

# Driving under the Influence of Alcohol and Drugs\*

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## Abstract

Because of the importance of providing the danger which occurs from driving under the influence of alcohol, drugs or other reasons the turkish lawmaker has regulated this act as an offence. In this article we tried to analyse this offence and emphasise the problematic views such as the limit of blood alcohol content, participation or aggregation. We hope to at least give an idea about the discussions about this certain offence.

**Keywords:** Endangering the traffic safety, endangerment offence, damage offence, drunk driving, traffic law, alcohol, drugs.

## I. In General

Every year in Turkey many injuries and deaths occur because of traffic accidents. The researches show that in year 2015 %2.48 of these accidents are due to driving under the influence of alcohol<sup>1</sup>. In order to prevent these kinds of accidents which occur because of drunk driving, the turkish lawmaker has choosen, under certain circumstances, to regulate driving under the influence of alcohol and drugs as an offence.

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\* Geliş Tarihi: 18.10.2016, Kabul Tarihi: 23.12.2016.

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<sup>1</sup> <http://www.kgm.gov.tr/SiteCollectionDocuments/KGMdocuments/Trafik/Trafik KazalariOzeti2015.pdf>, Tablo 12. Online (14.10.2016).

The offence of “driving under the influence of alcohol and drugs” is regulated in Article 179 Paragraph 3 under the title of Endangering the Traffic Safety in the Turkish Penal Code (TPC). According to the paragraph:

(3) *“Any person who uses a vehicle who is unable to direct or control such safely due to the influence of alcohol or drugs or other reasons, shall be sentenced in accordance with the provisions of the above section.”*<sup>2</sup>

According to the above section:

(2) *“Any person who directs and controls a land, sea, air or railway transportation vehicle such to risk the life, health or property of others shall be sentenced to a penalty of imprisonment for a term of up to two years.”*<sup>3</sup>

So the two year imprisonment will also be valid for paragraph 3.

## II. The Protected Legal Interest

The purpose of this offence is to protect the public order and safety by preventing the acts which endanger the traffic safety. And with the public and traffic safety we can say that the right to live, corporal integrity and the right of property are also protected<sup>4</sup>.

Another matter which should be examined under this title is that this offence is an endangerment offence. We can separate the offences as endangerment and damage offences. The offences which require a damage to occur on the protected legal interest<sup>5</sup> of the

<sup>2</sup> Edward Grieves/Vahit Bıçak, *The Turkish Penal Code*, September 2007, s. 108.

<sup>3</sup> Grieves/Bıçak, s. 108.

<sup>4</sup> Murat Önok, “Trafik Güvenliğini Tehlikeye Sokma Suçu (TCK m. 179)”, *Türkiye Barolar Birliği Dergisi*, S. 121, Kasım-Aralık, 2015, s. 161; Özlem Yenerer Çakmut, “5237 Sayılı Türk Ceza Kanunu’nda Trafik Güvenliğini Tehlikeye Sokma Suçları (TCK m. 179-180)”, *Alman – Türk Karşılaştırmalı Ceza Hukuku*, C. III, İstanbul, Yeditepe Üniversitesi, s. 775. Sibel Kılıçarslan İsfen, *Alman ve Türk Ceza Hukukunda Trafik Güvenliğini Kasten Tehlikeye Sokma Suçları*, Ankara, Seçkin, 2013, s. 71.

<sup>5</sup> Most authors make this differentiation between damage and danger crimes based on the object of the crime. Mahmut Koca/İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler*, 9. Baskı, Ankara, Seçkin, 2016, s. 113.

offence are called damage offences. And the offences which require only an endangerment to the protected legal interest of the offence are called endangerment offences<sup>6</sup>. For an endangerment offence a damage is not requested because the risk of a danger itself is found punishable. The endangerment offences are also divided into two as the concrete and abstract endangerment offences. To talk about a concrete endangerment offence the act against the norm should put the protected legal interest of the offence into a concrete endangerment. And the judge has to research if the act really caused a danger. For example article 179 paragraph 1 and 2 are concrete endangerment offences. For the abstract endangerment offences the judge does not have to research if the act caused a danger or not, the execution of the legally described act itself is enough to be responsible of this offence. Because there is an acceptance that the legally described act forms an endangerment against the protected legal interest of the offence. Due to these explanations we can say that the offence in art. 179 prg. 3 is an abstract endangerment offence.

