Unlawfully Obtained Evidences in Turkish Criminal Procedure Law*

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Abstract

Evidences have a great significance in criminal procedural law to find out material truths. However, there must be some restrictions on obtaining and assessing evidences in a criminal procedure based on the rule of law. The aim of this study is to show the legislative outlook of the current legislation regarding unlawfully obtained evidences in Turkish criminal procedure law.

Key words: Evidences, findings, exclusionary rules, evidence prohibitions, assessing the evidences, the fruit of the poisonous tree

I. Introduction

Evidences in criminal procedural law refer to resources which enable to be decided whether the criminal activity has been conducted or not (to find out the material truth)[1]. The principle of circumstantial evidence is recognized in criminal procedural law. Hence, anything involving the legal feature of proofs can be offered

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1 Öztekin Tosun, *Ceza ve Medeni Muhakeme Hukuku Açısından Hukuka Aykırı Yollarla Elde Edilmiş Delillerin İspat Kuvveti*, İstanbul, 1976, p. 1; Yener Ünver & Hakan Hakeri, *Ceza Muhakemesi Hukuku*, İstanbul, Adalet, 2014, p. 600.

as an evidence[2]. However, it cannot pave the way to show everything as an evidence in a criminal procedure based on the rule of law[3]. They must be excluded. Therefore, whether the criminal activity has been conducted or not must be proved only by the evidence which has been lawfully obtained. Put it differently, these sort of evidences are subjected to the exclusionary rule in the Turkish criminal procedural law.

Regulations as to admissibility of evidence are explicitly stipulated in the Constitution (Art. 38/6) and in the Turkish Criminal Procedure Code (Arts. 206, 217, 230, and 289). This study purposes to show a general legislation outlook on whether unlawfully obtained evidences can be used in the Turkish criminal procedural law.

II. The Concept of Evidence Prohibition/ Exclusionary Rule

An absolute application of the principle of circumstantial evidence can have negative consequences for both individual and social interests[4]. Hence, there are some restrictions on obtaining and assessing evidences in a criminal procedure based on the rule of law, which is called the exclusionary rule[5]. The evidence prohibition has two dimensions. The first, it requires some restrictions on the way of obtaining the evidence which is called the prohibition of evidence by illegal ways. The second is about the restrictions to introduce, assess and taking as a base of judgment which is called the prohibition of the assessment of the illegally obtained evidence[6].

The evidence prohibition has many functions. First of all, it serves as a guarantee for the protection of fundamental rights and

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2 Ünver & Hakeri, p. 600.

3 Cumhur Şahin & Neslihan Göktürk, *Ceza Muhakemesi Hukuku II*, Ankara, Seçkin, 2012, p.73.

4 Erdener Yurtcan, *Ceza Yargılaması Hukuku*, 12th. ed., İstanbul, Beta, 2007, p. 261.

5 Bahri Öztürk, Durmuş Tezcan & Mustafa Ruhan Erdem et. al., *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku*, 7th ed., Ankara, Seçkin, 2014, p. 392.

6 Yurtcan, p. 261; Şahin & Göktürk, p. 74; Nur Centel & Hamide Zafer, *Ceza Muhakemesi Hukuku*, 10th ed., İstanbul, Beta, 2013, p. 690.

liberties[7]. In this way, it ensures and protects the rights of the accused and the suspected. By doing so, it leads a proper application of criminal procedure[8]. It is also pointed out that it brings an order for the investigation and prosecution authorities[9].

III. The Evidence Prohibition in the Turkish Criminal Procedure Code (The TCPC)

A. The Prohibition of Obtaining Evidence

1. Not Fulfilling The Duty to Inform

The methods of testimony and interrogations are stipulated in Art. 147 of the Turkish Criminal Procedure Code. This provision sets forth some rights for the accused and the suspected. These are followings: Prior to interrogation or testimony, he or she must be clearly informed about the charged crime. Plus, he or she must be informed that he or she has a right to have lawyer and the lawyer can be present during the interrogation or testimony. Furthermore, he or she must be informed that he or she has the right to remain silent regarding the charged crime. Also he or she must be informed that he or she can demand for the collecting evidence which help him to exonerate. He or she must be provided with facilities to offer evidence in favor of him or her. If one of these rights fails, the evidence out as an unlawfully evidence. To illustrate, if the accused is not provide with a lawyer, he or she is not informed that he or she has a right to remain silent, the evidence which is obtained in this way cannot be used and assessed as unlawfully obtained evidence[10].

