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Retributive or Restorative?: A Descriptive Research on the Criminal Justice Understandings of Law Enforcements in Istanbul(*)

Cezalandırıcı mı yoksa Onarıcı mı?: İstanbul'da Çalışan Hukukçuların Ceza Adaleti Anlayışları Üzerine Betimsel Bir Çalışma

Res. Asst. Dr. Gülçin CEBECİOĞLU(**)

Abstract

The main purpose of this study is the role of punishment philosophies in the determination of punishments; from this point of view, it is to determine the understanding of criminal justice that dominates the Turkish Criminal Justice system. In this context, among the criminal justice theories, *retributive* justice seeing punishment as the first and primary way of dealing with injustices in the criminal justice system and believes that justice is established when the courts sentence the defendants, and *restorative* justice questioning the adequacy and necessity of this system and renewing the sense of justice with the alternatives it offers are focused on. Here, the parameters through which law enforcement judges, prosecutors and lawyers evaluate these two dimensions in the determination of penalties are aimed to be revealed. The data of the research, in which the qualitative research method was used, were obtained from in-depth interviews with 62 judges, prosecutors and lawyers working in criminal law in Istanbul. The data obtained were analyzed using the *Maxqda Plus 2020.4* computer program. As a result, it was observed that the law enforcement officers did not focus on only one dimension of the punishment, but made different evaluations according to the crime committed, the severity of the crime, the damage it caused, and the characteristics of the accused. The most striking point here is that clear-cut distinctions cannot be seen between retributive and restorative features contrary to what is claimed in foreign researches.

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In this research, the relevant data of the doctoral thesis titled "*Socıo-Economic Factors Affecting Decision-Making Processes of Judges, Prosecutors and Lawyers Working in Criminal Law*" were used.

(**) Kirsehir Ahi Evran University, Arts and Sciences Faculty, Department of Sociology, Kirsehir - Türkiye
E-posta: aktas_glcn@hotmail.com
Orcid No: https://orcid.org/0000-0003-3036-9717

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Punishment, Criminal justice, Retributivism, Restorative Justice.

Öz

Bu çalışmanın temel amacı cezaların belirlenmesi sürecinde cezalandırma felsefelerinin rolünün; bu noktadan hareketle de Türk Ceza Adaleti sistemine hakim ceza adaleti anlayışının belirlenmesidir. Bu bağlamda ceza adaleti teorileri içerisinde ceza adaleti sisteminde adaletsizliklerle baş edebilmenin ilk ve öncelikli yolunun cezalandırma olarak kabul edildiği ve mahkemeler sanıklara ceza verdiklerinde adaletin tesis edildiğine inanıldığı cezalandırıcı adalet ile mevcut cezalandırıcı adalet anlayışının hakim olduğu bu sistemin yeterliliği ve gerekliliğini sorgulayan ve sunduğu alternatiflerle adalet duygusunu yeniden inşa etmeye çalışan onarıcı adalete odaklanılmıştır. Burada da kanun uygulayıcıları hakim, savcı ve avukatların cezaların belirlenmesi sürecinde bu iki boyutu hangi parametreler üzerinden değerlendirdikleri ortaya çıkarılmaya çalışılmıştır. Nitel araştırma yöntemi kullanılan çalışmanın verileri İstanbul'da ceza hukuku alanında görev yapan 62 hakim, savcı ve avukatla yapılan derinlemesine mülakatlardan elde edilmiştir. Elde edilen veriler Maxqda Plus 2020.4 bilgisayar programı kullanılarak analiz edilmiştir. Çalışma sonucunda kanun uygulayıcılarının cezaların yalnızca bir boyutuna odaklanmadıkları, işlenen suça, suçun ağırlığına, ortaya çıkardığı zarara, sanığın özelliklerine göre değişen değerlendirmelerde bulundukları göze çarpmıştır. Burada en dikkat çekici nokta, yabancı araştırmalarda iddia edilenin aksine, cezalandırıcı ve onarıcı özellikler arasında kesin ayrımların görülmemesidir.

Anahtar Kelimeler

Ceza, Ceza Adaleti, Cezalandırıcılık, Caydırıcılık, Onarıcılık.

INTRODUCTION

Throughout the history of humanity, different approaches and acceptances have been displayed regarding how to react to criminal acts, that has led to the emergence of different senses of justice[1]. These different senses of justice are accepted as the main reason for the differences in punishments and their relations with many other factors such as the ideology and personality traits of law enforcement are among the issues that are discussed[2].

Among the criminal justice theories that constitute the theoretical framework of the research, retributive justice focuses on the necessity of punishing the act of the accused in its most general form while the focus is on the need for a restorative response to the accused in return for his crime in restorative justice. In this context, since crime is seen as a violation of the legal order in the understanding of retributive justice, criminality of the perpetrator and the gravity of the crime are taken into consideration more. On the other hand, in restorative justice, which

1 Arthur J. Lurigio vd., "Understanding Judges' Sentencing Decisions", *Applications of Heuristics and Biases to Social Issues*, ed. Linda Heath vd. (Boston, MA: Springer, 1994), 93.

2 John S. Carroll vd., "Sentencing Goals, Causal Attributions, Ideology, And Personality", Journal of Personality and Social Psychology 52/1 (1987), 107.

sees crime as destruction and damage, the main reasons underlying the criminal behavior of the accused as well as the severity of the crime are tried to be revealed. Therefore, while punishment is the main goal in the understanding of retributive justice, the main goal of restorative justice is reparation rather than punishment[3].

In the researches, besides the theoretical background of these aims listed above, it has been tried to determine what kind of behaviors they correspond to in practice. At this point, for example, McFatter[4] in his research on the decision-making processes of university students, looked for an answer if there is a relationship between direct retributive, deterrent and restorative justice understandings and, the length of the prison sentence, the severity of the crime, the potential of the accused to re-offend and the accusations attributed to the accused and the victim. And he concluded that participants with a deterrent understanding of criminal justice argue that all crimes should be responded to with the heaviest sentence, while participants with a restorative justice approach make suggestions for punishment according to the severity of the crime.

