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THE SCIENCE AND EDUCATION AT THE BEGINNING OF THE 21ST CENTURY IN TURKEY

Volume 2

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VOLUME: 2

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R. Cengiz DERDİMAN

INTRODUCTION

Based on the current practices in Turkish discipline law, there is a prevailing view that considers imposing only disciplinary penalties by law and conditionally leaving the determination of discipline crimes to the administration. In fact, the failure of full implementation of the principle of no crime and punishment without law in Turkish discipline law violates certain basic principles of 1982 Constitution.

Therefore, this paper aims to discuss this matter in detail. Theoretical data is supported by examples of adjudication. The principle of legality of punishment, the consequences of this principle and the problem of implementation of this principle in discipline law in harmony with the principle of "good administration" has been discussed in the study. The decisions of the Constitutional Court which were referred in the study were presented only with decision number. The related decisions can be accessed by decision number over the webpage of the Constitutional Court.

1. THE PRINCIPLE OF "LEGALITY OF CRIME AND PUNISHMENT" IN TERMS OF PENAL CODE AND THE VALUE OF THIS PRINCIPLE

One of the interesting debates in Turkish discipline law is the position and value of the principle of no crime and punishment without law. Guaranteeing the right to "live without concern" is one of the most important principles to be observed in protection or implementation of crimes and penalties in contemporary penal code. Thus, the principle of "no crime and no punishment without law" has an important role among these guarantees. This principle aims to prevent arbitrary actions of the state against the individual in implementation of the penal code (Özgenç, 2011: 103) and assuring the individual of prevention of arbitrary actions. No one can be deemed as "criminal" or punished for an act that is not written in the law. As a result, the individuals will be guaranteed not to be punished for an act they did not commit or for an act they committed but which was not deemed as a crime by law at the time of commitment.

The principle of no crime and punishment without law has a prominent value in Constitutional and legal nature, in theory of contemporary penal code, German law and other comparative law (Lehnig, 2003: 84–86).

Article 38 of 1982 Turkish Constitution, which is the basis of this principle in Turkish Law stipulates that *"no one shall be published for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed."*

As per the decision of Constitutional Court numbered 2011/116, "The principle of legality of crimes and punishments stipulated in the Constitution constitutes one of the basic principles of penal code today, when an understanding based on human rights and freedoms gained prominence. In parallel to article 38 of the constitution, as per the principle of "legality of crimes and punishments" in article 2 of Turkish Penal Code, the acts which are prohibited and the penalties to be imposed on these forbidden acts should be indicated in law in such a way to eliminate hesitations and in addition, the rule should be clear, understandable with clear limitations. This principle, which is based on the opinion that the individuals know the forbidden acts in advance, aims to guarantee fundamental rights and freedoms."

Article 7 of the European Convention on Human Rights (ECHR) stipulates that *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

Turkish Penal Code gives a separate importance to prohibition of analogy within the scope of the consequences of this principle and definition of the provision specifically.

The consequences of this principle can be specified more clearly as follows:

1-) Imposing a penalty to an act depends on definition of that act as a "crime".

2–) Orders and prohibitions that are violated by acts and that are deemed as crime and the penalties that will be imposed to crimes shall be "clearly" defined in the law.

3-) No crime can be imposed by regulatory procedures of administration, common law or on the basis of comparison (Derdiman, 2011a: 35).

4-) Removal of a crime committed by an individual during trial or execution or mitigation of the punishment results in a consequence in favor of the accused.

5-) Punishment of no one can be made heavier on account of a subject which is not deemed as an aggravating reason by law.

6-) The results of this principle which is applicable to penal responsibility is benefitting from suspicion by the accused and acquittal of the accused.

In this respect, no one can be punished unless the elements of the crime which is envisaged in penal code is complete. Contrary to what is believed, suspicion of crime, does not mean that only the act that is deemed as material element is suspected to fit into the law. A crime will be suspected when there is no enough evidence that the intention (and/or negligence) which is called spiritual element, fits the definition in the law.

