Analyzing The Actio Libera in Causa Doctrine in Theoretical, Philosophical and Applicable Law Perspective associated to Criminal Responsibility, Culpability and Voluntary Action

by

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ABSTRACT

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"Actio Libera in Causa" constitutes a controversial issue in terms of criminal responsibility. The doctrine of "Actio Libera in Causa" arises as an analytical model that serves the purpose of attributing the culpability to the perpetrator and holding him responsible for his unlawful action, in cases where the cause of the perpetrator's unlawful action is his previous culpable action which had eliminated his culpability. Since ancient times, the principles of determining criminal responsibility have changed and developed. Modern criminal law accepts the choices and actions of the individual based on his/her free will as the basis of criminal responsibility. The culpability, which is a reflection of the existence of free will, can be defined basically as the power of discernment and the ability to control the actions of the self. In the event of a temporary impairment or loss of the culpability, the questions of whether and how perpetrator should be punished were discussed especially in context of the attribution of moral and religious responsibility in classical philosophy. Currently, these questions have also been discussed in the context of criminal law. The *Actio Libera in Causa* has been developed to answer these questions and has found widespread applicability. However, the theoretical explanation, philosophical reasoning and application of the *Actio Libera in Causa* pose important difficulties. The main purpose of this thesis is to explain these difficulties related to the *Actio Libera in Causa* and to seek solutions to these difficulties. In addition, in line with the developing technology and medicine, the situations that may be encountered in terms of criminal responsibility and temporary reasons will be envisaged and analyzed.

ÖZETÇE

Kökeni İtibarıyla Özgür Fiil (Actio Libera in Causa) Kuramının Ceza Sorumluluğu, Kusur İlkesi ve İradi Eylem kavramları ile ilişkili olarak Teorik, Felsefi ve Uygulamalı Hukuk Açısından Analizi

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Kökeni İtibarıyla Özgür Fiil "Actio Libera in Causa", ceza sorumluluğu bakımından önemli tartışmalar içeren konulardan biridir. Failin hukuka aykırı fiili işleme nedeninin, kendi önceki kusurlu fiili ile –cezalandırılabilirliğin koşullarından biri olan- kusur yeteneğini ortadan kaldırması olduğu durumlarda; *Kökeni İtibarıyla Özgür Fiil* kuramı, kusurluluğun faile isnat edilebilmesi ve hukuka aykırı fiilinden kendisinin sorumlu tutulabilmesi amaçlarına hizmet eden bir düşünsel yöntem olarak karşımıza çıkmaktadır. Eski dönemlerden bu yana, ceza sorumluluğunun belirlenme esasları değişmiş ve gelişmiştir. Modern ceza hukuku, bireyin özgür iradesine dayanan tercihlerini ve eylemlerini ceza sorumluluğunun esası olarak kabul eder. Özgür iradenin varlığının yansıması olan kusur yeteneği, en basit tabiriyle, ayırt etme gücü ve bireyin kendi fiili üzerinde kontrol kabiliyetini ifade eder. Kusur yeteneğinin geçici olarak kaybedilmesi veya zedelenmesi durumunlarında, bireylerin cezalandırılıp cezalandırılmadığı koşullar ve ne şekilde cezalandırılacakları soruları, klasik felsefede özellikle ahlaki ve dini sorumluluğun isnadı üzerine tartışılırdı. Günümüzde ise ceza hukuku alanında da tartışılagelmektedir. Bu soruların çözümü için gelişen ve yaygın bir uygulama alanı bulan *Kökeni İtibarıyla Özgür Fiil* kuramının gerek teorik olarak tanımlanması, gerek felsefi olarak temellendirilmesi ve gerekse uygulanması önemli zorluklar oluşturmaktadır. İş bu tezin ana amacı *Kökeni İtibarıyla Özgür Fiil* kuramına ilişkin bu zorlukları açıklamak ve bu zorluklara çözüm aramaktır. Ayrıca, teknolojik ve tıbbi gelişmeler doğrultusunda ceza sorumluluğu ve geçici sebepler bakımından karşılaşılabilecek durumlar öngörülecek ve incelenecektir.

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INTRODUCTION

Actio Libera in Causa, which is the topic of our study, is one of the most debated issues in terms of criminal responsibility. The issue of responsibility forms the basis of all other issues of criminal law. "Indeed, law finds its characteristic among social principles in the idea of sanction and sanctions make sense when they are enforced. Its enforcement depends on the responsibility of the person who violates the legal provision. Therefore, the main and foremost sanction of law is responsibility. In this respect, the determination of the essence of criminal responsibility is not only a speculative philosophical exercise; it is also a matter of practical importance."[1]

Today, except for exceptional cases where the principle of objective criminal responsibility is accepted due to certain requirements, the principle of culpability[2] applies in criminal law. This issue is stated in Latin as "actus reus non facit reum nishi mens sit rea" and briefly called "mens rea". This concept, which we can express as the principle of culpability, means that unless a person's will is faulty, the act s/he performs will not make her/him a guilty person. Responsibility for action requires the understanding, cognizing and being aware of the legal meaning and consequences of actions, and if these actions constitute a crime, criminal responsibility will arise. The history of criminal law reveals that approaches to criminal responsibility have gone through various levels. These levels are: criminal responsibility for the actions of others, objective criminal responsibility, criminal responsibility in terms of personality/ identity and culpable responsibility for crimes.

In ancient times, a collective responsibility was accepted in criminal law, and even if any one of the group committed a crime, the whole group was held responsible and punished in the same way. Moreover, according to an ancient approach to criminal responsibility, a system was applied where the group members were lined up in order and

[1] Sulhi Dönmezer, "Cezai Sorumluluğun Esası Bakımından Klasik Teori ve Bu Teorinin Karşılaştığı İtirazlar" *Journal of Istanbul University Law Faculty,* 11 (3-4), 1945, p.65

[2] (See also principle of *guilt*.) Culpability is the term providing legal responsibility for a criminal act; an individual's blameworthiness; the quality of being culpable or faulty or guilt. Culpability refers to the mental state (mens rea) that must be proven for a defendant to be held criminally liable. In the thesis it will be used as a equivalent of "kusur yeteneği" in Turkish terminology. There are different translations like culpability, culpability, talent of defect, criminal charge; but in this study "culpability" is preferred.

counted, for example by counting them ten by ten, and only the tenths of them were punished.[3] It has also been observed that parents were punished for crimes committed by their children.[4] The second level, which is objective criminal responsibility, means that the perpetrator is held responsible for the result that is the result of his/her comissional or omissional voluntary act, solely due to the physical causal relation, without seeking the existence of any psychological/ mental bond. In other words, responsibility was not evaluated in terms of blameworthiness. The third level of the process of subjectivization of criminal responsibility is the determination of responsibility according to personality/identity. Accordingly, the basis for the judgment of blameworthiness was not the concrete action committed, but the way of being or living of the perpetrator, which means the personality of the perpetrator.[5] Such an understanding of blameworthiness ultimately rejected a differentiation between the perpetrator and the action, and punished on the basis of who the perpetrator was rather than the concrete action committed by him/her. It was towards the end of the Roman Republican Period that the concept of culpability began to be recognized. With the influence of the Glassators and Post-Glassators on German law, the concept of "culpability" gained importance and intent and negligence -as forms of culpability- were explicitly mentioned.[6]

As can be understood, the issue of determining criminal responsibility requires the examination of culpability, and the issue of culpability requires the examination of free will. The main questions are what free will is, whether it exists or not, and which time period should be taken as a basis when analyzing free will in terms of criminal responsibility. Although the perpetrator does not have the culpability at the time s/he commits the criminal act, it is possible for her/him to knowingly and voluntarily eliminate the culpability when s/he had the culpability before. Moreover, in doing so, s/he may even have aimed to avoid criminal responsibility for an act s/he will commit later, in other words, s/he may have planned to create an excuse for herself/himself. In such a case, it is, of course, incompatible with justice for the perpetrator to escape criminal responsibility, and it is necessary that no one should be given the opportunity to commit

[3] Faruk Erem, *Ümanist Doktrin Açısından Türk Ceza Hukuku,* I (12), Ankara: Seçkin, 1984, pp. 580–581

[4] Haluk Toroslu, *Ceza Hukukunda İsnat Yeteneği,* Ankara, 2015, pp. 126–127

[5] Ibid., p. 129

[6] Kayıhan İçel, *Ceza Hukukunda Taksirden Doğan Subjektif Sorumluluk*, İstanbul, 1967, p. 32

a crime by voluntarily removing the culpability and hiding behind a fake excuse.[7] *Actio Libera in Causa* (ALIC) emerged precisely because of this necessity.

Although *Actio Libera in Causa* is a relatively new concept, the question of how to assess the criminal responsibility of a person who commits an injustice in cases where the person who commits the injustice is not culpable at the time of committing it is a longstanding question.[8] Although Aristotle focuses more on issues of ethical responsibility, he was the first to make evaluations that fall within the scope of ALIC.[9] He stated that it should be accepted that human beings perform their actions voluntarily, the beginning of which is in their control.[10] He even stated that drunken perpetrators should be punished with double punishment, and the reason for this was that it was in the perpetrator's control to not get drunk.[11] At this point, it is necessary to mention a statement of Rumi (1207-1273), a famous philosopher of Turkish history: "A drunk person commits a murder and then says, 'I had an excuse, I was not conscious.' It is necessary to respond, 'Unconsciousness did not come to you out of your control, you called for it.'"[12]

During the periods when Canon Law was dominant, the most common issues were sleepiness and drunkenness. In the case of parents sleeping in bed with their small children and causing their children's death by asphyxiating them, the approach of prevention was predominant and the punishment of such acts was preferred in order to ensure that parents would be more careful.[13] In the case of drunken perpetrators, according to the religious texts, "the killing of one human being by another for a reason of his own pleasure" is indicated as a reason for increasing the punishment.[14] Therefore, the unjust act of an intoxicated person is characterized as more severe than that of a conscious person. In a case reflecting the approach that drunkenness increases criminal responsibility, the Court, citing Aristotle, held that the perpetrator should be subjected to

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[7] Ayşe Özge Atalay, *Ceza Hukukunda Actiones Liberae in Causa Kuramı*, İstanbul: On iki levha, 2019, 1., p. 2

[8] Gisela Kuhn-Pabst, *Die Problematic der Actio Libera in Causa*, Mannheim, 1984, p.12

[9] Serdar Talas, "Ceza Hukukunda Kusur İlkesi Bağlamında Nedeninde Serbest Hareket Kavramı ve Geçici Nedenlerin Ceza Sorumluluğuna Etkisi" İstanbul University Enstitute of Social Sciences Public Law Doctoral Thesis, 2011, p.69

[10] Aristoteles, *Nikomakhos'a Etik* (çev. Saffet Babür), BilgeSu, 2012, p.53

[11] Joachim Renzikowski, "Im Labyrinth des Vollrauschtatbestands (323 StGB)" *Alkohol und Schuldfahigeit: Entsheidung für Arzte un Juristen* (Hrsg. Frank Schneider and Helmut Frister), Berlin: Springer, 2002, p.141

[12] Hakan Hakeri, *Ceza Hukuku Genel Hükümler,* 21. Bası, Ankara: Adalet. 2017, p.410

[13] Kuhn-Pabst, op. cit., p.12

[14] David McCord, "The English and American His tory of Voluntary Intoxication to Negate Mens Rea" *The Journal of Legal History,* vol. 11, issue 3, 1990, p.375

double punishment because he was drunk and caused the death of a person.[15] The Court acknowledged that intoxication would have a negative effect on a person's cognitive abilities, but stated that this effect was caused by the person's own carelessness and that the person should not be granted any privileges and punished him with the death penalty.[16]

In the mid-13th century, in some regions where Canon Law was in force, there were also approaches to the innocence of the person in a state of sleep and even to the mitigation of the penalties for intoxicated perpetrators.[17] The main guilt was considered to be in the act of intoxication itself, and even if the intoxication was voluntary, the presence of guilt and will was not reflected in the subsequent act (the second stage act). It was accepted that this subsequent act was a consequence of the previous (first stage act) unlawful act.[18]

Thomas Aquinas discussed whether temporary causes, such as illness, could constitute an excuse for criminal responsibility and categorized actions into three categories: actions performed with free will (actus voluntarius), actions performed in the absence of free will (actus involuntarius), and actions which are not voluntary in themselves but are voluntary because of the causes (actus voluntarius in su causa).[19] He concluded that if an act is completely involuntary, the perpetrator cannot be held responsible for it. However, if an act is performed without free will, but the causes of its commission are based on the perpetrator's own free will, he considered that the action in question should be considered voluntary. We can say that the foundations of ALIC in terms of meaning and classification of actions were established with Aquinas' opinions.

Another person who first used an expression that is terminologically equivalent to ALIC is Pufendorf. [20] Three different characterizations were made by Pufendorf in terms of the relation between the action and freedom: the action itself is free (actio libera in se), the action itself is not free but the cause of the action is free (actio non in se, sed tamen

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[15] See Reniger v. Feogossa, 1551

[16] McCord, op. cit., p.374

[17] Kuhn-Pabst, op. cit., p. 13; Atalay, op. cit., p.23; Talas, op. cit., p.80

[18] Aniceto Masferrer, "Codification of Spanish Criminal Law in The Nineteenth Century: A Comparative Legal History Approach" *Journal of Comparative Law,* 4(1), 2009, p.120

[19] Joachim Hruschka, "Der Einfluß des Aristoteles und der Aristoteles-Rezeptionen auf die Bildung Heutiger Rechtsbegriffe am Beispiel der 'Actio Libera in Causa' ", in *Bürgerliche Freiheit und Christliche Verantwortung* (eds. M. Germann and H. de Wall), Tübingen: Festschrift für Christoph Link zum siebzigsten Geburtstag, 2003, p.688

[20] Yener Ünver, "Sebebinde Serbest Hareketler Kuramı" *Prof. Dr. Sahir Erman'a Armağan*, İstanbul, 1999, p.816; The first person to address ALIC as it is used in the modern literature is Kleinschrod (in 1974).

in sua causa libera), and neither the action itself nor its cause is free (actio neque in se, neque in sua causa in libera). In cases where only the last one of these types of actions occurs, the perpetrator will not be criminally responsible, whereas in cases where the other two types of actions occur, the perpetrator will be criminally responsible.[21] Pufendorf's greatest contribution to criminal law was to emphasize the attribution of culpability on the basis of voluntary action and to create the basis for the concepts used in the modern context.[22] He stated that a person cannot be held responsible only on the basis of his will to do or not to do something at the present time, and that the consequences of the impaired self-control, which was previously under her/his control but which s/he lost through her/his own fault, must also be imposed on her/him.[23] Thus, the understanding that culpability must always be attributable to the starting point of an action emerged and rapidly gained acceptance.

In line with these approaches, Kant also stated that no action and its consequences that are not based on freedom can be attributed to the agent, and that it is necessary to examine whether the agent has free will to do or not to do something.[24] According to him, the action performed in the absence of culpability is in fact the result of a free action previously performed. He also defended that the person who renders himself lacking culpability should not rely on the pretense that the crime he commits while in this state is not the result of free will and should not use the pretense as a method of escaping from responsibility.[25] In this sense, ALIC is also characterized as a "modus operandi", that is, a method for committing a crime.[26] Kant used the phrase "actio libera ab ignominia illicita", which overlaps with ALIC but is different in the literal sense, and means an action that is characterized as free because of the previous culpable action.[27]

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[21] Joachim Hruschka, "Imputation" *Brigham Young University Law Rewiev*, vol. 1986, ıssue 3, Art.7, 1986, p.688-689

[22] Michael Hettinger, Die Actio Libera in Causa: Strafbarkeit wegen Begehungstat Trotz Schuldunfahigkeit?, Berlin: Humblot GmbH, 1988, p.71

[23] Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* (Translated by William Abbott Oldfather), Britain: Oxford Unversity Press, 1931, p.214

[24] Immanuel Kant, *Religion Within The Limits of Reason* (translated by T. M. Grene and H. H. Hudson), New York: Harper Torchbooks, 1960, p.179

[25] Lara Denis and Oliver Sensen, *Kant's Lectures on Ethics*, England: Cambridge University Press, 2015, p.180

[26] Franz Streng, "Der Neue Streit um die 'Actio Libera in Causa'" *Juristen Zeitung*, 49. Jahrgang, nr.14, 1994, p.709

[27] Joachim Hruschka, "On the Logic of Imputation in The Vigilantius Lecture Notes" *Kant's Lectures on Ethics* (Eds. Lara Denis and Oliver Sensen), England: Cambridge University, 2015, p.181

Gershom Carmichael is an example of a thinker who takes a different approach to the issue. According to Carmichael, even if the perpetrator caused intoxication voluntarily, if he commits a crime in this situation, the perpetrator should be punished only for the act of being intoxicated.[28] In other words, s/he should not be punished for the crime s/he committed since s/he lacks the culpability. According to Atalay, this idea is not unfamiliar to the recent times because it can be said that the crime of "senselessly drunken state" existing in some legal regulations in comparative law or the approach that the responsibility and sanction of ALIC should be determined only on the basis of the moral element of the first stage action are based on the opinions of Carmichael.[29]

The first positive law regulation of ALIC is found in the General Territorial Law for the Prussian States (The Allgemeine Landrecht für die Preussischen Staaten) of 1794.[30] It is stated that a person who intentionally or negligently, by means of alcohol or any other intoxicant, deprives himself/herself of the ability to act freely shall be held responsible for the crimes committed while in this state.[31] Over time, in the codes of various countries, situations that fall within the scope of application of the ALIC doctrine have begun to be regulated. In countries where the Common Law legal system is in place, interpretations regarding ALIC and culpability have started to be included in court decisions. Although it is incompatible with some of the main principles[32] of criminal law, it is widely accepted in criminal law systems on the basis of equity, as it offers a possibility of punishment in order to ensure that the perpetrator does not escape from punishment.[33] Although the ALIC theory is accepted on a world scale, there are also views that do not agree with it.[34] Nevertheless, since the punishment on the basis of ALIC is widely accepted, the debate is no longer about whether ALIC should be applied or not,

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[28] Lara Denis and Oliver Sensen, op. cit., p.179

[29] Atalay, op. cit., p.30

[30] Ibid.

[31] Hubert Stühler, *Die actio libera in causa de lege lata und de lege ferenda: Eine Analyze von Rechtsprechung und Literatur verbundene mit einem Gesetzgebungsvorschlag.* Würzburg: Ergon Verlag, 1999, p.31

[32] See principle of *legality* (ALIC violates legality because it has no expilicit regulation in codes and it contradicts with the general provisions about temporary reasons.) and *guilt* (ALIC violates principle of ‘nulla poena sine culpa’ or the guilt principle is a legal principle requiring that one cannot be punished for something that they are not guilty of associated to their mental state- mens rea- culpability) and *concurrency* (the principle which means that guilty mental state ‘mens rea’ and guilty action ‘actus reus’ must occur at the same time.

[33] Helmut Satzger, “Dreimal ‘in causa’: actio libera in causa, omissio libera in causa und actio illicita in causa” *Jura*, 7/2006, 2006, p.513

[34] Kuhn-Pabst, op. cit., p.18-19

but about how to provide a legal basis for such a punishment and how the legal regulations should be formed.[35] In our opinion, another issue that needs to be examined in the context of ALIC is the nature of the concepts of freedom and action, which are the concepts contained in ALIC.

In this thesis, ALIC will be examined comparatively in theoretical, philosophical and practical aspects. In the first part of the first chapter, general explanations on the *Actio Libera in Causa* doctrine, the definition of the doctrine, terminological characteristics of the doctrine and suggestions on its Turkish translation will be mentioned. In the second part of the first chapter, the types of ALIC will be explained with case examples. In the last part of the first chapter, the common and different features of ALIC with similar theories which are consisting of two-stage actions will be discussed. Thus, the theory will be comprehended in general terms with respect to its meaning, types and comparison with similar institutions. In the second chapter, the doctrine will be analyzed in a deeper manner. It will be discussed on the philosophical roots of the concepts of "libera" and "actio" that ALIC points out, both ontologically and politically. Thus, we will research what kind of movements can be characterized as actions and the requirements of freedom (hence free will), and from this point of view, we will try to understand the issue of human responsibility more comprehensively and in relation to ALIC. In the third chapter, firstly, a comparative analysis of how ALIC is handled in contemporary legal systems and the Turkish legal system will be presented. Afterwards, new possibilities that will be discussed in the context of culpability and ALIC in the future as a result of medical and technological developments will be emphasized. Finally, in the conclusion, the study will be completed with a general evaluation and recommendations.

[35] Stühler, op. cit., p.45

Chapter 1:
THEORETICAL EXPLANATION OF ALIC

1.1 *Terminological Examination of the Actio Libera in Causa*

It is indeed important to determine the meaning of the term (ALIC: *actio libera in causa*) in different languages, as well as in Turkish, before entering into discussions on its essence and application, on how it should be qualified and on how it is originally named. Notwithstanding the fact that even a brief survey of the relevant sources shows that the description of the term that is *ALIC* varies from being considered as a theory or as a theorem to being accepted as a principle, as an exceptional rule or a doctrin, it is actually described as "*rechtsfiguur*" in German which points to the concept of 'legal status'. This juristic outcome, while generally not explicitly mentioned by name within the texts of the codes, finds its place in practice via case law and doctrine.

It is also observed that, in some German sources, this conceptualization is arrived at in the form of "*rechtswidrige Rechtsfigur*" (unlawful legal status/concept) because it actually expresses a legal situation that violates the law in terms of the contradiction it causes with basic legal principles such as guilt/ culpability (nulla poena sine culpa), concurrency[36] (mens rea and actus reus must occur at the same time) and legality (nullum cri- men nulla poena sine lege).[37]

The translations of *Actio Libera in Causa* is not perfectly synonymous for English and Turkish. While the predominant translation in the English doctrine is "action free in its cause", the translation as " cause of freedom in action" may also be observed. As for Turkish, it is seen that the translations of *"sebebinde serbest hareket"*[38] or *"nedeninde*

[36] The concurrency principle also known that contemporaneity or simultaneity and means that the guilty action of the perpetrator has to occur coincident with the guilty mental state of the perpetrator.

[37] Urs Kindhauser, *Strafrecht Allgemeiner Teil* (General Part of Criminal Law), 8. Auflage, Baden: Nomos Verlagsgesellschaft, 2017, p.157; Ellen Schlüchter, "Zur Vorsatzlichen Actio Libera in Causa bei Erfolgsdelikten", *Festschrift für Hans Joachim Hirsch zum 70. Geburtstag am* 11.April 1999 (Eds. Thomas Weigend, Georg Küpper), Berlin- New York: Walter de Gruyter, 1999, p.345

[38] Yener Ünver, (op. cit.) *Sebebinde Serbest Hareketler Kuramı,* p.872; Berrin Akbulut, *Ceza Hukuku Genel Hükümler,* 4, Ankara: Adalet Yayınevi, 2017, p.493; Mahmut Koca and İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler*, 10, Ankara: Seçkin, 2017, p.330

serbest hareket"[39] is preferred by the majority in Turkish doctrine in parallel with the dominant preference of the English doctrine.

Soyaslan, who instead of employing a literal and conceptual translation prefers a translation that would reveal the meaning: "suç işlemek için isnat kabiliyetinin kaldırılması"[40] which means "the removal of the ability of imput for committing a crime". However, such a translation can only cover ALIC cases processed by design, which means premeditated ALIC. Besides, this translation would exclude other types of ALIC. Therefore, we think that it is not a proper and correct translation.

When we look at the translations in older sources, we come across more convenient translations that have evaded the traps of being solely literal and of being both too long and restrictive. For example, the expression "*menşei itibarıyla hür fiil*"[41] used by Abadan, meaning that "free action as of origin", or "*aslında özgür olan hareket*"[42] which means "originally free movement", have been preferred. There is no obvious difference in meaning between these two expressions but only in terms of the coverages and usages and in fact, the second expression is perceived as a simplified and modernized version of the first. However, considering the connotation of the words as well as the roots they refer to and most importanly the original Latin version of the term, the expression "*menşei itibarıyla hür fiil*" (free action as of origin - *liberum actum ut originis*), seems more appropriate for both in terms of the proper language and in terms of preventing interconceptual confusion. That is why the second translation "aslında özgür olan hareket" includes the words: "asıl" and "hareket" which are not correct translation in our opinion (why not correct will be discussed further below). We think that "menşei itibarıyla hür fiil" is literally the correct translation. However, the word "menşe" is quite old and not commonly used in modern Turkish, also the word "hür" which had seen in the form of "hürriyet" as translation of "liberty" in 19th century, lately transliterated into modern Turkish as "özgür". We think that it would be more accurate to translate ALIC as "kökeni itibarıyla özgür fiil" by using the word "köken" instead, which means "the

[39] Talas, (op. cit.) "Ceza Hukukunda Kusur İlkesi Bağlamında Nedeninde Serbest Hareket Kavramı ve Geçici Nedenlerin Ceza Sorumluluğuna Etkisi", p.25

[40] Doğan Soyaslan, *Ceza Hukuku Genel Hükümler,* 7, Ankara: Yetkin, 2016, p.393

[41] Richard Honig, "İlliyet Nazariyesine Dair" (translated by M. Yavuz Abadan), *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası,* 2, 1936, p.175

[42] Mehmet Emin Artuk and Ahmet Gökcen and Mehmet Emin Alşahin and Kerim Çakır, *Ceza Hukuku Genel Hükümler,* 11, Ankara: Adalet, 2017, p.238; Nur Centel, Hamide Zafer, Özlem Çakmut*, Türk Ceza Hukukuna Giriş*, 10, İstanbul: Beta, 2017, p.400

basis, form, cause or source from which something originates or grounds; origin"[43]. On this thought, although we have a self-criticism regarding the obsolescence of the adverb "itibarıyla", it does not seem possible to replace it with a more appropriate and modern expression that has the capacity of referring to the time before the time spoken of and counting a set date as the beginning. Therefore, we prefer to include the word "itibarıyla" as the equivalent of "as of" in the translation. This is because we think it might be beneficial to use a word that points to the two-stage and processive (simultaneous) characteristic of the ALIC doctrine.

1.1.1 Terminological Examination of "Actio"

Firstly, the words, Latin *actio* and English act, action; find a clearer equivalent in Turkish, especially in the field of law, via the expression "*fiil*", rather than "*hareket*". In Turkish Penal Code, it is seen that "hareket" and "fiil" are taking place interchangeably. Although in the criminal law doctrine, action (fiil) and movement (hareket) are used interchangeably, almost in the same sense; actually the doctrinal picture is not so clear.[44] Some writers use "fiil" as an umbrella term comprising under it both "hareket" but also "netice" (consequence) and "nedensellik bağı" (causality).

The word "*fiil*" is encountered as a common translation of both to English "action" and Latin "actio", even there is different translation of *"hareket"* as "movement". However, while the action alone covers the acts of execution/ comission and omission; if the word movement (hareket) is preferred, then it must be determined with the adjectives of comissional or omissional to be brought before its quality. In other words, "movement" is almost like a subheading of the "action" as action includes both comissional and omissional behaviours. Additionaly, since the word "*fiil*" refers to the "*fail*" (perpetrator) that is, the person who commits the act, it also better complements the adjective attached in the term that comes before it. That is, the subject denoted by the adjective "*libera*" becomes not only the act itself, but also the agent. In other words, the emphasis on a person with free will is provided by the word itself. Such a distinction is important in that it points to responsibility arising from the previous event and therefore is decisive in terms of liability. "When we blame, we disapprove not only of the action by itself, but of the

[43] Turkish Language Association, https://sozluk.gov.tr/

[44] Selman Dursun, *The Concept of Action in Penal Law with an Interdisciplinary Approach,* Ankara: Seçkin Yayıncılık, 2021

defendant for doing that action. The burden for ascribing culpability lies in justifying that evaluative link between action and defendant—that link which allows us to trace judgments of the action back to the agent. Culpability involves moral assessments of the defendant's "engagement with the reasons why she should not"[45]

On the contrary, when the word "*hareket*" is preferred it will inevitably leave out of responsibility for actions that contain inactivity. Because movement is an example of action. Movement is reflex, action is about causing, creating or taking part in a manifestation -actively or passively-. And although every movement is an action, not every action is a movement; in that regard for example omission is an action. Thus, an action *"fiil"* may be committed by an act or omission. The conceptual and philosophical background of action is going to be analyzed more detailed in the second part of the thesis. One important point concerning the law should be mentioned in this context beforehand: although reflex movements are movements in the physical sense, they are not actions in the legal sense. Because they do not involve volition. Mental capacity is required for the existence of an act in the legal sense and there are two basic elements of this: capacity to comprehend (distinguishing right from wrong and having a concept of law) and volitional component (ability to conform behaviours or actions according to understanding). The most prominent example of a situation where capacity to comprehend is present but the volitional component is absent is the case of the kleptomaniac perpetrator. The kleptomaniac comprehends and knows that the act of stealing is wrong and also illegal; however, he or she lacks the ability to control his or her behavior according to this knowledge. Control and knowledge, which are elements of freedom and therefore of free action, will be discussed in more detail in the next chapter.

To give an example about omissional actions: A nurse can kill a patient by unplugging the life support or by giving the wrong medicine, or by not giving the required electroshock or remedy that should have be provided. However movement (hareket) requires a motion, a positive act or a behavior[46]. To give an example, if the preferred word in the conceptualization of ALIC is movement (hareket) then it will not be possible to hold the perpetrator, who is for example a diabetic, responsible by resorting to the first act of not taking the insulin drug for the subsequent but unconscious second act that s/he

[45] Miriam Gur-Arye, "Criminal Law Defences Divides" *Jerusalem Review of Legal Studies,* Volume 23, Issue 1, June 2021, p.176

[46] Turkish Language Association, https://sozluk.gov.tr/ date of access: 12.01.2023

will commit. This is because the first action (the first step) to be referenced, does not contain movement (hareket). Shortly, the word “*fiil*” is an action that gives the concept of the person together with the concept of time, while the word ‘*hareket*’ means a change of situation and place and requires a motion.

Conclusively, we think that the more appropriate equivalent of the word *actio* is *"fiil"* (action) rather than "*hareket*" (movement). However, despite our stated preference, it should be noted that this evaluation prioritizes the etymological origins and the convenience in terms of common usage and connotation. Otherwise, it cannot be denied that the word "action" has been used extensively in the Turkish legal literature, covering both omissional and comissional acts.[47] According to the approaches considering omission as an extrinsic act, which can be evaluated under three main headings: doing something different from what should be done, doing something opposite to what should be done, and doing something different from what has been done, omission is not not doing something, but doing the opposite; however, the explanations about the nature of this doing vary.[48] Also in English literature of law, the word ‘action’ is being used as a contrast to omission, which shows the using of the word could be more restrictive than we actually anticipate. In this case, it would be more appropriate to translate the concept by considering its expansion. ALIC is an abbreviation, the concept of "*actio libera in causa*" is also an abbreviation and its exact equivalent is "*actiones vel omissiones liberae in causa sive ad libertatem relatae*"[49] (actions and omissions free in the cause or related to freedom). In other words, this concept covers the acts of execution/ comission or omission and makes it possible to be applied to each type of acts. Therefore, the word “action” is lately used for both inclusively. This makes it more appropriate to use the inclusive word *"fiil"* in Turkish.

[47] Selahattin Keyman, "Cürmi Fiilin Yapısal Unsuru Olarak Hareket." *Ankara Üniversitesi Hukuk Fakültesi Dergisi 40.1, 198*8, p.122

[48] Yaprak Öntan, *Act and Result in Criminal Law,* Ankara Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dali Doktora Tezi, 2020, p.80

[49] Dorothee Sydow, *Die Actio Libera in Causa Nach dem Rechtsprechungswandel des Bundesgerichtshofs,* Peter Lang GmbH: Ftankfurt 2002, p.29

1.1.2 Terminological Examination of "Libera"

Secondly, it is necessary to eliminate the risk of causing conceptual confusion. In the field of criminal law various distinctions are made in accordance with nature of the action. One of these distinctions is the concept of "*serbest hareketli suç*" meaning that a crime which can be commited by any action or any way, which is used when there is no specification of the action in terms of violation of formal legality in the law codes. It seems quite possible to confuse this concept with the translation of ALIC to *"sebebinde serbest hareket"*. However, these two concepts cannot be evaluated in the same category, because ALIC by containing an arrangement on the basis of the action is quite different in that it establishes a two-stage causal link. Therefore, the use of the word *"serbest"* is inconvenient, although it seems the same with "*özgür*" (and "*hür*") in terms of its English translation. In addition to the goal of not giving way to conceptual confusions the sheer fact that the translation of '*libera*' as '*serbest*' - since the word "*serbest*" also means leisure (as in "*serbest zaman*" "leisure time") is erroneous and will cause misunderstandings, shall also be taken into consideration.

The words "*özgür*" and "*hür*" are synonymous and mean "not being bound by any restriction, coercion or condition"; "be free". They are equally convenient in that they can be used both characterizing the "perpetrator" (fail) and the "action" (fiil). Although the doctrinal difference between them is discussed in terms of their racial, ideological and historical origins, '*özgür*' and '*hür*' do not contain a significant difference in face of the meaning and function of the term ALIC.

Lastly, it seems appropriate to prefer the word "*özgür*" only because this word is more commonly used in the modern day and is therefore a relatively more understandable version of the language. At the same time, it is also known that the word *"hür"* (free) used to be considered as the opposite of slave, that is, as a substitute for a social status. The translation with the word *"özgür"* relatively liberates the word from this social and political context and moves it to a more individual context with an emphasis on the word *"öz"* (self). So we prefer to use *"özgür"* for "liberia" and "free".

1.1.3 Terminological Examination of "Causa"

An examination of relevant German court decisions, shows that the concept (of ALIC) is preferred to be used without resorting to any translations. However, in the case of incomprehension, it is suggested to translate the word "*causa*" as source/origin (der ursprung).[50] It has even been argued in German doctrine that the Latin expression of the concept is also incorrect and the expression "*actio libera efficiens per actionem illiberam*" would be more appropriate.[51] This correction, which is presented as an alternative to the original Latin version, means "the free action that becomes effective through an unfree action" (die freie handlung, die durch eine unfrei handlung wirksam wird).[52] This proposal is important in that it distinguishes the action that is committed when there is criminal culpability and the action that is committed when there is not, while also emphasizing the following steps and highlighting the temporal duality of the concept.

The translation of the word "*causa*" is literal in English -as in the form of "cause"-, therefore it does not create any duality. As stated, "*causa*" is used to mean origin and source in Euro-American literature. However, in its Turkish translation, we see that the words "*neden/ sebep*", "*menşe*" and "*asıl*" are used.[53] The basic meaning of the word which is *"reason"* (sebep) is not always sufficient to express its content. It should be translated to mean "the source to which any legal situation is legally attributed"[54] by making use of its connotations as the original Latin meaning is much more encompassing then the contemporary "cause". In other words, an expression that is capable of covering all the words which are "source, root, origin, basis, beginning and reason" should be used.

[50] Stühler, (op. cit.) *Die Actio Libera in Causa de Lege Lata und de Lege Ferenda*, p. 15; The 'source' of 'law' in classical Latin is '*fontes iuris*' though, not '*causa iuris*'. Accordingly, '*causa iuris*' (or *iuris causa*) would mean, if it did mean anything technical, 'cause of law'', not origin/ source of law. All in all, such phrases were not products of classical jurisprudence but rather the construct of theologians and moralist of the medieval era. For more on 'causa' of the Roman Law see Baha Yiğit Sayın, *Roma Klasik Hukukundan Modern Hukuklara Obligatio Naturalis*, İstanbul: On İki Levha Yayınları, 2023.

[51] Eberhard Schmidhauser, *Die Actio Libera in Causa: Ein Symptomatisches Problem der Deutschen Strafrechtwissenschaft,* Hamburg: Vandenhoeck und Ruprecht, 1992, p.67

[52] Ibid.

[53] See Yener Ünver, (op. cit.) Sebebinde Serbest Hareketler Kuramı, p.872; Berrin Akbulut, Ceza Hukuku Genel Hükümler, 4, Ankara: Adalet Yayınevi, 2017, p.493; Mahmut Koca and İlhan Üzülmez, Türk Ceza Hukuku Genel Hükümler, 10, Ankara: Seçkin, 2017, p.330; Talas, (op. cit.) "Ceza Hukukunda Kusur İlkesi Bağlamında Nedeninde Serbest Hareket Kavramı ve Geçici Nedenlerin Ceza Sorumluluğuna Etkisi", p.25; Richard Honig, "İlliyet Nazariyesine Dair" (translated by M. Yavuz Abadan), İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 2, 1936, p.175; Mehmet Emin Artuk and Ahmet Gökcen and Mehmet Emin Alşahin and Kerim Çakır, Ceza Hukuku Genel Hükümler, 11, Ankara: Adalet, 2017, p.238

[54] Ziya Umur, *Roma Hukuku Lügatı,* İstanbul, 1983, p.33

While the word "*asıl*" can meet the meanings of root, origin, basis and source, it leaves out the meanings of beginning and reason. The words "*sebep*" and "*neden*" have already been eliminated due to the fact that they contain only one, sole meaning as reason. Thus, it is understood that the word "*menşe*"[55] is more convenient than the others due to its inclusivity since "*menşe*" covers all the meanings aforementioned. However, as we have already mentioned, the word *"menşe"* is a very old Turkish word and its use today is very rare, perhaps even its meaning is no longer known by the majority. Since it is important that legal terms and regulations should be understandable as possible by people who are the recipients and interlocutors of them, we find it appropriate to use the word *"köken"* instead of the word *"menşe"*.

In conclusion, in line with the reasons we have presented, we propose that for the translation of "*actio libera in causa",* the expression "*kökeni itibarıyla özgür fiil*" (free action as of its origin) should be used which can wholly address the abstraction drawn by the original concept. However, for the sake of clarity and uniformity, throughout this study ALIC will be used as the abbreviated version of the concept "a*ctio libera in causa*'.

