A COMPARATIVE STUDY OF THE PROBLEM OF THE ADMISSIBILITY OF IMPROPERLY OBTAINED EVIDENCE

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ABSTRACT

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A Comparative Study of the Problem of the Admissibility of Improperly Obtained Evidence

This thesis provides a comparative analysis of the rules governing the admissibility of improperly obtained evidence in Turkish and English law. The main objective is to consider how the issue in question can most appropriately be solved under the different legal circumstances of both countries and how the positive law of each country may benefit from each other on this particular problem. The first chapter, which is the introduction, deals with a brief account of the object, the reasons, the goal and the method of the study. In order to place the issue in the context of the entire criminal justice systems, general comparison of Turkish and English law is subjected to examination in the second chapter. In Chapter Three, attention is turned to the theoretical issues associated with the problem of admissibility of improperly obtained evidence. Obviously, if the nature and justification of possible solutions to the issue is understood correctly, the treatment of improperly obtained evidence may be better evaluated. It is argued that the most appropriate solution is to adopt a flexible approach, which requires a certain amount of discretion to be given to the judiciary, rather than a rigid one. The legitimacy of the verdict principle is argued to be the most appropriate principle to guide the exercise of the discretion. In Chapter Four, attention is drawn to the fact that, with regard to the admissibility of improperly obtained evidence , Turkey and England have shared similar legislative activities in recent years: the 1992 Amendment to the Code of Criminal Procedure for Turkey and the Police and Criminal Evidence Act 1984 for England. Both legislations include two operative provisions; one is a general provision for any evidence and one a specific provision for confessions. As far as the general provisions are concerned, evidence may be excluded in England if it has an adverse effect upon the fairness of the proceedings whereas in Turkey, where evidence is secured "hukuka aykiri olarak" (unlawfully), it required to be suppressed. The amount of evidence excluded under these provisions may or may not be similar depending on how the Turkish and English judges interpret, the key words. Although the exact determination of what circumstances must exist before the fairness of the proceedings is adversely affected or before the lawfulness of a procedure is breached will undoubtedly require decades of jurisprudence, it is submitted that they may be interpreted quite similarly. In Chapter Six, it is argued there is a clear consensus between Turkish and English laws as to the fact that involuntariness is the decisive criterion for the admissibility of improperly obtained confessions. In the Next Chapter, the possibility of whether the same amount of evidence will be excluded by the operation of "unlawfulness" and "unfairness" concepts has been tested in the context of evidence obtained in breach of safeguards designed to protect the suspect. In the final chapter, it is concluded that there are, to a great extent, similarities in the ways the two countries deal with the issue, despite the fact that they do not share the same legal tradition. This finding contributes to deepen the belief in the existence of a unitary sense of criminal justice.

CHAPTER ONE

INTRODUCTION

1. Object of the Study and Terminology

In order to secure the necessary evidence for bringing offenders to justice, law enforcement officers are given powers to invade the freedom of individuals in the process of criminal investigations. These powers are not, however, unlimited; in modern democratic states the relationship between the public authorities and individuals is governed not by the arbitrary exercise of power but by power exercised within the constraints of law. Having said that, the law enforcement officers do not always exercise their powers within the permissible limits. Where law enforcement officers exceed their powers, evidence may be obtained to incriminate the suspect in trial. The question of whether such evidence can be taken as a basis for judgement is the main concern of this thesis.

Since the phrase "admissibility of improperly obtained evidence" is generally used to state the issue described in the above paragraph, there will be many references to it in the following pages. Thus, one may ask, what exactly does it mean? Before going further, analyzing what is meant by this expression may be useful.

Although the term "evidence" has been defined in different ways by authors who have made important contributions to the field of the law of evidence, it may simply, for the purpose of this thesis, be defined as the means of proof to establish the

existence or non-existence of a fact in the eyes of the trier of fact. Ideally, anything can be given as evidence; the interest of justice would be better served if no restriction is placed upon what evidence may be submitted to the court. Each departure from that ideal has to be separately justified.[1] The hearsay rule, for example, may be justified, as is often claimed, by the unfairness of arguing from statements that are not subject to cross-examination. Such an ideal, however, does not conflict with the classification of evidence, which is often made as oral, real and documentary. The problem in question may arise with regard to all these types of evidence. The concern of this thesis is not any particular type of evidence but evidence generally, although special emphasis is placed on confession evidence.

"Admissibility" refers to whether a piece of evidence is permitted to be given, or to be taken into account and must be distinguished from the weight or the credibility of evidence.

The adverb "improperly", on the other hand, is broad enough to include not only any departures from a declared standard or procedure for the conduct of criminal investigation with or without bad faith on the part of the investigator, but also any irregularities which, although not technically illegal, are incompatible with moral standards, such as deception in obtaining or exercising any power. To illustrate, an undercover policewoman acting as a girlfriend of a suspect or a policeman acting as a priest in order to obtain a confession from someone may be regarded as behaving improperly irrespective of whether the conduct is technically illegal. Impropriety can

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[1] *Bentham*, 1827, Rationale of Evidence, vol V, p. 1.

be committed by a third party as well as by law enforcement officers, with or without the contribution of the police. This study is mainly concerned with the latter.

The word "obtained" clearly suggests a connection between the improper conduct and the discovery of evidence. The question, however, may arise as to the nature of this relationship; whether it is a causal link or mere occurrence of impropriety in the course of gathering evidence. The approach adopted in this thesis is to interpret the word "obtained" as requiring not a causal relationship in the technical manner exemplified by Hart and Honore[2]. It is not necessary to establish that the evidence would not have been obtained but for the violation of procedural rules. Rather the fact that the improper conduct has contributed in some way to the availability of challenged evidence would be sufficient. Such an approach still is likely to rule out evidence which is obtained shortly before an impropriety, and evidence which is remotely associated with the impropriety.

2. Reasons for the Study

In order to justify this study three initial questions should be answered convincingly. These are, firstly, the choice of the admissibility of improperly obtained evidence as a research topic, secondly, the preference of comparative method, and finally, the selection of English and Turkish legal systems. These points will be clarified respectively.

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[2] *Hart* and *Honore*, 1984, Causation in Law, second ed., Oxford.

Although to choose a topic for academic purposes represent to a certain extent personal interest and preference, a feeling of dissatisfaction with the solution to the issue of admissibility of improperly obtained evidence in Turkish law is the main cause of pursuing this subject. Also the fact that it is a topic of considerable practical significance rather than of merely an academic significance has contributed.

The problem of admissibility of improperly obtained evidence is not unique to Turkey. It is a worldwide problem. Different legal systems may offer different solutions. This makes it interesting to compare the different solutions and approaches to this issue in different countries. Seeing how different legal systems approach the same problem enables one to learn much about the problem itself. Furthermore, a comparative study of the admissibility of improperly obtained evidence can provide a much richer range of standpoints than a study dedicated to a single nation's law. Therefore, making comparisons helps one to understand one's own system's solution by seeing it from a different perspective. At the same time, it helps gaining a perspective in critically assessing one's own national system's solution. Indeed, comparing a system with another one may demonstrate that certain elements which are assumed to be essential for the system to work are the product of history rather than necessity. It also enables one to be aware of gaps and weakness of one's own system's solutions which familiarity has led him to ignore. Similarly, the way an English solution to the issue in question is described by an outsider who has a different perspective may assist English readers to recognise special characteristics of which they have not been conscious.

The better comprehension of solutions in one's own legal system, which comparative study facilitates, enables constructive changes in the solutions. Knowledge of gaps and weaknesses highlights places where alterations are most needed; acceptance that certain components in the existing solutions are not unchangeable broadens the range of possibilities; and awareness of the different settlements in other legal systems provides suggestions of solutions. This is not to suggest that legal systems should borrow solutions from each other; legal rules transplanted from one social body to another are likely to be rejected. Comparison of the admissibility of improperly obtained evidence, however, is likely to facilitate practical improvements of laws by opening one's mind to the need for change, the possibility for change, and the range of potential solutions.

There are an enormous number of legal systems in the world; each independent state has its own system of law and often two or more legal systems may exist side by side within the same state. In spite of traditional recognition of the fact that civil and common law systems, to which Turkish and English systems are supposed to belong respectively, are based on very different views on the nature of justice, a civil lawyer generally looks for comparison at the common law, and vice versa. Such a tradition, however, does not answer the question of particularly why Turkish and English law have been chosen to compare among the other countries which belong to civil or common law.

Apart from being Turkish and conducting this study in England, there are other reasons for choosing to compare Turkish and English solutions to the issue of

admissibility of improperly obtained evidence in the first place. These two countries have been chosen as a result of the fact that in recent years both have been reformulating their approaches to the issue of improperly obtained evidence: in the last decade Parliaments of both countries enacted statutes regulating this problem.

Another reason for the choice of Turkish and English law may be stated as the lack of academic work comparing these countries' law. Comparison in England is most commonly made with other Commonwealth systems and sometimes with civil law systems such as German and French. Turkish law is a largely forgotten topic among comparative lawyers in the English speaking world. There has been up to now no direct or actual comparison of Turkish and English legal systems[3], let alone the solution to the admissibility of improperly obtained evidence. The choice of Turkish and English legal systems is also contributed to by other factors which include the researcher's past experience, accessibility of source materials, and language.

Before proceeding further, two technical points should be mentioned. First, this thesis is concerned only with English and Welsh law, hereafter for simplicity "English law", and thus excludes two other legal jurisdictions in the United Kingdom; Scottish and Northern Irish laws. Secondly, there may be occasional reference to the law elsewhere, but no other national systems apart from Turkish and English are discussed in detail.

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[3] The only exception is a passage from the edition of 1744 edition of "the Life of Honourable Sir Dudley North", by *Roger*, which was taken and published in 7 Illinois Law Review 162 (1912) as "Turkish and English Law Compared".

3. The Goal of the Study

The principal aim of the study is not only to ascertain how far, and in what respects, Turkish and English solutions to the issue of admissibility of improperly obtained evidence resemble to or differ from each other, but also to seek to explain similarities and diversities. It is hoped that some contribution will be made in this way to the issue of how the issue in question can most appropriately be solved under the different social, economic, and legal circumstances of both countries.

It is not intended to demonstrate the superiority of English or Turkish law, rather consideration will be given how the positive laws of each country may benefit from each other on this particular problem. Nevertheless, if, after careful consideration, it seems appropriate to suggest that Turkey should adopt a solution which exists in English law, or the other way around, this will not be avoided simply on the grounds that it is a foreign solution. However, existence of differences between the two countries' economic, social, and legal structures should not be ignored.

4. The Method of the Study

Having clarified the reasons and goals for undertaking this study, the next step is that of methodology. As has been stated above this study is not only aimed to identify divergencies and resemblances between Turkish and English solution to the issue in question, but also to explain such similarities and differences. To this end, three distinct stages may be noted in the subsequent pages during the process of

comparison. The first is the description of legal rules , concepts, and institutions of Turkish and English laws related to the issue in question. The second stage is the identification of differences and resemblances. The third stage is accounting for the resemblances and dissimilarities.[4] This is, however, not to state that these stages will invariably be distinguished from each other or they will always considered in this particular order; in the process of presenting arguments they may be mixed with each other.

In order to place the issue in question in the context of the entire criminal justice systems, general comparison of Turkish and English law will the subject of the second chapter. Also the fact that there is to my knowledge not even one article comparing the Turkish and English criminal justice systems neither in Turkish nor in English necessitates this general examination. Such a discussion, however, is intended only to give an appropriate general basis for an assessment of the issue of admissibility of improperly obtained evidence; the aim is not to write an authoritative general comparison.

Following the general comparison of Turkish and English law, attention will be turned, in chapter three, to the theoretical issues associated with the problem of admissibility of improperly obtained evidence. Obviously, if the nature and justification of possible solutions to the admissibility issue is understood correctly, the

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[4] These three phases are said to be essential for any legal study which claims to be comparative law. See generally, *Kamba*, 1974, "Comparative Law: A Theoretical Framework", 23 International and Comparative Law Quarterly 485-517.

treatments of improperly obtained evidence in Turkish and English law may be better evaluated. As pointed out by Zuckerman,

> "no rule of law except the most technical one can be found workable without an understanding of its rationale... When the purpose of a rule is unclear then its scope is going to be unclear too".[5]

General examination of approaches and rules of Turkish and English law to the admissibility of improperly obtained evidence is conducted in Chapter Four, where attention is drawn to the key words "unlawfulness" and "unfairness" in Turkish and English law respectively and to the separate regulation of admissibility of improperly obtained evidence in both jurisdictions. Chapter Five analyses the concepts of "unlawfulness" and "unfairness" in order to reveal the extent of similarity between these notions.

Chapter Six is allocated to analyzing the admissibility of improperly obtained confessions which have been subjected to special regulations both in Turkish and English law. This chapter will proceed by challenging the assumption that the involuntariness test has been abandoned in England. Then I will move to analyzing whether the same amount of evidence will be excluded in both jurisdictions where evidence obtained in breach of the rules safeguarding the suspect at the police station. Finally, in Chapter Eight, concluding remarks are made.

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[5] 1982 All England Law Reports Annual Review 126, 136.

CHAPTER TWO

GENERAL COMPARISON OF TURKISH AND ENGLISH LAW

1. Introduction

Since it is proposed to produce a comparative study, and England and Turkey belong to different legal systems, the criminal justice systems of these countries, as a preliminary step, will be examined briefly in this chapter. An attempt will be made to determine what general system differences and similarities do in fact exist between the procedures of Turkish legal process as compared to those of England.

2. Apples and Oranges

The existence of two main criminal justice systems in Western society is generally accepted by specialists in the field of comparative law: common law and civil law systems.[1] Although important variations can be observed from country to country, grouping legal systems on the basis of similarities and relationship may help to arrange the vast number of legal systems in a comprehensible order. Factors to be taken into consideration in deciding whether a particular legal system belongs to one group or the other are said to be historical developments, distinctive modes of legal thinking, certain legal institutions, sources of law and the ideology.[2] The Turkish

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[1] *David* and *Brierley*, 1968, Major Legal Systems in the World Today.

[2] For the detailed examination of these factors see *Zweigert*, 1987, Introduction to Comparative Law 63-75.

legal system is supposed to belong to the civil law while the English legal system is stated to be within the common law system.

As far as the system of criminal justice is concerned two models of criminal procedure are said to be exist, those are the accusatorial (adversary, Anglo-American) and inquisitorial (the Continental European) model. Both models as they exist today seem to be the consequence of historical growth rather than the result of any scientific inquiry into what the best way for the administration of criminal justice is. The term "inquisitorial" has been used in a more popular sense to describe a system of coercive judicial interrogation.[3] However, under the modern inquisitorial system the trial judge's function has become entirely separated from the investigatory and the accusatory functions. The accusatorial system, on the other hand, has been characterised by the limitation of the state's responsibility for the administration of justice only to providing means by which a person affected by the offence, or his relatives or friends, might secure sufficient remedy without resorting to private revenge.[4] However, under modern accusatorial system criminal conduct is considered as an offence against the state itself as well as a private injury to one of its members.

It is generally accepted that common law countries -including England- adopt an accusatorial procedure, while in civil law systems -including Turkey- an inquisitorial procedure is in force. However it should be kept in mind that it is hardly

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[3] See generally *Esmein*, 1914, A History of Continental Criminal Procedure 8.

[4] See generally *Stephen*, 1883, A History of the Criminal Law of England, vol. 1 (of 3), p. 428; and *Howard*, 1931, Criminal Justice in England, Chapter VII.

possible to find any legal system which adheres strictly to all the features of the classic models. In a sense it can be said that the evolution of criminal procedure in the last two centuries in the civil law world has been away from the extremes and abuses of the inquisitorial system, and that the evolution in the common law world during the same period has been away from the abuses and excesses of the accusatorial system. The two systems, in other words, are converging from different directions towards roughly equivalent mixed systems of criminal procedure. For example, by setting up the Crown Prosecution Service, England has taken a major step away from its former tradition of leaving most prosecutions to be handled by the police.[5] Similarly, the increased rights to be given to the defence in Turkish law[6] may be regarded as a move towards a more accusatorial system.

Moreover, the current adversarial and current inquisitorial system of criminal procedures are both committed to a search for truth[7]. The issue of which of these

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[5] Under the Prosecution of Offences Act 1985 the Crown Prosecution Service is decided into thirty-one areas throughout England and Wales, each of which is headed by a Chief Crown Prosecutor accountable to the Director of Prosecutions. See for detail, *Bennion*, 1986, "The Crown Prosecution Service", Crim. L. R. 3-15.

[6] See Chapter Seven.

[7] As early as 1863 Sir J. F. Stephen stated that ".. a criminal trial is a public inquiry, having for its object the discovery of truth." A General View of the Criminal Law of England, 167 (1863) cited by *Herrmann*, 1982, "The Philosophy of Criminal Justice and the Administration of Criminal Justice", 53 Revue International De Droit Penal 841, at 846. The Supreme Court of United States in *Tehan v. United States* (382 US 406) also expressed the view that "the basic purpose of a trial (criminal proceeding) is the determination of the truth". However, some commentators claim that discovery of the truth is not an objective of adversarial criminal proceeding. See *Coutts*, 1966, The Accused, A comparative study 14; *Pollock and Maitland*, 1952, History of English Law, vol. 2, p. 671 (2nd ed.); For criticism of the latter approach see *Herrmann*, *ibid*, p. 846.

systems is the most effective means of determining truth is beyond our concern. It is, however, necessary to identify the fundamental differences between these systems. On the whole, distribution of control over the criminal procedure among the participants- the trier of fact and law, the defence, the prosecutor- appears to be the most obvious factor that can be used to define differences between these two systems. In adversarial systems, the process of truth discovery is said to be structured as a dispute between the parties -prosecution and defence- in a position of theoretical equality before a criminal court. This system entrusts much control over the process to disputed parties and relatively little control to the decision makers- the judge and jury. In the purest version of this system a judge should be a "mere umpire, to pass upon objections and hold counsel to the rules of the game, and the parties should fight out their own game in their own way without judicial interference"[8]. As far as current adversarial systems are concerned interference by the judge without an objection from one side against the conduct of the other is recognised in some circumstances[9], but this does not change the adversarial nature of the system; that is maintenance of a high degree of control over the criminal process by the disputed parties.

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[8] *Pound*, 1906, "The Causes of Popular Dissatisfaction with the Administration of Justice", 40 American Law Review 738.

[9] For example PACE 76(3). In practice English judges are said to interrupt more often then the judges in other adversarial jurisdictions; Evans observed that "it has become the rule, now, for the English judge to come down into the arena and to take part to quite a surprising degree. The licence that he thinks entitles him to do this is to be found in the principle that all evidence should be relevant, and it is now the rule rather than the exception to hear judges breaking in on counsel with the question, 'what is the relevance of that' " , *Evans*, 1983, Advocacy at the Bar: A Beginner's Guide 91.

The idea that control over criminal procedure ought to be largely in the hands of the disputants is likely to provoke considerable scepticism in Turkish law as well as other inquisitorial systems. The allocation of so much power to self-interested parties runs contrary to inquisitorial legal thinking. In inquisitorial systems, there is an official inquiry into the facts, rather than a dispute about them, conducted by the judge in order to reveal the truth. In this system, control over the criminal procedure is almost totally yielded to the judge; he takes the initiative in conducting the case, rather than the parties; he leads the investigations, examines the evidence and interrogates the witnesses. The rules of procedure provide the defence and prosecutor with an opportunity to explain and support their claims before the court.

The natural consequences of such a distribution of control, in the adversarial model, is that each party to the dispute is usually represented by an openly biased advocate who is charged with seeking to establish the validity of his party's claims. In an inquisitorial system, however, either there are no attorneys at all or they are allocated for the primary responsibility of assisting the judge in reaching his decision. More importantly, differences in the distribution of control over criminal proceeding lead to different attitudes to guilty pleas.[10] Accusatorial systems accept them, whereas inquisitorial systems object to them on the ground that the guilty plea would interfere with the idea of a judicial search for truth; the court determines guilt, not the defendant or the prosecution. The defendant, although in fact innocent, may plead guilty for a variety of reasons such as protecting the real criminal, establishing a false alibi or undergoing punishment for pathological reasons. Moreover, since guilt is a

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[10] For the operation of the guily plea see below note 87 and accompanying text.

legal rather than a factual problem, the defendant may plead guilty without knowing whether he is actually guilty.

As far as the admissibility of improperly obtained evidence is concerned, exclusion can be justified more easily in the pure version of the adversarial system than that of the inquisitorial system. If proceedings are essentially a contest between parties for the settlement of a dispute, it is readily acceptable that a party, even if he is right on the merits of the dispute, forfeits on a technicality where he disobeys the rules regulating the contest.

Although these two systems differ with regard to the division of roles between parties, a great deal of natural criminal justice requirements are recognised under the law or established practice in every legal system. For example, in neither of these systems is the search for truth free from limitations which derive from a number of considerations such as civil liberties, or the need to ensure the integrity of procedures or the legitimacy of the verdict.[11] Furthermore, the need for conducting various activities before trial is recognised by all societies regardless of the specific system of criminal justice. In today's society when a crime is committed the executive authorities- generally the police- are expected to detect and investigate the offence and

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[11] Indeed, search for the truth is not the only commitment of the criminal proceedings. It also serves another function which is to protect individual rights and personal liberties of the accused (some aspects of human rights). These two functions are always, said to be in conflict with each other. By noticing the divergencies of emphasis upon these competing values in different legal systems, Packer identified two value systems, the crime control and due process model. see *Packer*, 1968, The Limits of the Criminal Sanction 149.

charge the wrongdoing, using all the techniques at their disposal. These activities are neutrally described as "pretrial" procedure by criminal justice systems.[12]

3. The Systems Described and Compared

Since a system of criminal justice is strongly related to its underlying historical, social, political environment, and the structure of authority on which it is based, the balance between the interest of crime control and the protection of the suspect in English and Turkish law may be expected to be different. It is not the aim of this study to suggest that either English or Turkish law is perfect, rather its goal is to assess whether the legislator and the courts in both countries might learn from each others' law and practice. By doing so it is acknowledged that some elements of English criminal procedure would not probably be acceptable to most Turkish lawyers, just as some aspects of Turkish criminal procedure would not be favourably received by most English lawyers.

What is contained in the pages immediately following is simply a narrative outline of Turkish and English law which is thought to provide important background material for a proper understanding of the subject covered in subsequent chapters. The framework of the discussion is based on the Turkish system which is unfamiliar to the reader.

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[12] The origin of the modern pre-trial process may be found in the establishment of a centralised police force in the middle of nineteenth century. Establishment of police forces has lead to the radical change in the nature of the criminal process and the pre-trial stage has became very important in the determination of the guilt or innocence of the accused.

3.1. The Origin of the Laws

After the collapse of the Ottoman Empire at the end of the First World War, the Republic of Turkey was created in 1923 by Kemal Ataturk. New Turkey was based on the predominantly Turkish portion of the empire. The primary policy of the Republic was to modernise the Turkish social life through westernisation.[13] In order to reach this goal, changing the existing law was considered as a useful device. As a result , the Islamic legal practices which had been valid for centuries were abolished; in their place Western laws[14] were adopted. It is important to note, firstly, that the impulse for the reform came not from below but from above; it was not that ordinary Turks, generally speaking, were dissatisfied with the law to which they were subject and began to demand its reform, but that these reforms were imposed on them by the new regime. Secondly, these codifications were not based on any scholarly research work. Although it is obvious that knowledge of the experience of other nations is invaluable when attempts are made to reform existing systems, adoption of another country's law without adjustments for local circumstances may be regarded as

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[13] Almost every aspect of social life was reformed. The collection of these reforms are called Kemalism which remains quite important even today. See for detail, *Shaw*, 1976, History of Ottoman Empire and Modern Turkey; For the relationship between Kemalism and modernization theory see *Hansen*, 1989, "Are we Doing Theory Ethnocentrically? A Comparison of Modernization Theory and Kemalism", 5 Journal of Developing Societies 175-187.

[14] In different branch of the law different countries' Codes are adopted. For example, The Swiss Civil Code of 1907 (ZGB) was accepted as the new Turkish Civil Code of 1926. French Commercial law was introduced as the new Turkish Commercial Law. The Turkish Penal Code of 1926 is based entirely on the Italian Penal Code of 1889, so on. These varieties lead to conflict of laws within the one legal systems. It is not entirely clear precisely why the Turkish legislature opted for different countries' Codes instead of only one.

"courting disaster"[15]. Indeed, the new Turkish law has encountered great difficulty in winning gradual acceptance among the population at large[16].

As far as criminal procedure law is concerned, Turkey replaced its traditional criminal procedure law by the German law. The present Turkish Code of Criminal Procedure of 1929 (Ceza Muhakemeleri Usulu Kanunu, hereafter CMUK)[17] is a translation of the German Code of Criminal Procedure of 1877. It naturally reflects the concern and values of Europe in the nineteenth century. However, the enactment of the 1961 Constitution[18] marks a point of radical departure from nineteenth century totalitarian state concepts. Although the provisions of the Constitution dealing with human rights are phrased in abstract and general terms, and do not explicitly protect individual rights in the criminal process, the classification of certain rights as constitutional in nature and deserving of state protection and enforcement as a matter of priority introduced a new dimension to Turkish criminal justice. Over the years the Turkish Criminal Procedure Code (CMUK) has also been subjected to several (twenty three) amendments in order to conform with a changing Constitution which adopts

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[15] This phrase has been suggested by Professor Birch.

[16] *Starr* and *Pool*, 1974, " The Impact of Legal Revolution in Rural Turkey", 8 Law and Society Review 533.

[17] *The Code of Criminal Procedure*, Statute no: 1412 of 4 April 1929. An English translation of the Code of Criminal Procedure (CMUK) was published in 5 The American Series of Foreign Penal Codes,(translated by Y. Altug), Sweet & Maxwell, London, 1966; It should be noted that this translation of the Code is sometimes out of date.

