person incapable of committing future crimes. Criminals restrained in prison cannot cause further harm to the general public during the length of their sentence.
2. *Specific deterrence:* By punishing the criminal for the crime, society demonstrates its ability and willingness to protect itself against those who commit crimes. The theory is that after being exposed to society's power to punish, the criminal will be taught a lesson and will refrain from any future misconduct.
3. *General deterrence:* When the general public observes criminals being punished for their crimes, the public is deterred from criminal conduct for fear of similar punishment. The effectiveness of this rationale depends on the degree of punishment and the degree of certainty that criminals will be caught, convicted, and punished.
4. *Rehabilitation:* Society may seek to prevent a criminal from committing other crimes by forcing that person to undergo training, psychological counseling, or some form of moral or social education as to the need for law-abiding patterns of behavior. If successful, rehabilitation will allow the individual to reenter society as a productive human being.
5. *Retribution:* Punishment may express the moral condemnation of the community and is a lawful means of avenging a wrong. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate wrongs." Public retribution also lessens the desire for private retribution by the victim or others who might seek personal revenge for the criminal's wrongdoing. For example, if society punishes the killer, the victim's friends and family have less need to avenge the death[15].

What Conduct should be Criminal?

In the broadest sense, both civil and criminal law intent to create and maintain the good society by the way of prohibition and requirement of special conduct. However, in the preservation of social order, the criminal law plays a unique role. One of the paramount roles is to prevent people from doing acts that harm others or society. It is generally said that the purpose of criminal law is to protect society in order to ensure that members of that society can be reasonably secure in carrying out their actions. For the sake of the preservation of the social order, among others, criminal law is the most commonly referred instrument. Because of that, to criminalize a certain kind conduct is to declare that it amounts to a public wrong, and that such behaviours ought to be avoided. For this reason, at the point of the legislation, legislature should decide what behaviour should be criminalised and what should not.

The frequent response to this question is that it should be the behaviour, which is immoral and harmful[16]. Unlike the general opinion, not all immoral or harmful behaviours are combated by means of a crime. To this respect more motives are required to defining crimes than opting whether behaviour is immoral or harmful[17]. In order to criminalize the behaviours, two leading phenomenon is governed by states by exercising the criminal law power in particular: The harm principle in Anglo-American Law and the Legal Good (Rechtsgut) principle particularly in German Law and civil law (continental law).

The Harm Principle

According to harm principle in John Stuart Mill's *On Liberty*, harm principle is described that a behaviour should not be criminal unless the behaviour causes harm to another person. Unlike moralism, harm principle does not concern the behaviours, which are not detrimental but unpleasant or impudent. According to Mill, society should not prevent the free choice of the another person's behaviour unless that behaviour harms society[18]. The state should intervene to protect society when harm is caused but what is harm? Harm has to be such that it threatens the mere fabric of society. It is for society to determine what constitutes 'harm'. In a democratic society this should pose little difficulty. We all accept that murder, rape, manslaughter, robbery, burglary and theft are all acts which are clearly wrong. Here, the victim should be protected from the 'wrong' and the wrongdoer should be punished. However, even here morals play a role. For example, we all agree that theft is wrong; harm is caused if I steal a wallet from the person sitting next to me on the train. Harm is caused to the individual, and society needs to be protected from my actions. Compare my act to the single unemployed mum who steals a pint of milk and a loaf of bread to feed her family. Is harm caused here? Is her act equally as reprehensible as mine? We all know that one should not steal, but does society really need protection from her? Arguably not. Although the quality of the act is the same the motives are very different. Although motives play no role in criminal law, this simple example shows there are varying differing standards as to what amounts to an act that causes harm. Not only is this dependent on the morals of those who represent our 'society' but it is also largely dependent on society's expectations and the changing values of that society[19].

The principle was initially designed to prevent the criminalization of conduct merely rested on moral or paternalistic grounds. Although this principle has been widely accepted, there has been much controversy over the term of harm. Today, the criminal law is not only concerned with the causing of direct harm to other people but also outlaws harm to state, public morals and the environment. The criminal law goes further and punishes conduct which may not cause harm but put others or itself in jeopardy, attempted crimes and acts which help others commit crimes[20].

Legal Good Principle

In continental legal thought, the concept of legal good which base on the idea that all offenses are there to defend specific legally protected interest has played an important role in the theory of criminalization[21]. According to legal goods principle, a legal good comprise two conditions in order to be considered worthy of protection by the criminal law: - the good must be of essential social importance and the adequate protection of the good requires the intervention of the criminal law. Legal goods are legally protected interests of the individual or other legal entities (e.g. corporate organisations) or of certain collectivities. They can be either natural material goods (e.g. land, water) or products of human labour; the latter can be further on divided into material goods (e.g. food, money etc.) and immaterial goods (e.g. privacy, education, freedom, security, etc.). These are just some classifications of legal goods. Normatively speaking, 'legal goods' are the goods or values of a particular society that may be mirrored in, and protected by, the law[22]. The concept of legal good is meant to properly limit the intervention of criminal law to protection of fundamental legal goods[23]. Continental legal thought, when dealing with the interpretation of the Criminal code's provisions, defining their objects and interrelation with other norms, in their majority, subscribe to the so-called doctrine of protected legal interests and the concept of the specific protective purpose of a law.

The General and Special Parts of Criminal Law

Criminal law consists of two sections: a general and a special part. In general, principles that are applied to every kind of crime regulated in the special part, are located in the general part. Defining the specific crimes and arranging them into the groups by subject matter pertain to the special part of criminal law. The general principles are the fundamental regulations and apply, without exception, to defined crimes in special part. Pursuant to the TPC, article 1- 76 contains general regulations that are applicable to every kind of specific crime. The special part of criminal law defines specific crimes, according to the principles set out in the general part.

Sources of criminal Law

1. *Legislature*: According to the principle of legality, criminal prohibitions and sanctions should be based on written law. The main body of criminal law is contained in the Penal/Criminal Code. But numerous legal norms providing for criminal liability can be found in other statutes, for example, in statutes regulating commercial matters, road traffic, or the handling of potentially dangerous drugs. Such statutes typically establish certain duties and requirements and add one or more paragraphs defining as crimes, the violation of specified duties.
2. *Judiciary:* The role of the jurisdiction is to interpret the criminal law not to make it. Also judges have no power to establish criminal liability without a clear statutory basis. The judge has a power to interpret the statute in line with the new insights or technological developments. However, due to prohibition of making comparison, when courts are of the opinion that certain conduct not covered by a statute should be treated as criminal, they cannot extend the reach of the statute. Their only recourse is to acquit the defendant and to write an opinion alerting the legislature to the gap in the present statutory law[24].
3. *Executive:* Especially for technical matters, the Turkish law system authorize administration to execute regulations in order to regulate details whose contents, purpose and scope are determined by the statute. The statute must describe exactly the conduct that is to be criminally prohibited and the maximum sanction to be imposed.

Criminal Law and Human Rights – The Function of the ECHR

There are certain rights that we have many of which are treasures[25]. For example, the rights of life, liberty, security, free speech, dignity, and prohibitions of slavery, forced labour, torture. These are seen as essential features of being human. In consideration of the importance of human rights, they are protected, without exception, by criminal law. Behaviour which severely breaches the human rights of another person will often be a criminal offense.

Human rights are protected also by the supranational conventions. One of those significant conventions is the European Convention on Human Rights, to which Turkey is a party. The European Convention on Human Rights (ECHR), which was signed in 1950 by all 47 member states of the European Council, aims at protecting and guaranteeing the human rights of people in countries that belong to the council of Europe. (With the 47 members, Council of Europe is separate from the European Union and was founded after the Second World War in order to protect human rights and the rule of law.

As an implementing court of the Convention, European Court of Human Rights (ECtHR), rules on individual or state applications alleging violations of the civil and political rights set out in the ECHR. The court's duty is monitoring respect for the human rights within the member states.

Principles of Criminal Law

As the core of the rule of law in criminal law, a set of principles can be found in the ECHR and national criminal codes. In relation to these principles the ECHR foresees, the following can be listed 'no punishment without law'; certainty in Article 7; 'presumption of innocence' in Article 6.

The Principle of Personal Responsibility

The principle of personal responsibility means that a person is responsible for her actions and no one else.

The Principle of Legality - Nulla Poena Sine Lege, Nullum Crimen Sine Lege

Criminal law looks back to the past. This is a logical and necessary consequence of principles deriving from the age of enlightenment, in which a scholar by the name Feuerbach first wrote the legality principle 'Nulle Poena Sine Lege, Nullum Crimen Sine Lege,' which states that an act may only be punished if criminal liability had been established by law before the act was committed. As a stance against the arbitrary treatment in the course of ongoing trial, Feuerbach proposed that there can be no punishment without a prior and precise rule stating so[26].

In view of the wide-ranging forms of the legality principle, it is preferred to divide it into four distinct principles.

1. Punishability requires a written act of parliament and cannot be based on custom. (No Punishment without Law)
2. Criminal prohibitions must determine the prohibited conduct, they must be definite (the principle of certainty)
3. Acts cannot be punished retroactively. (the principle of non retroactivity) The penalty and any ancillary measures shall be determined by the law which is in force at the time of the act. If the penalty is amended during the commission of the act, the law in force at the time the act is completed shall be applied. If the law in force at the time of the completion of the act is amended before judgment, the most lenient law shall be applied. A law intended to be in force only for a determinate time shall be continued to be applied to acts committed while it was in force even after it ceases to be in force, unless otherwise provided by law[27].
4. The statutory prohibition cannot be extended by analogy to conduct not covered by the ordinary meaning of the words used. (the principle of the interdiction of analogy)[28]. As a fundamental principle, *'No Punishment Without Law'* is regulated under most state constitutions, Criminal Codes and supranational Treaties including the ECHR. The ECHR, with its Article 7, defines the principle as '***No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.'*** Also, according to Article 38 of the Constitution of the Republic of Turkey; '***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 given a heavier penalty for an offense other than the penalty applicable at the time when the offense was committed'***.