Similarly, in researches on how judges' sense of justice plays a role in the type and weight of punishments they give, it has been concluded that the sense of justice and the type and severity of punishments are closely related. At this point, Forst and Wellford[5] state that judges with a deterrent sense of justice impose the longest sentences. According to Hogarth[6], judges who focus on the rehabilitative nature of sentences consider the characteristics of the accused more and argue that these defendants should receive supervision. On the other hand, he underlines that judges, who have a punitive approach, focus more on the crime committed.

When evaluated in the context of Turkish literature, there exists a body of literature on criminal justice. On the other hand, it is striking that the researches addressing the question just and fair sentencing, sentencing strategies, philosophies, practices and attitudes are generally theoretical in nature. Only a small number of empirical researches focus on the factors involved in sentencing decisions. From this point of view, in this paper, it is tried to determine which sentencing strategies the law enforcers are closer to which criminal justice sense in Turkey's criminal justice system, and it is hoped that it will contribute to the literature and other studies to be done in the field of practice.

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3 Lurigio vd., "Understanding Judges' Sentencing Decisions", 93.

4 Robert M. Mcfatter, "Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions", *Journal of Personality and Social Psychology* 36/12 (1978), 1490.

5 Brian Forst ve Charles Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment", *Hofstra University Law Review* 9 (1981), 799-837.

6 John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971).

I. LITERATURE REVIEW

A. TYPES OF CRIMINAL JUSTICE

1. Retributive Justice

Retributive justice, one of the oldest criminal justice philosophies, is a reflection of the Classical School's point of view, which sees crime as a violation of the social contract[7]. At this point, according to retributive justice, which defines crime as a rebellion against the will of the state, impunity for crime will reveal the potential of committing crimes in the society and will fundamentally disrupt the order of the society[8]. For this reason, even if the victim of the crime forgives the perpetrator, the state still has to punish him/ her in retributive justice, which acts with the principle of zero tolerance towards crime and the criminal[9].

Punishment and deterrence lie on the basis of the retributive justice which approaches crime and punishment with a logical legal technique[10]. The main purpose of punishments is to give the criminal the punishment he deserves and to prevent him from committing a crime by deterring him from committing a crime again, to avenge the victim and to prevent crime in general by giving the message to the society that the criminals are getting the punishment they deserve[11]. In addition, according to this point of view, the punishments given to the crimes should not be applied only for punitive purposes; if a punishment is to be imposed, it should be done by considering the benefit of the society[12]. In other words, since punishments are inherently painful and bad, the main purpose of imposing punishments should be to prevent crime. In addition, punishments should not be determined according to the characteristics of crime victims or perpetrators. Punishments should be determined directly taking into account the harm done to society[13].

According to the retributive justice approach, punishments must have certain qualities[14]. First and foremost, the punishments should be mandatory. To put it more clearly, a punishment should be imposed for each crime that will ensure

7 Osman Dolu, *Suç Teorileri* (Ankara: Global Politika ve Strateji, 2015), 95.

8 Mehmet Arıcan, *Ceza adaleti: Sistemi, Etkinliği ve İşleyişi* (Ankara: Seçkin Yayıncılık, 2009), 72.

9 Dolu, *Suç Teorileri,* 89.

10 Şener Uludağ, "Onarıcı ve Cezalandırıcı Adalet: Paradigma Değişikliğini Tetikleyen Şartlar" *Polis Bilimleri Dergisi* 13/4 (2011), 139.

11 Sulhi Dönmezer ve Salih Erman, *Nazari ve Tatbiki Ceza Hukuku 1* (İstanbul: Der Yayınları, 2016), 103; Werner J. Einstadter ve Stuart Henry, *Criminological Theory: An Analysis of Its Underlying Assumptions* (Boulder, CO: Rowman and Littlefield, 2016), 61.

12 Andrew Ashworth, "Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems" S*entencing in Australıa* (35, 1986), 43.

13 Cesare Beccaria, (2015), *Suçlar ve Cezalar Hakkında*, çev. Sami Selçuk (Ankara: İmge Kitabevi, 2015), 45-48.

14 Dolu, Suç Teorileri, 69-70.

that the damage caused by that crime to the society is relieved and that crime is prevented from being committed again. Thus, the punishments defined for each crime committed give the message to the society that when a crime is committed, it will not be unreciprocated[15]. Another feature that increases the effectiveness of punishments is that the punishments are imposed quickly. The faster the punishment is done after the crime has been committed, the greater the expected benefit from punishment will be. Because imposing punishment fast will help the individual to perceive the cause-effect relationship between crime and punishment more easily[16].

Moreover, in the retributive justice understanding, two types of approaches are adopted, which are still valid today and comply with the proportionality criterion of universal law, at the point of determination of punishment[17]. First of all, it is necessary to consider the loss and victimization caused by the crime in determining the punishment. More clearly, the penalty should be imposed to the extent that the criminal act reveals. In this context, if the victim's loss due to the crime is less, the punishment will be less; if the loss is more, the punishment will be too. Secondly, the material or moral benefit of the offender from the crime should be taken into consideration while determining the punishment. Since the penalty here will vary according to the rate of benefit obtained by the criminal, for example, the penalty given to a thief who steals a small amount of money will not be the same as a thief who steals a large amount of money[18]. Briefly, no matter which of the features listed above is prioritized, the main aims of avenging the victims of crime and deterring others who have the potential to commit crimes in the understanding of retributive justice have not changed.

2. Restorative Justice

Restorative justice, defined as a problem-solving approach that includes the victim, the offender, social networks, justice institutions and society, does not consider criminal behavior as a violation of the law. According to this approach, criminal behavior also offends the victim and society. Based on this idea, in restorative justice approach the needs of both parties by evaluating the consequences of criminal behavior in terms of the victim and society as well as the offender need to be met[19].

