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ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

A Procedural Oddity in the Investigation Stage in Turkish and German Practise: Preliminary Interview with the Suspect

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Abstract

In criminal procedure law, research may be conducted to obtain some information regarding the act after a crime has been committed. The details regarding the act in question are sought by obtaining information from the persons who are not the suspect. The statement of the suspect is taken to help the investigation, to determine the course of it and to contribute to the collection of evidence after the suspect is identified. Before the statement-taking process, the suspect is reminded about his rights and can benefit from these rights. There are regulations that protect the suspect, such as the right to remain silent during the statement-taking process. These regulations in favour of the suspect guarantee the right to a fair trial. However, in practise, in addition to statement taking, some officers also conduct unlawful alternative interviews with the suspect. It is seen that the information is obtained from the suspect without being recorded in the official report even though the suspect is known. This interview is called a preliminary interview in practise because it does not meet the conditions for statement taking. The preliminary interview is a part of an illegitimate process, and the suspect cannot use his rights protected by the rule of law during the preliminary interview. During the preliminary interview, he is not reminded of his rights, and his will become defective. The information obtained during the preliminary interview is addressed to the suspect as questions during statement taking. The interview does not constitute an assurance in favour of the suspect and it is not conducted in accordance with the technical and legal procedures of statement taking. The fact that the preliminary interview was conducted with a reliable third party does not eliminate the unlawfulness of the interview. Therefore, the information obtained during the preliminary interview by the law enforcement officer with the suspect should be considered forbidden evidence.

Keywords

Forbidden Evidence, Preliminary Interview, Preliminary Interrogation, Statement Taking, Reliable Person

Türk ve Alman Uygulamasında Soruşturma Aşamasında Bir Usul Garabeti: Şüpheliyle Yapılan Ön Görüşme

Öz

Ceza muhakemesi hukukunda bir suçun işlenmesinden sonra, olaya ilişkin olarak birtakım bilgilerin elde edilebilmesi adına araştırma yapılabilmesi mümkündür. Şüpheli olmayan kişilerden bilgi almak suretiyle iddia konusu olaya ilişkin ayrıntılar elde edilmeye çalışılmaktadır. Şüpheli belirlendikten sonra ise soruşturmanın önünü açmak, yönünü belirlemek ve delillerin toplanmasına katkı sağlamak amacıyla şüphelinin ifadesi alınmaktadır. İfade alma işleminden önce şüpheli, hakları konusunda bilgilendirilir ve bu haklardan yararlanabilir. İfade alma sürecinde susma hakkı gibi şüpheliyi koruyan düzenlemeler mevcuttur. Şüpheli lehine olan bu düzenlemeler adil yargılanma hakkını güvence altına almaktadır. Ancak uygulamada bazı görevliler, ifade almanın yanı sıra şüpheli ile hukuka aykırı alternatif görüşmeler de yapmaktadır. Şüpheli bilinmesine rağmen resmi tutanağa bağlanmaksızın, şüpheliden bilgi alındığı görülmektedir. Bu görüşme, ifade alma işleminin koşullarını taşımadığından uygulamada ön görüşme diye ifade edilmektedir. Ön görüşme, yasal olmayan bir sürecin parçası olup şüpheli, hukuk düzeni tarafından korunan haklarını kullanamamaktadır. Ön görüşme sırasında

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şüpheliye hakları hatırlatılmamakta ve şüphelinin iradesi sakatlanmaktadır. Ön görüşme sırasında elde edilen bilgiler; daha sonra ifade alma aşamasında soru haline getirilerek şüpheliye sorulmaktadır. Görüşme aşaması şüpheli lehine bir güvence içermemekte, ifade almanın teknik ve hukuki usullerine uygun yürütülmemektedir. Ön görüşmenin güvenilir bir üçüncü kişi kullanılarak yapılması da görüşmenin hukuka aykırılığını ortadan kaldırmamaktadır. Bu nedenle, kolluğun şüpheli ile yapmış olduğu ön görüşme sırasında elde etmiş olduğu bilgiler yasak delil olarak kabul edilmelidir.

Anahtar Kelimeler

Yasak Delil, Ön Görüşme, Ön Sorgu, Ifade Alma, Güvenilir Kişi

Extended Summary

In criminal proceedings, the law enforcement officers may conduct an investigation to obtain information about the crime. The statement, taken by asking questions to the person who is not the suspect to determine and clarify the crime, may be expressed as information retrieval. Investigation and research activities under the name of information gathering are conducted to find evidence of crime in cases where the suspect is not known. This is lawful because of the investigation stage and the effectiveness of the law enforcement in criminal procedure law. After the suspect is identified, his official statement is taken in accordance with legal requirements.

The suspect is the person who is suspected of committing a crime and against whom an investigation has been opened by the investigative bodies. According to the general opinion accepted in doctrine and judicial decisions, a person has the capacity of the suspect when investigative bodies take action to clarify the crime and take measures.

In practise, it has been seen that information is obtained from the suspect without recording although the crime has been revealed and the suspect has been identified. The informal information gathering in question is called a preliminary interview because the requirements for statement taking stipulated in the legislation are not complied with.

Although the suspect is identified, the law enforcement officer conducts an informal interview with him instead of taking the statement officially. This communication method becomes a rule in practise. The interview with him without complying with the requirements for statement taking can be exemplified as the significant problems seen in law practise in the investigation stage. The aim of this study is to identify the legal nature of the preliminary interview by a law enforcement officer with the suspect after a crime has been committed and to determine whether the information obtained is within the scope of forbidden evidence.

In criminal procedure law, an investigation is opened when the suspicion of a crime emerges. A face to face interview with the suspect could be beneficial to

obtain criminal evidence during the investigation. In this regard, taking the statement of the suspect is a significant investigation procedure to obtain criminal evidence and to determine the course of the investigation. Also, it is the reasoning process in which the suspect can use his right of defence for the first time. Therefore, he should be reminded of his rights before taking the statement, and the law enforcement should prevent his will from becoming defective during statement taking. In this regard, the preliminary interview by the law enforcement officer with him is called secret statement taking and considered as unlawful because it does not constitute an assurance in favour of the suspect. The statement taking, a technical and legal procedure, is conducted in the law enforcement unit by being recorded. Preliminary interviews, on the other hand, are made at the crime scene or while being taken to the law enforcement units or hospital, and the statement of the suspect is not recorded.

The suspect's will become defective can be shown as reason for the preliminary interview is forbidden evidence. The psychological or actual pressure caused by the unrecorded and informal interrogation prevents the suspect's free will. This violates the fair trial principle. The principle prohibits investigative bodies from using any means to reach the truth and also prevents the suspect's being suppressed and compelled to testify against himself and used as a means to obtain evidence. In a lawful statement-taking procedure, it should be stated to the suspect that he is free to make a statement about the accusations against him and that this right is protected by law before being interrogated. It is emphasised with freedom of giving a statement that the personal rights of the suspect are more important than the purpose pursued by the criminal investigation. However, the legal rights of the suspect were not reminded during the preliminary interview. Therefore, the suspect, whose free will is made defective, is compelled to accept the accusations against himself. A preliminary interview may also be made with a third party due to the fear that he will not tell the truth before the law enforcement. The third party's being present during the preliminary interview does not prevent the suspect's will from becoming defective. Therefore, it is unlawful to obtain some statements from him with the help of a reliable third party.

This preliminary interview by the law enforcement officer with the suspect is an unlawful procedure, and a conviction cannot be obtained based on the statement. The statement taken during the preliminary interview should be considered forbidden evidence even if later confirmed in court by the accused. However, the statement taken after the preliminary interview can be considered a lawful evidence. If the suspect is explained that the statement in the preliminary interview is forbidden evidence and his rights are reminded before his statement is taken officially, the subsequent statement can be considered legitimate.

Introduction

Taking the statement of the suspect constitutes one of the most important means of obtaining evidence in terms of the criminal procedure. Because in this way, the suspect is heard first-hand about the act to be clarified.[1] The suspect's statement often affects the judgement at the end of the proceedings. İt must be said that his statement is of vital importance in terms of revealing the material fact, which is the purpose of criminal proceedings.[2] Therefore, he must be able to make a statement freely and defend himself about the alleged act without feeling under any pressure.[3] This requirement is a right arising from the existence of the person.[4]

The necessary procedures by the investigation authorities to determine whether a crime has been committed should be conducted in accordance with the law.[5] The rules regarding the preservation of the fundamental rights and freedoms of the individual should be clearly regulated and the necessary inspection should be foreseen in order for the investigation subjects to comply with these rules in order to re-establish the public order, which has been disrupted by the crime committed.[6]

In Turkish and German practise, there is a tendency to depart from the classical concept of statement taking. As will be explained with examples in the following sections of the study, it is observed that in both countries, the law enforcement officers conduct an interview with the suspect during the investigation stage before his statement is taken, and this interview has almost become a rule in practise.

The statement taking is subject to strict rules that protect the functioning of criminal proceedings and the rights of the suspect.[7] For this reason, by putting forward the practise of preliminary interview, the concept of statement taking is attempted to be postponed and the legal guarantees attached to the concept of statement taking are attempted to be violated.[8]

After a crime has been committed, the nature of the questions asked by the law enforcement officers at the crime scene and in later research should be determined. It is important to determine whether the communication of the law enforcement officer with the suspect is a statement taking or a preliminary interview seen in practise, and

1 Timur Demirbaş, *Soruşturma Evresinde Şüphelinin İfadesinin Alınması* (Seçkin 2015) 101.

2 Cumhur Şahin, *Sanığın Kolluk Tarafından Sorgulanması* (Yetkin 1994) 99.

3 Claus Roxin, "Zum Beweisverwertungsverbot bei unterbliebener polizeilicher Belehrung über das Aussageverweigerungsrecht" (1992) (18) JZ 918, 920.

4 Nur Centel ve Hamide Zafer, *Ceza Muhakemesi Hukuku* (Beta 2020) 187.

5 Bernhard Kramer, *Grundlagen des Strafverfahrensrechts* (Kohlhammer 2014) 157.

6 Tobias Mahlstedt, *Die verdeckte Befragung des Beschuldigten im Auftrag der Polizei* (Duncker & Humblot 2011) 23.

7 Nikolaus Bosch, *Aspekte des nemo-tenetur-Prinzips aus verfassungsrechtlicher und strafprozessualer Sicht. Ein Beitrag zur funktionsorientierten Auslegung des Grundsatzes „nemo tenetur se ipsum accusare"* (Duncker & Humblot 1998) 243.

8 Serkan Meraklı, "İfade Alma-Sorgu Kuralları ve Bu Kurallara Aykırılık Halinde Elde Edilen Beyanların Hukuki Değeri" *Feridun Yenisey'e Armağan Cilt I* (2014) (Bahçeşehir Üniversitesi Yayını) 1594.

the determination of the legal nature of these in terms of determining the applicability of the relevant regulations.[9] In the study, it will be kept in mind at all times that compliance with the rule of statement taking is indispensable for the discovery of the material fact and the realisation of a fair trial, and this point will be emphasised throughout the study.

