

TÜRKİYE CRIMINAL DEFENSE MANUAL

FIRST EDITION, 2022

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Kurumunuzca hazırlanan, Türk Ceza Hukukunun Tarihsel Gelişimi ve Türk Ceza Yargısı Sistemi el kitapçığı tarafımda incelenmiş ve gayet faydalı olacağı yönünde görüş bildirme gereği doğmuştur.

Meslektaşlarımızın kaynak olarak kullanabileceği bu çalışmada, tüm konulara değinilmiş, konu içerikleri açıklanmış ve özellikle ceza hukuku ayrıntılı olarak ele alınmıştır. Bu çalışmadan dolayı memnuniyet duyduğumu belirtmek isterim.

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The handbook on the historical development of the Turkish Criminal Law and the Turkish criminal justice system prepared by your organization has been examined by me and I felt it necessary to express that it will be very useful.

This study can be used as a resource by our colleagues, all subjects are touched upon, the subject contents are explained, and criminal law is especially discussed in detail. I would like to express my satisfaction with this book.

2022/07/28

Av. Melikşah Korkmaz



Şanlıurfa Barosu olarak Local Development Organization (Sürdürülebilir Yerel Kalkınma Derneği) ile yaptığımız işbirliğinden memnuniyetimizi dile getirmek isteriz. Avukatın El Kitabı isimli çalışmanızdan ötürü sizleri kutlarız. Büyük emeklerle hazırlanmış olan kitapçık Avukatlar için yol gösterici olacaktır. Şanlıurfa Barosu Göç ve İltica Merkezi olarak sizin gibi değerli kurumlarla işbirliğini sürdürmek bizim için önem arz etmektedir. Kitapçığın hazırlanmasında başta International Bridges To Justice (IBJ) olmak üzere emeği geçen herkese teşekkür ederiz.

Saygılarımızla,

Şanlıurfa Barosu
Göç ve İltica Merkezi Başkanı
Av. Serhat HİCRİ

As Şanlıurfa Bar Association, we would like to express our satisfaction with our cooperation with Local Development Organization. We congratulate you for your work titled 'Türkiye Defender Manual'. The Manual, which is prepared with great effort, will be a useful guide for lawyers. As far as Şanlıurfa Bar Association's Migration and Asylum Commission are concerned, it is important for us to continue our cooperation with valuable institutions such as you. We thank everyone who contributed to the preparation of this Manual.



International Bridges to Justice

International Bridges to Justice is a global leader in systems change for access to justice, with an impact that spans 20 years, committed to ending torture in the 21st century and strengthening the rule of law across the world. IBJ collaborates with state, civil, and community-based organisations to comprehensively reform criminal justice systems and guarantee all individuals the right to competent legal representation, the right to be protected from cruel and unusual punishment, and the right to a fair trial. IBJ works to ensure that legal counsel is provided to the accused at the earliest stages of the criminal process with the aim of significantly reducing instances of torture, human rights abuse, and other prohibited treatment.

IBJ in Turkey

The programme, “Advancing Justice to Syrians in Turkey” builds on IBJ’s programmatic efforts in Syria since 2017, aiming to enhance the capacity and knowledge of justice actors on domestic and international criminal law and support the provision of accessible legal assistance to Syrian refugees and displaced communities. Many Syrian refugees living in Turkey are in need of life-saving assistance, including accessible legal aid. Furthermore, lawyers in Turkey taking on refugee cases are in need of financial, legal and capacity building resources to ensure systematic access to legal counsel. The Turkey programme will continue to follow the three-pillared approach to programming; building the capacity of lawyers through trainings, engaging justice stakeholders through Roundtable events, and empowering local communities through the dissemination of legal rights awareness campaigns. IBJ will also publish a Criminal Defender Manual to further supplement the legal materials widely available to lawyers and build their abilities, providing them with critical legal knowledge and skills that can be used in the unique and complex circumstances facing Syrian refugees in Turkey.



Local Development Organization
Sürdürülebilir Yerel Kalkınma Derneği

Local Development Organization

The Local Development Organization, also known as LDO is a not-for-profit, non-political civil society organization focused on supporting local administration, communities and reviving the economy. LDO organization is registered in Turkey and has its head office in Gaziantep- Turkey, with active offices inside Syria- including Idleb. The Local Development Organization's Advisory Board Members, specialized in various fields including public administration, local economy, strategic planning, institutional and community development.

LDO was established by a number of experts to support local administrations in the fields of governance, economy and community development. LDO seeks to achieve a framework that helps local councils and their communities to achieve professional standards and good governance. This good governance is the main element setting the balance between strategic and operational conduct in an organized and deliberate approach. LDO's good governance approach, and legal expertise will inform the strategic running of the project.

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This study includes explanations about the concept of law, its branches, the concept of criminal justice, the historical development of criminal justice in Türkiye and courts and stakeholders in the Turkish criminal justice system.

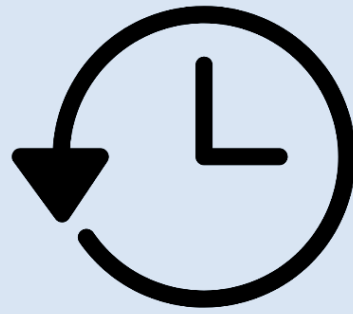
Acronyms

Constitution : The 1982 Constitution of the Republic of Türkiye No. 2709
TCP : Law No. 5237 Turkish Penal Code
TCCP : Law No. 5271 Turkish Code of Criminal Procedure
SSL : Law No. 657 Civil Servants Law
PDP : Law No. 2559 on Police Duties and Powers
EPSM : Law No. 5275 on the Execution of Penalties and Security Measures
CPL : Law No.6100 on Civil Procedural Law
FMI : Law No.2659 on Forensic Medicine Institute
ATL : Law No.3713 Anti-Terror Law
KHK : Related Decree Laws
LCL : Law No. 7036 on Labor Courts Law
LL : Law No. 4857 Labor Law
TCC : Law No. 6102 Turkish Commercial Code
CP : Law No. 5395 on Child Protection
HSK : Law No. 2002 on Judges and Prosecutors

Concept of Law

Law is a system that consists of legal rules. The rule of law, on the other hand, are the rules of behavior that are set by the authorized organs of the state; they regulate human behavior and administer sanctions. Sanctions, are the force applied by the state, in response to violations of the rule of law.

01



HISTORICAL
DEVELOPMENT OF
TURKISH CRIMINAL
LAW AND THE
TURKISH CRIMINAL
JUDICIAL SYSTEM

01

(1.1) TURKISH LEGAL SYSTEM

The Turkish legal system is divided into two systems. These are; the judicial branch and the administrative branch.

(1.1.1) ADMINISTRATIVE PROCEDURE

The administrative branch is established for the resolution of legal disputes between individuals and the state. If the rights of the citizens are damaged as a result of the works and transactions of the state (administrative works), they will be able to file lawsuits in this judicial branch within the framework of the freedom of seeking rights. The courts in the administrative branch are categorized in three levels:

1. The first instance administrative courts and first instance tax courts,
2. Regional administrative courts as second instance courts of appeal and,
3. Council of State as the third instance appellate court.

(1.1.2) JUDICIAL PROCEDURE

The Judicial branch in the Turkish legal system is divided into criminal proceedings and civil proceedings. The judiciary has the widest scope within the legal system and is organized in three stages within itself.:

1. First instance criminal and civil courts,
1. Regional courts of appeal as second degree courts of appeal and
1. The Supreme Court of Appeals as the third-degree appellate court.

(1.2) ACTORS OF THE TURKISH LEGAL SYSTEM

(1.2.1) GENERAL ACTORS

(1.2.1.1) Law Courts (See Civil Procedure Law No. 6100)

Civil Magistrates' Courts: The civil magistrate is responsible for dealing with the following disputes regardless of the value or amount of the subject of the case (Article 4 of CPL no. 6100):

- The court confirms the agreement drawn up by mediation,
- To decide on the objections made to the authority of the mediation office (LCL no. 7036 Article 3/9),
- The Mediation offices work under the supervision and control of the magistrates appointed by the Council of Judges and Prosecutors. In places where there is no mediation office, the task of the office is carried out by the registry office of the magistrates' court under the supervision and control of the judge (LCL no. 7036 art.28/3),
- Except for the provisions regarding the evacuation of rental properties by enforcement without judgment pursuant to the Execution and Bankruptcy Law dated 9/6/1932 and numbered 2004, the lawsuits regarding all disputes, including the lawsuits arising from rental relationships and the lawsuits filed against these lawsuits,
- Distribution of movable and immovable property and lawsuits regarding the dissolution of the partnership,
- In movable and immovable properties, cases only for the protection of possession
- Cases which CPL no. 6100 and other laws assign to the magistrates court or a magistrate judge.

Civil Courts of First Instance: Unless the law specifically appoints another court, the civil court of first instance is in charge of the hearing of all kinds of cases within the following two categories, regardless of the value and amount of the subject matter (CPL art.2):

- Lawsuits regarding property rights
- Lawsuits regarding immaterial rights

Commercial Courts of First Instance: The general framework of the works falling under the jurisdiction of the commercial court of first instance is as follows (Article 4/5 of TCC no. 6102):

- Lawsuits arising from the issues related to the commercial business of both parties are accepted as commercial lawsuits, the duty of hearing these lawsuits belongs to the commercial court of first instance,

- Commercial lawsuits in uncontested jurisdiction concerning the commercial enterprise of both parties,
- Regardless of whether the parties are merchants or not, the works are accepted by the Commercial Law No. 6102 as commercial litigation and uncontested jurisdiction.

Family Courts: The 4th and 6th articles of the Law No. 4787 and the Law No. 6284 on the Protection of the Family and the Prevention of Violence Against Women determines what cases and matters the family court is responsible for. Accordingly, the duties of family courts are as follows:

- To take precautionary decisions to protect women, children, family members and people who are victims of violence or who are at risk of being exposed to violence, and to prevent violence against these people (Law No. 6284, art.4/5).
- Divorce lawsuit,
- Cases arising from the implementation of the divorce protocol,
- Lawsuit for nullity or annulment of marriage,
- Cases allowing or preventing marriages due to minor age, absence, limitation or waiting period,
- Lawsuits for pecuniary and non-pecuniary damages filed with or after the divorce case,
- Cases concerning permission for the divorced woman to use her husband's surname,
- Abolishing the waiting period (iddah period) of the divorced woman,
- Alimony cases,
- Child custody or change of custody cases,
- Property division lawsuits in divorce (contribution receivable, participation receivable, litigation for receivables of value increase),
- Lawsuit for the rights of the family residence or the removal of the annotation, the case for the establishment of the right of usufruct to the surviving spouse on the family residence,
- Protection of family property cases,
- Cases for changing the family surname,
- Paternity suit, paternity objection and annulment case, denial of lineage,
- Cases of adoption and abolition of the adoption relationship,
- Cases for pecuniary and non-pecuniary damages due to the deterioration of the engagement,
- Sending a notice of abandonment,
- Custody cases (removal and replacement of trustee)

Labor Courts: Labor Courts are responsible for dealing with business lawsuits such as claims, compensation, determination, etc. arising from labor law disputes (Law on Labor Courts No. 7036). The labor court is a court of first instance, which is a special court. *The labor court* is responsible for dealing with all kinds of legal disputes arising from the contract or the law due to the employment relationship between the workers and the employer or employer's representatives. Apart from workers, the labor court is also responsible for adjudicating all kinds of lawsuits brought by seafarers and journalists, due to their employment relationship.

- Cases regarding compensation such as severance pay, notice indemnity and bad faith compensation are held in the labor court.
- The labor court is responsible for dealing with claims such as wages, overtime and annual paid leave.
- Compensation due to disability or death resulting from a work accident is heard in the labor court.
- Declaratory lawsuits arising from labor law are heard in the labor court. For example, cases such as determination of entitlement to retirement, service determination, determination of disability or determinations of work accident are heard in the labor court.
- Labor courts are also responsible for dealing with reemployment cases.
- Disputes arising from labor and social security legislation to which the Social Security Institution (SGK) or the Turkish Employment Agency are a party, are also heard in the labor courts. (Objections to administrative fines and disputes within the scope of temporary Article 4 of Law No. 5510 are excluded).

Consumer Courts: It is the court responsible for dealing with consumer transactions and cases arising from all kinds of actions towards the consumer. (Law No. 6502 art.73/1). The Consumer Court, is a court of first instance in the nature of a special court.

Cadastral Courts: The duties of the Cadastral Courts are regulated in Article 25 of the Cadastral Law. Cadastral courts deal with immovable property, limited in rem rights, , border and measurement disputes, similar cases concerning the cadastral and land registry and every other assigned case by special laws.

(1.2.1.2) Criminal Courts (see Criminal Procedural Law No. 5271)

Criminal Magistrates: During the prosecution investigation for a crime, the decisions made by the court are given by the Criminal Magistrates. Decisions are made by a single Judge.

Criminal Courts of First Instance: The criminal court of first instance is one of the basic courts of the criminal justice system. The criminal court of first instance is responsible for dealing with all cases and matters that other criminal courts are not in charge of. The legal regulations on which the court hears which cases and crimes are called the rules of duty. Although there are many exceptions to the determination of the competent court, the basic criteria are:

- The criminal court of first instance is responsible for dealing with cases and works that require a prison sentence of 10 years or less (Law No. 5235, art. 12).
- Cases that require more than 10 years of imprisonment are heard in the assize courts (criminal courts dealing with the most grave crimes).

In determining the duties of the courts, the upper limit of the penalty of the law is considered, regardless of aggravating or mitigating factors (Law no. 5235, art. 14).

If the laws have given a court special authority, that court will make the judgment. Criminal courts of first instance handle all cases other than the duties of criminal Magistrates, assize courts and other special courts. Lastly, are special or general laws have specifically assigned the criminal court of first instance, irrespective of the nature of the crime and the amount of punishment, the criminal court of first instance is considered to be in charge due to the special regulation (Law no. 5235 art. 11/1).

The type of cases the criminal court of first instance is responsible for, is determined by taking into account the upper limit of the prison sentence stipulated in the article of the law. If the upper limit of the penalty of the crime is more than 10 years or if no other court is in charge, the court in charge is the criminal court of first instance. Criminal courts of first instance are in charge of dealing with the following crimes, which are regulated in the TPC:

- Tax evasion crimes,
- The crime of bid rigging,
- Facilitating drug use,
- Malicious wounding,
- Involuntary wounding,
- Sexual harassment,
- Sexual assault (TPC art.102/1),
- Sexual intercourse with a minor,
- Threatening,
- Blackmailing,
- Deprivation of liberty,
- Violation of the immunity of residence,
- The crime of disturbing the peace and tranquility of people,
- Defamation offense,
- Violation of privacy,
- Recording of personal data,
- Theft
- Damaging property
- Abuse of trust,
- Using bonus bills,
- Fraud offense (TPC art. 157),
- Disposing on lost or accidentally recovered items

- The crime of gratuitous exploitation,
- Purchasing or accepting instruments of crime,
- The crime of releasing an animal that could cause damage,
- Endangering traffic safety,
- The crime of deliberately and negligently polluting the environment,
- Causing noise,
- Causing zoning pollution,
- Commencing spoiled or modified food or drugs,
- Using or possessing drugs,
- Unlawful burial,
- Counterfeiting money,
- The crime of breaking a seal,
- Corrupting, destroying, or concealing an official document,
- Making a false statement in the preparation of an official document,
- Forgery of private document,
- Corrupting, destroying, or concealing a private document,
- Misusing an open signature,
- Threats to create fear and panic among the public,
- incitement to commit a crime,
- praising the crime and the criminal,
- The crime of inciting people to hatred and enmity or humiliating,
- Incitement to disobey the law,
- Misusing religious services while on duty
- indecent acts and obscenity,
- Prostitution,
- Providing a place and opportunity for gambling,
- Begging,
- Ill-treatment of the people living together in the same residence,
- Violation of the obligation arising from family law,
- Kidnapping and detention of a child,
- Usury,
- Illegally hacking the information system,
- Blocking, corrupting, destroying, or changing the information system,
- Misuse of Banks or credit cards,
- Abuse of Power,
- Resisting duty,
- Slander,
- Using someone else's identity or identity information,
- Undertaking a crime,
- Fabricating a crime,
- Harboring a criminal,
- False testimony,
- Perjury,
- False expertise or false interpreting,
- Attempting to influence a judge, expert or witness
- Not reporting a crime,
- violating the confidentiality of the investigation or prosecution,
- Attempting to influence a fair trial,
- Abuse of guard duty,
- Entering the penitentiary institution or detention house instead of someone else,
- Escaping and rioting of a convict or detainee,
- Bringing prohibited items into the penitentiary or prison,
- Insulting the President,
- Alienating the public from military service,
- Entering military restricted areas

Assize Courts: The assize court or heavy criminal court, is the court that deals with the most serious crimes with the longest punishment stipulated in the law in the first-degree criminal proceedings, its duty is regulated in Article 12 of TCP no.5235. Whether any crime is within the jurisdiction of the assize court is determined by taking into account the criteria set by Article 12 of the Law No. 5235 in terms of the nature of the crime and the amount of punishment. The criminal court of first instance is in charge of dealing with crimes that are not clearly stated to be within the scope of the duty of the assize court. If the accused is under the age of 18, the juvenile heavy criminal court carries out the judicial function. There are three basic criteria in terms of crimes that fall under the jurisdiction of the assize court. These criteria are:

1. Unless special laws expressly give authority to deal with a separate crime, assize courts are responsible for dealing with the following crimes:
 - Looting (Extortion) (TCP art. 148, 149),
 - Voluntary manslaughter (TCP art. 81, 82),
 - Aggravated injury due to the consequence (TCP art. 87/4),
 - Causing death by negligence (TCP art. 85/2),
 - Extortion (TCP art. 250/1 and 2),
 - Embezzlement (TCP art. 247),
 - Bribery (TCP art. 252),
 - Forgery of official documents (TCP art. 204/2),
 - Major fraud offense (TCP art. 158),
 - Fraudulent bankruptcy (TCP art. 161).
2. Among the crimes defined in the Fourth, Fifth, Sixth and Seventh Chapters of the Book two Part four of the TPC No. 5237, the crimes within the scope of Articles 318, 319, 324, 325 and 332 of the TPC are not among the crimes that fall under the jurisdiction of the assize court. However, the authority to hear the cases regarding the following crimes, belongs to the assize court:
 - Offenses against the sovereignty of the state and the dignity of its bodies,
 - Offenses against the constitutional order and the functioning of this order,
 - Offenses against the national defense,
 - Crimes against state secrets and espionage,
 - Offenses of political nature, such as the crime of making propaganda and membership of an organization, which are within the scope of the Anti-Terror Law No.3713.
3. The assize court is responsible for hearing the cases regarding all crimes that require aggravated life imprisonment, life imprisonment and imprisonment for more than ten years, that is, with an upper limit of more than 10 years (Art. 12 of the Law No. 5235). For example, in cases related to forgery of money (TCP art.197/1) and drug production or trafficking crime (TCP art.188) regulated in article 197/1 of the TCP, the heavy penal court is in charge due to the upper penalty limit.

Juvenile Courts: is in charge of dealing with the cases brought against the children who were driven to crime due to their underage, related to the crimes that the criminal court of first instance is responsible for. (CKK No. 5395, art. 26/1).

Juvenile Heavy Criminal (Assize) Courts: It oversees grave crimes committed by children and brought against children for crimes that otherwise would be prosecuted by the assize /high criminal court. (CKK No. 5395, art. 26/2). The concept of child includes all individuals who have not reached the age of 18. Anyone under the age of 18 is considered a child. The nature of the crime determines which courts will judge the child's crime, namely the juvenile court of the juvenile heavy criminal court. If the same crime, which is the subject of the juvenile trial, falls under the jurisdiction of the criminal court of first instance for those over the age of 18, the juvenile court is in charge, and if it falls under the jurisdiction of the heavy penal court.

Note: The formation, duties and powers, functioning and trial procedures of all special and general courts in the Turkish legal system shall be regulated by law (See Turkish Constitution, Article 142)

(1.2.2) DUTIES AND AUTHORITIES OF JUDGES IN GENERAL

A judge is a person who works in the court and makes decisions by staying within the framework of the rules of law. Judges resolve disputes that individuals have with the state or other individuals.

- No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, make recommendations or suggestions. (See Constitution Article 138, II; HSK Article 4, I).
- No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial (see Constitution Article 138, III).
- Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution (see Constitution, Article 138, IV).
- Judges shall not be dismissed. (See Constitution article 139, I; HSK article 44).
- Unless they request, Judges shall not be dismissed before the age of 65. (See Constitution Article 139, I; Article 140, IV; HSK Article 44).
- Judges shall not be deprived of their salaries, allowances or other rights relating to their status, even in cases of the abolition of a court or a post. (See Constitution Article 139, I; HSK Art. 44, 45).
- The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their posts or place of duties, the initiation of disciplinary proceedings against them and the imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training, and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges (See Constitution, Article 140, III).

(1.2.3) MAGISTRATES

The criminal magistrate functions as a judge/court that examines some investigation proceedings and objections to these proceedings or to some administrative actions (eg, objection to administrative fines) according to the Criminal Procedure Law No. 5271. Although it is regulated as a judge, it is also legally defined as a “court” since it is considered as an impartial and independent judiciary in the practice of the European Court of Human Rights, and it is also responsible for deciding on secondary criminal cases such as arrest (Law No. 5235, art.10).

The criminal magistrates is in charge of dealing with some of the proceedings at the investigation stage. But the prosecution stages, the trial stages after the opening of a criminal case with an indictment, are carried out by the following courts, depending on the nature of the accused and the crimes:

Criminal magistrates are responsible, except for special authorizations, for the decisions during the investigation phase of a criminal procedure, carrying out the works and examining the objections made against them. (Law No. 5235, article 10)

According to the Criminal Procedure Law No. 5271, the criminal magistrate is responsible for:

- Stationary mental examination - to assess the clients mental health (TCCP Art.74),
- Internal body examination and decisions to take a sample from the body (TCCP Art.75),
- Molecular genetic examination decisions (TCCP Art.78),
- Appeals against the arrest warrant (TCCP Art.91/5),
- Objections to the detention decision (TCCP Art.91/5),
- Arrest decisions and examination of the objection to the arrest (TCCP Art.100 -m.101),
- Judicial search warrants (TCCP Art.78),
- Prevention search decisions (Police Duties and Powers Law Art.9/1)
- Seizure decisions (art.123-134),
- Judicial control decisions (TCCP art.109-110),
- Decisions to restrict the defense counsel's authority to review the file (TCCP art.153/2),

- Publication ban decisions regarding the investigation file (Rules according to Article 3/2 of the Press Law).
- Examinations of decisions given by other magistrates as the appeal authority
- Examinations of decisions of the Public Prosecutor's Office not to prosecute as an appeal authority,
- Examinations of the decisions of the public prosecutors regarding the postponement of the opening of the public case as an appeal authority,
- Decisions as the appealing authority against administrative sanctions given by the administrations, in cases stipulated by the laws.

Objections against the decisions of the criminal magistrates regarding the investigation proceedings are made by making a petition to the authority that made the decision or by making a statement to the record clerk, within seven days after the parties learned about the decision.

(1.2.4) PROSECUTORS

Prosecutors serve the justice as the counsel for the prosecution in criminal proceedings. The Prosecutor's Office is the authority that opens a criminal case on behalf of the state by performing the duty of prosecution in Criminal Procedure. Depending on the suspicion that a crime has been committed, prosecutors personally manage the investigation phase regarding the alleged crime.

Prosecutors are administratively affiliated to the Ministry of Justice. It is the duty of the Public Prosecutors to make an investigation and open a public case, even if there is no complainant, on the crimes falling within the jurisdiction of the High Criminal Court and on the matters where the law requires to file a public lawsuit. Again, in these preparatory investigations, it is the duty of the prosecutors to collect evidence and question the suspects. If the duties of prosecutors are listed item by item. Prosecutors;

- Carries out a preliminary investigation and initiates a public lawsuit, whether there is a complaint or not, on serious criminal offenses and on issues where a public lawsuit is required.
- Collects the evidence and interrogates the accused.
- Makes forensic examination of corpses, in cases of death.
- Prepares indictment and carries out judicial decisions.
- Defends the rights of the society and the people harmed by the crime.
- Opens civil lawsuits arising from the law.

According to Art. 161 of the Criminal Procedure Code,

- The public prosecutor may conduct any kind of exploration either directly or through the judicial security forces under his command; in order to achieve the outcomes mentioned in the above Article. He may demand all kinds of information from all public servants. In cases where there is a need to make a judicial interaction outside of his judicial district in the course of his judicial duties, the public prosecutor shall ask the public prosecutor at another district to conduct that interaction.
- The members of the judicial security forces are obliged to notify individuals whose cases they are handling, if the individual has been arrested without a warrant. Judicial law enforcement officers are obligated to immediately notify the prosecutor, under whose orders they work, about the arrested persons, incidents and the measures implemented.
- The public prosecutor shall deliver the orders to the members of the judicial security forces in written form and in exigent cases orally. (Additional sentence: 25/5/2005 - 5353/24 art.) The oral order shall be notified in written form as well, within the shortest period possible.
- The other public employees are also obliged to supply the information and documents that are needed during a pending investigation to the required public prosecutor without any delay.
- Public employees who misuse or neglect their duties stemming from the statute, or duties required of them according to provisions in the statute, as well as superiors and officers of the security forces who misuse or neglect to execute the oral or written demands or orders of the public prosecutors, shall be prosecuted by the public prosecutors in a direct way. Governors and administrative chiefs of districts shall be subject to provisions of the Act on Adjudication of Civil Servants and Other

Public Employees, dated 2 December 1999, No. 4483. The highest degree superiors of the security forces shall be subject to the provisions of adjudication, which are applicable for judges while they are under adjudication for crimes related to their offices.

- (Amended: 2/1/2017-KHK-680/9 art.; Adopted in kind: 1/2/2018-7072/8 art.) The investigation of crimes committed for personal reasons by the administrative chief of district shall be conducted by the public prosecutor at that city, and investigation of crimes committed by the governor shall be conducted by the chief public prosecutor at the nearest court district, applying the general provisions. In the crime is detected in the act and falls under the jurisdiction of the high criminal court, the investigation is carried with the general provisions.
- (Annex: 31/3/2011-6217/21 art.) If an investigation was transferred with non-jurisdiction on the point of venue, and the public prosecutor decides that he is also unauthorized, he sends the investigation file to the high criminal court closest to the high criminal court he works in, for the determination of the authorized prosecutor's office. The decision of the court on this matter is final.
- (Annex: 21/2/2014-6526/15 art.) Public prosecutors directly investigate the crimes regulated in Articles 302, 309, 311, 312, 313, 314, 315 and 316 of the Turkish Penal Code, even if they were committed while on duty or due to his duty. Article 26 of the Law on State Intelligence Services and National Intelligence Organization dated 1/11/1983 and numbered 2937, is reserved.
- (Annex: 15/8/2017-KHK-694/146 art.; Adopted in kind: 1/2/2018-7078/141 art.) The authority to investigate and prosecute a deputy who is alleged to have committed a crime before or after the election belongs to the Ankara Chief Public Prosecutor's Office and the heavy penal court. The Chief Public Prosecutor or his representative shall personally carry out the investigation. The Chief Prosecutor or his deputy may request that the investigation be carried out partially or completely from the Public Prosecutor of the place where the crime was committed. In cases where delay is inconvenient, the Public Prosecutor of the place where the crime was committed collects the obligatory evidence and, if necessary, makes a request from the magistrates

(1.2.5) LAW ENFORCEMENT (POLICE, GENDARME, CUSTOMS ENFORCEMENT AND COAST GUARD OFFICERS)

Law enforcement officers are protecting the fundamental rights and freedoms of the individuals, ensuring safety and order, protecting public order, taking measures to prevent crime and fight crime, clarifying crimes and handing over the suspects to judicial authorities, helping those who seek or need help and those in danger. law enforcement; (See Civil Servants Law No. 657, Police Duties and Authority Law No. 2559, Turkish Constitution)

- Law enforcement personnel cannot be assigned to services other than those assigned by the legislation. Their authorities and responsibilities are clearly determined, and they fulfill the orders of their superiors in accordance with the legislation. An order, which constitutes a crime, is not carried out in any way.
- No disciplinary punishment can be given to a law enforcement personnel unless the right of defense is granted. Disciplinary decisions cannot be excluded from judicial review, with the exceptions specified in the law. The law enforcement officer who is alleged to have committed a crime related to his duty has the right to be represented by a lawyer, to be defended and has the right to a fair trial.
- Law enforcement officers respect the independence and impartiality of the judiciary, they cannot object to the decisions of judicial authorities.
- Judicial remedy is open against all kinds of actions carried out by the law enforcement.
- Law enforcement personnel work in effective cooperation with the judicial authorities at every stage of the investigation.
- Law enforcement personnel respect the role of the advocate, this ensures that detainees effectively use their "right to benefit from the legal aid of a lawyer".
- In case there is a reasonable suspicion about a crime that has been committed or is likely to be committed, the judicial investigation is carried out in accordance with the method prescribed by the legislation, in accordance with the orders or decisions of the competent authority.
- Law enforcement personnel act according to the principle of 'innocent until proven' by a court decision.
- Without any discrimination, Law enforcement personnel inform the arrested persons about their rights to learn about the reason for their arrest and the allegations about them, their right to remain

silent, to notify a person that they have been caught, to benefit from a lawyer, to object to their arrest, and law enforcement personnel assist them in the exercise of these rights.

- Law enforcement personnel remind victims and witnesses of their rights recognized by the law and ensure their safety when threatened.
- Law enforcement personnel conduct the investigation objectively and fairly, they respect the special situations and needs of women, children, the elderly and the disabled.
- When necessary, law enforcement personnel explain the proceedings during the investigation to the parties in a language they understand and that they benefit from an interpreter if needed.
- Law enforcement personnel keep complete records of those kept in custody or detained.
- Law enforcement personnel ensure the safety, health, sanitation and proper nutrition needs of detainees or the ones in custody.
- Persons whose freedom has been restricted for any reason other than the suspicion of having committed a crime, are kept in a separate place from the suspects. Women who are detained are separated from men and children are kept separately from adults.
- While performing their duties, law enforcement personnel respect everyone's right to life, and other fundamental rights and freedoms specified in the Constitution.
- Law enforcement personnel cannot subject anyone to torture, inhuman treatment, degrading treatment or punishment. There is never justification for torture.
- Law enforcement personnel cannot limit anyone's freedom unless they comply with the reasons and method prescribed by law.
- Law enforcement personnel use a proportionate force when necessary and only to achieve a legitimate aim.
- Law enforcement personnel act with dignity and honesty. While performing their duty, they act impartially and do not discriminate between people.
- Law enforcement personnel cannot interfere with anyone's private life, with exceptions in the law.
- Law enforcement personnel protect all kinds of information and professional secrets they obtain, unless otherwise stated in the legislation.
- Law enforcement personnel pay great attention to the protection of information that is related to the private life of individuals or that may harm personal rights; Except for legal obligations, they cannot disclose this information and cannot use it in favor of itself or third parties.
- Law enforcement personnel consider the situations and needs of vulnerable people such as the elderly, disabled and children in their practices.
- While performing their duties or intervening in an incident, law enforcement personnel first reveal their professional identity and show their identity card under normal conditions.
- Law enforcement personnel, acting with honor and dignity, take a stand against all kinds of corruption within the institution. In case of encountering corruption and irregularity, it intervenes within its authority and notifies his superiors of situations exceeding his authority.
- Law enforcement personnel, by using their duties, titles, and powers, do not provide benefits in favor of themselves, their relatives or third parties; and do not engage in favoritism.
- Law enforcement personnel cannot receive gifts or gain benefits due to their duties. All kinds of goods and benefits that affect or may affect the impartiality, performance, decision, or performance of law enforcement personnel, whether they have economic value or not, and which are accepted directly or indirectly, are within the scope of gifts.
- Law enforcement personnel may use public buildings and vehicles and other public goods and resources only for public purposes and service requirements; they are required to protect these buildings and vehicles and take any necessary measures to keep them ready for service at any time.
- Law enforcement personnel intervene with the crime when faced, regardless of the service branch, place or time, within the boundaries of their jurisdiction. They prevent the continuation of the crime and ensure the detection of suspects and criminal evidence while delivering them to the authority.

(1.2.6) FORENSIC INSTITUTE

The Forensic Medicine Institute affiliated to the Ministry of Justice was established to act as an expert in justice affairs, to organize symposiums, conferences and similar events in the fields of forensic medicine, forensic science other specialization programs and in the fields of duty and to implement training in those areas. The duties of the

Forensic Medicine Institute are as follows (see Law No. 2659 on the Forensic Medicine Institute):

- To provide scientific and technical opinions on forensic medicine issues sent by public institutions, courts, judgeships and prosecutors and in areas deemed appropriate by the Institution.
- To provide forensic medicine specialization and minor specialization trainings in accordance with the legislation.
- To organize seminars, symposiums, conferences and similar events in order to carry out studies in the fields of forensic medicine and forensic sciences, to implement training programs related to these, and to assist the preparation and execution of forensic medicine-related training programs to be prepared by the relevant institutions, organizations and boards.
- To provide compulsory health services during forensic medicine services.

(1.2.7) AUTOPSY (SUSPICIOUS DEATH INVESTIGATION/RESEARCHERS)

Autopsy shall be conducted in the presence of the public prosecutor by two medical doctors, one of them being a coroner, the other an expert from the field of pathology or an expert of other branches, or a physician who is a general practitioner. The medical doctor provided by the defense counsel may be present during the autopsy, as well. In cases of necessity, the autopsy may also be conducted by one medical doctor only; the report on autopsy shall contain clear indications about this point. The principles covered by the autopsy are:

- Where the condition of the body /corps permits, autopsy shall consist of an opening of the head, chest and abdomen. In principle, it is performed by two practitioners, one being a forensic doctor, the other a pathologist and potentially the physician may be present if requested by the lawyer. This strengthens the “right to a fair trial”, by ensuring the evidence is reliable for the investigation, the lawyer can contribute to the determination of certain evidence at this stage.. Although this is the rule, it has also been accepted in some regions that the procedure can be performed by a physician when necessary.
- However, this medical doctor may be asked to be present during the autopsy and give information about the course of the illness.
- The autopsy will be carried out in the presence of a judge upon the motion of the public prosecutor. In non-delayable cases, the autopsy may be carried out in the presence of a prosecutor.
- The decision for the removal and examination of a buried corpse and the autopsy of the corpse will be made by a judge. However, if it is non-delayable, the Public Prosecutor can also decide.
- The decision to exhume the body will be immediately notified to a relative of the deceased; however, reporting will not be carried out if it would jeopardize the purpose of the investigation, for example if the body is likely to be destroyed or if it is difficult to reach the relative.
- During the interactions described in the above-mentioned subparagraphs, pictures of the body/corps shall be taken.

(1.2.8) GUARDIANS (PRISON OFFICERS)

Guardians are personnel who assist those in juvenile prisons and prisons with their housing, food, and survival needs. In addition, the prison officers help the detainees to reintegrate into society while also being responsible for the order and discipline in prisons.

Guardians ensure the control of the detainees and convicts and the order of the prison. They have basic duties such as resolving disputes between detainees and convicts and ensuring that they live in adequate conditions, which are not in violation of national or international standards. The execution and protection officer acts as a bridge between the detainees, convicts and the prison administration.

A guardian, who ensures the functionality of the prison, is responsible for maintaining the order in the prison. In addition, the correctional officer contributes to the rehabilitation processes by ensuring that the detainees lead an orderly life under humanitarian conditions.

- Keeping records about detainees,
- Searching the detainees and keeping their belongings safe,
- Accompanies the detainees to their wards and locking their doors,
- Checking the wards on regular intervals,
- Prevent escaping attempts of the detainees from the prison,

- Provide the needs of the detainees such as food and cleaning
- Counting the detainees,
- Resolve disputes between detainees,
- Be responsible for the administration in the absence of an administrative officer,
- Making periodic searches and therefore preventing substances that are prohibited.

(1.2.9) COURT TRANSLATORS

The purpose of the translator is to reinforce the right to defense by including the principle of protection. Thus, it has been accepted that the accused or the victim, who does not speak Turkish, should be told through a translator into their language, on an equal basis, the parts of the file that are necessary and useful for defense. (See Code of Criminal Procedure art. 202)

- If the accused or victim of the offense does not speak enough Turkish and is unable to express themselves, the essential points of the accusation and the defense shall be translated by an interpreter appointed by the court.
- The essential points of the accusation and the defense shall be explained to the accused or to the victim, in a manner and in a language that they can understand
- The provisions of this article are also applicable at hearings of the suspect, victim and witnesses in the investigation phase. The interpreter shall be appointed by the judge or the public prosecutor at this phase.
- Explain the indictment,
- Upon giving the opinion on the merits, the victim may make their oral defense in another language, which they are better able to express themselves in. In this case, translation services are performed by the translator chosen by the accused from the list in accordance with the fifth paragraph. The expenses of this translator are not covered by the State Treasury. This opportunity cannot be abused for the purpose of extension.
- The translators are selected from the list prepared every year by the provincial judicial justice commissions. Public prosecutors and judges can choose translators not only from the lists created for the province they are in, but also from the lists created in other provinces. The procedures and principles regarding the arrangement of these lists are determined by regulations.

(1.2.10) THE CONCEPT OF PROBATION

Probation is a criminal law institution that allows a criminal to carry out their sentence outside of prison during the trial period, as determined by the law. The convict is observed throughout this probation. The probation law is enacted on the grounds that prisoners can maintain ties with their family and adapt to the outside world. During the convict's sentence, whilst they are released on probation they are kept under surveillance.

Probation can be caused by many different reasons. For example, probation for drug use is a precautionary measure applied before a judgment is rendered against the person prosecuted. In this section, we will talk about the probation practice brought in accordance with Article 105/A and Provisional Article 6 of the Penal Execution Law No. 5275.

The Provisional Article 6 of the Law No. 5275 refers to a separate probation and execution system that has been enacted for crimes committed before 30.03.2020. Accordingly, with the Provisional Article 6, the following regulations have been introduced in terms of crimes committed before this date:

- The probation period will be applied as 3 years.
- Some imprisonment sentences will benefit from the provisions of conditional release if they serve 1/2 of their sentences in the penitentiary institution.

Both regulations above will be applied for crimes committed before 30.03.2020. For crimes committed after 30.03.2020, the execution provision in Article 105/A, no. 5275 will be valid, not the regulation we have explained above. It should be noted that it is sufficient that if the crime was committed before 30.03.2020 but the conviction occurs at a later date, the convict will be able to benefit from the provisions of probation and conditional release in the Provisional Article 6.

For example, with the new execution regulation, a convict serving a prison sentence of 6 years or less will be entitled to direct release.

In addition, convicts who are sentenced to 7 years in prison stay 6 months, 8 years in prison stay 1 year, 9 years in prison stay 1 year 6 months, 10 years in prison stay 2 years, and the ones sentenced to 15 years in prison stay for 4 years and 6 months, have the right to be released.

Convicts who commit the following crimes cannot benefit from the provisions of 1/2 execution provision “ and “3 years probation” introduced by the Provisional Article 6 of the Law No. 5275 regarding crimes committed before 30.03.2020. (Reminder that the following crimes also have permanent 1/2, 2/3 or 3/4 execution rates, see: Conditional release)

- Killing with intent (Arts. 81, 82, 83) ,
- Intended wounding which has been aggravated by its result against antecedents or descendents, or spouse or brother/sister, a person who cannot protect himself due to corporal or spiritual disability,
- Intended wounding which has been aggravated by its result (Art. 87)
- Torture (Arts. 94, 95),
- Torment (Art.96),
- Offenses against Sexual Immunity (Arts. 102, 103, 104, 105),
- Offenses Against Privacy and Secrecy of Life, Violation of Communicational Secrecy, Tapping and recording of conversations between the individuals, Violation of Privacy, Recording of personal data, Unlawful delivery or acquisition of data, Qualified forms of offense, Destruction of Data (Arts. 132,133,134,135,136,137,138),
- Production and trading of addictive or relieving/exciting drugs (Art. 188),
- Crime against the security of Turkish Republic (Alliance for offense included),
- Offenses against Constitutional Order,
- Offenses against national defense,
- Offenses against state secrets,
- Offenses within the scope of TMK (Anti-Terrorism Law) No. 3713, for example the crime of propaganda of an organization,
- Convicts whose conditional release right has been revoked, due to the same provision.

In terms of crimes committed until 30/3/2020, the calculation of the conditional release period is determined according to the execution regime to which they are subject. For example the time spent in the penitentiary institution; if the convict was under fifteen, one day is calculated as three days, if under the age of eighteen, one day is considered as two days. (Provisional Article 6/4 of Law No. 5275).

If one of the crimes of the same convict is within the scope of the law and the other is not, how will the application be? The most common problem in practice is that one of the crimes committed by the convict remains within the scope of the Provisional Article 6, while the other crime is excluded. In this case, 1/2 sentence reduction is made for the crime within the scope of Temporary Article 6. Thus, after the probation period is calculated, it is applied as 1 year (Execution Law art.105/A). In practice , a convict whose one of the crimes he has committed is outside the scope of the law, cannot benefit from the 3-year probation period brought by the Provisional Article 6 no.

Situation of Judicial Fines: Those convicted of judicial fines have to pay those in any case, they don't benefit from the provisions of conditional release and probation from the Provisional Article 6 (Criminal Execution Law art.105/A-4 and art.106/ 9). Judicial fine conviction, whether given directly, accompanied by a prison sentence, or commuted from a prison sentence, cannot benefit from the new regulation. If there is both a judicial fine and a prison sentence in the same provision, the judicial fine must be paid. Provisional Article 6 regulation numbered 5275 is only used for imprisonment.

Implementation in Case of Repetition of Crime: The prisoners who were applied the execution regime for recidivist won't benefit the 1/2 execution sentence brought under the Provisional Article 6 of the Law No. 5275, the execution rate in case of recidivism is 2/3. However, convicts who are applied recidivism provisions, can benefit from the 3-year probation measure within the scope of the same law. In case the recidivism provisions are applied for the second time, the convict cannot be released on probation and cannot be placed in an open prison and also cannot benefit from probation.

Attempted Crime, Incitement, Assisting and Unjust Provocation: There is no special regulation in the Provisional Article 6 of the Law No. 5275 for the cases of attempt and participation in the crime. In cases of attempting, incitement or assisting “crimes that cannot benefit from the regulation” in the law, the application of conditional release or probation cannot be benefited from. In other words, those who participate or attempt the crimes that are excluded from the scope, are subject to the regulation of the original crime that they were affiliated with under the law. Likewise, those who commit a crime under unjust provocation are also subject to the probation and execution regime to which that crime is subject.

Negligent Crime and Eventual intent: Negligent crimes (including conscious negligence) can benefit from all kinds of rights and regulations in the Provisional Article 6 of Law No. 5275. For example, those who commit murder by negligence (e.g. death by traffic accident) can benefit from the regulation. There is no special regulation in terms of eventual intent. Whichever article of the TCP is violated by the crime committed, whether or not it will benefit from the Provisional Article 6, is determined according to this article. For example, if the crime of manslaughter has been committed, the provisional article 6 cannot be used. However, TCP art. In the context of 86/1, the convict has the right to benefit from the Provisional Article 6 when the crime of intentional injury is committed.

Status of Captured Convicts: Convicts who have committed a crime before 30.03.2020 and have a criminal conviction and did not surrender by failing to comply with the invitation sent by the execution prosecutor or for whom an arrest warrant has been issued directly, regardless of when they surrender to serve their sentence, they will benefit from the execution reduction regulated in the Provisional Article 6 of the Law No. 5275 and from the application of probation law.

Situation of the Defendants with/without Arrest: The defendants whose trial is ongoing, will benefit from the provisional article 6 of the Law No. 5275, provided that the crime was committed before 30.03.2020 and the verdict is finalized. Regardless of the stage of the trial, whenever the criminal conviction becomes final, the reduction of execution and probation in the Provisional Article 6 shall be applied with the finalization of the sentence. While evaluating the detention conditions of the detained suspects, the reduction in the probation period in the Provisional Article 6 of the Law No. 5275 will definitely be taken into account. The detainees whose criminal qualifications fall within the scope of the Provisional Article 6 of the Law No. 5275, will be released earlier.

Status of Those Currently on Probation: The statutes of convicts who are currently on probation should be reissued. Since the convicts who are on probation for a crime within the scope of the Provisional Article 6 of the Law No. 5275 will benefit from 1/2 execution reduction, the probation period will also be shortened.

Situation of Those Who Have Already Breached Their Obligations on Probation: Those who violate the obligations for the probation measure (violation of signature, violation of the seminar, removal of electronic handcuffs, not being at the designated place at certain hours, etc.) can benefit from the 1/2 sentence rate reduction, but cannot benefit from the 3-year probation period.

Status of Offenders While on Probation: Those who are prosecuted for a crime despite acting in accordance with their probation obligations, stay on probation until their conviction is finalized, as they benefit from the presumption of innocence. Once the conviction is finalized, a separate execution process will run, requiring the convict to be taken to prison and the collection of sentences. In addition, if the convict has been arrested due to a crime, the period of probation is calculated by adding the period of detention to the period of conditional release. Convicts also have the right to deduct the time they've been in detention; the next offense will be calculated accordingly and with the deduction.

Situation of Those Living Abroad: If those living abroad want to benefit from probation within the scope of Provisional Article 6 of Law No. 5275, they have to act in accordance with the obligations determined in Türkiye during the probation period. There is no signature or similar application in the consulate. The probation law is a system that can only be applied within the borders of Türkiye.

5275 p. Law Provisional Article 6 Release Calculation Method: If there is more than one prison sentence, all penalties must be added up. 1/2 of the total penalty must be found and when the 3 years' probation measure is deducted from this calculated penalty, the remaining time is the period during which the convict must remain in prison in order to be released on probation. For example, the conditional release/conditional release of a convict who is sentenced to 10 years in prison is calculated as follows: 1/2 of a 10-year prison sentence is 5 years. 3 years of probation is deducted from the 5-year prison sentence; thus it becomes clear that this prisoner must remain in prison for 2 years.

NOTE: Implementation of the Decree Law No. 671 and the Law No. 7242 Together: With the Decree No. 671, which brings 1/2 execution reduction and 2 years' probation for some crimes committed before 01.07.2016, and the provisions of the Law No. 7242, which brings the 1/2 reduction and 3 years' probation for some crimes committed before 30.03.2020, cannot be applied at the same time. The law in favor of the convict is applied only once. If it is in their favor, to those who benefit from the Law No. 671, a new calculation is made according to the Law No. 7242 and is applied.

Bibliography

ADAL, Erhan: Hukukun Temel İlkeleri El Kitabı, Marmara Üniversitesi Yayın No: 428, İktisadi ve İdari Bilimler Fakültesi Yayın No: 372, İstanbul, 1985.[\[MB1\]](#)[\[FT2\]](#)

AKAD, Mehmet / VURAL DİNÇKOL, Bihterin: Genel Kamu Hukuku, 7. Basım, Der Yayınları, İstanbul, 2013.

AKTAŞ, Sururi: Hayek'in Hukuk ve Adalet Teorisi, Liberte Yayınları, Ankara, 2001.

ALİEFENDİOĞLU, Yılmaz: "Hukuk-Hukukun Üstünlüğü-Hukuk Devleti", Ankara Barosu Dergisi, 2001

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02



FUNDAMENTAL RIGHTS OF THE ACCUSED IN TURKISH CRIMINAL PROCEEDINGS

02

(2.1) UNLAWFUL SEARCH AND SEIZURE

(2.1.1) UNLAWFUL SEARCH (TCPARTICLE 120)

Unlawful judicial and preventive searches made by law enforcement officials refer to when a search takes place in a residence or a workplace without a court or criminal magistrate's decision or without reasonable doubt.

