Recent Attempts to Guarantee Human Rights in the Turkish Penal Procedure Law*

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I. Introduction

As we are approaching to the end of the Twentieth Century, we are witnessing the great changes that are taking place all around the world. While nationalist feelings create numerous problems within well established old states and new countries emerge from these conflicts, the whole world is uniting around common ideals Although it is an indisputable fact that every nation has various differences, such as language, customs and religion and still there are some basic values which are common to all civilized democratic countries: human rights is the core of all these values. This is the reason why we, colleagues from different nations, living at a certain part of the world have gathered together for this common cause: Human rights. Now, at the wake of the Twentyfirst Century, the last two or three decades of the old century must be called "the era of human rights". Human rights comes into close contact with law especially in the area of Criminal Law and Criminal Procedure Law and we, as professors of Criminal Law have much to say about it.

When are the human rights in danger in a society? Generally speaking, human rights violations take place during criminal procedure activities and are usually committed by government officials, especially law enforcement officers.

In a democratic society, when antisocial behavior is controlled and peace and order is maintained by the governments, values of a democratic society, especially human rights deserve utmost importance, because democracy is the expression of popular sovereignty.[1] When we have human rights and individual liberties on the one hand and public peace and order on the other hand, we must

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1 Nino, Carlos Santiago, The Ethics of Human Rights, New York, 1993, p.235.

show utmost care in obtaining the equilibrium between these.[2] However, human rights must never be sacrificed for the sake of peace and order.[3]

This is the reason why codes of criminal procedure and even constitutions have detailed rules to provide fair trial, due process and thus protect human rights. Those rules laid down in codes are not only to protect the rights of the accused, but also the rights of innocent citizens, who may one day be harassed by the law enforcement officers, if they are not controlled and limited by the laws. For this control and limitations we have to know more about some sociological aspects of the law enforcement system.

Although functions of the law enforcement officers are defined by the laws, the interpretation and enforcement of these laws are established by elements of the professional subculture of the officers. In the process of making laws, this subculture must be taken into consideration. Otherwise, this subculture, which is an international concept will cause many detriments. For example while the police is protecting peace and order, because of the elements of their subculture, they tend to out balance this equilibrium against the human rights.

Law enforcement officers are the armed forces of the government in peace time and the need to control their power and functions has gained more importance as the police force gets more organized. In the twentieth century, individuals and governments are more sensitive about the protection of human rights and since news and media keep informing the public about human rights violations, a general suspicion about the law enforcement officers, increases in the public. Legislators are making the necessary laws to control the law enforcement., hence to minimize human rights violations and control their illegal behavior, since in a democratic country, government must be consented by the governed, i.e. the individuals.[4]

On the other hand, socio-cultural events cannot be regulated with prohibitive methods. Law enforcement officers' functions and human rights may be reconciled, only by taking their subculture into consideration, because, when the officers violate the human rights, it is due to the elements of their subculture.

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2 Way, Frank H., Liberty in the Balance, Current Issues in Civil Liberties, New York, Pp. 118-119.

3 Sokullu-Akıncı, R. Füsun, Polis, Toplumsal Bir Kurum Olarak Gelişmesi, Polis Alt-Kültürü ve İnsan Hakları, Istanbul 1986, p. 96.

4 Nino, 240.

II. Subculture of the Law Enforcement Officers[5]

According to sociologists, professions have influence on people's personalities.[6] A person's profession creates an environment for him/her and the longer he/she works in that environment, the more he acquires the characteristics or personality traits of his fellow colleagues. This includes a special way of perception, in other words, seeing the world through a special lens, like all the other members of that group.[7]

Members of the law enforcement profession share the same environment for long periods of time. The key essential elements of these milieu are *danger, authority* and *efficiency.* Amalgamation of these factors generate distinctive cognitive and behavioral responses and they develop characteristics, special just to the law enforcement officers.[8] These characteristics are: *solidarity, secrecy, social isolation, conservatism, suspicion, deception*[9].

While the officers are carrying out their functions, they may violate some of the human rights, such as the right to privacy, liberty, security. The elements of the subculture cause these unlawful behaviors for the sake of obtaining evidence and thus being efficient.[10] Although the causality relationship in social events is not as apparent as in the positive sciences, it would not be appropriate to make any legislative activity concerning social life, without taking into consideration, data from real life.

Legislators can use two methods to limit the law enforcement officers and to protect the human rights: (1) *Punitive* method, (2) *Deterrent* method. In democratic countries, a mixed system with stress to deterrent method is used. In Turkey, only punitive method was in force until very recently (1992).[11] When protecting human rights, deterrent methods are more effective then the punitive ones, because punitive system punishes the officer who violates the human rights. But in the long run, it is difficult to punish a law enforcement officer, because of the secrecy and solidarity elements of his subculture.