Without having to take into account the purpose of making the evidence usable in court proceedings, it is important to evaluate the purpose of the law enforcement in applying an illegal procedure and the usability of the statement obtained.[10] Therefore, the aim of this study is to reveal the legal nature of obtaining information under the name of preliminary interview after the suspect is identified in the concrete case and whether the information obtained can be evaluated in criminal proceedings. In the evaluation to be made specifically for Turkish and German law, doctrine and judicial decisions are considered. In this study, first, the concepts of preliminary interview and statement taking are explained; then the obligation of disclosure, which is a right for the suspect and an obligation for the investigating authorities, is explained. Then, the forbidden methods of statement taking are analysed. Following this stage, evaluations are made in terms of the preliminary interview with the suspect. Thus, the legal value of the statements obtained under the name of preliminary interview in case of violation of the rule of statement taking is tried to be clarified.

1. Concept and Definition

In criminal procedure law, an investigation is opened when the suspicion of a crime emerges.[11] The investigation is a stage close to the alleged crime and is carried out based on technical knowledge requiring expertise.[12] The law enforcement officer, having the duty of investigating and detecting traces of crime and evidence, performs very effective activities during the investigation stage.[13]

In criminal procedure law, before the suspect in the crime under investigation is identified, how the person's interrogation is defined and the legal nature of the statement obtained during the interrogation should be determined.[14] Law enforcement may be conducted to obtain some information from person or persons regarding the act after a crime has been committed.[15] In cases where the suspect is not known, "examination-investigation" is carried out to verify the suspicion and to find things

[9] Şahin (n 2) 59.

[10] Wilhelm Degener, "§ 136a StPO und die Aussagefreiheit des Beschuldigten" (1992) GA 443, 444.

[11] Veli Özer Özbek, Koray Doğan ve Pınar Bacaksız, *Ceza Muhakemesi Hukuku* (Seçkin 2020) 191.

[12] Mandy Vetter, Verteidigerkonsultation im Ermittlungsverfahren (Duncker & Humblot 2018) 28.

[13] Yener Ünver ve Hakan Hakeri, *Ceza Muhakemesi Hukuku* (Adalet 2020) 501.

[14] Mahlstedt (n 6) 51.

[15] Centel ve Zafer (n 4) 264.

that may be evidence in the proceedings.[16] In practise, the statement obtained by asking questions to a person who is not a suspect for the detection and clarification of the crime can be defined as "information gathering".[17]

There is no difference between the Turkish and German practise in terms of the purpose, scope and nature of the information gathering activity.[18] The details regarding the concrete case are sought by obtaining information from the persons who are not the suspect.[19] These details can contribute to the determination and identification of the person who may be a suspect, to separate those who are related or not related to the alleged case, and to determine a direction in the investigation.[20]

Since the person is not yet a suspect at the stage of information gathering and there is no restriction on personal rights, there is no obligation to remind the suspect of his rights. This is because at this stage, the investigation is carried out for the sole purpose of gathering information and whether or not to provide information depends on the willingness of the person to whom the information is sought to cooperate.[21] According to the German Federal Court of Justice, arguing a similar opinion, the law enforcement officer who receives the information about that theft has occurred in a workplace may go to the workplace and ask questions for information gathering

16 Feridun Yenisey ve Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku* (Seçkin 2020) 574.

17 Ingrid Maria Schaal, *Beweisverwertungsverbot bei informatorischer Befragung im Strafverfahren* (Tenea 2002) 12. Information gathering essentially serves to obtain an initial picture of whether there is sufficient evidence of the existence of a crime and whether anyone present can be considered a witness or even a suspect. Werner Beulke und Sabine Swoboda, *Strafprozessrecht* (CF Müller 2020) 58. Thus the "first light in the darkness" may have been brought. Şahin (n 2) 60. Information gathering can be done at the crime scene or later. At this point, the purpose of information gathering is to determine whether a crime is committed, to determine who the criminals are and what their capacities. The first questions are asked and to whom the suspicion should be directed is determined with the information gathering process. Demirbaş (n 1) 52.

18 In Turkish law, information gathering, which differs from statement taking with some of its characteristics, but which may be confused with the concept of statement taking, is defined in Article 4 of the Regulation on Arrest, Custody and Statement Taking. Accordingly, information gathering refers to the listening and recording of the persons who are harmed by the crime and other persons who are not under suspicion of committing a crime in order to detect or clarify a crime. Demirbaş (n 1) 52. In German law, there is no regulation regarding information gathering. However, the information gathering activity, which is of practical importance in practise, is carried out by the law enforcement officers to clarify the case. Lutz Meyer Goßner und Bertram Schmitt, *Strafprozessordnung: Kommentar* (CH Beck 2020) 699.

19 Schaal (n 17) 36. The information gathering process also has the function of protecting fundamental rights and freedom. After a direct statement taking procedure, these persons may be considered the suspect and an investigation may be opened against them. However, the details regarding the concrete case can be reached with the information gathering process in accordance with the presumption of innocence. Thus, it is possible to prevent his name from being stained by taking his statement because of a crime he has never committed. This practise is used to allow people to be heard without being labelled them, without making them the suspect, and thus to gather information about the case. Meraklı (n 8) 1553.

20 Beulke und Swoboda (n 17) 93. Information gathering is often necessary to build a big picture of the case. In the information gathering activity; What happened? How did it happen? Who was there? Questions are asked and answers are obtained. These first serve to determine whether a crime has actually been committed and who is the victim, witness or suspect. Degener (n 10) 448. As a natural consequence of the messy investigation stage, it may be reasonable for the law enforcement to try to find out some details through people present or absent at the crime scene with a claim that a crime has been committed. These details are necessary for the investigation to be directed, and this information obtained from the third party should not be used as direct evidence at trial. However, the information obtained after the information gathering process may be conveyed informally to the next stages. To illustrate, it may be submitted to the judge at the hearing. In this case, the judge can only consider the information notes to assess the attitude and reaction of the accused while assessing the evidence.

21 Demirbaş (n 1) 48.

without any procedure until the suspect is identified due to the suspicion that any of the employees may have committed the crime.[22]

In general, there is no limitation on the information gathering and no procedure is regulated. Investigative authorities are granted the power of discretion for information retrieval.[23] Information gathering is the stage before the suspicion of crime is embodied, and it ends when the law enforcement starts working in a planned manner and engages in investigative procedures.[24] Any attempt to obtain information by the investigative body should be considered statement taking when the suspect is identified.[25] In other words, when there is a suspicion that a crime has been committed, the law enforcement officer must take the statement of the person under suspicion of a crime in relation to the crime under investigation.[26]

According to the German Federal Court of Justice, the information retrieval that may be done by the law enforcement officer is not conducted with the purpose of statement taking. After the suspicion of a crime arises, the taking statement of the suspect is not conducted as information retrieval. Otherwise, unlawfulness arises by manipulating the law.[27] According to the Court, in such an incident the suspect's statement should be subject to the conditions for statement taking.[28]

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22 BGH. 17.09.1982 - 2 StR 139/82.

23 Schaal (n 17) 39.

24 Centel ve Zafer (n 4) 264. Although it is theoretically possible to determine the end of the information gathering stage, the criteria for determining this in practise are limited. Therefore, the end of the stage of questioning those present in the scene can only be determined on a case-by-case basis. What is certain, however, is that as soon as there is a concrete suspicion that one of the persons concerned can be considered a suspect, it is no longer possible to ask them questions to gather information. For example, the law enforcement arriving at the scene of a fight may ask a person in the neighbourhood whether he has seen the incident or where the scene is located. However, if the officer realises that this person's clothes are torn or that blood is flowing from any part of his body, the information gathering activity must end.

25 Vetter (n 12) 113.

26 Schaal (n 17) 33. For example, it is learnt that a fire has started at the same time in different parts of a forested area. Suspicion arises that this is arson, and the authorities begin to investigate. In order to determine the cause of the fire, the law enforcement tried to build up a picture of how it happened through various questions. They may ask questions to a person who is not yet the suspect for research purposes. When a person who has a house in the forest says that he smells petrol and that a person escaped towards the road during the fire, this is within the scope of the information gathering activity. Asking questions to the person matching this description will also form part of the information gathering process. However, if, in the meantime, the smell of petrol was smelled on the person and burn marks were seen on his hands, suspicion is directed towards a person. The impression that a crime has been committed has turned into an initial suspicion in terms of the act and the person concerned. Since the suspect has already appeared, the information gathering stage is over. Naturally, this procedure should be terminated and he should be reminded of his rights and the statement taking stage should begin. Mahmut Gökpınar, "Şüphelinin Kolluk Tarafından Aldatılması" (2023) 31 (2) SÜHFD 665, 666.

27 According to the Court, in determining whether a suspicion of crime has arisen, besides taking into account the statement of the law enforcement, it is also necessary to consider how the behaviour of the law enforcement is reflected on the public and how the answerer perceives this situation. For example, the attitude of the law enforcement officer towards the person may cause him to feel like a suspect, although the officer does not state that the person encountered at the crime scene is a suspect. Therefore, the information gathering should proceed as statement taking instead of as an information gathering activity by talking to the person who feels like a suspect. BGH. 27.02.1992 - 5 StR 190/91.

28 BGH. 31.03.2011 - 3 StR 400/10.

In practise, the informal information gathering in question is called a preliminary interview because the requirements for statement taking stipulated in the legislation are not complied with.[29] The preliminary interview, which is the main subject of the study, is unlawful, as will be seen in the following sections.

Caution is therefore required in the research activity of obtaining information. Although information gathering is a necessary and important procedure, it clearly involves certain dangers. If the purpose of information gathering is to go into as much detail as possible before making a real statement, without reminding the suspect of his rights, without being subject to any obligation, and in this way to clean the dirty spots, such information gathering is unacceptable.[30] Because in this incident, a situation arises in which some rights of the relevant parties are violated by this method.[31] In reality, the purpose of the information gathering enquiry is to enable the law enforcement officer, at the very beginning, to identify the first decisive point. In this way, it can be determined which person of interest should play which role in the eyes of the law enforcement. Research may continue in this way until a suspect is identified. As soon as a suspect appears, it is no longer possible to continue the research to gather information. Once the suspect's judgement role has been concretised, it is expected that his rights will be exercised and his statement will be taken.

2. Statement Taking and Suspect's Rights During the Statement-Taking Process

In criminal procedure law, face to face interviews with the suspect may be effective in investigating every detail about an alleged crime.[32] The suspect's statement, having information directly, is highly crucial to reveal the material fact.[33]

In criminal procedure law, the statement taking is the first statement of will of the suspect regarding the act after the suspicion of crime arises.[34] It is a research process and refers to the reporting of the events that occurred during the investigation stage in relation to the crime alleged against the suspect.[35] The aim of statement taking is to

[29] Bosch (n 7) 244.

[30] Demirbaş (n 1) 53.

[31] Şahin (n 2) 61.

[32] Hans Moormann, *Die informatorische Anhörung im Ermittlungsverfahren* (1989) 36.