[18] Although the 1961 Turkish Constitution was abolished after the military coup in 1980, the present 1982 Constitution also, in more restricted terms, recognises the same values.

liberal values and to meet the requirements of modern life. Especially in 1992 the Turkish legislature took a major step towards liberalising criminal proceeding by passing an Act[19] which significantly improves the position of the defendant and regulates the admissibility of improperly obtained evidence.

The English legal system, on the other hand, cannot be treated as a replica of any foreign law. Over centuries a number of legal doctrines may have been absorbed from abroad, but the criminal procedure system (or English system as a whole) is the outcome of English legal history and political experience. Rather than importing, England, in actual fact, exported its legal system to the large part of Canada, the United States, to Australia, New Zealand, India, and elsewhere. Thus, the English legal system is more consciously tied to its past than the Turkish system, and more loyal to the customary form of legal thinking despite social and economic change. Moreover, at least in the last three centuries England never had an political disturbance like those have occurred several times in Turkey, where one of the principal effects of the military coups[20] was to overthrow the constitutional system and replace it by a totally new constitutional system. As a result of stability England experienced unbroken developments of its law for a considerable time[21]; the current law is the

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[19] *Ceza Muhakemeleri Usulu Kanunu ile Devlet Guvenlik Mahkemelerinin Kurulus ve Yargilama Usulleri hakkinda kanunun Bazi Maddelerinde Degisiklik Yapilmasina Dair Kanun* (hereafter shortly the 1992 Amendment), Statute number:3842, The Official Gazette no:21422 of 1 Dec. 1992.

[20] After the adoption of a multi party system in 1950 Turkey experienced three military coup in 1960, 1971, and 1980.

[21] It is said that English law has a continuous history which can be traced back to the sixth century. See, *Phillips* and *Hudson*, 1988, First Book of English Law 4.

result of gradual development over hundreds of years. It is, therefore, no exaggeration to maintain that the law of England is the product of the history of England; inevitably, great antiquity and continuity are both inescapable and fundamental characteristics of it. In the phraseology of Eddey "the student of English law is the student of English history because the former can only be fully intelligible in the light of the latter"[22].

3.2. Sources of the Laws

The law of Turkey is predominantly written law in the form of constitution, statutes[23], decrees having force of statutes (*Kanun Hukmunde Kararname*)[24], decrees (*Tuzuk*)[25], regulations (*yonetmelik*)[26]. Other sources are customary and case law.

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[22] *Eddey*, 1967, An Introduction to Public Law 2.

[23] These lay down principles, but leave to the judge the problem of interpreting these principles to concrete facts. Statutes written down in a systematic fashion to regulate specific areas of law are given the title of "Codes". The power to enact, amend and repeal statutes belongs in principle to the Turkish Parliament. Once they pass from the Parliament they become law only with the sanction of the head of the state, who promulgates them. In cases where the president considers that promulgation is unsuitable, he may return the statute back for further consideration to the Parliament (Article 89 of the Constitution).

[24] According to Article 91 of the Constitution the Parliament may empower the Counsel of Ministers to issue decrees having force of statutes. In the empowering statutes the Parliament should restrict the Cabinet by defining the purpose, scope, principles and operative period of them. They are required to be submitted to the Parliament on the day of their publication in the Official Gazette.

[25] These are issued by the Counsel of Ministers in order to govern the mode of implementation of a particular statute or to designate matters ordered by a particular statute. Thus, they can only be issued where a clear reference in the statute to the promulgation of them exists. As far as hierarchy of the norms is concerned, regulations come after statutes and include more concrete and specific norms than statutes. Regulations should be examined by the Counsel of State (Danistay) to check whether

Precedent also plays a small part in legal practice. In most cases it appears meaningless to begin proceedings if higher courts have consistently dismissed similar cases. However no judge is bound by any superior court's ruling on a similar case, with the exception of *Ictihadi Birlestirme Karari*[27] . Whereas in England, in spite of the fact that most new law is originated by legislation, an equally vital source of the law is the decisions of the judges in cases in the various courts. The judge in each case is expressing what the law is in the circumstances of the particular case and so, in effect, making new law. As far as early English law is concerned, the process of continuous decision by the judges has resulted in each branch of the law being built up on the basis of decided cases. The principle of precedent is taken much more seriously in England than Turkey[28]; decisions of the House of Lords bind all lower courts and the decisions of the Court of Appeal bind itself and courts below it. Acts of Parliament also contributed much, but there are important fields of law where even today legislation is of minor importance. Moreover, in those fields of law where legislation is relevant, the need for interpretation of words and phrases by the judges leads to their contribution to the development of the subject. There is no doubt about

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they conflict with existing statutes, and they should be signed by the President (Article 115 of the Constitution).

[26] These are issued by the prime minister, ministries or administrative authorities in order to put into practice the principles laid down by statutes and regulations. The provisions of these should not be contrary to statutes and regulations, this is inspected by the Counsel of State (Article 124 of the Constitution).

[27] A decision of the general Board of the Supreme Court of Appeals made for the purpose of reconciliation of contradicting opinions on the same question expressed in the decisions of various panels, or expressed in different decisions of the same panel, of the Supreme Court of Appeals.

[28] As a natural consequence of this fact cases are extensively reported in England.

the fact that the role of the judge in contributing to the making of law is older in origin than the making of law by Parliament in both countries since England and Turkey had an established system of law long before they had a Parliament.

The basic law in Turkey is the Constitution. All other regulations should conform with the Constitution. When the Turkish Armed Forces seized power, each time the generals insisted on a major revision of the constitutional system.[29] The present 1982 Constitution is also constructed by the military junta and confirmed by the public on a referendum held in 1982. The current Constitution guarantees to all Turks a catalogue of basic rights going beyond the classic human rights.[30] Having said that, most of the basic rights can be restricted to safeguard the integrity of "the sacred Turkish State".[31] The restrictions, however, can only brought into effect in the form of statute and are themselves restricted by the requirements of democratic society.[32]

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[29] *Harris*, 1985, Turkey: Coping with Crisis; *Birand*, 1987, The Generals' Coup in Turkey.

[30] For example, it guarantees the right to environment which is deemed as one of the dimensions of the Third Generation of Human Rights. See *Alston*, 1983, "Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law", 29 Northerland International Law Review 309.

[31] This phrase is used in the preamble which is, according to Article 176, part of the text of the Constitution. Giving "sacred" character to the state may be criticised in that it gives the impression that the Constitution defends the power of the state against the individuals.

[32] Article 13 reads:

> "Fundamental rights and freedoms may be restricted by statutes, in conformity with the letter and sprit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, and

The Constitution of 1982 also contains important procedural rules such as the guarantee of exclusive jurisdiction of the judiciary over decisions in criminal matters, the guarantee of independence of the judiciary, the prohibition of irregular courts, the right of the accused to be heard before the court, the prohibition of double jeopardy etc. It is implicit that the state is there for the people's sake and not vice versa, that is not to rule but to serve. Some basic rights may be restricted by statutes within narrow bounds. No statute is allowed to violate the basic requirements of democratic society. The basic rights are directly applicable law. The Parliament as lawmaker is just as strictly bound to the basic rights as the government, the courts, the administration, the police and the armed forces.

As far as the English legal system is concerned, a written constitution does not exist. That means in practice that the English citizens lack the protection of any written catalogue of rights. The existence or non-existence of a catalogue of rights in any legal system, however, should not lead us to a conclusive presumption that the basic rights of citizens have been protected or denied. Writing down the rights

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> national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant articles of the Constitution. General and specific grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of the democratic order of society, and shall not be imposed for any purpose other than those for which they are prescribed. The general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms".

For the English translation of the Constitution see *Dodd*, 1990, The Crisis of Turkish Democracy, p. 154-220

enjoined by citizens obviously does not necessarily mean to give them implementation, and vice versa.

As signatories to the same international treaties, covenants, agreements and conventions Turkey and England already have clear obligations under international law to ensure that their domestic laws are compatible with these supra-national rules. Of these international legal norms the most significant is the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter ECHR[33], which was ratified by Turkey in 1954[34] and by England in 1951[35] . By their accession to the ECHR, both jurisdictions committed themselves to the principle of international control of human rights. Indeed, Article 25 of the ECHR entitles citizens of signatory countries to file complaints, even against their own states, before the European Commission and the European Court if the state complained against has expressly recognized the right of individual petition. Turkey made a declaration under article 25 of the European Convention on Human Rights recognising the competence of the Commission to receive applications from individuals alleging violations of their rights and freedoms guaranteed by the Convention in 1987[36] while it was recognized by

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[33] It was signed at Rome on 4 November 1950 and entered into force on 3 September 1953, European Treaty Series, No. 5.

[34] *Insan haklari ve Ana Hurriyetleri Koruma Sozlesmesi ve Buna ek Protokolun tastiki Hakkinda Kanun* (The Act Approving the European Convention for the Protection of Human Rights and Fundamental Freedoms), Statute no 6366 of 10.03.1954, Official Gazette of 19.3.1954; Dustur, vol. 35, p.1567.

[35] For a discussion of the Cabinet debate on whether to sign, see *Lester*, 1984, "Fundamental Rights: The United Kingdom Isolated?" Public Law 46.

[36] The Official Gazette no. 19438 of 21 April 1987. This declaration has been prolonged for a period of three years commencing on 29 January 1993; see, the decree

England much earlier in 1966[37]. Both countries also accepted the Universal Declaration of Human Rights[38], the European[39] and the UN Conventions for the Prevention of Torture[40]. These ratifications open up the Turkish and English legal systems to the impact of international standards of criminal justice.

3.3. Judicial Control of Legislative Bodies

The Constitutional Court of Turkey was introduced in 1961 as a guardian of basic law. It examines legislation as to its conformity with the Constitution. If it rules a statute unconstitutional that statute can no longer be applied. The court acts in matters only if called upon by certain bodies, such as the main opposition party, the President of Turkey, lower courts, etc.

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of the Turkish Council of Ministers, The Official Gazette no. 21481 of 30 Jan. 1993. For the detailed examination of Turkey's ratification of Article 25, see, *Cameron*, 1988, "Turkey and Article 25 of the European Convention on Human Rights", 37 International and Comparative Law Quarterly 887-925.

[37] 1 Human Rights Reports 65. This acceptance has been renewed for a period of five years commencing on 14 January 1991.

[38] It was adopted by the General Assembly of United Nations on 10 th of December 1948. It is non-binding, but morally and legally significant. For detailed assessment see, *Alston*, 1992, The United Nations and Human Rights.

[39] 26 November 1987, 126 European Treaty Series, in Force 1 February 1989. For the approval of Turkey see, The Official Gazette of 27 February 1988. For the approval of England see, United Kingdom Treaty Series 5 (1991) Cm. 1634.

[40] 10 December 1984, GA res 39/46, Doc. A/39/51, in force 26 June 1987. For the approval of Turkey see, The Official Gazette of 10 August 1988. For the approval of England see, United Kingdom Treaty Series 107 (1991) Cm. 1775.

As a natural consequence of not having a constitution, England does not have an institution to supervise the use of Parliamentary power to make law in accordance with the basic law. It is accepted that supreme power related to enacting any law and changing any previous law is vested in the Parliament and there is no limit in law to the lawmaking capacity of that institution. This clearly contrasts with, among others, the Turkish system which accepted that Constitutional Court does have the power to overrule legislation as being "unconstitutional". It may be argued that the inability of the courts to examine the legislative process in England may create significant difficulties in the effective protection of individual rights.

3.4. The Present System of Criminal Procedure[41]

The criminal procedure in both countries is divided into two fundamentally district parts: the preliminary (pre-trial stage) and final investigation (trial stage). The former is conducted by the prosecution in Turkey while it is dominated by the police in England. The latter is the responsibility of the court in both countries. These stages will be examined in some detail.

3.4.1. The Preliminary Investigation

The purpose of the preliminary investigation is to clarify whether there is enough evidence against the suspect to justify criminal proceedings. To start the

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[41] Although there is an English translation of Turkish Code of Procedure, the literature available in English on Turkish criminal procedure is sparse.

preliminary investigation a simple suspicion that a crime has been committed is enough. The framework for conducting the pre-trial stage of criminal procedure is laid down by the Criminal Procedure Act (CMUK) in Turkey and by the Police and Criminal Evidence Act 1984 (hereafter PACE) in England. The provisions of both pieces of legislation are mainly concerned with police powers and suspects' rights in the course of police investigation. Procedural provisions are also contained in the Police Functions and Powers Act (PVSK)[42] and the State Security Courts Act[43] in Turkey. In England, on the other hand, more detailed regulations are needed in addition to PACE in order to ensure that the public and the police know exactly how an investigation ought to be conducted and what their respective rights and duties are. To this end, the PACE empowered the Home Secretary to issue, with the approval of the House of Parliament, Codes of Practice covering certain aspects of criminal investigation.[44] Regulation in the form of the Codes of Practice did not exist in English law before the PACE came into force, and thus the constitutional place of them as a source of law is open to dispute. Copies of the Codes are required to be kept at police station for consultation by police officers, detained persons and members

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[42] *Polis Vazife ve Selahiyet Kanunu* (Police Functions and Powers Act), Statute No. 2559 of 4 July 1934, Official Gazette of 15 Temmuz 1934.

[43] Statute no. 2845 of 16 June 1983, Official Gazette No. 18081 of 18 June 1983.

[44] At present five Codes of Practice are in force, entitled as follows; Code A (Code of Practice for the Exercise of by Police Officers of Statutory Powers of Stop and Search), Code B (Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises), Code C (Code of Practice for the Detention,Treatment and Questioning of Persons by Police Officers), Code D (Code of Practice for the Identification of Person by Police Officers) and Code E (Code of Practice on Tape Recording). The first edition of Codes A-D came into force on 1 January 1986. These were supplemented by Code E in 1988. A second, revised, edition of Codes A-D came into force on 1 April 1991. A third, revised edition, come into force on 10 April 1995.

of the public. Any breach of a provision of the Codes may lead to disciplinary proceedings against the wrongdoing police officer[45] and exclusion of evidence obtained as a result of that breach, but breach itself is not a criminal offence or civil wrong[46].

3.4.1.1. **Participants**

3.4.1.1.1. **Public Authorities**

Public authorities in the pre-trial stage are the prosecutor, law enforcement officers (the police and the gendarmerie) and the justice of the peace in Turkey, while the police[47] is the main body in England.

3.4.1.1.1.1. **The Prosecutor**

In Turkish legal theory the primary responsibility to conduct pre-trial (the preliminary investigation), either directly or through the law enforcement officers lies with the republic prosecutor.[48] Upon receipt of a complaint or any information indicating that a crime has been committed, he is required to initiate an investigation

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[45] PACE 67(8).

[46] PACE 67(10) and (11).

[47] Some investigations are conducted by specialist bodies such as trading standards officers, customs and excise officers.

[48] CMUK 148.

to determine whether there are grounds for prosecution.[49] All legally admitted methods of investigations can be initiated by him. The prosecution, like the courts, is assumed to be a judicial agency[50], it is, therefore, expected to serve truth and justice, and to direct all its activity towards this aim. As a natural consequences of this assumption the prosecution is not seen as a party opposing to the suspect. This means that the task of the prosecution is not only to gather evidence against the suspect but also to investigate circumstances favourable to him.[51]

Furthermore, determination of the guilt or innocence of the suspect is not the duty of the prosecution. Rather, its task is to clarify in the preliminary proceedings the question of whether there is sufficient evidence to justify the demand that the suspect should answer the accusation in a public trial before the court. If sufficient evidence exists to justify suspicion for filling a formal accusation, the prosecution is required to file charges (mandatory prosecution).[52] Otherwise, he discontinues the

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[49] CMUK 153/1.

[50] The judge and the public prosecutor have equal privileges, status and salary. Interchange between the two branches is simple and not uncommon. By noticing the difference of mentality of a public prosecutor and of the judge, it is claimed that a man who has exclusively performed the task of prosecuting can hardly be expected to become an absolutely impartial judge. See, *Mannheim*, 1937, "Trial by Jury in Modern Continental Criminal Law", 53 The Law Quarterly Review 99, at 112; If this is a valid criticism, impartiality of English judges who acted as a defence counsel, or prosecutor, in their early carriers is also questionable.

[51] CMUK 153/2.

[52] CMUK 148. The 'Mandatory prosecution' requirement does not prevent the prosecution from exercising any discretion, because the prosecution inevitably exercise discretionary power by the manner in which they weight the evidence available or decide issues of substantive penal law which determine whether the case will be prosecuted or dismissed.

proceedings. The victim may appeal the decision not to prosecute, either to the prosecutor's superior or to the court.

Law enforcement officials are required to report all the facts constituting a crime to the prosecutor as soon as they come to their attention. This enables the prosecutor to inspect whether the investigation is conducted within the boundaries of the law. By requiring this it is intended that the prosecutor acts as a guarantor of human rights. However, in practice most cases, particularly less serious ones, are handled by the prosecutor after law enforcement officials complete the investigation and give the file to him. Such a practice leads prosecutors to do little more than confirm what the police have already done. This practice derives from the facts that law enforcement officials learn about the crime first and that they are better trained than prosecutors to use the technology of factfinding, and that law enforcement officials often wish to avoid the formal procedures applicable to the investigation. It is obvious that such a practice would reduce the prosecutor's function to deciding only whether a formal charge against the suspect is to be filed.

3.4.1.1.1.2. ***Sulh Hakimi***

Apart from the prosecutor the preliminary investigation stage involves a judge (*sulh hakimi*) with the power to determine the legality of the prosecution's, or in urgent cases, of the law enforcement force's, demands where these interfere with the personal rights of the suspect. He is not an investigator and thus he can only act at the request of the prosecutor. One may ask how he can control the prosecutor

effectively if he acts only at the prosecutor's request. One of the basic principles of Turkish criminal law is the principle of legality which requires, *inter alia*, that prosecutors have no inherent power to take a position that modifies or nullifies the Code's requirements. The Code requires prosecutors and police to call on the *sulh hakimi* if an arrest[53] or search warrant[54] is needed. Where there is "danger in delay" a prosecutor may issue a search warrant on his own authority.[55] The *sulh hakimi*'s involvement derives from the constitutional requirement that civil rights and liberties of the citizen cannot be restricted without a decision of a judge.[56] The function of the judge at this stage is mainly to guard and control the prosecutor and the police by determining the necessity of pre-trial custody, or of a search warrant or a medical examination of the suspect etc.

Judicial control of pre-trial investigation is more theoretical than real. Albeit regarded as agents of the prosecutor, law enforcement officials inevitably tend to operate with a certain autonomy, and this is especially so in those cases where immediate action is called for. Requiring judicial authorization of arrests, interrogation, searches and seizures is not effective protection in practice because most accused persons cooperate with the law enforcement force not knowing that they do not have to.

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[53] CMUK 106.

[54] CMUK 97.

[55] CMUK 97.

[56] Article 20 and 21 of the 1982 Constitution.

The *sulh hakimi* may, on occasion, conduct an interrogation of the accused, or may examine a witness, during the investigation stage. When he does so, he acts at the request of the prosecutor, because records of judicial interrogation and examination may often be read into evidence at trial, while statements to the police can ordinarily be proved only by the testimony of police officers.[57]

3.4.1.1.1.3. **Law Enforcement Officials**

The preliminary investigation, in theory, should either be directed or controlled by a state appointed prosecutor in Turkey.[58] It is, however, conducted in practice by the law enforcement officials -the police judiciare[59]- (the police and the gendarmerie) since the prosecutor lacks his own agent. Law enforcement officials have a dual function; to maintain law and order, and to investigate crime in order to enable a criminal proceeding to take place. As regards their latter function they work under the formal supervision of the republic prosecutor.[60] They are obliged to execute orders of the prosecutor concerning the legal procedures.[61] Such orders are normally given in written form, but in emergency cases they may be delivered orally.

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[57] CMUK 247.

[58] CMUK 148 specifies that the prosecutor is the master of investigation.

[59] For the use of this phraseology see, *Leigh* and *Zedner*, 1992, A Report on the Administration of Criminal Justice in the Pre-Trial Phase in France and Germany, The Royal Commission on Criminal Justice, HMSO.

[60] CMUK 154 and 156.

[61] CMUK 154.

Law enforcement officials in Turkey are nationally organised into two separate bodies: the police and the gendarmerie. The police force are located in, and responsible for the provincial (vilayet) and the district (kaza) capitals. The police who investigate criminal complaints and prepare them for prosecution are called *adli polis* (judicial police) although they are members of the regular police forces and are not employed by the judicial department.[62] The gendarmerie, on the other hand, is responsible for rural areas, especially for villages. The gendarmerie is a branch of the Turkish Military Force. As far as detention and investigation of crime is concerned, it is responsible to the republic prosecutor.[63] Data published by General Commandership of Gendarmerie in 1989 reveals that in 92 % of investigation in Turkey is conducted by gendarmerie. However, since the density of population in rural areas is much lower than in urban areas, half of the population live in Turkey in the area in which gendarmerie has authority.[64] The use of the army, who lack professional training[65], for police duties is likely to increase the amount of improper conduct in performing such duties.

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[62] *Safak*, 1993, "Adli Polis Nedir? (What is the judicial Police?)", Zaman (daily newspaper) 31'st of January.

[63] *Jandarma Teskilat ve Yetkileri Kanunu*, (The Gendarmerie Organization and Powers Act), Statute no: 1908 of 1983, Article 7.

[64] *Yenisey*, 1991, Hazirlik Sorusturmasi ve Polis (Preliminary Investigation and the Police) 52.

[65] Generally speaking they not only lack professional training but also general educational background. Although, military service is compulsory and takes normally 18 months in Turkey, the fact that people who have a university degree perform it in 6 months leads this service to be performed by largely uneducated officials.

The idea of direct official supervision of police activities by prosecutor or magistrate has not so far been adopted in England.[66] Accountability for investigation still belongs to the police. Unlike Turkey, police forces are organised at local level in England[67] and they historically have been subject to a significant amount of local control.[68] Nowadays the Home Secretary has certain powers to control and co-ordinate all forces even though each force remains operationally independent.[69]

In order to bring criminals to justice, both legal systems seem to have felt the same pressure to give the law enforcement-force considerable power to proceed with their investigative functions. Despite structural differences in the pre-trial stage, similar powers are given to the law enforcement-force in both countries. The question of whether these powers are balanced by adequate safeguards is the concern of the next title.

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[66] One should note that the Royal Commission on Criminal Justice rejected the idea that judges or the Crown Prosecution Service should have a power and responsibility to supervise police investigation and preparation of evidence. *Royal Commission on Criminal Justice*, 1993, Report, Cmnd. 2263, p. 3, 22.

[67] There are 43 separate police forces; each force has its own geographical territory on the whole coinciding with the territory of the country's local authority units. The Police Act 1964 s. 2.

[68] Under the Municipal Corporation Act of 1935 local watch committees exercised controlling power over the police. See generally *Critchley*, 1978, History of the Police in England and Wales, p. 124. The PACE set up "consultative committees" to obtain the view of local people on policing matters (s. 106).

[69] *The Police Act 1964* s. 28-37.

3.4.1.1.2. The Suspect and his Counsel

Before the enactment of the 1992 Amendment the dominant feature of the preliminary investigation in Turkish law was secrecy and many of the procedural rights of the suspect were not recognised until the judicial examination began. The defence counsel, for example, were able to attend when the suspect was interrogated by the *sulh hakimi*, but not when he was questioned by the law enforcement force. In 1992 the Turkish legislature took a major step towards liberalizing criminal proceedings by passing an Act which amends several provisions of the 1929 Code of Criminal Procedure (CMUK).[70] Among other matters, the position of the suspect is considerably improved, and the openness principle of the preliminary investigation is introduced by the Amendment.

The Amendment establishes the suspect's right to legal advice and the right to inform someone of the suspect's whereabouts in the pre-trial stage.[71] It also states that the defence counsel has the right to communicate freely with the suspect who is held in pre-trial detention.[72] Their written communication cannot be subject to control.

The defence is further strengthened in that the defence counsel (mudafi) has been given a right to inspect the prosecutor's file at any stage of the investigation

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[70] *The 1992 Amendment*, *supra* note 19.

[71] Article 12 of the 1992 Amendment replacing Article 135 of CMUK.

[72] Article 20 of the 1992 Amendment replacing article 144 of CMUK.

proceedings.[73] Prior to 1992 in Turkish proceedings inspection was restricted to the time after the prosecutor had filed a formal charge with the court. The right to inspect the file is only given to the defence counsel; the suspect has no such right. It may be restricted by the judge (sulh hakimi) upon the request of the prosecutor if further investigation could be endangered.

The position of the suspect is also improved by requiring that at the beginning of an interrogation either by the police, the prosecutor or the judge the suspect has to be informed of his right not to say anything about the alleged offence.[74] Before 1992, the Turkish criminal practice did not expressly recognise either the right to silence or the right to be informed of it in pre-trial stage. Although the 1982 Constitution stated[75] that no one shall be forced to incriminate himself or his relatives prescribed by the statute[76], lack of any requirement to inform the suspect led to unawareness of the right not to incriminate.

The abovementioned procedural rights, however, are not recognised and enforced in cases of persons suspected of crimes such as terrorism, drug smuggling, membership in illegal organizations and espousing or disseminating ideas prohibited

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[73] Article 19 of the 1992 Amendment replacing article 143 of CMUK.

[74] Article 12 of the 1992 Amendment replacing article 135/4 of CMUK. He is, however, obliged to answer questions related to his identity (CMUK 135/1).

[75] Article 38/5.

[76] Such as spouse, ex-spouse, fiancee, relatives to the third degree of consanguinity. CMUK 47.

by law as "damaging the indivisible unity of the State".[77] These cases are tried by the State Security Courts which composed of two civilian and one military judge.

