JOURNAL OF AWARENESS
HOLISTENCE publications

Journal of Awareness
Volume / Cilt: 9, Special Issue/Özel Sayı 2, 2024, pp. 97-107
E-ISSN: 2149-6544
https://journals.gen.tr/joa
https://doi.org/10.26809/joa.2522

Received / Geliş: 01.09.2024
Accepted / Kabul: 14.10.2024

RESEARCH ARTICLE/ARAŞTIRMA MAKALESİ

Deferment of the filing of a public lawsuit and the treatment measure in the context of using narcotic or stimulant substances

Muhammet İsmet Yavuz

Res. Asst., Piri Reis University, Faculty of Law, Department of Criminal and Criminal Procedure Law, (Ph.D. Student, Istanbul University Institute of Social Sciences, Public Law Program), Türkiye, e-mail: miyavuz@pirireis.edu.tr

Abstract

In this study, the institution of postponement of public prosecution and the treatment measure envisaged in terms of the crime regulated in Article 191/1 of the Turkish Penal Code (TPC) No. 5237 will be addressed in the context of the "use" alternative action of the crime. According to Article 191/2 of the TPC, at the end of the investigation carried out in terms of the crime regulated in Article 191/1 of the TPC, a decision will be made to postpone the public prosecution for five years without seeking the conditions in Article 171 of the Criminal Procedure Code (CPC) No. 5271 regarding the suspect, and the public prosecutor does not have the discretion to make a decision not to issue this decision. In this respect, Article 191/2 of the TPC comes to the fore as an exception to the institution of postponement of public prosecution regulated in Article 171 of the CPC. In terms of investigations carried out pursuant to Article 191/6 of the TPC, such a decision cannot be made. According to Article 191/4 of the TPC, if the suspect insists on not complying with the obligations imposed on him or the requirements of the treatment applied during the postponement period, if he purchases, accepts, possesses, or uses drugs or stimulants again, an indictment will be issued and a public prosecution will be initiated. With the provision of Article 191/2 of the TPC, the suspect is given the opportunity to benefit from the possibility of treatment and to get rid of being a substance addict without waiting for the prosecution phase. The treatment measure can only be applied to a suspect who has reached sufficient suspicion of using substances. Other probation measures will be applied to a suspect who does not need treatment. If necessary, it is also possible to apply the treatment measure together with other probation measures. How the treatment measure will be implemented is regulated in Article 71 of the Probation Services Regulation. Accordingly, it is possible for the treatment to be carried out on an outpatient or inpatient basis. Pursuant to Article 191/3 of the TPC, a suspect in need of treatment during the postponement period will undergo treatment for a minimum of one year, and this period can be extended for a maximum of two more years in six-month periods.

Keywords: Narcotic Substance, Stimulant Substance, Postponement of The Filing of A Public Lawsuit, Probation, Treatment Measure.

Citation/Atıf: YAVUZ, M. İ. (2024). Deferment of the filing of a public lawsuit and the treatment measure in the context of using narcotic or stimulant substances. *Journal of Awareness*. 9(Special Issue/Özel Sayı 2): 97-107, https://doi.org/10.26809/joa.2522

Corresponding Author/ Sorumlu Yazar:
Muhammet İsmet Yavuz
E-mail: miyavuz@pirireis.edu.tr

1. ENTRANCE

The offense of using narcotic or stimulant substances, as intended in Article 191/1 of the TPC, refers to the elective actions of "purchasing, accepting, or possessing narcotic or stimulant substances for personal use or using such substances," which are punishable by imprisonment for a term of two to five years. These elective actions were added to the text and title of the article through Article 68 of the Law No. 6545, dated June 18, 2014, which amends the TPC and certain other codes.

Before the amendments made to Article 191 of the TPC by Law No. 6545, the reason for not criminalizing the use of narcotic or stimulant substances was stated as "the crime policy pursued" in the rationale of Article 191. In the general rationale of Law No. 6545, the criminalization of narcotic or stimulant substance use is justified as follows: *"In order to combat more effectively the offenses of manufacturing and trading in narcotic or stimulant substances, as well as their use, the penalties for these offenses are increased to some extent through amendments made to Articles 188, 190, and 191 of the Turkish Penal Code, and the measures of treatment and probation applied to users of narcotic and stimulant substances are made more effective."*

Before the amendment made in 2014, the Court of Cassation, in relation to the use of narcotic or stimulant substances, ruled that the offense was constituted and proceeded with sentencing on the grounds that, in order to perform the aforementioned actions, it was mandatory to carry out at least one of the acts of purchasing, accepting, or possessing listed in the article (Court of Cassation 10th Criminal Chamber, 10.07.2006, E.2006/4216, K.2006/9309). Following the amendment made by Law No. 6545, these discussions have come to an end (Çetin, 2016: 1387; Ateş, 2019: 84; Gök, 2023: 58).

