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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Conditions for the Application of Successive Crime in the Turkish Criminal Code

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Abstract

The act is one of the most important elements for the existence of a crime in criminal law. In this respect, the number of acts has an impact upon the number of crimes. As a matter of fact the general rule in Turkish criminal law is that: the number of crimes is determined by the number of acts and the number of punishments is determined by the number of crimes. This is named as a real joinder rule.

However, if this rule is applied without exception, some unfair consequences may occur. In order to prevent these unfair consequences, some exceptions are provided in the Turkish Penal Code. One of them is the regulation of the successive crime. Indeed, according to the provision of Turkish Penal Code (TPC) art. 43/1: where a person commits the same act, more than once, against the same person, at different times in the course of carrying out a decision to commit a crime, a single penalty shall be given. However, this punishment may be increased from one-fourth to three-fourths.

Although the other institutions of criminal law are included in the penal codes of many countries, the successive crime is not provided in the penal codes of many countries. As a consequence, the studies about successive crime in foreign doctrines are limited. In this respect, our study is not only important in terms of the Turkish doctrine but also in terms of foreign doctrines.

In this study, the conditions for the application of successive crime that is an exception of the real joinder rule were examined. While this issue was handled, the legal basement of successive crime was put forward and it was benefited from Turkish doctrine and Turkish court decisions.

Keywords

Successive crime • Same crime • Different times • Same person • Decision to commit one crime

Türk Ceza Kanununda Zincirleme Suçun Uygulanma Koşulları

Öz

Ceza hukukunda bir suçun varlığı için gerekli olan en önemli unsurlardan birini fiil oluşturmaktadır. Bu itibarla fiil sayısı suç sayısını da doğrudan etkilemektedir. Nitekim Türk Ceza Hukukunun öngördüğü genel kurala göre; ne kadar fiil varsa o kadar suç, ne kadar suç varsa o kadar ceza vardır. Bu kural gerçek içtima kuralı olarak ifade edilmektedir.

Ancak bu kural istisnasız bir şekilde uygulandığında bazı hakkaniyete aykırı sonuçlar ortaya çıkabilecektir. İşte bu sonuçların önüne geçmek adına Türk Ceza Kanununda bazı istisnalara yer verilmektedir. Bunlardan biri de zincirleme suç düzenlemesidir. Nitekim Türk Ceza Kanunu (TCK) m. 43/1'e göre; bir suç işleme kararının icrası kapsamında, değişik zamanlarda bir kişiye karşı aynı suçun birden fazla işlenmesi durumunda, bir cezaya hükmedilir. Ancak bu ceza, dörtte birinden dörtte üçüne kadar artırılır.

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Diğer ceza hukuku kurumlarının çoğu ülke kanununda yer almasına rağmen, zincirleme suça pek çok ülke kanununda yer verilmemiştir. Bunun sonucu olarak zincirleme suça ilişkin çalışmalar yabancı doktrinde sınırlıdır. Dolayısıyla çalışmamız yalnızca Türk doktrini açısından değil, yabancı doktrin açısından da önem arz etmektedir.

Bu çalışmada gerçek içtima kuralının bir istisnasını oluşturan zincirleme suçun uygulanma koşulları ele alınmıştır. Bu husus ele alınırken zincirleme suçun hukuki esası ortaya konulmuş ve Türk doktrini ve Türk mahkeme kararlarından faydalanılmıştır.

Anahtar Kelimeler
Zincirleme suç • Aynı suç • Farklı zamanlar • Aynı kişi • Tek suç işleme kararı

Introduction

The general rule in Turkish criminal law is that: the number of crimes is determined by the number of acts and the number of punishments is determined by the number of crimes[1]. This is named as a real joinder rule. In this respect, real joinder is considered when more than one crime is committed. Therefore, a person who fires seperately on both A and B and kills the two of them, is responsible for two homicides because there are two acts of committing a crime here.

However, there are some exceptions to this rule. This condition, that is named as joinder of crimes is composed of successive crime, ideal concurrence among the same types of crime and ideal concurrence among the different types of crime[2]. Accordingly, although more than one crime is committed in each of the three cases, a single punishment shall be given to the perpetrator. Yet, the punishment imposed for successive crime and ideal concurrence among the same types of crime is increased to a certain extent. The application of this rule requires the fulfillment of some conditions. If these exceptions are not in question, the rule of real joinder is applied and the perpetrator receives punishment upon each crime separately[3].

