

# The Concept of “Good Faith” in Criminal Law

## *İyiniyet Kavramının Ceza Hukukundaki Yeri*

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### ABSTRACT

Good faith is unfamiliar to criminal law because it is a private law-based concept. In criminal law, the concept of good faith has no normative counterpart in crime theory. Moreover, the doctrine of criminal law does not include the notion of goodwill within the theory of crime. However, since the concept of good faith does not have a normative counterpart in crime theory, it is not possible to accept it as a form of appearance of the moral element of the crime or as a form of view of the moral element, nor it is able to substitute intention. Because the intention is the deliberate and desired realization of the objective elements of the crime, it has a completely different meaning and function to the concept of good faith.

**Keywords:** Good faith, criminal law, moral element

**Submitted:** 12.11.2018 • **Revision Requested:** 15.01.2019 • **Last Revision Received:** 02.08.2019 • **Accepted:** 02.09.2019 •

**Published Online:** 27.09.2019

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**Citation:** Yasar Y, Icer Z, 'The concept of "good faith" in criminal law' (2019) 7(2) Ceza Hukuku ve Kriminoloji Dergisi-Journal of Penal Law and Criminology, 255.

## 1. Introduction

In certain articles of Turkish Penal Code 5237, the concept of good faith is included. However, good faith is in fact a foreign concept within criminal law terminology. The need to examine good faith in terms of criminal law is mainly due to certain judgments by the The Court of Cassation which included the concept of good faith. Especially in some decisions, the use of good faith instead of intent which is the mental element of a crime, shows that there is a terminological problem in practice. In this study, it is planned to emphasize the concept of good faith's meaning, types, functions and place in criminal law for the purpose of eliminating the aforementioned terminological problems.

Whether the concept of good faith has a function in terms of criminal law is an important issue. The principles of "legality" and "lex stricta" are valid in criminal law and the interpretation rules are applied more solidly because of this. But in some judgments by The Court of Cassation, it is understood that there is an attempt to position the concept of good faith within the general theory of crime. However, in the Turkish Penal Code, the concept of good faith is not included in the general theory of crime. Therefore, it should be explained whether this approach by The Court of Cassation is a conscious choice or a terminological mistake. Furthermore, whether good faith has a function in terms of effective remorse and alternative sanctions to imprisonment is also a matter to be dealt with. The Court of Cassation also referred to the concept of good faith in some of its decisions about these institutions.

Within this framework, in the last chapter which constitutes the basis of the study, the regulations of the criminal law, the concept of good faith, the place of this concept in the general theory of crime will be discussed; the relationship between the mental elements of the crime and the intent and negligence will be mentioned and the decisions of The Court of Cassation will be included. In addition, also the exemplary judgments of other criminal law institutions which The Court of Cassation uses the concept of good faith -such as the effective remorse and alternative sanctions of imprisonment- will be discussed in this section.

## 2. Concept

Good faith is a concept based on Roman law. This concept, which is called *bona fides*<sup>1</sup> in Roman Law, still exists and continues to be used in Civil Law based on Roman Law.

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1 Kemal Oğuzman and Nami Barlas, *Medeni Hukuk*, (23. edn, İstanbul 2017), s.248, n.806; Hasan Erman, *Medeni Hukuk Dersleri* (İstanbul 2016), s.114.

The concept of good faith has private law roots due to the fact that it is the basis of legal processes and relations.

According to Turkish official dictionary, good faith means “*not having any bad thoughts for anyone in any matters, good intention*”<sup>2</sup>.

In the legal sense, good faith can be described as “a state of ignorance or misunderstanding that excuses the existence or absence of a situation that prevents the acquisition of a right, despite the fact that the person shows all the necessary attention and care”<sup>3</sup>.

By reason of the fact that, legal order, as a basic principle, aim to people’s act in honestly and good faith, the protection of persons who act in good faith in order to establish a particular legal transaction or to gain a right is considered as a fundamental principle of civil law and moving from this idea, regulations on the protection of good faith have been included in the civil law of many countries.<sup>4</sup>

### 3. Types of Good Faith

Good faith in the civil law doctrine is examined under two sub-headings as “*subjective good faith*” and “*objective good faith*”.<sup>5</sup>

#### 3.1. Subjective Good Faith

Subjective good faith is defined as the presence of a situation that impedes the acquisition of a particular right or the absence of one of the elements necessary for the acquisition of the right, the level of ignorance or misinformation that can be justified in the individual, and the elements of goodwill are referred to as: *i) legal irregularity/the absence of rule ii) the absence of the legal awareness of the person and iii) legal acceptability of “ignorance” or “to be have misinformation”*.<sup>6</sup>

Accordingly, subjective good faith is the absence of a necessary condition for the acquisition of a right or the existence of a reason that prevents the acquisition of the

2 Look: Actual Turkish Dictionary (<https://sozluk.gov.tr/>)

3 Look for the definitions: Hüseyin Hatemi, *Medeni Hukuka Giriş* (İstanbul 2017), s.187, n.5-8; Oğuzman-Barlas, s.246 vd.; Ahmet M. Kılıçoğlu, *Medeni Hukuk* (Ankara 2016), s.123; Serap Helvacı and Fulya Erlüle, *Medeni Hukuk*, 5. edn., İstanbul 2018, s.43; Gökhan Antalya and Murat Topuz, *Medeni Hukuk* (İstanbul 2017), s.323; Erman, s.114; Mehmet Ayan and Nurşen Ayan, *Medeni Hukuka Giriş* (Ankara 2016), s.163, 164; Zafer Zeytin and Ömer Ergün, *Türk Medeni Hukuku* (Ankara 2017), s.65.