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5 For detailed information see Sokullu-Akıncı, 64-94.

6 Hughes, Everett C., "Work and the Self", Men and Their Work, Illinois, 1968, Pp.42-55; Becker, Howard, S.- Strauss, Anseim L., "Careers, Personality and Adult Socialization", American Journal of Sociology, No.62, Nov. 1956, Pp.253-263.

7 Scolnick, Jerome H., Justice Without Trial, New York, 1975, p.42; Radelet, Louis A.-Reed, Hoyt Coe, The Police and the Community, California, 1977. p. 112.

8 Scolnick, 42.

9 Szabo, Denis, Police Culture et Société, Montreal, 1974, p. 64 on; also see Trojanowicz, Robert C., "The Policeman's Occupational Personality", The Journal of Criminal Law, Criminology and Police Science, Vol. 62, No.4, p.553.

10 Scolnick, 234.

11 See art. 194 and 243 of the Turkish Penal Code.

Deterrent methods on the other hand aim to control and prevent the officer's motives for using illegal methods. For example, if a policeman questions an individual in an illegal way, violating human rights and dignity or if he uses illegal methods during searches and arrests, the deterrent method alters his motives which are based on his subculture, that makes him behave likewise. If the factors which create the subculture are altered, in time the subculture will also change.

III. System of the Turkish Criminal Procedure Code (TCPC)

TCPC enacted in 1929, still in force today with some amendments (1936-1992) is a translation of the German Criminal Procedure Code of 1877 (with some minor changes). This Code in some situations adopted the inquisitorial system and in other ways the accusatorial system. For example the preliminary investigation was conducted secretly until 1992.[12] On the other hand the remaining procedure is conducted publicly and in the presence of the accused.

A. Impartiality and Independence of the Judges[13]

One of the most important principles governing the TCPC system is the impartiality and independence of the judges.[14] This is secured by numerous articles both in the Constitution and in the Code. For example, art, 159/1 of the constitution states that, "The Supreme Council of Judges... shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges". The Supreme Council of Judges decides the appointment, promotion and disciplinary punishment of the judges. All would be perfect if members of this Council would be just judges. Whereas the second paragraph of the same article indicates that Minister of Justice is the president and the permanent under secretary to the Ministry is an ex-officio member of the Council.[15] Considering that the total number of the members is 7, it is not possible to say that Courts are independent and security of tenure of judges exists, because politics may play a

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12 This is in accordance with the secrecy aspect of the police subculture and leaves the suspect without any support and unaware of his rights. Fortunately, this is altered by the 1992 amendments and the suspect can have his attorney with him during all procedural activities and is supported by him from the very beginning of his apprehension.

13 Centel, Nur, "Avrupa İnsan Hakları Sözleşmesine Göre Mahkemelerin Bağımsız-lığı, Tarafsızlığı ve Türk Hukuku", Prof. Dr. Nurullah Kunter'e Armağan, İstanbul, 1998, p. 45 on; Kunter, Nurullah-Yenisey, Feridun, Ceza Muhakemesi Hukuku, İstanbul, 1998, Pp. 315 on; Keskin, Serap, "Yargıç Bağımsızlığı", Prof. Dr. Nurullah Kunter'e Armagan, İstanbul, 1998, p. 129 on.

14 Centel, Ceza Muhakemesi Hukukunda Hakim Tarafsızlığı, İstanbul, 1996.

15 Yurtcan, Erdener, Ceza Yargılaması Hukuku, İstanbul, 1996, p. 69.

role in the actions of the Council. This is also against the principle of separation of powers, because this Council is supposed to protect the independence of judges against the government.[16] This could have been achieved if all the members of this Council were selected among the judges. On the other hand since this is a constitutional problem, a majority of 2/3 is required to change the constitution.

Another point that can be criticized is that the decisions of this Council are beyond the control of the judiciary: It is not possible to appeal to the Constitutional Court against the decisions of the Council (Cons. art. 159/4, Act on the Supreme Council of Judges and Public Prosecutors, last paragraph of art. 12). This is in violation with the liberty to seek justice and also jeopardizes the rule of law.[17]

B. Jurisdiction and Venue

Besides the general judiciary, there are special courts such as the Supreme Court, which has jurisdiction over the trial of the President of the Republic, members of government (ministers), members of the High Court of Appeals and the Chief Public Prosecutor for offenses committed during the performance of their duties. There are also military courts for the trial of military personnel, for committing military offenses.

The jurisdiction and venue of the general judiciary is limited by subject matter,[18] locality[19] and person,[20] thus limiting as well as protecting the judge. Therefore, courts cannot try any cases outside their jurisdiction.

The court which has venue is the court of the place where the offense has been committed. If the place of the crime is not known, the court of the place where the accused is apprehended has the venue. To determine the venue, detailed rules exist in the Codes, because the principle of natural judge is considered to be crucial (like it is in most countries).