According to Article 2 of the TPC, '***A person may neither be punished nor be imposed cautionary judgment for an act which does not explicitly constitute an offense within the definition of the Law***.' As it is seen in the examples, the statutes do one of the two things:

- No one is in charge of any act or omission which did not constitute a criminal offense under national/international law at the time when it was committed.
- No one shall be given a heavier penalty for an offense other than the penalty applicable at the time when the offense was committed

As well as Article 7 of the Convention, the TPC (Turkish Penal Code) requires the existence of a legal basis in order to impose a sentence or a penalty.

As another aspect of the legality principle, the principle of non-retrospectivity of criminal law is also ensured by the ECHR as well as the TPC. The meaning of this principle that the state cannot punish a person for an offense, unless it is accepted as a crime at the time, when the act was committed. The people must be able to find out what the law is and the law must deliberately avoid catching people by surprise. The essence of the principle is that a person should never be convicted or punished except in accordance with a previously declared offense governing the conduct in question. In other words, a criminal sanction may only be imposed if the conduct in question existed under the relevant law at the time when the impugned conduct occurred. Hence, the law maker may not execute ex post facto criminal laws and judges may only apply criminal provisions that are applicable during the conduct occurred[29].

The principle does not apply to retrospective changes that benefit an accused person. In cases where the changes in the penal code are in favour of an accused, the non retrospectivity principle will not be applicable[30]. Hence, the application of a law enacted after the commission of a crime that decriminalized conduct or reduces the penalty for such conduct, does not violate the principle.

Theoretically, penal codes would have been very short with the definition of an offense such as:

'It is an offense wrongfully to harm someone in a blameworthy way.' However, there would be two main reasons to object such a criminal law. Because of the severe consequences of imprisonment, criminal offenses are drafted with clarity so that people recognise what they are free to do and what not to do. Law abiding citizens are entitled to check the criminal law and arrange for themselves obviously what they must do or not do to ensure they do not infringe the law. For that reason, criminal law, especially crimes, must be predictable, fairly certain and capable of being obeyed[31]. On the other hand, punishment apportioned to crime is the second reason to object a very short criminal law. It would be inappropriate to censure someone who parks his car illegally with the same level of blame as a deliberate killer[32]. Because of this reason the offenses should be certainly defined thus one can recognise what level of blame is attached to which offense. Contrary to this, if crimes are defined too tightly, the way is left open for a defendant to attempt to use technical arguments that he was not charged with exactly the right offense and so escape a conviction[33]. Also Article 7 of the ECHR requires the offenses and corresponding penalties to be clearly defined by law.

Principle of the interdiction of analogy is directly linked to the prohibition against retroactivity and hence a generally accepted component of the legality principle. Interdiction of analogy means that on the purpose of the filling the gaps in the criminal law, the judge can not apply a statute beyond its wording or by extending a precedent through the creation of a new unwritten crime[34].

The Presumption of Innocence

With a simple definition, no one is accused until proven guilty. The burden is on the prosecution to prove the case. The principle burdens the prosecution with the proof of the committed offense. A person however clear the evidence seems to be, is innocent until proved guilty. It is enshrined in Article 6/2 of the ECHR as: '***Everyone charged with a criminal offense shall be presumed innocent until proved quilty according to law***'. However, the European Court suggested that placing a burden of proof on the defendant may be permissible, but the state would need to demonstrate that to do so is necessary given the gravity of the issues involved.

your turn 1

Please describe briefly the principles of criminal law (ECHR 6 and 7)?

Criminal Law Distinguished from Civil Law

Criminal law is not the only body of law that regulates the conduct of persons. Civil law essentially provides remedies for private wrongs that are offenses in which the state has a less direct interest. Most civil wrongs are classified as breaches of contract or torts. A breach of contract occurs when a party to a contract violates the terms of the agreement. A tort, on the other hand, is a wrongful act that does not violate any enforceable agreement, but nevertheless violates a legal right of the injured party. Common examples of torts include wrongful death, intentional or negligent infliction of personal injury, wrongful destruction of property, trespass, and defamation of character. A crime normally entails intentional conduct; thus, a driver whose car accidentally hits and kills another person would not necessarily be guilty of a crime, depending on the circumstances. If the accident resulted from the driver's negligence, the driver would have committed the tort of wrongful death and would be subject to a civil suit for damages. Criminal law and civil law often overlap. A conduct that constitutes a crime can also involve a tort. For example, A intentionally damages a house belonging to B. A's act might well result in both criminal and civil actions being brought against him. On the one hand, A may be prosecuted by the state for the crime of willful destruction of property. On the other hand, A may also be sued by B for the tort of wrongful destruction of property. The state would be seeking to punish A for his antisocial conduct, whereas B would be seeking compensation for the damage to his property[35]. Another example would be deterrence from crime which occurs as a result of social influence and pressure from families, friends and communities. Criminal law is, however, different from such influence in that it is the established state response to crime. Further, breaking of a criminal law is seen as different from that of other branches of law in that a breach of criminal law involves a degree of official moral censure. To be ordered by a court to pay damages following a breach of contract (which is not a criminal offense) does not bring along the same kind of moral message or stigma that it would if you had been found guilty of a criminal act and then ordered to pay a fine[36].

LIABILITY REQUIREMENTS

In view of the criminal liability, criminal law is established on a three-legged stool. The first leg consists of objective and subjective elements that are related to the question of whether a person has fulfilled each element of the statutory description of an offense. The second leg is concerned with the question of whether the person's behaviour was unlawful, and the third leg is related to the individual accountability of the person for the wrongdoing. (Weigend, s. 259)

The two main elements required for a crime to have been committed are guilty act and guilty mind, which are derived from the Latin phrase, 'Actus non facit reum nişi mens sit rea', meaning 'a man is not liable for his action alone unless he acts with a guilty mind.'

Objectıve and Subjectıve Elements

Objective Element-Actus Reus

Voluntary Act

The objective element- also called physical or external element- that describes a voluntary act or omission, refers to the part of the definition of the offense in the statutory law which relates to the actions of the perpetrator and their consequences. The movements are willed by the conscious mind of the defendant. Otherwise, the conducts are regarded as involuntary, with the defendant not having performed the actus reus[37]. The element will mostly involve activity on the part of the accused, such as an assault, an act of appropriation of property (in theft) or entry into a building (in burglary). For example, in murder, the death of the victim must result from the perpetrator's act/omission, or in case of criminal damage, property must be damaged or destroyed. In view of this example, the perpetrator is punished for what he/she does or, when there is a duty to act (omission), punished for what he/she does not do. A person can be legally responsible for his/her voluntary bodily movements and, in some cases, speech, but not for the effects that are beyond his/her control. For instance, a person does not act voluntarily when he/she is used by another person as a physical instrument such as the case in which the person is pushed into a swimming pool, causing another one to fall and drown who happens to be on the scene. Another example would be related to a man who killed his mother while sleepwalking.

The actus reus of a crime must reflect the free will and autonomy of a person and, therefore, the performance must be voluntary. Although in some cases, the act can be involuntary, the person can be held liable if he/she omits to take precautions against harming others in an unconscious state. For example, a mother who takes her newborn into her bed and smothers the baby in her sleep can be held criminally liable for negligent manslaughter (or even murder if she acted intentionally) for the prior conduct of taking the baby into her bed without taking care to protect her from possible harm[38].

Omissions

As a general rule, omission does not attract criminal liability. Although a voluntary act is required in most cases for criminal liability, both civil and common law consist of several offense definitions that do not require an act while giving rise to criminal liability, which is referred to as acts of omission or failure to act.

As an example of the statutory duty, Article 98 of the TPC regulates that:

(1) Any person who fails to render assistance to an old, disabled or injured person at the extent of his ability, or fails to notify the concerned authorities in time, is punished with imprisonment up to one year or punitive fine.

(2) In case of death of a person due to failure in rendering assistance or notification of concerned authorities, the person responsible is sentenced to imprisonment from one year to three years.

The duty derives from rendering assistance to someone in danger. Note that the Code creates a duty to act only to the extent that the citizen can do it without danger to self; further, only intervention to the extent of one's abilities is required. This means, for instance, that if a person cannot swim, he/she is not required to jump in the river to save a drowning person; he/she would have a duty, however, to alert others or to help the drowning victim by throwing in a life ring or doing some other affirmative act[39].

Another type of the statutory duty refers to relationship duties. For example Article 97 of the TPC sets out that:

Any person who abandons another person who is under protection and observation due to state of disability bound to old age or sickness, is sentenced to imprisonment from three months to up to two years.

If the victim suffers an illness or subject to injury or death due to abandonment, the offender is punished according to the provisions relating to aggravated offense.

Criminal liability may also derive from the statute which foresees a duty to act, particularly arising from relationships, contractual duties as well as failure to maintain care duties.

Where a person has a contractual duty to protect or care for others and fails to carry out the duty, he/she may be held liable for remaining passive or not performing the duty. For example, lifeguards towards swimmers, childcare providers towards those under their care, doctors towards patients. Another type of duty is his/her previous behaviour (creation of danger) which constitutes a risk against others' life.

According to the TPC, gross negligence in failing to perform one's duties may attach criminal liability, if there is a death or serious injury. Pursuant to Article 83 of the TPC, in order to hold a person criminally responsible from death due to failure to perform an obligation, with the failure or negligence, these should create consequences that are equal to commissive acts in degree.

In order for negligence and commissive acts to be regarded as equal, a person:

a) should have undertaken liabilities arising out of a law or a contract to execute a commissive act,
b) His previous performance should constitute a risk against others' life.

Any person causing death of a person due to failure to perform a legal obligation or requirement is basically punished with imprisonment of twelve years to twenty years instead of heavy life imprisonment, and of fifteen years to twenty years instead of life imprisonment. In other cases, the court may order for imprisonment of ten years to fifteen years or reduction of punishment.