- Any public officer who unlawfully searches a person or their belongings is sentenced to imprisonment for between three months and one year.
- For lawful searches by law enforcement officers: *(See Regulation on Judicial and Prevention Searches Their Regulation, Code of Criminal Procedure dated 4/12/2004 and numbered 5271, Police Duties and Powers Law No. 2559 dated 4/7/1934, Gendarmerie Organization dated 10/3/1983 and numbered 2803, Duties and Authorities Law, Coast Guard Command Law No. 2692 dated 9/7/1982, (Amended expression: OG-29/4/2016-29698) AntiSmuggling Law No. 5607 dated 21/03/2007, 10/6 /1949 dated and 5442 numbered Provincial Administration Law, (Amended expression: OG-29/4/2016-29698) Law on the Prevention of Violence and Irregularity in Sports dated 31/03/2011 and numbered 6222, dated 10/6/2004 and numbered 5188 Law on Private Security Services, Associations Law No. 5253 dated 4/11/2004, State of Emergency Law No. 2935 dated 25/10/1983, Martial Law Law No. 1402 dated 13/5/1971 and dated 2/7/1993 and the Decree Law No. 485 on the Organization and Duties of the Undersecretariat of Customs and other relevant legislations.)*

In the above-mentioned Article, an unlawful search of a person's body or belongings is defined as a crime independent from the crime of abuse of power. This provision constitutes the sanctions for the violation of privacy, protected by the United Nations Universal Declaration of Human Rights dated 10.12.1948 (article 12), the European Convention for the Protection of Human Rights and Fundamental Freedoms dated 4.11.1950 (article 8, paragraph 1) and the Turkish Constitution.

Searching a person or their belongings constitutes an attack to the right to privacy, which is a continuation of personal immunity, as well as an infringement on human dignity.

For example, an illegal search of a person's pockets, handbag, suitcase or their private car will constitute that crime. If the search is carried out in a house that has been entered without authorization it also violates the inviolability of domicile and for this reason, the responsible party is determined according to the rules of actual aggregation.

The perpetrator of this crime must be a public official, thus the crime in question has the characteristics of a special offence. The term "unlawfully" is interpreted as not being permitted by the current legislation and it is clear that this crime would not apply to searches permitted by laws and regulations. In order for the crime to occur, a public official must have violated the liberty of a person by overstepping their duty or exceeding their authority. To conclude, the word "unlawful" includes overstepping or abusing of authority.

(2.1.2) UNLAWFUL SEIZURE (TCPC ARTICLE 127 ET AL. PROVISIONS)

For the purpose of preventing the crimes defined in the Turkish Penal Code and other special penal laws, or because it may be evidence of the crime or it is subject to confiscation, the process of removing the possession of the possession, even without consent, is called "seizure". (CMK art. 13, Regulation on Judicial and Prevention Searches, art.4)

In criminal procedure, seizure is considered as a measure that puts the property under the temporary ownership of the state. Therefore, seizure is not a punishment, but a protection measure. The permanent transfer of goods to the property of the state is called "confiscation". Confiscation is a sanction, and a confiscation decision can only be given by a judge as a result of a trial.

- The seizure decision is given by the judge of the magistrate in the investigation phase and by the court where the case was filed during the prosecution phase.

- The seizure may be conducted by members of the security forces upon the decision of a judge, or if the case is urgent, upon the written order of the public prosecutor; in cases where it is not possible to reach the public prosecutor, upon the written order of the superior of the security forces. (TCPC art.127)
- If a seizure was made without the warrant of a judge, the seizure shall be submitted to the judge who has jurisdiction within 24 hours. The judge shall reveal their decision within 48 hours from the act of seizure; otherwise, the seizure shall be automatically void. (TCPC art.127/3)
- The individual whose goods or property has been seized may ask the judge to give an order to release them at any time. (TCPC art.127/4). The seizure measure applied during the investigation or prosecution phases can be appealed.
- The right to appeal against a seizure decision also stands.

(2.2) UNLAWFUL ARREST AND UNLAWFUL DETENTION (TCPC art. 90, art. 91)

The responsibility of the state will come to the fore when unlawful arrest or detention, which are among the protection measures, are applied by law enforcement officers and competent authorities.

The Criminal Procedure Law No. 5271 was envisaged to pay compensation in terms of search and seizure protection measures, as well as unjustified capture (detention) and detention processes in the old law no. 466. However, since the Law No. 5271 foresees the payment of compensation only in terms of capture, arrest, search and seizure operations, the damage caused by the implementation of other protection measures will not be covered within the scope of TCPC article 141.

For example, if damage occurs due to protection measures such as search, copying and seizure of computers and computer logs, detection of communication, assignment of secret investigators and technical monitoring, no compensation can be claimed within the scope of TCPC article 141. However, this does not mean that the damages caused by these protection measures will not be compensated at all. On these terms, the accused person will be able to file a full remedy action (compensation) against the state in accordance with the provisions of the administrative law.

(2.2.1) REASONS OF COMPENSATION

The reasons for which individuals can claim compensation from the state are listed one by one in Article 141 of TCPC. The reasons for compensation are as follows;

- **If arrested or detained unlawfully, against the provisions foreseen by the statutes, or for whom the period of arrest has been extended against the regulations listed in statutes;** According to TCPC Article 141/1-a, the implementation of one of these procedures causes the state to be liable for compensation, if the necessary conditions for the arrest, detention or continuation of detention stipulated in the TCPC or other laws are not present. According to the decision of the 9th Penal Chamber of the Court of Cassation dated 18.12.2003 and numbered 2335/2281, compensation should be paid to the person who was arrested without a warrant of arrest and was released three days later. However, it should be noted that in cases where everyone has the authority to seize (eg, in flagrante delicto), damages arising from the use of such authority are not the responsibility of the state. Since the state authority is not used here, the state cannot be held responsible for the damages arising from their action.
- **Not being taken before a judge in a police detention within the period foreseen in the statute;** According to the Turkish Criminal Procedural Code, the detention period for individual crimes is 24 hours. But due to the difficulty in collecting evidence and the large number of suspects, the detention period for crimes committed collectively can be extended for a maximum of three days, not exceeding one day at a time, by the written order of the Public. If the detainees are not brought before a judge within these periods, the state will be liable for compensation.

- **If arrested with an arrest warrant without being told their legal rights, or if the request to use such rights had not been fulfilled;** it is an obligation to inform the arrested person about their rights under TCPC article 147. If this notification is not made and the person has not benefited, for example, from the legal assistance of a lawyer or the right to inform the family of the arrest decision, the state will be liable for compensation.
- **If the lawfully arrested person was not tried before the court and did not receive a judgment within a reasonable time;** the arrested person should be brought before the judicial authority within a reasonable time and the sentence against the person should be given within a reasonable time. The right to a trial within a reasonable time is evaluated within the framework of the right to a fair trial in Article 6 of the European Convention on Human Rights. As such, if the arrested person is not brought before the judicial authority within a reasonable time and the judgment against the person is not rendered within a reasonable time, the state will be liable for compensation.
- **If after having been lawfully arrested, a decision on no ground for prosecution has been issued or if the main trial has been acquitted;** According to TCPC Article 141/1e, after being lawfully caught or arrested, the person who is not prosecuted or acquitted can demand compensation. In this case, the judge does not examine whether the damage exists. If there is no room for prosecution or a decision of acquittal is revealed, compensation is awarded. The reason for the acquittal decision (lack of evidence, etc.) does not matter. Since the decision to postpone the announcement of the verdict is not considered as an acquittal decision, no compensation is awarded.
- **Compensation in the event of conviction;** According to TCPC Article 141/1-f, if the time spent in custody and detention is longer than the period of conviction, the state is liable for compensation. However, it should be noted that exceeding the conditional release (parole) period is not a reason for compensation.
- **If no explanation has been given of the grounds of their arrest and of the charges against them;** According to TCPC Article 97, the law enforcement authorities issue a report of the arrest and give a copy of the report to the person caught. In the arrest report, the reason of arrest is stated and what their rights are. If the person is not informed of their rights, the state's liability for compensation arises. For example, TPC art.141 crime of theft or art.148 crime of looting etc.
- **If their arrest status has not been notified to their relatives;** It is an obligation to inform the relatives of the person arrested in accordance with TCPC Article 95/1. Failure to comply with this obligation entails the state's liability for compensation.
- **If they have been subjected to an unproportional search;** According to TCP Article 141/1-i, the responsibility of the state can be applied for damages that occur during the execution of a search warrant.
- **If they have been subjected to a seizure of their property or of their assets although the requirements as foreseen in the code were not present, or measures of protection of their property were not taken, or the assets weren't returned timely;** According to TCPC Article 141/1-j, the state may be held liable for compensation if the confiscation decision is not met, the seized goods are used out of purpose, the necessary measures are not taken to protect the confiscated goods, and the seized goods are not returned in a timely manner.
- **Not Benefiting from the Opportunity to Appeal Against Arrest or detention;** If the arrested or detained person is not allowed to benefit from one of the procedures stipulated in the law, the compensation is again the state's responsibility.

- **Compensation in case of renewal of judgement;** Within the scope of TCPC art.323/3, if a retrial results in acquittal or with a decision not to impose a penalty, the person in question can apply to the state for material or moral compensation for the damages they have suffered.

(2.2.2) CONDITIONS OF COMPENSATION CLAIM

Compensation is not given automatically in criminal cases, but must be claimed with a separate trial. The conditions of the compensation claim based on the reasons in TCPC Article 141, are specified in TCPC Article 142. These are;

- Persons who have been subjected to unlawful arrest, detention, search and seizure can claim compensation pursuant to Article 141/1 of TCPC. If the person who has the right to claim compensation dies, the Supreme Court accepts that if a compensation lawsuit has been filed, their heirs can continue the lawsuit, but if it wasn't filed at the time of death, the heirs do not have the right to file a lawsuit.
- Within the scope of TCPC Article 141, the claim for compensation must be filed within three months from the acquittal or a non-prosecution notification to the person concerned, and within one year from the decision on acquittal or non-prosecution. If the compensation case is not filed within these periods, the claim is rejected without entering the merits.
- The claim for compensation mentioned in TCPC article 141 is made to the heavy criminal court that is located in the province where the injured person resides.
- This application is made with a petition. The petition must contain the information specified in TCPC art.141/2. If this information is not included in the petition, the court gives the applicant one month to complete the deficiencies. If the deficiencies in the petition are not completed within this period, the application will be rejected. It's important to mention that the lawsuit filed for wrongful arrest or detention is not subject to any fees.
- Pursuant to TCPC Article 142/5, in the compensation cases filed against the state within the scope of Article 141, a notification is made to the representative of the state treasury to convey its statements and to ensure the formation of a party. The Supreme Court pays particular attention to this matter, and it is the reason for the decision to be reversed.
- In compensation cases, the court gives its decision with a hearing. If the treasury representative is not ready despite the notification, a decision can be made in their absence. The applicant, the public prosecutor or the treasury representative may appeal against the decision made.
- In compensation cases arising from unjust arrest, only when the case is completely rejected is the attorney's fee awarded in favor of the defendant treasury, while the attorney's fee is not awarded in favor of the plaintiff.
- According to TCPC Article 141/1, all material or moral damages can be claimed from the state. The judge is bound by the claim and cannot award more than what is demanded.

(2.2.2.1) Material compensation

The person's loss of job due to arrest or detention, the attorney's fee, the severance pay for the termination of the employment contract and the claims for social assistance and bonuses can also be compensated. According to the Supreme Court, if the plaintiff was unemployed and did not present any evidence regarding their material losses during their detention, the person would be considered an unskilled worker and should be paid a net minimum wage in proportion to the period of detention.

When calculating material compensation, it is possible to determine the amount by considering the inflation rates. Likewise, in the decision dated 23.11.2004 and numbered 1- 177/203, the Supreme Court Criminal General Assembly decided that interests should be applied in pecuniary compensations. In addition, while determining the pecuniary damage, it is unlawful to reduce the compensation on the assumption that the plaintiff will not work on religious and national holidays.

Although it is possible to demand the attorney's fee as a financial compensation due to the unjust arrest and detention, the plaintiff must demonstrate their situation by presenting the evidence proving the payment made to the lawyer.

Apart from unjust arrest or detention, financial compensation can also be demanded due to unjustified searches and seizures. In the event that the seized goods are damaged under the supervision of the state, financial compensation can be requested from the state.

(2.2.2.2) Immaterial Compensation

The moral pain and grief of the arrested or detained person should be relieved, and may arise due to feeling discredited by their family and business environment, missing their family and relatives, the difficulties of being in prison, feeling depressed due to the restriction of their freedom, etc. Non-pecuniary compensations are demanded for these types of moral damages.

Although there is no objective criterion in determining a non-pecuniary compensation, it depends on the social and economic status of the plaintiff, the nature of the crime charged, the manner in which the plaintiff was arrested, the period of detention, etc. A reasonable amount is determined in accordance with the rules of rights and negotiation.

(2.3) AWARENESS OF THE RIGHTS OF THE ACCUSED

Persons arrested or detained must be informed of their rights immediately. At the time of the person's first arrest, the suspect is told five rights: a) For which crime they are suspected, b) The right to remain silent, c) The right to benefit from a lawyer, d) The right to inform their relatives, e) The right to apply to a judge against arrest (Regulation on Arrest 6/h). The rights to be said during the arrest are not specified in the law, but not mentioning these rights is considered as a reason for compensation (TCPC 141/1-c).

- **Right to know the accusation:** The arrested (or detained) persons are informed about the reasons for their arrest and the allegations against them immediately, presumably in writing or, if not possible, verbally. In cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge. (AY 19/4, İHAS 5/2, PYSK "2002-4771"13). If the person is not notified of the reason for the arrest in writing, the person who is caught will have the right to demand compensation, since the arrest will be 'unlawful'.
- **Right to know your rights:** It is a constitutional right to know your rights. Failure to notify someone of their rights renders the process null and void. As soon as the arrest is made, the arrested person is informed of their constitutional rights (TCPC 90/1. According to regulation, arrested persons are informed of their rights in writing, and it is ensured they understand them. When questioning, in order for someone to have informed of their rights, the person must at least be in the position of "suspect" or "accused". It is especially important to notify those who are "detained after being caught". Asking questions should be in the form of "statement taking" (TCPC 147). The person whose statement is taken should know that the questioning authority is an officer of the law enforcement.
- **Right to inform relatives:** Relatives of the arrested person are informed that they have been caught and taken into custody, once the individual is brought to the detention unit of the gendarmerie or police. Notification to "a person determined by the arrested person" increases blackening of evidence, thus, if there is any doubt; it's possible to delay the notification with a written order from the prosecutor (TCPC 95/1). Notifying the relatives of the arrested person are made by the prosecution authorities. The suspect cannot speak for themselves but in exceptional circumstance the judge can allow that with the condition, "the purpose of the investigation is not jeopardized" (TCPC 107/1 and 2). Realistically, informing the relatives is only possible, "after the arrested person is handed over to the official authorities" as in the previous stages, where the detainee is with the arresting police officer, its not obligated.

- **Notifying the suspect's designated person;** the police will immediately notify the relatives of the arrested person (PYSK "2002-4771" 13) but will inform the "designated person" with an order from the prosecutor (TCPC 95/1).
- **Notification of the arrest to the relevant persons;** If a crime's investigation and prosecution is dependant on a complaint, notification is made to those who have the right to complain pursuant to TCPC Article 90.
- **Notification to the Consulate;** The arrest of foreigners is reported to the consulate of the state of which they are a citizen; unless the arrested person opposes openly in writing (TCPC 95/5). The right not to report to the consulate should be taught to the apprehended.
- **Notification in terrorist crimes;** The status of a person who is caught, taken into custody, or whose detention period has been extended in crimes falling under the Anti- Terrorism Law, only has notice given to their relatives by the order of a prosecutor (TMK "2006-5532" 10).
- **Benefiting from a defense lawyer:** Before detainees are taken into custody, they are informed about their right to benefit from a lawyer (TCPC 154) and will be asked whether they want a lawyer (TCPC 147).
- **The right to testify:** Statements taken from people who have been arrested and taken into custody have a special importance in criminal procedure law.
- **The suspects right to inquiry:** The accused, has the right to be interrogated by the judge (within the periods specified above) (TCPC 147). It is obligatory to have a lawyer present during their interrogation (TCPC 91/6). The "mandatory" defense was established by the New Code of Criminal Procedure.
- **The right to apply to a judge regarding the unlawfulness of the arrest:** The arrested person, their lawyer, their legal representative, first or second degree blood relative or spouse, can apply to the Magistrate to ensure their immediate release against the extension of the arrest period or against the arrest process (TCPC 91/4) .
- **The right not to be caught again after being released:** If a person was released after being detained and taken into custody, they can't be arrested again for the same crime after being released, unless new evidence is provided (TCPC 91/5).
- **Right to claim compensation:** Persons arrested and detained in violation with the terms of Article 19 of the Constitution and Article 5 of the European Convention, have the right to seek compensation. With the amendment made in the Constitution, "the damage suffered by individuals shall be paid by the state according to the general principles of the compensation law" (Any. "2001-4709"19/last). Their change also reveals the way in which an individual can directly file a compensation claim against a law enforcement officer. Such compensation cases have had very effective and positive results on the behavior of law enforcement officers in the United States.
- **Right to individual application:** Individuals who believe that their rights from the European Convention on Human Rights are being violated, can make an individual application to the ECHR after using every domestic remedy, in order to ensure supervision.

(2.4) PRESUMPTION OF INNOCENCE

The Presumption of Innocence is based on the assumption that a person is innocent until proven guilty by legitimate and conclusive evidence. Treating a person as a criminal before it is proven can have serious consequences.

- In the present digital context, news can rapidly reach vast numbers of society in a very short time, via the internet, television and newspapers. This can have devastating effects if the accused is not proven guilty, yet may be treated as a criminal in the eyes of society and in their personal social circle. This demonstrates that violating the presumption of innocence can affect the accused's life to a great extent and makes them into victims.
- The importance of the Presumption of Innocence is emphasized in Article 6/2 of the European Convention on Human Rights that states, "Everyone charged with a crime is presumed innocent until proven guilty by law" and Article 38/4 of the Turkish Constitution that states, "No one can be considered guilty until their guilt is proven", the same is stated in the Turkish Criminal Law.
- The presumption of innocence aims to protect the alleged guilty person before or during the trial and until the sentence is finalized. The protection of the presumption of innocence begins when a person is accused of a crime and continues until the alleged crime is finalized by judgment.
- The presumption of innocence is a requirement of a fair trial and it is not only valid during the trial phase but also on every stage before. Considering the practical consequences, it can be said that the presumption of innocence is more important at this stage of the preliminary investigation.
- At this stage, the suspicion towards the accused is not very strong and for this reason, the authorities that undertake the investigation carry a heavy responsibility to minimize the risk of error about the suspect. In addition, an approach that the AIHM also follow, the presumption of innocence should not be limited to mere criminal proceedings, but should be applied to any accusation that has a wide range of adverse consequences.
- The presumption of innocence protects against making guilty statements about the accused and prevents against the creation of a perception of guilt.
- In Türkiye people are frequently treated as criminals before their guilt is confirmed. Social media and the news, which often creates a negative situation by referring to the guilt of the accused whilst they are still on trial.
- The presumption of innocence is valid until the conclusion of the trial and prohibits early statements about the guilt and actions of the person until a verdict is made. The scope of this assurance is not limited to the court that conducts the criminal proceedings and also obliges all other administrative and judicial authorities not to imply or make statements that the person is guilty until their guilt is proven by a verdict.

(2.5) THE RIGHT NOT TO BE SUBJECTED TO TORTURE OR ILL-TREATMENT

The prohibition of torture in article 3 of the European Convention on Human Rights, to which Türkiye is a party, states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". This provision is an absolute right without limitations or exceptions. It is an inviolable right for every human being not to be subjected to torture or similar treatment. The rights over the human body and immunity exist inherently in accordance with natural law and are not owned by any person or state. In this respect, no one, including the state, can interfere with this right.

Article 3 of the AIHS not only imposes a negative obligation on states, namely the prohibition of torture, but also imposes the obligation of positive behavior. This means that states are obliged to ensure that no one under their jurisdiction is exposed to such treatment, to enact laws that will prevent and punish any acts contrary to Article 3 and to effectively remedy violations that they cannot prevent.

According to the criteria of AIHM's prohibition of evidence, "The suspect should not be trapped, provoked or subjected to ill-treatment while obtaining evidence.". This would interfere with the accused's free will, and would constitute as an unlawful procedure of taking a statement, and the fundamental right of the suspect will be violated. Not resorting to prohibited procedures protects not only the fundamental rights and freedoms of the individual, but also the honor of the state.

According to Article 90 of the Turkish Constitution, International agreements duly enacted are statutory. It is not possible to apply to the Constitutional Court about these with the claim of unconstitutionality. (Additional sentence: 7/5/2004- 5170/7 art.) In case of conflicts between differences on the same subject in international agreements that have been duly put into effect and laws, the provisions of international agreements shall prevail.

(2.6) THE RIGHT TO REMAIN SILENT

Silence is a situation that expresses the state of not speaking or being afraid to speak. In criminal procedure, “silence” is seen as a fundamental right. This right ensures that the preference of the person under suspicion of a crime to remain silent regarding their crime is respected by the persons occupying the investigation or by the prosecution authorities of the state.

The right to remain silent, also known as the privilege of non-self-incrimination or the exemption from self-incrimination, can be written as “no suspect or accused shall be compelled to speak or to incriminate himself”. The ability to remain silent when one wishes, in addition to the accepted principles of law, plays a major role in the protection of fundamental rights and freedoms.

- The right to remain silent: The concept originates from the Common Law system, but also has its traces in the Continental European Legal System and has subsequently found application in Türkiye’s legal system. Although the right to remain silent is not explicitly stated in the Turkish Constitution, it has found a place in the criminal procedure law.
- The right to remain silent, which is one of the most effective defense weapons of the suspect/accused in the field of Criminal Law, is perhaps the least used. Based on Roman Law, the claimant is under the burden of proving their claim. When evaluated in this sense, if the person under the threat of punishment remains silent, that will put the whole burden of proof on the other party.

The main criterion for the validity of the suspect or the accused’s self-incriminating statements: The statements must not be made by being bullied, out of fear of harm and not in the hope of gaining advantage; it must be made voluntary (based on consent). Hereupon, there is a very close relationship between being able to benefit from a lawyer and the right to remain silent, for example deciding precisely whether or not the right to remain silent should be exercised, and if so to what extent, is a task that only a professional lawyer can do.

It is an unlawful prejudice to act on the assumption that the suspect or the accused “has something to hide” or is “not in a position to defend themselves” when staying silent. In short, exercising the right to remain silent should not be conclusive evidence of guilt. However, it should be noted that although the right to remain silent is very effective when used in the right place, it should not be overlooked that every person who exercises their right will avoid being punished. Moreover, punishment is inevitable if it is proven definitively that the person committed the crime, together with the legal evidence.

(2.7) THE RIGHT TO HIRE A LAWYER

The right of the suspect or the accused to benefit from a lawyer is very important in terms of legal security. The defender constitutes the guarantee of a judgement worthy of the state of law and at the same time is the observer of whether the rules regarding the law of procedure are followed. Likewise, it is possible for the suspect to benefit from the knowledge and experience of a lawyer. For this reason, the suspect or accused has the right to benefit from the assistance of a free lawyer of their choice, or one appointed through legal aid, at every stage of the trial, even during the execution or when the trial is reinstated.

This right is a requirement of a fair trial, which is included in the AIHS Article 6/3-c and the Turkish Constitution Article 36. Likewise, in Article 149/1 of the Criminal Procedure Code (TCPC), this right has been further embodied by stating that “The suspect or accused can benefit from the assistance of one or more lawyers at every stage of the investigation and prosecution”...”. It should be noted that due to the important role of a fair trial in a democratic society, the provision of Article 6/3-c of AIHS provides “a “concrete and real” defense, not “a “theoretical and substantial” defense.

- **Right of the Suspect or the Defendant to Choose a Lawyer:** Either the accused can choose a lawyer, or a lawyer can be appointed within the scope of legal aid. Therefore, the right to choose a lawyer and appointing a lawyer within the scope of legal aid, will be categorized as a compulsory defense.
- In accordance with Article 6/3-c of the AIHS, the biggest opportunity of the accused is to personally choose their defense counsel. Appointment of another lawyer by the competent authority instead of the lawyer chosen by the accused, or measures taken that will restrict the right to choose a lawyer, will violate the accused's right to benefit from a lawyer.

(2.8) THE RIGHT TO DEFENSE AND TO GATHER EVIDENCE IN FAVOR OF THE SUSPECT

In accordance with TCPC Article 14/1-f, the suspects are reminded that they may request the collection of evidence to get rid of the suspicion during the investigation phase.

In the trial phase, TCPC Article 177 states that the accused must submit a petition to the court president or judge at least five days before the hearing date when requesting the collection of defense evidence, a witness, an expert or the collection of defense evidence.

However, the fact that the collected evidence is in compliance with the law is a necessity and requirement. Indeed, Article 217/2 of TCPC states that "the charged crime can be proven with any kind of evidence obtained in accordance with the law". Anyone accused of a crime has the **right to defense**.

The right to defense according to the Supreme Court; It refers to rights such as self-defense before judicial organs, these could include; benefiting from the assistance of a lawyer, asking questions, being silent, not participating in the proceedings against you, benefiting from an interpreter, requesting the collection of evidence, being present at the hearing, or resorting to legal action.

According to Article 6/3 of the European Convention on Human Rights (AIHS), everyone accused of a crime has the following minimum rights in the context of right to defense:

- To be informed in detail of the nature and cause of the accusation against them as soon as possible, in a language they understand
- To have the necessary time and facilities to prepare the defense.
- To defend themselves personally or to benefit from a lawyer of their choice; if unable to financially hire a lawyer, to benefit from the assistance of an ex officio lawyer.
- To interrogate or have the witnesses of the allegation interrogated, to request the defense witnesses be invited and heard under the same conditions as the witnesses of the allegation.
- To have the free assistance of an interpreter if one cannot understand or speak the language used in the courtroom.

(2.9) THE PRINCIPLE OF NO PUNISHMENT WITHOUT LAW

There is no crime or punishment without any regulation in the law. In other words, the principle of no punishment without law (the principle of legality) provides an assurance against state intervention, by preventing the state from using its punitive power in an unlimited and arbitrary manner. While this is a requirement of being a state of law, it also serves the purpose of ensuring legal security.

In accordance with *the principle that there is no crime and punishment without law*, no one can be punished for an act that is not expressly considered a crime by law; No one may be punished for an act with a penalty other than the penalty prescribed by law or a heavier penalty than the penalty prescribed by law.

Since the power to make laws belongs to the legislative organ, rules involving crime and punishment can only be created by the legislature. This authority is vested in the Turkish Grand National Assembly. As a natural consequence of the 'no punishment without law' principle, the administration does not have the authority to set rules that include crime and punishment through regulatory actions.

The Effect of the Principle 'No Punishment without Law' in Turkish Criminal Proceedings

The principle is clearly expressed in the Turkish Penal Code as the specificity of laws involving crime and punishments, *lex talionis*, and the non-retroactivity of laws.

That crime and punishments are only included in the laws and that the administration does not have the authority to establish rules in these areas does not provide a guarantee on its own. As a matter of fact, crime and punishment provisions are only regulated by law or in other words, a presidential decree and other regulatory acts cannot impose penal provisions.

Laws involving crime and punishment should also be clear and unambiguous as there is also the principle of determinacy law. Since crime and punishment fundamentally affect the social life of the individual, the framework of the norm to be applied to individuals should be drawn strictly. For this reason, there is a ban on comparison between substantive criminal legal norms. In other words, the judge cannot punish an act committed by a person which the law does not explicitly consider a crime, by comparing it to another act that is regulated as a crime in the law.

One of the most important consequences of this principle is that the judge does not have the authority to create crime by comparison. The non-retroactivity of criminal laws is another complementary principle of the non-punishment without law principle. The purpose of this principle is to prevent the punishment of the perpetrator with an act that was not a crime at the time committed, but later was regulated as a crime by the penal code. The perpetrator can only be punished according to the penal laws at the time he committed the crime. If the act constitutes a crime according to the penal code of the period in which it was committed, the perpetrator can be punished. Even if the act is defined as a crime by a law that came into force after it was committed, the later law can not be applied retroactively.

The principle of non-retroactivity of penal laws does not apply to laws in favor of the perpetrator. In other words, for an act that was a crime at the time it was committed but was decriminalized or whose penalty amount was reduced by the penal code of a later date, the penal law can be applied retroactively in favor of the perpetrator. This situation is not contrary to the non punishment without law principle.

Arrest is a precaution in which the criminal character is important. In practice, even when deciding on detention, which is the most important measure limiting the freedom of the individual, the principle of no unlawful crime and punishment is violated, and sometimes the reason for a detention decision is not clearly indicated.

The principle of *no punishment without law* draws the limits of the state's intervention on the individual by using the criminal law. Thanks to this principle, the vital importance of legal security, the typicality of crimes and the belief in justice in the society are protected.

(2.10) EQUALITY

- **Constitution of 1962** (Old Constitution)
- **Constitution of 1982** (The current Constitution)

"Equality by the Law" was established since the beginning of the Constitutional Court. In both the 1961 and 1982 Constitutions, the principle of general equality was expressed by combining the principle of equal treatment by the law, with the prohibition of discrimination. However, unlike 1961, the principle in question was regulated in the 1982 Constitution to include the meaning of equal enjoyment of fundamental rights and freedoms (equal rights/equality in benefiting from fundamental rights). This type of equality, which is also called legal equality, accepts the understanding that individuals are considered equal by the law because they are legal personalities. In other words, it follows a process in which the principles of universal law are elaborated in the context and framework of each concrete legal discipline.

The Preamble of the Constitution begins by stating that “every Turkish citizen enjoys the fundamental rights and freedoms in the Constitution, in accordance with the requirements of equality and social justice...” On the other hand, the expressions in paragraph 7 of the preamble explain and complete the equality in Article 10 from another aspect.

It is essential to ensure equality in terms of legal rights, duties and obligations among individuals in society. This interpretation also highlights the necessity of ensuring equality in terms of protection guarantees. When the two Constitutions are compared, the 1962 Turkish Constitution took a more narrow interpretation of the content of equality norms and protection guarantees the current 1982 Constitution.

In addition, equality was regulated as one of the basic principles in the Preamble of the 1982 Constitution. Although it is not counted in Article 2 regulating the characteristics of the Republic, ‘equality’ is among the basic principles of the State due to the reference to the preamble. As a result, equality in the 1982 Constitution represents one of the reasons for the existence of the state, not an expected goal in the constitutional order.

One of the most important concepts in the Constitution regarding freedoms is the principle of equality before the law. This rule was regulated in more detail in the 1982 Constitution compared to the 1961 Constitution. Respectively, the issues that will not be discriminated against in terms of equality are not limited to those listed in the article. By introducing the principle that no discrimination can be made for similar reasons, the issues that cannot be distinguished have been expanded. The concept of equality in Article 10 of the Constitution means equality by the law, therefore, legal equality. With this principle, it is prohibited to violate the principle of equality before the law by granting more or wider rights and powers to a single person or to certain communities than to other citizens in the same situation.

The Constitutional Court evaluates the principle of equality as an attribute among the unalterable provisions of the Constitution. The acceptance of the principle of equality as one of the basic characteristics of the Republic has also led to the limitation of the discretionary power of the legislature regarding lawmaking and constitutional amendments. In the 1982 Constitution equality before the law has been regulated in a way that will be reinforced with the rule of law. The phrase “State organs and administrative authorities must act in accordance with the principle of equality before the law in all their transactions” in the 10th article of the Constitution shows that the laws should be applied equally to everyone by the state power in the common law system, where everyone is equally bound.

The 1982 Turkish Constitution had no need to develop a legal precedent about the principle of equality. Although the phrase “Every Turkish citizen enjoys the fundamental rights and freedoms in the constitution by the requirements of equality and social justice.” in the preamble of the 1982 Constitution, expresses equality limited to the context of benefiting from rights and freedoms. Where Article 2 refers to the basic principles stated at the beginning and its existence is enough to count equality among the basic characteristics of the Republic. Thus, equality, which is included in the prohibition of the amendment, continues to be evaluated by the Constitutional Court as an element of the social state or the rule of law.

The Constitutional Court expresses the relationship between the rule of law and equality in relation to democracy as follows: “The rule of law rests on the basis of the rule of law”. Equality before the law is an irrevocable principle; such a principle denies any privilege. The principle of equality is one of the most important principles in a democratic regime. The narrow interpretation of Equality in the decisions of the Constitutional Court has been subjected to amendments enriching its scope and meaning, and guarantees have been introduced for women and other vulnerable groups.

In 2004, women were made equal to men in terms of rights, and the state’s obligation on this issue was clearly emphasized. The state reinforced the prohibition of discrimination on the basis of gender with the statement “There will be no discrimination on the basis of gender” with the positive obligations of the state, and equality between men and women was guaranteed.

This amendment shows that gender equality cannot be achieved unless actual inequalities are prevented and eliminated and reveals the function of the principle of equality in fulfilling the social justice. In the same amendment, to legitimize positive measures to ensure equality in terms of specific individuals and groups, Article 10 states that “measures to be taken for children, the elderly, the disabled, the widows and orphans of martyrs of war and duty, the disabled and veterans shall not be deemed contrary to the principle of equality” (art. 10). By adding the phrase 3, it is possible to prepare the necessary conditions for the protection of the disadvantaged social groups, most affected by the negative consequences of discrimination and inequality.

(2.11) DOUBLE STANDARD EXCLUSION AND EQUALITY BY THE LAW

The first section titled ‘general principles’ in the Turkish Constitution clearly stated that everyone is equal by the law and by the state. According to this;

- Everyone is equal by the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.
- (Paragraph added on May 7, 2004; Act No. 5170) Men and women have equal rights. The State is obligated to ensure that their equality exists in practice.
- (Sentence added on September 12, 2010; Act No. 5982) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.
- (Paragraph added on September 12, 2010; Act No. 5982) Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as a violation of the principle of equality. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.

In addition, the 3rd article of the Turkish Penal Code states:

- Any penalty and security measure imposed upon an offender should be proportionate to the gravity of the crime.
- In the implementation of the Criminal Code no one shall receive any privilege and there shall be no discrimination against any individual on the basis of their race, language, religion, sect, nationality, colour, gender, political (or other) ideas and thought, philosophical beliefs, ethnic and social background, birth, economic and other social positions.

(2.12) IMPLEMENTATION OF THE LAW IN FAVOR OF THE ACCUSED

TEMPORARY LAWS: Some penal laws are created in order to meet the extraordinary and temporary needs and remain in force for only the period stated in the law. These laws, by their nature, must be applied to all crimes committed during the period in which they are in force. Otherwise, the deterrent effects of said laws will not exist or will be reduced.

It should be noted that for various reasons, the perpetrators of these crimes cannot be caught in the period of a temporary law, for example, if they escape, the perpetrator does not face any sanctions when the enforcement period of the law has passed.

For this reason, with the last paragraph of Article 7 of the Turkish Penal Code No. 5237, it has been stipulated that this article will not be applied to temporary laws. The statute of limitations will, of course, also apply to these crimes.

Article 7 of the TPC No. 5237 is regulated in a similar way with Article 2 of the TPC No. 765, which has been repealed, and in both articles; The principle of proactive effect, which states that the criminal law rules will be applied to crimes committed from the moment they come into force, and the principle of retroactive effect of the law in favor of the perpetrator, which is an exception to this principle, is included in the principle of “retroactive application” or “retroactively effective”.

Pursuant to this principle, if there is a difference between the law in force at the time a criminal offence was committed and a provision subsequently brought into force, then the law which is more favourable to the offender is applied and enforced.

In addition, regarding the determination of the favorable provision, in the 3rd paragraph of Article 9 of the Law on the Enforcement and Implementation of the Turkish Penal Code No. 5252 there is the regulation that “the favorable verdict is determined by applying all the relevant provisions of the previous and subsequent laws to the event, and by comparing the results with each other”.

The regulation regarding the implementation of the laws in terms of time is included in Article 7 of the TPC No. 5237. Article 7 includes the implementation principles of the law in terms of time. The rule that the law in favor is to be applied, has been preserved.

The procedural provisions in force have been deemed sufficient on how the new law, which is in favor of the finalized provisions, will be implemented.

The principles included in Article 7, TPC No. 5237 are as follows: (Article 7/1 of the TPC)

- Not being considered a crime on the date of action: No person shall be subject to a penalty or security measure for any act which did not constitute a criminal offence under the law in force at the time it was committed
- Not being considered a crime by the law after the date of action: No one shall be subject to a penalty or security measure for an act which does not constitute an offence according to the law which came into force after the commission of the offence.
- Execution and the abolition of legal consequences by itself: Where such a penalty or security measure has been imposed its enforcement and the legal consequences of such shall be automatically set aside.

Changed more than Two Laws: If there is a difference between the law in force at the time a criminal offence was committed and a provision subsequently brought into force, then the law which is more favourable to the offender is applied and enforced. (TPC art. 7/2)

In the event that more than two laws are changed, the second paragraph of Article 7 states that whichever is more favorable, will be applied.

Immediate Implementation of the Provisions Regarding the Execution Regime: The Enforcement Code provisions shall be applied immediately, except insofar as those provisions relate to suspended prison sentences, conditional release, and repeat offending (TPC art. 7/3)

In the third paragraph of the article, it is stated that the provisions in force at the time of the verdict will be valid in terms of execution procedures and practices, and thus, the remedial function of the measures is emphasized.

Temporary and Provisional laws: Temporary and Provisional laws continue to apply to criminal offences which were committed during the period that those laws were in force. (TPC art. 7/4)

Due to the necessity of justice, social benefit and the effectiveness of the law, the last paragraph is included in the text and thus the efficiency and justice of the temporary and temporary laws are requested.

Detection Criteria for the Law in favor

Both in doctrine and in judicial decisions where these situations are not considered to be in the best interest, these are;

The law imposing imprisonment is not favourable in comparison with laws imposing judicial fine.

For Laws containing the same kind of punishment;

- If the upper limits are the same, the one with a higher lower limit is not favourable.
- If the lower limits are the same, the one with a higher upper limit is not favourable.
- If the lower and upper limits are different, the one with a higher upper limit is not favourable.

- For the same crime, the law that is prosecuted on behalf of the public is not favourable in comparison to the law that is dependent on complaint.
- The law, which accepts a security measure in addition to a penalty, is not favourable. It is not possible to state that these criteria will have the same result, in every concrete case.

Although these criteria are insufficient to solve all the problems that may arise regarding the determination of the law in favor, it will be useful in terms of showing the basic principles that should be adopted in the periods when partial changes are made in the laws.

If the law of the time the crime was committed and the law that came into force later are different, the two laws are applied separately to the concrete case without mixing them up, then the penalties to be imposed according to both laws are determined and the law in favor of the culprit should be applied after.

(2.13) RIGHT TO BAIL (Security deposit)

According to TCPC Article 109 paragraph 1, titled "Judicial control", "In the presence of the arrest reasons specified in Article 100 and where an investigation is being conducted on account of an offence necessitating imprisonment whose upper limit is three years or less, a decision may be taken to place the suspect under judicial supervision instead of arresting him." The subparagraph 3-f of the same article specifies that, "Judicial supervision shall impose one or more of the following obligations on the suspect: ... f) Depositing an amount of money as a security, as determined by the judge at the request of the public prosecutor after taking into account the financial circumstances of the suspect and deciding if it is to be paid in more than one installment", such provision is included.

Based on Article 27 of the Law No. 5402 on Probation and Assistance Centers and Protection Boards, and in accordance with subparagraphs (a) and (b) of paragraph 4 of Article 26 of the Regulation on Probation and Assistance Centers and Protection Boards issued by the Ministry of Justice, "(4) In case the suspect or accused applies in due time, an probation plan is prepared by the probation officer

- Pursuant to sub-paragraph A: If the suspect or accused is taken under judicial control in return for a security deposit a notification is made by the branch directorate or bureau to the suspect or the accused within ten days to deposit the entire amount and, if it is in installments, to deposit the first installment. After the suspect or accused deposits the specified security at the finance cashier, they must submit the receipt to the branch office or bureau within five days, and the branch office or bureau must forward the receipt to the Office of the Chief Public Prosecutor to be sent to the court.
- Pursuant to sub-paragraph B: If the prohibition decision is made while in detention, the entire amount, or the first installment, of the security deposit is deposited in the name of the suspect or the accused, and the receipt is submitted to the Office of the Chief Public Prosecutor. In the event that the entire amount of the security is deposited, the document is not sent to the branch office or office. However, if the amount of the assurance is paid in installments and the first installment is paid, the document is sent to the branch office, or the bureau and the action is taken in accordance with the above subparagraph.

Article 109 of the Turkish Code of Criminal Procedure clearly states that the release of the suspect in return for payments, known as bail, is subject to the will of the public prosecutor.

Considering the suspect's financial situation, the judge has the authority to determine whether the amount of the security deposit (which is the guarantor of the pending trial), will be paid at once or in multiple installments. However, the legislator made the release of a suspect dependent on the will of the public prosecutor, in return for the security deposit. According to Article 110/3 of TCPC, the court has been given the same authority over the accused at the prosecution stage.

(2.14) RIGHT OF INTERPRETER

The purpose of a translator is to reinforce the right to defense by including the principle of protection of the victim. Thus, it has been accepted that the accused or the victim, who does not speak Turkish, should be told the necessary and useful parts of a file by a translator in their own language. (See Turkish Criminal Procedural Code art. 202)

- If the accused or the victim does not know sufficient Turkish to explain their plight, during the hearing the essential points of the prosecution and defense shall be interpreted by an interpreter to be appointed by the court.
- In the hearing of a handicapped accused or victim, the essential points of the prosecution and defense shall be explained to him in a way that he is able to comprehend.
- The provisions of this article shall also apply in respect of suspects, victims or witnesses heard during the investigation phase. During that stage, the interpreter shall be appointed by the judge or the public prosecutor
- Explaining the indictment,
- Upon giving the opinion on the merits, the accused can make the oral defense in another language, which they declare to express themselves better. In this case, translation services are performed by the translator chosen by the accused from the list created in accordance with the fifth paragraph. The expenses of the translator are not covered by the State Treasury. This opportunity cannot be abused for the purpose of procrastinating.
- The translators are selected from the people included in the list prepared every year by the provincial judicial justice commissions. Public prosecutors and judges can choose translators not only from the lists created in the province they are in, but also from the lists created in other provinces. The procedures and principles regarding the arrangement of these lists are determined by regulations.

TPC : Turkish Penal Code = TCK : Türk Ceza Kanunu

TCPC : Turkish Criminal Procedural Code = CMK : Ceza Muhakemesi Kanunu

AIHM = Anayasa İnsan Hakları Mahkemesi (Turkish Constitutional Court of Human Rights)

AIHS = Anayasa İnsan Hakları Sözleşmesi (Constitution Human Rights Convention)

03



DEFENSE LAWYER'S RIGHTS, DUTIES AND RESPONSIBILITIES

03

(3.1) INTERNATIONAL FRAMEWORK

The Havana Rules containing the duties and responsibilities of a lawyer were adopted by the United Nations Conference on the Prevention of Crimes and the Correction of Crimes, held in Havana between 27 August and 7 September 1990. According to these rules;

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality by the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defense of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,
Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

1. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
2. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
3. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty- eight hours from the time of arrest or detention.
4. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training of lawyers

1. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.
2. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.
3. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Guarantees for the functioning of lawyers

1. Governments shall ensure that lawyers
 - a. are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
 - b. are able to travel and to consult with their clients freely both within their own country and abroad; and

- c. shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
2. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
3. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
4. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.
5. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
6. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
7. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional associations of lawyers

1. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
2. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

1. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.
2. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.
3. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.
4. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

(3.2) DEFENSE ATTORNEYS' RIGHTS

Defense Attorney's Rights in General

As a fundamental right, the right to a fair trial is guaranteed by constitutions, laws and international legislations. The protection, development and strengthening of this right depends on the existence of independent courts, judges and prosecutors; It also requires the presence of knowledgeable, courageous, and most importantly, independent lawyers.

After briefly stating the importance of the trial and the defense, which is one of its basic elements, and those who take it as a profession, we shall move on to the rights of a lawyer, which is our main subject.

Resulting from the attorney-client relationship:

- Right to fee.
- The right to claim advances and expenses.
- The right to demand the compensation of the damage and loss suffered due to fulfilling the duty of attorney.

Authorities arising from attorneyship status:

- Authority to examine file documents
- Authority to take copies of file documents – Authority to be present
- Authority to interview and correspondence
- Authority to ask questions
- Authority to issue and approve samples
- Authority to make notifications
- Right to leave the hearing

In terms of obtaining a job:

- The right to monopoly
- The right to refuse the job

In terms of performing professional work:

- The right to examine the file and obtain information
- The right to take a sample from the file
- The right to use a sample
- The right to make a notification
- The right to follow up the job with an intern or a secretary
- The right to abstain from testifying
- The right to leave the trial
- If a crime is committed against a lawyer during the duty, they may benefit from the provisions relating to crimes against the judges of this offense.

In terms of relationships with professional organizations:

- The right to participate in the Bar association general assembly
- The right to elect and be elected to the Bar organs
- Choosing the BAT bodies and the right to be elected
- The right to defend himself/herself in the investigations against him/her
- The right to request a hearing in the disciplinary committee
- The right not to perform legal aid duties by paying a fee
- The right to enter the lawyers mutual fund

LAWYER'S RIGHTS

A) Rights Regarding Documents: These rights generally serve to fulfill the right of defense by providing privileged situations, aiming to prevent the difficulties and loss of time that the lawyer will encounter while performing his duties.

B) Right to Notify: It gives the lawyer the authority to serve the documents in the nature of judicial documents to the other party with a special method. *Paragraph 4 of Article 56 of the Attorneyship Law regulates this.*

According to this; Attorneys shall deliver judicial papers and documents to the other party through the relevant judicial authority. However, this judicial authority is not required to decide on the notification. In addition, a copy of the documents subject to the notification shall be placed in the file of the relevant judicial authority by paying the necessary fees and taxes. This authority facilitates the lawyer and contributes to the speedy functioning of the proceedings. In our opinion, this right has become much more effective with today's technology and the use of electronic communication tools.

The right to issue a sample, which is regulated in Article 56 of the Attorney Law, can be used in two ways. One of them is the power of attorney; the other is related to all kinds of papers and documents that contain the originals. In practice, sample extraction is done by confirming the photocopy with a sign by the lawyer. Most processes only accept documents approved by the notary.

Pursuant to paragraph 2 of Article 56 of the Law, the lawyer can take out a copy of any paper and document that contain the original. But they can only use them in judicial authorities and other justice authorities.

In the third paragraph of the 56th article of the law, the sanction for abusing this right is specified. According to this; A lawyer who approves a copy of an unoriginal power of attorney or other papers and documents or gives a copy that is contrary to the original is sentenced to imprisonment from three years to six years.

The 5th paragraph of Article 56 of the Law regulates that lawyers or attorney partnerships can give proxy to another attorney or attorney partnership, covering every right they own. This way, time and money losses will be reduced by going directly to the notary public.

C) The right to examine the file and take a sample from the file: The Attorney Law contains two separate regulations regarding this issue.

In article 2, paragraph 3 of the Law, it states that some institutions are obliged to assist lawyers. These institutions, with the exception of special laws, will submit the information and documents required by the lawyer for examination. As stated in the decision of the 1st Chamber of the Council of State, dated 10.04.2002 and numbered E.2002/26, K.2002/52; Arbitrary does not mean the will to want something regardless of any reason. The lawyer must specify the information and documents he wants to examine depending on which job can be done, together with the reasons explaining its necessity.

Article 46 of the Law, on the other hand, authorizes interns along with lawyers to examine cases and follow-up files without a power of attorney. The exercise of this right is not subject to the condition of showing the power of attorney of the party of the file. In this way, the lawyer will be able to learn about the case and then decide whether or not to take the job. A lawyer who abuses his authority to examine documents may be subject to disciplinary action, as this attitude will violate the professional law. In Article 46/2 and Article 2/3 of the Attorney Law, it is stated that a power of attorney is required to obtain a copy of the file documents. In addition, it is regulated in 46/1 that the samples that the lawyer does not want to be approved are not subject to fees. The use of the right to photocopy specified in the law depends on the availability of photocopying facilities in the courthouse. In today's technology, all courthouses have this opportunity.

D) Monopoly Right: The Attorney Law regulates the monopoly right in Article 35 under the title "Works that only lawyers can do". These jobs were kept very broad and in order to do them, it was required to be registered with the bar association. This is a very important right. We can also call it a privilege. Although it is said that the purpose of the monopoly of attorneyship is to fulfill the right by making legal transactions exclusive to lawyers, the true aim is to protect the profession. Of course, there are exceptions to the monopoly of attorneyship.