Considering that the principle of no crime and punishment without law is based on law in favor, in case of the presence of two contradicting laws in effect, the procedure of adopting the tacit removal of the other law by the one in favor might be the most appropriate method. However, adoption of this method is not anticipated by law; furthermore the method of competing of the laws in terms of time in selection

of the law to be applied in case of the presence of two separate laws can also be recommended. The best way to eliminate this inconvenient situation which causes hesitations by law will be the most appropriate approach (Erem, 1973: 135–136; Derdiman, 2011: 77).

2. THE NATURE OF DISCIPLINE LAW AND COMPARISION OF IT WITH THE PENAL CODE

In Turkish law, sanction to be imposed on those who violate order and prohibitions imposed by law to maintain social order is termed as "penalty". In society, penalty can be defined as the sanction anticipated to fulfill the aim of "maintaining social order" which cannot be achieved by other sanctions. In this respect, penalty, as a sanction, differs from sanctions such as "compensation of loss" given to someone. Penalty ensures submission liability of those who live or stay in a state and to obey social order (Durmuş, 2010: 210). In addition prevention of violating order and prohibitions, penalties also aims social acceptation of individuals and maintaining security (Otto, 2004: 14).

Turkish Dictionary (2013) issued by Turkish Language Association defines "discipline" as "*situation of obeying laws and written or oral rules about order in a cautious manner by a community. 2. All types of measures which are taken to make individuals to obey general opinions and behaviors of their society*". However, the term "discipline" is not concerned with the relationships of civil servants in Turkey with the institutions they work. Discipline refers to the rules implemented to maintain institutional order and effective execution of public services by the institutions and bodies they work. It is natural and essential that every institution impose certain regulations in parallel to their functions and their reason for being (Günal, 1958: 194).

Discipline law applies to civil servants, not to the general society. Since the sanctions of penal code are not considered as sufficient in execution of public services undertaken by public organizations and institutions, the essentials of discipline law requires rules specific to the execution of public services in public organizations (Yıldırım et al., 2011: 399).

Civil servants, are subject to discipline law in terms of their services and, like everyone, they are subject to the rules of penal code as "individuals or citizens living in a state".

Penal code is actually outside of the subjects that fall into the scope of discipline crimes and penalties. On the other hand, while the penalties within the scope of penal code are imposed by judicial authorities, disciplinary penalties are imposed by administrative authorities by administrative procedures (Günday, 2004: 560).

The sanctions anticipated by the discipline law are termed as disciplinary penalties. As per Council of the State Plenary Session of the Law Chambers decision dated 18.04.1969 and numbered d: 67/676, dec: 67/372 (cited by: Kaya, 2005: 62) disciplinary penalties are the precautions taken against the acts and behaviors of civil servants which violate law, order and public services. Council of the State 8.

Chamber decision dated 24.09.1996 and numbered d: 1996/1915, dec: 96/2267 (cited by: Kaya, 2005: 62) stipulates that disciplinary penalties are sanctions imposed on acts which violate rules and prohibitions on civil servants to execute public services and to ensure public good.

Penal code rules are comprehensive at country level. However, discipline law has a partial field of practice in this sense (Dönmezer and Erman, 1979: 384). Violation of rules and prohibitions anticipated in disciplinary penalties are termed as "disciplinary crimes". The sanctions anticipated by the penal code provide general social order, instead of partial order such as disciplinary sanctions.

The penalty anticipated by the penal code is practiced by the state. This penalty is imposed and executed by the authorized administrators or organs of the public organizations and institutions where civil servants serve (Durmuş, 2010: 210).

3. REFLECTION OF THE PRINCIPLE OF IMPOSITION OF CRIME AND PENALTIES BY LAW IN DISCIPLINE LAW

Discipline law in Turkey is a versatile discipline which comprises the principles of separate administrative law and penal code. At first, general principles were included in law no 657 on Civil Servants. Separate disciplinary principles, crime and penalties were anticipated for civil servants in different organizations such as university staff and Turkish National Police.

The legality of disciplinary crime and penalties civil servants should abide by in Turkish administrative law has been discussed (see: Derdiman, 2011a: 467).