According to Article 88 of the TPC, in the event that it is possible to diminish the effect of felonious injury by a simple medical surgery, the offender is sentenced to imprisonment of four months to one year or punitive fine upon complaint of the victim.

In case of commission of felonious injury by negligence, the punishment to be imposed may be reduced up to two thirds. The conditions relating to negligent homicide are taken into consideration in the application of this provision. A mother/nanny who passively watches as her toddler walks into a pool and drowns is presented as an example.

- In accordance with the abovementioned example, contractual obligation could be illustrated with the person employed as the baby's nanny who is under the duty to act.
- On the other hand, the baby's parents would be under the duty to act arising from a close family relationship with the victim.
- Furthermore, causing the risk of harm against the victim, the mother who puts the baby in the lake -even if by accident- is under a duty to act and will be punished for murder by omission40.

Consequently, a person can also be held criminally liable for mere nonfeasance when he/she is under a legal duty to avert a particular harm and neglects to fulfill that duty. If a person has violated a legal duty to avert the harm as defined in an offense description and the harm has occurred, the person becomes liable only if he/she could have averted the harm by fulfilling the duty to act. For example, if a mother sitting at the seashore does nothing although she sees that her child swimming outside is close to drowning in the high waves, she cannot be held responsible for "causing" the child's eventual death by her remaining passive when she cannot swim and there was no means available to obtain help from others[41].

Subjective Element-Mens Rea

The subjective element- also called the mental element- in crime is one of the most significant concepts of substantive criminal law. In general terms, an accused is held liable only if he/she has mens rea. Mens rea is the state of mind or, in the case of negligence, the failure to attain a certain standart of behaviour which the offense definition requires before the accused can be convicted. The Latin for 'guilty mind', 'mens rea' refers to the notion according to which a court should not find a person guilty of a crime unless he/she has a blameworthy state of mind. The philosophical foundation for mens rea is that the accused can control his conducts, including whether to engage in the conducts breaking criminal law[42].

Most criminal offenses require the accused to have intented or foreseen the consequences of their actions. In criminal law, actus reus is divided into two sublevels, namely intention and negligence. With the highest level of culpability with regard to mens rea, intention means that the accused deliberately causes harm. On the other hand, negligence means that the accused carelessly or recklessly causes harm.

Intention

Intent is the will of realizing all objective elements of a crime defined in criminal code, with the knowledge that these elements exist. According to Article 21 of the TPC, only intentional commission of a crime is punishable unless liability is explicitly extended to to negligent conduct by statute. Intent is classified into two types, namely direct intention and conditional-indirect intention. Intention is characterized by the fact that it is the offender's primary purpose to achieve what the crime definition describes; it is not necessary that the offender is convinced that he/she will obtain that goal. For example, an assailant acts with the intention to kill his victim if that is the purpose of shooting at him; it does not matter if the actor, because of the great distance at which he shoots, is not certain that he will actually hit the intended victim[43]. Direct intention occurs whereby the consequence of an intention is actually desired. Another example of direct intention would be the case in which A shoots at B because A wants to kill B. On the other hand, indirect intention covers the situation when a perpetrator foresees that a certain consequence that he/she does not desire will come about after the act and goes ahead anyway. For example, A throws a rock at B standing behind a closed window, hoping to smash B's window but it hits B on the head with it. A may not actively want to hit B on the head, but knows that it may result as such. Therefore, A intends to break the window as well as taking into account the harmful results of the possibility to hit B on the head.

Intention embodies two elements: will and knowledge. According to Emile Garçon, a prominent French criminal lawyer during the 19th century, "intent is, in its legal sense, to desire/will to commit a crime as defined by the law; it is the accused's awareness that he is breaking a law."[44]. Awareness requires the accused to be aware of the fact that he/she is breaking the law. Also will is interpreted as committing the wrongful act. In the conditional intention, the offender acknowledges the possibility that a certain result will follow the act and takes the risk. According to Article 21/2 of the TPC, the conditional intention includes the situation when the offender conducts an act while foreseeing that the elements in the legal definition of an offense may occur. Even though the offender does not want the consequences of his/her behaviour to occur, he/she approvingly takes into account the results of the possibility of violating the law by way of committing the relevant crime.

Negligence/Recklessness

A crime cannot be essentially punishable if the offender does not act with intention[45]. However, negligence is specified as a sufficient fault element for certain crimes. A person acts "negligently" only if he/she is to foresee the harmful consequences of his/her conduct while being unaware of the substantial risk that follows the conduct. Although the definition of negligence takes place in the general part of the TPC, it must be specifically referred to in the special part. In other words, negligence is punishable only when the statute specifically includes liability for negligence. According to Article 22 of the TPC, negligence is the failure to foresee the results that are described in the legal definition of a crime, as a consequence of carelessness or lack of diligence.

An example for negligence would be as follows:

Article 85 of the TPC:

(1) Any person who causes the death of another by reckless conduct shall be sentenced to a penalty of imprisonment for a term of two to six years.

(2) If the act results in the death of more than one person, or the injury of more than one person together with death of one or more persons, the offender shall be sentenced to a penalty of imprisonment for a term of two to fifteen years.

Article 182 of the TPC:

(1) Any person who discharges waste or refuse material into the earth, water or air through his recklessness such as to cause environmental damage shall be sentenced to a penalty of a judicial fine. Where the waste or refuse material has the propensity to remain in the earth, water or air then the penalty to be imposed shall be imprisonment for a term of two months to one year.

(2) Any person who causes, by his recklessness, the discharge of waste or refuse material which has a characteristic which may cause the alteration of the natural characteristics of plants or animals, enhance or create infertility or cause an incurable illness in humans and animals, the offender shall be sentenced to a penalty of imprisonment for a term of one to five years.

Two other categories of negligence are unconscious and conscious negligence. Unconscious negligence is defined as conducting an act without foreseeing the results as stated in the legal definition of the offense, due to a failure to discharge a duty of care and attention. Conscious negligence occurs when the offender is aware of a risk but thinks/hopes that the harmful result will not happen even if he/she performs an act he/she knows to be dangerous[46]. The foreseeability of the offender is assessed in consideration of the subjective conditions of his/her individual capabilities. A defendant can be convicted from a negligence offense only to the extent of ability to foresee a risk that an average person/a reasonable man could have foreseen. Hence, the defendant is required to do everything necessary within his/her power to prevent the ocurrence of harm in a situation where he/she is to warn against the potential harm.

For example, even though it is allowed to drive in the city centre up to 50 km/h, a man who drives 100 km/h and hits a pedestrian and causes him/her injury is held responsible for injuring the pedestrian. Not only he/she violates the law, but also he could have foreseen the possibility of hitting a pedestrian crossing the street. Therefore, the driver is liable for the injury through her concious negligent offense.

In another example, a car driver who suddenly becomes drowsy because of a disease of which he had not previously been aware cannot be held liable for negligent wounding of a cyclist whom the driver was unable to recognize because of his sudden drowsiness. But the subjective standard does not save the driver from criminal responsibility when he was aware of the defect, because in that case he could have foreseen the risk of an accident and should have, therefore, abstained from driving altogether. Thus, the driver is held responsible for the injury through his unconcious negligent offense.

Criminal Attempt

A person is guilty of an attempt to commit a crime if he/she acts with culpability. Otherwise, if he/she:

- purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
- when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
- purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act constituting a substantial step in a course of conduct planned to culminate in his commission of the crime

the person is regarded to have attempted to commit the crime.

A person attempts a crime by taking steps which will immediately lead to the completion of the crime as envisaged by him/her. In order to punish the attempt to commit an offense, the perpetrator must have had intention with regard to committing that offense and must have immediately proceeded to fulfilling the act. (Article 35 of the TPC). To this end, the perpetrator must undertake the actions which, according to his/her concept of the crime, will lead directly to fulfillment of its definition if there is undisturbed progress without interludes. The commission of acts as described in the statutory definition is, admittedly, not necessary. It suffices if the perpetrator's action is a direct precursor to the fulfillment of an element in the definition of the crime or is in direct spatial and temporal connection with the fulfillment of the definition[47]. The perpetrator should have directly started to execute the appropriate acts of committing an intentional crime–in case of negligence, attempt is not punished[48]. As a starting point of an offense, 'direct execution' to commit a crime will be determined for each type of crime. Yet, roughly speaking, the perpetrator's act of direct execution is assumed to have started when he/she had undertaken the actions defined by the actus reus of a crime and made no bones of intention to commit a crime, starting to walk along *iter criminis*. And, this is the reason why attempt liability should not be extended to perpetratory acts, whereby the perpetrator is not in direct spatial and temporal connection with the fulfillment of an element in the definition of a crime, in other words, the perpetrator is not very close to doing the act proscribed. A perpetrator who intends to commit a crime through the appropriate acts, but is not able to complete the act due to unavoidable reasons or circumstances beyond his/her control, shall be held liable for the attempt.

The TPC provides for impunity for those perpetrators who voluntarily abandon an attempt. In this regards, liability for attempt is extinguished when the perpetrator refrains from taking the last steps he/she deems necessary for the completion of the offense, or when the perpetrator, after having done everything necessary to bring about the desired consequence, becomes active and prevents the harm from occurring. For example, a burglar who breaks into a house and then retreats without taking anything with him is held to have voluntarily abandoned the performance of the acts of committing the offense. In another case, a man, who inflicts a life-threatening injury with the intent to kill his victim, but then rushes the victim to the hospital where his life is saved, is said to have prevented the completion of the offense or its consequences[49]. In these situations, the perpetrator will not be liable for attempted burglary or murder but he/she remains liable for those completed offenses, including breaking into the house or dangerous assault, if the completed part of an act constitutes another crime defined in the statute. The crucial element of the abandonment is to act with 'voluntariness'. This means that the perpetrator endeavors to prevent the consequence without being forced by external factors that make the completion of the act impossible or considerably riskier for the offender.