1.2 *Types of The Actio Libera in Causa*

To Eliminate one's own culpability with his/her own faulty behavior and commit an criminal wrong as a result, requires a two-staged flow of actions. In the first stage, the perpetrator intentionally or negligently removes culpability, and in the second stage, s/he commits an criminal wrong[56]. This two-staged flow of actions can unfold in various ways. Generally, this variety is categorized under the dichotomy of "intentional" and "negligent" in terms of practical convenience. However, the doctrine is not in agreement over which cases the existence of an intentional and negligent ALIC should be accepted. The moral element of the first stage action that eliminates free will and the moral element of the second stage action that constitutes the crime should be evaluated separately. Therefore, in this study, whilst the possibilities are going to be separated as premeditated, intentional, hybrid and negligent; they are also to be grouped in four different ways according to the two-staged acts; and their analysis will be tried to be done on the basis

[55] Turkish Language Association, https://sozluk.gov.tr/ date of access: 12.01.2023
[56] In Turkish: haksızlık, hukuka aykırı fiil (see criminal wrong, illegal action, tort, wrongful act)

these groupings. When we talked about the types of ALIC, we think that the acts and qualities of the both stages should be evaluated together in terms of the application of ALIC, which is a two-stage model.

1.2.1 Premeditated and Intentional Actio Libera in Causa

Intentional Elimination of Culpability and the Second Stage Action by Criminal Intent

This qualification is also called as 'double intent' (*doppelvorsatz*). This is the combination of the two stages, doctrinally acknowledged to belong to the category of intentional ALIC. In general, it is understood that stricter rules are accepted for the intentional ALIC in comparison with the rules acknowledged for negligent ALIC.[57] Although not all details have to be planned by the perpetrator, it must have been decided in concrete terms and there must be a criminal intent for a certain action.[58] For both the first and the second stage, it is valid for the perpetrator to act with direct criminal intent (*dolus directus*) or with eventual criminal intent (*dolus eventualis*). Direct criminal intent (*dolus directus*) is the expression of the will to realize a foreseeable and known result -which is against the law-. If it is certain that the act of the perpetrator in order to achieve a certain illicit result will bring about other consequences, it should be accepted that the perpetrator acted with direct criminal intent (*dolus directus)* during the consideration of such consequences.[59]

In order to break down these qualifications aforementioned, let's consider a situation where a person owing to his anger towards his neighbor decides to burn his neighbor's barn full of straw. He first takes alcohol accompanied by some antidepressants in order to break through his instinctual barriers and pluck up the courage to do this act. When he gets into the necessary mood, he goes and burns the barn.[60] ALIC comes into play when normally considering the perpetrator's lack of culpability due to the fact that

[57] Franz Streng, "Actio Libera in Causa und Verminderte Schuldfahigkeit" in *Juristische Schulung*, 2001, No.6, p.544

[58] Hannskarl Salger and Norbert Mutzbauer, "Die Actio Libera in Causa- Eine Rechtswidrige Rechtsfigur" *Neue Zeitschrift für Strafrecht*, 13(12), 1993, p.562

[59] Centel and Zafer and Çakmut, op. cit., p.369

[60] Wilhelm Friedrich Schneider, *Falle Strafrecht Allgemeiner Teil* (Criminal Law Cases General Part), 7. Auflage (ed. Alpmann Schmidt*),* 2017, p.60

the perpetrator intentionally got himself drunk and then intentionally committed a crime while intoxicated. Therefore, he will be punished for the crime of arson.

As can be seen, situations where direct criminal intent (*dolus directus*) is considered to be present are similar to cases where there exists "premeditation" in the context of ALIC.[61] The perpetrator removes his free will to commit a crime. Intentional ALIC and "premeditation" are not considered separately, but since the distinction is not drawn up by a legal regulation but is rather a facet of doctrine, it will be possible to arrive at separate results during the trial process. Otherwise, the person who commits a crime by intentionally just getting drunk (eventual intent) and the person who commits a crime by planning and getting drunk for realizing it (premeditation), will be treated the same provided that the execution is not determined by considering the distinction. Thus, the occurrence of injustice will be the likely outcome.

In the Italian Penal Code, drunkenness, which is created in the form of premeditation with the aim of benefiting by excuse, is regulated as a case requiring an aggravation of penalty.[62] The Italian Penal Code (*Codice Penale*) regulates that drunkenness not caused by a fortuitous event or a force majeure does not exclude or mitigate imputability, whilst at the same time aggaravating the penalty provided that the drunkenness was preordained in order to commit the crime, or to prepare an excuse.

On the other hand, in the Turkish doctrine,[63] it has been suggested that judges should aggravate the penalty in case of premeditation or direct criminal intention and that the general provisions of premeditation should be considered in cases where it is necessary to go beyond the ALIC, thus premeditation itself aggravates the punishment, regardless of intoxication.

In the case of eventual intent (dolus eventualis), although the perpetrator can foresee the consequences objectively, s/he does not care about it, remains reckless to the process and does not make a special effort to prevent the consequences from happening. A person who have previously committed an act of injury while drunk, foresees that he can commit such a crime again if he drinks alcohol and becomes drunk. In the case where he ignores this; gets drunk and then fights and injures another person, what we have is an example of ALIC committed by eventual intent (*dolus eventualis*).

[61] Still, crimes that are not premeditated can also be committed with direct intent.
[62] Italian Penal Code, Art.92
[63] Atalay, (op. cit.) *Ceza Hukukunda Actiones Liberae in Causa Kuramı*, p.288

As for the mental element (mens rea), the determination of the first-stage (act causing unconsciousness) is relatively easy and convenient. However, it will be very difficult to determine what degree of intent the perpetrator might have during the second act committed at the time of the impairment of consciousness. It is also problematic to distinguish the existence of eventual intent and the existence of conscious negligence, especially in terms of the second act as it will be necessary to discuss how perpetrator's consciousness is under the influence of substances, to what extent s/he has been exposed, and to what extent s/he is able to direct himself bodily and mentally. It seems difficult to develop a uniform discourse in terms of the mental element of the second act, since it is clear that not all substances or effects that abolish the free will lead to the same results.

The suggestion of this thesis is that only the certain degrees of mental element (mens rea) that direct intent or negligence should be used in the characterization of the second stage action: If the perpetrator, under the influence of first action damaging free will, directed his/her act objectively and directly to the victim, intent existed; If s/he has committed the act by mistake and without a target, existence of the negligence should be accepted. For example, with the crime of injuring the victim by throwing a glass at the his/her head in a drunken fight, the act is directed at the victim and carries the element of targeting, therefore it is intentional. However, in the crime of reckless endangerment of causing fire by the candle thrown on the ground while drunk during some celebrations, the act does not directly aim to start a fire. It is the result of carelessness; therefore, it is negligent. Determination of conscious negligence and eventual intent is misleading because in cases where exists a lack of consciousness due to intoxication via certain substances, drug, hypnosis etc.; the function of the prefrontal cortex, which provides reasoning and impulse control, is impaired. A person who has lost the ability to establish the cause-effect relationships and control his/her reactions does not have the ability to foresee. The difference between eventual intent and conscious negligence is based on a subtle distinction regarding foresight. The perpetrator who continues his/her act by thinking "whatever" despite foreseeing the unlawful result is considered to have committed the crime with eventual intent. The perpetrator who, despite foreseeing the unlawful result, continues to act by relying on a valid reason and trying to prevent this result, is considered to have committed the crime with conscious negligence. Making the discussion on subtle distinction over an unconscious or incompletely conscious person will lead to wrong conclusions. Thus, there are two possibilities for intent- intent combination: direct intent (for getting unconscious)- direct intent (for commiting crime) or eventual intent (for getting onconscious)- direct intent (for commiting crime). It is useful to emphasize that it would be more equitable to evaluate the direct criminal intent- direct criminal intent combination of ALIC within the scope of premeditation, and to evaluate the ALIC committed with eventual intent as a separate category.

According to double intent criteria and the general approach, the first and second stage act in ALIC process, whether has eventual or direct criminal intent, will fall under the category of intentional ALIC since there is no distinction in terms of the type of intention regarding ALIC. Eventual intent generally is evaluated with regard to the criminal act itself, not the manner of getting intoxicated; but we offer to evaluate type of intent for first stage act (getting unconscious- impairing culpability) for ALIC cases. Morover, intent and negligence should be evaluated for also second stage act (commiting crime); but their secondary types (eventual intent- conscious negligence) should not be evaluated because of the reasons explained in the previous paragraph. The importance of evaluating eventual and direct intent difference for first act is that level of culpability is different in these two in context of ALIC cases.

1.2.2 Hybrid Actio Libera in Causa

It is predominantly recommended to evaluate the cases that at least contain negligence in the course of the first stage and/or second stage action within the scope of negligent ALIC.[64] Thus, the subheadings under "hybrid ALIC" in this thesis are generally considering under the category of "negligent ALIC" although there exist differing views. Different combinations of negligence are not including the same degree of culpability. For example, the perpetrator who get drunk negligently and commit a crime negligently cannot regard as equal on culpability with another perpetrator who get drunk negligently but commit a crime intentionally. Therefore, it seems more equitable to categorize these two subheadings separately under new category as "hybrid ALIC".

[64] Henning Leupold, *Die Tathandlung der Reinen Erfolgsdelikte und das Tatbestandsmodell der "Actio Libera in Causa" im Lichte Verfassunggrechtlicher Schranken*, Berlin: Duncker & Humblot GmbH, 2005, p.16; Sanaz Bazrafkan, "Die Rechtsfigur der 'Actio Libera in Causa'", *Das Schuldprinzip des Türkischen StGB im Spiegel des Deutschen Strafrechts*, Vol. 2, Ankara: Seçkin, 2013, p.300-304; Basri Öztürk and Mustafa Ruhan Erdem, *Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku*, 14. Baskı, Ankara: Seçkin, 2014, p.251

Intentional Elimination of Culpability and the Second Stage Action by Negligence

In this category of acts, the perpetrator intentionally removes his/her culpability, but commits the crime negligently when s/he does not have criminal capacity. The intent of the perpetrator is only to be unconscious via intoxication, and s/he does not intend to commit a crime while deliberately using the intoxicating substance. For example, the perpetrator, who is a football fan, gets drunk during one match as he does every match day and injures his friend with a heavy object he throws while he is celebrating a goal. Here, the perpetrator had no intention of committing this act before getting drunk, and it is understood that his/her behavior towards the victim was not intentional while he was committing the act. However, he will be held responsible for this act[65] as he should have foreseen that when he got drunk, his mood would change and he might lose anger control and become impulsive as a result. It is left to one's own choice to experience harmless drunkenness or not to be drunk at all by taking measures to prevent the crime from happening while being drunk is not regulated as a crime in itself. However, it is also clear that crimes committed while intoxicated intendedly will lead to criminal responsibility.

In the aforementioned example, it is stated that the perpetrator who is intendedly drunk and causes injury by negligence, should be subjected to the rules of ALIC. However, it is also argued that the perpetrator can directly be held responsible of negligent injury by applying the general provisions of negligence without the need to resort to ALIC.[66]

In addition to this, it is also defended that the situations in which the culpability is intentionally removed shall be included to the category of intented ALIC not negligent.[67] According to this view, which argues that in cases where ALIC is to be applied, the moral element should be determined only on the basis of the first stage action and the moral element of the second stage action is not important in terms of the classification of ALIC. The moral element of the first act that removes the culpability and impair the free will is sufficient for determining the type of ALIC. According to this view, the negligent nature

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[65] Bernd Heinrich and Philipp Wissmann, "Die Actio Libera in Causa" *Ad Legendum: Richterrecht-Unter dem Radar des Gesetzgebers*, 2/2016, p.152

[66] Ibid, pp. 152-153

[67] Yener Ünver, op. cit., p. 855

of the first stage act is sufficient for the ALIC to be deemed negligent, and the intentional nature of the first stage act is sufficient for the ALIC to be deemed intentional. According to Ünver,[68] in cases where intented ALIC is accepted to exist, it is sufficient to perform the act that leads to the elimination of culpability. For intented ALIC, it is not necessary that the perpetrator plan to commit a crime or to foresee that an criminal wrong may occur. The rationale for this view is as follows: ALIC is only a concept related to the first action that eliminates or impairs free will, so making classification of the concept in terms of the moral element of the second action is irrelevant and unnecessary. Ünver thinks that the second act is important not in terms of the the classification of ALIC, but in terms of the type of crime for which the perpetrator will be held responsible.

In other words, although this hybrid form is mainly included under the category of negligent ALIC on the criteria of double intent, there are contrary opinions that include it in the intentional ALIC based on the moral element of the first act.[69]

Negligent Elimination of Culpability and the Second Stage Action by Criminal Intent

Another situation that seems to be an example of negligent ALIC is that the perpetrator impairs culpability by negligence and intentionally commits the criminal act while the related first stage act's impairing effect on free will and culpability endures. It is indeed controversial as to how a perpetrator who has lost culpability or free will, can act intentionally.[70] However, the majority view signals to the fact that there is no direct evidence that the post-antecedent actions that harm the free will of the person will occur in a mechanized way.[71]

The important point to be observed here is that the first act does not have to eliminate the free will and culpability altogether. A first stage action that harms free will and impair the culpability will also be included in the scope of ALIC. For example, the extent of impairment to the free will of an individual under the influence of hypnosis will not be the same as the extent of impairment to the free will of an individual who forgets to take antidepressant or diabetes medications, or of an individual under the influence of

[68] Ibid, pp.851-855

[69] Timur Demirbaş, Ceza Hukuku Genel Hükümler, 12, Ankara: Seçkin, 2016, p.222 and p.346; Talas, op. cit., p.143; Rolf Schmidt, Strafrecht- Allgemeiner Teil (General Part of Criminal Law), Dr. Rolf Verlag, 9. Auflage, Bremen, 2011, p.204

[70] Leupold, op. cit., p.16

[71] Sydow, op. cit., p.90

drugs or alcohol. The extension of impairment will change even depending on the type and dose of the substance under the influence. Looking at real-life examples it can be asserted that although we see that individuals who do not take their required medication or who are under the influence of alcohol experience a diminution in their impulse control abilities, it seems difficult to say that they have completely lost it.

Neuroscientific studies state that executive dysfunction (decision making disorder, lack of self-control, and working memory impairments) occur as a result of prefrontal cortex damage due to substance use disorder.[72] In other words, the situation is characterized not as the complete loss of a function, but as its deterioration to a certain degree. Some authors divide the level of intoxication as total and partial to consider the degree of culpability.[73]

In the light of these informations, it is taken as a basis that the perpetrator still has the opportunity to act intentionally or negligently, so it is understood that there should be no classification considering solely the moral element of the first stage act.[74] This view is accepted by the majority in the doctrine and it is also of our opinion. In this respect, it will be possible for a person who gets drunk by negligence to commit a crime intentionally afterwards.

This probability can be explained with an example: The perpetrator goes to a place to have fun and has no intention to get drunk in the first place; however, she inadvertently gets drunk because she could not adjust the dose of alcohol or consumed the drinks too fast. Afterwards, she encounters and kills her enemy who came to the same place by chance. In such a case, she will be included in the ALIC rule for her second act and punished even though she was drunk by negligence.

The question here is whether the act in question may be considered as a negligent or an intentional ALIC. According to the view defended by Heinrich, it is not necessary to resort to ALIC in negligent acts since in such cases it is possible to punish the perpetrator according to the general provisions of negligence.[75] Since the act of violence committed as a result of being drunk is foreseeable and preventable, the view argued that there is

[72] Bahadır Geniş and Ferit Şahin and Nermin Gürhan, “Neurobiological Basis of Violence and Suicide in Alcohol-Substance Use Disorders” in *Current Approaches in Psychiatry,* 2022; 14(2):264-275, p.268

[73] Miriam Gur-Arye, *Actio Libera in Causa in Criminal Law.* Harry Sacher Institute for Legislative Research and Comparative Law, Faculty of Law, Hebrew University of Jerusalem, 1984

[74] Sydow, op. cit., p.90

[75] Heinrich and Wissmann, op. cit., p.151

direct negligence responsibility. However, since there is a two-stage chain of actions and even the second stage is an intentional act, directly applying the provisions of negligence will be insufficient in terms of the conceptualization of categorizing the crimes and for the justification of the decision in terms of case law.

On the other hand, there is also the view who considers the negligence-intent combination within the scope of intentional ALIC; or considers the cases with intent-negligence combination as negligent ALIC by considering the second act which committed under absence of the culpability.[76] According to Talas, there is no need for the double intent principle for intentional ALIC. It is not necessary to remove the culpability intentionally, rather it is sufficient to perform a criminally intented action when there is no culpability. Talas argues that if such an evaluation is not made, it will lead to logically erroneous conclusions in terms of the analysis of the nature of the crime.[77] In the same vein, Demirbaş takes the moral element of the action performed after the culpability is eliminated as a basis.[78] They state that the moral element of the two actions should be evaluated separately and there is no need for resorting to the principle of 'double intent'; but contrary to Ünver,[79] they also argue that determination of intentional ALIC can be made by taking the moral element of the second action as a basis, not the element of the first action.

Thus, although the majority view, especially in German doctrine, includes this hybrid form under the category of negligent ALIC on the criteria of double intent, there are contrary opinions that include it in the intentional ALIC based on the moral element of only the second act.[80] Drunkenness designed for crime (direct intent-intent), drunkenness by taking the risk of crime (eventual intent-intent), negligent crime committed while drunk (intent-negligence), and an intentional crime committed while drunk (negligence-intent) express the different dimensions of ALIC and the different types and degrees of criminal responsibility equally. Therefore, in this study, it was also deemed appropriate to add the hybrid and premeditated categories for ALIC.

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[76] Rolf Schmidt, *Strafrecht- Allgemeiner Teil* (General Part of Criminal Law), Dr. Rolf Verlag, 9. Auflage, Bremen, 2011, p.204

[77] Talas, op. cit., p.143

[78] Timur Demirbaş, Ceza Hukuku Genel Hükümler, 12, Ankara: Seçkin, 2016, p.222 and p.346

[79] Yener Ünver, op. cit., p. 851

[80] Talas, op. cit., p. 143

1.2.3 Negligent Actio Libera in Causa

It was stated that the combinations included under the title of hybrid ALIC are mainly included in the scope of negligent ALIC. It is seen that the combination, which is negligent in terms of both stages of the chain, is accepted as negligent ALIC in majority of doctrine, albeit there exist some objections. Certain authors in Italian doctrine argue that ALIC can only be used in cases of intent, while also rejecting the applicability of ALIC to negligent cases.[81] Accordingly it is stated that when drunkenness is caused by a negligent reason, there exists no psychological connection between the reason and the second stage act. There must be a purposive relationship linking the first stage act to the second stage act.[82] This view excludes liability from the scope of ALIC in cases where there is a negligent stage and leads to the application of general negligence provisions. We think that it is more appropriate to evaluate it separately under the rules of ALIC, even if the criminal result (punishment) will not be different from the general provisions, since the cases related to losing culpability includes two stages and composes different situation from the crimes compose of one stage action.

On the other hand, there is an opinion in the Spanish doctrine, argues that there is no need for negligent ALIC due to the fact that the violation of the duty of care is sufficient to include under the category of intentional ALIC. This view claims that if the perpetrator intentionally or negligently puts himself/herself in a state of inability to understand and consent, there is no need to construct a negligent ALIC (*ALIC culposa*), since the act in question is contrary to the duty of care in which the endangerenment has already been fulfilled.[83] Despite this view, which finds it unnecessary to divide the ALIC into subcategories, we think that it is more equitable and enlightening to examine the ALIC possibilities with the categories.

Negligent Elimination of Culpability and the Second Stage Action by Negligence

In order to be able to talk about the existence of a negligent ALIC in a real sense, the perpetrator must lose the culpability by negligence and then commit a crime

[81] Haluk Toroslu, *Ceza Hukukunda İsnat Yeteneği*, Ankara: Savaş, 2015, pp. 85-88
[82] Ibid, p. 88
[83] F. Castillo Gonzalez, "Principio de Culpabilidad y Actio Libera in Causa" en *Defensa De Su Regulación Legislativa.* 2009, pp. 100-101

negligently. Any type of negligence (gross, conscious, contributory et al.) can be seen in the category of negligent ALIC.[84] Accordingly, it will be acknowledged that if the perpetrator, who removes her/his culpability, commits a crime that s/he could not foresee although s/he should have foreseen, the perpetrator acted by simple negligence.

In the case of committing a crime that s/he foresaw but hoped not to commit or in which s/he was confident in his/her own ability, it would be deemed that s/he acted with conscious negligence.[85] In our opinion, when evaluating the degree of negligence of the perpetrator in terms of the act that eliminates his/her culpability, it should be investigated and evaluated whether s/he has a foresight for getting drunk or unconscious. Actually, the criminal responsibility of the perpetrator will continue whether s/he loses his/her ability to discretion and cognition negligently (direct or conscious) or intentionally (direct or eventual). His/her responsibility for the crime he/she committed (e.g. intentional injury or negligent injury) will be evaluated separately and independently from the first stage act. However, how impaired the culpability of the person is important for the determination of the penalty, and therefore a preliminary examination of the moral element of the first stage act (loss of the culpability, e.g. being drunk) is necessary. Otherwise, only foreseeing about the possibility of committing a crime will be investigated, it will not be any difference from the negligent act committed by the perpetrator who was drunk intentionally but not for a crime. In other words, the difference between intent- negligence hybrid combination (intentional drunkenness- negligent crime) and negligence- negligence (negligent drunkenness- negligent crime) combination could not be taken into account inevitably. So the unfair situation will occur against the negligent ALIC perpetrator. This means that the two-act structure of ALIC should be taken into account when applying the elements for determining the penalty described in Article 61 of the Turkish Penal Code when applying to ALIC cases.

An example of conscious negligence in terms of first stage action can be given as follows: A truck driver, knowing that he would be working the night shift, drank a few glasses of alcohol, trusting that he would not get drunk; then, having confidence in his driving skills, he caused an accident by driving while under the influence of alcohol. Here, it is clear that consuming intoxicating substances regardless of the amount before driving

[84] Yener Ünver, op. cit., p.857
[85] Sydow, op. cit., p.40

is a conscious carelessness and it is foreseeable that drunk driving may cause a traffic accident, the perpetrator will be held responsible in accordance with the negligent ALIC.

An example of the situation in which there is simple negligence in terms of first stage action can be given also in the context of a careless mother.[86] In a case where the mother, who consumes alcohol without aiming to get drunk after putting her baby to sleep, then gets drunk and unknowingly falls on and crushes her baby; it is accepted that the mother in question could had foreseen the possibility of herself getting drunk and losing control, as well as foreseeing that her vulnerable baby might wake up and need her. Thus the mother is to be held responsible for simple negligence because she could not foresee even though she should have. If there is a situation that the perpetrator cannot foresee, it is not possible to be held responsible even within the framework of the negligent ALIC.

It should be understood that in cases where the perpetrator cannot even be expected to foresee, it will not be possible to talk about the existence of any criminal responsibility and reprehensibility in the context of ALIC. There are two other situations in which ALIC will not apply:

The first is the case where the act of eliminating the perpetrator's culpability also constitutes the typical element of a negligent crime. An example of such situations is the fact that driving under the influence of alcohol also constitutes the crime of ‘drunk driving’.[87] In these kind of situations, the perpetrator will be held responsible for the crime he has committed in accordance with the provisions of separate offense.

The second is that the punishment of the negligent form of the act in question is not regulated by a clear and precise provision in the code. In order to be punished within the scope of negligent ALIC, it is necessary to have committed a crime which can be commited and punishable by negligence according to its nature and regulations. Even if the possibility of negligent ALIC is realized, the perpetrator will not have criminal responsibility of crimes that can only be committed intentionally such as theft, forgery, insult which cannot be committed by negligence.

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[86] Klaus Geppert, “Die Volltrunkenheit” (323 a StGB*), Jura*, Volume 31, Issue 1, 2009, p.44

[87] See Turkish Penal Code, art. 179/3

1.3 *Comparison of Actio Libera in Causa with Similar Terms*

Generally, only a single act is taken as the basis for the assessment of criminal responsibility. However, there are cases where more than one action needs to be examined. ALIC theory is one of these rare cases; it includes two-stage actions and requires examination with reference to each other. However, ALIC is not the only theory in terms of situations that should be evaluated in two stages. There are other theories based on the two-stage movement such as voluntary intoxication, omissio libera in causa and actio illicita in causa. It is stated that these concepts come from the same root with ALIC, even though they emerged after ALIC and are less emphasized in the doctrine of criminal law.[88] Indeed, these two-stage evaluation concepts are very similar to each other and can even be taken as being complementary to each other. These concepts are the actors that are not written in the laws and provide the opportunity to take into account the antecedent- preceding actions in the evaluation of criminal responsibility.

The common point and purpose among these concepts is “to prevent the benefit of it by creating an appearance that the perpetrator does not have criminal responsibility when s/he commits the main criminal act”. While ALIC, omissio libera in causa and actio illicita in causa are concepts originating from continental European doctrines and do not take place directly in written and conceptual terms in the codes, the concept of voluntary intoxication is a product of the Anglo-saxon tradition and is a concept of jurisprudence.

In the next sections all of these concepts, which have a two-stage action structure, are going to be examined in terms of their connections and categorical relations with ALIC, emphasizing the similarities and differences between them.

1.3.1 Voluntary Intoxication

This term belongs to Anglo-Saxon law and is similar in essence to ALIC in terms of free action as its origin although ALIC is a higher concept in that it is more inclusive. In Turkish doctrine voluntary intoxication is generally considered as an "example" or, at most, a sub-category of ALIC. While ALIC also includes omissional and non-intoxication

[88] Satzger, (op. cit.) “Dreimal ‘in causa’: actio libera in causa, omissio libera in causa und actio illicita in causa”, p.517; Talas, op. cit., p. 96

loss of culpability - such as the cases where a diabetic is not taking the prescribed diabetes pills-, the scope of the voluntary intoxication defense is narrower. In other words, while there is no distinction in terms of methods used by the perpetrator for losing culpability within the scope of ALIC; the applicability of voluntary intoxication has only been accepted for some methods. The term "intoxication" limits the scope of the concept to substances that reduce or destroy consciousness by interacting with the body. While the loss of culpability by using or being exposed to alcohol, drugs, poisonous gases, medicines and similar substances is included, methods such as hypnosis or losing consciousness by not taking a medicine are not within the scope of the concept.

It would be easier to define the concept of "voluntary" by benefiting from its opposite: involuntary intoxication. Until the middle of the 19th century, intoxication was not accepted as a reason for defense in terms of criminal responsibility before the Anglo-Saxon criminal courts, and was even punished more severely due to the state of drunkenness. The intellectual development of the concept of "involuntary intoxication" increased towards the end of the 19th century and the beginning of the 20th century shall be marked as its first appearance in case law as can be seen in the *R v Meade* (1909) decision.[89] According to this decision, if perpetrator's mind is clouded by alcohol and the intention to take alcohol cannot be found, the accusation directed against him/her should be reduced from voluntary crime to negligent crime.

In late 19th century, with the case *State v. Bunn* the court established a test for involuntary toxication. The court held that intoxication could just be solely considered involuntary provided that the enterence of alcohol, drug or other toxic substance into a perpetrator's body "without his/her knowledge or by force majeure".[90] It is understood from this definition that the situation is voluntary intoxication, except when exposed to an intoxicating substance either by force or without knowledge. At the same time, the court also made an explanation about the time that should be taken as a basis in the process of taking the toxic substance in terms of the existence of will and how alcoholism should be evaluated. "when… a person take the first drink by choice and afterwards drinks successively and finally gets drunk, that is voluntary intoxication, even though s/he may

[89] Tony Storey**,** *Unlocking Criminal Law,* 5th Edition, New York: Routledge, 2015, p. 297

[90] State v. Bunn, 1973, 283 N.C. 444, 457, 196 S.E. 2d, 777-786

be an alcoholic"[91] It is follows that the will at the intentional first entry of the toxic substance into the body is sufficient for the responsibility of the perpetrator. In terms of alcoholism, the perpetrator's dependence does not make him irresponsible. Still, there exists decisions to the contrary. It has been argued that perpetrators who are addicted and takes forced rehab cannot make conscious decisions because they are forced by their addictions, so their situation is involuntary.[92] "Compulsion of the addiction" may render a person's intoxication involuntary. Today, with the development of neuroscience, the will power of the perpetrators is examined in the context of brain activities and there is a growing tendency to relate behavioral disorders in crimes to addiction and addiction-related diseases.[93]

According to the generally accepted view, judgments of responsibility rest on a folk psychological distinction between compulsion and weakness of will.[94] The weak-willed agent acts in accordance with desires that run contrary to his/her better judgment; had s/he exercised self-control, s/he would have succeeded in bringing her/his actions into line with his/her own judgment. In contrast, in the case of compulsion, the desire or urge on which the agent acts was, at that time, irresistible. And compulsion may force the will of agent externally or internally, so agent's attempts for self-control would fail. The general view holds that while weak agents are fully responsible for their actions, compelled agents are not fully responsible.[95] The unapplicable quality of this view is the impossibility of distinguishing these two type of intention problem. According to the 'choice model of addiction' and 'brain disease model', real compulsion bypasses

[91] State v. Bunn, 1973, 283 N.C. 444, 457, 196 S.E. 2d, 786; People v. Morrow, 1969, 268 Cal. App. 2d, 948-49, 74 Cal Rptr. 551-558

[92] Paul H. Robinson, "Criminal Law Defenses: A Systematic Analysis." *Columbia Law Review*, vol. 82, no. 2, 1982, p. 456, https://doi.org/10.2307/1122275. Accessed 18 Dec. 2022; See People v. Wyatt, 1972, 22 Cal. App 3d 671, 677, 99 Cal. Rptr. 674-678. (also see TPC art. 57/7: "As a security measure, persons addicted to alcohol or drugs or stimulants who commit a crime shall be placed under treatment in a health institution specialized for alcohol or drugs or stimulants addicts. The treatment of these persons shall continue until they recover from alcohol or drug or stimulant addiction. These persons may be released by the decision of the enforcement judge upon a report to be issued by the health board of the institution where they are placed.")

[93] Tade Matthias Spranger, "Neurosciences and The Law: An Introduction" in *International Neurolaw, A Comperative Analysis* (ed. Tade Matthias Spranger), Heidelberg, 2012, 1-10

[94] Jeanette Kennett, *Agency and responsibility: A common-sense moral psychology*. Oxford/New York: Clarendon Press/Oxford University Press, 2001, passim.

[95] Jeanette Kennett and Nicole A. Vincent and Anke Snoek. "Drug addiction and criminal responsibility." *Handbook on Neuroethics*, 2014, p.1069

intention.[96] However choice theorists[97] argue, in opposition to the disease model,[98] that drug use cannot count as being compelled because it is not like a tic or a reflex. Morse argues that in any circumstances addicted perpetrators should be held responsible due to responsibility for becoming addicted and having diachronic self-control.[99] He claims that "in general, addiction does not sufficiently undermine either cognitive or control capacities to excuse the addict for other crimes, and virtually all addicts can be held responsible for not taking the steps to prevent them from engaging in addiction related crime."[100] People take the addictive substance voluntarily usually in their adultery or early adultery times which corresponds to a temporal stage where they are aware (or justifiably expected to be aware of) of the law/ regulations and the adverse mental health issues related to intoxication. As for the others who take the intoxicative substence during their 'vulnerable' adolescense period, they may foresee the consequences of their addiction and can take precaution beforehand as "diachronic self-control is a form of control exercised in advance of an experienced temptation."[101] It follows that even if addicts are sufficiently irrational or "internally coerced" at the time they commit substance-related crimes to warrant mitigation or justification, they should be held accountable. The main reason for their accountability rests on the premise that addicts have lucid, rational intervals between episodes of use, during which they could act on the good reasons to seek assistance quitting or otherwise avoid engaging in harmful drug-related behavior.."[102]

Another modern view on the criminal responsibility of addicts is the "responsibility without blame"[103] approach, which proposes to differentiate according to the theme of the crime and to create remedial execution methods. As the sociopsychological effects of

[96] H. Pickard, "Responsibility without blame, empathy and the effective treatment of personality disorder" *Philosophy, Psychiatry and Psychology,* 18(3), 2011, 209–224

[97] G. M. Heyman, *Addiction: A Disorder of Choice*. Cambridge, MA: Harvard University Press, 2009; H. Pickard**,** "Responsibility without blame, empathy and the effective treatment of personality disorder" Philosophy, Psychiatry and Psychology, 18(3), 2011, 209–224; S. J. Morse, "Addiction and Criminal Responsibility" in *Addiction and Responsibility* (eds. J. Poland and G. Graham), 2011, 159–199

[98] A. I. Leshner, **"**Addiction is a brain disease, and it matters" *Science*, 278(3), 1999, pp. 45–47

[99] S. J. Morse, "Addiction and Criminal Responsibility" in *Addiction and Responsibility* (eds. J. Poland and G. Graham), New York: The MIT Press, 2011, p.173

[100] Ibid.

[101] Kennett and Vincent and Snoek, op. cit., p.1076

[102] Morse, op. cit., p.191

[103] N. Lacey and H. Pickard, "From The Consulting Room to The Court Room? Taking The Clinical Model Of Responsibility Without Blame Into The Legal Realm." *Oxford Journal of Legal Studies,* 2012, 1–29, http://ojls.oxfordjournals.org/content/early/2012/11/19/ojls.gqs028.full 10.01.2023 (the approach is unconstitutional under Turkish positive law)

addiction are statistically clear and definite, it is recommended that perpetrators shall be approached in an understanding way without any blaming or shaming, and shall also be encouraged to use their own will by therapy concurrently.

In terms of moral element of the crime, a dichotomy must be made:[104] *dolus generalis* (general criminal intent) and *dolus specialis* (specific criminal intent). First of all, it should be decided whether the crime committed by the perpetrator is a crime that can be committed with a *dolus generalis* or a *dolus specialis*. If it is decided that it is a *dolus specialis*, the perpetrator will not be punished by accepting that there is no moral element, even if the perpetrator is drunk by her/his own will.[105] However if it is *dolus generalis,* the criminal responsibility will be present and the perpetrator would take punishment for the criminal action and the taking drug intentionally. As the definition of *dolus generalis* which is also referred to by Weber, is a type of intention in which the elements of knowing and willing are combined, and it is classified as deception in two-stage case examples. The most famous is the “liquid dung pit 'Jauchegrubenfall' case”,[106] where the perpetrator covers the victim's mouth with two handfuls of sand in order to prevent her from screaming. And then thinking that the unconscious victim is dead -while she is not-, he throws her into the liquid manure collector, where the victim actually meets her demise. In other words, the first malicious act (in the aforementioned case, with ultimate intent) does not cause death, rather death results from a second act intended to hide the corpse. Thus, if the act is only conscious/ knowing and voluntary/ willing, it will be deemed to include general criminal intent, if the “purpose” that motivates the perpetrator is a necessary element for the existence of the crime, then it will be deemed to include special criminal intent.[107] A psychological element is also required for *dolus specialis*. Based on the neuropsychological references and medical data above, it is accepted that the mind of an intoxicated person is not capable of making any changes to a crime s/he has committed and cannot has any kind of specific criminal intent. Therefore, in cases where the existence of specific criminal intent is a necessary element for the formation of a crime,

[104] This distinction is based on a common law perception of intent and does not correspond to concept of intent in Turkish literature.

[105] Gabriel Hallevy, *The Matrix of Insanity in Modern Criminal Law*, Swiss: Springer, 2015, p.143

[106] BGHSt 14, 193, 26.04.1960

[107] Robert G. Thompson, “Voluntary Intoxication and Criminal Responsibilities” *Behavioral Sciences And The Law,* Volume:17, April-June 1999, Issue 2, p.200

the perpetrator will not be punished by accepting that the moral element required for this crime is not present, even if the perpetrator lose culpability by his/her own will.[108]

In this respect, in the case of committing crimes such as fraud, forgery, bribery, arson, false witnessing while intoxicated, the perpetrator's drunkenness may be an excuse to avoid criminal responsibility.[109] This situation constitutes an exception and is related to the mental situation of the perpetrator. If the need to element of motive is related to the severity of the punishment, it only causes the aggravating factor to disappear, but it does not remove the responsibility. Additionaly, it should be noted that crimes that can be committed with specific intent may differ amongst the legal systems (traditions) and accordingly should be evaluated separately. In the Anglo-Saxon legal system (common law), where the jury trial is essential, the burden of proof concerning the degree of drunkenness that prevents special intent, falls on the accused.[110]

This is not the only approach in the doctrin as there are also views claiming that committing a crime under voluntary intoxication should be accepted as the just one act and not let perpetrator avoid from the responsibility. It considers the burden of foresee the results of being drunk and taking precaution and the priority of the moral values on personal psychological reasons.[111] In addition, although it is widely accepted to punish in cases of *dolus generalis,* not in cases of *dolus specialis*, it is in fact more appropriate to evaluate each case specifically. In this respect, it is observed that the courts choose to interpret each case seperately taking into account their pecularities rather than following a strict guideline. It is worth noting that in Continental European and Turkish law, the distinction between dolus specialis and dolus generalis is not valid. We have already stated that the institution of voluntary intoxication is a specific institution of the common law.

As can be seen, the principle of “voluntary intoxication” is used as an institution in the Anglo-Saxon legal system has similar characteristics and function with ALIC. And it

[108] Charlotte Carter-Yamauchi, *Drugs Alcohol and The Insanity Defence: The Debate Over “Settled” Insanity,* Honolulu: HI: Legislative Reference Bureau, 1998, p.16

[109] R. T. Watterson, “Just Say no to The Charges Against You: Alcohol Intoxication, Mental Capacity and Criminal Responsibility” *The Journal of the American Academy of Pschiatry and The Law,* vol.19, issue 3, 1991, p.278

[110] S. M. Beck and G. E. Parker, “The Intoxicated Offender: A Problem of Responsibility” *Canadian Bar Review,* 44.4, 1966, p.578

[111] McCord, (op. cit.) “The English and American History of Voluntary Intoxication to Negate Mens Rea” p.389

creates a practical condition for punishing two-stage crimes committed due to voluntary unconsciousness specified to intoxication. In addition, although there are exceptions due to the observance of the moral element, it is important in terms of examining the conditions and consequences of the existence of free will and is mutually contributing with the ALIC theory.

1.3.2 Omissio Libera in Causa

Omissio libera in causa should actually be studied as a sub-title of ALIC, not as a completely separate concept since although ALIC is an abbreviation, the concept of "*actio libera in causa*" is also an abbreviation and its exact equivalent is "*actiones vel omissiones liberae in causa sive ad libertatem relatae*".[112] The concept of ALIC covers the acts of execution/comission or omission and makes it possible to be applied in both types of acts. Notwithstanding what is legally essential is the execution of the act, that is, being carried out by doing, it is also clear from the texts of the law and case-law that a crime can be committed by omission in some cases, that is, being committed by not doing anything. It is indeed important to explain the determination of the omission before analyzing *omissio libera in causa* as considering the subtitle of ALIC.