2. THE OFFENSE OF USING NARCOTIC OR STIMULANT SUBSTANCES (TPC ART. 191/1)

2.1. The Potected Legal Interest by the Offense

The purposes of regulating an act as a offense constitute the protected legal interest by the crime, or in other words, the legal subject of the crime (Ünver, 2003: 115). For this reason, the place where the crime is regulated within the systematic structure of the law is important in determining the protected legal interest intended to be protected by the offense. Considering that the regulation of Article 191 of the TPC is located in the 3rd section titled "Offenses Against Public Health" of the 3rd part titled "Offenses Against Society" of the 2nd book titled "Special Provisions" of the TPC, it can be said that the purpose of penalizing the acts of using narcotic or stimulant substances is the protection of public health (Tezcan et al., 2023).

2.2. Elements of the Crime

2.2.1. Material Elements

2.2.1.1. Act

The provision of Article 191/1 of the TPC constitutes an offense composed of alternative elective actions (Gök, 2023: 50). These elective actions include purchasing, accepting, possessing, and using narcotic or stimulant substances for personal use. In this study, only the "use" action will be examined, and the other actions will not be discussed separately. It should also be noted that the offense will be committed with the execution of at least one of the elective actions listed in the provision of the paragraph. In the case of the execution of more than one elective action, only one offense will be constituted; however, this issue will be taken into account within the context of Article 61 of the TPC in terms of concretizing the penalty (Ateş, 2019: 69). Since the offense consists of elective actions, it is also considered to be a connected act offense (Çetin, 2016: 1378).

In the doctrine, it is argued that what should be understood by use is the intake of the narcotic or stimulant substance into the body (Çetin, 2016: 1388). At this point, the method of consumption of the substance is not significant. The substance can be consumed by eating, drinking, inhaling, sniffing, or injecting it into the bloodstream (Güngör & Kınacı, 2001; Kaya, 2011: 51; Akkaya, 2013: 339). However, it is necessary to explain situations where the method of use does not

correspond to the narcotic or stimulant effect of the substance. In our opinion, if the substance is used in a way that prevents its narcotic or stimulant effect, the offense will not be constituted as there is no subject matter of the act. Another point of note is the small quantity of the substance. In one decision, the Court of Cassation ruled that the fact that the substance could not produce a narcotic effect due to being used in an unmeasurable small amount meant that the substance was not suitable for use, and therefore, the perpetrator did not have criminal intent (Court of Cassation General Assembly on Criminal Matters, 25.06.1984, 5-128/40, see: Erman & Özek, 1995). However, unlike the method of use, the small quantity of the substance does not affect whether it is of a narcotic or stimulant nature (Yokuş Sevük, 2007: 159; Günay, 2017: 140; Öner, 2021: 124). The quantity of the substance does not change its nature. Although the quantity of the substance is important in terms of its effect on the individual, Article 191/1 of the TPC does not regulate the element of result. However, according to one view in the doctrine, the small quantity of the substance also affects its nature, and a substance that does not produce any narcotic or stimulant effect due to its small quantity is not defined as a narcotic or stimulant substance (Erman & Özek, 1995).

The small quantity of the narcotic or stimulant substance, the unsuitability of the substance for the act of use, and the lack of narcotic or stimulant effect when used are different matters (Ateş, 2019: 85-86). In our opinion, if the nature of the substance cannot be determined due to its small quantity, it should be accepted that the subject matter of the act does not exist in accordance with the principle that the doubt benefits the defendant (Güngör & Kınacı, 2001).

It is necessary to determine whether the substance, although known to be of a narcotic or stimulant nature, could be unsuitable for use due to its small quantity. In our opinion, in this case, it is not possible to speak of an unpunishable offense. This is because Article 191/1 of the TPC does not include any limitation on quantity and does not regulate how the act of use should be carried out. Accordingly, even if the quantity of the substance is very small, the offense should be deemed to have been committed if it is consumed (Contrary opinion: Güngör & Kınacı, 2001). As explained above, the lack of narcotic or stimulant effect due to the small quantity of the substance will not prevent the formation of the offense since no such result is required.

2.2.1.2. Subject

The subject of all the elective actions regulated in Article 191/1 of the TPC consists of substances with narcotic or stimulant properties (Sevimli, 2019: 82). However, the article does not specify which substances possess narcotic or stimulant properties. In this regard, it must first be determined whether the substance considered to be the subject of the action truly possesses narcotic or stimulant properties (Yokuş Sevük, 2007). If it is determined that the substance in question does not have narcotic or stimulant properties, it will be concluded that the offense has not been committed on the grounds that the material elements are not constituted (Akkaya, 2013: 342).

