A MECHANISM FOR THE PREVENTION OF TORTURE: ARTICLE 135/A OF CMUK *

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INTRODUCTION

Historically, there was a time in which confessions were regarded as the most cogent and satisfactory proof of guilt (*regina probationum*). This belief derived from the presumption that a person would not make an inaccurate statement against his own interest. Thus, all confessions, no matter how obtained, were admitted as evidence without any distinction. The heavy reliance on confessions subsequently led to the recognition of torture as a legitimate method for extracting confessions.[1] As a response to such practice the other extreme was adopted after the French Revolution; confessions were considered as the most unreliable evidence (*demens quide se confitetur*) and the suspect or the accused were not permitted to give evidence on their own behalf.[2] Obviously neither of these approaches reflects the current Turkish approach to the issue.

Under the principle of "free evaluation of the evidence", the Turkish trial judge is trusted to be able to give to a pre-trial confession whatever weight he thinks it deserves.

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[1] J.H. Langbein, **Torture and the Law of Proof,** The University of Chicago Press, London, 1977; A. L. Lowell, "The Judicial Use of Torture", 11 **Harvard Law Review,** 1897, p. 290.

[2] E. Cihan, "Ceza Mukakemesi Hukukunda İkrar" (Confessions in the Criminal Procedure Law), **İstanbul Hukuk Fakültesi Mecmuası** (Journal of Istanbul Law Faculty), 1965, p. 121.

That means a pre-trial confession is admissible in principle. Having said that a number of provisions which seek to limit the use of confessions at trial is included by the Code of Criminal Procedure (hereafter CMUK).[3]

In addition to Article 254 of CMUK (examined elsewhere)[4], Article 135/A of CMUK, which was also introduced by the 1992 amendment, specifically regulates the admissibility of improperly obtained confessions in the following form:

> "Statements of the suspect and interviewee should be the result of their free will. The freedom to determine and exercise free will shall not be impaired by physical and psychological abuse such as ill-treatment, torture, giving drugs by force, fatigue, deception, physical force and violence, using any device. Promising an advantage which is against the statute is prohibited. Statements obtained in violation of these prohibitions may not be used in evidence even if the accused consents to its use."

It seems necessary firstly to discuss what kind of statements is this provision concerned with.

STATEMENTS: IN-COURT OR OUT OF COURT

A statement can be made either in or out of a court. Nowadays, it is unlikely that an in-court statement will be obtained improperly, but it is not impossible. Not only the law enforcement officials, but also judges, prosecutors or even defence lawyers may ask questions to the accused in a manner which may be considered as oppressive or deceptive.

There is no reason why a statement made in court (which incriminates its maker in a crime) should not be subjected to the admissibility test under Article 135/A. It is provided by Article 135/A that "statements of *ifade veren* (the interviewee) and *sanık* (the suspect) should be the result of their free will. ...". In Turkey, "suspect" status is received when an individual is questioned by the judge involved in the pre-trial stage and by the trial judge, whereas "interviewee" status is conferred upon an individual when he is interviewed by the police and the prosecutor.[5] Thus, the use of the word *sanık* clearly implies that an in-court statement can be subjected to the admissibility test. Moreover, Article 135/A is a supplement to Article 135 which regulates both *ifade alma*[6] (interviewing) and *sorgulama*[7] (questioning); both provisions are in the general part of the CMUK and, therefore, are applicable to whole criminal proceedings, not only to the preliminary investigation. In addition to these, Article 236, which is concerned with the commencement of trial, makes it more clear that,

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[3] The principle of orality and immediacy in Turkish trials requires that testimony must be presented in court, and that documentary evidence such as the confession given by the accused to the prosecutor or police cannot principally be read at trial. (CMUK, Art. 247).

[4] A. V. Bıçak, "Infringement of Procedural Rights: Article 254/2 of CMUK", 17-18 **Turkish Yearbook of Human Rights,** 1995-96, p.89-102.

[5] An individual does not change his status when he is charged as "the accused".

[6] It is conducted by the police or the prosecutor.

[7] It is conducted by the magistrate involved in pre-trial stage or by the trial judge.

"[t]he trial is commenced with a roll-call of expert witnesses. This is followed by introduction of the registration of the identity of the suspect; reading of the accusation; and questioning of the suspect *according to Article 135.* ... ".[8]

OUT OF COURT STATEMENTS: FORMAL OR INFORMAL

Generally, out of court statements are made either to a person in authority or to a person who does not possess authority. They may respectively be called "formal" and "informal" confessions. The latter, unlike the former, are often made in ignorance of the possibility that they may be used in any subsequent criminal trial. Also, they are unlikely to have CMUK standards with regard to safeguards[9] against likelihood of falsity.