According to the restorative justice approach, which argues that the crime phenomenon should be handled at a more macro level, punishment cannot be

15 Beccaria, Suçlar ve Cezalar Hakkında, 45-48.

16 Kazım Seyhan, "Klasik Okul Teorileri", *Kriminoloji,* ed. M. Alper Sözer ve Ercan Balcıoğlu (Ankara: Nobel Akademik Yayıncılık, 2016), 42.

17 Kayıhan İçel vd., *Yaptırım Teorisi* (İstanbul: Beta Basım, 2002), 135.

18 Mehmet Arıcan, *Ceza adaleti: Sistemi, Etkinliği ve İşleyişi* (Ankara: Seçkin Yayıncılık, 2002), 73.

19 United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York, NY: United Nations, 2006), 6.

considered as a concept only related to the criminal. Punishment is also related to the victim who has got harmed by the crime and, more importantly, to the restoration of the social order that has been disrupted by the criminal behavior. In this sense, restorative justice evaluates crime and punishment not only in terms of the offender, but also in terms of the victim and social order[20].

In restorative justice, which acts within the framework of a victim-centered understanding, it is aimed to eliminate the damage and hostility caused by the crime by ensuring the active participation of the individuals affected by the crime in the process. At this point, it does not allow the trial process to be carried out entirely by state organs; instead, places them in the position of passive observer and intermediary[21]. Trying to build an understanding that respects human dignity and equality, the offender is approached in a constructive, responsible and supportive manner in negotiations and interactions; to establish a balance between the criminal, the victim and the needs of the society is prioritized. From this point of view, it can be claimed that the restorative justice approach eliminates or reduces the stigmatizing effect of other crime and criminal justice approaches on the criminal[22].

Although restorative justice has emerged as an alternative to the classical punishment system, it does not aim to replace it. Restorative justice complements classical understandings of crime and criminal justice[23]. The response and result of criminal behavior is expected to be punishment, for sure. However, classical punishment does the same harm to the accused as it has done to the victim, but it does not compensate the victim. Based on this idea, restorative justice is applied on the grounds that it will provide more constructive results for both the victim and the accused and the society while resolving the damage suffered by the victim[24].

While restorative justice, which favors a victim-focused criminal justice model and argues that the accused cannot be avenged for his crime by being imprisoned, does not completely reject the amnesty of the accused but offers more fundamentalist programs such as mediation (mediation), family and group conferences, rings, community service, victim aid and ex-victim assistance programs[25]. Moreover, the concept of restorative justice, in which the problem is tried to be resolved by dealing with the main causes of the conflict, has a flexible

[20] Gökhan Gökulu, "Klasik Ceza Adaleti Felsefesinin Eleştirisi ve Onarıcı Ceza Adaleti Anlayışı", *International Journal of Social, Humanities and Administrative Sciences* 6/32 (2020), 1725.

[21] Uludağ, "Onarıcı ve Cezalandırıcı Adalet: Paradigma Değişikliğini Tetikleyen Şartlar", 129.

[22] Vahit Bıçak, *Onarıcı Adalet Yaklaşımıyla Ceza Adalet İsteminin Yeniden İnşası* (Adalet Şurası, Ankara, 2019), 4.

[23] Bıçak, *Onarıcı Adalet Yaklaşımıyla Ceza Adalet İsteminin Yeniden İnşası,* 4.

[24] Püren Akçay, "Onarıcı Adalet Modeli Çerçevesinde Uzlaştırma ve Çocuk Mahkemelerinde Uygulanması", *Pamukkale Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* 9 (2011), 134.

[25] Akçay, "Onarıcı Adalet Modeli Çerçevesinde Uzlaştırma ve Çocuk Mahkemelerinde Uygulanması", 134.

structure that can be easily adapted to different conditions, legal traditions, current crime and criminal justice systems. From this point of view, it can be said that restorative justice can be applied to almost all crimes and perpetrators. It provides appropriate responses to the criminal act, particularly in cases where there are defendants under the age of eighteen and the primary aim is to teach new values and skills to the perpetrators[26]. In this way, defendants under the age of eighteen, in other words, juvenile delinquents learn how their acts can cause harm, criminal law sanctions, the importance of living in harmony in society, and the elimination of the damage; as a result, it enables them to take responsibility[27].

II. METHODOLOGY

A. RESEARCH DESIGN

The subject of this research is about the views of law enforcement officers working in the field of criminal law on criminal justice. In the research, it is aimed to determine the understanding of criminal justice that dominates our criminal justice system, based on the shared experiences and thoughts of the judges, prosecutors and lawyers. The fact that the understanding of criminal justice has not been adequately examined from the perspective of the judges, prosecutors and lawyers makes it a necessity to investigate the subject. In this context, it is anticipated that the results of the study will contribute to the literature. In this direction, the following problem statement has been determined in order to address the subject.

- Which criminal justice approach do the judges, prosecutors and lawyers stand closer to?

Within the framework of the determined problem sentence, it is aimed to define the essence of the criminal justice understanding by revealing the common experiences and meanings of the law enforcements on whether they are closer to the restorative or punitive criminal justice understanding. As the study focuses on shared experiences and meanings, the phenomenological method, one of the qualitative research methods, was adopted. The phenomenological method is a method that enables individuals to reveal their interpretations, perspectives, thoughts and experiences. In this direction, the study was designed according to the phenomenological understanding of Van Manen[28]. Van Manen's interpretive phenomenology is a method that interprets the subject under study based on the experiences of the participants.

26 Bıçak, *Onarıcı Adalet Yaklaşımıyla Ceza Adalet İsteminin Yeniden İnşası,* 4.

27 Akçay, "Onarıcı Adalet Modeli Çerçevesinde Uzlaştırma ve Çocuk Mahkemelerinde Uygulanması", 130.

28 Max Van Manen, *Researching Lived Experience: Human Science for an Action Sensitive Pedagogy* (New York: State University of New York Press, 1990).

B. TARGET POPULATION AND SAMPLE

The population of the research consists of the province of Istanbul. Istanbul is the focus of attention of the research in many aspects such as its cosmopolitan structure, crime rates and crime diversity, as well as the high number of cases.