In our article, the conditions for the application of the successive crime are examined by means of definitive judicial decisions[4].

I. The Definition of Successive Crime and Its Legal Basement

The provision of Turkish Penal Code (TPC) art. 43/1 provides a special rule of joinder. Accordingly, where a person commits the same act, more than once, against the same person, at different times in the course of carrying out a decision to commit a crime, a single penalty shall be given. However, this punishment may be increased from one-fourth to three-fourths.

1 Türkan Yalçın Sancar, *Müteselsil Suç*, Seçkin, Ankara, 1995, 15; İzzet Özgenç, *Türk Ceza Hukuku Genel Hükümler*, 13th Press, Seçkin, Ankara, 2017, 582; Neslihan Göktürk, ''Türk Hukukunda Suçların İçtiması'', Ceza Hukuku ve Kriminoloji Dergisi, V.II, N:1-2, 2014, 31.

2 Berrin Akbulut, *Ceza Hukuku Genel hükümler*, 4th Press, Adalet, Ankara, 2017, 706.

3 Mahmut Koca and İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler*, 10th Press, Seçkin, Ankara, 2017, 496.

4 See also: Hakan Hakeri, Derya Tekin, Melik Kartal and Kübra Tunç, ''Turkish Criminal and Criminal Procedure Law'', *Turkish Public Law* (editor: M. Refik Korkusuz), Seçkin, Ankara, 2018, 140, 141.

In this regard especially needs to be put forward the difference between the successive crime and similar institutions. Within this framework the successive crime is different from the continious crime and the repeat crime. While the successive crime is the same crime, which is committed more than once, the continious crime is only one crime, which is committed continiously[5]. And the repeat crime is that same or different crime is committed after the finalization of the verdict. For the successive crime, the judgement regarding the first crime must not have been rendered already[6].

Three different views have been put forward to explain the legal basis of successive crime. These views are; fictitious unity, oneness of crime, and finally, multitude of crimes.

According to the opinion of fictitious unity[7], even if there is more than one crime within the context of successive crime, fundamentally there is an unity among these crimes because the existence of a decision to commit only one crime is in question here. Because of the fact that the same crime is committed in the course of the decision to commit a crime, there is a fictitious unity among these crimes[8].

According to the opinion of the oneness of crime[9], the unity among these crimes is not regarded as hypothetical[10]. Within this framework, in the countries, that do not have a regulation on this issue, it is accepted that there is a real unity among the crimes even if these crimes are committed at different times and it is assumed that only one crime is committed[11]. On the other hand this opinion is criticised by virtue of the fact that it can not answer the question of ‘‘why the punishment is increased to a certain extent’’[12].

Finally according to the opinion of the multitude of crimes[13], each of the crimes under the successive crime is regarded separately. However, due to legal regulations,

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5 Sancar, 30.

6 Sancar, 15; Veli Özer Özbek, Koray Doğan, Pınar Bacaksız and İlker Tepe, *Türk Ceza Hukuku Genel Hükümler*, 8th Press, Seçkin, Ankara 2017, 536.

7 See, for detailed explanations, Öztekin Tosun, “Müteselsil Suçlar”, İHFM, V. XXII, N. 1-4, 129. See also Nurullah Kunter, ‘‘Müselsel Suç ve Af”, İHFM, V. XVII, N. 3-4, 893-895. Sulhi Dönmezer and Sahir Erman, *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, V. I, 7th Press, Sermet, İstanbul, 1979, 448. See for the writers who defend this opinion: Bahri Öztürk and Mustafa Ruhan Erdem, *Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku*, 17th Press, Seçkin, Ankara, 2017, 394.

8 Koca and Üzülmez, 508. *Sancar* who adopts this opinion stated that there are as many crimes as the violations of norm and here, more than one crime is committed; but these crimes shall be regarded as one crime by virtue of the fictitious unity of decision to commit crime (Sancar, 60).

9 See, for detailed explanations: Tosun, 130. In this regard, see for the opinion of ‘‘reality’’ Kunter, 895. See also Dönmezer and Erman, 448. *Taner* has also defended the opinion of oneness of crime. Tahir Taner, *Ceza Hukuku Umumi Kısım*, İstanbul, 1949, 102. This opinion was accepted in a decision by Supreme Court General Assembly of Criminal Chambers (YCGK, 18.12.2012 E. 2012-11/999, K. 2012/1862 (YCGK: Supreme Court General Assembly of Criminal Chambers), Özgenç, 592, footnote 1109).