Psychological observations shows that crimes committed by omission tend to be seen more innocent by the society.[113] In fact, as seen in experiments such as the train experiment (trolley problem),[114] the rate of preferring more damage without changing the rails is higher than the rate of preferring even less damage by changing it. The psychology of the majority has a tendency to be able to forgive and justify more easily the bad consequences caused by staying stagnant and choosing not to act or intervene the process. However, this psychological and perceptual state does not provide relief from criminal responsibility for an act that s/he did not commit in cases where the duty of "doing" is imposed on the person.

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[112] Sydow, op. cit., p.29

[113] Mark Spranca and Elisa Minsk and Jonathan Baron. "Omission and commission in judgment and choice." *Journal of experimental social psychology,* 27, no. 1, 1991, 76-105

[114] For the ‘trolley problem’ *see* Judith Jarvis Thomson, “The Trolley Problem” *The Yale Law Journal* Vol. 94, No. 6, May, 1985, pp. 1395-1415

It is also argued that as long as an action has dual meanings and dual aspects as commission and omission, considering it as an action by way of comission should be given priority. The opposite view, on the other hand, advocates to consider that the penalty to be imposed for the action by way of omission should be lighter. In such a case, the principle of interpretation in favor of the accused should be applied.[115] In cases where the distinction between omission and comission is critically problematic; it would be appropriate to apply more than one of the criteria -that are causal process, active behaviour, body movement, social meaning, and the center of gravity of the behavior- for the determination of the qualification of the behavior.[116]

There are two views on the distinction between 'behavior by way of action' and 'behavior by way of omission' namely as the 'natural perspective' and the 'normative perspective'.[117] Natural perspective is divided into body movement criteria, use of energy criteria, causality criteria and mixed criteria of causality and use of energy.[118] According to the body movement criteria, if a person engages in active behavior in the form of 'doing', it constitutes a crime through behavior by way of action, while omissional crimes are the crimes which are committed by 'not performing any behavior'. The distinction between omission and behavior by way of action is laid down in terms of the effect the behavior causes in the external world.[119] The energy use criteria tries to explain by changing the name of the body movement criterion, although it is essentially based on the same explanations with body motion criteria. According to the causality criteria, behavior by way of action causes change in the external world, while omissional behavior does not change anything in the external world. In other words, behavior by way of action initiates and directs the causal process, while omissional behavior essentially has no effect on the causal process and does not involve any positive action to prevent the causal process. There is behavior by way of action if the result does not occur in the absence of positive action. There is behavior by way of omission if the positive action is present but is

[115] Hakan Hakeri, *Ceza Hukuku'nda İhmal Kavramı ve İhmali Suçların Çeşitleri*, p. 90.
[116] Mustafa Avcı and Erdal Yerdelen, "Verdict Analysis: The Seperation of Behaviour by way of Omission and Action at Qualified Omissive Crime" *Gazi Üniversitesi Hukuk Fakültesi Dergisi* 19, no. 1, 2015, p. 174
[117] Ibid.
[118] Hakeri, loc. cit., p.70
[119] Ibid, p.71

irrelevant to the result, or if the action does not affect the result in any way. The mixed theory, uses and combines these theories together.[120]

Normative perspective regards commission as an active behavior and omission as something that occurs due to a value judgment. While crimes through behaviour by way of action are determined naturally, a normative evaluation is needed for the determination of crimes of omission.[121] Two elements are necessary to determine the crime of omission. The first element is the presence of a behavior that manifests itself in the form of not doing -or inaction- and the second element is the presence of a norm of religious, moral or scientific nature on the basis of which the perpetrator is expected to make a certain action.[122] Then omission is not passively ‘not doing’, but is ‘not doing’ a certain action which that norm dictates[123]. The criterion of social meaning argues that behavior by way of omission should be determined according to the social purpose that the behavior is supposed to fulfill, rather than just looking at its appearance and whether it involves positive action. According to the point of gravity criteria, the issue is not the outward appearance of the behavior but the problem of legal assessment and accusation.[124] This assessment relates to whether the behavior is legally liable or not. In this context, it would be appropriate to discuss what is or is not behavior that is enabling and suitable for a lawfully regulated criminal result.

According to Roxin, it is necessary to be close to accepting it as behaviour by way of action in conflicting situations. For this, however, it is necessary to accept that the active expenditure of energy by the perpetrator is necessarily causal in terms of the result and that the intent of the perpetrator must be directed towards this purpose.[125] In the words of Brammsen, “in order to regard the perpetrator's act with an expenditure of energy as an active (executive) act, it is necessary and sufficient to initiate, continue or accelerate the process towards the realization of the result. In order to achieve this outcome, the behavior

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[120] Keyman, op. cit., pp. 122-173

[121] Füsun Sokullu Akıncı, and İzzet Özgenç, and Adem Sözüer, and Fatih Selami Mahmutoğlu, and Yener Ünver and Kayhan İçel, *Suç Teorisi,* 3. Baskı, İstanbul, 2004, p.135

[122] Keyman, op. cit., p.138

[123] Koca and Üzülmez, op. cit., p.377

[124] Mehmet Emin Artuk and Ahmet Gökçen and Caner Yenidünya, *Ceza Hukuku Genel Hükümler*, Ankara: Turhan Kitabevi, 2011, p. 262

[125] Claus Roxin, *Strafrecht Algemeiner Teil,* Band II, C.H. Beck Verlag München, 2003, Rn.78, p. 654

in the concrete case, in reality or according to the perpetrator's opinion, must be appropriate to be accepted as an attack on the protected value of norm”.[126]

It is necessary to distinguish cases where the effect of behavior by way of action on the causal link to the result is insignificant. It may be possible that the behaviour by way of action exists before the behaviour by way of omission, which does not directly affect the result, but is the one that matters. For example, in the case where a parent leaves a three-year-old child alone at home only for the child to play with fire playing causing his/her own death, the parent's leaving the house is an executive (active) behavior.[127] In this context, it is the question of whether the parent’s behavior is conducive and convenient to the result becomes in the determining the essence and type of behaviour.

In light of the theories on distinguishing between behaviour by way of action and omission, omission is a positive or negative, voluntary action of the perpetrator, which, according to an objective evaluation procedure, differs from what is expected from perpetrator by virtue of a norms. As it is emphasized in this definition, the free will of the perpetrator is sought in order for an act of omission to be punished because s/he violates the norms. However, when the reason or previous stages of the actions, which will be presumed as being committed lacking culpability if evaluated alone, are investigated, it can be seen that they contain free will in terms of origin. The concept of *omissio libera in causa* makes the punishment of these kind of omissional actions possible.

One condition for the application of *omissio libera in causa* is that the perpetrator loses the ability to perform physical acts. Therefore, it is possible to punish the perpetrator by taking into account his actions up to the point where he voluntarily lost the ability to move. In this context, the perpetrator must be unconscious, asleep or otherwise physically unable to move.[128] The point of distinction to be noted here is that the perpetrator deprives himself of culpability in situations that fall within the scope of the application of the ALIC theory. Still, this does not necessarily mean a lack of moving ability. However, in the case of *omissio libera in causa*, the perpetrator commits omission crime by removing his ability to act.[129] While s/he is normatively required to act, s/he does not. In other words,

[126] J. Brammsen, “Tun oder Unterlassen? Die Bestimmung der Strafrechtlichen Verhaltensformen” *Goltdammer's Archiv für Strafrecht,* 149, 4, 2002, p.193
[127] BGH NStZ, 1999, 607: German Local Court Decision Annulment by The German Federal Court in Accordance with The Gravity Criteria
[128] Sydow, op. cit., p.33
[129] Atalay, op. cit., p.309

in the case of *omissio libera in causa*, an act of omission is sought in the case of deprivation of the ability to act as well as the culpability and free will. Thus, while the main condition for ALIC to manifest is the lack of culpability, what *omissio libera in causa* requires is the lack of ability to act.[130] The reason why these two concepts are interconnected is that they envisage lack of culpability as a common condition. Since *omissio libera in causa*, in its essential sense, is not about the punishment of omission crimes solely, but the punishment of omission crimes committed by passive behaviour (negative action), which is committed as a result of the loss of the culpability due to the cause on which it is based. In other words, it deals with the criminal responsibility of free omission in terms of its cause or origin. And unlike ordinary omission crimes, it has two stages, and the stage based on fault is the first stage which is not visible at first sight. In fact, the basis of the perpetrator's omission, who will be punished for the omission in the second stage, is actually an behaviour by way of action that s/he carried out beforehand in first stage.[131] While the the second stage must be omission; the fact that the act to be carried out in the first stage is behaviour by way of omission or action does not make any difference or inconvenience in terms of being included in the scope of *omissio libera in causa*, that is, both of them are convenient in terms of benefiting from the concept.[132]

The typical example is the case where a railroad worker voluntarily takes alcohol and falls asleep intoxicated, losing the physical and mental strength required to intervene (does not act when he should change the switch) and causing an accident to occur as a result.[133] In such a case, the perpetrator impaired the ability to act and culpability by taking alcohol of his own will. Here, there are two norms violated: the prohibition to kill and the obligation to save. A bypasser watching the incident from the road is not obliged to change the switch or to intervene in the train, but the railway worker is obliged to change the switch on time. And this obligation is valid only for that person, so criminal responsibility arises for ommission of his duty.[134] All the conditions have been fulfilled that will enable him to be held accountable by making use of *omissio libera in causa*: the second behaviour by way of omission and unconsciousness, the first act that will create a

[130] Sydow, op. cit., p.33
[131] Ordeig Gimbernat, “Die Omissio Libera in Causa” in *Streitbare Strafrechtswissenschaft Festschrift für Bernd Schünemann*, zum 70, 2014, p.359
[132] W. Mitsch, *Strafrecht Besonderer Teil 2*, 3. Auflage, Berlin: Springer Verlag, 2015, p. 467
[133] Centel and Zafer and Çakmut, op. cit., p.401; Sydow, op. cit., p.33
[134] Gimbernat, op. cit., p.362

voluntary and unjustified excuse, and the existence of the perpetrator's normative obligation or responsibility. If it were not for one of these factors; for example, if the accident did not occur due to a third person's or any other appropriate intervention, then it could not fall within the scope of *omissio libera in causa* since a two-stage situation would not have occurred despite the existence of the first act in which railway worker lost consciousness of his own will.

Omissio libera in causa is not just for offences against life or physical integrity and it can be applied for all kinds of crimes that can be committed by omission. A good example for this is in the case of financial crimes, the example is about the financial hardship of businessman. The businessman anticipates that his company will soon run into financial difficulties and may even go bankrupt. Hence, he prefers to satisfy his own personal debtors from whom he had borrowed before instead of paying the accumulated social security premiums of the employees. The owner may have created a situation of financial hardship by his/her own free will owing to any other personal arbitrary choice which will prevent him from paying social security premiums. The situation in this example is that an act of the perpetrator prevents him/her from fulfilling his/her obligation later on. And consequently, an omission (*omissio praecedens*) has occurred. This situation is also called *omissio in omittendo*.[135]

If we had only looked at the second stage of the case, we should have argued that the perpetrator was not criminally responsible due to being in a state of ‘financial impossibility’. However, looking at the first stage, it is seen that the perpetrator caused the impossibility in the second stage with his own free choice/will. The presentation of this example in the doctrine reveals an important point: the scope of application of *omissio libera in causa* is not limited to crimes of omission solely due to lack of consciousness and situations including first-stage actions that lead to lack of consciousness, culpability or free will. In both stages, it can be seen that the perpetrator has free will. The expression "*libera*" in the concept refers not only to the presence or absence of the inner freedom, but also to the presence or absence of external freedom. And this difference between expressions of external and inner freedom will be explained in the following chapter of our study. The important interpretation we derive from this example given by Satzger[136]

[135] Satzger, op. cit., pp.516-517
[136] Ibid.

is based on the idea that even if the perpetrator is conscious during the second stage, he cannot be characterized as free due to the mental and financial situation he is in, but this does not prevent him from being held responsible through his free choice in the first stage. More importantly, this freedom is not limited to inner freedom, namely the existence of consciousness or free will and the impossibilities that will arise due to the absence of external elements of freedom also falls within in the scope of *omissio libera in causa*. Based on this example, it would be possible to broadly interpret and apply the concept of "libera" also with respect to ALIC.

1.3.3 Actio Illicita in Causa

Actio illicita in causa, which is translated as "illegal action in the origin" in the doctrine, can be explained that "In cases of actio illicita in causa, the perpetrator fulfills the conditions of a legal cause with his faulty behavior before the act".[137] The deceptive, illusory justification created by the perpetrator is in fact an unlawful and defective tool to achieve his/her malicious purpose. The concept of *actio illicita in causa* developed in order to prevent the perpetrator not to benefit from the justifications created by himself/herself, is based on a similar model of logic in comparision with the ALIC. In fact, an act is either lawful or unlawful, but the provisions of the law also provide for exceptions (states of justification[138]) in which criminal acts may become lawful because of their reasons. These are some examples of justifications: ‘state of necessity’, ‘self-defense’ and ‘consent of the concerned person’. *Actio illicita in causa* is a regulation designed to prevent the abrogation and abuse of these legal institutions. Although it may appear that the perpetrator has a lawful reason at the moment of the perpetrator's malicious act, *actio illicita in causa* ensures that the perpetrator cannot benefit from the states of justification because the perpetrator has a previous culpable act before the malicious act. An example of this is cases in which the perpetrator creates himself/herself the conditions that lead to the process of self-defense.

[137] George Freund, “Actio illicita in causa – Ein Übel oder eine Möglickeit, das Übel an der Wurzel zu packen?” in *Goltdammer's Archiv für Strafrecht.* C.F. Müller Verlag, 2006, p. 267

[138] See Turkish Penal Code art.24 et al.

It is also claimed in the doctrine that there is no difference between ALIC and *actio illicita in causa.*[139] This view that sees no difference between ALIC and *actio illicita in causa* further argues that there exists a sufficient basis for them to be considered under the same heading as both allow for responsibility due to antecedent motion. It is presumed that there is no difference between the perpetrator creating the conditions him/herself in order to claim a justifications and the perpetrator impairing his or her culpability and afterwards committing a crime.

We observe that some authors suggest that the theories referring to crimes with a two-stage act structure should be gathered under a single heading, but in today's doctrine, the idea that they should be evaluated as separate theories is dominating. It can be convenient and appropriate to examine *omissio libera in causa* and *actio libera in causa* (explained in the previous title) under the same main category due to the inclusive nature of the concept of “actio” and the commonality of emphasis on free will. However, *actio illicita in causa* differs from them for two main reasons: It has no necessary relationship with free will and is closely related to prepense crime (premeditation). In cases where *actio illicita in causa* is to be applied, perpetrator can have impaired culpability but the impairment of culpability or free will is not a condition for resort to *action illicita in causa.* Therefore, in our opinion, committing a crime by impairing the culpability and creating a sham justification are different issues from each other. It would be more appropriate to examine them using two separate concepts as it has widely accepted in the doctrine.

In terms of the “prepense” element of *actio illicita in causa*, the majority view of the Turkish doctrine[140] is that it should not be applied only in a way that prevents the perpetrator from benefiting from the justifications, but also in an aggravating way because the perpetrator has carried out the crime prepensely. This is because instead of committing the crime directly, the perpetrator committed the crime by creating a sham justification with the intention of abusing the law and deceiving the judicial bodies. Therefore, s/he has intent at the prepense level (level of premeditation). Additionaly, if the prepense (premeditation) is regulated as qualified version of crime that require increasing the

[139] Farrel, D. M. “What Should We Say About Contrived ‘Self Defens’ Defenses?” *Criminal Law and Philosophy,* 2013, p.578; Paul H. Robinson, “Causing The Conditions of One’s Own Defense: A Study in The Limits of Theory in Criminal Law Doctrine” *Virginia Law Review*, vol. 71, 1, 1985, p.2

[140] Atalay, op. cit., pp. 316-317

penalty, then the cases within the scope of *actio illicita in causa* should also be punished as qualified version of crime. Indeed, this should not remain only as a jurisprudential suggestion or a method of interpretation, but should be regulated in the codes to be clarified by the legislator.

The theory to be used for the application of *actio illicita in causa* is called the 'three-stage theory' "*drei stufen theorie*".[141] In cases of justification such as self-defense, there are two actions: the attack of the perpetrator and the counter-action of the victim. In cases of *actio illicita in causa,* these two actions are preceded by one more action. In the case of *actio illicita in causa,* there are three acts: a provocative act of leading the way "ausweichen", self-protection from the other person's action "schutzwehr" and the counter-action of the person in question "trutzwehr".[142] The temporal conformity between these movements is necessary for the existence of a causality relationship[143]. This phenomenon is often explained with the example of self-defense provocation and the most famous examples of *actio illicita in causa* are given through self-defense cases.

In terms of legitimate self-defense, in order for a real self-defense to be in question, an unjust attack must first be made. An attack may be considered unjust if it is against the person's legally protected rights and is harmful.[144] However, when the conditions are created by the perpetrator himself, there is no possibility of self-defense against self-defense, and therefore the existence of an unjustified attack cannot be mentioned. Provocation could be defined as pushing or triggering another person to perform a certain behavior and in this respect, refers to a consciously produced effect directed at a specific response.[145] In order for provocation to be in question, the perpetrator must be angry or upset due to the unlawful acts arising from the victim and commit a crime as a reaction.[146] There are main two types of provocative self-defense[147]: malevolently intentioned

[141] M. Breuer, "Die Actio Illicita in Causa: Darstellung und Meinungsstand" *Bonner Rechts Journal*, 1, 3-8. Rechts und Staatswissenschaftlichen Fakultät der Universität Bonn, 2008, p.5

[142] Michael Lindemann and Tilman Reichling, "Die Behandlung der so Genannten Abwehrprovocation nach den Grundsatzen der Acio Illicita in Causa" *Juristische Schlung*, 2009, p.497-8

[143] C. F. Stuckenberg, Provozierte Notwehrlage und Actio Illicita in Causa: Der Meinungsstand im Schrifttum, *Juristische Arbeitsblatter,* Heft 11, 894-904, München: Verlag Franz Vahlen, 2001, p.902

[144] Nur Centel, "Türk Ceza Hukukunda Yasal Savunma" *Das Shuldprinzip im Türkischen Strafgesetzbuch im Spiegel des deutschen Strafrechts* (Eds. G. Duttge and Y. Ünver), Ankara, 2013, p.99

[145] **Cambridge Dictionary ???**

[146] Guglielmo Marconi, "Provocazione" *Enciclopedia del Diritto* (ed. Francesco Santoro-Passarelli), Vol. 37, Giuffre, 1988, p.821

[147] For detailed information see: Daniel M. Farrell, (op. cit.) "What Should We Say We Say about Contrived 'Self-Defense' Defenses?", *Criminal Law and Philosophy*, 7, no.3, 2013, pp. 571-586

(purposeful) and intentional but well meaning.[148] In malevolently intentioned provocation, the perpetrator provokes his interlocutor in line with his plan to direct him to attack, and the attempted attack of his interlocutor constitutes the purpose of the perpetrator and the main result of the provocation.[149] For example; (A) wants to kill his close friend (B) and (A) is aware that B is a very impulsive person and usually gives aggressive reactions. While they are out together drinking, (A) spills beer on (B)'s shirt and (B) responds by throwing a glass on (A)'s head, thereby attacking (A). (A) then pulls a knife to defend himself and fatally injures (B) with the knife. In this case, (A) planned the whole procedure from the beginning, aiming to kill (B)[150] This is malevolently intentioned provocation and is difficult to prove, because it requires identifying the moral element and the intention of the perpetrator which expresses intrinsic motivation. On the other hand, in the intentional but well meaning provocation,[151] The perpetrator commits an act that may provoke his interlocutor to attack, but does not intend to create the conditions for self-defense, but nevertheless foresees that the other party may launch an attack. In this case, the perpetrator's aim may be, for example, simply to anger his interlocutor, and the fact that the angry interlocutor launches an attack in response is in fact a subsidiary consequence of the provocation.

In cases where the *actio illicita in causa* is created by a culpable act other than the deliberate provocation of self-defense, the perpetrator's right to benefit from self-defense is not completely eliminated, but is limited on the grounds of social ethical considerations.[152] A person who creates a state of self-defense with his own culpable act will not benefit from most of the privileges of self-defense. The perpetrator, who causes the attack of his opponent, will first of all use the means of escape if he has the opportunity to escape, and if he cannot escape, he can only resort to actions aimed at protecting himself, and only if these two methods are not sufficient, he can take defensive actions in

[148] In Turkish: "intentional but well-meaning provocation" means "kasıtlı fakat karşı tepkinin öngörülemediği durumlar"; "malevolently-intentioned provocation" means "amaca yönelik, kötü niyetli durumlar". The other type is "unintentional- incidental provocation" means "kasıtlı olmayan, kazara" and it is not a case of the aiic because it is considered that there is no "foreseeing", so no culpability.

[149] K. Hoffmann Holland, *Strafrecht Allgemeiner Teil,* 3. Auflage, Tubingen: Morh Siebeck Verlag, 2015, §3, n. 253

[150] F. Zieschang, *Strafrecht Allgemeiner Teil,* 4. Auflage, München: Richard Boorberg, 2014, p.220

[151] Jürgen Baumann and Ulrich Weber and Wolfgang Mitsch and Jörg Eisele**,** *Strafrecht Allgemeiner Teil*, 12. Auflage, Verlag Ernst und Werner Giseking, 2016. §15, p. 55

[152] Talas, op. cit., p. 99

the nature of counter-action.[153] According to another view, the scope of the defensive action that the provoking perpetrator can perform in such a situation should be determined in accordance with the comparative interpretation and application of the criteria established in the state of necessity.[154] An example of a state of necessity is when the perpetrator injures another person who is not related to the danger by pushing them down while fleeing from the danger. In this case, if the perpetrator caused the danger himself (for example, if he started the fire that caused the need to escape from the building), the actio illicita in causa will be resorted to. In these cases, it is only possible to avoid liability if and only if there is no culpability even on the level of negligence. Finally, it should be noted that since provocation refers to a conscious action aimed at a certain reaction, it is not possible to refer to provocation in cases where the action causes an attack in a completely unforeseeable manner.

[153] Satzger, op. cit., p. 519

[154] Günther Jakobs, *Strafrecht Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre*, 2. Auflage, Berlin and New York: Walter de Gruyter, 1991, 12-53; Urs Kindhäuser, *Strafrecht Allgemeiner Teil,* 8. Auflage, Baden: Nomos Verlag, 2017, 16-54; (For provisions of state of necessity, see Turkish Penal Code art. 25/2 et al.)

Chapter 2:
PHILOSOPHICAL BACKGROUND OF ALIC

2.1 *"Libera" by Explanation of The Freedom*

As mentioned above, when translating the concept of *actio libera in causa*, it would be appropriate to translate the word "libera" as "hür, özgür", meaning free. Issiah Berlin also considered it appropriate to use the word "libera" and the word "freedom" in the same sense, that is, in the same sense. Under today's usage, the meaning of "libera" has become more social and political, while "freedom" has become more individualistic. However, we hope that the nuanced difference in connotation between the two in terms of the nature of the primary action expressed in the concept of ALIC will not cause a shift in meaning. In this respect, the expression "actio libera" means a free action. In order to understand how an action can be free, we first need to talk about what freedom is and its types.

2.1.1 Politics of Freedom

In the Turkish doctrine on the Philosophy of Law, Aral divides freedom into internal and external. Internal freedom refers to the freedom of will, whereas external freedom refers to being free from external compulsions and being free from external interference in terms of decision-making.[155] In other words, this type of freedom means the freedom to act independently in line with one's self-chosen purposes or one's personal values, without being subjected to any attack from others. Such a freedom is expected to be realized within the framework of law and a systematic order. By limiting the obstructive behavior of others, it is ensured that everyone enjoys equal and civilized freedom.[156] On the other hand, internal freedom is not concerned with the realization of voluntary decisions, but with the realization of these decisions themselves. A person who

[155] Vecdi Aral, "Hukukta İrade Özgürlüğü" *Journal of Istanbul University Law Faculty*, 1983, p.249
[156] Vecdi Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 3, İstanbul: 1979, p. 25

does not have to obey the impulses that are effective in the formation of his/her will and who has the power to make decisions despite these impulses is free in this sense.[157] Accordingly, freedom of will means that the will of human beings is not conditioned, is not compulsory in the causal connection, but rather is self-determined.[158] This is why freedom of will is directly linked to responsibility. It is difficult to talk about the inner freedom and responsibility of a person who does not have neither the ability to think rationally about his impulses and emotions such as pleasure, pain or aggression, nor enough experience to understand them. This is why the accusation of culpability is not made against minors and the mentally ill. The deaf and dumb are also considered to mature later because of their lack of social experience. It follows that free will is a gift as well as a talent and a responsibility. In this respect, the existence and nature of freedom of will is important for law. The value or idea underlying the law is justice, so it is important that sanctionability can be explained on a clear and personal basis. Freedom is a prerequisite concept in terms of providing an explicable foundation for the perpetrator to be held responsible for the consequences of his/her act. Before examining the nature and scope of free will and the concept of autonomy in more detail, it is worth mentioning Issiah Berlin's classification of negative and positive freedom.

The definition of negative freedom is in line with external freedom. The level of negative freedom is measured by the non-interference of other people and authorities. If an individual is prevented from doing something he or she wants to do and is capable of doing, it means that his or her freedom is being restricted. Especially if the scope of individual activity is narrowed beyond the certain minimum, it is considered enslavement. "Coercion is not, however, a term that covers every form of inability. If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced. Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act."[159] At the same time, in a primitive form of freedom, activities that violate another's space are not included in the sphere of negative freedom. This is because negative freedom imposes on the person the responsibility of

157 Aral, (op. cit.) "Hukukta İrade Özgürlüğü", p.250
158 Hans Meyer, "Einleitung in die Philosophie" *Zweite Erweiterte Auflage*, Paderborn, 1962, 214
159 Isaiah Berlin, "Two Concepts of Liberty" *Four Essays On Liberty*, England: Oxford University Press, 1969, 118-172, 2

"not to do" or "to allow"; this responsibility must be balanced in such a way that one's own sphere of freedom is not violated. In other words, it must be balanced with the responsibility of the respondent not to "do". It seems that in order to ensure peace and civilization, it is necessary not to leave individuals to each other's conscience but to abolish the law of nature. Rousseau proposes the social contract for this. According to him, the social contract envisages the formation of a common force by the coming together of all individuals in society, and the protection of everyone's life and property by this common force. And in this way, envisages that everyone would remain free to the same extent as they were before, on the grounds that they have again subjected themselves to their own will.[160] Apparently, he sees the emergence of negative freedom as possible when individuals transfer their positive freedom, that is, their ability and right to determine themselves, to a common sovereign. However, it is important that this transfer of will is voluntary (contractual) and restricted (proportionate).[161] What is meant by proportionality is that it should not be suppressed by measures aimed at the need for security. The nature of suppression in this expression should be understood widely. Restricting only a primitive understanding of freedom that would prevent individuals from violating each other's rights does not ensure the validity of the contract. At the same time, effective mechanisms must be put in place to limit the possibility of interference on economic freedom and freedom of expression, especially by the State which has taken over the power. "…especially by such libertarians as Locke and Mill in England, and Constant and Tocqueville in France, that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred."[162]

But is freedom really so sacred? If by sacred we mean an intangible value that should inspire mystical reverence and even be worth giving one's life for, perhaps it is inappropriate to sanctify freedom to such an extent. Social status, educational curricula, job schedules, etc. may prevent an individual from doing whatever and whenever wants

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[160] Recai Galip Okandan, "J.J Rousseau'nun Devlet Hakkındaki Görüşleri" *Ord. Prof. Dr. Samim Gönensay Armağanı*, İstanbul 1955, 106-126, 110

[161] Jean Jack Rousseau, *İnsanlar Arasındaki Eşitsizliğin Kaynağı*, (Çev. R. Nuri İleri) İstanbul: Say Yayınları, 2004, 140

[162] Berlin, loc. cit., 118-172, 3

to do so. But can the individual be expected to sacrifice its values and contributions at the expense of freedom? Even if we assume that the ultimate goal is indeed freedom, for example economic freedom in terms of jobs, his or her current freedom is only a means of exchange. It is impossible to say that happiness, or even peace, which is supposed to be the ultimate goal of law, can only be realized if freedom is absolute. “The happy person might feel free, but whether they are free is another matter”[163] Besides, given the principle that freedom of some is restricted in order to provide other’s freedom and achieve societal peace, it will be understood that it is conflicting to attribute sanctity to freedom. “If freedom is a sacred; untouchable value, there can be no such principle. One or other, of these conflicting rules or principles must, at any rate in practice, yield: not always for reasons which can be clearly stated, let alone generalized into rules or universal maxims. Still, a practical compromise has to be found.”[164] Freedom is a state, even a fact, which provides various opportunities but also imposes responsibilities. It is a value that is more or less present in all circumstances and in all natural situations, but it is not an ultimate good but only a tool. Like any tool, it is important to know how to use it and to set its limits. Identifying the certain limits of negative freedom generously and providing the consciousness of will to ensure positive freedom serves a higher good.

It should be noted that the solution we propose does not, of course, represent the consensus in the doctrine. For example, Hobbes’[165] definition of freedom is limited to negative freedom and does not propose positive freedom. He even welcomes the suppression of desires and emotions through fear and does not see this as an interference with freedom and will. He says that the absence of external barriers is sufficient for freedom[166]. The person who physically does what he or she wants bears the responsibility for freedom; why he or she does it is not an issue[167]. In other words, a reaction out of fear would be equally free for him as one done out of positive emotions. "The usefulness of laws is not to prohibit men from all voluntary action, but to guide them so that they do not harm themselves by their irrational desires, impetuosity, or thoughtless acts, as fences

[163] Day, J. P., “On Liberty and the Real Will” *Philosophy*, 45, pp. 177–192 (reprinted in Day J. P., *Liberty and Justice*, London: Croom Helm, 1987)
[164] Berlin, loc. cit., 118-172, p. 4
[165] He is the first person to introduce the concept of “negative freedom”.
[166] Thomas Hobbes, *Leviathan* (translated to Turkish by Semih Lim), Türkiye: YKY, 2007, 6, p. 96
[167] Thomas Hobbes, “Of Liberty and Necessity” in *Hobbes and Bramhallon Liberty and Necessity* (ed. Vere Chappell), Cambridge 1999, p. 38

are built to keep travelers on the right road, not to stop them."[168] This view is interesting in that it suggests managing the positive freedom sphere as well as the external freedom sphere. It establishes a state-individual relationship that says, "I decide for your sake what is good for you and how to realize it.

Berlin's definition of positive freedom overlaps with Aral's definition of internal freedom. He sees and explains positive freedom as a characteristic of being human: “This is at least part of what I mean when I say that I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.”[169] Freedom has two aspects: opportunity and process[170]. The opportunity aspect means that more freedom gives us more opportunities for our aims in life. So it is not just a negative freedom in the sense of non-interference, but an expectation of action from the external power, usually the state, in the sense of creating opportunity. Positive freedom refers to the process aspect, that is, the act of choice of the individual himself or herself.

The opportunity and process aspects of freedom, or negative and positive types, usually serve a common purpose for the individual. The greater the opportunity, i.e. the greater the negative freedom, the greater the importance of the process, i.e. the individual's self-control and free will. Or if it decreases, the other will decrease; for example, a person who is imprisoned, whose negative freedom is limited, has considerably less opportunity to act. Therefore, the space to make a personal choice about what he/she wants to do is also narrowed. Or a person whose will is damaged due to substance addiction, the lack of inner freedom, that is, the lack of the ability to direct himself, may push him to turn to the substance he is addicted to although there are many other opportunities. However, there are also situations where these two types of freedom may contradict each other. For example, a person who is unable to make a choice between opportunities may receive counseling services and leave the authority to make a choice to another person, albeit partially. Or a person who has gained the ability to direct his or

[168] Thomas Hobbes, *Leviathan* (translated to Turkish by Semih Lim), Türkiye: YKY, 2007, 6, p. 239
[169] Berlin, loc. cit., 118-172, 8
[170] Amartya Sen, *Rationality and Freedom*, Cambridge, 2002, part 20

her impulses with free will may reject pleasures or ambitions for which he or she is externally free. The possibilities that could be developed on the second example are important. In fact, one of the most important contributions of the interaction between law and psychology is to balance these two types of freedom. To educate people who can peacefully manage their emotions, motives and ambitions, and to reduce crime within the broadest possible framework of negative freedom. Increasing enforcement and rehabilitation programs is important in this respect. But, as Berlin[171] worries, there is a risk that external interventions to develop the space for positive freedom could turn into manipulation and become tyrannical to the point of calling for the voluntary renunciation of negative freedom. One of the thinkers who gives the most obvious example of this is Rousseau. He says that in order for the social contract not to remain empty words, it must include a single engagement that will reinforce all engagement. Whoever refuses to obey the common will, the whole community will force him to obey it.[172] This means that the community decides how a person is to be free and forces the person to make that decision. For him, if his own will does not coincide with the will of the majority, this only shows that he is mistaken; being free means being able to conform to the majority.[173] It is obvious that this situation, with the slogans "for the common good", would both force people to make the choice that gives the perception of the "common best" and pave the way for the restriction of the freedoms of people who do not comply with this choice under the pretext of "violation of social order". In other words, it will restrict both negative and positive freedom. Not only Hobbes and Rousseau, as mentioned in the previous paragraphs, but also some recent thinkers, even within the frame of liberal ideology, advocate a kind of positive conception of freedom that serves the "common good"[174]. However, today, with the spread of pluralist liberal thought, we see that the majoritarian tendency has been replaced by mainstream pluralism.

"Opponents of the concept of positive freedom often characterize positive freedom as defending that certain and only one ideal should populate people's ears, whereas there is nothing to prevent the concept of positive freedom from being

[171] Berlin, loc. cit., 118-172, 7-10

[172] Jean-Jacques Rousseau, *Toplum Sözleşmesi* (translated by Vedat Günyol), Tr: İş Bankası, Kültür Yayınları, 2013, 25-45, part I-7

[173] Ibid, 103, part IV- 2

[174] Avital Simhony and David Weinstein (eds.), *The New Liberalism: Reconciling Liberty and Community,* Cambridge, 2001, passim.

pluralistic."[175] Issiah Berlin notes the risk of abuse of positive freedom and therefore suggests that it is better to claim positive freedom while preserving negative freedoms.[176] That is, to choose voluntarily while having external opportunities. Negative freedom is about pure possibility: how many doors are open when one decides to walk? External intervention should be to provide these opportunities, so in a positive sense - he speaks of a negative freedom that proposes action; at the same time, he says that what one wants or does not want is not important to anyone else, so he proposes non-intervention to ensure positive freedom.[177] This means that negative freedom is general, positive freedom is specific. Kant explains perfectly the relationship between the specificity, that is, the subjectivity, of positive freedom and the generality, that is, the universality, of negative freedom: "No one can force me to be happy according to their own conception of happiness; on the contrary, every human being can achieve happiness in a way that suits him or herself. As long as he can come to terms with a general law that makes possible the freedom of all, without interfering with the freedom of others pursuing the self-same goal."[178]

The absence of the two types of freedom discussed under the heading of political freedom also impairs legal accountability. For example, if a person's hands are tied (prevented by others) or if he/she is physically disabled (prevented by nature), he/she cannot be held responsible for the negligent crime committed by not informing the authorities about an injured person. This is because his/her freedom is restricted to such an extent that the action that must be taken to prevent the negligent crime from occurring cannot be expected from that person. Or the perpetrator who needs to buy urgent medication for a relative who falls ill at night is not punished for breaking the pharmacy window. Because s/he has no other choice or opportunity. If s/he had done the same act when s/he had the option to enter through the door, s/he would not be free from responsibility because s/he would have had the freedom to act in another way. Likewise, the perpetrator must have positive freedom; the not-liability of the mentally ill is an example of this. For *ALIC* to be realized, the first stage action, the cause, must be free in both respects. The person who is forced to take alcohol cannot be held responsible for the

[175] Lars Svendendsen, *Özgürlüğün Felsefesi* (translator, Murat Erşen), İstanbul: Redingot, 2021, 163

[176] Isaiah Berlin, *Liberty*, Oxford, 2002, p. 326

[177] Ibid, pp. 32-35

[178] Hakan Çörekçioğlu (ed.), "On the Common Saying: This May Be True in Theory, but it does not Apply in Practice" in *Kant Felsefesinin Politik Evreni,* Türkiye: Ayrıntı, 2017, p. 46

act commited under the intoxication, because he was not free. The existence or non-existence of positive freedom in terms of the first act going to be discussed separately.

But how should this specific and subjective freedom be defined? Is the mere absence of external directives sufficient for freedom of the will? Or, as Taylor says, are internal obstacles to freedom also important: "... you are not free if you derive your motivation from inauthentically internalized standards or from false consciousness that impedes your self-realization."[179] The question on how to define freedom, whether as a conceptual production or ideal, or as an existing reality, is going to be examined in the following section.

2.1.2 Ontology of Freedom

In the previous chapter, we talked about freedom as something given, that is, created. We tried to examine the relationship between freedom as something that creates opportunities and is created in the self, personal rights and the state/laws. Freedom as a granted and enjoyed right gave birth to responsibilities. In this section, we are going to talk about freedom as a state that already exists. In other words, we are not going to discuss it as an acquired or granted creation, but as a quality that human beings possess by nature. Freedom is a fundamental hypothesis that explains the responsibility of human beings to be considered as moral agents and to be responsible for the consequences of their actions.

We presume that only human beings can be the subject of moral praise and criticism. Because we think that humans have the ability to have certain values and to manage emotions and motives in line with these values. We think that they can manage their socialization patterns. When we think about animals, for example, we don't expect them to be able to direct the way in which their needs are fulfilled, and we don't expect them to make choices considering the consequences. Why? Because we assume that inner freedom is inherently not granted to them. When we think reasonably, this leads us to the conclusion that we cannot hold them responsible for their actions. Sanctions such as

[179] Charles Taylor, "What is Wrong with Negative Liberty?" in *Four Essays on Liberty*, New York: Oxford University Press, pp. 177-178

culling stray animals that harm people are not intended to rehabilitate those animals and deter others. But has it always been the same?