The sample design of the research was created with maximum variation sampling, one of the purposive sampling methods. Purposive sampling methods aim to obtain more detailed information about the researched subject, without any concern of quantitative research methods to create the representative power of the sample and to allow generalization to the whole universe[29]. In maximum diversity sampling, all samples that reflect similar and different situations in the universe are used. Thus, it can be revealed whether there are similarities in various situations, in other words, different dimensions of the research problem[30]. In the research, which focuses on punishment philosophies in criminal courts, it is foreseen that the maximum diversity on the subject can be reached through the criteria of discretion and conscientiousness; these criteria have led us to the main subjects of criminal courts, judges, prosecutors and lawyers. From this point of view, the sample design of the research was determined as 22 judges, 19 prosecutors and 21 lawyers.

C. DATA COLLECTION TOOLS

Considering the subject, purpose and methodology of the research, it was thought that the most appropriate technique to be used was in-depth interview and participatory observation. In the in-depth interview, which is one of the most frequently used techniques among the qualitative research method data collection techniques, the researcher conducts face-to-face, long-term and in-depth interviews and can obtain information about the problematic of the research. Within the scope of the study, in-depth interviews with judges, prosecutors and lawyers working in criminal courts made it possible to reach the opinions and experiences of the participants on criminal justice. Within the scope of another technique, participation observation, which allows the researcher to follow the subject he is dealing with in its natural environment, the hearings of the criminal courts, especially the heavy penal hearings, were attended in almost all courthouses, and information was obtained about the atmosphere of the courtroom by dissecting attitudes of judges, prosecutors and lawyers and their approaches to the criminals.

Pre-prepared interview question format was used as a guide for in-depth interviews. The questions were directed to the participants according to the flow of

29 Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (Thousand Oaks: Sage Publications, 2002), 40- 46.

30 Ali Yıldırım ve Hüseyin Şimşek, *Sosyal Bilimlerde Nitel Araştırma Yöntemleri* (Ankara: Seçkin Yayıncılık, 2016), 20-21.

the interview without considering a certain order. The interviews lasted between 45 minutes and three hours. Interviews were recorded at the request of the participants. Interviews with 45 people were mostly recorded using smart phones and, whenever possible, a voice recorder. The remaining 17 participants did not want audio recordings and these interviews were conducted by taking notes. Immediately after the field research, the interviews were transferred to the computer environment by the researcher. Considering the confidentiality principle, the names of the participants were not given in data analysis, for the interviewed judges Judge_1, Judge_2 etc., for the interviewed prosecutors Prosecutor_1, Prosecutor_2 etc. encodings are used. Due to ethical requirements of a scientific research, the ethics committee approval was obtained from the Social and Human Sciences Scientific Research and Publication Ethics Committee of Bolu Abant Izzet Baysal University, with the decision numbered 2017/ 32 during the data collection process.

The interviews firstly started with familiar judges, prosecutors and lawyers. Since interviews with judges and prosecutors were held in courthouses, other meeting plans were also made according to them. Interviews with lawyers were arranged for the remaining days of the judges and prosecutors who attend the hearings intensively on certain days of the week. During the meetings, I crossed paths with the associations of which some of the lawyers were member. In this way, meetings were easily arranged in Istanbul, where a large number of lawyers worked. In general, I can say that the participants approached the study positively. So much so that some interviews took three hours and there were days where only 1 participant was interviewed. As such, the interviews could only be completed in one year.

D. DATA ANALYSIS

Although the number of participants in qualitative studies is small, the data obtained can be high[31]. So much so that in this research, pages of data were obtained from a 3-hour interview. At this point, *Maxqda 2020 20.0.4* program was used to control the data more easily.

In the research, van Manen's[32] selective and emphatic approach was used to reveal the perspectives and ideas of the participants. In this direction, first of all, the participant statements that were considered important were coded. The themes were reached based on the relationships between the codes that emerged later. At the last stage, the opinions of the law enforcements about criminal justice were evaluated based on the experiences of the law enforcements through the themes reached.

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31 Semra Coşgun İlgar ve M. Zeki İlgar, "Nitel Veri Analizinde Bilgisayar Programları Kullanılması", *İZÜ Sosyal Bilimler Dergisi* 3/5 (2014), 51-52.

32 Van Manen, *Researching Lived Experience: Human Science for an Action Sensitive Pedagogy,* 93-94.

III. FINDINGS

A. SOCIO-DEMOGRAPHIC CHARACTERISTICS OF THE PARTICIPANTS

In this part of the study, the socio-demographic characteristics of the participants were discussed. First of all, starting with the gender of the participants, as seen in Table 1, 12 of the judges participating in the research were female and 10 were male; 10 of the prosecutors are women, 9 are men, and lastly, 11 of the lawyers are women and 10 are men. If we look at the ages of the participants, 1 of the 3 participants between the ages of 20-30 is a judge and 2 is a prosecutor. Among the participants aged 31-40, 6 are judges and prosecutors and 7 are lawyers. It can be seen that 8 of them are judges, 6 of them are prosecutors and 5 of them are lawyers in the 41-50 age range, where there are 21 participants. Of the 15 participants aged 51-60, 7 are lawyers, 5 are judges, 3 are prosecutors, and lastly, of the 4 participants aged 61 and above, 2 are judges and 2 are lawyers.

Table 1: Socio-demographic characteristics of the participants

		Judge	Prosecutor	Lawyer	Total
Gender	Female	12	10	11	33
	Male	10	9	10	29
Age	20-30	1	2	-	3
	31-40	6	6	7	19
	41-50	8	8	5	18
	51-60	5	3	7	15
	61 and over	2	-	2	4
Marital Situation	Married	14	13	12	39
	Single	4	5	7	16
	Divorced	3	1	2	6
	Widow	1	-	-	1
Years of Professional Work	1-10	5	8	3	16
	11-20	7	2	5	14
	21-30	8	7	8	23
	31-40	1	1	4	6
	41 and over	1	-	1	2

Continuing with the marital status of the participants from the table, the majority of the participants (39) are married, of which 14 are judges, 13 are prosecutors and 12 are lawyers. The remaining 16 participants were single, 6 divorced and 1 widowed. Finally, 5 judges, 8 prosecutors and 3 lawyers 1-10; 7 judges, 2 prosecutors and 5 lawyers 11-20; 1 judge, 1 prosecutor and 4 lawyers 31-40; 1 judge and 1 lawyer also stated that they worked in the profession between the years 41 and above.