General opinion is that the principle of legality is not applicable in discipline law (Karahanoğulları, 1999: 60). The opinion that inspires and supports the practice specify that the principle of "no penalty without law" can be accepted in discipline law; however a principle such as "no crime without law" cannot be applicable (see: Durmuş, 2010: 206, 207; Sancaktar, 2012: 477, 478; Odyakmaz et al., 2006: 373; Akyılmaz et al., 2009: 588). According to those who agree with this view, complexity of public sector, execution of public services through idiocratic procedures and individual structure and character of each public organization and institution makes imposition of these rules by law difficult. Although the penalties are identified, it will be inevitable to bring new rules by the administration according to the requirements of the rapid changing organizational structure. Imposition of rules that adapt to constantly and rapidly changing situations according to the needs of organizations and institutions by the administration can be appropriate. This situation can make resort to prohibiton of analogy as a result of the principle of legality in penal code acceptable (Yüce, 1994: 11; Kaya, 2005: 63; Söyler, 2008: 47, 48).

This view, which mainly appears to describe the practice, concentrates on "the necessity of imposing penalties by law". Although determining disciplinary crimes includes discretion to some extent, determining these crimes by law is deemed as a clearer guarantee (Günal, 1958: 195). Another parallel view is that after determining general framework by law, a relation of causality can be established

between disciplinary penalties and crimes by the administration (Tutum, 1972: 43). Determination of crimes by the administration can be considered as appropriate since the "administration" has its own field of specialization. Another view (Gözler, 2009: 756) is that disciplinary regulations are natural outcomes of administrative power of the administration. Therefore, the administration can apply disciplinary penalty under its discretion even without regulatory procedures. This view was stated in counter vote statement in Council of the State Administrative Law Chambers decisions dated 23.10.1992 and numbered d: 1991/496, dec: 1992/176 (cited by: Gözler, 2009: 759).

On the other hand, some argue that it is not compulsory to impose both discipline crimes and disciplinary penalties by law (Günal, 1958: 195, 211; Kaya, 2005: 64).

Another view on the possibility of imposing the acts that breach the order of the organization (Gözler, 2009: 758) specifies that only the acts that require "removal of public officer" should be imposed by law. They base this argument on article 70 of 1982 Constitution which regulates the right to enter public services as a fundamental right and fundamental rights cannot be restricted by law.

The opposite view emphasizes that the principle of "no crime and punishment without law" is valid in discipline law in terms of determining both crimes and punishments (see: Ersoy, 2008: 774, 778; Yıldırım et al, 2011: 430–434; Azrak, 1990: 8; Fındıklı-Bilgiç, 2006: 134). According to this view, both discipline crimes and disciplinary penalties should be imposed by law. The most important justification of this view is the principle of "no crime and punishment without law" under article 38 of 1982 Constitution. There is no exception that this principle can be valid only for the crimes and penalties adopted in penal code. Decision of the Constitutional Court no 1991/7 states the same view (cited by: Ersoy, 2008: 774; Sancaktar, 2012: 477, 478). Although this principle of the constitution applies to other security precautions that primarily maintain penalty and public order, it should be deemed valid also for the discipline law (sd: Hesselberger, 2001: 332). The aims, scope and certain aspects of the crimes and penalties adopted by discipline law and penal code have similarities, which complement each other (Ersoy, 2008: 770).

The principle of no crime and punishment without law can be considered as one of the most important requirements of state of law (Jähnke, 2010: 463). Thus, by the imposition of discipline crime and punishments by law "civil servant guarantee and right" which is one of the individual rights guaranteed by a state of law will be guaranteed, secured and restricted with legal method.

Constitutional Court decision numbered 1988/24 stipulates that the administration cannot impose disciplinary crime and punishment by its own discretion without a legal basis (see: Ersoy, 2008: 773, 774). Council of the State 10. Chamber decision dated 13.06.1984 and numbered d: 1984/812, dec: 1984/1269 (cited by: Ersoy, 774) decided that no penalty can be imposed for an act that is not included in regulation on the personnel of Social Security Organization.