When we look at the medieval and Renaissance periods, we see that animal trials were established.[180] The case of the intentional murder of a five-year-old child by a sow is an example of this. The sow's six piglets were also accused because they were found at the place of the murder soaked in the child's blood. However, the appointed lawyer discharged the piglets on the grounds of their immaturity and the inevitable negative influence of their mother on them. The mother's sentence was increased because she made bad noises and grunts in the courtroom, indicating that she was unrepentant.[181] Having reached its peak in the 17th century, animal trials were sporadic even in the 20th century, but it is understood that they came to an end with the theories developed in the 21st century. The emergence of the idea that animals cannot be held responsible for their actions may be thought to be linked to Darwin's separation of humans in terms of morality. However, before Darwin, we see that many philosophers such as Aristotle separated humans by nature. We consider that the primary reason for avoiding trials is more pragmatic: punishing animals for their actions precludes the owners from being held responsible for their lack of management or intent to causing damage using the animal as an instrument. Therefore, the way to prevent harm of stray animals has been reformulated as relocating them to their own environment, while the solution of holding the owners responsible for the consequences of animals' actions has been adopted. The theoretical incompatibility with the theoretical purposes of criminal punishment, as well as the practical fact that it prevents the owners from being held responsible for their voluntary actions, led to the end of the animal courts.

With the development of neuroscience, research has identified a brain region that biologically distinguishes humans from animals. This region, which is responsible for linguistic abilities and advanced cognitive abilities, is called the "ventral frontal cortex". The ventrolateral frontal cortex is found only in humans and other primates and is responsible for the most advanced language and cognitive functions. In the study, after taking MRI images of the human ventrolateral frontal cortex, this region was divided into

[180] Edward Payson Evans, The Criminal Prosecution and Capital Punishment of Animals, New York 1906, passim; Jen Girgen, “The Historical and Contemporary Prosecution and Punishment of Animals” in Animal Law Review, IX, 2003, passim.

[181] Girgen, ibid., p.110

12 areas. Each of the 12 areas connects to a region of the brain in a unique way. The researchers looked at the corresponding areas in monkey brains and found that 11 of the 12 areas had similar connections to other parts of the brain as in humans. The only remaining area, the lateral frontal pole prefrontal cortex, was absent in the monkey brain, unique only to humans. The importance of this part, which is closely related to strategic planning, multitasking and decision-making processes, was emphasized in terms of speech and speech interpretation.[182]

It has been claimed before that the human language ability is different and that the ability to communicate is evidence that humans have free will. But it was a claim based on logical arguments, not biological evidence. Aristotle's definition of "zoon politikon" is an example of this. Thanks to linguistic abilities, human beings can discuss their ideas rationally with other members of society; thus, they have the consciousness of good and evil and the ability to choose. According to Aristotle, knowledge is an element of free will in addition to conscious control.[183] If the individual does not have the experience and knowledge to foresee the consequences of his/her actions, he/she cannot be held responsible for the consequences. A clear example of this situation is a person whose coffee has been poisoned by a third actor, who unknowingly gives it to another person out of kindness. However, there is free will in terms of action here, that is, the act of giving the cup was done consciously. In terms of the result, no fault (culpa) can be attributed. In other words, being able to attribute culpability and having free will are not exactly overlapping situations. But this example shows the difference between being able to attribute fault and free action rather than the effect of knowledge on free will. The real example where we can argue that lack of knowledge affects free will is in the actions of minors. An example would be a child who has not experienced that the stove is hot, who has not acquired this knowledge, and who injures his friend by pushing him into the stove. The act of pushing is still free, but the element of knowing is so lacking that it cannot even be said that he should have known, and it would be appropriate to accept that his will is incomplete. Scientific studies show that the development of the prefrontal cortex, the brain region responsible for foreseeing the consequences of behavior, making

[182] F. X. Neubert and R. B. Mars and A. G. Thomas and J. Sallet and M. F. Rushworth, "Comparison of human ventral frontal cortex areas for cognitive control and language with areas in monkey frontal cortex." Neuron. 2014 Feb 5;81(3):700-13. doi: 10.1016/j.neuron.2013.11.012. Epub 2014 Jan 28. PMID: 24485097. Access date: 08.04.2023

[183] Aristoteles, *Nikomakhos'a Etik* (çev Saffet Babür), BilgeSu, 2012, p. 44

decisions and controlling impulses, begins in early childhood and continues into adolescence and young adulthood.[184] The reason is that executive functions are associated with the frontal lobes, and the frontal lobes are the latest developing region of the brain.[185]

In our opinion, learning the working principle of the brain emphasizes the existence of free will and sheds light on how it can be developed. When these researches were not able to be carried out, the fact that human beings, unlike other creatures, could be held responsible for their actions was tried to be explained by their ability to communicate and socialize. As we mentioned in the previous chapter, Aristotle defined the conditions of free will as knowledge and control. Modern neurobiology studies also have shown that knowledge and experience really activate the brain areas associated with our reasoning abilities. Lack of knowledge and experience may impair the will, but not completely eliminate it, or in cases where we can talk about responsibility for knowing, we shall consider that it does not eliminate it at all. It directly affects the liability to attribute fault to the perpetrator. In other words, the reason why responsibility disappears in adults with the ability of discernment due to lack of knowledge is not the absence of autonomy, but the disappearance of fault due to the absence of the possibility of foresight. Aristotle's second element, control, refers to the ability to direct the act. External inhibiting or coercive factors prevent voluntary choice, as they restrict one's options on how to act. Likewise, mental illness or "despotism of tradition"[186] can weaken control. Traditions, as a common acceptance in society, lead the individual to a certain moral attitude. They thus exert social pressure on the will. Since customs are one of the sources of law, the main purpose of which is peace, and since law is a progressive system based on sociological facts, such social value judgments sometimes help to ensure peace. But it can be risky in that it can create a collective prejudice, and it restricts freedom because it blocks individual decision-making. Kant, too, emphasizes that it is important to question traditions and habits and to avoid acting in accordance with them, because this deprives

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[184] S. Nazlı Batan and Öget Öktem Tanör and Erkan Kalem,” Reliability and validity studies 38 of Behavioral Rating Inventory Of Executive Function (Brief) in a Turkish normative sample” *Elementary Education Online*, 2011, 10(3), p.895

[185] Muriel Deutsch Lezak, “Executive Functions and Motor Performance” in *Neuropsychological Assessment,* 1995, pp. 650-685

[186] John Stuart Mill*, On Liberty*, ed.Elizabeth Rapaport (Indıanapoli, 1978), p.67

the individual of freedom.[187] Hegel, by contrast, says that habit is a "second nature"[188]. Without habits the world would fall apart because habits are almost like our instincts in their immediacy. For example, the less the player of a musical instrument thinks about where his hands are going, the more comfortable and better he plays. This does not mean that his willpower is weak because he has chosen to practice beforehand. Reflexive behaviors can be developed through practice. Another good thing about habit is that it can be changed. This is how it is possible to change a wrong habit by questioning it. Therefore, it would be a more appropriate teaching to question habits rather than abandon them. This is how character and subsequent behavior development is ensured. A person who takes the tradition of arguing by shouting from his family and makes it a habit, gets used to exhibiting this behavior reactively. But when he decides to change this dictated pattern of behavior and chooses the right thing in a controlled and consistent way, he will make this second pattern of behavior his habit. This is how it is possible for him to make quick decisions without a thinking process every time. Accordingly, we can see habit formation not as something that limits our willpower, but rather as an important tool for developing voluntary behavior.[189] Even if a habit is dictated by someone else and thus hinders freedom, it will not ultimately be an excuse for not having freedom, since it is still within the will power of the individual to change habits.

But is it really within individual capacity to change habits? People think that one is responsible for managing one's own thoughts and feelings. In human relationships, we hold our partners responsible not only for their actions but also for their thoughts and feelings. We also hold the other person responsible for who he or she is and what he or she believes. "From the point of view of this kind of everyday metaphysics, feelings and perceptions are seen not only as given, but rather as something that can be influenced by one's work on oneself."[190] The ability to make one's own rules, which we refer to as inner freedom, is not only a gift but also a virtue that can be developed through the concept of "autonomy". The conditions for autonomy, however, are the existence of a sufficient number of action alternatives and the use of our cognitive abilities. We explained the

[187] Immanuel Kant, "Lectures on Pedagogy" in *Anthropology, History and Education* (translated by Mary Gregor) (ed. Günter Zöller and Robert B. Louden), Cambridge, 2007, p.454

[188] G.W.F. Hegel, "The Encyclopedia Logic" in Part 1 of *The Encyclopedia of Philosophical Sciences,* (translated by T. F. Geraets)(Indianapolis, IN, 1991), p.410

[189] Jonathan Jacobs, *Choosing Character: Responsibility for Virtue and Vice* (Ithaca, NY, and London, 2001), p.19

[190] Svendensen, op. cit., p. 110

external part in the first section of this chapter. This concept, which is a combination of the words "auto" and "nomos", refers to the capacity to set laws for oneself and make decisions on one's own behalf in terms of inner freedom.[191] Every human being over a certain age is considered to be autonomous, unless he or she has a cognitive abnormality. This assumption is as valid when everything is fine and also when the situation is chaotic. In other words, a person who is autonomous and therefore responsible when he or she is in a peaceful mood and external factors are positive is also autonomous and responsible when he or she is in a negative mood and external factors are negative. This explains the personal responsibility of perpetrators who are disadvantaged by sociological and psychological factors. According to Gerald Dworkin, one can interfere with another person's autonomy by lying or deceiving them, but this will not limit the freedom of the interfered one.[192] This idea is contrary to Aristotle's criterion of "knowledge"[193], one of the criteria of free will. It is clear that giving false information reduces the agent's ability to act willingly, because information forms opinions, and opinions form beliefs and actions. However, when analyzing the effect of reduced freedom on liability, the number and variety of information sources to which the perpetrator is exposed and the accessibility of other information sources are important. Lack or inaccuracy of information certainly affects freedom, but its effect on culpability and accusability should be discussed on a case-by-case basis. A person who asks the waiter whether the drink he ordered is intoxicating or not, and is informed that it is not intoxicating, should be considered intoxicated involuntarily. However, the person who only asks his friend whether the drink is intoxicating or not and does not ask someone who is competent to know its content should be at least negligent in terms of intoxication.

Regarding the internal freedom aspect of autonomy, there are two basic theories: hierarchical[194] and authentic[195]. The first theory explains that there is a hierarchy of desires and that primary desires can be criticized and transformed through secondary

[191] Joachim Ritter and Karlfried Günther (eds.), *Historisches Wörterbuch der Philosophie*, I, Darmstadt, 1980, pp. 701-719

[192] Gerald Dworkin, *Theory and Practice of Autunomy,* Cambridge, 1988, p. 14

[193] Aristoteles, op. cit., p. 44

[194] Harry Frankfurt, *The Importance of What We Care About*, Cambridge, 1988, in part: "Freedom of The Will and The Concept of The Person" passim.

[195] Charles Taylor, *Benliğin Kaynakları: Modern Kimliğin İnşaası* (çev. Selma Baş, Bilal Baş), Küre, 2014, passim. (original source: Charles Taylor, *Sourches of The Self: The Making of Modern Ide*ntitiy, Cambridge, 1989)

desires. For example, a person on a diet has a primary desire to eat his/her favorite high-calorie dessert. His/her desire to lose weight is a secondary desire. Restricting the primary desire to fulfill the secondary desire is an example of hierarchical autonomy. The second theory explains that a person can be autonomous if his/her desires and beliefs are based on rational thinking. This means the ability to act based on rational reasoning without external coercion or manipulation. What the two theories have in common is that they argue that the agent's ability to construct beliefs about the true self that he or she identifies with will ensure freedom.

According to Harry Frankfurt, a person is actually free when his/her lower-level desires are identified with higher-level desires.[196] For example, if a person wants to drink alcohol and identifies himself with this behavior as his secondary desire, the act of drinking is free. However, if on the one hand he wants to drink alcohol and on the other hand he wants to stay conscious and thinks that it is not right for him to drink, then he is unable to control his primary desire thus drinking alcohol shows that he has failed to set his will free. Frankfurt gives an example of this situation through the difference between a person who takes drugs involuntarily and a person who takes them voluntarily.[197] Based on this interpretation, it would be useful to examine addictions. In terms of responsibility, it is important to distinguish between the intoxicated perpetrator who is an addict to the extent of disease and the perpetrator who gets intoxicated by drinking arbitrarily. It seems quite difficult for an addicted person who has lost his willpower to the extent that he is incapable of controlling his impulses and foreseeing the consequences to reject the addictive substance due to his impaired biological balance. In other words, he/she is unable to control his/her impulses not only under the influence of the substance but also during its absence. Should we then not hold a drug-addicted perpetrator responsible for his act against the victim whom he injured in order to access the substance? Moreover, of course, without a medical or psychological diagnosis, it would be very difficult in practice to distinguish between these two perpetrators. Moreover, this model has implications that contradict most societal norms of morality and well-established human intuitions. For example, should the fact that the pedophile's primary desire and secondary desire contradict exempt him from moral condemnation? Frankfurt holds a person responsible

[196] Harry Frankfurt, *Taking Ourselves Seriously and Getting It Right*, Stanford, CA, 2006, p.14
[197] Frankfurt, (op. cit.) *The Importance of What We Care About*, p.20

for his or her character and the actions that flow from it, not only because he or she creates that character, but also because he or she takes active responsibility for it.[198] This means that an addicted perpetrator can only be absolved of responsibility if he takes concrete actions to overcome his addiction. Or it would be possible for a pedophile to be held responsible for not taking precautions against his disease. So we actually come up with a two-stage liability proposal which matches ALIC. Even if the second act is out of control, the fact that he or she did not take precautions against his or her addiction or disease allows us to hold that person criminally responsible.

The main problem with this theory is its practice, that is, its real-life application. As actors, people think very little about which of their desires are primary, which are the higher desires to be attained and striven for. Most people set concrete, material sources of freedom or power as their goal and question the tools to get there, rather than thinking about such abstract freedom or real desires, or questioning who they are and cultivating virtue. Yet, as a being capable of self-reflection, human beings have the ability to objectively observe, evaluate and understand their own thoughts, feelings and behaviors. This ability is linked to the prefrontal cortex, the brain region we have associated with free will: "Hughlings Jackson postulated that a sense of self is dependent on the evolutionary development of the prefrontal cortex".[199] "Damage to the anterior prefrontal regions has been associated with impaired self-awareness for the appropriateness of social interactions, judgment and planning difficulties".[200] In other words, the prefrontal cortex, which is the neurological source of the free will we assume to be unique to human beings, is also the source of the ability for self-reflection and self-awareness that hierarchy theory considers necessary for exercising free will. This makes the connection between self-reflection and freedom more understandable. To summarize, according to hierarchy theory, being autonomous is on the one hand a gift and a responsibility, but on the other hand a virtue that can be cultivated. Although it may be impossible to pursue this in absolute measure, we can say that it is an ideal that suggests inner freedom. According to Frankfurt, freedom lies in the wholehearted identification between one's values, desires

[198] Frankfurt, (op. cit.) *Taking Ourselves Seriously and Getting It Right*, p.7

[199] Russell Meares, "The Contribution Of Hughlings Jackson To An Understanding of Dissociation" *The American Journal of Psychiatry,* Dec 1999, 156, 12: Health Module, 1999, pp. 1850–1855

[200] Donald Thomas Stuss "Disturbance Of Self-Awareness After Frontal System Damage." in *Awareness of Deficit After Brain Injury: Clinical and Theoretical Issues* (edited by G.P. Prigatano and D. L. Schacter) New York: Oxford University Press, 1991, pp. 63–83

and actions. If you act with all your heart, if your will is undivided, if you are fully committed to something, then you enjoy a special freedom.[201] More freedom than this is not human capable.[202]

Another problem with this theory is the fact that there are other elements that determine who a person is, and even external factors that suppress the will of the person. John Stuart Mill, as a necessitarian himself, criticizes fatalism: Although a man's character is shaped by the set of circumstances in which he finds himself, the desire to shape his own character as he wills is one of those circumstances, and not one that can be underestimated. And we are certainly capable of creating our own character if we would like to, just as others create our character through us.[203] Mill admits that some motives are compelling, but the fact that human actions are determined by causes is not incompatible with human autonomy. A person is free if he has a good enough cause for doing an act but is able to act otherwise.[204] Aristotle thinks along the same line: No one can avoid acting in accordance with her or his character, but since we at least partly shape our character, our actions are still voluntary; if each person is the cause of her or his behavior, she or he will be the cause of her or his dreams in some way.[205]

Thus, in order to be autonomous, the individual effort to acquire the skills of self-reflection and self-determination, which will ensure inner freedom, is as important as the institutional and material conditions that ensure external freedom. In both senses, although absolute freedom is unachievable, it is a process that can be developed through working towards it and requires individual responsibility. Therefore, as long as there are no external and internal factors that would condemn the perpetrator to a single choice, s/he will be free in the process of acting and will be held responsible for his/her act. For the first stage act to be considered free in terms of criminal responsibility associated to *ALIC*, both external and internal conditions of freedom would be required.

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[201] Harry Frankfurt, *The Reasons of Love,* Princeton NJ, 2004, p.97

[202] Ortwinde Graefetal, "Discussions with Harry G. Frankfurt" in *Ethical Perspectives*, 5, 1998, p.33

[203] John Stuart Mill, *Collected Works of John Stuart Mill: A System of Logic Ratiocinative and Inductive,* VIII, London, 1974, p.840

[204] Ibid, p.450: (*Collected Works of John Stuart Mill: An Examination of Sir William Hamilton's Philosophy)*

[205] Aristoteles, op. cit., p. 51

2.2 *"Actio" by Explaining the Elements of Action and Causa-lity*

An action refers to the act or behavior of a person, object, or concept. It involves the process of doing something or carrying out a specific activity. Actions can range from physical movements to mental or verbal activities. In the first part of this study, while discussing the translation of the word "actio", we tried to express its difference from movement and behavior. To recall briefly, we stated that the word "action" is inclusive of movement and behavior, and in addition, it emphasizes the existence of a directive will in the sense that it carries the element of an agent. While stating this, we mentioned the relationship between the words "action" and "actor" in a linguistic sense. (This corresponds to the fiil-fail relationship in Turkish.) In this section, we are going to talk about the qualities and elements of action. What is the difference between being and doing? Which elements of a change that arises in the external world can be considered as an "action"? In answering these questions, a reasoning will be made within the scope of the legal nature of the act and the action aspect of ALIC's two-stage structure will be analyzed.

Action is an act directed towards a specific goal, in which responsibility and freedom become a reality. Action is not an organic reflex, a simple instinctive behavior, or an automatic response to stimuli.[206] Action should be thought of as a spiritual reality that arises from a fundamentally spiritual conduct. It would be correct to consider action separately from behavior, which is the subject of psychology, and movement, which is the subject of physics.[207] Behavioral sciences have emerged as a result of the coming together of various disciplines that examine the determinants of behavior in the context of cause and effect.[208] Although it varies according to different approaches of psychology, behavior is mainly considered as an output of internal and external factors.[209] In other words, it is treated as a passive result of stimuli rather than a product of the individual's will. In order to emphasize the empirical and behavioral aspect of law, the

[206] Fatma Süzgün Şahin Ünver, *Hukuk Felsefesinde İrade Serbestliği ve Sorumluluk*, Ankara: Astana, 2018, p.142

[207] Ali Osman Gündoğan, *Eylemde Sorumluluk ve Özgürlük İlişkisi*, 2015, (statement doc), passim.

[208] Blair J. Kolasa, *İşletmeler İçin Davranış Bilimine Giriş.* (çev: Kemal Tosun vd.), İstanbul: Fatih Yayınevi, 1979, p.11

[209] Ibid, p.15; David Myers, *Social Psychology*, New York: The McGraw-Hill Companies, 2010

concept of "jurimetrics"[210] has been proposed. Law as behavioral science focuses on issues such as the social dynamics of the judicial members, criminal responsibility and the effectiveness of legal methods.[211]

In philosophy, the definition of action emphasizes the "conscious and voluntary agent"[212]; similarly, in social theory, it is defined as "the intentional and meaningful doing of an agent coexisting with others"[213]. In fact, philosophical analysis differs from the others in that it examines the immaterial and unobservable dimension. A distinction needs to be made between what a human agent is doing and what is happening. Because not all human movements can be characterized as actions of free will.[214] The spiritual dimension of action is discussed around the human behavioral categories of "being", "having" and "doing". For a long time, morality in Spinoza's tradition aimed to confer the tools of "being" to human beings, and thus responsibility was attributed according to who or what you are. The category of born criminals[215] and the implications of physiognomy are examples of this. On the other hand, The Kantian Morality assigned action as the supreme value and established an ethical system aimed at conferring the tools of "doing". Thus, individual will came to the fore. According to Sartre, to act is to have the tools for a purpose and to produce a kind of wholeness. A change in one of the components of this whole can be capable of changing the whole chain.[216] Sartre also emphasizes agency, the power of action and existing by means of action (or doing). He thinks that "existence precedes essence and and that means it is essential to begin from such subjectivity (his understanding of subjectivity is based on individuality and also agency, he opposes to critisisms on his idea by claiming relativity associated to subjectivity).[217] Without conceptualizing, existence cannot arise; therefore, first there is "vision" (technical

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210 Lee Loevinger, "Jurimetrics: The Methodology of Legal Inquiry" *Law And Contemporary Problems,* 1963, 28.1, pp. 5-35.

211 Glendon A. Schubert, "Political Culture And Judicial Behavior: Political Culture And Judicial Elites" *A Comparative Analysis,* University Press of America, 1985; William Kitchin, "Review of Glendon Schubert's 'Political Culture and Judicial Behavior' " *Politics and the Life Sciences,* vol. 5, no. 1, (Aug., 1986), pp. 167-169

212 Ahmet Cevizci, *Bilgi Felsefesi*, Ankara: Say, 2012, p.626

213 Ibid.

214 Abraham Irving Melden, Action Theory: Free Will and Determinism (eds Berofsky, Bernard), Harper Row Publishers, 1966, p.196

215 Ernest Watson Burgess, *On Community, Family, Delinquency*, London, 1973, pp. 175-177; Paul Nacke, "Lombroso und die Kriminal-Anthropologie von Heute," in *Leitschrift fur Kriminal Anthropologie*, 1897, p. 19.

216 Jean Paul Sartre, *Varlık ve Hiçlik* (çev. Turhan Ilgaz, Gaye Çankaya), İthaki, 4, 2011, p.551

217 Jean Paul Sartre, *Varoluşçuluk* (Existantialism) (çev. Asım Bezirci), Say, 31, 2022, p.37

appearance - concept), then there is doing (action), and finally there is existence. According to the existentialism, person cannot be predefined or determined and will be what he or she does. In other words, person's actions will determine who s/he is.[218] Thus, the initial mission of existentialism is to restore each person to his or her own existence and to put the responsibility for his or her existence on himself or herself.[219]

In order to understand freedom and responsibility and to ground legal conclusions on a reliable basis, it is useful to first examine the elements of action. In this study, action will be divided into two basic elements: deed and causality which are including sub-elements as process and agent.

2.2.1 Explanation of Deed by Differentiating from Action

It is common among philosophers to treat voluntary action as a unified category. Despite the many differences between moving a hand, walking, fixing a machine, eating a cake, acting in a fair way, honoring a contract, and marrying someone, they are all treated in the same way as belonging to a single category: acting. This assumption is supported with the way we use language. These are, after all, all valid answers we give when asked what we are doing. Aristotle provides us with an alternative view that has had immense influence in philosophy:

> Throughout his writings, Aristotle distinguishes between "making" or "producing" (poíêsis) on the one hand, and "acting proper" (praxis) on the other.[220] The two are distinguished by their success conditions. The success conditions for makings are external to them: one succeeds at making insofar as something external to the making obtains (the product). On the contrary, the conditions for success of proper actions are the actions themselves. This is why we pursue them for their own sake. By this standard, the activities of hammering a nail, or fixing a fridge count as makings, because the hammering is successful insofar as something external takes place: a nail is hammered in a wall, or a fridge is fixed. Precisely because the success conditions are external, it is possible to succeed at making something by luck. On the contrary, Aristotle would regard

[218] Ibid, p.39
[219] Ibid, p.40
[220] (*see* an early version of the distinction appears in Plato's Charmides 163a–c).

> acting justly, keeping a promise, or marrying someone as proper actions. To succeed at these actions consists in doing the actions well. A coerced marriage is not a successful marriage. Hence, these actions cannot be done by luck. This distinction underlies the aforementioned distinction between two forms of human excellence in the practical sphere: skill (technê) is excellence at making, and practical wisdom (phronêsis) is excellence at acting proper.[221]

In fact, it seems confusing to set the condition of success as the dynamic to distinguish the types of deed of “making”. Because the value of doing or producing is expected to be a concrete output. In other words, in this case, wouldn't the antecedent actions of a person who has the volition to produce be considered an act? For example, if a person who sets out to produce shoes fails to produce a shoe because the necessary tools break down, he or she has failed by chance. But if the process of producing shoes cannot be completed because of his own incapacity, are we still to regard it as a failure by chance because of the producing character of the act? This shows that we need to consider antecedent acts. That is, poiesis can contain praxis in its cause. A making that seems to depend on external factors may involve a proper action in its cause. The 'proper actions' of working and learning support the success of the 'making-producing' behaviors in completing the production process. To explain this idea, we need a notion of volition that presupposes a distinction between willing and doing.[222] A volitional being is someone who thinks about what he or she does and determines it according to the goals he or she chooses. That is to say, he or she determines what to do by his or her own will, without external influence. Aristotle called the having of the will for this determination as success. In this situation, "being", one of the categories of action, signifies a person with free will. This is a being as a result of biological and psychological attributes. It does not by itself create responsibility, but it is the ground of responsibility. Wanting the process and the result creates the "deed". An action and a deed are not the same concept. For example, a person who wants to lift a weight may not be able to do so may because of illness or weakness. So, the deed has taken place, but the action has not. Acting in accordance with

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[221] Piñeros Glasscock, Juan S. and Sergio Tenenbaum, "Action", *The Stanford Encyclopedia of Philosophy* (Spring 2023), (eds. Edward N. Zalta, Uri Nodelman), https://plato.stanford.edu/archives/spr2023/entries/action/

[222] Peter Bieri, *Özgürlük Zanaatı* (cev. Turkis Noyan), İstanbul: Kitap, 2009, p.46

the deed in question is in the category of "doing". In fact, whether it is *poesis* or *praxis* does not change the assessment to be made in terms of liability for action. Afterwards, the resulting output belongs to the category of "having". Who we are and what we have is related to what we do, but not its absolute result. A person who has developed the personality to be just and has worked hard to understand justice is expected to be just. Or if he creates a system of justice, he is expected to create a system that covering justice. Indeed, he is more likely to do so than someone who has not worked and has not invested in his personality. But it is not an absolute outcome. In this sense, making success as a condition is confusing and also it directs the meaning of action to utility. Korsgaard criticizes this as follows: utilitarianism is not a moral theory because utility is a property of productions, not of actions.[223] Whether a movement is an action or not, and whether it is morally blameworthy or not, is not determined by the utility it yields to the outcome. It is inevitable that the level of external and internal freedom affects the outcome. Arendt modifies and develops Aristotle's classification:

> Arendt distinguishes between three kinds of practical activities: labour, work, and action. The most basic of these is labour, which Arendt conceives as simply an extension of our animal lives: a “metabolism” (Marx’s phrase) between the human animal and the world, characterized by a cycle of consumption and the production of goods to be consumed, and aiming at meeting our basic biological needs[224]. Since this is a cycle, Arendt suggests that there is no sense of speaking here of means and ends: there is no fact of the matter as to whether the production of goods is for the sake of consumption, or the consumption for the sake of production.[225] Means and ends enter at the next level of practical activity, work (the Aristotelian poíêsis). Like Aristotle, Arendt takes the aim of working to be the finished work, the product, whether it be a work of art, like a painting, a tool, like a knife, or a way to safeguard living, like a house. The central importance of work lies in its ability to produce lasting products that lie beyond the activity of the producer.[226] Arendt contends that these products can begin to shape an objective world of objects that stands against

[223] Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity*. Oxford: Oxford University Press 2009, pp. 18-26
[224] Hannah Arendt, *The Human Condition*, 2nd Edition, London: University of Chicago Press, 1998, p. 145 and p. 155
[225] Ibid.
[226] Ibid, p. 144

the humans who produce them. However, the world does not emerge in its fullness except by way of the third level of practical activity, action (the Aristotelian praxis). Action is the means by which humans reveal themselves in the public sphere, a revelation needed to give reality to a personality that otherwise remains entirely unactualized in subjectivity. It is thus essentially communicative, and depends on other humans to whom one might make herself known;[227] and it depends, given its essential ephemeral nature, for its permanence in the continued existence of a polity that may preserve words and deeds in more enduring forms, like sculptures and tales. Ungoverned by either the natural laws of labor, or by the norms arising from a particular aim, action is for Arendt unproductive, free, and unpredictable. It is the distinguishing activity of human beings as such.[228]

Arendt changes the condition Aristotle calls success to purpose. What we do for the necessities of life, which has a common purpose with animals, are acts of *metabolism*. In the second category, by preferring the word ‘work’ instead of ‘produce’, she attaches importance to the process, not the result. In other words, she speaks of the activity of working regardless of the output, this activity is *practical*. The real action, on the other hand, emphasizes the social aspect of human beings and its effect is on subjects, not objects. In this sense, we can talk about action as a way of mutual communication. Another philosopher who emphasizes the communication aspect of action is Austin. According to him, speaking, which is normally an ordinary activity, gains the quality of action when it transcends the quality of making sounds and turns into meaningful words. The ability to communicate, which distinguishes human beings, is directly related to the ability to act. With words, decisions are made, rights or power are exercised, orders or directions are given. Words that have an effect in terms of result and words that only give a stance and information are evaluated separately.[229] While the words of a commander who gives orders to the army are action-words, the words of a witness who tells what he saw in court are deed-words. In terms of criminal responsibility, acts of encouraging suicide or incitement to commit a crime are examples of the responsibility arising from

[227] Ibid, pp. 38-49

[228] Ibid, p. 177 and pp. 204-206; Glasscock and Juan and Tenenbaum, op. cit., passim.

[229] John Langshaw Austin, *Söylemek ve Yapmak* (cev. Levent Aysever), İstanbul: Metis, 2009, pp.19-20

this type of speech-action. In modern law, human criminal responsibility is limited to "doing", which is the second of the categories of "being", "doing" and "having". Doing an act that constitutes a crime causes accusation. Being the father of the person who committed this crime is not a reason for condemnation because all offenses are personal. Natural occurrences, i.e. non-human acts such as natural disasters, are not the subject of legal action on their own. Or the identity one possesses is not valid evidence for sanction. For example, a person who is known as a mafia member cannot be accused solely because of this label without a specific act. Sometimes, however, being or having an identity can impose obligations. Having a lot of assets increases taxes. Being a citizen creates an obligation to do military service. But these are related to social policies and do not fall within the scope of actus reus (responsibility of act).

In this study, the action is analyzed in terms of criminal philosophy and crime theory. Within the framework of the classical theory of crime, the consequence was considered to be one of the sub-elements of the action and it was accepted that there would be no crime without a consequence. However, a scholars of the doctrine adopted the new theory of crime instead of the classical theory. In this theory, since the injustice expressed by the action is taken as a basis, the consequence is now accepted as an element that does not have to be present in every crime. Therefore, if it is clearly stated in the definition of the article, the consequence will be taken into consideration as an element. Otherwise, the realization of the action will be sufficient for the completion of the crime.[230] When we look at the action within the scope of ALIC, there are two separate acts and at most one consequence, namely the act that removes the culpability (intoxication, not taking medication, hypnosis, etc.) and the act that constitutes a crime. Can the institutions of criminal attempt or voluntary renunciation be applied in this case?

The attempt is when a person starts to directly execute a crime that he/she intends to commit with proper actions, but fails to complete it due to reasons beyond his/her control.[231] As stated, the direct execution must have begun. In other words, preparatory acts (unless they constitute a separate crime, with exceptions) are not punishable. In terms of ALIC, if we accept the act that removes the perpetrator's culpability as the beginning of the executive actions, this act will naturally be an attempt and will be treated within

[230] Koca and Üzülmez, (op. cit.) *Türk Ceza Hukuku Genel Hükümler,* pp.127-128
[231] *Turkish Criminal Code* art.35, *StGB* art.22

the scope of the crime.[232] In order to talk about the beginning of execution, a danger to a legally protected right must have arisen. It is a controversial issue whether the sole removal of the culpability creates this danger.[233] According to one assessment, the perpetrator walking to commit murder is considered as a preparatory act. If he is caught on the way, he cannot be punished. However, if the perpetrator who drinks to find courage is caught in this situation, it is considered an attempt and he will be punished. According to this assessment, it is sufficient that the execution of the plan of a crime designed in the perpetrator's mind has begun.[234] Schülchter, on the other hand, requires that the act of attempt must be capable of achieving the consequence foreseen for the crime and does not characterize only being drunk as an attempt.[235] What is important is to establish the appropriate causal link between the act of intoxication and the consequence. If this link cannot be established, it will remain doubtful whether the intoxication of the perpetrator was effective on the consequence.[236]

There are three main theories in terms of the attempt associated with ALIC: Theorie vom ersten Schluck, Theorie vom Eintritt der Schuldunfahigkeit, Theorie von der Ausführungshandlung will be explained in order. According to the Slug Theory, the attempt is based on the moment when the perpetrator started drinking. According to the Beginning of Deprivation Theory, the attempt starts from the moment the perpetrator loses his/her culpability. According to the Execution of the Act Theory, the moment when the actual criminal act begins to be executed is taken as basis. In the event that the perpetrator commits a crime different from the one designed by the perpetrator, it is a problem how the criminal responsibility will be determined and for which crime the person will be held responsible for the attempt while only intoxication is in question.[237] For this reason, it is a necessity that the perpetrator also demonstrates the act that will reveal what the crime he/she intended to commit after his/her intoxication.[238]

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[232] Kuhn-Pabst, (op. cit.) *Die Problematic der Actio Libera in Causa*, p.131

[233] Yener Ünver, (op. cit.) “Sebebinde Serbest Hareketler Kuramı” p.839

[234] Dirk Schweinberger, “Actio Libera in Causa: Folgeprobleme des Herrschenden Tatbestandsmodells” *Juristische Schlung*, 2006, Heft 6, p.508

[235] Ellen Schlüchter, “Zur Vorsatzlichen Actio Libera in Causa bei Erfolgsdelikten” p.351

[236] Bazrafkan, (op. cit.) “Die Rechtsfigur der Actio Libera in Causa” *Das Schuldprinzip des Türkischen StGB im Spiegel des Deutschen Strafrechts,* p.308

[237] Sydow, (op. cit.) *Die Actio Libera in Causa Nach dem Rechtsprechungswandel des Bundesgerichtshofs,* p. 92

[238] Bernd Heinrich and Philipp Wismann, Die Actio Libera in Causa, *Ad Legendum, 2/ 2016, Richterrecht- Unter dem Radar des Gesetzgebers,* p. 151

Voluntary renunciation is the willing withdrawal of the perpetrator from the execution of the crime or the preventing of the completion of the crime or the realization of the consequence by his own efforts.[239] It is controversial whether it will be applicable in terms of ALIC. According to the minority approach, the perpetrator who loses his/her culpability by his/her own will benefits from the provisions of voluntary renunciation if he/she gives up from committing the act while he/she does not have the culpability. And if his completed acts do not constitute a crime, he will not be punished for the act he renounced. The justification for this view is as follows: To prevent the misconception that a perpetrator who voluntarily loses the culpability and commits a crime can no longer exhibit good behavior in any way.[240] Those who think otherwise constitute the majority opinion. To be able to give up the intention to commit a crime, a person must have the power of reasoning and decision-making within himself/herself. In order to have this power, he/she must not have lost the culpability. This situation is similar to pulling the trigger of a gun; it is no longer possible for the perpetrator, who is moving like a bullet in the air, to voluntarily give up his/her act.[241]

In the first part of the study, we have explained the types of ALIC. In the second stage act, it is accepted as the majority opinion that the perpetrator, who has already lost the culpability, can act with intention or negligence. Therefore, the perpetrator, whom we assume to have lost the culpability, may actually have decreased the culpability. In this case, it is necessary to take into account that there is a possibility of voluntary renunciation of the crime. As a result, it is possible to apply the provisions of voluntary renunciation in cases falling within the scope of the ALIC theory. However, it may only be considered in cases where the culpability is reduced, not completely lost.[242] Unfortunately, it is clear that it is quite difficult in terms of proving and requires very fine evaluation. For example, it will be more difficult to determine whether the perpetrator could not complete the crime because he lost his power or whether the victim's words

[239] Turkish Criminal Code art.36

[240] Rolf Dietrich Herzberg, “Gedanken zur Actio Libera in Causa: Straffreie Deliktsvorbereitung als Begehung der Tat?” *Festschrift für Günter Spendel zum 70. Geburtstag* am 11 Juli 1992 (Ed. Manfred Seebode), Walter de Gruyter, Berlin, 1992, 203-236, p. 209

[241] Claire Finkelstein and Leo Katz, “Contrived Defenses and Deterrent Threats: Two Facets of One Problem” *Ohiao State Journal of Criminal Law,* 2008, vol.5, p. 490

[242] Ufuk Toprak, “Kasten veya Taksirle Kusur Yeteneğinin Ortadan Kaldırılmasının ya da Azaltılmasının Alman Hukukuna Göre Ceza Sorumluluğuna Etkisi (Actio Libera in Causa Formulü)”, *Türkiye Adalet Akademisi Dergisi,* 3, 10. Sayı, Temmuz 2012, 741-774, p.767

were effective and he gave up, compared to the general situation. Despite this difficulty, it is possible that the act of voluntary renunciation may occur and it does not seem reasonable to withhold the perpetrator from the provisions in his favor by creating a theoretical presumption. It would be appropriate to determine the criminal responsibility by evaluating the possibilities in order to reveal the truth.

2.2.2 Explanation of Causa-lity

Causality refers to the chain between causes and effects. We will examine two types of causality: Causalism in terms of the commission of the action (causalism) and causality in relation to the effect that occurs after the performance of the action (causality). The chain of causality analyzed in terms of the commission of the action refers to a mental process. It is related to the moral element of the act. It is the answer to the question "Why did the perpetrator perform this action?". It is directly related to the concepts of will, intent and purpose. At the same time, it depends on the perpetrator's culpability, and according to the answer we give to the question, the responsibility for culpability is also affected. In this sense, pre-action causality (causalism) is directly related to the perpetrator, which is one of the elements of the action.

