

## **An Overview of the Concepts of "Tiring", "Deceit" and "Offering an Unlawful Gain" Under Section 135/II of the Criminal Trials Procedural Act**

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### **Introduction**

In 1992, Act No. 3842 was developed and enforced in order to amend certain rulings and to add some new ones to Act No.1412 of the Criminal Trials Procedural Act. What was intended by Act No. 3842 was to refine, improve, recognise, protect and facilitate the use of the suspect's rights, and to prevent his maltreatment during the preliminary as well as the final inquiry stages<sup>1</sup>. Within this framework, another section titled "Prohibited Interrogation Methods" pertaining the means of determining the suspect's statement was added to the Criminal Trials Procedural Act as Section 135/a. According to this section: "The evidence given by an individual and the suspect's statement must be based upon his free-will. It cannot be prevented by interventions such as harassment, torture, giving medicine by force, tiring, cheating, using physical force or device that could cause emotional damages and spoil free-will. No gain can be obtained unlawfully. Evidence obtained by

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<sup>1</sup> For detailed information see Füsün Sokullu Akıncı, "Recent Attempts to Guarantee Human Rights in the Turkish Penal Procedure Law", *Annales de la Faculté de Droit d'Istanbul*, XXXII/NO. 48, Istanbul, 1998, pp. 253-269.

unlawful means stated in the sections mentioned above cannot be used even if approved by the provider. Section 135/a of the Criminal Trials Procedural Act was developed by following the provisions which provide for the accused person charged with a crime to make a statement on his free-will without being subject to pressure, harassment, and when refusing to make statement, to exercise the right to keep silence provided under Section 135/4 of the Criminal Trials Procedural Act. Although Section 135/a of the Criminal Trials Procedural Act seems adequate enough to meet the demands in this area, in terms of its enforcement as well as some concepts stated in this section requiring further clarifications, it has not been able to solve all the problems and it has created new ones. In this work, I will not focus upon the entire Section 135/4 of the Criminal Trials Procedural Act, but I will look at the concepts in it which seems to me to have problems. As the title implies, I will look into the concepts of "tiring", "deceit" and "offering an unlawful gain" stated in the Section stated above<sup>2</sup>.

### **1- Determining the Suspect's Statement**

Determining the suspect's statement, in other words taking his statement, is very important in criminal judiciary law. Any kind of statement, explanation of the incident, evidence and material provided by an accused person of a crime without exercising his right to keep silence provided under Section 135/4 of the Criminal Trials Procedural Act should be considered with suspicion, but the possibility of their truthfulness and their significance in determining the actual reality of the matter should never be ignored either. I believe that the truthfulness and consistency of what the suspect who has been accused of committing or being accessory to a crime says can be determined by interrogation techniques and methods provided under provisions set out in Sections 135 and 135/a of the Criminal Trials Procedural Act<sup>3</sup>.

<sup>2</sup> See for the prohibited interrogation methods Füsün Sokullu Akıncı, Polis, İstanbul, 1990, Gümüş Basımevi, pp. 159-162-Füsün Sokullu Akıncı, "Recent Attempts to Guarantee Human Rights...", *ibid.* pp. 264-266-Feridun Yenisey, İnsan Hakları Açısından Arama, Elkoyma, Yakalama ve İfade Alma, Ankara, 1995, Ankara Üniversitesi Siyasal Bilgiler Fakültesi İnsan Hakları Merkezi Yayını, pp. 132-135.

<sup>3</sup> See Serap Keskin, Ceza Muhakemesi Hukukunda Temyiz Nedeni Olarak Hukuka Aykırılık, İstanbul, 1997, Alfa Yayın, p. 175.