Forms of Participation-Principal and Secondary Participant-Incitement and Assistance

In criminal law, almost all offenses are described taking into consideration the sole perpetrator. Yet, many of the worst crimes are committed by several persons who participate in a common scheme. While some of the participants may be the driving force behind the activities, others may merely take instructions or orders or wish to help. Some of them do not wish to be seen at the crime scene and stay in the back as organisational superintendents. As a system of state reaction to the degree of personal guilt in law-breaking, criminal law must provide for different answers and prescribe liabilities depending on the type of participation in criminal behaviour[50]. To that end, criminal law systems distinguish three forms of principal and two forms of complicity.

Principal

As the main perpetrator of the offense, principal is usually the person who commits the actus reus. Where more than one person is directly responsible for the actus reus, there may be more than one principal; those are known as joint principals. In general, criminal law systems distinguish three forms of principals: principal, joint principal and indirect principal. To put it another way, whoever commits an offense individually or through another person is liable as a principal.

Joint principal is an agreement between two or more persons to behave in a shared manner that will automatically constitute an offense commited by at least one of them[51]. According to the TPC, any person who jointly performs an act prescribed by law as an offense shall be culpable as well. What stands out as the most important matter is that joint principal requires a common plan shared by all accomplices. No verbal agreement is required, meaning that any offender can act nonverbally or spontaneously. Moreover, any offender can be already in the process of committing the crime. For example, A forcefully restrains the victim while B takes the victim's wallet out of his jacket, neither A nor B applies force *and* takes away the victim's wallet. Here both A and B can be held liable for robbery if they have worked together in accordance with a common plan; the respective acts of A and B are attributed to each joint principals. Joint principles are also not required to be present at the crime scene where the plan is being carried out; even a gang leader who has designed the criminal plan but leaves to others the actual performance can be a joint principal.

Indirect principal refers to committing the offense through another person who conducts the criminal act. Another person –the agent– becomes an instrument while committing the offense. The indirect principal exercises control over the offense through the agent who directly commits the crime. Jurisprudence and commentators have acknowledged the following categories with regard to indirect principal:

a) The agent is not fulfilling either the actus reus or mens rea of the offense. Example: Indirect principal P asks the agent A to take Victim's car and bring it to P's house; he tells A that the car is his own and V had borrowed but did not return it despite P's demands. In reality, the car belongs to V. Here A lacks the mens rea for the actus reus element of 'property belonging to someone else'.
b) The agent lacks a specific mens rea component or has the mens rea for a different offense. Example: P tells A that he only wants to borrow V's car for a short ride and will return it immediately afterwards. A has the necessary mens rea for all the actus reus elements of theft, but lacks the additional intention to appropriate the car for himself or P.
c) The agent is acting objectively lawfully under an accepted defense. Example: A, a police constable, is told untruthfully by P that V has just stolen a handbag from her. A pursues V and arrests her. A is acting under his power to arrest persons suspected of an offense.
d) The agent is acting without personal guilt under an accepted defense. Example: P forces A to commit an armed bank robbery by holding his wife and children hostage, threatening to kill them; A is acting under duress. P is telling A, who suffers from a mental illness amounting to insanity in the legal sense, to kill V. Alternatively: P tells elderly A that V is approaching to attack her with a knife, A hits V over the head with a large stick. Although A is not acting in self-defense, he may be acting without guilt or intent because of his error.
e) The agent lacks criminal capacity. Example: P asks A, a 10-year-old child, to steal a packet of cigarettes. Even if she thinks that she is committing an offense, A is not held criminally liable as she is under 14[52].

Complicity

In general, criminal law systems distinguish two forms of complicity: incitement and assistance. Incitement and assistance can occur only in terms of the basic kinds of intention-based offenses. The article 40 of the TPC indicates and acknowledges this rule as follows: In order for an offense to constitute a jointly committed offense, it is sufficient that the act is unlawful and committed intentionally. Each person participating in the commission of an offense shall be sentenced according to his unlawful act, irrespective of the individual circumstances of others which may prevent the imposition of a penalty. Also, in order to be held responsible for a jointly committed offense, there must have been at least an attempt to commit the offense.

Incitement-Instigator

The instigator who incites another person to commit an offense shall be subject to the penalty appropriate to the offense that is committed. The inciter is punished in the same manner as the principal perpetrator of the offense even though he/she does not directly perform the act described by law. Incitement includes encouragement with regard to committing the crime, which is given at the time that the crime is committed. The principal is probably required to be aware of such encouragement, although the encouragement need not have caused the principal to go ahead and commit the principal offense. Instigation of the principal consists of causing another person to conduct an intentional and unlawful act. The instigator uses psychological influence on the person who performs the criminal act. In other words, the abettor plants the idea in the principal's mind, after which the principal decides whether and how to commit the act. If the principal is already determined to commit a crime, it is impossible to instigate the same crime to be committed[53].

Aiders

Aiding refers to helping the principal at the time when the offense is committed. In order to convict the aider of a committed offense, the aider must have given some support which is described in Article 39 of the TPC as follows:

- encourages the commission of an offense,
- reinforces the decision to commit an offense,
- promises that he will assist after the commission of an act,
- provides counsel as to how an offense is to be committed,
- provides the means used for the commission of the offense,
- facilitates the execution of an offense by providing assistance before or after the commission of the offense.

There need not be any direct contact between the perpetrator and the aider, and the perpetrator does not even have to know about the support that is given. Also, mere psychological support may be treated as punishable by courts. Unlike an instigater, an aider does not impose the idea of committing a crime. Yet aider facilitates the commission of the offense. The scope of the aiding must not be extended to the crucial points in the commission of a crime. To put it another way, in cases where the assistance of the aider becomes essential in order for the crime to succeed, the aider transforms into a joint principal.

Corporate Liability

It is generally acknowledged that personal blameworthiness is the basis of liability of natural persons. Corporations have the ability neither to act nor to be blamed. However, corporations may be subjected to non-criminal fines such as administrative fines.

Causation

The principal is accused of the result only if there is a casual relationship between the act committed by the principal and the result of the act. Even though most criminal laws do not, in general, explicitly indicate or define causation, it is a central component of criminal responsibility, as many provisions threaten punishment to those who cause a specified result. Criminal offenses can be classified into result crimes and conduct crimes. Result crimes require proof that the defendant's acts or omissions caused the consequence prohibited by the crime charged. Examples would include murder and manslaughter in which the defendant's conduct must cause another person's death. In the case of assault, the defendant's assault must cause actual bodily harm on another person. Furthermore, criminal damage requires that the defendant's conduct cause a damage or destruction on the property of another person. In some pollution offenses, the defendant's conduct must cause polluting matter to enter into a river or stream[54].

If two persons have independently acted in a manner so that their contributions worked together to bring about the effect, each contributor is deemed to have caused the effect. For example, A, as well as B, give X one dose of poison, and two doses were necessary to kill X. In the exceptional case of two independent sufficient causes acting simultaneously to bring about a consequence, each factor is regarded as causal. If, in the example just posed, both A and B independently pour two doses of poison into X's drink and X dies after drinking the fatal potion in one gulp, both A and B are regarded as having caused X's death[55]. In another example, if T knocks V unconscious and leaves him on the beach below the high watermark so that V is drowned by the incoming tide, T is regarded to have legally caused V's death. The natural event of the tide coming in is not abnormal or 'extraordinary', but exactly what could be expected and foreseen. It does not break the chain of causation. If, on the other hand, V dies through a lightning strike, the courts might well say that this was 'extraordinary' and not reasonably foreseeable so superseding T's conduct as the legal cause of death. Conduct crimes shall be committed by way of negligence as well.

According to Article 170 of the TPC:

(1) Any person who acts in such a way which is capable of creating panic, fear or anxiety in the public or endangering the life, health, property of the public by:

a) causing fire;

b) causing the collapse of a building, landslide, avalanche, flood or breaching of an aquatic boundary; or

c) using weapons fire or explosives

shall be sentenced to a penalty of imprisonment for a term of six months to three years.

(2) Any person who creates a danger of causing a fire, the collapse of a building, a landslide, an avalanche, a flood or a breaching of an aquatic boundary, shall be sentenced to a penalty of imprisonment for a term of three months to one year, or a judicial fine.

Article 171 of the TPC:

(1) Where, by recklessness, a person causes;

a) a fire,

b) the collapse of a building, a landslide, avalanche, flood or a breach of aquatic boundary, which creates a risk to the life, health or property of others

shall be sentenced to a penalty of imprisonment for a term of three months to one year.

Causation is a general element of result offenses. Causation is not the only element of criminal liability and punishment; however, it requires proof that the result can be attributed to the principal's act. Causation is a part of the objective element – actus reus- of the offense.

Theories of causation:

According to the theory of last cause, the last condition is necessary for criminal liability. If another behaviour intervenes between the behaviour and its consequence, then the link is broken[56].

According to the theory of adequate causation, some acts are regarded as effective means for the commission of the crime, whereas other acts create a greater possibility of such commission.

According to the equivalence theory, each condition necessary for carrying out an action is considered as a cause. In this regard, there is no distinction between a more and less important cause or first and last cause[57]. If, for example, the defendant wires up the electrics on a central heating system wrongly so that the victim is electrocuted when he touches a live radiator, many things apart from the defendant's act, must happen before victim's death is produced. The victim must touch the radiator, must not be wearing rubber gloves or rubber-soled shoes, the electricity must be switched on, the electricity company must be transmitting power down the lines, and so on. The law typically focuses on whether the act performed by the defendant is a cause of the death. In the case postulated, the law would regard the defendant as causing the death[58]. In order to limit the widening of the theory, a limitation called 'condition sine qua non'– 'but for'– 'objective attribution' test is used by jurisdictions.

Anglo-American criminal law distinguishes between two aspects of the causation analysis: Factual cause and legal (or proximate) cause. Factual cause is "but-for cause", meaning that "the conduct is the cause of the result when it is an antecedent but for which the result in question would not have occurred." In contrast, factual cause is rarely discussed; almost all causation cases are concerned with legal or proximate cause: "The relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense[59].