10 Sancar, 56.

11 Koca and Üzülmez, 509; Özbek, Doğan, Bacaksız and Tepe, 536.

12 Koca and Üzülmez, 509.

13 See for detailed explanations: Tosun, 130.

these crimes are punished as a single crime[14]. In other words, according to this opinion, there is neither fictitious nor real unity among the crimes. The prevailing opinion in Turkish doctrine is the opinion of multitude of crimes[15].

In our opinion, the opinion of multitude of crimes, which prevails in Turkish doctrine, is right because the crimes under successive crime are independent of each other in every sense. Conversely a single punishment is given to the perpetrator on the grounds that these crimes are committed in the course of a decision to commit a crime. This does not mean that the crimes under successive crime constitute only one crime or there is a fictitious unity among these crimes. Only one of these crimes is taken as a basis of the verdict, and the other crimes cause the increasement of the punishment[16].

II. The Conditions for the Application of the Successive Crime

A. Committing of the Same Crime

According to Article 43 the application of the provision regarding successive crime depends on committing the same crime. Therefore the statement ''same crime'' is not a violation of same article but rather the violation of same type of crime[17]. In this respect the provisions regarding successive crime is also applicable in the event that the provisions under different codes are violated[18].

Each of the acts composing these crimes must be appropriate to the typicality and unlawful[19]. The provisions of successive crime can be applied not only to the

[14] Sancar, 58, 59.

[15] Kayıhan İçel, Füsun Sokullu Akıncı, İzzet Özgenç, Adem Sözüer, Yener Ünver and F. Selami Mahmutoğlu, *Suç Teorisi*, 4th Press, Beta, İstanbul, 2004, 434; Özgenç, 592; Özbek, Doğan, Bacaksız and Tepe, 537; Akbulut, 708, 709; Göktürk, 42. According to *Kunter*, the fact that the unity among the crimes which constitute successive crime is fictitious or real is not important, but it is important that whether the crime in question is divisible or not. *Kunter* asserts that the successive crime is not divisible (Kunter, 897). See, for the similar opinion: Dönmezer and Erman, 449. According to *Tosun*, the successive crime does not mean that the existence of only one crime is accepted. The legislator has provided an exception of the rule of real joinder (Tosun, 124 vd.). *İçel* remarked that there are as many crimes as the violations of norm and he did not make a mention of committing only one crime or the crime unity (Kayıhan İçel, *Suçların İçtimaı*, İstanbul 1971, 92). *Zafer*, unlike the above opinions, asserts that the opinon of oneness of crime should be taken as basis for penalisation; but the opinion of multitude of crimes should be taken as basis for the other institutions of criminal law provided that no other regulation is envisaged. For example each crime must be regarded as an independent crime in terms of the application of amnesty act (Hamide Zafer, *Ceza Hukuku Genel Hükümler*, 6th Press, Beta, İstanbul, 2014, 501).

[16] Hakan Hakeri, *Ceza Hukuku Genel Hükümler*, 21st Press, Adalet, Ankara, 2017, 619.

[17] Koca and Üzülmez, 514; Özbek, Doğan, Bacaksız and Tepe, 537; Hakeri, 620; Ömer Keskinsoy, ''Yeni Türk Ceza Kanunu'nun Müteselsil Suçla Alakalı Hükümlerinin Değerlendirilmesi'', TBB Dergisi, N: 61, 2005, 343.

[18] Özbek, Doğan, Bacaksız and Tepe, 537. Therefore the provisions regarding successive crime can be applied between the offence of embezzlement in Turkish Criminal Code and the offence of embezzlement in the Banking Code (Osman Yaşar, Hasan Tahsin Gökcan and Mustafa Artuç, *Yorumlu-Uygulamalı Türk Ceza Hukuku V. I*, 2nd Press, Adalet, Ankara, 2014, 1241). But, there are also some writers who do not accept this opinion in Türkish doctrine. As a matter of fact according to *Hakeri,* it is not possible to apply the provisions of successive crime between a crime in Turkish Criminal Code and a crime in Special Code. See: Hakeri, 621. See for opposing view: İçel, Sokullu Akıncı, Özgenç, Sözüer, Ünver and Mahmutoğlu, 443.