The status of the legal representative, the ability of the husband and wife to appoint each other as a proxy in cadastral matters, and the cases where the authority to refer the case is given to someone else by law are examples of these.

The sanction of breach of the monopoly of attorneyship is not specified in Article 35. In such cases, the penalty

given in case of using the attorney powers regulated in Article 63 may be applied. In a decision of the 7th CD, the Supreme Court of Appeals punished the person who wrote petitions of complaint and determination of evidence for others, according to the aforementioned article, although he was not a lawyer.

In some cases, the attorney may be subjected to attacks on the defense profession, personally or as a whole, during the trial. In this case, the lawyer may leave the hearing by giving reasons and immediately informing the bar association on this matter. This right is not specified in the law. In Article 21 of the Professional Rules, it is regulated that the lawyer cannot leave the hearing, but he can leave the hearing in cases where his personal or professional honor are damaged. It would be against the law to force the lawyer, who has exercised his right to leave the hearing, to come to the next hearing. It is also not contrary to Article 41, which regulates the internal relationship between lawyer-client.

It is also possible for the lawyer to quit his job. This right is regulated in many places. Article 41 and Article 174 of the Attorney Law states that the lawyer can withdraw from the follow-up, and Article 38 of the Professional Rules states that he has the right to refrain from prosecuting the case.

POWERS OF THE LAWYER

A) Authority to Examine the File: The authority to examine the file is regulated in TCCP article 153. According to the provision of the article, the lawyer or attorneys have the right to examine the file at different stages of the proceedings and to take samples without any fee. The defense counsel or attorney has the right to see all the actions taken in relation to the person whose defense he undertakes. According to Article 153/1; During the investigation phase, the defender can examine the contents of the file and get a copy of the documents he wants free of charge. According to the second paragraph of the article, if the defense counsel's examination of the contents of the file or taking samples from the documents may endanger the purpose of the investigation, this authority may be restricted by the decision of the Criminal Judge of Peace upon the request of the Public Prosecutor. According to paragraph 2, the defender can take a copy of the document from the file without paying any fees. However, the prosecutor may apply to the Magistrates' Court and take a decision to restrict the defense counsel. But there are exceptions to this too. Some documents, such as statements and interrogations, expert opinions, practice and discovery reports, location showing, body examination reports, must be open to the examination of the lawyer. No restrictions can be placed on them. The defense counsel examines them as he wishes. The purpose of this is to be able to freely defend the rights of the accused or suspect represented by the defense counsel. Paragraph 4 also mentions the prosecution phase. At the prosecution stage, no restrictions can be placed on the attorney's authority to examine; The attorney's authority to review files is also being expanded.

B) Authority to Request the Notification of the Transactions: In every case where the defense counsel or the attorney is a representative in the criminal proceedings, all transactions are reported to the lawyer or the attorney. Minutes, warrants, etc. It will always be reported to the attorney-attorney. The lawyer has the right to do so.

C) Authorization to be present: The defense counsel may attend the hearing by representing the accused in any way, even if the accused is not present. In the Criminal Procedure Code, when the accused did not enter, the defense counsel was not taken to the hearing. Since this situation means the restriction of the right of defense, this situation has been abolished in the new Criminal Procedure Code.

D) The Right to Interview the Arrested and Detained: According to the regulations in the law (TCCP, AK); The lawyer has the right to meet with the suspect or accused at every stage of the proceedings, to be present in their statements and inquiries and to provide legal assistance, and this right cannot be hindered or restricted in any way. This right is very important. Because, for example, the person was caught and put in prison, the lawyer has no knowledge, he does not have a power of attorney yet, what will happen in this case? In the provision of the article, it is called "lawyer". The lawyer goes to the prison, gets information by meeting with the suspect/defendant and undertakes his defense by taking a power of attorney if necessary. According to the provision of this article, there is no need to be a "defender". A lawyer who is not a lawyer can also meet with the suspect or the accused anywhere as a requirement of the right of defense. This right cannot be blocked or restricted. But this is not an unlimited right. For example, according to prison rules, there are certain meeting times and procedures.

E) Right to Recourse to Legal Remedies: The Advocate must be able to take any action in favor of the suspect/defendant. This authorization must be given in the power of attorney to apply for legal remedy. However, this authority is already stated in the general case power of attorney. However, in the event of a situation against the accused at the end of the trial, the lawyer should talk to the accused and act accordingly. This is not a rule, it is an ethical situation. This right can never be against the accused. The defense counsel can only apply to the law in favor of the accused. The prosecutor, on the other hand, can apply both for and against.

F) Authority to Ask Questions Directly: With Article 201 of the TCCP, the prosecutor and the lawyer (whether he is a lawyer or a deputy) are given the right to ask questions directly and without limit. For this, as in the CMUK, conditions such as the alliance of the lawyer and the prosecutor or the permission of the judge are not sought. The judge will only ensure order, and the defender will be able to ask any question he wishes. The judge is solely responsible for not breaking the discipline of the hearing. If the judge does not like the question, he has no authority to ask it not to be asked. The judge may, however, bar the question upon objection. Lawyer and prosecutor; They can directly ask questions to the accused, to the participant, to the witnesses, to the experts and to the persons summoned to the hearing. An important point to be emphasized here is the importance of this authority. With the power to ask direct questions, the lawyer now has a very active weapon in criminal proceedings. The lawyer will be able to come out freely and ask any question he wants. TCCP Article 201 is a very important right to reveal the material truth. This criminal law institution is very important in terms of a healthier functioning of the criminal proceedings, reaching the material truth and the right of the accused to defend.

G) Authority to Perform His Duty in Freedom: In order for the advocate to perform his duty in freedom, he must have some additional assurances. In this sense, no one can give orders or instructions to the defense counsel. The lawyer also has some legal guarantees. A lawyer cannot be punished, even if there are elements constituting the crime of insult in the petitions he submits to the court and the words he uses during the hearing while performing his duty of defense or attorneyship. This is called defensive immunity.

(3.2.1) RIGHT OF REPRESENTATION IN COURT

It freely represents the independent defense, which is one of the founding elements of the judiciary, within the scope of the Attorney Law No. 1136. The purpose of attorneys; To ensure the regulation of legal relations, the resolution of all kinds of legal issues and disputes in accordance with justice and equity, and the full implementation of the rules of law at all levels before judicial organs, arbitrators, public and private individuals, boards and institutions. For this purpose, the lawyer allocates his legal knowledge and experience to the justice service and to the benefit of individuals.

Judicial organs, police authorities, other public institutions and organizations, state economic enterprises, private and public banks, notaries, insurance companies and foundations are obliged to assist lawyers in the fulfillment of their duties. With the exception of special provisions, these institutions are obligated to present the information and documents required by the lawyer for his examination. Taking samples from these documents depends on the presentation of the power of attorney. In pending cases, writs can be obtained from the court without waiting for the hearing day.

(3.2.2) RIGHT TO INTERVIEW WITH THE CLIENT DETENT.

Within the scope of this right; The lawyer has the right to meet with the suspect or accused at every stage of the proceedings, to be present in their statements and inquiries and to provide legal assistance, and this right cannot be hindered or restricted in any way. This right is very important. Because, for example, the person was caught and put in prison, the lawyer has no knowledge, he does not have a power of attorney yet, what will happen in this case? In the provision of the article, it is called “lawyer”. The lawyer goes to the prison, gets information by meeting with the suspect/defendant and undertakes his defense by taking a power of attorney if necessary. According to the provision of this article, there is no need to be a “defender”. A lawyer who is not a lawyer can also meet with the suspect or the accused anywhere as a requirement of the right of defense. This right cannot be blocked or restricted. But this is not an unlimited right. For example, according to prison rules, there are certain meeting times and procedures.

The regulation on this subject in the Criminal Procedure Code article 154 is as follows.

1. The suspect or accused can meet with his/her lawyer at any time and in an environment where others cannot hear what is being said, without seeking a power of attorney. The correspondence of these persons with their counsel cannot be subject to inspection.

2. The right of the suspect in custody to meet with his lawyer in terms of the crimes defined in the Fourth, Fifth, Sixth and Seventh Chapters of the Second Book of the Turkish Penal Code, the crimes falling within the scope of the Anti-Terror Law and the production and trafficking of drugs and stimulants committed within the framework of organizational activity, upon the request of the public prosecutor may be limited to twenty-four hours by a judge's decision; statements cannot be taken during this time.

(3.2.3) RIGHT TO INFORMATION

In every case where the defense counsel or the attorney takes part as a representative in the criminal proceedings, all proceedings are reported to the lawyer or the attorney. Minutes, warrants, etc. It will always be reported to the attorney-attorney. The lawyer has the right to do so.

The authority to examine information and documents takes its legal basis from Article 2 of the Attorney Law. Article 2 of the Attorney Law, titled "The Purpose of Attorney"; Article 2 – (Amended first paragraph: 2/5/2001 – 4667/2 art.) Purpose of attorney; To ensure the regulation of legal relations, the resolution of all kinds of legal issues and disputes in accordance with justice and equity, and the full implementation of the rules of law at all levels before judicial organs, arbitrators, public and private individuals, boards and institutions.

For this purpose, the lawyer allocates his legal knowledge and experience to the justice service and to the benefit of individuals. (Amended: 2/5/2001 – Article 4667/2) Judicial organs, police authorities, other public institutions and organizations, state economic enterprises, private and public banks, notaries, insurance companies and foundations are obliged to assist lawyers in the fulfillment of their duties. . Without prejudice to the special provisions in their laws, these institutions are obliged to present the information and documents required by the lawyer for his examination. Taking samples from these documents depends on the presentation of the power of attorney. In pending cases, writs can be obtained from the court without waiting for the hearing day. It contains the provision. As can be seen from the text of the article, the power of attorneys to examine information and documents is limited with the phrase "without prejudice to the special provisions in their laws". In practice, unfortunately, this authority given to lawyers in terms of practicing the profession is often arbitrarily and unconsciously limited, thus, lawyers experience great difficulties in collecting information and documents from public institutions.

As such, some lawyers, without having the opportunity to make an examination beforehand, make a case based on the limited documents and statements submitted by their client, acting with the logic of "the court will summon", but even when these documents are summoned by the court during the trial, surprising results may occur that may adversely affect the course of the case.

Although the lawyer has the right to complain about the officer's abuse of office, complaining about the officer after failing to provide the required information and documents in a timely manner does not provide much benefit in solving the problem in practice. (In practice, it is also seen that some officials who had difficulties at first, gave permission later in order not to be exposed to complaints.) In Article 163 of Law No. 1136, Article 35, titled "Works that only lawyers can do, that the attorney contract should cover a certain legal aid, that unwritten agreements will be proven according to general provisions," is also stated. In the article, it is stated that it is the lawyers' responsibility to sue, defend the rights of real and legal persons, follow the legal proceedings, and arrange all the documents pertaining to these matters.

In Article 36 of the Constitution, it is stated that everyone has the right to a fair trial by claiming and defending as plaintiff and defendant before the judicial authorities by making use of legitimate means. The right to defense is not an unlimited right. The limit of this right is closely related to the concepts of crime, judicial authorities and litigation. In the meantime, we have to consider the provisions of Articles 2 and 3 of the Turkish Civil Code, which regulate the rules of honesty and goodwill, under the title: the scope of legal relations. In these provisions, in cases where everyone has to comply with the rules of honesty while exercising their rights and fulfilling their obligations, the obvious abuse of a right is not protected in the legal order. Considering the provisions of Article 2 of the Law No. 1136 and the other provisions mentioned above, as well as the provisions of Articles 2 and 3 of the Civil Code, the general limits of the provisions authorizing the attorneys to collect information and documents emerge.

Accordingly, the institutions and organizations listed in the article allow lawyers to defend their clients within the scope of fulfilling their duties, to sue for their rights, to speedup the trial process and to resolve disputes in accordance with justice and equity and to receive the letters written by the judicial authorities to other departments about a matter before the hearing date. They should help accelerate the requested issues and collect the necessary information and documents.

The function of submitting for examination should be carried out in an appropriate place in the institution and organization where the information and document is located, accompanied by an officer when necessary. Since it is not possible to fulfill the obligation to submit the information and document for examination by sending it to a place or city other than the institution and organization where the information and document is located, it will not be in accordance with the provisions and purpose of the law for the lawyers to request that the information and documents they need or their certified copies or photocopies be sent to their addresses.

(3.3) DEFENSE ATTORNEYS' DUTIES AND RESPONSIBILITIES

DEFENSE LAWYER'S DUTIES

Duties and Responsibilities of Lawyers in General

1. Lawyers, as a fundamental element in the delivery of justice, always protect the honor and dignity of their profession.
2. The duties of lawyers towards their clients include:
 - To inform their clients about the rights and obligations they have and the functioning of the legal system to the extent that it concerns the rights and obligations of their clients;
 - To assist his clients in all appropriate ways and to take legal action to protect their rights;
 - Assisting clients before courts, tribunals and, if appropriate, administrative authorities.
3. While protecting the rights of their clients and trying to achieve justice, lawyers try to promote human rights and fundamental freedoms recognized by national and international law, and act freely and diligently in accordance with the law and the accepted standards and moral rules of the legal profession.
4. Lawyers always respect the interests of their clients.

(2.3.1) MISSION TO AVOID CONFLICTS IN REPRESENTATIONS

The lawyer is also responsible for preventing conflicts of interest between different clients or between the lawyer and the client. In order for a lawyer to practice the profession secularly, he must avoid conflicts of interest. In this context, a lawyer cannot serve two different clients on the same subject if there is a conflict between them or if a conflict is likely to arise. Similarly, a lawyer should refrain from advocating for a person about whom he has confidential information through a former or current client. A lawyer should not act as a proxy for a person who has a conflict of interest. If this conflict of interest arises at the time of the legal service, the attorney should leave the attorneyship.

In order for a lawyer to be trusted by clients, third parties, courts and the state, that lawyer must be given this value. In order to deserve this trust; The lawyer should be a member of a respected professional organization and should not act in a way that erodes the dignity of the profession and the confidence of the society in the profession. However, although a lawyer cannot be expected to be a perfect individual, it is understood that he/she should not behave in a disgraceful manner that would damage the honor and dignity of the profession while practicing his profession as a lawyer or in other business relationships and even in his private life. Disgraceful acts may cause the lawyer to be punished with sanctions, which can go up to dismissal.

(3.3.2) DUTIES TO PROTECT THE CONFIDENTIALITY OF CLIENT INFORMATION

The right and duty of a lawyer to keep his client's information confidential and to respect professional secrecy is a very important issue both within the scope of the Attorney Law and the Constitution of the Republic of Türkiye.

The most important feature of a lawyer's job is to provide information to his lawyer that the client will not disclose to others, and the lawyer carries this information - such as private personal information and very valuable trade secrets - within the concept of trust and confidentiality. This Code emphasizes both aspects of this principle: observance of confidentiality is not only the duty of the lawyer, but also the fundamental right of the client. In accordance with the rules of "professional privilege"; prohibits the use of communication between lawyer and client against the client. In some legal jurisdictions, the right to confidentiality is seen as a right that belongs only to the client, while in others, "professional secret" is the communication of a lawyer with the lawyer of the other party; may require it to be kept confidential from its own client within the scope of privacy. It covers the concepts of professional privilege, confidentiality/secret and professional secrecy. This debt and duty of the lawyer to the client continues even if he stops representing the client.

Pursuant to Article 36 of the Attorney Law, titled Confidentiality; "Attorneys are prohibited from disclosing the matters entrusted to them or what they have learned due to their duties as lawyers or in the bodies of the Union of Turkish Bar Associations and bar associations.

The ability of the lawyers to testify about the issues written in the first paragraph depends on the consent of the client. However, even in this case, the lawyer may hesitate to testify. (Additional sentence: 2/5/2001 – 4667/24 art.) Exercising the right of withdrawal does not create legal or criminal liability. ...". In the aforementioned article, it is stated that lawyers have an obligation to keep secrets on the information they have obtained due to their duties, and that they have the right to abstain from testifying on these issues, so much so that this right can be exercised even if the client has consented.

The lawyer's obligation to keep confidentiality has found its place in almost every place where the legal profession is practiced. So much so that the Code of Conduct for European Lawyers, Article 2.3 states;

- As a requirement of the service rendered, it may be possible for the client to explain to his lawyer what he would not disclose to others, or for the lawyer to access other confidential information on the basis of the trust placed in him. Confidence cannot be talked about unless you can be sure that secrets will be kept. The obligation to keep confidentiality is the primary and fundamental right and duty of the lawyer. The lawyer's obligation to keep confidentiality serves the interests of the client as well as the administration of justice. Therefore, the obligation to keep secrets is subject to special protection by the state.
 - The lawyer has to respect the confidentiality of all information obtained during the practice of his profession.
 - The obligation to keep a secret is not limited to time.
 - A lawyer ensures that his colleagues working with him and everyone he employs during the performance of the service comply with the confidentiality obligation.

Therefore, the lawyer's obligation to keep confidentiality is regulated by both national and international rules. The most important issue that this obligation points to is keeping the information between the lawyer and his client confidential.

(3.3.3) BEING A DILIGENT LAWYER

Lawyers have had additional responsibilities such as maintaining peace and order in societies since ancient times. In fact, these activities have been assigned as a mission by lawyers and society today. So, to be a diligent lawyer, you need to have additional qualifications and skills beyond the standard lawyers. However, as in every profession, having some skills in law will make you more successful. For example, it is very difficult for an athlete who is not physically competent to be successful. Similarly, it seems a bit difficult for a person who hates reading and humanity to be an excellent lawyer. The qualifications required to be a diligent lawyer are as follows;

Analytical Skills: Writing down the meaning of the word analytics will help you understand, this it is a must-have for lawyers. Turkish Language Institution defines analytical thinking as a systematic way of thinking that is carried out to solve a problem, by parsing the information and to arrive at a conclusion by considering the elements that

make up the problem. We can easily use the expression that analytical thinking ability is one of the indispensable features of a diligent lawyer who solve problems that are constantly experienced by their profession.

Creativity: If you want to win the appreciation of your clients and become a well-known lawyer in the legal community, you need to produce different perspectives and be constantly innovative. In addition to the moves made by each lawyer in resolving troublesome situations, you also need to take some additional actions. Producing new and different solutions and playing a leading role in solving troublesome issues is another feature you will need to become a diligent lawyer. Having a point of view that can go beyond the standards will always add pluses.

Research: It is among the jobs that lawyers have always done to make detailed examinations through the files, to research previous decisions, case law and legislation for hours. That's why you need to be adept at researching and examining. Always aim to be one step ahead by adding your appropriate and striking comments to successful data analysis. You can become a star with the printed documents, that is, the petitions, that you will prepare as a result of your research.

Communication: Being a 21st century person, it is unlikely that you will see a person who is not advanced in communication. You can reach the person you want with a communication tool anywhere at any time and you can do whatever you want. Using your communication channels very well will add benefits to you in almost every sense. You can reach new clients, get help on issues you have problems with, and complete many transactions that we can't list in the most effective way with your communication skills.

Willingness to Work: Every person serving in the legal profession – all lawyers, not just those who want to be perfect – should be determined and patient. Perseverance and patience are essential to becoming a great lawyer, as there are often many hours of work involved, such as heavy research, paperwork, and petition preparation. A good lawyer or legal assistant has to continue his work without getting bored and tirelessly in order to finish the job correctly and on time.

Effective Communication Skills: The way of addressing and speaking is an important issue for attorneys as it is in every profession. In fact, speaking effectively is much more important in law than in many professions. Many people may think and even argue that the ability to speak effectively is an innate ability. However, you can take private lessons to speak effectively and speak to a community, so you can develop that side even more.

Continuing Education: If you have an idea to become a diligent lawyer, you must constantly improve yourself. Ensuring the continuity of your education will contribute to everything you can think of or even think about. Law is a huge concept. It is not very possible to understand everything in a short time and to serve in all kinds of law. By always improving yourself, you can continue to serve more accurately, faster and in more categories.

Reading Comprehension Skill: The first thing that comes to mind when it comes to the profession of law in our country is probably thick books. Lawyers who started their professional life with volumes of law books and continue their service as they did in the first years. Lawyers working in an intense reading and analysis cycle should have a high level of ability to understand and interpret what they read in the best possible way.

Writing Skills: We choose the most appropriate words to express ourselves. Every choice we make in terms of words is to express ourselves in the best and clearest way. Our knowledge (age, experience, culture, language) is effective in this preference. Words are the most important tool for people who speak and write. People who use them on the spot will be successful in speaking and writing. Since lawyers are constantly in a traffic of writing, they should constantly increase their writing skills. The words of a diligent lawyer are always his most effective weapon.

Modesty: However, lawyers who do not see themselves at the highest level and continue to work for the better and better, get closer to being a better lawyer thanks to their efforts.

The subjects of law are very diverse and at the same time broad. For this reason, a good lawyer must have a good command of his field and be able to immediately answer the questions asked by his client. Again, a good lawyer must have references to previous cases. References are very important to see how successful lawyers are in tough cases.

The best lawyer is the one who understands his client best and finds the best solution. However, it is of great importance that a lawyer who can follow the whole process from the interrogation and detention stages to the detention stage, especially when following the first criminal, heavy penalty and peace penalty processes, where personal freedom is in question, is of great importance. For this reason, care should be taken to be a lawyer who defends his client in the best way, even at the stage of judicial control.

In addition to all these, the speech of a good lawyer should be smooth and understandable. Because a lawyer who cannot explain the problem to his client will not be able to tell the judge either. For this reason, it is very important for the lawyer to be able to express himself correctly in the litigation process.

(3.3.4) DUTY TO DO THE NECESSARY RESEARCH

- While performing the profession of a lawyer, he should show the care required by the profession and should not deviate from honesty. Attorney Law Article 34 clearly stated this point. According to this provision, Attorneys are obliged to fulfill their duties with care, accuracy and dignity in a way that befits the sanctity of this duty, to act in accordance with the respect and trust required by the title of attorney and to comply with the professional rules determined by the TBB. Within the scope of the duty of care, the lawyer is under the obligation to act in accordance with the interests of his client and to avoid behaviors that will harm his client. Even if there is no agreement between the client and the lawyer regarding this responsibility, the lawyer is obliged to take care, act honestly and protect the interests of his client while performing his profession. Another basis for the duty of care is contained in BK Article 390. Accordingly, the responsibility of the attorney arising from the service contract has been compared to the duty of care that the worker must show while doing his job.
- When determining whether the lawyer violated the duty of care, it should be taken into account whether he had enough time for the work he did do in terms of the issue for which he provides legal assistance. In the preparation of petitions relating to a case, the lawyer normally has sufficient time to gather important legal information about that case. The duty of care is evaluated within this framework. However, the Lawyer may not have the appropriate time to take a position immediately on an issue that arises suddenly at the hearing. If he has the information that can be expected from an experienced and attentive lawyer, it will be possible for him to take the position immediately. Undoubtedly, if the lawyer does not feel competent to do what is necessary for the moment, he should try to create an opportunity by requesting a break in the hearing.
- Failure to fulfill the duty of care requires compensation for the damage arising from the wasted interest in proper performance. The burden of proving that the duty of care has not been fulfilled is on the client.
- The client must prove that the lawyer has acted actively or remained passive that violates the professional rules, and therefore the result is unusual compared to the normal course of business. If the client proves that the desired result did not occur due to the failure to fulfill the duty of care, the lawyer will be able to avoid liability by proving that he has no fault. For example, he must prove that he failed to fulfill his duty of care because of the client's binding instruction.
- The responsibility of care has two elements, subjective and objective. The objective element relates to the availability of knowledge, skills and training required for the job to be performed. On the other hand, the subjective element is; is to take the necessary initiatives and behaviors required by the job.
- The lawyer's violation of the duty of care is subject to certain sanctions. In case of violation of the duty of care, first, disciplinary penalties are applied to the lawyer as clearly stated in Article 134. Sanctions are listed in Article 135 and the following articles of the Attorneys Law. In addition, in case of violation of the duty of care, a lawyer may be prosecuted for the offense of misconduct as set forth in Article 257 of the TPC.

- Lawyers are responsible for knowing and assimilating the legal legislation and the relevant rules regarding the performance of their profession and following the changes made in this field. The lawyer must know and follow the court case law related to his field within the scope of his responsibility of care.
- A lawyer should not accept a job that his abilities do not comply. As a matter of fact, it has been clearly stated in the International Professional Rules organized by the International Bar Association that a lawyer should not serve his client in a matter in which he is incompetent.
- Another dimension of the duty of care is to act in accordance with the client's instructions. Although the principle of the independence of the lawyer and the responsibility of the lawyer to act in accordance with the client's instructions seem to contradict each other, the lawyer is bound by the instructions of a client. For example, in cases where the employer wants a criminal complaint to be made in the follow-up procedures regarding bad checks, the lawyer cannot be expected to act against this instruction. Likewise, in a case where it is possible to demand interest in connection with a receivable, where the client explicitly waives the interest demand, the lawyer should not act against this instruction. The lawyer should base his request for the waiver of the attorney on a written document in cases where his client will lose his rights. The lawyer has to obtain the written consent of his client in works that mean abandonment.
- Another behavior required by the responsibility of care is that the lawyer transfers or delivers the money he collects to his client or his account, without delay.
- If the power of attorney given to the lawyer is indefinite, if the given instruction is not fulfilled for a long time and it is desired to be fulfilled later, it is a requirement of the responsibility of trust to ask the client whether the job should be done or not and to receive instructions again.
- The lawyer must also be honest and open in the conduct of the business. He should be worthy of trust and protect the interests of the client. In this context, the duty of doing what he has to do is considered to have begun, as it will be accepted that the lawyer who accepted the power of attorney assumed the duty of follow-up with this behavior. As stated in the TBBDK decision, "delivery of documents deposited by the attorney without his consent, even if it does not constitute a crime in criminal proceedings, constitutes a breach of the duty of care."
- Another obligation within the scope of the obligations in this context is the "obligation to be accountable". According to this obligation in the TCO, the attorney is obliged to give an account of the work he has done upon the request of the client and to deliver what he has received to his client.
- The lawyer has to choose the safest and most effective way, which is appropriate for the purpose, in order to carry out the work he undertakes. The lawyer is obliged to carry out the case he receives until the end, within the framework of the possibilities provided by the law, to the extent permitted by the conditions stipulated in the law. If the lawyer does not find it beneficial to appeal the decision rendered at the end of the case, he has to notify his client of his opinion on this matter in writing before the appeal period expires.
- While taking the case, the lawyer has to determine all the difficulties and objectionable aspects of the case and inform his client about these issues.
- Failure of a lawyer to inform his client in a timely manner, not informing him about the notifications and execution orders, and not appealing the unfavorable decision without obtaining the client's consent is considered an act of violation of the duty of care.
- Advocacy is one of the professions based on the "presumption of truth". The lawyer must refrain from acts that would contradict this presumption and shake this belief. For example, the lawyer's wish to continue the case in the absence of the defendant by making a notification instead

of notifying the address of the defendant, whose address he knows, is one of the behaviors that will undermine the trust in the legal profession. Likewise, it is incompatible with the honor of the legal profession to demand interest above the legal limits by taking advantage of the ignorance of the debtor. For example, demanding interest above the rate of interest determined by a verdict is one of the behaviors that undermine the confidence of the society in the profession.

(3.3.5) DUTIES TO BE INDEPENDENT

- There are special provisions in the Attorney Law that regulate the professional activities of lawyers. In addition to these provisions, it should be evaluated within the scope of Attorney Law in the regulations regarding professional principles. In addition to the jurisprudence, the disciplinary rules of the bar associations aiming to ensure professional discipline are among the sources of special importance in terms of the determination and implementation of the law of attorneys in the decisions made.
- In this section, the qualifications of the legal profession will also be included. Lawyering, which combines the nature of public service and the nature of self-employment, has a different place due to this feature. At first glance, these two features, which appeal to different fields, bring special privileges and obligations to the lawyer in the provision of legal services and representation of the independent defense.
- The concepts of defense immunity and independence of the lawyer need to be evaluated separately due to the unique nature of the profession. Independence and immunity are the features recognized by judges and prosecutors by their own professional laws, and these features are mandatory for the attorney's ability to represent in terms of the practice of attorneyship.
- After the amendments numbered 4667 and dated 2001 made in the Attorney Law, it is possible to define the lawyer as "the person who acts as the founding element of the judiciary, in the name of independent defense, in the regulation of legal relations, resolving legal issues and disputes in accordance with justice and equity, and the full implementation of the rules of law".
- The lawyer has two functions. The lawyer acts as a party representative in one respect. On the other hand, it operates as an integral part of the judiciary to ensure that the rules of law are applied equally, fairly and effectively for everyone. The lawyer is the founding element of the judiciary. As an inseparable and independent element of the Trio of Lawyer, Prosecutor, Defense and Judgment, they constitute the defense pillar.

(3.3.6) DUTY TO BE ETHICAL

General rules

- Turkish lawyers believed in the need for the independence of bar associations and the Union of Turkish Bar Associations, and they decided to fulfill their duties, both as individuals and as organizations.
- Maintains the independence of the lawyer in his professional work; avoids accepting a job that would harm this independence.
- The lawyer carries out his professional work in a way that will ensure the public's belief and trust in the profession and with full loyalty.
- Attorneys must refrain from all kinds of attitudes and behaviors that will damage the reputation of the profession. The lawyer is obliged to take care of this in his private life as well.
- A lawyer should express his thoughts in a mature and objective manner, whether he is writing or speaking. In his professional work, the lawyer should avoid statements that are irrelevant to the law.

- Lawyer is concerned with the legal aspect of claim and defense. It should stay out of the hostilities caused by the disagreement between the parties.
- The lawyer should meticulously avoid any unnecessary behavior aimed at gaining fame.
- The lawyer can only announce the change of address by means of advertisements, which do not have the nature of advertisement.
- Attorney's titled papers, business cards, office signs must not be excessive that may carry the nature of advertisement.
- The lawyer can print addresses in the professions section of the phone book. Apart from this, letters of different sizes or advertisements cannot be included.
- Lawyers who set up a joint office make sure that the office does not become an advertising tool and does not lose its quality as a law firm.
- The lawyer refrains from any behavior that is in the nature of providing a job for himself.
- The lawyer pays attention to the fact that other legal positions and opportunities do not affect his professional work.
- Lawyers cannot use the benefits of attorneys in personal disputes other than professional work.
- A lawyer cannot make contradictory claims for the same case.
- The lawyer has to act in accordance with the professional solidarity and requirements accepted by the Union of Turkish Bar Associations.
- The lawyer endeavors to keep the bar association in accordance with the dignity of the office.
- Having to stay away from his office for a long time, the lawyer informs the bar association of the name of his colleague who will take care of his business and accept his clients.
- Lawyers are obliged to accept the duties assigned by professional organizations, except for justifiable reasons.
- He gives a copy of the lawsuit filed against him due to his professional work to the lawyer bar. He has to accept the bar association's offer to mediate in legal disputes.
- The lawyer has the right to see all kinds of documents related to himself at the bar association.

Relations with Judiciary and Judicial Units

- In his relations with judges and prosecutors, the lawyer has to act in accordance with the criteria arising from the characteristics of the service. Mutual respect is essential in these relationships.
- A lawyer cannot take part in a job that he has previously examined as a judge, prosecutor, arbitrator or in any other official capacity.
- The lawyer uses his discretion in the most appropriate way, in line with the honor of his profession, in relation to the judge and prosecutor and other relations other than the degree written in the force of law, which shows the obstacles arising from kinship or marriage.
- Lawyers and Attorney Trainees serve in the courts with their heads uncovered in professional attire. They appear at the hearings in a gown determined by the Union of Turkish Bar Associations and in a clean attire. Male Lawyers wear ties as long as the climate and seasonal conditions allow.

- The lawyer cannot leave the hearing. However, in cases where personal or professional honor necessitates, he can be withdrawn from the hearings. In this case, the lawyer immediately informs the bar association.
- The lawyer avoids requests that will result in prolongation of the case, unless it is necessary for the defense.
- Regarding the refusal of the judge, the rejection or complaints of prosecutors and other justice officials, and generally in his speeches and writings, the lawyer shall explain the reasons required by the law in a way that does not exceed its purpose. A copy of the rejection or complaint petition is also given to the bar association.
- If the lawyer has had to learn about certain matters from the people who will be heard as witnesses in the future, he should avoid falling under the suspicion of influencing them. A lawyer cannot advise witnesses, instruct them on how to testify or how to act before a judge.
- The lawyer maintains his attitudes and behaviors in accordance with the dignity and dignity of his profession in his relations with the officials working in court offices, enforcement offices and all kinds of authorities.

Collegiate Solidarity and Relationships

- No lawyer can make publicize his views on the professional attitudes and behavior of a colleague. The only authority for complaints on this path is the bar associations.
- No lawyer may openly express his personal views and opinions that are disparaging to a colleague, especially a proxy colleague.
- A lawyer notifies his own bar association of the case he will pursue in the capacity of principal or agent against another lawyer in a letter.
- This rule is valid for the lawsuits filed by bar associations and the Union of Turkish Bar Associations against third parties or against third parties against Bar Associations and UMT, depending on the obligation to provide information.
- Lawyers working together as dependents in public or private institutions, regardless of their staff duties, are obliged not to depart from the principles of justice and equality and avoid behaviors that do not comply with professional solidarity and honor in work distribution, supervision and all kinds of business relations. (The fourth paragraph of the article was accepted at the XII. General Assembly meeting held in Eskişehir.)
- The lawyer who goes to a court case for the first time in another bar district tries to pay a courtesy visit to the president of that bar association.
- A lawyer appointed by the president of the bar association for the death of a colleague or for other reasons cannot refuse this duty without showing an acceptable reason.
- In professional work, they do not spare the help and convenience that can be considered as a necessity of solidarity in procedural transactions and file examinations between lawyers.
- If the lawyer, who was given a decision in absentia because he was late for the hearing, came immediately, the attorney of the other party has to request the cancellation or correction of the absentee decision.
- A lawyer who cannot attend a hearing in another place due to a valid reason, should inform his colleague of his excuse in advance.

- Correspondence between lawyers bearing the record of “private” cannot be disclosed without the consent of the author.
- If the opponent does not have a lawyer, the contact of the lawyer with the opponent remains within the mandatory limits. After each contact with the opposing party, the lawyer informs his client.
- Regardless of the type and procedure of the case, the lawyer gives a copy of the statement and important documents he has given to the court (unwanted) to his colleague.
- The lawyer, who agrees to take an intern with him, shows the necessary attention and care and prepares the opportunities for the interns to grow well.

Relations with clients

- A lawyer can explain to his client his legal opinion about the outcome of the case. However, it specifically states that this is not a guarantee.
- The lawyer does not accept the power of attorney of two persons in the same case, whose defense may harm each other.
- A lawyer who provides legal assistance to one of the parties in a dispute cannot take the power of attorney of the other party in conflict and cannot provide any legal assistance.
- Lawyers working in the joint office are also bound by the rule not to represent anyone whose interests are in conflict.
- The lawyer is bound by professional secrecy. It also takes this measure as the basis for refraining from witnessing. The lawyer also considers the information he learned as a secret due to the application of people whose case he did not take. Keeping the secret of attorneys is indefinite, leaving the profession does not remove this burden. The lawyer also takes measures to prevent the behavior of his assistants, interns and employees against professional secrecy.
- The lawyer may refuse the job offered to him without giving any reason. He cannot be compelled to explain the reasons that are the basis of his discretion.
- A lawyer does not accept a job that his time and skills cannot reach.
- The lawyer will take care to use his right to refrain from taking the case and prosecuting in a way that does not harm his client.
- If the business owner wishes to represent a second attorney after the attorney with whom he made the agreement, he must inform the first attorney in writing before the second attorney accepts the job.
- A lawyer cannot make a statement on behalf of his client unless absolutely necessary. It is not intended to be effective in fairness in explanations.
- A lawyer cannot benefit himself at the expense of his client by arguing or misusing his duty in the case he is dealing with.
- The lawyer may request an advance to cover business-related expenses. Attention is paid to ensure that the advance does not exceed the requirements of the job, that the expenses made from the advance are reported to the client from time to time, and that the remaining money from the advance is returned to the client at the end of the work.
- The money and other values received on behalf of the client are announced and given to the client without delay.

- If there is an account related to the client, the situation is reported in writing at appropriate times.
- The lawyer tries to prevent taunts from his client to his colleagues; If necessary, he can withdraw from the power of attorney.
- The lawyer can use his “right to imprisonment” in proportion to his receivables.
- The works that are seen through judicial consultation are carried out with the care shown to other works.
- The lawyer who will file a wage lawsuit first informs the board of directors of the bar association. The board of directors of the bar association has the authority to express its opinion on this matter.

Relations of Lawyers with the Union of Turkish Bar Associations and Other Bar Associations

- The duties of the Presidency of the Bar Association, the membership of the Bar Board of Directors and the Disciplinary Board, the Presidency of the Union of Turkish Bar Associations, the membership of the Board of Directors, the Chairman of the Disciplinary Board of the Union of Turkish Bar Associations and membership cannot be combined in one person.

(3.4) LAWYER DISCIPLINE

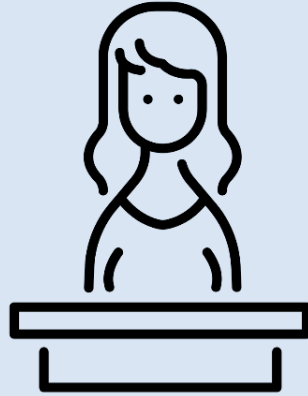
- Attorney Law Article 134: Disciplinary penalties written in this law are applied to those who act and behave in a way that does not comply with the honor of attorneys, order and traditions and professional rules, those who do not perform their duties in their professional work or do not act in accordance with the honesty required by their duties.
- The important point here is that abandoning the complaint or acquittal in criminal proceedings has no value in terms of disciplinary punishment. A lawyer who violates the Attorney Law or professional rules with his actions or behaviors will face disciplinary action within the scope of this article.
- Disciplinary penalties stated in Article 135: warning, reprimand, fine and dismissal.
- WARNING PENALTY: This penalty is a warning to the lawyer to be more careful while doing his job. A crime that does not require a heavier penalty is applied as the first penalty to a lawyer who has not been penalized in the last 5 years. It is the lightest punishment.
- PENALTY OF CONDEMNATION: This penalty is to inform the lawyer that he or she has acted with fault. In addition, it is applied as a higher penalty to the lawyer who has a final warning penalty in the last 5 years.
- It should also be noted that in case of violation of the actions and behaviors specified in the section entitled “Rights and Duties of the Attorney” in Section 6 of the Attorneyship Law, a direct reprimand will be given instead of a warning.
- Therefore, failure of the lawyer to carry out the work he has undertaken with due diligence, integrity and dignity requires direct reprimand.
- Article 34 of the Attorney Law and Article 2-3 of the professional rules of the TBB. and Article 4 are applied to protect the dignity of the profession.
- FINE PENALTY: Considering the gravity of the lawyer’s actions and behavior and the fact that the resulting damage has not been remedied, to protect the honor, order and traditions, professional rules and reputation of the attorneys stipulated in Article 158 of the Attorney Law, and to ensure that the profession is carried out in accordance with the purposes and requirements and justice, the penalties may be given directly by the disciplinary committee. Apart from this, it is applied as

a higher penalty to the lawyer who has a finalized reprimand in the last 5 years. This fine is given within the framework of the procedures stipulated by the law.

- **DISCHARGE:** It means the prohibition of the lawyer's professional activity for less than three months but not more than three years. If a lawyer who has been fined in the last 5 years repeats a behavior that requires a disciplinary penalty, then a temporary dismissal penalty is applied. Again, a lawyer who has received a reprimand in the last 5 years may be given a dismissal instead of a fine depending on the severity of his action and behavior.
- In addition, attorneys who cooperate in any way or employ those who are convicted of one of the crimes that prevent being a judge or being an attorney in Article 45/2-3 of the Attorney Law, or those who are prohibited from being attorneys, are given the minimum penalty of dismissal directly.
- **DISSMISSAL:** This is the removal of the lawyer's name from the bar association plate by withdrawing the attorney's license. This deletes the bar association attorney partnership from the registry.
- Pursuant to Article 136/1 of the Attorney Law, with a final decision of imprisonment for more than 2 years or heavy imprisonment for more than 1 year for embezzlement, extortion, bribery, theft, fraud, forgery, being convicted of disgraceful crimes such as abuse of belief and fraudulent bankruptcy, smuggling, smuggling excluding consumption and illicit smuggling requires dismissal from the profession. In addition, those who are convicted of disgraceful crimes will face this penalty even if their sentence is postponed or converted into money.
- Since the difference between imprisonment and heavy imprisonment has been abolished in the new TCK, this penalty will be applied to lawyers who have been sentenced to more than 2 years, excluding negligent crimes. Again, the important thing in the crimes mentioned as names is the characterization of the crime. In this context, time is not important. At an important point, although the disciplinary boards give first warning, then reprimand, fine, temporary dismissal and dismissal from profession, the disciplinary boards have a wide authority. Disciplinary committees may impose penalties without ranking according to the form and severity of the attorney's behavior. This is the case in accordance with the principle of deterrence of disciplinary punishments.
- Pursuant to Article 64 of the Attorneyship Law, the complainant must present a defense to the board of directors of the bar association. An administrative fine may be imposed by the Bar Association if no defense is given. An administrative fine is not a disciplinary penalty.
- Article 138 of the Attorneyship Law states that if the actions and behaviors before being admitted to the bar association are not an action that requires dismissal, they will not lead to disciplinary prosecution. Of course, the internship period is excluded from this provision. Again, even if the lawyer leaves the profession, he is also responsible for the actions and behaviors during the advocacy in terms of discipline.
- **PROHIBITION FROM WORK:** Article 153 of the Attorney Law regulates prohibition from work. According to this article; A lawyer who is being prosecuted for a job that would require the penalty of dismissal from the profession may be banned from work as a precautionary measure by the decision of the disciplinary board. In order for this decision to be made, the person concerned must have been heard or called to be heard before court.
- Disciplinary committees cannot act on their own, that is ex officio. They act upon the request of the board of directors of the bar association and examine the file limited to the request of the board of directors of the bar association.
- **OBJECTION:** Against the decisions of the Disciplinary Committee, an objection can be made to the TBB Disciplinary Committee within 30 days.

- TIMEOUT: According to Article 159 of the Attorney Law, disciplinary prosecution cannot be made if 3 years have passed since the act requiring disciplinary punishment. If the work is confiscated by the board of directors, this period does not run. Again, disciplinary punishment cannot be imposed if 4.5 years have passed since the act requiring disciplinary punishment. If the act also constitutes a crime and the law has a longer statute of limitations for this crime, this period is taken into account.
- When disciplinary punishments are finalized, they find application area. The lawyer who has been sentenced may apply to the Disciplinary Board and request that the disciplinary penalty be deleted from the registry after 5 years have passed.

04



CLIENT CENTERED
REPRESENTATION

04

(4.1) CLIENT CENTERED REPRESENTATION

Undoubtedly, the most important and prioritized aspects for lawyers are their clients. According to research, a good client-lawyer reference is the best way to promote a lawyer and their office. If so, we can easily say that the relationship and communication between clients and lawyers is the key point in a flawless management of a business process. The criteria we have listed below are the indispensable rules of a client-centered representation:

- A lawyer can explain to their client their legal opinion about the outcome of the case. However, this is not a guarantee.
- The lawyer cannot represent two people in the same case, whose defense may harm the defense of the other.
- A lawyer who provides legal assistance to one of the parties in a dispute cannot represent and provide any legal assistance to the other party.
- Lawyers working in the joint office are also bound by the rule to not represent people whose interests are in conflict.
- The lawyer is bound by professional secrecy.
 - » The lawyer also takes professional secrecy as a basis in refraining from being a witness.
 - » If the lawyer decides not to take the case, he/she will keep the information he learned during the application process, as a secret.
 - » This secrecy is indefinite, leaving the profession does not remove this burden.
 - » The lawyer also takes measures to prevent the behavior of their assistants, interns and employees against professional secrecy.
- A lawyer can refuse the job offered to him without any reason. They cannot be compelled to explain the reasons that are the basis of their discretion.
- A lawyer does not accept a job outside their capacity.
- A lawyer must use their right to refrain from taking a case in a way, that does not harm their client.
- A lawyer cannot make a statement to the press on behalf of their client, unless absolutely necessary.
- The lawyer cannot provide any benefit to himself by neglecting or misusing their duty in the case he is dealing with. The lawyer may request an advance to cover the expenses related to the work, but that these advances do not exceed needs. The expenses are notified to the client from time to time, and the money remaining is returned to the client at the end of the work.
- Money and other values received on behalf of the client are informed and given to the client without delay.
- A lawyer tries to prevent disrespect from their client to their colleagues; If necessary, he can withdraw as a representative.
- A lawyer can use their “right to imprisonment” in proportion to their attorney-fees.
- If a lawyer files a lawsuit regarding their payments from a client, he/she first informs the board of directors of the bar association he is associated with. The board of directors of the bar association has the authority to express its opinion on this matter.

(4.2) ESTABLISHING A LAWYER - CLIENT RELATIONSHIP

- Relationships with clients are the most tiring and frustrating relationships for lawyers when they are not carried out in a healthy way. Relationships, which may have initially begun with endless optimism, can be eroded as time progresses, due to delays and failures in the expectations of the clients, and after a while, claims can be made that the lawyer is indifferent, incompetent or even in agreement with the other parties' claim. The client - lawyer relationship loses its dignity; unpleasant situations occur and complaints begin.
- Undesirable results in relations with clients are usually sown when establishing a client- attorney relationship. The commitments and promises given to the client are always a headache when the case is undertaken by deviating the Attorney Law and professional rules. No one pays a lawyer to face negative consequences, the clients want to hear from their lawyer that positive results will be obtained at the end of the case. Under the psychology of this tendency, the client often perceives the lawyer's optimism as a firm commitment. Relationships enter a painful period when promises are not kept. However, although a lawyer is amongst the important actors of a trial, he alone does not have the power to influence the outcome. In addition, unluckiness or delays caused by procedures may cause the promises made at the beginning come to naught.
- That is why, while explaining their opinion to their client, the lawyer should inform the clients of every possible outcome and should never make any firm statements that the outcome will be positive. A lawyer who gives untrue information to their client in order to undertake the case or makes unreasonable commitments cannot avoid being in a difficult situation, which is incompatible with the honor of being an attorney. For this reason, before a case is undertaken, the scope and limits of the work must be clearly written in the job report or wage contract. The client should be informed that the attorney's fee is not a fee that is collected based on winning a lawsuit, but in return for the effort to seek justice.
- It is also wrong for lawyers to undertake tasks that they cannot handle. Attorneys should keep in mind that if they take cases and works that they are not compatible with, at least, they cause delays in solving the problem. On the other hand, legal inexperience and inadequacies in the case undertaken can also cause loss of rights.
- Money plays an important role in the attorney-client relationship. The relationships that wear out lawyers the most are experienced in monetary matters. The issue of money is a prominent problem both in terms of the collection of the fee and the problems experienced in the payment of the money collected on behalf of the client. Most cases that are reported to the Disciplinary Boards are about lawyers who are blamed by their clients for the uncertainty of their fee agreements. The best solution is always binding the wage to a contract. If there is no such contract, the lawyer must be satisfied with the mandatory minimum wage. Although the use of the right of imprisonment to obtain the wage is a legal right, lawyers must be very careful in the use of the right of imprisonment.
- The lawyer's right of imprisonment is a special type of guarantee recognized in favor of lawyers in order to ensure that they can collect their claims related to attorney's fees and expenses.
- Lawyers are required to deliver the money they collect on behalf of their clients to the client as soon as possible. This is a very sensitive subject. If for any reason, it is not possible to deliver the money to the client, the money should not remain with the lawyer, but should be kept in an account to be opened in the name of the client.
- Another issue in the lawyer-client relations is whether the lawyer can take a case against their former client. According to the Turkish Attorney Law (Article 38/b), a lawyer who has acted as an attorney for a party with opposing interests in the same business or has given an opinion, has to reject the job offered to him. This prohibition was further expanded by the rules of the profession and the phrase "in the same job" was indicated as "in a dispute". For this reason, a lawyer who provides legal assistance to one of the parties cannot take the power of attorney of the conflicting party and

cannot provide any legal assistance. However, this prohibition is not life-long, it is possible to file a lawsuit against the former client after a suitable period of time has passed. However, lawyers should still be sensitive and respect the obligation to keep secrets of former clients.

