

Function of Turkish Penal Code for Domestic or Intimate Partner Violence

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Abstract

Violence which is a reflection of cognitive development of human beings is as old as the existence of humans, and it has become one of the snowballing problems of the society with the socialization of mankind. Moreover, violence that is accompanied by social and personal elements has become very complicated¹.

This study deals with conceptions of violence, intimate partner violence and domestic violence and types of violence by means of regulations in concerning laws. Deficiencies of Turkish Penal Code in practice will be tried to be expressed critically when intimate partner violence, as a type of violence, happens. As a result, it will be suggested to prevent intimate partner violence that legal regulations should be expanded so that it can contain ex-wives, ex-partners, partners, fiancées and people with high possibility of being exposed to intimate partner violence that are not protected adequately by laws along with the ones protected sufficiently by laws.

Key Words: Violence, Types of Violence, Domestic Violence, Intimate Partner Violence, Numbered Law On Protection of Family and Prevention of Violence Against Women, Turkish Penal Code and Violence.

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¹ Şenol Dolunay/Yıldız Sıtkı, Kadına Yönelik Şiddet Algısı, Kadın ve Erkek Bakış Açılıyla, Mutlu Çocuklar Derneği Yayınları, Ankara, 2013, s.3.

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Introduction

Violence is defined as using brute force against people with extremity in violence, brute force and feelings and opposing views². On the other hand, it is defined as all types of physical, sexual, psychological, oral or economical attitudes and behaviors in social, public or private area which also include movements resulting in damaging people or causing them to suffer or possible situations like those, and threat, press or arbitrary prevention of freedom in Article 2/d of Law No: 6284 of Protection of Family and Prevention of Violence Against Women. In the definition of concerning law, types of violence are mentioned as general violence, domestic violence and violence against women³. Being aware of different types of violence and putting restrictions for them are very significant for protection of victims of violence and getting rid of negative results of violence on people.

As a type of violence, physical violence can be exemplified as physical deeds such as pushing and shoving, punching, biting, smacking, injuring with any object or gun or torturing etc⁴. Sexual violence can be exemplified as behaviors such as using sexuality as a weapon of threatening, pressing and controlling, treating the person like a sexual object, forcing the person for sexual intercourse; psychological violence can be exemplified as behaviors such as making the person lose self-esteem by abusing feelings, intimidating, making that person feel weak, ignoring needs of that person like love, affection, attention, support, despising, humiliating; economic violence can be exemplified as behaviors such as using economic resources and money as a means of threat and control⁵.

In Contract of Council of Europe to which our country is a party and in Law No: 6284 of Protection of Family and Prevention of Violence Against Women, domestic violence is defined as violence which occurs when the victim and the offender belong to the same family. Marriage is not meant by being a family at this point; mentioned unity of family is based on moral bonds between partners without all social difficulties. Parties do not have to stay at the same house with a civil marriage so that they can be deemed as a family. Whether they stay at the same house or not, family conception must be expanded so that it can include spouses or people staying together⁶.

When intimacy between victim of violence and people using violence is considered, it stands out that victims and offenders are generally in intimate relationship in social life⁷. Thus, the

² Türk Dil Kurumu,

http://www.tdk.gov.tr/index.php?option=com_bts&arama=kelime&guid=TDK.GTS.574e89b18133f8.42979956
01.06.2016.

³Ceylan, Ebru: "Türk Hukukunda Aile İçi Şiddet ve Kadına Karşı Şiddetin Önlenmesi ile İlgili Yeni Düzenlemeler", Türkiye Barolar Birliği Dergisi, Sayı 109, Ankara, 2013,13-54, s. 23.

⁴ Şenol Dolunay/Yıldız Sıtkı, "Kadına Yönelik Şiddet...", s.9.

⁵ Nuhoglu, Ayşe: Aile Fertlerine Kötü Muamele Suçu (Türk Ceza Kanunu madde:232/1), Kadın Hakları Adli Yardım Eğitim Seminerleri, İstanbul Barosu Yayınları, İstanbul,Şubat 2013,51-64 arası s.57; Ayşe Nuhoglu, Kadına Yönelik Şiddet, Bahçeşehir Hukuk Fakültesi, Kazancı Hukuk Dergisi, 2012, C.8, s. 97-98, s.62 vd.; Münevver Mertoğlu, Aile İçinde Şiddet Uygulayan Erkeklerin Mağduriyeti, Bahçeşehir Hukuk Fakültesi Kazancı Hukuk Dergisi, 2012, C.8, s.97-98, s.53 vd. aktaran Ceylan, Ebru: "Türk Hukukunda Aile İçi Şiddet ve Kadına Karşı Şiddetin Önlenmesi ile İlgili Yeni Düzenlemeler", Türkiye Barolar Birliği Dergisi, Sayı 109, Ankara, 2013,13-54, s. 23.