The question of what happens to an informal statement in Turkey has not been subjected to any judicial decision yet. Article 135/A seems to be concerned with, "a statement of the suspect and interviewee". Although an informal statement is made neither by the suspect nor by the interviewee, this omission, it seems to me, derives from the rare introduction of an informal statement into trial, and does not prevent Article 135/A being applied to informal statements as well as formal statements.

Formal pre-trial statements may also take two forms; judicial and extra-judicial statements. As far as Turkish law is concerned, the former are made to the *sulh hakimi* (the justice of the peace), while the latter are made to the prosecutor and the law enforcement officers. With regard to the probative value, there appears to have been a slight prejudice against formal extra-judicial confessions and informal confessions. There is a general corroboration requirement with regard to them[10]; the accused shall not be convicted in a case where his own extra-judicial or informal confession is the only evidence against him, unless it has been repeated before a judge. Having said that, the corroboration requirement is a different issue and does not affect the possible challenge of admissibility of such statements under Article 135/A.

STATEMENTS: INCULPATORY OR EXCULPATORY

A statement may be either inculpatory or exculpatory. Although an exculpatory statement mainly contains denial of involvement with the alleged offence, in some cases the prosecutor may wish to introduce it as evidence against the accused. To state such a situation in a more concrete form the following example may be given: a suspect accused of burglary states to the police that he was not in that part of the city at the time of the alleged offence. Obviously such a statement is exculpatory when it is made. However, if the prosecution were able to prove at trial that the suspect was near the scene at

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[8] Emphasis added. The original version of Article 236 reads as follows:
"Duruşmaya tanıkların ve bilirkişinin yoklamasıyla başlanır. Bundan sonra sanığın açık kimliği ve şahsi durumu tesbit olunur. Daha sonra iddianame okunur ve 135. maddeye göre sanık sorguya çekilir.... ".

[9] Such as the right to legal advice.

[10] C.G.K 16.2.1987 E.7/271 K.50; C.G.K 2.2.1987 E.314 K.18; 6.C.D. 1.3.1990 E.1989/10255 K.1990/1524; 6.C.D 10.5.1988 E.1988/5307 K.1988/6175; 6.C.D 17.3.1987 E.1987. K.1987/2751 cited by İ. Özmen and U. Aktalay, **Ceza Muhakemeleri Usulü Kanunu** (The Code of Criminal Procedure), 1993, p. 341-342; *Ahmet Case*, Yargıtay Ceza Genel Kurulu, E.1993/6-236, K. 1993/255, T.18.10.1993, **Yargıtay Kararları Dergisi** (Journal of the Court of Appeal Decisions), 1994, p. 804.

the time of offence the suspect's previous exculpatory statement would be used by the prosecutor to demonstrate his consciousness of guilt or creditworthiness of his possible testimony at trial. What may therefore have been intended as an exculpatory remark, may later turn to be inculpatory. One may ask whether such a statement could be subjected to the admissibility test under Article 135/A.

The use of the term "beyan" (statement) rather than "ikrar" (incriminating statement) in Article 135/A suggests that there is no ground for discussion whether the exclusionary rule is applicable to a purely exculpatory statement. As a natural consequence of such terminology not only inculpatory but also exculpatory statements may be subjected to the admissibility test under Article 135/A.

FORMS OF STATEMENTS: MADE IN WORDS OR OTHERWISE

A statement may be made in speech or in writing, and in neither is it necessarily the case that words must be used. The question arises as to whether an artistic communication or physical gesture can be regarded as a statement. With regard to the former it may be said that relating something may be easier for illiterate and unsophisticated people in the way of demonstrating it in action rather than describing it in words.

An interesting example of such situation has arisen under English common law. In the case of *Li Shu Ling*[11] the suspect re-acted the way in which the killing of the victim took place with a women police officer. The police made, with his consent, a video recording of the re-enactment. The filmed re-enactment of the crime by the suspect was regarded as a confession by the Privy Council. Indeed, as far as the evidential value of revealing the fact that the crime was committed by its maker is concerned, substantial differences do not exist between a confession made in words and an admission made by demonstrating in action.