(4.3) PRACTICAL TIPS FOR THE FIRST INTERVIEW

First impressions are very important in client-lawyer meetings. Given that a self-employed lawyer needs new clients to get new business, the lawyer needs to make an especially good first impression.

- The first basic rule of making a positive first impression for lawyers is to be stylish. You have to get used to wearing a suit, whether you like it or not, as you will often be in formal environments due to your job.
- It should not be forgotten that the time required for first impression varies according to the experts, but it is a maximum of 30 seconds.
- External factors such as the location of your office, the reception of your assistant and the quality of the furniture in your room also play a large part in the first impression. Of course, we do not expect a lawyer who has just started their profession to have a luxury office. He may not even have an assistant. However, the existence of each of these is a plus value for a lawyer in the eyes of the client.
- If there is a possibility that you will be late for your appointment, you should inform your client beforehand, without leaving it until the last minute.
- Greet clients at the door, it never befits a host to welcome sitting. Clients often do not come alone.
- Shake hands in a friendly way. There are also some rules that you should pay attention to when shaking hands;
 - » Men don't reach out until the women do. No show of strength when shaking hands. However, it is important to shake hands in a way that grasps the whole hand, not with the fingertips, and with confidence.
 - » When shaking hands, the other hand should not be in the pocket.
 - » When shaking hands, you should look into the eyes of the other person and smile.
- Since they will have an official meeting with a lawyer whom they have met for the first time, in an environment they are in for the first time, client candidates are generally uneasy and insecure. First of all, you should soften the environment and make them feel comfortable. Make sure you are alone and, in a noise-free environment so that they can share their privates more comfortably.
- You can easily make your client feel that you care about them by telling your assistant not to take any incoming calls. If your mobile phone rings during a call, do not answer it, so that your attitude is consistent.
- Before starting the meeting, do not forget to offer your guests a treat.

(4.4) SPECIAL POPULATION

'Special populations' is a term often used to refer to a particular disadvantaged person, a group that is vulnerable in many ways in society. Groups that need special protection; poor living conditions in society; showing different quantity and quality depending on demographic variables; Physiological, psychological, social, health, economic, political and cultural aspects. These are all social groups that need special protection from of the state, in order to reach contemporary life boards.

Children and young people, women, elderly, disabled, immigrants and minorities are among the groups that need special protection, they are also referred as disadvantaged groups in the Turkish legal system.

Within the scope of United Nations Organization principles and directives regarding the right of legal access, 11 principles have been adopted regarding the disadvantaged groups in the Criminal Justice Systems. According to these Principles special measures should be taken to ensure:

- Women's access to legal aid,
- Children and groups with special needs, including but not limited to the elderly,
- Minorities,
- Disabled persons,
- Those with mental illness,
- Cohabitants with HIV and/or other serious infectious diseases,
- Drug users,
- Stateless persons,
- Asylum seekers, refugees and internally displaced persons.
- Foreign citizens,
- Immigrants and migrant workers

(4.4.1) MINORS

In the Turkish legal system, there are many protective regulations regarding children from disadvantaged groups. Since this handbook that we preparing for lawyers is about criminal law in general, primarily the regulations in the Turkish Penal Code are included. According to this regulation;

- The criminal responsibility of children is determined according to their imputation ability (responsibility of actions). In order for children to have full criminal responsibility, two elements of impeachment ability must coexist:

The Child's Perception Ability: The child's ability to perceive the legal meaning and consequences of the act, in other words, to understand and comprehend.

The Ability of the Child to Direct the Behaviors: The ability to direct the behavior of the child, who understands the legal meaning and result of the act, along this perception. In criminal law, the ability to direct behavior is also called "will power".

The absence of one of the "perception" and "will" abilities of a child who commits a criminal act or a decrease in these abilities means that the criminal capacity of the child is not complete.

(4.4.1.1) CRIMINAL RESPONSIBILITY OF CHILDREN BY AGE GROUPS

Criminal proceedings against children are carried out by juvenile criminal courts. The criminal capacity of a child is the most important legal dispute that the court must resolve. Considering the age, the criminal responsibility of children is determined by classifying them into three groups:

- Criminal Responsibility of Children Under Twelve (12) Years of Age,
- Criminal Responsibility of Children aged 12-15,
- Criminal Responsibility of Children aged 15-18.

(4.4.1.1.1) Criminal Responsibility for Children Under Twelve (12) Years Old

Children under the age of 12 do not have any criminal responsibility. There is no need for a report or investigation to determine the criminal liability of children under this age. For this reason, children under the age of 12 are considered to be absolutely incapable of fault cannot be prosecuted if they commit a crime. Even if these children do not have criminal responsibility, "security measures specific to children", which we have explained under a heading below, may be applied (TPC Art.31/1).

Children whose real age is younger than 12 but appear older in the population registry should have their age determined by the Forensic Medicine Institute. If it turns out that their real age is under 12, contrary to the birth certificate, a decision should be made that there is no basis for prosecution against the child. The court should also decide that "there is no need for a penalty to be imposed on the child who is dragged into crime because of their minor age".

(4.4.1.1.2) Criminal Responsibility of Children aged 12-15

The criminal capacity of children, who have reached the age of 12 but not 15, is determined by conducting research. The criminal capacity of children in this age group should be examined in two separate parts:

- Children in the 12-15 age group who cannot perceive the legal meaning and consequences of their actions or whose ability to direct their behavior is not sufficiently developed do not have criminal responsibility. “Juvenile-specific security measures” can also be applied to these children who are dragged into crime. (As explained before, the Turkish legal system uses the term “*children who are dragged into crime*” instead of child criminals.)
- Children in the 12-15 age group who have the ability to “perceive” the legal meaning and consequences of their actions or have the ability to “direct” their behaviors have criminal responsibility.

According to Article 20 of the Regulation on the Procedures and Principles Regarding the Implementation of the Child Protection Law, it is a legal obligation to obtain the following two reports in order to fully determine the criminal responsibility of children in this age group:

Forensic Report on Legal incompetence: For children aged 12-15, it is a legal obligation to obtain a “forensic report” in order to determine whether the ability to “perceive” the legal meaning and consequences of the criminal act and “direct” their behavior in relation to this act is sufficiently developed. A “forensic report” should be obtained from a Forensic Medicine specialist, a psychiatric hospital or a specialist in the child psychiatry department of a full-fledged public hospital. In the forensic report, it should be explained whether the child has the ability to “perceive” and “direct” separately for each crime he is accused of.

Social Examination Report: A “social analysis report” should be obtained from a specialist, after an examination showing the child’s individual characteristics and social environment should be made by the juvenile judge or juvenile court. The expert who conducts the social examination prepares a report on the family environment, social environment conditions, education, physical and mental development of the child. While assessing whether the child in this age group has the ability to understand the act. The judge considers the observations, determinations and evaluations included in the report prepared by the expert he assigned. The social examination report is an important criterion in the court’s appreciation of the child’s ability to perceive the legal meaning and consequences of the act he committed and to direct their behavior in relation to this act (Child Protection Law Art. 35/1). If a decision is made without a social examination report, the reason for not obtaining a social examination report should be explained in detail in the decision. Implementing both the legal incompetence and the social examination report, it should be noted that; The discretion whether the children who have completed the age of 12 but not completed the age of 15 at the time of committing the act, belongs exclusively to the court. The penalty reduction for the crime committed by children aged 12-15 who have criminal capacity is as follows:

- If the person has the ability to perceive the legal meaning and consequences of the act he has committed and can direct their behavior in relation to this act, the child is sentenced to imprisonment from twelve to fifteen years, if the crime committed by such persons requires aggravated life imprisonment (TPC Art.31/2).
- If the crime requires life imprisonment, the child is sentenced to imprisonment from nine years to eleven years (TPC Art.31/2).
- Half of Other imprisonment sentences are reduced in half and even then, the prison sentence for each act cannot exceed seven years (Article 31/2 of the TPC).

(4.4.1.1.3) Criminal Responsibility of Children aged 15-18

Although the criminal capacity of children in the 15-18 age group is full, a certain amount of penalty reduction should be made over the determined penalty due to being a minor (TPC Art.31/3). It is not obligatory to obtain a “judicial report” on whether the ability to “perceive” the legal meaning and consequences of the act or to “direct” their behavior has developed. However, it is a legal obligation to show the legal justification for not receiving a

report according to Article 35 of the Child Protection Law. If the court or the juvenile judge does not carry out a social examination of the child, the reason should be shown in the decision. If the reason for not obtaining a social examination report is not explained in the decision, this decision can be reversed by the Court of Cassation. For children aged 15-18, the penalty is determined as follows by considering the minor age (TPC Art.31/3):

- Children who have are fifteen but not yet eighteen at the time of committing the act, are sentenced to imprisonment from eighteen years to twenty-four years if the offense requires aggravated life imprisonment.
- If the crime requires life imprisonment, a sentence of imprisonment from twelve to fifteen years is imposed.
- One third of all other term sentences are reduced, and in this case, the prison sentence for each act cannot exceed twelve years.

(4.4.1.1.4) What are Child-Specific Safety Measures?

“Juvenile-specific security measures” are applied to children who do not have criminal capacity. In the TPC law numbered 5237, it's not possible to apply a security measure instead of punishment for a child with a criminal capacity. For those with criminal responsibility, a reduced penalty will be applied according to Article 31 of the TPC. For children with criminal capacity, the security measures specific to children, to which Article 56 of the TPC refers, will not be applicable. However, the protective measures set forth in the 5th article of the ÇKK can be applied.

Security measures specific to children without criminal capacity are regulated under the title of “Protective and Supportive Measures” in Article 5 of the Child Protection Law. Protective and supportive measures are the measures to be taken in the fields of counseling, education, care, health and shelter, primarily to ensure that the child is protected in their own family environment. These measures are:

Counseling Measure: On raising children to those responsible for the care of the child; It also aims to guide children in solving their problems related to their education and development.

Education Measure: The child's attendance to an educational institution as; It is intended for students to attend a vocational or art training course in order to acquire a job or profession, or to be placed next to a professional master or in public or private sector workplaces.

Care Measure: It is a measure for the child to benefit from public or private nursing home or foster family services or to be placed in these institutions, if the person responsible for the child's care cannot fulfill their duty for any reason.

Health Measure: It aims to provide the temporary or permanent medical care and rehabilitation necessary for the protection and treatment of the physical and mental health of the child, and the treatment of those who use addictive substances.

Shelter Measure: It aims to provide suitable accommodation for people with children who do not have a shelter or for pregnant women whose life is in danger.

(4.4.1.1.5) Conversion of the Child's Sentencing to a Judicial Fine

Judicial fine is a type of sanction that can be applied alone or together with a prison sentence for a crime committed.

- It is obligatory to convert a prison sentence of one year or less into a judicial fine for children in all age groups who are under the age of 18 (TPC 50/3)
- Judicial fine imposed on children under the age of 18 cannot be converted into imprisonment because they are not paid (Article 106/4 of the Penal Execution Law No. 5275). However, for the purpose of collecting the judicial fine imposed on children, enforcement proceedings can be carried out with the procedure followed for the collection of other public debts.

(4.4.1.1.6) Postponement of Prison Sentence for Children and HAGB

The suspension of a sentence is a conditional renunciation before the sentence determined by the court in prison is carried out.

- Children sentenced to 3 years or less imprisonment for the crime he/she has committed may be postponed (TPC 51/1).
- Postponing the Announcement of the Judgment (HAGB) is a criminal procedure institution that causes the dismissal of the case. If the sentence imposed on the accused does not produce results within a certain period of supervision, and when certain conditions are met during the inspection period, the penalty decision is eliminated without any consequences. It may be decided to defer the announcement of the verdict (HAGB) regarding the imprisonment sentences of 2 years or less or when judicial fines imposed on juveniles.

(4.4.1.1.7) Detention Order and Prohibition of Arrest for Children

Arrest is a temporary protection measure applied for reasons such as preserving evidence, preventing the escape of the suspect or the accused, etc. An arrest warrant may also be issued for juveniles, if the conditions for detention are met. However, in practice, considering the child's age, arrest warrants should not be issued for crimes outside the jurisdiction of the juvenile heavy penal court.

- Prohibition of arrest; It means that children cannot be arrested in any way by the court, regardless of the nature of the crime or the circumstances. An arrest warrant cannot be issued for children under the age of 15, for their actions requiring a prison sentence with an upper limit not exceeding five years (Art. 21 of the Child Protection Law).

(4.4.1.1.8) The Upper Limit of Children's Prison Sentences Should Not Be Exceeded.

- Without considering that the maximum prison sentence of 12 years and 3 months for children the age group of 12-15 on the date of the crime, with the application of Article 31/2 of the TPC No. 5237, applying the 7 years in accordance with the last sentence of the same article and the discretionary reduction and assigning extra penalty is unlawful.
- The sentence of 12 years and 6 months in prison for a juvenile driven to crime is reduced by 1/3, pursuant to Article 31/3 of the same Law, from the 18 years and 9 months prison sentence pursuant to Articles 103/2, 103/3, 43/1. And according to the regulation in the last sentence of the same article, it is unlawful to over-determine the penalty without considering that it cannot be more than 12 years.

(4.4.1.1.9) Provisions of Recidivism Cannot Be Applied To Juveniles

In the 4th paragraph of the article, after specifying the crimes that cannot be taken as a basis for repetition, the 5th paragraph states that "the recidivism provisions cannot be applied due to the crimes committed by persons who were under the age of eighteen at the time of committing the act". Against the clear regulation in the 5th paragraph, there is no possibility to take the verdict given by the Trabzon 1st High Criminal Court for attempt to kill intentionally as a basis for repetition.

In addition to the above-mentioned issues, some decisions have been taken regarding the disadvantaged minors in the Turkish legal system, both by legal regulations and international agreements. These are as follows;

The definition of "child" is included in the paragraph 6/1-b of the section titled "Definitions" in the beginning part of the Turkish Penal Code No. 5237. In this context, a person who has not yet completed the age of eighteen is considered a child according to the TPC.

- According to the ILO, the minimum working age is 15.
- The entry of children and young people into working life as workers begins with the industrial revolution.

- For the first time in the international arena, in the 1890 Berlin Conference, a decision was taken regarding the age and duration of children's employment, and occupational health and safety.
- The first regulation in Türkiye was the Law No. 151 in 1921.
- There are regulations such as Law No. 3308 and the 1961 constitution.
- In the Law No. 4857, it is stated that it is forbidden to employ children under the age of 15.
- There are special provisions for those over the age of 14.
- Prohibition of working children and young people underground and underwater, or nightwork and also a health report is required in heavy and dangerous works that are stated in the law.

(4.4.2) WOMEN

It is possible to examine the principle of equality from different aspects and dimensions. In addition to the regulations issued by international organizations, domestic law regulations and published scientific works on this subject, there are also judicial decisions. However, it cannot be said that the principle of equality always finds an area of application and gives practical results. Generally, when a solution cannot be found with concrete regulations to a problem that arises in this direction, the principle of equality regulated in the Constitution is applied to an appropriate extent.

Although the scope and limits of the principle of equality have been set forth in the laws (especially in the Constitution and the Labor Law) to some extent, the content of the principle of equality is re-examined and tried to be applied in every concrete case. Even though trying to achieve equality through positive discrimination is a matter of law, judicial decisions on this subject are not frequently encountered. Positive discrimination should be examined according to specific and limited principles and the characteristics of each concrete case.

Article 157 of the Lisbon Treaty of 1.12.2009 on the Functioning of the European Union, which amended the Convention of 25 March 1957, the founding Convention of the European Union (which amended the former Article 141), is the provision of the Member States for women or men who cannot adequately represent themselves. It has accepted that in order to eliminate inequality, they can take measures to make it easier for them to practice their profession regarding positive discrimination. Since these measures will be taken with the aim of ensuring equality, it is necessary to examine the principle of equality first.

In this regard, it is necessary to draw attention to an important development in the history of disadvantaged Turkish women.

(4.4.2.1) 12th International Women's Congress, 1935

In particular, although it has not been brought to the agenda until today, the 12th International Women's Union Congress, which was held in Istanbul between 18-24 April 1935 and attended by women representatives from 39 countries, regarding the equality of men and women and granting equal rights to women, has historical value in this regard. This congress shows the importance given to women at the beginning of our republican history.

(4.4.2.2) Principle of Legal Equality and Affirmative Discrimination

Today, if we examine the principle of equality in terms of public law, we can find its basis in Article 10 of the Turkish Constitution. According to Article 10, "Everyone is equal before the law without any discrimination based on language, race, color, gender, political thought, philosophical belief, religion, sect and similar reasons. Women and men have equal rights. The state is responsible for ensuring that this equality is secured. Measures to be taken for this purpose cannot be interpreted as contrary to the principle of equality. The measures to be taken for children, the elderly, the disabled, the widows and orphans of the martyrs of war and duty, the disabled and veterans cannot be contrary to the principle of equality. No person, family, group or class shall be granted privilege. State organs and administrative authorities are obliged to act in accordance with the principle of equality before the law in all their actions."

According to Article 11 of the Turkish Constitution, “Constitutional provisions are the basic legal rules that bind the legislative, executive and judicial organs, administrative authorities and other institutions and individuals.” As it is seen, the principle of equality, which is expressed in the Constitution, primarily binds the organs of the state such as the legislative, executive, judiciary and administrative authorities that exercise public power and obliges them to observe the principle of equality towards citizens while fulfilling their functions. However, by regulating that the provisions of the Constitution are binding on other organizations and individuals other than public bodies, it accepts that the principle of equality will be valid not only in terms of vertical effect (legal procedures), but also in the relations between private law institutions and individuals horizontally. (Workplaces etc.)

Thus, the Constitution does not see the principle of equality as a purely public law institution but adopts its validation also in private law relations. This basic principle is embodied as an institution that limits or shapes the employer’s field of action or limits the management authority, for equal treatment in the field of Labor Law.

(4.4.2.3) Positive Discrimination in Labor Law

It is not possible to apply the principle of equality in the field of private law (employment law) in the same scope and width as it is in public law. If it is implemented in this scope and breadth, there is a possibility that a clear contradiction may arise with the principles of freedom of work and contract, freedom of enterprise (Art. 48) and to the right to property (Art. 35). Within the framework of freedom of contract, individuals do not have an obligation to treat each other equally in this context. However, it is still not possible to discriminate on religion, language and race for the reasons listed in article 10 of the Constitution. The parties making purchase and sale contracts, lease contracts and employment contracts have the right to choose the contracting party, to determine the content of the contract for their own benefit and to terminate them duly, in order to protect their interests, protect and develop their tangible assets, especially because if they assume a risk when investing.

However, the principle of equality, especially in the field of labor law, gains meaning as an obligation to treat equally. Because the worker’s economical and social situation in the working life, according to labor law, they require the employer’s special protection. For this reason, the legislator has brought protective regulations in the field of labor law due the obligation given by the Constitution. In this context, the employer’s equal treatment of dependent workers while exercising its management authority is beyond the justification of fairness and has limited the employer’s freedom of contract and management authority with these special regulations.

Article 5 of the Labor Law No. 4857, which entered into force in 2003, has introduced comprehensive and detailed regulations for the principle of equality, and also determined the principles that will form the basis of positive discrimination.

As stated above, Article 10 of the Turkish Constitution has brought an absolute prohibition of discrimination with the measures it brings. This prohibition is valid both in terms of public law and in terms of private law relations. Criteria of Article 5 of the Labor Law are also very clear in this regard. The employer cannot discriminate the worker because of their religious beliefs, language spoken or race to which he belongs, while hiring. In this sense, the prohibition of discrimination is, in a sense, absolute. Paying different wages due to gender is also of the same nature. Freedom of contract cannot be a priority in this regard. However, apart from this, the prohibition of discrimination and the obligation to treat equally are staggered in private law and are not absolute except for explicit discrimination. In this respect, it is not always easy to identify behaviors contrary to the obligation of equal treatment, and in today’s conditions, the concern of achieving equality by making positive discrimination may even lead to inequality in some cases and conditions. This situation, which can be described as the reversal of the principle of equality in the formal sense, requires a reconsideration.

- Article 5 of the Labor Law has comprehensively regulated the employer’s equal treatment debt under the title of “Principle of Equal Treatment”. In the first paragraph, the basic principle is determined.
- According to Article 5 paragraph 3 of the Labor Law, “The employer cannot directly or indirectly act any different to an employee, in the creation, implementation and termination of the employment contract, due to gender or pregnancy, unless biological reasons or reasons related to the nature of the work oblige.” Pursuant to paragraphs 4 and 5 of the same Article “A lower wage cannot be

determined for a job of equal value due to gender. The application of special protective provisions due to the gender of the worker does not justify the application of a lower wage.”

- Article 74 of the Labor Law regulates that pregnant female workers cannot be employed for a total of sixteen weeks, eight weeks before delivery and eight weeks after delivery.
- Provisional Article 6 of the Labor Law No. 4857 states: By making positive discrimination beyond the principle of equality in terms of women workers, if women voluntarily terminate their employment contract within one year from the date of marriage, they are entitled to severance pay.
- In Communiqué No. 57 dated 30 November 2011 on the Determination and Implementation of Corporate Governance Principles, it is stipulated that at least one female member must be present in the boards of directors of publicly companies. According to the 3rd paragraph of article 26 of the Law on Trade Unions and Collective Bargaining No. 6356, “Organizations are obliged to comply with the principle of equality and prohibitions of discrimination among their members in benefiting from their activities. Organizations observe gender equality in their activities.” With the regulation, unions are obliged to comply with the principle of equality and not act against the prohibition of discrimination in terms of union activities.

(4.4.2.4) Positive Discrimination in Terms of International Regulations

According to these regulations, the prohibition of discrimination shall not be contrary to the adoption and protection measures aimed to prevent and compensate disadvantages groups. In accordance with Article 157 of the Treaty, the member states of the principle of equal treatment shall adopt or retain measures conferring certain advantages in order to facilitate the exercise of the underrepresented sex in a professional activity. As a rule, European Union Conventions or Directives oblige the member states to take measures to ensure equality between women and men, including positive discrimination when necessary.

- Maternity Protection Convention on the protection of women by the ILO.
- Türkiye ratified the UN’s Convention on the Elimination of All Forms of Discrimination against Women in 1985.

(4.4.3) ELDERLY

The elderly, who are considered to be in a disadvantageous position in the Turkish legal system, are considered people who are at least 65 years old. Institutional Maintenance Services include;

- Nursing Home, Nursing Home for the Elderly, Help House for the Elderly, Elderly Apartments - Villages for the Elderly
- People over the age of 65 are entitled to a pension.
- They receive free health services with a green card.
- Measures to be taken for the elderly are not considered to be against the principle of equality.

(4.4.3) DISABLED PEOPLE

The obligation to employ disabled people in Türkiye was first introduced with the Law No. 854. The quota system was included in the labor law numbered 1475.

- In private sector workplaces employing 50 or more workers, at least 3% is required, in public workplaces it is 4%. This takes place through the Turkish employment agency.
- There is a ban on working with the disabled people underground and under water.

(4.4.4) LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX

Disadvantaged people in the Turkish legal system; Sexual orientation definitions such as lesbian, gay, bisexual, transgender and intersex are not included. This issue remains taboo in Turkish society in general. However, it is also known that the number of people who define themselves under the name of these identities in Turkish society is too high to be underestimated.

Again, in Turkish Law, gender reassignment cases come to the fore much more than sexual orientations and sexual identities. This situation manifests itself especially in court decisions, apart from legislative regulations.

Gender is the concept that expresses the sexually based biological difference between men and women. But gender reassignment defines the medical intervention that enables the transformation of a woman into a man or a man into a woman.

The first regulation in Turkish law regarding gender reassignment; Before the Turkish Civil Code No. 4271, the Law No. 3444 (Law on the Amendment of Some Articles of the Civil Code of the Turkish Law No. 743 and Article 49 of the Code of Obligations No. 818) or the amendment made in the Law No. 3444; the Supreme Court did not register changes of those, whose gender was changed by surgery.

According to the second paragraph added to the Civil Code Article 29; “If the gender change that occurs after birth is documented with a minimum health board report, necessary adjustments are made in the population register. In lawsuits to be filed in these matters, if the transgender person is married, hostility is also directed against the spouse, and the same court decides who will be given the custody of the joint children, if any; On the date when the gender change decision becomes final, the marriage automatically ends.”

The regulation added by Law No. 3444 was criticized because it did not specify the circumstances and conditions of the gender reassignment, and it only stipulated that the gender reassignment be approved by the court, without any preconditions.

Through Article 40 of the Turkish Civil Code, a regulation was made regarding gender reassignment. The legislator sees the regulation on gender reassignment as related to the personal status registry (population register) and the article with the correction margin is regulated by the provision of 40.

Conditions for gender reassignment are regulated in Article 40 of the Turkish Civil Code No. 4721; Anyone who wants to change their gender will be able to apply to the court in person and request the change. In order to allow gender reassignment, the court examines whether the claimant:

- Is over the age of 18,
- Is unmarried,
- Is of sound mental health.
- Documentation of the permanent deprivation of reproductive ability with an official health board report must be obtained from a research hospital,

However, Edirne 1st Civil Court of First Instance applied to the Constitutional Court for the annulment of the phrase “...and that he was permanently deprived of reproductive ability...” in the second sentence of the first paragraph of the aforementioned article. The Constitutional Court found it unconstitutional and annulled it by majority of votes.

Judgment of the Constitutional Court No. 2017/130, Decision No. 2017/165 and 20.03.2018 R.G. Dated Decision: Grounds for the Objection: In summary, the conditions for allowing sex change are regulated in the first paragraph of Article 40 of the Turkish Civil Code, one of these conditions is the condition of being permanently deprived of reproductive ability as stated in the rule, and that due to the stipulation of this condition, the ability to reproduce. that transgender people who are not permanently deprived cannot change their gender, that this situation causes inequality between transgender people depending on whether they are permanently deprived of reproductive ability, that transgender people who are not permanently deprived of reproductive ability cannot be expected to continue their lives without sex reassignment surgery – So it has been argued that the rule is in violation of Articles 10, 17 and 20 of the Constitution.

(4.4.5) MENTALLY ILL PATIENTS

The most basic regulation regarding mentally ill people, who are in a disadvantageous position in the Turkish legal system, appears in the 32nd article of the Turkish Penal Code.

(TPC Art.1) A penalty shall not be imposed on a person who, due to mental disorder, cannot comprehend the legal meaning and consequences of the act he has committed, or if, in respect of such act, their ability to control their own behavior was significantly diminished. However, security measures shall be imposed for such persons.

(TPC Art. 2) Notwithstanding that it does not reach the extent defined in paragraph one, where a person's ability to control their behavior in respect of an act he has committed is diminished then a term of imprisonment for a term of twenty-five years where the offence committed requires a penalty of aggravated life imprisonment shall be imposed. Otherwise, the penalty to be imposed may be reduced by no more than one-sixth. The penalty to be imposed may be enforced partially or completely as a security measure specific to mentally disordered persons, provided the length of the penalty remains the same.

Turkish Criminal Code states that if individuals with mental illness commit an offense, they should be punished according to the extent their offense ability is affected. A person lacking ability to perceive the legal meaning and consequences of the offense or having considerably lost the capacity to control their actions due to insanity may not be subject to any punishment (TPC m. 32/1).

The mental illness detected in perpetrator may result in different effects to each event, between types of mental illness' different results can occur in terms of substantive criminal law. For example, it is clarified that 3.8-10% of the burglars are kleptomaniac. It can be said that the person with a kleptomania mental illness does not have the ability of will in terms of theft for things of little value. However, if this person commits the crime of willful homicide, their mental illness does not affect their ability to perceive or will in relation to this act.

It is a medical issue to determine whether a person is mentally ill or not and to determine in general what effects the illness may have on their ability to perceive and will. After the expert reveals this report, it is the judge's duty to determine whether the mentally ill person is responsible for the concrete event, and to what extent the mental illness affects these abilities.

(4.4.5) VICTIMS OF TORTURE

Torture, literally, is defined as excessive physical or moral torture to a person. This general definition of torture, which has an emotional and moral character rather than a legal one, refers to inflicting severe pain and suffering on anyone for whatever reason.

When considered as a legal concept, torture can be defined in various ways. Starting from the regulations in positive law, the motive of the perpetrator, or the legal value that is sought to be protected by the prohibition of torture. For this reason, it is a complex problem to set a standard definition of torture.

As a matter of fact, no definition representing a common understanding of torture can be found in both national and international texts. Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as an "act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining (from him or a third person) information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

Torture, as defined in the Turkish Legal Dictionary, is to commit bodily torment to someone for any purpose, or to hurt the accused to make them confess their crimes, to inflict persecution and torture on them. In Article 94 of the TPC, torture is defined as the perpetration of acts by a public official against a person that is incompatible with human dignity and that will cause him to suffer physically or mentally, affect their perception or will power, and humiliate him.

According to the Turkish Penal Code, the act element of torture consists of “behaviors that are incompatible with human dignity and that will lead to physical or mental suffering, affect perception or willpower, and humiliation”. Accordingly, the act element of torture in TPC consists of two sub-elements. Behaving incompatible with human dignity and committing one or more of the elective acts specified in the article is sufficient for the crime of torture to be committed.

(4.4.5.1) Torture Around the World

The State of Research on the Psychology of Torture Victims in the World Scientific research on the psychology of torture trauma, as a sub-field of psycho-traumatology, started in the 1980s, mostly on dissidents who were victims of torture escaping to European countries from the oppression regimes in the Middle East and South America in the 1970s. While scientific research was carried out only in the countries where the victims took refuge in the first years, these studies started to be conducted in countries where torture was committed, including Türkiye.

Hundreds of studies on the psychology of torture victims have been published so far, and general evaluations were made with meta-analytical studies. It has been clearly demonstrated that torture has a negative impact on the psychology of the victim (eg, Basoglu et al., 1994a; Goldfield, Mollica, Pesavento, & Farone, 1988). To summarize very briefly;

Through International Bridges to Justice’s work we have found that:

- Torture is the cheapest form of investigation,
- Torture is often an economic issue,
- Torture is preventable through providing early access to legal counsel,
- Having a lawyer present at the police station or immediately after arrest protects clients from torture.

According to the conclusions of Steel et al. (2009), which is the largest meta-analytical study in the field, it is necessary to move beyond a narrow-scoped trauma model that focuses on the traumatic event to a social-interpersonal-contextual model to better understand the psychological effects of torture.

(4.4.5.2) Punishment of Torture Crime in Turkish Law (TPC Art.94)

According to the United Nations Universal Declaration of Human Rights;

- The United Nations General Assembly, of which Türkiye is a member, adopted the Universal Declaration of Human Rights on 10 December 1948. Article 5 of the Declaration states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Since the statement is not a contract, it is not legally binding.

According to the European Convention on Human Rights;

- It was adopted by the European Council in Rome on 4 November 1950 and entered into force on 3 September 1953: According to Article 3 of the Convention, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

According to the Constitution of the Republic of Türkiye;

- Everyone has the right to live, protect and develop their material and spiritual existence.
- The physical integrity of the person cannot be touched, except for medical obligations and the cases written in the law; it cannot be subjected to scientific and medical experiments without consent.
- No one can be tortured; No one shall be subjected to a punishment or treatment incompatible with human dignity.
- Acts of killing that occur in compulsory situations where the law permits the use of weapons during the states self-defense; execution of arrest and detention orders, prevention of the escape of a detainee or convict, suppression of an uprising or rebellion, or execution of orders given by the competent authority in extraordinary circumstances, are excluded from the provisions of the first paragraph.

The penalty for torture in the Turkish penal code is as follows;

- Any public official who commits acts that are incompatible with human dignity and that will cause the victim to suffer bodily or spiritually, affect their perception or will power, and humiliate him is sentenced to imprisonment from three to twelve years (TPC Art.94/1).
- If the crime is against a child, a person who cannot defend himself in terms of body or spirit, or a pregnant woman, due to their duty to a lawyer or other public official, he is sentenced to imprisonment from eight years to fifteen years, if committed. (TPC Art.94/2).
- In case of sexual harassment, a prison sentence of ten to fifteen years is imposed (Article 94/3 of the TPC).
- Other persons participating in the commission of this crime are punished with the same sentence as public officials (Article 94/4 of the TPC).
- If this crime is committed with negligence, the penalty to be imposed will not be reduced for this reason (TPC Art.94/5).
- The statute of limitations does not apply for this crime. (TPC Art.94/6).

(4.4.5.3) Two Main Effects of Torture on Human Beings:

(4.4.5.3.1) Depression: It is a mood disorder characterized by a lack of pleasure in actions, and a constant feeling of exhaustion and sadness. Biological, social, psychological factors and their combinations in the life of the individual are effective in its emergence. Metabolic changes in the brain, genetic factors, stress in life, sadness and traumatic events are the causes of depression. The symptoms are generally; sleep change, appetite change, avoidance of social relations, not enjoying life, sexual reluctance.

(4.4.5.3.2) Post-traumatic stress disorder: The functioning of the brain is effected by hereditary psychological risks, experiencing/witnessing events that frighten, helpless and unexpectedly, as well as psychological and social factors caused by traumatic events such as natural disasters, war, illness, torture. Symptoms are generally in the form of insomnia, quick startle, nightmares; symptoms of re-experiencing, avoidance, and overstimulation.

(4.4.5.4) In Case of Suspected Torture or Human Rights Violations, the Lawyer:

As a result of the compulsory defense practice in CMK, the possibility of taking the statement of the suspect without the participation of a lawyer has been eliminated. This situation prevents a criminal suspect from giving a statement without the assistance of a lawyer and thus directly dealing with law enforcement. Despite this, in practice, from time to time, illegal situations that can be considered as misconduct, are noted.

What will be the attitude of the Lawyer who thinks or observes that their client has somehow faced torture, ill-treatment or human rights violation victimization? Above, the crime of torture and its punishment are stated in the law. However, proving this situation or determining whether the accusation is real or not, and if there are strong doubts, to have them recorded, are among the greatest duties of the Lawyer.

The occurrence of this crime is usually in the form of psychological or physical pressure, rough beatings, threats to honor or in forcings confession of guilt. The Lawyer must be able to understand the psychology of these people correctly. In addition to the signs that can be observed from the outside, the general psychological structure of the victim can also give many clues to the lawyer. Symptoms such as serious emotional turmoil, sudden reactions, and rapid anger may appear in these people. The interview should be held in a private area and when no one is present. A calm, understanding and supportive attitude should be displayed. The victim of torture should have confidence in the lawyer.

In practice, victims of torture do not follow up with this crime due to economic impossibilities, ignorance about the remedies or lack of institutions that provide legal assistance. This plays an important role in the continuation of torture. Dealing with sensitive experiences, the Lawyer should focus on this issue sensitively. If the victim understands that he or she has been exposed to torture or an attitude that violates human rights, the Lawyer should

report this matter officially and have the victim checked by a doctor before all other procedures. Thus, it is ensured that there is concrete evidence of the torture.

Many local Bar Associations have special commissions and working groups on this issue, and lawyers share the case with professional organizations to ensure that the relevant organizations take action. In addition, lawyers should report the crime directly to the Prosecutor's Office without delay and ensure that the legal process begins quickly. The lawyer, who figures out the process, the perpetrator and way torture was committed, should directly file a criminal complaint on behalf of their client.

Sometimes it can occur that access of a lawyer to the victims of torture is also arbitrarily prevented medical examinations in accordance with the legislation are avoided, examinations are sometimes accompanied by the police, and many other arbitrary practices are carried out. As explained above; Necessary measures should be taken by the Lawyer to ensure that a detailed health report is obtained from the appropriate institutions. The lawyer should urgently bring the matter directly to the Public Prosecutor, explain the victim's statement and ensure that the relevant persons withdraw from the incident, for keeping the necessary the security camera under protection, and conduct an effective and fast new investigation.

05



INVESTIGATION
STAGE

05

(5.1) FIRST CRIMINAL CHARGE

In the Turkish criminal justice system, while the records are used in the legal field, they actually express the beginning of the event rather than a result. In the investigation phase, which is the first step of the criminal proceedings, the reports are prepared at the beginning of the case. From a legal point of view, after the evidence is obtained, statements are taken from the people and then the preparation of the report begins. The evidence obtained, the statements taken by the police, all known information were collected; The prosecutor is expected to prepare a report. In the report to be prepared by the prosecutor; It should provide detailed information on what the crime was committed, the description of the person or persons who committed the crime as suspects, and the date and time of the crime.

In the case where the report is prepared, if there is a crime, on the report; The crime element, the date the crime was committed, the time the crime was committed, the crime scene and the evidence should definitely be included. Finally, there should be a field under the conclusion title and the result should be explained in detail. There should be no question mark in the mind of the person who reads the summary. The personal information of the suspect or suspects related to the crime, their family information, and their address of residence should be clearly and completely included.

(5.2) ARREST

If there is concrete evidence leading to a strong suspicion of crime and a reason for arrest, an arrest warrant may be issued for the suspect. However, no arrest warrant will be issued if the suspected crime does not carry any penalty or security measure. The following are all sufficient reasons for arrest under the Criminal Procedure Code.

Arrest Order: During the investigation phase, a public prosecutor may request a judge of a court of peace to issue an arrest warrant for a suspect. During the prosecution phase, the public prosecutor may request that the court arrest the accused. These requests must be justified and include legal and factual reasons stating that the judicial control of the suspect or accused will be insufficient without arrest.

Requests for the Release of the Accused: The accused may request to be released at every stage of the investigation and prosecution stages. These requests shall be decided by the judge. The judge's decisions can be appealed. Any appeal of a decision on a request for release will be determined by either the regional court of justice or the Court of Cassation after appropriate investigation.

Procedure: As per Articles 103 and 104, the court will decide to accept, reject or apply judicial control on the defence's release request within three days after the opinion of the public prosecutor, suspect, accused or the attorney has been received by the relevant authority (Additional clause: 24/11/2016- art. 6763/23). This period for decision of judge, shall be applied as seven days in terms of the crimes committed within the framework of the organized crimes , excluding the requests made in accordance with the first sentence of the paragraph one of Article 103 (Additional clause: 11/4/2013- art. 6459/15). This decision shall be made outside the hearing, without obtaining the opinions of the public prosecutor, suspect, accused or defense counsel. These decisions can be appealed.

Notification of the Arrest to Relatives: A relative of the arrested person or a person determined by the arrested person shall be informed without delay of the arrest and each extension of the arrest by the court. Furthermore, the arrestee shall be allowed to report the arrest in person to a relative or a person they designate, provided that the purpose of the investigation is not jeopardized. If the arrestee is a foreigner, the arrest will be reported to the consulate of the state of which the arrestee is a citizen, so long as the arrestee does not object in written form.

Investigation of Detention: At the request of the public prosecutor, the penal court of peace judge shall decide whether it is necessary to continue the detention of the arrestee during the investigation phase. This shall occur no later than 30 days after the detention of the arrestee, as per Article 100, and shall allow the arrestee and defense counsel to argue for release. The arrestee may also request an investigation of the detention within the period set forth above. The judge shall decide ex officio in each hearing whether the detention of the accused should be continued or not. If required by the circumstances, this review may also take place between hearings.

(5.2.1) UNLAWFUL ARREST

If an arrest and detention are carried out in violation of established procedure or statute, the state may be held responsible.

Under Code of Criminal Procedure No. 5271, the state must make just compensation for any searches, seizures, unjust arrests, or detentions carried out during the period when former law No. 466 was in force. However, Law No. 5271 provides for the payment of compensation only for searches, seizures, unjust arrests, or detentions. Any other harms caused by government action do not fall within the scope of Article 141 of the Code of Criminal Procedure.

For example, if harm occurs due to the search, copying and confiscation of computers and computer logs, detection of communication, use of confidential investigators, or monitoring with technical means, no compensation can be claimed under Article 141 of the Code of Criminal Procedure. However, this does not mean that any damages caused by these actions cannot be compensated at all. In such a case, the person harmed may file a compensation lawsuit against the state in accordance with the provisions of administrative law.

(5.2.1.1) What are the Reasons for Compensation?

The reasons on which persons can claim compensation from the state are listed individually in Article 141 of the Code of Criminal Procedure. They are as follows:

- **Decision on Detention, Arrest or Continuation of Detention other than the Conditions stipulated under the Laws:** As per article 141/1-a of the Code of Criminal Procedure, the state is liable for compensation if it turns out that the necessary conditions for detention, arrest or continuation of detention, as stipulated in the Code of Criminal Procedure, do not exist. As per the decree of the 9th Criminal Chamber of the Supreme Court dated 18/12/2003 and numbered 2335/2281, a compensation payment is required for any person arrested without a warrant and released after three days if an unjust arrest is in question. However, in cases where everyone has authority for arrest (e.g. in-the-act status), the state shall not be responsible for any damages arising from the exercise of such authority. If an individual other than the state exercises authority to arrest another, the state cannot be held responsible for any resulting damages.
- **The Legal Detention Period:** As per the Code of Criminal Procedure, persons accused of individual crimes may only be detained for up to 24 hours. The period of detention can be extended to a maximum of three days, not to exceed one day at a time. The public prosecutor must issue a written order extending detention due to the difficulty in collecting evidence or the large number of suspects in collective crimes. If the detained persons are not brought before a judge within three days, the state is obligated to compensate the detainees.
- **Arrest Without Being Informed of Legal Rights:** It is obligatory to inform the arrested person of his/her rights within the scope of Article 147 of the Code of Criminal Procedure. If this notification has not been served and the person has not benefited from the legal assistance of a lawyer or the right to inform the family of the arrest decision, the state is obligated to compensate the arrestee.
- **Right to Be Brought Before the Judicial Authority and Right to Trial Within a Reasonable Period of Time:** All arrestees must be brought before the judicial authority within a reasonable period of time, and their trial must also occur within a reasonable period of time. The right to a fair trial within a reasonable period of time is guaranteed by the right to a fair trial included in Article 6 of the European Convention on Human Rights. Thus, if an arrestee is not brought before the judicial authority within a reasonable period of time and does not receive a trial within a reasonable period, the state is obligated to compensate the arrestee.
- **Compensation and Release:** As per Article 141/1-e of the Code of Criminal Procedure, after being arrested or detained in accordance with the law, a released person may claim compensation. In such a case, the judge does not examine whether damages have occurred. If the crime in question is not sufficient to warrant prosecution and the arrestee was released in a timely manner, no compensation is required. It does not matter for what reason the arrestee was released (lack of

evidence, etc.). However, a decision to adjourn announcement of a verdict shall not be considered as a release decision, and compensation shall not be precluded.

- **Providing Compensation in Case of Conviction:** As per Article 141/1-f of the Code of Criminal Procedure, if the time lapsed in arrest and detention is more than the time determined for the conviction, the state will become liable for compensation. However, it should be noted that detention exceeding the aforementioned three day conditional release period shall not constitute a reason for compensation if the detainee is convicted.
- **Reasons for Arrest and Detention and Failure to Disclose Charges:** As per Article 97 of the Code of Criminal Procedure, the police must issue an arrest report for any person they arrest and give a copy of this report to the arrestee. In the arrest report, the reason for the person's arrest and his/her rights are stated. If the person has not been informed of his/her rights, the state is liable for compensation. For example: Turkish Penal Code art. 141 crime of theft or art. 148 crime of plunder, etc.
- **Failure to Notify Relatives:** It is obligatory to inform an arrestee's relatives about the arrest or detention in accordance with Article 95/1 of the Code of Criminal Procedure. Failure to comply with this obligation will result in the state being obligated to compensate the arrestee.
- **Extreme Implementation of the Search Decision:** As per the Code of Criminal Procedure art. 141/1-i, the state may be liable for any damages that occur during a search.
- **Resolving a Confiscation Decision If Necessary Conditions Do Not Exist, Use of Confiscated Goods for a Purpose Other than Intended, Failure to Take Required Measures for the Protection of Confiscated Goods, and Failure to Timely Return Confiscated Goods:** As per article 141/1-j of the Code of Civil Procedure, the state may be liable for compensation if any of the following occur: confiscation occurs despite necessary conditions for confiscation not existing, the confiscated goods are used for a purpose other than intended, required protective measures are not taken for the confiscated goods, or the confiscated goods are not returned in a timely manner.
- **Denying an Arrestee or Detainee Legal Rights:** Failure to grant the detained or arrested person the opportunity to exercise their legal rights as enumerated in the law may make the state liable for compensation.
- **Compensation In the Case of Renewal of Trial:** Persons released as the result of a renewal of trial within the scope of Article 323/3 of the Code of Criminal Procedure, or whom the state declines to prosecute, may request compensation from the state for any pecuniary or non-pecuniary damages they have suffered as a result.

(5.2.1.2) Conditions of Claims for Damages

Compensation is not granted automatically after release or resolution of a criminal case. A respective claim must be made for compensation. The conditions of a compensation claim made on the basis of Code of Criminal Procedure art. 141 are stated in Code of Criminal Procedure art. 142. The conditions for compensation are as follows:

- Pursuant to Article 141/1 of the Code of Criminal Procedure, persons who are subject to unlawful detention, arrest, search, or confiscation procedures may claim compensation. In the event of the death of the person entitled to claim damages, the Supreme Court has ruled that the person's heirs can continue the lawsuit if a lawsuit has been filed, but the heirs will not have the right to file such a lawsuit themselves.
- Within the scope of Article 141 of the Code of Criminal Procedure, any claim for damages must be filed within three months of the notification of release or the state declining prosecution, and in any case within one year from the decision to release or decline prosecution. Actions for damages not filed within these periods shall be rejected without considering the merits.

- Within the scope of Article 141 of the Code of Criminal Procedure, the claim for damages shall be made to the criminal court. This court shall be the criminal court located in the courthouse of the district where the suffered person resides.
- The application must be made via petition. The information specified in Article 141/2 of the Code of Criminal Procedure should be included in the petition. If this information is not included in the petition, the court will grant the applicant one month to remedy any deficiencies. If the deficiencies in the petition are not remedied within this period, the application will be rejected. Any lawsuit filed for unjust arrest or detention will not incur any filing fees or other charges.
- Pursuant to Article 142/5 of the Code of Criminal Procedure, in actions for damages filed against the state within the scope of Article 141 of the Code of Criminal Procedure, notification will be served to the representative of the state treasury. This notification shall convey all filings and alert the state that they are a party to the suit. This issue is a matter that the Supreme Court pays special attention to and is the reason for the reversal of the decision.
- In actions for damages, the court will issue its decision with a hearing. If the treasury representative is not ready despite the notification, a decision may be issued in its absence. The applicant, the public prosecutor, or the treasury representative may appeal the decision.
- In actions for damages arising from unjust arrest, attorney's fees shall not be awarded for either party unless the case is rejected by the court in its entirety. In that event, the treasury may be awarded attorney's fees.
- As per Article 141/1 of the Code of Criminal Procedure, all pecuniary or non-pecuniary damages can be claimed from the state. The judge will be bound by the claim for damages and cannot rule on an amount more than that claimed.

(5.2.1.3) Pecuniary (Monetary) Damages

In an action for damages, the plaintiff may claim any of the following, so long as it is a result of their arrest or detention: lost severance pay, benefits, and bonuses up until the date of termination of their employment, loss of their job, and attorney's fees for necessary objections during the suit. According to the Supreme Court, if the plaintiff does not submit any evidence of financial losses during his/her unemployment and/or detention, they shall be considered as an unskilled worker and paid the net minimum wage pro rata for the period of detention. Inflation rates must be included when calculating pecuniary damages. Likewise, under the Supreme Court decision dated 23/11/2004 and numbered 1-177/203, interest must be applied to pecuniary damages. It is against the law to assume that the plaintiff will not work on religious and/or national holidays while determining pecuniary damages. Any pecuniary damages so ordered shall be considered incomplete.

The plaintiff may include any attorney's fees incurred as a result of the lawsuit in their request for pecuniary damages. These must be supported by filings showing the retention of the attorney and any payments to the attorney claimed as damages.

In addition to unjust arrest or detention, pecuniary damages can also be claimed for unjust search and/or confiscation procedures. If the confiscated goods are damaged during the search or while in the custody of the state, pecuniary damages can be claimed in compensation.