2.2.1.3. Perpetrator

Since the offense defined in Article 191/1 of the TPC can be committed by anyone, it is not a specific offense (Ateş, 2019: 94). In this regard, there is no difference whether the perpetrator is a child, young, elderly, female, male, citizen, foreigner, first-time user of the substance, or an addict (Centel, 2001: 177).

2.2.1.4. Victim

It can be said that the victim element of the offense regulated in Article 191/1 of the TPC is society, considering the place where the offense is regulated in the law and the l protected legal interest intended to be protected by the offense (Yokuş Sevük, 2007: 131; Çetin, 2016: 1370). It should also be noted that since the perpetrator and victim elements of a crime cannot be the same person, the perpetrator who uses narcotic or stimulant substances cannot be the victim of the crime he commits (Gök, 2023: 46).

2.2.2. Mens Rea

The offense regulated in Article 191/1 of the TPC can only be committed intentionally since liability for negligence is not separately regulated (Ateş, 2019: 95). Although no specific intent is stipulated in the context of the elective action of using narcotic or stimulant substances, for the other elective actions mentioned in the paragraph to constitute an offense, the perpetrator must carry out these actions with the intent to use the narcotic or stimulant substance (Sevimli, 2019: 123). In our opinion, it is possible for the offense to be committed with probable intent in the context of the act of use; however, it is not possible for the other elective actions to be carried out with probable intent (Contrary opinion: Çetin, 2016: 1396).

2.2.3. The Element of Unlawfulness

The element of unlawfulness of the offense refers to the contradiction of the act, which conforms to the legal type, with the norms of the legal order (Artuk et al., 2022). In this regard, an act that conforms to the legal type is presumed to constitute an offense, and this presumption is rebutted by the reasons for lawfulness. Accordingly, any reason for lawfulness present in the concrete case prevents the formation of the offense, even if the act conforms to the legal type.

In the context of the regulation under Article 191/1 of the TPC, the reason for lawfulness that may come into question is the exercise of a right. The reason for lawfulness in the exercise of a right is regulated under Article 26 of the TPC: "No punishment shall be imposed on a person who exercises a right." In the context of using narcotic or stimulant substances, the right to treatment may come into play. Accordingly, the purchase, acceptance, possession, or use of narcotic or stimulant substances prescribed by an authorized physician as part of the treatment of certain ailments such as pain, crisis, and addiction will not constitute an offense (Güngör & Kınacı, 2001; Yokuş Sevük, 2007: 152).

2.3. Aggravated Elements of the Offense

The aggravated form of the offense is regulated in Article 191/10 of the TPC as follows: "If the acts described in the first paragraph are committed in public or publicly accessible places within a distance of 200 meters from buildings and facilities such as schools, dormitories, hospitals, barracks, or places of worship where people gather for treatment, education, military, or social purposes, or within the boundaries marked by surrounding walls, barbed wire, or similar obstacles or signs, the penalty to be imposed shall be increased by half." This aggravated form has been introduced based on certain locations where the offense is committed (Ateş, 2019: 109).

The provision of this paragraph has been criticized for being contrary to the principle of legality within the framework of definiteness, with the argument that the expressions "buildings and facilities where people gather" and "public or publicly accessible places" need to be clarified (Özbek et al., 2023). The same issue applies to the fact that the places where the offense is committed are not exhaustively listed due to the use of the term "such as" (Sevimli, 2019: 148).

2.4. Culpability

In order for the perpetrator to be held responsible for an act that conforms to the legal type, they must possess the capacity for culpability (Alacakaptan, 1975). In this regard, culpability pertains to the ability to be punished and is not one of the elements of the offense (Koca & Üzülmez, 2023). However, the sole issue concerning the ability to be punished is not just the capacity for culpability; it is also necessary to examine situations that remove or diminish culpability responsibility (Alacakaptan, 1975: 119). In the context of using narcotic or stimulant substances, the states of necessity and mistake of law are particularly noteworthy.

The state of necessity is regulated under Article 25/2 of the TPC, which states: "No punishment shall be imposed on a person for acts committed out of necessity to protect a right belonging to oneself or another from a severe and imminent danger that was not wilfully caused by the person and could not be averted by other means, provided that the act was proportionate

to the severity of the danger and the means employed." However, it is debatable whether the state of necessity can be applied within the scope of Article 191/1 of the TPC. According to one view, no punishment shall be imposed on the perpetrator if the act of use is carried out to prevent a withdrawal crisis (Çetin, 2016: 1409). It is also argued that Article 25/2 of the TPC can be applied in situations where the perpetrator, due to their circumstances, cannot consult a doctor and cannot alleviate unbearable pain without using narcotic or stimulant substances (Zafer, 2007: 112). According to another view, if the crisis is caused by the perpetrator's continuous use of the substance, the state of necessity cannot be applied (Çalışkan et al., 2023).