4 Kılıçoğlu, s.123.

5 Hatemi, s.187, kn.4a; Oğuzman-Barlas, s.246, kn.803; Kılıçoğlu, s.121; Erman, s.114.

6 Antalya-Topuz, s.329-331; Ayan-Ayan, s.164, 165; Zeytin-Ergün, s.65, 66.

right is not known for a justified reason.<sup>7</sup> From this definition, it is not possible to claim good faith in cases where the obstacle is known or the obstacles can be known.<sup>8</sup> Subjective good faith is regulated in article 3 of the Turkish Civil Code as: “*In cases where the law establishes a legal conclusion to good faith, the important factor is the existence of goodness. However, anyone who does not show the expected diligence according to the requirements of the situation cannot claim good faith.*”

By this regulation, the legislator has accepted that individuals act in good faith in their social lives (*presumption of goodwill*). As a result of the acceptance of this presumption, which can be easily proved otherwise, the obligation to prove the existence of bad faith, falls to the people who expressed this claim, in other words, the obligation to prove good faith is not owned by the person or persons who will benefit from the protective effect of good faith.<sup>9</sup> For example, the person who acquires real rights on an immovable property by relying on the registry of deeds acts in good faith as by presumption. But this does not mean an absolute presumption and can be proved otherwise. At this point, according to presumption it will be accepted that the person who acquires the real rights does not know the mistake in the registry of deeds otherwise, the claimant shall be obliged to prove it.<sup>10</sup>

Since subjective good faith is related to the acquisition of a particular right, in the doctrine, the following conditions must be found together in order to gain a right based on good faith or to protect good faith legally: *i) the existence of a legal outcome, ii) the existence of good faith according to legislation, iii) the existing of a legal deficiency, iv) good faith of the person who wants to achieve the legal outcome.*<sup>11</sup>

### 3.2. Objective Good Faith

Objective good faith is not about acquiring the right; it is the kind of good faith sought in terms of the exercise of the right that earned.<sup>12</sup> In Turkish legal theory, objective good faith is also called the rule of honesty. The rule of honesty refers to the obligation of individuals to behave in a manner consistent with the reasonable behavior expected of an honest, honorable, moral and average person in similar legal relations.<sup>13</sup>

7 Oğuzman-Barlas, s.248, 249; Hatemi, s.187, kn.5-8; Kılıçoğlu, s.121; Zeytin-Ergün, s.65.

8 Hatemi, s.188, kn.9; Oğuzman-Barlas, s.249, kn.808.

9 Hatemi, s.187, kn.6-7; Oğuzman-Barlas, s.258, kn.840; Ayan-Ayan, s.168; Zeytin-Ergün, s.69, 70.

10 Kılıçoğlu, s.123, 124.

11 Antalya-Topuz, s.335-337; Kılıçoğlu, s.124-127.

12 Kılıçoğlu, s.121; Oğuzman-Barlas, s.246, kn.804.

13 Helvacı-Erlüle, s.44; Oğuzman-Barlas, s.262, kn.853.

In determining whether the behavior conforms to the rule of integrity, moral measures prevailing in society, practices brought by customs and traditions, and the purpose of the concrete legal relationship are taken into consideration.<sup>14</sup> The violation of this rule is considered as an abuse of the right and this situation is not protected by law. As a matter of fact, in our positive law, in Article 2 of the Turkish Civil Code, the rule of honesty is regulated as follows and this rule is connected to a certain legal consequence: *“During the exercise of their rights and during the performance of their obligations, everybody is obliged to act according to the code of honesty. The legal order does not protect the manifest abuse of a right.”*

In determining whether the abuse of the right, in other words, whether there is a violation of the honesty rule, the following criteria are used: *i) the lack of a legitimate interest in the exercise of the right, ii) there is an excessive disproportion between the benefit of the exercise of the right and the damage given to another person, iii) use of rights based on its own moral conduct or contradictory behavior.*<sup>15</sup>

#### **4. The Function of Good Faith in Private Law**

Subjective good faith carries out a function in private law that protects the individual from the legal consequences or changes the result.<sup>16</sup> In this respect, good faith ensures security in legal proceedings.<sup>17</sup> However, in private law, acting in good faith is not always a protected situation, and as stated in Article 3 of the TCC, good faith can be maintained in cases where the law has a legal conclusion to good faith. For example, when (A) sells an item (C) that has been left entrusted to them by (B), it is not possible, as a rule, for (A) to gain ownership of (C) since (A) does not have the power of disposition. However, if (C) is unaware that the goods belong to (B), they will be deemed to have acted in good faith and (C) gains the ownership of the goods.<sup>18</sup> In Article 988 of the Turkish Civil Code it is stated as followed: *“The acquisition of a person who has acquired, in good faith, ownership or limited rights in-kind from the possessor of a movable who bears the title of an trustee, is protected even if the possessor does not have the authority to make such dispositions.”* Pursuant to this regulation, in the example, (C) will acquire ownership as it is in good

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14 Helvacı-Erlüle, s.44.

15 Helvacı-Erlüle, s.45.

16 Oğuzman-Barlas, s.249, kn.810.

17 Antalya-Topuz, s.326.

18 Oğuzman-Barlas, s.250, kn.811.

faith. As it can be seen, the Turkish Civil Code concluded to buyer's good faith about lack of knowledge about the belonging of the good and has maintained people who acquires ownership over goods with good faith.