Juvenile courts have been established in Turkey but they only function in a few metropoles such as Istanbul, Ankara and Izmir and it is very much criticized for not being properly organized countrywide.

There are also State Security Courts for crimes committed against the security of the state. Some of the amended articles of TCPC (in 1992) which

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16 Kunter-Yenisey, 322.

17 Yurtcan, 70.

18 For detailed information see Kunter-Yenisey 338 on; Öztürk, Bahri, Uygulamalı Ceza Muhakemesi Hukuku, Ankara, 1994, p.144., Yurtcan 14.

19 See Kunter-Yenisey, 351 on; Öztürk, Uygulamalı, 157; Yurtcan, 17.

20 See Kunter-Yenisey, 374 on; Öztürk, Uygulamalı, 166; Yurtcan, 24.

ameliorated human rights are not applied in these courts. This is a "legal monstrosity", because the Turkish Criminal Procedure Code is amended, thinking that it was not good enough to serve modern needs; whereas the abolished articles are still valid for the State Security Courts. This is unacceptable,[21] because procedural rules are changed for better ones. If the previous norms were insufficient they should not be valid in the State Security Courts too.

IV. New Articles of the Turkish Penal Procedure Code concerning Human Rights (1992 Amendments)

A. Interrogation

In the Turkish system, interrogation is made by different organs: firstly by the law enforcement officers and the public prosecutor, and secondly by the interrogation judge. During the interrogation, the suspect (accused) must be allowed to relate everything (s)he knows about the criminal incident, without any interruption.[22] So that he has the chance to eliminate all suspicion against him and put forward evidences to support him.[23]

Interrogation is the means to reach to the truth at the end of the criminal investigation and trial; but from the accused's (suspect's) perspective, it is a means of defense. The old version of article 135 of the TCPC was a very short one. The amended article on the other hand has formulated interrogation in a detailed way, so as to secure human rights:

1. The Accused must be Informed about the Nature of the Incrimination (TCPC. art 135/1)

The article states that the alleged crime must be explained to the suspect, i.e. the accused must be informed clearly about the nature of the charges against him. The details of the alleged criminal act must be given. This includes the nomen iuris of the crime and the facts and events related to it. Especially, clear explanation of the criminal act must be given in detail.[24] The contents of such an

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21 Hafizoğulları, Zeki, "Ceza Muhakemeleri Usul Hukukunda Yapılan Değişiklik-ler Üzerine", Ankara Üniversitesi Hukuk Fakültesi Dergisi, 1993, Vol.43, No. 1-4, p.46.

22 Çağlayan, Muhtar, "Sanığın Sorguya Çekilmesi", Adalet Dergisi, 1964, Vol.55, No.1, p.10; Kunter-Yenisey, 425; Şahin, Cumhur, Sanığın Kolluk Tarafından Sorgulanması, Ankara, 1994, p.130; Yurtcan, 166.

23 Çağlayan 10.

24 Donay, Süheyl, İnsan Hakları Açısından Sanığın Hakları ve Türk Hukuku, İstanbul, 1982; Tosun. Öztekin, Türk Suç Muhakemesi Hukuku Dersleri, Genel Kısım, Vol.1, İstanbul 1984, p. 628; Yurtcan, 166.

information differs at each incident. The aim is to enable the accused (suspect) to defend himself efficiently and to his own advantage[25] and that he can relate his own version.

On the other hand, the article does not indicate clearly, the specific time the accused (suspect) should be informed about the nature of the incrimination. This must be done before the interrogation begins and after his identification is made.[26]

2. The Right to Remain Silent (art. 135/4)

The right to remain silent is a final point that the criminal procedure law has reached. In the past, especially during the inquisitorial period, the accused was considered as a source of evidence and he was forced to confess.[27] With pressure and physical torture, even innocent individuals were made to accept that they had committed the crime.[28] The right to remain silent thus prevents any form of forceful interrogation and torture. In fact, in a system where the accused has the right to remain silent, interrogation becomes a means of defense.[29] Waivering of this right is up to the accused.

After informing the accused about the charges against him, he is to be clearly reminded that he has the right not to say anything. But this does not include the information about his identity. The article clearly indicates that the suspect is obliged to give the information on his identity correctly. Not do so is a crime in the Turkish Penal Code (art. 343).

Even if the suspect already knows his rights through other sources, the officials have to make this warning at every stage of the prosecution. The officers (or public prosecutor or judge) will ask the accused whether he wants to answer or not. This is the right to remain silent. Although a similar norm existed in the previous version of the Code, it said, "the accused must... be asked, whether he wishes to answer such charges or not". The new rule states that, "he is advised that it is his legal right not to say anything", thus he is overtly[30] reminded that he has the right not to answer. This is not just for protecting the

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25 Gölcüklü, Feyyaz, "Avrupa İnsan Hakları Sözleşmesinde 'Adil Yargılama' ", Ank.Üni. Siyasal Bilgiler Fak. Der., Vol. '9, Jan-June 1994, No.1-2, p.222.