Like Turkey, an arrested person in England has a statutory right to consult a solicitor[78] and to ask the police to notify a named person likely to take an interest in his welfare about the arrest.[79] The police are also required to caution a person whom there are grounds to suspect of an offence before questioning.[80]

Conducting criminal investigation is closely regulated by both jurisdictions. In order to balance police powers a comprehensive system of safeguards for the suspect was provided. Although it is open to criticism whether the right balance was established between police powers and safeguards for the suspect, one point is clear: that both the police powers and safeguards are structured within a clearly defined framework. This probably will enable the suspect and the police to know exactly where one another stands in relation to respective rights and responsibilities. The breach of safeguards will be subjected to a detailed examination in Chapter Seven.

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[77] Article 143 of the Constitution.

[78] PACE 58.

[79] PACE 56.

[80] Code C para 10.

3.4.2. Trial Stage

If at the end of the preliminary investigation the republic prosecutor reaches the conclusion that a public prosecution is necessary, a public accusation is prepared with the list of evidence and handed to the court of venue in Turkey. In England such a decision is made by the police and the case is handed over to the Crown prosecutors.[81] A national prosecution service for England and Wales has been introduced by the Prosecution of Offences Act 1985 in which the prosecution of offenses is separated from the detention and investigation of crime.[82] Accordingly, after the case is handed over to Crown prosecutors, responsibility for conducting the case through the court belongs to the prosecutor. The prosecutor has the power to make decision to continue or drop a case without consulting the police.[83]

Depending on the seriousness of the offence involved different courts are responsible for the conduct of the trial in both countries. In Turkey there are three types of general criminal courts; Justice of the Peace Courts (Sulh Ceza Mahkemeleri), Court of General Jurisdiction (Asliye Ceza Mahkemeleri), and Aggravated Felony

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[81] Instead of prosecuting the police may, at their discretion, administer a caution, or take no further action.

[82] See for detail, *Bennion*, *supra* note 5, p. 3.

[83] The power of the prosecutor to withdraw the charges in the magistrates' court is absolute (the Prosecution of Offences Act 1985, section 23), whereas it is subject to the court's approval in a crown court [*R. v. Broad*, (1978) 68 Cr. App. R. 281].

Courts (Agir Ceza Mahkemeleri).[84] In England, on the other hand, the courts with trial jurisdiction in criminal cases are the Crown Courts and the magistrate' courts.[85]

There are no formal proceedings such as preliminary hearing before the trial in Turkey. By contrast, in England all persons accused of crime appear first in the magistrates' court, and around 95% of all criminal cases are heard and determined by these courts. The great majority of the accused[86] in England foregoes trial as a result of the mechanism of "guilty pleas".

The system of guilty plea in England operates as follows; at the beginning of the trial the accused is asked how he pleads, whether guilty or not guilty to the charges against him. If he pleads guilty, the judge or the magistrate normally proceeds to the question of sentence: the prosecution does not need to prove the case according

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[84] Jurisdiction of the Justice of the Peace Courts is restricted to trying persons charged with misdemeanours strictly listed in the Criminal Code. Persons charged with felonies punishable by severe penalties such as death, severe imprisonment and imprisonment for more than five years are required to be tried by the Aggravated Felony Courts. All offences outside these two groups are subject to the jurisdiction of the Criminal Courts of General Jurisdiction. (The Turkish Criminal Code, Articles 526-584).

[85] The form of trial used in the Crown Court is entitled "trial on indictment" while the commencement of trial in the magistrates' court is named as "summary trial". The legal framework of how to decide whether a case is tried in the Crown Court or in a magistrates' court is provided by the Criminal Law Act 1977 in which offences are divided into three classes. First of those are offenses triable summarily only; these are the least serious offenses. Secondly, some offenses are triable only on indictment; the most serious offenses fall into this category. Thirdly, some offenses are triable either way; this class includes offenses of medium gravity (The Criminal Law Act 1977, The Magistrates' Courts Act 1980).

[86] The extent of guilty plea is said to be over 90 per cent in the magistrates' courts and more than 60 per cent in the crown court. *Zander*, 1989, A Matter of Justice 188.

to rules of evidence, despite the rhetoric about the prosecution having to prove its case beyond reasonable doubt. The idea behind the plea of guilty seems to be a practical one; saving time and money. To reach this end, guilty pleas are encouraged by the criminal justice system. The Court of Appeal, for example, allowed an accused who pleads guilty to be given a discount on his sentence.[87] This practice is likely to put considerable pressure on defendants to plead guilty. There is even some evidence which suggests that the discount for a guilty plea pushes defendants into pleading guilty where they are really innocent.[88] Of course the great majority of those pleading guilty do so with other incentives such as the desire for quickness; defendant's real guilt; less publicity, less cost etc.

3.4.2.1. **Lay or Professional Involvement**

In the vast majority of criminal cases in England the decision -makers are lay people. They are involved as magistrates and as members of the jury. Lay involvement in the court is likely to introduce popular experience of the world and current standards of morality into the criminal justice system, and therefore to fulfil an important social and political function. Such a practice is likely to prevent the law from becoming remote from "the man in the street".

The magistrates are predominantly local lay people who carry out their work on a part time basis and they generally receive no salary. They are advised about

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[87] *R. v Coffey* (1982) 74 Cr. App. R. 169.

[88] *Baldwin* and *McConville*, 1977, Negotiated Justice: Pressure to Plead Guilty.

legal matters by their legally trained clerk. There are, however, a few full time stipendiary magistrates who are lawyers and sit alone. The Crown Courts, on the other hand consist of a professional judge[89] and jury.[90] There is a division of functions between jury and judge; the jury's duty is to ascertain what are the true facts, and then to determine, on the basis of these, the guilt or innocence of the accused, whereas the task of the judge is to control the evidence presented before the jury, to direct the jury on matters of law and to sum up the evidence of the prosecution and defence for them. Question of law are decided by the judge while the jury is concerned with questions of fact. Although the issue of the admissibility of improperly obtained evidence may involve mixed question of law and fact, it is a judicial matter. When admissibility of evidence is questioned on the ground that it has been obtained improperly, the judge conducts a voir dire (trial within a trial) in the absence of jurors.

It is noteworthy that trial by jury is used by only about 5 per cent of those who are eligible to be so tried.[91] Since the resources of the court system do not allow all defendants to be tried by jury[92], the system of "pleading guilty" is encouraged. Thus almost 90 per cent of all defendants charged with serious criminal offences plead

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[89] In England judging is seen as the culmination of a successful career as a lawyer, rather than a career on its own right.

[90] *The Juries Act 1974*, *The Courts Act 1971* s.16-25 and 31-40.

[91] *McConville* and *Baldwin*, 1981, Court, Prosecution and Conviction 77.

[92] Crown Court trial costs £7,500 a day. *Gibb*, 1995, "Law Reform Chief Attacks 'Obscure and Antique Acts'", The Times, March 16.

guilty.[93] The limited use of the jury trial is capable of giving the impression that the jury's functions of being an example of participatory democracy and being a safeguard against abuse of state power[94] are largely symbolic.

Unlike England, lay participation in courts does not exist in Turkey because it hardly conforms to the ideas of uniform, bureaucratically organised and centralised justice. There is only one judge to conduct the trial in the Justice of Peace Courts and the Courts of General Jurisdiction, while Aggravated Felony Courts have a chief justice and two associate justices.

3.4.2.2. Is Trial a Contest or an Inquest?

The Turkish trial may be seen as a judicial quasi-scientific search (an inquest) for the truth rather than a contest or dispute between the parties. It is the judge who interrogates the defendant, the lay and expert witnesses.[95] Even in Turkish legal terminology the prosecution and the defence are not even called parties (taraflar) but participants (sujeler).[96] There is no case for the prosecution[97] nor a case for the

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[93] *McConville* and *Baldwin*, *supra* note 91, p. 7.

[94] For a recent critique of the jury system see, *Darbishire*, 1991, "The Lamp that Shows That Freedom Lives: Is It Worth the Candle?", Crim. L. R. 740-752.

[95] CMUK 231.

[96] *Kunter*, 1986, Muhakeme Hukuku dali Olarak Ceza Muhakemesi Hukuku (Criminal Procedure Law) 289.

[97] The courts are not bound by the submission of the prosecution ; They have power to reformulate the criminal charge during the course of trial (CMUK 257/2).

defence but simply the case before the court. The trial judge -or a chief justice in Aggravated Felony Courts- is responsible for constructing an objective and comprehensive picture of the alleged offence by including the arguments and the evidence of the participants.[98] He can on his own initiative request documents or other information from public authorities and can obtain expert opinion. It is the judge, not the defence lawyer or the prosecution, who conducts all questioning of witnesses and other participants in order to define the issue in controversy. Cross-examination by defence lawyer and republic prosecutor is not allowed. If a defence lawyer or public prosecutor wants to put a question to a witness or a suspect, he has to suggest the question to the judge. The judge then decides whether to ask that question.[99] A formal acknowledgement of guilt which makes presentation of proof unnecessary does not exist under Turkish law. Even if the accused has submitted a full confession, other evidence against him should be presented to the court. The court

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[98] The trial starts by reading the accusation of the prosecutor, followed by questioning of the accused and witnesses by the judge. The republic prosecutor and counsel for the defence are allowed to ask supplementary questions but they are not permitted to cross-examine the defendant or witnesses. The reason for this might be the assumption that the prosecutor and the defence counsel (mudafi) do not oppose each other as parties. They should not engage in battle before the court. Indeed, even during the trial the prosecutor is required to take into account the facts favourable to the defendant and, in appropriate cases, must demand the acquittal of the accused. Although the participants have limited influence upon the manner in which evidence is adduced at trial, their affect on the extent of the proof may be significant. Before the trial the defendant and his counsel can cause the court to summon witnesses and experts or produce other evidence. During the course of the trial participants can also request additional evidence to be taken. If the trial judge is not satisfied with the evidence introduced by the participants he has authority to seek further evidence and adjourn the trial.

[99] *Cizmeci*, 1993, "Caprazin Bu Mu Adalet" 11 Nokta (Weekly Journal) 77, 13 March.

must ascertain the full truth for itself without being bound by the pleas of the participants.

Because the courts are not dependent on the submission of the parties and are responsible for the extent and nature of the evidence to be taken , the judge possesses prior knowledge of the case. During the trial he also uses a dossier that has been prepared by the prosecutor and the police before trial. This practice may have a negative effect upon the impartiality of the judge in that the point of view of the prosecution will communicate itself to the judge before the case has been heard. This danger is lessened by the requirement that only the evidence received in open court may be considered in reaching a judgement. In spite of the fact that the case-file (dosya) consists of all materials considered relevant for the case, documents-including the record of investigation- cannot be used as evidence unless they are read aloud at the trial. If the accused, the witnesses, or experts are present at the trial the court is required to base its judgement on what has been heard directly from them. Statements made to the police and the gendarmerie principally cannot be read at trial.[100] The court is not permitted to read prior statements from the records unless their present statements differ from what they said at an earlier stage.[101] The principles of orality and immediacy require that only the evidence received in open court may be considered in reaching a decision.

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[100] CMUK 242 and 243.

[101] CMUK 247/2.

Criminal trials in England, on the other hand, take the form of a contest between the prosecutor and the defence: the onus is on the parties to present their cases. The procedure is mainly oral. Witnesses come to give their evidence in open court and can be cross-examined by the opposing party. The judge or magistrate has no power to interrogate the accused, and should not normally ask questions except to clear up some ambiguity left unanswered by prosecutor's or defence counsel's question.[102] The trier of fact (the jury in the Crown Court and the bench in the magistrates' court) do not have access to pre-trial statements. The evidence becomes known for them essentially from the accounts of witnesses.

It should also be mentioned that under Turkish criminal procedure, as is generally the case on the Continent, the accused cannot be a witness in his own case. Of course, he is questioned at the trial, after being informed of his right to silence, if he is willing to answer. He is always heard as an accused and never as witness in Turkey whereas in England the accused cannot be questioned without consenting to be sworn as a witness in his own defence. It seems completely unacceptable to a Continental lawyer to burden an accused with the witness' obligation to tell the truth under oath. This would seen to create a situation where he might be compelled to choose between self-incrimination and criminal liability for perjury.

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[102] *R. v. Marsh*, The Times, 6 July 1993 (CA): "it was most undesirable that judges should interrupt a witness, particularly a defendant, when giving evidence in-chief or being cross-examined".

4. Conclusion

In this chapter the systems of criminal procedure of England and Turkey have been outlined without going into detail. This examination shows first that no judicial system, and certainly neither the English nor the Turkish system, has ever been designed from scratch; they have developed over a long period by trial and error, and inevitably have features which are only explicable by reference to history. Secondly and more specifically, the goal of the English proceeding, like that of the Turkish, is the determination of the objective truth on the basis of and within the framework of the procedural forms which the law prescribes. It seems to me that it is error to view the English criminal procedure merely as a sporting match between the prosecution and the defence without any goal of ascertaining the truth. Similarly, it is just as wrong to view the Turkish criminal procedure as a means of convicting the accused at any price. Rather, the object of both criminal procedures is the same; search for the truth within the permissible legal framework. The formalities of criminal proceedings should be constructed to create the proper atmosphere for discovering the truth and for avoiding factual errors. It is out of our concern to respond to the question of whether the truth may be better obtained by placing the responsibility for evidence on the parties who may use cross-examination, or by leaving the interrogation of the accused and the witnesses to the presiding judge.

The division of criminal procedures in both countries as pre-trial and trial stage is the same and specifically designed to guard against two broad errors; the placing on trial of those against whom there is no real evidence, and the conviction of any

who are possibly innocent. The former error is aimed to be avoided by the mechanism of the pre-trial stage, while the latter is attempted to be prevented by the trial. There are, however, some operational differences such as the pre-trial stage in England is left entirely in the hands of the executive officer-the police; they conduct the investigation, decide whether or not to prosecute, while in Turkey a public prosecutor has charge of the pre-trial investigation. One may, however, argue that this difference is more theoretical than real.

There is no dispute between Turkish and English law over the fact that procedural formalities should serve to protect the fairness of proceeding, particularly by means of balancing powers of public authorities against safeguards for the suspect. The strictness of the legal requirements of criminal procedure should also contribute to the protection of the defendant's human rights in criminal procedure. The difference between Turkish and English criminal procedure does not lie in the ideals but rather in the methods chosen to achieve them.

Having examined the background, we now turn to the theoretical analysis of the possible solutions to the issue of the admissibility of improperly obtained evidence.

CHAPTER THREE

THE THEORETICAL ISSUES

1. Introduction

It is important in the first place to bear in mind that there is more than one "exclusionary" or "inclusionary" rule in relation to improperly obtained evidence, such as the exclusion (or inclusion) rule applying to search and seizure, or applying to confessions, or applying to identification. To some extent each rests on a different basis and has a somewhat different scope. In this chapter "exclusionary" and "inclusionary" rule will refer to combined exclusionary or inclusionary rules unless otherwise is stated.

It seems to be generally accepted that there are three main solutions to the problem of admissibility of relevant evidence which is obtained contrary to the standards of propriety recognised by the law. The first is that if evidence proposed by the prosecution is relevant and of the necessary probative value, the court does not need to inquire into its origin, it should be admitted as a basis of judgment. At the other end of the spectrum it is maintained as a second solution that all evidence which has not been obtained properly by the police should be excluded. The third solution is a flexible one. On this approach no dogmatic answer exists; improperly obtained evidence should be admitted in some cases but excluded in others. The pros and cons of each approach will be examined in turn.

2. Mandatory Inclusion

The traditional solution to the problem of admissibility of improperly obtained evidence both in England and Turkey is to admit all relevant and reliable evidence, adduced before the court by the prosecution, as a basis of judgment regardless of how it was obtained.[1] In a nineteenth century English case, *R. v Leatham*[2] the court pronounced; "it matters not how you get it; if you steal it even, it would be admissible in court".

2.1. Justifications

A number of reasons may be identified, which are given to justify the solution in question. They are;

2.1.1. Determination of Facts Fully and Accurately

It is maintained that the object of the criminal trial is to ensure full and accurate determination of facts[3]. Taking into account all relevant information increases the amount of relevant evidence available to the factfinder, and ensures full and accurate determination of facts, and naturally facilitates the discovery of "truth"

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[1] See Chapter Four 2.1 and 2.2.

[2] [1861] 8 Cox C. C. 498.

[3] Criminal Law Revision Committee, 1972, Eleventh Report, Evidence (General), Cmnd 4991, para. 1.

as to whether the suspect committed the offence with which he is charged. The conclusion is inescapable, therefore, that all relevant evidence should be included regardless of how it was obtained.

In reply to this argument one may ask whether establishing the objective truth is the only purpose of the trial. In the adversarial British system it is hardly possible to give an affirmative answer to this question because in this system the trier of fact makes a decision that appears to be justifiable on the material presented in court rather than ascertaining the truth in any real sense[4]. At first glance the above argument may seem to be, to some extent, justifiable in the inquisitorial Turkish system because it is generally accepted that a inquisitorial system yields particular importance to "truth discovery" when compared with an adversarial system. Although it is true that determination of the objective truth is quite important in an inquisitorial system, it does not mean that the objective truth will be determined at any price; it is not legitimate to apply every possible method to reach the goal (discovery of truth). The truth should be discovered within the boundaries of the law in Turkey, otherwise *delil yasaklari*[5] (evidentiory use prohibition) may come into force to exclude evidence obtained by breaching the law.

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[4] See Chapter Two. The plea of guilty is given as an example of the assertion that "adversary procedure is not concerned with the truth of the material facts but only truth of facts put in issue by the accused". See *McEwen*, 1992, Evidence and the Adversarial Process 7.

[5] CMUK 135.

2.1.2 The Object of the Trial is to Ascertain the Facts in Issue

The point at issue is whether the trial is a suitable place for trying violations of legality which are said to be unconnected with the issue in the case. Wigmore held the view that;

> "a judge does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt to investigate and punish all offenses which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheik: but it does not comport with our own system of law"[6]

So far as this reasoning is concerned, rules of evidence are only designed to enable courts to determine the truth of the charge against the accused; the way in which evidence was obtained is irrelevant to the determination of the guilt or innocence of the particular suspect. An inquiry into improprieties will be collateral to the main issue. The court is not in a position to conduct a complete inquiry into the alleged improprieties, and therefore investigation of alleged impropriety could confuse and delay adjudication on the main issue[7]. Consequently, the criminal court should not attempt to inquire into improprieties during criminal investigation.

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[6] *Wigmore*, 1922, "Using Evidence Obtained By Illegal Search and Seizure", American Bar Association Journal 479.

[7] *Ibid*, p. 479.

This justification is derived from the fragmentary model of a prosecution[8] in which the court's sole task is said to be to hold a trial; there is no way that a court can involve itself in extra-courtroom executive misconduct by performing its truth-seeking function.

The justification in question is criticised in that it simply ignores the moral dimension of the criminal trial. In Zuckerman's phraseology, it is argued:

> "...(the criminal trial) is concerned with the determination of moral blame, which may in turn justify the infliction of suffering and humiliation on an individual, as well as of legal liability. The willingness of the public to accept the authority of the criminal court as a dispenser of punishment depends on the extent to which the public believes in the moral legitimacy of the system. The morality or fairness of the system of adjudication hinges on many factors, such as the impartiality and incorruptibility of the judiciary. Amongst these must also be numbered a publicly acceptable judicial attitude towards breaches of the law. A judicial community that is seen to condone , or even encourage, violations of the law can hardly demand compliance with its own edicts"[9].

The important point to be noted is that Wigmore's fragmentary line of argument does not refuse to acknowledge that there should be certain standards regulating the conduct of criminal investigation; but contends that the infringement of these standards should be subjected to separate prosecution. However, it can be argued that the separate prosecution of the wrongdoing officer is not an obstacle to

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[8] For detailed examination of the Fragmentary and Unitary models of the prosecution see, *Schrock* and *Welsh*, 1974, "Up from Calendra; The Exclusionary Rule as a Constitutional Requirement", 59 Minnesota Law Review 255.

[9] *Zuckerman*, 1989, The Principles of Criminal Evidence 344.

excluding improperly obtained evidence. In order to explain why separate prosecution does not preclude exclusion one may argue that they have different goals. Indeed, the separate prosecution is conducted to inflict a direct punishment on the law enforcement officer who violates the applicable standards, while the exclusionary rule is designed for some other purposes[10] rather than punishing a particular wrongdoing officer.

2.1.3. The Social Interest in Ensuring the Conviction of the Guilty

It is beyond question that the public has an interest in ensuring the conviction of the guilty. Advocates of inclusion argue that this social interest requires the admission of all evidence probative of guilt.

This argument is open to dispute in that it assumes that the social interest is simply in the factual outcome of criminal proceedings. However, it can equally be argued that social interest also exists in ensuring the quality of the proceedings.[11] For example, it can hardly be maintained that the social interest does not exist in a conviction based on a confession obtained by inhuman treatment (torture). It is necessary to acknowledge a plurality of social interests involved in this debate.

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[10] These purposes will be examined under the title of 'the Justification of Exclusionary Rule'. See Chapter Three 3.1.

[11] *Dennis*, 1989, "Reconstructing the Law of Criminal Evidence", 42 Current Legal Problems 31. This point has been expressly recognised in a number of cases *R. v King* [1969] 1 A.C. 304; *R. v Fox* [1985] 1 W. L. R. 1126.

2.1.4. Reducing Crime

The essence of the argument here is that if we want to reduce the crime rate, all the evidence ought to be admitted into the trial. According to Wilkey, inclusion of all evidence will significantly curtail a variety of crimes such as gambling, narcotics, prostitution, armed robbery and concealed weapons[12]. However, no mention is made by Wilkey about any empirical evidence which shows that a logical connection exists between the inclusion and the crime rates. On the other hand, it may be argued that inclusion encourages police crime such as assault, corruption, and related unlawfulness such as breach of regulatory Acts, Codes etc.

2.1.5. Reminding of Obedience to the Law

A great deal of consideration is given by Professor Nesson[13] to the behavioral implications of judicial decisions. He points out that one of the primary aims of a legal system is to encourage and enable citizens to assimilate legal rules into their behaviour. The function of the trial is not only to discover the truth about a past event, but also to project a behavioral message which will influence the conduct of members of society. Through trials,

> "the court's message to the public at large is 'if you do what the defendant did, you will be doing wrong and

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[12] *Wilkey*, 1978, " The Exclusionary Rule; Why Suppress Valid Evidence", 62 Judicature 215.

[13] *Nesson*, 1985, "The Evidence or the Event? On Judicial Proof and Acceptability of Verdicts", 98 Harvard Law Review 1357.

> you should feel guilty; if you commit such an action, we will judge you guilty and punish you'"[14].

Inclusion of all evidence regardless of how it was obtained is, therefore, to make stronger this behavioral message in that it reminds the individuals that the law must be obeyed; failure to do so will be punished irrespective of the fact that evidence is obtained improperly.[15]

However, it can equally be argued that to admit all evidence is also to reinforce a message to the society that the police are not bound to behave in ways the law wishes them to behave.

2.2. **Criticisms**

2.2.1. **Courts will be Party to Lawless Invasions**

Critics of the inclusionary rule maintain that when a court becomes aware that a law enforcement officer has breached the rules regulating the obtaining of evidence, and subsequently permits the use of the fruits of such an invasion at trial, it condones the wrongdoing and effectively becomes an accomplice after the fact to the improper activity.[16]

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[14] *Ibid*, p. 1360.

[15] *Choo*, 1989, "Improperly Obtained Evidence", Legal Studies 266.

[16] *Bennett*, 1973, "Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule", 20 UCLA Law Review 1137; see below notes 81, 82 and accompanying text.

2.2.2. Legitimising the Improper Conduct

There is no dispute over the fact the law enforcement officers are not permitted to conduct the criminal investigation in an unrestricted manner, as certain rules are laid down for the conduct of all authorities. Critics of the inclusionary rule argue that admitting the evidence obtained in violation of these standards may be seen a manifestation of a willingness to tolerate to such malpractice.[17] The court's attitude in this direction may, to some extent, have a legitimizing effect of the improper conduct. Thus, existence of the inclusionary rule can hardly convince the citizens about the fact that improper conduct of law enforcement officers is truly forbidden in the first place.[18]

2.2.3. Reducing the Public Respect for the Law

The basic assumption of this criticism is that the behaviour of those involved in the administration of the criminal justice system is a model for the citizens[19]. Both the law enforcement officers and the citizens should be subjected to the same rules. Wrongdoers, including those within the administration of the criminal justice system, should not benefit from their wrongdoing. It is maintained that by admitting improperly obtained evidence the criminal justice system is benefiting from its own

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[17] *Kamisar*, 1978, "Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment", 62 Judiciare 67, at p. 83.

[18] *Paulsen*, 1961, "The Exclusionary Rule and Misconduct by the Police", Crim. L.C. & P.S. 255, at p. 258.

[19] *Olmstead v United States* (1928) 277 U.S. 438, at p. 485.

wrong. Inclusion is, therefore, capable of giving to the society a behavioral message that those responsible for the administration of the criminal justice system may commit crimes in order to secure the conviction of private criminals. Such a message is likely to reduce the respect for the law in the eyes of the public.[20]

2.2.4. Encourage Laziness and Inefficiency of the Police

Although the duty of the police in a democratic society requires them to observe the procedural requirements which conform with democratic values, the inclusionary rule may encourage laziness and inefficiency of the police by enabling them to rely on improperly obtained evidence instead of more proper detective methods.

3. Mandatory Exclusion

The exclusionary rule is one of the most controversial issues all over the world. It excludes otherwise admissible evidence from criminal trials where that evidence was obtained improperly by the law enforcement officer.