Related to the physical gesture it should be noted that not all behaviours are equivalent to speech in any society and implications of the physical gesture may be different in diverse cultures. Having said that, some conducts clearly indicating acceptance in response to an accusation may be regarded as a statement. This point may be illustrated by giving examples. Firstly, when a suspect faces the question whether he committed a particular offence, he may nod his head instead of replying 'yes'. Similarly, a person accused of murder may take the police to the scene and show them the location of the body, instead of saying where the body is concealed.

Written or oral confessions can be made expressly or impliedly. An express confession occurs where the person confesses to the commission of the offence in a very direct manner. A confession may be implied in cases where the only inference which can be drawn from words used in particular circumstances is the admission of the alleged offence. Naturally, in the presence of any ambiguity, such an inference cannot be safely drawn. The Turkish Court of Appeal, for instance, held that the offer by the suspect to pay the value of a ram in the face of an accusation of theft cannot be taken as an implied

[11] (1989) **A. C.** 270.

confession.[12] However, in some cases where the accused raises a defence, a confession could be implied. For example, in the face of a rape accusation, the fact that sexual intercourse took place could be inferred from a defence by the suspect that the woman consented.

One may ask whether silence in response to an accusation gives rise to an inference that the accused accepts the truth of the accusation, and if so whether the admissibility tests under Article 135/A can be applied in such cases. As far as the first part of this question is concerned, the fact that individuals are entitled to refrain from answering questions put to them for the purpose of discovering whether they committed an offence is well known as the right to silence, and clearly recognised in Turkish' procedural rules regulating the criminal investigation.[13] The interviewee and the suspect, according to Turkish law, should be notified that, "he has a legal right not to make a statement about the accusation".[14] This requirement makes it technically impossible to consider the post-caution silence as implied confession in that silence following "the caution" may be nothing more than the exercise of the cautioned right.

The level of appreciation of the right to silence in Turkey appears low among the public as a whole; the popular culture of Turkey is reflected by a common proverb that "*sukut ikrardan gelir*" (silence means guilt). Although there is no clear judicial pronouncement, one may expect to find the reflection of such culture at the level of the courts.

THE CRITERION OF ADMISSIBILITY: THE VOLUNTARINESS TEST

Article 135/A would seem the result of the postulate that individuals ordinarily have freedom of choice[15] and of the moral conviction that persons should enjoy a degree of mental freedom to choose whether or not to confess. Lack of such "mental freedom" is required to result in the exclusion of any subsequent confession. At this point, one may ask whether factors such as mental disease or abnormality which impair the suspect's capacity to act voluntarily are covered by the article. Taken literally, the answer to this question should be negative; the concern of article 135/A seems to preserve a certain degree of mental freedom against improper practices which come from the outside world. That means confessions are only admissible under article 135/A provided that the suspect is not deprived of freedom of will by third parties.

The article in question does not attempt to define the words "free will" or "voluntariness". Instead, it lists a number of improper techniques which are likely to create an un-

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[12] Mehmet Case, Yargıtay Ceza Genel Kurulu (The General Assembly of Court of Appeal), E.1993/6-67 K.1993/108 T.19.4.1993, 19 **Yargıtay Kararları Dergisi** (The Journal of the Court of Appeal Decisions), October 1993, p. 1564.

[13] The Turkish Constitution, Art. 38/5.

[14] CMUK, Art. 135/4.

[15] Determinists contend that all incidents, including all human beings' preferences, are caused. From the determinist point of view, therefore, a person faced with a choice between alternatives is not free in a contra-causal sense; it would be possible to forecast accurately somebody's option in the face of particular alternatives provided that the person's genetic code and all his previous experiences are known. See generally, M. Beardsley and E.Beardsley, **Invitation to Philosophical Thinking**, 1972

acceptable risk of depriving the suspect of his free will.[16] Obviously, prohibiting certain categories of police tactics provide concrete guidance for the law enforcement officers and increased protection for the suspects. One has to accept, however, that a comprehensive enumeration of all the techniques is extremely difficult due to the evolutionary nature of police practices and the suspect's possession of varying degrees of sensitivity and resistance to improper tactics. Moreover, the impact of such a listing depends, of course, upon the interpretation given to the terms "ill-treatment", "torture", "giving drug by force", "fatigue", "deception", "physical force and force", "using any device", and "promising an advantage". Depending on a broad, or restricted interpretation of these terms, improper conduct may, or may not, be held to result in an involuntary confession.