[19] (The term of typicality means that the act of perpetrator fits in the definition of crime, which is stated in the the penal code. The term of unlawful means that there is no such defence in the case that makes the act of perpetrator lawful.) Sancar, 69; İçel, Sokullu Akıncı, Özgenç, Sözüer, Ünver and Mahmutoğlu, 436 Özbek, Doğan, Bacaksız and Tepe, 537; Hakeri, 620; Zafer, 502; Akbulut, 712. The Court of Cassation also drew attention to this issue in its decisions. See: Y. 10. CD., 21.11.2007, 2007/15026-2007/13536 (YCD: Penal Department of the Supreme Court) (Yaşar, Gökcan and Artuç, V. 1, 1231).

crimes committed with the positive act but also to crimes committed with the act of omission[20].

We must state that the repetation of the acts of the crime does not influence the unity of crime. For example A stabs B in 3 different body parts, there are no three acts[21]. Beacause here, there is only one act in the juristic sense[22].

The provisions regarding successive crime are applied even if one of the crimes is attempted. In this respect, when one of the crimes is completed but the other is uncompleted, the provisions of successive crime can be applied[23].

In the previous Turkish Penal Code (Nr. 765) period, Court of Cassation made a decision that the provisions of successive crime can be implemented in the event that there is a mitigating/aggravating circumstance in terms of one of the crimes.[24]. This issue was regulated by current Turkish Penal Code (Nr. 5237) specifically. Accordingly the basic version and qualified versions, which require higher or lesser punishment, of a crime shall be deemed to be one crime (TPC art. 43/1)[25]. Therefore, if the offence of insult is committed against someone and one day later, the insult is committed in public (which is a qualified version of insult), in this case the provisions regarding successive crime are applied.

The same situation is also valid in terms of the aggravation of a crime due to its consequence[26]. The aggravation of a crime due to its consequence is also based on the basic version of the crime. This issue is understood from that the regulation of the aggravation of a crime due to its consequence is created right after the basic crime and in determination of the verdict is attributed to basic crime[27].

However, in the case that there is no relation of basic and qualified versions of crime among the crimes (such as theft and robbery), the offenses are not the same but rather different offenses. In such cases, the provisions regarding successive crime can not be applied even though the perpetrator acts in the course of decision to commit one crime[28]. The same situation is also valid in terms of the offence of sexual harassment and sexual assault. Because of that, there is not a relation of basic and

[20] Tosun, 130; İçel, Sokullu Akıncı, Özgenç, Sözüer, Ünver and Mahmutoğlu, 438; Timur Demirbaş, *Ceza Hukuku Genel Hükümler*, 12nd Press, Seçkin, Ankara, 2017, 540; Koca and Üzülmez, 513; Akbulut, 713.

[21] Mehmet Emin Artuk, Ahmet Gökcen, M. Emin Alşahin and Kerim Çakır, *Ceza Hukuku Genel Hükümler*, 11th Press, Adalet, Ankara, 2017, 713.

[22] Koca and Üzülmez, 511. (In the case that the acts of perpetrator are carried out closely in terms of time and place, the acts are considered as a single act in the juristic sense.)

[23] Sancar, 69; Özbek, Doğan, Bacaksız and Tepe, 537; Zafer, 504; Akbulut, 714; Keskinsoy, 342.

[24] YCGK, 20.03.1973, 265 (Hakeri, 620).

[25] Keskinsoy, 343.

[26] Akbulut, 718.

[27] Hakeri, 621.

[28] Özbek, Doğan, Bacaksız and Tepe, 538; Yaşar, Gökcan and Artuç, V. I, 1241; Hakeri, 621.

qualified version of crime among these crimes, the provisions regarding successive crime can not be implemented in terms of these crimes[29].

The abolished TPC Nr. 765 used to refer to the violation of ‘‘the same provision of code[30], but the new code refers to committing the same crime. Within this framework as mentioned above, the phrase of “same crime” does not refer to the same article but the same crime type. This detection is of capital importance. because there is more than one crime types in some articles.[31]. For example in TPC art. 244, the offence of ‘‘preventing or corruption the functioning of a system and destruction or alteration of data’’ is generally regulated. Concordantly in the first subsection of this article, the offence of corruption of the functionality of a system is regulated and in the fourth subsection of the same article, the provision of obtaining unjust benefit by using information system is regulated. Accordingly, if a perpetrator commits the offence of corruption of an information system and a day later, commits the offence of obtaining unjust benefit by using information system in the course of decision to commit same crime, the provisions of successive crime shall not be applied.