Mistake of law is regulated under Article 30/4 of the TPC, which states: "A person who makes an unavoidable mistake about the unlawfulness of the act committed shall not be punished." The most common example given in the context of using narcotic or stimulant substances is the situation where a person who legally uses marijuana in their own country uses it in Turkey. In this case, if the mistake made by the person is unavoidable, no punishment shall be imposed pursuant to Article 30/4 of the TPC (Yokuş Sevük, 2007: 150).

2.5. Special Forms of Appearance of the Offense

2.5.1. Attempt

The offense regulated in Article 191/1 of the TPC is a mere conduct crime, as no result is required in addition to the execution of the elective actions listed in the paragraph. Although it is generally accepted that an attempt is not possible for mere conduct crimes, it is exceptionally possible to attempt these crimes if the execution acts can be divided into parts (Demirbaş, 2022: 493). In this regard, it can be said that an attempt to commit the act of use is possible. However, even if there is an attempt to use in the concrete case, the offense is considered to be completed since at least the act of possession, one of the other elective actions listed in the paragraph, has already been executed (Centel, 2001). In our opinion, elective actions other than the act of use may, in some cases, constitute separable parts of the act of use (In a similar vein: Çetin, 2016: 1379), and in some cases, they may even constitute preparatory acts carried out before the execution of the act of use. However, this does not mean that Article 191/1 of the TPC is an offense of attempt. For example, it can be said that a person who enters an environment where a narcotic substance is used by inhalation with the intent to inhale the substance but fails to do so due to circumstances beyond their control has attempted the act of use without carrying out the acts of purchase, procurement, or possession (Gök, 2023: 82).

2.5.2. Participation

As a rule, it is possible to participate in the offense regulated in Article 191/1 of the TPC (Ateş, 2019: 123; Contrary opinion: Özdabakoğlu, 2007: 182). However, the actions of the participant must not constitute the offense of facilitating the use of narcotic or stimulant substances as regulated in Article 190/1 of the TPC. Otherwise, the person will be held responsible not for participating in the offense under Article 191, but for being the perpetrator of the offense of facilitating the use of narcotic or stimulant substances under Article 190/1 of the TPC (Çetin, 2016: 1415). Similarly, a person who sells or provides the narcotic or stimulant substance will be held responsible not for participating in the offense under Article 191, but for being the perpetrator of the offense of narcotic or stimulant substance trafficking as regulated in Article 188/3 of the TPC (Ateş, 2019: 123).

2.5.3. Concurrence

It was mentioned in the previous sections that the offense regulated in Article 191 of the TPC consists of alternative elective actions. In this regard, if more than one of the elective actions constituting the offense is carried out, this situation will be evaluated within the scope of apparent concurrence, and according to the principle of the consuming-consumed norm relationship, the elective actions carried out after the first elective action will be considered subsequent actions that are not punishable (Ateş, 2019: 129).

Pursuant to Article 43 of the TPC, if the offense is committed multiple times at different times as part of the execution of a decision to commit a

crime, the provisions of continuous offense will be applied, and a single penalty will be imposed, which can be increased by one-fourth to three-fourths. However, in the doctrine, the prevailing view is that the provisions of continuous offense cannot be applied to the act of use, as multiple instances of use constitute a single act in the legal sense (Güngör & Kınacı, 2001).

Another issue that needs to be addressed under the topic of concurrence is ideal concurrence. Although it does not seem possible for the offense to be committed within the scope of ideal concurrence of the same kind as regulated in Article 43/2 of the TPC, it is possible for it to be committed in such a way that it establishes a relationship of ideal concurrence of different kinds as regulated in Article 44 of the TPC. At this point, particularly the provisions of Articles 188/3 and 297/1 of the TPC come into play. It is possible for the perpetrator to possess the narcotic or stimulant substance both for the purpose of use and for the purpose of trafficking. In this case, the penalty will be imposed under Article 188/3 of the TPC, which requires a more severe punishment (Çetin, 2016: 1419). If the perpetrator brings the narcotic or stimulant substance into a penal institution or detention center with the intent to use it, in addition to the offense regulated in Article 191/1 of the TPC, the offense of bringing prohibited items into a penal institution or detention center as regulated in Article 297 of the TPC will also be constituted. In this case, the penalty determined according to the provisions of ideal concurrence will be increased by half in accordance with the last sentence of Article 297/1 of the TPC (Ateş, 2019: 136).