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[20] *Bennett*, *Supra* note 16, p. 1137; *Heydon*, 1973, "Illegally Obtained Evidence", Crim. L. R. 1147; see below notes 81, 82 and accompanying text.

3.1. Justifications or Rationales for the Exclusionary Rule

The exclusion of improperly obtained evidence has been much debated[21]; a number of principles that might justify the existence of exclusionary rule may be derived from these disputes. Each justification will be examined in turn.

3.1.1. Personal Right Theory

An early rationale for the exclusionary rule in United States held that the accused enjoys a personal constitutional right to exclude evidence obtained as a result of breach of the constitution[22]. It is maintained that the constitution is sufficient to give the aggrieved party a personal right to suppression. The right to exclusion is conceptually and ethically a part of constitutional right to be free from unconstitutional (improper) conduct of law enforcement officers and the right to fair trial. If improperly obtained evidence were taken as a basis of judgment, the protection of the constitution declaring citizens' right to be secure against improper activities would

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[21] The literature relating to the exclusionary rule is extensive. For articles favouring the exclusionary rule see, *Atkinson*, 1925, "Admissibility of Evidence Obtained Through Unreasonable Search and Seizure", 25 Colom. L. R. 11; *Allen*, 1950, "The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties", 45 ILL. L. Rev. 1; *Hall*, 1953, "Police and Law in a Democratic Society", 28 Ind. L. J. 133; *Paulsen*, 1954, "The Fourteenth Amendment and the Third Degree", 6 Stan. L. Rev. 411; *McKey*, 1973, "*Mapp v. Ohio*, The Exclusionary Rule and the Right of Privacy", 15 Ariz. L. Rev. 3277; *Paulsen*, *supra* note 18, p. 255; *Quantana*, 1973, "Erosion of the Fourth Amendment Exclusionary Rule", 17 How. L. J. 805; *Traynor*, 1962, "Mapp v Ohio At Large in the Fifty States", Duke L. J. 319; *Bennett*, *supra* note 16, p. 1129.

[22] *Weeks v United States* 232 U.S. 383 (1914); *Gouled v United States* 255 U.S. 298, 313 (1921).

have no value. Further it is stated that to use improperly obtained evidence against the accused at trial will be a denial of the constitutional rights of the accused[23]. The constitution absolutely forbids the violation of itself and therefore requires exclusion of improperly obtained evidence. Support for this position may be found in the case of *Mapp v Ohio*[24] in which it is stated that

> " when the Forth Amendment's ban against unreasonable searches and seizures is considered with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."

Accordingly, both the innocent and guilty have a right to apply to the courts to vindicate their constitutional right to exclusion[25].

This theory requires mandatory exclusion of improperly obtained evidence because it entitles the defendant with a constitutional right to exclusion whereas it does not give the court a right to admit the evidence obtained improperly.

As far as the concept of a "fragmentary model of government" is concerned, the personal constitutional exclusionary right is implausible in that the executive, not the court, is the sole addressee of the constitutional norms which regulate the way of obtaining evidence. Since the executive is the only branch of government which is capable of infringing the constitutional requirements, the norms particularly speak to the executive. If violations of the constitution happens it is out of the court's

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[23] *Weeks v United States*, 232 U.S. 383, at p. 398 (1914).

[24] 367 U.S. 643, at p. 662 (1961).

[25] *Weeks v United States* 232 U.S. 383, at p. 392 (1914).

competence, and thus the court is not responsible for it. Without responsibility for the impropriety it can hardly be claimed that the court has a duty to exclude evidence improperly obtained at the trial. Thus, non-existence of a duty means non-existence of the right.[26]

The theory expounded in *Mapp v Ohio*, however, conforms with the unitary model of government. Indeed, unlike the fragmentary model of government approach, the unitary model maintains that there is no fragmentation of governmental responsibility, nor any implication that the constitutional norms are addressed only to the executive.[27] It assumes that there is a conceptual and moral connection between the trial and the evidence gathering process. The court, therefore, cannot insulate itself from responsibility for the manner in which evidence was obtained.[28] If the court admits improperly obtained evidence it commits a constitutional wrong. It is implied that admission is unconstitutional when the way of obtaining evidence is unconstitutional.

Although it is maintained that the exclusionary rule is a command of the Constitution in the form of a personal constitutional right of the party, opponents of this viewpoint would maintain that it does not exist in the text of the American Constitution. Indeed, there is no textual support in the Constitution itself to justify a personal exclusionary right. Neither the Fourth Amendment nor the Fifth Amendment

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[26] *Schrock & Welsh*, *supra* note 8, p. 289.

[27] *Ibid*, p. 295.

[28] *People v Cahan*, 1955 cited by *Schrock & Welsh*, *supra* note 8, p.298.

say anything about the existence of a right to exclusion. Moreover, where it is clear that both the police and the defendant acted improperly one may ask why the defendant has a personal right to be freed from the consequences of his own illegal acts because of improper police incursion upon a right which they were abusing.

As far as English and Turkish laws are concerned, none of them explicitly recognize a personal exclusionary right. England, unlike Turkey, does not even have a written constitution in the form of a single document.[29]

3.1.2. Unreliability Theory

As far the unreliability rationale is concerned the primary purpose of the criminal trial is to determine the truth of the criminal charges, and thus improperly obtained evidence may only be excluded on the ground of unreliability. It seems possible to say that the unreliability principle is a natural consequence of the right of the accused to a fair trial, because this right requires that the suspect should not be convicted where there is a risk that the evidence is unreliable. There is no doubt about the fact that unreliable evidence is likely to lead to wrongful conviction of the suspect. In order to reduce the high risk of wrongful conviction, unreliable evidence obtained improperly should be excluded.

It is to be noted that this principle operates in such a way as to draw much improperly obtained evidence outside the scope of the exclusionary rule. To illustrate,

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[29] See Chapter Two 3.3.

a verbal confession obtained by use of torture would have been admissible as evidence where independent evidence confirming its truth exists. Further, suppose that this confirmatory evidence is insufficient by itself to prove guilt, should the confession be admitted? With regard to the reliability principle, since there is no doubt about the reliability of the confession the answer must be affirmative. It becomes obvious from this example that the reliability theory does not find any fault with the use of coercive tactics to extract statements as long as it does not have an impact on the reliability of the statements. Similarly, there is no significant risk of unreliability as to the result of a breathalyser administered by the police in excess of their power. The examples we have given points to a conclusion that the unreliability theory would result in weakening the standards for the conduct of criminal investigation. If one takes standards for the conduct of criminal investigation seriously, the unreliability rationale can hardly be a sufficient criterion in deciding whether to admit improperly obtained evidence.

Furthermore, as far as the suspect is concerned it is maintained that the unreliability principle fails to provide "any" protection against the disadvantages of the infringement[30]. However, it is necessary to recognize that it provides some, but only incidental, protection on the grounds of unreliability.

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[30] *Ashworth*, 1977, "Excluding Evidence as Protecting Rights", Crim. L. R. 723, at p. 729.

3.1.3. **Protective Theory**

According to this rationale justification of the exclusion of improperly obtained evidence runs on the following lines[31]. To subject a suspect to improper treatment during the police investigation will be an infringement of the suspect's right recognised by the law. Since it is the responsibility of a legal system to take declared rights seriously, the suspect whose rights have been violated should be protected against any disadvantage flowing from the violation. It is said that the appropriate way of protecting the suspect from such disadvantage is for the court of trial to exclude any evidence obtained as a result of the infringement, because by doing so the suspect will be put in such a position as if the infringement had not occurred.

So far as the protective principle is concerned, the police officer's state of mind is irrelevant in deciding the admissibility of improperly obtained evidence, because the concern of this rationale is the effect of the particular conduct upon the suspect.

According to this theory the exclusionary rule is only justifiable where the evidence was obtained as a result of a breach of the rules which are intended to safeguard the suspect's rights. This premise includes two separate limitations. Firstly, not every breach of a pre-trial procedure is capable of exclusion of evidence. Breach of a rule which is not intended to safeguards rights so as to protect against the collection of evidence is unlikely to be causally linked to obtaining evidence. Arrest, for example, is not a step taken for the collection of evidence except in the remote

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[31] *Ibid*, p. 729.

sense that without arrest there would have been no interrogation and perhaps therefore no confession. To sum up, in order to justify the exclusionary rule the pre-trial procedure which has been infringed is, firstly, required to be a step towards the collection of evidence. Secondly, a causal link is required between the breach of the rules which are aimed to safeguard the suspect's rights and the collection of evidence. The important point to be noted is that an infringement could occur of a rule which is intended to safeguard the suspect's rights, and yet there might be no causal link to the obtaining of evidence. A clear illustration of this might be the case of *R. v Alladice*[32], where the rule broken (the right to legal advice) was intended to safeguard rights, but the evidence was not obtained through that breach.

The rationale in question can hardly be said to be unproblematical. Some of the difficulties were identified by Zuckerman. He points out that by bringing into existence the standards for the conduct of criminal investigations, the lawmaker's intention was to prevent the innocent from disturbance by the law enforcement officer where probable cause does not exist.[33] He goes on;

> "Here, whether we like it or not, we are no longer concerned with the question of whether we should disturb an individual against whom there is no probable cause but with the question of whether a person, in relation to whom evidence of guilt is now available, should be treated as if there were no increased probability of his guilt."

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[32] (1988) 87 Cr. App. R. 380.

[33] *Zuckerman*, 1987, "Illegally Obtained Evidence -Discretion as a Guardian of Legitimacy", 40 Current Legal Problems 57.

The increased probability of guilt reveals that the price to be paid for protecting the suspect from disadvantage resulting from the breach of declared standards may be acquittal of the guilty. It is not self-evident that excluding evidence, as a result failing to protect the public from the criminal, is an appropriate response to police violation.[34]

In discussing the difficulties of the protective rationale, Ashworth himself has drawn attention to the fact that the definition and the extent of the rights for this purpose may give rise to problems, particularly in those jurisdictions which do not have a constitutional or codified declaration of individual rights.

Problems such as these give rise to the view that not every departure from a declared standard or procedure should render evidence liable to exclusion. Ashworth himself argues that a rigid protective rationale should be rejected and instead a "qualified protective principle" should be adopted. As far as this new rationale is concerned,

> "evidence obtained by means of a departure from a declared standard or procedure should be liable to exclusion, unless the court is satisfied that the accused in fact suffered no disadvantage as a result of the breach".[35]

The qualified protective principle does not require the mandatory exclusion of improperly obtained evidence. Rather, it "provides only a prima facia justification"

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[34] *Ibid*, p. 58.

[35] *Ashworth*, *supra* note 30, p. 729.

for exclusion and invests the trial judge with a discretion to decide whether to accept improperly obtained evidence as a basis of his judgement.[36]

3.1.4. Deterrence Theory[37]

3.1.4.1. In General

Another justification for the exclusion of improperly obtained evidence is the deterrent rationale. Under this theory, improperly obtained evidence is excluded in order to deter law enforcement officer from violating standards or procedures for criminal investigation. This theory assumes that a criminal court has responsibility for the whole course of conduct called prosecution rather than merely for the trial[38]; the evidence-gathering role of the police can hardly be detached from the evidence-admitting function of the courts[39]. The rationale presumes that the potential exclusion of improperly obtained evidence will discourage the police from employing improper methods in the process of collecting evidence.

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[36] *Ibid*, p. 733.

[37] The terms "deterrence theory" or "deterrence effect" is said to be inaccurate by Kamisar, despite its popularity in legal literature. Instead, he suggested that "it seems more accurate and more useful to call the [exclusionary] rule a 'disincentive'- a means of eliminating significant incentives for [acting improperly]", *Kamisar*, 1983, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition'", 16 Creighton Law Review 565, at p. 597.

[38] This is called the 'Unitary Model of Government', see for detail *Schrock & Welsh*, *supra* note 8, p. 257.

[39] *U.S. v Leon* 468 U.S. 897, at p. 938 (1934).

This theory aimed to protect the general public from future police misconduct rather than compensating the individual rights of the victim. It is expected that by encouraging obedience with the rules, the exclusionary rule will ultimately benefit the general public since fewer improprieties will occur in future.

According to this theory the rule applies only in situations where it logically could be expected to have a deterrent effect. If a violation of procedural requirement occurs in a situation where the violator is not apt to be deterred, than the rule is not applied.

Aspects of deterrence

To make this theory as clear as possible it is important to distinguish three distinct types of deterrence; "special", "general" and "systemic deterrence"[40]

Special deterrence refers to the deterrent effect of exclusion on the wrongdoing officer himself. It is maintained that preventing an offending officer from presenting his evidence to the court would give a message that it was a vain effort and likely to lead him to feel resentful, and thus it would persuade him to be more careful in the future. It is doubtful, however, to what extent, if any, exclusion of evidence will have such a influence upon the individual police officer. Furthermore, one may argue that

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[40] The fist two types were identified by *Oaks*, 1969-70, "Studying the Exclusionary Rule in Search and Seizure",37 University of Chicago Law Review, and the third is mentioned by *Mertens & Wasserstrom*, 1981, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law", 70 The Georgetown Law Journal 394.

concentrating his attention upon the procedural requirements might lead him to discovering new ways of covering up his misconduct so as not to be caught.[41]

General deterrence is described in the work of Oaks[42] as follows; besides deterring the specific officer who lost evidence from acting improperly further, the exclusionary rule also deters the police officers who are aware of the rule but had no personal experience of suppression of evidence obtained by themselves. This aspect of deterrence is subdivided into two categories; "direct" with immediate effect, and "indirect" involving long term consequences. As far as the former is concerned it is said that compliance with the rules will be induced by the threat of excluding improperly obtained evidence.[43] it is further recognised that effectiveness of direct deterrence depends on a number of factors. Those are, firstly, effective communication between the court and the police officers; secondly, understanding of the officers as to the law related to obtaining evidence and the importance to them of obeying those rules, and thirdly, police officers' perceptions of the relative costs of conformity and nonconformity with the rule.[44]

With regard to indirect deterrent effect, by applying the writings of Johannes Andenaes, Herbert Packer and Franklin Zimring, Oaks made an analogy between the deterrent effect of criminal law and the deterrent effects of the exclusionary rule, and

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[41] This point has been brought to my attention by Professor Birch.

[42] *Oaks*, *supra* note 40, p. 665.

[43] *Ibid*, p. 710.

[44] *Ibid*, p. 710.

identified three indirect ways in which the threat of exclusion may play a role in deterring violation of the standards. Firstly, exclusion clearly expresses the social disapproval for the infringement. Secondly, exclusion may help to develop patterns or habits of conforming behaviour that keep influencing an individual police officer's conduct even after he has ceased to weigh the pros and cons of observance in an individual case. Thirdly, the exclusionary rule may be valuable in providing an argument to a obedient police officer to justify his own obedience where compliance is regarded as undesirable by his fellow officers.[45]

Finally, systemic deterrence is used to describe the exclusionary rule's effects upon an individual police officer through a police department's institutional compliance with the standards of criminal investigation[46]. It is assumed that the threat of exclusion will be likely to influence police departments and through them, the individual officers. Unlike individual officers, police departments cannot, at least officially, have hostility toward the proper ways of obtaining evidence, and it is proper to expect from the police institutions to encourage their officers through training and issuing guidelines to act according to regulations during the investigation of an offence.

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[45] *Ibid*, p. 711.

[46] *Mertens & Wasserstrom*, supra note 40, p. 399.

3.1.4.2. Criticisms of the Deterrence Theory

It seems perfectly proper to accept that the deterrent theory may present several difficulties. Those which have frequently been pointed out deserve brief attention.

3.1.4.2.1. Lack of Empirical Support for the Rule's Deterrent Effect

In the United states a considerable amount of empirical research has been conducted to assess the deterrent effect of the exclusionary rule. Although all researches specifically focused on the implementation of the rule to evidence obtained as a result of improper search and seizure, they contain valuable arguments which are pertinent to the general deterrent effect of the exclusionary rule.

The first empirical assessment of the effect of the rule was conducted by students of Colombia University Law School.[47] Their interest was to determine whether the exclusionary rule altered police search and seizure practices in narcotics cases by using before-after[48] research design. They found that the exclusionary rule did not have a substantial effect in changing police practices.[49]

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[47] *Note*, 1968, "Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in narcotics Cases", 4 Columbia Journal of Law and Social Problems 87-104.

[48] In *Mapp v. Ohio*, decided in 1961 (367 U.S. 643), the Supreme Court of United States held that evidence derived from an illegal search and seizure is subject to the exclusionary rule.

[49] *Note*, *supra* note 47, p. 103.

Oaks' Study: The importance of the contribution made by Oaks to this debate is accepted by both the opponents and the advocates of the exclusionary rule. His study is heavily depended upon by most critics of the exclusionary rule's deterrent effect. He examined the arrests for narcotics, weapons, gambling and stolen property offenses in an American city-Cincinnati- for the period of six years before and after the imposition of the exclusionary rule. Although he was careful to recognise the limited nature of his study[50], he stated that the imposition of the exclusionary rule in 1961 in United States had no deterrent effect on police practices, because his data indicated that impropriety occurred quite frequently after the adoption of the rule.[51]

However, occurrence of the violations despite the exclusionary rule does hardly prove that the rule does not deter police misconduct. It seems perfectly realistic not to expect the exclusionary rule to remove improprieties completely. Therefore, in determining the extent of the exclusionary rule's deterrent effect one should examine the number of improprieties it prevents, not the number of that occur despite it. In other words, the only sensible approach to the problem is to ask how much police impropriety would be without the rule. Davies clearly illustrates this point by drawing an analogy between the imposition of the speed limit on the nation's highways and the imposition of the exclusionary rule as follows;

> "Anyone who drives frequently will have observed that many drivers do not comply with the 55-mph limit (new speed limit). At the same time, however, it seems

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[50] *Oaks, supra* note 40, p. 709.

[51] *Ibid*, p. 707.

highly likely that motorists' average speed has decreased from what it was during the era of 70-mph speed limits. Thus despite the frequent violation of the formal speed limit,it is still likely that the reduced speed limit has influenced motorists' driving behaviour. Much the same is probably true about the effect of the exclusionary rule on police behaviour. It clearly has not ended illegal searches. Yet is quite likely that the rule has limited the incidence of illegal searches."[52]

Spiotto's Research: Following in Oaks' footsteps, Spiotto[53] counted suppression motions in felony cases in Chicago trial courts for a twenty year period before and after federal imposition of the exclusionary rule in order to determine the impact of the rule. He assumed that there would be a decrease in the number of motions to suppress if the rule was effective. Since his findings indicated a significant increase in the rate of motions to suppress, he concluded that the rule was not deterring illegal searches by the police.[54] Shortly after Spiotto's study was published, a critique written by Davies[55] revealed that Spiotto's research contains several flaws including a faulty research methodology. Spiotto wrote[56];

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[52] *Davies*, 1983, "A Hard Look at What We Know (and Still Need to Learn) About the 'Costs' of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests", American Bar Foundation Research Journal 627.

[53] *Spiotto*, 1973, "Search and Seizure; An Empirical Study of the Exclusionary Rule and Its Alternatives", 2 Journal of legal Studies 243.

[54] *Spiotto*, 1973, "The Search and Seizure problem- Two Approaches: the Canadian Tort Remedy and the U.S. Exclusionary Rule", 1 Journal of Police Science and administration 37.

[55] *Critique*, 1974, "On the Limitations of Empirical Evaluations of the Exclusionary Rule: A critique of the Spiotto Research and *United States v. Calandra*", 69 Northwestern University Law Review 741, at p. 754.

[56] *Spiotto*, *supra* note 53, p. 243.

> " During the period 1950-1970 in the course of which the exclusionary rule was introduced into Illinois, there was proportional increase in the motions to suppress for narcotics and guns. Yet it would seem that if the exclusionary rule had a strongly deterrent effect on the police, the proportional number of motions to suppress would have decreased."

Since Illinois adopted the exclusionary rule in 1923, thirty-eight years before the federal imposition of the rule, not during the 1950-70 period, the court was governed by the rule in 1951 as well as in 1969, and thus his study has no pre-rule data to support the 'before-after' type of research.

Furthermore, the use of motions to suppress as indicators of the rule's deterrent effect may be criticised[57]. It may be said that observation of the frequency of motions made before and after the introduction of the exclusionary rule can hardly measure the impact of the exclusionary rule for two main reasons. Firstly, the motions to suppress, by virtue of its non-existence, cannot measure improprieties prior to the introduction of the exclusionary rule. Secondly, even in the case of existence of some form of motions to suppress before the appearance of the new rule, an increase might be expected on the rate of motion to suppress following the introduction of the new law which introduces more liberal exclusionary approach by tightening the regulation of the law enforcement officers' duties and the suspect rights.

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[57] For detail see, *Critique*, *supra* note 55, p. 755.

Canon's Study: Another empirical study was conducted in the early 1970's by Canon and published in 1974[58]. Two basic data gathering techniques were used; those are, firstly, replicating Oaks' examination of arrest records in nineteen large American cities, and secondly, sending questionnaires to police departments, prosecutors and public defendants in cities with a population of more than 100.000. With regard to replicating the Oaks' study, Canon was aware of the fact that it was easier to demonstrate the existence of widespread non-compliance with the rule than to demonstrate compliance, and he did not attempt to show the efficiency of the exclusionary rule as a deterrent. Rather, he raised considerable doubt about earlier conclusions that the rule was ineffective in deterring improper police behaviour.[59] On the other hand, his survey demonstrated that police compliance with search and seizure regulations increased significantly between 1967-1973, and he attributed these changes to the imposition of the exclusionary rule. [60]

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[58] *Canon*, 1974, "Is the Exclusionary Rule in Failing Health? Some new Data and a Plea Against a Precipitous Conclusion", 62 Kentucky Law Journal 681.

[59] *Ibid*, p. 725.

[60] The methodology and representativeness of Canon's questionnaires are criticised by Schlesinger as follows " .. he received returns on only 47.4 per cent of the questionnaires sent to the police, 35.2 per cent of those sent to prosecutors and 40.2 per cent of those sent to public defenders. Thus, the nature and the size of his sample do not permit valid generalization; it was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law- those whose practices would have negated cannon's thesis about the effectiveness of the rule- would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or to announce their own failure to obey the law.....there is simply no way of knowing whether the questionnaires were answered truthfully.....the questions themselves contained strong inducements for the police to answer in a manner which confirmed Canon's thesis...". See, *Schlesinger*, 1979, "The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?" 62 Judicature 406-407; This discussion, while undoubtedly an important one, is beyond the scope of the present discussion.

The common feature of the above studies is that they were all carried out immediately after the imposition of the federal exclusionary rule in United states. It is to be remembered that changing the law does not cause alterations in human behaviour overnight; it takes quite a long time. It can, therefore, be argued that the impact reported in 1960's and early 1970's may not continue to exist without great change into the present.

3.1.4.2.2. **Deterrent Effectiveness is Doubtful**

Apart from empirical assessment of the deterrent effect, criminal justice literature supplies a number of reasons for doubting the deterrent effectiveness of the exclusionary rule. Reasons for doubting the deterrent effectiveness may be stated as follows;

The Operative scope of the rule is limited; As the Report of the Royal Commission[61] has argued, the operative scope of the rule is limited to exclude only that evidence presented at trial. Considering the large number of defendants who are either not arrested, or not charged, or not prosecuted, or plead guilty, it becomes obvious that a small proportion of police activity comes to the attention of a trial court. Even where the improper conduct ultimately results in a criminal trial, there is nothing a court can do unless the prosecutor attempts to exploit violations by introducing at the trial evidence obtained as a result of an improper behaviour. Even

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[61] *Royal Commission on Criminal Procedure*, 1981, Report (The Philips Report), Cmnd. 8092, para. 4.125.

then, the exclusionary rule does not come into play where the suspect does not contest the legality of police action. To conclude, the instances in which the rule can have deterrent effect are tremendously minimized. This consequently leads to the question of why the court's exclusion of evidence should deter police when most of the time the issue of admissibility cannot come into play.[62]

The police have other purposes in acting improperly than obtaining evidence; Another reason that has been advanced for doubting the effectiveness of the exclusionary rule as a deterrent is that the police are not always concerned with collecting evidence, prosecuting and convictions.[63] Instead they may attempt to deal in their own way with antisocial behaviour. A number of examples is given by Heydon[64] to illustrate other purposes of the police in acting improperly than obtaining evidence for use in court as follows;

> "One purpose may be to obtain a hold over one participant so that he can be used as an informant in future. Another is that the police can to some extent control crime by such illegal forms of harassment as illegal arrests, physical maltreatment of suspects or prisoners, and unnecessary destruction of property. In this way crime is prevented- an illegal search of a suspect which leads to the discovery and confiscation of weapons prevents their abuse, a brief period of illegal arrest interrupts the criminal activity. Crime is made less attractive- money may have to be spent on lawyers

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[62] *Burns*, 1969, "*Mapp v Ohio*: An All American Mistake", 19 De Paul Law Review 80, at p. 96.

[63] *Lafave*, 1965, "Improving police Performance Trough the Exclusionary Rule", 30 Missouri Law Review 391, 421-58; *Barrett*, 1960, "Personal Rights, Property Rights, and the Fourth Amendment", Sup. Ct. Rev. 46, at 55; *Allen*, 1961, "Federalism and the Fourth Amendment: A Requiem for Wolf", Sup. Ct. Rev. 1, at p. 37.

[64] *Heydon*, *supra* note 20, p. 690.

> to get release, the destruction of gambling equipment adds to the expense of the criminal conduct,... The complaisant members of the public who gamble and buy alcohol and drugs illegally will be deterred by raids and searches; and the illegal conduct of the police may be intended to create in the mind of would-be criminals an illusion of police omnipresence and omnipotence, and an increased fear of being detected."

It becomes obvious from these examples that some improper police activities may not be affected by the exclusionary rule because of a tendency not to prosecute offenders.