### **III. The Material Elements**

#### **A. The Offender-Victim**

This is an offence which demands a special status of the offender. Only a person who uses a vehicle who is unable to direct or control such safely due to the influence of alcohol or drugs or other reasons can be the offender<sup>7</sup>. Anyone else who does not provide this special status cannot be the offender.

The victim is generally the public. It does not have to be a specific person.

#### **B. The Object of the Offence**

The object of an offence is what or whom the legal act was taken on<sup>8</sup>. The legal act, driving is taken on the traffic. So we can say that

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<sup>6</sup> Koray Doğan, "Tehlike Suçları ile Zarar Suçları Arasındaki Suçların İçtimalı Sorunu", *Türkiye Adalet Akademisi Dergisi*, S. 16, Ocak 2014, s. 181 vd.

<sup>7</sup> Önok, s. 162; vs. Mahmut Koca, Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu (TCK 179/2,3), *Kazancı Hakemli Hukuk Dergisi*, Sayı 11, Temmuz 2005, s. 107.

<sup>8</sup> Koca/Üzülmez, s. 111.

the traffic is the object of the offence<sup>9</sup>. On the other and, a vehicle is not the object of the crime, but the object for committing the crime. The definition of vehicle according to the Highway Traffic Code (HTC) is: "Vehicle is the common name of engined, non- engined and special purposed transportations, construction vehicles and tractors which can be used on the highway". By the term of vehicle we should understand all sorts of engined and non-engined vehicles which are suitable for transportation<sup>10</sup>. So it should be stated that the act is not only taken on road vehicles. Railroad, sea and air vehicles are also the objects of the offence. Because this offence is mostly committed on the highways, we will focus on highway vehicles.

It does not matter if the vehicle works with an engine or not. The engined vehicles can work with electricity, gasoline or any other fuel. For example, trucks, automobiles, busses, motorcycles, electrical scooters, quad bikes, tractors, golf carts are qualified as vehicles. There is even a decision of the Bayerische Oberste Landesgericht (BayObLG) which recognises an electrical wheelchair as a vehicle<sup>11</sup>.

The non-engined vehicles are vehicles which work by human or animal power like bicycles or carriages. Scooters, sledges and inline skates are also considered as vehicles<sup>12</sup>.

Vehicles should be used on the highway. In the HTC, highway is defined as: "Terrain strips, bridges and areas which are open to the use of the public for the traffic". According to the HTC, traffic is the states and actions of pedestrians, animals and vehicles on the

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<sup>9</sup> Önok says that the object is the traffic order and safety, *Trafik Güvenliğini Tehlikeye Sokma Suçu*, s. 163.

<sup>10</sup> Urs Kindhäuser, *Strafrecht Besonderer Teil I*, 4. Auflage, Baden- Baden, Nomos, 2009, s. 384, kn. 5.

<sup>11</sup> Bay ObLG v. 13.7.2000 – 2 St RR 118/2000, NstZ- RR 2001.

<sup>12</sup> Karl Lackner/Kristian Kühl, *StGB Strafgesetzbuch Kommentar*, 27. Auflage, C.H. Beck, München, 2011, § 315c, kn. 3; Ali Rıza Çınar, "Trafik Güvenliğini Tehlikeye Sokma Suçlarından Türk Ceza Yasasının 179/3. Maddesindeki Alkollü Araç Kullanma Suçu", *Fasikül Aylık Hukuk Dergisi*, S. 2, Eylül, 2010, s. 10.

highway. So to commit this offence, there has to be an area which is open to the use of the public<sup>13</sup>. This offence cannot be committed in special areas which only certain people are allowed (The parking lot for employees of a company)<sup>14</sup>.

### C. Act

Using a vehicle when unable to direct or control such safely due to the influence of alcohol or drugs or other reasons is the typical act of this offence. As it can be understood from the text, driving under the influence of alcohol or drugs itself isn't an offence. The person should also not be able to direct or control the vehicle safely. Not being able to drive safely should be determined for each incident. It can be because of alcohol, drugs or another reason.

One of the reasons for driving unsafely is the influence of alcohol. Infact it is the most common case in the practice. It is known that alcohol has negative influences on the human body, but how does this effect driving safely?

First of all alcohol effects individuals mentally. It weakens the feeling of responsibility and directs them to reckless acts<sup>15</sup>. Individuals who are under the influence of alcohol are more prone to take risks<sup>16</sup>.