In any case, the listing does not enable us to restrict the Turkish notion of voluntariness to a single meaning. Since securing confessions by deceit or by promising an advantage that is illegal in itself is mentioned by the article, the voluntariness test is not only limited to coercive tactics. All methods that have the effect of damaging the suspect's free will may be included.

THE BURDEN AND STANDARD OF PROOF

The implementation of voluntariness test may become a source of controversy. In this part of the article, attention will be drawn to the questions of who bears the burden of proving voluntariness of a confession, and of what the standard of proof by which the judge assesses voluntariness should be. There is no specific provision regulating this subject in Turkish law. This omission makes the formulation of Article 135/A important.

Section 135/A does not include standards to which a confession must comply in order to achieve the quality of voluntariness. Instead, a negative test has been chosen. The conclusion as to the voluntariness of a confession depends on the absence of factors which are likely to render a confession involuntary. In other words, to have the quality of voluntariness a confession should be shown not to be involuntary.

Such a negative formulation is likely to draw judicial attention away from what is voluntary to what is involuntary; and therefore is capable of constituting a bias against exclusion of confessions in that all confessions may be considered voluntary unless involuntariness proved. This possibility is particularly supported by the fact that what exactly occurred during interrogation is difficult to know in Turkey since there is no tape-recording requirement of interrogation. At trial, there is little to prevent law enforcement officers from describing the condition of interrogation in favour of admissibility. Of course, the defendant could present his version. It is up to the trial judge or the panel to decide the relative credibility of the two sides' stories. Taking a cynical approach, judges may systematically resolve the credibility issue in favour of the police. Such a course is unlikely to be taken by the Turkish judiciary because of the general substantive law's principle that suspicion should be interpreted in favour of the suspect.

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[16] This list may be interpreted as the statement of improper techniques which result in an "involuntary" confession as a matter of law, regardless of the likelihood that they did or could produce a false confession and regardless of their effect on the actual confession.

In the case of *Osman, Huseyin and Haci Osman*[17] the Turkish Court of Appeal ignored the issue of the burden of proving voluntariness though there was a opportunity to clarify it. In this case the suspects claimed at their trial that their confessions at the police station were obtained by coercion, but this claim did not prevent conviction. Confessions were held, by the Court of Appeal, to be involuntary and therefore inadmissible on the ground that the suspects' claims were supported by the report of the Forensic Medicine Organization in which it was stated that ecchymosis (signs of torture) were discovered on the bodies of the suspects. More recently, however, the suspect's claim that his confession at the gendarmerie station was obtained by coercion has led to exclusion, without support of any report. The Court of Appeal held that such a confession cannot be taken as a basis for conviction unless the contrary of the suspect's claim is proved by the prosecution.[18]

Having concluded that the admissibility of confessions in Turkish jurisdiction has been governed by the notion of voluntariness, it is now necessary to examine which methods and practices in the process of criminal investigation will render a confession involuntary.

Before attempting to identify certain practices it is necessary to recognise that such circumstances should not be expected to be static; there may be more extensive circumstances than identified here. In the following pages an attempt will be made to identify the most notorious ones and to clarify the exact meaning of them by analyzing various courts' decisions. This will include not only domestic high courts of each country but also the European Court and Commission of Human Rights.

As far as Turkish law is concerned, there exists a list of improper techniques capable of creating an involuntary confession. The Turkish Constitution affirms as a fundamental principle that "no one shall be subjected to *torture, ill-treatment,* or *any treatment incompatible with human dignity*"[19] The Code of Criminal Procedure expressly pronounces the involuntariness of confessions obtained by "torture", "ill-treatment", "giving drug by force", "fatigue", "physical force and violence", and "using any device" such as a lie detector.

TORTURE

In the view of the European Commission of Human Rights, the concept of torture includes an aggravated form of severe physical or mental suffering.[20] More recently, it has also been defined by an International Covenant as, "any act by which severe pain or suf-

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[17] Yargıtay Ceza Genel Kurulu (General Assembly of the Court of Appeal's Criminal Division), E.1993/6-192, K, 1993/217, T.4.10.1993, 20 **Yargıtay Kararları Dergisi** (Journal of The Court of Appeal's Decisions), 1994, p. 450.

[18] Ahmet Case, E.1993/6-236, K.1993/255, T.18.10.1993, 20 Yargıtay Kararları Dergisi (Journal of the Court of Appeal's Decisions), 1994, p. 804.

[19] Article 17, emphasises added.