⁶Contract of Council of Europe about Violence against Women and Prevention of Domestic Violence and Struggle against them 3/b, 1/a,

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e>

01.06.2016.; Bakırcı Kadriye, İstanbul Sözleşmesi, Ankara Barosu Dergisi, 2015/4 s.133-204.

⁷Jansen Henrica A.F.M./Yüksel İlknur/ Çağatay Pelin, "Kadına Yönelik şiddetin Yaygınlığı", 45-69, Türkiye Cumhuriyeti Başbakanlık Kadının Statüsü Genel Müdürlüğü, Türkiye'de Kadına Yönelik Aile İçi Şiddet, Ankara, 2009; Şenol Dolunay/Yıldız Sıtkı, "Kadına Yönelik Şiddet...", s.24.

possibility of violence against one person by another one who she/he doesn't know or has no social relationship is lower than violence against one person by another one who she/he is in intimate relationship⁸. Intimate partner violence which has almost the same meaning with domestic violence is violence between all partners with civil marriages or relationships without civil marriages. Similar to domestic violence, victims may not be only married people in this type of violence; partners or fiancées can be victims of this type of violence as well. It is understood from being partner expression that not only relationships of partners with heterosexual orientations but also emotional and social intimacy between people with homosexual orientations are meant.

In the rest of the paper, what we should understand with conception of intimate and how intimate is approached by existing legal regulations in Turkish Law will be discussed by comparing national legal regulations.

Intimate Partner Violence in Numbered 5237 Turkish Penal Code

“Life is the period when a person was born and goes on at wealth level that is as high as possible, and dies because of natural reasons.” Protection of life by the states, right to apply to the state for help by the victimized people because of the ones acting against this protection and right to claim protection, guarding and development of that right by the state constitute right to life completely⁹.

Right to life which a person has because of being a human being and on which all other rights are based is guaranteed against intentional killing and injury deeds which are regulated under the title of crimes against life in Numbered 5237 Turkish Penal Code (Turkish Penal Code Article 81 and 86). Commitment of behaviors that can be considered as intentional killing or injury crimes against the spouse is punished with more serious sanctions compared to the ones against an ordinary person. In other words, commitment of these deeds against the spouse having civil marriage forms the aggravated situation of these crimes. As Turkish Penal Code defines spouse terms in a narrow sense, it accepts only the spouse having civil marriage as spouse (family); it doesn't include ex-wife, partner and fiancée, spouse having religious marriage, mistress. While giving punishment for injury and killing cases against the said people, it doesn't set forth aggravation reason¹⁰.

Although the parties have no family unity due to civil law between them but the relationship between the parties is regarded as intimate relationship because of İstanbul Convention, the fact that intentional killing and injury deeds are committed against the ex-wife, ex-fiancée, ex-partner, partner and the fiancée must be accepted in the way that this case has an aggravated form of these crimes and those people must be punished as if their crimes were committed against the spouse having civil marriage by considering that Turkish Penal Code is a law which has deterrent regulations about crime and punishment¹¹. The reason is that international agreements that have entered into force in due form are statutory according to Constitution of Turkish Republic. In accordance with Paragraph 5 of Article 90 of Constitution of Turkish Republic, provisions of international contract are used as a base if laws and international contracts have different provisions

⁸ Zara Page Ayten/İnce Merve, Aile İçi Şiddet Konusunda Bir Derleme, Türk Psikoloji Yazıları, Aralık 2008, Cilt11, Sayı 22,87-94, s.93.

⁹ Akyazı Güner/Tatar Onur, Yaşama Hakkı ve Ölüm Cezası, Ankara Barosu İnsan Hakları Komisyonu Yayınları, Haziran 2002, s. 7.

¹⁰ Toroslu Nevzat, Ceza Hukuku Özel Kısım, Eylül, 2015,, Savaş Yayınevi, s.33.; Hafızoğulları Zeki/ Özen Muharrem, Türk Ceza Hukuku Özel Hükümler Kişilere Karşı Suçlar, US-A Yayıncılık, Ankara 2011, s.48.

¹¹ Hafızoğulları Zeki/Özen Muharrem, Türk Ceza Hukuku Özel Hükümler, US-A Yayınları, 7. baskı, Ankara 2014, s. 4 ; Contract of European Council on Prevention of Violence against Women and Domestic Violence and Fighting against Them, Article 2/1, 3/b, 12/2 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e> , 01.06.2016.