Under the continental criminal law doctrine, "objective attribution" is established as an additional filter besides causality: The offender's conduct must have created a wrongful risk of this specific result, and the result must be the product of this very risk[60]. For example, D cannot evade liability by arguing that V's own actions contributed to the result in its actual form. The same applies if V's physical or mental constitution is special or even abnormal. Fortuity of consequence has no room in negating causation[61]. Other forms of objective attribution are alternative and cumulative causes. Where there are several offenders acting seperately and not as joint principals, alternative causation covers those situations whereby there are two or more causes, each of which would have been sufficient to cause the result, and impact at the same time.

For example: D1 and D2 each independently administer a lethal dose of poison to V, V dies of the simultaneous effect of both poisons. D1 and D2 are both guilty of murder. If, however, it cannot be established whether one of them did not take effect before the other, both D1 and D2 are each only guilty of attempted murder. Alternative causality may also apply if D initiated two causes, each of which in itself could have caused the result alone; this can be important with respect to the mens rea in which the causes were set. D, who had been drinking heavily together with V, retired to his room. Shortly afterwards, he heard noises downstairs. He took his pistol and, with conditional intent to kill, fired a shot at the person he saw standing at the bottom of the stairs, who was V, whom D did not recognise. The injury caused by the shot was lethal, but could have been treated successfully had V been given immediate medical care. D returned to his room and a few minutes later heard more noises downstairs. He went back to the stairs and fired a random shot in the assumption that there might be several people downstairs. V was hit a second time; again the injury caused was lethal in itself. V died as a result of the injuries received by both shots. The first shot was regarded as a sufficient cause of V's death and D was found guilty of murder already through firing the first shot, and of negligent killing through firing the second—although the trial court was critisized for not examining the question thoroughly of whether or not D had also have conditional intent for the second shot. Based on the doctrine applying to multiple charges, the negligent killing was, however, a subsidiary offense to the murder anyway and D was thus only convicted of murder.

If, in the above example of D1 and D2 using poison on V, the lethal result was only reached by the combined effect, we speak of cumulative causality. In this context, both are still causal. The question of whether V's death could be fully attributed to both D1 and D2 as in the case of alternative causality is much more difficult. The tendency appears to be not to do so and, depending on the mens rea of D1 and D2, thay may be convicted of attempted murder and/or causing grievous bodily harm or administering noxious substances[62].

your turn 2

What are the objective and subjective elements of crime?

Justification

As aforementioned, relating to the question of whether the person's behaviour was unlawful, the justificatory defenses constitute the second step of the crime defined in the criminal code. Provisions of a statute, orders from superior, legitimate defense, use of a right and consent are the main justificatory defenses regulated in the TPC. These exculpating reasons prevent establishing the crime. Although certain behaviours that would normally fulfill the elements in the definition of the crime and entail criminal liability, the existence of the justificatory defenses/exculpating reasons prevent the condemnation of the person who behaves in conformity with actus reus and mens rea of the crime.

Self Defense and Defense of Another

As one of the main exculpating reasons, self defense has always been recognized as a ground of justification. Article 25 of the TPC defines self defense as:

'No penalty shall be imposed upon an offender in respect of acts which were necessary to repel an unjust assault which is directed, carried out, certain to be carried out or to be repeated against a right to which he, or another, was entitled, provided such acts were proportionate to the assault, taking into account the situation and circumstances prevailing at the time.'

The reason behind recognizing self-defense as a justification is twofold: First, a person must have a right to preserve his/her life, health, and property when/she has been unlawfully attacked; and the defender represents the interest of the community in upholding the legal order[63]. The preconditions to be met before the right to self-defense arises are, on the one hand, imminence and unlawfulness of the attack and, on the other hand, proportionality. The self-defense situation must in fact exist, meaning that the perpetrator's reasonable belief that he/she is being unlawfully attacked is insufficient to satisfy this objective element of self-defense. Self-defense applies to the defensive acts aimed at protecting any legal interest including property[64]. In order to take the advantage of self-defense, the perpetrator defends himself/herself against an unlawful assault which is directed at a legal good of his/her right or another's right. The unlawfulness of such assault points out that such act is proscribed under all branches of law. The unlawful assault may be directed, carried out, certain to be carried out or repeated. That is, a person who is or will be attacked has the right to defend himself/herself or prevent the directed assault before it is carried out. Another key term for self-defense is necessity. If it is possible to escape without danger, self-defense is not allowed[65], which could be inferred as drawing certain normative boundaries, such as a proportionality test. The test would require weighing the harm inflicted through the defensive action against the harm to be prevented. The defendant can be justified if he/she causes serious physical injury to fend off attacks on property[66].

A person who goes beyond the limits of necessity with respect to self-defense by using excessive force is regarded to have acted unlawfully. But if that person is said to have been in a state of confusion, fear, or terror due to the attack, the unlawful act will be excused. In other words, if the limits were exceeded in the course of legitimate defense as a result of excitement, fear or agitation and the act is regarded as excusable, the offender shall not be subject to a penalty.

Consent

A victim's consent to the defendant's behaviour can exempt the defendant from liability. The issue normally arises in relation to non-fatal offenses against the person and has already been touched upon in the context of rape where, instead of being viewed as a defense, it is treated as part of the definition of the offense. For example, tattooing, surgery and ear-piercing normally constitute the crime of injury. Yet the consent of the victim prevents the act from being proscribed.

According to the TPC, no one shall be punished if he/she acts within the scope of the consent that has been declared by an individual concerning a right, on which he/she has an unrestricted right to use. The consent of a victim to the defendant's behaviour is valid only if it has been given voluntarily. Before the commission of the relevant act, the victim has a full authority to give consent on a voluntary and well-informed basis. In order to establish its validity, the consent must be rational and voluntary, which means that it is freely given by a person legally competent and well-informed to give consent. The assault must be directed to the victim's certain legal interest which he/she can can dispose over in full, such as property or bodily integrity. The holder of a certain legal interest may not effectively give consent even if the interest is an individual one, if public policy does not allow him/her to dispose freely over it; the best example is the protection of one's own life and bodily integrity. Consent with regard to attacks on common or public interests is, as a rule, of no effect.

Certain people do not have capacity to consent to the use of physical force over their body. They may lack such capacity due to, for example, minority or ill mental health. Capacity to consent also requires that the victim has the necessary intellectual maturity, the lack of which appears at people with mental disorders or minors- to understand what he/she is consenting to and that he/she can make an informed decision and understand the consequences of his/her actions[67]. In certain cases, consent can be given on behalf of a child or an incompetent adult through the legal representatives or the authorisation of a court, particularly in relation to surgery required in an emergency.

Consent has to be externally declared before the act consented to is performed. Moreover, consent, once given, must continue to exist from the beginning of the act until the end. It can normally be freely revoked; from that point onwards the act becomes unlawful. That is, consent must be present and continuous, revoking consent at a later time is invalid.

Execution of Statutory Provisions and Superior Orders

A person who carries out the provisions of a statute shall not be culpable.

A perpetrator who carries out an order given by an authorized body as part of his/her duty the execution of which is compulsory, he/she shall not be held liable for such act. It is of noteworthy, however, that the order given by the superior must not constitute an offense. Otherwise, both the person who carried out and the person who gave the order will be culpable. The reason behind the law's approach is the principle of the rule of law: No one can escape the umbrella of the law. Even the most senior army officer is bound by criminal law and cannot give an exemption to others[68].

Exercising of a Right

A person who exercises his/her legal right shall not be punished provided that legal practice has recognized a subjective right to an individual that can be exercised directly by him/her, there is no criminal responsibility if the right has been used in a proper way and within its limits[69]. For example, Article 90 of the Turkish Criminal Procedure Code ('TCPC') contains a right for everyone to make an arrest if the offender is caught during the commission of a criminal offense.

Article 90 of the TCPC:

(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.

.....

A person who makes an arrest of another person will not be punished for deprivation of liberty (Article 109 of the TPC). According to the respective article, 'Any person who unlawfully restricts the freedom of a person to move, or to remain, in a particular place shall be sentenced to a penalty of imprisonment for a term of one to five years.' The TCPC converts unlawfulness to lawfulness. Another example would be sporting competitions, whereby it is unavoidable to hurt the competitor in terms of physical injury, notwithstanding the fact that none of the scorers shall be convicted of injury except aggravated consequences. The defendants are treated as having consented to even serious injuries provided that such injuries are brought about when the players were acting within the rules of the game or are resulted from the conduct to which the players could reasonably be regarded as having consented. As such, it can be deduced that many injuries that are brought about during sporting competitions are regarded to have been implicitly consented. To put it another way, those taking part in sport competitions are accepted to have given implied consent to physical injury, as it is an inevitable risk[70].

EXCUSES

Excuses are the third step in determining the person's individual accountability for the wrongdoing. There are several ways in which accused persons may try to reduce the level of liability for the alleged offense, or lower the level of punishment if convicted. Even though excuses do not abolish the existence of the offense, they reduce the level of or remove the liability of the perpetrator.

Necessity

There is a wide range of conceptions of necessity in legal systems. Yet, in all legal systems, these conceptions are designed in the form of defense to address the cases where the perpetrator commits a crime in order to save himself or others from a danger which may derive from a natural force or, as in the case of duress by threats, from a human agent. A threat as such must be against life and limb, excluding those against other interests such as freedom of property. The threat must also be imminent. In case of duress, which emanates from a natural force, the threat must have resulted from circumstances beyond the actor's control, which means that a self-induced necessity shall not suffice. If a threat meets the prescribed criteria, the act must be further objectively necessary and reasonable and the actor must not have intended to cause a greater harm than the one sought to be avoided[71]. In case of necessity, the unlawfulness of the perpetrator's act does not negate but only provides ground for negating the perpetrator's criminal responsibility.

