EVALUATION OF ACTUAL AGGREGATION AND CONCEPTUAL AGGREGATION RULES IN TERMS OF THE CRIME OF DISTURBING THE INDIVIDUALS' PEACE AND HARMONY

KİŞİLERİN HUZUR VE SÜKUNUNU BOZMA SUÇU BAKIMINDAN GERÇEK İÇTİMA VE FİKRİ İÇTİMA KURALLARININ DEĞERLENDİRİLMESİ

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Abstract: The crime of disturbing individuals' peace and harmony enacted in Article 123 of the Turkish Criminal Code (Turkish Law No 5237) is mostly accepted as a "general and complementary" type of crime in doctrine and judicial decisions. According to these, if the actions that constitutes the crime in question also constitutes another crime, they will be evaluated within the scope of the relevant crime first and the perpetrator will not be convicted of the crime of deterioration of peace and order. This pre-acceptance in practice is far from always producing fair and just results; giving the verdict of one crime without a meticulous evaluation in terms of the uniqueness of the act is incompatible with the aim of the lawmaker while preparing the law of the arrangement of conceptual aggregation. In this study, a general framework regarding the crime of disturbing the individuals' peace and harmony was firstly included, and then the rules of actual aggregation and conceptual aggregation were elaborated. Subsequently, practices of actual aggregation and conceptual aggregation in terms of this crime were shown and criticisms and proposals towards these practices were given in the light of the Court of Appeal decisions.

Keywords: Peace and Harmony, Actual Aggregation, Conceptual Aggregation

Özet: 5237 sayılı Türk Ceza Kanunu'nun 123. maddesinde hüküm altına alınan kişilerin huzur ve sükununu bozma suçu, doktrinde ve yargı kararlarında ekseriyetle "genel ve tamamlayıcı" bir suç tipi olarak kabul edilmektedir. Buna göre söz konusu suçu oluşturan eylemler, aynı zamanda başkaca bir suçu da oluşturuyorsa öncelikle ilgili suç kapsamında değerlendirme yapılacak ve fail hakkında ayrıca kişilerin huzur ve sükununu bozma suçundan hüküm tesis edilmeyecektir. Tatbikatta işbu ön kabul, daima hakkaniyetli ve adaletli sonuçlar doğurmaktan uzak olup; fiilin tekliği bakımından titiz bir

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değerlendirme yapılmadan tek suçtan hüküm kurulması, kanun koyucunun fikri içtima düzenlemesini hüküm altına alırken güttüğü amaç ile de bağdaşmamaktadır. Çalışmada öncelikle kişilerin huzur ve sükununu bozma suçuna ilişkin genel bir çerçeveye yer verilerek, gerçek içtima ve fikri içtima kuralları detaylandırılmış; akabinde atıf yapılan suç bakımından Yargıtay kararları perspektifinde içtima uygulamalarına ve bu uygulamalara yönelik eleştiri ile önerilere yer verilmiştir.

Anahtar Kelimeler: Huzur ve Sükûn, Gerçek İçtima, Fikri İçtima

INTRODUCTION

Conceptual aggregation which is defined as "a person who commits more than one offense through a single act shall only be sentenced for the offense with the heaviest penalty" in Article 44 of the Turkish Criminal Code No. 5237 and which is one of the exceptions to the actual aggregation that can be briefly defined as "*the number of crimes should be equal to the number of acts, and the number of punishments should be equal to the number of crimes*" [1] can be defined as the collection of more than one crime in a single act, or it can also be expressed as "one act, more than one crime, one punishment". The crime of disturbing individuals' peace and harmony, which provides protection for the spiritual aspect of personal liberty, is a type of crime in which the provisions of conceptual aggregation are often applied in practice. In this context, if the acts that constitutes this crime also constitutes any other crime, the evaluation shall be made first taking into consideration the other crime, and the perpetrator shall not be convicted of the crime of disturbing individuals' peace and harmony. Although the justification of this practice is is stated in the doctrine as the fact that the crime in question is accepted as a "general and complementary" type of crime, both this acceptance and the reasoning of the Court of Cassation's decisions for conceptual aggregation are not in consistent with the aim of the legislator in defining aggregation. As it will be explained in detail in this study, the most important condition for accepting the existence of conceptual aggregation is the "single act", and it is not possible to apply the provisions of the conceptual aggregation if the existence of more than one act is accepted in the legal sense. In the study, it is criti-

1 https://www.mevzuat.gov.tr/

cized that the criterion of "sameness of the act" is not taken into account in the implementation of aggregation carried out by referring to the "general and complementary" crime type in terms of the crime of disturbing individuals' peace and harmony; in this context, it is recommended in the study that, in the event that there are groups of acts that are not considered as the same, the perpetrator be prosecuted and convicted of both the crime of disturbing individuals' peace and harmony and the other related crime by applying the provisions of actual aggregation if the conditions exist. In the study, respectively, a morphological examination of the crime of disturbing individuals' peace and harmony was made, the conditions of existence of actual aggregation and conceptual aggregation were explained, and finally, the practice of aggregation applied for the type of crime and the criticism of and suggestions for these practices were explained.

I. Crime of Disturbing Individuals' Peace and Harmony

The crime of disturbing individuals' peace and harmony is defined in Article 123 of the Turkish Criminal Code No. 5237 as follows; "*Where a person persistently makes phone calls, creates noise, or otherwise acts in an unlawful manner, with the aim of disturbing a person's peace and harmony the offender shall be sentenced to a penalty of imprisonment for a term of three months to one year, upon the complaint of the victim*";[2] this norm protects the right of individuals to live in peace of mind and under the assurance of not being disturbed.[3] As is clearly stated in Articles 17 and 56 of the Constitution of the Republic of Turkey numbered 2709, everyone has both the right to protect and improve his/her corporeal and spiritual existence and the right to live in a healthy and balanced environment.

