

# The First Indictable Stage of Crime in Turkish Criminal Law\*

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## ABSTRACT

It is very hard to generate a set of criteria to separate preparatory from executive acts. This fact can be considered as a necessity. At the same time this also reflects the vulnerability of the legality principle. The distinction between preparatory acts and the executive acts is one of the most controversial issues in modern criminal law. In Turkish Penal Code, the sole criterion regarding the beginning of executive acts is reflected in Art. 35 which states "A person who (directly) acts". This in fact is not a clear formulation and unable to answer the question of when exactly the executive acts start. Therefore, the Turkish courts, especially the Supreme Court (Yargıtay), are inspiring from the Turkish doctrine which takes advantages of various theories below, adopts and updates new measures and criteria to separate preparatory acts from executive ones.

**Keywords:** Attempt, Turkish Penal Code Article 35, Distinction, Executive Acts, Preparatory Acts,

## INTRODUCTION

If we consider that a crime is committed in a pathway called *iter criminis*, it can be said that the offender follows four stages. The first

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stage is thinking. The offender thinks to commit a crime. In the second stage, the offender performs some preparatory acts in conformity with his thinking. These acts aim the consequence. In the third stage, the offender performs executive acts, again in conformity with his thinking, and these acts are able to cause the consequence and better reflect the intention of the offender to commit crime than preparatory acts. At the end, the consequence occurs.

In case of attempt, the consequence does not result in the last stage, and therefore *iter criminis* is not over. In such a case, we shall talk about an inchoate crime and we refer to attempt to commit a crime.

In this article, we review the first indictable stage of crime in Turkish Criminal Law. It needs a distinction between the preparation and execution of crime. According to the formulation of the justification of Art. 35 within the Turkish Penal Code, preparatory acts cannot be punished. However, there are no descriptions for either preparatory or executive acts in Turkish law and also no statement regarding when the executive acts begin. This question is solved based on the opinions in doctrine and interpretation of the Supreme Court's decisions.

We first present general information about the regulation of attempt in Turkish Penal Code which is applicable to all convenient crimes and deal with the conditions of attempt correspondingly with our issue. Then, we review executive acts under the titles of theories on distinction between preparatory and executive acts and last we refer to Turkish Practice.

## I. ATTEMPT

Attempt is regulated in Art. 35 of Turkish Penal Code. The first paragraph of the article regulates the conditions required for an attempt, and the second one regulates the punitive sanctions for attempt to commit a crime. Article 35 of Turkish Penal Code is read as;

*“(1) A person, who (directly<sup>1</sup>) acts with the intention of committing a crime but fails to perform the acts necessary to commit the crime due to a cause beyond his control, is considered to have attempted to commit crime.*

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<sup>1</sup> The word (directly) is added to text by us to prevent the Turkish expression loss in translation

(2) *In case of attempt to commit a crime, the offender is sentenced to imprisonment from thirteen years to twenty years instead of heavy life imprisonment according to the seriousness of the damage or danger; and imprisonment from nine years to fifteen years instead of life imprisonment. In other cases, the punishment is abated from one-fourth up to three-fourth.*"<sup>2</sup>

This provision is a general regulation which is applicable to all convenient crimes since "attempt" is regulated within the general part of the Turkish Penal Code.

Now we analyze the conditions of attempt in Turkish law inspired from this article.

### A. Conditions of Attempt

The first condition refers to the "*mens rae*" aspect of attempt. It means that as an essential ingredient of attempt, the offender must have the criminal intention to commit a crime. Offender solely attempts to commit a crime with a criminal intent. This also implies that no one can attempt to commit a negligent crime.<sup>3</sup>

We shall touch upon the subject of *dolus eventualis* (possible malice). Article 21 of Turkish Penal Code states that "*execution of an act by the offender being aware of its possible results is considered as dolus eventualis.*"<sup>4</sup> Within the Turkish doctrine, some of the writers claim that the crimes with *dolus eventualis* are fit to attempt to commitment.<sup>5</sup> However, the widely-accepted view states that these crimes are not fit to attempt to commitment. The Turkish Supreme Court also agrees with the second group of writers and their opinion.<sup>6</sup>

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<sup>2</sup> The Ministry of Justice, **Turkish Penal Code** (English Version), [http://www.justice.gov.tr/basiclaws/Criminal\\_Code.pdf](http://www.justice.gov.tr/basiclaws/Criminal_Code.pdf) (Online 14.10.2014)