(5.2.1.4) Non-Pecuniary Damages

The moral suffering and grief of an arrestee or detainee may include loss of reputation in both the family and work environment, feeling homesick for family and relatives, difficulties stemming from incarceration, and depression caused by restrictions of personal freedom. Actions for non-pecuniary damages may be filed for these forms of suffering or grief.

While objective criteria for determining non-pecuniary damages are impossible, a reasonable amount will be determined according to the rules of right and generational rights, as well as by taking into account the social and

economic status of the plaintiff, the nature of the crime attributed to them, the manner of occurrence of the event that caused their arrest, the period of detention, etc.

(5.2.2) ARREST WITHOUT A WARRANT

Arrest without a court order is called an irregular arrest. When this occurs, the “unlawful order” and “order constituting the subject offence” provisions of the Constitution of the Republic of Türkiye become effective.

Where civil servants are given authority to carry out their duties, they are responsible for the performance of those duties in a full and timely manner, and in compliance with the laws, bylaws and regulations of the institutions for which they work. Within those institutions, administrative supervisors can issue orders to civil servants under them. Those civil servants are then obliged to fulfill the orders they receive from their superiors. However, if the order given is contrary to legislation or constitutes a crime, it is necessary for civil servants and attorneys to be aware of the legal ramifications of the order.

(5.2.2.1) What is an Order?

- We can define an order as a declaration of will by a body (supervisor) with the authority and power of superiority, directed and explained to the subordinate (civil servant) for the purpose of performing or not performing a certain action.
- For an order to be legally binding and not incur responsibility for the person fulfilling the order, the order must arise from the public law relationship. In other words, a hierarchical relationship must exist between the person who gives the order and the person who will fulfill the order.
- The order can be a general order in terms of having more than one addressee or having a continuous attribute, or it can be a special order. Orders given to a single officer should be considered special orders; orders that are circulated for all employees should be considered general orders.

(5.2.2.2) What are the Elements of an Order?

An order given by a so-authorized person must be legitimate in order to be fulfilled. The order will be binding upon the recipient only if it is legitimate. For the order to be legitimate;

- It must be issued to the subordinate by an authorized supervisor,
- Fulfilling the order is mandatory, and
- It must be compliant with the law in terms of form and content.

(5.2.2.3) What is an Unlawful Order and an Order Whose Subject Constitutes a Crime?

- In paragraph one of the provision titled “unlawful order“, located in Article 137 of the Constitution of the Republic of Türkiye, it states: “If a person working in public services in any capacity sees the order received from him/her as contrary to the provisions of the regulation, Presidential decree, law or Constitution, he/she does not fulfill it and notifies this violation to the person who gave that order. However, if the superior insists on his order and renews this order in written form, the order is carried out; in this case, the one who fulfills the order is not responsible.”
- In paragraph two of the same article, it states regarding orders constituting a crime: “The order, which constitutes a crime, is not fulfilled in any way; no one who fulfills it can get rid of responsibility.”

The concepts of orders that are contrary to the law and orders that constitute a crime are different from each other. If the order given by the supervisor is contrary to the provisions of the Constitution or the law, but the fulfillment of the order does not constitute a crime, the civil servant who will be required to fulfill the order must notify the supervisor who gave the order of this violation. However, if the supervisor insists that the order be fulfilled regardless and repeats the order in written form, the civil servant must comply with the order. If the supervisor does not repeat the order in written form despite his insistence, the civil servant must not obey the order. In other words, the prerequisite for the fulfillment of an unlawful order is that the order be repeated in written form.

If liability arises from the execution of an unlawful order that does not constitute a crime, it shall fall upon the supervisor who gave the order. However, the responsibility for fulfilling an unlawful order that constitutes a crime belongs to both the ordering supervisor and the officer who fulfilled the order. In other words, the officer who fulfilled an order that constitutes a crime cannot absolve themselves of responsibility by saying that he/she fulfilled an order given, and remains the perpetrator of the crime he/she has committed. Any order that constitutes a crime must not be fulfilled in any way, and there is no responsibility against the supervisor for not fulfilling said order.

The supervisor who gives an order that constitutes a crime may be charged with abetment. In order for the supervisor to be punished, the civil servant who received the order must commit the act or attempt to commit the act constituting a crime. If the civil servant does not fulfill an order that constitutes a crime, the supervisor will not be responsible or punished for giving the order.

(5.2.3) DETENTION AND CONTINUATION OF DETENTION

One of the most recent changes in the Turkish Criminal Justice system is that any continuation of detention will be examined by the judges of the Criminal Court of First Instance. Accordingly;

- In line with the Judicial Reform Strategy Document issued by the Ministry of Justice, some amendments have been made to the Code of Criminal Procedure via the adoption and enactment of the 4th judicial package by the Grand National Assembly of Türkiye. One of these changes is that as of January 1, 2022, all appeals of arrest decisions or judicial control decisions issued by a Criminal Magistrate will be reviewed by a higher court (Criminal Courts of First Instance) rather than by another Criminal Magistrate. Judges of the Criminal Court of First Instance will evaluate the decision(s) resulting in the appeal and accept or reject the appeal. Where the judge of the Criminal Court of First Instance also presides over the Criminal Magistrate from which the appeal was made, the appeal shall instead be examined by the President of the Assize Court.

The maximum detention period may vary depending on the nature of the offence for which the accused is tried or on the type of court. The maximum detention period refers to the maximum period during which a person can be held as a prisoner while being tried for a crime. Investigation into the detainee must be completed and a verdict issued before the maximum detention period has elapsed. Otherwise, an immediate release order must be issued for the detainee. The maximum detention periods are as follows:

- **Maximum Detention Period During Investigation:** The maximum detention period during the investigation phase is 1 year for criminal proceedings and 6 months for civil proceedings (Article 102/4 of the Code of Criminal Procedure).
- **Maximum Detention Period for the Criminal Court of First Instance:** The typical detention period for crimes falling within the jurisdiction of the Criminal Court of First Instance is 1 year. This period may be extended by 6 months in case of necessity. Thus, the maximum detention period for Criminal Courts of First Instance is 1.5 years.
- **Maximum Detention Period for Criminal Courts:** For crimes falling within the jurisdiction of a criminal court, the maximum detention period is 2 years. This period may be extended by 3 years in case of necessity. Thus, the maximum detention period for the crimes subject to the duty of the Criminal Court is 5 years (Article 102/2 of the Code of Criminal Procedure).
- **Maximum Detention Period Under the Anti-Terror Law No. 3713:** The maximum detention period for crimes within the scope of the Anti-Terror Law No. 3713 is 7 years (Article 102/2 of the Code of Criminal Procedure).

Conducting a Detention Investigation: A detention investigation will be performed by the court between the hearings. Detention investigation is a decision on the continuation of the detention or release of the detainee. The court makes its decision by examining the detention status of the detainee via their file.

What is a Review of Detention? A review of detention is the same as a detention investigation. While it can be confusing, the two terms have no difference in meaning. Both terms are legal terms used in court reports.

Hearing for a Review of Detention: A review of detention hearing is an exceptional type of hearing. Generally, reviews of detention are carried out via documents and require no hearing. However, if the detention period is prolonged and the alleged crimes fall within the scope of the Anti-Terror Law No. 3713, the court will hold a review of detention hearing within 90 days. The hearing for the review of detention may only be attended by the detainee and their lawyer. The complainant may not attend.

Failure to Notify the Accused of a Review of Detention: A 30-day detention review can be done without notifying the detainee via document. However, the detainee or his/her lawyer must be heard during each review of detention hearing for crimes falling under Anti-Terror Law No. 3713, to be held every 90 days. If the court has heard from the detainee during the detention review, it does not have to hear from defense counsel. If the detainee has been prepared for the hearing, failure to notify the defense counsel of the detention review shall not constitute a legal violation. It is legally sufficient for any detainee or their lawyer to be heard in detention investigations conducted within the framework of the Anti-Terror Law No. 3713.

Continuation of Detention Decision: After a review of detention, the court may decide to continue the detention of the detainee. The defense may object to this decision.

Objections to a Continuation of Detention Decision: The objection to the decision on the continuation of the detention must be made subject to the provisions of general legal remedies under the Code of Criminal Procedure No. 5271. For example, an appeal against a decision to continue detention issued by the Istanbul Bakırköy 1st Criminal Court would be examined by the Istanbul Bakırköy 2nd Criminal Court.

(5.2.4) ARREST BY PRIVATE PERSONS

Private persons may not make arrests in the Turkish Criminal Justice System.

(5.2.5) ARREST BY THE JUSTICE OF PEACE

The Criminal Court of Peace is legally considered a court under the European Court of Human Rights, acting as an impartial and independent judicial body responsible for deciding secondary criminal matters such as arrests (art. 10 of Law No. 5235). It is also regulated as a court of law. It has jurisdiction over investigation procedures carried out in accordance with the Code of Criminal Procedure No. 5271, objections to these procedures, and objections to select administrative procedures (e.g., objections to administrative fines). It

The penal court of peace is responsible for dealing with some of the proceedings pending during the investigation. This includes carrying out the judge's rulings during the investigation phase in criminal proceedings and examining objections to those rulings, without prejudice to the cases before the court (Article 10 of the Law No. 5235).

As per the Code of Criminal Procedure No. 5271, the duties of the penal court of peace are as follows:

- Decisions to keep under supervision (Article 74 of the Code of Criminal Procedure),
- Internal body examinations and decisions to take samples from the body (Article 75 of the Code of Criminal Procedure),
- Molecular genetic examination decisions (Article 78 of the Code of Criminal Procedure),
- Objections to arrest decision (Article 91/5 of the Code of Criminal Procedure),
- Objections to detention decision (Article 91/5 of the Code of Criminal Procedure),
- Examination of arrest decisions and objections to arrest (Articles 100-101 of the Code of Criminal Procedure),
- Forensic search decisions (Article 78 of the Code of Criminal Procedure),
- Preventive search decisions (Police Duty and Authority Law Article 9/1)
- Confiscation decisions (art. 123-134),
- Judicial control decisions (Code of Criminal Procedure art. 109 - m. 110),
- Defense counsel decisions to restrict examination of the file (Article 153/2 of the Code of Criminal Procedure),
- Broadcasting prohibition decisions related to investigation files (Article 3/2 of the Press Law),

- Examination of decisions resolved by other criminal courts of peace as an appeal authority,
- Examination of the public prosecutor's office's decisions to decline prosecution as an appeal authority,
- Examination of public prosecutors' decisions to postpone the filing of a public lawsuit as an appeal authority,
- Acting as the body of appeal authority against administrative sanctions imposed by administrations in cases stipulated by law.

A party may object to a criminal court of peace's decision on investigation procedures by making a statement to the clerk of the court, provided that it is recorded in a petition or a report to be given to the authority that made the decision within seven days from the day the decision is learned, in cases where the law does not provide an alternative provision.

(5.2.6) ARREST OF PERSONS FOR SPECIAL CRIMES

The Turkish Penal Code has a category of crimes called catalog crimes. Catalog crimes provide authority for arrest in the terms of the crimes themselves. Thus, anyone accused of a catalog crime will be tried as a detainee.

Where a strong suspicion of crime exists based on concrete evidence, the Code of Criminal Procedure defines the following as catalog crimes (Code of Criminal Procedure Article 100):

- Genocide and crimes against humanity (Article 76, 77 and 78 of the Turkish Penal Code),
- Intentional manslaughter (Article 81, 82 and 83 of the Turkish Penal Code),
- Intentional gunshot injury (Turkish Penal Code art. 86/3-e),
- Aggravated intentional injury due to the result (Turkish Penal Code art. 87),
- Torture (Turkish Penal Code art. 94, 95),
- Sexual assault offenses (Turkish Penal Code art. 102 - excluding paragraph one),
- Sexual abuse of children (Article 103 of the Turkish Penal Code),
- Theft (Turkish Penal Code art. 141, 142),
- Extortion (Article 148, 149 of the Turkish Penal Code),
- Production and trafficking of narcotic drugs and psychotropic substances (Article 188 of the Turkish Penal Code),
- Establishing an organization for the purpose of committing a crime (Article 220 of the Turkish Penal Code, excluding paragraphs two, seven and eight),
- Crimes Against the Security of the State (Article 302, 303, 304, 307, 308 of the Turkish Penal Code),
- Crimes Against the Constitutional Order and the Functioning of Order No. 136 (Turkish Penal Code art. 309, 310, 311, 312, 313, 314, 315),
- Arms smuggling under the Law on Firearms and Knives and Other Tools (Art. 12),
- Embezzlement under Banking Law No. 4389 (Art. 22/3-4),
- Offences defined in the Anti-Trafficking Law No. 4926 which require imprisonment,
- Crimes Against the Protection of Cultural and Natural Heritage No. 2863 (Art. 68, 74),
- Deliberate forest burning under the Forest Law No. 6831 (Art. 110/4-5),
- Crimes listed in Article 33 of the Law on Meeting and Demonstrations No. 2911,
- Crimes listed in Article 7/3 of the Anti-Terror Law No. 3713.

Even though offences against physical integrity (intentional injury, reckless injury, reckless killing, etc.) are not among the catalog crimes, they are treated as such (Code of Criminal Procedure art. 100/4). In other words, if there is a strong suspicion of a crime against body integrity based on concrete evidence, authority to carry out an arrest is intrinsic to the crime.

(5.3) SEARCHES

In criminal proceedings that strive to uncover material truth, the research activity carried out on the defendant and/or others in order to obtain evidence is referred to as a "search." A search may include the defendant's belongings, residences, workplaces or other places. A search is a protection measure specific to criminal procedure which has serious implications for the fundamental rights and freedoms of the individual. Its application therefore is very strictly regulated via several detailed conditions.

- A search is a protection measure that seriously affects and limits many fundamental rights and values granted under the Constitutional Guarantee.
- During a search, the housing immunity, privacy of private life, personal freedom and sometimes body immunity of an individual may be invaded and the accompanying rights may be affected.

For these reasons, such severe and important measures as a search can only be applied under certain conditions within the rules exhaustively determined and regulated by the legislation. These rules include the Constitution of the Republic of Türkiye, the Code of Criminal Procedure and other relevant regulations.

The search measure can be performed for two purposes. The first of these is to conduct an arrest or obtain evidence, which is called a “forensic search.” The other is performed to prevent a crime or other danger, and is thus called a “preventative search.”

(5.3.1) FORENSIC SEARCH

As per Article 5 of the Regulation on Forensic and Preventive Searches, a forensic search is defined as “the arrest of anyone under reasonable suspicion of committing a crime or participating in or abetting the crime, of the hiding person, the suspect or the convict and it is the crime investigation process carried out in the residence, workplace, other personal places, on private papers, in his/her goods, vehicles in accordance with the Code of Criminal Procedure No. 5271 and other laws by limiting the privacy of a person’s private life and family life in order to obtain traces, tracks, signs or evidence of the crime.” Based on this definition, a forensic search is carried out for two purposes:

- First, to arrest the suspect, the accused, the convict, the hiding person, the person under reasonable suspicion of committing a crime or participating in or abetting it;
- Second, to obtain traces, tracks, signs or evidence of a crime.

What can be searched with a forensic search:

- A person’s residence
- A person’s workplace
- Other places belonging to the person
- The person himself
- A person’s private documents
- Personal belongings
- A personal vehicle

Required conditions for a forensic search: As mentioned above, a search has more strict conditions that must be satisfied than other protection measures. Any application for a search warrant must specify the reasons the warrant is required, and satisfy the following basic principles of a protection measure:

- Proportionality,
- Degree of doubt,
- Irrevocability (non-delayed nature),
- Legal justification (legality).

However, these principles alone are not sufficient to justify a search. Article 116 of the Code of Criminal Procedure requires there to be a “strong suspicion based on concrete evidence” and Article 117 requires an “existence of events that allow it to be accepted that the search was carried out”. Both of these criteria must be met in order to search a suspect, accused, or third parties.

Forensic search conditions for the suspect or the accused: Article 116 of the Code of Criminal Procedure states that “If there is a strong suspicion based on concrete evidence that he/she can be arrested or criminal evidence can be obtained; the suspect or the accused’s body, belongings, residence, workplace or other places belonging to him/her can be searched.” This article lays out the conditions for searching the suspect or the accused’s body, belongings, residence, workplace or other places belonging to him/her. With the amendment introduced in 2014, the phrase

“Strong Suspicion Based on Concrete Evidence” was added. Thus, under this article, a search warrant can be issued in cases of strong suspicion based on concrete evidence that the suspect or accused may be caught or criminal evidence may be obtained.

The phrase “strong suspicion” was used as the criterion in order to prevent abstract or unfounded reports and arbitrary searches. “Strong suspicion” is the most intense form of suspicion, and is among the types of suspicion set forth in the Criminal Procedure. Moreover, even “strong suspicion” alone is not enough. It must also be “based on concrete evidence; both are necessary elements for a forensic search.

These criteria set forth a burden of proof that can be examined if the decision to issue a search warrant is questioned. This includes how the “strong suspicion” was formed and on what concrete evidence the suspicion was based. If these elements cannot be explained or proven, the forensic search may have been unlawful. Therefore, in order to protect the immunity of private life, family life, and housing (some of the most fundamental rights of individuals), since 2014 forensic searches have required a “strong suspicion based on concrete evidence.”

While “strong suspicion based on concrete evidence” is required for a forensic search, mere “simple suspicion” suffices to commence criminal proceedings and file suit.

Search Related to Suspects and Non-Suspects: Third parties, also called “those subjected to search” in the literature, refers to persons other than suspects or the accused and who are not related to the crime. In Article 117 of the Code of Criminal Procedure, search conditions for these persons are set forth.

The Intention of the Search: The purpose for searching third parties is to arrest the suspect or accused and/or to obtain criminal evidence. In order for a search of third parties to be carried out, there must be an “existence of events” which would reasonably place the suspect or the accused or criminal evidence at the place of search. “The existence of events” requires even more than a “strong suspicion”, that the person or evidence sought is located in the place of search. This provision tries to guarantee the rights of those subjected to search who had nothing to do with the crime.

Searches Conducted While the Suspect or Suspect’s Whereabouts Are Tracked: Paragraph three of Article 117 of the Code of Criminal Procedure makes an exception to the aforementioned requirements. If the suspect or suspect’s whereabouts are being monitored, no “strong suspicion” or “existence of events” is required for a search. Instead, only reasonable suspicion is necessary. Therefore, a “strong suspicion based on concrete evidence” (as laid out by Articles 116 and 117 of the Criminal Procedure Code) is not necessary in these circumstances.

Bodies Authorized to Issue a Search Decision and Warrant: In general, search warrants must be issued by a judge. However, in cases where delay is inconvenient, a written order of the public prosecutor is available as an alternative. In cases where the public prosecutor cannot be reached and it is inconvenient to delay, a search can be made with the written order of a law enforcement officer.

- Exception: When a search is carried out pursuant to an order of the public prosecutor, the search may only be made in the residence or workplace of the searched person, or in closed areas that are not open to the public. Any search made pursuant to a written order of a law enforcement supervisor should be reported immediately to the public prosecutor.

(5.3.2) PREVENTIVE SEARCH (DIRECT SEARCH BY LAW ENFORCEMENT OFFICERS)

Search procedures that can be performed without a search decision, warrant, or order are called “direct search by the law enforcement officers.” The suspect or the accused can be searched:

- If there is a decision to arrest,
- If there is a decision to bring him/her by force, and
- If the person is a “fugitive” for whom an arrest warrant has been issued.

For persons who meet these criteria, no search decision or warrant is necessary to search their residence, workplace, settlement, or vehicle.

- Although a body search is a judicial search, and thus typically requires a search warrant or order, there is no need for a search warrant or order if the person was directly apprehended by law enforcement and the search is made in order to prevent harm to the arrestee, another person, or law enforcement personnel.
- No search warrant is necessary, in the search of the detained person before being placed in detention center,
- If a person is detained by law enforcement but subsequently escapes, there is no need for a search warrant in order to search the vehicle, building or other areas they entered during or after their escape.
- No search warrant is necessary if a crime is carried out or there is a call for help. For example, if a person is seen stealing, there is no need for a search warrant in order to enter a building or its annexes to catch the person.

Mandatory Issues to be Included in a Search Decision or Search Order

- The reason for the search,
- The person, address, goods, residence, or other place to be searched,
- The period of time during which the decision or order will be valid,
- Whether the goods to be searched will be confiscated if they are obtained.

Compulsory Elements for the Execution of a Search

- If the place to be searched is a residence, workplace, or other private place, the public prosecutor must be present during the search. If they cannot be present, two people must be found to be present during the search. These people can either be from the elderly committee, or neighbors of the place being searched.
- If the place to be searched is owned or used by the military, the participation of the public prosecutor is obligatory, and the search must be carried out by military authorities.

Night Search

As a rule, a forensic search must be carried out during daylight hours. Article 118 of the Code of Criminal Procedure prohibits night searches.

Although this is the general rule, searches can be carried out during the night under the following circumstances;

- In cases where delay is inconvenient,
- In cases where the commission of a misdeed is underway,
- In cases where an arrestee or detainee escapes from law enforcement and a search is necessary to apprehend them.

(5.3.3) SEARCH FOR ARRESTED PERSONS

The following provisions shall apply to persons held at detention centers:

- They are to be duly searched before being placed in the detention center or, in compulsory cases, in the places allocated for this purpose. Female detainees are to be searched by a female officer or other woman.
- They must not possess any objects such as belts, ties, ropes, and cutting or piercing tools that may be used to cause harm to themselves or others.
- The goods and money on their person are to be stored by the detention center. A report must be issued stating the type, serial number and amount of any money to be stored. This report must also list the type and brand of any goods to be stored. The detainee must be provided with a copy of this report.

(5.3.4) SEARCH ON WOMEN

Article 119 of the Code of Criminal Procedure is the controlling authority for conducting a search in Turkish Criminal Procedures. This article regulates judicial and preventative searches made on women, physical and genetic examinations of women in criminal proceedings and determinations of physical identity for women. It states, “Law enforcement officers may search upon the decision of the judge or in cases where it is inconvenient to delay, with the written order of the public prosecutor, or in cases where the public prosecutor cannot be reached, with the written order of the public prosecutor. However, in cases where it is inconvenient to search, judge or delay in the residence, workplace and in closed areas not open to the public, the written order of the public prosecutor may be made. The search results issued by the written order of the public prosecutor shall be notified to the chief public prosecutor immediately.”

Execution of Body Searches and Searches of Personal Belongings: Necessary security measures shall be taken to prevent individuals from escaping or attacking law enforcement officers during a search. Law enforcement officers carrying out a search must show their identity cards proving their identities as law enforcement officers.

A search must be performed by an officer of the same gender as the person being searched. During a body or personal belongings search, the reason for the search is to be explained to the person being searched. A body search is to be carried out, if possible, by an electromagnetic device. If no such device is available, then the officer may conduct the search themselves. The same process is to be used for unattended items. If the person being searched resists proportional force may be used to carry out the body or personal belongings search. Body and personal belongings searches should be carried out where the person or vehicle was first stopped or near that place, in a way that cannot be seen by others as much as possible. Searches cannot be made by taking the person or personal belongings elsewhere. If necessary, the law enforcement vehicle or a nearby closed place may be used. Any papers and envelopes found on the person or in his/her belongings during his/her body search shall not be opened unless there is a possibility that it may contain an item subject to confiscation; even if it is opened, any written information thereon cannot be read.

If there is a reasonable suspicion that a person possesses an item not permitted by law and the purpose of the search cannot be achieved otherwise, the search may be carried out by removing the clothes as follows:

- Before the search is made, the top officer in command of that unit of law enforcement must be notified. This notice must include why the search is necessary and how the search will be conducted.
- The search must be conducted by officials of the same gender as the person being searched. The officers conducting the search must take measures to ensure that no one is seen during the search.
- The search is made in a way that will minimize any feelings of shame. First the clothing on the upper part of the body is removed and searched. The person being searched is then permitted to replace their clothing on the upper part of the body. Clothing on the lower part of the body is then removed and searched.
- Necessary care is taken not to touch the person's body during the search.
- The search must be completed as soon as possible.

If any trace, artifact, sign, or evidence of a crime is obtained as a result of the search, the person is arrested.

The procedures in this article may be carried out at night.

(5.3.5) SITE SEARCH

Criminal search is an investigation process carried out in accordance with the Code of Criminal Procedure No. 5271 and other laws in order to capture the person, fugitive, suspect, accused, or convict who is under reasonable suspicion of committing or participating in a crime. It may also be carried out in order to obtain traces, works, signs, or evidence of a crime. A search temporarily limits the privacy of a person's private and family lives, residence, workplace, other places belonging to him/her, belongings, private papers, and/or vehicle.

- Law enforcement officers cannot unilaterally decide to search housing, workplaces, or other indoor areas not open to the public. For these locations, a search can only be made with the written order of the public prosecutor in cases where waiting for the judge to decide may cause an inconvenient delay.

- The person to be searched, the address of the residence or other place to be searched, or the item to be searched must be clearly displayed.
- The Chief Public Prosecutor's Offices shall appoint a public prosecutor to make decisions regarding searches for twenty four hours.
- If an arrest warrant, arrest order, forced arrest warrant, or absence warrant has been issued against the person to be searched, then no search warrant or order is necessary in order to search their residence, workplace, settlement, ancillaries, and/or vehicle in order to arrest them.
- Under Article 25 of the Turkish Penal Code No. 5237, in cases of life-threatening danger to society or individuals, calls for help, self-defense, or necessity, no search warrant is necessary to enter a residence, workplace, settlement, or ancillary and take appropriate action. Similarly, under Article 26 of the same Code, no search warrant is necessary to enter the residence, workplace, settlement, or ancillary of an individual who has consented to the entry and thereby waived their right to privacy. Lastly, under Article 24 of the same Code, no search warrant is necessary to carry out a search in order to apprehend someone in flagrante delicto.
- The judicial search report must include: the license plate number and brand of any vehicle searched; the open address of any residence, workplace, or attachment searched; the type, name, owner, and user of any surface vehicle searched; and the type, name, equipment, port of anchorage, tonnage, agency, captain, and search location of any sea vehicle searched.
- Under Article 20 of the Law on Associations No. 5253, prevention search cannot be made in residences, residential areas, private workplaces, or annexes that are not open to the public.

(5.3.5.1) Searching Housing and Additions

If an arrest warrant, absence warrant, or forced arrest warrant is issued, no search warrant is necessary for a search made to arrest that person. However, this applies only to the person against whom the arrest warrant was issued. No search may be made for other persons in that location unless otherwise agreed or authorized.

The law enforcement knocks on the door by taking the necessary security measures in the closed places and attachments to be searched.

When a search is authorized by a judge or other appropriate authority, or in circumstances that do not require authorization to carry out a search, the conducting officer should attempt to obtain permission from the owner or resident of the place to be searched before entering and request their cooperation.

Closed places and attachments may be entered and searched without prior notice or communication in the following instances:

- The officer conducting the search knows that the place to be searched is not used as a residence or settlement,
- It is understood that there is no one in these places during the search,
- If informing the owner or resident of the impending search may cause destruction or removal of evidence, jeopardize the purpose of the search, or endanger law enforcement officers or others.

In all other cases, law enforcement officers must display the search warrant before entering the place to be searched. If displaying the search warrant may cause inconvenience or delay, the display may be made after entering.

If the search is opposed, an officer may use proportional force to conduct the search. After displaying the search warrant, the officer must warn that force will be used if the door is not opened. If the door is not opened, the premises may be entered by force and the search carried out. The force used should be increased gradually. Any persons present may be searched for possession of criminal goods, either to confiscate the criminal goods or to

ensure the security of the premises. The search is carried out to the extent necessary to achieve the goal, taking into account the size and nature of what is desired to be found. Maximum care must be given to the private lives and property of the people in the place searched.

Any secured containers such as safes may be opened by law enforcement or a qualified professional at the expense of the container's owner. If opening the secured container would be costly, burdensome, or damaging to the premises, the container may also be opened by transporting it to another location owned by law enforcement. Any papers or envelopes encountered during the search are not opened unless there is a possibility that they may contain an item subject to confiscation; even if opened, any written information cannot be read.

The following provisions apply to searches:

- The owner of the places or goods to be searched may be present for the search. If they are not present, one of the following must be present: their representative, one of their relatives with knowledge of the places or goods, a person sitting with the owner, or the owner's neighbor.
- Prior to beginning a search made to arrest the suspect or the accused, or to obtain evidence of a crime, the owner or the person present in the owner's absence must be informed as to the purpose of the search.
- The lawyer of the person cannot be prevented from being present for the search.
- It is not necessary to have witnesses for searches of restaurants, bars, pavilions, casinos, taverns, and similar places which open to the public at night.

(5.3.5.2) Time of Search

The search must be made within the period specified in the decision or written order. Each search warrant authorizes only one search unless a provision to the contrary is present. If there is no emergency that jeopardizes the purpose of the search, the forensic search must be carried out during the day. Forensic searches of residences, workplaces, or other private places may not be carried out at night. In addition, searches cannot be made in these places even with a written order from the police chief. However, a search can be made at night under the following circumstances;

- A person is in the act of committing a misdeed,
- It is inconvenient to delay the search,
- The search would result in the reaprehension of an escaped detainee or convict,
- If the search happens at public places of rest and entertainment open to the public at night and listed in Article 7 of the Police Duty and Authority Law No. 2559.

Preventive searches, inspections, and checks may be made at any time, including at night.

(5.4) CONFISCATION OF GOODS AND DOCUMENTS

Confiscation means the withholding of an item owned by another without their consent in order to prevent a crime or other danger, because it is evidence of a crime, or because the item is otherwise subject to confiscation.

For searches conducted in accordance with Article 10 of the Regulation on Forensic and Prevention Searches, any persons arrested or findings obtained outside the scope of the search order or decision;

- Are not subject to the decision or written order, despite any relation to the current investigation or prosecution,
- May raise a suspicion that another crime has been committed despite not being related to the current investigation or prosecution.

Any evidence so obtained will be taken under protection and a new written order will be requested from the public prosecutor to confiscate the evidence. Additionally, the Chief Public Prosecutor's Office must be notified immediately. If the public prosecutor cannot be reached, a written order by the law enforcement chief will allow confiscation of the evidence.

The confiscation process must be submitted for approval by the judge presiding over the investigation or prosecution within twenty-four hours. The judge must announce their decision within forty-eight hours of the confiscation; otherwise, the confiscation shall be automatically lifted. Any persons seized who are outside the purpose and subject of the search and who have an active arrest warrant shall be referred to the Chief Public Prosecutor's Office with their documents.

Search in Law Offices: If a parcel of legal mail is confiscated and the lawyer, their counsel, or the president of the bar association objects, paragraph three outlines the procedures to be followed.

Search in Associations: Law enforcement officers may not enter, search, or confiscate the goods of an association or its ancillaries without authorization from a judge. This applies even in cases where delay is inconvenient. A judge may extend such authorization if necessary to protect public order or prevent crime.

A judicial decision must also be sought within twenty four hours of a civilian authority confiscating any item. The judge must announce their decision within forty-eight hours of the confiscation; otherwise, the confiscation will automatically be lifted.

(5.5) SUBPOENA

Judges have jurisdiction over decisions and orders for criminal searches. If law enforcement authorities request a search decision, they must provide, via the public prosecutor, a detailed and reasoned report stating their reasons for reasonable suspicion.

If obtaining a judge's decision would result in an inconvenient delay, a written order from the public prosecutor may authorize a search. If the public prosecutor cannot be reached, a written order from the chief of law enforcement may authorize a search. When this occurs, a detailed report shall be prepared and added to the investigation documents explaining why the public prosecutor cannot be reached and which means of reaching them were attempted.

Searches cannot be authorized by the chief of law enforcement for housing units, workplaces, and indoor areas that are not open to the public. In these places, a search can only be authorized by the written order of the public prosecutor if obtaining a judge's decision would result in an inconvenient delay (Abolished clause: RG-29/4/2016-29698).

The Chief Public Prosecutor's Office must immediately be notified of any search and any results thereof authorized by a written order of the chief of law enforcement. If the public prosecutor cannot be reached to authorize a search of a housing unit, workplace, or other indoor area not open to the public, the chief of law enforcement may authorize a search of the outside of the premises. In any request, decision, or order for a search, the following must be included:

- The action that constitutes the reason for the search,
- The person or goods to be searched, or the address of the residence or other place to be searched,
- The period of time during which the decision or order will be valid,
- A clear indication of whether the goods sought are to be confiscated if found.

The Chief Public Prosecutor's Offices shall appoint a public prosecutor to make decisions regarding searches for twenty four hours.

Forensic Search Report: The forensic search process must be recorded in a report. The report must include:

- The date and number of the search decision, or if there is no judge decision, the date and number of the written order and the authority issuing the order,

- The place, date and time of the search,
- The subject of the search,
- The name of the person searched, or descriptive information if they do not provide their name,
- The license plate number and brand of any vehicle searched; the open address of any residence, workplace, or attachment searched; the type, name, owner, and user of any surface vehicle searched; and the type, name, equipment, port of anchorage, tonnage, agency, captain, and search location of any sea vehicle searched.,
- The results of the search, including detailed information about any confiscated criminal items,
- The identities of any persons arrested in the search, or descriptive information if they cannot be identified,
- Whether any injury or material damage occurred as a result of the search,
- The name, surname, registry, and title of the persons who performed the search.

The report must be signed by both those who participated in the search and those present. A copy of the report is given to the relevant person.

(5.6) AUTOPSY

An autopsy must be performed in the presence of the public prosecutor, a forensic specialist and a pathologist or a member of one of the other branches, or by two practitioners. A physician brought in by an attorney may also be present at the autopsy. If necessary, an autopsy can also be performed by a physician. When this occurs, it must be clearly stated in the autopsy report. An autopsy is to be conducted as follows:

- An autopsy is a medical procedure performed by opening the head, chest and abdomen, if the condition of the body allows. In principle, one is done by the coroner, the other by a pathologist or a member of one of the other branches, or by two general practitioners. Any physician brought in by a lawyer may also be present at the autopsy. This strengthens the “right to a fair trial” and allows the lawyer to contribute to the determination of certain evidence in order to obtain solid evidence during investigation. In some regions, conditions may not allow for the listed specialists to be present. Under those circumstances and when necessary, an autopsy may be performed by a physician.
- Any physician who treated the deceased’s illness prior to their death may not perform their autopsy, but may be asked to provide information about the course of the disease by being present during the autopsy.
- Where seeking the decision of a judge would result in an inconvenient delay, an autopsy may be performed at the request of the public prosecutor and in their presence.
- A judge must authorize the removal and autopsy of a buried body. However, where seeking a judge’s decision would result in an inconvenient delay, the public prosecutor may authorize the removal and autopsy.
- A relative of the deceased must be immediately notified of any decision to exhume the deceased’s body. However, notice is not required if it would jeopardize the purpose of the investigation. This may include if the body is likely to be destroyed or if a relative is difficult to contact.
- During the autopsy, the body shall be photographed as much as possible.

(5.7) DETENTION

(5.7.1) Arrest: Refers to the temporary restriction of a person’s freedom in order to eliminate an existing danger to public security, public order, or the person’s body or life, or because the person shows strong traces, works, signs, and/or evidence that they have committed a crime.

(5.7.2) Detention: Refers to the temporary detention of an arrested person, within the legal period and in a manner that does not harm their health, until they are brought before the presiding judge or released.

Temporary arrests may be made by anyone in the following instances:

- If they encounter a person while that person is committing a crime,
- If a person who has committed a crime may escape from any witnesses, or any witnesses to the crime would not be able to immediately identify the perpetrator.

If a delay would be disadvantageous and there is no immediate opportunity to request authorization from the public prosecutor or his superiors, a law enforcement officer may arrest a person without an arrest warrant. The justifiability of such an arrest depends on the crime committed by the arrestee. However, for crimes committed against children or persons incapacitated by physical or mental illness, disability, or weakness, no such determination is required, and the arrest is presumptively just.

Law enforcement must immediately inform any arrestee of their legal rights after taking measures to prevent them from escaping or harming themselves or others during their capture. The public prosecutor must be immediately informed about the arrestee and incident.

Should the purpose of an arrest warrant be rendered null and void for any reason, the court, judge, or public prosecutor shall immediately rescind the warrant.

The Public Prosecutor's Office may continue to detain the arrestee until the investigation is completed. However, the period of detention shall not exceed twenty-four hours from the moment of arrest, excluding the mandatory period for transporting the arrestee to the nearest judge or court. The mandatory period for transportation to the nearest judge or court to the place of arrest cannot be more than twelve hours.

Detention is determined by the necessity of detention to complete the investigation, or the existence of concrete evidence creating the suspicion that the arrestee has committed a crime. In collective crimes, due to the difficulty of collecting evidence or the large number of suspects, the public prosecutor may order in written form that the period of detention be extended for up to three days, with each written order not exceeding an extension of one day at a time. The detainee shall be immediately notified of each order extending the period of detention.

Law enforcement officers may choose to detain a person for up to twenty-four hours. However, a person may be detained for up to forty-eight hours during social events that may lead to widespread violence and serious deterioration of public order, or for crimes committed collectively.

The public prosecutor shall be immediately informed of all actions taken by law enforcement if the reason for a person's detention is eliminated, all necessary procedures are completed, or either the twenty-four or forty-eight hour period elapses. If the detainee is not released at that time, the procedures described above shall apply. However, the person must appear before a judge within forty-eight hours of their detention at the latest, or within four days of their detention in cases of collective crimes.

The following offences involving constraint or violence committed during social events are established in the Turkish Penal Code:

- Intentional homicide,
- Reckless homicide,
- Intentional injury,
- Sexual assault,
- Sexual abuse of children,
- Theft,
- Plunder,
- Production and trafficking of narcotics or psychotropic substances,
- Acting contrary to the measures related to contagious diseases,
- Prostitution,
- Maltreatment,
- Offences included in the Anti-Terror Law,
- Crimes specified in Article 33 of the Law on Meetings and Demonstrations,
- Violating the curfew declared on the basis of the Provincial Administration Law,
- Crimes specified in Article 3 of the Anti-Trafficking Law.

Despite any written order of the public prosecutor authorizing the arrest, detention, or extension of the period of detention of a person, that person, their lawyer or legal representative, spouse, or first- or second-degree blood relative may petition the judge of the penal court of peace for their immediate release.

The penal court of peace judge will examine the petition and issue a ruling thereon prior to the expiration of the twenty-four hour detention period. If the judge rules that the arrest, detention, or extension of the period of detention is appropriate, the petition will be rejected. Alternatively, the judge may rule that the arrested person is to be immediately transported to the Public Prosecutor's Office with the investigation document.

Upon the expiry of the period of detention or the ruling of the judge to release the arrestee, that person cannot be detained again for the same reason unless new and sufficient evidence is obtained about the act that caused the arrest and the decision of the public prosecutor.

If the detained person is not released by the end of the twenty-four or forty-eight hour periods at the latest, he/she must be brought before the judge and interrogated. Their lawyer must also be present during the interrogation. The appointed public prosecutors shall supervise the detention facilities where the detained persons will be kept, the testimony rooms, if any, the situations of these persons, the reasons and periods of detention, and all records and transactions related to detention as a requirement of their judicial duties; they shall record all of the preceding in the Book of Detained Persons.

Persons who are under arrest or arrested and transported from one place to another may be handcuffed in order to prevent escape, or to eliminate any danger they may pose to the life and bodily integrity of themselves or others. Any person arrested in the investigation or prosecution phases pursuant to an arrest warrant issued by the judge or court shall be brought before the issuing judge or court within twenty-four hours at the latest.

If the arrested person cannot be brought before the issuing judge or court within twenty-four hours at the latest, he/she will appear before the judge or court via an audio video communication system. If the court which has jurisdiction over the area where he/she was arrested within the previous twenty-four hours is not available, he/she may appear in the nearest court instead. When a suspect or accused person is arrested, detained or the period of detention is extended, a relative or a person designated by the order of the public prosecutor must be notified immediately.

If a foreigner is arrested or detained, and does not object in written form, the consulate of the state of which he/she is a citizen shall be notified of the arrest or detainment. If a suspect is arrested before a criminal complaint is filed against them, the person authorized to make the complaint, or at least one person if there are multiple persons so authorized, shall be notified of the arrest. The arrest process must be recorded in a report. This report must clearly indicate for what crime, under what conditions, where and when the person was arrested, who made the arrest, by which law enforcement member they were determined, and that their rights were fully explained.

If a suspect is subpoenaed during the investigation phase but does not respond, or the subpoena cannot be served because the suspect cannot be found, the presiding criminal judge may issue a detention order for the suspect at the request of the public prosecutor. Additionally, if a request for an arrest warrant is rejected by the court, that decision may be appealed, and the appellate court shall have authority to issue an arrest warrant.

Public prosecutors and law enforcement agencies may also issue arrest warrants for suspects or the accused who escape from a law enforcement officer after arrest, a detention facility, or a prison. During the prosecution phase, an arrest warrant for the fugitive accused may be issued on the court's own motion, or at the request of the public prosecutor. The arrest warrant must include a clear description of the person, their identity when known, where they are to be sent when caught, and the crimes with which they are charged.

(5.8) POLICE INTERROGATION

Interrogation or inquiry refers to when the judge or court hears testimony from the suspect or accused person in relation to the crime which is the subject of the criminal case. Inquiry is carried out both by the Criminal Court of Peace during the investigation phase and by the competent court where the criminal case is filed during the prosecution phase. For example, if the police and prosecutor's office make statements to the court recommending the arrest of a person who is detained for the crime of abuse of trust, the Criminal Judiciary of Peace will decide whether or not the suspect is arrested.

The main difference between the inquiry and the testimony process is that the testimony process is carried out by law enforcement officers (police, gendarmerie, coast guard) or the prosecutor's office, while the inquiry process is always carried out by a judge. As a reminder, suspect refers to the person suspected during the investigation phase of having committed a crime. The prosecution phase begins with the accusation of commission of a crime. The accused refers to the person who, as a result of the investigation, is under suspicion of committing crime. The prosecution then files the lawsuit with an indictment and begins the prosecution in the court. In short, if there is a suspicion that a person committed a crime, they will be called a "suspect" during the investigation phase and the "accused" during the prosecution phase.

Calling to Testify or Interrogate in the Investigation: The public prosecutor is responsible for the execution of the investigation phase. The public prosecutor conducts the investigation through the police and gendarmerie officers under his command and collects all of the evidence. The police or gendarmerie collect evidence including the kinds of tools used in the crime, doctor's reports, statements of "complainant, suspect and witness" and all kinds of other evidence related to the investigation.

- Law enforcement officers must immediately inform the public prosecutor of persons they have arrested or measures taken on suspicion of the commission of a crime. Law enforcement officers cannot take statements or carry out other police station procedures without instructions from the public prosecutor.
- Criminal law enforcement officers must immediately inform the public prosecutor of any confiscated items, persons arrested, and measures applied, and carry out all the orders of the public prosecutor without delay. The public prosecutor gives their orders and instructions to law enforcement officers in written form; in urgent cases, verbally (Article 161/2-3 of the Code of Criminal Procedure).
- Deposition of the suspect occurs primarily by subpoenaing the suspect to appear at the police headquarters, gendarmerie, police station, or prosecutor's office. The deponent is sent a subpoena, which must clearly state the reason for being summoned and that if they do not appear they will be forcibly summoned (Article 145 of the Code of Criminal Procedure).
- In practice, the police usually receive statements by calling the relevant persons by phone as per Article 15 of the Police Duty and Authority Law. Nevertheless, parties to the case may be subpoenaed by the public prosecutor. During the investigation phase, the police cannot force the complainant, suspect or witnesses to appear and testify without a subpoena from the prosecutor. However, as per Article 36 of the Regulation on Duties and Powers of the Gendarmerie Organization, even if there is no decision of the prosecutor to use force, the gendarmerie may force the appearance of suspects, complainants and witnesses who have not responded to a subpoena.
- If the need arises to depose the suspect regarding the same incident a second time, this can only be done by the public prosecutor (Article 148/5 of the Code of Criminal Procedure). However, for the crimes within the scope of the Anti-Terror Law No. 3713, the police may take statements for the public prosecutor upon the public prosecutor's written order (Provisional Article 19 of the Anti-Terror Law No. 3713).

Forced Summons Decision for Interrogation or Testimony: A forced summons, sometimes called an enforcement order, is a criminal proceeding measure that compels the witness, suspect, or complainant to appear before the judge or court for interrogation and/or deposition by the public prosecutor. Forced arrest and detention are different procedures. The purpose of detention is to restrict a person's freedom to enable the collection of evidence or prevent the person's escape (Code of Criminal Procedure 91). However, the purpose a forced summons is to interrogate a person or take their testimony.

Forced Summons of the Suspect: If the suspect or accused did not appear when subpoenaed, or they have an outstanding arrest warrant, a forced summons may be issued. The forced summons must include the name of the suspect or accused, the crime of which they are suspected, their description if necessary, and the reason for their forced appearance. A copy of the forced summons must be given to the suspect or the accused.

Period of Forced Retention: The forcibly summoned suspect or accused is taken as soon as possible to the summoning judge, court or public prosecutor within twenty-four hours at the latest, excluding up to twelve hours of travel time, and then is either deposed or interrogated.

Start and End of Forced Summons: A forced summons begins at a time deemed justified and continues until the conclusion of the interrogation or deposition by the judge, court or public prosecutor.

Forced Summons of the Complainant: The complainant must be subpoenaed via the call sheet (invitation). A failure to appear is recorded on the call sheet. If a suspect or accused has been detained, the complainants may be brought by force, directly, without sending a subpoena. The forced summons must lay out the reasons for forcing the claimant's appearance. Additionally, the procedure about the witnesses coming with the call sheet is applied to these complainants who are brought by force. The complaining may also be contacted via telephone, telegram, fax, and/or electronic mail. However, a failure to respond to one of these methods is not recorded as a failure to appear on the call sheet. After the lawsuit has been filed, the court may issue a written order requiring the relevant law enforcement officers to be present on the day and time when the complainants who are deemed necessary to be heard will be present. A complainant may only be forcibly summoned if they are heard as a witness before the public prosecutor, judge or court (Article 236/1 of the Code of Criminal Procedure with reference to Article 43 of the Code of Criminal Procedure). Witnesses may also be subpoenaed or forcibly summoned via the same procedure as the complainant. All rules and procedures for forcibly summoning a suspect also apply to victims and complainants (Article 146/7 of the Code of Criminal Procedure).

Procedure in Taking Statements and Interrogation: During the investigation, shall call all individuals whose statements are required and ask them all necessary questions (Police Duty and Authority Law art.15/1). The police may ask the suspect, complainant, or witnesses any question they deem relevant to the investigation. However, they may not ask unfounded or frivolous questions, nor choose what to include and what not to include in their report. Law enforcement officers do not have the right of discretion when taking statements, nor are they the evaluation authority. Law enforcement officers must take all statements given regarding the nature of the incident and record them in the statement report.

Rights of the Suspect or the Accused During Testimony or Inquiry: The inquiry made by the judge or court and the deposition taken by the prosecutor's office or the police must be carried out in accordance with the following principles and rights of the suspect or the accused:

- **Identification:** Before starting the deposition or inquiry, the identity of the suspect or accused must be determined. The suspect or the accused is liable to answer the questions with regard to his/her identity correctly (Article 147/1-a of the Code of Criminal Procedure).
- **Explaining the Charged Offence:** The suspect or the accused must be informed of the accusation made against him/her before beginning the interrogation or deposition (Article 147/1-b of the Code of Criminal Procedure). The European Convention on Human Rights (ECHR art. 6/a) that the suspect or the accused must be informed in detail of the accusation made against them and the reasons for that accusation as soon as possible, in a language they understand. Informing the suspect or the accused of the accusation against them includes informing them of the grounds on which the accusation is based and what crime the accusation constitutes. It is not possible to depose or make inquiries without first explaining what the suspect or accused is accused of in a way that does not cause confusion or hesitation.
- **Reminder of the Right to Hire an Attorney:** The suspect or the accused must be informed that they have the right to benefit from the legal assistance of a lawyer before deposing or interrogating them. They must also be notified that they have the right to choose their lawyer or defense attorney, may benefit from the lawyer's legal assistance, and that the lawyer can be present for their d or interrogation. If the suspect or the accused is not in a position to choose a lawyer themselves and wants to benefit from the help of a lawyer, they shall be assigned a lawyer by the bar.