26 Şahin, 118.

27 Yurtcan, 168.

28 Kunter-Yenisey, 426-427.

29 Yurtcan, 168.

30 The warning must be clear enough for the suspect (accused) as to his level of education and his mental state, Şahin, 123.

accused from torture and maltreatment, but also for not forcing him to give incriminating evidence against himself and his relatives (Const. art.3815).

The accused has no obligation to tell the truth too.[31] Although Özgenç asserts that if the accused chooses to speak, he has to say the truth for the sake of fair trial,[32] this is unacceptable in our legal system. Whereas in the American system, the accused has the right to remain silent, but if he chooses to speak, he takes his place in the witness stand and under oath and he has to tell the truth.[33] According to our laws the accused is not a witness, he is not given oath to tell the truth. In my opinion, the accused may even lie, to evade punishment. All acts which are morally wrong are not punishable crimes. In fact, The Turkish Penal Code art. 286 punishes the witness who commits perjury, but no such punishment is established for the accused who lies.

Unfortunately, this new version of the article is not applied at the State Security Courts. Such an exclusion, in my opinion, is a grave encumbrance to the human rights and is an open contradiction with the constitutional principles. If the accused does not have the right to remain silent at the State Security Courts, this is against the constitutional norm which states that, "No one may be forced to give incriminating evidence against himself or his relatives" (art. 38/5).

What more to be done is that the article must be amended, so that the suspect is warned about his right to remain silent at his first encounter with the officials. At present he is informed about this right, just before the commencement of the interrogation. Whereas, not knowing his rights, he might voluntarily make some statements, some of which may even be self incriminating. So a warning after that will have no real meaning.[34] Taking into consideration the "deception" element of the police subculture, we know that the officers have the tendency to deceive.[35] So they might pretend to chat with the suspect and make him speak about the alleged crime. This is against the rule of law and fair trial.[36]

3. **The Right to Counsel** (Art.135/3)

The society will be harmed if the suspect (accused) cannot defend himself properly and is convicted because of this.. Such a conviction is unfair for two reasons: firstly because an innocent person is convicted, secondly because the

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31 Kunter-Yenisey 251.

32 Özgenç, İzzet, "Suç Zanlısı Kişinin Gerçeği Söyleme Yükümlülüğü ve Bunun Hukuki Sonuçları", Hukuk Araştırmaları, 1995, Vol. 9, No.1-3, p.134.

33 Kunter-Yenisey 430.

34 Öztürk, Bahri, "CMUK Reformu ve Delil Yasakları", İzmir Barosu Dergisi, April 1993, No 2, p.19.

35 Sokullu-Akıncı, 88.

36 Keskin, Serap, Ceza Muhakemesi Hukukunda Temyiz Nedeni Olarak Hukuka Aykırılık, İstanbul, 1997, p.173.

real criminal is not found.[37] To overcome this, the suspect or the accused has right to have a defense counsel during his/her interrogation by the police, the public prosecutor or the judge. The judge and the public prosecutor are law school graduates and the police, during their education take law classes too. The suspect (accused) on the other hand is not in the position to know the laws. So according to the rule of "equal weapons", he must have the right to counsel.[38] The accused must be reminded of his right by the officials who are making the interrogation. The interrogation will adjourn until the defense counsel comes. If the accused does not have an attorney or he is not in the position to appoint one, the bar association will do so by sending an attorney for him/her. This rule is not applied at the State Security Courts and during the preliminary investigation of the crimes within the jurisdiction of these courts.

On the other hand, according to article 138, if the accused is a minor or deaf and dumb or disabled to the degree that he is unable to defend himself and he does not have an attorney, a defense counsel is appointed for him, without his request.

The attorney is not a person who just watches the interrogation. The accused must be able to speak with his attorney before and during the interrogation. He must be able to relate everything to him and take his advice. During the interrogation the attorney can intervene and remind the accused of the consequences of his declarations and sometimes warns him that he better not answer certain questions.[39]

The presence of an attorney during interrogation minimizes the negative effects of the authority factor of the law enforcement officers' subculture and obliges them to respect the human rights.[40]

B. Arrest and Apprehension[41]

One of the most important criminal procedure activities concerning the human rights issues is arrest and apprehension of the suspect. Article 19 of the Turkish Constitution states that. "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except .... where procedure and conditions are prescribed by law". Individuals against whom there are strong indications of having committed an offense, can be arrested by decision of a

37 Erem, Faruk, "Mecburi Müdafilik ve Adli Yardım", Yargıtay Dergisi, Vol.4, 1978/4, p.440.

38 Donay, Süheyl, "Kamu Özgürlüklerinin Korunmasında Avukatın Rolü". İ.Ü. Hukuk Fakültesi Mecmuası. Vol. 43, 1977, No. 1-4, p.405.