B. CRIMINAL JUSTICE IN PRACTICE

It is striking that the theories of criminal justice, which emerged in order to eliminate the deficiencies of the previous ones in order to provide justice in punishment were shaped according to the characteristics of the period in which it emerged. Researches try to show differences of each one of these theories. As for the difference between retributive and restorative features[33] illustrated it well with the notion that the punishment used to be made to fit the crime while the treatment is now made to fit the individual. Hogarth[34] clarified this idea more with his studies that with a rehabilitation sentencing philosophy a great deal more weight was claimed to be placed on the characteristics and background of the offender. On the other hand, with other penal philosophies, it is tended to attach relatively greater importance to the characteristics of the offense. He also added that for serious crimes more severe sentences were positively related to retribution and deterrence orientations whereas for relatively minor offenses more severe sentences were positively related to a rehabilitation orientation.

According to data of this study, aimed to determine the understanding of criminal justice that dominates Turkish criminal justice system, above all the differences put thorough by the researchers can be seen in criminal justice practices. However, although the law enforcement officers participating in the research seem to have adopted the classical understanding of punishment with criminal justice, taking into account the characteristics of the accused and the crime committed, clear-cut distinctions cannot be seen between these retributive and restorative features. The most striking point here is that law enforcement officials make assessments that vary according to the situation, rather than focusing only on one sense of criminal justice.

1. The Character of the Accused

As stated above researches on criminal justice theories have revealed clear-cut distinctions between retributive and restorative philosophies. It is pointed out that restorative justice mainly focuses on the characteristics of the accused when determining penalties. However, in the research, it is striking that the characteristics of the accused are an important issue for both law enforcements who espoused retributive and restorative philosophies, only their approaches differ.

Asworth and Roberts[35] suggested that in order to ensure justice in sentencing, certain characteristics of the accused must be taken into account. For example,

33 David Matza, *Delinquency and Drift* (Routledge, 2018).

34 Hogarth, *Sentencing as a Human Process.*

35 Andrew Ashworth ve Julian V. Roberts, "Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing", *Mitigation and Aggravation at Sentencing*, ed. Julian V. Roberts (London: Cambridge University Press, 2011), 30.

if the accused is a woman, incarceration of the woman may cause her to suffer more harm because she is a woman. For this reason, it would be more appropriate to mitigate the sentence by applying positive discrimination to the accused because he is a woman. Similarly, in this study, participant law enforcements with restorative justice understanding do not find it appropriate to directly imprison the defendants who are in a disadvantageous position such as women, the elderly and children; they argue that alternatives should be sought to rehabilitate and reintegrate these defendants into society:

Lawyer_18, (Female): Giving another chance to the accused, you know, can be an approach like giving lighter penalties, especially if they come to their senses and at least know that they have a sanction. In other words, I find the differentiation correct for some situations. I mean, people... I don't think to punish and put them in prison is efficient because I don't think people are rehabilitated in any way anyway.

Moreover, the participant stated that an educated defendant is approached more punitively when compared to an uneducated defendant:

"The uneducated are actually luckier in this regard. Because judges approach like this: 'Look, son, you didn't study at work, but you went through mill. How did you get into such a thing?" and they can approach them in a more paternalistic way. For example, when they are educated, they can react more harshly: 'You know, you're an educated man, how did you get into such a thing... You know, it should have never occurred to you or something.' Educated people are less fortunate in this regard. Especially in criminal proceedings. I mean they think the uneducated must have done this to his/ her ignorance and illiteracy. And they also gain sympathy for that matter."

Another participant, Judge_1, (Male) thinks that male defendants have a more punitive approach when compared to women:

"In my opinion, punishments against women and girls are more protective, and more favorable laws are used. Penal sanctions are more severe for men. If a woman has committed a crime once, she is a student, a girl, etc. He stole a couple of clothes. You can decide that there is no need for a penalty because the amount stolen is small. More decisions are being made to prevent women from entering prisons."

The participating judge explained, with an example from his own case files, that the application of alternative sanctions for an elderly or young defendant who has committed a crime for the first time can prevent the defendant from being involved in the crime again:

"For example, if an older man does not have a criminal record, if he has a certain age, you do not imprison that person, you apply other sanctions. If a younger person commits a crime for the first time, you apply the same sanctions to him. You can give it another chance because the person's past is clean. This can prevent him from being involved in a crime again. Some may even thank you. For example, one of them came to me in the same situation. He came, thanked me, said he found a job again and something. I am happy too."

On the other hand, some participants argue that a punitive approach is applied to individuals of different ethnic origins or different sexual orientations, both in terms of whether they have committed the crime or not:

Lawyer_14, (Male): But in terms of premise, if a transgender person comes before the president of a high criminal court for the crime of plunder, he says that he has already plundered. If a blackish citizen goes before the criminal judge of the first instance on the charge of stealing, he says, the judge of the first instance has already done this job.

Lawyer_6, (Male): It (he means transgender) increases upwards. The quality of what we have ... ... comes into play. Libertarian point of view, traditional point of view, our judges may tend to give harsher sentences on this issue...

As Asworth[36] stated in his study, in England a principle called loss of mitigation was being applied as for the previous criminal record of the accused. If s/he was a first offender, s/he must be given concession thanks to her/ his previous good record. However, this mitigation decreases as the previous convictions increase in number. So much so that after more than four convictions the offender should be given full sentence. Similarly, some of the law enforcers participating in this research also argued that a punitive approach should be followed for the accused who are repeat offender:

Lawyer_2, (Male): For example, this may have become repetitive. The man has a criminal record for similar crimes. The judge does not discount it. He says this has already made it into a thing. It's become a habit.