3. THE INSTITUTION OF DEFERRAL OF THE FILING OF A PUBLIC LAWSUIT AND THE OFFENSE OF USING NARCOTIC OR STIMULANT SUBSTANCES

3.1. Deferral of the Filing of a Public Lawsuit within the Context of Article 171 of the CPC

The deferral of the filing of a public lawsuit is regulated under Article 171 of the CPC, and according to the second paragraph of this article: "Except for the offenses subject to reconciliation and prepayment, the public prosecutor may decide to defer the filing of a public lawsuit for a period of five years despite the presence of sufficient suspicion, for offenses that require a maximum imprisonment of three years or less."

As can be understood from the text of the paragraph, certain conditions must be met in order for a decision to be made to defer the filing of a public lawsuit. It should also be noted that even if these conditions are met, the public prosecutor is not obliged to decide on the deferral of the filing of a public lawsuit and has discretion in this matter (Yenisey & Nuhoğlu, 2023).

In order for a decision to be made to defer the filing of a public lawsuit, the investigation phase must be ongoing. According to Article 2 of the CPC, an investigation refers to "the phase from the moment the suspicion of a crime is learned by the competent authorities to the acceptance of the indictment." It should be noted that the phrase "despite the presence of sufficient suspicion" in Article 171/2 of the CPC indicates the degree of suspicion required for the drafting of an indictment. Therefore, it must be stated that the decision to defer the filing of a public lawsuit can be made at the end of the investigation, in other words, at the time when the indictment could be drafted (Şahin & Göktürk, 2023).

Another condition required for a decision to defer the filing of a public lawsuit is that the offense under investigation must not be subject to reconciliation or prepayment. However, if the fulfillment of the reconciliation obligation is postponed to a later date, divided into installments, or involves continuity, a decision to defer the filing of a public lawsuit will be made regarding the suspect without the need to meet the conditions under Article 171 of the CPC (Gökcen et al., 2024). Lastly, it should be noted that no deferral decision can be made regarding the offenses specified in Article 171/6 of the CPC, regardless of whether they are subject to reconciliation or prepayment.

The other conditions required for the deferral of the filing of a public lawsuit are regulated in Article 171/3 of the CPC. According to the text of the paragraph: "a) The suspect must

not have been previously convicted of an intentional offense, b) The investigation must provide the belief that the suspect will refrain from committing crimes if the filing of a public lawsuit is deferred, c) The deferral of the filing of a public lawsuit must be more beneficial for both the suspect and society than the filing of a public lawsuit, d) The damage caused to the victim or the public by the commission of the offense, as determined by the public prosecutor, must be fully compensated through restitution, restoration to the state before the offense, or compensation." These conditions must be met together (Yenisey & Nuhoğlu, 2023).

3.2. Deferment of the Filing of a Public Lawsuit in the Context of Article 191 of the TPC

In Article 191/2 of the TPC, it is stated: "In an investigation initiated for this offense, a decision shall be made to defer the filing of a public lawsuit for five years without the need to meet the conditions stipulated in Article 171 of the CPC, dated 4/12/2004. The public prosecutor shall warn the suspect that if they fail to comply with the obligations imposed on them or violate the prohibitions during the deferral period, the consequences for them may be severe. The deferral decision shall also be communicated to the law enforcement units." This regulation provides that a decision to defer the filing of a public lawsuit shall be made regarding the suspect, who is sufficiently suspected of having committed the offense regulated in Article 191/1 of the TPC, without the need to meet the conditions mentioned under the previous heading (Sevimli, 2019: 277).

Unlike the regulation in Article 171 of the CPC, the public prosecutor does not have the authority to decide not to defer the filing of a public lawsuit under Article 191/2 of the TPC. In this respect, it can be said that the regulation in Article 191/2 of the TPC constitutes an exception to the institution of deferral of the filing of a public lawsuit (Gök, 2023: 119).

According to the second sentence of Article 191/2 of the TPC, the public prosecutor shall warn the suspect about the obligations imposed on them during the deferral period and the consequences of non-compliance. The form of this warning is not specified in the article. In our opinion, the form of the warning should be determined according to the specific circumstances of each case, taking into account the suspect's educational, social, cultural, and similar conditions (In a similar vein: Gök, 2023: 121).

In relation to the offense regulated in Article 191 of the TPC, it should first be determined whether there is another ongoing investigation regarding the same offense for the suspect who is being investigated and is sufficiently suspected of having committed the offense. If such an investigation exists, it must be established whether the date on which the offense is alleged to have been committed falls within the deferral period (Gök, 2023: 122). If it is understood that the date on which the offense is alleged to have been committed falls within the deferral period, this situation shall be considered a violation under Article 191/5 of the TPC, and no separate investigation shall be initiated. The explanations provided here are also applicable to the probation period determined within the scope of the decision to defer the pronouncement of the judgment and in terms of prosecution.