Objective good faith (the honesty rule) is applied - except for in the exercise of rights and the performance of debts - in the interpretation of the provisions of the law, in filling the gaps in the law, in the prevention of fraud, in the formation, interpretation and completion of legal proceedings, in the interpretation, amendment or termination of the rules for application.<sup>19</sup>

## 5. The Role of Good Faith in Criminal Law

### 5.1. Normative Regulations of Good Faith in the Turkish Penal Code

While positive provisions of the criminal law do not include the concept of good faith in the context of the elements of the crime, it is observed that there is a certain consequence to good faith in normative regulations on security measures such as "confiscation of goods" and "confiscation of assets".

Paragraph 1 of the Article 54 of the Turkish Penal Code is issued as followed: *"On the condition of not belonging to bona fide third parties, the seizure of properties used in the commission of an intentional crime or allocated to the commission of the crime or which arises from the crime shall be decreed. The property prepared in order to be used in the commission of the crime shall be seized in the circumstance that it is dangerous to public safety, public health or public morality. In case of limited right in favor of third parties, the confiscation decision shall be granted on condition that this right is reserved."*<sup>20</sup>

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19 Helvacı-Erlüle, s.45, 46; Oğuzman-Barlas, s.263, kn.854-856.

20 Article 54: (1) On the condition of not belonging to bona fide third parties, the seizure of properties used in the commission of an intentional crime or allocated to the commission of the crime or which arises from the crime shall be decreed. The property prepared in order to be used in the commission of the crime shall be seized in the circumstance that it is dangerous to public safety, public health or public morality. In case of limited right in favor of third parties, the confiscation decision shall be granted on condition that this right is reserved. (2) In the event of the disposal, selling off, consumption or seizure of the property falling under the scope of clause one being rendered impossible through any other means, the confiscation of a sum of money equal to the worth of the property shall be decreed. (3) When it is understood that the seizure of the property used in the crime shall cause more severe consequences in comparison to the crime committed and thus be inequitable, seizure may not be decreed. (4) A property the manufacture, possession, usage, carrying, buying and selling of which constitutes a crime shall be seized. (5) Where the seizure of only some parts of a property is required, if it is possible to remove said part without damaging the whole, the seizure of only said part shall be decreed. (6) With regards to multi-shareholder property, the seizure of only the share of the person who complicit in the crime shall be decreed.

As it is seen, in order to be able to decide on confiscating goods, the condition subject to confiscation should belong to the qualified third parties. In the official reason of the Article 54 it is explained as followed: "(...) *To ensure that the confiscation does not damage the property right in constitution, it is accepted to decide on the confiscation of the goods used for the crime or the goods assigned to the offense. However, for this, the goods should not belong to the third parties who act in good faith. In other words, if the person is not aware of the crime, and even if the goods were used to process a crime, confiscation cannot be decided.*"

As stated in the official reason of the article, to act in good faith in the confiscation of goods has importance not in terms of elements of the particular crime but whether or not the owner of goods of confiscation knows that his/her belongings were used in a particular offense.<sup>21</sup>

According to the Court of Cassation; "*Pursuant to Article 54/1 of Turkish Penal Code numbered 5237, in order to allow the confiscation of goods used in the processing of a deliberate crime or assigned to the commission of the crime, this good should not belong to the third party. According to the official reason of the article, it is the situation in which the person does not participate in the processing of the crime and is not aware of the crime.*"<sup>22</sup>

In short, in terms of provisions for confiscation, whether or not the person's actions in good faith are not considered as a determinant in the existence or absence of the elements of the offense, but for the confiscation of the object, particularly in the context of the terms and conditions of it, this concept was required to be included in the normative regulation.

In Article 55 of the Turkish Penal Code, where the confiscation of earnings is

21 The transfer was given to the defendant with the custodian purposes by the owner whose good faith cannot be proven otherwise. According to declarations of financial responsible and the defendant it should decide to confiscate instead of courts assumption based acceptance regarding the return the vehicle to the rights holder *Court of Cassation, 7. CC., 23.02.2017, 2014/32977, 2017/1303* "The defendant is the brother of the financial responsible. It is against the usual flow of life that the financial responsible who is a brother of the defendant does not know that there is a cigarette in the vehicle. It should restate but not confiscation regarding the lack of good faith. *Court of Cassation, 7. CC., 20.10.2016, 2014/30253, 2016/9954.*

22 The continuation of the decision is as follows: "*Subject to the fact that the defendant said that the gun was a duty weapon, the gun was licensed in the name of his wife and he took it to clean, the court's decision on the refusal of the objection did not appear to be insignificant, because it was understood that S.V., the holder of the warrant, was not "a third person acting in good faith" within the meaning of Article 54/1 of the Turkish Penal Code*"

23 *Court of Cassation. 8. CC., 16.06.2014, 2014/907, 2014/14799.*

issued, the provisions of the Turkish Civil Code have been referred directly to the protection of the person who acquired the goods in good faith with an indication that the person who acquired the goods should not be able to benefit from the provisions of Turkish Civil Code No. 4721 on the protection of good faith.<sup>24</sup>

It has been stated in the official reason of the article as follows: “In the application of this provision, the rights of the victim and the third parties acting in good faith shall be protected and their financial values shall not be subject to the confiscation of earnings.