<sup>3</sup> Mahmut Koca – İlhan Üzülmöz, **Türk Ceza Hukuku Genel Hükümler**, 7. Baskı, Ankara, 2014, p. 391; Mehmet Emin Artuk – Ahmet Gökçen – Ahmet Caner Yenidoğru, **Ceza Hukuku Genel Hükümler**, 7. Baskı, Ankara, 2013, p.558

<sup>4</sup> Supra Note 1

<sup>5</sup> Bahri Öztürk, Mustafa Ruhan Erdem, **Uygulamalı Ceza Hukuku ve Emniyet Tedbirleri Hukuku**, 9. Baskı, Ankara, 2006, kn. 297; Adem Sözüer, **Suçta Teşebbüs**, İstanbul, 1994, p. 165

<sup>6</sup> Turkish Supreme Court (Yargıtay) 1st Criminal Section, Decision No: 2008/6351, Date: 31.07.2008

Another condition of attempt refers to performance of convenient act(s).<sup>7</sup> Likewise Art. 35/1 includes the words of “...*fails to perform the acts necessary to commit the crime...*”

The justification of the Art. 35 points out the same condition and states that materials used in the commission of criminal offenses should be suitable for the feausance stipulated in the legal definition of the crime.<sup>8</sup> In terms of convenience, the acts should also be suitable to commit the crime. Therefore, convenience is binding both in terms of the performed acts and used materials.

Another condition of attempt is explained with the following statement: “a crime with consequence must exist”<sup>9</sup>. Fulfilment of this condition is derived from the nature of the attempt. In Turkish Penal Code, some of the crimes are regulated as sheer act crimes or crimes of adjacent act to consequence.<sup>10</sup> Such examples include threat crime, aspersion crime or defamation crime. In these crimes, the offender performs the act stipulated in the legal definition of the crime, and at the same time the consequence occurs. For example offender uses the insulting words to the victim of defamation crime. It is not necessary to observe a consequence after the commission of the act. Yet others argue that there is a consequence even in such crimes and that consequence occurs instantly.<sup>11</sup>

It should be noted that if the sheer act(s) may be separated the sections, in such a case it would be possible to attempt the sheer act crime.<sup>12</sup> For example offender intends to insult someone by letter. The letter can be seized by the police at the post office. So in such a case, we shall consider that offender attempted to defamation crime.

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<sup>7</sup> Mahmut Koca – İlhan Üzülmöz, **Türk Ceza Hukuku Genel Hükümler**, p. 398; Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p.570

<sup>8</sup> Adalet Bakanlığı, **Türk Ceza Kanunu Madde Gerekçeleri**, [www.ceza-bb.adalet.gov.tr/mevzuat/maddegerekce.doc](http://www.ceza-bb.adalet.gov.tr/mevzuat/maddegerekce.doc)(Online 15.10.2014)

<sup>9</sup> Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p.572

<sup>10</sup> Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p.247

<sup>11</sup> Hakan Hakeri, **Ceza Hukuku Genel Hükümler**, 14. Baskı, Ankara, 2012, p. 148

<sup>12</sup> Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p.572

As another condition for attempt, the consequence should not occur. This is also indicated in Art. 35 which states "...but fails ...to commit the crime due to a cause beyond his control"

Consequence must be unaccomplished due to a cause beyond the offender's control. In case the offender voluntarily abandons performing the acts necessary to commit the crime or avoids accomplishment of the crime with his own efforts, then he may not be punished for this crime; however, where the accomplished part constitutes an offense, punishment is given only for this specific offense. In that case we consider voluntary abandonment instead of attempt.<sup>13</sup>

The last and the most important condition for attempt is that the performed acts must be in nature of executive acts.<sup>14</sup> As mentioned before, offender follows a crime path called *iter criminis*. After thinking about committing a crime, the offender makes some preparations which aim to accomplish the consequence. Then s/he performs some acts which are able to accomplish the crime.

## II. INDICTABLE ACTS

According to the justification of the Art. 35, preparatory acts cannot be punished. In Turkish law there are no certain and clear measures which distinguish between preparatory and executive acts.