According to Article 191/6 of the TPC: "After the filing of a public lawsuit pursuant to the fourth paragraph, a decision to defer the filing of a public lawsuit cannot be made in investigations initiated with the allegation that the offense defined in the first paragraph has been committed again." In our opinion, this provision contradicts the presumption of innocence, as an acquittal decision may be rendered at the end of the prosecution. However, the Constitutional Court, when faced with the provision of Article 191/6 of the TPC within the scope of concrete norm review, ruled that: "In this respect, the rule stipulated by the legislature within the scope of its discretion in determining the tools of criminal policy and the conditions related to these tools does not have an aspect that violates the principle of the rule of law or the presumption of innocence," and thus found that it was not unconstitutional (Constitutional Court, 16/12/2021, E.2021/70, K.2021/98).

3.3. Probation and Mandatory Treatment Measure in the Context of Article 191 of the TPC

According to Article 191/3 of the TPC: "During the deferral period, the suspect shall be subject to a probation measure for a minimum of one year. This period may be extended for up to two more years, in six-month increments, upon the recommendation of the probation office or by the decision of the public prosecutor ex officio. The person subject to the probation measure may be required to undergo treatment during the probation period if deemed necessary. The public prosecutor shall decide to refer the suspect to the relevant institution at least twice a year during the deferral period to determine whether they have used narcotic or stimulant substances." Accordingly, a probation measure will be applied for at least one year during the five-year deferral period. It is regulated that the probation period may be extended by six-month increments for up to two more years, resulting in a maximum period of three years. As can be understood from the clear wording of the law, the extension periods cannot be less than or more than six months. In our opinion, this situation is not necessary for every concrete case and constitutes a violation of the principle of proportionality. Accordingly, while a maximum limit of six months for the period is appropriate, the possibility of determining a shorter period should also be provided.

The provision of the paragraph stipulates a treatment measure limited to the probation period for the suspect. In our opinion, the treatment measure may last as long as the probation period or be shorter, but it cannot exceed the probation period. The measure regarding a suspect whose treatment is successful will thus be terminated for this reason (Sevimli, 2019: 301). In our opinion, even for a suspect whose treatment is not successful despite complying with the obligations specified in Article 191/4 of the TPC, a decision of non-prosecution should be issued.

Although the provision of the paragraph mentions treatment, there is no determination regarding the form of the treatment. At this point, the regulation of Article 71 of the Regulation on Probation Services is relevant. According to this article, treatment will be carried out either on an outpatient or inpatient basis. It should be noted that while the probation measure may come into play for each elective action regulated in Article 191/1 of the TPC, the treatment measure can only be applied in relation to the elective action of use. Furthermore, it is not mandatory to apply the treatment measure to every suspect who is sufficiently suspected of committing the elective action of use regulated in Article 191/1 of the TPC. What is important at this point is whether the person needs treatment (Gök, 2023: 128). It should also be noted that, unlike the former TPC No. 765, there is no requirement for the suspect to be an addict in order for the treatment measure to be applied (Ateş, 2019: 190).

Another issue that needs to be addressed is that probation and, consequently, the treatment measure are practices that violate the presumption of innocence. Additionally, since the treatment measure in particular results in the limitation of individual rights and freedoms, the fact that the public prosecutor can decide on this measure alone is contrary to Article 38 of the Constitution (Çetin, 2016: 1441; Sevimli, 2019: 293). In our opinion, obtaining a decision from the magistrate's court for the implementation of probation and treatment measures would not change the fact that this violates the presumption of innocence and the relevant constitutional principles.

Not everyone who uses narcotic or stimulant substances must be the perpetrator of the offense regulated in Article 191/1 of the TPC. At this point, the mistake of fact regulated in Article 30/1 of the TPC is particularly important. According to the text of the paragraph: "A person who does not know the material elements of the legal definition of the offense at the time of the act does not act intentionally. Liability for negligence due to this mistake is reserved." Consequently, even if the suspect has used narcotic or stimulant substances, they may not have acted intentionally. In this case, since the subjective element of typicity, that is, the mens rea of the offense, would not be present, the offense would not be committed. Imposing obligations with

penal sanctions for non-compliance on a person who is not the perpetrator of the offense violates the presumption of innocence and the right to protection from defamation. It is not possible to expect a person to deliberately fail to comply with the obligations and wait for an indictment to be prepared and a public lawsuit to be filed in order to be acquitted. In our opinion, in a possible amendment, the institution of deferral of the filing of a public lawsuit regulated in Article 191 of the TPC should be made applicable with the consent of the suspect.