However, it can be argued that none of the supporters of the rule meant to suggest that the rule would influence all types of police behaviour. If the rule fails to deter some types of improper police behaviour, additional controls should be developed rather than removing the existing device.[65] To make this point as clearly as possible Professor Amsterdam's analogy between the exclusionary rule and police department anti theft programs for marking personal property is worth quoting;

> "Identification marks diminish the value of property to a prospective thief because he knows that it will be more difficult to sell the goods at a worthwhile price. Thus such programs reduce the incentive to steal. Although thieves who steal only for excitement, for their own use, or for revenge, are not deterred by identification programs, police departments should not, for this reason alone, abandon these programs."[66]

Similarly, it can not be right to claim that the exclusionary rule is a failure as a deterrent since it fails to deter a police officer whose conduct is motivated by something other than the hope for successful prosecution.

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[65] *Mertens & Wasserstrom*, *supra* note 40, p. 397.

[66] cited by *Mertens & Wasserstrom*, *Ibid*, p. 397.

The impact of the rule falls only indirectly on police; Looking at the problem from the "special deterrence" point of view it may be maintained that suppression of evidence does neither punish the offending officer directly, nor effect his official status with regard to his payment, or his job security etc.[67] Despite the supporters of the deterrence rationale's assumption that a conviction is important to the police, it is claimed by the critics that loss of conviction through exclusion of evidence is not a serious matter for the police since police effectiveness is not measured by the number of convictions. The only person who is directly effected by the exclusionary rule is said to be the prosecutor, rather than the individual officer whose improper conduct results in the exclusion of evidence.

Although it is true that effectiveness of law enforcement is not judged by the conviction rate, it does not follow that exclusion of evidence creates no incentive for the law enforcement officers to correct their improper pattern of behaviour. The general public concern against recent miscarriage of justice in England suggests that the loss of conviction may be a serious matter for the officer who engaged in the improper activity[68]. Moreover, it may be suggested that the number of cases dismissed because of the improper activity should be taken into account in deciding the promotion or salary of the wrongdoing officer.

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[67] *Schlesinger*, 1977, Exclusionary injustice: The Problem of Illegally Obtained Evidence 57-58.

[68] My attention has been drawn to this point by Professor Birch.

Furthermore, one may ask whether there are good reasons for regarding the prosecutor and the law enforcement officer as totally independent functionaries. Unlike English criminal justice system, in the Turkish system the prosecutor has authority over the police[69] and can pressure the police to correct the improper practice. A similar direct channel of communication and co-operative arrangement between the prosecutor and the law enforcement officer may be suggested for English law.

Lack of clarity of the rules regulating obtaining evidence; According to this argument the law regulating the proper ways of obtaining evidence is, in some areas, quite complex and it can hardly be understood and followed by ordinary police officers.[70] This complexity inevitably makes difficult for a police officer the determination of legality of his activity in advance and consequently prevents deterrent effectiveness of the exclusionary rule.

This argument assumes that many police activities are in a doubtful or marginal zone of legality. However, it becomes obvious from the study of New York City Police[71] that most improper police activities occur in situations where police officers clearly know that they are violating the law.

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[69] See Chapter Two 3.4.1.1.1.

[70] *Oaks, supra* note 40, p. 731.

[71] *Loewenthal*, 1980, "Evaluating the Exclusionary Rule In Search and Seizure", 49 U.M.K.C. Law Review 32.

This line of criticism, if a valid one, may, and should, be overcome by a number of ways such as introducing more clear substantive rules or clarifying the existing rules or by educating the law enforcement officers about the rules regulating the collection of evidence. It should be noted that lack of clarity is a problem associated with the substantive law, not the exclusionary rule, and therefore, it may not only be a reason for doubting the deterrent effectiveness of the exclusionary rule, but also may be a reason to doubt the deterrent effectiveness of any device which may be introduced for enforcing the norms regulating the ways of obtaining evidence.

Impossibility of deterring the law enforcement officer from behaviour that he believes to be correct; The deterrence rationale for the exclusionary rule is also criticised in that when a law enforcement officer acts with a reasonable , but mistaken, belief that his conduct is consistent with the requirement of procedural norms, exclusion would hardly have a deterrent effect. This is the criticism which lead to the adoption of a "good faith exception" to the exclusionary rule by the United States Court of Appeal.[72]

This criticism and the following "good faith exception" are derived from the incorrect assumption that the exclusionary rule is designed to serve a specific deterrence. As explained above the rule more importantly has a systematic deterrence dimension.[73]

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[72] *Illinois v Gates*, 103 S. Ct. 2317 (1983).

[73] For the comprehensive discussion of the 'good faith exception' see, *Mertens & Wasserstrom*, *supra* note 40, p. 365; *LaFave*, 1982, "The Fourth Amendment in an Imperfect World: On Drawing 'bright Lines' and 'Good Faith'", 43 University of

3.1.4.2.3. Availability of More Effective Deterrent Devices;

One may ask whether the exclusionary rule is the only answer to discouraging impropriety of the law enforcement officer or whether other remedies may be devised to achieve the same end and at less social cost. It is maintained by the critics of the exclusionary rule that excluding the evidence is not the only effective method of deterring police misconduct; there are several other remedies which are more effective than the exclusionary rule.[74] One can argue for this reason that the deterrent rationale does not require exclusion of evidence, instead it requires replacement of the exclusionary rule with a more effective deterrent device. This argument assumes that, firstly, deterrence is the primary rationale for invoking any remedy to rectify an improper police behaviour, and secondly, the exclusionary rule is not as effective a deterrent as it should be.

Pitisburgh Law Review 307; *Jensen & Hart*, 1982, "The Good Faith Restatement of the Exclusionary Rule", 73 The Journal of Criminal Law and Criminology 916; *Kamisar*, 1984, "Gates 'Probable Cause,' 'Good Faith,' and Beyond", 69 JOWA Law Review 551.

[74] *Wilkey*, 1982, "Constitutional Alternatives to the Exclusionary rule", 23 South Texas Law Journal 531; Also see *Schroeder*, 1981, "Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 The Georgetown Law Journal 1361; *Note*, 1975, "The Fourth Amendment Exclusionary Rule, Past, Present, No Future", 12 The American Criminal Law review 507; *MacDougall*, 1985, "The Exclusionary Rule and Its Alternatives- Remedies for Constitutional Violations in Canada and the United States", 76 The Journal of Criminal law and Criminology 608; *Foote*, 1955, "Tort Remedies for Police Violations of Individual Rights", 39 Minnesota Law Review 483.

3.1.5. Judicial Integrity Theory

Another justification advanced for the exclusionary rule is based on the recognition of the need to safeguard "judicial integrity".[75] It is generally accepted that this rationale finds earliest expression in Justice Brandeis' dissenting opinion in *Olmstead v United States*[76] in which he stated that improperly obtained evidence ought to be excluded in order to ,first, maintain respect for the law, adding that "if the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy".[77] The second goal of the rationale is stated as preventing the development of totalitarian government.[78]

Underlying this rationale is the conception of a "unitary model of a government" in which the investigatory process is seen as a part of the entire criminal justice process and is thus inseparably tied to the criminal trial.[79] No distinction can be drawn between the government acting as a gatherer of evidence and the government

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[75] "Integrity" is defined as "an unimpaired or unmarred condition:entire correspondence with an original condition... an uncompromising adherence to a code or moral...or other values." Webster's Third New International Dictionary 1174 (1966)ed. , cited in *Bennett, supra* note 16 , p. 1133, footnote 14.

[76] 277 U.S. 438 (1928). However, fourteen years before *Olmstead v U.S*, in *Weeks v United States*- 232 U.S. 383 (1914)-, a similar argument advanced but it was not labelled as a judicial integrity theory at that time. See *Bennett, supra* note 16.

[77] 277 U.S. 485 (1928).

[78] 277 U.S. at 485. " To declare that in the administration of criminal laws the end justifies the means- to declare that the Government may commit crimes- would bring terrible retribution".

[79] *Schrock & Welsh, supra* note 8, p. 257-258.

acting as a judge.[80] By assuming the existence of an inextricable link between the courts and the police, this rationale places a responsibility on the courts for the way the evidence they use is obtained.

Several concerns are tightly interwoven in this rationale. The first concern is the ratification of improper police activity. It is maintained that admitting the fruits of improper police activity into evidence means that the court implicitly gives its 'sanction' to such impropriety, and, consequently, becomes an accomplice to the improper activity.[81] To make this point as clearly as possible it is said that when an improper act is committed, it is a crime only of the individual officer and thus the court-more widely the government- is innocent. However,after having full knowledge about this impropriety if the court accepts the evidence, all the elements of a ratification would seem to be present.[82] In the ordinary course of events it goes without saying that it is wrong for the state to participate in or condone improper conduct by individual police officers. Subsequently, under this justification the judiciary, by excluding evidence, declines to legitimize improper conduct.

The second concern, as stated above, is to maintain respect for the law. It is morally inappropriate for the state to fail to observe its own law and disregard the

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[80] *Olmstead* 277 U.S. 438 at 470 (1928).

[81] *Tery v Ohio*, 392 U.S. 1, 13 (1968): "Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions".

[82] *Olmstead v United States* 277 U.S. 483 (1928).

procedural standards, and at the same time require its citizens to observe the law.[83] The state -and its agent the police- must obey the law while enforcing the law. Failure to do so will destroy respect for the law. As far as this rationale is concerned the only appropriate way the court has to show its respect for the law is exclusion of evidence obtained improperly. Because, by doing so the government whose agents violated the investigation standards would be in no better position than the government whose agent obeyed it.[84] Some commentators have pointed out that the exclusion is not a punishment, instead it is a method of teaching proper behaviour that preserves the integrity of the judicial process. In the phraseology of Justice Brandeis in *Olmstead v United States*;

> "our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt for law."[85]

One further significant feature of the judicial integrity theory is that it does not require the mandatory exclusion of improperly obtained evidence. The reason for this is that a rigid rule of exclusion is highly likely to result in technical acquittals and this would bring the criminal justice system into just as much disrepute as a failure to observe the procedural standards.[86]

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[83] *People v Cahan* (1955) 282 U.S. p 2d. 905 at 912.

[84] *Kamisar, supra* note 17, p. 68.

[85] (1928) 277 U.S. 438 at 485.

[86] *Choo, supra* note 15, p. 278.

3.2. Criticisms

3.2.1. It Exacts Heavy Societal Costs in the Form of Lost Cases

As has already been mentioned the rule enables the suspect to make a motion to suppress evidence alleged to have been improperly obtained. If the motion is granted the evidence in issue will be lost. This clearly reveals that the rule is by no means a costless remedy for the violation of criminal proceedings norms. Opponents of the exclusionary rule, however, developed this point by claiming that the rule is a legal device which frequently prevents the factfinder from considering probative and reliable evidence that would convict offenders.[87]

In an attempt to answer the question of how many cases are lost as a result of the exclusionary rule several empirical assessment of the rule's effect in the United States were conducted by the General Accounting Office[88], the National Institute of Justice[89], Nardulli[90], Davies[91], Orfield[92], and Uchida and Bynum[93].

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[87] *Bivens v Six Unknown Federal Narcotics Agents*, 403 U.S. 338 416 (1971); *Posner*, 1982, "Excessive Solutions for Governmental Misconduct in Criminal Cases", 57 Was. L. Rev. 635.

[88] *General Accounting Office*, 1979, Report of the Controller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (GAO Report).

[89] *National Institute of Justice*, 1982, The Effects of the Exclusionary Rule: A study in California (NIJ Report).

[90] *Nardulli*, 1983, "The Social Cost of the Exclusionary Rule: An Empirical Assessment", 3 American Bar Foundation Research Journal 585.

The GAO Report found that only 0.4 per cent of cases studied were declined for prosecution due to the exclusionary rule. Moreover, by examining 2.804 cases which went to trial the study found that the admissibility of evidence was challenged in 10.5 per cent of cases. A great deal of challenges were not successful. Evidence was lost in only 1.3 per cent of the cases. In many cases even after losing the alleged improperly obtained evidence convictions were still obtained on the basis of other evidence. Total loses altogether -cases dropped in trial and pre-trial rejected cases- constituted 0.8 per cent of all cases examined. Thus, the report concluded that the exclusionary rule had minimal effect.

In 1982 another research study conducted by the National Institute of Justice focused on felony cases rejected for prosecution or dismissed by the prosecutor after charges were filed because of search and seizure problems. It is reported that 4.8 per cent of all cases of arrest for felony were not proceeded with because of improper search problems.[94] It further revealed that the attrition rate in drug cases was as high as 30 per cent. Consistent with this line of data it is concluded that the exclusionary rule had a major impact on the disposition of felony arrests.

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[91] Davies re-analyzed the NIJ data and reached different conclusion see *Davies*, *supra* note 52.

[92] *Orfield*, 1987, "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016.

[93] *Uchida* and *Bynum*, 1991, "Search Warrants, Motions to Suppress and 'Lost Cases':The Effects of the Exclusionary Rule in Seven Jurisdictions", 81 The Journal of Criminal Law & Criminology 1034.

[94] NIJ Report, *supra* note 89, p. 10.

The NIJ study is often criticised by those who maintained that it overstates the effect of the rule[95]. Further, NIJ data was re-analyzed by Davies and different conclusions were reached. In Davies reanalysis the NIJ data show that only 0.8 per cent of all arrests were not proceeded and that 2.4 -not 30- per cent of arrests in drug cases were lost because of the rule.

Another attempt to clarify the impact of the exclusionary rule on felony prosecutions was made by Nardulli. He conducted a larger study which is based on the data collected in nine medium-sized counties (with the population ranging from 100,000 to 1,000,000) in three states (Illinois, Michigan and Pennsylvania). In order to provide a comprehensive picture of the impact of the rule data was collected not only on motions to suppress physical evidence but also motions to suppress identification and confession evidence. The results showed that the motions to suppress were filed in 11 per cent of cases studied but only in 7.6 per cent of cases were the motions to suppress proceeded. The success rate was only 0.69 per cent. Even in the cases where the motions were allows a number of defendants were still convicted on the basis of other evidence. Nardulli concluded that less than 0.6 per cent of the cases he examined were lost because of the exclusionary rule and thus, "the various exclusionary rules exact only marginal social costs".[96]

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[95] *Driscol*, 1987, "Excluding Illegally Obtained Evidence in the United States", Crim. L. R. 559; *Davies*, *supra* note 15, 52, p. 617; *Nardulli*, *supra* note 90, p. 590.

[96] *Nardulli*, *supra* note 90, p. 585.

The studies conducted by Orfield and Uchida and Bynum[97] have also reached similar results with the findings reported by Nardulli, Davies and GAO report.

To sum, apart from the NIJ study, the evidence, derived from all these American studies, suggests that it would be a mistake to exaggerate the amount of lost cases dictated by the exclusionary rule. Only around one per cent of prosecuted cases are lost as a result of the rule's operation and most of them were not serious offenses. Even after evidence obtained improperly is excluded a number of defendants were still convicted without the excluded evidence.

3.2.2. **Benefits Only the Guilty**

Invoking the exclusionary rule may result in exclusion of powerful evidence of guilt without questioning its evidentiary reliability. Therefore, for many years a popular way of attacking the exclusionary rule has been to say that it is a device for 'freeing the guilty'.[98] It is maintained that the rule only operates in the interest of a person who is clearly guilty, because it works after the facts come into existence, so that by then it is known who the criminal is, the evidence against him, and the other circumstances of the case.[99] At the same time innocent victims of improper conduct

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[97] *Supra* note 93.

[98] See, *Schlesinger*, *supra* note 67, p. 3; *Wilkey*, *supra* note 12; phraseology of Justice Cardoza -'the criminal is to go free because the constable blunders'-is often quoted by critics of the exclusionary rule, *People v Defore* 270 U.S. 657 (1926).

[99] *Kaplan*, Criminal Justice, 215-216; Professor Oaks has observed that this criticism of the exclusionary rule is more valid in the search and seizure context than the coerced confession or the eyewitness identification, because evidence obtained as

receive no direct benefit, since nothing incriminating them is obtained there is nothing to suppress.[100]

As far as deterrent theory is concerned, it is not necessarily true that only a guilty person is benefitted by the rule, through the rule's deterrent effect. The innocent victim, along with the public as a whole, is benefitted from a decrease in police impropriety through the rule's systematic deterrence effect.[101]

This line of criticism is said to be misdirected; it is more properly directed at criminal justice system standards.[102] While it is true that, by depriving the courts of relevant and probative evidence clearly pointing out the guilt of the defendant, the rule result in the freeing of the guilty, it does not follow that the rule prevents criminals from being convicted more often that would be the case if other remedies were replaced for it.[103] Furthermore, the same accused would not be convicted since the evidence would not have been discovered if the police officer had complied with the standards of criminal procedure in the first place.[104] Therefore, if

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a result of improper search and seizure is no less reliable than properly obtained evidence, *Oaks*, *supra* note 40, p. 737-738.

[100] *Williams*, 1955, "Evidence Obtained By Illegal Means", Crim. L. R. 345.

[101] *Heydon*, *supra* note 20, p. 692.

[102] *Stewart*, 1983, "The Road to *Mapp v Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases", 83 Columbia Law Review 1392.

[103] Almost everybody accept that the breach of criminal procedure standards should not be left without any remedy.

[104] *Loewenthal*, *supra* note 71, p. 31.

something is to blame for freeing the guilty it should be the standards rather than exclusionary rule.

3.2.3. **Restricts the Police Too Much**

The exclusionary rule is also criticised for making obtaining evidence more difficult by placing too big a burden on the police.[105] With the concern of the increasing crime rates[106], the advocates of this argument point out the non-existence of restrictions to criminals in their choice of weapons, and suggest similarly non-existence of restrictions for the police.[107]

This criticism may also be said to be misdirected since it is not the exclusionary rule which places limitations on the action of the police, but the substantive rules governing obtaining evidence. Since none of the parties to the present discussion suggested non-existence of any remedy, abolishing the exclusionary rule would hardly affect restrictions upon the police. Only a change in the substantive law of obtaining evidence which the police are required to obey can do that.

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[105] *Wilkey*, *supra* note 12, p. 224.

[106] *Schlesinger*, *supra* note 67 p. 4.

[107] *Heydon*, *supra* note 20, p. 694.

3.2.4. Undermines the Reputation of and Destroys the Respect for Entire Judicial System

Another criticism of the rule focuses on its undermining effect on the reputation of the judicial system. According to this criticism the rigid operation of the exclusionary rule will result in the technical release of many suspects, and this would undermine the respect for the legal and judicial system in the eyes of the general public.[108]

3.2.5. Encourages Certain Form of Police Misbehaviour

Some commentators have pointed out the existence of some indications that certain kinds of police misconduct are being encouraged by the exclusionary rule.[109] A clear illustration of this is that the law enforcement officers may intentionally conduct an improper activity not in order to obtain evidence, but in order to immunize the criminals from conviction while at the same time satisfying the public that criminal are being harassed by them. By examining the records of the Chicago Crime Commission, and by observing one of the breaches of Municipal Court's practice Dash noted that the same police officers are involved repeatedly in improperly conducted gambling raids which could very easily have been conducted in a proper legal manner.

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[108] This point has been made by a number of authors. See, *Heydon*, *supra* note 20, p. 695; *Schlesinger*, *supra* note 67, p. 61; *Zuckerman*, *supra* note 9, p. 345.

[109] *Dash*, 1951, "Cracks in the Foundation of Criminal Justice", 46 Illinois Law Review 392; *Schlesinger*, *supra* note 67, p. 57.

He was convinced that "raids are made to immunize the gamblers"[110]. However, Heydon is quite right in pointing out that immunising by corrupt policeman is not a valid criticism for the exclusionary rule because if police corruption is common, the police would have many other methods of helping criminals in addition to abusing the exclusionary rule.[111] Another kind of police misconduct which is being encouraged by the exclusionary rule is said to be perjury on the witness stand. A study conducted in the United States indicates that police officers often fabricate testimony to escape from the effect of the exclusionary rule.[112]

3.2.6. It Penalises the Public Rather than the Individual Officer who Acted Improperly

Barring use of the evidence obtained as a result of improper police conduct is seen as a penalising of the public at large in that it will prevent the court from using some amount of evidence. This deprivation will injure the public at large not the policeman. Consistent with this line of reasoning it is recommended that instead of penalising the public by excluding evidence, the wrongdoing police officer should be penalised. In this connection Wigmore wrote that "our way of upholding the

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[110] *Dash*, *supra* note 109, p. 382.

[111] *Heydon*, *supra* note 20, p.695.

[112] *Note*, *supra* note 47, p. 87.

Constitution is not to strike at the man who breaks it, but to let off somebody who broke something else"[113]

However, it might have been possible to argue that exclusion can hardly be seen as a punishment to the public. As far as the deterrent effect of the rule is concerned society as a whole will benefit from it through its systematic deterrence effect.

Further, although it is true that objective of the exclusionary rule is certainly not to penalize the law enforcement officer for the past wrong he has done, it may have some indirect penalizing effect upon the law enforcement officers. For example, if the officer's improper conduct too frequently results in exclusion of evidence, his personal record will show it and promotions may not follow.[114]

4. Flexible Approach (Discretionary Exclusion or Inclusion)

Between the strict inclusionary and exclusionary approaches lies an intermediate solution which may be called the flexible approach. It suggests a situation where instead of deciding the issue of the admissibility of improperly obtained evidence by recourse to a fixed rule of exclusion or inclusion, the court is able to decide between these two alternatives by taking into account the conflicting

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[113] *Wigmore*, 1940, A Treatise on the Anglo-American System of Evidence in Trials of Common Law, para. 2184.

[114] A police officer stated that "... the police force is an egotistical society. We are all motivated by rank, position...." *Fielding*, 1988, Joining Forces, p. 148.

interest in each individual case. Since in legal terminology the power to make choice between alternative courses of action is called "judicial discretion"[115], this approach may be labelled the "discretionary rule".

4.1. Justifications

4.1.1. The Conflicting Nature of Perspectives

The law of evidence, and in particular the above examined rigid rules regulating the admissibility of improperly obtained evidence reflect two identifiable perspectives towards the criminal process.[116] The first is the utilitarian perspective which focuses on the ascertainments of truth and the apprehension of the guilty as a paramount objective. The other one may be labelled the moral perspective which regards the criminal procedure norms as deserving of protection and as taking precedence over other concerns.[117] The conflicting nature of these perspectives inevitably confronts the judges with a dilemma which cannot be solved without a flexible- discretionary- rule.

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[115] *Smith*, 1980, Judicial Review of Administrative Action, p. 278.

[116] Packer calls them models- "The Crime Control Model" and "Due Process Model" see *Packer*, 1969, The Limits of the Criminal Sanction, Chapter 8, p. 149.

[117] See *Zuckerman*, *supra* note 9, p. 344.

4.1.2. Undesirable Consequences of Both The Mandatory Exclusionary and Inclusionary Rules

It is true that the rule of mandatory inclusion and the rule of mandatory exclusion have the advantage of being relatively easy to apply. However, none of the above arguments, as has been seen, are totally convincing as to whether improperly obtained evidence should be automatically included or excluded. Both the exclusionary and inclusionary rule have undesirable consequences. As pointed out by Zuckerman,

> "there is an uncanny symmetry between the consequences of an admissibility and inadmissibility rule. If applied consistently, each of these rules will undermine public confidence in the criminal process. If the court always admits illegally obtained evidence, it will be seen to condone the malpractice of the law-enforcement agencies. If it always excludes it, it will be seen to abandon its duty to protect us from crime."[118]

Therefore, the only conclusion which can safely be drawn is that improperly obtained evidence must be excluded in some circumstances but admitted in others. This is likely to reduce the harsh consequences of a strict application of the rules.

4.1.3. The Need for Individualised Justice

Since the variety of unforeseeable circumstances may arise in day to day enforcement of the criminal procedure law, it may be impractical laying down fixed rules in that "rules without discretion cannot fully take into account the need for

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[118] *Ibid*, p. 345.

tailoring results to unique facts and circumstances of particular cases"[119]. Justice requires that the conditions surrounding the individual case is to be taken into account. This is called "individualised justice" and can only be achieved by the discretionary rule.[120] For many circumstances the mechanical application of the exclusionary or inclusionary rules may mean injustice.

4.1.4. The Subjection of Police Practices to Judicial Scrutiny

Another justification for discretionary inclusion or exclusion is that it enables the judiciary to scrutinize police practices in the investigation stage of criminal process. This scrutiny is said to endorse the fact that the law enforcement officers are not above the law.[121]

4.1.5. The Legitimacy of the Verdict Theory

According to this theory, which is discussed in detail in chapter five, courts are not only concerned with promoting the factual accuracy of the verdict but also with the legitimacy of the verdict. Decisions as to the admissibility of improperly obtained evidence depend on the courts findings whether the legitimacy of the verdict will be harmed.

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[119] *Davis*, 1970, Discretionary Justice; A preliminary Inquiry, p. 17.

[120] *James*, 1974, "A Judicial Note on the Control of Discretion in the Administration of Criminal Justice", in Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowich, ed by R. Hood, p. 157.

[121] *Zuckerman*, *supra* note 9, p. 356.

4.2. Criticisms

A number of disadvantages are associated with the discretionary rule, and they are often offered, at the same time, as an argument for the need to structure discretion through guidelines. The list of disadvantages attributed to the discretionary rule includes the lack of clarity, unpredictability, and the shortage of judicial accountability.

