

Droit Public

Criticism of the Provisions of the New Turkish Criminal Code, Concerning Restorative Justice*

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I. Introduction

In terms of Criminal Law, crimes are deviations which disturb the public order and by punishing them we restore the public order and this is called criminal justice or legal justice, but the aim of the contemporary Criminal Law cannot be just punishment. The aim of punishment today is still general and individual prevention of crime¹. Jeremy Bentham centuries ago (1789), said that "the general object of all laws is to prevent mischief...when there are no other means of doing this than punishment... the most extensive, and most eligible object is to prevent...all sorts of offences whatsoever... so to manage that no offence whatsoever may be committed"². Indeed "Beccaria then Bentham, contributed the central claims of the deterrence hypothesis on which almost all systems of criminal law now rely: that punishment is more likely to prevent future crime..."³. But to be able to do this the punish-

* Paper presented to the 14th World Congress of Criminology in August 7-11, 2005, in Philadelphia, U.S.A.

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1 Füsun Sokullu-Akinci, *Kriminoloji (Criminology)*, 4th. Ed., Istanbul, 2004, p. 117-118.

2 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, New York, 1948, p. 179.

3 Lawrence W. Sherman, "The Use and Usefulness of Criminology, 1751-2005: Enlightened Justice and Its Failures", *ANNALS, AAPSS*, 600, July 2005, p. 120.

ment must be certain, immediate⁴, proportionate to the crime and more costly than the outcomes of the crime⁵.

Fair and efficient criminal justice is a prerequisite for any democratic society based on the rule of law⁶ but the justice we achieve is it always fair for all the parties: for the victim, for the society (community) and even for the offender? The needs of the victim may be different from that of the society. There are also lots of things to do for the offender. Punishing the criminals is not sometimes sufficient for neither of the parties. On the other hand restorative justice is a problem solving approach to crime and it involves the parties themselves as well as the community⁷.

Then, what should be restored besides justice? What do we restore to achieve restorative justice? Justice is not there to solve social problems. So we have to find an alternative way to solve the social problems created by the crime. Since crime causes injury to people and communities, we must find a way to repair those injuries and the parties must be permitted to participate in that process. Restorative justice programs therefore enable the victim, the offender and affected members of the community to be directly involved in responding to the crime. They all become a part of the criminal justice process and the system aims at offender accountability, reparation to the victim and full participation by the victim- the offender-the community, and thus by involving all the parties achieving the restorative outcome of reparation and peace. For example, to attend fully the financial, material, emotional and social needs of the victim and those who are close to the victim and are affected by the crime; to enable offenders to assume active responsibility for their actions; to prevent recidivism by reintegrating offenders into the community; to recreate a working community that supports the rehabilitation of offenders and victims and is active in preventing crime; to provide a means of avoiding escalation of legal justice and the

4 Cesare Beccaria, *Dei Delitti e Delle Pene*, Milano, 1973, Pp. 47-50.

5 Beccaria, 79-80; Bentham, 179-180.

6 Recommendation No R (95) 12, Council of Europe, Committee of Ministers.

7 Since Aristoteles justice is classified as distributive justice and rectificatory justice. Today social justice took the place of distributive justice and legal justice is the compensation of pecuniary (actual) damage (restitutive justice) and compensation of moral damage (corrective justice). Criminal justice on the other hand is retributive justice.

associated costs and delays⁸. In short restorative justice is the repairing of the harm caused by crime.

In restorative justice, just like classical criminal penalties, we aim general and individual prevention of criminality, even with more success, because crime is mainly caused by social conditions and relationships in the community. As a result of this the community must take some responsibility for remedying those conditions that cause crime. In addition it must not be forgotten that the aftermath of crime cannot be totally resolved for neither the offender nor the victim without their personal involvement⁹. The concept of restorative (reparative) justice seeks to use interventions that return the victim and offender to their pre-offense states. For offenders this means an assurance that the action will not be repeated¹⁰. In fact research indicates that in cases where the offender meets the victim, and realizes the pains he/she caused, he/she is more apt to pay indemnities and his/her recidivism is less probable¹¹.

There are different kinds of restorative justice as practiced all over the world such as community service, restorative resolutions, conferencing, mediation, family/group conference, peer mediation, victim offender reconciliation, restitution¹².

II. Related Articles of the Turkish Criminal Code of 2005

Before enactment of the new Criminal Code, rules concerning the execution of criminal punishments and alternatives to punishment were in the old Code of Execution of Punishments (1965). The provisions of this code were enabling the trial judge to convert short term imprisonment (prison sentence under one year) to pecuniary punishment or *restitutio in rem* or ordering the convict to attend to a special education program, to acquire some professional skills, or not to go to some specified places or banning the convict to take part in some specified activities. This system was criticized, because although these are alternative punish-

⁸ Tony F. Marshall, *Restorative Justice an Overview*, Home Office Research Development and Statistics Directorate, London 1999, p.6.