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on the same subject with respect to fundamental rights and liberties. Thus, regulations in Turkish Penal Code don't protect victims of intimate partner violence; on the contrary, it rewards offenders of violence crime.

According to existing regulations in Turkish Penal Code, aggravating circumstance is not applied for the people who commit injury and killing deeds against the spouse getting divorced after ending civil marriage. In the event of conditions, killing deed can be considered as an aggravating circumstance as a result of deliberation which is one of aggravated cases of intentional killing only for the person who has divorced and sets his/her mind to killing. For this reason, considering aggravated form of that deed will not be different from disregarding relationship between the person using violence and the other one being exposed to violence rather than protecting the person being subject to it.

Intimate Relationship in Turkish Civil Code

Civil Code to which is attributed about being a partner considers engagement as a pure family law relationship and it regulates family law relationships especially as relationships depending on the person¹². Contrary to Turkish Penal Code, family term is interpreted broadly in Civil Code, and it puts forward sanctions stating that engagement occurs with the commitment of marriage¹³. According to Civil Code, marriage is a legal institution which is formed with the existence of the same and positive consent before an authorized person. According to the concerning law, though engagement relationship doesn't depend on any requirement as to form, the constituent element for this relationship is reciprocal and proper statements of persons with different genders to get married¹⁴. One thinks that the aim to be attained by these regulations is that being a family is not legally being married; moral bonds can be regarded as a condition of being a family when existing regulations in law are interpreted. Whereas Turkish Civil Code regulates family term in a broader sense and with protection perception compared to Turkish Penal Code, it doesn't include same sex relationships in family law like, Turkish Penal Code and it doesn't introduce any regulation on this issue. This case is just one of the most important criticisms against existing regulations.

On the other hand, loyalty responsibility in social relationships personally¹⁵ falls into family term. In concerning article of Turkish Civil Code, a variety of responsibilities are conferred to spouse within the scope of loyalty responsibility. One of these responsibilities is obligatory of faithfulness to each spouse to the other one¹⁶. Whereas loyalty responsibility is not regulated clearly for engagement in Civil Code, existence of this responsibility for parties to be engaged is accepted in doctrine in accordance with objective rules of good faith, moral thoughts and general customs¹⁷. Similarly, abstaining from marriage without any valid reason is considered illegal within the scope of concerning articles of civil code about engagement. Considering available regulations, not only the spouse who has civil marriage but also engaged people are regarded as a family are included in family term in the concerning law, and sanctions are proposed on this point.

The fact that there is no clause about partner relationship in Turkish Civil Code does not mean that this relationship should not be taken into consideration. Thinking that law is a human

¹²Dural Mustafa/Öğüz, Tufan/Gümüş Mustafa Alper, Türk Özel Hukuku Cilt III Aile Hukuku, Filiz Kitabevi, İstanbul, Ocak, 2014, s.5-6.

¹³Özcan Bilge, Medeni Hukukun Temel Kavramları, Turhan Kitabevi, 38. Bası, Ankara, Ağustos 2013, s.405. Türk Medeni Kanunu madde 118 <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4721.pdf> , 01.06.2016.

¹⁴Dural Mustafa/Öğüz Tufan/Gümüş Mustafa Alper, Türk Özel Hukuku..., s. 16 -17.

¹⁵Türk Medeni Kanunu madde 185, <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4721.pdf> , 01.06.2016.

¹⁶Dural Mustafa/Öğüz Tufan/Gümüş Mustafa Alper, Türk Özel Hukuku..., s. 155.

¹⁷ Özcan, Bilge, Medeni Hukuk'un Temel Kavramları, Turhan Kitabevi, 38. Bası, Ankara 2013, Syf, 151, 173, 409. 1-980.

structure aiming to required things and intimate partner violence is perceived in the way that it includes partners, it is a drawback that there aren't any articles including partners. The fact that there is no regulation about this issue in the existing law doesn't mean that this issue is ignored; however, one may think that this case might be overlooked. For this reason, regulations must be urgently carried out after consideration of this case like other points since there are regulations about intimate relationship in international contracts to which we are a party¹⁸ and these regulations are considered equal by laws in our domestic law.

While intimate partner violence is defined in İstanbul Contract, people in intimate relationship may also be offender or victim of intimate partner violence, which is contrary to definitions in our laws¹⁹. Responsibilities conferred to state parties must be fulfilled on condition that legal regulations which are seen as necessary by state parties are made and necessary preventive and protective measures are taken²⁰.