The causal theory of action, also known as the "standard story of action"[243], is the most common and widely accepted theory of intentional action. According to this theory, an act is considered an intentional act or not because of its causal connection to certain mental states. The modern causal theory of action, or "causalism"[244], was pioneered by Donald Davidson, although similar views have been put forward before:

> “In Action, Reasons, and Causes (ARC), Davidson provides an account of the nature of rationalizing explanations of actions, or what is often called ‘intentional explanations’. Such explanations explain the action by providing the reason why the agent acted. ARC tries to understand how a reason can explain an action. The two central theses of ARC, or modified versions of them, became subsequently widely, though certainly not universally, accepted. The first thesis is that the explanation of an action involves a ‘primary reason’: a belief and a desire pair that rationalizes the action by expressing the end pursued in the action (desire) and

[243] J. David Velleman, “What Happens when Someone Acts” in *Mind,* 101 (403), 1992, 461–481

[244] Donald Davidson, *Essays on Actions and Events: Philosophical Essays,* Volume 1, Oxford: Clarendon Press, 2nd edition, 2001

how the agent thought the action would accomplish this end (instrumental belief)."[245]

According to this theory, the previous chain of the movement that constitutes the action has two links: desire and belief. Some philosophers criticize this theory for its assumption that the perpetrator is rational.[246] Assuming that the agent acts rationally when determining causes that we cannot observe does not always lead us to the right conclusion. For example, we may think that a man who goes to the bazaar does so with the desire to shop and the belief that the bazaar is a good place to shop. But he may also have wanted to take a walk and believed that the appropriate route was through the bazaar. Assuming that human actions are always rational may lead to erroneous conclusions. The question of how non-causal theories can distinguish between merely potentially explanatory reasons for an action from the reasons that actually explain it became known as "Davidson's Challenge" to non-causal theories of action.[247]

Another theory of the mental origin of action, the Practical Knowledge theory, explains this situation by a rationality that is formed in the perpetrator's own mental world. A perpetrator knows what he/she is doing without observation.[248] This is because, intuitively, whereas I need to look at what is being written on the board to know what someone else is writing, I don't need to look at what I am doing to know what I am writing. Beyond intuitive examples, however, it has proven difficult to explain what non-observational knowledge is.[249] The non-observational character of this knowledge is traditionally associated with mental states. Hence, public happenings, actions, could be known in the identifying way traditionally reserved for internal mental states, so that there would be "spontaneous knowledge of material reality"[250]. Anscombe presents several arguments for the claim that an agent must know what he or she is doing in order to act intentionally. The first argument is her answer to the question why, and takes it for granted

[245] Glasscock and Juan and Tenenbaum, op. cit., passim.

[246] Alfred R. Mele, *Springs of Action: Understanding Intentional Behavior*, New York and Oxford: Oxford University Press, 1992, passim.

[247] Alfred R. Mele, "Actions, Explanations, and Causes" in *Reasons and Causes: Causalism and Non-causalism in the Philosophy of Action* (ed. G. D'Oro), London: Palgrave-Macmillan, 2013, passim.

[248] Gertrude Elizabeth Margaret Anscombe, *Intention*, Oxford: Basil Blackwell, 1957, p.8

[249] Gertrude Elizabeth Margaret Anscombe, "Causality and Extensionality", *The Journal of Philosophy*, 66 (6), 1969, pp. 152–159

[250] Sebastian Rödl, *Self-consciousness*, Cambridge, MA: Harvard University Press, 2007, p.121

that this answer is sincere.[251] When asked the question "Why do you pull the trigger?", if she answers "to murder", we speak of intentional action. However, if she says "to have fun, to celebrate", there is no intent in terms of the crimes of injuring and killing, but there is negligence responsibility. However, there will be intention for the crime of danger. If answers "I don't know, I'm not conscious of it", there is a lack of knowledge or a general lack of cognizance of the tool and the moral element of the act, of the crime, does not occur. In the last example, Anscombe does not characterize it as an action[252] because one of the elements of the action is the perpetrator, and in this example there is no perception, which is one of the elements that the perpetrator must have. The second argument is about the consistency of the process. The argument begins with the observation that a process in progress bears a non-accidental connection to its completion.[253] What distinguishes intentional action is that the non-accidental connection between the process and the conclusion is achieved through the intention of the perpetrator to act in a certain way. This theory is based on the claim that an intentional action is an action resulting from a cause.[254] The perpetrator must therefore be in a position to provide a reason that fits the process. To take the previous example: I move my hand because I pull the trigger (adding the other elements of the theory: I want to murder and I believe it is a proper action). So in this theory, the relation of the perpetrator to causality is knowledge.[255] When agents act intentionally, they must know what they are doing. Recall from the previous section that, for Aristotle, one of the requirements of internal freedom was knowledge. It seems that also one of the requirements of real (intentional) action (actus reus) is, in fact, freedom.

Another important point where Davidson's classical causation theory is criticized is the following: It excludes omission behavior by specifying movement as an element. According to Davidson, a real action implies an occasion, and more specifically, a bodily movement. This bodily movement counts as an action if and only if the occasion is an intentional action. This claim frames action as follows: "we never do more than move our

[251] Anscombe, (op. cit.) *Intention*, 1957, p.42
[252] Ibid, p.33
[253] Michael Thompson, 2011, "Anscombe's Intention and Practical Knowledge", in *Essays on Anscombe's Intention* (eds. Anton Ford, Jennifer Hornsby and Frederick Stoutland), Cambridge, MA: Harvard University Press, 2011, pp. 198–210
[254] Michael Thompson, "Forms of Nature", in *Freiheit. Stuttgarter Hegel-Kongres*, (eds. G. Hindrichs and H. Axel), Frankfurt am Main: Vittorio Klostermann, 2013, pp. 701–735
[255] John Hyman, "How Knowledge Works", *The Philosophical Quarterly*, 49 (197), 1999, 433–451

bodies: the rest is up to nature."[256] Whatever the outcome, if there is bodily movement and the movement is caused by mental states, it is an action. Some thinkers attribute the chain of agent-causality entirely to natural phenomena and point to an absolutely determinate process (which mental processes cannot influence at all).[257] In contrast to this deterministic approach, there are also those who think that action results from a teleological chain, not a causal one.[258] According to them, the important question is not "Why did this happen?" or "Why did you do this?" it should be "For what purpose did you do this?". These approaches assume that there is a movement in the chain and they question it. But when there is no action, that is, when there is omission, can we talk about responsibility for action? Or is the punishment of negligent crimes related to non-action? Is it enough to complete a mental process without any change in the external world for an action to take place?

"If we accept that omissions are absences, or at least that they are not events, the possibility of intentional omissions seem to present a challenge to the causal theory of action. After all, if agency can be manifested without any events being present, it is difficult to see how agency can be explained in the terms of the standard story of action."[259] Based on the idea that action is the way the perpetrator represents him/herself[260], it can be argued that omission behaviors can also be considered as actions. Not doing is a form of communicating with the social environment as well as doing and it expresses a conscious stance in response to an events. Philosophers usually describe cases of omissions as cases of perpetrator's failing to do something that I was somehow "supposed to do".[261] In every choice of action, we are not held responsible for not doing another action. However, if there is an action that should have been done and we do not do it, there is omission. Also, it should be possible to choose not to do that action. For

[256] Donald Davidson, "Agency" in *Agent, Action, and Reason,* Toronto: University of Toronto Press, 1971, p. 23

[257] Erasmus Mayr, *Understanding Human Agency*, Oxford: Oxford University Press, 2011, passim: Develops a version of the view that tries to show that human agency is not essentially different from other forms of substance causation that we find in the natural world.

[258] Timothy Cleveland, *Trying Without Willing*, Aldershot: Ashgate Publishing, 1997.; Scott Sehon, *Teleological Realism: Mind, Agency, and Explanation,* Cambridge, MA: Bradford Books/MIT Press, 2005.

[259] Glasscock and Juan and Tenenbaum, op. cit., passim.

[260] Arendt, op. cit., p.95

[261] Kent Bach, "Refraining, Omitting, and Negative Acts", in *A Companion to the Philosophy of Action* (eds. Timothy O'Connor, Constantine Sandis), Chichester, West Sussex: Wiley-Blackwell, 2010, pp. 50–57

example, if a babysitter is unable to act because she is injured as a result of a fall down the stairs and the child is harmed, she is not responsible for not preventing the child from suffering any damage. The external and internal freedom of the perpetrator is expected in this case as well. The perpetrator must fail to prevent the child from being harmed, either intentionally or negligently, in order to be held liable for his/her omission. It is clear that omissions also have all the elements of an action: an intention to act in a certain way, an attitude appropriate to the realization of that intention, i.e. the deed, the perpetrator, and the proper chain of causation.

Some authors consider omissions as situations in which the perpetrator is held responsible for failing to form the expected intention (such as the caregiver's failure to form the intention to protect the child from harm). For example, "Sartorio argues that intentional omissions are often not best explained by other events (such as the formation of an intention), but by the non-occurrence of certain events (the best explanation of why I omitted to help my friend move might be that I omitted to form the intention to help them, rather than that I did form the intention not to help them)."[262] We think that this definition is problematic and prone to create confusion. Because in omissions, there is no such thing as an unfulfilled intention or an incomplete deed. On the contrary, there is an intention conceived by the perpetrator (including desire and belief), a completed deed, and a mental background convenient for establishing proper causation. Therefore, omission should also be considered as an action. It is meaningful in this respect that the initial version of the ALIC theory also includes the phrase omissio.

The post-action causal relationship refers to the causal link between the consequence reflected in the outer world and the perpetrator's action. Within the framework of modern criminal law framework, the act must originate from the will of the person and must be directed towards the consequence in connection with the other elements of the crime. Mere blind causality will not suffice, and the responsibility of the person will be determined on this basis.[263] Due to the two-stage action structure of the ALIC theory, the determination of the existence of the causal link gains a special

[262] Glasscock and Juan and Tenenbaum, op. cit., passim.; Carolina Sartorio, "Omissions and Causalism", *Noûs,* 43 (3), 2009, pp. 513–530

[263] Kayıhan İçel, *Ceza Hukuku Genel Hükümler*, 2016, Beta, p.262

importance in terms of criminal responsibility.[264] If it were not for the influence of alcohol or drugs, or if the culpability had not been eliminated by any other method, the perpetrator would not have committed the crime in question, or the consequence would have occurred in a different way. Only in these possibilities will it be accepted that there is a causal link between intoxication and the consequence of the crime.[265] According to the conditio sine qua non (indispensable condition) theory, every condition without which the consequence would not have occurred carries a causal value.[266] Another principle, "quidquid est causa causae, est causa causati" means "the cause of the cause is the cause of the effect". This principle is suitable to be applied to the two-stage causal relationship of ALIC cases. Since the perpetrator's act of eliminating his own culpability with his free will paves the way to the unlawful result, the causal link between the result and the first act is established.[267]

As a result of this chapter, we have tried to analyze the three main elements of the Actio Libera in Causa theory: action, liberty and causality. An important interpretation that emerges from the analysis of the philosophy of action can be the following: Action, as a specific type of human behavior, inherently contains freedom and causality. The accuracy of this interpretation will of course vary according to the views of different philosophers in the field of action. But from this point of view, acting is unique to humans as a species with free will. And human beings are subject to condemnation and praise for their ability to act. It is possible to ensure absolute freedom in neither an internal nor an external sense. It is practically impossible to absolve the individual from psychological elements or the influence of external circumstances. But it is possible to increase the level of freedom both through the development of social policies and through the development of inner awareness and self-reflection. Biologically, an individual who loses or reduces his/her willpower through methods that affect the brain's control mechanism may become unable to foresee the consequences of his/her actions and control his/her impulses, as his/her ability to act will also decrease.[268] For example, under the influence of alcohol, a person may become angry and start fights over things they would not normally get angry

[264] Wilfried Küper, Aspekte der 'Actio Libera in Causa' ein Dialog. Kriminologie- Psychiatrie- Strafrecht: Festschrift für Heinz Leferenz zum. 70. Geburststag, (edt. Hans Kerner, Hans Göppinger, Franz Streng), Heiderberg: Müller Juristischer Verlag, 1983, p.581

[265] Sydow, op. cit., p.80

[266] Centel and Zafer and Çakmut, (op. cit.) *Türk Ceza Hukukuna Giriş,* p.273

[267] Baumann and Weber and Mitsch and Eisele, (op. cit.) *Strafrecht Allgemeiner Teil*, p.458

[268] Neubert and Mars and Thomas and Sallet and Rushworth, op. cit., passim.

over.[269] The reason why a person under the influence of such substances or hypnosis can be held responsible for his or her actions is that his or her initial actions were intentional. The responsibility of addicted individuals needs to be examined separately. Criminal responsibility should be assessed according to the age at which they became addicted, the level of addiction, and the extent to which they took measures and made efforts to overcome their addiction. This recommendation has already been mentioned. But if we observe that individuals who have no addiction and who are not under the influence of substances may have different levels of internal and external freedom, why don't we make a difference in their responsibility?

The concept of "culpability" helps us in answering this question. In fact, culpability defines a minimum level of freedom and the ability to act. We assume that it is present in every average individual of a certain age and perception. It is defined in the doctrine as follows: "The set of psychological conditions sought by the law in order to attribute an action to the perpetrator and gathered around the axis of freedom"[270]. In other words, the basis of criminal responsibility is not the assumption of absolute freedom of will, but the assumption of the minimum level of freedom of will. In terms of this assumption, it becomes important which of the views put forward to explain the basis of criminal responsibility to be adopted. In this study, since the emphasis is on explaining what freedom is, the classical school and modern legal approaches are mostly addressed. The classical school accepts that the human will has the capacity to freely choose among competing motives.[271] Modern approaches take into account the psychological and sociological factors that affect the human will and the actions subject to law. For a more comprehensive and comparative analysis, Lombrosso[272] and the positivist school or utilitarian school of law could be analyzed seperately.

Up to this part of the thesis, we have tried to provide a terminological explanation of ALIC, its types, its similarities and differences with other doctrines, and an in-depth explanation of the rights, values and concepts on which it is based. In the next section, we will discuss the application of the ALIC theory.

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[269] Larry Alexander, Kimberly Kessler Ferzan, *Crime and Culpability*, Cambridge Uni. Press, 2009, p.166

[270] Somay Tümerkan, *Klasik, Pozitivist Okullarda ve Toplumsal Savunma Hareketinde Ceza Sorumluluğunun Esası,* İstanbul Üniversitesi Hukuk Fakültesi Dergisi, c.48, 1-4, 1982-1983, p.53

[271] Artuk, Gökçen, Alşahin, Çakır, *Ceza Hukuku Genel Hükümler*, Ankara: Adalet, 11, 2017, p.34

[272] Cesare Lombroso, *Criminal Man* (eds. Mary Gibson, Nicole Hahn Rafter), Duke University Press, 1895, passim.

Chapter 3:
CONTEMPORARY APPLICATION OF ALIC

3.1 *General Outlook of Actio Libera in Causa in Legal Systems*

Although ALIC is not explicitly mentioned by name in any legal regulation, it is a concept that has gained a place in the criminal law doctrine and even jurisprudence of many countries, leaving aside the discussions on its legal basis.[273] Analyzing the regulations in the national legislation of the countries, it can be said that there are basically two approaches. The first of these is that the criminal responsibility will continue if the person whose culpability has been eliminated acts on his/her own will; however, if the person loses his/her culpability due to a reason completely outside of his/her own will, he/she will not be criminally responsible. This approach decides to punish on the basis of the ulterior act, i.e. the second stage act of the ALIC. The second basic approach is to regulate intoxication to the extent that it disrupts public order as a separate crime. This approach takes the prior act as the basis for punishment. In many states both approaches coexist, so they are not exactly competing approaches, but different entities. Suffice it for now to mention that the first approach is taken as the basis in Turkish law; it will be explained in more detail in the next section. Apart from these approaches, another example from the Netherlands is that there is no regulation on drunkenness.[274]

In this section, firstly, the approach to the effects of intoxication on criminal responsibility in terms of the Rome Statute will be examined due to its international relevance. Then, the current regulations in the legislation of some countries within the scope of the Continental European legal system will be examined. We have explained in the third part of the first chapter that the equivalent of *ALIC* in the Anglo-Saxon legal system is the concept of *voluntary intoxication*. In the Anglo-Saxon legal system, case law is essential instead of legislations. Therefore, this chapter will be limited to the Rome Statute and certain continental law jurisdictions.

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[273] Atalay, *Ceza Hukukunda Actiones Liberae in Causa Kuramı*, p.34
[274] Ibid, p.35

Article 31 of the Rome Statute, the constitutive text of the International Criminal Court, regulates the circumstances in which a person is not criminally responsible.[275] According to this article, the inability of a person to perceive the illegality of his/her act and to direct this act due to a mental incapacity or illness removes his/her criminal responsibility. In this article, in accordance with the elements of free will, the competencies of both knowledge and control are sought. Although the Rome Statute does not aim to regulate the present situation of international criminal law, in other words, it only sets out the principles valid for its own field of application, such a provision is a guiding principle for all criminal legal systems.[276] Among the provisions regulating the circumstances in which a person is not criminally liable under the Rome Statute, there is also a provision on the use of alcohol and drugs. In this context, intentional intoxication is not recognized as a situation that eliminates criminal responsibility. In other words, although it is not explicitly mentioned, the ALIC theory is also included. The rationale behind this principle is to prevent intoxication with malicious intent. As stated in 31/1. (b), the situation in which a person is intoxicated knowing that it will lead to the commission of the criminal act will constitute an obstacle to his/her release from criminal responsibility.[277] In other words, since this person's will is free while forming the basis of the criminal acts, his/her responsibility will be held full while being punished.[278]

In accordance with Article 31 of the Rome Statute, we observe that while legal systems recognize mental illness as a state of lack of the culpability, intoxication is not recognized as a ground for excuse. This is often linked to the sociocultural structure of

[275] Rome Statute, art. 31/1. (a)

[276] Rıfat Murat Önok, *Uluslararası Ceza Hukuku,* Seçkin Yayıncılık, Ankara, 2009, p.468

[277] for the elements of determining mental element, intention and knowledge see Rome Statute art. 30:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly

[278] Sabina Zgaga, "Intoxication and Criminal Liability in International Criminal Law" in *Law Journal of The Higher School Economics,* 2014, no.2, p.159

the society and its perception toward alcohol.[279] For example, in some countries with a muslim majority, the use of alcohol is considered to be an aggravation of the penalty to be imposed on the perpetrator, or even a criminal offense in itself.[280] On the other hand, in Western countries, drunkenness is recognized as a mitigating circumstance in terms of criminal responsibility and even as a circumstance that eliminates the components of intent to know and desire in terms of moral responsibility.[281] Within the scope of the Rome Statute, the approach of limitation with the most serious crimes that concern the whole humanity has been preferred. Intoxication cannot constitute an excuse for criminal responsibility for genocide or crimes against humanity. For example, the perpetrator will not be able to claim that he was under the influence of intoxication and could not comprehend the meaning of his actions while giving orders regarding the crime of genocide or committing acts within the scope of this crime. In contrast, it has been deemed possible for some war crimes to be considered as a reason for excuse. For example, it is possible for a soldier to claim that he was so intoxicated that he could not realize that the act of killing he committed was actually genocidal.[282] The discussion of this slight distinction with the examples of the commanders and soldiers in terms of the identity of the perpetrator in the doctrine is meaningful in terms of the element of foreseeing. Since it will be important to identify awareness before intoxication and to assess foreseeability of the consequences, making this slight distinction would require research within the scope of ALIC. Indeed, it seems difficult in practice to offer an excuse of intoxication for crimes under the Rome Statute. And yet, according to the regulations, it becomes almost impossible to even claim intoxication as an excuse for criminal responsibility.[283]

In Italian Law, Article 92 of the Criminal Code of 1930 regulates the intentional or premeditated deprivation of the culpability by the perpetrator.[284] Except in cases caused by a coincidental event or force majeure, drunkenness does not remove or diminish the capacity for culpability. In fact, if intoxication is caused by design with the purpose of

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[279] Kai Ambos, "Defences in International Criminal Law" in *Research Handbook on International Criminal Law* (ed. Bartam S. Brown), England: Edward Elgar Publishing, 2011, p.305

[280] M. Akif Aydın, *Türk Hukuk Tarihi*, 14. Bası, İstanbul: Beta, 2017, p.154, p.170

[281] Zgaga, op. cit., p.154

[282] Albin Eser, "Grounds for Excluding Criminal Responsibility, Art. 31" *The Rome Statute of The International Criminal Court a Commentary* (eds. Otto Triffterer, Kai Ambos), 3rd Edition, Munich: C. H. Beck Hart Nomos, p. 1140

[283] Ibid., p. 1141

[284] http://legislationline.org/

committing a crime or creating an excuse, the penalty to be imposed on the perpetrator will be increased. According to Ünver[285], this regulation in Italy points to the existence of a positive legal regulation on ALIC, even if it is not mentioned by name and its scope is limited. Article 92 of the Italian Penal Code is similar to Article 34/2 of the Turkish Penal Code. However, unlike the Turkish Penal Code, it regulates premeditated intoxication as a qualifying (aggravating) circumstance. In fact, a suggestion for such a proposal can be found in the Turkish Legal History. In the 1940 draft prepared by the Ministry of Justice for the amendment of the Turkish Penal Code, it was proposed to add the phrase "the penalty of anyone who gets drunk or uses narcotic substances to commit a crime shall be increased from one third to one half".[286] However, this proposal was not accepted and no amendment was made in this direction. According to Atalay[287], this provision in the Italian Penal Code completes a missing point in the Turkish Penal Code. Because it accepts that the perpetrator who commits a crime by eliminating the culpability will be punished more severely if he/she commits the crime by premeditation.

In Spain, the Criminal Code of 1995 contains a more detailed regulation than the laws of other countries. In Article 20 of the Code, the persons who are not criminally liable are listed in seven subsections. According to the first subsection of this article, a person who suffers from a mental disorder at the time of committing a crime is not criminally liable, as he or she is unable to comprehend the concept of illegality. However, if this mental disorder is caused by the perpetrator with the intent to commit a crime or even though he foresaw that he might commit a crime or should have foreseen that he might commit a crime, he is criminally liable. The inclusion of the condition of "foreseeing" in the Spanish Penal Code is important in terms of pointing to negligent ALIC. Although the theory of ALIC is not mentioned by name, it is a regulation that includes both negligent and intentional ALIC.[288] Another important aspect of the Spanish Penal Code is that it also addresses crimes committed in a context of addiction and deprivation. The second paragraph of Article 20 stipulates that a person who is in a state of complete intoxication under the influence of alcohol, narcotics, stimulants or substances producing similar effects shall not be criminally liable if he did not come to

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[285] Yener Ünver, (op. cit.) “Sebebinde Serbest Hareketler Kuramı” pp. 821-822
[286] Uğur Alacakaptan, *Sarhoşluk Halinde İşlenen Suçlarda Cezai Mesuliyet,* Ankara: Ankara Hukuk Fakültesi Yayınları, no. 163, 1961, p.154
[287] Atalay, op. cit., p.40
[288] Yener Ünver, op. cit., p.827

this state with the intention of committing the crime in question, knowing that he would commit it or foreseeing the possibility of committing it, or if he becomes incapable of perceiving his unlawful act due to the deprivation syndrome he experiences as an addict of these substances.[289] The deprivation syndrome caused by addiction is regulated like a disease that constitutes a mental illness in the legal regulation. At this point, we would like to emphasize the importance of obtaining expert support from psychology and medical authorities through reports and so on for the correct determination of addiction. As we have stated in the previous sections of the study, in our opinion, whether the perpetrator is receiving treatment for his/her addiction is also important in terms of showing his/her personal effort to recover.

The French Criminal Code of 1994 regulates criminal responsibility in Article 122/1. It is regulated that the perpetrator shall not be punished in cases where the perpetrator has lost the control and reasoning ability due to a psychological or neuropsychological disease at the time of committing the criminal act, and in case of a decrease in the aforementioned abilities, the punishment of the perpetrator shall be reduced to the extent to be determined by the court.[290] This a provision about mental illness or insanity, not an ALİC-related provision. In this regulation or in other regulations, there is no statement on how the criminal responsibility will be evaluated in the event that the perpetrator's culpability is eliminated voluntarily. Although such a deduction can be logically interpreted by proof reading through the reversal of Article 122/1, it is possible to say that there is no regulation regarding the ALIC doctrine or the issues on which it is based.

In the Swiss Criminal Code (1937), there are two main regulations related to ALIC. Firstly, in Article 19, there is a provision on the determination of the criminal responsibility of the perpetrator in case of mental disability or diminished culpability. If the loss of the culpability is not due to a cause that can be attributed to the perpetrator, no fault can be attributed to the perpetrator. However, if the mental disability or diminished capacity for fault is caused by a situation that the perpetrator could have avoided and the perpetrator commits a criminal act that he/she could have foreseen that he/she could commit, he/she will be considered to have full culpability and so be punished.[291] The article draws attention to two basic elements: avoidance and foreseeing. Although the

[289] http://legislationline.org/
[290] http://legislationline.org/
[291] https://www.admin.ch/opc/en/classified-compilation/19370083/index.html

possibility of negligent elimination of the culpability is not explicitly evaluated, it is stated in the doctrine that the application of negligent ALIC can be made based on the article. It is stated that the emphasis on the possibility of a situation that the perpetrator did not avoid when he could have avoided and the necessity of foreseeing that he could commit a crime while intoxicated before he became drunk enable the application of negligent ALIC.[292] The possibility of punishment in cases within the scope of negligent ALIC is important. Because if the perpetrator is not punished according to negligent ALIC, it will create an extremely unfair situation for a person with full culpability to be punished for the crime caused by only a moment of absent-mindedness. It would create an unfair situation if the perpetrator, whose act would be considered negligent because he was drunk solely due to his own carelessness, is not punished, but the other perpetrator is punished for the negligent crime due to his absent-mindedness.[293]

Another provision in the Swiss Criminal Code is found in Article 263. If intoxication is to the extent that it disrupts public order, it is punished as a separate crime. A person who, through voluntary use of alcohol or similar narcotic substances, renders himself incapable of culpability will be punished with a judicial fine if he commits a crime or misdemeanor. The amounts of the fines are determined by a separate code.[294] In Switzerland, provisions on intoxication are also found in special criminal codes. Article 80 of the Swiss Military Criminal Code of 1927 is an example. According to this article, a person who disturbs public order due to intoxication may be punished with a judicial fine of up to ninety days. A person who is voluntarily intoxicated and commits a crime or misdemeanor while in this situation is punished with a judicial fine of up to one hundred and eighty days. In mild cases, disciplinary punishment is envisaged.[295] As can be seen, Switzerland is noteworthy for having a legal system with very detailed regulations on voluntary intoxication.

In the Netherlands, in the Criminal Code dated 1881, the issues regarding the elimination or reduction of criminal responsibility are regulated in Article 39 and its continuation.[296] Issues such as mental illness, legitimate defense, execution of the order

[292] Sydow, (op. cit.) *Die Actio Libera in Causa Nach dem Rechtsprechungswandel des Bundesgerichtshofs*, p.178
[293] Ibid., p.179
[294] https://www.admin.ch/opc/en/classified-compilation/19370083/index.html
[295] https://www.admin.ch/opc/en/classified-compilation/19370083/index.html
[296] http://legislationline.org/

of the law are included, but no regulation has been made in terms of intoxication. The reason for this situation is explained in the doctrine that alcohol, drugs and other similar substances have no effect in terms of criminal responsibility.[297] In other words, if the person eliminates his/her own culpability through intoxication, criminal responsibility will continue to exist in terms of the crimes he/she commits. Besides, it is accepted that this situation has been adopted to such an extent that there is no need to base it on a special regulation. The severity of the crime and the conditions under which it was committed are among the issues to be discretioned by the judge during the determination of the penalty.[298] The acceptance of the intoxication of the perpetrator within the scope of the issues related to the commission of the crime and taking it into consideration when determining the punishment means a great expansion of the discretionary power of the judge. According to Atalay[299], this issue, on the other hand, prevents any controversy in terms of the contradiction of ALIC to the principle of legality. This is because it is generally accepted that the ALIC doctrine can be applied without the need for a written provision in the law.

In the Swedish Criminal Code (1965), it is stated that if the act constituting a crime is committed in a state of temporary intoxication or lack of mental faculties caused by the perpetrator himself, the act in question shall be deemed to constitute a crime.[300] No detailed regulation is also provided. Nevertheless, it is stipulated that the acts of the perpetrator who voluntarily removes his/her culpability have the quality of being a crime. Therefore, it can be said that the ALIC doctrine has also found a place in Sweden as a legal regulation.

A different arrangement has been made in Austria, where intoxication can be punished separately. Article 287 of the Austrian Criminal Code of 1974 regulates the committing of a crime in a state of intoxication. According to the article, whoever commits a crime, even negligently, while intoxicated to the extent that he/she loses his/her culpability, shall be punished with imprisonment of up to three years. But the penalty of the perpetrator cannot be more than the penalty for the crime committed while

[297] Anton Van Kalmthout, "Intoxication and Criminal Responsibility in Dutch Criminal Law" *European Addiction Research,* Issue 4, 1998, p.102
[298] Ibid.
[299] Atalay, op. cit., p. 44
[300] http://legislationline.org/

intoxicated.[301] This provision, as an exception to the basic principle that the perpetrator who has no culpability cannot be punished, ensures that the perpetrator is punished independently of the crime committed while in this situation. It is a regulation that is essentially equivalent to Article 323 a of the German Criminal Code. However, while the title of the German article is "senselessly drunken state", the title of the Austrian article is "committing a punishable act while intoxicated". According to Atalay[302], the title of the article preferred in the Austrian law is more appropriate. This is because it contains a more accurate approach to reveal what the punishable act is and prevents it from being perceived as if being drunk is a crime.

In the German Criminal Code of 1871, the basic regulation on deprivation of the culpability is found in Article 20. It is accepted that the perpetrator shall not be held to be at fault if, at the time of committing the act, he is incapable of understanding the illegality of the act or acting on the basis thereof due to mental disorder constituting a disease, substantial impairment of consciousness or mental weakness, or any other abnormal and severe mental condition.[303] Apart from this, since there is no regulation regarding the intentional loss of the culpability by the perpetrator, ALIC continues to exist as an unwritten rule in Germany.[304] Nevertheless, in the German Criminal Code, "vollrausch", senselessly drunken state, is regulated as a separate offense in StGB 323. Firstly, this article will be explained, then its similarities and differences with ALIC will be evaluated. Translation of the related article is following:

> (1) Whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be liable to imprisonment not exceeding five years or a fine if he commits an unlawful act while in this state and may not be punished because of it because he was insane due to the intoxication or if this cannot be excluded. (2) The penalty must not be more severe than the penalty provided for the offence which was committed while he was in the drunken state. (3) The offence may only be prosecuted upon request, authorisation or upon

[301] http://legislationline.org/
[302] Atalay, op. cit., p. 48
[303] Feridun Yenisey and Gottfried Plagemann, *Alman Ceza Kanunu Strafgesetzbuch StGB Almanca Metin ve Türkçe Çevirisi Açıklamaları ve Sözlük*, 2. Bası, İstanbul: Beta, 2015, p.19
[304] Michael Köhler, *Strafrecht Allgemeiner Teil*, Berlin: Springer Verlag, 1997, p.397

request by a foreign state if the act committed in the drunken state may only be prosecuted upon complaint, authorisation or upon request by a foreign state.[305]

Three requirements are sought for the application of this article: The perpetrator becomes intoxicated intentionally or negligently, the intoxication removes the perpetrator's culpability or it cannot be determined whether it removes it or not, and the perpetrator commits an unlawful act while intoxicated.[306] As it is understood from the requirements, this article cannot be applied if there is a suspicious situation regarding the cause of intoxication. Likewise, if the perpetrator has sufficient capacity to comprehend and volition despite having consumed alcohol and similar substances, this article will not be applied to him/her, due to the fact that he/she has not lost his/her culpability.

This article aims to ensure that the perpetrator who commits an unlawful act, but who cannot be punished by any other way due to the absence of the culpability, does not remain unpunished.[307] Due to this feature, the article is characterized as an omnibus bill "auffangtatbestand" by some authors in the doctrine.[308] This is because this article allows the perpetrator to be punished regardless of which crime is committed while intoxicated. Even if the intoxicated perpetrator commits more than one crime while in this situation, the punishment will be a single punishment.[309] Because what is penalized by this article is that the perpetrator is drunk to the point of losing consciousness. Drunkenness constitutes the objective condition for the perpetrator to be punished under this article.[310] Another purpose of this article is to eliminate the danger posed to society by excessive drunkenness. However, there is no consensus in the doctrine as to whether it is an abstract endangerment crime or a concrete endangerment crime.[311] In other words, is the sole state of drunkenness sufficient for the crime to have been committed or should it be investigated whether the state of drunkenness causes a danger? Some authors state that the crime will be committed only by entering into a state of drunkenness, and since there is no regulation in the legislation regarding the crime to be committed while drunk, it is

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305 http://legislationline.org/

306 Alan Reed, Michael Bohlander, Nicola Wake, Emma Smith, *General Defences in Criminal Law: Domestic and Comperative Perspectives*, England: Ashgate, 2014, p. 237

307 Zgaga, op. cit., p.150

308 Wolfgang Joecks, Klauss Miebach, *Münchener Kommentar zum Strafgesetzbuch,* Band 1: 1-37, 3. Auflage, 2017, Beck-Online Die Datenbank: https://beck-online.beck.de/Home, rn.151

309 Benedict Fischer and Jurgen Rehm, Alcohol Consumption and The Liability of Offenders in The German Criminal System, *Contemporary Drug Problems*, vol.23, ıssue 4, 1996, p.714

310 Köhler, op. cit., p.398

311 see in Turkish: soyut tehlike suçu, somut tehlike suçu

stated that Article 323 expresses an abstract endangerment crime.[312] According to the majority opinion, the article does not establish a connection between drunkenness and the unlawful act, only the actual and potential dangerousness of the drunk person is mentioned. Moreover, as can be understood from the content of the article, the punishment will be related to a criminal act committed only after becoming drunk. Even the procedure depends on the criminal act in question; if it is a crime subject to complaint, the complaint procedure will also be sought for the punishment of drunkenness within the scope of 323. Therefore, the dangerousness of the drunk person should be proved separately for each case, and he/she should be punished only if it is determined that he/she poses a concrete threat to the society.[313]

Here is a problematic issue for StGB 323: how is the degree of intoxication, in the title of the article "senselessly", to be measured? The German Criminal Courts consider the result of the measurement of the blood alcohol concentration as the basis for determining whether criminal responsibility is diminished. If the blood alcohol concentration is 3% or higher, the perpetrator is considered to be incapable of culpability.[314] Since it is important who made this measurement and how long after the crime, another criterion has been introduced: the principle of "in dubio pro reo", i.e. the accused benefits from the suspicion, applies.[315] Although the general method of determination is blood alcohol concentration, this method is not the sole decisive measure. In a decision of the German Federal Supreme Court, it was observed that although the blood alcohol concentration was very high at the time of the crime, the perpetrator's behavior did not resemble that of a person with diminished culpability. For example, there was no impairment of motor function. Therefore, it ruled that criminal responsibility does not need to be reduced due to the alcohol consumption of a person with a high alcohol tolerance.[316] In summary, it is stated in the decision that blood alcohol concentration cannot be accepted as a sufficient criterion on its own, and that judgment

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[312] Yener Ünver, op. cit., p.809

[313] Georg Freund and Joachim Renzikowski, “Zur Reform des 323 a StGB” *Zeitschrift für Rechtspolitik*, vol.32, no.12, 1999, p.497

[314] Jan B. Daniels, “Die Actio Libera in Causa unter dem Aspekt der Vorverlagerung der Strafbarkeit” *Grenzen der Vorverlagerung in einem Tatstrafrecht* (Eds. Arndt Sinn, Walter Gropp, Ferenc Nagy), Germany: V. R. Unipress GmbH, 2011, p.346

[315] Sydow, op. cit., p.80

[316] Fischer and Rehm, op. cit., p.712

should be rendered by evaluating all the behaviors of the perpetrator before, during and after the crime.

According to a decision of the German Federal Supreme Court, in order to punish the perpetrator pursuant to StGB 323, it is necessary that the perpetrator knew (foresee) or should have known that he could commit an offense while intoxicated. And this must be included in the article as a clear rule.[317] Because it is not explicitly stated in the text of the article that the perpetrator must have foreseen that he could commit a crime, and it does not seem possible to infer such a requirement through the interpretation.[318] It seems that one of the main differences between StGB 323 and ALIC is the following: in ALIC, the responsibility of the perpetrator begins at the moment of loss of the culpability and is aimed at punishing the secondary act of the perpetrator, whereas in StGB 323, the excessive drunkenness itself and its harmful consequences are punished.[319] Although it is important to point out this formal difference, it should be accepted that both regulations refer to the perpetrator who willingly removes the culpability. Even if it is not explicitly stated in StGB 323, it is a regulation that constitutes an exception to StGB 20. And the fact that the perpetrator, who is unable to distinguish between right and wrong, comes to this state by his own free will, prevents him from benefiting from the impunity enjoyed by perpetrators deprived of the culpability under StGB 20. In fact, in essence and in practice, the moral element sought in the perpetrator's act of the first stage is common to the ALIC and the StGB.