## 5.2. The Role of Good Faith in the General Theory of Crime

When the concept of good faith in terms of the general theory of crime is evaluated, firstly, it is necessary to explain under which heading this concept can be studied in crime theory.

In the Turkish Penal Code, the concepts of “intention” and “negligence” are defined as the moral elements of the crime. In addition, “aggravated crime due to consequence” is regulated in Article 23 of the Code. In the doctrine, as well as intention and negligence, “aggravated crime due to consequence” and “motive” are examined under the moral elements of the crime. However, neither the Code nor the doctrine contain the concept of good faith among the moral elements.

When the comparative law criminal laws are examined, it is seen that the concepts of intention and negligence are mostly preferred as the moral elements of the crime. As in our country, in the criminal codes of many countries (for instance Germany<sup>25</sup>,

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24 **Article 55:** (1) The seizure of material benefits gained through the commission of the crime or which constitutes the subject-matter of the crime or which is provided for the commission of the crime and the economic gains acquired from their investment or conversion shall be ruled. For a ruling of seizure as per the provision of this clause, the material benefit should be non-returnable to the victim of the crime. (2) In circumstances where the property or material benefits which are object of seizure cannot be confiscated or where they are not delivered to the concerned authority, seizure of values equivalent to them shall be decreed. (3) For the property which falls within the scope of this article to be able to be seized, the person who later acquires the property should be not able to benefit from the provisions of the Turkish Civil Code no. 4721 and dated 22/11/2001 regarding the preservation of bone fide.

25 Claus Roxin, *Strafrecht Allgemeiner Teil*, Band I, (4. edn., München 2006), s.444, a.m.; Walter Grop, *Strafrecht Allgemeiner Teil*, (4. edn., Heidelberg 2015), s.151 a.m.; Johannes Wessels and Werner Beulke and Helmut Satzger, *Strafrecht Allgemeiner Teil*, (44. edn., München 2015), § 7, s.90 a.m.; Bernd Heinrich, *Strafrecht Allgemeiner Teil*, (4. edn., Stuttgart 2014), s.102 a.m.; Urs Kindhäuser, *Strafrecht Allgemeiner Teil*, (7. edn., Baden-Baden 2015), § 13, s.125 a.m.; Rudolf Rengier, *Strafrecht Allgemeiner Teil*, 5. Aufl. 2013, § 7 n.2 a.m.; Günther Jakobs, *Strafrecht, Allgemeiner Teil: die Grundlagen und die Zurechnungslehre*, 2.Aufl., 1991, 8/1 a.m.; Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5. Auflage, Berlin 1996, § 24 III 4, 5 a.m.

The United Kingdom<sup>26</sup>, The United States<sup>27</sup>, Italy<sup>28</sup>, China<sup>29</sup>, Israel<sup>30</sup>, Spain<sup>31</sup>, Netherlands<sup>32</sup>, Portugal<sup>33</sup>, Belgium<sup>34</sup>), the general form of crime is intention, and the exceptional form of crime is accepted as negligence. In the criminal laws, the concept of good faith is not included in the moral elements of a crime or general theory of crime, and in the doctrine this concept is not considered in the moral elements of the crime. Even in the explanation of concepts such as intention and negligence, it is not possible to come across the concept of good faith.

In the criminal law, due to the similarity with the intent which contains the elements of knowing and demanding, it can be considered that the concept of good faith is a moral element of the crime or a form of appearance of the moral element. Indeed, definitions such as knowing, not knowing, and lack of knowledge are the result of the association of the concept of good faith with the intention. For this reason, it is quite natural to think that the concept of goodwill can be positioned within the moral element of crime in the general theory of crime. However, it should be noted, that the concept of good faith does not have a normative counterpart in crime theory, nor does this concept occur in the theory of crime. This concept is purely a private law concept and no legal result has been established in terms of the existence or absence of elements of the offense, whether the persons have good faith or not under the criminal law.

As it is known, criminal law is based on defect liability. The person who violates a certain penalty norm with intention or negligence, can be accused of the crime.

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- 26 L. H. Leigh and J. Eryl Hall Williams, *Criminal Law (United Kingdom)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 2, September 1994), s.49-52.
- 27 Scott Broyles, *Criminal Law (United States)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 41, April 2011), s.66-68.
- 28 Astolfo Di Amato, *Criminal Law (Italy)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 42, April 2011), s.81-86.
- 29 Mi Zhou and Shizhou Wang, *Criminal Law (China)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 21, January 2001), s.72, 73.
- 30 Emanuel Gross and Gabriel Hallevey, *Criminal Law (Israel)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 43, October 2011), s.45-52.
- 31 Lorena Bachmaier and Antonio del Moral García, *Criminal Law (Spain)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 46, October 2012), s.83-89.
- 32 J.A.W. (Hans) Lensing, *Criminal Law (Netherlands)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 11, June 1997), s.61-65.
- 33 Maria Paula Bonifácio Ribeiro de Faria, *Criminal Law (Portugal)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 34, March 2009), s.58-60.
- 34 Lieven Dupont and Cyrille Fijnaut, *Criminal Law (Belgium)*, in: International Encyclopaedia For Criminal Law (Edited by Prof. Frank Verbruggen; Dr. Vanessa Franssen), (Suppl. 1, December 1993), s.65-69.