In Turkish law, disciplinary crime and penalties are anticipated in articles 124 and 125 in Law on Civil Servants. Article 125 specifies discipline crimes and penalties that require each of these penalties separately. Article 125/4 stipulates that *"in acts and cases that require imposition of disciplinary penalties disciplinary penalties of the same kind are imposed to those who commit similar acts in terms of nature and aggravation"*. Article 82 of Law no 3201 on Turkish National Police determines the penalties to be imposed on personnel, however leaves the assignment of disciplinary crimes that require those crimes to statute in article 83. Based on this provision, "Disciplinary Statute on Turkish National Police" was enacted. Higher Education Law no 2547 determines penalties to be imposed on university students and leaves the behaviors requiring these penalties to regulation. Thus, "Higher Education Organizations Student Discipline Regulation" was enacted.

4. UNCONSTITUTIONALITY OF THE CURRENT LEGAL SITUATION EXEMPLIFIED IN TURKISH LAW

1-) The provision of article 125/4 mentioned above is considered as a provision which makes comparison possible. Although this seems as necessary for the effective execution of public services by the administration, it violates fundamental rights according to the constitution. Imposition of crime based on comparison is unacceptable in discipline law (sd: Sancaktar, 2012: 477; Derdiman, 2011: 35; Akgüner, 2009: 259). Punishment of a civil servant by the administration for a crime created as it resembles the acts in the law, deprives the civil servant from the guarantee by law and makes the use of the fundamental right which is termed as civil servant guarantee unusable. An argument based on "the requirements of public order and public services" does not justify the right to civil servant guarantee. The grounds and conditions of fundamental rights are defined in the constitution. Restriction of civil servant guarantee right should also be in parallel to these conditions. Restriction of fundamental rights by law is one of these conditions.

As a result, the following provisions in below given articles of the constitution stipulate that, like the penalties the crimes should be in line with the principle of legality in discipline law:

i-) article 38 on the subject of this study;

ii-) article 13, the principle of restriction of fundamental rights only by law;

iii-) article 128, the provision that all employee personal rights of civil servants are arranged by law.

On the other hand, the ambiguous content of a certain part of discipline crimes in the law can be considered as violation of the legality of discipline crime and penalties in another aspect. Such a situation allows the administration to impose a penalty on an act deeming it as a crime whenever it wants (Yıldırım et al., 2011: 431). For example, since it is ambiguous how and under what conditions the behaviors that hamper the prestige of the job appear are, it might cause the administration to interpret every kind of behavior as "in violation of professional dignity and prestige" and to deem as

a ground for assignment of penalty. This situation will unquestionably violate civil servant guarantee. Constitutional court decision no 1988/8 stipulates that disciplinary penalties applicable to civil servants due to broad concepts such as "disobedience to a program anticipated by public organization" or "failure" will be unconstitutional (cited by: Yıldırım et al., 2011: 432).

2-) Regulation of a discipline crime in statute is another problem. Article 115 of the constitution stipulates that statute can "*specify jobs in law*" or can be enacted to "*indicate implementation of law*". Authorization of the administration by law to determine discipline crimes by statute in a subject with unspecified subject and limits violates the principle of *"inalienability of legislative power*" stipulated in article 7 of the Constitution. Yet, the mentioned article 115 authorized the Board of Ministers to issue statute and declares "specification of the jobs in the law" among the grounds for issuing the statute. This requires drawing the attention to the need that outlines of groups of crimes that can be considered as a ground for assignment of penalty that should be determined by the law-maker.

3-) It is not possible to regulate a discipline crime by regulation and it cannot be considered as legal (sd: Gözler, 2009: 757). As regulation can show "implementation of laws" it concentrates on how a law is to be implemented. Since how the law will be implemented will give rise to a problem of procedure, concrete determination of the subjects and only the implementation should be determined by regulation. Regulation of a subject by statute will cause different problems in terms of showing implementation of law. Unless the crimes on which disciplinary penalties will be imposed are separately specified for each discipline penalty and unless a general framework is drawn by a regulation or statute, the statute or regulation will violate the constitution.