There are also many physical negative effects of alcohol. A decrease of concentration and difficulty of understanding is one of the first indications<sup>17</sup>. The vision turns blurry<sup>18</sup> and the perception of

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<sup>13</sup> İsfen, s. 79.; Ali Rıza Çınar, s. 10.

<sup>14</sup> İsfen, s. 79

<sup>15</sup> Klaus Peter Becker, **Alkohol im Straßenverkehr**, Deutscher Anwalt Verlag, Bonn, 2004, s. 76, kn. 119.

<sup>16</sup> Ersin Budak/İbrahim Taymur, "Alkol ve Madde Etkisi Altında Araç Kullanımı ile İlişkili Psikolojik Faktörler", (Online) [http://www.cappsy.org/archives/vol7/no3/cap\\_07\\_03\\_10.pdf](http://www.cappsy.org/archives/vol7/no3/cap_07_03_10.pdf), 21.09.2016.

<sup>17</sup> Alexander Reineke, **Der wegen Trunkenheit vermindert schuldfähige Täter**, Verlag Dr. Kovač, Hamburg, 2010, s. 74-75.

<sup>18</sup> Faruk Aşıcıoğlu, **Trafikte Güvenli Sürüş Açısından Alkol**, İstanbul, Beta, 2009, s. 19.

colors get damaged<sup>19</sup>. The automatism which develops with driving experience is lost, so the automatic reactions of the driver could be managed only with a special effort<sup>20</sup>.

It is clear that these effects will effect any persons ability to drive safely. But the influence of alcohol can be different on each person. For that reason the legislation did not put a general limit to the ratio of alcohol, but limited it by saying not being able to drive safely. That's why a person with a ratio of 0.2 promile can be punished because he lost his ability to drive safely but a person with a ratio of 0.9 promile may not be punished because he did not lose that ability. But it should also be stated that the Institution of Forensic Medicine<sup>21</sup> has decided that almost everyone with the ratio above 1.0 promiles loses their ability to drive safely<sup>22</sup>. And the High Court (Yargıtay) has also such decisions<sup>23</sup>. The legislator legislated these decisions in 2013. According to the HTC article 48 paragraf 6: "Article 179 paragraf three of the Turkish Penal Code will also be implemented on the drivers who were caught and determined that they were under the influence of more than 1.0 promile alcohol". This means it is accepted that the drivers under the influence of alcohol above 1.0 promilles have lost their ability to drive safely<sup>24</sup>. So the drivers above 1.0 promilles without any need for further researches will be punished. For the drivers under 1.0 promilles there is a need of expressive indications which indicate the loss of the ability of driving safely. The lower the ratio of alcohol the more and certain should the indications be<sup>25</sup>. The Instution of Forensic

<sup>19</sup> Peter König, § 316, **Leipziger Kommentar**, 12. Auflage, Band 11, De Gruyter Recht, Berlin, 2008, kn. 16a.

<sup>20</sup> "Türk Ceza Yasasına Göre Alkollü Araç Kullanmanın Güvenli Sürüş Yeteneğine Etkileri Çalıştay Sonuç Bildirgesi", **Adli Bilimler Dergisi**, s. 74.

<sup>21</sup> Adli Tıp Kurumu

<sup>22</sup> Faruk Aşıcıoğlu/Belkıs Yapar/Aliye Tütüncüler/Ahmet Belce, "Trafik Güvenliğini Tehlikeye Sokma Suçu Açısından Alkol", **Adli Tıp Dergisi**, C. 23, S. 3, s. 15.

<sup>23</sup> 12. Ceza Dairesi E. 2011/5656 K. 2011/3668 from İsfen, s. 112, dn. 213.

<sup>24</sup> Also İsfen, s. 109, 110, 112; Cengiz Apaydın, **Trafik Güvenliğini Tehlikeye Sokma Suçları ve Trafik Ceza Hukuku**, İstanbul, Ege, 2015, s. 77.

<sup>25</sup> Sesim Soyer Güleç, "Yeni Türk Ceza Kanununda Trafik Güvenliğine Karşı İşlenen Suçlar", **HPD**, S.9, Aralık, 2006, s. 177; Önok, s. 177, 178.