In this context, in order for individuals to actively and efficiently use their aforementioned rights, acts intended to violate these rights

2 https://www.mevzuat.gov.tr/

3 Similar to this article, a crime of misdemeanor was defined in Article 547 of the TCC no. 765... For the crime defined in Article 547 of the TCC No. 547, a light prison sentence of up to fifteen days or a light fine was foreseen, and the crime was subject to ex officio prosecution. "Recep Gülşen, "Kişilerin Huzur ve Sükununu Bozma Suçu (TCK m.123) [Crime of Disturbing Individuals' Peace and Harmony (TCC Art.123)]", *Zirve Üniversitesi Hukuk Fakültesi Dergisi*, 2012, p. 6-7)

have been defined as crimes by the legislator, and thus, a protection was created for the moral aspect of personal freedom, in other words, the moral liberty of the individual.[4]

In fact, when a comparison is made in terms of the crimes stipulated in the Turkish Criminal Code No. 5237, special criminal laws or other laws containing criminal provisions, it will be noticed that the crime of disturbing individuals' peace and harmony is a type of crime that is frequently encountered in the ordinary flow of life. In this context, it can be said that the crime referred to is in close connection with the privacy of private life, the honor and dignity of the individual, sexual immunity, inviolability of the domicile, inviolability of workplace, freedom of residence, and freedom of work and contract.

The aforementioned connection stems from the fact that acts carried out with the sole aim of disturbing individuals' peace and harmony often affect other areas that are under legal protection.

For example, in the event an individual has to change his job as a result of being persistently tracked on the route to/from the workplace, a relationship will emerge in terms of the peace and harmony of the individual and the freedom of work and contract. Similarly, in the event an individual whose room is spied out from the window of the opposite house every night has to move to another place, a relationship will emerge in terms of the peace and harmony of the individual, the privacy of private life and the freedom of residence. This connection between various legal protection areas clearly reveals that the crime of disturbing individuals' peace and harmony has a protection with a broad perspective. [5]

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4 Özlem Yenerer Çakmut, Kişilerin Huzur ve Sükununu Bozma ve Gürültüye Neden Olma Suçları [Crimes of Disturbing Individuals' Peace and Harmony and Causing Noise], Beta Yayınları, Istanbul 2014, p. 52.; Moreover, considering that the crime referred to was included in the seventh chapter of the second part of the second book of the Law No. 5237, which was titled "Crimes Against Liberty", there is no doubt that the provision contains a protection for the liberty of the individual.

5 "In this way, criminal law sanctions can be applied against violations that cannot be considered within the scope of any crime, such as psychological violence in the workplace, telephone terrorism or persistent stalking, but that interfere with inner peace of an individual." (Rezzan İtişgen, "Kişilerin Huzur ve Sükununu Bozma Suçu [Crime of Disturbing Individuals' Peace and Harmony]", *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi,* 2014, p. 109)

The crime of disturbing individuals' peace and harmony differs from the crime of "causing noise" defined in Article 183 of Law No. 5237 and from the misdemeanor of "noise" defined in Article 36 of the Misdemeanor Law No. 5326, which are thought to have similar characteristics. [6] In this context, the fact that the victim of the crime of disturbing individuals' peace and harmony must be a specific person, [7] the insistence on the act is a condition for the occurrence of the crime, and the fact that the crime can only be committed with a special intention are the distinguishing features.[8]

In the article, the material (act-action) element of the crime is expressed as persistently making phone calls, making noise or executing any other unlawful behavior for the same purpose. [9] As can be clearly understood from the wording of the provision here, the element of insistence is valid for all the actions specified as elective. [10] In other

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[6] Ümit Kocasakal, "Kişilerin Huzur ve Sükununu Bozma Suçu (TCK 123) [Crime of Disturbing Individuals' Peace and Harmony (TCC Art.123)]", *Ankara Barosu Dergisi,* 2015/2, p. 116.

[7] "There is no specific victim of the crime of causing noise. Anyone living in the society can be a victim of this crime. The fact that the noise is made against an unknown person distinguishes this crime from the crime of disturbing individuals' peace and harmony defined in Article 123 of the TCC. While the perpetrator of the crime defined in Article 123 of the TCC targets a certain person, the perpetrator of the crime in the Article 183 of the TCC does not target a specific person." (18th Criminal Chamber of Court of Cassation, 2016/14794, 2019/31, 01/0/2019, www.kazanci.com)

[8] On the other hand, it is stated by some authors in the doctrine that the legal interests targeted by the above-mentioned crimes are also different, and in this respect, the crimes should be considered separately: Gökhan Taneri, Ne Bis İn İdem ve Kanunilik İlkesine Göre Çevreye Karşı Suçlar İdari Yaptırımlar-Kabahatler [Crimes Against Environment According to Ne Bis İn İdem and Legality Principle Administrative Sanctions- Criminal Misdemeanors], Seçkin Yayıncılık, 2021, p.186 and 293.; Ahu Karakurt Eren, "Türk Ceza Kanunu'nda Gürültüye Neden Olma Suçu [Crime of Making Noise in Turkish Criminal Code]", *Türkiye Barolar Birliği Dergisi*, Edition 132, 2017, p. 60-61)

[9] In the doctrine, some authors (Meral Ekici Şahin, "Kişilerin Huzur ve Sükununu Bozma Suçu [Crime of Disturbing Individuals' Peace and Harmony]", *Ceza Hukuku Dergisi,* 2013, p.21.) consider the material element of the crime, especially the part of "another act against the law for the same purpose" as problematic in terms of the principle of clarity and definiteness of criminal law. Again, Şen underlines that a provision contrary to the principle of legality was created, with the expression of "another unlawful behavior". (Ersan Şen, "Özel Hayata Karşı Suçlar [Offences Against Private Life]", İstanbul Barosu Dergisi, 2005/3, p.711.)

[10] Muharrem Özen/Atacan Köksal, "Kişilerin Huzur ve Sükununu Bozma Suçu [Crime of Disturbing Individuals' Peace and Harmony]", *Ankara Üniversitesi Hukuk*

words, performing the act only once is not enough for the crime to occur, but the existence of more than one insistent action is required for the occurrence of the crime. The insistence is evaluated according to the characteristics of the concrete case. On the other hand, although crime is accepted as a general and complementary type of crime by some authors in the doctrine [11] it is not possible to agree with this view. Because, in the text of the article, there is no expression stating this nature of the crime, and it is not mentioned in the justification of the article that the crime is of a general and complementary nature. [12] In the light of these facts, in our opinion, it is not appropriate to accept an issue that is not mentioned in the text and justification of the article as a quality-element of the crime, and to create a case-law and opinion with the justification that "*the act should not constitute another crime*", in a way that will harm the principle of legality, especially in terms of aggregation practices. Because, as explained in detail below, such a presupposition regarding the crime may lead to the fact that the perpetrator cannot be punished for some of his/her actions and this is not appropriate in terms of criminal justice.