As a moral element of the crime, the concept of intention is used to express the psychological link between the perpetrator and the action in criminal law. As a rule, crimes can be processed with intention. The elements of intent are the knowing and demanding of the objective elements of the crime(TPC a. 21).<sup>35</sup>

Objective elements are: primarily the act of the offense, the result, the bond of causality, the subject, the qualified elements, the perpetrator and the victim. Pursuant to Article 30 (1) of the Turkish Penal Code, a person is not considered intentional to act in the event that the objective elements of the offense are not known during the execution of the act.<sup>36</sup>

In criminal law, the state of knowing the elements of the crime in terms of the existence and absence of the offense is directed towards the objective elements of the crime. If the objective elements of the crime are not known, it can be said that there is no "good faith" but an error which removes the intention.

To clarify, unlike the meaning of good faith in civil law, if he is mistaken in the objective elements contrary to his duty of attention and care, although the person is capable of knowing the objective elements, it cannot be concluded that he acts with intention. In this case, if the crime is a crime that can be committed through negligence, the person can be punished within the framework of the provisions related to negligence crimes.<sup>37</sup> For example, a hunter sees a movement in the woods behind the bushes, and fires thinking that it is a rabbit. The person who thinks he has killed a rabbit has killed another person who is hunting there. In this case, an experienced hunter should not fire his weapon until he is certain that his target is really an animal, and should pay attention and care. If the hunter had not hurried and he had tries to perceive that the movement on the target, after waiting for a moment; he would not make a mistake and would not shoot a person. Thus, in this case, the hunter essentially killed a person, thinking that he was a rabbit, in a situation where he could know what the target was in the framework of his general life experiences and the characteristics of the concrete event, as a result of acting contrary to the obligation of attention and

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35 Roxin s.444, kn.18, 19; Gropp, s.151, 152; Wessels and Beulke and Satzger, § 7, s.90, kn.203; Heinrich, s.102, n.264; Kindhäuser, § 13, s.125, n.2,3; İzzet Özgenç, *Türk Ceza Hukuku Genel Hükümler*; (10. edn., Ankara 2014), s.236, 237; Mahmut Koca and İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler*; (10. edn., Ankara 2017, s.153; Mehmet Emin Artuk and Ahmet Gökçen and M. Emin Alşahin and Kerim Çakır, *Ceza Hukuku Genel Hükümler*; (11. edn., Ankara 2017), s.324-328.

36 Artuk-Gökçen-Alşahin-Çakır, s.561, 562.

37 Kindhäuser, § 27, s.217, kn.1; Özgenç, s.435.

care. In this case, it can be said that the hunter is capable of knowing the subject of the crime, but this does not show that he acted intentionally to kill. For this reason, the hunter, within the framework of Article 30/1 of the TPC, benefits from his error regarding the material element, and he can be punished for the crime of killing with negligence rather than a crime of intentional killing (Article 81).

The suspicion about the existence of one of the objective elements of the crime, the inability to be sure, eliminates the element of knowledge. In cases of an acceptance of the result it is considered as eventual intent and if it is believed that it will not happen, it is considered as conscious negligence.<sup>38</sup>

In civil law, a person is deemed to be acting in good faith if he does not know the existence of a necessary condition for the acquisition of a right or does not know the existence of a reason preventing the acquisition of the right or can benefit from the provisions of the Law regarding the protection of good faith. Although the person does not know this state, if he is in a position to know, he is not able to benefit from the provisions related to good faith. As will be remembered, even if the person is capable of knowing the objective elements in the criminal law and he has acted without knowing the objective elements in the concrete case, he is not considered to be acting intentionally and can benefit from the provisions of the error (Article 30/1).

Another type of moral element is negligence. Contrary to intention, the acts committed through negligence shall be punished when the law explicitly states. For this reason, negligence is an exceptional type of responsibility. Negligence is the realization of a behavior through not foreseeing the results specified in the legal definition of the crime, due to a violation of the obligation of care and attention. This is called unconscious (simple) negligence. If the result occurs, although the person does not desire the predicted result, it is called conscious negligence. (TPC Article 22)

If the person has knowingly and willingly carried out the material elements of the crime, , or because of his behavior contrary to the obligation of attention and care, caused a result taken under protection in the law, his criminal liability will be on the agenda. . At this point, whether or not a person is a good, moral, honorable, honest person in character has no meaning or significance. Criminal law is not interested in the person's general character, temperament, lifestyle, personality traits but it is

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38 Koca-Üzülmez, s.253.

interested in an act of intentional or negligent behavior that is prohibited under a particular form of crime.

A person who has committed a crime in breach of a specific criminal norm can be a truly honest, moral, honorable person in good human relations. However, such characteristics are not taken into account in the evaluation of the moral element of the act performed since in contemporary criminal law, the perpetrator is not important but the act is. This means that criminal law sanctions are imposed on the individual through criminal acts.

Perpetrator's good faith, honesty, chastity, having good morals, or known with these characteristics around him- are not related to the elements of the offense. But it can be argued as a defense argument for form an opinion in the presence of judicial authorities about the certainty of action.

In practice, however, it is seen that good faith is tried to be substituted for intent and that it is subject to defenses. . In some cases, subject to the Court of Cassation, it is possible to see examples of this:

*“... to his son, and regarding **“we didn't know that we would get permission from anywhere in the preparatory”** statements repeated by the defendants (...)”*<sup>39</sup>;

*“**the defendant's plea that the messages are sent in good faith**, the content of the messages and the movement of a specific purpose for the crime to occur and it is mandatory for the perpetrator to have a special intention to disrupt the peace and tranquility of the victim (...)”*<sup>40</sup>;

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39 The whole decision is as follows: “regarding to minutes of the hearing process, which reflects the conscience, documents, according to the reasons and content according to the criminal history; the scope of the power of attorney given from the defendant ... to his son, and regarding **“we didn't know that we would get permission from anywhere in the preparatory”** statements repeated by the defendants; there is not any inappropriate in the court's appreciation and evaluation (...)” Court of Cassation 18. CC.,10.13.2016, 2015/26922, 2016/4627.