Whereas protection for relationships based on marriage is stipulated in family law, it must be accepted that people who live together without any marriage are in the scope of regulations in family law as discrimination based on marital status is prohibited with "similar reasons" expression in accordance with Article 10 of Constitution of Turkish Republic²¹

Intimate Partner Violence in Law No: 6284 of Protection of Family and Prevention of Violence Against Women

The aim of this law is to protect people who were exposed to violence or have the possibility of being exposed to it and prevent violence against these people²². If provisions of the concerning law are not enough for concrete cases, İstanbul Contract which is accepted as international contract and is considered equal in our domestic law and which must be implemented even before our laws about basic rights and liberties²³ must be applied, and shortcomings must be eliminated and secondary victimization must be prevented before happening²⁴.

While intimate partner violence term is defined, it is stated that the victim and the offender don't have to stay at the same home and people living together at the same home don't have legal marriage status. In other words, it is clearly regulated that living together at the same home or non-existence of legally valid institution of marriage even if they live at the same home doesn't pose an

¹⁸ Contract of European Council on Prevention of Violence against Women and Domestic Violence and Fighting against Them, Articlén 3/b, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e> , 01.06.2016.

¹⁹Contract of Council of Europe about Violence against Women and Prevention of Domestic Violence and Struggle with them 3/b <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e> , 01.06.2016.

²⁰ Contract of European Council on Prevention of Violence against Women and Domestic Violence and Fighting against Them, Article 12/2 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e> , 01.06.2016.

²¹ Bakırcı Kadriye, İstanbul Sözleşmesi..., s.138.

²² Law No: 6284 of Protection of Family and Prevention of Violence Against Women Article 1-1, <http://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm> 01.06.2016.

²³ Türkiye Cumhuriyeti Anayasası madde: 90/5, <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.2709.pdf> , 01.06.2016.

²⁴ Law No: 6284 of Protection of Family and Prevention of Violence Against Women Article 1/2-a, <http://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm> 01.06.2016.

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obstacle for being a family²⁵ As for the reason, the concerning law considers all kinds of physical, economic, psychological and sexual violence which occurs in the family, at home or between people regarded as member of family as intimate partner violence whether they are the same home or not²⁶

In Article 4 of the same law, protective orders to be taken by the judge are regulated. In clause b of Article 4 of that law, it can be deduced via interpretation and converse proof in article about protective orders that unmarried people can also be victims of intimate partner violence that is defined in law by stating that “assigning a different settlement from the common settlement if the person is married”²⁷.

Conclusion

Mankind needed supreme power possession to protect themselves with differences they have with socialization in the process of living together and adapting to social association, and they created law by introducing sanction power to the state as a solution to their needs. Law is made up of rules, norms, orders and prohibitions which protect existence of human beings, regulate way of living of communities and which is strengthened by sanctions of the state²⁸

Legal norms must be in “essential” patterns and not against ethical values. To be able to live by protecting ethical values, we need an approach based on ethical values and philosophical knowledge of ethical values rather than norms because approaches which notice where human dignity is in danger are far from decrement of value in encountered cases²⁹. For this reason, legal values are unity of norms which must be protected and not be ignored.

Human rights and ethical values must not be ignored in regulations to be in law. Human life, a primary value, is not only a subject of philosophy but also a topic of legal regulations which protect right to life and use human rights as a base. The basic element of theory of human rights is “person”. The gist of human rights notion is a person’s having fundamental rights and liberties because of “absolute being a person”³⁰. For this reason, life which is a natural yield of being a person, liberty and personal security is a right of everybody³¹ and it is unthinkable that law systems which aim to protect people may ignore these rights.

Humans, the subject of many rights, need to benefit from protection of body integrity and right to life in the best way. The aim of penal code is to protect values and benefit which are important for the society³² In parallel to this aim, after detecting transgressive deeds in Turkish Penal Code, penal sanctions are stipulated to prevent these deeds which damage to the society and

²⁵ Law No: 6284 of Protection of Family and Prevention of Violence Against Women Article 1, <http://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm> 01.06.2016.

²⁶ Law No: 6284 of Protection of Family and Prevention of Violence Against Women Article 2.b, <http://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm> 01.06.2016.

²⁷ Law No: 6284 of Protection of Family and Prevention of Violence Against Women Article 4/B , <http://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm> 01.06.2016.