[33] Klaus Rogall, "Die erste Vernehmung des Beschuldigten" (2015) (9) RechtsBrücke 157, 157. As a rule, taking a statement cannot be understood as only an activity carried out in a closed place or in a statement taking room. In reality, a statement is any behaviour by the investigating authority that may induce the suspect to make a statement that may incriminate himself. In this sense, the place of statement taking may be the statement room at the law enforcement unit, the suspect's home or the place where he is suspected of committing the crime or where he was caught, the street, the place of discovery, in short, anywhere. In a simple incident, it is possible to make a statement immediately in the scene of the crime or at the suspect's home or workplace. However, in cases where it is necessary to make a detailed statement, it is appropriate to make this in a special place. Cumhur Şahin ve Neslihan Göktürk, *Ceza Muhakemesi Hukuku I* (Seçkin 2021) 170.

[34] Meyer Goßner und Schmitt (n 18) 700.

[35] Markus Löffelmann, *Die normativen Grenzen der Wahrheitserforschung im Strafverfahren* (De Gruyter Recht 2008) 53.

conduct research and collect evidence in order to find the material fact and to enable the suspect to make a defence about the incident subject to the crime.

There is no difference between Turkish and German practise in terms of the purpose and nature of the statement taking.[36] Taking the statement of the suspect has an informing function in order to reveal the material fact for the investigative authorities. It contributes to help the investigation, to determine the course of it and the collection of evidence. The evidence are collected to reveal the facts supporting a suspicion of crime.[37]

During the statement-taking process, a report is prepared for the scope of the statement. The report is a mandatory result of the statement-taking process, which shows the functioning of the statement-taking process and the suspect's statement. The report prepared at the end of the statement taking is extremely important both in terms of subsequent decisions in the investigation and in terms of its evaluability in the trial.[38] For this reason, it is the only material from which one can obtain information about the course of the statement taking, an indispensable part of the statement taking, a reflection of reality.[39]

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[36] Although there is no difference in practise in terms of the purpose and nature of the statement-taking activity, there is a difference in Turkish and German law regarding the naming of the activity of hearing the suspect. Namely, in Turkish law, the concepts of statement-taking and interrogation are differentiated. While statement is the hearing of the suspect by the law enforcement or the prosecutor (Art. 2/1-g), interrogation is the hearing of the suspect by the judge (Art. 2/1-h). In German law, the concepts of statement taking and interrogation are not recognised as separate. The hearing of the suspect (§ 163a - Vernehmung) carried out by the law enforcement or the prosecutor and the interrogation by a judge (§ 136-richterliche Vernehmung) are both considered as interrogation. As can be seen, the activity of hearing the suspect is still defined as interrogation, even though the officials-performing this task are different. Meraklı (n 8) 1558. The meaning and function of statement taking are not defined in the Turkish and German Criminal Procedure Codes. The Code only includes regulations that determine when a person's statement will be taken as a suspect at the latest, and which rules will be followed. Gökpınar (n 26) 671. As can be seen in the concepts of a statement taking in Turkish and German law, the suspect is confronted by an official whose official capacity is open. In this case, where similar practise is accepted in Turkish and German law, a statement taking does not take place when the person taking the statement does not have an official capacity or when the person conceals this capacity. In accordance with this explanation, the German Federal Court of Justice makes a definition that can be attributed to both Turkish and German law. Namely, during a statement taking, the person taking the statement must appear before the suspect within the scope of an official function and listen to the suspect within the framework of this relationship. BGH. 21.07.1994 - 1 StR 83/94. From this point of view, the Court states that the concept of a statement taking has only a formal structure, not a functional one, and should be evaluated in this context. In making this assessment, the Court uses the secret investigator's activity as evidence. Namely, if the interview was considered as a statement taking based on its function, the statements made by the suspect to the secret investigator should also be considered as a statement taking. In this case, the investigator would have to remind the person of his rights in the first instance. This is not possible in terms of secret activity. This situation reveals that the concept of a statement taking should be understood as limited to its formal aspect.

[37] Antje Schumann, Verhör, *Vernehmung, Befragung* (Mohr Siebeck 2016) 12. The aim of the criminal procedure is not necessarily to punish in any way whatsoever. The aim is to investigate and reach the material fact. The investigation stage must provide the method for achieving this aim. The way to achieve this aim is to involve the suspect in the investigation stage as soon as possible. This is possible by taking his statement. Otherwise, the judgement may be directed in the wrong direction based on the one-sided and incomplete information and investigations of the law enforcement. However, only a small statement by the suspect can end the judgement at the very beginning or contribute to the right direction. Şahin (n 2) 82.

[38] Roxin (n 3) 921.

[39] Şahin (n 2) 152. It is the statement-taking process that constitutes the content of the report. The report must reflect in detail the entire process from the beginning until the signing of the report. The statement taking report must reflect the suspect's statements as accurately and truthfully as possible and show the reasons why and how he made the statement. Demirbaş (n 1) 207.

That when a person is considered a suspect should be identified first regarding the determination of when to take a statement. The suspect is the person who is under the suspicion of crime due to the alleged crime and under investigation.[40] Whether the person is considered suspect or not has importance in determining which legal action can be taken against him and which rights he can use.[41] One obtains the capacity of a suspect when an action is taken against the person due to a crime alleged to have been committed and any measure is taken against that person.[42]

The law enforcement officers, upon being informed that a crime has been committed, immediately begin to investigate and may ask questions to other people around, in case the suspicion of crime has not yet been directed to a certain person. If the law enforcement suspects the person whose information he consulted, then the questioning process for information retrieval should be terminated immediately and the statement-taking process should be started.[43]

The investigation process regarding any crime is not unlimited and absolute. It is necessary to maintain individual values during the investigation process.[44] Therefore, the rules regarding statement taking are addressed to the investigative authorities, and these rules ensure that the public authority acts within the scope of law.[45]

The suspect may be suppressed to receive a confession and collect evidence regarding the crime during statement taking. Therefore, the taking the statement of the suspect should be subject to specific legal rules to protect the fundamental rights and freedom of him.[46] The fact that his statement is taken and carried out in accordance with stipulated rules indicates that the suspect's statement is intended to be completely based on his free will. The statement of record must include why the statement is taken and, where and when the statement is taken while the suspect's statement is being taken. Additionally, the names and capacities of the persons present during the statement taking and the clear identity of the person taking the statement must be recorded. The lawyer's name and signature must be included

40 Centel ve Zafer (n 4) 175.

41 Moormann (n 32) 50.

42 Bahri Öztürk, *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku* (Seçkin 2020) 247.

43 Schaal (n 17) 40.

44 Demirbaş (n 1) 101.

45 Beulke und Sabine (n 17) 103. Taking the statement of the suspect is an important criminal procedure of the investigation stage. This importance arises from two aspects: First, statement reports give direction to the investigation and help the collection and evaluation of evidence. Second, the statement procedure is sensitive in terms of the protection of human rights and freedoms. Considering that methods such as torture are generally used to make the suspect talk, it is possible that false statements may be prepared and innocent people may be convicted as a result. For these reasons, statement taking is regulated in the criminal procedure laws. Faruk Turhan ve Murat Aksan, "Ceza Muhakemesinde Şüphelinin İfadesinin Alınması ve Sorguya Çekilmesine İlişkin Hükümlerin Eleştirel Bir Değerlendirmesi" (2020) 24 (2) AHBVÜHFD 289, 293.

46 Meyer Goßner und Schmitt (n 18) 709.

in the relevant record in procedures where the lawyer is present with his capacity. These conditions are considered both as the assurance of the statement of the person testifying and can be evidence that the statement was taken in accordance with the law.

Taking the statement of the suspect is one of the effective means of criminal procedure, in which the suspect can use his right of defence directly or with the help of his lawyer during the investigation stage.[47] The statement taking, necessary for the suspect to use his right to defence, must include his rights.[48] These rights support him and enable the investigation authority and him to meet under equal conditions.[49]

The accusation should be explained the suspect to use his right to defence. The accusation should be explained in detail with its concrete reasons. In accordance with the right to due process, the suspect has the right to remain silent.[50] The person who uses his right to remain silent must not be forced to testify or provide any evidence.[51]

The suspect has the right to claim the collection of concrete evidence regarding the crime. He has the right to access legal assistance from a lawyer.[52]

Reminding the suspect of his rights is of particular importance. By reminding his rights, he is not only provided with a simple legal knowledge, but also, if necessary, a deception that may arise from the fact of the statement itself is eliminated.[53]

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47 Rogall (n 33) 161.

48 Not reminding the suspect of his rights at all, reminding him about them incompletely or reminding him about them by misleading restricts his right to defence. Rogall (n 33) 162.

49 Werner Beulke, "Die Vernehmung des Beschuldigten, einige Anmerkungen aus der Sicht der Prozeßrechtswissenschaft" (StV 1990) 180, 181. Die Vernehmung des Beschuldigten, einige Anmerkungen aus der Sicht der Prozeßrechtswissenschaft, in: StV 1990, s. 181. Reminding the suspect of his rights means that the equality of arms principle is applied in the investigation stage. Öztürk (n 42) 158. The equality of arms principle requires a fair balance between the parties to the proceedings. The parties must have a reasonable opportunity to present their case, including evidence. This principle includes the right of the suspect to be reminded; to have sufficient time to prepare his defence; to be informed of the evidence and submissions of the parties; and to be present at the proceedings and to make statements. Şahin ve Göktürk (n 33) 182.

50 Freedom of statement, which is a right of the suspect during the investigation stage, is of great importance for him. Being a subject of the proceeding who can contribute to the shaping of the proceedings, even if limited, is only possible if the accused is able to be the true owner of his own statements by assuming personal freedom and responsibility, and to decide whether to speak or not and to the extent he wishes to speak, free from all kinds of pressure. Şahin (n 2) 102. Not speaking or not telling the truth is also a form of defence. No one shall be compelled to make a statement or produce evidence incriminating himself. This right is an extension of the right to a fair trial and a complementary element of the presumption of innocence, which constitutes one of the most fundamental human rights. The fact that the suspect cannot be compelled to make a statement or present evidence against himself shows that he is not obliged to actively participate in the proceedings. Mehmet Arslan, *Die Aussagefreiheit des Beschuldigten in der polizeilichen Befragung* (Duncker&Humblot 2015).

51 It is indisputable that in criminal procedure, which begins with suspicion and ends with the overcoming of suspicion, the suspect is not an ordinary object, but rather a subject who plays an important role in overcoming suspicion. If this person does not exercise his right to remain silent, within the framework of the "freedom to make statements", he may help the law enforcement to find the material fact with his statements during the investigation stage, or he may try to prevent the investigation authorities from reaching the material fact. This is because the suspect, as a self-determining subject, is in a position to decide whether or not to make a statement based on his own free will. Beatrice Brunhöber, "Für ein Grundrecht auf ein faires Verfahren in der strafprozessualen Praxis" (2010) (12) ZIS 761, 765.

52 Jürgen Peter Graf, *Strafprozessordnung: Kommentar* (CH Beck 2019) 821.

53 Roxin (n 3) 924.

Furthermore, it is an indispensable part of his rights to be reminded that he does not have to incriminate himself.[54] A reasonable interpretation of the right against self-incrimination recognises the need to remind the suspect that he cannot be compelled to make a statement. A suspect may use a right he has only if he is reminded of that right. A right without knowledge of its existence is meaningless.