Another common basis between ALIC and StGB 323 is the commission of the criminal act by a person who voluntarily loses his/her culpability. Both provisions come into play when the perpetrator commits an act after losing consciousness. If an excessively intoxicated perpetrator falls asleep, he will not be punished simply because he has lost his culpability, unless his negligence constitutes an offense.[320]

In cases of intentional or premeditated ALIC, it is not possible to apply StGB 323. This is because the intent of the perpetrator referred to in StGB 323 is not a single intent that starts from the loss of the culpability and continues throughout the crime committed. On the contrary, following the loss of the culpability, an intent to commit a crime is

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[317] BGHSt 10, 247

[318] Uğur Ersoy, Türk ve Alman Ceza Hukuku Sistemlerinde Kusur Prensibinin Kapsamı ve Objektif Cezalandırılabilme Şartlarının Kusur Prensibi ile Bağdaştırılabilirliği, TBB Dergisi, no. 109, 2013, p.224

[319] Fischer and Rehm, op. cit., p.718

[320] Klaus Geppert, *Die Volltrunkenheit* (323 a StGB), Jura, Volume 31, Issue 1, 40-49, 2009, p.44

formed inside the perpetrator. For this reason, it is even suggested that this perpetrator's will to violate the law is less than the perpetrator of ALIC.[321] In our opinion, in this sense, ALIC is inclusive of StGB 323. In cases of intentional ALIC, the courts find it appropriate to apply ALIC and do not apply StGB 323.[322] This is because if the perpetrator is punished according to the relevant article of the crime as if he was fully capable of culpability on the basis of ALIC, it is no longer necessary or possible to apply StGB 323 to the perpetrator.[323] However, both the perpetrator who gets drunk with premeditation and the perpetrator who gets drunk due to carelessness can be punished under the ALIC doctrine. StGB 323 separately regulates the situation of the perpetrator who is intoxicated by simple negligence. In this respect, it is argued that in the relationship between the two, which is characterized as competitive, StGB 323 lags behind ALIC and becomes applicable to situations where ALIC cannot be applied.[324] The following two cases are given as examples: Where a person who decides to drive a car after getting drunk at home causes an accidental death, StGB 323 applies, and where a person who gets drunk at a place where he goes in his car causes an accidental death on the return way driving his car, ALIC applies.[325] In our opinion, this inference and exemplification is not appropriate. Because the first example shows simple negligence and the second example shows conscious negligence[326], and it is quite possible to apply ALIC in both cases. Only in the first case, ALIC competes with the StGB and the StGB can be applied instead of ALIC; in the second case, ALIC will inevitably prevail. To summarize, it should be stated that the ALIC is inclusive of the StGB in terms of the moral element of the first stage act (loss of the culpability). The preference for the application of StGB 323 in the case of negligence is not due to the lack of applicability of ALIC, but due to the fact that the StGB is more clear and functional in terms of determining the penalty. In fact, it is even stated in the doctrine that StGB 323 is utilized in cases where full criminal responsibility

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[321] Franz Streng, "Schuld ohne Freiheit? Der functionale Schuldbegriff auf dem Prüfstand" *Zeitschrift für die Gesamte Strafrechtswissenschaft*, vol.101, ıssue 2, 1989, p.320

[322] 06.11.2001- 5 StR 292/01, http://www.bundesgerichtshof.de/DE/Home/home_node.html

[323] Yener Ünver, op. cit., p. 854

[324] Sydow, op. cit., p.42

[325] Konrad Handel, "Criminal Law Enforcement in the Federal Republic of Germany" *University of Cansas City Law Review,* 1, 178 -211, 1963, p.203

[326] which are explained in the first chapter of this study/ thesis

cannot be imposed pursuant to intentional ALIC.[327] In this sense, it serves as an instrument of compensation.[328]

According to the comparisons in the doctrine, it is understood that in practice it differs from ALIC in terms of the degree of the moral element of the crime. In this sense, StGB 323 should be understood as a tool for the protection of society. The reason for the punishment of a perpetrator who had no criminal intent before he lost the culpability is that he was intoxicated to the extent that he lost consciousness. Such a person may be punished because of the noise he or she makes and the disturbance he or she causes to the public by being drunk.[329] From this point of view, it is meaningful that both the StGB 323 regulation and the ALIC doctrine, which does not exist in a written regulation, are included in the court decisions of German Law. The fact that intoxication without taking precautions is punished with a separate regulation is important primarily in terms of deterrence. In order not to commit any crime and not to be subjected to criminal sanctions, it will always be necessary to be careful and avoid socially dangerous alcohol consumption.[330] Secondly, the application of the doctrine of negligent ALIC in the form of a reduction in the penalty over the article regulating the relevant crime would create a discretionary power for the judge and it would be difficult to provide a standardized assessment. This difficulty can be compensated by StGB 323. It is also considered that such a functional approach to the principle of culpability leads to more satisfactory results in terms of the sense of justice in society. [331]

The main criticism of StGB 323 a is the inadequacy of the penalty stipulated in the article. It is accepted that the penalty of imprisonment for up to five years and a judicial fine is sufficient for negligent offenses, but it is considered that this penalty cannot be accepted for intentional offenses or premeditated intoxication.[332] In practice, we have stated that the courts prefer ALIC for intentional intoxication and StGB 323 for negligent intoxication. In line with this preference, it seems to be the right approach to advocate the increase of the penalty in the StGB for the sake of ALIC or the application of ALIC

[327] Geppert, op. cit., p. 42
[328] Fischer and Rehm, op. cit., p.719
[329] Sydow, op. cit., p.168
[330] Gunnar Duttge, "Der Vollrauschtatbestand de Lege Lata und de Lege Ferenda" *Festschrift für Klaus Geppert zum 70. Geburstag am 10 Marz 2011* (eds. C. Geisler, E. Kraatz, J. Kretschmer, H. Schneider, C. Sowada), Berlin: De Gruyter. 2011, p.73
[331] Streng, loc. cit., p.318
[332] Sydow, op. cit., p.165

directly. However, it is considered to be an approach that would require extra effort due to the lack of an existing legal regulation that would constitute the basis for the application of ALIC.[333] According to Atalay, this effort is inconsistent with legal procedure: In order to apply StGB 323 in cases where ALIC is not applicable, there must be a general regulation on ALIC and StGB 323 must be an exception to it. It is not reasonable to assume that a statutory provision constitutes an exception to an unwritten rule of law.[334]

Proposals to reform StGB 323 have also been made by the legislative authorities. The inadequacy of the penalty stipulated in the article in terms of serious crimes was pointed out and it was emphasized that the legal situation should be changed.[335] The German Federal Council proposed that the penalty stipulated in the article should be changed to a prison sentence of three months to twenty years.[336] The rationale for leaving such a wide range of discretion to the judges is that when sentencing, allow for the possibility of taking into account the penalty stipulated in the article of the relevant law, which was violated by the perpetrator in a state of vollrausch.[337] In this case, it would be necessary to take into account the relevant provision in the law for each offense, and this would ultimately lead to the outcome that the ALIC doctrine seeks to achieve. In other words, the legislative power, is trying to make a revision and refinement of the StGB that will enable the application of ALIC, instead of making a regulation directly related to ALIC.

Finally, it should be added that in the German Legal System, another provision on drunkenness is found in Article 7 of the Military Penal Code. According to this article, voluntary intoxication shall not be considered as a ground for reduction of punishment for a military offense committed during the execution of an order. In this sense, it differs from the Rome Statute because it does not take into account the possibility that not only the commanding perpetrator but also the perpetrator in the status of orderly who performs the duty may not be able to comprehend the meaning of the act due to intoxication as a reason for reduction in punishment. This provision, which does not even have an equivalent in the StGB, may indicate a special sensitivity in terms of military crimes.

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[333] Ibid, p.208
[334] Atalay, op. cit., p. 63
[335] Erlauterung: 968. BR, 08.06.18 https://www.bundesrat.de/SharedDocs/TO/968/erl/4.pdf?_blob=publicationFile&v=1
[336] Freund and Renzikovski, op. cit., p.497
[337] Atalay, op. cit., p.64

3.2 Actio Libera in Causa in Turkish Law

In this section, where we will discuss how the ALIC doctrine has been included in the Turkish legislation and jurisprudence, firstly, will examine the period of the Penal Code No. 765, then the period of the Criminal Code No. 5237, which entered into force in 2005, and finally the regulations in the other codes.

Article 48 of the Law No. 765 regulated the conditions that remove and reduce criminal responsibility. It was regulated that the provisions 46 and 47 would be applied to the perpetrator who was in a state of mental illness due to an extrinsic reason at the time of committing a crime.[338] In other words, in case of mental disability caused by an external reason, no punishment could be imposed by considering it within the scope of mental illness. Part 2 of Article 48 contained a provision stipulating that voluntary intoxication would not be considered within the scope of this article. According to those who characterized the regulation of Article 48 as very harsh, it was considered excessive that if a person who was intoxicated, for whatever reason, committed a crime at the moment he lost consciousness, he would be sentenced to the full penalty as if he had committed an intentional crime.[339] It was criticized that a person who gets drunk without the intention of committing a crime and later commits a crime is held responsible for negligent crime in other legal systems, but in our system, in order to combat drunkenness more effectively, the person in this situation is held responsible for intention. Moreover, interfering into a legitimate act such as alcohol consumption with harsh provisions due to the fight against drunkenness has also been discussed in terms of state intervention in individual freedom. According to Dönmezer, in a civilized society, the society has as much freedom as the individual has. One of the freedoms of the society is to protect itself against dangerous individuals and individuals who are made dangerous by, for example,

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[338] Art. 46: "Suç olan fiili işlediği anda şuur ve harekat serbestisini tamamen kaldıracak surette bir akıl hastalığına duçar olan kimseye ceza verilmez." Eng: "No penalty shall be imposed on a person who, at the time of committing the criminal act, suffers from a mental illness that completely deprives him/her of his/her consciousness and freedom of action." Art. 47: "Fiili işlediği zaman şuurunun veya harekatının serbestisini ehemmiyetli derecede azaltacak surette akıl maluliyetine müptela olan kimseye ceza verilir. Fakat bu ceza maddede gösterilen oranlarda indirilir." Eng: "A person who, at the time of committing the act, suffers from a mental illness that significantly impairs his/her consciousness or freedom of action shall be punished. However, this penalty shall be reduced in the proportions indicated in the article." (for more information see Sinan Bayındır, *Türk Ceza Hukukunda Akıl Hastalığı,* On İki Levha, 2018, pp. 99-105)

[339] Alacakaptan, op. cit., p.765 (This criticism is based on a minority interpretation of the provision.)

drugs.[340] In fact, since Article 48 does not prohibit the consumption of alcohol and does not punish drunkenness per se, the punishment and prohibition specified by it relate to the criminal act.

The article did not include an indication of premeditated intoxication. However, in order to be able to utilize the term "extrinsic reason" in the first part of the article, the perpetrator must not have any fault in the occurrence of this reason. If the perpetrator has caused this extrinsic reason through his/her own fault, even at the level of negligence, the existence of an extrinsic reason can no longer be mentioned. In Article 48/2, the same principle was adopted and it was stated that voluntary intoxication or being under the influence of narcotic drugs voluntarily would not be accepted as an extrinsic reason under any means.[341] For this reason, it is understood that the culpability will be accepted as full, even though a separate statement regarding premeditated intoxication has not been used. However, it is not possible to consider it a reason for increasing penalty through the interpretation of the law.

Although alcohol and narcotic substances were mentioned in Art. 48/2, other reasons were also accepted in the doctrine under the influence of ALIC within the scope of temporary loss of the culpability. In other words, the introduction of any natural or synthetic substance into the body or the deliberate elimination of the culpability by any other method without the introduction of any substance into the body. Even febrile diseases, sleepiness, hypnosis and epileptic seizures that cannot be medically characterized as mental illness, poisoning or other conditions that can eliminate or reduce the culpability in terms of the concrete case.

It is important to examine the application of 48/2 as reflected in the decisions of the Turkish Court of Cassation during the period when the Law No. 765 was in force, in order to see the application of ALIC. Pursuant to the provision of the law, the Court of Cassation treated the perpetrator who committed a crime in a state of voluntary intoxication as a perpetrator with full culpability. In sentencing, it has evaluated the moral element in terms of the crime committed and in doing so, it has taken as basis not the first act that resulted in the removal of the culpability, but the second act committed while the culpability was

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[340] Sulhi Dönmezer, Uyuşturucu Maddelerin Hukuk ve Kriminoloji ile İlgili Bazı Yönleri, *Journal of Istanbul University Law Faculty,* cilt 36, sayı 1-4: Ord. Prof. Reşit Belgesay Hatıra Sayısı, 1970, 1-14, p.4

[341] Sulhi Dönmezer and Sahir Erman, *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt 2, 12. Bası, İstanbul: Beta, 1999, p.157

absent.[342] For example, in a 2003 case where the morgue staff who took the gold bracelets from the victim's arm the court accepted that voluntary intoxication does not remove criminal responsibility against the defense of the perpetrator which stated that he was intoxicated at the time of the crime and could not remember his actions, yet he did not act with the intention of theft.[343] As a rationale, the court stated that since the act of taking the bracelets was carried out knowingly and willingly for the purpose of benefiting, it was understood that he acted with intent to commit a crime and all the elements of the crime of theft were realized. So, in terms of the act after intoxication, the court examined the intent and negligence and decided the application of intentional ALIC according to the qualification of the second stage act. In addition, there was no investigation of intoxication for the purpose of committing a crime or negligent intoxication.

Furthermore, in another decision of the Court of Cassation dated 1983[344], it was decided by a majority that the perpetrator who defiled the statue of Atatürk while intoxicated did not act intentionally because he did not defile the statue with the intention of insulting the memory of Atatürk. The dissenting members argued that the act was intentional because the perpetrator went to the statue, which was far away from where he was before the act of defilement. The important point in this decision is that the intention-negligence discussion was made over the second stage act and the decision was made as a result of this evaluation. In another decision of the Court of Cassation in the case where the perpetrator, who entered the shop to buy a lighter while intoxicated, was suspected of theft as a result of two lighters coming out of his pocket when he was taken to the police station as a result of the fight that broke out, it was decided that there was no reason for the perpetrator, who had no criminal record and had a job, to steal only one lighter and therefore there was no intent. Since theft is a crime that can only be committed with intent, it was ruled that there was no crime. At the time, this decision was characterized as a breakthrough in the law. This is because, if Article 48 had been applied in the case, the person would have been held responsible for the offense of theft solely because he was voluntarily intoxicated.[345] However the Court of Cassation emphasized that in the case of voluntary intoxication, the degree of fault may differ, although it stated that the culpability

342 Atalay, op. cit., p.69
343 CGK 06.05.2003, 2003/11-116 Esas, 2003/148 Karar
344 CGK 10.10.1983/9 Esas, 1983/530 Karar
345 Turhan Tufan Yüce, *Ceza Hukukunun Temel Kavramları,* Ankara: Turhan Kitabevi, 1985, p.56

would be present regardless of the intensity of intoxication. Thus, a jurisprudence has developed that the criminal act committed by the perpetrator who is intoxicated voluntarily should also be examined in terms of its moral element and a court decision should be made accordingly.

The current Turkish Penal Code No. 5237 regulates the circumstances that remove criminal responsibility under the title of "temporary reasons, being under the influence of alcohol and drugs". According to this article, a person who is unable to perceive the legal meaning and consequences of the act committed or whose ability to control his/her behavior in relation to this act is significantly reduced due to a temporary reason or alcohol and drugs taken involuntarily shall not be punished. However, the second part of the article states that the provision of the first part shall not apply to a person who commits a crime under the influence of alcohol and drugs taken voluntarily.

The first part of the Article stipulates that, in addition to intoxication or temporary cause, this cause or intoxication must cause the inability to understand or control the act. If the temporary cause did not remove the ability to perceive the legal meaning of the act or significantly impair the ability to control it, the perpetrator shall be punished with the full penalty for the offense committed. Yet, the court may still take into account the temporary cause during the determination of the penalty.[346] In the article's rationale[347], examples are given to illustrate what temporary causes may be: people working in a company where chemical substances are produced are affected by the odor emitted from the chemical substance, a mother who is breastfeeding her baby falls asleep, diabetes and psychoses that occur after pregnancy.[348] In addition to these, the doctrine gives examples of poisoning, epileptic seizures, high fever, sleepwalking and hypnosis.[349] In such cases, the act committed by the perpetrator is not approved by the legal order but "tolerated by the legal order". [350]

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[346] Koca and Üzülmez, (op. cit.) *Türk Ceza Hukuku Genel Hükümler,* p.325

[347] Basis for article, reason (in Turkish see "gerekçe")

[348] Fatih Selami Mahmutoğlu, Serra Karadeniz, *Türk Ceza Kanunu Genel Hükümler Şerhi,* İstanbul: Beta, 2017

[349] Selami Turabi, "Kusurluluk ve Kusurluluğu Etkileyen Haller" *Türkiye Barolar Birliği Dergisi*, 101, 2012, p.282 and p. 763-764.

[350] Elvan Keçelioğlu, "Kusurluluğu Ortadan Kaldıran Sebeplerle Hukuka Uygunluk Sebepleri Arasındaki Ayrımın Türk Ceza Kanununun Uygulanması Bakımından Pratik Sonuçları" *Türkiye Barolar Birliği Dergisi*, 87, 2010, p.303

The restriction with the phrase "alcohol and narcotic substances" in Article 34/2, which is considered as the equivalent of ALIC[351], is criticized in terms of narrowing the scope of the application.[352] In addition to the use of stimulants, all possibilities that may result in the loss of the culpability should be taken into consideration. In fact, the basis of the article allows for the non-exclusion of other possibilities in terms of application. Because in the basis of the article, it is stated that in the event that the mother falls asleep while breastfeeding and her baby dies from lack of air while the mother is asleep, when determining the responsibility of the mother for the death of the baby, not her behavior during sleep, but her behavior before falling asleep should be taken as basis. It is emphasized that the mother's taking the baby to bed in violation of her objective duty of care will be evaluated. In other words, although it is not stated in the text of the article and the basis of the article only refers to paragraph 1 and gives an example based on temporary reasons, in fact, as suggested by the ALIC doctrine, attention is focused on the free act by its cause. In the doctrine, it is also stated that other temporary reasons are also effective on the perpetrator, although only alcohol and drugs are mentioned in Article 34/2, which are the most common types in terms of the mediators that eliminate the culpability. Therefore, it has been suggested that Art. 34/2 should be understood to cover all of the temporary causes that voluntarily bring about the conditions that require the application of the ALIC theory.[353] Even if such logical inferences are appropriate, it must be acknowledged that the wording of Article 34/2 is restrictive, and it is clear that it would be beneficial to be more inclusive in order to ensure a straightforward understanding.

In addition, it has been criticized that in the TPC No. 5237, the temporary reasons (34/1) are listed only as the reasons that abolish the culpability and abolish the criminal responsibility. In the former TPC, a distinction was made between temporary reasons that diminish and abolish culpability. It was accepted that the punishment to be imposed on the perpetrator would be reduced in the event that the culpability was significantly

[351] "Although there is no explicit regulation on ALIC, Article 34/2 of the TPC is considered within this scope as a presumption against the perpetrator. The perpetrator, who voluntarily removes his/her culpability, is expected to bear the consequences of this." (Veli Özer Özbek, Koray Doğan, Pınar Bacaksız, İlker Tepe, *Türk Ceza Hukuku Genel Hükümler*, 8, Seçkin, 2017, p. 358.) (İzzet Özgenç, Türk Ceza Hukuku Genel Hükümler, 13, Seçkin, 2017, p.398)

[352] Fatma Ari, Selim Emre Ercan, Fahriye Pelin Tokcan, "Fallstudien die Actio Libera in Causa in der Deutschen und Turkischen Rechtsprechung" *Die Entwicklung von Rechtssystemen in ihrer gesellschaftlichen Verankerung* (Eds. Gropp, Öztürk, Sözüer, Wörner), Nomos Verlagsgesellschaft, Baden: Baden, 2014, p.563

[353] Koca and Üzülmez, op. cit., p.333

reduced due to an involuntary temporary reason. However, in the new code, temporary causes are recognized only as reasons that abolish criminal responsibility. Therefore, the reasons that allow a person to continue to partially perceive the legal meaning and consequences of the act committed or that reduce the ability to direct their behavior to a non-significant degree will not affect culpability.[354]

Another criticism of Art. 34/2 is that no distinction is made in terms of the purpose of alcohol and drugs taken voluntarily. Therefore, the lack of a distinction between a person who gets drunk with the intention to kill a person and a person who drinks at a wedding and commits the offense of damaging property by getting drunk is a deficiency.[355] Another deficiency emphasized in connection with the above is that the law does not explicitly state that the person who is intoxicated voluntarily should have at least foreseen that he/she would commit a crime afterwards. Hence, the perpetrator who is negligently intoxicated, who should have foreseen what he could do but did not foresee it, will be responsible for the full penalty sanction in accordance with 34/2. According to Önder, there is no need for a general regulation on negligent ALIC. The author accepts intentional ALIC when the intent covers both the act aimed at removing the culpability and the criminal act committed while in this state. On the other hand, he accepts negligent ALIC in the event that the perpetrator foresees that he may commit a crime in a state of lack of culpability. However, he further deduces that negligent ALIC is unnecessary. For example, if a driver continues to drive his vehicle thinking that he will not have an accident even though he is sleepy and has an accident as a result, or if a child in a building is poisoned as a result of the fainting of the person in charge during the spraying activity, he argues that it is possible to hold them responsible based on the general provisions on negligence without applying ALIC.[356]

Talas opposes this view for the following reasons: The first point to be stated on this view, which is inspired by the typicality model in the German doctrine, is the issue of the basis of responsibility in the negligence responsibility. The main difference between classical negligent crimes and negligent ALIC is as follows: In classical negligent acts, the perpetrator's behavior contrary to the duty of care, which causes the consequences, is

[354] Hamide Zafer, *Ceza Hukuku Genel Hükümler (TCK m.1-75) Ders Kitabı*, 4, İstanbul: Beta, 2015, pp. 339-340

[355] Atalay, op. cit., p.80

[356] Ayhan Önder, *Ceza Hukuku Genel Hükümler*, cilt 2, İstanbul: Beta, 1989, pp. 235-238

still avoidable before the consequences occur. Whereas in negligent ALIC, since the perpetrator is unconscious in terms of the second stage act, the possibility of preventing the consequence at the last moment is no longer in his/her hands. The difference between the situation of the parent who leaves the window open despite the possibility of the baby falling out of the window and the situation of the mother who takes her baby in her arms and falls asleep, causing the baby to suffocate to death, is that the perpetrator in the first example still has the ability to act to prevent the consequence before the consequence occurs. In terms of the examples given by Önder, the application of classical negligence will result in questions such as determining which act causes the typical consequence and the moment of the act to be left unanswered.[357] We agree with Talas on the difference of negligent ALIC from the general negligence provisions.

Moreover, Isfen criticizes the fact that no distinction is made between intentional or negligent loss of culpability in Article 34/2.[358] Due to the fact that the article only states that crimes committed under the influence of voluntary intoxication can be attributed to the perpetrator and does not mention the form of responsibility to be imposed, different opinions have emerged on this issue. One of the opinions in the doctrine is that the responsibility of the perpetrator, whose culpability is lost or diminished, should be determined by detecting the intent-negligence of the perpetrator at the time of committing the crime.[359] In other words, the second stage is based on the act in terms of the moral element of the crime. Another opinion argues that taking into account the possibility that intoxication has completely removed the person's consciousness, criminal responsibility should be determined by determining the negligence-intent that existed during the elimination of the culpability.[360] Finally, there are authors who argue that the moral element that the person has both during the removal of the culpability and during the act committed after the removal of the culpability should be evaluated.[361] As we mentioned in the first section when we talked about the types of ALIC, we hold that the acts and

[357] Talas, op. cit., p.164

[358] Osman İsfen, "Das Ausnahmemodell in Art.34/2 DES Turkischen Strafgesetzbuches- eine kritische Würdigung im Hinblick auf dessen Vereinbarkeit mit dem Schuldprinzip" *Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi*, c.1, s.1, 2011, p.13

[359] Mehmet Emin Artuk, Ahmet Gökçen, Caner Yenidünya, *Türk Ceza Kanunu Şerhi*, 1. Cilt, Ankara: Adalet Yayınevi, 2014, p. 1133

[360] İsmail Malkoç, *Açıklamalı İçtihatlı 5237 Sayılı Yeni Türk Ceza Kanunu* (m. 1-81), 1. Cilt, Ankara, 2013, p.51

[361] Atalay, op. cit., p.82

qualities of the both stages should be evaluated together in terms of the application of ALIC, which is a two-stage model.

The criticisms regarding the Turkish Criminal Code's regulation on the intentional loss of the culpability and the commission of a crime in this situation have been mentioned in general. In order to resolve debates, Ünver believes that there should be a positive regulation on ALIC and that this regulation should not impose any limitations in terms of the form of the loss or decrease of the culpability, the tool used and the person who commits this act. He also argues that negligent ALIC should be accepted along with intentional ALIC.[362] On the contrary, Soyaslan states that ALIC does not need to be regulated as a general provision in the law, because it is possible to reach the same conclusion from the interpretation of other provisions.[363] On the other hand, İsfen made a suggestion similar to the practice in the German legal system: The adoption of a separate regulation that includes the punishment of the perpetrator for eliminating the culpability through intoxication.[364] In a similar vein, Alacakaptan suggests a regulation that recognizes crimes committed in a state of intoxication as a separate offense. In this way, a system that is simple to apply would emerge and the discretionary power of the judge would be prioritized and the debates on culpability would be prevented. Moreover, if the criminal penalty will not be beneficial for the perpetrator, it will be possible to decide to impose only security measures based on the expert review.[365] According to Atalay, since these explanations are not accompanied by any recommendation on punishment, taking such a practice as a basis would not make any sense other than the transfer of the discussions on the axis of StGB 323 in the German Criminal Law system to the Turkish Criminal Law.[366]

It is also pointed out by Alacakaptan that the profession of the perpetrator might be of special importance in terms of the punishment of the perpetrator. In cases where the perpetrator of ALIC is a driver, pilot or a person belonging to similar professions, the assessment to be made will be of greater importance, and it is necessary to decide on the

[362] Yener Ünver, op. cit., p.825
[363] Soyaslan, *Ceza Hukuku Genel Hükümler*, p.394
[364] İsfen, op. cit., p.41
[365] Alacakaptan, op. cit., pp. 134-137
[366] Atalay, op. cit., p.85

temporary or permanent dismissal of these persons from the profession or service together with the punishment they will receive.[367]

Through Article 34/2, which is based on the same grounds as the ALIC theory, an exception is created in the system of general provisions of criminal law, whereby individuals are expected to bear the criminal consequences of the acts they commit within the framework of their voluntary intoxication.[368] In a 2016 decision of the Criminal General Assembly, it is noteworthy that the phrase "Actio Libera in Causa" was explicitly included in the evaluation.[369] Comparisons between 34/2 and ALIC in the doctrine and judicial decisions point to a meaningful relationship.

Crimes committed while not having the culpability are regulated in the Turkish Penal Code as a situation affecting criminal responsibility within the scope of temporary reasons. After reminding that the minimization of ALIC responsibility to drunkenness has been the subject of criticism, it should be noted that other codes also contain specific regulations on drunkenness. In the Military Penal Code, after stating that it is bound by the Turkish Penal Code in terms of general provisions, a regulation on the effect of being in fear for personal safety and voluntary intoxication on the punishment is included in Article 46. It is stated that voluntary intoxication cannot lighten the punishment in disciplinary violations and misdemeanors or offenses committed during military service. The expression "offense committed during military service" is discussed in the doctrine as it may be understood as a condition of punishment stipulated by the law. If the offense committed by the soldier while intoxicated was not committed during service, which law should be applied? According to Ünver, the Military Penal Code regulation does not aim to prevent the application of Article 34/2 of the Penal Code and therefore ALIC.[370] According to this view, offenses committed by a soldier under voluntary intoxication outside of service will be punished in accordance with Article 34/2 and criminal responsibility will be presumed to be full. Article 46 of the Military Penal Code includes not only intoxication but also fear for personal safety. Accordingly, failure to perform a service or a command of service constitutes an offense. If the failure to fulfill the command is due to the soldier's fear for personal safety, this has no effect on the

[367] Alacakaptan, op. cit., p. 136
[368] Toroslu, **(op. cit.)** *Ceza Hukukunda İsnat Yeteneği*, p.104
[369] CGK 2016/12-748 Esas, 2016/405 Karar, 08.11.2016
[370] Yener Ünver, op. cit., p.880

commission of the offense and the penalty. This is because military service does not involve fear, but endurance of risk. This article regulates a special state of responsibility. Normally, even harming another person due to fear of harm to one's self is considered a reason for impunity within the scope of self-defense, but in the case of military service, even fleeing due to fear gives rise to criminal responsibility.

In the Military Penal Code, only drunkenness is mentioned among the cases of loss of the culpability under the scope of ALIC, but since the Turkish Penal Code will be taken as basis in terms of general provisions, other temporary reasons should also be taken into consideration. For example, in the case of a soldier who sleepwalks and gets his weapon stolen when he falls asleep during his watch, it cannot be said that he has no culpability.[371] Because in this example, the soldier fell asleep when he should not have fallen asleep during his watch and had his weapon stolen while he was in a situation of lack of culpability caused by his own will.

The Misdemeanor Law does not provide a separate provision for temporary reasons and misdemeanors committed when the culpability is voluntarily lost. However, the basic principles regarding crimes and misdemeanors are common.[372] In terms of misdemeanors, free will during the act is a prerequisite for responsibility.[373] On the other hand, although it is not regulated as a crime in the Turkish Penal Code, drunkenness constitutes a misdemeanor itself pursuant to Article 35 of the Misdemeanor Law. According to this article, an administrative fine is imposed by law enforcement officers on a person who is drunk and behaves in a way that violates the peace and calm of others, and the person is also kept under control until the drunkenness is over. Here, the law enforcement officers are authorized in terms of a new type of arrest called "keeping under control".[374] In order for this article to be applied, firstly, the person must be intoxicated to the extent that he/she is unable to control his/her actions, and secondly, he/she must disturb the peace of others with his/her behavior as a result of this situation. The discussions on abstract and concrete endangerment offenses in the section on the StGB are also valid for this article. However, since the condition of disturbing others is sought in the text of the article, we think that it

[371] Fahrettin Demirağ, *Türk Ceza Kanununun Genel Hükümleri Işığında Askeri Ceza Kanunu,* Ankara: Seçkin, 2016, p.670

[372] Erdener Yurtcan, *Kabahatler Kanunu ve Yorumu,* Beta Yayınlan, İstanbul, 2005

[373] Sulhi Dönmezer, *Genel Ceza Hukuku Dersleri*, İstanbul: Bahçeşehir Üniversitesi Yayınları, 2003 p.217

[374] Feridun Yenisey, *Kolluk Hukuku,* 2. Bası, İstanbul: Beta, 2015, p.167

is a concrete danger crime / misdemeanor. According to the basis of the article, in order for this provision to be applied, the behavior does not necessarily have to be carried out in a public place. Disturbing other family members or neighbors in one's own home is also sufficient for sanctions to be imposed.[375] Finally, it should be noted that, although the title of Article 35 of the Misdemeanor Law is drunkenness, it is not the drunkenness itself that is considered a misdemeanor and sanctioned; it is causing environmental disturbing situations while being drunk.

3.3 *New Possibilities Related to The Technological and Medical Developments*

With the developing technology, there are possible innovations on basically two issues related to ALIC. The first issue is the neurological studies regarding the responses to the question of the presence or absence of the culpability, which is one of the elements of criminal responsibility, and therefore the presence or absence of free will. While determining the moral element of ALIC, i.e. the intent and negligence of the perpetrator, it will not be enough to observe only his/her behavior and demeanor; with brain imaging techniques, the formation of the decision regarding the act, which is assumed to involve free will, can also be examined at the physical level. The first part of this chapter will discuss the possible effects of neurological studies on legal responsibility and therefore on the application of the ALIC doctrine. The second issue is, technological developments may add new ones to the temporary reasons covered by ALIC, such as electromagnetic mind manipulation and brain battery. In the second part of this section, we will discuss how new temporary reasons related to developing technology may have an impact on the application of the ALIC theory.

Contrary to philosophy, neuroscience does not see the mind as a phenomenon in its own right, but as a " epiphenomenon" of bodily mechanisms.[376] In other words, according to neuroscience, the mind is not a decision-making authority that dominates the body, but on the contrary, it is a concept, an epiphenomenon generated by physical mechanisms in

[375] Erdener Yurtcan, *Yargıtay Kararları Işığında Kabahatler Kanunu ve Yorumu*, 2. Bası, Ankara: Türkiye Barolar Birliği Yayınları, 2016, p.328

[376] Yavuz Selim Tübcil, Afra Yörükoğlu, Ali Murat Durdu, Mehmet Sinan Tübcil, "Zihne Yapılan Elektromanyetik Manipülasyonun Maddi Ceza Hukuku Açısından İncelenmesi." *Suç ve Ceza 14.2*, 2021, p.395

the body.[377] This approach of neuroscience, which is fundamentally opposed to Kantian dualism, which regards mind and body as two separate entities, has led to serious developments in the last fifty years. Numerous studies have been conducted on the role of the human brain in physiology. Brain-related research is being carried out on the production of thinking, the mechanisms of will and decision-making, and what consciousness is. But first of all, it should be noted that even though there have been advances in the field of neurology in recent years, what "consciousness" is and how it is formed remains unclear. Physicists are trying to understand consciousness by using quantum mechanics. Some functional properties of quantum mechanics, such as non-determinism, are said to provide an alternative basis for understanding and analyzing complex consciousness processes such as information analysis and decision-making.[378] Since the brain is at the center of the decision-making mechanism, the interaction between neuroscience and the branches of science that include human will at their core has increased and new fields of study such as neuropsychology and neuroethics have emerged.[379] The interdisciplinary field that examines the relationship between neuroscience and law is called neuro-law. The term was first used in 1991 and is the name of the branch of science that investigates the role of the brain on human behavior and its impact on legal disputes. The main research topics are the effect of neurological disorders on criminal responsibility and the usability of neuroscientific evidence in criminal procedure. Neurocriminology is the branch of science that investigates the role of the human brain in the commission of crime.[380] It studies the role of brain structure and characteristics in the commission of crime and whether there is a link between neurological disorders and criminal behavior. With the help of various technologies such as brain imaging techniques, researchers working in this field analyze various aspects of crime and criminality based on the structure of the brain.[381]

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377 John Jamieson Carswell Smart, "The Mind/Brain Identity Theory" *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), (ed. Edward Nouri Zalta), https://plato.stanford.edu/archives/spr2021/entries/mind-identity/

378 Mustafa Erol, *Kuantum Fiziği ile Bilinç Çağına Yolculuk*, İstanbul: Nobel Akademik, 2022, p.10

379 Aykut Eken, "Sosyal Beyni Anlamak için Disiplinler Arası Yeni Yaklaşımlar" *Pivolka*, c.7, s.25, 2017, p.3

380 Zafer İçer, "Nörokriminolojik Açıdan İrade Özgürlüğü ve Ceza Sorumluluğu" in *Özgür İrade: Hukuk, Nörobilim, Psikoloji ve Ötesi* (eds. Ozan Erözden, Salih Haydar Günler, Mustafa Ebrar Palteki, Cem Uysal), 2021, p.191

381 Zafer İçer, "Yapay Zeka Nörohukuk Sisteminde Suç ve Cezaya Yaklaşım" in *11. Uluslararası Eğitim Denetimi Kongresi, Eğitim, Hukuk ve Yapay Zeka Bildiri Kitabı,* Aralık 2019, p.106

It should be reminded that the two main historical doctrines regarding free will are the classical and positivist doctrines. The classical school grounds the basis of criminal responsibility on freedom of will and argues that the mentally ill cannot be held responsible for the acts they commit because they do not have freedom of will.[382] The positivist school, on the other hand, does not accept freedom of will and argues that actions are the absolute result of internal and external factors. As a result, it argues that the mentally ill can commit crimes and should be held responsible since they pose a danger to society.[383] Lombroso analyzed criminal skeletons, facial expressions and measurements of criminals and tried to determine the anatomical, biological and psychological differences of them, and tried to reveal the role of these differences in the commission of crime. Criminology emerged with the influence of the positivist school. Following Kant, phenomenal consciousness came to be seen as the source of free will and the dualist view holding that man is more than a machine became dominant. Defending the ontological irreducibility of phenomenal consciousness assumes that there is an unbridgeable explanatory gap between subjective experience and objective brain activity.[384] Legal systems, which since Kant have considered the human will as the source of human dignity and placed it at the center of law, have been wounded by interventions on the human will in laboratory environments, making it necessary to think about new normative definitions.[385]

Today, human brains can be observed with electroencephalogram (EEG) and magnetic resonance imaging techniques and brain activity can be monitored in detail.[386] In addition to studying brain structure, these techniques are also used in criminological research to understand and analyze criminal behavior.[387] According to Adriane Raine's neuroimaging study on criminals, the prefrontal cortex of murderers is less functional. The prefrontal cortex, a area linked to complex mental and cognitive processes related to

[382] Somay Tümerkan, "Klasik ve Pozitivist Okullarda ve Toplumsal Savunma Hareketinde Ceza Sorumluluğunun Esası" *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, c.48, 1-4, 1983, p.52

[383] Fatmanur Akgün, "Suçlu Davranışı Konusunda Klasik Okul ile Pozitivist Okulun Yaklaşımları" *Ceza Hukuku Dergisi,* c.7, s.19, 2012, p.327

[384] Joseph Levine, "Materialism and Qualia: The explanatory Gap" *Pacific Philosophical Quarterly*, n.64, 1983, p.354-361

[385] Joshua Green and Jonathan Cohen, "For The Law Neuroscience Cahnges Nothing and Everything" in *Oxford Handbook of Neuroethics* (eds. Judy Illes and Sahakian J. Barbara), 2011, p. 655

[386] Tade Matthias Spranger, "Neurosciences and The Law: An Introduction" in *International Neurolaw, A Comperative Analysis* (ed. Tade Matthias Spranger), Heidelberg, 2012, p.1

[387] Nicole Rafter, Chah Posick, Michael Rocque, *The Criminal Brain, Understanding Biological Theories of Crime,* 2. Edition, New York, 2016, p.262

control, logic and problem-solving abilities, is called the guardian angel of behavior by Raine. However, it was found that the prefrontal cortex of serial killers functioned at a high level, while the non-functioning area was amygdala, which is associated with empathy and the feeling of regret.[388] The amygdala is made up of clustered mirror neurons and allows us to know what is going on in someone else's mind. The mirror neurons play a key role in the development of psychopathy because they allow us to understand what another person is feeling.[389] It remains unclear whether the prefrontal cortex of these individuals is developed by different premeditations before killing or whether it is innately developed.[390]

There are also case studies showing the effect of the brain on crime. H. Weinstein, who had never committed a crime before and was known to be non-violent, killed his wife and threw her out of a window after an argument. The perpetrator's positron emission tomography revealed that a tumor was pressing on his prefrontal cortex.[391] It cannot be determined with certainty whether the perpetrator would have committed the crime without this tumor. However, the view that he would most probably not have committed such an act is not without a logical basis. The question of whether or not such acquired brain diseases constitute a valid temporary reason in terms of the culpability will undoubtedly be one of the primary topics of discussion among the criminal law doctrine in the coming period.[392] Furthermore, depending on its severity and nature, brain deseases may even be characterized as a mental illness over and above a temporary reason.