On the other hand, if an evaluation is to be made in terms of the moral element of the crime, first of all, it should be stated that the crime cannot be committed by negligence. [13] In this context, although the moral element of the crime is the intent, general intent is not sufficient. In order for the crime to occur, the perpetrator must be acting with the

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Fakültesi Dergisi, 2019, p. 484-485)

[11] Kocasakal, p. 131.; In some of its decisions, the Court of Cassation considered the crime of disturbing individuals' peace and harmony as a general and complementary crime and pointed out that the act should not constitute another crime for the proof of the crime. "The crime of disturbing individuals' peace and harmony defined in Article 123 of the TCC is a general and complementary crime, and for any act to be defined within the scope of this crime, the act must not have been defined as a separate crime in the Law." (18th Criminal Chamber of Court of Cassation, 2017/1471, 2019/4815, 03/12/2019, www.kazanci.com)

[12] For example, this issue is clearly stated both in the text of the article and in the justification of the article of the crime of "misuse of public duty". It is agreed upon in the doctrine and the practice of the Court of Cassation, that this crime is regulated as a general, secondary and complementary crime. However, it is not possible to see the presence of the same clear attitude regarding the crime of disturbing individuals' peace and harmony.

[13] Murat Yılmaz, Kişilerin Huzur ve Sükununu Bozma [Disturbing Individuals' Peace and Harmony], Legal Yayıncılık, 2017, p. 29.

sole aim of disturbing the peace and harmony of the victim. [14] In the doctrine, this necessity appears as "special intent", which can also be expressed as a purpose or motive and is classified as a form of direct intent. [15] In this context, phone calls made to insult or threaten the person will not constitute this crime in principle, since the existence of a special intent is sought for the occurrence of the crime referred to; in these cases, if the conditions exist, the perpetrator will be prosecuted for other related crimes. [16]

"Exercise of a right and the consent of the person concerned", which are stipulated in Article 26 of the Law No. 5237, are the most common reasons of eliminating the unlawfulness of the act for the crime in question. Because an individual's right to peace and harmony is an absolute right that he/she can benefit from. For this reason, if the relevant person consents to the violation of his/her right, the crime in question will not occur. Again, in the case of exercising a right arising from the law or custom, it will be possible to argue that the crime does not occur, considering that the action is not directed to a particular victim and there is no special intent. For example, cases such as a wedding organization, repairing, or moving house can be considered in this scope.

Finally, the crime is an offense prosecuted on complaint, and the sanctions to be imposed is stipulated in the text of the article as imprisonment from three months to one year. We consider as a deficiency the fact that no qualified versions of the crime in question is defined.[17]

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14 Ali Parlar/Muzaffer Hatipoğlu, Cezai ve Hukuki Sorumluluk Boyutlarıyla Çevre Hukuku [Environmental Law with Criminal and Legal Responsibility Dimensions], Adalet Yayınevi, Ankara 2010, p. 309.

15 Veli Özer Özbek/Koray Doğan/Pınar Bacaksız, Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Code General Provisions], Seçkin Yayıncılık, Ankara 2021, p.265.

16 Veli Özer Özbek/Koray Doğan/Pınar Bacaksız, Türk Ceza Hukuku Özel Hükümler [Turkish Criminal Code Special Provisions], Seçkin Yayıncılık, Ankara 2021, p.487.

17 For example, it would have been more appropriate in terms of the criminal justice system if the Law had included some qualified versions of the crime such as the crime being committed at night or the perpetrator being a public official.

II. Actual Aggregation - Conceptual Aggregation

Aggregation, which is defined as "conjoining, gathering, meeting" in the current Turkish dictionary [18] of the Turkish Language Institution, refers to two separate institutions in terms of criminal law: the first is the "consolidation of penalties" and the second is the "aggregation of crimes". The consolidation of penalties is as an institution that enables the collection of more than one sentence ruled in a single or different proceedings against a perpetrator, [19] which cannot be evaluated within the scope of material criminal law and which has importance in the execution of penalties.[20] In this context, the consolidation of penalties primarily depends on the presence of more than one crime. [21]

The aggregation of crimes is included in the general theory of crime, and causes some of the penalties of aggregated crimes not to be imposed on the perpetrator. [22] In other words, if an act that constitutes a crime violates or seems to violate more than one norm at the same time, the institution of the aggregation of crimes comes to the fore in solving the problem of which norm will apply to the event. [23] In the

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18 http://www.tdk.gov.tr.

19 The reason for not including the consolidation of punishments procedure, which was clearly stipulated in Article 68 of the Abolished Criminal Code No. 765, in the Turkish Criminal Code No. 5237 is expressed as follows: "One of the basic rules of criminal law is expressed as 'the number of crimes should be equal to the number of acts, and the number of punishments should be equal to the number of crimes. Exceptions to this rule are specified in the aggregation of offenses part. Apart from these exceptions, a separate punishment must be imposed for each crime committed. In this way, each penalty imposed will maintain its independence. Accepting the opinion that the question of how to execute more than one punishment of the same or different nature should be regulated in the execution law, it was decided by the Commission to remove the provisions regarding the 'consolidation of punishments' from the text." (İzzet Özgenç/Cumhur Şahin, Türk Ceza Hukuku Gazi Külliyatı [Turkish Criminal Law Gazi Collection], Ankara 2005, p. 48)

20 "Consolidation of punishments is a process of execution institution; crimes the punishments of which are consolidated maintain their legal independence and each crime has separate consequences." (6th Criminal Chamber of Court of Cassation, 2014/8126 E., 2014/20012 K., 11/17/2014, www.kazanci.com)

21 Mehmet Emin Artuk/Ahmet Gökcen/Caner Yenidünya, Ceza Hukuku Genel Hükümler II (Yaptırım Hukuku) [Turkish Criminal Law General Provisions II (Sanctions Law)], Seçkin Yayıncılık, Ankara 2003, p. 169.