Medicine agrees that the drivers which have a ratio of 0.30 promille blood alcohol content do not lose their ability of driving safely. For the ones between 0.30 and 1.00 promilles the loss of this ability can be detected with an urgent doctor examination<sup>26</sup>. Even if an alcohol measurement is not made it is still possible to be sentenced by this offence. For example we have to accept that this offence is the matter when the driver falls asleep while driving or if he is not able to stand up. These indications must be due to the influence of alcohol. Or else everyday mistakes that all drivers can make will not indicate that the driver cannot direct or control safely.

Drugs are defined as substances which cause a narcotise effect, an unstoppable desire and need and a physical and spiritual addiction<sup>27</sup>. Cocaine, morphine, marihuana, heroin could be given as examples. A person who drives a vehicle who is unable to drive safely under the influence of these substances will also be sentenced with this offence.(179/3)

Another matter which brings up this offence is when a person uses a vehicle who is unable to direct or control such safely due to other reasons. What should be understood by "other reasons" is, every situation which arises from the driver<sup>28</sup> that prevents the driver from directing or controlling the vehicle safely. In the preamble of the article, driving while very tired and sleepy is given as an example. Another example could be a person who got his licence but in time who lost an important level of his senses and drives a vehicle. Such a person can be also the offender of this offence.

#### IV. The Moral Element

This offence can be committed only with intent. Because for a certain offence to be committed with negligence should be regulated in the legislation.

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<sup>26</sup> Aşıcıoğlu/ Yapar/ Tütüncüler/ Belce, s. 15.

<sup>27</sup> Fatma Karakaş Doğan, **Türk Ceza Hukukunda Uyuşturucu Veya Uyarıcı Madde Suçları**, İstanbul, Legal, 2015, s. 9.

<sup>28</sup> Güleç, s. 173.

## V. Unlawfulness

From the justifications like self defence, consent of the person concerned, exercise of a right can come in mind. But because the protected legal interest is the public safety and the victim is the public, we can not speak of a consent of a certain person. That's why consent of the person concerned will not be a justification.

## VI. Culpability

From the grounds precluding culpability we can speak of the state of necessity. But to accept the existence of the state of necessity the offender must prove that he had no other way to act. For example it is not a state of necessity when a group of friends get out of a bar and the only one who knows how to drive drives even he is unable to drive safely. Because they can always go home with a taxi. But if there is a need of an urgent medical attention then we can speak of the state of necessity<sup>29</sup>.

When the offender is under the influence of alcohol or drugs which was taken involuntarily the culpability will be precluded and he will not be punished. But if the offender took these substances voluntarily then he will be punished as his culpability was complete<sup>30</sup>.

## VII. Types of Manifestation of the Offence

### A. Attempt

In Turkish law to talk about an attempt a person should directly begin the execution of an offence he intends to commit through suitable conduct, but should be unable to complete such due to circumstances beyond his control.

It is mostly agreed that attempt is not possible in offences which the result is attached to the act because we can not separate the act

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<sup>29</sup> Koca, Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu (TCK 179/2,3), s. 104.

<sup>30</sup> Önok, s. 182, 183.



and result spatial and temporal<sup>31</sup> or in offences which only require an act and don't have a result. In other words, as soon as the act is done the offence is committed, so there is no phase for an attempt. Insult<sup>32</sup> and theft<sup>33</sup> are one of the most given examples. Driving under the influence of alcohol and drugs is also an offence which does not have a result. Because the act cannot be separated and the offence occurs as soon as the act is done. So an attempt cannot be possible<sup>34</sup>. According to İsfen if a person who is not able to direct or control a vehicle safely gets into a car and starts the engine but fails to run the car because the engine breaks, an attempt is possible because all conditions of an attempt has realised<sup>35</sup>.

## B. Participation

Because this is an offence which demands the offenders special status, it is mostly agreed in the turkish doctrine that only instigation and assistance is possible for these offences, a joint offence is not possible<sup>36</sup>. Koca is in the opinion that a joint offence is possible only if the vehicle is used together<sup>37</sup>. We must state that we are also in the same opinion. When more than one individuals have the special status which this offence demands and they all play an active role as an offender why shouldn't we speak about a joint offence? If we are to give an example; when two persons who are unable to direct or control a vehicle safely, get into a car and one controls the steering wheel, the other who is sitting in the other seat controls the gas pedal then there are two persons who fulfil the special status of the

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<sup>31</sup> Hakan Hakeri, **Ceza Hukuku Genel Hükümler**, 16. Baskı, Ankara, Adalet, 2013, s. 471; Timur Demirbaş, **Ceza Hukuku Genel Hükümler**, 10. Baskı, Ankara, Seçkin, 2014, s. 471, 472.