The working principle of the brain in the decision-making process is summarized as follows: (1) Data perceived by the five senses are transmitted to neurons. (2) Neurons carrying new data and experiences communicate with other neurons. (3) The signals resulting from this communication interact with and activate the relevant parts of the brain that perform various functions. (4) The signals processed in these parts activate the prefrontal cortex of the brain and a conscious decision is formed.[393] Some authors have emphasized the risk that the determinism assumed in terms of the working principle of the brain may turn into fatalism. In spite of this risk, a person can overcome the tendency

[388] Adrian Raine. *The Anatomy of Violence: The Biological Roots of Crime*. Vintage, 2013. 61-100
[389] Rita Carter, *Beyin*, İstanbul, 2013, p.124
[390] İçer, (op. cit.) "Nörokriminolojik Açıdan İrade Özgürlüğü ve Ceza Sorumluluğu", p.196
[391] Susan E. Rushing, "The Admissibility of Brain Scans in Criminal Trials: The Case of Positron Emission Tomography", *Court Review,* vol.50, p.62
[392] İçer, loc. cit., p.197
[393] Ibid, p.200

to self-deception and move towards a much more effective orientation with his or her own self, and this orientation can lead to an increase in the freedom of the inner will.[394] In area of law, the culpability sought for criminal responsibility defines a minimum level of freedom and the ability to action; and we -as lawyers- postulate that it is present in every average individual of a certain age and degree of cognition. In other words, the basis of criminal responsibility is not the assumption of an absolute freedom of will, but the assumption of an adequate freedom of will. Otherwise, various individual and environmental disadvantages could be used as an excuse to evade responsibility. Although the functions of the brain seem to be unchanging processes that follow each other and there is a risk of creating a perception of absolute determinism, in our opinion, contrary to this risk expectation, learning the working principle of the brain emphasizes the existence of free will and sheds light on how it can be developed. When these researches were not able to be carried out, the fact that human beings, unlike other creatures, could be held responsible for their actions was tried to be explained by their ability to communicate and socialize. As we mentioned in the previous chapter, contemprorary neurobiology studies have revelead that knowledge and experience do activate the brain areas associated with our reasoning abilities. The way to increase inner freedom and make free decisions is to have access to diverse sources of information and gain experience. In this sense, in terms of political freedom, we find it important to ensure freedom of the press and freedom of expression in order to increase the diversity of information. In terms of combating crime, it should be noted that informative psychosocial education practices would be preventive and important in order to reduce the genetic and environmental factors that lead to criminal tendencies. Internal factors, such as the structural characteristics of the brain, can only provide insight into an individual's tendency to commit crime. The ability to control is a personal responsibility that must be developed through the practice of self-reflection. Environmental factors should be tried to be corrected through the study of the sociology of law. The other element, knowledge, is a responsibility both on the executives in terms of providing access to information and on the individual himself/herself in terms of exercising the will to use the sources of information to which he/she has the opportunity to have access. Even if absolute freedom cannot be realized, it is important to try to maximize it both internally

[394] Altan Heper, “Nörobilimler ve Hukuk Üzerine” *Ceza Hukuku Dergisi,* s.28, 2015, p.306

and externally. Attention should be drawn to the difference between the brain and the mind, so it should be suggested that the machine called the brain should be used functionally and efficiently to develop the mind and mental capacity.

There are also opinions in the doctrine arguing that the neurobiological studies should not be the only reference for the determination of free will. According to Akal, due to the newness, variety and uncertainty of the field opened by neuroscience, it is obvious that this science remains at the level of assumptions and predictions for now. Akal warns that these assumptions should not be turned into a consumeristic superstition of scientificism. Neuroscience, too, has a place in the infinite diversity of nature, and in the unity of body and mind, the human being cannot merely consist of the brain.[395]

Akal also explains that it is important not to be conservative about neuro-law with an example of a case. In India, a woman who allegedly poisoned her boyfriend with arsenic was convicted on the basis of neuroscience experts who found that she had a cerebral reaction to the word "arsenic" in an EEG test.[396] This judgment and neuroscience are criticized for failing to be impartial to a patriarchal pseudo-truth. In order to avoid the danger of a complete submissivist perspective, but at the same time to benefit from neuroscience, Akal suggests using neuroscience only to help the advocacy of the defense, and thinks that this might be a fairer solution. Otherwise, he warns, neuro-law conservatism could even turn us back to Lombroso[397]: Neuroscience, within the scope of the sovereignty granted to it, can decide in a pre-determination that anyone is responsible by looking at his or her brain alone, without taking into account the countless reasons why he or she qualifies as dangerous. And this could transform the system of punishment for the act of the perpetrator into the extremism that punishment for who the perpetrator is and what physiological characteristics he or she possesses.[398] As we noted in chapter two, there are three types of action: being, having and doing. A murderer who kills a man should not be punished because he has the genes that cause the tendency to commit this

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[395] Cemal Bali Akal, "Özgür İrade Reddi ve Natüralizm Açısından Hukuki Bilimden Nörobilime" in *Özgür İrade: Hukuk, Nörobilim, Psikoloji ve Ötesi* (eds. Ozan Erözden, Salih Haydar Günler, Mustafa Ebrar Palteki, Cem Uysal), 2021, p.31

[396] Laura Pignatel, "L'Emergence du neurodroit Dans le Monde", *Le Cerveau est-il Coupable?* p.65

[397] Lombroso's theory of biological criminology suggests that criminality is hereditary and that a --- 'born criminal' person can be identified by his or her physical appearance. In 1876, he proposed an atavistic (ancestral) form as an explanation for criminal behavior. This explanation centered on the idea that criminals have physical distinguishing characteristics. In his book 'The Criminal Man' (L'Uomo delinquente), he proposed that there are different biological classes of human beings prone to crime.

[398] Akal, op. cit., p. 36

crime. Nor should he be punished for being a murderer; his identity becomes that of a murderer because he commits the voluntary act of killing, and he should be punished for that crime itself. What is blameworthy is not identity or biological or environmental characteristics, but the act itself. The legal scholar must utilize tools to identify the real causes, but must also be able to remain autonomous. For crimes committed under ALIC, neuro-law can be useful in the following ways: Determining the level of reduction in the culpability and hence the type of ALIC. But this would require the necessary tests before the temporary cause gives way to a normal situation of one with full culpability, which would of course be difficult to practise. But it would be possible to calculate, for example, the brain function of a diabetic in a state of deprivation and its effect on the culpability.

With the developing technology, it will be possible to intervene in brain functions as well as detecting brain functions. In the 20th century, discoveries in quantum physics led to the development of new microscopy methods. The invention of the scanning tunneling microscope in 1981 made it possible to observe individual atoms, paving the way for the control of matter at the atomic and molecular level. One of the applications of this branch, called nanotechnology, was the development of nanoscale robots. With the applications of this technology on the human brain, it is stated that it may be possible to observe, record and even manipulate brain-based data such as mood and decision-making at the cellular level. It is also stated that brain-brain, brain-computer and brain-cloud interfaces can be developed and manipulation can be carried to much more advanced dimensions.[399]

The Stimoceiver has been a pioneering invention in the history of neuroscience. Developed by Jose Delgado in the 1950s, this device, which he named by combining the words stimulator and receiver, could measure and record electrical changes in the brain area where it was surgically implanted and generate electrical stimulation in the same area. The system consisted of two parts: the part connected to the brain and the part connected to the computer. The frequency, intensity and duration of the electrical stimulation could be adjusted on the computer and sent wirelessly to the brain via radio waves. In this way, the patient's mobility was not restricted and communication was not lost in cases such as epileptic seizures. In addition, since the experimental setup could be

[399] Nuno Martins, Amara Angelica, Krishnan Chakravarthy, Yuriy Svıdınenko, Frank Boehm, Ioan Oprıs, Mikhail Lebedev, Melanie Swan, Steven Garan, Jeffrey Rosenfeld, Tad Hogg, Robert Freıtas, "Human Brain- Cloud Interface" *Frontiers in Neuroscience,* vol. 13, no. 112, 2019, pp. 1-3

hidden from the eyes, the patient could interact in a natural environment.[400] The most famous of Delgado's stimoceiver experiments is the bullfighting experiment he conducted in 1963. In this experiment, Delgado appeared with a red cape in front of the bull in which he had implanted a stimoceiver in the area of the brain that regulates aggressive behavior. When he was about to be hit by the bull's sharp horns, he pressed the button on the remote control in his hand, stopping the bull and making it turn back.[401] Delgado, who gained big budgets thanks to his growing popularity and started human experiments, tried to put his work on a philosophical ground by publishing a book.[402] He claimed that the device he developed would take human evolution to a new level by eliminating the behaviors that cause primitiveness like aggression in humans. However, rising ethical standards pushed Delgado out of the literature in the 1970s, leading to the replacement of brain intervention methods with pharmaceutical treatment.[403] In the 1980s, the failure of pharmaceutical treatment to show the expected effect and the restriction of the use of psychoactive medicines for therapeutic purposes due to their negative effects led the literature to new searches. With the development of electronic technologies, electrical manipulation of the brain has once again attracted the greater interest.[404]

Experiments have shown that electronic waves sent into the brain of human subjects can affect the way they judge others[405], the regret they feel[406], their level of aggression[407], their sleep and wakefulness[408], and their cognition. This wide range of effects of

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400 John Horgan, "The Forgotten Era of Brain Chips", *Scientific American*, vol. 293, no.4, 2005, pp.66–73

401 Timothy Marzullo, "The Missing Manuscript of Dr. Jose Delgado's Radio-Controlled Bulls" *Journal of Undergraduate Neuroscience Education,* volume 15, no 2, 2017, pp. 29-35

402 Jose Manuel Rodriguez Delgado, *Physical Control of The Mind: Toward A Psychocivilized Society,* New York, 1971, p. 31

403 Horgan, op. cit., pp. 66–73

404 Yavuz Selim Tübcil, Afra Yörükoğlu, Ali Murat Durdu, Mehmet Sinan Tübcil, "Zihne Yapılan Elektromanyetik Manipülasyonun Maddi Ceza Hukuku Açısından İncelenmesi." *Suç ve Ceza 14.2*, 2021, p.405

405 Liane Young, Joan Albert Camprodon, Marc Hauser, Alvaro Pascual-Leone, Rebecca Saxe, "Disruption of the Right Temporoparietal Junction with Transcranial Magnetic Stimulation Reduces the Role of Beliefs in Moral Judgments" *Proceedings of the National Academy of Sciences,* Volume 107, no. 15, 2010, pp.6753–6758

406 Danique Jeurissen, Alexander Sack, Alard Roebroeck, Brian Russ, Alvaro Pascual-Leone, "TMS Affects Moral Judgment, Showing the Role of DLPFC and TPJ in Cognitive and Emotional Processing" *Frontiers in Neuroscience*, vol. 8, no. 18, 2014, p.8.

407 Dennis Hoffman, Dennis Schutter, "Inside the Wire: Aggression and Functional Interhemispheric Connectivity in The Human Brain" *Psychophysiology*, vol. 46, no.5, 2009, pp.1054– 1058.

408 Marcello Massimini, Fabio Ferrarelli, Steve Esser, Brady Rıedner, Reto Huber, Michael Murphy, Michael Peterson, Giulio Tononi, "Triggering Sleep Slow Waves by Transcranial Magnetic Stimulation" *Proceedings of the National Academy of Sciences,* vol. 104, no. 20, 2007, pp. 8496–8501.

electromagnetic mind manipulation devices, although promising for the treatment of many diseases, makes it possible for these devices to be turned into highly dangerous weapons when misused.[409] The Havana Syndrome is a case in point. In 2016, more than twenty diplomats working at the United States embassy in Havana, Cuba, and their families began to suffer from a mysterious illness. The diplomats reported hearing a ringing-like sound at night, followed by a feeling of vibration and pressure on their faces and bodies, followed by nosebleeds, headaches, dizziness, fatigue, problems with sleep and consciousness, and impaired vision, hearing and sense of balance. Some of the effects were temporary, but some recurred. After examinations, brain damage and oedema were found in their brains, a disorder named as Havana Syndrome. After at least 11 employees at the US consulate in Guangzhou, China, suffered similar symptoms in 2018, the issue came under scrutiny as a matter of national security. An article published in 2018 in the journal Neural Computation, published by the Massachusetts Institute of Technology, found that the symptoms were consistent with those of patients previously exposed to electromagnetic waves, that the waves were the cause, and that they were identical to Havana Syndrome.[410] In the doctrine, it has been discussed within the scope of which crime such interventions should be included, and it has been stated that one of the legal values it damages is human dignity. Human dignity is related to human freedom, will and intellect, and the loss of these characteristics through external or internal intervention means that human dignity is damaged. And according to the Kant-centered approach, the responsibilities of such a person are removed.[411]

The effect of the electromagnetic manipulation or nanorobot on a person, whether used for therapeutic purposes or directly for malicious purposes, will also affect the legal responsibility of that person and have consequences in terms of criminal responsibility. In some cases, as the person loses autonomy and even becomes alienated from himself/herself, it may be possible that his/her criminal responsibility may be reduced or completely eliminated.[412] As in the case of Havana Syndrome, in external interventions that eliminate the culpability, periods of attacks may be considered as temporary causes

[409] Tübcil and Yörükoğlu and Durdu and Tübcil, op. cit. p.413

[410] Beatrice Alexandra Golomb, "Diplomats' Mystery Illness and Pulsed Radiofrequency/Microwave Radiation" *Neural Computation*, vol. 30, no. 11, 2018, pp. 2882–2985

[411] Pollok Konstantin, *Kant's Theory of Normativity: Exploring the Space of Reason*, Cambridge University Press, 2017, pp. 201-219

[412] Susanne Beck, "Grundlegende Fragen zum Rechtlichen Umgang mit der Robotik" *Juristische Rundschau*, issue 6, 2009, p.228

that eliminate criminal responsibility. In fact, such movements are not considered as actions in the criminal law sense because they are not governed by free will. Therefore, there is no voluntary action on which criminal responsibility can be based. However, nanorobots or brain batteries, as in the example we gave with Delgado's Stimoceiver experiment, may require different evaluations. In the case of nanorobots that cause deep brain stimulation and have such potential dangers, their unfavorable negative effects on the personality of the patient brings about a new possibility that requires an examination in terms of the ALIC theory when such devices are left to the patient's control.[413] Just as if a person consumes alcohol under the influence of alcohol, despite knowing that he is generally prone to violence, and if he starts a fight and injures someone after getting drunk, he will be held responsible under ALIC for the act of injury he commits, despite his lack of culpability; in the case of the use of a brain battery, if the person who consents to the implantation of a nanorobot in his body, which he knows may have an effect on his psychological state, commits a crime in a state of diminished culpability as a result of the psychological imbalances that occur, he may be held responsible for this crime within the scope of ALIC.[414] This is because if the patient causes a criminal consequence due to a malfunction in the medical device he/she uses against his/her will, he/she will not be held responsible for this, but the consequences that occur with the patient's will would cause his/her criminal responsibility.[415]

In order to apply ALIC, the patient must have acted intentionally or negligently with regard to the removal of the culpability. Beck expresses his opinion on this issue with an example: A person who activates a brain battery, despite knowing that it has the effect of increasing sexual desire, cannot be considered to have acted intentionally for this reason alone. According to the author, in order to accept that a patient acted intentionally, it is necessary to know that he/she is likely to engage in disapproved sexual behavior towards every person he/she encounters. In order for the patient to be relieved of criminal responsibility in this situation, he/she is expected to take measures to ensure that he/she

[413] Gerrit Hornung, and Manuela Sixt, "Cyborgs im Gesundheitswesen: Die rechtlichen Herausforderungen der technischen Erhaltung und Optimierung körperlicher Funktionen" *Computer und Recht*, vol. 31, no. 12, 2015, https://doi.org/10.9785/cr-2015-1214, p.833

[414] Atalay, op. cit., p.304; Beck, (loc. cit.) "Grundlegende Fragen zum Rechtlichen Umgang mit der Robotik" p.229

[415] Timothy Brown, Patrick Moore, Jeffrey Herron, Margaret Thompson, Tamara Bonaci, Howard Chizeck, Sara Goering, Personal Responsibility in the Age of User Controlled Neuroprosthetics, in *International Symposium on Ethics in Engineering, Science and Technology* (Vancouver, BC), pp. 6-7

stays at home or to apply to a treatment or therapy center, depending on the severity of the case.[416] Not treating a patient in a critical condition with new technological methods only because of the possibility of posing a danger to society may create an unfair and disproportionate situation.[417] According to Atalay, what should be done here is to make an assessment by establishing a balance in accordance with the principle of sacrifice balancing. Whether a healthy individual or a potential criminal will be brought to the society, the extent of the disease, the recovery potential of the treatment and the risks it will pose should all be evaluated together.[418]

In the future, in addition to the classical situations that necessitate the application of the ALIC doctrine, it is already evident today that there will be different possibilities as a result of developments in the technological sphere. Eagleman states that as time progresses and science develops, the situations in which perpetrators should be held accountable may also change. In the future, actions that have the quality of changeability will be evaluated differently.[419] With the help of classical views, new solutions can be produced to the problems that may arise. It will be necessary to make evaluations by closely following the developments and comparatively examining and using the theories of criminal responsibility.

[416] Susanne Beck, Neue Konstruktionsmöglichkeiten der Actio Libera in Causa, *Zeitschrift für Internationale Strafrechtsdogmatik,* 13. Jahrgang, 2018, p.206

[417] Susanne Beck, “Grundlegende Fragen zum Rechtlichen Umgang mit der Robotik” p. 229

[418] Atalay, op. cit. p.305

[419] David Eagleman, *Incognito: Beynin Gizli Hayatı* (çev. Zeynep Arık Tozar), 2016, p.192-193

CONCLUSION

Law is a coercive order of social life. For this reason, the law establishes various rights and responsibilities and imposes certain measures in order to maintain social order. The essence of punishment is to prevent crimes and to rehabilitate and reintegrate the perpetrator into society; and the purpose is to preserve the social peace without violating it. For this reason, even if there is no damage yet, there may be cases where even attempting to violate the order of peace or creating a dangerous situation alone is considered sufficient for criminal responsibility.

In modern law, the principle of "nulla poena sine culpa" (legal principle requiring that one cannot be punished for something that they are not guilty of) is commonly adopted. This principle, as well as stipulating that no punishment can be imposed on a person who is not culpable, also prohibits the imposition of a heavier punishment than the culpability of the perpetrator. The reason for the punishment of the perpetrator punished within the scope of ALIC for the act committed while his/her culpability was impaired is his/her previous culpable act that caused the impairment of his/her culpability. However, as we explained in the first chapter of this study, there are different types of ALIC and the degree of culpability of the perpetrator varies depending on which of these types he/she commits. In the doctrine, ALIC is mainly analyzed in two categories of culpability: intentional ALIC and negligent ALIC. In our opinion, this categorization is insufficient and causes perpetrators who have different degrees of culpability to be evaluated in the same category. Surely, even if the result is the same, the degree of culpability of the perpetrator who commits both the first and second stage acts negligently is not the equivalent to the degree of culpability of the perpetrator who commits the first stage act negligently and the second stage act intentionally. Likewise, the degree of culpability of the perpetrator who impairs his/her own culpability by premeditating to commit a crime is not the equavelent to the degree of culpability of the perpetrator who intentionally commits both the first-stage act and the second-stage act (we tried to explain the difference between these two with the combinations of direct criminal intent-intent and eventual criminal intent-intent). Therefore, we recomend that the addition of two other categories, namely "premeditated ALIC" and "hybrid ALIC", to the types of ALIC would be beneficial in terms of determining the degree of culpability and the severity of the punishment. We would also want to draw attention to the importance of making a case-by-case assessment when determining culpability and criminal responsibility in cases where ALIC (especially hybrid ALIC) occurs.

In order to understand ALIC, it is important to understand the concepts that constitute ALIC. In this context, the correct translation of *Actio Libera in Causa* is necessary to enable us to think through the right concepts, and we suggest that the translation "menşei itibarıyla hür fiil" (free action as of its cause) is appropriate, as we reasoned in the first chapter. We have taken special attention to explain the importance of the concept of freedom embodied in the doctrine in the second chapter. As we have learned from comparative studies, the belief that free will is a natural characteristic of human beings is universal, in other words, it is present in all cultures and societies.[420] Modern criminal law is also based on the acceptance of freedom of will. "Freedom of will must be accepted as a postulate in this sense. Otherwise, accepting a deterministic approach in the field of law would turn law into a purely technical activity, not only in the field of criminal law but in all other fields as well."[421] Moreover, the effect of the belief in free will on individual and social responsibility is also positive. According to an experiment conducted in 2008[422], the subjects who were conditioned to believe that free will does not exist were more likely to cheat and engage in deceptive behavior than subjects who were conditioned to believe that free will does exist. In subsequent experiments, it was found that a weakened belief in free will increases the tendency to engage in aggressive behavior, whereas a strong belief in free will increases parameters such as helpfulness and the ability to control negative emotions.[423] These findings raise concerns that if the arguments and beliefs that the concept of free will is groundless gain power, destructive consequences may emerge in terms of social life.[424] It is therefore important to work

[420] H. Sarkissian, A. Chatterjee, F. De Brigard, J. Knobe, S. Nichols, S. Sirker, "Is Belief in Free Will a Cultural Universal?" in *Mind and Language*, vol.25, 2010, pp.346-358

[421] Talas, op. cit., p. 196

[422] K. D. Vohs and J. W. Schooler, "The Value of Believing in Free Will: Encouraging a Belief in Determinism increases Cheating" in *Psychological Science*, vol.19, 2008, pp. 49-54

[423] R. F Baumeister, E. J. Masicampo, C. N. Dewall, "Prosocial Benefits of Feeling Free: Disbelief in Free Will Increases Agression and Reduces Helpfulness" in *Personality and Social Psychology Bulletin*, vol.35, 2009, pp. 260-268; T. F. Stillman, R. F. Baumeister, "Guilty, Free and Wise: Determinism and Psychopathy Diminish Learning from Negative Emotions" in *Journal of Experimental Social Psychology,* vol.46, 2010, pp. 951-960

[424] R.F. Baumestier, A. W.Crescioni, J. L. Alquist, "Free Will as an Advanced Action Control for Human Social Life and Culture" in *Neuroethics,* vol.4, 2010, pp.1-11

towards increasing freedom both internally and externally (negative and positive). It is practically impossible to free the individual from all psychological forces or all external constraints. However, it is possible and necessary to increase the element of knowledge (using information), which is one of the two basic elements of free will. It is necessary to increase individuals' awareness of their rights and responsibilities through education and to ensure their access to different sources of information - by increasing freedom of expression (by functionalizing and diversifying the tools that ensure freedom of expression, such as the press and broadcasting bodies).

In order to strengthen the other element of free will, control, it is important to have individual efforts to build up habits and the social and psychological fight against unfavorable conditions -especially addictions- in order to ensure that the pre-frontal cortex, the brain region responsible for impulse control, maintains its function. The impairment of the addicted person's culpability is not limited to the time when he or she is under the influence of the relevant substance. His/her self-control is also impaired when he/she is in the withdrawal syndrome of the substance. Therefore, addictions should be likened to disease states and the ALIC responsibility -or irresponsibility- of the addicted perpetrator should be determined by evaluating the conditions we have discussed in both the first and second chapters. These conditions can be briefly listed as the age of addiction (the age of consciousness is evaluated in terms of the development process of the prefrontal cortex because it provides the capacity to foresee the consequences of the actions), the type of addiction (material addictions are more severe and serious than behavioral addictions in terms of their effect on metabolic chemicals in the body), wheter or not receiving preventive and curative rehabilitation (it is important in terms of showing the effort of the perpetrator to not commit a crime). In our opinion, it would not be equitable to consider addiction as a mere disease and completely remove the criminal responsibility of the perpetrator, or to consider the act committed under the influence of addiction as the completely free act due to its cause and to accept full criminal responsibility within the scope of ALIC. It would be unfair to treat it as a disease and completely exempt it from criminal responsibility, because the perpetrator has previously made the choice to become an addict. Of course, in this case, it is also important to determine at what age he/she became addicted. The reason why it should not be equated with non-addicted perpetrators is that there is a possibility that the volitional capacity is not complete even when using a substance that removes the culpability. While suffering from withdrawal syndrome, the expectation of controlling the tendency to use the relevant substance and foreseeing the consequences will not be the same as that of a perpetrator whose brain functions normally. For this reason, we think that such an alternative -as an exception of the exception- application for -only- addictive perpetrators may be useful.

Of course, it is true that individuals who have no addictions, and even those who are not under the influence of any conditions that impair their culpability, may have different levels of internal and external freedom. So why don't we take into account each individual's own psychological and environmental conditions for each situation when determining their criminal responsibility arising from their actions? It is appropriate to explain this question with the culpability (the set of psychological requirements sought by the law in order to attribute an act to the perpetrator and which are gathered on the axis of freedom). In fact, the culpability sought for criminal responsibility defines a minimum level of freedom and the ability to action; and we postulate that it is present in every average individual of a certain age and degree of cognition. In other words, the basis of criminal responsibility is not the assumption of an absolute freedom of will, but the assumption of an adequate freedom of will. Otherwise, various individual and environmental disadvantages could be used as an excuse to evade responsibility.

ALIC contradicts concurrency and legality, which are among the most important principles of criminal law. According to some authors, ALIC's contradiction with these basic legal principles creates significant problems in terms of criminal responsibility; therefore, it should not be accepted as a legal doctrine.[425] According to this view, the problems regarding the acts within the scope of ALIC should be solved by StGB 323 and general provisions on negligence.[426] "Although this view is defensible in terms of German law, it is not applicable to Turkish law. On the other hand, it does not provide any solution to the problem."[427] Moreover, under German law, the application of StGB 323 for serious crimes would not be in accordance with criminal justice (for example, an ALIC perpetrator who commits the crime of murder can only be sentenced to a maximum of five years' imprisonment on the basis of StGB 323).

[425] Schmidt, (op. cit.) *Strafrecht, Allgemeiner Teil* (General Part of Criminal Law), p.205

[426] Dirk Schweinberger, “Actio Libera in Causa: Folgeprobleme des Herrschenden Tatbestandsmodells” *Juristische Schlung*, 2006, Heft 6, p.511; Daniels, op. cit., p.342

[427] Talas, op. cit., p.198

There are also theories that claim that ALIC is consistent with general principles of criminal law and try to put ALIC on a legal basis (following): Vorverlagerungstheorie/ Tatbestandsmodel, Ausdehnungstheorie, Unrechtstheorie, Mittelbare Taterschaft/ Werkzeugtheorie. The theories (respectively as original names) of typicality, extension of the act, material injustice and indirect perpetrator, which make the justification of ALIC on the objective elements of the crime, reach the same conclusion with the same arguments but with different interpretation techniques.[428] We agree with Talas's view that it is not possible to solve a problem arising on culpability by using typicality or an objective element.[429] We do not agree with these theories that use arguments such as the perpetrator begins his action at the moment when he loses the culpability, that the concept of action should be interpreted broadly, that the injustice in general -not the action- should be taken into account in terms of the principle of concurrency or that the perpetrator is an indirect perpetrator of himself.

In our opinion, the only way to explain the punishment of actions falling within the scope of *Actio Libera in Causa* is to accept that this is an exception (Ausnahmetheorie) to the principle of concurrency. In our opinion, it is not acceptable to say that such an exception to the principle of concurrency violates the principle of culpability. This is because the provision regulated in Article 30/4 of the Turkish Penal Code, which states that "a person who falls into an unavoidable mistake about the fact that the action he commits constitutes an injustice shall not be punished" or the provision regulated in Article 25/2 of the Turkish Penal Code, which stipulates that a person shall not be punished for an action he commits due to the state of necessity "because he or someone else is in danger", are based on a similar notion of exceptional regulation. In our opinion, Article 34/2 of the TPC is also an exceptional provision which provides the applicability of ALIC in Turkish Law. The first paragraph of Article 34 regulates the general rule and the second paragraph provides an exception. According to the first paragraph, "A person who is unable to perceive the legal meaning and consequences of the action he/she has committed or whose ability to direct his/her behavior in relation to this action has significantly impaired due to a temporary reason or due to the influence of alcohol or narcotic substances taken against his/her will shall not be sentenced." This regulation is a

[428] Ibid.
[429] Ibid.

reflection of the principle of culpability in criminal law. The second paragraph of the article is an exception to the rule. According to the regulation, the provision of the first paragraph does not apply to the person who commits a crime under the influence of alcohol or drugs taken voluntarily. In this case, the person who commits a crime under the influence of alcohol or drugs taken voluntarily will continue to be criminally responsible since he/she has eliminated his/her culpability with his/her own culpable action.

However, we find it necessary to express some criticisms in this regard. In the doctrine and practice, the statement "voluntarily" about taking alcohol and narcotic substances is interpreted as covering situations where the person impairs his/her culpability both “intentionally” and “negligently”. Therefore, in addition to the expression "voluntarily", it is necessary to use the criterion of "foreseeing", where the perpetrator can foresee that he/she may commit a crime while in such a situation.

Our other criticism is that Article 34/2 limits the methods of impairment of culpability to alcohol and narcotic substances. There are other temporary causes that cause impairment or loss of the culpability and the number of these temporary causes is increasing with the developing technology. For example, a person may voluntarily impair his/her culpability by methods such as sleep, hypnosis, medication, treatment interruption, brain battery, etc. and may commit crimes while in this state. A literal interpretation would lead to a problem such as the inability to attribute responsibility, since temporary causes other than alcohol and narcotic substances are outside the scope of 34/2. For this reason, in our opinion, instead of enumerating the circumstances that remove or decrease the culpability in Article 34, we think that it is more appropriate to adopt a general statement that the impairment of culpability by one's own culpable act is the basis of responsibility and to codify it in this way. As we have stated in the part of our study on Turkish Law, the fact that the basis of the article gives the example of "sleepiness" and that the views on the application of Article 34/2 in the doctrine are not limited to alcohol and narcotic substance shows that the intellectual and practical groundwork for such a literal change is already present. Finally, instead of the expression "The provision of the first paragraph shall not apply to the person who commits a crime under the influence of alcohol or narcotic substances taken voluntarily.", the expression should be used in the sense of "The provision of the first paragraph shall not apply to the perpetrator who has impaired or lost his/her capacity to comprehend the legal meaning and consequences of the action s/he committed or to direct his/her behavior in relation to this action by his own culpable (voluntary) act, although s/he could at least foresee that s/he could commit an unlawful act while in such a situation".

Finally, we would like to state that in the future, in addition to the classical temporary reasons that lead to the necessity of applying the ALIC, there will be different probabilities as a result of the developments in the field of technology, and when evaluating these probabilities, the developments should be closely monitored and evaluated by reviewing and developing the classical ideas on criminal responsibility. Studies in the field of neuroscience or claims that human actions are the product of a purely mechanical functioning should be considered cautiously. It, of course, may be beneficial to use medical and technological opportunities when determining criminal responsibility, but in our opinion, it should not be ignored that neuroscience is also one of the opportunities/ tools within the infinite diversity of nature and that human actions should be evaluated within the coexistence of body (physical) and mind (mental).

BIBLIOGRAPHY

Akal, C. B. (2021). “Özgür İrade Reddi ve Natüralizm Açısından Hukuki Bilimden Nörobilime” in *Özgür İrade: Hukuk, Nörobilim, Psikoloji ve Ötesi* (eds. Ozan Erözden, Salih Haydar Günler, Mustafa Ebrar Palteki, Cem Uysal). Istanbul: Zoe Kitap.

Akbulut, B. (2017). *Ceza Hukuku Genel Hükümler*, 4. Bası, Ankara: Adalet Yayınevi.

Akgün, F. (2012). “Suçlu Davranışı Konusunda Klasik Okul ile Pozitivist Okulun Yaklaşımları” *Ceza Hukuku Dergisi,* c.7, s.19. İstanbul: Seçkin.

Alacakaptan, U. (1961). *Sarhoşluk Halinde İşlenen Suçlarda Cezai Mesuliyet,* Ankara: Ankara Hukuk Fakültesi Yayınları, no. 163.

Alexander, L. and Ferzan, K. K. (2009). *Crime and Culpability*, Cambridge University Press.

Ambos, K. (2011). “Defences in International Criminal Law” in *Research Handbook on International Criminal Law* (ed. Bartam S. Brown), England: Edward Elgar Publishing.

Anscombe, G. E. M. (1957). *Intention*, Oxford: Basil Blackwell.

Anscombe, G. E. M. (1969). “Causality and Extensionality”, *The Journal of Philosophy*, 66 (6): 152–159. ISSN: 1939-8549 (web).

Aral, V. (1979). *Hukuk ve Hukuk Bilimi Üzerine,* İstanbul: On İki Levha Yayınları (republished in 2010).

Aral, V. (1983). “Hukukta İrade Özgürlüğü” *Journal of Istanbul University Law Faculty,* 48 (1-4),249-282. Retrieved from https://dergipark.org.tr/tr/pub/iuhfm/issue/9077/113290

Arendt, H. (1998). *The Human Condition*, 2nd Edition, London: University of Chicago Press.

Ari, F and Ercan, S. E. and Tokcan, F. P. (2014). “Fallstudien die Actio Libera in Causa in der Deutschen und Turkischen Rechtsprechung” *Die Entwicklung von Rechtssystemen in ihrer gesellschaftlichen Verankerung* (Eds. Gropp, Öztürk, Sözüer, Wörner), Nomos Verlagsgesellschaft, Baden:Baden.

Aristoteles. (2012). *Nikomakhos’a Etik* (çev. Saffet Babür), Türkiye: Bilge Su.

Artuk, M. E. and Gökçen, A. and Alşahin, M. E. and Çakır, K. (2017). *Ceza Hukuku Genel Hükümler,* 11. Bası, Ankara: Adalet Yayınları.

Artuk, M. E. and Gökcen, A. and Yenidünya, C. (2011). *Ceza Hukuku Genel Hükümler,* Ankara: Turhan Kitabevi.

Artuk, M. E. and Gökçen, A. and Yenidünya, C. (2014). *Türk Ceza Kanunu Şerhi*, 1. Cilt, Ankara: Adalet Yayınevi.

Atalay, A. Ö. (2019). *Ceza Hukukunda Actiones Liberae in Causa Kuramı*, İstanbul: On İki Levha Yayınları.

Austin, J. L. (2009). *Söylemek ve Yapmak* (çev. Levent Aysever), İstanbul: Metis.

Avcı, M. and Yerdelen, E. (2015) "Verdict Analysis: The Seperation Of Behaviour by Way of Omission and Action at Qualified Omissive Crime" *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, 19, no. 1: 163-190.

Aydın, M. A. (2017). Türk Hukuk Tarihi, 14. Bası, İstanbul: Beta.

Bach, K. (2010). “Refraining, Omitting, and Negative Acts” in *A Companion to the Philosophy of Action* (eds. Timothy O’Connor, Constantine Sandis), Chichester, West Sussex: Wiley-Blackwell.

Batan, S. N. and Öktem Tanör, Ö. and Kalem, E. (2011). “Reliability and validity studies 38 of Behavioral Rating Inventory of Executive Function (Brief) in a Turkish normative sample” *Elementary Education Online*, 10(3), 894-904.

Baumann, J. and Weber, U. And Mitsch, W. and Eisele, J. (2016). *Strafrecht Allgemeiner Teil*, 12. Auflage, Verlag Ernst und Werner Giseking.

Baumeister, R. F. and Masicampo, E. J. and Dewall, C. N. (2009). "Prosocial Benefits of Feeling Free: Disbelief in Free Will Increases Agression and Reduces Helpfulness" in *Personality and Social Psychology Bulletin*, vol.35, 260-268.

Baumestier, R. F. and Crescioni, A. W. and Alquist, J. L. (2010). "Free Will as an Advanced Action Control for Human Social Life and Culture" in *Neuroethics,* vol.4.

Bayındır, S. (2018). *Türk Ceza Hukukunda Akıl Hastalığı,* İstanbul: On İki Levha Yayınları.

Bazrafkan, S. (2013). "Die Rechtsfigur der Actio Libera in Causa" *Das Schuldprinzip des Türkischen StGB im Spiegel des Deutschen Strafrechts,* 2, Ankara: Seçkin Yayınları.

Beck, S. (2009). "Grundlegende Fragen zum Rechtlichen Umgang mit der Robotik" *Juristische Rundschau* (eds. Dirk Olzen, Gerhard Schäfer*)*, issue 6, Deutsch: De Gruyter.

Beck, S. (2018). "Neue Konstruktionsmöglichkeiten der Actio Libera in Causa" *Zeitschrift für Internationale Strafrechtsdogmatik,* 13. Jahrgang.

Beck, S. M. and Parker, G. E. (1966). "The Intoxicated Offender: A Problem of Responsibility" *Canadian Bar Review,* 44.4, 563-609.

Berlin, I. (1969). "Two Concepts Of Liberty" *Four Essays On Liberty*, England: Oxford University Press, 118-172.

Berlin, I. (2002). *Liberty*, England: Oxford University Press.

Bieri, P. (2009). *Özgürlük Zanaatı* (çev. Turkis Noyan), İstanbul: Kitap Yayınları.

Brammsen, J. (2002). "Tun oder Unterlassen? Die Bestimmung der Strafrechtlichen Verhaltensformen" *Goltdammer's Archiv für Strafrecht,* 149, 4, 193-213.

Breuer, M. (2008). “Die Actio Illicita in Causa: Darstellung und Meinungsstand” *Bonner Rechts Journal*, 1, 3-8. Rechts und Staatswissenschaftlichen Fakultät der Universität Bonn.

Brown, T. and Moore, P. and Herron, J. and Thompson, M. and Bonaci, T. and Chizeck, H. and Goering, S. (2016). “Personal Responsibility in the Age of User Controlled Neuroprosthetics" in *International Symposium on Ethics in Engineering, Science and Technology* (Canada, Vancouver BC, 13-14 May 2016), IEEE Publishing, 1-12.

Burgess, E. W. (1973). *On Community, Family, Delinquency* (eds. Leonard S., Albert Hunter, James F.), University of Chicago Press.

Carter Yamauchi, C. (1998). *Drugs Alcohol and The Insanity Defence: The Debate Over “Settled” Insanity*, Honolulu: HI: Legislative Reference Bureau.