22 Fatma Karakaş Doğan, "Türk Ceza Hukukunda Cezaların İçtimaı Kurumunun Düzenlenmesi Gerektiği Üzerine ["On the Necessity of Including the Procedure of Consolidation of Punishments in Turkish Criminal Law]", *Ankara Barosu Dergisi,* 2011, p. 87.

23 9th Criminal Chamber of Court of Cassation, 2020/7817, 2020/2297, 11/25/2020,

doctrine, on the other hand, İçel make the definition of "the problem of how the responsibility will be determined in the crimes committed whether there is a final conviction or not" in terms of the combination of crimes (competition, aggregation). [24]

The basic principle that dominates the Turkish Criminal Law is the actual aggregation, and according to this principle, "the number of crimes should be equal to the number of acts, and the number of punishments should be equal to the number of crimes". [25] According to this principle, in case of violation of more than one norm by the same person, the perpetrator shall be held separately responsible for each violation, in other words, the criminal responsibility of the perpetrator shall be determined according to the number of crimes committed. [26] The "aggregation of crimes" defined in Articles 42, 43 and 44 of the Turkish Criminal Code No. 5237 is an exception to the principle in question, and apart from these exceptions, a separate sentence should be imposed for each crime committed. In this context, it is not legally possible to implement principles of actual aggregation, and aggregation of crimes at the same time. Because in the presence of actual aggregation, there are more than one act, more than one crime and more than one punishment. [27]

As referenced in the paragraph above, "conceptual aggregation of different kinds",[28] which is one of the exceptions to the principle of actual congregation and defined with the compound offenses and successive offenses in the fifth chapter titled "Aggregation of Crimes" of the second part titled "Principles of Criminal Liability" of the first

www.kazanci.com.

[24] Kayıhan İçel, Ceza Hukuku Genel Hükümler[Criminal Law General Provisions], Beta Yayıncılık, 2021, p. 579.

[25] Mahmut Koca, "Fikri İçtima [Conceptual Aggregation]", Ceza Hukuku Dergisi, 2007, p. 197-198)

[26] Fatih Birtek, Ceza Hukuku Genel Hükümler ["Criminal Law General Provisions], Adalet Yayınevi, Ankara 2018, p. 23-24)

[27] Berrin Akbulut, Ceza Hukuku Genel Hükümler [Criminal Law General Provisions], Adalet Yayınevi, Ankara 2021, p. 757.

[28] In the doctrine, the use of the concept in question by some authors as in the abolished Penal Code period is considered problematic in terms of the principle of choosing a plain language. "The same principle could have been used by using the term 'formal aggregation' instead of conceptual aggregation." (Mustafa Özen, "Ceza Hukukunda Fikri İçtima [Conceptual Aggregation in Criminal Law]", *Türkiye Barolar Birliği Dergisi*, 2007, p. 133) 29 https://www.mevzuat.gov.tr/

book titled "General Provisions" of the Turkish Criminal Code No. 5237, defined in Article 44 as follows; "*A person who commits more than one offense through a single act shall only be sentenced for the offense with the heaviest penalty*."[29],[30] Accordingly, in order for the existence of conceptual aggregation of different kinds to be accepted, the following conditions must be met:

1- There must be an act, [31]

2- More than one crime must have been committed with this act,

3- The perpetrator must have been sentenced for the offense with the heaviest penalty, [32]

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[29] https://www.mevzuat.gov.tr/

[30] Conceptual aggregation can also be defined as the combination of more than one crime in a single act. In this context, "If the crimes are the same, there is a conceptual aggregation of the same kind, and if the crimes are different, there is a conceptual aggregation of different kinds." (Neslihan Göktürk, "Türk Hukuku'nda Suçların İçtimaı [Aggregation of Crimes in Turkish Law]", *Ceza Hukuku ve Kriminoloji Dergisi*, 2014, p.44.) Conceptual aggregation of the crimes of same kind is defined in Article 43/2 of the Turkish Criminal Code No. 5237.

[31] "...There definitely must be only one act in both conceptual aggregation of the crimes of same kind and of the different kinds." (Muhammed Demirel, Karar Analizi Tehlike Suçları Zarar Suçları Arasındaki İlişkinin İçtima Kuralları Kapsamında Değerlendirilmesi [Decision Analysis, Evaluation of the Relationship Between Endangerment Crimes and Crimes Causing Harm in the Scope of the Rules of Aggregation], İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 2013, p.1482.)

[32] In a recent decision of the 9th Criminal Chamber of the Court of Cassation, the following is stated about the method to be followed in terms of the implementation of the rule of conceptual aggregation in cases where more than one crime are committed with a single act of the perpetrator but these crimes are subject to the same type and amount of punishment; "With the amendment made in Article 241 of the TCC with Article 14 of the Law No. 7242, which was published in the Official Gazette dated 04/15/2020, the lower limit of the judicial fine in the article was changed to five hundred days, and the upper limit of the imprisonment sentence was changed to 6 years. It is clear that Article 241 of the TCK, which stipulates the heaviest penalty must be imposed pursuant to Article 44 of the TCC for POS usury actions committed after this date. In the concrete case, regarding the problem of which law should be applied, since the same type and amount of penalties are specified in Article 241 of the TCC in force and Article 36 of the BKKK (Bank Cards and Credit Cards Law) Law No. 5464 as of the date of the crime : As discussed in detail above under the heading "Examination of the Legal Relationship Between the Parties According to the Law of Obligations", in the case of POS usury, although there is a contract of sale in appearance and the credit card is used as a tool in committing the crime, the real intention of the parties consists of making an interest agreement. The perpetrator, who is the owner of the card acceptor enterprise, charges the card holder's credit card the sum of the interest and the loan amount subject to the agreement using the POS device installed in the workplace,

4- The dispute must not be a dispute that can be resolved within the framework of the principles of aggregation in appearance.[33]