39 Yurtcan, 167.

40 Sokullu-Akıncı, 167-169.

41 Centel, Nur, Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama, İstanbul, 1992, Kunter-Yenisey, 610 on; Öztürk, Uygulamalı, 438 on, 443 on; Yurtcan. 344 on and 370 on.

judge, solely for the purposes of preventing escape or preventing the destruction or alteration of evidence as well as in similar other circumstances which necessitate detention and are prescribed by law. Apprehension of a person without the decision of a judge shall be resorted to only in cases when a person is caught in the act of committing an offense or in cases where delay is likely to thwart justice.[42] The conditions of such apprehension are defined by law.

Arrest and apprehension are two different concepts. A person can be arrested only with a warrant of arrest issued by a judge. On the other hand apprehension can be made either by the law enforcement officers or even by ordinary citizens, in case of a flagrant offense. TCPC. does not have a provision as to informing the apprehended person about the nature of the incrimination. The Turkish Constitution in article 19/4 states that, "Individuals arrested or detained shall be promptly notified, and in all cases in writing or orally, when the former is not possible, of the grounds for their arrest or detention and the charges against him. In cases where an of offense has been committed collectively, this notification shall be made, at the latest, before the individual is brought before the judge". The fact that such a provision does not exist in TCPC does not prevent the apprehended person to learn the nature of the incrimination.[43] Because, besides the Constitution art. 19/4, Art. 13/5 of the Police Act requires that the police officers inform the apprehended person about the grounds for his apprehension. Besides this, the Act on Paying Damages to People who are Unlawfully Apprehended or Arrested (Art. 1/2), indicates that not informing in writing an apprehended person about the grounds of his apprehension is a reason for paying damages.[44]

Arrest and detention are security measures, not punishments.[45] So they are not the aim of the criminal procedure *per se*.[46] They are means to finalize the proceeding, therefore they are temporary[47] and the preliminary investigation concerning an arrested person, must be resumed as soon as possible.[48]

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42 Centel, 5; Yurtcan, 373.

43 Centel, 195.

44 Tezcan, Durmuş, Türk Hukukunda Haksız Yakalama ve Tutuklama (Önleyici ve Giderici Tedbirler), Ankara, 1 989, Pp.32-33.

45 Yenisey, Feridun, Uygulanan ve Olması Gereken Ceza Muhakemesi Hukuku, Hazırlık Soruşturması ve Polis, İstanbul 1993, p.163; ÖZEK, Çetin, "Devletin Korunması. Terörle Mücadele Yasası ve Bilgilendirme Hakkı", Edip F. Çelik'e Armağan, Değişen Dünyada İnsan, Hukuk ve Devlet, İstanbul, 1995, p.381.

46 Mahmutoğlu, Fatih, "İnsan Hakları Açısından Tutuklama ve Türk Hukuku", Prof. Dr. Nurullah Kunter'e Armağan, İstanbul, 1998, p.159.

47 Centel, 5; Öztürk, Uygulamalı, 270; Kunter-Yenisey, 605-606.

48 Tosun, Öztekin, "Hazırlık Soruşturmasında Tutukluluk", Ceza Hukuku ve Kriminoloji Dergisi, 1978, Vol.1,No.1, p.32.

According to the TCPC, the suspect must be brought before a judge within 24 hours (48 hours according to the Constitution), excluding the time necessary for sending him to the nearest justice of the peace. In case of collective offenses, committed by three or more persons, the period of detention may last up to four days if the public prosecutor requires, and if the prosecution cannot be resumed in four days, this period can be extended up to eight days with a written request of the public prosecutor and the decision of the justice of the peace.

Unfortunately, the same law that made improvements in the TCPC. in 1992, made some changes in the Act on the Establishment and Procedure of State Security Courts. According to this act, apprehended persons are brought before a judge within 48 hours and in case of collective crimes this period is 15 days. In areas where state of emergency is declared due to widespread acts of violence and serious deterioration of public order, the above periods are doubled. In my opinion the more grave a crime is, the more heavy the penal sanction becomes. But as to the requirements of procedural necessities, making the periods longer does not make any contribution to the establishment of the facts and thus this unnecessary detention constitutes a human rights violation *per se*.

According to the new version of TCPC, a person may be arrested when there is great suspicion connecting him with a particular crime, under the following circumstances:

1. Where there are facts indicating that the suspected person plans to escape.
2. Where there are facts indicating that he is attempting to destroy or alter evidence or traces of the criminal act or encouraging his accomplices or witnesses to make false statements or to refuse to testify or trying to influence expert witnesses.