Not reminding the suspect of his rights before making a statement, or not reminding them incompletely, is generally accepted in Turkish and German practise as a violation of the right to defence and therefore right to a fair trial.

It is considered unlawful that the suspect is not being reminded of his rights or not being given the opportunity to exercise his rights before his statement is taken. These statements cannot be used as grounds for conviction in the trial.[55]

According to the Turkish Court of Cassation and the German Federal Court of Justice, arguing a similar opinion, if the suspect is not reminded that he is free to comment or make a statement about the accusation before his statement is taken, these statements are unlawful.[56]

As explained before in this chapter, the primary purpose of the suspect's statement is to be directed towards the defence of his. The authority taking the statement must comply with this purpose at every stage of the proceedings.[57] In this way, the statement gives the right to use his right to explain his purpose at the investigation stage and thus to defend himself effectively. For this reason, the statement taking should not only be seen as a procedure that complements the deficiencies in the investigation of the crime by the law enforcement.[58] On the other hand, the statement

[54] Degener (n 10) 445.

[55] Meyer Goßner und Schmitt (n 18) 711. During the first statement is taken by the law enforcement, the suspect is more, not less, exposed to the danger of unthinking self-incrimination. He can comfortably prepare for his statement at the main trial and receive legal advice and is often accompanied by a defence lawyer at the main trial. In the first statement taken by the law enforcement, he is usually unprepared and is not in the mental state to which he is accustomed. He is confused by the events and upset or frightened by the unfamiliar surroundings. He may even be able to correct the statements made at the main trial with the help of the lawyer. In the first statement taken by the law enforcement, there is a suspect who is psychologically uncontrollable. Therefore, reminding the suspect of his rights at the first statement taking is of paramount importance in favour of his and must not be violated. Roxin (n 3) 920.

[56] Yargıtay 8. Ceza Dairesi, 14.12.2009, 2008/334 Esas, 2009/15739 Karar; BGH. 07.06.2022 - 5 StR 332/21. According to the criminal procedure law, the suspect is a subject who has various rights and powers. The condition for the suspect, who is a subject of the proceedings, to exercise his rights and powers is that these procedures are based entirely on his free will. Therefore, the statement of a person who knows that he has rights is based on his free will. If a statement is obtained from him without reminding him of his rights, it cannot be accepted that this statement is based on his free will. For this reason, the statement taken without reminding the suspect of his rights or the evidence obtained on the basis of this statement is obtained by unlawful means and cannot be evaluated. Demirbaş (n 1) 79.

[57] Degener (n 10) 444.

[58] Mahlstedt (n 6) 52. The public authority has no right to request the suspect to participate in the investigation of the material fact. Rather, the public authority must leave it to the free will of the suspect whether or not to participate. Arslan (n 50) 277. According to the German Federal Constitutional Court, arguing a similar opinion, the suspect does not stand before the public authority as a subject of research without rights or as a mere object in the research for material fact, but rather as an independent person. This is proof of his subject status. The person has the right against self-incrimination, even if he is a suspect. Therefore, his right to decide of his own free will to what extent he will contribute to the investigation by giving a statement should not be ignored. BVerfGE. 11.10.1978 - 1 BvR 16/72.

is also an important tool for the clarification of the incident. Because the suspect is also a means of proof and his statement is among the sources of information of the judgement within the framework of free evidence evaluation. However, this situation should never be evaluated because the first aim of statement taking is to prove that the suspect is guilty. The primary purpose of the statement taking is to enable the suspect to explain his purpose and to defend himself effectively. Therefore, the research for the material fact must never affect the right to defence. The suspect's will must not be impaired, his rights must be reminded and he must be enabled to exercise these rights.

3. Preliminary Interview and the Assessment of the Legality of the Statement Taken During the Preliminary Interview

3.1. General Explanations

The activity of interviewing the suspect in order to obtain information, which is frequently used in practise and carried out by the law enforcement before the statement is taken during the investigation stage and therefore before the suspect is accused, is expressed in terms such as interview, preliminary interrogation or preliminary interview. This activity is considered unlawful as it is carried out on a person under suspicion of a crime. It is accepted as a procedure carried out without the guarantees given by the law to the person who is a suspect by the law enforcement.[59]

In criminal procedure law, it is not forbidden to obtain information from at person who is not suspected. This method is a research activity that may be carried out at the stage before an initial suspicion, it may facilitate finding out the suspect and the initial suspicion.[60] The preliminary interview with him was secret statement taking and was not lawful because it did not meet the requirements of statement taking.[61] Asking some questions to him while he is being taken to the police station or the hospital or the law enforcement unit without being recorded in the statement taking report is not considered as statement taking.

[59] Demirbaş (n 1) 54. In the preliminary interview activity, the law enforcement can obtain information from the suspect before making his statement, for example, by having a meal or a drink with him and creating the impression that he is having a conversation with him. The information obtained in this interview is then added to the file submitted to the prosecutor. During this activity, the person neither knows that he is a suspect, nor knows what he is accused of, nor are his rights reminded. Therefore, it is certain that the information obtained is unlawful. Meraklı (n 8) 1557.

[60] Schaal (n 17) 36.

[61] Mahlstedt (n 6) 51.

The law enforcement officer may conduct the preliminary interview with the suspect by declaring that it is not a statement taking procedure without concealing his capacity, by concealing his capacity or through a third party.[62] Therefore, the preliminary interview differs from the process of taking the statement of the suspect.[63]

3.2. The Concept of Forbidden Evidence in Criminal Procedure Law

In criminal procedure law, the investigative authority is obliged to collect and maintain the evidence for and against the suspect and, to protect his rights through the law enforcement under his command in order to investigate the material fact and to conduct a fair trial.[64]

First, the evidence must be obtained "in accordance with the law", that is, without going beyond the limits set by the law in terms of means, incident, person, place, and time. In fact, the lawfulness of the evidence is characterised as "the most important feature that must be present in an evidence".[65]

In modern criminal procedure law, the law should be prioritised, not the evidence.[66] The purpose of "reaching the truth by applying the rules of law in finding out the crime and the criminal" should stand out rather than the purpose of "finding out the truth at all costs and punishing the guilty".[67] Evidence are collected with the respect for the fundamental values of civilisation and justice and the truth reveals.[68] In criminal procedure, the individual is not an object that has no rights and has to endure the intervention of the public authority in any case, and is a subject of law who has rights as well as some obligations.[69] Any investigation process that violates

62 Arslan (n 50) 319.

63 The taking the statement of the suspect is an attempt to obtain and secure as objective and comprehensive a knowledge of an event as possible, considering legal rules and criminalistic points of view. As can be seen, the statement taking is an interrogation of the suspect about an alleged crime, conducted from legal and criminalistic points of view. The statement taking is therefore distinguished from a preliminary interview with the suspect by formal rules, such as informing him of what he is accused of and reminding him of his rights. Demirbaş (n 1) 48.

64 Harro Otto, "Grenzen und Tragweite der Beweisverbote im Strafverfahren" (1970) GA 289, 291.

65 Demirbaş (n 1) 30.

66 Arslan (n 50) 364. The aim of criminal procedure is to research and reveal the material fact. The material fact will undoubtedly be revealed through evidence. In the criminal procedure of a state of law, how evidence is obtained to find the material fact is regulated. If the rule for obtaining evidence is violated, the evidence obtained will be unlawful. Through the so-called evidential prohibitions and the limitations imposed on both the obtaining and evaluation of evidence, it is intended to indicate that reaching the material fact is not the ultimate goal, but that the protection of values such as human dignity and the right to defence is superior. Considering that the goal of the law is to make people happy, it will automatically become clear that human dignity cannot be sacrificed for any purpose. Mahmut Koca, "Ceza Muhakemesinde Hukuka Aykırı Delilleri Değerlendirme Yasağı" (2000) 4 (1-2) AÜEHFD 105, 145.

67 Jürgen Baumann, "Sperrkraft der mit unzulässigen Mitteln herbeigeführten Aussage" (GA 1959) 33, 36. A reasoning conducted without respect for human dignity cannot be accepted even if it is carried out in order to reveal the fact. Therefore, the effort of revealing the material fact is not absolute in criminal procedure law. There are unacceptable sacrifices and high interests that must be preserved in order to achieve this goal. Yenisey ve Nuhoğlu (n 16) 76.

68 Ünver ve Hakeri (n 13) 613.

69 Kramer (n 5) 40.

the individual as being a subject and may mean the denial of his value due to being a person is against the dignity of the individual.[70]

A conviction decision, made based on the evidence collected illegally by the investigative authorities, is not legitimate. Otherwise, an understanding that results, in obtaining information in any way causes, an individual to become a procedural object.[71] Therefore, the means of proof should be lawful as a basic principle in criminal procedure law and the suspect's statement should be based on his free will.[72]

During the preliminary interview, the law enforcement officer gets the suspect to confess to the crime. This is usually done by violating the suspect's will. In this respect, the preliminary interview conducted by the officer with the suspect or the preliminary interview conducted by using a reliable person is highly likely to be evaluated within the scope of deception.[73] Therefore, in this chapter where forbidden evidence is explained, the deception of the suspect should also be analysed separately and comprehensively.

In Turkish and German practise, the main criterion for the acceptance of deception as a forbidden statement-taking method is whether it violates the suspect's will.

The condition for a suspect to be considered free to decide whether to incriminate himself is that he knows what is contained in a statement given by him.[74] Therefore, the suspect must understand the situation. A voluntary decision can only be made if the person is aware of the consequences of his behaviour.[75] Therefore, for example, in cases where the law enforcement officer deceives the suspect about the importance of his statement or provides incorrect information about the evidence or legal situation,

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[70] Löffelmann (n 35) 67. Article 148 of the Turkish Criminal Procedure Code and Article 136a of the German Criminal Procedure Code regulate what should not be done during the statement-taking process and are the basic norms on forbidden statement-taking methods. According to Article 148/1 "The suspect's statement must be based on his free will. Physical or psychological interventions such as ill-treatment, torture, drugging, fatigue, deception, force or threats, or the use of certain means may not be used to prevent this." According to Article 136a/1, "The suspect's freedom of voluntary decision making and voluntary activity cannot be violated by ill-treatment, fatigue, bodily interventions, medication, torture, deception or hypnosis." According to Article 136a/2, "Measures that prevent the suspect's ability to remember or realise cannot be applied." The forbidden methods that may arise during the statement-taking process are not regulated in a limited manner in both countries' regulations. In this way, other possible methods that may violate the suspect's freedom of will are also to be prevented. Gökpınar (n 26) 671. Both legislatures prevent human rights and fundamental freedoms from being disregarded in criminal proceedings. In addition to the element of individual protection, both regulations make it clear that in criminal proceedings the truth cannot be investigated at any cost, but can only be investigated in a judicial manner. Therefore, any method that may influence the will of the suspect is prohibited.

[71] Christian Jäger, *Beweisverwertung und Beweisverwertungsverbote im Strafprozess* (CH Beck 2003) 90.

[72] Patrick J. Gau, *Die rechtswidrige Beweiserhebung nach § 136a StPO als Verfahrenshindernis* (Tenea 2006) 65.