The significance of the statement of the suspect who has been accused of committing or being accessory to a crime has always maintained its important place in the criminal judiciary, but there has been some changes in the methods of determining the suspect's statement as the time changed. As can be understood from the ruling under Article 17/III of the 1982 Constitution "Nobody can be subject to torture or harassment; Nobody can be subject to undignified treatment or punishment", using force and harassing the suspect for the sake of getting to the truth is absolutely forbidden. This prohibition comes from the contemporary principle of the rejection of treatment against human dignity. Apart from this, it is possible to consider other reasons that may serve as grounds for this prohibition such as evidence obtained by force not reflecting the actual reality and may lead to the suspect's admission to a crime by fear, and the suspect's maltreatment being considered as a crime in criminal law (Section 243 of the Turkish Criminal Code).

Security forces, experienced and competent in their task, are entitled to interrogate and take the suspect's statement in accordance with Section 135/a of the Criminal Trials Procedural Act, because as briefly mentioned above the suspect's statement and other evidence arise from this statement are import aspects to the criminal judiciary process in terms of providing facts of the matter. Although I accept Section 135/a of the Criminal Trials Procedural Act in terms of its objectives, in the following I would like to criticise this section concerning three points by referring to some examples. These critics are important, because according to its last subsection the evidence obtained by unlawful methods set out in the section could not be used even if approved by its provider. I must stress that, due to its unlawfulness, any other evidence obtained by following such evidence cannot receive any acceptance in the criminal judiciary<sup>4</sup>.

We need to look at Section 135 of the Criminal Trials Procedural Act, which is trying to provide detail provisions on methods spoiling the suspect's free-will, narrowing down the techniques of interrogation and obtaining statements in its scrutinising efforts, in terms of the concepts of "tiring", "deceit", and "offering unlawful gain". In fact, before the

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<sup>4</sup> See Serap Keskin, *ibid.* pp. 181-182-Ersan Şen, *Türk Ceza Yargılaması Hukuku'nda Hukuka Aykırı Deliller*, İstanbul, June 1998, pp. 144-162.

enforcement of Section 135/a of the Criminal Trials Procedural Act, obtaining evidence by force of harassment banned under this section had already been prohibited, and such evidence and others obtained by such methods had to be regarded as unlawful<sup>5</sup>. Unfortunately, due to problems arose from its enforcement, the legislator was forced to put this prohibition in writing by providing Section 135 of the Criminal Trials Procedural Act. When this section was provided the legislator could have done two things: The first could have been to develop a general provision stating "The suspect's statement has to be based upon his free will. Any evidence obtained by interventions contrary to this principle cannot accepted and used in any way"; and the other could have been the current form of Section 135/a or another comprehensive form of it. In this regard, the legislator approved the current form of Section 135/a and preferred to develop a general provision, choosing neither to narrow down the interrogation techniques nor to keep them too broad. I am of the view that this section can be criticised with regards to three issues: the first is "obtaining the suspect's statement by tiring him"; the second is "obtaining the suspect's statement by deceit"; and the third is "obtaining the suspect's statement by making an offer of an unlawful gain". When we look, without any interpretation or explanation, at the legislator's provisions on these concepts set out under Section 135 of the Criminal Trials Procedural Act, we can easily see that it is possible to consider many interrogation methods as unlawful by implicating them in "tiring", "deceit" and "offer of unlawful gain", and to make an extreme narrowing in this area.

## **2- Tiring**

When we have a close look at the meanings which the "tiring" concept implies we can see that it does not refer only to keeping the suspect continuously standing, making him run, forcing him to do physical exercises, not allowing him to rest and allowing him to rest only when he states what is demanded of him; It also refers to asking him questions constantly in order to get to the truth and exhausting him by

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<sup>5</sup> See Ersan Şen, *ibid.* p. 43-51.

asking him questions in such a manner<sup>6</sup>. Furthermore, trying to benefit from a spoiled mind, confusion and tiredness caused by constant questioning and suggestions cannot be considered as lawful methods<sup>7</sup>.