If the suspect has no domicile or residence and cannot prove his identity and if the indicted crime's maximum punishment is not less than 7 years imprisonment, the suspect is presumed to make an escape or attempting to destroy evidence.

In the previous form of the article, the minimum of seven years did not exist. This amendment is an amelioration. But on the other hand the new version of the article is very much criticized.[49] For example, Öztürk says that instead of setting a limit of seven years, it would be much better to establish a

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49 Öztürk, Uygulamalı, 446-447; Mahmutoğlu, 165-166.

catalogue of crimes which are considerably more severe; such as organized crimes, rape and homicide.[50]

On the other hand, even suspects of crimes which require 6 months of imprisonment can be arrested if the crime is likely to arouse public indignation or anger,[51] or if he has no domicile or residence or if he cannot prove who he is. In my opinion, it is difficult to make a definition of public indignation or anger. No criteria can be put forth as to which crimes can cause public anger. Besides this, in the Turkish Criminal Law system, punishments up to one year of imprisonment are considered short term imprisonment and can either be converted into fines or suspended. So arrest of suspects of crimes which require six months of imprisonment is rather incongruous and in contradiction with the system. In a country where even the convicts of short term imprisonment are not put into prison, it is unacceptable to put non convicted persons into jail.

I very much approve the amendment which states that an arrest should never be made if it will cause an injustice or if another measure of security will be sufficient to attain the same result. This is in accordance with the principle of proportionality of the security measures.[52] There must indeed be a proportion between the criminal act that the suspect is accused of, and the security measure applied to him. These measures are not the end but the means for reaching to the substantial truth through fair trial, always keeping in mind the principle of the presumption of innocence

C. Exclusionary Rules

Exclusionary rules are very new to the Turkish Criminal Procedure system and are introduced only in 1992. It is expressed in two separate articles: One, excluding evidence obtained by illegal methods of interrogation, the second and more general excluding all illegal evidences:

1. TCPC. Article 135 a

Using illegal methods during interrogation of the accused is prohibited. The accused must give his testimony with his free will. Physical or mental

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50 Öztürk, Uygulamalı, 447.

51 This is using a security measure beyond its purpose, Tezcan, 27; Öztürk, Bahri, Ceza Muhakemesi Hukukunda Koğuşturma Mecburiyeti (Hazırlık Soruşturması), Ankara. 1991, p. 105.

52 Kunter-Yenisey, 608; Also See Kunter, Nurullah, " 'Tehlike Tedbirleri' Genel Teorisi ve Para Cezaları için İcrai ve İhtiyati Haciz', İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol. 34, 1969, p.1-4; Yurtcan, 341.

interventions which affect the accused's will power, such as maltreatment, torture, giving drugs, tiring, deception, physical force or the use of some devices is prohibited. No illegal profit may be promised. All testimony obtained by means of the above illegal methods cannot be evaluated as evidence, even if they have been obtained by consent of the accused. This deters the use of illegal methods during interrogation and gives no chance to find any excuses for it.[53]

This is in accordance with article 17/3 of the Turkish Constitution which reads as, "No one shall be subjected to torture or ill-treatment, no one shall be subjected to penalty or treatment incompatible with human dignity". The purpose of the prohibition of illegal methods is to protect human dignity. This article is applied at the State Security Courts, too.

Art. 135 a of the TCPC, states examples that will affect the accused's will power. But the stated examples are not *numerus clausus*.[54] There may be examples not foreseen in the article such as threatening.[55] For example Threatening the suspect to kill,[56] to give him to the public waiting outside to lynch him, threatening to torture[57] or telling the suspect that if he does not confess his wife will be arrested for the same crime,[58] making him to listen to a person's moanings, may it be real or a scenario,[59] talking with one another (officers) about the torture they made previously[60] is threatening and must be considered within article 135 a. So is hypnotism, which elevates the control on the will power.[61]

Article 135 a has already been taken into consideration by the Turkish Court of Cassation in some major decisions. The Court reversed decisions of courts of first instance, even in cases where the accused was acquitted, stating that, "interrogation is a procedural institution for reaching at the substantial truth. It aims to protect the accused as well as the public. So if the accused is not reminded of his rights, even in cases where he is acquitted, the decision must be

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53 Şahin 227.

54 Yurtcan, 302-303.

55 Demirbaş, Sanığın Hazırlık Soruşturmasında İfadesinin Alınması, İzmir,1996, s.296; Sokullu-Akıncı 165; Şahin 218 on.

56 Wigmore, Henry John, A Treatise on the Anglo-American System of Evidence in Trials of Common Law, Boston. 1953, p.832.

57 Redd V. State, 69 Ala. 258, in Wigmore 833, footnote 3.

58 Rogers V. Richmond, *365* US. 534 (1961) in ISRAEL, Jerold H.-La Fave, Wayne R., Criminal Procedure, Constitutional Limitations, St. Paul Minn., 1980, p.217.