[20] *Denmark et al. v Greece* (1969) 12 **Yearbook of E.C.H.R** 504; This case is widely known as "*the Greek Case*" which was logged by Denmark, Norway and Sweden in 1967 against the military junta in Athens.

fering, whether physical or mental, is intentionally inflicted on a person ...".[21] Both definitions include the element of severe suffering which is a matter of degree, dependent upon the facts and circumstances of an individual case. A general idea as to the amount of suffering required may be obtained from the findings of international and domestic authorities.

As far as the European Commission of Human Rights is concerned, the practice of torture is found in the application of "falanga" which involves "the beating of the feet with a wooden or metal stick or bar".[22] Similarly, the use of five interrogation techniques including wallstanding, hooding, subjection to continuous noise, deprivation of sleep, and deprivation of adequate food was considered to amount to torture.[23] On a more universal level, the Human Rights Committee of the UN found the presence of torture in cases where there existed singular or combined cruelties, such as forcing a suspect to remain standing with the head hooded for long hours (planton), electric shocks, putting hooded head into foul water (submarino), keeping him hanging for hours, keeping him naked and wet, squeezing the suspect's fingers after pieces of wood have been placed between them, and so on.[24]

These examples should not mislead us into assuming that torture is only physical cruelty. As has been confirmed by the aforementioned definitions, non-physical torture is also possible, defined as "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault".[25] This type of torture is exemplified by the sub-commission in *the Greek Case* as mock executions, threats of death, insults, humiliations, threats of reprisals against relatives, threats to be present at the torture of others or actual presence at such torture.

Although torture is prohibited by a number of legal texts[26] in Turkish law, there is no statutory definition of it. Examples of torture, however, can be found in the judgements of the Court of Appeal. In the case of *Gazi, Faik and Ziya*[27], who were charged with causing the death of the three person under detention, it was reported that the suspects accused of smuggling historical and artistic items claimed to have been discovered by themselves were detained by gendarmerie. Following their denial of such an involve-

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[21] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1, United Nations, Document A/Res/39/46.

[22] *The Greek Case*, **supra** note 26, p. 505

[23] Ireland v United Kingdom, (1978) 2 **E. H. R. R**. 25; The European Court of Human Rights, however, declined to consider these tactics as torture, instead they have been labelled as "inhuman treatment".

[24] Bazzano and Massera v Uruguay (5/1977), Report of the Human Rights Committee, **GAOR**, 34th Session, Supplement No. 40 (1979), Annex 7; *Grille Motta v Uruguay* (2/1977), Report of the Human Rights Committee, **GAOR**, 35th Session, Supplement no.40 (1980), Annex 11; *Lopez v Uruguay* (52/1979), Report of the Human Rights Committee, **GAOR**, 36th Session, Supplement No. 46, 1981; cited in N.S. Rodley, **The Treatment of Prisoners Under International Law**, 1987.

[25] The *Greek Case*, **supra** note 26, p. 461.

[26] Article 17 of the Constitution, Article 243 of the Penal Code, UN Convention Against Torture (**The Official Gazette** 10 August 1988), the European Convention for the Prevention of Torture (**The Official Gazette,** 29 Feb. 1988).

[27] Yargıtay Ceza Genel Kurulu (The General Assembly of Court of Appeal), E.1983/8-64, K.1983/156 T.4.4.1983, **Yargıtay Kararları Dergisi** (Journal of Court of Appeal Decisions), 1983, p. 445.

ment, electric currents were connected by a sergeant to their fingers, toes and penises in an attempt to discover the location of items. This practice continued for several days. Then the captain ordered to bring them to the headquarters where the suspects were punched, kicked, their testicles were squeezed, and their heads were kept in water until they almost drowned. These methods also failed to disclose the location of items and the suspects were taken back to the initial detention centre. After a few days they were taken to the medical doctor who not only gave a medical report stating the non-existence of any signs of torture but also offered to help to make the suspects confess. Then an official request seeking the aid of the medical expert to uncover the location of items was made in a written form by the captain. Following this request, the doctor attended the gendarmerie station at 3.00 a.m., and asked the gendarmes to bring him salt and flour. He forced the suspects to eat the mixture of salt and flour, whilst at the same time pouring water from one cup to another in order to exploit their thirst. In other cases the Court of Appeal has found examples of torture such as assault with truncheons, beating after pouring cool water, burning with cigarettes and yanking people by the hair.[28]