Methods such as keeping the suspect continuously standing and forcing him to perform certain physical motions have nothing to do with obtaining a proper statement of the suspect and are not included in the definition above; they are included in the "maltreatment" concept defined under Section 135/a of the Criminal Trials Procedural Act; and thus, all the methods exercised to obtain a statement and/or evidence from the suspect and all the information, documents and materials obtained by using such methods are inconsistent with law. Therefore, it is necessary to remove the "tiring" concept from Section 135/a of the Criminal Trials Procedural Act. It is possible for a suspect to become tired after being through a long and constant interrogation process. Since there are no limits set out to the "tiring" concept stated under Section 135/a of the Criminal Trials Procedural Act, it will be possible to allege that evidence obtained by applying the method of tiring, which is an unlawful interrogation method, on the suspect is inconsistent with law.

We need to make a distinction here: trying to get to the truth by chasing information based upon contradictory responses to constant questioning undertaken by a judge, a prosecutor of the republic or by judiciary security forces is significantly different than trying to make the suspect tired by forcing him to perform certain activities that might result in making a statement and/or disclosing some evidence, and telling him that such bad treatment will increasingly continue unless he did not do as he was told, did not make the desired statement, and did not provide the information demanded from him. While the former being a lawful method used where the suspect does not want to exercise his right to silence or is reluctant to do so, the latter is a total maltreatment directed solely towards the suspect, and thus, unlawful.

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<sup>6</sup> See Timur Demirbaş, *Sanığın Hazırlık Soruşturmasında İfadesinin Alınması*, İzmir, 1996, Adalet Matbaacılık, pp. 287-288-Cumhur Şahin, *Sanığın Kolluk Tarafından Sorgulanması*, Ankara, 1994, Yetkin Yayınları, p. 199.

<sup>7</sup> It has been claimed that long interrogation will come under "tiring" and will contradict with Section 135/a of the Criminal Trials Procedural Act. Bahri Öztürk, *Uygulamalı Ceza Muhakemesi Hukuku*, Ankara, 1994, p. 363-Timur Demirbaş, *ibid.* p. 288.

### 3- Deceit

Let us have a close look at the “deceit” concept with an example: Suppose there is a young girl who has been raped; Although the rape has been confirmed by medical reports, no technical report is available and the truth of the matter is not disclosed; However, it is possible to obtain a detailed statement from the suspect only by telling and convincing him that the young girl is pregnant, although she is not, and that it would no longer be possible to hide the truth<sup>8</sup>. Likewise, another example may be: telling the suspect that his crime associate gave his name, convincing him that it would be no longer useful to keep the truth secret, and asking him to show where the gun used in the crime was hidden, and thus getting down to the truth of the matter<sup>9</sup>.

Evidence obtained by using the methods referred to the examples above should be considered lawful, because these methods have nothing to do with the principle of “prohibition of treatment inconsistent with human dignity”. However, as Section 135/a of the Criminal Trials Procedural Act considers “deceit” as an unlawful method of interrogation, evidence obtained by methods applied in the above examples could be considered unlawful if we are to conform to the content of this section. For this reason, perhaps we may not chose to exclude the “deceit” concept completely, but it must be limited to two conditions: The first one could be forcing the suspect to make a statement by deceit which the suspect would never do, which would result in having the suspect assume the responsibility of a crime which he did not commit. For example: the suspect might be prepared to admit to a crime and/or provide evidence upon being told that his mother is ill and will die unless he gives her his blood. Moreover, this example also falls within the scope of the “maltreatment” concept embedded in Section 135/a of the Criminal Trials Procedural Act. The second one might be obtaining a statement of the suspect by introduction of a police officer himself as an ordinary civilian, in which case the suspect’s statement will

<sup>8</sup> For detailed information see Timur Demirbaş, *ibid.* pp. 288-292.

<sup>9</sup> For the opposite view see Cumhur Şahin, *ibid.* p. 203-Seydi Kaymaz, “Yasak Sorgu Yöntemi Olarak Aldatma”, *Yargıtay Dergisi*, Volume: 24, Edition: 1-2, pp. 73-83, Ankara, January-April 1998, pp. 76-77.

be totally damaged as a result of not being informed of his rights by a person who is not known to him to be a security officer of the judiciary<sup>10</sup>.