59 Kaymaz, Seydi, Uygulama ve Teoride Ceza Muhakemesinde Hukuka Aykırı (Yasak) Deliller. Ankara, 1997, p. 122

60 Şahin, 218-219

61 Kaymaz, 121; Şahin, 217.

reversed.[62] In fact, fair trial is not only for the sake of the accused, but also for the rule of law. In a country where the rule of law is prevalent, no one is above the law, so all public officials must obey the laws and in due time everyone will get used to behave legally.

2. Prohibition of all Illegal Evidences (254/2).

A new paragraph is added to the article 254 stating that all illegal evidence obtained by the investigation officials, are not to be taken into consideration for the final judgment.[63] This brings a contemporary dimension to the Turkish Procedure Law. The principle that everything can be evidence in the criminal procedure is limited with the boundaries of the law and with human dignity, which is one of the most prominent of the human rights.[64] Although finding out the truth is the ultimate aim, the state has no right and should never try to conduct her activities outside the legal sphere and especially should not even attempt to violate any laws concerning the human rights , human dignity and integrity and respect right to privacy. There are some very strict rules on how to obtain evidence and establish the truth. There are also some values which can not be put aside even for the sake of finding the truth.[65] As Erman put forth, "In a country where the rule of law is prevalent, the ultimate aim does not justify the illegal means.[66]

Illegal methods of interrogation is prohibited by article 135a and article 254/2 goes beyond this: any evidence obtained by using illegal methods, for example through illegal searches and seizures, illegal line-ups, illegal wire tapping or illegal secret agents is not to be taken into consideration for the final judgment.

This article is unique in the continental law. It reminds us of the American "poisonous tree doctrine" which prevents the use of derivative evidence if they are based on primary illegal evidence and is the only way to prevent the use of illegal methods by the law enforcement officers. In my opinion, punishing the officers, for the crimes they commit while performing their duties and collecting evidence by using illegal methods, is not enough to deter them, because of the secrecy and solidarity aspects of their subculture.[67] Some Turkish lawyers, without taking this into consideration claim that this

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62 YGK. (General Assembly of the Court of Appeals) decision no. E. 1995/6-238, K. 1995/305, dated Oct.24,1995, in Yargıtay Kararlar Dergisi, 1995, No.12, p.1885.

63 This amendment is applied at the State Security Courts too.

64 Nino, 164-168.

65 Yurtcan, 476.

66 Erman, Sahir, "Sentez Raporu", Prof. Dr. Nurullah Kunter'e Armağan, İstanbul, 1998, p.8.

67 Sokullu-Akıncı, 187.

new rule is a further encumbrance to the already slow procedural system[68] and the accused will be acquitted because of a "minor infringement" of the law enforcement officers. Unfortunately they classify illegal evidences as "minor" and "major" violations of the law.[69] Some say that a comparison must be made between the damages of the crime on the society and the damages of illegal evidences on the individual and if the former is more prevalent then illegal evidences can be taken into consideration.[70] This is an unacceptable solution and it is against the clear deposition of article 254/2. Besides, when an individual's rights are violated, there is always public harm and damage to the society. On the other hand if some of the violations of the police officers are classified as "minor" and "unimportant", it will be impossible to prevent illegal evidences and then it is not possible to talk about the rule of law. The police is an organization with a subculture.[71] Subculture is a sociological notion. So if we are lenient to some of their violations, which we consider "minor", the police will never include lawful behavior in their subculture.

Yenisey declares that, to consider en evidence within article 254/2, there must be a violation of the individual's constitutional rights.[72] This solution is taken from the American Law where all procedural rules are in the American Constitution and all violations of the procedural rights of the individual are "unconstitutional". But this is not true for Continental Europe and Turkey where only a few of the procedural rules are in the Constitution but the majority of procedural rules are in separate Codes. So all illegal evidences are not "unconstitutional". This proposition seems to be one of the unfortunate efforts to limit the application of article 254/2. If we respect the rule of law, all illegal evidences must be considered within the said article.

On the other hand, one group of lawyers are arguing that, this article is limited to the evidence obtained by the investigating officials and does not include illegal evidence obtained by private persons.[73] For example, Öztürk states that in Public Law, an act that is not prohibited is free.[74] In my view, this is an unacceptable assertion since laws must be obeyed by every one. They are

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68 Demirbaş 305.

69 İçel, Kayıhan, "Sorgulamada Hukuka Aykırılık ve Sonuçları", Prof. Dr. Nurullah Kunter'e Armağan, İstanbul, 1998, p.127; Öztürk, Bahri, "Delil Yasakları", İnsan Hakları Merkezi, Ankara Üniversitesi Siyasal Bilgiler Fakültesi, Ankara, 1995, Pp.44-45.