[73] Reşit Karaaslan, "Soruşturma Organları Hesabına Hareket Eden Özel Kişilerin Eylemlerinin Kamu Makamlarına Atfedilebilirliği – İfade Almada Yasak Usul Olan "Aldatma" Örneği Üzerinden Bir İnceleme" (2021) 25 (2) AHBVÜHFD 555, 560.

[74] Otto (n 64) 290.

[75] Holger Kraschutzki, "Die Abgrenzung zwischen verbotener Täuschung und erlaubter Lis im Rahmen des § 136a StPO an Hand ausgewählter Fallbeispiel unter besonderer Berücksichtigung des so genannten Telefonmithörens durch Polizeibeamte" in: Grenzüberschreitende Polizeiarbeit, Martin Möllers (Hrsg.) (2005) 11, 11.

it will be difficult for the suspect to make a decision with his clear will.[76] In such cases, although it may seem that he gave the statement willingly, in reality, the statement given is based on false information because his will is affected. Based on these findings, deception can be defined as follows: It is any behaviour in which the officer may cause the suspect to make a mistake by concealing the truth.[77]

The aim of deception is to induce a certain behaviour. This includes a behaviour that the law enforcement officer assumes that the suspect will not perform voluntarily, in a self-determined manner. The officer believes that it must induce him to perform the desired behaviour by creating a deception. A deception is therefore always aimed at ensuring that he behaves in accordance with the will of the law enforcement and therefore in a manner determined by the law enforcement. Consequently, the right against self-incrimination and the deception of the suspect by law enforcement are incompatible. In fact, the deception of the suspect by law enforcement is aimed at destroying the right against self-incrimination.

Misrepresentation of the actual situation to the suspect by law enforcement is of course prohibited. Statements by the law enforcement such as "the suspect was seen committing the crime", "the accomplice has already confessed" or "the suspect has no chance due to the abundance of evidence" are unacceptable.[78] It is also prohibited to misrepresent the legal position "that silence is evidence against you". On the other hand, so-called criminal cunning, such as trick questions, are considered legitimate. Ambiguous statements are also allowed in this context.[79]

[76] Demirbaş (n 1) 341. The condition for the suspect to be considered to be able to freely make her own decision about incriminating himself is to know what is going on during a statement taking. The suspect must therefore be able to understand the situation. One can only speak of a voluntary decision if one is aware of the consequences of one's behaviour. Thus, any deception that may affect the suspect's freedom to give a statement or not, the freedom to give his statement as he wishes, and the scope of his statement is unlawful. Şahin (n 2) 203.

[77] Şahin ve Göktürk (n 33) 182.

[78] Demirbaş (n 1) 340.

[79] Şahin (n 2) 138. Deception is when a law enforcement officer violates the suspect's freedom to exercise reasonable judgement by misrepresenting factual and legal situations. However, it is also a necessity to clarify the incident, and in this context, "cunning" during the statement-taking process constitutes an aspect that cannot be dispensed with. Meraklı (n 8) 1596. There can be no prohibition of criminal cunning in criminal procedure law. In general, pressure methods are prohibited if the suspect's freedom of will is violated. Therefore, a "little deception" is permitted, which is more kindly called "permitted deception". Bluffing and confusing the suspect, and skilful cunning and clever tactical methods are not forbidden. Kraschutzki (n 75) 13. Whether a behaviour constitutes deception must be interpreted narrowly. There is a difference between obtaining a statement by cunningly acting against the suspect and obtaining information by deceiving him. Although he may lie, especially the officer asks questions to which they already know the answers. Here, the officer can deliberately use his or her superior knowledge. Since the officer is not obliged to inform him of its knowledge of the incident, it tactically confronts the lying him with his answers. Demirbaş (n 1) 255.

3.3. The Assessment of the Preliminary Interview Held by Law Enforcement

In criminal procedure law, the aim of limited acceptance of investigative measures, such as statement taking and the arrangement of the rules to be followed in statement taking in detail in the legislation is the idea of preventing the law enforcement from using methods such as preliminary interview.[80]

As stated in the previous sections of the study, although it is possible for law enforcement to use the method of information retrieval before the suspect is identified, it is unlawful to conduct a preliminary interview instead of taking a statement after he is identified, within the scope of the investigation carried out regarding an allegation of crime.[81] After the suspect is identified, since there is no function of collecting information, statements must be taken in accordance with the procedures stipulated in the legislation in order to reveal the material fact by following the rules of law.[82]

There is absolutely no reason to use speculative methods to receive a confession whose credibility must be checked in any case.[83] The preliminary interview is part of an illegitimate process and violates the legal practise conditions for statement taking.[84] Moreover, it leads to contradiction and inconsistency in the system in which there are universal principles to be followed in criminal procedure law.[85]

In Turkish and German practise, the will of suspect becoming defective can be shown as reason for the preliminary interview being unlawful.

The person may be taken to the interview room at regular intervals before taking legal statements and without his lawyer, and be forced to testify off-the-record during the preliminary interview. A person may be intimidated by being detained, arrested, or even released, that the pursuit will continue and he will be constantly disturbed.[86] After the suspect is identified, conducting a preliminary interview instead of taking a statement may cause fear, anxiety and distrust in terms of his fundamental rights and freedoms.[87] The suspect's statement during the preliminary interview cannot be considered to be based on his free will due to the psychological pressure of being

[80] Bosch (n 7) 96. According to the European Court of Human Rights, arguing a similar opinion, the conviction must not be based on the statements taken against the person's consent at the end of the criminal procedure. It is necessary to prevent the application of the law enforcement to any means that may affect the consent of the person. Saunders v United Kingdom (1996) 19187/91.

[81] Beulke (n 49) 181.

[82] Vetter (n 12) 117.

[83] Rogall (n 33) 157.

[84] Bosch (n 7) 245.

[85] Özbek, Doğan ve Bacaksız (n 11) 163.

[86] Vetter (n 12) 117.

[87] Moormann (n 32) 14.

accused of an act and being kept under the supervision of the law enforcement. In this case, law enforcement abuses his mental state.

Forcing the suspect to testify during the preliminary interview may also be considered as a violation of the right against the self-incrimination principle.[88] There is a risk of him that the right against self-incrimination will not be considered during the preliminary interview.[89] A person cannot be compelled to make an accusatory statement against himself or his relatives and to present evidence in accordance with the principle.[90] This principle protects the suspect from involuntary self-incrimination at every stage of the investigation.[91] According to the Turkish Court of Cassation, arguing a similar opinion, the right against self-incrimination is violated in the interview with the suspect in a conversational atmosphere, even though he states that he will not give a statement at the law enforcement unit.[92]

During the preliminary statement, the suspect may give his statement unwillingly. Considering the concern that the accuracy rate is low and may lead to an incorrect judgement, the statement should be given voluntarily in order to contribute to revealing the fact.[93] According to the German Federal Constitutional Court, arguing a similar opinion, the suspect is not an object of criminal procedure and his statement at the investigation stage has importance. Therefore, the attempts that nullify his statement in the investigation should be avoided.[94]

The law enforcement officer may intend to ask the suspect to give a statement by making a mistake because of his will becoming defective during the preliminary interview.[95] In particular, the suspect, who is taken to a separate room, can be deceived

[88] With the contribution of the right against the self-incrimination principle, the freedom of the suspect to refrain from accusing himself is guaranteed. The aim is to ensure that the evidence is obtained by lawful methods without any coercion or pressure, that it is reliable, and thus to reach the material fact, which is the aim of the criminal procedure law. Arslan (n 50) 199. The right not to be compelled to incriminate oneself also means guaranteeing the suspect's positive freedom of statement. The suspect is the master of his own judgement and must be able to take his own destiny into his own hands. Löffelmann (n 35) 68.

[89] Schaal (n 17) 104.

[90] Heiko Artkämper und Karsten Schilling, *Vernehmung* (VDP 2010) 49 et al.

[91] Mark A. Zöller, "Beweisrechtliche Probleme beim Einsatz Verdeckter Ermittler" (2014) (2) CHKD 85, 99.

[92] In this case, C and E were detained on the same day on suspicion of murdering their sister›s husband and were held in custody until 24.05.2002. On 24.05.2002, the law enforcement attempted to take statements from both of them, but both of them stated that they would exercise their right to remain silent and that they wanted to give a statement to the prosecutor. On the same date, a videotape, which was apparently secretly recorded, containing a conversation between a law enforcement officer and C, in which C stated that E had committed the crime with his help, was submitted to the prosecutor. It appears that this tape was recorded between 21.05.2002 and 24.05.2002. As a result, C and E denied the crime at the following stages of the investigation, with C stating that he had conducted the interview on the tape because he feared that the officer would torture him. According to the Court of Cassation, judgement of conviction cannot be made using evidence obtained through forbidden statement-taking methods. In the investigation, suspect C made it clear that he would not give a statement to the law enforcement. Nevertheless, he was deceived and prevented from making a defence of his own free will by videotaping the interview, which was conducted in a conversational atmosphere, without his knowledge. Therefore, it is not possible to accept the videotape, which is understood to have been obtained through forbidden statement taking methods, as evidence. Yargıtay 1. Ceza Dairesi, 16.02.2004, 2003/3819 Esas, 2004/299 Karar.

[93] Bosch (n 7) 108.

[94] BVerfG. 15.12.1970 - 2 BvR 629/68.

[95] Mahlstedt (n 6) 238.

by giving information such as that the punishment for the crime will be high and that the crimes committed are very different.[96] Because the preliminary interview is not protected by a rule of law, other proceedings of the criminal procedure may be constructed unlawfully upon, the suspect's statement because of his defective will.[97]

According to the German Federal Court of Justice, the fact that only the rights are not reminded during the preliminary interview without any pressure on the will of the suspect may cause the preliminary interview to be deemed unlawful. Reminding his rights is an essential and constitutive factor of statement taking. He is expected to know his rights in order for the statement to be considered within the scope of the right of defence.[98] The Court, in its another decision, states that the purpose of the norm on the reminder of the rights is that the suspect can be kept in the trial as a subject, and his position in the criminal proceedings will be damaged in case of violation.[99] The failure to remind the suspect of his rights during the preliminary interview is a fundamental violation of law, as it eliminates the principle of the right of defence.

The suspect should feel safe during the statement taking.[100] The suspect, who technically knows his rights before the statement taking, decides when the statement taking will end. The suspect, however, whose statement is taken during the preliminary interview, cannot decide when the interview will end.[101]

In the official statement-taking process, the law enforcement contribute to the revealing of the material fact. When the suspect uses his right to remain silent or does not accept the accusations, this should be considered reasonable by the law enforcement and the statement taking-procedure is terminated. However, the suspect, whose rights are not mentioned during the preliminary interview, is expected by the law enforcement to admit that he has committed the alleged crime. In this case, the law enforcement punish the suspect rather than contributing to the reveal of the material fact.