Lawyer_11, (Female): First of all you will look at that person's past and also the status of the registry. Someone has a record for theft. The other is his first crime, maybe as an adventure. ... As I said, the man may make crime a profession. He's doing this for 40 years. He was living off theft. Now the whole community knows him. But this means that the sentences given are not a deterrent, that this man was able to commit this crime enough to create a criminal record for his entire life. Therefore, they should be evaluated differently.

[36] Ashworth, "Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems", 53-54.

The defendant's demeanor in court also play a role in the evaluations of the imposition of punishments. At this point, a punitive approach is displayed for the accused who behaved inappropriately in court:

Lawyer_2, (Male): He comes and starts a fight in the court. He argues. He has acted inappropriately. Or he has got too much of a record. A repeat offender. I impose a heavy penalty.

The female participant, Judge_18, also stated that the behavior of the accused during the hearings played a role in their approach to him/ her:

Judge_18, (Woman): While using the right of discretion, how the event has happened, the attitude of the accused in the event, his attitude after the event, his attitude during the hearings...

The participating judge also added that whether the accused feels remorse for his/ her crime or not is also effective in the determination of the sentences:

"Some, for example, do something out of anger. He regrets it later. You can tell by his actions that he truly regrets it. It cannot be said otherwise. You can tell by their behavior. He constantly expresses his regret. He is trying to make up for the damage of the other party, to make up to him/her. Of course these are always effective."

Another participant, Prosecutor_13, (Male) stated that the repentance of the accused was effective in their approach to the accused with the following words:

"The post-incident attitude of the accused and the perpetrator of the crime. Some comes and says: 'I did fairly well. I would kill you anyway.' Some of them regret: 'I lost my consciousness. It wasn't something I could accept if I have all my marbles. I didn't know what I was doing.'"

Participating Judge_21, (Male) also, based on the example of a traffic accident, stated that if the accused exhibits a conciliatory attitude with remorse, s/he can be approached within the scope of restorative justice; on the other hand, he stated that a more punitive approach could be shown to him if he behaved otherwise:

"Did the victim in the traffic accident withdraw the complaint? Even that affects it. He came and apologized to me after the accident. I forgive. We had financial needs. He met. Even the behavior of the accused affects the punishment. If he never apologized. He didn't take a blind bit of notice. He didn't meet his needs. He didn't apologize or etc. This is why we call the punishment, he never felt remorse or apologized. You go up on discretion."

Judge_14, (Male) exemplified that alternative sanctions can be applied to the accused at the point of repentance of the accused's crime as follows:

"If the person is unemployed, for example, if he/she has committed a crime for the first time, if he/she has deep regrets about it, although there are institutions that will deal with it, for example, you have given a prison sentence for that moment. Unemployed... The courts usually choose the first alternative to this. The person can conditionally postpone the punishment. You can delay. Or you can turn your punishment into some other cautions. For example, you can turn it into working in a publicly useful business."

To summarize briefly, the character of the accused is considered among the features that should be taken into consideration during the determination of the sentence. However, there is a significant difference between the evaluations of law enforcers with a punitive approach and those with a restorative justice approach. Law enforcements with a restorative justice understanding argue that a more moderate approach to a disadvantaged defendant should be approached, and they underline that practices should be made to reintegrate them into society. On the other hand, according to law enforcements who have a punitive justice understanding, the behavior and actions of the accused in court, whether they regret the crime they have committed, whether they have committed the crime for the first time or not, are the issues that they put emphasis on in determining the severity of the punishment to be given to them. Moreover, the ethnic affiliation and sexual preferences of the accused are among the factors evaluated in terms of the severity of the sentences given to them. Here, it can be interpreted that apart from the punitive understanding of lawyers, different characteristics of themselves also play a role in the decision-making process.

2. Elements of Criminal Features

According to researches criminal features are important mainly for law enforcements with punitive criminal justice understanding[37]. In this study it can be seen that the criminal characteristics are other factors that play a role in shaping the punishment philosophies adopted by the participants for law enforcements not only with punitive understanding but also with restorative understanding. However, their approaches to the criminal features differ. In the data obtained from the interviews with the participants, the features of crime can be discussed under 3 headings. In this context, the type of crime, the characteristics and the reason of the crime allow us to see whether the law enforcers are closer to classical criminal justice or restorative justice in their sentences.

[37] Ashworth, "Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems", 50.

a. Types of Criminal Offenses

The seriousness and the type of the crime and the harm caused by it should be taken into consideration when evaluating the sentence[38]. According data obtained from the interviews with the participants, it is striking that what crime the accused committed, directly related with the issue that its seriousness and the harm caused by it, is among the important factors that determine their approach to the accused in the punishment process. In this context, individuals who are prosecuted for sexual crimes, murder and fraudulent crimes can be approached more harshly, while individuals who are prosecuted for theft can be approached more moderately, taking into account the characteristics of the accused.

To start with the participants who first focused on sexual crimes, some participants argue that more severe punishment should be given to the accused in cases where the victim is at a young age and the accused is married and has children:

Judge_2, (Male): ... If a person who is married and has children is the subject of a crime of sexual abuse against minors, must be given a heavier punishment.

Participating Lawyer_1 (Male) also thinks that a defendant involved in sexual crimes should be given a heavier penalty if he is married, without pointing out any characteristics related to the victim:

"It can affect in sexual abuse-related crimes. If he is married, he should be given even much heavier punishment."

Participant Judge_6, (Male) stated that there has been a significant increase in sexual crimes in recent years; he argues that these crimes should be considered as another crime in the laws and regulations made, as it includes an act of interference with the freedoms of the victim, such as dressing and the freedom to go out at night, as well as the act committed for sexual purposes. At this point, the participant shares the following example from a case in England:

"A young girl is crossing a park in England at a late hour... when she goes through the park she can get her home more quickly. He goes through the park, not on the main light road, and someone starts molesting there. English judge, of course, Anglo-Saxon cultures are very different from ours, gives the perpetrator a one-year sentence. The girl has already been punished for being molested, but because he has also created a fear for British girls and disrupt their freedom to walk on the street or in the park at night he gives 15 more years. Therefore, it is in compliance with the law. This is also regulated by law and penal sanctions are decided accordingly."