<sup>32</sup> Koca/Üzülmez, s. 416.

<sup>33</sup> Adem Sözüer, **Suçta Teşebbüs**, İstanbul, Kazancı, 1994, s. 230.

<sup>34</sup> Also: Emine Eylem Aksoy Retornaz, "Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu", **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi**, 2012, S. 1, s. 59; Çakmut, s. 788; Apaydın, s. 101.

<sup>35</sup> İsfen, s. 147, 148; Önok also agrees on this example, Önok, s. 184, dn. 127.

<sup>36</sup> İsfen, s. 148; Önok, s. 188; Güleç, s. 182.

<sup>37</sup> Koca, Trafik Güvenliğini Kasten Tehlikeye Sokma Suçu (TCK 179/2,3), s. 110.

offender, so there is a joint offence. Another good example would be a tandem bicycle. A tandem bicycle usually has two seats and two pedals for each person. The person in the front seat controls the handlebars but they both can pedal. So as long as they both pedal in the condition which they are unable to direct or control a vehicle safely due to the influence of alcohol or drugs or any other reason, they both will commit this offence and there will be a joint offence<sup>38</sup>.

### C. Aggregation of Offences

The first thing we should consider in the aggregation of offences is when paragraph 2 and 3 of article 179 both occur at the same time. That means a person who uses a vehicle who is unable to direct or control such safely due to the influence of alcohol or drugs or other reasons causes a concrete danger of risking the life, health or property of others. In this situation according to the majority of the doctrine there is a formal aggregation<sup>39</sup>.

When a damage occurs as a result of an endangerment offence, in other words when death or injury occurs as a result of this offence, again formal aggregation will be the matter according to the majority<sup>40</sup>. Some authors are in the opinion that this is a case of an irreducible aggregation<sup>41 42</sup>. The High Court (Yargıtay) used to decide that there is a formal aggregation because there is more than one offence with a single act, so the offender should be sentenced for the offence which requires the heaviest punishment<sup>43</sup>. But in its newest decisions the High Court (Yargıtay) decides that if both an endangerment and a damage offence was committed with a single act, the offender must be sentenced with the punishment of the damage offence<sup>44</sup>.

<sup>38</sup> Cf. König, LK, §315c, kn. 38.

<sup>39</sup> Güleç, s. 183; Önok, s. 187; İsfen, s. 149.

<sup>40</sup> Güleç, s. 183; Çakmut, s. 789, İsfen, s. 150.

<sup>41</sup> Görünüşte içtima

<sup>42</sup> Muhammed Demirel, "Karar Analizi: Tehlike Suçları- Zarar Suçları Arasındaki İlişkinin İçtima Kuralları Kapsamında Değerlendirilmesi", **İstanbul Üniversitesi Hukuk Fakültesi Mecmuası**, C. LXXI, S. 1, 2013, s. 1484; Hakeri, s. 595, 596.

<sup>43</sup> 17.1.2012, 15930/177 from Önok, s. 185, dn. 133.

<sup>44</sup> 12. Ceza Dairesi E. 2014/5384 K. 2015/1493, 12. Ceza Dairesi E. 2014/8555 K. 2015/1717, 12. Ceza Dairesi E. 2014/13189 K. 2015/5934 from Apaydın, s. 186 vd.

Another matter that should be considered is the relation between TPC 179/3 and HTC 48. According to the Misdemeanour Code Article 15/3 if an act is described both as an offence and misdemeanour, sanctions will be imposed only for offences. But in 2013 some changes were made in the HTC. According to these changes if it is determined that a driver is under the influence of alcohol with a ratio more than 0.50 promilles even if his act is an offence he will also have to pay 700 Turkish Liras. This means an exception of the aggregation practice was made. So for example if a driver was caught driving under the influence of 1,21 promille alcohol, he or she will be sentenced with imprisonment according to the Turkish Penal Code and will have to pay 700 Turkish Liras.

If a driver is caught driving under the influence of drugs, he or she will pay 3600 Turkish Liras and if the conditions of TPC 179/3 is accepted he or she will be sentenced with prison according to the HTC 48/8. This imprisonment will be between three months and two years.

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