As far as the lack of clarity argument is concerned, it is maintained that " the discretion of a judge is the law of tyrants; it is always unknown; it is different in different Men".[122] Although it is true that whenever any aspect of a trial is left to the discretion of the judge , some degree of uncertainty is inevitably imported into the law, this line of criticism overstates it by equating the discretionary rule with arbitrariness. However, the discretionary rule gives the judge a freedom to choose between permissible alternatives.[123] The fact that individual judgments do not derive from a rigid rule, does not mean that there is no guiding force for the discretionary rule. The discretionary rule does not suggests a judicial discretion which is unlimited. An unrestrained discretion will not confirm with the idea of the Rule of Law.[124]

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[122] Lord Comden, *Doe d. Hindson v. Kersey* (1765) Lincoln's Inn Library Trial Pamphlet no:204 ft:124, cited by *Pattenden*, 1990, Judicial Discretion and Criminal Litigation, p. 11.

[123] *Dworkin*, 1977, "Is the Law a System of Rules", in The Philosophy of Law, ed. by R. M. Dworkin, p. 52.

[124] *Pattenden*, *supra* note 122, p. 26.

According to the argument for unpredictability, the discretionary rule does not permit the defence and the police alike to predict the outcome of possible challenge to the admissibility of improperly obtained evidence. Again, structuring discretion through guidelines increases one's ability to predict outcomes in particular cases. One should not, however, expect an absolute predictability. It is unlikely that guidelines can forecast all future situations in which the exclusionary or inclusionary discretion might be applied. Even if this would be possible, it is equally unlikely that guidelines structured at the present time will be sufficient to produce a fair outcome in all future cases.

The shortage of judicial accountability argument, on the other hand, is based on the concern that the discretionary rule may make difficult for the public to scrutinize judges for their decisions in individual cases. This concern may also be overcome by regulating discretion through guidelines which can be a yardstick for testing the judge's decisions and which reduce the scope for reliance on irrelevant or arbitrary factors.

These arguments reveal that, although each case depends on its own facts and circumstances, the principles by which the discretion is to be exercised are needed to be developed. The emergence of guidelines is likely to increase uniformity of judicial decisions and with it the stability and rationality of the legal system.[125] Conversely, lack of guidance on how to exercise the discretion is likely to harm the uniformity,

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[125] *Ibid*, p. 19.

clarity and consistency of the legal system. The possible criteria by which discretion might be exercised will be subjected to discussion in the next chapter.

5. Conclusion

The strict exclusionary rule is in direct confrontation with the crime control consideration, while the strict inclusionary rule places too much emphasis on the crime control consideration and at the same time ignores the moral dimension of the criminal trial. The danger of such strict rules may be summarized as follows; the strict exclusionary rule fails to bring crime under tight control and thus leads to the breakdown of public order, the rigid inclusionary rule can easily become a tool for those seeking to create a police state. It seems to me that the discretionary rule has some advantages over the strict rules. Because it does not require a choice- at least in advance- between the competing considerations, rather suggests that they are to be reconciled or weighed against each other by considering the fact and circumstances of each case. However, unless certain guidelines for the use of discretion exists this approach will also have the disadvantage of being imprecise and confusing.

CHAPTER FOUR

APPROACHES AND RULES OF TURKISH AND ENGLISH LAW REGARDING THE ADMISSIBILITY OF IMPROPERLY OBTAINED EVIDENCE

1. Introduction

In the previous chapter we discussed some of the theoretical perspectives that have proved useful in helping us understand the possible treatments of improperly obtained evidence. In this chapter it is proposed to discuss the English and Turkish approach to improperly obtained evidence and to point out differences and similarities of the law of each country in this area. Attention will be drawn to the fact that with regard to the admissibility of improperly obtained evidence England and Turkey have shared similar legislative activities in recent years. The legislative history of key provisions such as PACE 78 and CMUK 254 will be traced. The various elements of such provisions will be analysed in the light of the interpretation of these provisions by the appeal courts of each country.

2. The General Rule

2.1. In Turkish Law

The traditional view of a criminal trial in the Turkish criminal justice system is that its main objective is "truth discovery", with the role of the judge being to discover the truth by examining all sources of relevant information, including the

defendant.[1] A distinction is made between the formal (statutory) truth and the actual (objective) truth. The former denotes what is seen as real (truth); it does not extend beyond the appearance of the reality. For example, a contract for sale of land can only be proved by certain types of written agreement; it is not possible to prove the existence of it by other means. The actual truth, on the other hand, relates the substantial reality rather than the formal one. Unlike Turkish civil procedure, Turkish criminal procedure is interested in actual (objective) truth,[2] rather than the formal (statutory) truth. Section 237 of CMUK requires the court to investigate all aspects of a case with the purpose of ascertaining objective truth. Two important principles derive from this requirement. Firstly, in the proof-taking session the judge in a criminal trial is not bound by the submissions of the participants.[3] In order to search out the truth the court must on its own motion extend the taking of evidence to all facts and means of proof that are important for their decision. In other words the court is not limited to the evidence offered by the prosecution or the accused[4] but must satisfy itself with any investigation necessary to ensure that justice has been served. The court may even reformulate the criminal charge during the course of the trial.[5]

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[1] See Chapter Two 3.5.2.2.

[2] *Kunter*, 1986, Ceza Muhakemesi Hukuku (Turkish Criminal Procedure Law), p. 23.

[3] CMUK 155 and 156.

[4] By a motion to receive evidence, the party does nothing but call the court's attention to its clarifying function.

[5] Fulfilling this function requires the judge to exercise considerably more control over the process than his English counterpart who, as stated in the case of *R. v Marsh* (The Times, 6 July 1993), "sat and held the ring. It was for counsel on each side to conduct

Secondly, the judge is not bound by any formalistic rules (statute) that establish certain ways to prove certain facts in evaluating the evidence and deciding the case. Generally speaking in the criminal process, unlike civil process, everything may be regarded as evidence and the weight given to the evidence and the inferences allowable are left to the discretion of the court. It is the judge who evaluates all offered or self-requested evidence, giving it the weight he thinks it reasonably deserves. Neither the facts which may be given as evidence nor evaluation of them can be restricted. This is called "*the system of free conviction*" (*vicdani delil sistemi*) or "*the principle of free evaluation of evidence*" (*delillerin serbestligi prensibi*)[6]. This principle is a contrast with the ancient Continental system of "*legal proof*" *(preuve legale, gesetzliche Beweistheorie)* where the evaluation by the fact-finder was governed by strict rules attributing certain quantities of weight to any given evidentiary item. Under the system of legal proof, if the legally required evidence was obtained, a conviction had to follow regardless of the judge's evaluation of that evidence. The reverse was also true. No matter how persuaded the judge of the defendant's guilt on the basis of evidence other than legally required, a conviction was not permitted.[7] By

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examination and cross-examination and for the judge to see that they did it unfairly". For the relatively active role of the Turkish Judge, see Chapter Two 3.5.2.2.

[6] The terms of "moral certainty" or "full persuasion" of the judge may also be used to describe this principle which is expressed in the phrase of *Intime Conviction* by the French, *Libero Convincimento* by Italians, and *Beweiswurdigung* by Germans. This principle may be traced back to the ancient Roman law doctrine that proof of a fact meant nothing unless the judge was thoroughly convinced of its existence. *Kunter*, *supra* note 2, p. 542.

[7] This system was politically and sociologically inspired by the desire to restrain the judge's power, which was to be achieved by making him executor of prescribed rules rather than the decisive factor in a legal proceeding. This system was in force all over Europe from the early decades of the sixteenth century until the French revolution. See generally *Esmein*, 1914, A History of Continental Procedure; *Kunert*, 1966, "Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and Civil Law System of

refusing the system of legal proof, it is constitutionally established in Turkey that the judges shall decide according to their free conviction (*vicdani kanaat*)[8]. This principle is also reinforced by the provision of CMUK as follows;

> "with respect to the effect of reception of the evidence, the court decides according to its free conviction obtained from the investigation and the trial".[9]

Not surprisingly, this philosophy has made traditional Turkish law hostile to the exclusion of improperly obtained evidence. The cases in which the question of admissibility of improperly obtained evidence has directly been presented to the courts have virtually always ruled in favour of admissibility. In the case of *E.966/742, K.967/46*[10], for example, the Supreme Court of Military Appeals was confronted with the problem of eavesdropping by the police without lawful authority. Although the act was plainly illegal, it was held that the way of gathering evidence cannot be restricted, every piece of material which is helpful in reaching the truth may be taken as evidence. In a few cases, however, dicta were expressed that the evidence would not be admitted under all circumstances.[11]

'Free Proof' in the Code of Criminal Procedure", Buffalo Law Review 122, at p. 144.

[8] Article 138/1 of the Constitution: "Hakimler vicdani kanaatlerine gore hukum verirler".

[9] CMUK 254/1: "Mahkeme irat ve ikame edilen delilleri, durusmadan ve tahkikattan edinecegi kanaate gore takdir eder".

[10] T.18.1.1967, E.966/742, K.967/46 (2. division), 11 Askeri Adalet Dergisi (Journal of Military Justice) 51; Another decision to the same effect is *E.570, K.561* which was decided on 10.11.1970, (3 rd division) (unpublished) cited by *Coskun*, 1972, Aciklamali Askeri Mahkemelerin Kurulusu ve Yargilama Usulu Kanunu (The Establishment and Criminal Procedure of Military Courts), p. 226.

[11] 35/100 (2 nd division), date;26.4.1973 (unpublished) cited by *Coskun*, 1974, Gizli Dinleme (Eavesdropping), p. 148.

2.2. In English Law

In English law it is traditionally accepted that the trial is not a suitable forum for trying violations of legality or due process which are unconnected with the issue in the case and an investigation of an alleged illegality or impropriety could confuse and delay adjudication on the main issue[12]. Therefore relevant evidence is in principle admissible irrespective of the fact that it was illegally or improperly obtained and this is clearly emphasised by early cases. In *Jones v. Owens*[13] a constable unlawfully searched the suspect and found a quantity of young salmon in his pocket. By accepting this evidence as a basis of judgment the suspect was convicted of unlawful fishing and the following view expressed;

> "it would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means, it could not be used against a party charged with an offence".

This approach has been employed in subsequent cases. In *Kuruma*[14] the Judicial Committee of the Privy Council held that in order to decide whether evidence is admissible, the test to be applied is whether it is relevant to the matters in issue. If the answer is affirmative, it is admissible and the court is not concerned with how it was obtained.[15] The accused in this case was convicted of being in unlawful

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[12] *Wigmore*, 1940, A Treatise on the Anglo-American System of Evidence in Trials of Common Law, 3rd ed., vol.8, s. 2183, p. 5.

[13] (1870) 34 J.P. 759.

[14] [1955] A.C. 197.

[15] Although the facts which lead to the appeal in *Kuruma* had occurred in Kenya, the opinion of the Judicial Committee of the Privy Council is regarded as a restatement of the law of England as it stood in 1955.

possession of ammunition which had been discovered in consequence of a search by a police officer of a lower rank than the rules required for such searches. In support of its judgment the Privy Council referred to a dictum in *R. v Leatham*[16] where it was stated that it does not matter how evidence was obtained, even if it had been obtained by theft it would be admissible. Thus, English law traditionally did not see the problem of the admissibility of improperly obtained evidence in terms of principles such as legitimacy, deterrent, or protective, but was instead concerned with the relevance of the evidence. Although all cases mentioned above are concerned with illegal searches, the approach which has been adopted in these cases is applicable to all sort of evidence[17], subject to certain exceptions.

2.3. Comparison

It becomes obvious from the above explanation that for many years it was well established as a general rule both in Turkey and England that the means by which evidence was obtained was immaterial to its admissibility in criminal proceedings. Both jurisdictions hold a firm belief that the ends of justice are better served if no attention is given to the fashion in which relevant evidence is produced. This general rule is not, however, free from any exception.

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[16] (1861) 8 Cox C. C. 498, at p.501; The issue in this case was involved the admissibility of letters, containing incriminating statements to corrupt practices at an election, which were obtained as a result of a clue given in the course of improper examination of the defendant.

[17] For the case of illegally obtained sample of body fluid see *R. v Apicella* (1985) 82 Cr. App. R. 295; for illegally taking breath specimens see *Fox v Chief Constable of Gwent* [1986] A.C. 281 (H.L).

3. Exceptions to the General Rule

3.1. Traditionally

3.1.1. In Turkish Law

The principle of free reception and evaluation of evidence does not mean that the Turkish courts have power to convict the suspect on whim. There are limits to this general rule. It is firstly limited by the maxim *in dubio pro reo* ;in doubt decide for the accused. This maxim mandates a standard of proof substantially similar to the English burden of proof[18]. Secondly, the principle of orality requires that nothing but what has been discussed in open court can be made a basis for judgment.[19] Thirdly, the court is also required to disclose the grounds for the judgment[20]. According to the CMUK a criminal judgment contains two parts, the dispositive judgment and the statements of reason (*gerekce*)[21]. Not only all single facts that were found but also all inferences leading from one fact to another and to the final combination of facts are included in the *gerekce*. By qualifying the principle of free

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[18] It is a common misapprehension about criminal procedure in the civil law system that there is no presumption of innocence. See, *Merryman*, 1985, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 131.

[19] CMUK 254/1.

[20] "Takdire esas olan hal ve sebeblerin hukumde gosterilmesi gerektigine..", Yargitay, 1 C.D, 14.4.1966 T ve 902/1245; ile 25.4.1970 T, 2688/1307 decisions.

[21] CMUK 260.

evaluation the requirement of *gerekce* opens the doors to an appeal based on the alleged violation of rules of logic or experience or of the laws of nature.

Finally and more importantly it is not permitted to use every possible evidence to reach the objective (actual) truth. The use of some methods described by the constitution and Code of Criminal procedure for obtaining evidence is forbidden. Although the Code before the 1992 Amendment did not contain specific exclusionary rules that prohibit the use in court of any evidence obtained through violation of those provisions , in a few cases dicta were expressed that all evidence obtained in violation of those provisions or of public decency or morality should be excluded regardless of its probative value.[22] The fact that evidence obtained improperly cannot be regarded as evidence is stated in the phrase of *"evidentiary use prohibition" (delil yasaklari)*.[23]

3.1.2. In English Law

Besides accepting as a general rule the principle of admissibility of relevant evidence, it has been recognised at common law that the trial judge always has the discretion to disallow evidence in criminal cases if the rules of admissibility would operate unfairly against an accused. Apart from reaffirming the traditional rule under which relevant evidence is always admissible regardless of how it was obtained, the

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[22] "... kanuna, ahlaka ve genel adaba aykiri surette toplanan delilleri hakim telakki etmekten kacinmak zorundadir." Askeri Yargitay (The Supreme Court of Military Appeals), 2. Ceza Dairesi, 26.4.1973 t, 35/100, cited by *Coskun*, *supra* note 11 , p. 148.

[23] This term is employed in Turkey to cover all exclusions of evidence, including those based on competence or relevance.

case of *Kuruma*[24] gave, at the same time, some support to the existence of a discretion to suppress improperly obtained evidence. The existence of the judge's discretion to exclude illegally or improperly obtained evidence was acknowledged in *Jeffrey v Black*[25],in which the suspect was arrested for a trivial offence of theft (of a sandwich) and then the police searched the suspect's home and discovered a quantity of drugs. Although the Divisional Court held the opinion that the search was illegal on the ground that it was not for the offence for which he was arrested, evidence obtained by illegal search was accepted as a basis for judgement. However, the Court expressed the view that

> "...the justices sitting in this case, like any other criminal tribunal in England sitting under the English law, have a general discretion to decline to allow any evidence to be called by the prosecution if they think it would be unfair or oppressive to allow that to be done...it is a discretion which every criminal judge has all the time in respect of all the evidence which is tendered by prosecution."[26]

The proper scope of the exclusionary discretion was not certain at common law. The Privy Council in *Kuruma* did not articulate the basis on which relevant but improperly obtained evidence may be excluded in the exercise of discretion. Evidence obtained by trick was given by the Privy Council to illustrate excludable evidence on the ground that its admission would be unfair to the accused.[27] The court, however,

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[24] [1955] A.C. 197.

[25] [1978] 1 Q.B. 490, The existence of the discretion was first recognised in *Voisin* [1918] 1 K.B. 531 at 539-540; see also *May* (1952) 36 Cr. App. R. 91 at p. 93.

[26] [1978] 1 Q.B. 497-498.

[27] *Kuruma* [1955] A.C. 204.

did not attempt to account for why a trick can give rise to the exclusion of evidence whereas the illegality in *Kuruma* did not. Similarly, in *Callis v Gunn* it was held that evidence of fingerprints obtained without cautioning the suspect that he could refuse was admissible. Simultaneously, it was proclaimed that the discretion would be exercised to disallow evidence if "the evidence was obtained oppressively or by false representations or a trick, threat or bribe".[28] More recently, in the case of *Jeffrey v Black*[29], it was held on appeal that cannabis and cannabis resin obtained in the absence of the defendant's consent or of a search warrant should had been admitted as evidence; at the same time it was stated that

> "if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery, or they have misled someone , or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, than it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial"[30]

Further discussion to clarify the scope of the discretionary power to exclude was conducted in *R. v Sang*[31]. Five Law Lords dedicated their effort to bringing dicta in previous cases into harmony. There is, however, very little consensus in *R. v Sang* on the true ambit of the discretion except two points; The first is that as a part of his function of ensuring the accused received a fair trial according to law the judge always

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[28] *Callis v Gunn*, [1964] 1 Q.B. 495.

[29] [1978] 1 Q.B. 490.

[30] *Jeffrey v Black* [1978] 1 Q.B. 490, at 498, emphasis added.

[31] [1979] 2 All E. R. 1222; this decision has been subjected to intense scrutiny and criticism; see, *Polyviou*, 1981, "Illegally Obtained Evidence and *R v. Sang*" in Crime, proof and Punishment: Essays in Memory of Sir Robert Cross, ed. by Tapper, p. 226.

has a discretion to disallow evidence if its prejudicial effect outweighs its probative value. The second is that the discretion could not be used in entrapment cases. The unanimity as to the issue of entrapment was the result of the recognition that the discretion to exclude improperly obtained evidence can only be exercised where evidence was "obtained from the accused after the commission of offence".[32] That is to say, the trial judge has no discretion to exclude improperly obtained evidence if it was obtained during or before the commission of offence. This formulation automatically rules out the exercise of discretion in cases such as evidence obtained by means of telephone tapping or bugging of the suspect's residence during the commission of offence.

One should notice that in none of the above cited cases had evidence been excluded in the exercise of discretion ; instead, in each case it is stated that the discretion would be exercised if some other things occurred. It is open to speculation whether the discretion would be exercised had the other things happened. Leaving aside the speculations one thing is clear; that the judicial discretion to exclude relevant evidence on the ground that it was illegally or improperly obtained has been rarely exercised at common law in reported decisions. The cases of *R. v Court*[33] and *R. v Payne*[34] are rare illustrations of the use of discretion. The appellants in both cases, convicted of driving motorcars whilst unfit through driving, were taken to a police station immediately after their arrest. They were told at the station that a doctor

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[32] *R. v Sang*, [1979] 2 All E. R. 1222.

[33] [1962] Crim. L. R. 697.

[34] [1963] 1 All E. R. 848.

would examine them in order to determine whether they suffered from any illness or injury; but that the purpose of examination was not to ascertain whether they were fit to drive. Although at the time of examination there was no deliberate attempt on the part of the police to mislead the suspects, later on the police decided to take advantage of medical examination of the suspect. In other words, the evidence obtained as a result of medical examination was sought to be used for a purpose which it was not originally intended; to prove they were intoxicated. The Court of Appeal held in both cases that evidence of the doctor that the defendant had not been fit to drive should have been excluded in the exercise of discretion. Evidence, which arose in these cases as a result of the physical examination, was seen in *R. v Sang*[35] as tantamount to a self-incriminating admission which the suspect has been unfairly induced to make, after the offence has been committed, against the principle of *nemo debet prodere se ipsum.*

3.1.3. Comparison

The above explanations show that the question of how the court should handle improperly obtained evidence has been a problem that has plagued both Turkish and English justice for a long time. As far as the traditional law of each country is concerned, the issue was far from settled. No attempt has been made by the higher courts of Turkey and England to decide once and for all what was the state of law. Although a coherent and principled approach to the problem cannot be said to have emerged, some form of exclusionary rule was recognised in exceptional cases in both

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[35] [1979] All E. R. 1222.

jurisdictions. Traditionally, both jurisdictions, however, gave more weight to controlling crime than to protecting society from improper harassment by the law enforcement officer.

Establishing the existence of an exclusionary rule in Turkey and in England is in conflict with the commonly held assumption that the exclusionary rule is "unique to American jurisprudence"[36]. Indeed, one of the leading American commentators argued that non-adoption of the exclusionary rule by any other civilized nation is one of the proofs of the irrationality of the exclusionary rule[37]. The above explanations, however, reveal that this is a misconception; European nations including England and Turkey have also recognised some kind of exclusionary rule in their criminal justice systems, and thus there is nothing, at least any more, unique to the United States. Moreover, it is argued by Pakter that exclusion was discussed by European scholars and courts long before the American counterparts and a form of exclusionary rule was adopted in France and Germany before the adoption of the exclusionary rule in the United States.[38]

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[36] According to Chief Justice Burger, exclusion of improperly obtained evidence is "unique to American jurisprudence", *Bivens v. Six Unknown Named Agents of Fed. Breou of Narcotics*, 403 U.S. 388 (1971); see also *Macdougall*, 1985, "The Exclusionary Rule and Its Alternatives- Remedies for Constitutional Violations in Canada and the United States", 76 The Journal of Criminal Law & Criminology 608, at 627.

[37] *Wilkey*, 1978, "The Exclusionary Rule: Why suppress valid Evidence?" 62 Judicature 216

[38] Pakter maintains that " in France, as early as 1672, a proceeding based on illegal search was 'nullified' which, in effect, excluded the evidence. Proceedings were nullified frequently in the nineteenth century. In this century, the first French case to reserve a decision due to an illegal search and seizure occurred in 1910, four years before the first United states case. ... Evidence obtained from an illegal search and seizure was excluded in Germany as early as 1889." (footnotes are omitted). *Pakter*, 1985, "Exclusionary Rules in

3.2. Recent Legislations

In recent years both English and Turkish legal systems have been reformulating their approaches to the admission of improperly obtained evidence. Indeed, the legislature in both countries passed a law regulating this issue; The Police and Criminal Evidence Act 1984 for England and the 1992 Amendment on the Code of Criminal procedure for Turkey.

3.2.1. In Turkey

In spite of the fact that the search for truth is the dominant function of the Turkish Criminal Justice System, the 1992 Amendment added two important provisions which require the exclusion of improperly obtained evidence to the Code of Criminal Procedure (CMUK).

3.2.1.1. Section 254/2

The new sub-clause 254/2 governs the admissibility of improperly obtained evidence generally in the following terms;

> "evidence obtained in breach of law (unlawfully) by investigative authorities cannot be taken as a basis for the judgment"

France, Germany, and Italy", 9 Hastings International and Comparative Law Review 1, 4.

The phraseology of this provision strictly prohibits the admission of evidence in any criminal case which is obtained unlawfully, regardless of the probative value or reliability of such evidence. It may, therefore, be applied to the situations where the officers have acted in the objectively reasonable belief that their conduct does not violate the law or to irregularities which are rather minor or merely technical. The original version of the provision required bad faith on the part of the law enforcement officer[39], but this requirement was omitted from the formulation of the section without given any reason.

Article 254/b has now been in operation for a short time. It is still too early to say how it has been interpreted by Turkish courts. The most dramatic possibility would be that any evidence obtained in a situation which did not meet the legal standards laid down would be inadmissible at the trial.

Although a specific rationale is not being given by the Parliament, with the exclusion of all improperly obtained evidence it would have been hoped, firstly, that the citizen's procedural rights would become more than a "form of words". Secondly, the integrity of the court system or the legitimacy of the verdict would be upheld since the courts would not be condoning or actually participating in improper behaviour by using evidence that had been improperly obtained. Thirdly, the exclusion of improperly obtained evidence would discourage the police and the gendarmerie from engaging in such activities since they would have nothing to gain from evidence so

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[39] The Bill Proposed by the Government, 11 TBMM Tutanak Dergisi (Journal of Parliamentary Debates), p. 24.

obtained. The question of whether this provision has brought Turkey close to having an American style exclusionary rule[40] is discussed in the next chapter.

3.2.1.2. Section 135/A

The other provision of the 1992 Amendment -135a-, which contains specific exclusionary rules that prohibit the use in court of any statements obtained through violation of the statutory provisions that prohibit certain behaviours, reads as follows;

> " 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 drug 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."

This section seems not to exclude statements on the ground of unreliability, it is rather intended to protect human dignity and to serve as a symbol separating liberal from authoritarian proceedings. The detailed analysis of this provision will be made in chapter five.

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[40] A short time after the enactment of the Bill the deputy prime minister of Turkey stated that "the law on judicial practices has brought American standards to bear on our criminal procedures". See The Financial Times 7 May 1993.

3.2.1.3. Historical Backgrounds of These Provisions

When the preamble and the Parliamentary debate of the Bill are examined, it becomes evident that the off-quoted statements from official quarters to the effect that Turkey accepted , *inter alia*, the above cited provisions of its own will and just because the Turkish nation deserves this[41] seems to be incorrect, or at least incomplete. Since the military coup on 12 September 1980 not only put an end to the parliamentary democracy in Turkey but also left the country with a bad reputation in the field of human rights[42], the western countries felt the need to freeze relations and cooperation with Turkey. Indeed, Turkey's membership of the European parliament was blocked[43], five other members of the Council of Europe brought applications against Turkey before the European Commission of Human Rights alleging major violations of several articles of the European Convention on Human Rights[44], and the Association Agreement of Turkey with the European Economic Community was

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[41] See, Cumhuriyet (Daily Newspaper) 02/09/1992, "Demirel (then prime minister): Yargi Reformu Halk Icin".