If discipline provisions are also observed as a protective right for civil servants (Yıldırım et al., 2011: 433), it is possible to determine an act by law by deeming it as a discipline crime or at least leaving it to the regulatory procedure of the administration within a general framework.

4-) Consideration of an act committed to require penalty on the grounds that it resembles another act that violates order and prohibitions imposed by law or regulatory administrative procedure is inconvenient that constantly concerns civil servants. Civil servants should know or should be in a situation to know what behaviors require a disciplinary penalty (Kaya, 2005: 65). To use such a broad judicial discretion in a lawful manner, it would be appropriate for the administration to specify and announce the acts that fall into the scope of penal responsibility as they resemble other acts which are not specified, however are crime in the legislation. The principle of state of law requires knowledge of administrative action and procedures in advance. In contrast, punishment of an act based on comparison without defining that act as a crime in advance violates the following provisions of the constitution:

i-) civil servant guarantee should be restricted by law,

ii-) No crime and punishment without law,

iii-) employee personal rights of civil servants are regulated by law.

5. THE PROBLEM OF CONSTITUTIONALIZATION OF DEVIATION FROM PRINCIPLE OF LEGALITY OF CRIMES IN DISCIPLINE LAW

The principle of legality of crime and punishment requires specification of acts which require disciplinary acts and penalties to be imposed upon these acts in law prior to the commitment of these acts (Akgüner, 2009: 259).

Council of the State 8. Chamber decision dated 12.3.1996 and numbered d: 1994/6429, dec: 1996/652 stipulates that even if there is no clear provision in the legislation on punishment of each concrete act, existence of a province that fits for a committed act is necessary and adequate for the punishment of that act. As a result, the demand of cancellation of the applied penal procedure on the mentioned act by a lawsuit in administrative jurisdiction will be rejected by the court.

Public good will be achieved by establishing a balance between taking necessary precautions for the public organization and institutions to provide better service and constitutionalization of administrative regulations.

Establishment of this balance requires the following:

1-) Disciplinary penalties are compelling sanctions imposed on disciplinary crimes which can have a character of intervention on rights and guarantees of civil servants. Therefore, disciplinary penalties to be anticipated for specific reasons for each public organization and institutions should be imposed by law. As indicated above, Turkish law doctrine does not contain a significant contradiction; to be more precise, there is almost unanimity.

2-) Primarily, determination of discipline crimes by law should be preferred. In cases when it is believed that discipline crimes cannot be determined by law in a concrete and clear manner, the law should provide a general framework. The administration should be able to use its power to regulate in imposing a crime within this framework (sd: Derdiman, 2011a: 468). The administration should not breach the principle of flexibility and definiteness in determination of discipline crimes and penalties (Karahanoğulları, 1999: 62). However, finding the basis of the acts that require disciplinary penalties in law requires clear indication of disciplinary penalties to be imposed on discipline crimes in law (Akgüner, 2009: 259; Günday, 2004: 560). The principles that prevail in discipline penalties are subject to the same principles since discipline crimes are a type of administrative penalties (Oğurlu, 2003: 102; Özay, 1985: 29).

The provision of Turkish Penal Code numbered 5237 which adopts the principle of legality of crimes and punishments stipulates that no crime can be imposed by the regulatory procedure of the executive organ. Furthermore, this provision specifies that no one can be imposed a penalty on a subject which is not clearly deemed as a crime in the law. The constitution stipulates that no one can be imposed a penalty for an act which is not deemed as a crime by law. However, the definition of the constitution does not include the term “clearly” or another similar expression. Based on this, it will be necessary to agree that the method of regulation method which is defined as “framework law” that authorizes the administration in penal code does not violate the principle

of legality in the constitution (Özer, 2008: 42). *"Clear"* specification of a crime that requires penalty emphasizes that the framework which will be defined as a crime should be more significant. However, remaining within this framework, the administration cannot be deemed to have lost its authority to implement regulatory procedures.