The situations which are provided as examples above come under the "deceit" concept of the legislator. Therefore, it is necessary to remove the "deceit" concept embedded in Section 135/a of the Criminal Trials Procedural Act and consider this matter under the provision "Unlawful evidence obtained by the inquiry and interrogation authority cannot serve as a basis for a decision" provided under Section 254/II of the Criminal Trials Procedural Act; It is necessary to confirm this matter within its concrete facts, and the "deceit" concept embedded in Section 135/a of the Criminal Trials Procedural Act must be rearranged within the framework of above explanations in details. In terms of enactment techniques, the "deceit" concept should be taken out of Section 135/a, and the "maltreatment" concept and Section 254/II of the Criminal Trials Procedural Act should be considered in the enactment of the new legislation on the matter.

There is another issue worth mentioning here: the concept of "maltreatment inconsistent with human dignity, inhumane and humiliating behaviour" should be chosen as an unlawful interrogation method to replace the "deceit" concept used in Section 135/a of the Criminal Trials Procedural Act. This will provide the opportunity of eliminating the vagueness and narrowness of the "maltreatment" concept.

#### **4- Offering an unlawful gain**

The concept "offering an unlawful gain" refers to a pledge of a gain, which is unlawful or impossible to provide by lawful means, made by the judiciary security forces, the prosecutor of the Republic or the judge to obtain the suspect's statement and/or to obtain other evidence by such pledges. The legislator, indeed, considers this situation as an unlawful interrogation method under Subsection 3 of Section 135/a of the Criminal Trials Procedural Act. For example, telling and promising the suspect that he would definitely not be imposed any punishment if he

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<sup>10</sup> See Seydi Kaymaz, "Yasak Sorgu Yöntemi Olarak Aldatma", *ibid*, pp. 75-76. In the doctrine, Yurtcan states that telling the suspect the admission of his accessories when it is not true should be considered as deceit. Erdener Yurtcan, *Ceza Yargılaması Hukuku*, İstanbul, May 1996, p. 173.

disclosed how he committed the crime, and making an offer of money or other material gain are all within the scope of this prohibition. As the suspect's free-will will be damaged in such conditions, such statements should be considered as "never existed" and evidence obtained by being based upon such statements should be considered unlawful; they will be totally unreliable and have no value of lawfulness.

Apart from this, an "offer of a unlawful gain" does not exist in situations like obtaining the suspect's statement by telling and convincing him that his cooperative attitude would be reflected in the inquiry file if he assisted to the inquiry, it would be considered when deciding on arrest and imposing punishment, and the prosecution's punishment request would be reduced<sup>11</sup>. According to Kaymaz who shares a limited part of my opinion and makes a distinction on this issue, exemption and reduction from punishment is subject to the admission of guilt, and offering a gain that is not openly provided by law in return for admission or informing other suspects should be considered unlawful. This view expresses, although not being subject to admission of guilt or providing evidence for crime, that the suspect cannot be made a promise of imposing the bottom line of the punishment, conversion of an imprisonment to a monetary punishment and postponement of a sentence<sup>12</sup>. However, Yurtcan focuses on the impossibility of the accomplishment of an offer of a gain by lawful means and thus, he thinks, the matter of concern here is an unlawful promise. But in his explanations, he gives an example, which supports Kaymaz's view, of a reduction to be exercised in the sentence of a suspect who shows the location of a drug stated in Section 405 of the Turkish Penal Code<sup>13</sup>.

Undoubtedly, some provisions that can be classified as a method of "compromise" and can be applied for the benefit of the suspect when assisted in the inquiry process should be made to improve Turkish Criminal Judiciary Law; This will provide consistency in law and fair results.

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<sup>11</sup> See Timur Demirbaş, *ibid.* p. 294-Cumhur Şahin, *ibid.* p. 216.