[38] Christine Piper ve Susan M. *Easton, Sentencing and Punishment: The Quest for Justice* (United Kingdom: Oxford University Press, 2005), 92.

When considered in the context of the crime of homicide, the female participant Judge_5 stated that there should be a proportionality between the sentences given and the severity of the crime:

"Like I said, you can't say work and serve your sentence for a person who murdered a person. He needs to go to prison. The nature of the crime is serious. But for example, I said stealing. Theft... He stole a melon. He stole 3 balls. If you put him in prison, it would be against the principle of proportionality. You say serve your sentence by working. So that he doesn't get out of his job, but he will be punished as well."

Aggravated fraud comes along the crimes considered that the accused should be given heavier sentences, Lawyer_5 (Male) stated that in this type of crime, which is encountered random, the defendants are definitely arrested and sentenced to heavier sentences. Another participant, Lawyer_2, (Male) exemplified the crime of qualified fraud by associating it with the profession of the accused as follows:

"For example, in aggravated fraud crimes, we lawyers who are educated and abuse it, for example, are prosecuted with heavy penalties. When we abuse our power. We will be tried with aggravated punishment for the crime of misconduct."

Finally, in terms of theft, some participants argue that the accused should be approached more moderately, taking into account such characteristics as age, income status, etc.:

Prosecutor_ 4, (Male): So, let's say that a child at the age of 13, 14 stole from the canteen of the school. Ok, theft is a bad thing. But you may think that it is of no use to us socially to convict this child of stealing. Okay, the canteen may have lost 3,5 cents. The child may have made a mistake. As I said there, it is more important to integrate the child into society in the future, to be an individual, than to fight against crime, after using the powers widely, you may give lighter punishments and save that child from theft conviction.

b. How is the Crime Committed?

Another factor that plays a role during the evaluation of the sentence to be given to the accused is the way the crime is committed. In other words, situations such as whether the accused is involved in the crime deliberately or negligently, at night or during the day, the number of people involved in the crime, whether he uses a crime tool or not, are taken into account when determining the severity of the punishment to be given to the accused. At this point, participant Lawyer_2, (Male) explained how the defendant's intentional or negligent involvement in the crime was evaluated as follows:

“If you can foresee that, then something new has become popular, called eventual intent. Murder with eventual intent, this is not like killing intentionally. But it’s not like reckless killing, either. Right in the middle. For example, the law regards the car as a weapon here. So you used this car as a weapon to kill people. And as a result, you have to foresee that if you have an accident, you can kill yourself or the people in the car or another person. Then, let’s say that you killed a person with an eventual intent, not intentionally, let’s say that his punishment is two years for imprudence, but it increases to 10 years, 12 years there. But when you kill by planning, he now gets a life sentence, instead of execution.”

Another participant, Lawyer_9, (Female) exemplified the role of the way the crime was committed in punishment as follows:

“Let’s say you’re passing by on the way. Children came in front you, thinner addict and so on. Knife in hand. He said give me money. Let’s say other children with him are not involved. Even so the judge he can see that they are all together in the event as a group. You know the story of day or night, knives and guns because of robbery or qualified robbery.”

c. What is the Intent to Commit a Crime?

Finally, it was found out that why the defendants were involved in the crime played an important role in the approach of the participants to the defendants. To put it more clearly, a defendant who is involved in theft can be approached more moderately in order to earn a living, to heat, to buy medicine for a sick relative:

Judge_6, (Male): They also do things to survive. This is the situation. An 18-year-old boy, who was stealing money from someone to maintain his own life, to make a living, to steal a coat, to keep warm or to support his house, was reflected in the newspapers. He steals money for that purpose, to buy medicine for her because her mother cannot work, because her brother is sick. But they are of course in the minority. I think these should not be ignored.

Prosecutor_12, (Woman): Let’s say he is stealing. If he is a very poor person, I will give him lighter punishment. The man is hungry. He steals a phone. He sells and buys bread. Of course, I approach him leniently. But if he steals just for fun, state changes.

The participating prosecutor added that if a rich person steals arbitrarily, she will not impose a lighter penalty.

As for the elements of the crime it can be concluded from the data of the research that the type of crime committed, how and with what intention it has been committed are taken into consideration in determining the type and

severity of the penalty. At this point, in serious crimes such as rape and murder, which cause great harm, the defendants and to a defendants who have been also intentionally involved in a crime are approached more punitively. On the other hand, for example, a defendant who has been involved in a theft crime in order to meet certain needs can be approached more moderately.

CONCLUSION, DISCUSSION AND IMPLICATIONS

The issue of securing justice and equity in punishment, one of the main problematics of criminal justice, is discussed from different perspectives. At this point, especially in foreign literature, it is underlined that which punishment philosophy the law enforcers are closer to plays an important role in their approach to the accused and their decisions. In this research, it is aimed to reveal the criminal justice understanding of judges, prosecutors and lawyers working in the Turkish criminal justice system. While doing this, it was tried to determine which parameters law enforcement focused on in the decision-making process.

According to the findings obtained from the research, it is striking that the understanding of criminal justice in Turkish criminal justice practices is shaped on two main themes. To put it more clearly, law enforcement officers participating in the research seem to have adopted the classical understanding of punishment with retributive and deterrent features, or restorative criminal justice, taking into account the characteristics of the accused and the crime committed.

Hogarth stated that while the judges who adopt the retributive justice approach mostly focus on the features related to the crime, the judges who focus on the rehabilitative feature of the sentences consider the characteristics of the accused in their decisions. In the aforementioned study, it was seen that the participants, who adopted both retributive and restorative justice understanding, considered the characteristics of the crime and the accused in the type and severity of the punishments they gave. Firstly, as for the characteristics of the accused, the characteristics of the accused such as gender, age or ethnicity, his behavior in the court and his feeling remorse for the crime directly affect the approach of law enforcement to the accused, in other words, their understanding of criminal justice. In this context, while women, children and the elderly are approached more leniently; a more retributive attitude is displayed towards men, individuals with different sexual orientations or different ethnic affiliations. Moreover, while defendants who exhibit inappropriate behavior in court and do not regret their crimes are approached more punitively, individuals who express their regrets can be approached within the scope of restorative justice.