It is also possible that a person may have used narcotic or stimulant substances under coercion, violence, intimidation, or threat in situations other than those listed above. In such cases, the capacity for culpability cannot be discussed. The same applies to cases such as mental illness and minority. In our opinion, in such situations, since the treatment measure cannot be considered a security measure, a deferral decision should not be made, and an indictment should be prepared. Although it seems possible to make a deferral decision on the condition that the treatment measure is not applied, it cannot be expected that a person who committed the offense under the circumstances listed would comply with the obligations listed in Article 191/4 of the TPC. This is because the deferral of the filing of a public lawsuit, probation, and treatment measures regulated under Article 191 of the TPC are, so to speak, opportunities given to the suspect by the legislature. Expecting a person who does not have the capacity for culpability or who committed the offense with their capacity for culpability removed to comply with these obligations would be inconsistent with the purpose of the regulation. At this point, the subgroup of children who have not yet reached the age of 12 is particularly noteworthy. Since prosecution cannot be conducted against them, it is accepted that a decision to defer the filing of a public lawsuit cannot be made either (Ayanoğlu, 2022: 51).

According to Article 191/9 of the TPC: "In cases where there is no contrary provision in this article, the provisions of Article 171 of the CPC regarding the deferral of the filing of a public lawsuit or Article 231 regarding the deferral of the pronouncement of the judgment shall apply." Therefore, it must be accepted that appeals can be made against the decisions of deferral of the filing of a public lawsuit, probation, and treatment measures made within the scope of Article 191 of the TPC (Çetin, 2016: 1444-1445).

4. CONCLUSION

The institution of deferral of the filing of a public lawsuit, regulated under Article 191/2 of the TPC, is applied specifically to the offense of purchasing, accepting, or possessing narcotic or stimulant substances for use, or using such substances, as regulated in the first paragraph of the same article, and it constitutes an exception to the provisions of Article 171/2 and the following articles of the CPC. Accordingly, at the end of the investigation conducted concerning the offense mentioned in Article 191/1 of the TPC, a decision will be made to defer the filing of a public lawsuit for five years without the need to meet the conditions stipulated in Article 171 of the CPC. It should be noted that the legislature has not granted any discretion to the public prosecutor at this point. If the suspect fails to comply with the obligations specified in Article 191/4 of the TPC, an indictment will be prepared, and a public lawsuit will be filed.

The treatment measure can only be applied to a suspect for whom sufficient suspicion has been reached regarding the use of narcotic or stimulant substances and cannot be applied to a suspect who has committed the other elective actions without committing the elective action of use. However, in this case, other probation measures will come into play. It is also possible to apply the treatment measure together with probation measures, but limited to the elective action of use.

The manner in which the treatment measure will be applied is not regulated in Article 191 of the TPC. This issue is regulated in Article 71 of the Regulation on Probation Services, according to which treatment can be carried out on an outpatient or inpatient basis. According to Article 191/3 of the TPC, the duration of the treatment is at least one year, and this period

may be extended by six-month increments for up to two more years if necessary.

In our opinion, the mandatory decision to defer the filing of a public lawsuit and the application of the treatment measure for a suspect for whom sufficient suspicion has been reached regarding the use of narcotic or stimulant substances constitutes a violation of the presumption of innocence and the right to protection from defamation. This is because the suspect is treated as if the alleged offense has already been established, even though the prosecution phase has not yet begun. At this point, the mistake of fact, which negates intent and is regulated in Article 30/1 of the TPC, becomes particularly relevant. It cannot be expected that the suspect would fail to comply with the obligations specified in Article 191/4 of the TPC in order to facilitate the preparation of an indictment and the filing of a public lawsuit so that they can be acquitted. In a possible amendment, the application of the institution of deferral of the filing of a public lawsuit, as regulated in Article 191 of the TPC, should be made contingent upon the suspect's consent, and the decision should be made by a magistrate judge upon the request of the public prosecutor.

BİBLİOGRAPHY

AKKAYA, Ç. (2013). *Uyuşturucu ve Uyarıcı Madde Suçları.* Ankara: Adalet, Second Edition, ISBN: 9786051460369

ALACAKAPTAN, U. (1975). *Suçun Unsurları*. Ankara: Sevinç, First Edition.

ARTUK, M. E., GÖKCEN, A., ALŞAHİN, M. E. & ÇAKIR, K. (2022). *Ceza Hukuku Genel Hükümler.* Ankara: Adalet, Sixteenth Edition, ISBN: 9786258209020

ATEŞ, N. (2019). *Uyuşturucu veya Uyarıcı Madde Kullanma Suçu (TCK m. 191)*. İstanbul: Oniki Levha, First Edition, ISBN: 9786057820280

AYANOĞLU, C. (2022). Kamu Davasının Açılmasının Ertelenmesi. Master's Thesis. Bahçeşehir University, Postgraduate Education Institute.

CENTEL, N. (2001). *Uyuşturucu Madde Kullanma ve Bulundurma Suçu. Prof. Dr. Nuri Çelik'e Armağan*, 1, 147-192.