40 The whole decision is as follows: “The defendant's brother was the assistant manager of the building in exchange for wiping the stairs, after the request to remove the defendant's brother from the building because the stairs are not wiped, the defendant sent 8 messages and the fact that the participant is therefore considered uncomfortable, **the defendant's plea that the messages are sent in good faith**, the content of the messages and the movement of a specific purpose for the crime to occur and it is mandatory for the perpetrator to have a special intention to disrupt the peace and tranquility of the victim, without evaluation of the dates and times of the messages and the HTS records relating to the call register between the parties, whether the action is committed only in order to disrupt the peace and tranquility of the participant, the decision of conviction with incomplete research and inadequate reasons (...)” Court of Cassation 18. CC., 11.10.2017, 2015/42027, 2017/10790.

*"In order to prove a claim based on a legal relationship or to document a real situation, to apply Article 211 of Turkish Penal Code No. 5237, which is arranged as a case requiring less punishment in case of fraud in the document, the perpetrator must have acted in order to provide evidence of an actual event. To prove the accuracy or reality is not a condition, **due to the fact that the perpetrator has sufficient faith in the accuracy of this event in good faith** (...)"<sup>41</sup>;*

As it is seen, the defendants' pleas regarding their actions in good faith, are primarily intended to demonstrate that they do not carry criminal intent. However, these defenses have no counterpart in terms of criminal law. Acting in good faith when performing a certain behavior has no effect which removes neither intent nor criminal responsibility. In terms of the criminal law technique, it is necessary to act on the concept of intention and its elements in order to point out that the moral element of the crime has not occurred. If the objective elements of the crime are not known, it is necessary to take into account Article 30/1 of the Turkish Penal Code. In this context, good faith, only as a general character trait or behavior in terms of occurrence of an act, can be subject a defense argument towards the establishment of a judgment.<sup>42</sup>

### **5.3. Court of Cassation Decisions in Which Good Faith is Used Instead of Intention**

Although the concept of good faith has no meaning in terms of the moral element of the crime, in some decisions of the Court of Cassation the concept of good faith is used in the evaluation of the moral element instead of intention and it is substituted for the intention itself:

41 The whole decision is as follows: *"In order to prove a claim based on a legal relationship or to document a real situation, to apply Article 211 of Turkish Penal Code No. 5237, which is arranged as a case requiring less punishment in case of fraud in the document, the perpetrator must have acted in order to provide evidence of an actual event. To prove the accuracy or reality is not a condition, **due to the fact that the perpetrator has sufficient faith in the accuracy of this event in good faith**, be able to determine the truth without doubt and to determine whether Article 211 of the TPC No. 5237 can be applied or not,... had taken a decision from the 1st Civil Court of First Instance concerning the miswriting of his mother's name and the other person who had a decision on his behalf ... also stated that his grandfather's last name was spelled incorrectly. A written decision instead of the legal status of the defendant after these conditions are investigated and deed has been determined (...)" **Court of Cassation 21. CC., 10.02.2016, 2015/5895, 2016/1057.***

42 " 'she approached the matter in good faith and did not make any threats, during the prosecution phase, the defendants came to their houses separately, they don't come together' despite of the aforementioned statement of the wife of the complainant it has sentenced an excess penalty regarding jointly threatening (...)" **Court of Cassation 4. CC. 23.12.2015, 2013/24281, 2015/40726.**

In the decision of the 12th Criminal Chamber of the Court of Cassation dated 19.04.2017, file numbered 2016/10599 and decision numbered 2017/3302, the following opinions and consideration were made which are incompatible assessments regarding universal principles applicable to criminal law, general principles of the moral element of the crime and in particular the principle of defect:

***“It is mandatory that the good faith rule in the Turkish Civil Code should be considered as a general legal principle and taken into account in the assessment of the types of crimes regulated in Article 65 of the 2863 numbered Code (...), to the extent permitted by the special status of the real estate or the region, he must also know that he can undertake construction and physical interventions within the framework of the permit procedure to be carried out in public institutions. The good faith of the person is not able to be mentioned in the case where he does not get the permission to undertake construction, although he is aware of the decision to register on the basis of structure or region”***<sup>43,44</sup>

The decision of the 8th Criminal Chamber of the Court of Cassation dated 11.03.2015, file numbered 2014/36892 and decision numbered 2015/13426, stated the following as the reversal reason and misused the concept of good faith rather than intention: *“It is understood from the pleas of defendants, registry of deeds, declarations*