⁹ Marshall, 6.

¹⁰ William G. Doerner- Steven P. LAB, *Victimology*, 1995, Cincinnati, Ohio, p.224.

¹¹ Füsün Sokullu-Akıncı, *Viktimoloji (Victimology)*, Istanbul, 1999, Pp. 177-8.

¹² For detailed examples see, Paul C. Friday, "Community-Based Restorative Justice: The Impact on Crime", in H. Kury & J. Oberfell-Fuchs (Eds.), *Crime Prevention: New Approaches*, Mainz: Weisser Ring, Pp.386-389.

ments, they are punishments, and their place should be in the Criminal Code¹³. On the other hand these alternatives were very limited and comparative law included a large scope of other examples¹⁴. The Criminal Code of 2005, on the other hand regulates alternatives for short term prison sentence in article 50 and nearly repeats the same rules and the provisions of the Code of Execution of 1965.

Besides this trivial change, for the first time in the Turkish legal system article 50/1-f, of the new Code has a provision enabling the trial judge to decide on *voluntary community work* as an alternative to short term imprisonment. In our previous publications we insisted that this alternative is very important, and that it must be included in the Turkish Laws¹⁵. But the way it is formulated is quite inadequate, because it is only possible for short term imprisonment. For example, first time offenders, offenders who are overtly remorseful for the crime they committed are convicted to 18 months of prison sentence cannot serve it as community work. On the other hand, there are other examples in the Code where the convict can work. For example, when the sentence is suspended by the judge (Criminal Code 51/4-b) or the convict is released after the execution of some part of his prison sentence because of good behaviour (Code of Execution 107/7), the convict is allowed to work under the control of a person who is the master of that profession. The time limit for the suspension of the execution of the sentence is two years. Although this work is not voluntary, the time limits should be in harmony.

A similar solution is true for convicts who are released conditionally. Such convicts are allowed to practice the profession they have acquired during the execution of their prison sentences under the control of a professional, either in a public or a private work place (Code on the Execution of Punishments of 2005, art. 107/7).

13 Kayıhan İçel, "Hürriyeti Bağlayıcı Cezalara Seçenek Olan Müesseselerdeki Gelişmeler ve Türk Ceza Sisteminin bu Yönden Değerlendirilmesi", in *Değişen Toplum ve Ceza Hukuku Karşısında Türk Ceza Kanununun 50. yılı ve geleceği Sempozyumu* (22-26 Mart.1976), İstanbul, 1977, p. 321.

14 Kayıhan İçel/Fusun Sokullu-Akinci, et al. *Yaptırım Teorisi (Punishment Theory)* 2nd Ed., İstanbul, Pp, 79-94.

15 Fusun Sokullu-Akinci, "Alternatif Yaptırımlar" (Alternative Punishments), in Prof. Dr.Nurullah Kunter'e Armağan, İstanbul, 1998, Pp. 335-338; see also Fusun Sokullu-Akinci, *Hürriyeti Bağlayıcı Cezalar ve Alternatifleri*, in TC. Adalet Bakanlığı, 21. Yüzyıla girerken Cezaların İnfazı Sempozyumu, (21-22 Ocak, 2000), Ankara, 2001.

Execution of prison sentences under two years may be suspended if the *personal indemnities* of the victim are restored by returning the proceeds of the offense or by payment of the damages (TCC . art. 51). The period is 3 years for children under 18 and for those above 65. The prior conviction of the offender should not be above three months for intentional crimes and his behaviour and the penitence he shows during the trial must convince the judge that he will not commit crimes in future. According to the same article, suspension of the sentence may be postponed until the personal rights of the victim are restored or redressed totally by the convict. If this condition is satisfied, the convict is released immediately. I must admit that this article is very positive in terms of restorative justice.

In the abolished Law, *conditional release* of the convict could be postponed until the compensation of the victim's losses. The new system mentions "obligations" but does not specify what they are and they do not have any postponing effect. In the old law, one of the conditions for conditional release was the restoration of the victim's losses thus the present system is far from being a reform in terms of restorative justice.

Reconciliation (art. 73/ last paragraph) between the victim and the offender is also rendered for a very limited number of minor offences defined in the Code, where the initiation of legal prosecution is subject to the filing of a private complaint by the victim and both parties agree on reconciliation. Reconciliation is a very important and useful kind of restorative justice. In the Turkish system initiation of legal prosecution is subject to filing a private complaint by the victim is possible only in a few unimportant crimes. Reconciliation in the mentioned article is possible only if the offender accepts that he has committed the crime and pays compensation to the victim and this is done in presence of either the judge or the public prosecutor, then legal prosecution does not begin. Reconciliation should be possible also for legal prosecution commenced by the public prosecutor, and if it is either a negligent crime or is a crime against persons, property and the like. In fact in a very recent law (June 3, 2005), Child Protection Act art. 24, reconciliation is possible also for negligent crimes and also for intentional crimes with the minimum limit of 3 years for people between the age of 15-18 and 2 years for people under 15¹⁶.