In POS usury, the sale transaction in appearance that does not reflect the real will (Intention) of the parties shall be invalid, but the hidden transaction (loan contract) that reflects their real purpose shall still exist. When the act is evaluated in the light of these explanations, in POS usury, the intent of the perpetrator is to gain benefit by usury, and the intended crime is usury. The perpetrator makes more than one move acts when committing this crime. Although the perpetrator also commits the crime defined in Article 36 of the Law No. 5464 with some of these acts aiming to secure his receivables, more than one acts in question constitutes a "single act" in the legal sense. As emphasized in the decision of the assembly of criminal chambers of the Court of Cassation dated 07/06/2010 and numbered 2010/8-51 E., 2010/162 K., "With Article 44 of the TCC, the legislator has adopted the 'melting system'. Accordingly, in POS usury, the crime of violating Article 36 of the Law No. 5464, which the perpetrator commits with some acts while committing the crime, melts into this act, since the act of usury, which is the main purpose of his intent, is the only act. For this reason, the article defining the crime of usury, which the the real intend of the accused, in other words, to which the accused's intention is directed, should be applied. Moreover, considering the provisions of the TCO, it is a result of the legal logic that the criminal law, which pursues the material truth, should take the hidden transaction (loan contract) into account that the parties ultimately want to achieve (Intention), not the transaction in appearance in the evaluation of the act. VII - CONCLUSION Considering that the legal value protected by Article 241 of the TCC, which is applicable to the POS usury acts, and the legal value protected by Article 36 of the Law No. 5464 are different, and the victims of both crimes are different, it is not possible for the dis-

thus guarantees his receivable, and then he pays a less amount than the amount he charges the credit card and collects (i.e. the loan amount subject to the agreement) in cash to the card holder. The lending of money is based on the pretended sales agreement that is present in appearance. The collusion here is a relative collusion. Pursuant to Article 19 of the TCO, in cases of relative collusion, the transaction in appearance shall be invalid because it does not reflect the real will of the parties, and the hidden transaction that reflects the real will of the parties shall have legal consequences.

pute to be resolved in the light of the principle of "the special norm precedes", which is one of the principles of aggregation in appearance, as requested by the Supreme Court Chief Public Prosecutor's Office, in other words, Article 36 of the Law No. 5464 cannot be applied. In POS usury, the intent of the perpetrator is to gain benefit by usury, and the intended crime is usury. Although the perpetrator makes more than one acts when committing this crime and he also commits the crime defined in Article 36 of the Law No. 5464 with some of these acts that he performs to guarantee his receivables, since the above mentioned multiple acts constitute a "single act" in the legal sense, the acts violating Article 36 of the Law No. 5464 melt in usury act which is the intention of the perpetrator. It was understood from the content of the file and the reasoning in the decision of our chamber that the provision of the article defining the crime of usury, which the perpetrator intended to commit, should be applied to the perpetrator; for this reason, the objection of the Office of the Chief Public Prosecutor of the Court of Cassation was not deemed appropriate. Thus, although the types and terms of punishments for the crimes are the same, it has been stated that the legal identification should be made correctly in terms of issues such as amnesty, complaint, right to participate, and determination of the competent chamber of appeal. The aforementioned decision states that in cases where more than one crime are committed with a single act of the perpetrator and where the provisions of the conceptual aggregation will be applied, if the penalties specified in the law for the crimes are of the same type and amount, an evaluation shall be made taking into account the perpetrator's intent. (9th Criminal Chamber of Court of Cassation, 2020/7817, 2020/2297, 11/25/2020, www.kazanci.com) "In order for the provision of conceptual aggregation defined in Article 44 of the TCC to be implemented, it is necessary to first determine whether there is an aggregation in appearance, and if there is, it is not possible to apply the provision of conceptual aggregation..." (5th Criminal Chamber of the Court of Cassation, 2020/394, 2021/114, 01/14/2021, www.kazanci.com); "the law to be applied in cases of aggregation in appearance" are determined according to the principles such as "consuming - consumed norm relationship", "secondary norm comes second" and "special norm precedes". (Assembly of Criminal Chambers of the Court of Cassation, 2017/8-1122, 2020/381,

09/29/2020, www.kazanci.com); for detailed explanations about aggregation in appearance, see: 9th merits, 2020/2297 decision dated 11/25/2020 of the 9th Criminal Chamber of the Court of Cassation, and the decision 2017/11-212 merits, 2019/20 decision, 01/17/2019.

Here, within the framework of the dissolution system and in the light of the principle of "non bis in idem", the legislator has concluded that punishing the perpetrator more than once, taking into account the sameness of his act conflicts with the criminal justice. According to this, the legislator found it adequate to impose the heaviest penalty on the perpetrator. The said approach of the legislator is quite appropriate. However, it should be emphasized here that the conceptual aggregation provision is only a provision that regulates the imposition of punishment. For this reason, it is necessary to accept that every crime is independent except the imposition of punishment.[33]

The most important issue in terms of the fair application of the principle of conceptual aggregation is the appropriateness of the legal assessment to be made on the sameness of the act (action). Because, in every principle within the scope of the aggregation of crimes, the concept of "act" has been given a special legal value and in this context, different meanings have been attributed to the concept in the doctrine.[34] Although different opinions have been put forward in the doctrine in terms of the sameness of the act (action),[35] in our opinion, it is the sameness in the legal sense that should be taken as the basis here. According to this, the fact that an act is single in the natural sense does not mean that it is single in the legal sense as well. In this context, although each bodily action performed constitutes a separate move-

33 Nur Centel/Hamide Zafer/Özlem Yenerer Çakmut, Türk Ceza Hukukuna Giriş [Introduction to Turkish Criminal Law], Beta Yayıncılık, 2020, p. 486.

34 Tuğçe Özkan, Yargı Kararları Işığında Türk Ceza Hukukunda İçtima Kavramı [Concept of Aggregation in Turkish Criminal Law in the Light of Judicial Decisions], T.C İstanbul Kültür Üniversitesi Lisansüstü Eğitim Enstitüsü, Master's thesis, April 2019, p.4.