The primary purpose of lawful statement taking is to ensure that the suspect is heard in accordance with the law and to give him an opportunity to defend himself.[102] The suspect, who is investigated with the allegation of committing a crime, has to

96 Otto (n 64) 290.

97 Moormann (n 32) 14.

98 BGH. 07.06.1983 – 5 StR 409/81.

99 BGH. 27.02.1992 – 5 StR 190/91.

100 Vetter (n 12) 176.

101 Rogall (n 33) 165.

102 Vetter (n 12) 114. According to the Turkish Constitutional Court, ensuring the right to defence in criminal proceedings is a fundamental principle of a democratic society. Fatih Tas (2014) 2013/1461. According to the European Court of Human Rights, arguing a similar opinion, the measures taken for trial should be compatible with the complete and full use of the right of defence, and these rights should be interpreted in an effective and practical way, not theoretical and abstract, in order for a fair trial to be conducted. Sejdovic v İtaly (2006) 56581/00.

endure a process carried out against him in accordance with the law, but should also have the right to oppose unlawful actions. Because he suppressed, during the preliminary interview, cannot personally oppose these procedures, the preliminary interview prevents the person from using the right to defence.[103]

Each norm that establishes the right of the citizen holds the public authority responsible.[104] The implementation of the state's power to punish ultimately depends on the good behaviour of the investigative bodies.[105] Therefore, a similar condition as the preliminary interview does not contribute to ensure criminal justice.[106]

The public authority, trying to establish the public order that has been disrupted due to the crime committed, should conduct the proceedings in an honest and legal manner. The public authority has the power in terms of procedures. Therefore, when a procedure is established between the individual and the public authority, the individual should always be the party to be protected. It is necessary for a fair trial to empower the weak individual by granting him certain rights and powers before the powerful authority.[107] That the statement taking is done as a preliminary interview is contrary to the principle of fair dealing[108] and, also violates the right of a fair trial. The right to a fair trial is not only a statement and a procedural rule but, also an enforceable fundamental right. The right to a fair trial is based on more specific fundamental freedom rights related to the rule of law, and the use of unlawful methods such as preliminary interviews is a violation of the right to a fair trial.[109]

In the statement-taking process, the distinction between the preliminary interview and statement-taking essentially indicates the aspiration of law enforcement to act against the law.[110] The aim of considering the preliminary interview as forbidden evidence is to discipline the law enforcement, to prevent possible arbitrary behaviour,

[103] Baumann (n 67) 36.

[104] Schumann (n 37) 4.

[105] Baumann (n 67) 36.

[106] Schumann (n 37) 11. The resocialization of a person begins with the criminal proceedings brought against him. If the suspect does not feel that the investigation proceedings against him are fair, the socialisation process cannot achieve its purpose. He should not get the impression that the entire criminal investigation serves only to decide for him whichever rights he has. The public authority is obliged to prevent investigations that may present this impression. Otto (n 64) 297.

[107] Demirbaş (n 1) 89.

[108] The principle of fair dealing is that criminal proceedings shall be conducted in accordance with the rule of law, within the framework of the procedures previously regulated by law, without using methods that prevent the freedom of will or restrict the defence, such as deception. Any distinction between the prosecution and defence authorities that would prevent the proper performance of either of the activities of the prosecution and defence is contrary to this principle. In this respect, it is a consequence of the principle of fair dealing that the suspect may exercise the rights that are regulated for him. Otto (n 64) 291.

[109] Brunhöber (n 51) 762.

[110] Kramer (n 5) 160. The fact that the investigative authorities try to take statements with the preliminary interview method results from the fact that they consider themselves over the law and privileged. Baumann (n 67) 36.

to bring the law enforcement into law and thus to prevent the suspect's rights and freedom from being violated.[111]

The preliminary interview does not constitute an assurance for the suspect since it is not conducted in accordance with the technical procedures of statement taking. After the suspect is identified, therefore, a conviction decision cannot be made based on the statement taken during the preliminary interview.[112] It is not possible to improve or correct the statement taken during the preliminary interview later. The statement taken during the preliminary interview should be considered forbidden evidence even if later confirmed in court.[113] According to the German Federal Court of Justice and Turkish Court of Cassation, arguing a similar opinion, the suspect does not give his statement based on his free will during the preliminary interview. His statement not based on his free will is submitted to the court unclearly. Therefore, the preliminary interview with him is unlawful and, his statement during the preliminary interview should not be used against the accused in the trial.[114] As a result, the statements taken during the preliminary interview are forbidden evidence, these statements should not be read at the hearing and the witness of the interviewer that the relevant statements were given should not be accepted.

3.4. Preliminary Interview Held with Reliable Person

In Turkish and German practise, the preliminary interview may also be made with a third party due to the fear that the suspect will not tell the truth before the law enforcement during the investigation stage.

The third party is a person whom the suspect trusts and makes some explanations about the crime. By using a reliable person, the law enforcement officer can obtain from the suspect some important information about the incident under investigation. These statements of the suspect containing important information are brought to the attention of the investigating authorities without the suspect's knowledge.[115]

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[111] Gau (n 72) 79. In practise, the information obtained from the suspect during the preliminary interview with the suspect is noted and submitted to the public prosecutor after turning them into an accusation. In a state of law, the public order is adversely affected when law enforcement violates the rules stipulated in the criminal procedure law. Therefore, the public prosecutor should not issue an indictment, considering the statement of the suspect taken in the preliminary interview as an illegitimate method. The statements taken in the preliminary interview should not be used as a justification for the implementation of apprehension, detention, arrest, search and seizure, control of communication and similar protection measures in the concrete case in addition to the fact that the statement taken from the suspect is not taken into account while issuing the indictment. Schumann (n 37) 11.

[112] Schaal (n 17) 123.

[113] Artkämper und Schilling (n 90) 55.

[114] BGH. 12.12.1990 - 3 StR 470/89; Yargıtay Ceza Genel Kurulu, 15.05.2018, 2017/1087 Esas, 2018/211 Karar.

[115] Löffelmann (n 35) 54.

During the interview of the reliable person with the suspect, the law enforcement officer can either listen to the conversation or consider the information note prepared by the reliable person in the investigation.[116]

As explained in the previous section of the study, the suspect knows that the person with whom he makes a preliminary interview is a public official. However, it is also possible that the person-facing the suspect is not a person with an official capacity acting on behalf of the investigating authorities. Likewise, it is also possible that the person in an official capacity tries to obtain evidence by communicating with the suspect without clearly revealing this capacity.[117] In other words, it is possible that the suspect does not know that the person communicating with him is acting on behalf and account of the investigating authorities and makes a statement against himself.[118] For example, A is being investigated with the allegation of drug trafficking. In order to reduce her husband's responsibility, B, the wife of A, goes to law enforcement officer C and states that she can meet with D, the other suspect. B also stated that she could record her interview with D if C requested and provided the necessary equipment. Thus, C provides the necessary equipment. After recording the interview with D, C promises D that the conversation will remain between them only. During the interview, D makes statements against himself.[119] In this case, it is an important issue to examine whether the activity of the person who is not clearly understood to be acting on behalf of and on account of the investigating authorities can be evaluated in the proceedings.[120]

The illicit methods of statement taking in the procedural laws should not be interpreted narrowly. A situation, especially making the will of suspect defective, should be considered within the scope of forbidden evidence.[121] Therefore, taking some statements from the suspect with the help of a reliable person should be considered as manipulation and forbidden evidence.[122]

It is expected that the legal position of the suspect in the criminal investigation will be further improved. In this regard, law enforcement should not resort to physical

[116] Graf (n 52) 829.

[117] Meraklı (n 8) 1594.

[118] Kraschutzki (n 75) 18.

[119] Karaaslan (n 73) 579.

[120] Mahlstedt (n 6) 163.

[121] Kraschutzki (n 75) 25.

[122] Yenisey ve Nuhoğlu (n 16) 609. When confronting public authorities with an accusation, public authorities will try to obtain evidence from him. However, in a state of law, everyone has confidence that the public authorities will act within the limits set by the law. When this justified trust is undermined because of a game organised at the direction of public authorities, then the quality of the evidence obtained is damaged and this should be attributed to the public authorities. Indeed, when public authorities use third party for the sole purpose of interviewing the suspect, his justified trust is undermined. In this case, the suspect, who is unaware of the game organised by the law enforcement, is used as a tool to find the truth about the alleged crime. In such cases, where the public authorities use the suspect as an object, it is necessary to speak of deception, which is a forbidden procedure.

or psychological coercion and avoid trickery and surprises.[123] According to the European Court of Human Rights, arguing a similar opinion, the statement taken by using a reliable person damages the free will. According to the Court, although the person who violated the right to a fair trial in the concrete case was not a law enforcement officer in an official capacity, given that the private person acted on behalf of and on account of the public authorities, his action must be attributed to the public authorities. The right against self-incrimination is an integral part of the right to a fair trial. If this right is violated through a game organised by public authorities, even if the violator is a private person, the law will still be violated. This is because the public authorities exerted power/pressure on the suspect through the reliable person, and this power/pressure forced him to incriminate himself. In such a situation, the public authorities use private persons to obtain information from the suspect whose freedom to testify has been violated, and the public authorities deceive him through these private persons. Therefore, the evidence obtained should not be used.[124]

If the suspect, without any provocation by the investigating authority, trusts a lawyer, witness or any other private person and makes self-incriminating statements, these statements may be used against him. In other words, there is no deception if, for example, the suspect's telephone conversation with another person is listened to by the officer. In these circumstances, he trusts a third party. This is because the third party is not acting on behalf of the law enforcement.[125] However, the interview between the person and the suspect, which is the result of a game organised by the public authorities, cannot be considered a private interview. Both the manner and content of this interview must be attributed to the public authorities.[126] Because

[123] Bosch (n 7) 96.

[124] In the case, A and M were detained on the allegation that they had committed the robbery. A, repeatedly stated that he had exercised his right to remain silent before his statement was taken. The room where A stayed with M was continuously listened to and recorded by the law enforcement. When the officer failed to obtain any evidence from the conversations between A and M, they placed a reliable person, H, in the room where A was staying. H was in charge of forcing A to talk. One day, the officer takes A to the law enforcement unit to take his statement. Meanwhile, other officers placed recording devices on H›s body. After returning from the police station, H asked A various questions. H explains that the recorder did not work, but that A confessed to the crime after returning from the law enforcement unit. H›s explanations have an impact on the conviction of A. Allen v Britain (2002) 48539/99.

[125] Şahin (n 2) 179.