The necessity of regulating crime "clearly" which is anticipated in Turkish Penal Code is applied in discipline law in a softer manner in such a way to expand the discretion area of the administration. Laws on discipline law do not include a provision on "clear" anticipation of crime in laws on discipline law. Therefore, imposition of crime by the administration in discipline law within the framework determined by the law-makers will not breach the constitution.

No crime should be imposed by regulation based on framework provision. Since "determining tasks in law" is the subject of only statute in terms of the rights and guarantees of civil servants, it would be more convenient to impose crimes according to the framework provision. The necessity of investigation of the statute by Council of State will be a guarantee in terms of the regulation of the subject by statute.

3-) Imposition of penalty based on comparison in acts which are not considered as crime in legislation breaches the necessity of "civil servants' knowledge of the acts that gives rise of disciplinary penalty in advance". However, Council of the State Administrative Law Chambers decision dated 09.11.2000 and numbered d: 2000/646, dec: 2000/1119 (cited by: Kaya, 67) rejected the lawsuit filed for the cancellation of the provision on punishment of behaviors in "Higher Education Organizations Student Discipline Regulation" which are not regulated as disciplinary crimes, however which resemble other acts in the regulation in nature. Like in penal code, no penalty should be imposed based on comparison in discipline law (see: Sancaktar, 2012: 477). Despite this, in case of insistence on provisions of discipline law that envisages imposition of penalty based on comparison, at least, other possible acts for which a penalty can be imposed in comparison to the crimes determined in law should be objectively announced by the administration before the date of the act (see: Gözler, 2009: 757).

4-) It is agreed in discipline law that "ignorance of law cannot be considered as an excuse" since they are issued in public law procedures such as law, statute and regulation and they are expected to be known by everyone (it can be possible)(Kaya, 2005: 68; Söyler, 2008: 54). Thus, a civil servant is imposed a disciplinary crime when he/she violates an order or a prohibition by his/her defective behavior.

It is observed that whether a clear and unavoidable mistake such as ignorance of the legislation or being unable to think removed doctrine of guilt has not been determined. We believe that the following articles of the constitution require considering that the provision of doctrine of guilt is removed by "ignorance of the act" or "unawareness about the act":

i-) article 38 on the principle of no crime and punishment without law

ii-) article 5 which authorizes the state to maintain justice,

iii-) article 2 on state of law,

iv-) article 2 which stipulates a state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice.

5-) Doctrine of guilt is kept broader in discipline law since the penalties imposed are lighter and are limited to the related organization and institutions. On the other hand, in penal code, a penalty is imposed when the penalties are committed intentionally or negligently when they are clearly specified in the law. Presence of no such condition or distinction in discipline law can be considered as diversion from the "principle of mercy" in punishment justice. Yet, a crime committed negligently requires less punishment than one that is committed intentionally. Furthermore, in penal code, there should be a clear regulation in law to hold someone responsible for negligence.

For these reasons, whether a distinction can be made in discipline law based on committing a crime intentionally or negligently should be widely discussed. At least, the degree of influence of negligence or intention in sanctions that give rise to heavy consequences such as removal of civil servant should be discussed.

6-) The principle of benefitting from suspicion by the accused as a consequence of the legality of crimes is accepted also in discipline law. In penal code and discipline law, suspicion is mainly searched in "*material character*" of the crime. Evaluation of suspicion in terms of faultiness which is considered as the spiritual element; exemption of a person who cannot think that a behavior is a crime due to various reasons from both penal code and discipline law will be a necessity of penal justice.

7-) The principle of implementation of the law in favor as one of the consequences of the principle of no crime and punishment without law can be valid for discipline law (Söyler, 2008: 53). Implementation of the law in favor in discipline law is based on the right of civil servant guarantee, the principle of no crime and punishment in article 38 of the Constitution and the rule of regulation of employee personal rights of civil servants by law in article 128 of the Constitution.

i-) There are no provisions on implementation of law in favor in disciplinary law.

ii-) In case of two conflicting laws, whether the principle of implementation of law in favor or implementation (competition) of laws in terms of time will be taken as a basis is not clearly specified in penal code or in laws on disciplinary law.