²⁸ Adal Erhan, Hukukun Temel İlkeleri EL Kitabı, Marmara Üniversitesi Yayın No: 428, İktisadi ve İdari Bilimler Fakültesi Yayın No: 372, İstanbul, 1985, Fatih Yayınevi, s. 1.; Centel Nur/Zafer Hamide/Çakmut Özlem, Türk Ceza Hukukuna Giriş, 7. Bası, Beta Yayınları, 2011, s.3.

²⁹ Kuçuradı İonna, “Etik ve Etikler”, Türkiye Mühendislik Haberleri, Sayı 423- 2003/1, s. 7-9.

³⁰ Kılıç Muharrem, “İnsan Haklarında Beden Bütünlüğünün Korunması Makalesi”, 393-410 derleyen Gürsoy Naskali Emine/ Koç Aylin, İğdiş, Sünnet ve Bedene Şiddet Kitabı, 1. Baskı, Kitabevi Yayınları, Ekim 2009, s.394.

³¹ Universal Declaration of Human Rights, Article 3, <http://www.un.org/en/universal-declaration-human-rights/> 01.06.2016.

³² Hakan Hakeri, Ceza Hukuku Genel Hükümler, Adalet Yayınevi, 16. baskıAnkara, 2013, s. 2.

the person³³. With socialization of human beings, debates and perception gap between people make violence a part of human life. Victims of violence are generally exposed to violent deeds from their immediate environment, and these deeds are against them and prohibited by sanctions in penal code³⁴. For this reason, the majority of the violence incidents are intimate partner violence cases nowadays. Intimate relationship which is between the offender and the victim in injury and killing cases as a type of violence is the first point that must be prevented because of intimacy they have due to their social status. Thus, the most significant power which will protect the person exposed to violence from the person using violence is the penal code. Regulations about deeds related to intentional killings and injury must not contradict with aim and content of international contracts to which we are a party because Contract of Council of Europe which we are a party to indicates prevention of intimate partner violence as a primary component to be regulated in state policies³⁵. Furthermore, regulations in our domestic law must be in accord with each other in addition to the necessity to conform to international contracts to which we are a party. For this reason, an adaptation must be provided between articles about ex-partner, ex-spouse, ex-fiancée, spouse, partner and fiancée in Law No: 6284 of Protection of Family and Prevention of Violence Against Women which includes special regulations about intimate partner violence and penal code. Similarly, although civil code is used as base, family law relationships in Turkish Penal Code which are specified with attributions to regulations in civil code³⁶ don't correspond to available regulations. Though expecting Penal Code to protect family component is not the primary aim, regulations for prevention of intimate partner violence must be made in Turkish Penal Code in accordance with other laws. During these regulations, social relationships like marriage and partnership must be taken into account. Furthermore, relationships of couples with homosexual tendency must not be ignored instead of only considering people with heterosexual tendency with regard to these regulations.

Penal Code is a branch of law which protects entity of the society, supports its development and guarantees and provides assurance for its sustainability³⁷. Fairness of penal norm is an issue to be determined according to whether it is appropriate for final values of law order and its aim³⁸. In this context, disregarding some sections of the society poses an obstacle to conformability of Turkish Penal Code with law by causing penal code to deviate from final aim of penal code.

Considering the *nullum crimen* approach approved in accordance with legality principle in Article 2 of Turkish Penal Code, as deeds written in law cannot be expanded by making comparison to the detriment of the criminal, mentioned shortcomings must be urgently removed on condition that extension is made for penal code. One should not forget that the existence of different regulations on the same topic in a law system constitutes opposition to unity of law and it also decreases efficiency and deterrence of available rules.

³³Timur Demirbaş, Ceza Hukuku Genel Hükümler, Seçkin Yayınevi, 9. baskı, Ankara, Eylül 2013, s.48-49

³⁴Şenol Dolunay/Yıldız Sıtkı, "Kadına Yönelik Şiddet Algısı...", s.24.

³⁵ Law No: 6284 of Protection of Family and Prevention of Violence Against Women 1,a- 7,1- 12,2, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e> , 01.06.2016.

³⁶ Toroslu Nevzat, Ceza Hukuku Özel Kısım, Savaş Yayınevi, 2015 s. 33.

³⁷Rocco, L' Oggetto del reato e della tutela giuridica penale, Roma, 1932, s.443 aktaran Özen Muharrem/Hafizoğulları Zeki, Türk Ceza Hukuku Genel Hükümler, US-A Publishing 7.Edition, Ankara 2014, s. 12

³⁸ Özen Muharrem/Hafizoğulları Zeki, Türk Ceza Hukuku Genel Hükümler, US-A Publishing 7.Edition, Ankara 2014, s. 12.

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