Necessity can be applicable to all types of offenses, provided that three conditions must be satisfied for its application according to the TPC: First, there must be an existing or imminent and serious danger. Second, such danger must have necessitated the commission of the offense. And third, the offense must have been proportionate to the danger[72]. It is of noteworthy that, in necessity cases, the victims of the danger-averting acts are innocent third parties who were neither endangered nor responsible for creating the danger. In case of emergency, the person has no choice but to violate the law to avoid death or serious injury to himself/herself or another. Duress by threats requires the defendant to 'act reasonably and proportionately in order to avoid a threat of death or serious injury'.

In deciding whether the defense is available, jurisdiction should particularly focus on initially whether the perpetrator was 'or may have been impelled to act as he/she did because as a result of what he/she reasonably believed to be the situation he/she had good cause to fear that otherwise death or serious injury would result'. Then, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to the situation by acting as the accused did?'[73]. In order to prevail on a claim of necessity, the perpetrator must show the following;

- The act charged as criminal must have been done to prevent a significant damage.
- There must have been no adequate alternative to the commission of the act.
- The harm caused by the act must not be disproportionate to the harm avoided.
- The accused must entertain a good faith belief that this act was necessary to prevent greater harm.
- Such belief must be objectively reasonable under all the circumstances.
- The accused must not have substantially contributed to the creation of the emergency[74].

The TPC includes different forms of necessity. While one of them is defined in general provisions which can be implemented in terms of each kind of offenses, other necessity forms are defined under the related articles in the special part of the code. For example,

Article 147 of the TPC:

(1) Where the offense of theft is committed as a result of an urgent and serious need, the penalty to be imposed may be either reduced or waived altogether, having taken into account the circumstances of the situation.

Article 91 of the TPC

(1) Any person who removes an organ from another person without his lawful consent shall be sentenced to a penalty of imprisonment for a term of five to nine years. If the subject of the offense is tissue, then the offender shall be sentenced to a penalty of imprisonment for a term of two to five years.

....

(3) Any person who purchases, or sells, an organ or tissue, or acts as an intermediary in such activities, shall be sentenced to the penalty in paragraph one.

....

Article 92 of the TPC

(1) A penalty may be reduced (or not imposed at all), after considering the social and economic conditions of the person selling his own organs or tissue.

Apart from the examples mentioned above, jurisdiction has accepted necessity in the following cases:

- criminal trespass by police informers into the house of a suspect for the purpose of uncovering facts about drug offenses,
- leaving the scene of an accident in order to avoid physical abuse,
- disturbing the peace of the dead by performing an organ transplant if the consent of the relatives could not be obtained, or by taking a blood sample from a deceased accident victim for the purposes of excluding drunkenness in the context of potential insurance claims,
- violation of the privacy of the spoken word by making secret phone recordings for the purpose of using them in civil or family proceedings,
- or to prove the bias of a judge in a criminal case for the purpose of recusing him,
- taking away someone's car key to prevent him from driving whilst drunk[75].

Mistake

There are two types of mistakes—mistake about the legality of an action ("I did not know it was against the law.") and mistake about an essential fact ("I did not know the goods were stolen.") Whoever at the time of the commission of an act is unaware of a fact that is a definitional element of an offense shall be deemed not to have acted intentionally. Any liability for negligent commissions, however, remains unaffected. If the perpetrator lacks the awareness that he is acting unlawfully on the ground of an unavoidable mistake, he shall not be punished.

Mistake of fact: A mistake of fact occurs whereby the perpetrator violates criminal law since his/her grasp on reality is erroneous. In such cases, the basic assumption is that the perpetrator would not have acted in the way he did had he/she known the facts of the case. If the perpetrator's intention is nonetheless criminal, his mistake about the facts does not relieve him of criminal liability, as in the case of an error in person. In other words, the perpetrator must have committed an illegal act without intending to do so, lacking mens rea. If that is the case, the perpetrator should be treated as if the facts were what he believed them to be. In principle, the perpetrator will be relieved of criminal responsibility[76]. For example, a hunter mistakes a helper for a bear and shoots the helper. He does not have the intent to kill a human being and, therefore, cannot be punished for intentional homicide. If the mistake resulted from the actor's lack of proper care, that person may well be liable for an offense of negligence. If the definition of an offense includes a legal element (e.g. theft under Article 147 of the TPC requires that the object taken belong to another person, which may depend on rules of property law), the offender acts with intent only if he/she draws correct conclusions with regard to the legal situation[77].

Mistake of law: A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the court shall not be a ground for excluding criminal responsibility. The TPC recognizes mistake of law as a defense if the mistake was unavoidable for the perpetrator. As such, it reflects the acknowledgement of the principle of culpability. Although the perpetrator's act is still deemed intentional, he is excused if he cannot be blamed for being ignorant of the law. For example, the perpetrator in this situation is deemed to act with intent, since intent does not presuppose a correct evaluation of the legal relevance of one's conduct. But a person does not act culpably if he/she thought that the behavior was lawful and was unable to avoid this mistake. Mistake of law would, accordingly, be regarded as a valid excuse only under unusual or unexpected circumstances. A perpetrator could, at the time of his act, point to a favorable statement of the law subsequently reversed, such as a court decision later overturned by the same, or a higher, court or an opinion by an official later revised by the same official, overridden by a superior, or invalidated in court. The most liberal approach would accept any mistake of law as excuse, even if the perpetrator was ignorant in a blameworthy way[78].

Insanity and Diminished Responsiblity

Any person who at the time of the commission of the offense is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt but the verdict leads perpetrator to a medical disposal[79]. In some criminal cases, the defendant claims that he is entitled to an acquittal because at the time of the crime he was so impaired by mental illness as to be "insane" within the meaning of the criminal law definition. Insanity is a legal term, not a medical term. It refers to any mental illness that meets the legal threshold for incapacity. Mental incapacity or insanity may be used by one accused of crimes at several points in the criminal process. The following describe the various ways mental incapacity may become an issue in a criminal proceeding[80]. In this situation, the court will rely on psychiatric expertise in making a finding on this issue.

The mental capacity of a perpetrator precludes his/her criminal liability, if at the time of his/her conduct 'the person suffers from a mental disease or defect that destroys that peson's capacity to control to appreciate the unlawfullness or nature of his or her conduct, or capacity to control his/her conduct to conform to the requirements of law.

According to the TPC, anyone who due to a mental disease is incapable of appreciating the legal meaning and consequences of his conduct or whose ability to control his/her behaviour with respect to the conduct was substantially diminished, shall not be punishment. Yet, security measures shall be imposed for such persons. This concept inherently builds on the assumption that a "normal" person has some freedom of will that enables that person to refrain from doing wrong[81]. It should be noted that a perpetrator who committed a criminal offense in a state of insanity without being convicted of the crime, can be committed to a psychiatric hospital as a measure of rehabilitation and security[82].

Diminished responsibility means that the perpetrator's mental state at the time of the crime (or at the time of sentencing) may be taken into consideration even though the legal standard of insanity was not reached. According to the TPC, anyone whose ability to control his/her behaviour with regard to his/her conduct is diminished, albeit the diminishment does not reach the level of insanity, the penalty may be reduced.

Infancy

Under the law, an infant/child is a person who has not yet reached the age of majority – that is 18 in the Turkish law system-. Generally, with some exceptions, infants are not able to enter into contracts, vote. They also have no criminal responsibility for their own behaviours. A crime is not committed if the mind of the person doing the act is incapable of forming a culpable act; therefore, an infant is exempt from criminal responsibility for his or her acts if sufficient mental capacity is lacking. Infancy, in this case, means only that the child does not have the capacity to determine right and wrong; and the age of infancy is set by case law or statute[83].

In general, there is an age under which a child is believed to be incapable of forming a criminal intent. Children under the age of twelve can not be criminally liable. There is also an age range where the presumption of incompetence is rebuttable, that is, the state may show (by clear and convincing evidence) that the child knows right from wrong and can understand the proceedings. In these cases, the child may be held responsible for their actions. Where a child is older than twelve, but younger than fifteen at the time of an offense, and he is either incapable of appreciating the legal meaning and consequences of his act or his capability to control his behavior is underdeveloped, then he shall be exempt from criminal liability. The age selected by the jurisdiction as the minimum age for a child's criminal responsibility creates a conclusive presumption that a child under that age lacks the capacity to commit a crime. As the presumption is conclusive, evidence to the contrary may not be presented. People over a certain age are inferred to be capable of formulating the necessary mental frame of mind to commit a crime. Evidence showing otherwise, however, can be used to show incapacity. Moreover, such children may be prosecuted in juvenile courts, rather than adult courts[84]. This means, if a child is aged 12 or over but under 15, there used to be a presumption that they could not form mens rea. In other words, this presumption is rebuttable by way of proving that the child has the capability to compherend the legal meaning, consequences of the act and to control his behaviours in respective of his act. By the presentation of evidence showing that the child has the mental capacity and frame of mind, the child shall be responsible for consequences of his criminal behaviour. Where a child is older than fifteen but younger than eighteen years at the time of the offense, has a criminal responsibility. In this case the penalty to be imposed shall be reduced.

Intoxication

In principle, intoxication does not excuse the perpetrator, however, if the perpetrator who is under the thumb of involuntary consumption of alcohol or drugs at the time of committing a crime, is assumed that he/she is unable to compherend the legal meaning and consequences of the act or perpetrator's ability to control his/her behaviour regarding such act was significant diminished, shall not be subject to a penalty. The influence of alcohol or drugs on the perpetrator's mind can be so strong as to be classified as a temporary mental disease, thus permitting a finding of insanity. Under the TPC, only involuntary intoxication may, under certain circumstances as aforementioned, preclude the perpetrator's criminal responsibility. A person who commits an offense under the influence of alcohol and drugs consumed willfully has full criminal liability.

Coercion (Duress)

Criminal liability of an actor can only be discussed if he/she acted of his/her own free will. The defense of constraint, sometimes known as duress, applies when the defendant had no choice but to commit the offense. This traditional defense of duress covers situations where the defendant has been forced by another to break the law under a direct threat of death or serious personal injury to himself/herself or someone else[85].