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7 Yurtcan, p. 262; Veli Özer Özbek, Mehmet Nihat Kanbur & Koray Doğan, et. al., *Ceza Muhakemesi Hukuku*, 3rd ed., Ankara, Seçkin, 2012, p. 676, 677.

8 Mahmut Koca, "Ceza Muhakemesinde Hukuka Aykırı Delilleri Değerlendirme Yasağı", *AÜEHFD*, vol. 4, no. 1-2, 2000, p. 107.

9 Centel & Zafer, p. 693; Özbek, p. 677.

10 Öztürk et. al., p. 397; Özbek et. al., p. 679; See also, Adem Sözüer & Öznur Sevdiren, "Turkey: The Move to Categorical Exclusion of Illegally Gathered Evidence", in Ed. Stephen C. Thaman, Springer, 2013, p. 305, 306.

2. The Prohibited Interrogation Techniques

Using of some techniques to obtain evidence is prohibited[11]. This is regulated in art. 148 of TCPC, which reads as below:

"(1) The submissions of the suspect or accused shall be stemming from his own free will. Any bodily or mental intervention that would impair the free will, such as misconduct, torture, administering medicines or drugs, exhausting, falsification, physical coercion or threatening, using certain equipment, is forbidden.

(2) Any advantage that would be against the law shall not be promised.

(3) Submissions obtained through the forbidden procedures shall not be used as evidence, even if the individual had consented.

(4) Submissions obtained by the police, without the defense counsel being present, shall not be used as a basis for the judgment, unless this submission has been verified by the suspect or the accused in front of the judge or the court"[12].

This provision emphasizes that the statement of the suspect or the accused during testimony and interrogation must be based on the freewill. If the statement obtained without freewill of the suspect or the accused, it must be excluded. For example, even if the accused makes a confession in his or her statement without his or her freewill, this evidence cannot be used and must be excluded[13].

One more provision regulated in the aforementioned regulation is about the right of defense. In doing so, statement obtained by the police, without the defense counsel being present, cannot be used as a basis for the judgment, unless this submission has been verified by the suspect or the accused in front of the judge or the court[14].

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11 Yurtcan, p. 262; See also, Sözüer & Sevdiren, p. 302-304.

12 Feridun Yenisey, *Turkish Criminal Procedure Code, Ceza Muhakemesi Kanunu*, 1st ed., Istanbul, Beta, 2009, p.162- 163.

13 Özbek et. al., p. 678.

14 Öztürk et. al., p. 397.

3. The Prohibited Evidence Tools

Some tools which serve as an evidence may unlawfully obtained. These leads to exclude the evidence obtained through these tools. To illustrate, criminal coercive measures such as seizure, custody, and detain etc. shall be imposed by the decision of the judge. If an evidence has been obtained through one of these measures without decision of judge, these evidence must be excluded[15]. For example, a witness who has a right to refuse the testimony must be informed about his or her right before the testimony. If he or she gives testimony without being informed, the statement of that witness must be excluded.

4. The Prohibitions Introduced by the Code

In some instances, the codes may permit using the evidence for certain purposes and by doing so it prohibits using for other purposes[16]. For example, some evidence can be obtained through the process of the mediation, a method which is used in Turkish criminal procedure. However, *"the assertions made during the mediation conferences shall not be used as evidence in any investigation and prosecution, or in any case"*[17].

B. The Prohibitions of Assessing the Evidence

The prohibitions of assessing the evidence implies that some evidence cannot be used as a basis for the judgment[18]. In this regard, a problem arises on the issue of assessing the evidences in the violation of the rules on obtaining the evidence. Whether it must be used or not is controversial among scholar. However, it is mostly argued in Turkish doctrine that these sort of evidence must be excluded[19].

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15 Özbek et. al., p. 679.

16 Ünver & Hakeri, p. 671.

17 Yenisey, p.265.

18 Özbek et. al., p. 679.

19 Öztürk et. al., p. 394; Özbek et. al., p. 679.