[126] Rogall (n 33) 170. There is a legally significant difference between a person who communicates with a suspect within the framework of a game organised by the public authorities and a person who tells the police what he has randomly heard about a crime. In fact, this difference is so important that in the second case, deception cannot even be mentioned, whereas in the first case, the existence of deception violating free will should not be doubted. Indeed, in cases where the public authorities organise a person to interview the suspect, he is used as a tool to reveal an incident of which he is accused, since his free will is violated. This is because without the intervention of law enforcement, the conversation between the person and him would not have occurred; he would not have made self-incriminating statements. Karaaslan (n 73) 611.

the public authority provoke the suspect.[127] Therefore, the fact that the private person conceals his real intention within the framework of a game organised by the investigating authorities and informs the law enforcement of the content of, for example, a telephone call or a private interview with the suspect is sufficient, deception to violate his free will.[128] To think otherwise is to regard the suspect not as a subject of criminal proceedings, but only as an object from which information is obtained. This is clearly incompatible with modern criminal procedure law, whose aim is not to find the material fact at any cost.[129]

It is indisputable that the law enforcement officer, acting in an open manner without concealing their official capacity, must inform the suspect against whom there is a concrete suspicion before making his statement. If the officer does not inform, the information provided by the suspect cannot be used. Accordingly, if the officer does not inform the suspect and at the same time conceals his official capacity, the prohibition on the use of information should be even more valid and strict.[130] However, if the officers are not allowed to make a statement without reminding the suspect of his rights, they are also not allowed to use a private person to obtain information. Because what they are not allowed to do themselves, they should not be allowed to do by using private persons.[131]

In a case decided by The German Federal Court of Justice, the reliable person assigned, by the law enforcement regarding the alleged crime made, a private telephone conversation with the suspect and asked him a number of questions regarding the accusation attributed to him. An investigation is being conducted against the suspect for the crime of theft in the housing. In his testimony, a witness stated that the suspect told him that he had committed the crime. Then, the law enforcement organise a phone call between the suspect and the witness. During this call, trap questions prepared in advance by the law enforcement are asked the suspect through the witness. The suspect provides explanations in detail regarding the crime he committed. The officer and a second witness listen to the conversation. The local court decrees the verdict of conviction for the accused in accordance with the second witness's testimony. The attorney objects to the conviction decision on the

[127] Löffelmann (n 35) 55. A telephone conversation organised by law enforcement and secretly listened by officers should not be considered anything other than unlawful. In this case, the inducement to make a telephone call is used as a trick to obtain a statement. The suspect does not realise that a statement is being made. When he tells his story, he does not realise who is on the other side of the device and to whom he is explaining his story. Likewise, during the statement taking, the officer may interrupt the statement-taking process and allow the suspect to speak to a third party in the belief that he is not being listened to by anyone else. Or the officer may, at the end of the statement taking, provoke a private conversation between the suspect and another officer so that it can be listened to by another officer. Such behaviour constitutes an abuse of the power to make statements and an indirect deception of the suspect. Consequently, information obtained in this way cannot be considered as evidence. Şahin (n 2) 179.

[128] Zöller (n 91) 95.

[129] Karaaslan (n 73) 608.

[130] Roxin (n 3) 925.

[131] Degener (n 10) 460.

grounds that the testimony of the second witness cannot be used as evidence since it violates the accused's right to remain silent. According to the Court, in the incident that the law enforcement used private persons to ensure that these persons made a telephone call to the suspect and listen to this phone call, the information obtained should not be used since the suspect was not reminded of his rights as a natural consequence of this secret game. Violations of the reminder of rights and the related prohibition of evidence are not limited to formal statement taking. Otherwise, it may cause unfavourable consequences for the suspect's rights. The suspect should benefit from the same rights as during a formal statement taking in "statement taking-like" situations. In other words, in cases where private persons are deliberately used by law enforcement, every word said by the suspect should be considered as if it was said by the suspect during a statement taken by law enforcement. This is because there is no difference in terms of evidential value between the words spoken during the game organised by the law enforcement and the words spoken during the formal statement taking. Therefore, the usability of the evidence obtained during the game organised by the law enforcement should be examined according to the rules governing the evidence obtained during the formal statement taking. In a state of law, the suspect has the right to remain silent when confronted by law enforcement. Therefore, this right must also exist when the suspect is confronted with a private person acting on behalf and account of the law enforcement.[132]

In a case decided by the Turkish Court of Cassation, while C and E, two brothers accused of murder, were waiting for the public prosecutor, an officer and suspect C had several conversations which were secretly recorded by the law enforcement. During the recording, C confessed to the officer that his brother E had killed him with his help. Afterwards, this recording was taken as a basis for the conviction by the local court. The Court of Cassation accepted that the recording was unlawful. According to the Court, any form of deception, in other words, manipulation of will, which prevents the suspect from conducting his defence of his own free will and creates a situation unfavourable to her, cannot have any legal value. The suspect was deceived and prevented from making a defence of his own free will by videotaping the interview, which was conducted in a conversational atmosphere, without his knowledge. Therefore, it is not possible to take the videocassette, which is understood to have been obtained through forbidden statement taking methods, as evidence in the judgement.[133]

In criminal proceedings, taking the statement of the suspect is a procedure that the investigating authorities are in charge of and must be carried out in accordance with a certain procedure. The freedom to make a statement is an absolute freedom,

[132] BGH. 22.03.1995 - 5 StR 680/94.

[133] Yargıtay 1. Ceza Dairesi. 16.02.2004, 2003/3819 Esas, 2004/299 Karar.

and the statement obtained by violating the suspect's will should not be used in the judgement.[134] The material fact is considered legitimate when it is obtained by complying with the rules of law and illegitimate when it is obtained by violating the rules. For this reason, forcing a suspect to give a statement by setting a trap violates, first of all, his general personality rights, the principle of the rule of law and the principle of fair trial that emerges as a result. This situation causes a violation of the person's freedom of statement and therefore general personal rights.

It should also be clarified whether the undercover investigator, in his capacity as a "reliable person", can meet with the suspect and obtain information from him about the investigation and whether this statement can be evaluated in the judgement.

The public officer assigned as an undercover investigator must conduct all kinds of investigations into the crime and to collect evidence.[135] His main duty is not to report and record what he has heard and seen. The undercover investigator must access and collect concrete evidence of the crime; identify the crime subject to the investigation and the responsible persons, informations, documents, and witnesses; and report all these to the authority in full and without delay.[136]

First, the following point should be emphasised. An undercover investigator is assigned to perform a secret activity in accordance with the law. The behaviour of this person within the framework of the law must be confidential due to its nature. The behaviour of this person must not be told or revealed to the suspect.[137] The method of obtaining information from a suspect using the undercover investigator should be distinguished from the method of preliminary interviewing of a suspect by law enforcement in violation of the procedure for a statement taking. When the suspect's statement is taken openly by the officer, the Code of Criminal Procedure[138] regulates the reminding of suspect's rights. As explained in the previous section of the study, this reminder is required. Due to the nature of the undercover investigator procedure, he must not disclose his official investigative task to the suspect. Imagine that the undercover investigator is secretly involved in a drug trafficking organisation. If this officer introduced himself to the suspect as a law enforcement officer and reminded the suspect about his right to remain silent, the whole operation would, of course, be meaningless. Consequently, this officer is not obliged to remind the suspect. In this respect, there is no "a statement taking" anyway, since the undercover investigator does not act as an official interrogator. Rather, it is assumed that a private interview occurs in which the suspect is free to explain and conceal some information. There is

134 Schumann (n 37) 6.

135 The undercover investigator is regulated in § 110a of the German Criminal Procedure Code and Article 139 of the Turkish Criminal Procedure Code.

136 Yenisey ve Nuhoğlu (n 16) 469.

137 Özbek, Doğan ve Bacaksız (n 11) 434.

138 § 163a of the German Criminal Procedure Code and Article 147 of the Turkish Criminal Procedure Code.

no conflict justifying the obligation to inform. In a procedure in which an undercover investigator is formally assigned, statements made in an interview or conversation without informing the suspect are therefore not subject to the forbidden evidence.[139]

The purpose of the undercover investigator's activity must first be determined. The undercover investigator conducts research to obtain evidence of the crime. Therefore, due to his function of collecting evidence by conducting research, he can talk to the suspect and other persons. The undercover investigator tries to obtain information by talking to the suspect and other persons related to the crime. These interviews or conversations are not statement taking but are part of the investigative procedures. The undercover investigator's interview with the suspect, in other words, listening to him about the crime committed, is not a formal statement-taking procedure, but can be considered as questioning similar to a statement-taking. These statements of the suspect shall be included in the proceedings as legitimate evidence. Due to this evidence, the undercover investigator will be able to become a witness.[140]

The suspect should not be forced to speak. The opposite is true. The public authority does not have the right to obtain a statement, but the suspect has the right to remain silent. Any "trick" to induce the suspect to break his silence is unlawful.[141] Such behaviour means withdrawing the information on rights that has already been provided and reducing the importance of these rights.[142] Therefore, if he has exercised his right to remain silent, it should be considered as a forbidden procedure to bring an undercover investigator in front of the suspect and thus cause the suspect to make self-incriminating statements.[143] The fact that a suspect who has exercised his right to remain silent is confronted by an undercover investigator whom he already knows or has met in prison, for example, should be considered as a deception.[144] Information obtained through behaviour that violates the exercise of the right to remain silent will be unlawful. Confessions obtained by establishing a relationship of trust between the undercover investigator and the suspect who has exercised his right to remain silent are therefore a violation of the prohibition of deception. According to the German Federal Court of Justice, arguing a similar opinion, as a rule, the information obtained by the undercover investigator from the suspect may be used in the proceedings. This is because the undercover investigator is officially assigned, and the confidentiality of the activity carried out by the investigator is based on the law. Obtaining information

139 Zöller (n 91) 96.

140 Ünver ve Hakeri (n 13) 469.

141 Roxin (n 3) 920.

142 Mahlstedt (n 6) 142.

143 If a suspect states that he wishes to remain silent in an investigation, his decision must in any case be respected in accordance with the right against self-incrimination. This is because the purpose of using a undercover investigator here is to directly violate the suspect's right to remain silent. Even if the secret investigator is officially assigned, this is unacceptable. This therefore constitutes a legal limit for the officially assigned undercover investigator to obtain information from the suspect. Arslan (n 50) 321.

144 Mahlstedt (n 6) 223.

from the suspect because of the confidential activity must of course also be concealed from him. This situation cannot be compared to a violation of the suspect's freedom of will through ill-treatment, fatigue, physical interference or torture. Therefore, the suspect's making a statement to the investigator is no different from the suspect's making a statement to a reliable friend, acquaintance or other third party. However, the undercover investigator may not pressure a suspect who has exercised his right to remain silent to make a statement in violation of the relationship of trust created. The investigator may not obtain information about the crime from the suspect in a statement-taking like interview. Obtaining evidence in this way violates the right against self-incrimination and leads to the prohibition of the use of evidence. Consequently, although the undercover investigator is not prohibited from obtaining information from the suspect, if the investigator violates his right to remain silent, the use of the evidence obtained from the conversations is prohibited.[145]

3.5. Spontaneous Statements of the Suspect

A situation similar to the statement-taking process is the spontaneous statements made by the suspect to the law enforcement. These statements of the suspect were made without an official request for information.[146] He makes some statements about the crime without waiting for a question or warning. In this situation, there is no statement-taking process and it becomes almost impossible to remind the suspect of his rights, especially the right to remain silent.[147]

Spontaneous statements are not intended to bypass the rules governing the taking of statements. These statements must be legally meaningful and may be used as evidence in the proceedings.[148] Such spontaneous statements are of great importance for the investigation. The suspect feels completely free in his statements. There is absolutely no pressure of a statement taking-like situation in which he feels obliged to make a statement due to the official behaviour of the law enforcement. Therefore, spontaneous statements made by the suspect without the intervention of law enforcement should be considered within this scope.[149]

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[145] In this case, A was suspected of having killed a fifteen-year-old girl. A, openly exercised his right to remain silent. As the law enforcement had no other evidence at the time, an undercover investigator was assigned. This investigator met A, who had been arrested. The investigator was introduced to A during a prisoner transfer and subsequently visited him several times in prison. After leaving prison, the undercover investigator found an apartment for A and became a friend with him. Recalling the relationship of trust between them, he finally asked A to tell the truth about the case. Relying on their friendship, A confessed to the undercover investigator that he had committed the crime. BGH. 26.07.2007 - 3 StR 104/07.