35 For detailed explanations regarding these opinions, see: Emrah Öz demir, Türk Hukukunda Yargıtay Kararları Işığında Fikri İçtima [Conceptual Aggregation in Turkish Law in the Light of Court of Cassation Decisions], Akdeniz Üniversitesi Sosyal Bilimler Enstitüsü, master's Thesis, Antalya 2012, p. 17-39.; Mustafa Özen, Suçların İçtimaı (Zincirleme Suç-Fikri İçtima-Bileşik Suç) [Aggregation of Crimes (Successive Offense- Conceptual Aggregation- Compound Offenses)], Ankara Üniversitesi Sosyal Bilimler Enstitüsü, Doctoral Thesis, Ankara 2008, p.26-40.

ment, the issue that is meant to be expressed by the fact that the movement is single in the legal sense is different. Accordingly, even if there is more than one act performed, these acts form unity in the evaluation due to legal reasons and are hereby accepted as a single act. [36] In other words, although more than one action is taken during the commission of some crimes, these behaviors constitute a single act in the legal sense specified in the legal definition of the crime. [37]

III. Implementation of the Principle of Aggregation for the Crime of Disturbing Individuals' Peace and Harmony

As stated above within the explanations regarding the crime of disturbing individuals' peace and harmony, the said crime is accepted as a "general and complementary" crime in the doctrine by some authors and in some decisions of the Court of Cassation. According to this opinion, if the actions of the perpetrator constitute any other crime, first of all, the evaluated shall be made within the scope of the relevant crime, and in this case, the perpetrator shall not be separately convicted of the crime of disturbing individuals' peace and harmony.[38] Although the Court of Cassation has mostly justified the said practice within the framework of the principle of conceptual aggregation, [39] it is not acceptable to define the crime as a general and complementary type of crime and, hereby, to introduce a condition of occurrence incompatible with the condition of legality, namely that the act not constitute another crime, and to implement conceptual aggregation rules without performing a rigorous evaluation in terms of the sameness of the movement. Because, as mentioned under the relevant headings above, the existence of an act that can be considered as a single act in the legal sense is essential for the implementation of the provisions of the conceptual

[36] Assemly of Criminal Chamber of Court of Cassation, 2019/14-44, 2020/510, 12/8/2020, www.kazanci.com

[37] Mahmut Koca/İlhan Üzülmez, Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Law General Provisions], 14. Baskı, Seçkin Yayıncılık, Ankara 2021, p. 492.

[38] Kocasakal, p. 131.

[39] "Without considering that the crime of disturbing peace and harmony would not occur according to the conceptual aggregation rules, since it is accepted that the accused had insulted and threatened the intervening party by telephone, calling and texting..." (4th Criminal Chamber of Court of Cassation, 2012/16788, 2013/30595, 6/3/2013, www.kazanci.com)

aggregation. However, in the implementations of the provisions of aggregation by the Court of Cassation as a presupposition in terms of the crime of disturbing individuals' peace and harmony, it is observed that the sameness of the act (movement) is not evaluated separately in each concrete case, and in cases where the provisions of Article 123 of the TCC come to the fore, the conviction provisions for the other crime committed are automatically applied.[40] In our opinion, in cases where the crime of disturbing individuals' peace and harmony and another crime are committed, the acts should be evaluated according to the criteria of full sameness and partial sameness, and in this context, actual aggregation / conceptual aggregation rules should be applied.

Because, in practice, it is observed that the crimes of sexual harassment, threats, blackmail, violation of dwelling immunity, insults, violation of privacy of private life and causing noise are discussed together with the crime of disturbing individuals' peace and harmony.[41]

In determining the sameness of the act in conceptual aggregation, the exact sameness of the acts should be sought, and all the execution

40 "The crime of disturbing individuals' the peace and harmony defined in Article 123 of the TCC must have been committed with the sole intend of disturbing the peace and harmony of a specific person. Since this crime is a general and complementary crime, if the act constitutes any other crime, the crime of disturbing individuals' peace and harmony shall not occur. In the concrete case, it was understood that the accused YÖ had sent sexual messages to the mobile phone of the intervening party on different dates. Imposing penalty on the accused with the justifications that are non-statutory and not deemed appropriate without considering the fact that the acts of the accused are the acts defined in articles 105/1 and 43 of the TCC…" (4th Criminal Chamber of the Court of Cassation, 2013/6856, 2014/32599, 11.11.2014, www.kazanci.com); "In case the perpetrator commits crimes such as threats, insults, blackmail, sexual harassment through the phone call or the messages he sent, investigation and prosecution should be carried out only for these crimes, and should not be punished for committing the crime of disturbing individuals' peace and harmony which is a general crime." (4th Criminal Chamber of Court of Cassation, 2013/40149, 2014/35879, 12/11/2014, www.kazanci.com)

41 In our opinion, another reason why the crime of disturbing individuals' peace and harmony cannot be described as "general" compared to the crimes in question is the difference between the legal values protected by the crimes in question and by the crime of disturbing individuals' peace and harmony. "The first condition to be able to take into account the "special norm-general norm relationship" is that both norms protect the same legal value. In other words, the legal value protected by the special norm and the legal value protected by the general norm are the same. (9th Criminal Chamber of Court of Cassation, 2020/7817, 2020/2297, 11/25/2020, www.kazanci.com)

actions should be common for all types of crimes.[42] In this context, just intersection, in other words, partial sameness, is not sufficient for the application of the rules of aggregation. [43] Because in the case of partial sameness, it is not possible to apply the rules of conceptual aggregation, since it is not possible to accept the singleness of the act. In our opinion, in case of partial sameness, each act should be evaluated as separate act, and a separate penalty should be sentenced for each crime by applying the real actual aggregation.

To give an example about the sameness (full-partial) of the acts; assume that the perpetrator sent a message to a person five times at intervals of one hour, and all of these messages also contained insulting expressions. In such a case, it is clear that all of the acts are exactly the same. Because although there is more than one act in the natural sense, due to the legal reasons, these acts form the singleness in the evaluation, and all of the acts meet definitions of both crimes at the same time. In other words, in terms of the crimes that are committed, there is no action that are not taken into consideration, so to speak. In this case, since there is an act that can be considered as a single act in the legal sense and more than one crime were committed by this single act, the provisions of the conceptual aggregation will be applied and the perpetrator will be penalized only for the crime of insult and also the provisions of the successive crime will be applied. In our opinion, since the act can be accepted as one a single act in the case of complete sameness, the application of conceptual aggregation does not create an unfairness. However, this is not the case in the case of partial sameness. For example, assume that the perpetrator sent a message to a person five times at one-hour intervals, but only two of these messages contain insulting expressions. In the presence of such a situation, since it cannot be argued that the crime of insult has been committed in terms of the other three messages, it cannot be stated that the crime types are common in terms of all acts. [44] In other words, it is not possible to accept

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[42] Göktürk, p. 46.