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43 The whole decision is as follows: ***“It is mandatory that the good faith rule in the Turkish Civil Code should be considered as a general legal principle and taken into account in the assessment of the types of crimes regulated in Article 65 of the 2863 numbered Code. In other words, regarding the registration procedures made prior to the amendment of the Law No. 6498, there is no annotation in the declarations of the title deed of the real estate. Even if it is not announced by ordinary means at the place of registration decision, the statement regarding the perpetrator’s awareness of the registration of the real estate or the region cannot be ignored. For the person who knows that the real estate he owns or that he uses is in a protected regional site or it is required protection because of its qualifications, it is forbidden to make any modifications upon his will. To the extent permitted by the special status of the real estate or the region, he must also know that he can undertake construction and physical interventions within the framework of the permit procedure to be carried out in public institutions. The good faith of the person is not able to be mentioned in the case where he does not get the permission to undertake construction, although he is aware of the decision to register on the basis of structure or region. Hence, the perpetrator is not able to legally protected in both cases of whether intentional unauthorized construction and physical intervention by knowing the nature of the region or the real estate, or in case of initially not knowing but continuing to interfere after knowing through the minutes issued by public officials. It is also not possible to talk about the good faith of the perpetrator in terms of acts carried out on unlawful grounds. In other words, (...) In the case of construction and physical intervention on the immovable property belonging to the treasury or the state, it shall not be effective whether the decision of the registration is declared or not by ordinary means at the place of registration decision. In this case, it is necessary to acknowledge that the perpetrator has interfered with the immovable that the perpetrator is not the owner or does not have the legal right to use and this act is deprived of legal protection. The search for a proclamation rule in terms of construction and physical interventions carried out on the unlawful ground does not correspond to the usual flow of life and the principles of logic (...)”***

44 Also for a similar decision ***Court of Cassation 12. CC., 15/02/2018, 2016/1354, 2018/1617; Court of Cassation 12. CC., 08.02.2018, 2015/16583, 2018/1268.***

*of the technical and local experts that the defendants infringed the field located in the 2516 numbered parcel by planting it. Their acts are the crime of infringement to the ground which is not regulated in Article 154/2 of TPC. Regarding the **good faith** cannot be accept in the cadastral areas, this decision must be subject to reversal."*

The consideration of the concept of "good faith" expressed in these decisions of the Court of Cassation as a criterion in terms of criminal law and criminal offenses is inappropriate. There is no normative basis to refer to the concept of good faith in the evaluation of the elements of the crime (especially the moral element). In such cases, it should be investigated whether the perpetrator acted intentionally and willingly in the objective elements of the offense. If the objective elements known during the execution of the act of the crime, it is accepted that intention exists. If it is not known, an error can be in the objective elements of the crime and the error on the objective elements removes one's intention (Art. 30/1).

As we have stated before, the fact that a person is in a position to know a particular situation or phenomenon does not mean that he does indeed know or that a fact in criminal law can be known is not indicative of the existence of intent. In such cases, if a person is able to know a particular fact, because of his behavior which is contrary to the obligation of attention and care and has caused a certain result that has been sanctioned in the law, his responsibility for the crime can be ascribed (Art. 30/1).

#### **5.4. Other Cases of Court of Cassation Decisions Which Include the Concept of Good Faith**

##### **5.4.1. Good Faith in the Implementation of Effective Remorse Provisions**

In addition to the elements of the crime, there are other cases in which the Court of Cassation has made decisions which relied on the concept of good faith. The first of these is effective remorse.

In Turkish Penal Code No. 5237, effective remorse after the crime has been completed, is accepted as a personal reason that eliminates punishment or requires a less penalty, for the offenses whose nature are appropriate for the effective remorse and which mentioned in the penal code itself.<sup>45</sup>

45 For further information on effective remorse: Kayıhan İçel, *Ceza Hukuku Genel Hükümler*, (4. edn. İstanbul 2017), s.535, 536; Nur Centel and Hamide Zafer and Özlem Yenerer Çakmut, *Türk Ceza Hukukuna Giriş*, (10. edn., İstanbul 2017), s.478, 479; Artuk-Gökçen-Alşahin-Çakır, s.635; Koca-Üzülmez, s.437; Timur Demirbaş, *Ceza Hukuku Genel Hükümler*, (12. edn., Ankara 2017), s.478, 479.

The decision of the 15th Criminal Chamber of the Court of Cassation dated 16.03.2017, file numbered 2014/18119 and decision numbered 2017/7650 as follows: “(...) *It also stated that the intervening parties declared that they estimated the amount of the loss and the defendant paid the amount of 26.180,00 TRY which can be seen in the petition dated 17.10.2011. It has not been considerate to apply Article 168/1 of the Turkish Penal Code, for the defendant **who acted in good faith** and showed remorse and sentenced more punishment than it requires.*”<sup>46</sup>

As it seems, the Court of Cassation considers the behaviors of the defendant which resulted in the benefit of effective remorse, to be good faith. To state it clearly, the effective remorse provisions which are applied after the crime is committed, regulate to behaviors that include regret to eliminate the harmful consequences of the crime committed by the person. In this respect, a perpetrator’s will to eliminate the harm caused by the crime cannot be explained by the concept of “good faith”, rather by the concept of “remorse” which is regret stemming from a past incident. Since good faith has a meaning in terms of whether a fact or a legal situation is known or not, the use of this concept in the institution of effective remorse is accurate neither conceptually nor legally.

#### **5.4.2. Good Faith in the Implementation of Alternative Institutions for Imprisonment**

The Court of Cassation uses the concept of good faith in terms of the conditions of the alternative institutions for imprisonment.