[42] See, *inter alia*, *Amnesty International*, 1986, Turkey: Testimony on Torture; *Parliamentary Assembly of the Council of Europe (PACE) Political Affairs Committee*, 1984, Report on Fact-Finding Visit to Turkey, (17 May, Doc.5208); *PACE Legal Affairs Committee*, 1984, Opinion on the Situation in Turkey (7 May, Doc 5216); More recently, *the European Committee for the Prevention of Torture*, The Public Statement on Turkey (15 December 1992), printed in 4 European Journal of International Law 199 (1993).

[43] Parliamentary Assembly of the Council of Europe (PACE) Order 398 (14 May 1981), excluding Turkish delegates, Res.803 (30 Sept 1983), 982 (9 May 1984), 822 (10 May 1984), 840 (23 April 1985).

[44] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* (Apps. 9940-9944) (1982) 35 D&R 143, Declared admissible 1983, printed in 6 Human Rights Law Journal 331 (1985).

suspended[45]. All these actions naturally put pressure on Turkey and since 1983 the Turkish governments have endeavoured to improve Turkey's image abroad by adhering to a number of international conventions[46] concerning human rights and by a number of national law reforms[47]. More recently, however, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) organised three visits to Turkey. The first two visits, carried out from 9 to 21 September 1990 and 29 September to 7 October 1991, were of an *ad hoc* nature. The negative conclusions reached by the CPT as a result of these visits are followed by a number of suggestions to the effect that legal safeguards against torture and other forms of ill-treatment need to be reinforced and new safeguards introduced. Although after the third visit, which took place from 22 November to 3 December 1992, the Committee concluded that the Turkish authorities failed to improve the situation in the light of its recommendation, the Turkish Parliament at that time was about to legislate the law amending some provisions of the Code of Criminal procedure and of the law relating to the organisation and procedure of state security courts. Indeed, the legislation going in the direction of the recommendation made by the CPT on the strengthening of legal safeguards against torture and other form of ill-

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[45] See, *Keesings Contemporary Archives* (May 1987) p. 31287.

[46] Turkey has ratified both the 1984 UN and 1987 Counsel of Europe Conventions Against Torture, see The Guardian, 8 Apr. 1988 and The Independent, 9 May 1988, see also Turkish Official Gazette, 27.2.1988, sayi: 19738 and 10.8.1988 sayi:19895 ; On 29 January 1987 Turkey made a declaration under article 25 of European Convention on Human rights recognising the competence of the Commission to receive applications from individuals alleging violations of their rights and freedoms guaranteed by the Convention. See Chapter Two 3.3.

[47] Article 141, 142 and 163 of the Penal Code, which were aimed at combating communism, separatism and advocacy of a religious state, were repealed in 1991. Statute no;3713 of 12 March 1991, The Official Gazette, no:20843 of 12 March 1991.

treatment had been approved by the Turkish Grand National Assembly on 21 May 1992, but it was subsequently returned by the President of the republic to the assembly for reconsideration. At the end a revised version of the Bill came into force on 1 December 1992. This Bill was introduced by the government as a device enabling democratisation of the country and catching up with the procedural standards of member states of European Council[48]. During the parliamentary debate of it, several spokesmen on behalf of the government firmly stated that the Bill, if it became a law, would improve the reputation of the country and stop the recurrence of criticism of Turkey by the international community in the field of democratization and human rights[49].

To conclude, firstly, the 1992 Amendment was introduced as a result of external pressure. Since the West is economically and strategically very important to Turkey, reports of Western governmental and non-governmental organizations about human rights abuses in Turkey, particularly involving torture, were, and still are, a matter of great concern in Turkey. Secondly the possible effect of this legislation was exaggerated, if not stated optimistically, by the Turkish government. The social role

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[48] The Preamble of the Bill.

[49] For the benefit of Turkish readers it may serve a purpose to quote the spoksmen's exact words: "Bu degisiklerle, iskence ve iskence iddialari ortadan kalkacak.." (These amendments will cease allegations of torture), Seyfi Oktay, the Minister of Justice; "..Turkiye uluslararasi platformlarda suclamalardan kurtulacak.."and "..tasari tartismalara son verecek, ulkemize yoneltilen suclamalara set cekecek.." (This Bill, if it becomes law, will stop allegations of torture against Turkey in international level), Adnan Keskin (SHP, Denizli); "..artik ulkemizde iskence iddiasinin sozu dahi edilemeyecektir.." (from now on it will not be possible to mention allegations of torture in our country), Melih Papuccuoglu (DYP, Balikesir), TBMM B:79 21.5.1992 O:3, 11 TBMM Tutanak Dergisi (Journal of Parliamentary Debates) 338.

of the law enforcement officers remains essentially unchanged; CMUK has done little to alter the culture and organization of law enforcing. Altering the procedural rules will not necessarily have any impact on behaviour and certainly will not lead to predictable or uniform change. The very fact that pre-1992 Amendment practices did not in many respects correspond to the formal rules[50] should make this point obvious enough.

3.2.2. In England

3.2.2.1. In General

The existence of the judge's discretion to exclude improperly obtained evidence was recognised at common law. In 1984, however, the Police and Criminal Evidence Act regulated the issue of the admissibility of improperly obtained evidence. Accordingly, PACE contains three sections which are relevant for our purposes: section 78, which deals with the exclusion of unfair evidence generally, section 76, which relates to the admissibility of confessions, and section 82(3), which preserves the common law discretion to exclude relevant evidence.

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[50] The use of torture or any other cruel or inhuman treatment has always been prohibited in Turkish national law. See Article 26 of the Constitution dated 1876 (Dustur, I.Tertip, C.4, s.4-20), Article 73 of the 1924 Constitution (Dustur, 3. Tertip, C.5, s.1019-1032), and article 14 of the 1961 Constitution (RG, 20/07/1961). Finally, Article 17, paragraph 3, of the Constitution states: "No one shall be subjected to a penalty or to treatment incompatible with human dignity". Article 245 of the Criminal Code punishes law enforcement officers who ill-treat or cause bodily injury to persons with whom they come into contact in the fulfilment of their duties. Article 243 of the criminal Code punishes any public official who tortures an accused person in order to make him confess his offence.

3.2.2.2. Section 78/1

The basic provision is section 78(1) which states that

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

This section has chosen a middle ground between admitting all evidence, however obtained, and excluding all improperly obtained evidence, by giving the judge a discretion to exclude evidence. A certain amount of help by the Act was provided as to the extent of this discretion; the evidence may be excluded if its admission would adversely affect the fairness of the proceedings. There is, however, still room for controversy as to when the admission of the evidence in question adversely affects the fairness of a trial. The concept of "adverse effect upon the fairness of trial" will be examined in the following chapter.

3.2.2.2.1. Background of Section 78

When the PACE was first presented before the Parliament, this section was not included. Section 78 emerged after an amendment to the PACE Bill was proposed in the House of Lords by Lord Scarman and approved by the House. This amendment become known as the Scarman amendment which stated that:

> "if it appears to the court in any proceedings that any evidence (other than a confession) proposed to be given

by the prosecution may have been obtained improperly, the court shall not allow the evidence to be given unless

(a) the prosecution proves to the court beyond reasonable doubt that it was obtained lawfully and in accordance with a code of practice (where applicable) issued, approved, and in force, under Part VI of this Act; or

(b) the court is satisfied that anything improperly done in obtaining it was of no material significance in all the circumstances of the case and ought, therefore, to be disregarded; or

(c) the court is satisfied that the probative value of the evidence, the gravity of the offence charged, and the circumstances in which the evidence was obtained are such that the public interest in the fair administration of the criminal law requires the evidence to be given, notwithstanding that it was obtained improperly.

To put this into more simple words it means that the judge, faced with evidence improperly obtained , is bound to exclude it except in certain circumstances which are specified in the subsections.

A number of important features of this proposal may be identified. First, the amendment is said to restore the wider power to exclude improperly obtained evidence which many had thought was part of the law until the decision in *R. v Sang*.[51] There is, however, a slight difference between the pre-*Sang* discretion and the discretion proposed in this amendment in that the former was a discretion to exclude otherwise admissible evidence while the latter is one to include otherwise inadmissible evidence. Contrary to the Lord Chancellor's observation that the Scarman amendment introduces the American style "total exclusion"[52], it follows very much the position of *"a reverse*

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[51] The Parliamentary Debates (Hansard); House of Lords (vol:455) (1984) col:672.

[52] The Lord Chancellor, *ibid*, col 667.

onus exclusionary rule" proposal made by the Australian Law Reform Commission in their report on criminal investigation.[53] Second, it gives some guidelines to the court as to how the discretion is to be exercised. The guidelines such as "gravity of the offence charged", "the probative value of the evidence", and "material significance" were, however, criticised for their lack of clarity.[54] Third, although the objective of the amendment was not to discipline the police it was acknowledged by the Lord Scarman that it would place upon the courts a deterrent power by operating "as a deterrent to abuse of power by the police"[55]. Finally, the onus of proof to justify inclusion is placed upon the prosecution.

When the Bill returned to the House of Commons the Government decided not to accept the Scarman amendment on the grounds of, firstly, the lack of desire for improperly obtained evidence to be excluded to mark society's disapproval of the improper police conduct.[56] It was clearly stated by Mr L. Brittan, the then Home Secretary, that "disciplinary matters should be dealt with by disciplinary procedures"[57], and the only purpose for the exclusion should be to avoid an unfair trial[58]. The second reason for unwillingness on the part of the Government for

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[53] Criminal Investigation: Report No:2, An Interim Report, Australian Government Publishing Service, Canberra, 1975 para:295 ;This formulation is practised in the common law of Scotland, see Lord McCluskey, The Parliamentary Debates (Hansard) House of Lords, vol 455, para:666, 31 July 1984.

[54] The Lord Chancellor, *ibid*, col. 670.

[55] *Ibid*, col. 672 and 657.

[56] Parliamentary Debates (Hansard): House of Commons (vol:65) (1984) col. 1012.

[57] *Ibid*, col. 1029.

[58] *Ibid*, col. 1012.

accepting the Scarman amendment was attributed to the heavy onus of proof which is placed upon the prosecution and to the excessive burdens on the courts of "trial within trials".[59] Finally, the guidelines laid down in the Scarman amendment were considered to be too complex for a court in the course of ordinary criminal proceedings.[60] Eventually, to replace the Scarman amendment the Government brought forward its amendment which was described as "simple and clear in form, yet suitably flexible".[61] The Government amendment was enacted and now appears as section 78.

3.2.2.2.2. The Important Features of Section 78

3.2.2.2.2.1. Applicability to various situations

Section 78(1) may be implemented in a variety of situations, with or without the presence of some elements of impropriety in the way in which the evidence was obtained. In order to apply section 78(1), it is not necessary that there should be any impropriety on the part of the police or anyone else. It includes an "unfairness" discretion unhampered by the need to establish impropriety. Indeed, in *R. v O'Connor*[62], where a conspiracy charge was in issue, the Court of Appeal held that

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[59] *Ibid,* col. 1013 and 1023.

[60] *Ibid,* col. 1014 and 1029; Mr Lyell identified nine different matters which the court will have to go through every time the subject is raised , see col. 1014.

[61] *Ibid,* col. 1014.

[62] (1987) 85 Cr. App. R. 298; see also more recent leading authorities *R. v Kempster* [1989] 1 W. L. R. 1125 and *R. v Mattison* [1990] Crim. L. R. 117.

section 78(1) is applicable to evidence of a co-accused's conviction for conspiracy with the defendant. The reason given for this is that the defendant had not been present at the other man's trial and had no opportunity to cross-examine him. To admit the conviction as an evidence therefore would enable the prosecution to put a statement made by the co-accused in the absence of the defendant to the jury without the co-accused being present to be cross-examined. The list of possible sample cases is endless, but this study is confined to the application of section 78(1) to exclude evidence which has been improperly obtained. Implementation of s 78(1) to exclude properly obtained evidence which, if admitted, may diminish the chances of reaching a fair judgment is left out of the scope of this study.

3.2.2.2.2.2. **Covers all the evidence**

Despite the draftsman's intention not to omit any specific form of evidence from the section[63] some writers argued that section 78 is designed for evidence other than confessions[64]. No such restriction appears in the section. The Court of Appeal also did not agree with this restricted approach and adopted a position which is in conformity with the "*mind of the legislature*"[65] in several cases. In the case of *R. v*

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[63] Mr Brittan, the then Home Secretary, stated that "there is no restriction in our clause on applying the test of admissibility to confession evidence..... Our amendment will ... provide a framework for considering the fairness of admitting all forms of evidence..", Parliamentary Debates, House of Commons, 1983, vol. 65, col. 1014.

[64] *Robertson*, 1989, "The Looking-Glass World of Section 78", New Law Journal, (September 15), p. 1224.

[65] Although it is often difficult to find out the legislature's intention the point in question is clear in the parliamentary record of the section. See, *supra* note 63.

Mason[66], for example, it was held that the word "evidence" in the section in question means all the evidence which may be introduced by the prosecution to the court: it even includes a confession which has passed the admissibility test under section 76(2). Another example would be the case of *R. v Gaynor*[67]. in which the failure on the part of the police to observe identification procedures laid down in the Codes of Practice resulted in the exclusion of the identification evidence. Furthermore, the section also would seem to widen the scope of the discretion at common law by removing restrictions on the exclusionary discretion imposed by the House of Lords in *R. v Sang* to the effect that evidence obtained from the defendant after the commission of the offence is incapable of being subject to the discretion.[68] Accordingly, section 78(1) potentially applies to evidence obtained by entrapment: however exclusion in such cases is rare.[69]

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[66] [1988] 1 W. L. R. 139.

[67] [1988] Crim. L. R. 242; For the fact that English judiciary are prepared to use their powers of exclusion to ensure that identification procedures are complied with see *R. v Ladlow* [1989] Crim. L. R. 219; *R. v Grannell* (1989) 90 Cr. App. R 149, *R. v Samms* [1991] Crim. L. R. 197, and *R. v Nagah* (1991) 92 Cr. App. R. 344.

[68] *R. v Christou and Wright* [1992] 4 All E. R. 559, at 564; *R. v Edwards* [1991] Crim. L. R. 45; *R. v Gill and Ranuana* [1989] Crim L. R. 358.

[69] It was even decided in the case of *Governor of Pentonville Prison, ex parte Chinoy* - [1992] 1 All E. R. 317- that the fact of entrapment did not infringe English law in that the detection and proof of certain types of criminal activity such as drug trafficking offences may necessitate the employment of covert and unlawful means.

3.2.2.2.2.3. Confined to the Prosecution Evidence

Section 78 empowered a court to refuse to admit only the evidence on which the prosecution "proposes to rely". It naturally covers the evidence proposed by other parties but relied upon by the prosecution in that accepting the contrary would enable the prosecution to bring the otherwise inadmissible evidence into the trial by indirect route.[70]

3.2.2.2.3. The Process of Exercising the Discretion

3.2.2.2.3.1. No guidelines

Both the Parliament and the courts have refused to lay down any guidelines clarifying precisely how the discretion should be exercised. During the Parliamentary debate of section 78 in the House of Commons it was stated by the Home Secretary that;

> "... we must recognise that the multiplicity of circumstances in which that may arise makes it impossible, or at any rate undesirable, to confine the matter to a set of specific criteria"[71]

The judiciary has also expressly declined to set any general guidance by making the following typical comments:

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[70] See *Murdoch v Taylor*, [1965] A.C. 574.

[71] House of Commons Official Report, Parliamentary Debates (Hansard), vol.65, no. 212, p. 1014.

"it is undesirable to attempt any general guidance as to the way in which a judge's discretion under s.78 or his inherent powers should be exercised, circumstances vary infinitely."[72],

"every case has to be determined on its own facts."[73],

"the circumstances of each case are almost always different, and judges may well take different views in the proper exercise of their discretion even where the circumstances are similar"[74],

> "we are concerned with the exercise of discretion by the trial judge. This should not lightly be overruled."[75]

This approach can be disputed by maintaining that it is not realistic to say that "circumstances vary infinitely", different facts of individual cases should have to be examined in the light of general discretionary principles. As argued by Ashworth the choice of principle -whether disciplinary, protective or reliability- cannot be avoided in the practical exercise of such a discretion.[76] The judicial reluctance to set certain criteria to govern judicial discretion has a number of disadvantages. First, judicial attitude cannot be predicted and therefore it would be hard to know when the discretion will be exercised. Second, in the absence of some clear guidelines to regulate judicial discretion rational criticism of its exercise can hardly be possible.[77]

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[72] *R. v Samuel* [1988] 1 Q.B. 615, at p. 629.

[73] *R. v Parris* (1989) 89 Cr. App. R. 68.

[74] *R. v Jelen and Katz* (1990) 90 Cr. App. R. 456, at p. 465.

[75] Lord Mustill, in *R. v Preston and others* (1994) 98 Cr. App. R. 405, at p. 434.

[76] *Ashworth*, 1977, "Excluding Evidence as Protecting Rights", Crim. L. R. 723, at 734.

[77] *Allen*, 1990, "Discretion and Security: Excluding Evidence Under Section 78(1) of the Police and Criminal Evidence Act 1984, 49 Cambridge Law Review 80.

Guidelines, on the other hand, are expected to be capable of ensuring more open and rational decision making. A number of reasons are given for this. First, they make accountability possible by acting as a criterion for testing decisions, and therefore minimize the extent of reliance upon irrelevant, improper or arbitrary factors. Second, they encourage consistency in judicial decisions. Third, they prompt the law enforcement officer to be more careful and critical about the evidence to be obtained and the policies to be followed.[78]

Adopting guidelines, however, is not free from disadvantages: By their very nature, the factors which will be considered in individual cases will be limited. The more precise and indisputable they are , the less consideration to other factors will be given. Moreover, guidelines tend to became fixed and difficult to change, and instead of being reviewed in view of experience and objectives, become unalterable.[79] In the light of these pros and cons it is now clear that the strict adherence to guidelines will contrast with the idea of giving discretion.

Due to the lack of judicial guidelines to govern judicial discretion it is maintained that it may be worthwhile to look at other jurisdictions such as the Scottish, Irish, Canadian and Australian where a similar wide discretion has been operated for some time and a number of guidelines have been identified.[80] These

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[78] *Galligan*, 1987, "Regulating Pre-Trial Decisions" in Criminal Law and Justice: Essays from the W G Hart Workshop, ed. by Dennis, p. 177.

[79] *Ibid*, 186-7

[80] See, *Yeo*, 1981, "The Discretion To Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches", 13 Melbourne University Law Review 46; *Allen*, *supra*

include taking into account factors such as the importance of the rights breached; whether the impropriety in question was deliberate; the gravity of the offence charged; the probative value of the improperly obtained evidence; the presence or otherwise of circumstances of urgency, emergency or necessity; and the availability or otherwise of a direct sanction against the law enforcement officer responsible for impropriety. From the Parliamentary history of the section it is clear that some of these guidelines were included in the Scarman amendment which has not been enacted on the ground, *inter alia*, that it is unnecessary for Parliament to set out the criteria by which a judge should be guided. In the light of the Parliamentary history of the section one may argue that had the legislature intended to authorize the courts to apply such a test, it would have said so. Although it is true that the courts are not being authorised to do so, they are not openly being banned from applying guidelines adopted by other jurisdictions in exercising their discretion.

Despite the judiciary's unwillingness to lay down some guidelines to clarify the process of exercising the discretion, where the argument for exclusion of evidence under section 78(1) is based on the effect of alleged breach of the procedural rules two points have to be considered before exercising the discretion. These are;

3.2.2.2.3.2. **Impropriety**

The first stage is to identify whether there has been an impropriety. As far as English law is concerned, the "impropriety" covers not only evidence which obtained

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note 77, p. 85; *Pattenden*, 1990, Judicial Discretion and Criminal Litigation 288.

through violation of a statute, a rule of common law, or a provision of the Codes of Practice[81], but also evidence obtained by way of unfair or unethical manner. The meaning and the scope of the term "improperly" has been clarified in the Introduction Chapter.[82]

3.2.2.2.3.3. **Unfairness**

The second step is to decide whether admitting improperly obtained evidence will have an adverse effect on the fairness of proceeding. The heart of the matter here is the concept of "unfairness" which will be examined in some detail in the following chapter.

One may ask whether, if the courts have the opinion that both conditions have been satisfied, there is any further component of the discretion to exclude evidence. With regard to this question two possible answers, derived from different interpretation of the phraseology, may be given. The first interpretation of s.78 is that when the courts reach the conclusion that conditions described in s.78 exist they should not have any other discretion but to exclude the evidence. According to this interpretation the meaning of "may" in s.78 is "shall".[83] The second is that when the court has the opinion that the infringement of procedural norms had adverse effect on the fairness

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[81] *R. v Absolam* (1988) 88 Cr. App. R. 332, at 337; *R. v Delaney* (1988) 88 Cr. App. R. 338.

[82] See Chapter One 1.

[83] *Allen*, *supra* note 77, p. 83; *R. v Middlebrok* and *Caygill*, 1994, Lexis, Court of Appeal (18 February), Transcript by J. Larking.

of proceedings the evidence may be excluded, but exclusion is not automatic; as pointed out in *R. v Walsh*[84],"the test to be applied is whether the evidence would have *such* an adverse effect on the fairness of proceedings that it ought not to be admitted. There must therefore be some attempt to estimate the degree of unfairness which creeps into the proceedings if the evidence is allowed."[85] On the latter interpretation clearly the scope of the discretion is much wider. Nevertheless, whichever interpretation is adopted the vague phraseology of s.78 is capable of providing a wide discretion to the trial judge to exclude otherwise admissible evidence.

3.2.2.3. Section 76(2)

Subsection 76(2) of PACE Act specifically regulates the issue of the admissibility of confession evidence in the following form:

> "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained
>
> (a) by the oppression of the person who made it; or
>
> (b)in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession was not obtained as aforesaid."

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[84] (1989) 91 Cr. App. R. 161.

[85] *Birch*, "Commentary on *R. v Walsh*" [1989] Crim. L. R. 824.

To put it into simple terms this subsection requires the exclusion of confessions obtained by oppression or induced in circumstances conducive to unreliability. Detailed examination of this provision will be conducted in Chapter Six.

3.2.2.4. Section 82(3)

The Police and Criminal Evidence Act 1984 also preserves all existing common law discretion to exclude improperly obtained evidence. Subsection 82(3) provides;

> "nothing in this part of this Act shall prejudice any power of a court to exclude evidence whether by preventing questions from being put or otherwise) at its discretion".

3.2.2.5. Comparison of Section 78 Discretion with Common Law

Despite the draftsman's pronouncement that " we are making new law"[86], when section 78(2) became a law there was not much hope that it would make considerable difference to the approach of the court at common law.[87] Subsequent cases have also produced conflicting opinions. According to the Court of Appeal view expressed in the case of *R. v Mason*[88], section 78 did no more than re-state the power which judges had at common law before the PACE came into force. Looking at the

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[86] House of Commons Official Report, Parliamentary Debates (Hansard) vol:65, no:212, col 1017.

[87] *Zuckerman*, 1987, "Illegally-Obtained Evidence-Discretion as a Guardian of Legitimacy", 40 Current Legal Problems 55.

[88] [1988] W. L. R. 139, at 144; (1988) 86 Cr. App. R. 349; see also *R. v Harwood* [1989] Crim. L. R. 285.

problem from this point of view, it would seem that the existence of s.82(3) which preserved the common law exclusionary rule can hardly be explained. It may be said that the existence of s.82(3) gives rise to the only conclusion which can safely be drawn which is that Parliament intended section 78 to be independent and wider than the position at common law. In addition to this, the phraseology of the section in question does not restrict the applicability of it to any particular evidence: It applies to "any evidence on which the prosecution proposes to rely". In this sense it widens the "*Sang* discretion"- widely believed to be equivalent to the common law discretion- which was restricted to cases in which the prejudicial effects of evidence outweighs its probative value, and to evidence obtained from the accused after the commission of the offence.[89] Moreover, section 78, being a part of a codifying Act[90], is to be interpreted in the light of the principles set out in *Bank of England v Vagliano*[91]. The principle expressed in that case was that the court had to examine the language of the statute and ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of law.

It seems to me that the scope of section 78 is much wider than the common law power to exclude illegally or improperly obtained evidence. The concern of the section in question is the effect of the admission on the fairness of the proceeding.

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[89] See, *R. v Christou and Wright*, (1992) 97 Cr. App. R. 264; *R. v Smurthwaite* [1994] 1 All E. R. 898 at 902; for the contrary view see *Smith*, 1993, "Commentary on *Williams and O'Hare v DPP"* Crim. L. R. 776; also *R. v Khan* [1994] 4 All E. R. 426.

[90] *R. v Fulling* (1987) 85 Cr. App. R. 136 at 141. This view is also held by Professor *Birch*, 1994, "What is a Fair Cop?", 47 Current Legal Problems 73.

[91] [1891] A.C. 107 at 144.

Since to admit evidence the prejudicial effect of which outweighs its probative value is highly likely to have adverse effect on the fairness of proceedings, evidence which could properly be excluded in common law also may be excluded under the section in question[92], but not vice versa. One may reasonably respond to this argument by asking what is the function of section 82(3). A possible answer is that the Section 82(3) discretion may be applied after the evidence is given[93] in cases such as where improperly obtained evidence arises out of cross-examination or where in the light of fresh evidence the judge changes his earlier admission of evidence [94].

3.2.3. **Comparison**

Certain similarities and differences between Turkish and English approaches may be identified from the above examination. They will be examined in the following pages.

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[92] *Matto v Wolverhampton Crown Court*, [1987] R. T. R. 337 at 346. This fact, however, is explained by Professor Smith with the "enlargement of the notion of what is unfair", see Commentary on *R. v Christou and Wright* [1992] Crim. L. R. 732.

[93] The section 78 power, on the other hand has to be applied before the evidence is given. See below note 120 and accompanying text.