Turkish doctrine and courts rely on general and international theories on describing the preparatory and the executive acts.<sup>15</sup>

### A. Theories on the distinction between preparatory and executive acts

Theories about the separation of preparatory and executive acts can be classified in three groups. These include subjective theories

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<sup>13</sup> Koca – Üzülmöz, *Türk Ceza Hukuku Genel Hükümler*, p. 401 ff; Artuk – Gökçen – Yenidünya, *Ceza Hukuku Genel Hükümler*, p. 574 ff

<sup>14</sup> Artuk – Gökçen – Yenidünya, *Ceza Hukuku Genel Hükümler*, p.561 ff; Koca – Üzülmöz, *Türk Ceza Hukuku Genel Hükümler*, p. 392 ff

<sup>15</sup> For further information Sözüer, *Suçta Teşebbüs*, p.194 ff; Doğan Soyaslan *Teşebbüs Suçu*, İstanbul, 1994, p. 65 ff

(obviously expressed malice theory, theory abiding by offenders plan), objective theories (time sequence -chronological- theory, formal and substantive objective theory, expressive act theory) and hybrid theories.<sup>16</sup>

Subjective theories are further divided into two branches. These theories consider the intention of the offender.

“Obviously expressed malice theory” is the first one. Haelschner, Bockelmann from Germany, Hafter from Switzerland, Garraud, Vidal-Magnol from France, Garofalo from Italy maintain the theory.<sup>17</sup> According to theory, the executive acts are the acts which express the offender’s malice certainly and undoubtedly.<sup>18</sup>

Other branch of the subjective theories is the “theory abiding by offenders plan”. Hans Welzel maintains the theory. In his opinion according to offenders’ plan(s) attempt starts with the activities directly targeting to accomplish the legal definition of the crime.<sup>19</sup> Preparatory acts or executive acts can, therefore, be found out from the offenders’ plan.<sup>20</sup>

Objective theories do not consider malice but the act and distance between the act and the consequence, and the essential character of the act.<sup>21</sup>

First group of writers of objective theories maintain “time sequence (chronological) theory”.<sup>22</sup> According to Petrocelli, Scarano and Massari, who maintain this theory, those acts that are distal (far acts) to the consequence are considered as preparatory acts, whereas closer acts are viewed as executive acts. Proceeding from this

<sup>16</sup> Artuk – Gökçen – Yenidünya,  **Ceza Hukuku Genel Hükümler**, p.564

<sup>17</sup> Ibid

<sup>18</sup> Ibid, Koca – Üzülmöz,  **Türk Ceza Hukuku Genel Hükümler**, p. 395

<sup>19</sup> Artuk – Gökçen – Yenidünya,  **Ceza Hukuku Genel Hükümler**, p.565

<sup>20</sup> Sözüer,  **Suça Teşebbüs**, p. 203; Koca – Üzülmöz,  **Türk Ceza Hukuku Genel Hükümler**, p. 395

<sup>21</sup> Sözüer,  **Suça Teşebbüs**, p. 194 ff, Artuk – Gökçen – Yenidünya,  **Ceza Hukuku Genel Hükümler**, p. 566, Sulhi Dönmezer,  **Teşebbüste Hazırlık ve İcra Hareketleri Tefriki**, İÜHFM, C.:VIII, İstanbul, 1942, p.440 ff

<sup>22</sup> Artuk – Gökçen – Yenidünya,  **Ceza Hukuku Genel Hükümler**, p. 566

expression they make a distinction between distal attempt and closed attempt.<sup>23</sup>

One other group of objective theories is formal and substantive objective theory. The supporters of the formal objective theory argue that the executive acts which are stipulated in the legal definition of the crime.<sup>24</sup> As a result, executive acts start when the legally stipulated acts start. The acts before these acts are regarded as preparatory acts.<sup>25</sup> According to assertors of substantive objective theory, executive acts refer to those acts which necessarily and naturally depend on the feausance in the legal definition of the crime.<sup>26</sup> Last objective theory is “expressive act theory”. Carrara from Italy maintains this theory.<sup>27</sup> According to theory, the executive act is the act which expresses the offender’s malice without giving rise to confusion.<sup>28</sup> While executive acts express the offender’s malice to commit a specific crime, preparatory acts express the offender’s intention to undefined legal or illegal aims.<sup>29</sup>

The last groups of theories are the hybrid theories of subjective and objective theories. In doctrine there are too many hybrid theories put forward in different nature.<sup>30</sup>

## B. Turkish Practice

The Turkish doctrine, as well as the Turkish Supreme Court, adopts hybrid or combined theories in principle. In Dönmezer-Erman’s opinion, being in favor of an hybrid approach on the

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<sup>23</sup> Ibid

<sup>24</sup> Sözüer, **Suçta Teşebbüs**, p. 194 ff

<sup>25</sup> Ibid, Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p. 566, Koca – Üzülmöz, **Türk Ceza Hukuku Genel Hükümler**, p. 394

<sup>26</sup> Sözüer, **Suçta Teşebbüs**, p. 197, Koca – Üzülmöz, **Türk Ceza Hukuku Genel Hükümler**, p. 394, Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p. 566,

<sup>27</sup> Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p. 567.