- **Reminder of the Right to Remain Silent:** The right to remain silent is the most basic defense right of the suspect or the accused. The suspect or the accused has a legal right to not give a statement about the crime with which they are charged (Code of Criminal Procedure 147/1- e). The exercise of the right to remain silent may not be interpreted against the suspect or the accused when assessing the evidence. Article 6 of the European Convention on Human Rights upholds the right to remain silent as a protected human right within the scope of the right to a fair trial.
- **The Right to Request the Collection of Evidence of the Suspect or the Accused:** The suspect or accused has the right to show evidence during the investigation or prosecution and to request the collection of such evidence. During the deposition or interrogation process, the suspect or the accused must be reminded that he/she may request the collection of evidence, and that he/she will be granted the opportunity to confront the evidence against them and make arguments in their own favor (Code of Criminal Procedure art. 147/1-f).
- **Determining Personal and Economic Status:** The suspect or the accused person must be asked about his/her personal and economic status before beginning the deposition or interrogation. The suspect or the accused's personal and economic situation must be taken into account by the court in the implementation of personalized institutions (e.g., postponement of punishment, postponement of announcement of the verdict, etc.). Additionally, if a prison sentence is imposed as a result of the trial, the defendant's economic situation must be considered in determining how much of the prison sentence to convert into a judicial fine.

(5.9) STATEMENTS OF THE ACCUSED

Deposition means that the statement of the suspect relating to the crime under investigation is taken by law enforcement officers or the public prosecutor (Article 2/g of the Code of Criminal Procedure). It may be carried out by the gendarmerie or police via statement taking, or directly by the prosecutor's office. A deposition may not be conducted during the investigation phase by any person other than these officials specified in the law. For example, a deposition regarding a judicial investigation cannot be taken by National Intelligence Organization (MIT) officials.

Testimony and Inquiry Report: Regardless of whether a statement was given to the police, gendarmerie, or the prosecutor's office, the deposition must be recorded in the minutes. The report must be signed by the person who took the statement, the person who recorded the statement, and the person who wrote the statement. A copy of the written statement must be given to the person whose statement was taken. The same requirements apply to the inquiry process, and a copy of the inquiry report must be given to the person who is interrogated by the judge.

Electronic recording devices may be used to record the deposition and inquiry. For example, the SEGBIS record can be used when obtaining the statement of the suspect or the accused. However, a breakdown of these records must be given in a report later.

Pursuant to the Code of Criminal Procedure, Article 147, the testimony or inquiry report must include at least the following:

- The place and date of the deposition or interrogation,
- The names and titles of the persons present during the deposition or interrogation and the identity of the person who was deposed or interrogated,
- Whether all required procedures have been followed in taking the deposition or conducting the inquiry. If these procedures have not been followed, the reasons why must be included,
- The content of the report must be read and signed by the person deposed or interrogated and their lawyer,
- Should the deponent or their lawyer refuse to sign the report, their reasons for so doing must be included.

Obligation of Presence of the Lawyer in Testimony and Interrogation: If the suspect or the accused so requests, the police or gendarmerie must allow his/her lawyer to be present while taking his/her statement. The suspect or accused must be given the opportunity to choose a lawyer for his/herself. The suspect or the accused may make a statement in the presence of their lawyer of his/her own free will. If the suspect or the accused declares that he/she is not in a position to choose a lawyer, a free lawyer shall be appointed by the bar upon his/her request (Article 150 of the Code of Criminal Procedure).

Cases Where the Presence of an Attorney is Required: In some cases, it is legally required that any statements must be taken or inquiries must be made in the presence of a lawyer representing the suspect or the accused, even if he/she does not so request. In these cases, it is not lawful to take statements or make inquiries outside the presence of a lawyer and any such statements or inquiries may not be used as evidence. The following cases carry a legal requirement for a lawyer to be present when any statement is taken or inquiry made:

- If the suspect or the accused is a disabled or deaf 18-year-old child who does not possess the capacity to speak in his/her own defense, a lawyer will be assigned to represent him/her without seeking his/her request (Article 150/2 of the Code of Criminal Procedure).
- Some offences require a lawyer due to the severity of the punishment. In the investigation and prosecution of crimes with a minimum penalty of imprisonment for more than five years, if the suspect or accused does not have a lawyer, it is required that the bar appoint a lawyer to represent him/her (Article 150/3 of the Code of Criminal Procedure).
- When an arrest warrant is requested or issued against the suspect or the accused, he/she will benefit from the help of a lawyer to be selected by him/her or assigned by the bar (Article 101/3 of the Code of Criminal Procedure).
- When an investigation is carried out under the serial proceeding procedure, the suspect or the accused is legally required to retain a lawyer to represent him/her (Article 250 of the Code of Criminal Procedure).

Gendarmerie or Police Statement Taken Without a Lawyer: Any statement taken by the gendarmerie or police before the appointed lawyer has had sufficient time to prepare has no evidence value unless the suspect or the accused accepts it before the court without basing his/her acceptance upon a verdict.

Article 148/4 of the Code of Criminal Procedure states that “the statement taken by law enforcement officers without the presence of a defense counselor cannot be considered to constitute a basis for any verdict unless verified by the suspect or the accused before the judge or the court.” Article 213 of the same Code states that “if there is a contradiction between them, the statements provided by the accused before the judge or the court and the reports of the law enforcement officers issued and the statements taken by the Public Prosecutor in the presence of the accused can be read at the hearing.” Therefore, there are two conditions for reading the suspect or the accused’s statement at a hearing. The first is that his/her statement must contradict his/her statement given to law enforcement officers or his/her deposition by the public prosecutor. The second is that the contradictory statement must have been taken by the judge, the court, the public prosecutor, or law enforcement officers with the suspect or the accused’s lawyer present.

(5.10) RIGHT TO REMAIN SILENT

Silence refers to a state in which a person chooses not to talk or is afraid to talk. In criminal proceedings, “silence” is seen as a fundamental right. This right, which is also referred to as the right to remain silent, may not be violated by any other party involved in the case.

The right to remain silent, sometimes referred to as the right not to testify against oneself or the right not to incriminate oneself, can also be stated as follows: “no suspect and accused person can be forced to speak or incriminate themselves.” One’s right to remain silent is accepted as a bedrock principle of law, and plays a major role in the protection of fundamental rights and freedom.

- **Right to Remain Silent:** While it originated from the Common Law, it has had a profound effect upon the European Legal System and has subsequently been adopted into the Turkish legal system. Although the right to remain silent is not clearly stated in the Turkish Constitution, it has found its place in the Code of Criminal Procedure.

The right to remain silent, which is one of the most effective defense weapons of the suspect or accused in the field of criminal law, is perhaps the least used. As in most legal systems based on Roman Law, the plaintiff carries the burden of proof. Therefore, if the defendant remains silent, he/she leaves the entire burden of proof to the other party. In order to be valid, any admission or confession of guilt must be made voluntarily, and not be made out of fear of bullying, harm, or promises made by a person in a position of authority. In determining whether or not to make a confession or admission of guilt, a defendant may greatly benefit from the assistance of their lawyer. A competent and professional defense attorney will be able to decide when and to what extent the right to remain silent or a confession of guilt may be in the defendant's best interests.

It is unlawful for any party or person to assume that a defendant's silence indicates that "he has something to hide" or "he is not in a position to defend himself." In other words, a defendant's exercise of their right to remain silent must not be seen as evidence of his/her guilt. While the right to remain silent is very effective when used correctly, this is not to say that every defendant who exercises their right to remain silent is guaranteed to avoid punishment. If concrete legal evidence can be presented that proves that the defendant has committed the crime, they are extremely unlikely to avoid conviction.

Reminder of the Right to Remain Silent: The right to remain silent is the most basic defense right of the suspect or the accused. The suspect or the accused has a legal right to not give a statement about the crime with which they are charged (Code of Criminal Procedure 147/1-e). The exercise of the right to remain silent may not be interpreted against the suspect or the accused when assessing the evidence. Article 6 of the European Convention on Human Rights upholds the right to remain silent as a protected human right within the scope of the right to a fair trial.

(5.11) PROHIBITED INTERROGATION METHODS THAT MAY NOT BE APPLIED TO THE CLIENT BY LAW ENFORCEMENT OFFICERS (MALTREATMENT)

Prohibited Methods in Taking Statements and Interrogation: Article 148 of the Code of Criminal Procedure No. 5271 is titled, "Prohibited Procedures in Taking Statements and Interrogation." Any statements of the suspect or the accused should be made out of his/her own free will. Causing physical or mental distress by means of misbehavior, torture, drug administration, fatigue, deception, constraint, threats, or use of tools is strictly illegal (Article 148/1 of the Code of Criminal Procedure).

- Statements obtained through prohibited procedures cannot be considered as evidence, even if they are given with consent. Any testimony taken outside the presence of the suspect or the accused's lawyer cannot be based upon a verdict unless the suspect or the accused confirms it before the court (Article 148/3-4 of the Code of Criminal Procedure).
- Article 148 of the Code of Criminal Procedure not only lists the above prohibited interrogation methods, but also prohibits all interrogation methods "like" the ones listed above. Thus, any method of causing physical or mental distress that affects the free will of the suspect or the accused is prohibited and is strictly illegal. The legally prohibited interrogation methods listed above are defined below.

Maltreatment: Refers to behavior detrimental to the mental or physical health of a person. Maltreatment is considered a crime of torture when it becomes continuous or systematic. For example, depriving a detained suspect of food or pressuring him/her verbally and via detrimental behaviors are both considered to be forms of mistreatment.

Torture: Refers to any action by a public official that is incompatible with human dignity and that causes physical or mental suffering, affects a person's perception or will, or humiliates a person in a systematic and continuous way. For example, continuously and systematically keeping a person awake is considered to be a form of torture.

Drug Administration: Refers to administering drugs to the suspect or the accused in a way that will harm their health or affect their freedom of the will. Drugs can affect a person's free will in many ways. For example, a psychiatric stimulant and a psychiatric depressant may both be administered in the same way. They may be given in the form of medication, tablets, liquid injections, or adding to what the suspect or the accused eats and drinks. In all cases, the administration of drugs to affect the free will of the suspect or the accused are strictly illegal.

Fatigue: Refers to intentional actions that are physically or mentally taxing or are designed to exhaust the suspect or the accused. Such actions fall within the definition of "fatigue," and are strictly illegal. For example, it would be unlawful to start taking statements late at night and to continue taking the same person's statement well into the morning shift. This would be a form of fatigue.

Deception: Refers to the effect of that fraudulent acts or statements may have in convincing the suspect or the accused to make a statement of his/her own free will. For example, the suggestion that the punishment for the act committed by the suspect or the accused is very high, and that the punishment will be reduced if he/she gives the desired statement is against the law, and is a form of deception.

Constraint and Threat: Constraint refers to forcing the suspect or the accused to act in a certain way by using physical force. Threat refers to the promise or implication that the suspect or the accused will be subjected to a future harm or danger if they do not comply with a certain demand. For example, a statement that the suspect or the accused's family will be harmed if he does not give an appropriate confession or testimony is a threat.

Use of Tools: Refers to the use of any tool that diminish the free will of the suspect or accused. The nature of the tool used does not matter. Tools that emerge due to technological developments may be a form of use of tools, as well as older techniques such as hypnosis or polygraph.

Unlawful Promise: Refers to any promise of an unlawful benefit to the suspect or the accused. For example, promising the suspect or the accused that he/she will be released via effective repentance provisions if they confess their crime, when no such provisions exist, would be a form of unlawful promise.

Before a deposition begins, the identity of the suspect must be determined. The identity of the suspect and his/her social-economic status are then written on the top of the statement report. After identification, the suspect must be reminded of his/her rights (the right to remain silent, the right to benefit from the legal assistance of a lawyer, the right to request the collection of the evidence in his/her favor, etc.). After being reminded of his/her rights, the suspect's statement about the accusation is taken. The process of taking a statement takes the form of asking questions to the suspect. The suspect is asked questions one by one, and the suspect answers the questions. He/she may exercise the right to remain silent when he/she is asked questions that he/she does not want to answer. In this case, the next question asked is recorded in the statement report and written immediately after the question in which the suspect exercises his right to remain silent. After the deposition is completed, the statement report is signed by the law enforcement officers who took the testimony, recorded the testimony, and wrote the testimony.

(5.12) DEFENSE INVESTIGATION (PREPARATION AND RESEARCH)

Any evidence collected or uncovered after the investigation phase of the case concludes is held by the court. The collected evidence is then presented at the trial; any party or their attorney may make a statement about the presented evidence (Turkish Penal Code 215). After all such statements have been made, the phase of deducing the conclusion from the hearing, that is, the phase in which the court makes its final decision, begins. The inference phase can be divided into two main sections: the "discussion of evidence" and the "end of hearing and verdict." The discussion of evidence phase occurs first. Arguments regarding the merits of the case will be made in the "discussion of evidence" section, the final stage in the trial.

As per Article 216 of the Code of Criminal Procedure No. 5271, the parties shall speak in the following order during the "discussion of evidence" section of the conclusion stage:

- Any intervening parties representing a prosecuting individual and his/her lawyer, will make their closing statement on the merits of the case.
- The public prosecutor, who represents the state, makes his closing argument on the merits of the case, immediately after any intervening parties and their attorneys.
- After the prosecution party has said their last words, the accused and his/her lawyer or the accused's legal representative will make their closing argument on the merits of the case.

At this point, the accused is reminded that the trial will end after their closing argument, and asked once more for “his/her last word” on the case. After this point, the accused will not be permitted to make any further statements before the court. Failure to give the accused a final say after the statement on the merits is in the nature of a restriction of the right of defense and is an absolute ground for annulment. Because the limitation of the right to defense by court decision in matters that are important for the verdict is among the reasons for annulment. (Article 289/1-h of the Code of Criminal Procedure).

(5.12.1) PROSECUTION AND OBTAINING OTHER EVIDENCE

The primary goal of any criminal proceeding is to reveal the truth through the investigation of material facts. Material truth can only be revealed through reasonable and realistic evidence.

As per the second paragraph of Article 160 of the Code of Criminal Procedure No.5271, during the investigation phase, the public prosecutor must collect and preserve evidence both in favor of and against the suspect. They must also protect the rights of the suspect with the help of the judicial law enforcement officers at their disposal in order to investigate the material facts and carry out a fair trial.

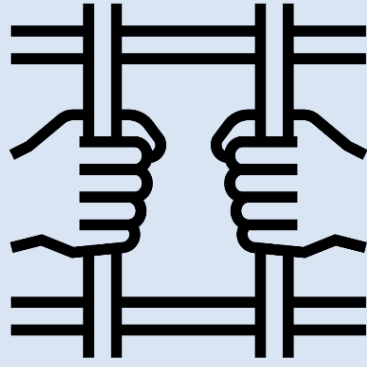
Therefore, the public prosecutor is legally required to add any evidence collected in favor of the accused to the file. The suspect or the accused carries no burden of proof in criminal proceedings. He/she is not required to prove their innocence. The burden of proof falls upon prosecutors, and thus they also have the authority and responsibility to collect evidence. Any person may report any evidence they want to add to the file to the public prosecutor’s office as per Article 147-1/f of the Code of Criminal Procedure.

The suspect or the accused must be reminded that he/she may request the collection of evidence, and that he/she will be granted the opportunity to confront the evidence against them and make arguments in their own favor. Additionally, the suspect or the accused themselves may also provide evidence to be added to the file. The prosecutors must collect any evidence in favor of the suspects, process the evidence via logical analysis, and prepare an indictment after sufficient evidence has been collected to file a lawsuit.

Article 170/5 of the Code of Criminal Procedure states that “in the conclusion part of the indictment, not only the issues against but also the issues in favor of the suspect shall be put forward.” Article 174-1/a of the Code of Criminal Procedure states that if an indictment is issued in contradiction with Article 170, the court must decide if the indictment shall be rescinded. Thus, any prosecutor who does not diligently collect evidence in favor of the accused during the investigation phase and include that evidence in their indictment may be sanctioned by having their indictment rescinded.

In conclusion, as in other countries included in the Continental Europe legal system, the prosecutor is required to collect any and all evidence in favor of the accused during the investigation, even though he/she is themselves a party to the criminal proceedings. The prosecutor should take care to be impartial in carrying out this responsibility. In the event that the prosecutor includes evidence against the suspect in the indictment but is negligent in collecting and including evidence in favor of the suspect, Article 174 of the Code of Criminal Procedure will apply and the incompletely issued indictment will be rescinded. It should be noted that this obligation stems from a mandatory provision of the law.

06



CRIME THEORY

06

(6.1) DEFINITION OF THE CRIME AND PREPARATION OF THE CASE THEORY

At the heart of the law lies the human being as the subject matter of the law. Only human beings can be the addressees of legal norms. A human being will be under an obligation to act in accordance with these norms in the form of orders or prohibitions which apply to him/her. Violation of the obligation in question by an act of commission or omission constitutes injustice.

The elements that need to be found in order to determine that a criminal injustice occurred constitute the subject matter of the crime theory. In crime theory, the structure of a crime is subjected to analytical examination and divided into its elements. Structural elements of crime include material elements, moral elements and unlawfulness elements. These are the mandatory elements that must be present in every crime. If the injustice carried out includes material and moral elements, the violated legal tariff (and corresponding criminal charge) will be mentioned.

However, the fact alone that an injustice is common doesn't automatically make it criminal. Additionally, it must satisfy the legal definition of a crime, or in other words, it must violate one or more statutes. Even if an injustice does meet this criterion, that does not mean that the alleged defendant can or should be punished.

In order for a criminal sanction to be applied against the defendant, the defendant must be deemed to be culpable for the criminal injustice. The defendant can only be punished if he/she is guilty (*nulla poena sine culpa*: no punishment without fault/principle of fault). If the defendant cannot be found liable under the facts of the case, it will not be possible to punish him/her. Therefore, after determining that the structural elements of injustice have occurred, an assessment of the defendant must be made regarding culpability. It should be noted that culpability will not be a structural element of injustice. At this stage, after the determination of the existence of injustice, it will only consist of a judgment about whether to punish the defendant (a judgment of fault).

In determining criminal culpability, it will typically be sufficient to analyze the elements of a crime and determine if the defendant's actions meet each element. However, in some crimes, a defendant cannot be found guilty unless they meet additional conditions. Some of these are positive conditions, meaning that they must be fulfilled in order to find the defendant guilty. Some of these are negative conditions, meaning that they must not be fulfilled in order to find the defendant guilty. These conditions that must be fulfilled in order for the defendant to be punished and whose satisfaction the prosecution will seek to prove are called the conditions of objective punishment. In summary, in order to punish a defendant for a crime on the grounds of criminal policy, they must not only meet the statutory elements of the crime, but must also meet the conditions of objective punishment. Otherwise, they cannot be punished for the crime.

For example, misconduct occurs when a public official acts contrary to the requirements of his/her duty. However, in order for the public official to be punished for this crime, he/she must have caused harm to the public or caused victimization of persons due to acting contrary to the requirements of his/her duty or he/she must have provided an unfair advantage to third parties. It should be noted that the material elements of the crime must coincide exactly in order for the defendant to be found liable for misconduct under the Turkish Penal Code.

Therefore, as previously explained, both "material elements" and "moral elements" of the crime (the cornerstones of a criminal trial) should be included when preparing your case theory.

(6.2) ELEMENTS IN DETERMINING THE THEORY AND THEME OF A CRIME

In order for a behavior to be attributed with the quality of injustice, it must contain both the material elements and moral elements of the crime. However, in this case, an injustice may occur and criminal liability be attributed to the defendant by establishing a link between the act and the defendant.

Pursuant to Article 21 of the Turkish Penal Code, "The occurrence of the crime depends on the existence of the intention." This provision makes it clear that, as a rule, criminal intention must exist for a crime to exist. However, Article 22 of the Turkish Penal Code states that "Acts committed by negligence shall be punished in cases clearly

stated by law.” This means that even if the defendant had no criminal intent, the element of intent will be deemed to have been met by the defendant’s negligence. However, the punishment of the defendant in these cases can be attributed to the fact that there is a clear provision in the law on this issue.

(6.2.1) INTENTION

In Article 21 of the Turkish Penal Code, intention is defined as “knowingly and willingly conducting the elements in the legal definition of an offence.” Therefore, a defendant must both know the statutory elements of a crime and willingly commit them in order to have intention.

A defendant who is aware of the statutory elements of a crime and commits criminal actions is deemed to have acted intentionally. In other words, in order to find that the defendant acted intentionally, he/she must make a conscious decision that includes the material elements of the crime. However, to establish intent, the defendant cannot make that decision intending to keep and uphold the law. The defendant must be aware that their actions will harm another person but still carry out the crime. For example, a defendant who enters someone else’s house must know that the house and the items in it do not belong to him/her but nevertheless take possession of the items inside. This behavior would satisfy the requirement of intention, and therefore be a crime.

(6.2.1.1) Direct Intent

If the defendant who decides to commit a crime foresees with certainty that the material elements in the legal definition of the crime exist or will occur during the execution of the act, and in particular that the desired result of the type of crime will occur, there is direct intent. In other words, if the defendant deliberately performs the act that meets the elements in the legal definition of the crime and knows the consequences of his/her action (or reasonably predicts their act will produce those consequences), he/she acts with direct intent. For example, a defendant who places a bomb on an aircraft with the intention of killing individual “A”, knowing that “A” has boarded the plane, also knows (or reasonably should know) that other people in the plane will die when the bomb explodes. Thus, the defendant had direct intent to carry out their crime.

(6.2.1.2) Possible Intent

In paragraph 2 of Article 21 of the Turkish Penal Code, possible intent is defined as “when the individual conducts an act while foreseeing that the elements in the legal definition of an offence may occur.” Thus, we can define possible intent as the defendant foreseeing and accepting the result that will occur if they actually commit the crime.

It should be noted that the defendant acts with possible intent if he/she accepts the consequences of the act. In other words, if a defendant thinks they cannot prevent a possible consequence of their act but accepts those consequences and acts anyways, they have possible intent. For example, if a defendant places a bomb in a car to kill “A” predicts that another person passing by the car may die when the bomb explodes, but accepts that it might happen and still places the bomb, they have possible intent. In this example, the defendant has direct intent to kill “A” and possible intent to kill any passersby. This is because the defendant was aware of a concrete danger that may occur, but did not deem that danger to be serious enough to cease their action.

Another way to think about it is if the defendant deemed their goal to be so important that the possible consequences were risked to achieve that goal, they have possible intent.

Various theories have been advanced regarding the conditions required to establish possible intent. These theories are as follows:

- Theory of Knowledge (which includes the sub-theories of possibility and probability)
- Theory of Will
- Theory of Consent and Acceptance

According to the Theory of Knowledge, the person who considers that the result is possible (referred to as the Theory of Possibility) or probable (referred to as the Theory of Probability) and commits the act regardless shall be deemed to have acted intentionally. Knowledge constitutes an important element in these theories.

The Theory of Will, unlike the Theory of Knowledge, only requires that the defendant knows of and voluntarily tolerates the existence of danger to establish possible intent. Under this theory, there is possible intent if the defendant does not take any preventative measures although he/she considers it reasonably possible for the danger to occur.

According to the Theory of Consent and Acceptance, if the defendant is aware that their action will cause danger, does not believe that the danger is impossible or highly improbable, and is able to take measures to mitigate the danger, they have possible intent. The defendant does not believe that the danger will not occur, but on the contrary does not try to prevent it from happening and accepts the possible consequences.

If the defendant recognizes the danger is reasonably likely to occur as a result of their actions, but decides to risk the realization of that danger regardless, possible intent can be established and the defendant may be found guilty.

According to the paragraph 2 of Article 21 of the Turkish Penal Code, the consequences of possible intent can be severe: “Accordingly, for offences that require a penalty of aggravated life imprisonment, life imprisonment shall be imposed; for those offences that require a penalty of life imprisonment, a term of twenty to twenty-five years of imprisonment shall be imposed; otherwise the penalty shall be reduced by one-third to one-half.”

(6.2.2) NEGLIGENCE

In Article 22 of the Turkish Penal Code, negligence is defined as “conducting an act without foreseeing the results as stated in the legal definition of the offence, due to a failure to discharge a duty of care and attention.” Thus, a defendant who commits an act knowingly and voluntarily, while foreseeing but not desiring the result shall bear the responsibility of negligence. A person who unintentionally performs an act defined in the Turkish Penal Code by violating the duty of care (unconscious negligence) or who sees the occurrence of such an act as likely but trusts that the consequence will not occur (conscious negligence) shall be deemed to have acted negligently.

In order for a crime to be committed with conscious negligence it is necessary for the consequence to occur, despite its undesirability, due to the defendant violating the duties of care and due diligence. In that case, the following elements must be present in order for the wrongful content of negligent crimes to occur;

- Violation of the objective duty of care,
- Observability of the danger situation,
- Causing consequences.

As per paragraph 1 of Article 22 of the Turkish Penal Code “Acts conducted with [negligence] shall be subject to a penalty only where explicitly prescribed by law.” Therefore, wherever a defendant is found guilty of negligently committing a crime, it can be attributed to a law specifically criminalizing that negligent behavior.

Despite the existence of the due diligence obligation of the defendant in negligent crimes, any person who causes harmful consequences by not showing the necessary due diligence and care and not taking the necessary precautions will be held responsible even though he/she does not want the result to occur.

(6.2.2.1) Negligence

The Turkish Penal Code divides negligence into conscious negligence and unconscious negligence. As mentioned above, since unconscious negligence overlaps with the definition of negligence in Article 22 of the Turkish Penal Code, we refer readers to Section 6.2.2 of this document for an explanation. Even though the result is not targeted when a defendant acts with possible intent, they do not take the danger into consideration, and in conscious negligence, the defendant acts with the belief that the result will not occur. In both types of negligence, even though the violation of the obligation of due diligence is a required element, the difference is that conscious negligence applies when it was possible for the defendant to predict the result.

(6.2.2.2) Conscious Negligence

In paragraph 3 of Article 22 of the Turkish Penal Code, conscious negligence is defined as follows; “An act is conducted with conscious [negligence] when the result is foreseen but is not desired.” In other words, although the person foresees the result, he/she performs the action but does not want the result to occur. The defendant would refrain from performing the act if he/she knew that the result would occur, but he/she performs the action thinking that the result will not occur.

In the Turkish Penal Code system, if the crime is committed with conscious negligence, “the penalty for the [negligent] offence shall be increased by one-third to one-half.” Ideally, conscious negligence will therefore have a deterrent effect and prevent occupational accidents, traffic violations, and other crimes. With this explanation, we understand that the purpose of this article is to ‘have a deterrent effect.’

There are various opinions in the literature about whether conscious negligence is a type of negligence or not. Some authors argue that if the defendant predicts the result, there can be no negligence. In other words, they advocate the existence of possible intent, not conscious negligence, when the consequence is predicted. Some other authors define negligence as a type of conscious negligence in accordance with the law.

In our opinion, conscious negligence is a type of negligence under the law. In the case of conscious negligence, the defendant acts with the belief that the possible result will not be realized, and although he/she foresees the result, he/she performs the act as in unconscious negligence. The difference is that prediction is present in conscious negligence, whereas no prediction exists in unconscious negligence.

(6.2.2.3) Possible Intent - Conscious Negligence Distinction

The defendant predicts the result both in possible intent and in conscious negligence. These two concepts differ in whether the result is desired or not.

In possible intent, the defendant accepts that the foreseen result may realize and acts without any confidence that the result will not occur. They are effectively saying ‘Whatever happens, happens.’ In conscious negligence, the defendant is confident that the foreseen result will not occur. Although he/she never wants the result to occur, he/she does not hesitate to act, perhaps in reliance on their own ability to avoid the unwanted result. For this reason, legislators have ruled that in the presence of conscious negligence, the punishment for the negligent crime will be increased.

In conscious negligence, the defendant will not be condemned for wanting the result, but only for being reckless, thereby creating their responsibility for negligence. While it’s impossible to definitively determine whether a defendant wanted or did not want a result, the judge should evaluate whether there was conscious neglect or possible intent according to the facts and characteristics of the case.

In possible intent, the defendant does not allow the risk of the result to prevent him/her from acting. However, if it can be said that the defendant would not have acted if he/she had known that the result would have been realized, we can talk about the existence of conscious negligence. For example, if a driver driving too fast anticipates that it is highly probable that he/she will hit another vehicle, but he/she acts with confidence that he/she will not hit another vehicle, the driver has possible intent. If a person wants to hit another individual walking on a pedestrian path, but also hits another person next to them, he/she commits the crimes of manslaughter with direct intent against who he/she really wanted to hit, and with possible intent against the person next to them.

(6.3) EXPLAINING THE ACTION AND PRESENTING THE THEORY AND THEME OF CRIME

The action or actions described in the indictment are the subject matters of the judgment/criminal case. It is difficult to define the criminal “act” as the subject matter of a criminal case. There is no clear definition in the Turkish Criminal Justice Law for the term act (deed). The concept of act (deed) in criminal justice law and the concept of act (deed) in criminal law are not the same.

In criminal law, the criminal act (deed) is defined using legal concepts. For example, “Any person who appropriates removable property, from its place, which belongs to another, without the consent of the individual in whose possession it is, in order to derive benefit for himself, or a third party” (Article 141/1 of the Turkish Penal Code).

In criminal justice law, the concept of “act” (deed) is defined as an action experienced historically by the defendant and reflected to the external world. There are various opinions about what should be construed when saying “act” (deed) regarding the subject matter of criminal proceedings.

(6.4) DEFENSES

There are several arguments that can be made to reduce or eliminate a criminal penalty. As any lawyer undertaking defense of a defendant should know the best way to raise these arguments, they will be examined in detail below.

In Turkish Penal Code, Articles 24 through 34 state all the reasons for reducing or removing criminal responsibility. These arguments relate to the conditions related to how and why the prohibited and criminal acts were committed, surrounding events, who caused the crime, and reasons why the crime should not be punished or why a reduction in penalty should be made.

The important things are whether the defendant’s act was done in compliance with the law or whether there is a justification or excuse that removes the defendant’s fault. If the act was done in compliance with the law, it shall not be considered a crime under criminal law. Additionally, if the act was done in compliance with the law, the right to make a request in private law will not arise as the act of the person will not be considered a crime. Because the act is not considered a crime, the victim will not be able to file a claim for damages against the defendant. The reasons for compliance with the law in criminal law are listed in four headings: legitimate defense, performance of duty, exercise of right and consent of the person concerned.

(6.4.1) INACCURACY OF THE TRUTH (STATE OF NECESSITY)

A state of necessity is provided in the law as a defense that eliminates all culpability. It is not a matter of protecting oneself from an unjust attack, as in legitimate defense, but from the danger that occurs for any reason, whether just or unjust. The important thing is that one has taken the necessary action to protect himself/herself from this danger. For example, if a person has to enter a house belonging to someone else in order to be protected from an attacking dog, the defendant will not be punished for violating housing immunity.

The behavior that removes the danger does not need to be done against the person who creates the danger. It is also possible to perform that behavior in order to get rid of the danger to a third person or object.

Force, violence, threat, force majeure, and state of necessity are all different from each other. In force, violence, and threat, the will of the defendant is forced by someone else. In the face of an external factor in force majeure, the defendant does not have the opportunity to use his/her will and accordingly acts against his/her will. However, in case of necessity, a voluntary behavior is performed in order to protect against danger. In force, violence, and threat the defendant unintentionally performs that behavior against his/her will, and in case of necessity, he/she acts willingly and voluntarily in order to get rid of a dangerous situation he/she does not desire to happen.

Turkish Penal Code Article 25/2 states that, “No penalty shall be imposed upon an offender in respect of acts which were committed out of necessity, in order to protect against a serious and certain danger (which he has not knowingly caused) which was directed at a right to which he, or another, was entitled and where there was no other means of protection, provided that the means used were proportionate to the gravity and subject of the danger.”

Rationale of the Article: “In paragraph two of the article, the state of necessity (necessity, requirement) is regulated as a reason that eliminates defectivity. In case of necessity, the person shall have no criminal responsibility for the behavior he/she performs in order to eliminate a danger to a right that he/she or someone else has. Unlike legitimate defense, danger will be in question but not an attack, in case of necessity. For the acceptance of necessity, it will also be investigated that the person does not knowingly cause danger, that it is not possible to get rid of the danger without resorting to an action that is a crime, and that the danger is severe and certain. In addition, the “principle of proportionality” has been accepted between the severity of the hazard and the subject and the tool used.”

(6.4.1.1) Conditions for State of Necessity

Conditions for Danger

- The presence of a serious danger
- The danger is directed against a legal right
- To cause danger unknowingly

Conditions for Protection

- Lack of other possible means of protection
- Proportion between the severity of the hazard and the act committed
- No obligation to accept the danger

In cases of necessity, the legislator condones the behavior conducted against the third party. For example, suppose that “A” is about to be hit by a car, but is pushed by “B.” As a result of their push, B hits another vehicle. A’s behavior would be evaluated within the scope of necessity.

(6.4.2) SELF-DEFENSE

Self-defense is an act committed to prevent an attack, in proportion to the force being used, against an unfair attack directed against oneself or another.

In criminal law, legitimate self-defense is accepted as an act in compliance with the law (Article 25 of the Turkish Penal Code). Anyone who uses proportional counterpower to repel an attack shall be spared of punishment under the provisions of self-defense. While their actions are influenced by the unfair attack, the defendant will not be punished even if the limits of self-defense are exceeded by “excitement, fear and panic” (Article 27 of the Turkish Penal Code).

(6.4.2.1) Conditions of Attack in Self-Defense

The conditions of the attack are the conditions arising from the unfair attack of the other party. They draw the boundaries of the defense that can be made within this framework. These conditions are as follows:

- **An Attack Must Be Present for Legitimate Defense State;** the first condition of legitimate defense is that an attack must be present. It is necessary to broadly understand the concept of attack. Any attack that will eliminate the opportunity to defend or make it difficult to defend is considered as an attack that has started. Additionally, any attack that is feared to be repeated even though it is over shall be considered an unfinished attack. Any of these scenarios fulfills the first condition for exercising the right of legitimate defense.
- **An Unfair Attack Must Be Performed for Self-Defense;** an attack directed at the defendant or someone else must be an unfair attack. If there is a legitimate justification for the attack, the defendant cannot benefit from the provisions of self-defense. For example, if force is used while intervening to prevent another from committing suicide, the provisions of self-defense cannot be applied for the act of battery if the person who attempted suicide defends themselves and beats the person who tried to prevent him/her.
- **An Attack Must Be Directed Towards a Right That Can Be Protected by Self-Defense;** the purpose of self-defense should be to protect a right. Therefore, the attack defended against must have been directed towards a right that can be protected by self-defense. It will not be possible for the defendant to benefit from legitimate defense provisions if he/she protects a right that cannot be protected by legitimate defense. For example, the defendant who beats his neighbor against the closure of the right of passage on his neighbor’s land cannot benefit from the provisions of self-defense. This is because the neighbor’s “attack” was not made on a right that could be protected by legitimate defense. It does not matter whether the right to be protected by legitimate defense belongs to the defendant or someone else.
- **Attack And Defense in Self-Defense Must Be Concurrent;** legitimate self-defense must occur at the same time as the attack on the defendant. If the defense and the attack did not take place at the same time, the legitimate defense provisions cannot be applied. In cases where the attack has not started or is unlikely to start, or in cases where the attack has ended, the right of legitimate defense cannot be exercised.

(6.4.2.2) Requirements for Defense in Legitimate Defense

Self-defense is an institution that should be evaluated separately for each act both in terms of attack and in terms of defense. Defense conditions must materialize at the same time as the attack conditions. These conditions are as follows:

- Defense for Self-Defense Must Be Mandatory; if it is possible to get rid of the attack in any other way without defending, the defendant cannot benefit from self-defense provisions. In the circumstances and conditions of the defendant, defense must be necessary to get rid of the attack.
- Legitimate Defense Must Be Done Against the Attacker; while the defendant can make a claim for legitimate defense against an attack, any action against third parties who are not involved in the attack cannot benefit from legitimate defense. For example, suppose two brothers named “A” and “B” were walking on the road and A attacked and battered “C” while arguing with C whom he/she met on the road. Although B was not involved in the fight, “C” also battered “B”. C cannot benefit from the provisions of self-defense here because he/she performed his/her legitimate defense action not only against the attacker, but also against the attacker’s brother, B.
- Attack and Defense in Self-Defense Must Be Proportional; one of the most controversial issues of criminal law in practice is whether the principle of proportionality is followed between defense and attack. If the defense is not proportional to the attack, the provisions of legitimate defense shall not apply. If a defendant uses excess force in defense, they may benefit from the provisions of unjust provocation or the provisions of exceeding the limit in legitimate defense. For example, a person who shoots and kills another who had punched him/her can only benefit from the unfair provocation provision, because the legitimate defense conditions are not met.

(6.4.2.3) Exceeding the Limits in Legitimate Defense (Self Defense)

Even if the defense is initiated when the conditions of self-defense exist, in cases where the act is not considered as a legitimate defense due to the violation of the principle of proportionality, “exceeding the limit in legitimate defense” will be in question. In legitimate defense, the defendant will not be punished if their use of non-proportional force is caused by excitement, fear or haste. The conditions for this defense in cases of exceeding the limit in legitimate defense are as follows:

- Having a right that can be protected by legitimate defense
- All of the conditions related to the attack, which are mandatory to be able to make a legitimate defense, are present
- Exceeding the limit by violating the condition of “proportionality”, which is one of the conditions related to legitimate defense
- Exceeding the limit of self-defense must result from an excitement, fear or haste that can be excused

When individuals are attacked, they may experience fear, excitement, adrenaline, and anxiety as a result. Thus, there is a decrease in the ability of the defendant to direct and moderate his/her behavior. The psychological condition of the defendant is important in determining whether the limit is exceeded in legitimate defense. If the defendant responds to the attack with a grudge and vengeance rather than fear and haste, the application of unfair provocation provisions can be mentioned in the legitimate defense.

If all the aforementioned conditions are met, the defendant has a legitimate excuse for exceeding the limit in self-defense and shall not be punished. In particular, whether the defendant who committed the crime of intentional manslaughter acts within the limits of legitimate defense should be carefully evaluated by the criminal lawyer.

(6.4.3) STATE OF ERROR (BEING MISTAKEN)

Error in understanding criminal law is accepted as one of the defenses that can eliminate or reduce criminal responsibility. Turkish Penal Code No. 5237 has categorized this defense under two basic headings. The first of these is Essential Error (Turkish Penal Code 30/1-2) and the other is Inevitable Error (Turkish Penal Code 30/3-4). According to the Turkish Penal Code No. 5237, error (having a mistaken understanding) cases have been regulated as follows (Article 30 of the Turkish Penal Code);

- A person who does not know the material elements in the legal definition of a crime during the execution of the criminal act does not act intentionally. Due to this error, the state of negligent liability shall be reserved.
- A person who makes a mistake regarding the occurrence of qualified forms of a crime that requires a heavier or lesser penalty shall benefit from their error.
- A person who makes an inevitable mistake regarding the fulfillment of the conditions for the defenses or justifications that remove or reduce criminal responsibility shall benefit from their error.
- A person who commits an unavoidable mistake that his/her act constitutes an injustice shall not be punished.

States of error are applied only in terms of crimes committed directly with intent. Error provisions shall not be applied in crimes committed with possible intent.

(6.4.3.1) Material Error/Being Mistaken (Turkish Penal Code Art. 30/1-2) A trivial error (material error) is that in which the obligation to act carefully and diligently (negligence) will not be sought in order to get rid of the error and it is sufficient for the accused to fall into error in a simple manner. According to the Criminal Code, trivial error occurs in two ways:

- Error in Material Elements of Crime (Turkish Penal Code 30/1): Error in material elements of crime is a situation related to the subjective status, perception and understanding of the defendant. Therefore, unless it is asserted by the defendant or his/her lawyer, as a rule, the court cannot investigate whether the defendant has made a mistake in the material elements of the crime. In the criminal law, in the event of an error in the material elements of the basic form of a crime, the defendant's error eliminates the intention in the nature of a fundamental error. In the event of an error in material elements, if the defendant cannot be punished for their negligent actions or crimes, the liability for the negligent act will continue.
- Error in Major Cases of Crime (Turkish Penal Code 30/2): In the basic case of the crime, the major cases in which the defendant who has fallen into error in the material elements and who has made a mistake shall not be taken into consideration when the punishment is ruled. In other words, in major cases of crime, error eliminates the intention of being major.

Let us particularly emphasize that in all cases where the victim being underage is an element of the crime, if the defendant made a genuine error regarding the age of the victim, there will be a mistake in the material elements of the crime. Therefore, the court will determine by investigating whether the defendant was really mistaken about the age of the victim, and whether there are (or were) relationships between the defendant and the victim such as acquaintance, business relationship, student, family relation, etc.

(6.4.3.2) Inevitable Error (Turkish Penal Code Art. 30/3-4)

Inevitable error is when the defendant made a mistake despite showing the necessary attention and care. If the defendant shows the necessary diligence and care, but the error is avoidable, the provisions of Article 30/3-4 of the Turkish Penal Code cannot be applied. The concept of inevitable error is also regulated in the law in two ways:

- Inevitable Error Regarding Whether Conditions for the Reduction or Abolishment of Criminal Liability Have Been Met (Turkish Penal Code 30/3): The person who makes a mistake about the existence of these situations will benefit from his/her mistake. Errors in the material conditions for acting in compliance with the law (e.g., legitimate defense) and cases of error affecting culpability (e.g., mental illness) are regulated within the scope of Article 30/3 of the Turkish Penal Code. In order for the defendant to benefit from this provision, his/her error must be inevitable in light of the conditions he/she is in.
- **LAW ERROR:** A person who commits an unavoidable mistake that his/her act constitutes an injustice shall not be punished. The defendant acts with the idea that the act committed is lawful, does not create injustice, and is on the line of legitimacy, and if this error is considered inevitable when the conditions of the defendant are evaluated, no punishment will be levied. Whether the

error is inevitable or not will be determined by taking into account the knowledge, education, social and cultural conditions of the defendant. For example, according to the Turkish Civil Code, the usual age of marriage is the age of 17. However, the fact that Syrian irregular migrants got married before they were even 16 years old and even had a child falls under this category of error. In the event that any criminal proceeding is made under the Turkish Penal Code with the claim that the crime of “sexual intercourse with a minor” was committed, the provisions of the Turkish Penal Code will be applied.

(6.4.4) TEMPORARY CAUSES, NARCOTIZED DUE TO ALCOHOL OR DRUGS

A person who cannot perceive the legal meaning and consequences of the act committed for a temporary reason or when narcotized due to alcohol or drugs taken involuntarily, or whose ability to direct his/her behavior in relation to this act has significantly decreased, shall not be punished.

However, it is worth noting that the punishment for any crime committed under the influence of alcohol or drugs taken voluntarily shall be fully applied.

(6.4.5) UNDERAGE

Children who have not reached the age of twelve at the time of the criminal act shall have no criminal liability. Criminal prosecution cannot be filed against these persons; however, child-specific safety precautions may apply.

- For those who have completed the age of twelve but not completed the age of fifteen at the time of committing the act and cannot perceive the legal meaning and consequences of the act or their ability to direct their behavior is not sufficiently developed, will not face criminal liability. However, child-specific security measures will be imposed on these persons. If they have the ability to perceive the legal meaning and consequences of their actions and can direct their behavior, the sentence will merely be reduced. If the crime requires aggravated life imprisonment, their sentence shall be twelve to fifteen years; if it requires life imprisonment, their sentence shall be nine years to eleven years. Any other sentences will be reduced by half and the prison sentence for each act cannot be more than seven years.
- If the crime requires aggravated life imprisonment, for persons who have completed the age of fifteen at the time of committing the act but have not completed the age of eighteen, the sentence of imprisonment will be eighteen years to twenty-four years. If it requires life imprisonment, he/she will be sentenced to imprisonment for twelve to fifteen years. Any other sentences will be reduced by one third, and the prison sentence for each act cannot be more than twelve years.

(6.4.6) FULFILLMENT OF THE PROVISION OF THE LAW AND THE PREVAILING ORDER

According to the Turkish legal system and the Constitution of the Republic of Türkiye, anyone who fulfills the provision of the law shall not be punished.

- A person who executes an order given by a competent authority, whose fulfillment is obligatory as a duty, will not be held responsible.
- However, any order that constitutes a crime cannot be fulfilled in any way. Otherwise, both the one who executes the order and the one who gives the order will be held responsible.
- In cases where the inspection of the lawfulness of the order is prevented by law, the one who gives the order is held responsible for its execution. (This may include instances of hierarchy, war, mobilization or a State of Emergency, etc.)

(6.4.7) UNJUSTIFIED PROVOCATION

A person who commits a crime under the influence of anger or severe suffering caused by an unfair act shall be sentenced to life imprisonment from eighteen to twenty-four years instead of aggravated life imprisonment and from twelve to eighteen years instead of life imprisonment. In other cases, one-fourth to three-fourths of the penalty to be imposed is reduced.

Article 29 of the Turkish Penal Code states that “Any person who commits an offence in a state of anger or severe distress caused by an unjust act” would be injured by the reduction of penalties without detailing the conditions of unjust provocation. The degree of unfair provocation will also determine the amount by which the penalty is reduced.

- There Must Be an Act That Creates Unjust Provocation; if the defendant commits a crime against the victim on the assumption that the victim will commit an unjust act against him/her, he/she cannot benefit from a reduction of penalties due to unfair provocation. In order for unfair provocation reductions to apply, the victim must commit a concrete tort against the defendant. The defense cannot be raised based purely on criteria such as the defendant’s personal opinions about the victim, the victim’s past, and the relationship between the defendant and the victim. Without any concrete act, a legal value cannot be attributed to the defense that the defendant committed a crime under unjust provocation. The idea that the victim will commit an unjust act against the defendant without a concrete act through logical inference is unacceptable in the practice of unjust provocation.
- The Act Causing Unjust Provocation Must Be An “Unjust Act”; if the act brought against the defendant by the victim is justified, the defendant cannot benefit from any reduction of penalty due to unjust provocation. Whether the act is an unjust act should be evaluated separately in each concrete case.
- The Act Constituting the Unjust Act Must Be Directed Towards the Defendant; in order for a reduction of penalties due to the unjust act to be applied, the defendant must commit the crime against the person who committed the unjust act. However, it is not required that the wrongful act be committed directly against the defendant himself. If the unjust act is committed against the relatives of the defendant, other persons he/she cares about, or those who are completely alien to the defendant but the unjust act is such as to cause anger or pain in the defendant, the provisions of unjust provocation may be applied. However, in cases where the person causes the incident by his own unjust action, no reduction in penalty can be applied via unjust provocation.
- The Defendant Must Remain Under the Influence of Anger or Severe Grief; the defendant who commits an unlawful act under unfair provocation must act out of anger or under the influence of severe grief. Whether the defendant is angry or acting under the influence of severe grief can be determined from their behavior before the act.
- The Crime Must Be the Result of the Mental State Caused by the Committed Crime, Anger and Grief; an unjust act that causes anger or grief creates a mental change in the defendant. The defendant’s mood should vary considerably from the situation before the unjust act. The defendant must then commit the crime against the victim as an emotional response. If the defendant commits a crime against the victim in cold blood and not out of an emotional reaction, he/she cannot benefit from the provisions of unjust provocation.

(6.4.8) FORCE AND VIOLENCE, INTIMIDATION AND THREAT

A person who commits a crime as a result of force or violence that he/she cannot resist or escape, or as a result of a certain and severe intimidation or threat, shall not be punished. In such cases, the person who used force, violence, intimidation, or threats against the defendant will be considered the perpetrator of the crime.

If one of the elements of force, violence, intimidation, or threats are found, the act of the defendant will not be punished. However, certain situations and conditions must exist. This has been regulated in Article 28 of the Turkish Penal Code:

- Force is when the defendant is prevented from acting voluntarily and caused to act against their will. In the simplest sense, it is coercion and pressure imposed on a person. It is when a person encounters a pressure that he/she cannot resist and that he/she is afraid to resist. A victim of force may be faced with physical coercion under material pressure. Facing an oppressive physical force shall refer to force.