[43] Kayıhan İçel/Füsun Sokullu Akıncı/İzzet Özgenç/Adem Sözüer/Fatih Selami Mahmutoğlu/Yener Ünver, Suç Teorisi [Crime Theory], Beta Yayınevi, İstanbul 2000, p. 423.

[44] “In order for the conceptual aggregation to take place, for each crime, the act must match the type, be unlawful and faulty. If there is an act with these characteristics for only one of the crimes, it means the conditions of conceptual aggregation have not been met, and the provisions of actual aggregation should be applied. (Assembly of Criminal Chamber of Court of Cassation, 2014/12-516, 2018/47, 2/20/2018,

that all acts constitute a single act in a legal sense. Because, the other three messages that do not contain insulting expressions are not evaluated. As in the second example given, if there is a partial sameness in terms of acts, applying the provisions of the conceptual aggregation by accepting the crime of disturbing individuals' peace and harmony as a "general and complementary" crime type and making a decision for only the other relevant crime committed will not contribute to criminal justice. Because, on the basis of the principle of conceptual aggregation, the singleness of the perpetrator's act is taken into account, and in this context, the perpetrator is prevented from being punished for the same act more than once. However, in the case of partial sameness, it is not possible to cause a situation in which the perpetrator is not punished for the acts that are not taken into account on the grounds of "conceptual aggregation" in terms of the crimes that the perpetrator has committed with separate actions. [45] In this context, in the second possibility mentioned above, in our opinion, if all the conditions of the crime are present, the actual aggregation provisions should be applied and a conviction should be established for both the crime of insult and crime of disturbing individuals' peace and harmony.

We have mentioned above that, in practice, the sameness of the act (movement) is not evaluated separately in each concrete case, and in cases where the provisions of Article 123 of the TCC come to the fore, the conviction provisions for the other crime committed are automatically applied (by making reference to general and complementary crime type). In this context, we believe that we should mention two separate decisions of the Court of Cassation, which also contains opinions supporting this understanding, and our criticisms about it. In this context, first of all, the Court of Cassation decision will be referred to in which aggregation provisions were applied for the crime of "causing noise", which is thought to have similar characteristics with the crime of disturbing individuals' peace and harmony. The relevant part of this decision is as quoted below; [46]

www.kazanci.com)

[45] In our opinion, applying conceptual aggregation rules and non-applying separate punishment for the crime of disturbing individuals' peace and harmony in cases where there is partial sameness will lead to the existence of previous or subsequent actions that are not punished.

[46] 18th Criminal Chamber of Court of Cassation, 2016/15421, 2017/2171, 2/27/2017, www.kazanci.com

"As can be seen, there are different provisions in our law regarding noise, that are subjected to different conditions. In this case, it is necessary to determine the areas they cover in order to evaluate all the regulations regarding noise together and to determine the sanction to be applied.

1-) If the source of environmental noise is "transportation vehicles, building sites, plants, workshops, workplaces, recreation locations, service buildings, dwellings" as explained in Article 14 of Law No. 2872, the penalties stated in each paragraph must be imposed in the conditions stated in the same paragraphs;

A-) If the noise is capable of harming the health of another person, the penalty specified for the crime defined in Article 183 of the TCC must be imposed based on the provision of Article 14 of Law no. 2872,

b-) Even if the noise is made only for the purpose of disturbing the peace and harmony, if it is capable of harming the health of another person, the penalty of the crime with the heaviest penalty between the crimes defined in Articles 123 and 183 of the TCC must be imposed, based on Article 14 of Law no. 2872 and Article 44 of the TCC,

c-) If the noise is not made by the perpetrator for the sole purpose of disturbing peace and harmony, is not capable of harming the health of another person but can disturb peace and harmony of the victim, the administrative fine specified for misdemeanor defined in Article 14, 20/h of Law No. 2872 must be imposed,

2-) Regardless of its source, if the environmental noise is made only for the purpose of disturbing peace and harmony and is not capable of harming the health of another person, the penalty for the crime in Article 123 of the TCC must be imposed,

3-) If the source of environmental noise is any other place than "transportation vehicles, building sites, plants, workshops, workplaces, recreation locations, service buildings, dwellings" specified in Article 14 of Law No. 2872, or is not made with the sole purpose of disturbing peace and harmony or is not capable of harming the health of another person, the penalty specified for misdemeanor defined in Article 36 of the Misdemeanor Law No. 5326 must be imposed,

4-) If the vehicles of motor vehicle drivers make noise in a way to disturb the people around them, if the noise does not have the qualifications described in the paragraph (1) above, in accordance with the aggregation rules in Article

15/1 of the Law No. 5326, the heavier administrative fine of the fines specified in article 30/b of the Highway Traffic Law No.2918 and in Article 36 of Law No. 5236 must be imposed."

According to this, even if the noise is made only for the purpose of disturbing the peace and harmony, if it is capable of harming the health of another person, the penalty of the crime with the heaviest penalty between the crimes defined in Articles 123 and 183 of the TCC must be imposed in accordance with conceptual aggregation rules. In our opinion, the aforementioned pre-acceptance is not appropriate in terms of conceptual aggregation rules. Because, in order for the conceptual aggregation rules to be applied, first of all, there must have been a single act and this single act must have caused more than one different crime to be committed. However, according to the acceptance in the above-mentioned decision, it is not possible to say that the acts constituting the crimes can always be considered as one in the legal sense. In other words, the complete sameness may not always come to the fore here. For example, assume that the perpetrator owns a manufacturing factory and there is an apartment adjacent to this small factory, that the perpetrator has made noise above the legal level on five different nights, and that all of this noise is capable of harming the health of the resident of the adjacent apartment. In such a case defined above, it is clear that there is complete sameness in terms of acts and that the acts causing the crimes are common in terms of all related crime types. In this case, since there is an act that can be considered as a single act in the legal sense, the provisions of the conceptual aggregation will be applied and the penalty of the crime with the heaviest penalty among the related crimes will be imposed. [47] But assume that only two of the noises made by the same perpetrator on the nights of five different days are capable of harming the health of the resident of the flat, and the other three are noises that only [48] are only capa-