<sup>12</sup> See Seydi Kaymaz, "Yasak Sorgu Yöntemi Olarak Kanuna Aykırı Menfaat Vaat Etmek", *Istanbul Bar Association Journal*, Volume: 71, Issue: 523-528, Istanbul, 1997, pp. 526-527.

<sup>13</sup> Erdener Yurtcan, *ibid.* p. 173.



### **5- Recommendation in the text content of Section 135/a of the Criminal Trials Act**

Considering above outline, the content of Section 135/a of the Criminal Trials Act should be rephrased as follows: "The suspect's statement must be based upon his free-will. Applying methods and techniques contradictory to human dignity, inhumane treatment, humiliation, torture, administration of medicine, using physical and emotional force or violence, using device and equipment that would undermine the suspect's free-will, offering and providing unlawful gains are prohibited. Evidence and statements obtained by methods stated in the previous subsection cannot be used at any stage of the inquire even if approved by the suspect".

### **6- Problem of review**

The main problem with obtaining a statement from and interrogation of the suspect is their judicial control. In other words, there will be serious problems arising from whether or not unlawful methods used in the confirmation of the facts on the allegations and defence, because there is the suspect who makes a statement on one side and the judiciary security forces, the prosecutor of the Republic, or the Judge on the other, and the party that engages the interrogation does the recording and decides on what to record as they wish prior and during the course of taking the statement and questioning. Under such a condition it becomes very difficult or almost important, physically, to determine whether or not unlawful interrogation methods, particularly physical force and violence, were used.

Although it might be impossible to achieve a complete result, there are two solutions here: The first one is to treat statements and evidence that are subject to allegations of unlawful method usage by considering them on their own merits. The second, perhaps more important, one is to conduct, right from the very beginning right through to the end, a complete visual or at least audio recording of the suspect's interrogation (Section 264 of the Criminal Trials Procedural Act) signed by the suspect, which can be compared with the allegations and reviewed in terms of the usage of unlawful methods and which will be very useful to confirm and deter many unlawful deeds.

Apart from this, no matter what legal provisions are developed and restrictions are brought to the area of obtaining the suspects statement and interrogation by unlawful methods, in practice they will all remain in theory and consequently there will always be a continuous and secret use of unlawful methods. It is, no doubt, possible to exercise unlawful interrogation methods on the suspect before the visual and/or audio recording commences and to present the matter as if no unlawful stand has been taken; and it may not be possible to eliminate such problems completely. Indeed, the purpose of the resolution recommendation is not to eliminate all of the incidents where unlawful interrogation methods are used, rather it is to provide a control mechanism, to deter arbitrary behaviour of those who conduct interrogation, to force them to use lawful methods instead, and to develop this habit in them. But, I must stress that it might be possible to understand whether or not unlawful interrogation methods were exercised on the suspect from a visual and/or audio recording conducted continuously without interruption or break.

### **Conclusion:**

I believe that it is necessary to rearrange Section 135/a of the Criminal Trials Procedural Act, which includes provisions on "unlawful interrogation methods". Especially the concepts of "tiring", "deceit" and "offering an unlawful gain" stated in the section have to be rephrased comprehensively to provide a certain level of broadness in interrogation methods for the judicial authority, the prosecutor of the Republic and the judiciary security forces. It is important, undoubtedly, to make these arrangements by conforming to the rules provided for the individual's rights and freedom and the suspect's rights. Unless these arrangements are not made, it will be possible to implicate many stages of the suspect's interrogation and statement declaration process in the concepts of "tiring", "deceit" and "offering an unlawful gain", in which case those who conduct the interrogation and take the statement could have the propensity towards unlawful deeds. At this point, current provisions of Section 135/a of the Criminal Trials Procedural Act fall to short to provide any benefit, on the contrary it leads to consequences that would be impossible to compensate for in terms of the right to a genuine judiciary process.