The decision of the 17th Criminal Chamber of the Court of Cassation dated 22.06.2016, file numbered 2015/16293 and decision numbered 2016/9396 gave the following as the reversal reason: “*While the defendant was judged, his personality was evaluated positively and in accordance with Article 51 of the Turkish Penal Code. The subject of the crime, which is a stereo, has been delivered to the complainant in an undamaged manner and the defendant does not have any criminal record. The Court stated that the defendant did not fully compensate for the damages of the complainant,*

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46 The whole decision is as follows: “*Although the attorney of the intervening party stated that the partial payment of the defendant shows us that he did not give his consent in accordance with Article 168/4 of the Turkish Penal Code, the damage suffered by the intervening party did not determine in the financial expert report. It stated that the amount of damage based on the estimation. It also stated that the intervening parties declared that they estimated the amount of the loss and the defendant paid the amount of 26.180,00 TRY which can be seen in the petition dated 17.10.2011. It has not been considerate to apply Article 168/1 of the Turkish Penal Code, for the defendant **who acted in good faith** and showed remorse, and sentenced more punishment than it requires.*”

*he did act in favor of the other defendant and complainants and he did not take any action to show his **good faith** towards them. In this respect, it is clear that the conditions of the article 231/5 of the Code of Criminal Procedure did not occur. Deciding not to implement Article 231 of the Code of Criminal Procedure with the unlawful justification that there is no room for its implementation is a reason for reversal."*

The assessment of the Court of Cassation regarding this point is appropriate. It is wrong for the Local Court to accept the defendant's actions against the complainants whether it is in good faith or not, as a reason for the deferment of the announcement of the verdict since the conditions of implementation of this institution are determined in a concrete and legal way in Criminal Procedure Law article 231. There is no requirement in the conditions of application of this institution that the defendant must act in good faith towards the complainants. In particular, the condition for the compensation of damage is extremely clear and objective (CPL art. 231/6-c). If the damages are paid, the condition is met. This provision does not apply unless the damages are paid.

As a subjective condition regarding the implementation of this institution, the court should be convinced that the defendant will not commit a crime again considering his personality traits, attitudes and behaviors at the hearing (CPL art. 231/6-b). It is not even possible to evaluate the concept of good faith in terms of this condition. In fact, the defendant's personality traits are not specific to a particular phenomenon or case, and they require a general evaluation judgment. Rather, good faith relates to the recognition of a specific, concrete phenomenon, fact or situation.

The defendant's attitude and behavior during the trial can be expressed as, statements and defenses that facilitate the work of the judicial authorities to reveal the material truth, expressing remorse for the act he committed, and behaviors that are conducive to arousing the conviction that the person will not commit a crime again in the presence of the court. Therefore, he would prove that he will not commit a crime again. As we have stated before, this concept can be explained only with the concept of "remorse", but it is certainly not the concept of "good faith".

## 6. Conclusion

Good faith is unfamiliar to criminal law because it is a private law-based concept. In private law, the incognizance regarding the absence of a necessary condition for the acquisition of a right or the incognizance regarding the existence of a reason to prevent the acquisition of the right or the impossibility of the cognizance of such

situation shows good faith and it can be protected when the Civil Code establishes a legal conclusion to good faith.

In criminal law, the concept of good faith has no normative counterpart in crime theory. At the same time, the doctrine of criminal law does not include the notion of goodwill within the theory of crime. Good faith is a purely private law concept and no legal result has been attributed to the existence or absence of elements of the offense, whether or not the persons act in good faith in criminal law. Accordingly, in order to be able to decide on the confiscation of goods, the goods subject to confiscation are required to be owned by the third parties who act in good faith (art. 54/1). In the confiscation of earnings, it stated that the person who acquired the subject should not be able to benefit from the provisions of Turkish Civil Code numbered 4721 regarding the protection of good faith.

When considered in terms of the general theory of crime, the concept of good faith is similar to intention because it contains the elements of knowing and demanding, and therefore brings to mind the idea of the moral element of the crime or a form of appearance of the moral element. However, since the concept of good faith does not have a normative counterpart in crime theory, it is not possible to accept it as a form of appearance of the moral element of the crime or as a form of view of the moral element, nor can it be a substitute for intention. Because intention is the deliberate and desired realization of the objective elements of the crime, it has a completely different meaning and function to the concept of good faith. In short, no legal conclusion has been established in terms of the existence or absence of the elements of the offense, whether the persons are in good faith or not in the criminal law.

The Court of Cassation has used the concept of good faith in the evaluation of the moral element rather than the intention. Since the concept of good faith does not have a normative basis, it is an erroneous application to consider this concept as a criterion for the types of crime that are the subject of the trial. The psychological link between the act and the perpetrator refers to the concept of intention (and negligence), and it must determine whether the perpetrator is aware of the objective elements of the offense and whether he is willing to commit the crime. If it is not known, an error can be mentioned in the objective elements of the crime and the error on the objective elements removes one's intention (Art. 30/1).

The fact that a person *can* know a particular situation or phenomenon does not mean that he *does* know it and that a fact is able to be known in terms of criminal law does not indicate the existence of intent. In fact, the difference between intention and good faith manifests itself at this point. In such cases, if a person is capable of knowing a particular phenomenon, because of his behavior contrary to the obligation of attention and care and has caused a certain result which sanctioned in the law, his responsibility for the crime by crime can be ascribed Art. 30/1).

The Court of Cassation has used the concept of good faith in terms of effective remorse provisions and the conditions of alternative institutions for imprisonment. In our opinion, the behavior of the person who committed a crime, to eliminate the damages caused by the crime, or some of the behaviors that he displayed after the crime, can be explained by the notion of remorse and it cannot be considered the same as the concept of good faith. Since good faith makes sense in terms of whether a fact or a legal situation is known or not, the consideration of these institutions in terms of their conditions is not appropriate in both conceptual and legal aspects.

**Grant Support:** Authors received no financial support for this work.

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