INHUMAN TREATMENT

Improper behaviour which falls short of torture may still cause an involuntary confession if it can be categorised within the concept of "inhuman treatment". The distinction between torture and inhuman treatment is a matter of the intensity of the suffering inflicted. In the case of *Ireland v United Kingdom*[29] , the aforementioned five techniques were regarded as inhuman treatment by the European Court, despite the earlier classification of them as torture by the Commission. The court's approach is obviously a move towards limiting the meaning of torture to its general understanding, extreme barbarity.[30]

The practices of inhuman treatment vary from trivial beating to forcing to stand against a wall and beating severely.[31] The presence of such a practice was found by the Turkish Court of Appeal in cases where the suspect was beaten so badly that he had marks and was unable to work for seven days.[32]

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[28] Sanık Belediye Başkanı, Y.1.C.D., 13.1.1970, E. 1969/1730, K.1970/118 cited by S. Dönmezer, **Özel Ceza Hukuku Dersleri,** 1984, p. 131; *Hırsızlık Zanlıları*, YCGK, T. 22.3.1976, E.1976/8-100 K.1976/133, 3 **Yargıtay Kararları Dergisi** (Journal of Court of Appeal Decisions), Vol. 3, 1977, p. 412; *Jandarma Erleri*, 6.10.1976, Y.1.C.D., E.1976/3053, K. 1976/3167, 3 **Yargıtay Kararları Dergisi** (Journal of Court of Appeal Decisions) Vol. 3, p. 106; *Mustafa*, Y.8.C.D., 20.2.1986 E.1985/6399 K.1986/1151, 12 **Yargıtay Kararları Dergisi** (Journal of Court of Appeal Decisions), 1986, p. 1556; *Rıdvan*, 17.6.1986, 3320/3733, cited in Ş. Malkoç, **Memurlar ve Suçlar: Memurlar ve Kamu Görevlilerinin Hukuki Sorumlulukları** (Public Servants and Crimes: Responsibility of Public Servants), 1988, p. 86.

[29] (1978) 2 **E. H. R. R**. 25, at p. 76-85.

[30] See, R. Sarup, "Torture under the European Convention on Human Rights", 73 **American Journal of International Law,** 1979, p. 267.

[31] *The Northern Ireland Case*, **supra** note 29, para g. 110, 115 and 174.

[32] *Hasan Case*, YCGK, 5.10.1987, E.1987/8-186 K.1987/423, 14 **Yargıtay Kararları Dergisi** (Journal of Court of Appeal Decisions), 1986, p. 102-105; *Erdoğan*, YCGK, 17.4 1989, E.1989/3-87, K.1989/143.

DEGRADING TREATMENT

Practices which are not sufficient to amount inhuman treatment may cause involuntary confessions if they constitute degrading treatment. It was held that treatment of an individual may be regarded as degrading "if it grossly humiliates him before others or drives him to act against his will or conscience".[33]

Taken literally, the former element of the definition, "grossly humiliates him before others", may give rise to the misunderstanding that apart from the tormentor and the suspect the presence of a third party is required. The latter element, "drives him to act against his will or conscience", may also lead to the misconception that submission of the suspect to the request is necessary. These should not be the case. As pointed out by Rodley, the behaviour aimed at humiliation or action against will should be enough.[34]

Turkish courts has not found any treatment of suspects degrading and therefore causing involuntary confession. Some examples, however, may be given by referring to the decisions of European judicial institutions. It was held that degrading treatment is a relative concept; identifying its presence may differ in case to case depending on the duration of the treatment, its effects, the suspect's characteristics such as sex, age, religion etc.[35] In the Greek case, for example, a certain roughness of treatment did not amount to degradation since it was tolerated by the suspect and the public.[36] Another example would be that forcing the strict vegetarian to eat meat might fall within this concept whereas similar conduct towards a non-vegetarian might not. The concept of relativity is susceptible to misuse so it should be employed with caution.

The difference between these three concepts is likely to derive principally from a difference in the intensity of the suffering inflicted. It is , therefore, difficult to identify the exact scope of each term. Such an effort may not be important with regard to the admissibility of confessions as all of them will cause involuntariness.

GIVING DRUGS

Voluntariness of confessions may also be impaired by giving substances, whether in solid, liquid or gas form, to the body of the suspect. Obviously, it does not matter whether they have been swallowed, mixed with foods or drinks, breathed, rubbed into the skin etc. The important point for the judiciary to focus on is whether such substances are capable of affecting the suspect's mental capacity.