This issue is mainly regulated in Art. 38/6 of the Turkish Constitution and Art. 217/2 of TCPC. These provision along with other rules regarding prohibitions of assessing the evidence will be dealt with in the below.

1. The Constitutional Provisions

Many significant amendments have been conducted through the harmony process into the European Union law. One of them is the amendment added to Art. 38 of the Constitution as a 6th subsection regarding the exclusionary rule. Art. 38/6 reads as;

"Findings obtained through illegal methods shall not be considered evidence."

This Constitutional provision refers to a broader term by saying "findings". This means that all kinds of clue, indication, and signs cannot be used as evidence in criminal procedure [20].

It should be also pointed out that the Constitution reads as not *"unlawfulness"*, but *"illegality"* whereas the TCPC states *"unlawfulness"* in terms of the prohibitions of assessing the evidence. In Turkish criminal procedure law, there is a difference between unlawfulness and illegality. Unlawfulness is a broader term than illegality as it refers to not only legal texts or codes such as Constitution, criminal code, and international agreements etc.; but also it refers to unwritten universal principles[21]. Therefore, if the evidence is unlawful, it must be excluded from criminal procedure. Even if some procedural failures which do not violate any fundamental rights and liberties, the evidence obtained through this process must be excluded.

Giving the priority to the Constitutional provision, all sort of unlawfully obtained evidence cannot be used in the criminal procedure regardless of whether there is a violation any fundamental rights and liberties[22]. The terms, unlawfulness and illegality, must be

[20] Sözüer & Sevdiren, p. 292; Özbek, p. 673.

[21] Öztürk, p. 399; Centel & Zafer, s. 689; Ünver & Hakeri, p. 660.

[22] Sözüer & Sevdiren, p. 292; Özbek, p. 673.

equally understood in terms of every branch of law in order to ensure the unification and integrity of law[23]. Therefore, the Constitutional provision finds application both in criminal and other procedure[24]. Furthermore, unlawfully obtained evidence by private persons must be excluded from the criminal procedure as the Constitutional is binding for every individual.

2. The Criminal Procedural Law Provisions

Art. 217/2 of the TCPC sets forth the general prohibitions of assessing the evidence. It reads as "*the charged crime may be proven by using all kinds of legally obtained evidence*"[25]. The provision implies that the charged crime cannot be proven by using unlawfully obtained evidence[26]. If the evidence has been unlawfully obtained, it must be rejected pursuant to Art. 206/2-a of the TCPC, titled *"introducing and rejection of evidence"*. Furthermore, the evidence which judgment based on and have been rejected must be indicated in the judgments. In that respect, the unlawfully obtained evidences in the case file must be explicitly and separately indicated according to art. 230/1-b. What's more, pursuant to Art. 289/1-j, if the judgment is based on the unlawfully obtained evidence, this leads the absolute violation of the law, which is counted as a ground for the appeal of judgment by the TCPC in Art. 288[27]. If the criminal procedural law provisions are assessed in conjunction with constitutional provisions, it can be concluded that unlawfulness and illegality are being used in the same sense. However, it can be also pointed out that Turkish statutes refer to both unlawfulness and illegality leaded to a classification as absolute and relative unlawfulness. This classification is based on the idea that some violation is petty whereas the other has more significance for the fundamental rights and freedoms[28].

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23 Ünver & Hakeri, p. 658.

24 Öztürk, p. 398; Centel & Zafer, p. 697; Ünver & Hakeri, p. 658; Özbek, p. 674; Ersan Şen, "Ceza Yargılaması Süreci", *TBB*, No: 97, 2011, p. 293.

25 Yenisey, p.216.

26 Centel & Zafer, p. 689; Özbek et. al, p. 681.

27 Centel & Zafer, p. 698.

28 For critics see Ünver & Hakeri, p. 642.

Absolute unlawfulness means that unlawfully obtained evidence cannot be basis of the judgment whatsoever[29]. It is argued that simple procedural failures should not lead the exclusion of evidence. Especially, it is pointed out by saying that some conditions which are not mandatory and do not lead the violation shall not be excluded. For example, performing seizure in a house requires the presence of the public prosecutor. If he or she cannot be present in this search, Art. 119/4 of the TCPC says that two persons who can be from community council or neighbor of the house. According this argument in doctrine, even if this requirement of the law do not fulfilled, the evidence can be used as it has nothing with violation of fundamental rights and freedoms; it is a simple rule of criminal procedure[30]. Likewise, Yargıtay, the Appeal Court, held this argument and decided that not fulfilling the simple rule in criminal measures do not render the evidence unlawful[31]. In this case, there was a violation of Art. 119/4 of the TCPC saying that if the public prosecutor cannot be present in the search at home, then two persons who can be from community council or neighbor of the house must be present. Nevertheless, the evidences obtained in that measure were used as a basis of the conviction[32].