Carter, R. (2013). *Beyin* (çev. Güneş Kayacı Sevinç). İstanbul: Alfa.

Castillo Gonzalez, F. (2009). “Principio de Culpabilidad y Actio Libera in Causa” en *Defensa de su Regulación Legislativa.* ALICante: Biblioteca Virtual Miguel de Cervantes.

Centel, N. (2013). “Notwehr im Turkischen Strafrecht (Türk Ceza Hukukunda Yasal Savunma)” *Das Schuldprinzip des Türkischen StGB im Spiegel des Deutschen Strafrechts* (Eds. G.Duttge and Y.Ünver), Band 2, 85-97.

Centel, N. and Zafer, H. and Çakmut, Ö. (2016). *Türk Ceza Hukukuna Giriş,* 10. Bası, İstanbul: Beta Yayınları.

Cevizci, A. (2012). *Bilgi Felsefesi,* Ankara: Say Yayınları.

Cleveland, T. (1997). *Trying Without Willing*, Aldershot: Ashgate Publishing.

Çörekçioğlu, H. (Ed.). (2017). “On The Common Saying: This may be True in Theory, but it does not Apply in Practice” in *Kant Felsefesinin Politik Evreni,* Türkiye: Ayrıntı.

Daniels, J. B. (2011). “Die Actio Libera in Causa unter dem Aspekt der Vorverlagerung der Strafbarkeit” *Grenzen der Vorverlagerung in einem Tatstrafrecht* (Eds. Arndt Sinn, Walter Gropp, Ferenc Nagy), 323-347, Germany: V. R. Unipress GmbH.

Davidson, D. (1971). “Agency” in *Agent, Action, and Reason,* Toronto: University of Toronto.

Davidson, D. (2001). *Essays on Actions and Events: Philosophical Essays,* Volume 1, 2nd edition, Oxford: Clarendon Press.

Day, J. P. (1987). “On Liberty and the Real Will” *Philosophy*, 45: 177–192. (reprinted as book: Day J. P. *Liberty and Justice*), London: Croom Helm.

Delgado, J. M. R. (1971). *Physical Control of The Mind: Toward A Psychocivilized Society*, 2nd Edition, New York: Harper Colophon Books.

Demirağ, F. (2016). *Türk Ceza Kanununun Genel Hükümleri Işığında Askeri Ceza Kanunu,* Ankara: Seçkin.

Demirbaş, T. (2016). *Ceza Hukuku Genel Hükümler*, 12. Baskı, Ankara: Seçkin Yayınları.

Denis, L. and Sensen, O. (2015). *Kant’s Lectures on Ethics*, England: Cambridge University Press.

Dimock, S. (2013). “Actio Libera in Causa” in *Criminal Law and Philosophy*, October 2013, volume 7. 3. Swiss: Springer.

Dönmezer, S. (1945). “Cezai Sorumluluğun Esası Bakımından Klasik Teori ve Bu Teorinin Karşilaştiği İtirazlar” *Journal of Istanbul University Law Faculty,* 11 (3-4) , 65-80.

Dönmezer, S. (1970). “Uyuşturucu Maddelerin Hukuk ve Kriminoloji ile İlgili Bazı Yönleri” *Journal of Istanbul University Law Faculty,* cilt 36, sayı 1-4: Ord. Prof. Reşit Belgesay Hatıra Sayısı, 1970, 1-14.

Dönmezer, S. (2003). *Genel Ceza Hukuku Dersleri*, İstanbul: Bahçeşehir Üniversitesi Yayınları.

Dönmezer, S. and Erman, S. (1999). *Nazari ve Tatbiki Ceza Hukuku Genel Kısım*, Cilt 2, 12. Bası, İstanbul: Beta.

Dursun, S. (2021). *The Concept of Action in Penal Law with an Interdisciplinary Approach,* Ankara: Seçkin Yayıncılık.

Duttge, G. (2011). "Der Vollrauschtatbestand de Lege Lata und de Lege Ferenda" *Festschrift für Klaus Geppert zum 70. Geburstag am 10 Marz 2011* (eds. C. Geisler, E. Kraatz, J. Kretschmer, H. Schneider, C. Sowada), Berlin: De Gruyter.

Dworkin, G. (1988). *Theory and Practice of Autunomy,* England: Cambridge University Press.

Eagleman, D. (2016). *Incognito: Beynin Gizli Hayatı* (çev. Zeynep Arık Tozar), İstanbul: Domingo Yayınevi.

Eken, A. (2017). "Sosyal Beyni Anlamak için Disiplinler Arası Yeni Yaklaşımlar" *Pivolka*, c.7, s.25. Ankara.

Erem, F. (1984). *Ümanist Doktrin Açısından Türk Ceza Hukuku,* I (12), Ankara: Seçkin.

Erol, M. (2022). *Kuantum Fiziği ile Bilinç Çağına Yolculuk*, İstanbul: Nobel Akademik Yayıncılık.

Ersoy, U. (2013). "Türk ve Alman Ceza Hukuku Sistemlerinde Kusur Prensibinin Kapsamı ve Objektif Cezalandırılabilme Şartlarının Kusur Prensibi ile Bağdaştırılabilirliği" *Türkiye Barolar Birliği Dergisi*, no. 109.

Eser, A. (2016). "Grounds for Excluding Criminal Responsibility, Art. 31" *The Rome Statute of The International Criminal Court a Commentary* (eds. Otto Triffterer, Kai Ambos), 3rd Edition, Munich: C. H. Beck Hart Nomos, pp.1125-1160.

Evans, E. P. (1906). *The Criminal Prosecution and Capital Punishment of Animals,* New York: Cornell University Law Library (e-book).

Farrel, D. M. (2013). “What Should We Say About Contrived ‘Self Defens’ Defenses?” *Criminal Law and Philosophy,* issue 7, 571-585.

Finkelstein, C. and Katz, L. (2008). “Contrived Defenses and Deterrent Threats: Two Facets of One Problem” *Ohiao State Journal of Criminal Law,* vol.5, 470-504, *US: Ohiao State University.*

Fischer, B. and Rehm, J. (1996). Alcohol Consumption and The Liability of Offenders in The German Criminal System, *Contemporary Drug Problems*, vol.23, ıssue 4, 707-729.

Frankfurt, H. (1988). *The Importance of What We Care About*, England: Cambridge University Press.

Frankfurt, H. (2004). *The Reasons of Love,* New Jersey: Princeton University Press.

Frankfurt, H. (2006). *Taking Ourselves Seriously and Getting It Right*, California: Stanford University Press.

Freund, G. (2006). “Actio illicita in causa – Ein Übel oder eine Möglickeit, das Übel an der Wurzel zu packen?” in *Goltdammer's Archiv für Strafrecht.* C.F. Müller Verlag.

Freund, G. and Renzikowski, J. (1999). “Zur Reform des 323 a StGB” *Zeitschrift für Rechtspolitik*, vol.32, no.12. 497-500.

Geniş, B. and Şahin, F. and Gürhan, N. (2022). “Neurobiological Basis of Violence and Suicide in Alcohol-Substance Use Disorders” in *Current Approaches in Psychiatry*, 14(2):264- 275.

Geppert K. (2009). “Die Volltrunkenheit” (§323 a StGB) [The full intoxication StGB §323a]. *Jura*, 31(1), 40–49.

Gimbernat Ordeig, E. (2014). “Die Omissio Libera in Causa” in *Streitbare Strafrechtswissenschaft Festschrift für Bernd Schünemann*, zum 70. Geburtstag am 01.11.2014, ISBN 9783110315578, 351-362.

Girgen, J. (2003). “The Historical and Contemporary Prosecution and Punishment of Animals” in *9. Animal Law Review.* US: Michigan State University Animal Legal and Historical Center.

Glasscock, P. and Juan, S. and Tenenbaum, S. (2023). "Action" in *The Stanford Encyclopedia of Philosophy* (Spring 2023), (eds. Edward N. Zalta, Uri Nodelman), https://plato.stanford.edu/archives/spr2023/entries/action/

Golomb, B. A. (2018). “Diplomats’ Mystery Illness and Pulsed Radiofrequency/Microwave Radiation” *Neural Computation*, vol. 30, no. 11. Cambridge: MIT Press.

Graefetal, O. (1998). “Discussions with Harry G. Frankfurt” in *Ethical Perspectives*, 5.

Green, J. and Cohen, J. (2011). “For The Law Neuroscience Cahnges Nothing and Everything” in *Oxford Handbook of Neuroethics (*eds. Judy Illes and Sahakian J. Barbara). Oxford University Press

Gur-Arye, M. (1984). *Actio Libera in Causa in Criminal Law.* Harry Sacher Institute for Legislative Research and Comparative Law, Faculty of Law, Hebrew University of Jerusalem.

Gur-Arye, M. (2021). “Criminal Law Defences Divides” *Jerusalem Review of Legal Studies,* Volume 23, Issue 1, June, 167–183.

Gündoğan, A. O. (2015). “Eylemde Sorumluluk ve Özgürlük İlişkisi” Access: http://aliosmangundogan.com/PDF/Bildiri/Ali-Osman-Gundogan-Eylemde-Sorumluluk-ve-0zgurluk. Access date: 20.05.2023

Hakeri, H. (2003). *Ceza Hukuku'nda İhmal Kavramı ve İhmali Suçların Çeşitleri*, Ankara: Seçkin Yayınları.

Hakeri, H. (2017). *Ceza Hukuku Genel Hükümler,* 21. Bası, Ankara: Adalet Yayınları.

Hallevy, G. (2015). *The Matrix of Insanity in Modern Criminal Law,* Swiss: Springer.

Handel, K. (1963). “Criminal Law Enforcement in the Federal Republic of Germany” *University of Cansas City Law Review,* 1, 178 -211.

Hegel, G. W. F. (1991). “The Encyclopedia Logic” in *The Encyclopedia of Philosophical Sciences*, (translated by T. F. Geraets), Indianapolis: Hackett Publishing Company.

Heinrich, B. and Wismann, P. (2016). “Die Actio Libera in Causa” *Ad Legendum: Richterrecht- unter Dem Radar Des Gesetzgebers,* 2, 146–152.

Heper, A. (2015). “Nörobilimler ve Hukuk Üzerine” *Ceza Hukuku Dergisi,* s.28, İstanbul: Seçkin.

Herzberg, R. D. (1992). “Gedanken zur Actio Libera in Causa: Straffreie Deliktsvorbereitung als Begehung der Tat?” *Festschrift für Günter Spendel zum 70. Geburtstag* am 11 Juli (Ed. Manfred Seebode), 203-236, Berlin: Walter de Gruyter.

Hettinger, M. (1988). Die Actio Libera in Causa: Strafbarkeit wegen Begehungstat Trotz Schuldunfahigkeit?, Berlin: Duncker Humblot GmbH.

Heyman, G. M. (2009). *Addiction: A Disorder of Choice*. Cambridge, MA: Harvard University Press.

Hobbes, T. (1999). “Of Liberty and Necessity” in *Hobbes and Bramhallon Liberty and Necessity* (ed. Vere Chappell), England: Cambridge University Press.

Hobbes, T. (2007). *Leviathan* (çev. Semih Lim), Türkiye: Yapı Kredi Yayınları.

Hoffman, D. and Schutter, D. (2009). “Inside The Wire: Aggression and Functional Interhemispheric Connectivity in The Human Brain” *Psychophysiology*, vol. 46, no.5. Wiley-Blackwell.

Hoffmann Holland, K. (2015). *Strafrecht Allgemeiner Teil,* 3. Auflage, Tubingen: Morh Siebeck Verlag.

Honig, R. (1936). “İlliyet Nazariyesine Dair” (translated by M. Yavuz Abadan), *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, 2, 169-188.

Horgan, J. (2005). “The Forgotten Era of Brain Chips”, *Scientific American*, vol. 293, no.4. USA: Springer Nature.

Hornung, G. and Sixt, M. (2015). "Cyborgs im Gesundheitswesen: Die Rechtlichen Herausforderungen der Technischen Erhaltung und Optimierung Körperlicher Funktionen” *Computer und Recht*, vol. 31, no. 12, 2015, pp. 828-840. https://doi.org/10.9785/cr-2015-1214.

Hruschka, J. (1986). “Imputation” *Brigham Young University Law Rewiev*, vol. 1986, Issue 3, Art.7, 669-710.

Hruschka, J. (2003). “Der Einfluß des Aristoteles und der Aristoteles-Rezeptionen auf die Bildung Heutiger Rechtsbegriffe am Beispiel der ‘Actio Libera in Causa’ ”, in *Bürgerliche Freiheit und Christliche Verantwortung* (eds. M. Germann and H. de Wall), Tübingen: Festschrift für Christoph Link zum siebzigsten Geburtstag.

Hruschka, J. (2015). “On the Logic of Imputation in The Vigilantius Lecture Notes” *Kant’s Lectures on Ethics* (Eds. Lara Denis and Oliver Sensen), England: Cambridge University Press, 170-184.

Hyman, J. (1999). “How Knowledge Works”, *The Philosophical Quarterly*, 49 (197), 433–451, Oxford University Press.

İçel, K. (1967). *Ceza Hukukunda Taksirden Doğan Subjektif Sorumluluk*, İstanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları.

İçel, K. (2016). *Ceza Hukuku Genel Hükümler,* İstanbul: Beta (Yenilenmiş Bası).

İçer, Z. (2019). “Yapay Zeka Nörohukuk Sisteminde Suç ve Cezaya Yaklaşım” in *11. International Congress of Education Supervision,* Bildiri Kitabı, Antalya,

İçer, Z. (2021). “Nörokriminolojik Açıdan İrade Özgürlüğü ve Ceza Sorumluluğu” in *Özgür İrade: Hukuk, Nörobilim, Psikoloji ve Ötesi* (eds. Ozan Erözden, Salih Haydar Günler, Mustafa Ebrar Palteki, Cem Uysal). İstanbul: Zoe Kitap.

İsfen, O. (2011). “Das Ausnahmemodell in Art.34/2 DES Turkischen Strafgesetzbuches- eine kritische Würdigung im Hinblick auf dessen

Vereinbarkeit mit dem Schuldprinzip" *Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi*, c.1, s.1.

Jacobs, J. (2001). *Choosing Character: Responsibility for Virtue and Vice*, New York: Cornell University Press (e- book).

Jakobs, G. (1991). *Strafrecht Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre*, 2. Auflage, Berlin and New York: Walter de Gruyter, 12-53.

Jeurissen, D. and Sack, A. and Roebroeck, A. and Russ, B. and Pascual-Leone, A. (2014). "TMS Affects Moral Judgment, Showing the Role of DLPFC and TPJ in Cognitive and Emotional Processing" *Frontiers in Neuroscience*, vol. 8, no. 18.

Joecks, W. and Klauss, M. (2017). *Münchener Kommentar zum Strafgesetzbuch,* Band 1, 3. Auflage, 1-37. Beck-Online Die Datenbank: https://beck-online.beck.de/Home.

Kant, I. (1960). *Religion Within The Limits of Reason* (translated by T. M. Grene and H. H. Hudson), New York: Harper Torchbooks.

Kant, I. (2007). "Lectures on Pedagogy" in *Anthropology, History and Education* (translated by Mary Gregor) (eds. Günter Zöller and Robert B. Louden), England: Cambridge University Press.

Keçelioğlu, E. (2010). "Kusurluluğu Ortadan Kaldıran Sebeplerle Hukuka Uygunluk Sebepleri Arasındaki Ayrımın Türk Ceza Kanununun Uygulanması Bakımından Pratik Sonuçları" *Türkiye Barolar Birliği Dergisi*, 87.

Kennett, J. (2001). *Agency and Responsibility: A Common-Sense Moral Psychology*. Oxford/ New York: Clarendon Press/ Oxford University Press.

Kennett, J. and Vincent, N. A. and Snoek, A. (2014). "Drug Addiction and Criminal Responsibility" *Handbook on Neuroethics* (2014): 1065-1083.

Keyman, S. (1988). "Cürmi Fiilin Yapısal Unsuru Olarak Hareket." *Ankara Üniversitesi Hukuk Fakültesi Dergisi 40.1.*, 122-173.

Kindhäuser, U. (2017). *Strafrecht Allgemeiner Teil* [General Part of Criminal Law], 8. Auflage, Baden: Nomos.

Kitchin, W. (1986). "Review of Glendon Schubert's 'Political Culture and Judicial Behavior' " *Politics and the Life Sciences*, vol. 5, no. 1, August. DOI:10.1017/S0730938400001908.

Koca, M. and Üzülmez, I. (2017). *Türk Ceza Hukuku Genel Hükümler*, 10, Ankara: Seçkin.

Köhler, M. (1997). *Strafrecht Allgemeiner Teil*, Berlin: Springer Verlag.

Kolasa, B. J. (1979). *İşletmeler İçin Davranış Bilimine Giriş.* (çev: Kemal Tosun vd.), İstanbul: Fatih Yayınevi.

Konstantin, P. (2017). *Kant's Theory of Normativity: Exploring the Space of Reason*, Cambridge: Cambridge University Press.

Korsgaard, C. M. (2009). *Self-Constitution: Agency, Identity, and Integrity*. Oxford: Oxford University Press.

Kuhn-Pabst, G. (1984). *Die Problematic der Actio Libera in Causa*, Germany: Universitat Mannheim.

Küper, W. (1983). "Aspekte der 'Actio Libera in Causa' ein Dialog" *Kriminologie- Psychiatrie- Strafrecht: Festschrift für Heinz Leferenz zum. 70. Geburststag,* (eds. Hans Kerner, Hans Göppinger, Franz Streng), 573-592, Heiderberg: Müller Juristischer Verlag.

Lacey, N. and Pickard, H. (2012). "From The Consulting Room to The Court Room? Taking The Clinical Model Of Responsibility Without Blame Into The Legal Realm." *Oxford Journal of Legal Studies,* 1–29, access date: 10.01.2023 http://ojls.oxfordjournals.org/content/early/2012/11/19/ojls.gqs028.full

Leshner, A. I. (1997). "Addiction is a Brain Disease, and it Matters." *Science*, Oct 3;278(5335):45-7. DOI: 10.1126/science.278.5335.45.

Leupold, H. (2005). *Die Tathandlung der Reinen Erfolgsdelikte und das Tatbestandsmodell der "Actio Libera in Causa" im Lichte Verfassunggrechtlicher Schranken*, [Successfully committed crimes and the factual model of the "Actio Libera in Causa" in the light of constitutional barriers]. Berlin: Duncker und Humblot.

Levine, J. (1983). "Materialism and Qualia: The Explanatory Gap" *Pacific Philosophical Quarterly*, 64, October:354-361.

Lezak, M. D. (1995). "Executive Functions and Motor Performance" in *Neuropsychological Assessment,* USA: Oxford University Press.

Lindemann, M. and Reichling, T. (2009). "Die Behandlung der so Genannten Abwehrprovocation nach den Grundsatzen der Acio Illicita in Causa" *Juristische Schlung*, 6, 496-501.

Loevinger, L. (1963). "Jurimetrics: The Methodology of Legal Inquiry" *Law and Contemporary Problems,* 28.1: 5-35. North Carolina: Duke University Journals Online.

Lombroso, C. (1895). *Criminal Man* (eds. Mary Gibson, Nicole Hahn Rafter), Duke University Press.

Mahmutoğlu, F.S and Karadeniz, S. (2017). *Türk Ceza Kanunu Genel Hükümler Şerhi,* İstanbul: Beta.

Malkoç, İ. (2013). *Açıklamalı İçtihatlı 5237 Sayılı Yeni Türk Ceza Kanunu* (m. 1-81), 1. Cilt, Ankara: Yetkin.

Marconi, G. (1988). "Provocazione" *Enciclopedia del Diritto* (ed. Francesco Santoro-Passarelli), Vol. 37, Giuffre, 1988, 821 – 835.

Martins, N. and Angelica, A. and Chakravarthy, K. and Svidinenko, Y. and Boehm, F. and Opris, I. And Lebedev, M. and Swan, M. and Garan, S. and Rosenfeld, J. and Hogg, T. and Freitas, R. (2019). "Human Brain- Cloud Interface" *Frontiers in Neuroscience,* vol. 13, no. 112.

Marzullo, T. (2017). "The Missing Manuscript of Dr. Jose Delgado's Radio-Controlled Bulls" *Journal of Undergraduate Neuroscience Education,* volume 15, no 2. https://www.funjournal.org/archives/

Masferrer, A. (2009). "Codification of Spanish Criminal Law in The Nineteenth Century: A Comparative Legal History Approach" *Journal of Comparative Law,* 4(1). 96-139.

Massimini, M. and Ferrarelli, F. and Esser, S. and Riedner, B. and Huber, R. and Murphy, M. and Peterson, M. and Tononi, G. (2007). "Triggering Sleep Slow Waves by Transcranial Magnetic Stimulation" *Proceedings of the National Academy of Sciences of The United States of America,* vol. 104, no. 20.

Mayr, E. (2011). *Understanding Human Agency*, Oxford: Oxford University Press.

McCord, D. (1990). "The English and American History of Voluntary Intoxication to Negate Mens Rea" *The Journal of Legal History,* vol. 11, issue 3, 372-395.

Meares, R. (1999). "The Contribution of Hughlings Jackson to an Understanding of Dissociation*" The American Journal of Psychiatry,* December, 156, 12: Health Module.

Melden, A. I. (1966). *Action Theory: Free Will and Determinism* (eds. Berofsky, Bernard), New York: Harper and Row Publishers.

Mele, A. R. (1992). *Springs of Action: Understanding Intentional Behavior*, New York and Oxford: Oxford University Press.

Mele, A. R. (2013). "Actions, Explanations, and Causes" in *Reasons and Causes: Causalism and Non- causalism in the Philosophy of Action* (ed. G. D'Oro), London: Palgrave- Macmillan.

Meyer, H. (1962). *Einleitung in die Philosophie*, Zweite Erweiterte Auflage, Paderborn.

Mill, J. S. (1974). *Collected Works of John Stuart Mill,* volume VIII, University of Toronto Press.

Mill, J. S. (1978). *On Liberty* (ed. Elizabeth Rapaport), Indianapolis: Hackett Publishing.

Mitsch, W. (2015). *Strafrecht Besonderer Teil 2*, 3. Auflage, Berlin: Springer Verlag.

Morse, S. J. (2011). “Addiction and Criminal Responsibility” in *Addiction and Responsibility* (eds. J. Poland and G. Graham), 159–199, New York: The MIT Press.

Myers, D. (2010). *Social Psychology,* New York: The McGraw-Hill Companies.

Nacke, P. (1897). "Lombroso und die Kriminal-Anthropologie von Heute," in *Leitschrift fur Kriminal Anthropologie*, The University of Illinois Library Online Archive.

Neubert F. X. and Mars R. B. and Thomas, A. G. and Sallet, J. and Rushworth, M. F. (2014). “Comparison of Human Ventral Frontal Cortex Areas for Cognitive Control and Language with Areas in Monkey Frontal Cortex.” *Neuron*. 2014 Feb 5; 81(3):700-13. doi: 10.1016/j.neuron.2013.11.012. Epub 2014 Jan 28. PMID: 24485097. Access date: 08.04.2023

Okandan, R. G. (1955). “J.J Rousseau’nun Devlet Hakkındaki Görüşleri” *Ord. Prof. Dr. Samim Gönensay Armağanı,* İstanbul, 106-126.

Önder, A. (1989). *Ceza Hukuku Genel Hükümler,* cilt 2, İstanbul: Beta.

Önok, R. M. (2009). *Uluslararası Ceza Hukuku,* Ankara: Seçkin Yayıncılık.

Öntan, Y. (2020). “Act and Result in Criminal Law” Ankara Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, Doctoral Thesis.

Özbek, V. Ö and Doğan, K. and Bacaksız, P. and Tepe, İ. (2017). *Türk Ceza Hukuku Genel Hükümler,* 8, Ankara: Seçkin.

Özgenç, İ. (2017). *Türk Ceza Hukuku Genel Hükümler,* 13, Ankara: Seçkin.

Öztürk, B. and Erdem, M. R. (2014). *Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku*, 14. Bası, Ankara: Seçkin.

Pickard, H. (2011). "Responsibility Without Blame, Empathy and The Effective Treatment of Personality Disorder." *Philosophy, Psychiatry and Psychology*, 18(3), 209–224.

Pignatel, L. (2016). "L'Emergence du neurodroit Dans le Monde", *Le Cerveau est-il Coupable? (Sous la direction de Boris Cyrulnik) French: Philippe Duval.*

Plato, *Charmides,* Perseus Digital Library: Gregory R. Crane, Editor in Chief Tufts University. https://www.perseus.tufts.edu/hopper/

Pufendorf, S. (1931). *Elementorum Jurisprudentiae Universalis Libri Duo* (Translated by William Abbott Oldfather), Britain: Oxford Unversity Press.

Rafter, N. and Posick, C. and Rocque, M. (2016). *The Criminal Brain, Understanding Biological Theories of Crime,* 2. Edition, New York.

Raine. A. (2014). *The Anatomy of Violence: The Biological Roots of Crime*. (reprinted edition). New York: Vintage.

Reed, A. and Bohlander, M. and Wake, N. and Smith, E. (2014). *General Defences in Criminal Law: Domestic and Comperative Perspectives*, England: Ashgate.

Renzikowski, J. (2002). "Im Labyrinth des Vollrauschtatbestands (323 StGB)" *Alkohol und Schuldfahigeit: Entsheidung für Arzte un Juristen* (Hrsg. Frank Schneider and Helmut Frister), 141-157, Berlin: Springer Verlag.

Ritter, J. and Günther, K. and Gottfried, G. (eds.) (1980). *Historisches Wörterbuch der Philosophie*, I, Darmstadt: Schwabe Verlag, Online ISBN: 978-3-7965-3736-3, DOI: 10.24894/HWPh.7965.0692.

Robinson, P. H. (1972). "Criminal Law Defenses: A Systematic Analysis." *Columbia Law Review,* vol. 82, no. 2, https://doi.org/10.2307/1122275. Access date: 03.01.2023

Robinson, P. H. (1985). "Causing The Conditions of One's Own Defense: A Study in The Limits of Theory in Criminal Law Doctrine" *Virginia Law Review,* vol. 71, February, no. 1, 1-63.

Rödl, S. (2007). *Self-consciousness*, Cambridge, MA: Harvard University Press.

Rousseau, J. J. (2004). *İnsanlar Arasındaki Eşitsizliğin Kaynağı* (çev. R. Nuri İleri), İstanbul: Say Yayınları.

Rousseau, J. J. (2013). *Toplum Sözleşmesi* (çev. Vedat Günyol), Türkiye: İş Bankası Kültür Yayınları.

Roxin, C. (2003). *Strafrecht Algemeiner Teil,* Band 2: Besondere Erscheinungsformen der Straftat, München: C.H. Beck Verlag. www.beck.de, ISBN: 978 3 406 43868 4.

Rushing, S. E. (2014). "The Admissibility of Brain Scans in Criminal Trials: The Case of Positron Emission Tomography", *Court Review: The Journal of the American Judges Association,* vol.50, issue 2.

Salger H. and Mutzbauer N. (1993). Die actio libera in causa-eine rechtswidrige Rechtsfigur [The actio libera in causa-an illegally legal concept]. *Neue Zeitschrift für Strafrecht*, 13(12), 561–565.

Sarkissian, H. and Chatterjee, A. and De Brigard, F. and Knobe, J. and Nichols, S. and Sirker, S. (2010). "Is Belief in Free Will a Cultural Universal?" in *Mind and Language*, vol.25.

Sartorio, C. (2009). "Omissions and Causalism", *Noûs,* 43 (3): 513–530.

Sartre, J. P. (2011). *Varlık ve Hiçlik* (çev. Turhan Ilgaz, Gaye Çankaya), İstanbul: İthaki Yayınları.

Sartre, J. P. (2022). *Varoluşçuluk* (Existantialism)(çev. Asım Bezirci), İstanbul: Say, 31.

Satzger, H. (2006). "Dreimal 'in causa'-actio libera in causa, omissio libera in causa und action illicita in causa" [Triple "in causa" -actio libera in causa, omissio libera in causa and actio illicita in causa]. *Jura*, 7, 513–520.

Sayın, B. Y. (2023). *Roma Klasik Hukukundan Modern Hukuklara Obligatio Naturalis*, Istanbul: On İki Levha Yayınları.

Schlüchter, E. (1999). “Zur Vorsatzlichen Actio Libera in Causa bei Erfolgsdelikten” *Festschrift für Hans Joachim Hirsch zum 70. Geburtstag* am 11.April 1999 (Eds. Thomas Weigend und Georg Küpper), Berlin- New York: Walter de Gruyter, 345-362.

Schmidhauser, E. (1992). *Die Actio Libera in Causa: Ein Symptomatisches Problem der Deutschen Strafrechtwissenschaft* [The Actio Libera in Causa: A Symptomatic Problem in German Criminal Law], Hamburg: Vandenhoeck und Ruprecht.

Schmidt, R. (2011). *Strafrecht, Allgemeiner Teil* (General Part of Criminal Law). Dr. Rolf Verlag, 9. Auflage, Bremen.

Schneider, W. F. (2017). *Falle Strafrecht Allgemeiner Teil (Criminal Law Cases General Part)*, 7. Auflage (ed. Alpmann Schmidt), Münster.

Schubert, G. A. (1985). “Political Culture And Judicial Behavior: Political Culture And Judicial Elites” *A Comparative Analysis*, US: University Press of America.

Schweinberger, D. (2006). “Actio Libera in Causa: Folgeprobleme des Herrschenden Tatbestandsmodells” *Juristische Schlung*, Heft 6, 507-511.

Sehon, S. (2005). *Teleological Realism: Mind, Agency, and Explanation,* Cambridge, MA: Bradford Books-MIT Press.

Sen, A. (2002). *Rationality and Freedom*, England: Cambridge University Press.

Simhony, A. and Weinstein, D. (Eds.) (2001). *The New Liberalism: Reconciling Liberty and Community,* England: Cambridge University Press.

Smart, J. J. C. (2017). “The Mind/Brain Identity Theory” *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition) (ed. Edward Nouri Zalta), https://plato.stanford.edu/ archives/spr2021/entries/mind-identity/

Sokullu Akıncı, F. and Özgenç, İ. and Sözüer, A. and Mahmutoğlu, F. S. and Ünver, Y. and İçel, K. (2004). *Suç Teorisi,* 3. Bası, İstanbul: Beta.

Soyaslan D. (2016). *Ceza Hukuku Genel Hükümler,* 7. Baskı, Ankara: Yetkin Yayınları.

Spranca, M. and Minsk, E. and Baron, J. (1991). "Omission and Commission in Judgment and Choice." *Journal of experimental social psychology 27, no. 1:* 76-105.

Spranger, T. M. (2012). “Neurosciences and The Law: An Introduction” in *International Neurolaw, A Comperative Analysis* (ed. Tade Matthias Spranger), 1-10, Heidelberg, Springer.

Stillman, T. F. and Baumeister, R. F. (2010). “Guilty, Free and Wise: Determinism and Psychopathy Diminish Learning from Negative Emotions” in *Journal of Experimental Social Psychology,* vol.46, 951-960.

Storey, T. (2015). *Unlocking Criminal Law,* 5th Edition, New York: Routledge.

Streng, F. (1989). “Schuld ohne Freiheit? Der functionale Schuldbegriff auf dem Prüfstand” *Zeitschrift für die Gesamte Strafrechtswissenschaft*, vol.101, ıssue 2, 273-334.

Streng, F. (1994). “Der Neue Streit um die ‘Actio Libera in Causa’” *Juristen Zeitung,* 49. Jahrgang, nr.14, 709-714.

Streng, F. (2001). “Actio Libera in Causa und Verminderte Schuldfahigkeit” [Actio Libera in Causa and Diminished Responsibility] in *Juristische Schulung*, 6, 540–545.

Stuckenberg, C. F. (2001). Provozierte Notwehrlage und Actio Illicita in Causa: Der Meinungsstand im Schrifttum, *Juristische Arbeitsblatter,* Heft 11, 894-904, München: Verlag Franz Vahlen.

Stühler, H. (1999). *Die actio libera in causa de lege lata und de lege ferenda: Eine Analyze von Rechtsprechung und Literatur verbundene mit einem Gesetzgebungsvorschlag.* Würzburg: Ergon Verlag.

Stuss, D. T. (1991). “Disturbance of Self-Awareness After Frontal System Damage.” in *Awareness of Deficit After Brain Injury: Clinical and Theoretical Issues* (eds. G.P. Prigatano and D. L. Schacter) New York: Oxford University Press.

Svendensen, L. (2021). *Özgürlüğün Felsefesi* (çev. Murat Erşen), İstanbul: Redingot.

Sydow, D. (2002). *Die Actio Libera in Causa Nach dem Rechtsprechungswandel des Bundesgerichtshofs,* Frankfurt: Peter Lang GmbH.

Şahin Ünver, F. S. (2018). *Hukuk Felsefesinde İrade Serbestliği ve Sorumluluk,* Ankara: Astana Yayınları.

Talas, S. (2011). "Ceza Hukukunda Kusur İlkesi Bağlamında Nedeninde Serbest Hareket Kavramı ve Geçici Nedenlerin Ceza Sorumluluğuna Etkisi" İstanbul University Enstitute of Social Sciences Public Law Doctoral Thesis.

Taylor, C. (1969). "What is Wrong with Negative Liberty" in *Four Essays on Liberty*, New York: Oxford University Press, 174-193.

Taylor, C. (2014). *Benliğin Kaynakları: Modern Kimliğin İnşaası* (çev. Selma Baş ve Bilal Baş), Türkiye: Küre Yayınları. (for original source: Charles Taylor, *Sourches of The Self: The Making of Modern Ide*ntitiy, Cambridge University Press, 1989)

Thompson, M. (2011). "Anscombe's Intention and Practical Knowledge" in *Essays on Anscombe's Intention* (eds. Anton Ford, Jennifer Hornsby and Frederick Stoutland), Cambridge, MA: Harvard University Press.

Thompson, M. (2013). "Forms of Nature" in *Freiheit. Stuttgarter Hegel-Kongres* (eds. G. Hindrichs and H. Axel), Frankfurt am Main: Vittorio Klostermann.

Thompson, R. G. (1999). "Voluntary Intoxication and Criminal Responsibilities" *Behavioral Sciences And The Law, Volume*:17, April-June, Issue 2.

Thomson, J. J. (1985). "The Trolley Problem" *The Yale Law Journal*, *94*(6), 1395–1415. https://doi.org/10.2307/796133

Toprak, U. (2012). "Kasten veya Taksirle Kusur Yeteneğinin Ortadan Kaldırılmasının ya da Azaltılmasının Alman Hukukuna Göre Ceza Sorumluluğuna Etkisi (Actio Libera in Causa Formulü)", *Türkiye Adalet Akademisi Dergisi,* 3, 10. Sayı, Temmuz, 741-774.

Toroslu, H. (2015). *Ceza Hukukunda İsnat Yeteneği*, Ankara: Savaş Yayınları.

Tübcil, Y. S. and Yörükoğlu, A. and Durdu, A. M. and Tübcil, M. S. (2021). "Zihne Yapılan Elektromanyetik Manipülasyonun Maddi Ceza Hukuku Açısından İncelenmesi" *Suç ve Ceza 14.2*. Ankara: Beta.

Tümerkan, S. (1982-3). "Klasik, Pozitivist Okullarda ve Toplumsal Savunma Hareketinde Ceza Sorumluluğunun Esası" *İstanbul Üniversitesi Hukuk Fakültesi Dergisi*, c.48, 1-4.

Turabi, S. (2012). "Kusurluluk ve Kusurluluğu Etkileyen Haller" *Türkiye Barolar Birliği Dergisi*, 101.

Umur, Z. (1983). *Roma Hukuku Lügatı,* İstanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları.

Ünver, Y. (1999). "Sebebinde Serbest Hareketler Kuramı" *Prof. Dr. Sahir Erman'a Armağan*, İstanbul: İstanbul Üniversitesi Hukuk Fakültesi Eğitim Öğretim ve Yardımlaşma Vakfı Yayınları, 8, 801- 887.

Van Kalmthout, A. (1998). "Intoxication and Criminal Responsibility in Dutch Criminal Law" *European Addiction Research,* Issue 4, pp. 102-106.

Velleman, J. D. (1992). "What Happens when Someone Acts" in *Mind,* 101 (403). ISSN: 0026-4423, New York: Clarendon Press/Oxford University Press.

Vohs, K. D. and Schooler, J. W. (2008). "The Value of Believing in Free Will: Encouraging a Belief in Determinism increases Cheating" in *Psychological Science*, vol.19, 49-54.

Watterson, R. T. (1991). "Just Say no to The Charges Against You: Alcohol Intoxication, Mental Capacity and Criminal Responsibility" *The Journal of The American Academy of Pschiatry and The Law,* vol.19, issue 3, 277-290.

Yenisey, F. (2015). *Kolluk Hukuku,* 2. Bası, İstanbul: Beta.

Yenisey, F. and Plagemann, G. (2015). *Alman Ceza Kanunu Strafgesetzbuch StGB Almanca Metin ve Türkçe Çevirisi Açıklamaları ve Sözlük*, 2. Bası, İstanbul: Beta.

Young, L. and Camprodon, J. A. and Hauser, M. And Pascual-Leone, A. and Saxe, R. (2010). “Disruption of the Right Temporoparietal Junction with Transcranial Magnetic Stimulation Reduces the Role of Beliefs in Moral Judgments” *Proceedings of the National Academy of Sciences,* Volume 107, no. 15.

Yüce, T. T. (1985). *Ceza Hukukunun Temel Kavramları,* Ankara: Turhan Kitabevi.

Yurtcan, E. (2016). *Yargıtay Kararları Işığında Kabahatler Kanunu ve Yorumu*, 2. Bası, Ankara: Türkiye Barolar Birliği Yayınları.

Yurtcan, E. (2005). *Kabahatler Kanunu ve Yorumu*, İstanbul: Beta Yayınları.

Zafer, H. (2015). *Ceza Hukuku Genel Hükümler (TCK m.1-75) Ders Kitabı,* 4, İstanbul: Beta Yayıncılık.

Zgaga, S. (2014). “Intoxication and Criminal Liability in International Criminal Law” in *Law Journal of The Higher School Economics,* no.2, pp.149-161.

Zieschang, F. (2014). *Strafrecht Allgemeiner Teil,* 4. Auflage, München: Richard Boorberg Verlag.