In this context it is crucial to state that Turkish Court of Cassation decided that the provisions of successive crime can be executed for the offence of forgery of official documents and the offence of forgery of private documents. In the light of the information above, this decision of the Court of Cassation is not correct because both crimes are regulated in different articles as independent to each other. In other words, it is not possible for these crimes to be regarded as the same crime.

On the other hand, the Court of Cassation had regarded both crimes as the same crime and applied the provisions regarding successive crime on the grounds that the protected legal interest by the crimes and the victim of the crimes are the same[32]. According to the Court of Cassation, the legal interest in terms of both crimes is public confidence and furthermore the victim of these crimes is the community. Granted the Court of Cassation’s determination, regarding the protected legal interest and the victim is appropriate. However, both crimes are provided under the separate provisions, and the object of these crimes is created differently. As a matter of fact, while the object of the offence of forgery of an official document is an official document, the object of the offence of forgery of a private document is a private document. Moreover, both crimes are different from each other in terms of criminal

[29] Yaşar, Gökcan and Artuç, V. I, 1242.

[30] It is stated that the violation of ‘‘the same provision of code’’ is accepted as a condition for the successive crime in German doctrine. For this and more information about German law see: Hakan Hakeri, ‘‘Alman Ceza Hukukunda Müteselsil Suç’’, Kamu Hukuku Arşivi Dergisi, October 1999, 243.

[31] However, one opinion in the doctrine alleges that even if the same crime in different codes is committed, it is possible to apply the provisions of successive crime due to the expression ‘‘the same crime’’ in current criminal code and in order to prevent this, the expression ‘‘the same provision of code’’ in the old code shall be situated in current code (Özbek, Doğan, Bacaksız and Tepe, 537).

[32] YCGK, 05.06.2012, 15/491-219 (Yaşar, Gökcan and Artuç, V. I, 1242).

act. Accordingly, the offence of forgery of a private document is a crime, which constitutes of multiple acts, yet the offence of forgery of an official document is a crime which can be carried out by alternative acts. Therefore it is incorrect for Court of Cassation to regard both crimes as the same crime and to apply the provisions in relation to successive crime[33].

B. Committing the Same Crime at Different Times

The crimes committed against the same person must be committed at different times. In fact it is not possible to commit the same crime againts the same person more than once at the same time[34]. After a crime is committed against a person and completed and if the same crime is committed against the same person once again, this requirement will be fulfilled. Accordingly, the second offence of deprivation of the liberty of a person must be committed after the offence of deprivation of the liberty of the same person is completed. A short or long time period can be between these two crimes[35]. The important issue here is that the second crime is committed following the completion of the first crime and both crimes must be committed in the course of a decision to commit the same crime. However, the time period between two crimes can be used as a measure in the matter of whether these crimes were committed in the course of a decision to commit one crime[36].

In this respect, the provisions of successive crime shall not be applied in the case that more than one alternative act of the crime is committed at the same time[37]. As an example, if a wall is destroyed immediately after a garden wall is damaged by being painted, only one crime is already committed. Therefore, the provisions of succesive crime are not applied. On the other hand, if a crime with an alternative act is committed and after a while, the other aternative act of the same crime is carried out, in this case two crimes exist and the provisions of successive crime are applied.

Having looked at the decisions of Turkish Court of Cassation, it seems that the Court of Cassation abides by this condition. The Court of Cassation ruled that the provisions of succesive crime can not be applied in the case in which the accused had given three checks with the amount of 12.000.000.000 TL simultaneously. The court showed the expression ‘‘at different times’’ as a reason in legal regulation[38].

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33 See for similar opinion Akbulut, 716.

34 Akbulut, 710, 711.

35 This time period must not be too long. Because, if the time period among the crimes is too long, the decisions of committing a single crime cannot be mentioned. (Öztürk and Erdem, 397).

36 Zafer, 505.

37 Sancar, 68; Özbek, Doğan, Bacaksız and Tepe, 538.

38 Y. 11. CD., 29.11.2007, 7718/8624 (Yargıtay Kararları Dergisi, Ekim 2008).

C. Committing the Crime Against the Same Person

The same crime must be committed against the same person at different times. In other words, the victim of the crimes must be the same person[39]. In this context if the same crime is committed against different persons, even though in the course of enforcement of a decision to commit one crime is carried out, the provisions of successive crime will not be applied[40].