In fact, discipline law is a necessity of principle of good administration. It enables public organizations and institutions to run public services and activities under their responsibility in a regular basis. Therefore;

Only one of the following alternatives can be applied:

i-) Determination of the law which will be abided by in accordance with the principles of competing 2 conflicting laws

ii-) Implementation of law in favor of the civil servant who will potentially receive a punishment sanction

This ambiguity will give rise to injuries which can be deemed to violate civil servant rights. Thus, in cases of imposition of penalties, one of the law provisions

which violate each other should be removed. Furthermore, as a general solution, competing laws on disciplinary crime and penalties, the principle of taking the one which is favor of the civil servant should be determined by law provision.

CONCLUSION

It cannot be stated that the principle of "*no crime and punishment without law*" which is implemented as a fundamental principle in Turkish penal code is meticulously applied in disciplinary law on Turkish civil servants in terms of discipline crimes and penalties.

It was observed that, the principle of no crime and punishment without law which is agreed in general terms without distinction of any kind of crime or penalty in 1982 Constriction turned into a specific method in discipline law. The prevailing view in Turkish discipline law is that, mainly disciplinary penalties are regulated by law, while discipline crimes anticipated for these penalties can be determined by the administration. This method is adopted in practice. This view and practice includes comparison in determination of discipline crimes and gives the administration a broad discretion. This discretion is based on the fact that the administrative power is "a natural necessity of the duties of the administration".

In fact, like contemporary penal code, discipline crime and penalties also influence and can significantly harm public conscious. Fundamental rights of the civil servants who will receive discipline penalties, as individuals, should be abided by. Therefore, regulation of discipline penalties committed by civil servants by law will constitute the most important guarantee of the right of civil servant guarantee. The rule in 1982 constitution on no crime and punishment without law also requires regulation of discipline penalties and crimes by law.

However, that the liability of each public organization and institution to introduce their own rules by keeping up with constant changes due to their specific characteristics, and for the execution of their duties in the best and most effective manner can be considered to justify imposition of discipline crimes by the administration.

In this case, the middle course the administration should follow without violating the principle of imposing its own rules is;

1-) Imposition of discipline penalties by law in any case,

2-) Imposition of discipline crimes by law as much as possible.

In cases where determination of crimes by law in all respects might be inconvenient in terms of the "principle of good administration" and "principle of adapting to changing conditions"; determination of at least the general framework by law and regulation of crimes by the administration within this framework (Derdiman, 2011a: 468) will be the most appropriate and balanced method. In this case, the basis of the practice will be law or discretion arising from law instead of comparison of discretion arising from administration. As a result, imposition of penalties for acts which were previously regulated however not announced or for those which are impossible to be known will be prevented.

Certain regulations should be adopted as sine qua non of this proposed method. The followings are valid in terms of discipline crimes and punishments:

1-) The principle of suspicion in favor of the accused,

2-) The principle of not deeming ignorance of law as an excuse,

3-) The principle of implementation of law which is in favor of the accused

Doctrine of guilt in discipline law requires imposition of no penalty when at least one of discipline crime factors is nonexistent in an act.

The fact that, rather that maintaining a broad area of guilt, the necessity of intentional commitment of crime in discipline law; in cases when required by law, a penalty can be imposed on a negligent act should be adopted as a principle.

When one thinks reasonably, imposing no penalty for an individual who cannot know an act constitutes a discipline crime or makes an unavoidable mistake of awareness can be a necessity of civil servant guarantee. Article 30/4 of Turkish Penal Code stipulates that "an individual who makes an unavoidable mistake about realization of conditions that remove or decrease penal responsibility benefits from this mistake". While "mistake", "ignorance" or "unawareness" are listed among the grounds that remove penal responsibility in the penal code which anticipates heavier penalties than discipline law, considering that these grounds do not remove penal responsibility is contradictory and violates the constitution.

ABBREVIATIONS

same dictum: (sd)
d: (docket no)
dec:(decision no)

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