According to the type of crime committed in the context of crime-related features, individuals who are prosecuted for serious crimes such as sexual crimes,

murder and qualified fraud are approached more punitively, while individuals who are prosecuted for theft can be approached more leniently, taking into account the characteristics of the accused. Again, how the crime is committed determines whether the participants will be approached within the scope of punitive or restorative justice. In this context, for example, while a more punitive approach is applied to an individual who has been involved in a crime deliberately, by planning, alternative sanctions can be applied to an individual who has been involved in a crime by negligence, within the scope of restorative justice. Finally, it has been noted that why the defendants are involved in the crime plays an important role in the approach of law enforcement to the defendants in punishment. To put it more clearly, a defendant who is involved in theft in order to earn a living, to warm up, to buy medicine for a sick relative can be approached more leniently.

It can be concluded that law enforcement officers do not focus on only one aspect of the punishment, but make evaluations that vary according to the crime committed, the severity of the crime, the damage it causes, and the characteristics of the accused. From this point of view, punishment can be brought down not only to the retributive and deterrent characteristics of punishments from the classical school point of view; nor to a restorative criminal justice approach, which favors a victim-oriented criminal justice and argues that the accused should be subjected to different programs instead of imprisoning them. Ultimately, it is hoped that the study will contribute to the literature and further studies in terms of revealing the theoretical background of criminal justice, as well as the parameters and how it is evaluated in criminal proceedings.

REFERENCES

Akçay, Püren. “Onarıcı Adalet Modeli Çerçevesinde Uzlaştırma ve Çocuk Mahkemelerinde Uygulanması”. *Pamukkale Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* 9 (2011), 129-144.

Arıcan, Mehmet. *Ceza Adaleti: Sistemi, Etkinliği ve İşleyişi*. Ankara: Seçkin Yayıncılık, 2009.

Ashworth, Andrew. *Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems.* Sentencing in Australia, 35, 1986.

Ashworth, Andrew ve V. Roberts, Julian. “Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing”, *Mitigation and Aggravation at Sentencing*, ed. Julian V. Roberts. London: Cambridge University Press, 2011.

Bıçak, Vahit, *Onarıcı Adalet Yaklaşımıyla Ceza Adalet İsteminin Yeniden İnşası*. Adalet Şurası, Ankara, 2019.

Beccaria, Cesare. (2015), *Suçlar ve Cezalar Hakkında*. çev. Sami Selçuk. Ankara: İmge Kitabevi, 2015.

Carroll, John S., Perkowitz, William S. Lurigio, Arthur J. ve Weaver Frances M. “Sentencing Goals, Causal Attributions, Ideology, And Personality”, Journal of Personality and Social Psychology 52/1 (1987), 107-118.

Dolu, Osman. *Suç Teorileri.* Ankara: Global Politika ve Strateji, 5. basım, 2015.

Dönmezer, S. Sulhi ve Erman, Salih. *Nazari ve Tatbiki Ceza Hukuku 1*. İstanbul: Der Yayınları, 14. baskı, 2016.

Einstadter, Werner J. ve Henry, Stuart. *Criminological Theory: An Analysis of Its Underlying Assumptions*. Boulder, CO: Rowman and Littlefield, 2016.

Forst, Brian ve Wellford, Charles. “Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment”. *Hofstra University Law Review* 9 (1981), 799-837.

Gökulu, Gökhan. “Klasik Ceza Adaleti Felsefesinin Eleştirisi ve Onarıcı Ceza Adaleti Anlayışı”, *International Journal of Social, Humanities and Administrative Sciences* 6/32 (2020), 1721-1728.

Hogarth, John. *Sentencing as a Human Process.* Toronto: University of Toronto Press, 1971.

İçel, Kayıhan vd., *Yaptırım Teorisi*. İstanbul: Beta Basım, 2. Baskı. 2002.

İlgar, Semra Coşgun ve İlgar, M. Zeki. “Nitel Veri Analizinde Bilgisayar Programları Kullanılması”. *İZÜ Sosyal Bilimler Dergisi* 3/5 (2014), 31-78.

Lurigio, Arthur J. vd., “Understanding Judges’ Sentencing Decisions”. *Applications of Heuristics and Biases to Social Issues*. ed. Linda Heath vd. Boston, MA: Springer, 1994, 91-115.

McFatter, Robert. “Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions”. *Journal of Personality and Social Psychology* 36/12 (1978), 1490.

Patton, Michael Quinn. *Qualitative Research & Evaluation Methods*. Thousand Oaks: Sage Publications, 2002.

Piper, Christine ve M. Easton, Susan. *Sentencing and Punishment: The Quest for Justice,* United Kingdom: Oxford University Press, 2005.

Seyhan, Kazım. “Klasik Okul Teorileri”. *Kriminoloji*. ed. M. Alper Sözer ve Ercan Balcıoğlu. Ankara: Nobel Akademik Yayıncılık, 2016, 38-47.

Uludağ, Şener. “Onarıcı ve Cezalandırıcı Adalet: Paradigma Değişikliğini Tetikleyen Şartlar”. *Polis Bilimleri Dergisi* 13/4 (2011), 127-151.

United Nations Office on Drugs and Crime. *Handbook on Restorative Justice Programmes*. New York, NY: United Nations, 2006. https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.

Van Manen, Max. *Researching Lived Experience: Human Science for an Action Sensitive Pedagogy.* New York: State University of New York Press, 1990.

Yıldırım, Ali ve Şimşek, Hüseyin. *Sosyal Bilimlerde Nitel Araştırma Yöntemleri.* Ankara: Seçkin Yayıncılık, 2016.