There was no requirement of ‘‘committing the crime against the same person’’ in the period of TPC Nr. 765. Therefore at that time, there was a debate about whether or not the provisions of successive crime could be applied in the event that the victims are different persons. However the prevailing opinion in doctrine accepted that the provisions of succesive crime can also be applied where the crimes are committed against different persons since the expression ‘‘against the same person’’ was not provided in the code. Another opinion made a distinction among the crimes and asserted that the provisions of successive crime can be applied to crimes against property where the crimes are committed against different victims but can not be applied to the crimes committed against life and physical integrity. [41]. Eventually such discussions were finalized by being added the expression ‘‘against the same person’’ to the current code.

As understood from all these expressions, the victim must be correctly identified. If the perpetrator knows or may know that the victim of the crimes is not the same person, the provisions of successive crime can no longer be applied. Accordingly the provisions in relate to succesive crime can not be applied to the thief who stole the things from the cupboards on which the owner name is written[42]. However, in the case in which some items are stolen from a family house, in which the items belong to the different members of the family, the Turkish Supreme Court accepts that only one crime is committed here, yet when the house is not occupied by a single family but is rather a shared house and the rooms are separated and if the perpetrator also knows or may know this circumstance, the Court of Cassation identifies these crimes as different crimes[43]. Similarly the Court of Cassation did not apply the provisions of successsive crime and accepted that three seperate crimes were committed when three different bags on different desks in a classroom were stolen[44]. The provisions of the successive crime shall also be applied to the crimes where the victim is not a specifically identifiable person due to a special regulation which was newly added to the code (TPC art. 43/1).

[39] Özgenç, 592

[40] Öztürk and Erdem, 399.

[41] See for discussions: Sancar, 108, 109.

[42] Özgenç, 597.

[43] See: Yaşar, Gökcan and Artuç, V. I, 1243.

[44] YCGK, 13.10.1998, 304 (Hakeri, 630).

Thus where the offence is committed against public, the provisions regarding successive crime shall also be applied, provided that the offence in question has been committed in the course of the enforcement of a decision to commit one crime. Accordingly, the Turkish Supreme Court implements the provisions regarding the successive crime in terms of collusive tendering (TPC art. 235)[45]. However in our opinion, the rule of real joinder should be applied but not the provisions of successive crime where the victim of an offence against public or state is certain directly[46].

D. Committing the Crimes in the Course of Enforcement of a Decision to Commit One Crime

The most important application condition of successive crime is that the crimes are committed in the course of enforcement of a decision to commit a single crime. Accordingly even though these crimes are committed more than once against the same person, the provisions regarding the successive crime can not be applied if these crimes are not committed in the course of the enforcement of decision to commit a crime.

Within this framework, what ''the decision to commit one crime'' means must be set forth. The perpetrator must act with the will to commit the same crime while committing the crimes against the victim. It is stated that the will in question, which also involves the intention, is a subjective element[47]. In this sense after the perpetrator commits an act, where he commits the same act once more by taking advantage of the situation, a decision to commit one crime is out of the question[48]. Likewise, if the perpetrator arrives at a decision on committing the act for the second time after the first act has been committed, this condition will not be fulfilled and the provisions regarding successive crime can not be applied. In other words, the decision to commit the subsequent acts must be made before the first act has been committed. This decision must be made, at the latest, when the first act is committed[49].

Crimes of negligence can not be the object of the successive crime[50] because the existence of knowledge and intent, or at least foreseeing and remaining unresponsive, is necessary for the decision to commit a crime. However, because of the fact that the existence of crimes of negligence depend on a failure to discharge a duty of care and attention, it is not possible for the perpetrator to act on the decision to commit a crime[51].

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45 Y. 5. CD., 05.02.2013, 848 (Hakeri, 631).

46 See: Öztürk and Erdem, 399; see for example: Koca and Üzülmez, 518; Akbulut, 720; Keskinsoy, 346.

47 Tosun, 136; Sancar, 96, 98; İçel, Sokullu Akıncı, Özgenç, Sözüer, Ünver and Mahmutoğlu, 445; Özgenç, 599; Koca and Üzülmez, 519; Hakeri, 625; Demirbaş, 542; Akbulut, 708; Keskinsoy, 342.