Art. 254/2 of the former Criminal Procedure Code stated that unlawfully obtained evidence shall not be basis of the judgment. But the new Criminal Procedure Code stipulates that the charged crime can be proved by all kinds of evidence which are lawfully obtained[33]. Consequently, the unlawfully obtained evidence cannot be used in any phase of criminal procedure. To illustrate, the public case cannot be brought into action by basing the unlawfully obtained evidence. Likewise, the decision for imposing detention, arrest, search or seizure cannot be held by basing these sort of evidence[34].

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29 Koca, p. 111.

30 Ünver & Hakeri, p. 668.

31 YCGK, E. 2011/8-278, K. 2012/96, T. 13.3.2012.

32 Yargıtay held the same view in the other decision. See at YCGK, E. 2007/7-147, K. 2007/159, T. 26.6.2007.

33 Öztürk et. al., p. 399.

34 Sözüer & Sevdiren, p. 292; Ünver & Hakeri, p. 661.

There is no difference regarding exclusionary rule among parties, defendant or prosecution. Also, the unlawfully obtained evidence which lead the acquittal of the accused cannot be used[35].

3. The Issue of the Unlawfully Obtained Evidence by Private Persons

The regulation as to admissibility of evidence explicitly stipulated in the Constitution (Art. 38/6) is binding not only for criminal procedure authorities; but also for private persons. Hence, it should be pointed that unlawfully obtained evidence by private persons must be excluded from the criminal procedure[36]. The evidences obtained by private persons can be used in the criminal procedure as far as they are lawfully obtained[37].

4. Rejection of Unlawfully Obtained Evidence

The unlawfully obtained evidence cannot be filed in the criminal case pursuant to provisions of the TCPC. If the demand to introduce the evidence which has been unlawfully obtained to the case file shall be rejected according to Art. 206/2-a[38].

These provision aims to prevent the use of the unlawfully obtained evidence which has been introduced into the criminal case file in anywise. Especially, this is of significance on legal remedies. Because, that the unlawfully obtained evidence has been basis of the judgment is considered as an absolute violation of law[39]. Furthermore, the provision emphasizes the prohibition of assessment of the unlawfully obtained evidence[40].

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35 Öztürk, p. 401; Ünver & Hakeri, p. 672.

36 Öztürk, p. 421; Özbek et. al, p. 682.

37 Ünver & Hakeri, p. 672.

38 Nurullah Kunter, Feridun Yenisey & Ayşe Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 18th ed., İstanbul, Beta, 2010, p. 1481; Özbek et. al., p. 682.

39 Ünver & Hakeri, p. 664.

40 Centel & Zafer, p. 699.

5. Beyond Effects of the Illegally Obtained Evidence

In Turkish criminal law, it is controversial whether the evidences which has been obtained by the unlawfully obtained evidence must be excluded or not. It is argued that these sort of evidence must be excluded by taking the idea called "*The fruit of the poisonous tree*" doctrine prevailing in common law countries.

The fruit of the poisonous tree doctrine became the positive regulation in Turkish law by adding the amending to Art. 38 of the Constitution[41]. If the criminal procedural law provisions are assessed in conjunction with constitutional provisions, it can be concluded that the evidences which has been obtained by the unlawfully obtained evidence must be excluded by aiming to prevent beyond effects of the illegally obtained evidence[42]. Likewise, the majority of Turkish scholars argue that the evidences obtained by the unlawfully obtained evidence must be excluded[43].

41 Ünver & Hakeri, p. 667.

42 Centel & Zafer, p. 701.

43 Kunter, Yenisey & Nuhoğlu, p. 1477; Özbek, p. 682.