The perpetrator who acted under the influence of a force or a constraint that he/she could not resist does not have criminal liability. The defense of duress will be available only if there has been a threat of death or serious personal harm. Also, the defendant must have had no opportunity to avoid threat except by complying with it. A person who forces another to commit a crime can be charged and convicted of the crime committed in addition to other offenses. In the case of coercion, a person who forces another to commit a murder could be charged and convicted of murder[86]. For example, a woman who commits a crime under the pressure of her husband, in other words, if she is threatened by her husband, and the coercion or violation is intolerable or inevitable or serious menace or gross, her husband involved in the use of force shall be deemed to be the perpetrator. It is not necessary for her to show that the threats were related to death or serious injury; any threat will be sufficient as long as it compelled her to commit the crime. It must be shown that the pressure was such that she was 'forced unwillingly to participate'[87].

Provocation

Any person who commits a crime in a state of anger or severe distress caused by an unjust act shall be sentenced to a shorter term of imprisonment. In criminal law, punishment of an offender who committed a crime as a result of an unjustified act of another shall be reduced. There are three conditions that have to be met in provocation cases. First, the offender must have acted as a result of aggressiveness and anger which he/she cannot control any longer. Second, the provocation act must be unjustified. Third, there must be a causal link between the unjustified act and the reaction against this act. The TPC contains provisions regarding provocation cases which reduce the punishment of the offender both in the general and special part. In general terms, there are two conditions for the application of the provocation provision in the Turkish criminal law. The first condition is concerned with the provocation act, which has to be unlawful, and the second condition is related to the psychological situation of the offender, which is called the psychological element of provocation. In order to fulfill the psychological element, the offender must have been entered in a state of intense affection and heat. The determination of these conditions varies according to the system chosen in a given legislation. The Turkish definition of provocation lists the conditions of affection and heat disjunctively. As regards common law and the U.S. law, the central term is anger, while in Italian and German law it is heat and anger, respectively. In Austrian and Swiss laws, the conditions of provocation are an asthenic or sthenic affection and this affection must be excusable.

In the Turkish criminal law, if the case meets the conditions of Article 29, the punishment of the perpetrator shall be reduced. First, there must be an unjustified act against the provoked perpetrator himself/herself or another, and this provocation must have led the perpetrator to heat or affection. The most important element of a provocation within the meaning of Article 29 of the TPC is the unjustified nature of provocation. The provocation must have caused by the provoked perpetrator himself. There is no clarity in Article 29 of the TPC as to whom the provocation act must have been directed. The unjustified act may have been directed at the relatives, close ones and other persons. The offense committed as a consequence of the unjustified provocation, however, must be committed against the provoker himself. The attack may target the body or property of the provoker. Furthermore, the offense may be committed against a person who is in a position to prevent the unjustified act. According to this view, a provocation may be in line with the definition of Article 29 of the TPC if the perpetrator has committed the crime against the provoker himself/herself or against a victim who has not prevented or approved the unjustified act. In the Turkish criminal law, the time condition of the provocation evaluated is a criterion according to which the perpetrator must commit the crime under the influence of heat or affection. There must be a causal link between the crime and the act of provocation. The fact that the crime committed under the influence of provocation must be clearly evidenced. The TPC sets out no proportionality test. Having said that, there must be a reasonable link between the provocation and the crime committed, if not a proportionate relationship. The court must in such cases consider the social environment and upbringing of the perpetrator as well as his power to resist. If the perpetrator's reaction is exceedingly disproportionate to the provocative act it cannot be said that there is a proportionate relationship between the (unjustified) act and the reaction (crime).

Summary

LO 1 Will be able to explain the basic functions of criminal rules in a society

Criminal law plays a distinctive role in society. This role includes the following functions: to deter people from doing acts that harm others or society; to set out the conditions under which people who have performed such acts will be punished; and to provide guidance on the kinds of behaviours which are considered as acceptable by society.

The governing principles, which lie at the core of modern criminal law are as follows:

- The principle of welfare and upholding the common good,
- The principle of prevention of harm to others,
- The principle of minimal intervention: Law should not criminalize too much behaviour,
- The principle of social responsibility: Society requires a certain level of cooperation between citizens,
- The principle of proportionate response: The response of criminal law should be reasonably in proportion to the harm committed or threatened to be committed,
- The non-retroactivity principle: A person should not be convicted or punished except in accordance with a previously declared offense,
- The thin-ice principle: Those who skate on thin ice can hardly expect to find a sign denoting the precise spot where they will fall in,
- The principle of maximum certainty: People should have sufficiently certain and clear warnings about the forbidden conducts,
- The principle of fair labelling: Offenses should be labelled in a manner to reflect the seriousness of the law violated,
- The principle of strict construction: Ambiguities in criminal law should be construed in favour of the defendant,

The purpose of criminal law is thus to protect society, so that its members can be reasonably secure in carrying out constructive activities. Only behaviors that are detrimental to the welfare of society should be made criminal. A balance is always to be achieved between the rights of the individual and the protection of society. In the social contract, a concept originating with Thomas Hobbes and John Locke, individuals give up certain liberties in return for being protected by society. We give up the "right" to steal what we want in return for society's protection against being victimized by others. We also give up other liberties as members of a lawful society, however, society must, in return, impose only laws that have a purpose consistent with the protection of and minimally intrusive on our individual liberties.

LO 2 Will be able to differentiate among various excuses

There are several ways in which accused persons may try to reduce the level of liability for the alleged offense, or lower the level of punishment if convicted. These are called excuses. Even though excuses do not abolish the existence of the offense, they reduce the level of or remove liability of the perpetrator. Necessity, Mistake, Insanity are good examples for excuses. Necessity is almost always in the form of a defense to address the cases, where the perpetrator commits a crime in order to save himself or others from a danger which may derive from a natural force or, as in the case of duress by threats, from a human agent. A threat as such must be against life and limb, excluding those against other interests such as freedom of property. The threat must also be imminent. In case of duress, which emanates from a natural force, the threat must have resulted from circumstances beyond the actor's control, which means that a self-induced necessity shall not suffice. If a threat meets the prescribed criteria, the act must be objectively necessary and reasonable and the actor must not have intended to cause a greater harm than the one sought to be avoided. In case of necessity, the unlawfulness of the perpetrator's act does not negate but only provides ground for negating the perpetrator's criminal responsibility.

As regards mistakes, there are two types of mistakes—mistake about the legality of an action ("I did not know it was against the law.") and mistake about an essential fact ("I did not know the goods were stolen.") Whoever, at the time of the commission of an act, is unaware of a fact that is a definitional element of an offense shall be deemed not to have acted intentionally. Any liability for negligent commissions, however, remains unaffected. If the perpetrator lacks the awareness that he is acting unlawfully on the ground of an unavoidable mistake, he shall not be punished.

LO 3 Will be able to juxtapose different liability requirements

In view of the criminal liability, criminal law is established on a three-legged stool. The first leg consists of objective and subjective elements that are related to the question of whether a person has fulfilled each element of the statutory description of an offense. The second leg is concerned with the question of whether the person's behaviour was unlawful, and the third leg is related to the individual accountability of the person for the wrongdoing. The two main elements required for a crime to have been committed are guilty act and guilty mind, which are derived from the Latin phrase, 'Actus non facit reum nişi mens sit rea', meaning 'a man is not liable for his action alone, unless he acts with a guilty mind.'

1 Which of the following would a crime **not** be?

A. An act
B. An exception
C. An omission
D. A state of affairs
E. A misconduct

2 Which of the following is **not** frequently cited as a justification for punishment?

A. Retribution
B. Incapacitation
C. Rehabilitation
D. Deterrence
E. Revenge

3 What is an omission?

A. Where a duty to act is present, the defendant failed to act and the prohibited result ensued
B. Where the defendant failed to act, but no duty was necessary
C. Where the defendant acted, but not in the correct a manner
D. A principle which can be committed in all offenses
E. Omission is an act which the defendant acted voluntary.

4 Which of the following **cannot** give rise to criminal liability for an omission to act?

A. A duty arising out of contract
B. A duty arising out of a relationship
C. A duty arising out of a sense of religious obligation
D. A duty arising from the assumption of care for another
E. A duty arising from the obligation of law

5 Which of the following is the correct definition of causation?

A. Where an accused is charged with a result crime, it is necessary for the defendant to prove that his acts or omissions did not cause the prohibited consequence
B. Where an accused is charged with a conduct crime, it is necessary for the defendant to prove that his acts or omissions did not cause the prohibied consequence
C. Where an accused is charged with a conduct crime, it is necessary for the prosecution to prove that his acts or omissions caused the prohibited consequence
D. Where an accused is charged with a result crime, it is not necessary for the prosecution to prove that his acts or omissions caused the prohibited consequence
E. Where an accused is charged with a result crime, it is necessary for the prosecution to prove that his acts or omissions caused the prohibited consequence

6 What is '*mens rea*'?

A. A process used by the courts to establish guilt
B. A state of mind which may give rise to criminal liability
C. The phrase is used when a defendant is found guilty of an offense
D. A phrase which means 'innocent person'
E. The external/physical element of a criminal act

7 What is direct intention?

A. Where the consequence was what the defendant was aiming at
B. Where the consequence was not what the defendant was aiming at, but occurred anyway
C. Where the defendant had no intention to create a certain consequence
D. Where the defendant didn't know what he was aiming at
E. Where the consequence was what the defendant was not aiming at but foresaw

8 Which Article of the ECHR upholds the principle of 'innocent until proven guilty'?

A. Article 2(2)
B. Article 4(2)
C. Article 6(2)
D. Article 8(2)
E. Article 10 (2)

9 Children under a certain age cannot be held criminally liable. Which one of following denotes this age?

A. 8
B. 10
C. 12
D. 14
E. 18

10 What is the defense of insanity concerned with?

A. The accused's clinical history of mental conditions
B. The accused's mental state at the time the defendant was arrested
C. The accused's mental state before the time the offense was committed
D. The accused's family history of mental conditions
E. The accused's mental state at the time when the alleged offense was committed

1. B	If your answer is wrong, please review the "Defining Crime and Criminal Law" section.
2. E	If your answer is wrong, please review the "Defining Crime and Criminal Law" section.
3. A	If your answer is wrong, please review the "Liability Requirements" section.
4. C	If your answer is wrong, please review the "Liability Requirements" section.
5. E	If your answer is wrong, please review the "Causation" section.
6. B	If your answer is wrong, please review the "Subjective Element – Mens Rea" section.
7. A	If your answer is wrong, please review the "Intention" section.
8. C	If your answer is wrong, please review the "Criminal Law and Human Rights – The Function of the ECHR" section.
9. C	If your answer is wrong, please review the "Infancy" section.
10. E	If your answer is wrong, please review the "Insanity and Diminished Responsibility" section.