48 Yaşar, Gökcan and Artuç, V. I, 1239.

49 Hakeri, 626; Yaşar, Gökcan and Artuç, V. I, 1238.

50 Tosun, 130; Demirbaş, 540; Öztürk and Erdem, 400; Keskinsoy, 342.

51 Hakeri, 627. However it is pointed out that there are different opinions about this issue. See: Sancar, 71. As a matter of fact one opinion in the doctrine argues that the provisions regarding the successive crime applied in the intentional crimes shall primarily be applied in the negligent crimes which have less intensity of injustice than intentional crimes (İçel, 147).

The determination of the existence of the decision to commit a crime is assessed by the judge[52], considering the circumstances of each concrete case[53]. In order to do this, specific criteria are taken into account[54]. Accordingly, the similarities among crimes with regard to the way in which they are committed[55] are taken into consideration by the doctrine[56]. This circumstance has been clearly expressed in the Court of Cassation's decisions[57].

In this respect, there is not a general rule for the time interval between the first and second crimes[58]. Certainly the time interval between the crimes is not the only criterion here. While it may not be possible to apply the provisions regarding successive crime in some cases where the time interval between two crimes is too short, it may also be possible in some cases where the time interval between two crimes is too long. Nevertheless, the time intervals between crimes can be used as an important criterion in terms of the determination of the existence of a decision to commit one crime [59].

III. The Consequence of the Application of Successive Crime

If it is determined that the aforementioned conditions are met, the perpetrator will not be punished for each of these crimes separately but instead for only a single crime[60].

However the sentence shall be increased to a certain extent. This extent is indicated in the code. Accordingly, the sentence that will be imposed is increased from one-fourth to three-fourths. This increase is made upon the final sentence by being taken into the TPC art. 61 which stipulates the provisions regarding the determination of the punishment. This regulation outlines when the increase based on the successive crime should be made. Firstly in this context, the basic sentence will be determined. Secondly if there are the qualified versions of the crime which require a penalty higher or lower than the basic version of that crime, the basic penalty is first increased, then reduced. Finally, the provisions regarding attempt, participation and successive crime are respectively applied upon the determined sentence.

The sentence is determined according to the completed crime even though one of the crimes within the successive crime is completed but the other crimes are attempted.

52 Tosun, 136.

53 İçel, Sokullu Akıncı, Özgenç, Sözüer, Ünver and Mahmutoğlu, 436; Özgenç, 599; Akbulut, 723.

54 YCGK, 01.06.1999, 1999/6-122-1999/145 (Yaşar, Gökcan and Artuç, V. I, 1240).

55 The fact that the crimes are committed in the same place can show that there is only one decision to commit one crime (Sancar, 102).

56 Sancar, 99 vd.; Hakeri, 628; Zafer, 508, Öztürk and Erdem, 400.

57 See: YCGK, 20.04.1999, 5/61-74 (Yaşar, Gökcan and Artuç, V. I, 1239).

58 Sancar, 101.

59 Sancar, 101; Hakeri, 627.

60 Öztürk and Erdem, 400.

In other words, the attempt provision is considered in terms of the determining of the punishment only if all of the crimes are attempted. In our opinion, the attempted crime must be taken into account when determining the extent of the increase of the punishment in accordance with the successive crime provisions where one of the crimes is completed and the other is attempted. Consequently, there must certainly also be a difference between the fact that the subsequent crime has been completed or attempted.

IV. The Exception of the Application of Successive Crime

An exceptional regulation preventing the application of the rule in question is provided in the provisions regarding successive crime. Accordingly, the provision which regulates successive crime shall not apply to intentional homicide, intentional injury, torture and robbery (TPC art. 43/3).

Before the amendment in the Law No 5377, dated 29.06.2006, the offence of sexual assault and the offence of sexual abuse of a child were among the exceptional crimes. These two crimes have been excluded from the list by the aforementioned law. As justification, the problem of evidence in these crimes and the amount of nonproportional punishment have been shown. As a matter of fact, it is obvious that it is very hard to prove how many offences of sexual assault were committed against the victim by a perpetrator who incarcerated the victim in a house. However, it should be emphasized that the same difficulty is also valid in terms of torture or robbery[61].

Consequence

We must underline that the regulation of successive crime is very reasonable. Likewise, it should be stated that this regulation of in Turkish criminal law has played an important role to prevent nonproportional punishment. However, imposing only one punishment for crimes, including serious results in terms of physical integrity such as intentional homicide, intentional injury would lead to unjust consequences. So the provisions of successive crime will not be applied in terms of intentional homicide, intentional injury, torture or robbery (TPC art. 43/3).

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[61] Özgenç, 602.

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