ÇALIŞKAN, S., ORUÇ, R. & ÇALIŞKAN, E. C. (2023). *Tüm Yönleri ile Kullanmaya Yönelik Uyuşturucu ve Uyarıcı Madde Suçları.* Ankara: Platon, Fourth Edition, ISBN: 9786258128932

ÇETİN, S. H. (2016). Kullanmak İçin Uyuşturucu yeya Uyarıcı Madde Satın Almak, Kabul Etmek, Bulundurmak ya da Uyuşturucu veya Uyarıcı Madde Kullanmak Suçu (TCK m.191). *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 65(4), 1353-1480.

DEMİRBAŞ, T. (2022). *Ceza Hukuku Genel Hükümler.* Ankara: Seçkin, Seventeenth Edition, ISBN: 9789750279751

ERMAN, S. & ÖZEK, Ç. (1995). *Ceza Hukuku Özel Bölüm, Kamunun Selametine Karşı İşlenen Suçlar.* Globus, ISBN: 9789759565312

GÖK, B. Y. (2023). Kullanmak İçin Uyuşturucu veya Uyarıcı Madde Satın Almak, Kabul Etmek veya Bulundurmak ya da Uyuşturucu veya Uyarıcı Madde Kullanmak Suçu. Master's Thesis. Marmara University, Institute of Social Sciences.

GÖKCEN, A., ALŞAHİN, M. E. & ÇAKIR, K. (2024). *Ceza Muhakemesi Hukuku*. Ankara: Adalet, Eightht Edition, ISBN: 9786052648100

GÜNAY, M. (2017). Uyuşturucu veya Uyarıcı Madde İmal ve Ticareti Suçlarında Etkin Pişmanlık. *Türkiye Barolar Birliği Dergisi*, 133, 133-162.

GÜNGÖR, Ş. & KINACI, A. (2001). *Uyuşturucu ve Psikotrop Maddelerle İlgili Suçlar.* Ankara: Yetkin, First Edition, ISBN: 9789754641936

KAYA, M. (2011). Uyuşturucu Madde Suçları. Uyuşturucu Madde Bağımlılığıyla Mücadele ve Ceza Hukuku Paneli (Doğuş University Law Faculty), 39-81.

KOCA M. & ÜZÜLMEZ İ. (2023). *Türk Ceza Hukuku Genel Hükümler.* Ankara: Seçkin, Sixteenth Edition, ISBN: 9789750286797

ÖNER, M. Z. (2021). Uyuşturucu Madde Suçları. Ankara: Adalet, Second Edition, ISBN: 9786257595834

ÖZBEK, V. Ö., DOĞAN, K. & BACAKSIZ, P. (2023). *Türk Ceza Hukuku Özel Hükümler.* Ankara: Seçkin, Eighteenth Edition, ISBN: 9789750287725

ÖZDABAKOĞLU, E. H. (2007). *5237 Sayılı Türk Ceza Kanunu'nda Uyuşturucu veya Uyarıcı Madde Suçları ve İlgili Mevzuat.* Ankara: Adalet, First Edition, ISBN: 9789944416658

SEVİMLİ, H. Ö. (2019). Türk Ceza Hukukunda Kullanmak İçin Uyuşturucu veya Uyarıcı Madde

Satın Almak, Kabul Etmek veya Bulundurmak ya da Uyuşturucu veya Uyarıcı Madde Kullanmak Suçu. Master's Thesis, Ankara University, Institute of Social Sciences.

ŞAHİN, C. & GÖKTÜRK, N. (2023). *Ceza Muhakemesi Hukuku*. Ankara: Seçkin, Fourteenth Edition, ISBN: 9789750286957

TEZCAN D., ERDEM M. R. & ÖNOK M. (2023). *Teorik ve Pratik Ceza Özel Hukuku*. Ankara: Seçkin, Twenty-first Edition, ISBN: 9789750287718

ÜNVER, Y. (2003). Ceza Hukukunda Hukuksal Değerin *Hukuk Felsefesi ve Sosyolojisi Arkivi* 8. Eds: H. Ökçesiz. ss. 113-120, İstanbul: Ufuk, First Edition, ISBN: 9756689269

YENİSEY F. & NUHOĞLU A. (2023). *Ceza Muhakemesi Hukuku*. Ankara: Seçkin, 11. Baskı, ISBN: 9789750287053

YOKUŞ SEVÜK, H. (2007). *Uyuşturucu veya Uyarıcı Madde Kullanılmasına İlişkin Suçlar*. Ankara: Seçkin, First Edition, ISBN: 9789750204227

ZAFER, H. (2007). Uyuşturucu ve Uyarıcı Madde İmal ve Ticareti Suçu (TCK m. 188). *İlaç Hukuku ve Etik Anlayışı Sempozyumu* No:2 (Marmara University Law Faculty), 94-125.