16 Yener Ünver, "Deliller ve Değerlendirilmesi", Legal Hukuk Dergisi, Ağustos 2005, Year 3, No. 3, p. 2906; also see Yener Ünver, "2005 Draft of Child Protection Act", Paper delivered at the XIVth World Congress of Criminology, August 7-11, August, in Philadelphia.

In the special part of the new Code, *returning the crime proceeds* before the commencement of the prosecution is a mitigating circumstance for some crimes and in cases of *effective regret*, the offender is not convicted at all. For example according to article 168 of the new code, if the offender himself or the perpetrator or the facilitator of the crime returns voluntarily that which he had taken or compensates the loss of the victim of the crime, after the commission of the crime is completed and prior to any proceedings are commenced against him, his punishment is reduced from one third to two thirds in crimes of larceny, damaging other peoples property, breach of trust, fraud and utilization without payment. In case of plundering, the rate of reducing the punishment is between one third to one sixth. In case of partial return or compensation, victim must agree to the reducing of the punishment. This is a good example of restorative justice and the crimes that are included are crimes against property.

There are other examples of effective regret in the new code. According to article 192, if an offender who participates in narcotics crimes shows effective regret by reporting the other participants and the place where the narcotics are manufactured or hidden, before the officials are informed about the commission of the crime, and if this information enables the apprehension of the participants and the goods, then the informer is not punished. Also if a person buys, accepts or keeps narcotics for his personal use and informs the officials about where, when and by whom this narcotic is delivered, and thus enables the officials to apprehend the offenders and the narcotics is not punished. In cases where the offender only helps the officials, who are already informed about the crime and facilitates the apprehension of the other participants voluntarily his punishment is reduced from one fourth to one half. In the same article if a narcotics offender, applies to the officials with the request for treatment, before any proceedings are commenced against him/her, she/he is not convicted to any punishment. Taking into consideration that the narcotics crimes are both victimless crimes and organized crimes, the offenders are very difficult to apprehend and the majority of such crimes are black numbers, the mentioned formulation of the article is acceptable. Effects of requesting treatment existed in the abolished code too. I consider this quite favourable, and a good example of restorative justice.

Effective regret is taken into consideration also for some of the crimes against persons, such as trafficking of organs and tissues (93), crimes of

violating personal liberty (110), crimes of illegal construction (184/5), crimes against public confidence, for example counterfeiting of money, public bonds and valuable seals (201), crimes against public peace, for example forming societies with the purpose of committing crimes (221), crimes against the trustworthiness and functioning of the public administration, such as embezzlement by extortion (248), bribery (254), crimes against the judicial administration, for example libel and slander (false accusation) (269), perjury (274), evasion of the convicts or arrested suspects (293). The victims of these crimes are not always private persons, In most cases it is the public, but in all of these effective regret is accepted either to give another chance to the offender and not to stigmatize him or to decrease the harm caused by the crime which in short may be called restorative justice. In other words the harm given to the community is restored in all these cases. On the other hand an offender who is in the position of effective regret is hoped to quit criminal careers therefore will not be a recidivist.

III. Evaluation and Conclusion

In short, the provisions of the new Criminal Code are far from being adequate with respect to restorative justice. Some alternative sentences such as community work is only possible for short term imprisonment, whereas it should cover offenders convicted for longer sentences and because for example they are first time offenders and for obvious reasons, should not be put in prison. Working on the other hand, is used as a substitute to a part of the long term prison sentence; for example a convict having completed a part of the prison sentence in good behaviour may work during a part of his conditional release. It may also be applied as a condition the suspension of the sentence and this is a positive change.

Restorative justice is an "approach" to justice and it can be applied to prevent crime by using *mediation* to resolve conflicts before they reach to the threshold of criminal behaviour or sometimes right after it. The new Turkish Penal Code has no such provisions.

The new Criminal Code is enacted in 2005, within a whole series of alleged reforms in which the Code of Criminal Procedure, Code of Execution of Punishments, Child Protection Act etc. are also newly made (all in the year 2005!) for the sake of harmonizing the Turkish legal system with that of the European Union. In the European legal system,

restitution and compensation of the harm caused to the victim is an important aspect of restorative justice. Recommendation R (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure, under paragraph D. 10 states that, "It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realized should be abolished". In the abolished Turkish Criminal Procedure Code the victim could apply for his damages either at a civil court or at the criminal court (Abolished Criminal Code art. 37). What I was criticizing in the old system was, that after the criminal court's decision on the amount of compensation, the victim was in a disadvantageous situation and the laws should be changed so as to enable the victim to receive the compensation in the same way as the government gets the fine from the offender¹⁷. But the reforms did just the contrary and abolished the victims right to sue for his compensation in the criminal court. I leave it to you to decide whether this is a reform or just the opposite.

¹⁷ Sokullu-Akinci, *Viktimoloji*, Pp. 207-208.