Please describe briefly what are the principles of criminal law (ECHR 6 and 7).

your turn 1

As the core of the rule of law in criminal law, a set of principles can be found in the ECHR and national criminal codes. In relation to principles the ECHR regulates 'no punishment without law'; certainty in Article 7; 'presumption of innocence' in Article 6.

Legality principle means that an act may only be punished if criminal liability had been established by law before the act was committed. In view of the wide-ranging forms of the legality principle, it is preferred to divide it into four distinct principles.

Punishability requires a written act of parliament and cannot be based on custom. (No Punishment without Law)

Criminal prohibitions must determine the prohibited conduct, they must be definite (the principle of certainty)

Acts cannot be punished retroactively.(the principle of non retroactivity) The penalty and any ancillary measures shall be determined by the law which is in force at the time of the act. If the penalty is amended during the commission of the act, the law in force at the time the act is completed shall be applied. If the law in force at the time of the completion of the act is amended before judgment, the most lenient law shall be applied. A law intended to be in force only for a determinate time shall be continued to be applied to acts committed while it was in force even after it ceases to be in force, unless otherwise provided by law .

The statutory prohibition cannot be extended by analogy to conduct not covered by the ordinary meaning of the words used. (the principle of the interdiction of analogy) . As a fundamental principle, 'No Punishment Without Law' is regulated under the most state constitution Criminal Codes and supranational Treaties including ECHR.

As another aspect of the legality principle, the principle of non-retrospectivity of criminal law is also required by the ECHR. The meaning of the principle is that the state cannot punish a person for an offense unless it is accepted as a crime at the time when an act was committed. The people must be able to find out what the law is and the law must prevent catching people by surprise. The essence of the principle is that a person should never be convicted or punished except in accordance with a previously declared offense governing the conduct in question.

With a simple definition, no one is accused until proven guilty. The burden is on the prosecution to prove the case. The principle burdens the proof of the commission of offense to prosecution. A person, however clear the evidence seems to be, is innocent until proved guilty. It is enshrined in Article 6/2 of the ECHR as: '***Everyone charged with a criminal offense shall be presumed innocent until proved quilty according to law***'. However, the European Court suggested that placing a burden of proof on the defendant may be permissible, but the state would need to demonstrate that to do so is necessary given the gravity of the issues involved.

What are the objective and subjective elements of crime?

your turn 2

The objective element, which describes a voluntary act or omission, refers to the part of the definition of the offense in the statutory law which relates to the actions of the perpetrator and their consequences. The movements are willed by the conscious mind of the defendant. Otherwise, the conducts are regarded as involuntary, with the defendant not having performed the actus reus. The actus reus of a crime must reflect the free will and autonomy of a person and, therefore, performance must be voluntary. Although in some cases, the act can be involuntary, the person can be held liable if he/she omits to take precautions against harming others in an unconscious state. Although a voluntary act is required in most cases for criminal liability, both civil and common law consist of several offense definitions that do not require an act while giving rise to criminal liability, which is referred to as acts of omission or failure to act. According to the TPC, gross negligence in failing to perform one's duties may be attached criminal liability if there is a death or serious injury.

The subjective element in crime is one of the most significant concepts of substantive criminal law. In general terms, an accused is held liable only if he/she has mens rea. Mens rea is the state of mind or, in the case of negligence, the failure to attain a certain standart of behaviour which the offense definition requires before the accused can be convicted. The Latin for 'guilty mind', 'mens rea' refers to the notion according to which a court should not find a person guilty of a crime unless he/she has a blameworthy state of mind. The philosophical foundation for mens rea is that the accused can control his conducts, including whether to engage in the conducts breaking criminal law. Most criminal offenses require the accused to have intented or foresaw the consequences of their actions. In criminal law, actus reus is divided into two sublevels, namely intention and negligence. Intent is the will of realizing all objective elements of a crime defined in criminal code, with the knowledge that these elements exist. Intention embodies two elements: will and knowledge. A crime cannot be essentially punishable if the offender does not act with intention. However, negligence is specified as a sufficient fault element for certain crimes. A person acts "negligently" only if he/she is to foresee the harmful consequences of his/her conduct while being unaware of the substantial risk that follows the conduct.

Endnotes

1 Blackstone, Commentaries on the Laws of England.

https://ebooks.adelaide.edu.au/b/blackstone/william/comment/introduction1.html, 15.

2 William Wilson Criminal Law doctrine and Theory, Longman, 2011, s.4

3 Jonathan Herring, Criminal Law, Palgrave Macmillan Law Masters, 8.edition, s.4

4 Herring, Criminal law, s.4

5 Nicola Padfield, Criminal Law, Oxford Uni Press, 2012, s.2

6 Joycelyn Pollock, Criminal Law, Routledge, 10.Edition, s.7

7 Padfield, Criminal Law, s.4

8 Thomas Weigend, Germany, in: The Handbook of comparative Criminal Law, Ed. By Kevin Heller, Markus Dubber, Stanford Law Books, 2011, s.258

9 Marcel Alexander Niggli, Stefan Maeder, Punishment and Security, Asian Criminology 2014, 9, 189-203, s.191.

10 Niggli, s.192

11 Joel Samaha, Criminal Law, Wadsworth Learning, 10.Edition, 2011,s.23

12 Niggli, s.193.

13 Niggli, s.192

14 Niggli, s.194

15 Ronald J. Bacigal, Criminal Law and Precedure an Overview,3.Edition, Delmar Cengage Learning, s.3.

16 Jonathan Herring, The Basics of Criminal Law, Routledge, 2010, s.2

17 Herring, The Basics, s.3

18 Claudia Carr, Maureen Johnson, Beginning Criminal Law, Routledge, 2014, s.3; Herring, Criminal law, s.5

19 Carr/ Johnson, Beginning criminal law, s.2

20 Herring, Criminal law, 4.

21 Kimmo Nuotio, Theories of criminalization and the limits of criminal law: A legal Cultural Approach, in: The boundaries of the criminal law, s.372.

22 Nina Persak, Criminalisin Harmful Conduct, Springer, 2006, s.104

23 Ambos, The overall., s.305

24 Weigend, s.256

25 Herring, criminal law basics, s.7.

26 Niggli/ Maeder, s.189

27 Michael Bohlander, Principles of German Criminal Law,Hart Publishing, 2009, s.25

28 Weigend, s254.

29 Claus Kress, Nulla poena nullum crimen sine lege, max planck encyclopedia of public international law, s.6

30 Jeremy Horder, Ashworth's Principles of Criminal Law, s.82

31 Herring, the Basic, s.8

32 Herring, criminal law, s.11

33 Herring, criminal law, s.11

34 Kress, s. 7

35 John M. Scheb, John M. Scheb II, Criminal Law, 6.Edition, Wadsworth Cengage Learning, 2012, s. 7.

36 Herring, Crimnal law, s.4

37 Claire de Than, Russell Heaton, Criminal Law, 4.Edition, Oxford, 2013, s.6

38 Weigend, s.260

39 Pollock, s.52

40 Herring, The Basic, s.16

41 Weigend, s.260

42 Michael Jefferson, Criminal law, 11.Edition, Pearson, 2013, s.88

43 Weigend, s.262

44 Catherine Elliott, France, in: The Handbook of comparative Criminal Law, Ed. By Kevin Heller, Markus Dubber, Stanford Law Books, 2011, s.217

45 Feridun Yenisey, Turkish Criminal Law, Kluwer Law, 2008, s.83

46 Weigend, s.263.

47 Markus Dubber/Tatjana Hörnle, A comparative approach to Criminal Law, Oxford, 2014, s.348.

48 Yenisey, s. 93

49 Weigend, s.264

50 Bohlander, s.153.

51 Oxford dictionary of law, s.98.

52 Weigend, s.266; Bohlander, s.156.

53 Weigend, s.267

54 Than/Heaton, s.7

55 Weigend, s.268

56 Yenisey, 76.

57 Yenisey, s.76

58 Than/Heaton, chapter 2, s.16.

59 Dubber, s.300

60 Dubber, s.301

61 Bohlander, s.49

62 Bohlander, s.49

63 Weigend, s.270

64 Ali Emrah Bozbayındır, Turkey and the International Criminal Court: A Substantive Criminal Law Analysis in the Context of the Principle of Complementarity, Nomos and Stämpfli Verlag, Baden-Baden 2013, s.119.

65 Yenisey, s.88

66 Dubber, s.407.

67 Bohlander, s.84

68 Herring, Criminal law, s.308

69 Yenisey, s.90

70 Catherine Elliott, French Criminal Law, Routledge, 2001, s.381.

71 Bozbayındır, s.120

72 Weigend, s.224

73 William Wilson, Criminal Law, 4.Edition, Longman Law Series, 2011, s.257

74 Pollock, s. 98

75 Bohlander, s.113

76 Bozbayındır, s.122

77 Weigend, s.272

78 Dubber, s.277

79 Bohlander, s.131

80 Joycelyn, s.78

81 Bozbayındır, s.134

82 Weigend, s.273

83 Joycelyn, s.75

84 Thomas Gardner/Terry Anderson, Criminal Law, 11.Edition, Wadsworth Cengage Learning, 2012, s.85

85 Elliott, Criminal law, s.358

86 Gardner/Anderson, s.135

87 Herring, criminal law, s. 304.