[146] Meyer Goßner und Schmitt (n 18) 705.

[147] Degener (n 10) 462.

[148] Evidence obtained through a spontaneous statement may be included and used in the proceedings without restriction, even if the suspect subsequently wishes to exercise his or her right to remain silent. Anneke Petzsche, "Belehrungspflichten vor der ersten Vernehmung: Verwertbarkeit von Spontanäußerungen revisited" (2021) 133 (2) ZSTW 502, 507. According to the German Federal Court of Justice, arguing a similar opinion, if a person wishes to make a statement of his own free will and is not pressurised to make a statement, the use of such statements is legitimate. BGH. 09.06.2009 – 4 StR 170/09.

[149] Petzsche (n 148) 506.

In the event that the law enforcement prepares the opportunity for the suspect to make a statement by creating a conversational atmosphere, that is, by developing a friendship with the suspect, there can be no spontaneous statement. İn other words, in this case, a procedure in which prohibited methods are used is applied. If the law enforcement induces the suspect to talk by creating a conversational atmosphere and recording these conversations, there is a statement taken by unlawful methods.

In a case decided by The German Federal Court of Justice, a mother and daughter who started a fire by being angry with the homeowner were rescued at the last moment. When the law enforcement officer who arrived at the scene reminded both of them of their rights, the mother and daughter told the officer that they wanted to exercise their right to remain silent. The mother and her daughter were then taken to the hospital for treatment. The mother frequently asked the other officer who was with her at the hospital about her daughter's health. When the officer told her that her daughter was in good health, the mother confessed that she and her daughter had burned down the house. This confession of the mother was accepted as legitimate evidence by the local court. This statement was also considered by the Federal Court of Justice as a spontaneous statement. According to the court, the other officer did not set the mother up in the incident. The mother makes a spontaneous statement without giving the officer the opportunity to remind her of her rights. Perhaps the law enforcement did not know whether the mother was a suspect in the fire incident. Perhaps the officer thinks that the fire was accidental. Therefore, the mother's confession at the hospital has evidential value within the scope of spontaneous statements.[150]

Spontaneous statements made by the suspect are not considered in terms of the concept of statement taking. They are considered independently of the rules applicable to statement taking.[151] In other words, sudden - spontaneous statements made by the person who encounters the law enforcement without giving the law enforcement the opportunity to remind him of his rights or to tell him what the accusation is or to ask questions for the purpose of gathering information cannot be considered as a statement.[152] For example, the officer goes to a house close to the crime scene. The person who opens the door is told by the officer that there is an investigation into a crime committed near this house. In this case, the person tries to defend himself before the officer says anything and does not allow the officer to say anything. In the information he gives to the officer, the person accuses himself of the incident and

[150] BGH. 06.03.2018 - 1 StR 277/17.

[151] Demirbaş (n 1) 51.

[152] Beulke und Swoboda (n 17) 3.

accepts that he committed the crime.[153] These statements made spontaneously by the suspect should be used as evidence. Because these statements are not within the concept of statement taking. Naturally, the person may cause himself to be accused with his spontaneous statements.[154] In such a case, a spontaneous statement is a situation where the law enforcement officer does not intend to bypass the rules of statement-taking process. Therefore, it is not considered a prohibition of evidence.

The right against self-incrimination is not a protection against all forms of self-incrimination. Such a right exists only where the public authority is dominant. Therefore, it is possible for the person to accuse himself in spontaneous statements. Moreover, the right against self-incrimination also includes the right to accuse. Therefore, without violating the suspect's will in any way, spontaneous statements made by the suspect before the statement is taken are legitimate and can be evidence in the proceedings.[155]

3.6. Impact of the Preliminary Interview on the Following Investigation

The reason for the existence of the investigation stage in the criminal procedure is to research whether there is a need for a criminal case.[156] This stage of the criminal procedure is of great importance for all parties. Indeed, since the first steps are often decisive, all care must be taken in the investigation stage. Because the mistakes that occur at this stage are very difficult to correct later on. In this respect, care must be taken to ensure that the interview of the law enforcement with the suspect during the investigation stage is not unlawful and does not adversely affect the subsequent procedural proceedings.[157]

After that the preliminary interview is within the scope of forbidden evidence and cannot be considered as evidence in the trial is explained in detail, it should also be clarified how the preliminary interview will affect the following statement taking.

The question of how the ongoing effects of a procedural violation can be eliminated has fundamental importance. For this purpose, it should first be determined whether it is possible to correct executional mistakes, and then how wrong or neglected instructions can be corrected.

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153 According to another example, during the plundering incidents, hundreds of people entered the street clash with the police and dozens of police officers were injured. It is easy to imagine the chaos. However, while such plundering incidents are fortunately infrequent, similar situations in which the police are heavily involved and confronted with potential or actual violent groups are common. After being taken to the police vehicle, one of those detained in the scene spontaneously told the officer in the vehicle about the incident. He has not yet been reminded of his rights. As soon as he gets in the vehicle, he states that he was involved in the incidents but that he never intended to injure the police officers with the bottle he threw. Petzsche (n 148) 503.

154 Meraklı (n 8) 1555.

155 Degener (n 10) 464.

156 Yenisey ve Nuhoğlu (n 16) 564.

157 Degener (n 10) 446.

A procedural violation may result in defectiveness in the following procedure if it impacts the following statement taking.[158] The suspect, who confessed his crime during the preliminary interview, which is unlawful, is interrogated for his confession during the preliminary interview during the statement-taking process after his rights are notified. In this case, a direct connection can be established between the preliminary interview and the following statement. The preliminary interview was used as a reason for statement taking.[159] In this case, the following statement should also be considered forbidden evidence because the following legal actions will be built on another illegitimate investigation.[160] However, that the preliminary interview will be forbidden evidence and will not be taken into account in the trial is explained to the suspect by the law enforcement during the statement-taking process and if a new statement taking is done in accordance with the procedure, this statement taking should not be considered as forbidden evidence in this case.[161] In German law, this notification is defined as a qualified informing obligation for the subsequent statement to be valid. The qualified informing obligation is a concept created to make it possible to use the suspect's statements as evidence in the process after the preliminary interview. Accordingly, if the suspect is not reminded of his rights during the preliminary interview with the officer, the suspect's statement cannot be used in the proceedings. However, when the law enforcement want to take his statement after the preliminary interview, his rights must naturally be reminded in order for the statements obtained in this new statement-taking process to be used as evidence in the proceedings. However, if the suspect's statement is taken in this way after the preliminary interview, it is not sufficient to merely remind him of his rights in order for his statements to be used. In addition to the reminder of his rights, the suspect must also be informed that the statement previously taken at the preliminary interview without being reminded of his rights cannot be used as evidence in the proceedings. The second statement taken in this way will not be affected by the illegality of the first statement made during the preliminary interview with the suspect. The second statement in the statement-taking procedure may be used as evidence.[162]

Conclusion

In the criminal procedure, taking the statement of the suspect is one of the most important procedures of the investigation state. The statement, on the one hand, gives the suspect the opportunity to defend himself and, on the other hand, contributes to reaching the material fact. In addition, in case he makes a statement, his statements

158 Baumann (n 67) 39.

159 Artkämper und Schilling (n 90) 50.

160 Schaal (n 17) 122. See for similar opinions. BGH. 20.12.1995 –5 StR 445/95.

161 Rogall (n 33) 167. See for similar opinions. BGH. 18.09.1987 - 3 StR 398/87.

162 Löffelmann (n 35) 52.

determine the direction of the investigation and prosecution and help the collection and evaluation of evidence. Due to the possibility of forbidden procedures while making a statement, how the statement is made is also important in terms of protecting his rights.

In practise, an informal interview is conducted with the suspect before the statement taking in order to remove the guarantees of the statement taking for him. This may be called a preliminary interview. It should be considered unlawful that the investigative authorities take a statement with another method by manipulating the law in order to rule out the provisions of the statement-taking process that protect the rights and freedom of the suspect. After the suspect is identified, the law enforcement asking questions or trying to obtain a statement in any way should be considered statement taking. An effort to take a statement without complying with the statement taking procedure –whatever- it is called should be accepted useless since it is an undefined research method.

The preliminary interview is made as a research method in practise. At the end of this procedure conducted in a conversational mood, some notes are taken and these notes are used in preparing a police enquiry report by the law enforcement. The law enforcement enquiry report, including the information obtained during the preliminary interview, is submitted to the Public Prosecution Office and an indictment is drawn up based on the police enquiry report, including information that should not be taken into account by the prosecutor's office, but should be considered as an unlawful activity.

The function of legal statement taking is eliminated with the establishment of a preliminary interview in practise. In fact, the taking of the statement is considered as unlawful by the suspect due to the unlawfulness of the preliminary interview. As a result of the use of unlawful methods as preliminary interview, the investigation activity, which began under concrete and legal conditions, is left implicit as much as possible and only conclusions are submitted to the judicial authority. Although it may be argued that the prohibitions on obtaining and assessing evidence provide assurance for the suspect, the submission of files "free from forbidden evidence" to the court, which is the proceeding authority, actually eliminates this assurance.

The fact that the law enforcement prefer to take statements with the unlawful method indicates that they do not have enough competence in terms of the effective characteristic of the investigation. While an officer with sufficient competence can access information with the help of this characteristic, he may prefer to act against the law when he does not have sufficient competence.

In practise, with the use of concepts such as preliminary interview, the concept of taking a statement and the legal guarantees attached to the concept of taking a statement are tried to be violated. It can be said that this is due to the difficulty of abandoning the use of the evidence actually obtained in practise. However, the investigating authorities must consider the guarantees regulated in the law in favour of the suspect. Because only if these guarantees are taken into account, the judgement taken at the end of the proceedings will be legally satisfactory. In order to reflect the principle of the rule of law in the concrete case, the investigating authorities should act with a sense of duty and should not refrain from reminding the suspect of his rights. Courts should also support such behaviour with their decisions. Therefore, law enforcement should not abandon the classical concept of taking a statement. They should refrain from applying exceptions to the concept of making a statement, such as a preliminary interview with the suspect. Otherwise, the rule of law and the right to a fair trial will certainly be adversely affected.

Concealing the identity of the law enforcement or using a third party to destroy the rules that protect the suspect during the statement-taking process directly violates the will of the suspect. İmagine living in a society where deception is the order of the day. It would be impossible to make rational decisions and live a meaningful life. How would it be possible to decide whether a certain type of behaviour is appropriate and, whether it is important to strive for a certain goal? Free personal development would be meaningless. Because in the absence of will, no one would know why one should behave as one does.

During preliminary interview, it is not ensured by the authorised person in the investigation that the suspect consciously provides information concerning the procedures. By taking his statement, the information necessary for the trial should be provided by the suspect consciously. He should not be set up while being heard. The person who took the statement should appear before the suspect in his official capacity, remind him of his legal rights, and ask the suspect to testify and give information about the case.

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