- Intimidation is referred to as moral coercion. Intimidation is when the defendant is forced to commit a crime to prevent for damage to themselves or another. It is the state in which a person commits a crime in order to protect himself or someone else. The defense of intimidation can only be raised when the threat of harm is certain to occur if the defendant does not cooperate. Intimidation cannot be used as a defense if the threatened harm is uncertain or unlikely to occur.
- Threat is described as a harm that may occur conditional upon the defendant fulfilling a specific request. The crime must therefore occur as a result of the threat. The threat must include a harm to the defendant or their relatives. Additionally, the harm the defendant seeks to avoid must be definite and certain to occur if the request of the threat is not carried out. If the harm is abstract or uncertain to occur, threat cannot be raised as a defense.

(6.4.9) DEAFNESS AND MUTISM

Under the Turkish Penal Code, there are no separate regulations for deaf and mute individuals, but these conditions are evaluated in determining the basic penalty.

Regarding deaf and mute individuals (Turkish Penal Code Art. 33):

”The provisions of this law which relate to minors under twelve years of age at the date of the offence shall also be applicable to deaf and mute persons under the age of fifteen. The provisions of this law which relate to minors who are over twelve years of age but under fifteen shall also be applicable to deaf and mute persons who are over fifteen years of age but under eighteen years of age. The provisions of this law which relate to minors over fifteen years of age but under eighteen of age shall be applied to deaf and mute persons who are over eighteen years of age but under twenty years of age.”

(6.4.10) EXERCISE OF THE RIGHT AND CONSENT OF THE PERSON CONCERNED

No penalty shall be imposed on any person exercising his/her right. This is because the exercise of a right is done in compliance with the law. It is a known fact that no one who exercises a right can be deemed to have acted unlawfully. A right may be based on laws, statutes, regulations, circulars, or may arise from the performance of a profession provided that it is legally recognized and regulated.

However, this only applies to rights that are universally and directly available. If a right can only be exercised by filing an application to an authority, it does not fall under this provision.

No one shall be penalized for committing an act within the framework of consent he/she has received, so long as that consent is received in relation to a right that a person has the ability to dispose of. The consent of the person concerned means that any act carried out within the framework of that consent is done in compliance with the law. Similarly to the requirement that the consent must relate to a right a person can dispose of, a person must also be capable of giving consent regarding the right they are waiving.

(6.4.11) MENTAL ILLNESS (INSANITY)

A person who is unable to perceive the legal meaning and consequences of his/her act or whose ability to direct his/her behavior relating to his/her act is significantly reduced due to mental illness shall not be punished. However, security measures shall be imposed on these persons.

A person whose ability to direct their behavior relating to their act has decreased but not to the degree stated in the first paragraph, will be sentenced to twenty-five years instead of aggravated life imprisonment, and twenty years instead of life imprisonment. For other cases, the penalty to be imposed may be reduced by no more than one-sixth. The sentenced punishment can also be applied partially or completely as a security measure specific to mental patients, provided that the duration is the same.

Mental illness may cause a person to be unable to perceive the meaning and consequences of their act, or significantly affect their ability of will in relation to the act they have committed. If so, it thereby creates a defect in the individual. Since their act can be directly attributed to their defect, no penalty can be imposed on them. However, since their act was nevertheless contrary to the actual law, security measures specific to mental patients will be applied about the person.

It should also be pointed out that mental illness may not have an effect on one's ability to perceive or will in terms of every act one commits. For example, it can be said that the person with kleptomania does not have the ability of willpower in terms of the crime of theft committed for things of lower value. However, if this person deliberately commits the crime of manslaughter, the mental illness he/she is disabled with does not affect his/her ability to perceive or will in relation to this act.

It is a medical issue to determine whether the person is mentally ill, what effects his/her illness may have on his/her perception and ability of will, and how it affects his/her behavior in general. After an expert investigates and testifies on this issue, it will be the duty of the judge to determine whether the mentally ill person has the ability to perceive or will in terms of the act committed and to what extent the mental illness affects these abilities in terms of the concrete event.

07



EVIDENCE
UNDER TURKISH
CRIMINAL LAW

07

(7.1) IN GENERAL

Turkish Criminal Procedure is the branch of law that regulates how investigations and trials are carried out if an act is committed that is defined as a crime under Turkish law and for which the law has determined a penalty. The criminal procedure aims to uncover the material truth about such events and ensure that any crimes are proven with evidence that leaves no room for doubt. During the investigation phase, evidence is collected regarding the committed act. This evidence is then presented to the court during the prosecution phase to argue the case and inform the judge's ruling. Finally, in the trial phase, the judge determines whether the act was a crime under Turkish law, and who committed it. Therefore, any evidence collected to prove a crime must have certain characteristics to avoid objections.

(7.1.1) FREEDOM OF EVIDENCE AND RULES OF EVIDENCE

In cases referred to the public prosecutor, they must first examine any evidence gathered through investigation, to decide whether the incident constitutes a crime or not (Article 170/2 of the Turkish Criminal Procedure Code). If the evidence collected by the end of the investigation phase creates a sufficient suspicion that a crime has been committed, then the prosecution phase begins. For the trial to take place, an act defined as a crime in our penal laws must occur and the criminal justice system must be aware of this act.

Since criminal trials are universally held after the act in question has occurred, the judge rules after considering the evidence obtained during the investigation and presented during the prosecution phase. Individuals who have committed crimes almost never provide evidence against themselves to the court and often attempt to destroy such evidence. As a result, if the kinds of evidence admissible at trial are too limited, it may become impossible to prove cases, and the justice system may become inoperable. Turkish criminal procedure, therefore, allows a case to be proved through all kinds of evidence. Article 217/2 of the Code of Criminal Procedure, which regulates judges' power of discretion relating to evidence, states that "the crime charged can be proven by any evidence obtained in accordance with the law". This is known as the principle of freedom of evidence. According to the principle of freedom of evidence:

- Anything may be considered evidence;
- Any party to the case may present evidence;
- The judge may seek evidence sua sponte;
- The submission of evidence is not subject to any time limitations;
- The burden of proof may not be placed on the accused;

The judge retains absolute discretion concerning evidence. As the purpose of criminal procedure is to ensure justice by revealing the material facts, any means used to prove the alleged crime occurred may be evidence, and the judge holds the power of discretion to accept or reject any such means.

(7.2) PRESENTATION, VERIFICATION AND REFUTATION OF EVIDENCE

The presentation of evidence begins after the accused has been interrogated. This includes hearing witnesses and experts, as well as introducing, explaining, and examining other means of proof. Any evidence that is not presented and discussed in this phase cannot be considered by the judge in reaching a verdict, pursuant to Article 217/1 of the Code of Criminal Procedure.

The evidence must be discussed and presented in the presence of the parties after the interrogation of the accused. However, Article 206 of the Code of Criminal Procedure sets forth an exception. If the defendant fails to appear despite duly-served notice, the fact that the accused was not interrogated does not prevent the discussion of the evidence. Any proceedings conducted in the defendant's absence will be read to them upon their next appearance before the court. It is essential that all evidence is collected during the investigation phase and preparation for trial to ensure that the case is concluded in a single trial. Article 206 also sets forth the conditions under which evidence shall be rejected. Those conditions are as follows:

1. If the evidence was obtained illegally;
2. If the event or fact to be proven by the evidence is irrelevant to the case;
3. If the request to present evidence is made solely to delay the proceedings.

In addition, if the public prosecutor and the accused, or their defense counsel, stipulate they may jointly request that the court waive the disclosure of evidence or testimony of a witness. If there is no waiver, and the judge issues a verdict based on an incomplete investigation, or without hearing the parties' witnesses, that judgment shall be reversed. New evidence may be presented after a reversal. The court must make a clear decision on any reversals.

(7.3) DEFENDANT'S REQUEST FOR THE COLLECTION OF DEFENSE EVIDENCE

When the accused requests the summoning of witnesses or experts or the collection of defense evidence, they shall submit their motion to the presiding head of court or judge at least five days before the date of the hearing, indicating the events to which they relate.

- The accused shall be notified of the ruling on their petition immediately.
- The public prosecutor shall be immediately notified of any of the accused's requests which are granted.
- Any witnesses or experts who refuse the summons will be subpoenaed to appear.

If the presiding head of court or the judge rejects the accused's motion to summon a witness or an expert witness, the accused may bring them to the court themselves. Any witnesses or experts present shall be heard at the hearing unless it is for the sole purpose of prolonging the proceedings.

Both the public prosecutor and the accused shall be notified of the names and addresses of any summoned witnesses. The accused shall inform the public prosecutor within a reasonable period of time of the names and addresses of any witnesses or experts they will summon, subpoena or bring themselves during the trial. The public prosecutor shall also notify the accused within a reasonable period of time of the names and addresses of any witnesses or experts they will summon, subpoena or bring themselves other than those shown in the indictment or invited upon the request of the accused.

(7.4) DOCUMENTS AND RECORDS THAT MUST BE DISCLOSED AT THE HEARING

Documents being used as evidence, such as investigation records, transcripts of any interrogation of the accused, witness or expert testimony transcripts, written statements, judicial records, documents containing information on the personal and economic situation of the accused, and any other written records, must be disclosed during the trial.

Upon the express request of the accused or victim(s), the court may order that any documents containing personal data be disclosed in a closed session.

(7.4.1) DOCUMENTS TO BE EXCLUDED FROM THE HEARING

- If the evidence of the incident consists of the statements of a witness, this witness must be heard at the hearing. The reading of a transcript or a written statement made during a previous hearing shall not be substituted for their testimony during the hearing.
- If a person has the right to testify at the hearing but abstains from doing so, their previous statements may not be read out in place of their testimony.

(7.4.2) DOCUMENTS THAT MAY ONLY BE READ AT THE HEARING

The previous testimony or written statements of a witness or accomplice of the accused may be read out in place of their testimony under the following conditions:

- If the witness or the accused's accomplice is dead;
- If the witness or the accused's accomplice is mentally ill;
- If the witnesses or the accused's accomplice's whereabouts cannot be ascertained;

- If the witness or the accused's accomplice is unable to attend a hearing for an indefinite period of time due to illness, disability, or other condition that cannot be remedied;
- If the witnesses or the accused's accomplice's testimony is of such importance that their presence is not considered necessary; or
- If the public prosecutor, the witness or accomplice or their representative, and the accused or their defense counsel all stipulate to the reading of previous testimony or written statements.

(7.4.3) READING OF THE WITNESS'S PREVIOUS STATEMENT

- If a witness cannot remember their previous statement, the relevant part of the record containing their previous statement shall be read to them.
- If there is a contradiction between the witness's testimony at the hearing and their previous testimony, the contradiction shall be eliminated by reading the previous testimony.

(7.4.4) READING OF THE DEFENDANT'S PREVIOUS STATEMENT

- If there is a contradiction between the accused's testimony at the hearing and their previous testimony to the public prosecutor or law enforcement officers, their previous testimony may be read at the hearing so long as it was originally given in the presence of their defense counsel.

(7.4.5) THE READING REPORTS, DOCUMENTS AND OTHER WRITINGS

- If deemed necessary, after reading an official document, medical examination and report, or other document containing an explanation and opinion, the signatories of the documents or report may be called to the hearing to explain their opinions.
- If the document or report was authored by a committee, the court may require the committee to appoint one of its members to explain the committee's opinion.
- Disclosure of scientific opinions shall be made in accordance with the provisions of Article 68 of the Code of Criminal Procedure.

(7.4.6) QUESTIONS ABOUT OPINION AFTER THE HEARING AND READING

- After a witness, accomplice, or expert has testified and any documents have been read, the prosecution, defense, and any intervening parties shall have the opportunity to argue the evidence presented.

(7.4.7) DISCUSSION OF EVIDENCE

- The prosecution, defense, and any intervening parties each have the right to speak during the discussion of the evidence.
- The prosecution and the intervenor/complainant or their representative may respond to the statements of the defense. Likewise, the defense may respond to the statements of the prosecution and any intervening party or their defenders.

(7.5) WITNESS STATEMENT

Witness testimony is one of the most important forms of evidence under Turkish Criminal Procedure. Witness testimony is a person's narration "in the presence of the court" regarding information and experiences obtained with their five senses about a past event. As ruled by the Court of Cassation, statements made outside the presence of the court, such as to law enforcement or the prosecutor's office, are not accepted as witness statements.

- Under Article 6 of the Turkish Penal Code, being a witness is considered a public duty, and witnesses are considered public officials.

- A defendant cannot testify as a witness in their own case, but an acquitted defendant may testify against other defendants. Although it is controversial, there is no legal regulation preventing defense counsel from testifying.
- Pursuant to Article 236/1 of the Code of Criminal Procedure, the victim may testify as a witness. All normal provisions regarding testimony, except for oaths, apply when the victim is heard as a witness.
- While witness statements may contain differences, any contradictions must be resolved. The first step to resolving a contradiction in testimony is to confront the witness about it. If that does not eliminate the contradiction, it should be resolved by a judge selecting which witness's testimony is superior and explaining why.
- Even a mentally ill person may be heard as a witness. The evidentiary value of their witness statement should be evaluated on a case-by-case basis, taking into account their condition.
- Witnesses should only testify as to facts and should not give opinions or personal assessments unless the judge asks them to do so.
- Individuals reporting to or questioned by the police are not considered witnesses. Statements or records from law enforcement officers cannot be accepted as witness statements. A witness statement must be given by a witness, before the court, of their own free will to be used as evidence. The complainant may also be a witness if they have direct knowledge of and witnessed the incident.
- Lawyers may ask questions directly to witnesses.

(7.5.1) SUMMONING WITNESSES

Witnesses shall be invited to court by summons. The summons shall contain a caution about the consequences of a failure to appear. In cases where the accused is detained, a subpoena may be issued for the witnesses under Article 43/1 of the Code of Criminal Procedure. The subpoena shall contain an explanation of the reasons for the issuance of the subpoena. All rules, regulations and procedures which apply to summoned witnesses shall also apply to subpoenaed witnesses.

A witness may also be notified of a summons by telephone, telegram, fax, or electronic mail if available. However, witnesses summoned by these methods do not face any penalties for a failure to appear (Article 43/2 of the Code of Criminal Procedure). If a hearing is continued, the court may order, in writing, that any witnesses who are deemed necessary must be present at the date and time of the new hearing.

The President of Türkiye may abstain from testifying at his discretion. If he wishes to testify, his statement may be taken at his residence or sent in writing.

These provisions only apply if a person is heard as a witness before a public prosecutor, judge or court. The public prosecutor can also subpoena a witness according to Article 146/7. However, if the accused has not been detained, neither the court nor the prosecutor may subpoena witnesses without first sending a summons. If a witness is sent a summons, the party summoning them may cancel the summons. This terminates the witness's responsibility to appear before the court. A judge may not reverse a cancelled summons.

(7.5.2) ABSTENTION FROM TESTIFYING

The following persons have the right to abstain from testifying as a witness:

- a. The fiancée of the accused,
- b. The spouse or former spouse of the accused,
- c. Persons related to the accused in the ascending or descending direct line, either by blood relationship or affinity relationship

- d. Persons related to the accused within three degrees, or persons collaterally related to the accused within two degrees,
- e. Persons having a relationship with the accused by virtue of adoption.

With the consent of their legal representative, individuals who cannot appreciate the importance of refraining from testimony may testify as witnesses. This includes individuals who are minors, suffer from mental illness, or are mentally infirm. However, if the legal representative is a defendant in the same matter, they may not prevent such an individual from testifying.

Individuals who have the right of abstaining from testimony shall be notified of that privilege before being called upon to testify. They may assert their privilege at any point during the hearing, including after beginning to testify. This right exists not only in the trial phase but also in the investigation and prosecution phases. A witness who has the right to abstain from testifying also has the right to request to be heard with or without being placed under oath (Article 51 of the Criminal Procedure Code).

- A person may be identified as the accused's fiancée by the existence of a betrothal, or by facts and circumstances indicating that the parties intend to marry.
- It is a procedural error if a witness who has the right to abstain from testifying is not reminded of that right before they are called to testify. The impact of any such error and any subsequent testimony shall be considered if the verdict is appealed.

(7.5.3) ABSTENTION FROM TESTIFYING BECAUSE OF PROFESSIONAL PRIVILEGE OR PRIVILEGE GRANTED BY PERMANENT OCCUPATION

The following individuals may abstain from testifying on certain subjects because of their professions or permanent occupations: The persons who have the right of refraining from taking the witness stand because of their professions or their permanent occupations, as well as the subject matter and the conditions of refraining are listed below:

- a. Lawyers, their trainees or assistants may abstain from testifying about the information they have learned in their professional capacity or during their judicial duty,
- b. Medical doctors, dentists, pharmacists, physicians, nurses, assistants, and other members of the medical profession may abstain from testifying about information acquired as health personnel related to their patients or their patients' relatives,
- c. Certified public accountants and notary publics may abstain from testifying about information regarding their clients that they acquired during their work.

Maintaining the confidentiality of the attorney-client relationship increases the degree of trust between attorneys and their clients. This benefit was found to outweigh the societal benefits of revealing material truth via trial. Therefore, due to the nature of lawyers' professional activities, they have an absolute right to abstain from testifying, even if the person concerned grants their consent. However, under Article 46/2 of the Code of Criminal Procedure, persons other than lawyers, their trainees or assistants may not abstain from testifying if they have the consent of the person concerned.

Journalists may not claim professional secrets to abstain from testifying. For example, if a person is killed while a journalist is busy shooting a news story, the journalist is obliged to testify as a witness and has no right to abstain. However, a journalist is not required to disclose their sources for news learned through their work.

(7.5.4) NOTIFICATION OF THE REASON FOR ABSTAINING FROM TESTIFYING

As specified in Articles 45, 46, and 48, and when deemed necessary by the presiding judge or the public prosecutor, a witness claiming the right to abstain from testifying shall state the facts constituting the basis for their abstention and, if necessary, be placed under oath. Neither the accused nor any participants may request the witness to inform the court of the facts constituting the grounds for their abstention.

(7.5.5) REFRAINING FROM TESTIFYING AGAINST ONESELF OR ONE'S RELATIVES

A witness may abstain from answering questions that may expose themselves or persons referred to in the first paragraph of Article 45 (as stated under heading 7.5.2) to criminal prosecution. All witnesses shall be informed in advance and reminded that they may abstain from answering any such question, even if they testify. The purpose of this provision in Turkish Criminal Procedure is to prevent a witness from lying to protect themselves or their relatives from criminal prosecution.

(7.5.6) TESTIMONY WITHOUT OATH

The following persons do not have to be placed under oath before testifying:

- Individuals under the age of 15 at the date of testimony,
- Individuals who lack the ability to distinguish between right and wrong, or otherwise cannot comprehend the nature and meaning of the oath,
- Individuals, who are suspected, accused, or convicted of participating in, being an accomplice to, or destroying, hiding, or altering evidence of the crimes under investigation or prosecution.

If a witness is not legally required to take an oath but is made to take an oath, any statement so taken shall be considered as being made without oath in practice. However, since taking the oath may affect the witness' statement, it is necessary for the witness to testify again.

Under Article 45 of the Criminal Procedure Code, it is at the discretion of the court whether to administer the oath to those who have the right to abstain from testifying. If the witness is one of the relatives of the accused as enumerated in Article 45 of the Code of Criminal Procedure, they should be reminded of their right to "refrain from taking the oath." If the witness wishes, they may testify after refraining from taking the oath.

If a witness is heard without oath, the reasons therefore should be noted in their statements.

(7.5.7) ADMINISTERING THE OATH TO WITNESSES

Witnesses must each take separate oaths before testifying. If there is any doubt as to whether it is appropriate to hear a person as a witness, or if otherwise necessary, administration of the oath may be postponed until after the testimony. During the investigation phase, public prosecutors also must administer oaths to witnesses. Law enforcement officers cannot administer an oath to a witness. All witnesses in the investigation and prosecution phases shall be heard under oath.

The importance of the oath, like the importance of the testimony, must be explained to the witness by the judge.

(7.5.8) TESTIMONY ON STATE SECRETS

Any information which may harm the State's foreign relations, national defense, national security, or pose a danger to the constitutional order of the State, shall be deemed to be a State secret. However, State secrets concerning the facts of a crime cannot be withheld from the court.

If the information subject to testimony is a State secret, the witness shall be heard only by the judge or the panel of the court, without the presence of a court reporter. The presiding judge shall then record in the statement of the witness only information which is relevant to the charged offense. These provisions shall apply to offenses for which the minimum penalty is five or more years in prison. If the President of Türkiye testifies, he shall determine which parts of his statement constitute State secrets.

(7.5.9) RE-HEARING OF A WITNESS

If a witness has previously testified under oath and needs to be reheard in the same investigation or prosecution phases, it is not necessary to administer a new oath. Instead, they may simply be reminded of their previous oath, referred to as "recalling the oath." This also applies during the same stage in a trial. If a rehearing occurs during the same hearing, a witness does not need to be reminded of the oath.

The Court of Cassation has ruled that previously administered oaths may be recalled in proceedings following the reversal of the local court decision. But, in the event of a retrial, the oath must be re-administered. Failure to recall the oath is grounds for reversal.

An oath previously administered at trial may be recalled during an inspection.

(7.5.10) CONFIDENTIAL WITNESSES

In the investigation and prosecution phases of criminal proceedings, witnesses may be called as “confidential witnesses” if the defendant’s knowledge of their identities would constitute a “grave and serious danger” for the witnesses or their relatives.

A confidential witness may be heard by the prosecution in the investigation phase and by the court in the prosecution phase. Law enforcement officers are not authorized to listen to confidential witnesses. Whether a witness will be called as a confidential witness requires legal evaluation.

Pursuant to the Witness Protection Law and Article 58 of the Code of Criminal procedure, witnesses who will testify regarding the following crimes may be heard as a secret witness and are placed under witness protection:

- Crimes punishable by aggravated life imprisonment, life imprisonment, or ten or more years imprisonment.
- Offenses carrying a minimum penalty of two or more years imprisonment which are committed as either part of the activities of an organization established for the purpose of committing acts criminalized by law, or as part of the activities of a terrorist organization.

(7.5.11) TESTIMONY OF CHILDREN

(7.5.11.1) Oath of A Testifying Child

Under Article 50 of the Code of Criminal Procedure, children under the age of fifteen at the time their testimony must be heard without oath.

Additionally, individuals who lack the ability to distinguish between right and wrong, or otherwise cannot comprehend the nature and meaning of the oath shall be heard without an oath. Thus, if a child is over 15 years of age but cannot comprehend the nature and importance of the oath, they must be heard without oath.

(7.5.11.2) Hearing of A Child Witness

Article 52 of the Code of Criminal Procedure allows images and sounds to be recorded during the testimony of witnesses. However, this recording is mandatory for the testimony of child victims. The video and audio recordings must only be used within the scope of the criminal proceedings.

Article 236 of the same law reads as follows: “A child or the victim who has suffered psychological damages from the committed crime, shall be heard only one time in relation to the investigation or prosecution of the committed crime. Cases which pose a necessity with respect to revealing the factual truth are exceptions.” If deemed necessary by the public prosecutor or judge, the witness statement of a child or victim may be taken by experts in a private environment. This may include if it would be traumatic or otherwise inconvenient for the child or victim to appear before the defendant in-person.

(7.5.12) INTERROGATION OF ACCOMPLICES

Article 152 of the Code of Criminal Procedure No. 5271 titled “Defense in case of more than one suspect or accused” states that “The defense of more than one suspect or defendant, whose interests are compatible with each other, may be assigned to the same defense counsel.”

However, Article 38, paragraph 1, subparagraph (b) of the Attorneyship Law No. 1136 requires a lawyer to refuse an assignment if it is on behalf of a party with conflicting interests to an existing client in the same matter. Additionally, Article 35 of the Professional Rules of Attorneyship adopted by the Union of Turkish Bar Associations states that “A lawyer shall not accept the attorneyship of two persons in the same case, where the defense of one may harm the defense of the other.”

Taken together, these provisions indicate that attorneys should broadly avoid any conflicts of interest so as not to compromise a client’s defense in any way. The same view has been adopted in the literature. If an attorney can only defend one of their clients by accusing another of their clients, that constitutes a conflict of interest, and the defendants should be represented separately.

This is well illustrated by a case where multiple defendants were tried for the crime of zoning pollution. The defendants were all represented by the same attorneys, which weakened their defense. They were ultimately all convicted. Under Article 152 of the Code of Criminal Procedure, Article 38 of the Attorneyship Law No. 1136 and Article 35 of the Attorneyship Professional Rules, the local court should have required the defendants to seek separate representation, rather than continuing the hearing and reaching a verdict. Doing otherwise violated the principle and minimum requirements of a fair trial as set out in Article 6 of the ECHR.

(7.5.13) EXPERT OPINION AND EXPERT WITNESS REPORT

When an expert's opinion is requested, and after completing the necessary examinations, the expert shall sign and submit a report explaining his/her actions and conclusions to the requesting authority. Any sealed items shall also be sent to the relevant authority and recorded in the report.

If multiple experts hold different opinions or reach differing conclusions, their positions and the reasons, therefore, are to be included in their reports.

An expert witness may not provide explanations, characterizations, or evaluations in their report or during their testimony except regarding those matters requiring their expertise, skills, or knowledge.

Copies of any reports prepared by experts may either be given directly to the opposing party during the hearing or may be sent to them by registered letter with return receipt.

The judge or court is entitled to appoint an expert; if more than one expert is appointed, the court shall issue an appropriate decision including the court's rationale. If the court has denied motions by either party to appoint multiple experts, the court's decision shall meet the same requirements.

The prosecution, defense, or any intervening party may request a scientific opinion from an appropriate expert. The party may use that opinion to evaluate the subject matter of the trial, prepare their own written expert opinion, or evaluate the written opinions of other experts. Parties may not request additional time for this purpose.

(7.6) DNA, FINGERPRINTS, PHYSICAL EXAMINATION AND BODY SAMPLING

(7.6.1) PHYSICAL EXAMINATION AND TAKING SAMPLES FROM THE BODY OF THE DEFENDANT

The judge or the court, upon the motion of the public prosecutor or sua sponte, may conduct an external or internal physical bodily examination of the defendant. This may also include taking blood, hair, saliva, nail, or other biological samples from the victim to obtain evidence of a crime. In instances where a delay may imperil the case, the public prosecutor may conduct a body examination and collect samples without submitting a motion to the court. Any such decision of the public prosecutor must be forwarded to the judge or the court for approval within 24 hours. The judge or the court shall rule on the decision within 24 hours. If the decision is not approved, any evidence obtained from the examination is inadmissible. Taking samples or conducting an internal body examination must not pose a risk of harm to the health of the person. If the victim consents to the body examination and taking of samples, no motion or review is required to carry out these procedures.

Internal body examinations or taking samples from the body may only be performed by a physician or other healthcare professional. An examination of the genitals or anus is also considered an internal body examination.

For offenses carrying a penalty of less than two years' imprisonment, internal body examinations may not be carried out on the person and samples may not be taken.

Decisions of a judge or court taken pursuant to this Article may be appealed. Alcohol examinations and blood sampling are governed by other laws.

(7.6.2) PHYSICAL EXAMINATION AND TAKING SAMPLES FROM THE BODIES OF THIRD PARTIES

When seeking to establish the paternity of a child, a motion must be filed and granted before a body examination may be conducted on or samples taken from the child.

Individuals may abstain from body examinations or having samples taken from them on any of the same grounds that would allow them to abstain from testifying. In instances where the individual is a minor, suffers from mental illness, or is mentally infirm, the decision whether to abstain from body examinations or having samples taken shall be made by the person's legal representative.

If the individual is a minor, mentally ill or mentally infirm but understands the legal meaning and consequences of taking the witness stand, their preference must be considered. Any evidence obtained from the body examination or samples taken from such an individual may not be used in any further stages of the lawsuit unless the individual's legal representative consents.

If the legal representative of the individual is the defendant in the same case, the judge shall decide and consent on behalf of the individual.

Judge or court decisions rendered under this provision may be appealed.

(7.6.2) PHYSICAL EXAMINATION OF A FEMALE

Upon her request and if possible, a female medical doctor shall conduct any physical bodily examinations of a female.

(7.6.4) MOLECULAR-GENETIC TESTS

Molecular-genetic examinations may be performed on any samples taken from an individual if necessary to determine genealogy or to whom biological evidence belongs. Samples taken for any other purpose are prohibited. Molecular-genetic examinations may also be carried out on body parts that are found and cannot be identified. Samples taken from such a body part for any other purpose than those listed previously are prohibited.

(7.6.5) CONDUCTING A MOLECULAR-GENETIC TEST

Molecular-genetic tests shall only be conducted upon a judge's order. The ruling shall also contain the name of the expert appointed to conduct the test. Experts may be selected from officially appointed experts, individuals required to act as an expert, officials not attached to the investigating or prosecuting authorities, or officials belonging to an objectively separate structural branch of the investigating or prosecuting authorities. Experts must take all reasonable organizational and technical precautions to prevent molecular-genetic tests from being conducted illegally, and to prevent unauthorized third parties from gaining access to the results. The items to be tested shall be delivered to the expert without labelling them with the name, family name, address, or date of birth of the person from whom the items originate.

(7.6.6) CONFIDENTIALITY OF MOLECULAR-GENETIC EXAMINATION RESULTS

The results of a molecular-genetic test are considered personal data and shall not be used for any purposes other than determining genealogy or to whom biological evidence belongs. Individuals with access to the files shall not disclose the information to unauthorized persons. Any information about the results of the molecular-genetic test is to be destroyed in the presence of the public prosecutor as soon as any of the following occurs:

- The time limit to file an appeal on no ground for prosecution is exhausted;
- The appeal is denied; or
- The court acquits the defendant or decides not to punish the defendant, and that judgment is made final.

The destruction of the results of the genetic-molecular test must be documented.

(7.7) PHYSICAL IDENTIFICATION

If it is necessary for the identification of the suspect or the accused, due to a crime that requires a penalty of two or more years imprisonment as an with the upper limit, his/her photograph, body measurements, fingerprints and palm prints, other features on his body that will facilitate his diagnosis, as well as his voice and images may be recorded and placed in the file pertaining to the investigation and prosecution stages by order of the Public Prosecutor.

These records are to be inserted into the investigation and prosecution file.

(7.8) REVIEW OF COMPUTER RECORDS

During an investigation, in the presence of strong grounds for suspicion based on concrete evidence and in the absence of any other means of obtaining evidence, the judge may search the computers, computer programs and computer logs of the suspect. They may make copies of any electronic records found in order to decode and transcribe them. In instances where a delay may imperil the case, the public prosecutor may search a suspect's computers, computer programs and computer logs and make copies without court approval. Any such decision of the public prosecutor must be forwarded to the judge or the court for approval within 24 hours. The judge or the court shall rule on the decision within 24 hours. If the time limit expires or the search is not approved, the copies and any decoded records shall be immediately destroyed.

A suspect's tools and computer equipment may be seized if their computers, computer programs and computer logs cannot be accessed due to encryption, password protection, or if accessing the files will take an undue amount of time. As soon as the files are accessed and any necessary copies are made, the confiscated property shall be returned without delay.

During the seizure of computers or computer logs, all data in the system must be backed up. A copy of this backup must be made and given to the suspect or their legal representative, recorded in a report, and signed by all those concerned. In the alternative, a copy of all or part of the data in a system may be made without seizing the computer or computer logs. The copied data shall be printed on paper, recorded in a report, and signed by all those concerned.

(7.9) DEFENDANT'S CONFESSION AND ADMISSION

If there is a contradiction between the accused's testimony before the court and their previous testimony to the public prosecutor or law enforcement officers, their previous testimony may be read at the hearing so long as it was originally given in the presence of their defense counsel.

A defendant's admission before the judge that he or she committed the charged offense is called a confession. The judge may read the defendant's confession as evidence during the hearing.

If such an admission is not made in the presence of the judge, it is called a "statement of the accused" and still has value in the criminal proceeding. If there is a contradiction between the accused's testimony and the statement of the accused, the statement may be read at the hearing. In general, however, the statement of the accused cannot be read at the hearing as evidence of a confession. This is to respect human rights and prevent abuses of power. Only minutes issued by the judge are considered fully reliable.

(7.10) DEFENDANT'S STATEMENT AND FINAL WORDS

After the defense has presented their last presentation on merits, where they summarize all evidence and any contradictions in evidence or testimony has been resolved, the court will ask the defendant to present their defense on the merits. This defense is the declaration that will be considered by the court in reaching a verdict. After the defense on the merits is made, the defendant is given the last word before sentencing. Article 216/3 of the Code of Criminal Procedure clearly rules that "the last word belongs to the defendant."

The rule of "giving the last word to the defendant" before the verdict is rendered is necessary to the principle of "continuity of the public case" upon appeal. Failure to "give the last word to the defendant" constitutes a clear violation of both Article 216 of the Code of Criminal Procedure and the principle that "the right of defense cannot be limited." Such a violation is grounds for reversal due to procedural error.

“The defendant has the last word. Giving the last word to the accused is very important for the defense. For this reason, the failure to give the last word to the defendant who is present is considered an absolute ground for appeal, a definite violation of the law and therefore a reason for reversal.” “The last word must be given to the accused who is present before proceeding to the sentencing phase”. This provision is mandatory and regulated as a requirement of the principles of equality of arms and presumption of innocence. Giving the last word to the defendant is a mandatory procedural rule to be followed in the trial after the reversal.” Therefore, the rule of “giving the last word to the defendant” has been unanimously adopted.

(7.11) BALLISTIC EXAMINATION

Under Turkish Criminal Procedure, the Forensic Medicine Institution has the authority to conduct all ballistic examinations. Ballistic Investigation (ballistics) is considered by Turkish law as a branch of science that examines the thrust, flight and impact effect of bullets. Ballistics is based on the examination of the bullet core, bullet core fragments or pellets, and the firearm.

Ballistics is analyzed in five sections:

- Interior Ballistics: Examines the movement of bullet cores in the firearm.
- Intermediate Ballistics: Examines the movement of bullet cores as they leave the muzzle, until only exterior ballistics forces are acting upon them.
- Exterior Ballistics: Examines the movement of bullet cores between the barrel and the target.
- Terminal Ballistics: Examines the impact of the bullet core on the target.
- Wound Ballistics: The study of the physical and biochemical phenomena and anatomical and physio-pathological changes caused by bullets, bullet fragments or pellets on and within living tissues, both in terms of the bullet core and the target tissue.

Almost all modern pistols and infantry rifles are rifled firearms. A rifled firearm has grooves and ridges in the barrel that allow the bullet to gain rotational motion when fired and gives the barrel a spiral appearance. This rotational motion increases the stability and speed of the bullet, thus increasing its range, accuracy, and force when hitting the target. The ridges created by the grooves in the barrel are called “lands.” Although heavy weapons such as cannons can be produced with or without rifling, long-range cannons always have rifled barrels.

During forensic investigations and the prosecution of gun-related crimes, ballistics experts are often asked to prepare a report of their findings after examining and evaluating the evidence.

Such an investigation may include:

- Casing and bullet core examinations;
- Firearm and cartridge examinations;
- Non-firearm examinations;
- Shotshell cartridge examinations;
- Trigger pull weight measurements;
- Initial velocity measurements of the projectile core;
- Consulting BALISTIKA (an archive of casings and bullet cores); and
- Antique weapon examinations.

All tools, devices, and substances classified as weapons by the Turkish Penal Code must be examined in terms of crime analysis as well as their own characteristics. If it is necessary for the identification of the suspect or the accused, due to a crime that requires a penalty of two or more years imprisonment as with the upper limit, his/her photograph, body measurements, fingerprints and palm prints, other features on his body that will facilitate his diagnosis, as well as his voice and images may be recorded and placed in the file pertaining to the investigation and prosecution stages by order of the Public Prosecutor.

Keeping in mind the high rate of error in ballistic reports and the necessity of penal law to be based on conclusive evidence, the suitability of such reports should be meticulously audited, and it should not be forgotten that audits can be made by independent institutions.

According to one opinion, the whole of the historical event explained in the indictment should be understood from the concept of act (deed) in terms of criminal proceedings law. In the indictment, the public prosecutor states an individualized act or acts that have been committed. While the act or acts are specified/explained/individualized in the indictment, this does not suffice to explain the crime and its elements under criminal law. When specifying the act (deed), it is necessary to show to whom the defendant's behavior (action) is directed and when and where it is committed. However, the wrong spelling of the place, time, the way the act was committed and the name of the victim of the crime does not eliminate the fact that the act (deed) is the same. Events that are not specified and individualized in the indictment cannot be the subject matter of criminal proceedings (disputes to be prosecuted).

The judicial authority may judge only the event or events specified/disclosed/individualized in the indictment. In other words, the court cannot judge and make the action or actions that are not explained in the indictment subject to judgment.

According to the historical view, even if the essence of the event is not sufficiently specified in the indictment, all situations that can be objectively and naturally linked to this event constitute the historical event. In Turkish criminal justice law, Kantar states that "the subject matter of the lawsuit and judgment is the material act, historical event shown in the indictment or in the decision to commence the last investigation."

Thus, according to the "historical event" view, all naturally related events/actions are the subject matters of the criminal case/criminal trial.

Apart from the "historical event" view, opinions such as "event handled legally and normatively" and "plaintiff's final request" also discuss how to understand the act (deed) that is the subject matter of criminal proceedings. The characteristic that is common to all views is that the event or events included in the indictment must be included in any understanding of the term act (deed) as the subject of the criminal proceeding.

The Criminal Procedure Law clearly reveals that the criterion in determining the subject matter of criminal proceedings (dispute issue) will be the indictment. According to the law, "Judgment is ruled only about the act shown in the indictment" (Article 225/1 of the Code of Criminal Procedure). Therefore, the event or events specified in the indictment constitute the subject matter of the criminal case. The subject matter of criminal proceedings/judgment shall be determined by considering the action(s) shown in the indictment.

It is necessary to have a broad understanding of the concept of action (deed) shown in the indictment. In the indictment, it is necessary to accept the entire historical event experienced by the defendant as an action or actions that constitute the subject matter of the criminal trial/verdict.

In other words, in the whole of the material event described in the indictment, the action(s) and/or behavior(s) that are contrary to the criminal law, and therefore punishable, will be the subject matter of a criminal proceeding/verdict. Thus, it is the whole of the events consisting of material human behaviors reflected in the external world as explained in the indictment, which constitutes the subject matter of the criminal trial/verdict.

The judicial authority will investigate judge actions which are subject to criminal sanctions. More precisely, the court will be obliged to judge all the action(s) and/or behaviour(s) within the historical event described in the indictment issued by the public prosecutor. Events that are an integral part of the indictment in connection with the events shown in the indictment constitute the subject matter of criminal proceedings, even if they are not explicitly shown in the indictment.

Whether there is a connection between the event shown in the indictment and the event that emerged later or whether the events are part of a whole will be determined by considering criteria such as place, time, victim, causality relationship and social intertwining. The whole of the event specified in the indictment and all events that are in close connection with this event and that arise subsequently constitute the subject matter of the judgment.

For example, even though a lawsuit has been filed against the act of violating the housing immunity specified in the indictment with incomplete attempt, when it is revealed that the act of violating the housing immunity has been completed, it will be sufficient to give the defendant the right to additional defense in order to make this event the subject matter of the verdict (Article 226/2 of the Code of Criminal Procedure). From a legal point of view, no matter how closely linked they are with the incident that appeared afterwards, which gave rise to a separate criminal appearance, the subject matter of the verdict/trial cannot be established without issuing a new indictment.

After these explanations, we can say that the subject matter of the judgment/criminal case is the action or actions described in the indictment. All actions included in the historical event in the indictment text of the public prosecutor shall be subject to trial and verdict. In the indictment, the actions described should be evaluated objectively and the subject matter of the trial (dispute) should be determined by the court. This is because the action(s) and behavior(s) in the indictment, which are punishable, constitute the objective element of the judgment. Therefore, the subject matter of the trial/verdict is objective according to the Criminal Justice Law.

The subject matter of the trial (dispute) cannot be determined by considering subjective criteria such as the purpose or will of the public prosecutor who issued the indictment. According to the established judgment of the Supreme Court, mentioning another event during the disclosure of an incident does not indicate that a lawsuit has been filed against that event, and the event to be filed should be clearly and independently shown. Therefore, if the public prosecutor has mentioned an event based on another, the will to file a lawsuit cannot be in question for this event. In one case, an indictment was filed against the defendant which included multiple acts constituting the crime of looting. These included how the victim was “injured by [the defendant] hitting his chest with a screwdriver in order to get his money”, “died as a result of blows and impacts”, and how the defendant “searched the pockets of the victim and took the money in his pocket.” Although the defense and the trial were carried out in relation to these actions and the judgments were established, the Supreme Court General Assembly did not consider that a lawsuit was filed in relation to the crime of extortion in the indictment and ultimately decided to reverse the resistance provision of the court of first instance. In German criminal justice law, action (“die Tat,” meaning act) is one of the most important concepts. Therefore, the most important thing for a criminal lawyer to do is to explain and describe the action correctly to the court.

08



B A I L

08

(8.1) BAIL

Release on bail is a form of judicial control measure. Accordingly, upon the request of the public prosecutor, the amount and payment method will be determined by the judge after considering the financial situation of the defendant.

Under Criminal Procedure Code Article 109/ f 1., a suspect may be placed under judicial control rather than arrested during the investigation phase, as long as the conditions specified in Article 100 of the Code of Criminal Procedure are met.

Arrest is the most severe measure in criminal proceedings and should be resorted to only in cases of necessity. Release on bail is less severe and may be used to ensure that the accused is not deprived of their liberty. Release on bail is subject to the following conditions:

- The accused must have been arrested for reasons other than suspicion of tampering with evidence,
- Collateral must be provided (Article 11 allows collateral to be money, government funds or the financial guarantee of a reputable person),
- Release on bail must be requested by the accused or their counsel, and
- If the accused does not reside in Türkiye, they are required to appoint an attorney who must be present in the jurisdiction.

It should be noted that release on bail is not an obligatory decision for the judge or prosecutor.

Article 109/1 of the Code of Criminal Procedure, entitled “Judicial control,” states that “In cases where the grounds as regulated in Art. 100 are present, which would have resulted in arrest with a warrant, a decision to put the suspect under judicial control may be rendered, instead of arresting him with a warrant, if the conducted investigation is about a crime that carries a punishment of imprisonment at the upper level of 3 years or less.” Subparagraph (f) of paragraph 3 of the same article further states that “Judicial control involves subjecting the suspect to one or more of the following obligations ... To deposit an amount of the money as a safeguard, which shall be determined by the judge upon the motion of the public prosecutor, after considering the financial conditions of the suspect, and whether it shall be paid by more than one instalment and the period of payment”.

According to Article 26, paragraph 4, subparagraphs (a) and (b) of the Regulation on Supervised Release and Assistance Centers and Protection Boards issued by the Ministry of Justice (based on Article 27 of Law No. 5402 on Supervised Release and Assistance Centers and Protection Boards), “If the suspect or defendant applies in due time, a supervision plan is prepared by the relevant officer”.

If the suspect or defendant is released on bail, the branch directorate or bureau shall direct the suspect or defendant to deposit the entire amount of the security deposit, or the first instalment if it is in instalments, to the finance cashier within 10 days. The suspect or defendant must submit the receipt to the branch directorate or bureau within five days of the deposit. The branch directorate or bureau shall then forward the receipt to the Office of the Chief Public Prosecutor to be sent to the court. After the amount of the guarantee is paid in full, the branch directorate or bureau closes the record in the ledger and sends it to the Office of the Chief Public Prosecutor to be forwarded to the court.

If release on bail is approved while the suspect or defendant is under arrest, and their release is conditional upon the deposit of the entire amount of the security deposit or the first instalment thereof, the payment may be deposited in the name of the suspect or defendant at the finance cashier’s office and the receipt shall be submitted to the Office of the Chief Public Prosecutor. If the full amount is deposited, the receipt is not sent to the branch office or bureau. However, if the security deposit is to be made in instalments and the first instalment is deposited, the receipt is sent to the branch directorate or office and action is taken in accordance with subparagraph (a).

Article 109 of the Code of Criminal Procedure explicitly makes release on bail subject to the request of the public prosecutor. The judge, taking into account the financial situation of the suspect, determines the amount of the security deposit and whether it must be paid in full or in multiple instalments. The amount and conditions of the security deposit must be sufficient to guarantee a trial without detention of the defendant. However, legislation has made release on bail conditional upon the request of the public prosecutor. According to Article 110/3 of the Code of Criminal Procedure, the court has the same authority in the prosecution stage as the public prosecutor had in the investigation stage.

09



09

(9.1) CRIMINAL COURTS (JUDGESHIPS) OF PEACE (Criminal magistrate)

(9.1.1) IN GENERAL

The criminal court of peace, also known as the criminal judgeship of peace, examines certain investigative proceedings and objections to those proceedings (such as objections to administrative fines) under Criminal Procedure Law No. 5271. Because these courts are considered to be impartial and independent judicial bodies and are authorized to decide on secondary criminal cases such as arrests under Article 10 of Law No. 5235, the European Court of Human Rights also legally recognizes them.

The criminal court of peace oversees certain proceedings during the investigation phase. After a criminal case has been opened with an indictment, the proceedings are carried out by the following courts, depending on the nature of the defendants, and charged crimes:

- The High Criminal Court,
- Criminal Courts of first instance,
- Juvenile Courts, or
- Juvenile Criminal Courts.

(9.1.2) DUTIES OF THE CRIMINAL JUDGESHIP OF PEACE

Criminal judgeships of peace are authorized to make decisions and act as a judge would during the investigation phase of criminal proceedings, including examining any objections (excluding cases delegated to other authorities by law).

According to Law No. 5271 on Criminal Procedure, criminal judgeships of peace may rule on the following:

- Detainment (Article 74 of the Criminal Procedure Code);
- Internal bodily examinations and body sampling (Article 75 of the Criminal Procedure Code);
- Molecular genetic examinations (Article 78 of the Criminal Procedure Code);
- Arrest warrant appeals (Article 91/5 of the Criminal Procedure Code);
- Detention order appeals (Article 91/5 of the Criminal Procedure Code);
- Arrest warrant reviews and objections to arrest (Article 100 - 101 of the Criminal Procedure Code);
- Judicial search warrants (Article 78 of the Criminal Procedure Code);
- Preventive search warrants (Article 9/1 of the Law on Police Duties and Powers);
- Confiscation orders (Articles 123-134);
- Judicial control measures (Article 109- Article 110 of the Criminal Procedure Code);
- Restricting the case file (Article 153/2 of the Criminal Procedure Code);
- Press broadcast bans for the investigation file (issued pursuant to Article 3/2 of the Press Law);
- Appeals from the rulings of other criminal judgeships;
- Appeals from the decisions of the public prosecutor's office;

- Appeals from the public prosecutor's decision to postpone the opening of the public prosecution;
- Appeals against administrative sanctions.

(9.1.3) OFFICERS OF THE CRIMINAL COURT OF PEACE

Criminal judgeships of peace have a single judge. Criminal judgeships of peace only conduct hearings during the investigation phase if a referral is made to arrest a suspect. In that case, the criminal judgeship of peace may hold a hearing to interrogate the suspect. The public prosecutor is not present at any such interrogation hearings.

(9.1.4) OBJECTIONS AGAINST CRIMINAL COURT OF PEACE DECISIONS

Parties may object against the rulings of the criminal court of peace. Appellate review of the rulings of the criminal judge of peace on investigation procedures are carried out by the subsequently numbered criminal judge of peace. Objections from rulings by the last numbered judge shall be examined by the first numbered judge. If there is only one criminal court of peace in the region where the objection is filed, a criminal court of peace in the region where the heavy criminal court is located will review the appeal.

If there is only one criminal court of peace in the region where the heavy criminal court is located, the criminal court of peace in the region where the next nearest heavy criminal court is located shall examine any appeals. Where the public prosecutor objects against a rejected arrest request, the criminal judgeship of peace that rejected the request cannot review the decision as an objection authority.

Objections against the decisions of the criminal judgeships of peace regarding investigation procedures must be made within seven days from the day on which those concerned learn about the decision, unless otherwise provided by law. Objections must be made by submitting a petition to the authority issuing the decision or by making a statement to the minutes clerk if it is recorded in the minutes.

(9.1.5) OBJECTIONS AGAINST ADMINISTRATIVE SANCTION DECISIONS OF THE CRIMINAL COURT OF PEACE

Administrative sanction decisions of administrative/public authorities imposing administrative fines or confiscation of property may be objected to the Criminal Court of Peace within fifteen days of the date of notification or announcement of the decision. If an appeal is not made within this period, the administrative sanction decision becomes final.