One may ask whether confessions obtained from the suspect who has voluntarily taken alcohol, drugs or prescribed medicine with side effects on mental ability are inadmissible with regard to Section 76 and Article 135/A. As argued earlier, impropriety is needed for the implementation of these provisions. With regard to this question, although the law enforcement officer has no responsibility whatever on taking these sub-

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[33] *The Greek Case*, **supra** note 26, p. 500.
[34] N. S. Rodley , **The Treatment of Prisoners Under International Law**, 1987, p. 93.
[35] *Ireland v UK*, **supra** note 29, para. 162.
[36] *The Greek Case*, **supra** note 26, p. 501.

stances, questioning a suspect who has no control over his decision making is itself improper.

FATIGUE

Experience of being detained and interrogated by the police is naturally tiring. If the suspect, however, is detained in conditions or questioned in a manner which make him extremely tired, the issue of voluntariness comes into play. The typical examples of such exhaustive tactics may be given as prolonged and incommunicado questioning, transporting the suspect from one police station to another, shining a bright and blinding strobe light continuously on the suspect's face, withholding food and drink from him,[37] keeping him awake to the point of extreme exhaustion, waking up regularly after brief periods of sleep, etc.

As far as the English judiciary is concerned, the confession of a drug addict who has been in police custody for 18 hours without any rest, despite the Code's requirement of at lest eight hours rest in any period of 24 hours, was found to be involuntary.[38] A similar conclusion was reached for the confession of a retired public servant who had been subjected to a total of 700 questions for 25 hours out of 50 spent in custody during a hot summer.[39]

THREAT

Moral restraint by means of threat can also harm the voluntariness of a confession. The coercive power of threat rests not only with the fear they produce but also with an individual's suggestibility. Clearly, the age, intelligence and character of the suspect will be important considerations.[40] The question to be addressed should be whether the suspect reasonably considers himself in sufficient danger. To be effective for the involuntariness purpose it needs not to be trivial or implausible. Having said that, threats may have cumulative effect; where any of them is not sufficient by itself to cause involuntariness, all, taken together might.

Threats occur in different shapes and sizes. The problem may arise as to the employment of words to the effect that "it would be better" to tell the truth. In the case of *R. v Emmerson,*[41] a submission for the exclusion of a confession obtained by oppression was made on the grounds that the suspect was frightened by threats, where one of the police officers conducting the interview raised his voice and swore at the suspect. The police officer was saying in effect that it was plain that the suspect had committed the crime, and asking why he was wasting their time. Although the conduct of the police officer

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[37] Not providing anything apart from bread and water for three days to the detainee, which is required as a disciplinary punishment by Military Criminal Code, has been claimed to be unconstitutional before The Turkish Constitutional Court. The Court, however, did not agree. *Katıksız Hapis Case*, 27/12/1965, E.1963/57, K.1965/65, D.4/3-9, **Official Gazette,** No. 12520 of 6/2/1967.

[38] *R. v Trussler*, **Criminal Law Review**, 1988, p 446.

[39] *Hudson*, 72 **Criminal Appeal Review**, 1980, p. 163.

[40] *R. v McGovern*, 92 **Criminal Appeal Review**, 1992, p. 228.

[41] 92 **Criminal Appeal Review,** 1991, p. 284.

was found to be rude and discourteous, it was not regarded as capable of causing involuntariness.

One has to accept that verbal intimidation could render a confession involuntary if it reaches a certain degree. Where should one draw the boundary of this level? There is no simple answer to this question. It is beyond question that police officers can interrogate a suspect with the intention of eliciting his account or gaining admissions and that there is no requirement for stopping questioning after the first denial, or even a number of denials. By the same token, police officers are not allowed to continue to question a suspect until they get what they want. Thus, shouting at a suspect what they wanted him to say after he had denied involvement over three hundred times was held to be undoubtedly good enough for exclusion of subsequent confession.[42]

PROMISE

A promise to the suspect that if he confesses he will be released on bail[43] or that he will not be prosecuted, at least for some other accusations, may damage the voluntariness of a confession. The sort of promise which may, or may not, affect voluntariness depending on factors such as the severity of the crime, the position of the suspect.