<sup>28</sup> Sulhi Dönmezer, **Teşebbüste Hazırlık ve İcra Hareketleri Tefriki**, p. 448.

<sup>29</sup> Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p. 568

<sup>30</sup> Sözüer, **Suçta Teşebbüs**, p. 206 ff; Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p. 569

distinction between preparatory and executive acts is essential because of the necessity to keep balance between defining the borders of individual freedom and not to draw conclusions contrary to the clear provisions of the penal law.<sup>31</sup>

According to Toroslu, none of the above-mentioned theories are suitable to solve the problem. The solution will be found with the judge's assessment with common sense and satisfactory knowledge. In each concrete case, taking advantage of all these theories, the judge researches the question of "does offender express his intention to commit a crime?" and "is the protected legal value thrown hazard". In this way, s/he decides whether the acts are preparatory or executive acts.<sup>32</sup>

In Turkish Penal Code, the sole criterion regarding the start of the executive acts are reflected in the words "*A person who (directly) acts*". This is not a clear formulation and is unable to answer the question of when exactly the executive acts start.

It should be noted that there is no legal formulation of executive acts in Turkish law. The justification of penal code formulates that "preparatory acts cannot be punished". This is an inexplicit criteria on beginning of executive acts Although the justification of the penal code explains this formulation by stating that the offender will be punished after he directly starts to commit executive acts, it does not give a clear formulation when the executive acts starts. Therefore, the Supreme Court's decisions can be considered as the most important guide on this issue. However, it should also be noted that these decisions are peculiar for specific reviewed cases.

According to the formulation of the Art. 35, descriptions in the justification of this article and opinions in doctrine, we can say that the executive acts starts when the offender starts performing the acts in the basic or aggravated form of legal definition of the crime. Nonetheless if the legal definition of crime includes a consequence as

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<sup>31</sup> Sulhi Dönmezer – Sahir Erman, *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, C.:1, 12. Baskı, İstanbul, 1997, p. 568

<sup>32</sup> Nevzat Toroslu, *Ceza Hukuku Genel Kısım*, Ankara, 2005, p.261



a primary matter to commit that crime, the executive acts are the acts which necessarily depend on the feasance.<sup>33</sup>

## CONCLUSION

Attempt is regulated under the Art. 35 of Turkish Penal Code. The first paragraph of the article regulates the conditions for the attempt whereas the second one regulates the punitive sanctions of attempt to commit a crime.

According to the provisions of the Art. 35, attempt to commit a crime has a number of essential conditions. First one is the criminal intention to commit a crime (*dolus directus*). Second, convenient act or acts must be performed. As a third condition, a crime with consequence must exist. The last condition is the most important one for our issue and states that performed acts must be in nature of the executive acts.

In Turkish law there are no certain and clear measures or criteria describing the distinction between preparatory acts and executive acts. The Turkish doctrine and the courts rely on general and international theories for describing the preparatory and the executive acts. We can say that Turkish doctrine and courts adopt hybrid theories to generate measures and criteria to distinguish between preparatory and executive acts.

On the other hand, this generation process goes on in its nature since entry into effect of Turkish Penal Code No. 5237. This is mainly because there is no legal formulation of the executive acts within the Turkish law. This calculated space is estimated to be filled by Supreme Court's interpretation. The solution to the question of distinction between preparatory and executive acts will be found with the judge's assessment in each concrete case, taking advantages of all theories mentioned above.

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<sup>33</sup> İzzet Özgenç, **Türk Ceza Hukuku Genel Hükümler**, 8. Bası, Ankara, 2013, p. 447; Artuk – Gökçen – Yenidünya, **Ceza Hukuku Genel Hükümler**, p. 570; Koca – Üzülmöz, **Türk Ceza Hukuku Genel Hükümler**, p. 397; Hakan Hakeri, **Ceza Hukuku Genel Hükümler**, 14. Baskı, Ankara, 2012, p. 422 ff; Turkish Supreme Court (Yargıtay) Penal Plenary Session, Decision No: 2012/209, Date 22.05.2012.

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