70 Kaymaz, 263.

71 Sokullu-Akıncı, 64 on.

72 Yenisey, Yasak, 1239.

73 Öztürk, Uygulamalı, p.395; Öztürk, Delil Yasakları, p.113; Yenisey, "Yasak Yöntemlerle ve Hukuka Aykırı Şekilde Elde Edilen Deliller", Savaş,Vural-Mollamahmutoğlu, Sadık, Ceza Muhakemeleri Usulu Kanunu Yorumu, Vol.I, Ankara, 1995, p.1238.

74 Öztürk, Delil, 114.

not just for the state officials, especially the law enforcement officers. Otherwise an officer by using a private person to obtain an illegal evidence will by-pass the law. Laws must be interpreted as to the purpose they are aiming. A stolen document is an illegal evidence and if an officer uses a third person to obtain it, he still is using an illegal evidence. As Keskin indicates, public officials have the authority to prosecute criminal acts and collect evidences. Private persons have no such authority and they cannot violate other peoples' fundamental rights while they are exercising their own rights.[75] I agree with this view and I want to add that, if a permission is not granted by the laws to officers with the authority to prosecute, no such permission will be true for people with no authority, i.e. private persons.

If a court's final judgment takes an illegally obtained evidence into consideration, this will be a wrong decision and the Court of Appeals will reverse it.[76] But the problem of causality is discussed by the Turkish doctrine. Some say that, since article 320 of the TCPC. indicates that, "The Court of Appeals is entitled to review on points indicated in the appellate petition and in the appellate brief and if the appellate request is based on omissions regarding court procedures, on the facts declared in the appellate petition and on other violations of the law, even if they are not mentioned in the appeal, but *which Will have a bearing on the judgment*". If an illegal evidence has no direct influence on the final judgment, there is no reason to reverse it.[77] Unfortunately this seems to be one of the efforts for limiting the application of article 254/2. But the majority of the Turkish doctrine state that if illegal methods are used, the judgment must be reversed even if these evidences have no direct bearing on it.[78] Keskin even adds that if the legislator wanted a direct causal effect of the illegally obtained evidence on the judgment, the second paragraph would be added to article 308 instead of 254.[79]

IV. Proposals for further Amendments in the Turkish Criminal Procedure System

1992 amendments made some positive changes in the Turkish Criminal Law system. Turkey has made her choice on human rights and well-being of the individuals. In the history of human rights, there have always been collective entities which had interests that were not reducible to those of individuals. We have outlived the days when the nation as a basic moral unit and its interests

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75 Keskin, 184.

76 Keskin, 32.

77 İçel, 126; Kaymaz, 253; Savaş/Mollamahmutoğlu 1200; Yenisey, Yasak, 1217, 1235 on.

78 Keskin, 176; Öztürk, Delil, 43; Şahin, 228.

79 Keskin 176.

prevailed over those of its citizens[80] and we do not want to go back to those days. I am glad to see that most of the proposals that I put forward in my doctorate thesis in 1986, on the right to counsel and exclusionary rules have been accepted by the 1992 amendments. But there are still a lot to be done in this respect. For a country where human rights are fully enjoyed, the following changes must be made in the criminal procedure rules and also in the Turkish Constitution:

1. The principle of natural, unbiased and independent judge must be accepted. This starts with a change in the composition of the Supreme Council of Judges and requires a constitutional change.

2. Defense attorney must have all the opportunities for defending the accused, e.g. the attorney cannot bring evidence now. This must be made possible.

3. 1992 changes give the accused the right to counsel, but the accused tried in the State Security Courts is deprived of this right. Every individual has the same human rights and deserves equal treatment and this segregation is wrong. Every accused must have the right to counsel, whatever the nature of the crime he committed. Unfortunately the European Court of Human Rights with a majority of 8:12, ruled that the State Security Courts are not impartial and independent.[81]

4. For various reasons, criminal investigation and trial takes a long time in Turkey. The procedure must be resumed within a reasonable time.

5. A judicial police force working under the public prosecutor must be established.

6. A special procedure is applied for the trial of civil servants. This is wrong and must be changed. Civil servants must be tried like all other citizens.

7. Wire tapping and eaves dropping has not been arranged in the Turkish legal system. So if a law is not passed, no wire tapping or eaves dropping can be done, even if it is ordered by a judge.[82]

8. Victims' rights are an important part of human rights, but they are not fully observed in our system.

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80 Nino, 152-153.

81 Incal V. Turkish Republic (41/1997/825/1031), Strasbourg, June 9, 1998. The Turkish Constution is amended recently and the military member of the State Security Court is placed by a civilian judge (June 1, 1999)

82 A new law concerning organised crimes is passed and wire tapping and eaves dropping is now posibble for such crimes (August 1, 1999).