It should make no difference whether the promise was initiated by the suspect or by the officer; there is not much difference between a positive reply to the suspect's question "if I make a statement, will you give me bail" and telling the suspect "if you make a statement, I will see that you get bail".[44] The promise does not need to be made directly to the suspect, it may be sufficient if it comes to his knowledge.[45]

DECEPTION

Another tactic which may cast doubt on the voluntariness of a confession is deception. This method is said to be an alternative to coercive interrogation.[46] Indeed, a sociological study examining changes in the nature of police interrogation in America reveals that "deception and manipulation have replaced force and direct coercion as the strategic underpinning of information-gathering techniques that police now employ during criminal investigation".[47] Unfortunately there is no empirical data to prove or disprove such a trend in Turkey

For the present purposes two different forms of interrogatory deception may be identified as maximisation and minimisation.[48] The former generally involves attempts to

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[42] *R. v Paris, Abdullah and Miller*, 97 **Criminal Law Review**, 1993, p. 100.

[43] *R. v Conway*, **Criminal Law Review**, 1994, p. 838.

[44] *R. v Zaveckar*, 54 **Criminal Appeal Review**, 1969, p. 202; [1970] 1 All E. R. 413.

[45] *R. v Thompson* [1893] 2 **Q. B.** 12.

[46] R. Marx, **Undercover: Police Surveillance in America,** 1988, p. 130.

[47] R. A. Leo, "From Coercion to Deception: the Changing Nature of Interrogation in America", 18 **Crime, Law and Social Change,** 1992, p. 35.

[48] See Kassin and McNail, "Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication", 15 **Law and Human Behaviour,** 1991, p. 233. To obtain confession, there may be other types of deceptions. To illustrate, by conducting undercover operations the fact of interrogation itself

scare the suspect into confessing by providing fabricated evidence. Tactics include informing the suspect falsely that an accomplice has identified him, stating falsely that existing physical evidence such as fingerprints, bloodstains or hair samples affirms his involvement, conducting a false line-up which automatically leads to his identification and ascertaining incorrectly that the result of a lie-detector[49] confirms his guilt. The latter, on the other hand, involves attempts to give the suspect a false sense of security by misrepresenting the seriousness of the accusation or by offering sympathy, tolerance, or moral justification. Examples include telling a murder suspect that the victim is still alive, convincing a suspect of rape that the complainant consented, persuading a suspect of embezzlement that low pay or inadequate working conditions are to blame for his action.

Both maximization and minimization creates an appearance that the suspect's confession will have no effect; the former suggests that he will be convicted in any case whereas the latter implies that he will not be responsible for the accusation, regardless of whether he confesses.

CONCLUSION

Not only the criteria which are used to determine the admissibility of confessions by Article 135/A, but also the more fundamental question of the extent of this provision is sought to be examined in this article.

It has been identified that involuntariness has emerged in Turkish jurisdiction as a central concept in determining whether a confession elicited by law enforcement officials should be admitted as evidence. Considerable room for discussion, however, exists as to the exact meaning of this concept. On one extreme, confessions obtained even by torture are the product of conscious choice and ,therefore, voluntary in the sense that the suspect submits to the wishes of the torturer in order to avoid the imposition of further suffering. On the other extreme, no confession is voluntary at all in the sense that it has been obtained as a result of the suspect's fear that adverse consequences will stem from it.[50] Looking at the issue from an extremist point of view is inappropriate. To be able to apply this notion, voluntariness of a confession must be affected in some circumstances but not in others.

Eight general types of tactics capable of causing involuntariness have been identified. This list is by no means exhaustive. There may, of course, be many other improper methods which may be significant causes of involuntariness. An attempt to explain the most notorious ones is hoped to assist in clarifying the standards of legal voluntariness. Identification of involuntariness is relatively easy in cases where the extreme end of a range of improper tactics were employed. As one's attention moves from harder to softer

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may be misrepresented; typically police officers act as priests, newspaper reporters, lawyers, psychologists, cell mates, meter readers etc. In such cases fairness issue may arise rather than voluntariness.

[49] There is no consensus as to the scientific reliability of this test. See for detail D.T. Lykken, **A Tremor in the Blood: Uses and Abuses of Lie-Detector,** New York, 1981.

[50] **Ibid.**, p. 887.

improprieties, they become less visible and therefore it becomes more difficult to draw the line between tactics which cause involuntariness and which do not.

Since more than one test for admissibility of confessions is provided by CMUK it must be recognised that the tests are capable of overlapping each other's scope. Therefore, extra attention is required for the interpretation of the provisions. The underlying difference between article 254 and article 135/A is that the former is a general provision regulating admissibility of all improperly obtained evidence, while the latter is a special provision which regulates only admissibility of confession evidence. It seems to me that in the application of the admissibility test, priority should be given to the special provision rather than the general one (*lex specials derogat generali*).