If this time limit has been exceeded due to a force majeure event, an objection may be filed within seven days from the date on which the force majeure event ends. This objection shall not prevent the finalization of the decision, but the court may suspend its implementation. An objection must be made by the legal representative or lawyer of the party via a petition submitted in duplicate to the criminal court of peace. In the appeal petition, the administrative sanction decision and any evidence against this decision must be clearly shown. For a late petition, the force majeure event that prevented the application from being made in due time must be shown as well.

The decisions of criminal judgeships of peace regarding administrative sanction decisions are subject to object. This objection shall be filed within seven days at the latest from the date of notification of the decision. The objection shall be made to the criminal judgeship of peace, which is numbered as in other decisions of the criminal judgeships of peace. The decision on the objection is made by reviewing the file. For each objection, the Court shall decide whether to "accept the objection" or "reject the objection". The court's decision shall be notified to the parties.

Finally, the following information is important for criminal lawyers to know:

- If a party is represented by a lawyer as proxy, the parties shall not be notified separately of any appeals.
- The decisions of the criminal judgeship of peace cannot be appealed.
- Decisions of the criminal judgeship of peace can only be challenged by an application for reversal in the interest of the law, which is an extraordinary remedy.

(9.2) COURTS AND PROCEDURE IN TURKISH CRIMINAL PROCEDURE

After the investigation phase proceedings are concluded at the Criminal Court of Peace, the case is filed with an indictment before the appropriate criminal court (Criminal Court of Peace, Criminal Court of First Instance or High Criminal Court). A complaint is required before the prosecutor's office may bring suit for crimes subject to complaint. However, the prosecutor's office may act independently for crimes not subject to complaint. To open a criminal case, the prosecutor's office first investigates whether a crime has been committed, and if so, by whom and the nature of the crime committed.

If, as a result of its investigation, the prosecutor's office concludes that a person has committed a crime, it is obliged to open a criminal case by issuing an indictment. The indictment states the act constituting a crime, the legal article of the crime, the evidence obtained through investigation, and a request to try the suspect. An indictment means that there is sufficient suspicion that a crime has been committed. Sufficient suspicion means that the suspect is more likely to be convicted than acquitted. If the prosecutor's office is of the opinion that there is insufficient suspicion to open a criminal case, it must issue a decision of non-prosecution.

The court to which the prosecutor's office submits the indictment must either accept it or, if it is deficient, return it to the prosecutor's office within 15 days of submission. The prosecutor's office may appeal against the court's decision on returning the file or file a new indictment by correcting the deficiencies specified in the decision. If the court accepts the indictment, it must prepare for a hearing by setting a date and summoning the parties. If the defendant is under arrest, the court issues a writ to the prison ordering the defendant to be present at the hearing. The Court of Cassation is the supreme court whose main task is to conduct an appellate review of lower courts' judicial jurisdiction. For this reason, the Court of Cassation is also referred to as the "court of appeal". The Court of Cassation is the highest court and ensures unity in the application of law. The Court of Cassation cannot conduct case reviews like courts of first instance or regional courts of appeal. Upon appeal, it conducts a "legal review" on whether the appealed decision is in accordance with the law.

(9.2.1) HEAVY CRIMINAL PROCEEDINGS IN TURKISH CRIMINAL JURISDICTION

The heavy criminal court, also called the assize court or court of assizes, deals with serious crimes carrying the heaviest potential punishments as defined by law. It is the court of first instance for these criminal proceedings. The duty of the heavy criminal court is regulated in Article 12 of Law No. 5235.

Article 12 of Law No. 5235 also determines whether a crime falls within the jurisdiction of the heavy criminal court by considering the nature of the crime and its potential sentence. The criminal court of first instance deals with any crimes that do not explicitly fall within the jurisdiction of the heavy criminal court. If the defendant is under the age of 18, the juvenile criminal court handles the proceedings.

During the prosecution phase of a criminal case, any decisions that must be made by a court are made by a criminal judgeship of peace.

(9.2.2) DUTY OF THE HEAVY CRIMINAL COURT

The following three categories of crimes fall under the jurisdiction of the assize court;

- Unless special legislation expressly mandates them to deal with other offenses, the heavy criminal courts deal with the following offenses:
 - Robbery (Qualified Robbery) (Art. 148, 149 TPC),
 - Intentional Killing (Art. 81, 82 TPC),
 - Aggravated Injury on Account of its Consequences (Art. 87/4 TPC),
 - Reckless Killing (Art. 85/2 TPC),
 - Extortion (Art. 250/1 and 2 TPC),
 - Embezzlement (Art. 247 TPC),
 - Bribery (Art. 252 TPC),
 - Counterfeiting Official Documents (Art. 204/2 TPC),
 - Qualified Theft by Deception (Art. 158 TPC),
 - Bankruptcy by Deception (Art. 161 TPC),

- Crimes under Articles 318, 319, 324, 325 and 332 of the TPC, among the crimes defined in Chapters Four, Five, Six and Seven of Part Four of Book Two, Part Four of the TPC No. 5237, do not fall within the jurisdiction of the heavy criminal court. However, the heavy criminal court is authorized to hear cases related to the following crimes:
 - Offenses against the State's sovereignty and the dignity of its bodies,
 - Offenses against the constitutional order and its functioning,
 - Offenses against national defense,
 - Crimes involving state secrets and espionage,
 - Crimes of a political nature such as making propaganda or membership in an organization falling within the scope of Anti-Terrorism Law No. 3713.
- Crimes carrying a penalty of aggravated life imprisonment, life imprisonment, or a maximum penalty of more than ten years imprisonment (Art. 12 of Law No. 5235). For example, counterfeiting money (Article 197/1 of the TPC) and manufacturing or trafficking in narcotic substances (Article 188 of the TCC) both fall under the jurisdiction of the heavy criminal court because they carry potential maximum penalties of imprisonment for more than ten years.

The jurisdiction of the heavy criminal court is determined by the statutory maximum penalty of the crime, regardless of any aggravating or mitigating circumstances (Article 14 of Law No. 5235).

(9.2.3) STRUCTURE OF THE HEAVY CRIMINAL COURT

The heavy criminal court, also known as the assize court or court of assizes, shall have a president, also known as the presiding judge, and at least two members, also known as the court panel. The court shall only operate when its president and two members are present. The presiding judge, the court panel, and the prosecutor must attend all hearings (Art. 9 of Law No. 5235).

All decisions in a criminal court must be deliberative. The presiding judge leads the deliberation, collects the votes, and announces the verdict. The member judges state their views and participate in the deliberation (Article 228 of the Code of Criminal Procedure).

(9.2.4) APPEAL AGAINST HEAVY CRIMINAL COURT DECISIONS

The appeal procedure allows another court at the same level to evaluate the decision of a first instance court. For example, if an arrest is appealed, another court at the same level will review the validity of the arrest warrant.

Appeals may be filed against interim decisions of heavy criminal courts, not only final rulings. For example, a party may appeal against arrest, seizure, confiscation and continuation of detention decisions.

All heavy criminal court appeals shall be handled by the subsequently numbered heavy criminal court. Appeals from rulings by the last numbered court shall be examined by the first numbered court. If there is only one heavy criminal court in the region, the next nearest heavy criminal court shall examine any appeals.

Appeals against the decisions of the Assize Court must be filed within seven days from the date of notification (Art. 268/1 of the Criminal Procedure Code). The announcement of a verdict may be deferred until any appeals are settled.

(9.2.5) APPEAL OF HEAVY CRIMINAL COURT DECISIONS TO THE HIGHER COURT

Upon appeal, a superior court may review both the material facts and legal aspects of a decision by a heavy criminal court.

Decisions of the heavy criminal courts that conclude a case, i.e., judgments, may be appealed under certain conditions. Sentences of 15 years or more imprisonment are automatically subject to appellate review by the Court of Appeal.

The following are exceptions and may not be appealed:

- Judicial fines of 3,000 or less Turkish Lira (TL).
- Acquittals for crimes punishable by a judicial fine not exceeding 500 days (approximately 10,000 TL) are final (Article 272/3-b of the Criminal Procedure Code).

Representation by a lawyer is mandatory for most crimes that fall under the jurisdiction of the Assize Court.

(9.2.6) JUDGMENT (REASONED DECISION) IN HEAVY CRIMINAL COURTS

Article 230 of the Code of Criminal Procedure stipulates which elements should be included in any conviction issued by a heavy criminal court:

- The claim and defense, the evidence on which they are based, and the evidence gathered by the court,
- Discussion and evaluation of the evidence, the reasons for rejecting or accepting evidence, and which side has the preponderance of the evidence,
- The act of the defendant that is considered to constitute a crime, its legal elements, its characterization, and the applicable article of law,
- Any aggravating and/or mitigating factors, whether there are legal grounds for abolishing the penalty, the acceptance or rejection of any related requests, and the rationale behind the penalty,
- The grounds for postponement or conversion of the penalty, grounds for the application of additional security measures, and the acceptance or rejection of any related requests,
- Whether the defendant may apply for legal remedies and compensation at the end of the judgment, including the duration, form, and authority of any remedy or compensation.

The phrase “reasoned decision has been written” indicates that the case has been concluded and the court has deliberated on its verdict. After the reasoned decision is written, the parties shall be notified, and the appeal period starts.

In criminal cases, a reasoned decision must be prepared within 15 days from the date of the verdict. In civil, administrative, or tax court cases, a reasoned decision must be prepared within one month from the date of the verdict.

A reasoned decision is finalized in two ways:

- First, if no appeal is filed against the reasoned decision within the appeal period, the decision becomes final.
- Secondly, if an appeal is filed against the reasoned decision but the appellate court upholds the judgment, the decision becomes final.

The appeal period in criminal cases is seven days from notification of the reasoned decision. However, if the decision is read in court, the appeal period instead starts from the date of the hearing. The appeal period in civil court cases is two weeks from notification of the reasoned decision. If there are conditions upon the appeal, the appeal period for a decision by the Regional Court of Appeal is two weeks from the notification of the decision. If it is intended to file a petition of appeal after the reasoned decision, a petition for keeping time must be filed, declaring that the defender is waiting for the detailed decision and keeping time for the appeal petition preparation.

(9.2.7) HEAVY CRIMINAL COURT FLOWCHART

There are fundamentally two parties in a criminal case: the plaintiff and the defendant. These two sides are not opposed to each other, but rather help each other to reach the material truth. For example, the prosecutor is obliged to gather evidence both for and against the suspect or defendant.

The prosecutor is the main actor for the prosecution. The prosecutor is assisted by the police to carry out the prosecution. Later, when the civil case is opened, the victims or those harmed by the crime can also submit their requests to participate in the case, and if their requests are accepted, they can also take part in the prosecution alongside the prosecutor.

The defendant is the main actor for the defense. The defendant tries to disprove the accusations brought against them by the prosecution: they try to prove that they did not commit the crime, that their actions were lawful, that there are reasons why they should not be punished, or that there are reasons why they should be punished less. The defendant may be assisted in this activity by a lawyer; in fact, for some crimes and persons, the presence of a lawyer is mandatory.

The prosecution presents a thesis, and the defense presents an antithesis. It is the duty of the courts to reach a synthesis based on both.

(9.2.8) COURTROOM ETIQUETTE

Structure of the Courtroom: The place where the hearings are held is called the “courtroom”. To facilitate efficient and effective hearings, there is a predetermined procedure in the courtroom and all work is carried out in a certain order. This predetermines who will stand where, who will speak when, who will be present in the courtroom and who will not be present. All parties must follow these rules to maintain order in the courtroom.

Who Sits Where in a Trial: The judge and the public prosecutor sit “on the bench.” Normally, one judge sits on the bench. However, in a panel court, three judges sit on the bench. The judge’s right side is reserved for the plaintiff (the claimant-complainant), while their left side is reserved for the defendant (the defendant-accused). Accordingly, the public prosecutor stands to the right of the judge. For those facing the judge, the left side is reserved for the plaintiff, and the right side is reserved for the defendant.

A “court clerk” sits in front of the judge. The clerk records the proceedings during the hearing in the minutes, which are kept on the judge’s instructions.

Who Speaks Where in a Trial: Witnesses speak from the bench in front of the clerk. Non-detained defendants and, in civil cases, the plaintiff stand in their allocated positions and address the court from there. The lawyers of the parties, if any, stand next to them. All parties stand from their seats when speaking. Only the witness comes to the lectern to speak since they are not seated in the courtroom.

Who Speaks in a Trial and When: The court operates according to the procedure. Parties must request the judge’s permission to speak. The judge will give a party the floor (or, in other words, permission to address the court) when necessary. Parties may not speak out of turn or interrupt other speakers. Parties are expected to show respect for the court by standing while speaking.

Where the Witness Sits During the Trial: Witnesses are not allowed into the courtroom until they are to be heard. This is to ensure that they tell the truth accurately without being affected by any events taking place inside the courtroom. Therefore, there is no place for the witness to sit. When the witness is going to testify, the bailiff will call them into the courtroom. After their testimony, the witness may leave when the judge gives permission.

Not Everyone Can Enter the Courtroom During the Trial: Hearings are open to everyone. However, in cases where public morality or public security requires it, hearings may be closed. This may include, for example, cases involving children, sexual offenses, etc. A closed hearing will be indicated in advance, and no spectators will be allowed in the courtroom. Any already inside will be asked to leave.

How the Parties Should Behave in the Hall: The courtroom is under the control of the judge. They may take necessary measures to maintain order in the courtroom, including punishing persons who disrupt proceedings with disciplinary imprisonment. Individuals in the courtroom are expected to remember that trials are important and serious matters. Accordingly, spectators may not speak, comment on the speeches, applaud or boo. All cell phones are to be turned off in the courtroom, and no photos or videos may be taken.

In contrast to the USA, the Turkish criminal justice system does not use juries.

(9.2.9) OPENING STATEMENT (ACCEPTANCE OF THE INDICTMENT)

Under Turkish Criminal Procedure, the opening statement is made by accepting and reading the indictment. Article 190/1 of the Code of Criminal Procedure lays out the following procedure for public trials: the indictment is read, the accused is interrogated, the evidence attached to the indictment is evaluated, the prosecution and defense make statements before the court, and the court reaches a decision. Any party who finds the court's decision unlawful may appeal against it. In theory, this should all be accomplished within a few hearings to ensure that truth and justice are reached in a reasonable time without delay. However, the reality is somewhat different.

The defendant has the right to a fair trial during the prosecution stage. This right is violated if any of the following occurs:

- The “principle of orality” is not fulfilled due to an incomplete record of the defense's statements in the minutes,
- The minutes are incomplete due to clerk error,
- The defendant and/or defense counsel were excluded from the hearing where the court's verdict was read,
- The defendant and/or defense counsel only received copies extracted from the written short decision, or
- Proper interpretation was not provided.
- It is critical that the minutes be complete and accurate. As a written document, the minutes may be used by the court as evidence in making its decision or reviewed upon appeal.

In cases where there are many defendants in pre-trial detention, the evaluation and discussion of the evidence may not occur until the court has ruled on all requests for release. Depending on the number of defendants, it may take a court a substantial amount of time to evaluate and decide all of the requests. This delay, in turn, violates the right to a fair and speedy trial of any defendants who are not detained. Both the length of time spent in custody and the violation of the right to a fair and speedy trial are further worsened towards the end of the trial, when the prosecutor must issue their final opinion, and each defendant and their counsel files their written defense. In contrast, if the court releases the defendants held in pre-trial detention, the trial process is greatly expedited and there are fewer rights violations. In short, while trials are designed to proceed and resolve quickly, the actual length of a trial is dictated largely by the number of defendants and whether pre-trial detention continues during the trial. This also causes most defendants to view pre-trial detention as a punishment.

(9.3) DIRECT EXAMINATION

The public prosecutor, defense counsel may ask direct questions to the defendant, participants, witnesses, experts, and any other persons called to the hearing. The defendant and participants may also ask questions through the presiding judge. If any party objects to a question, the presiding judge shall decide whether the question should have been asked or not. If necessary, the question may be re-posed.

In panel courts acting, the judges forming the panel may pose questions to the individuals mentioned above (Article 201 of the Criminal Procedure Code).

(9.3.1) JUDGEMENT BY THE HIGH CRIMINAL COURT

The high criminal court both conducts the trial and issues its verdict as a panel.

The two most important phases of the Turkish Criminal proceedings are the investigation phase and the prosecution phase. A trial begins with the acceptance of the indictment. Then any evidence collected during the prosecution phase is presented and evaluated, the parties are heard, and the court makes a final judgment on whether to punish the defendant. However, procedural decisions may sometimes be rendered without considering the merits of the case. Possible procedural and substantive decisions are as follows:

Procedural Decisions:

- Decision of Non-Jurisdiction
- Decision of Rejection of Venue
- Decision on Consolidation of Cases
- Decision on Separation of Files
- Transfer of Case Decision
- Dismissal of the Case
- Case Suspension Order

Decisions on the Merits

- Conviction Decision
- Security Measure Decision
- Acquittal Verdict
- Lack of decision for penalty
- Deferment of the announcement of the verdict
- Decision of abatement

(9.3.2) DIRECT QUESTIONS AND CROSS-EXAMINATION

Cross-examination is the questioning of witnesses, defendants, intervenors, and/or complainants to check the accuracy and reliability of their statements. It may also be used to raise doubts about their statements, or to draw attention to or strengthen the claim or defense of any party in the proceedings. Cross-examination is introduced to criminal procedure by interpreting Article 59 of the Code of Criminal Procedure (TCPC) and Article 201 of the TCPC together.

Judges, the prosecutor, and lawyers for parties to the case all have the right to ask direct questions under Article 201 of the TCPC. These questions must clarify or explain a matter relevant to the case.

(9.3.2.1) DIRECT INTERROGATION

Article 148 of the Code of Criminal Procedure No. 5271 is titled, “Prohibited Procedures in Taking Statements and Interrogation.” Any statements of the suspect or the accused should be made out of his/her own free will. Causing physical or mental distress by means of misbehavior, torture, drug administration, fatigue, deception, constraint, threats, or use of tools is strictly illegal (Article 148/1 of the Code of Criminal Procedure).

Statements obtained through prohibited procedures cannot be considered as evidence, even if they are given with consent. Any testimony taken outside the presence of the suspect or the accused’s lawyer cannot be based upon a verdict unless the suspect or the accused confirms it before the court (Article 148/3-4 of the Code of Criminal Procedure).

Article 148 of the Code of Criminal Procedure not only lists the above prohibited interrogation methods, but also prohibits all interrogation methods “like” the ones listed above. Thus, any method of causing physical or mental distress that affects the free will of the suspect or the accused is prohibited and is strictly illegal. The legally prohibited interrogation methods listed above are defined below.

Maltreatment: Refers to behavior detrimental to the mental or physical health of a person. Maltreatment is considered a crime of torture when it becomes continuous or systematic. For example, depriving a detained suspect of food or pressuring him/her verbally and via detrimental behaviors are both considered to be forms of mistreatment.

Torture: Refers to any action by a public official that is incompatible with human dignity and that causes physical or mental suffering, affects a person’s perception or will, or humiliates a person in a systematic and continuous way. For example, continuously and systematically keeping a person awake is considered to be a form of torture.

Drug Administration: Refers to administering drugs to the suspect or the accused in a way that will harm their health or affect their freedom of the will. Drugs can affect a person’s free will in many ways. For example, a psychiatric stimulant and a psychiatric depressant may both be administered in the same way. They may be given in the form of

medication, tablets, liquid injections, or adding to what the suspect or the accused eats and drinks. In all cases, the administration of drugs to affect the free will of the suspect or the accused are strictly illegal.

Fatigue: Refers to intentional actions that are physically or mentally taxing or are designed to exhaust the suspect or the accused. Such actions fall within the definition of “fatigue,” and are strictly illegal. For example, it would be unlawful to start taking statements late at night and to continue taking the same person’s statement well into the morning shift. This would be a form of fatigue.

Deception: Refers to the effect of that fraudulent acts or statements may have in convincing the suspect or the accused to make a statement of his/her own free will. For example, the suggestion that the punishment for the act committed by the suspect or the accused is very high, and that the punishment will be reduced if he/she gives the desired statement is against the law and is a form of deception.

Constraint and Threat: Constraint refers to forcing the suspect or the accused to act in a certain way by using physical force. Threat refers to the promise or implication that the suspect or the accused will be subjected to future harm or danger if they do not comply with a certain demand. For example, a statement that the suspect or the accused’s family will be harmed if he does not give an appropriate confession or testimony, is a threat.

Use of Tools: Refers to the use of any tool that diminish the free will of the suspect or accused. The nature of the tool used does not matter. Tools that emerge due to technological developments may be a form of use of tools, as well as older techniques such as hypnosis or polygraph.

Unlawful Promise: Refers to any promise of an unlawful benefit to the suspect or the accused. For example, promising the suspect or the accused that he/she will be released via effective repentance provisions if they confess their crime, when no such provisions exist, would be a form of unlawful promise.

(9.3.2.2) CROSS-EXAMINATION

For cross-examination to work properly, the cross-examiner must have a theory of the case. A theory of the case is a general framework of the ways and methods by which the party’s claim or defense will be put forward, and the desired end result. Cross-examination without a theory of the case can lead to unfavorable results.

In the Criminal Procedure Code System, direct questioning and cross-examination are merged. The right to ask direct questions is not the same as cross-examination. Article 201 of the Criminal Procedure Code is titled “Direct Questioning.” Under Turkish Criminal Procedure, direct examination (also called narrative interrogation) can only be conducted by the presiding judge.

However, defense counsel, the prosecutor, and member judges of the court have the right to ask direct questions.

Cross examination is a right recognized under both Article 611 of the American Federal Rules of Evidence and Article 59 of the Turkish Criminal Procedure Code.

In the American system, if a witness testifies against the party bringing the witness, the party bringing the witness may ask the judge to declare its witness a “hostile witness”.

Impeachment refers to when the parties cast doubt on a witness’s testimony by asking questions. It is one of the main purposes of cross-examination.

Purposes of Cross-examining Witnesses or the Defendant

- To re-introduce case facts from another individual’s perspective,
- To strengthen or weaken a case by highlighting a fact,
- To demonstrate that one party’s witnesses more accurately represent the truth,
- To confirm or raise doubts about the credibility of a witness or witness statement.

Issues to be Cross-Examined

- Perception,
- Memory,
- Partiality.

How cross-examination is conducted is determined by the nature of the case and the qualifications of the cross-examiner. Each cross-examination should be conducted differently based on the cross-examiner's theory of the case. Accordingly, there are many different cross-examination techniques. However, any cross-examiner should bear the following in mind:

- The party bringing the witness must pose a direct question before the other side may conduct cross-examination.
- The cross-examiner should have a good command of the case details and cross-examine in a controlled manner.
- Questions should be aimed at achieving a specific objective or obtaining specific information.
- The cross-examiner should ask questions in a logical order and progression.
- The most important and consequential question should be saved for last.
- When possible, posing questions using the witness's own words is most effective.

(9.3.3) SUMMONING THE DEFENDANT OR COMPELLING THEIR APPEARANCE

A court may compel a complainant, victim, suspect or defendant, witness, or expert to appear before the court or at the prosecutor's office. This may include the use of force if necessary to carry out proceedings during the investigation or prosecution phases. For individuals in custody, the order to appear is known as a "writ of habeas corpus." For individuals not in custody, the order to appear is known as a "subpoena."

Compulsory appearance may be imposed for as long as necessary to carry out the relevant procedure. Once the procedure is completed, any compulsory appearance orders are automatically lifted. According to the Code of Criminal Procedure No. 5271, compulsory appearance must be applied in accordance with the provisions of Article 233 and Article 44/1 of the Code of Criminal Procedure for complainants and victims, and Articles 43 and 44 for witnesses. Article 146 of the Criminal Procedure Code, which contains the general provisions regarding compulsory appearance, also applies to the suspect or defendant, witnesses, victims, complainants, and experts.

(9.3.3.1) CONDITIONS FOR COMPULSORY APPEARANCE

Compelling an individual's appearance to take their statement, interrogate them, or carry out some other procedure (identification, discovery, taking a signature sample, etc.) is considered a protection measure. Protection measures are measures applied by courts for the purposes of conducting criminal proceedings, preserving evidence, and executing judgment. A court must meet certain conditions specified in the law before utilizing a protection measure that interferes with personal freedoms.

The following conditions must be met to issue a compulsory appearance order for the suspect or defendant, witnesses, victims, complainants, and experts (CPC 146):

- There must be sufficient grounds for an arrest warrant against that person; or
- There must sufficient grounds for the issuance of an apprehension order against that person; or
- The person must have been summoned for interrogation and notified that they would be brought by force if they did not comply, then failed to appear.

(9.3.3.2) AUTHORIZATION TO ISSUE A WARRANT OF COMPULSORY APPEARANCE

The public prosecutor has the authority to issue a compulsory appearance order during the investigation phase. Law enforcement officers may not issue such an order. They may only enforce a compulsory appearance order from another authority. As a reminder, the investigation phase starts with suspicion of a crime and ends with the court's acceptance of the indictment issued by the prosecutor's office.

In some cases, a criminal judgeship of peace may also issue a compulsory appearance order during the investigation phase. If the public prosecutor for a case is inaccessible, or if the case exceeds the public prosecutor's work capacity due to the case's scope, the criminal judge of peace may carry out all investigation phase procedures under CPC 163.

During the prosecution phase, the presiding judge of the court is authorized to issue a compulsory appearance order. There are two general courts in the prosecution phase: the criminal court of first instance, and the heavy criminal court. The criminal court of first instance has a single judge and the decision to compel is made by the judge of the court. The heavy criminal court has three judges, and the decision to compel is made by the president of the court. As a reminder, the prosecution phase starts with the court's acceptance of the indictment and continues until the judgment is finalized.

(9.3.3.3) ENFORCEMENT OF A COMPULSORY APPEARANCE ORDER

A compulsory appearance order cannot interfere with a person's private sphere of life. For example, law enforcement officers issued to pick up a person with a compulsory appearance order are not authorized to enter that person's house. Law enforcement officers cannot enter private places that are not open to the public in order to execute compulsory appearance orders. Accordingly, a house search requires a separate search warrant (Article 119 of the Criminal Procedure Code). If the person does not leave the house or the relevant closed private place, law enforcement officers may notify one of the person's relatives of the compulsory appearance order. If the person is found in a public place, such as on the street, in a park, or in a shopping center, the compulsory appearance order may be carried out by force.

In practice, a compulsory appearance order functions as both a form of summons and a method of forced presence. Law enforcement officers usually go to the house of the person ordered to appear and notify the person or their relatives of the order. If the person or their relatives are not home, law enforcement may even leave a note under the door. The person is thus summoned through a kind of an invitation and brought before the judicial authority who issued the compulsory appearance order. After the necessary procedure is completed at the courthouse, the compulsory appearance order is lifted by delivering a note written by the court clerk or bailiff to the law enforcement agency.

(9.3.3.4) TYPES OF COMPULSORY APPEARANCE ORDERS

A judge or the prosecutor's office may issue two different kinds of compulsory appearance orders:

Dated Order of Compulsory Appearance: If the procedure necessitating a compulsory appearance order will take place on a given date, the judge or prosecutor may require the relevant person to appear on that date. For example, the court may order that "the defendant shall be compulsorily brought to the hearing dated 10/09/2020 for the purpose of taking his/her statement." Similarly, the prosecutor's office may order a suspect to be present during an investigation or to appear at the courthouse for identification on a certain day.

Indefinite Compulsory Appearance Order: Indefinite compulsory appearance orders require the relevant person to appear before the court or at the prosecutor's office immediately after they are seized, or if this is not possible, within 24 hours at the latest, excluding travel time (Article 146/4 of the Code of Criminal Procedure). However, the periods of detention and release prescribed by law must still be respected.

(9.3.3.5) OBJECTIONS TO COMPULSORY APPEARANCE ORDERS

Objections are regulated under Articles 267 et seq. of the CPC. An objection is a legal remedy against the decisions of a judge or court. When the judge or court issues a compulsory appearance order, a party may object within 7 days from the notification or learning of the decision.

Articles No. 5271, 146, and 44 of the CPC regulate a public prosecutor's ability to issue a compulsory appearance order. These regulations do not provide for an appeal against the order as a legal remedy. However, since compulsory appearance orders are protection measures that interfere with individual rights and freedoms, the person concerned has the right to appeal against the order to a criminal judge of peace as a legal remedy for that interference.

A copy of the compulsory appearance order shall be given to the suspect or defendant. The summoned suspect or defendant shall be taken to the authorizing judge or public prosecutor immediately, or if this is not possible, within twenty-four hours at the latest, excluding travel time (Article 146/3-4 of the Code of Criminal Procedure). Once before the authorizing official, they may be interrogated or have their statement taken as necessary.

An individual's compulsory appearance begins at a time deemed justified for this purpose and continues until the end of the interrogation or statement taken by the judge or public prosecutor (Article 146/5 of the Code of Criminal Procedure). Experts, victims, and complainants who fail to appear when summoned may also be the subject of a compulsory appearance order.

(9.3.3.6) COMPULSORY ATTENDANCE OF EXPERT WITNESSES OR WITNESSES

A witness is a person who testifies "in the presence of the court" regarding information, knowledge and experiences obtained with their five senses. An expert witness is a person who assists the court in cases that require expertise, special or technical knowledge. All provisions applicable to witnesses also apply to the summoning or compulsory attendance of expert witnesses (Article 62 of the Criminal Procedure Code).

Witnesses and experts shall be invited to court by summons. The summons shall contain a caution about the consequences of a failure to appear. In cases where the accused is detained, a compulsory appearance order may be issued for the witnesses under Article 43/1 of the Code of Criminal Procedure. The order shall contain an explanation of the reasons for the issuance of the order.

A witness may also be notified of a summons by telephone, telegram, fax, or electronic mail if available. However, witnesses summoned by these methods do not face any penalties for a failure to appear (Article 43/2 of the Code of Criminal Procedure). If a hearing is continued, the court may order, in writing, that any witnesses who are deemed necessary must be present at the date and time of the new hearing.

These provisions only apply if a person is heard as a witness before a public prosecutor, judge or court.

Arrest warrants may not be issued for witnesses or expert witnesses who fail to appear despite a compulsory appearance order. Instead, the court may order that the compulsory appearance order be carried out by force.

Witnesses or experts who are duly summoned but fail to appear without justification shall be brought by force and shall be liable for any expenses caused by their failure to appear, to be paid according to public claims procedures. After being compelled to appear, if the witness or expert subsequently declares a reason that justifies their previous failure to appear, any expenses awarded against them shall be canceled (Criminal Procedure Code 44).

Compulsory appearance orders for the victim or complainant shall be subject to the conditions and procedures described in Criminal Procedure Code 146/7.

An order of compulsory appearance against soldiers in active service shall be executed through military authorities (Article 44/2 of the Code of Criminal Procedure).

(9.4) FINAL ARGUMENT / CLOSING OF THE TRIAL

A defense on the merits is the statement and opinion of the defense made to the court against the accusations brought by the prosecutor. It is the last defense made during criminal court proceedings, and advocates for the court to rule for the defense.

A defense on the merits is a mandatory element of the "adversarial procedure" set out in Article 6 of the European

Convention on Human Rights. At the close of the trial, the prosecution submits its closing statement on the merits and the defense submits its defense on the merits. Thus, an adversarial procedure is carried out.

Defenses on the merits are regulated in Article 216 of the Code of Criminal Procedure No. 5271.

(9.4.1) DEFENSE ON THE MERITS

Any evidence collected or uncovered after the investigation phase of the case concludes is held by the court. The collected evidence is then presented at the trial; any party or their attorney may make a statement about the presented evidence (Turkish Penal Code 215). After all such statements have been made, the phase of deducing the conclusion from the hearing, that is, the phase in which the court makes its final decision, begins. The inference phase can be divided into two main sections: the “discussion of evidence” and the “end of hearing and verdict.” The discussion of the evidence phase occurs first. Arguments regarding the merits of the case will be made in the “discussion of evidence” section, the final stage in the trial.

As per Article 216 of the Code of Criminal Procedure No. 5271, the parties shall speak in the following order during the “discussion of evidence” section of the conclusion stage:

- The complainant/intervening party and their lawyer address the merits of the case before anyone else.
- The public prosecutor, who represents the state, makes their closing argument on the merits of the case next.
- After the prosecution party has said their last words, the defendant and their lawyer or legal representative make their final defense on the merits of the case.

At this point, the accused is reminded that the trial will end after their closing argument and asked once more for “his/her last word” on the case. After this point, the accused will not be permitted to make any further statements before the court (Article 289/1-h of the Code of Criminal Procedure).

(9.4.2) SCOPE OF THE DEFENSE ON THE MERITS

The defense on the merits does not have to solely address the prosecution’s closing statement. Matters not addressed by the prosecution’s closing statement but included in the indictment or discussed in the previous stages of the proceedings may also be included. The criminal court’s verdict is not bound by the classification of the crime in the indictment, nor by the parties’ final statements. Therefore, a defense on the merits should cover the entire case. Particular attention should be paid to the following:

- **Discussion of Evidence:** Discussing evidence is the most important form of defense on the merits. Unlawful evidence should be identified and brought to the court’s attention. Any judgment based on evidence obtained by unlawful methods is considered unlawful and may be reversed upon appeal (Article 289/1-h of the Code of Criminal Procedure). While discussing evidence, the defense should explain and justify why evidence in the defendant’s favor is more persuasive than other evidence. Each piece of evidence should be discussed in context of its specific characteristics. For example, phone calls are considered “indication” evidence, taping and writing down the content of a phone call is considered “document” evidence, and the testimony of someone who heard the content of the phone call is considered “declaration” evidence. The laws and procedures for acquiring, preserving, presenting and discussing each of these types of evidence are different and should be carefully examined for potential unlawfulness. There is no concept of “conclusive evidence” in criminal procedure. All evidence must be conscientiously judged and evaluated by the court.
- **Discussion of the Nature of the Crime:** Determining the nature of the crime is important for resolving the “legal issue/crime type” in criminal proceedings. During the defense on the merits, the nature of the crime may be addressed by referring to either party’s version of events. If the defendant is convicted, their sentence will be determined according to the nature of the crime. For example, if the prosecution argues that an act that is considered a fraud crime (Article 158 of the

TCC) also qualifies as a crime of abuse of trust due to the relationship between the parties (Article 155 of the TCC), a defense argument disputing that the defendant's act qualifies as both crimes may lead to a significant change in sentence.

- **Procedural Errors:** A defense on the merits may also address any procedural errors committed by the court during the trial. This may include failing to collect requested evidence that impacts the merits of the case, incomplete or incorrect procedures, or errors such as not giving a party's lawyer the opportunity to speak during the hearing of witnesses.
- **Discussion of Substantiation:** A defense on the merits should also address the fundamental question of whether the offense was committed by the defendant or not.

(9.4.3) DEADLINE FOR STATEMENTS AGAINST THE OPINION ON THE MERITS

After the prosecutor's opinion on the merits is announced, the defendant and their lawyer have the right to request a "reasonable time" from the court to prepare a defense on the merits. What constitutes a reasonable time is determined according to the characteristics of each case (number of defendants, complexity of the case, nature of the accusation, etc.). Courts usually grant the request, giving the defendant and their lawyer two to three months to prepare a defense on the merits. In exceptional cases, an extension of this period may be requested.

After the prosecution has submitted its opinion on the merits, the defendant and their lawyer may raise any relevant objections to the prosecution's statement. The defense may subsequently request further investigation instead of asking for a reasonable time for defense. This extends the prosecution phase and allows the parties to gather new and additional evidence to present to the court. The prosecution may submit a new opinion on the merits after any new evidence is gathered and presented to the court, and the defense may make a new defense on the merits. If the defense's request for further investigation is denied, they should be given a reasonable time to prepare their defense on the merits.

Article 150 of the CPC provides that if a defendant's attorney fails to attend the hearing where the court's verdict is to be announced, the defendant's substitute attorney may request a reasonable time to prepare a defense on the merits due to unfamiliarity with the case file. If that request is denied by the court as unnecessarily delaying and prolonging the trial, the court's ruling may violate the defendant's right to choose their own defender. That would provide grounds for appeal and reversal of the court's verdict. Therefore, the new attorney should be granted a reasonable time, appropriate to the scope of the case file, to prepare a defense on the merits.

(9.4.4) DEFENDANT'S STATEMENT AND LAST WORD

After the defense on the merits is made, the defendant is given the last word before sentencing. Article 216/3 of the Code of Criminal Procedure clearly rules that "the last word belongs to the defendant."

The rule of "giving the last word to the defendant" before the verdict is rendered is necessary to the principle of "continuity of the public case" upon appeal. Failure to "giv[e] the last word to the defendant" constitutes a clear violation of both Article 216 of the Code of Criminal Procedure and the principle that "the right of defense cannot be limited." Such a violation is grounds for reversal due to procedural error.

(9.5) CONVICTION CANNOT BE BASED ON SUSPICION

According to the established case law of the Court of Cassation, a conviction cannot be based on suspicion, even if there is a strong suspicion that a crime has been committed. A conviction also cannot be based on probability. These principles are established in decision number 2014/3253 e. 2014/5690 k of the Court of Cassation 1st Criminal Chamber.

It is a fundamental legal theory that a person is presumed innocent until proven guilty by a court of law. The existence of a criminal offense does not mean that a person is guilty. Guilt must be established through concrete, material evidence. Accordingly, the principle of the benefit of the doubt (in dubio pro reo) states that in criminal proceedings, any doubt or uncertainty that cannot be eliminated should be interpreted in favor of the defendant. This is essentially an extension of the presumption of innocence.

(9.5.1) THE BENEFIT OF THE DOUBT

The principle of the benefit of the doubt relates to the substantive elements of the charges against the defendant. This includes whether the defendant committed the crime, how the crime was committed, and the conditions applying to any court procedures carried out. This principle is also applied in determining the men's rea of the crime. For example, in a homicide case, if it cannot be proven that the defendant acted with intent to kill, the court cannot rule that the crime was committed intentionally.

The principle of the benefit of the doubt does not apply in areas that are not conducive to proof. Legal problems are at the forefront of this area. Every legal problem has a single correct interpretation, and the key is to find this correct interpretation even if it is to the detriment of the accused.

The presumption of innocence is the basis of the principle of the benefit of the doubt in law (Thoughts on the Presumption of Innocence, Sulhi Dönmezer, 1999, pp. 67-68). Article 6(2) of the European Convention on Human Rights states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law," Article 38/4 of the Turkish Constitution states that "No one shall be considered guilty until proven guilty by a verdict," and Article 223/2-e of the CPC states that "If it is not established that the charged offense was committed by the accused, a verdict of acquittal shall be given."

(9.5.2) APPLICATION OF THE BENEFIT OF THE DOUBT

Pursuant to Article 217 of the CPC, a judge may only issue a verdict based on the evidence presented and discussed in their presence at trial. They must also be firmly convinced that all relevant evidence has been collected. If any uncertainty remains that the defendant committed the crime after a deliberative evaluation of the evidence, the judge must apply the principle of the benefit of the doubt.

According to Article 160 of the Criminal Procedure Law No. 5271 and paragraph 2 of Article 170 of the CPC, evidence collected must create sufficient suspicion that a crime has been committed by a suspect before an indictment may be issued and criminal proceedings commenced. An indictment does not, however, require complete material or legal certainty in every aspect. During the investigation phase, the public prosecutor is not bound by the principle that the suspect must benefit from any doubt or uncertainty.

Arrest is a temporary protection measure to preserve evidence, prevent suspects or defendants from becoming fugitives, etc. During the investigation phase, an arrest warrant is issued by a criminal judgeship of peace. During the prosecution phase, an arrest warrant is issued by the court where the criminal case is filed. However, under certain conditions, the public prosecutor's office may also issue an arrest warrant.

An arrest warrant may not be requested or issued if it is possible to conduct a trial using judicial control decisions instead. This applies even if there are concrete grounds for arrest.

(9.6) ARREST WARRANTS

An arrest warrant may be issued against a suspect or the accused. A suspect is a person who is suspected of committing a crime during the investigation phase. An accused is a person who is suspected of committing a crime during the prosecution phase (Criminal Procedure Code Art. 2 (1), a-b).

An arrest warrant has two main purposes:

- Ensuring the preservation of evidence: An arrest warrant may be issued to preserve evidence if there is a strong suspicion that a suspect or the accused may attempt to tamper with witnesses, the victim, or other individuals, or obscure, destroy, or modify any kind of evidence.
- Preventing the escape of the suspect or defendant: An arrest warrant may be issued if there is a strong suspicion that the suspect or defendant may flee and become a fugitive. Any suspicion of escape must be based on concrete facts. Subjective assessments that a person may flee without concrete facts cannot be accepted as a reason for arrest.

(9.6.1) LEGAL PURPOSE OF THE ARREST WARRANT

- **Temporary Detention:** An arrest warrant is a temporary measure. Arrest is not a punishment or a means of execution of punishment. When the grounds for arrest cease to exist, the arrested individual must be released immediately. The ECHR and the Constitutional Court recognize that the reasons for an arrest that existed at the beginning of the proceedings should be subjected to stricter assessment at later stages. For example, if all relevant evidence for the proceedings has been collected and the suspect and the accused can no longer influence the evidence, or if there is no longer a strong suspicion based on concrete facts, the grounds for detention no longer exist.
- **Individuality of Arrest:** In criminal law, the principle of the individuality of crime and punishment dictates that an arrest warrant may not be issued against persons other than a suspect or the accused. Accordingly, it is also illegal for a judicial body to harass or arrest the relatives of a suspect or defendant.
- **Arrest as an Instrument:** Arrest is a tool to preserve evidence and prevent flight. Arrest cannot be used as a punishment for crime without a trial, or to ensure that a defendant's sentence is carried out.
- **Justification for Arrest:** Ostensible justification means that there is an indication that some irreparable harm will occur immediately unless an individual is arrested.
- **Proportionality of Arrest:** Proportionality refers to the application of lighter or heavier protection measures based on the necessity and seriousness of the legal situation of the suspect or defendant.

(9.6.2) RIGHTS OF THE ACCUSED IN CUSTODIAL INTERROGATION

Proceedings concerning an arrest warrant are considered secondary criminal proceedings. During an interrogation, the suspect or the accused has the following basic rights:

- **Right to Hire an Attorney:** The suspect or the accused must be informed that they have the right to benefit from the legal assistance of a lawyer before interrogating them. They must also be notified that they have the right to choose their lawyer or defense attorney, may benefit from the lawyer's legal assistance, and that the lawyer can be present for their interrogation. If the suspect or the accused is not able to choose a lawyer themselves and wants to benefit from the help of a lawyer, they shall be assigned a lawyer free of charge by the bar (Criminal Procedure Code Art. 147/1-c).
- **Right to Remain Silent:** The right to remain silent is the most basic defense right of the suspect or the accused. The suspect or the accused has a legal right to not give a statement about the crime with which they are charged (Code of Criminal Procedure 147/1-e). The exercise of the right to remain silent may not be interpreted against the suspect or the accused when assessing the evidence. Article 6 of the European Convention on Human Rights upholds the right to remain silent as a protected human right within the scope of the right to a fair trial.
- **The Right to Request the Collection of Exculpatory Evidence:** The suspect or accused has the right to show evidence during the investigation or prosecution phases and to request the collection of such evidence. Before the interrogation begins, the suspect or the accused must be reminded that they may request the collection of evidence (Code of Criminal Procedure art. 147/1-f).
- **Right to Defense:** This is the most basic right of a suspect or the accused in any state that operates under the rule of law. The suspect or accused must be given the opportunity to confront the evidence against them and make arguments in their own favor (Article 147/1-f of the Criminal Procedure Code).

(9.6.2) APPEAL PERIOD AGAINST ARREST

An appeal can be filed against an arrest warrant. The right to appeal against arrest is one of the most important rights granted to a suspect or defendant (Art. 5/3 ECHR and Art. 19/7 of the Turkish Constitution). The appeal period against an arrest is 7 days from the arrest, not counting the day on which the suspect or accused was arrested (Criminal Procedure Code Art. 101/5, Art. 104/2, Art. 267 and 268).

It is possible to appeal against an arrest warrant prior to the arrest of the suspect or accused. If the suspect or accused is subsequently arrested, the appeal period runs as specified above.

The right to appeal against an arrest belongs primarily to the person arrested. However, the following individuals may also file an appeal:

- The lawyer of the arrested person (Article 261 of the Criminal Procedure Code);
- The legal representative of the arrested person (father, mother, or other legal representative, if any) (Article 262/1 of the Criminal Procedure Code); and
- The spouse of the arrest person (Article 262/1 of the Criminal Procedure Code).

(9.6.4) PROCEDURE FOR APPEALING AGAINST AN ARREST WARRANT

Article 268 of the Criminal Procedure Code regulates how and where an appeal against an arrest warrant should be filed. The appeal must be made by filing a petition of objection, or by making a statement to the court which issued the arrest warrant and having this statement recorded in the minutes by the clerk (Criminal Procedure Code Art. 101/5 and Art. 268/1).

Once the appeal is filed, the judge that issued the arrest warrant may withdraw the arrest warrant to settle the appeal. However, if the judge believes that the arrest warrant should remain, they must send the appeal to the appropriate appellate authority within three days of its submission (Criminal Procedure Code 105). The appropriate appellate authorities are established by Article 268/3-a through 3-c of the TCPC.

(9.6.5) DURATION OF DETENTION

The duration of detention is Türkiye's most frequent conviction at the European Court of Human Rights. According to the European Convention on Human Rights, an individual's right to liberty and security (Art. 5/3 ECHR) is violated if they are detained for longer than the reasonable time necessary for investigation and prosecution.

- **Maximum Detention Period During the Investigation Phase:** During the investigation phase, an individual may not be detained for more than six months for matters not falling within the jurisdiction of the heavy criminal court, or one year for matters falling within the jurisdiction of the heavy criminal court. However, for crimes defined in the Fourth, Fifth, Sixth and Seventh Chapters of the Fourth, Fifth, Sixth and Seventh Parts of the Fourth Section of the Turkish Criminal Code, individuals may be detained for up to one year and six months. This period may be extended for an additional six months with proper justification (Article 102/4 paragraph 4 of the Criminal Procedure Code). These are crimes falling within the scope of the Anti-Terrorism Law or committed collectively.
- **Maximum Detention Period for the Criminal Court of First Instance** The period of detention during the investigation phase shall not exceed six months for matters not falling within the jurisdiction of the heavy criminal court and one year for matters falling within the jurisdiction of the heavy criminal court. This period may be extended for an additional six months in cases of necessity. Thus, the total maximum detention period for matters falling within the jurisdiction of the criminal court of first instance is one year and six months.
- **Maximum Detention Period for the Heavy Criminal/Assize Court:** For crimes that fall within the jurisdiction of the heavy criminal court (Art. 12 of Law No. 5235), i.e. crimes punishable by aggravated life imprisonment, life imprisonment and imprisonment for more than ten years, the maximum period of detention is two years. (Article 12 of Law No. 5235). This period may be

extended for an additional three years in cases of necessity. Thus, the total maximum detention period for matters falling within the jurisdiction of the heavy criminal court is five years (Article 102/2 of the Code of Criminal Procedure).

- Maximum Detention Period under the Anti-Terrorism Law No. 3713: The extension period may not exceed five years for the offenses defined in Part Four, Sections Four, Five, Six and Seven of Book Two, Chapter Four of the Turkish Penal Code No. 5237 and for the offenses covered by the Anti-Terror Law No. 3713. Thus, the total maximum detention period for these offenses is 7 years (Article 102/2 of the Criminal Procedure Code).
- For children under the age of fifteen when the crime was committed, the maximum detention periods shall be half of the period listed above. For children under the age of eighteen when the crime was committed, the maximum detention periods shall be three-quarters of the period listed above.

No period of detention may be extended until after the opinions of the public prosecutor, the suspect or the accused and their defense counsel have been taken.

These maximum detention periods only apply to suspects or defendants that have been arrested on reasonable grounds. If there are no reasonable grounds for arrest, or the reasonable grounds for arrest no longer exist, the suspect or defendant must be released immediately.

The main purpose of the Criminal Procedure Law is to reach the material truth. Therefore, the accused must be proven guilty of the offense attributed to them by lawfully obtained, concrete evidence. This process utilizes some basic and universal principles, the most significant of which is the principle of the benefit of the doubt.



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