[47] "According to the current system of the TCC, conceptual aggregation of different kinds provisions can be applied if the conditions are met for the crimes of causing noise and of disturbing individuals' peace and harmony." (Gülsün Ayhan Aygörmez Uğurlubay, Çevreye Karşı Suçlar-Türk ve Alman Çevre Ceza Hukukunda Güncel Sorunlar [Crimes Against the Environment-Current Issues in Turkish and German Environmental Criminal Law], Yetkin Yayınları, 2015, p. 477)

[48] Here, in terms of the crime of disturbing individuals' peace and harmony, the fact that whether the perpetrator's actions is directed to a specific victim, and the specific intent to disturb the individuals' peace and harmony should be evaluated separately in each concrete case.

ble of disturbing the peace and harmony. In such a possibility, in our opinion, there are two separate sets of acts: Accordingly, since all acts are not common in terms of all related crimes, the provisions of actual aggregation should be applied, and if the conditions are met, both the penalties of the crime of disturbing individuals' peace and harmony and the crime of causing noise should be imposed. Moreover, in the doctrine, it is stated that the key concept in the assessment of conceptual aggregation in terms of the crime of causing noise, as exemplified above, is the "singleness of the movement".[49]

On the other hand, in the decision 2014/20501 merits and 2014/32250 decision of 4th Criminal Chamber of the Court of Cassation in which assessment for aggregation was made in terms of the crime of disturbing individuals' peace and harmony, it was stated that;

"The crime of disturbing individuals' peace and harmony is a general and complementary crime. It is argued that the crime of disturbing individuals' peace and harmony will not be committed if the acts that must be carried out in order for this crime to occur, constitute the commission of another crime. In the concrete case, it was understood that the accused ... using the phone number 05332850322 had disturbed the intervening party by constantly and persistently calling the phone number 05398529621 used by the intervening party, and that had taken actions to disturb the intervening party, who had rejected his marriage proposal, and to force her to do what he had wanted. In our opinion, in the event that the perpetrator's single act causes more than one result, undoubtedly, if the act was committed with a single intent, he must be held responsible for the crime with the heaviest penalty within the scope of Article 44 of the TCC, and if the intent of the accused is directed to the commission of both crimes, even if there is single act, conceptual aggregation rules cannot be applied and it must be accepted that the two crimes were committed separately. It must be accepted that the accused acted with the intention of both disturbing and insulting in the actions he took after the marriage proposal was rejected by the intervening party, and that, even if the accused's acts were considered as a single act, the accused has separate intents and wanted more than one outcome to occur separately. Within the framework of the provisions of actual aggregation, it should be accepted that the accused have committed both crimes separately. It is not correct in legal sense to seek whether the accused acted with the sole special intent of "disturbing

[49] Karakurt Eren, s. 108.

peace and harmony" in the appeal examination made by the Supreme Court only for the crime of disturbing individuals' peace and harmony. It is clearly understood from the scope of the file that his intent had been to commit more than one crime",[50] and it was stated that, even if there is only one act, if the intent of the perpetrator had been to commit both crime, conceptual aggregation rules could not be applied. In our opinion, the justification of the said decision, which states that the actual aggregation rules should be applied for the crime of insult and the crime of disturbing individuals' peace and harmony, is not legally appropriate. Because Article 44 of Law No. 5237, which regulates the actual aggregation rules, is clear and no assessment has been made in this article in terms of the perpetrator's intent for the crimes. In this context, when the above-mentioned conditions of conceptual aggregation are met, it is not legally possible to apply the provisions of actual aggregation on the grounds that the perpetrator's intent is directed to all crimes. Because the conceptual aggregation is based on the singleness of the act of the perpetrator, the quantity of his/her intention is not important here. For the reasons explained, the grounds for objection of the Office of the Chief Public Prosecutor of the Court of Cassation in the decision to which reference was made is not appropriate, and it would have been more reasonable to make an assessment according to the criterion of the sameness of the acts in the concrete case.

IV. Conclusion

The crime of disturbing individuals' peace and harmony defined in Article 123 of the Turkish Criminal Code No.5237 is accepted as a "general and complementary" type of crime in doctrine and some decisions of the Court of Cassation. It is not possible to agree with this opinion. Because the aforementioned nature of the crime was not specified in the text of the article, nor was it mentioned in the justification of the article that the crime was of a general and complementary nature. In light of these facts, it is not appropriate to accept an issue that is not mentioned in the text and justification of the article as a quality-element of the crime, and to create a jurisprudence and opin-

[50] The part of the decision referred to above is the grounds of appeal of the Office of the Chief Public Prosecutor of the Court of Cassation. The Chamber, considering the reasons for the objection in question appropriate, accepted the objection and upheld the decision of the local court.

ion with the justification that "the act should not constitute another crime", especially in terms of aggregation practices. In our opinion, in the event that other crimes come to the fore together with the crime of disturbing individuals' peace and harmony, the issue of whether the actual aggregation rules or conceptual aggregation rules will be applied should be determined according to the singleness of the act within the framework of the sameness of the acts. Accordingly, if there are groups of acts that do not form singleness in the evaluation, the perpetrator should be convicted of both the crime of disturbing individuals' peace and harmony and the other related crime by applying actual aggregation rules, if the conditions are met.[51]

In practice, in our opinion, it is not fair in terms of criminal justice to establish a verdict for another related crime on the grounds that the crime of disturbing individuals' peace and harmony is a general and complementary crime. Again, contravening the criterion of the singleness of the act and making an evaluation only for the intent of the perpetrator does not comply with the general principle of the aggregation rules. Therefore, we believe that it is necessary to prevent the acceptance of crime as a general and complementary type of crime, without prejudice to the principle of legality in crime and punishment, and in this context, the aggregation rules should be evaluated within the framework of the "singleness of the act" criterion.

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[51] In the doctrine, Şen points out that in cases where crimes such as insulting, threatening and disturbing individuals' peace and harmony are committed together, the provisions of actual aggregation should be applied. (Ersan Şen, Yeni Türk Ceza Kanunu Yorumu [Commentary of New Turkish Criminal Code], İstanbul 2006, p. 521)

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