[94] *R. v Sat-Bhambra* (1888) 152 J. P. 365; (1989) 88 Cr. App. R. 55; see also *May*, 1988, "Fair Play at Trial: An Interim Assessment of Section 78 of the Police and Criminal Evidence Act 1984", Crim. L. R. 722.

3.2.3.1. **Recent Parliamentary Legislation**

In recent years both countries have shared some degree of parallel developments: In 1984 the English and in 1992 the Turkish legal systems reformulated their approaches to the admission of improperly obtained evidence. The issue in question in both countries was brought about by the legislature, rather than by the courts. Regulating by legislation is the typical method of a Civil Law country. With regard to English law it is, however, a departure from traditional common law in which judges go on to develop law from case to case, as new circumstances arise.

The similar attitudes of the Parliaments is the clear illustration of the fact that both countries are moving towards a more careful review of methods of pre-trial investigation. Such a trend is probably the result of the influence of the European Convention on Human Rights.[95] Many of the European countries including England and Turkey, by adhering to the European Convention on Human Rights, have subjected themselves to general standards of procedural fairness. Although the European Commission has consistently held that the admissibility and probative value of evidence are essentially matters for national law[96], a number of complaints to the effect that the introduction of certain evidence in a criminal trial breached the

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[95] See generally, *Linke*, 1971, "The Influence of the European Convention of Human Rights on National European Criminal Proceedings", 21 De Poul Law Review 397-420.

[96] *App. No: 8876/80 v. Belgium*, 16.10.1980, 23 D & R 233; *App. No: 7450/76 v. Belgium*, 28.2.1977, 2 Digest 243.

applicant's rights under Article 6 of European Convention on Human Rights have been examined under the general rule of a fair evidence-taking procedure.[97]

3.2.3.2. Recognition of the Exclusionary Rules

What really emerges as the outstanding feature of English and Turkish legislation is the principle that when other sanctions attached to procedural requirements fail to ensure compliance with the latter, exclusion of improperly obtained evidence provides an additional device for the judge to protect the procedural safeguards, to ensure fair trial, or to reach legitimate verdicts.

3.2.3.3. Different or Similar Solutions

Establishing that England and Turkey both have exclusionary rules founded on statutory provisions does not help the question of whether the exclusionary rules in these countries are the same or not. Under the Turkish exclusionary rule governed by article 254, exclusion of improperly obtained evidence is mandatory in the sense that whenever unlawfulness is established, the resulting evidence must be excluded. Once the unlawfulness is proved, a trial judge has no discretion in its exclusion: no further principle such as fairness or trustworthiness may be invoked against exclusion after that finding. Decisions as to which evidence will or will not be excluded depends principally upon the meaning attributed to the word "unlawfulness", rather than upon

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[97] *Nielsen v Denmark* (European Commission of Human Rights: Art 31 Reports) 15.3.1961, 4 Yearbook 494, para.52.

anything inherent in the exclusionary rule. The English position, on the other hand, is quite clear that exclusion is discretionary. Under Section 78 of PACE the court has a discretion to exclude improperly obtained evidence if its reception would adversely effect the fairness of the proceedings. In both jurisdictions the amount of evidence which will be excluded depends on the meaning attached to the single words; "unlawfulness" in Turkey and "unfairness" in England. The meaning of these terms will be subjected to examination in the next chapter.

When consideration is shifted from the exclusion of improperly obtained evidence generally to the admissibility of confession evidence, greater and clearer similarities are to be found between Turkish and English law.[98]

3.2.3.4. The Special Regulation of Confession and Possible Causes for it

It should be noted that the admissibility of confessions (statements) has been subject to special rules of evidence both in England and Turkey.[99] It is worth examining possible causes for the special regulation of confession evidence. A number of possible causes may be identified as follows;

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[98] See Chapter Five.

[99] Even before PACE came into force a distinction was drawn between confessional and non-confessional evidence in *R. v Sang* -[1979] 3 W. L. R. 263- which was concerned with non-confessional evidence.

3.2.3.4.1. Existence of a Fundamental Difference Between Confession and Other Evidence

Since confession evidence is made by, or elicited from, the suspect, it does not exist until the suspect makes it. It, therefore, requires to be tested for admissibility primarily by the manner in which the suspect was led, or came, to produce a statement. The same consideration does not necessarily apply to the question of admissibility of non-confessional evidence. Unlike confessions, the inculpatory character of non-confessional evidence is generally unaffected by the manner of its acquisition.

3.2.3.4.2. High Risk of Untrustworthiness

The special regulation of confession evidence may arise from being aware of the fact that confessions are more likely to be unreliable than other evidence. Some recent and widely publicised cases such as the Birmingham Six, the Guilford Four, The Tottenham Three and the Confait Case illustrate the point that reliability of confession may be extremely doubtful[100]. It was recognised in one of the research studies on which the Report of the Royal Commission on Criminal Procedure[101] was based that "there are powerful social and psychological forces operating in interrogation which ... may effectively destroy the voluntariness of statements so

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[100] See Chapter Six 1.

[101] *Royal Commission on Criminal Procedure*, 1981, Report, Cmnd 8092.

obtained."[102] There will no doubt always be instances in which innocent people seek to confess crimes[103]. Indeed psychological researches on the reliability of confession show that circumstances may make the suspect confess to a crime which he did not commit. Accordingly, false confession may derive from variety of reasons. Kassing and Wrightsman[104] suggested that there are three psychologically different types of false confession. These are voluntary, coerced-compliant, and coerced-internalized confessions. These three psychological types are described by Gudjonsson in detail[105]. Voluntary false confessions are made without any external pressure. Four different motives are said to lead to voluntary false confession; (i) a ghoulish desire for publicity or notoriety, (ii) a desire to protect the real criminal, (iii) the need to atone for guilty feelings through receiving punishment, (iv) lack of adequate capacity to distinguish between reality and fantasy. The coerced-compliant confession is caused by the persuasive interrogation where the suspect perceives that he will gain some benefit such as being allowed to go home for confessing, though he is fully aware of not committing the crime. In this situation the suspect generally believes that sooner or later the truth will come out and he will than be released. The coerced-internalised confession results from psychological manipulation of the suspect into believing that

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[102] *Irving and Hilgendorf*, 1980, Police Interrogation- Psychological Approach Royal Commission Research Study, p. 24.

[103] The question of whether it should be possible to convict on the strength of a pre-trial confession is subjected to an examination by *Pattenden*, 1991, "Should Confessions be Corroborated?", 107 The Law Quarterly Review 317-339.

[104] *Kassing* and *Wrightsman*, 1985, Confession Evidence, The Psychology of Evidence and Trial Procedure, p. 76.

[105] *Gudjonsson*, 1992, The Psychology of Interrogations, Confessions and Testimony.

he has committed the crime he is accused of. Here the suspect does not trust his memory and begins at least temporarily to accept suggestions offered by the police.

3.2.3.4.3. **Frequent Introduction of Confession in the Court;**

Although we are in ignorance of the exact frequency with which confessions are made and introduced in the courts, it has been reported by several American researchers[106] and has also been noted in a number of English studies[107] that a high proportion of defendants make such admissions. The proportions founded by the main English studies vary -Bottoms and McClean 70 per cent, Zander 76 per cent, Irving 65 per cent, Softley 61 per cent-; but they all clearly indicate that suspects frequently confess when they are interrogated. Even if it is a fact that a majority of suspects make a confession, it does not necessarily follow that the prosecution introduces such

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[106] *Younger*, 1968, "Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the effect of the Miranda Decision upon the Prosecution of Felony Cases", 5 American Criminal Law Quarterly 32-39; *Souris*, 1966, "Stop and Frisk or Arrest and Search- The Use and Misuse of Euphemisms", 57 Journal of Criminal Law, Criminology and Police Science 251; *Witt*, 1973, "Non-Coercive Interrogation and the Administration of Criminal Justice:the Impact of Miranda on Police effectuality", 64 Journal of Criminal law and Criminology 320-332.

[107] *Bottoms* and *McClean*, 1976, Defendants in the Criminal Process; *Zander*, 1979, "The Investigation of Crime: A Study of Cases Tried at the Old Bailey", Crim. L. Rev. 203-219; *Irving*, 1980, Police Interrogation: A Case Study of Current Practice, Royal Commission on Criminal Procedure Research Study no:2; *Sofiley*, 1980, Police Interrogation: An Observational Study in Four Police Stations, Royal Commission on Criminal Procedure, Research Study no:4; *McConville*, 1993, Corroboration and Confessions: The Impact of a Rule Requiring that no Conviction cab be Sustained on the Basis of Confession Evidence Alone, Royal Commission on Criminal Justice Research Study No:13; *The Royal Commission on Criminal Justice*, 1993, Report, Cmnd. 2263.

evidence to a great extent or relies upon it to prove its case. Many commentators[108], however, have asserted that confessions constitute an essential part of the case for the prosecution in a majority of criminal trials.[109] This assertion might be true for the case of Turkey, but in England a written or verbal confession is likely to lead to a plea of guilty. If this is so, the proportion of reliance upon confession by the prosecution in trial may be expected to decrease in England.

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3.2.3.4.4. High Impact of Confession Upon the Outcome;

The literature on the role played by confessions in the prosecution of criminal cases is not massive. Without reference to the empirical evidence the assertion generally is presented that confession can be decisive of a defendant's fate. As stated by McCormick " the introduction of a confession makes the other aspects of a trial in court superfluous"[110] Recently a number of studies concerned with the role of confession evidence, however, have appeared in the United States. There is no apparent reason for not assuming that the findings can be relevant to both Turkey and England. In a mock jury experiment, Miller and Boster[111] had read to the subjects a description of a murder trial that include (1)only circumstantial evidence, (2)

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[108] See, *Devlin* , 1979, The Judge, p. 79; *Inbau*, 1968, "Popular Misconceptions Regarding Police Interrogation of Criminal Suspects", 14 Buffalo Law Review 274.

[109] For the contrary view see *McConville and Baldwin*, 1981, Courts, Prosecution and Conviction.

[110] *McCormick* , 1972, Handbook of the Law of Evidence.

[111] *Miller* and *Boster*, 1977, "Three Images of the Trial; their Implications for Psychological Research", In Psychology in the Legal Process, ed. by Sales.

eyewitness testimony, and (3) testimony alleging that the defendant had confessed to the police. The result was that those subjects who received the confession evidence were more likely to find the defendant guilty than the other groups. A similar conclusion has also been reached by Kassin and Wrightsman[112]. Moreover, McConville and Baldwin found that only about 3 per cent of those making written confessions and 9 per cent of those making verbal confessions were acquitted at trial[113]. Although no one knows exactly what reliance the court or juries place upon confession evidence, the fact that few defendants making confessions to the police are acquitted at trial is perhaps an indication of the confession's great impact over the outcome.

4. Procedures to be Followed

As has been shown in Chapter Two, there are structural differences between the Turkish and English trial. The effect of these divergencies upon the procedures when relying on the above examined sections is be considered in this section.

In order to show a measure of independence from the preliminary work done by the participants to the case and inform himself of the nature of the case involved and decide accordingly how to plan and direct his own conduct, the Turkish trial judge is permitted to read the entire file in advance of the trial.[114] Before the trial he,

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[112] *Kassin* and *Wrightsman*, *supra* note 104.

[113] *McConville* and *Baldwin*, *supra* note 109, p. 159.

[114] See Chapter Two 3.5.2.2.

therefore, may have knowledge about the every piece of evidence regardless of admissibility. During the trial the dossier is also placed on the desk in front of the judge or the presiding judge in more serious cases. In addition to this, every point which may have evidential value may be presented as evidence during the course of trial. Since the jury does not exist in Turkish trials[115], any challenge for exclusion of evidence that the defence might wish to raise[116] is presented to the same judge or to the same panel of judges[117] that will ultimately decide the case. If the evidence is excluded, the judge or the panel of judges should disregard the prohibited (excluded) evidence while deciding the issue of guilt or innocence.

One may quite rightly wonder how realistic it is to expect from the judge or the panel of judges to disregard the evidence which has been already known by them. The solution to this aspect of the problem is said to be the written judgment with detailed reasons. Although according to Turkish law the judge may find the accused guilty if he is "convinced" of his guilt, the conviction of the judge must be a rational rather than a psychological one. The judge or the panel must justify its verdict by a written opinion expounding the reasons for the decision in detail[118]. This requirement is also backed by a comprehensive system of appellate review which allows the Appeal Court to scrutinize the judge's reasons for the decision. Indeed, if

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[115] See Chapter Two 3.5.2.1.

[116] The judge may consider the issue of admissibility without a motion to suppress of evidence by the defendant.

[117] The least serious cases are tried before a single judge, while the more serious cases are tried by a panel of judges.

[118] CMUK 260.

evidence which falls within the boundaries of "evidentiary use prohibition" (suppressed evidence) constitutes a substantial part of the prosecution's case, the court may not be able to defend a guilty verdict in writing and may be forced to acquit the accused regardless of the court's own feelings about the defendant's guilt. Moreover, since the trial before the appellate court is regarded as a fresh search for the truth, the appellate court, on its own motion, may examine whether the trial judge employed any prohibited evidence in reaching his verdict regardless of whether there was any motion to suppress by the defendant at the prior trial.[119]

This explanation reveals that the decision as to admissibility of improperly obtained evidence in Turkey is made by the trier of fact while in England the position is quite different in some cases and deserves closer examination.

As far as the English law is concerned, objections to the admissibility of evidence on the ground that it was obtained improperly may be raised either by counsel for any accused against whom the evidence may be used or by the court of its own motion. Principally, submissions to exclude improperly obtained evidence under section 78(1) or section 76(2) should be made before the disputed evidence is adduced into trial.[120] In exceptional cases, however, a trial judge may also be asked to exclude improperly obtained evidence during trial under Section 82(3) of PACE in order to prevent injustice.[121] Since there is a vital difference between the structure

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[119] CMUK 320.

[120] *R. v Dutton*, 1988, Lexis, Court of Appeal, (11 November).

[121] *R. v Sat-Bhambra* (1988) 88 Cr. App. R. 55.

of the Crown and Magistrates court[122] it seems reasonable to examine the procedure in each of them separately.

In Crown Courts: In some cases the objection as to the admissibility of improperly obtained evidence can be raised on the basis of papers without the need for evidence to be called, while in other cases it may be necessary to adduce evidence. As far as the latter situation is concerned the admissibility is decided in the absence of the jury by the judge at a trial within a trial; "a voir dire", which is designed to assist the defence by preventing the jury hearing possibly inadmissible evidence unless and until the judges rules it admissible.[123] This regulation reflects the division of functions between the judge and jury; questions about the exclusion of evidence are for the judge to decide while questions regarding the truthfulness of the evidence are for the jury to decide. If certain evidence is ruled inadmissible the jury hears nothing of it. In this way it is aimed to ensure that the jury's decision is reached only on the basis of admissible evidence. Looking at the problem from another point of view it would seem that this regulation reveals the feeling that the jury are not able to discount , or give the correct weight to, certain sorts of evidence, and thus demonstrates the limited trust placed in the discernment of the jury by the legal profession.[124]

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[122] See Chapter Two 3.5.2.

[123] *R. v Manji* [1990] Crim. L. R. 512.

[124] *Duff* and *Findlay*, 1982, "The Jury in England , Practice and Ideology" 10 Int. J. Soc. L. 253, at 256.

Where the evidence is adduced into the trial and as a result disputed evidence is known by the jury, the judge is still not powerless to act; he may discharge the jury or may direct the jury to disregard the evidence they heard.[125]

In Magistrates' Courts: since the magistrates are the judges of both fact and law, the procedure to be followed in magistrates' courts where the defence object to the admissibility of evidence proposed by the prosecution has been the subject of controversy amongst justices and commentators.

It is maintained that the voir dire is not suitable in magistrates' courts on the ground that the main function of a trial within a trial is to allow the trier of law to decide a legal point in the absence of the trier of fact. The procedure for dealing with the way in which the admissibility of evidence was determined at common law was that the justices had a discretion to consider whether or not,in any particular case, it was appropriate for them to undertake a separate trial within a trial.[126] That common law discretion has not been affected by the PACE, and thus the magistrates are not bound to conduct a trial within a trial and there is no general rule as to when the decision on admissibility should be announced. The magistrates must within statutory constraints determine their own procedure.[127]

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[125] *R. v Sat-Bhambra* (1988) 88 Cr. App. R. 55 at 62; For detailed information on "discharge of jury" see *Sprack*, 1992, Criminal Procedure 114-115.

[126] *S.F.J. (An Infant) v Chief Constable of Kent*, [1982] Crim. L. R. 682, The Times, 17 June 1982; *A.D.C. (An Infant) v Chief Constable of Greater Manchester*, (unreported) cited in *Regina v Liverpool Juvenile Court* [1988] Q.B. 1; *Conway v Hotton* [1976] 2 All E. R. 213

[127] *R. v Epping and Ongar J.J, ex p. Manby* [1986] Crim. L. R. 555.

With regard to confessions, by virtue of section 76(2) it is no longer a matter for the exercise of discretion. Section 76(2) of PACE requires justices conducting a summary trial to hold a trial within trial to determine the admissibility of confessions challenged on one of the grounds referred to in that section.[128] By this requirement it is firstly aimed to give protection to the defendant to give evidence without being cross-examined as to the truth of the alleged confession. The second goal of this requirement is to entitle the defendant to know the strength of the case which he has to meet at the at the end of prosecution case and make it easier for him to decide whether to go into the witness box.[129]

Under 121(6)(7) of the Magistrates Court Act 1980, the same justices should hear the entire case: there is no question that if justices rule a particular evidence inadmissible, following a trial within a trial they should disqualify themselves from the substantive trial. Since the magistrates learn the nature of the evidence in the course of the presentation of arguments about its admissibility, one may ask how they can put it out of their mind when they become the trier of fact. It would be very difficult for a magistrate genuinely not to be influenced by the fact that, for example, the accused had confessed, even though the circumstances of the confession rendered it inadmissible.

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[128] Since the admissibility of confession evidence is generally challenged both under section 76 and section 78, the procedure for the two sections would be expected to be the same. But where the confession is challenged only under section 78 there should not be a requirement for holding a trial within a trial. See *Vel v Owen* [1987] Crim. L. R. 496, (1987) 151 J. P. 287; (1986) The Times, February 14.

[129] *Regina v Liverpool Juvenile Court* [1988] Q. B. 1

To sum, the distinction between the question of law and the question of fact, and the entitlement of different bodies to deal with these matters in England, to some extent, differentiate the procedures of the countries in question when determining the admissibility of evidence. But when both fact-finding and law-applying is entrusted to a single body - the magistrate- English procedure is very similar to its Turkish counterpart.

5. Conclusion

The recent ratification of the legislation in both countries show that there is an agreement between Turkish and English legal systems as to the fact that Parliament should take the responsibility for deciding what the rules regarding the admissibility of improperly obtained evidence should be. In addition to this, both regulate the admissibility of confession evidence and exclude involuntary confessions on a mandatory basis. With these respects the two systems are approaching each other though each of them belongs to different legal systems.

In spite of these similarities, the difference between Turkish and English law about the general rule as to the treatment of improperly obtained evidence still exists. In England, under section 78(1) the impropriety does not affect the admissibility of evidence unless it has an adverse effect upon the fairness of the proceedings. Whereas the position in Turkey is that not the possible effect of the improperly obtained evidence upon the trial that has to be considered but the impropriety itself, regardless of the nature of the evidence. Once the unlawfulness or impropriety is established, no

argument based on a further criterion such as fairness or credibility is permitted under section 254(2). Although the Turkish model does not seem, at first sight, to have the flexibility of English law, the question of whether the same amount of improperly obtained evidence will be excluded in each system depends on the interpretation of the concept of "unlawfulness" in Turkish law and concept of "unfairness" in English law. These concepts will be examined in the next chapter.

CHAPTER FIVE

THE CONCEPTS OF "UNLAWFULNESS" AND "UNFAIRNESS"

1. Introduction

Having reviewed the statutory provisions relating to improperly obtained evidence in Turkey and in England, it became apparent in the previous chapter that both jurisdictions are not denying the judicial control over the manner in which evidence was obtained. In England there is clearly a discretion in the trial judge to exclude improperly obtained evidence where admission of it may have an adverse effect upon the fairness of the proceeding; in Turkey, where evidence is secured *hukuka aykiri olarak* (hereafter unlawfully)[1], it is required to be suppressed. Obviously, the terms "unlawfulness" and "unfairness" gain importance in deciding the characteristic and scope of exclusionary rule respectively in Turkish and in English law. The concern of this chapter is, therefore, to seek an answer to the questions of "what is *hukuka aykirilik* (hereafter unlawfulness)?" in Turkish law and "what is unfairness?" with regard to English law. This chapter inevitably falls into two distinct halves, with the first looking at the meaning likely to be attributed to "unlawfulness" under the Turkish rule of exclusion, and the second dealing with unfairness under the English rule. An attempt will also be made to compare them.

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[1] Note the difference that the English language uses the same word "law" for two distinct notions, the sum total of legal norms and a particular enactment, whereas the word "*hukuk*" in ordinary Turkish language may be used for a whole set of legal rules (*mevzuat*), but not for an act issued by the legislator.

2. The Concept of "Unlawfulness"

2.1. Unlawfulness & illegality

As has been seen in the previous chapter, when a court in Turkey finds that there has been a violation of law, the evidence obtained by means of this violation must be excluded without any further consideration. Therefore, what matters most in Turkish courts is whether the evidence is the product of unlawfulness. It might seem at first sight that the Turkish admissibility test requires a mandatory exclusion of evidence in the sense that whenever a breach of a procedural rule occurs, subsequently obtained evidence cannot be admitted, or conversely, that non-existence of a breach of any technical rule will save the evidence. The correctness of this impression, however, depends on the interpretation of unlawfulness. Such ambiguity would not be raised if one of the terms "*kanuna aykirilik*", "*yasaya aykirilik*" or "*mevzuata aykirilik*" (hereafter illegality) was used by the Turkish legislature. They all refer to infringement of rules recognised by the positive law, whereas unlawfulness may go well beyond this.

Turkey, at present, possesses an undeveloped and relatively undefined notion of "unlawfulness" with regard to section 254 of CCP. The concept of unlawfulness clearly indicates a violation of law, it is a departure from and goes contrary to lawfulness, whatever it is.

2.2. What is the Law?

In attempting to explain the meaning of the term "unlawfulness" it may be helpful to begin by seeking to clarify what "the law" is . Similar to trying to define and describe the proverbial elephant, this question is not quite so easy as might be imagined. The question "what is law?" has been answered by serious philosophers in so many different, strange, and even contradictory ways. To illustrate, a number of definitions which have been made in different times may be worth citing.The law is:

> "the prophecies of what the courts will do in fact, and nothing more pretentious"[2]
>
> "not counsel but command; nor a command of any man to any man; but only of him whose command is addressed, to one formally obliged to obey him"[3]
>
> "a rule of human conduct sanctioned by human displeasure"[4]
>
> "the aggregate of rules set by men as politically superior, or sovereign, to man as politically subject"[5]
>
> "highest reason, imbedded in nature, which commands what should be done and forbids the contrary"[6]
>
> "a device and gift of God, a decree of wise men, a setting right of all wrongs done voluntarily or

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[2] Holmes, cited by *Hart*, 1994 The Concept of Law 1.

[3] *Hobbes*, 1651, Leviathan,(Reprint 1952), Part 2, Chapter 26, page 203.

[4] *Clark*, 1883, Practical Jurisprudence: A Comment on Austin 188.

[5] Austin, cited by *Clark*, *ibid*, p. 104.

[6] *Chrysippus*, cited by *Friedrich*, 1969, The Philosophy of Law in Historical Perspective 29

involuntarily, a common agreement of all the state, according to which all in the state ought to live"[7]

"a rule of moral actions obliging to that which is right"[8]

"the rules, not of action in general, but of human action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free will, is commanded to make use of these faculties in the general regulation of his behaviour"[9]

"an order of commands whose obligatory force rests ultimately on the conformity of these commands with ethical postulates"[10]

The amount of material on the meaning of the word "law" is enormous. Understood in their contexts, Hart states, such statements are both illuminating and puzzling; "they throw a light which makes us see much in law that lay hidden: but the light is so bright that it blinds us to the remainder and so leaves us still without a clear view of the whole".[11] Williams takes this observation a stage further, the only wise manner to bring the controversy to an end is to renounce thinking and arguing about it.[12]

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[7] *Demostheness*, cited by *Clark*, *supra* note 4, p. 97.

[8] *H. Grotius*, cited by *Clark*, *supra* note 4, p. 101.

[9] *Blackstone*, 1809, The Commentaries on the Laws of England in Four Books, (Reprint 1982), vol.1, p. 39.

[10] *Coing*, Grundzuge der Rechtsphilosophie, p. 18; cited by *Bodenheimer*, 1954, "German Legal Philosophy Since 1945", 3 Am. J. Comp. L. 385.

[11] *Hart*, *supra* note 2, p. 2.

[12] *Williams*, 1945, "International Law and The Controversy Concerning the Word 'law' ", 22 The British Yearbook of International Law 146, at p. 163.

Although the endless theoretical discussions have not enabled a final answer to be reached to the basic question of "what the law is", two basic approaches may be identified as legal positivism and natural law.[13]

Under legal positivism, law is regarded as a body of legal provisions which have been produced largely as a result of the activities of a legislature and a body of courts. The characteristic feature of this approach is that it is not directly concerned with any ideal law but only with actually existing law. Accordingly, the entire law of Turkey may be seen in terms of a hierarchy of sources of law, the highest of which is the constitution, while the lowest is by-laws, and in between are found international agreements, statutes, decrees having force of statutes, degrees, regulations, customs, precedents.[14] The phenomenon of the breach of law (unlawfulness) is essentially a contravention of such norms. A morally iniquitous norm is not for that reason alone unlawful. As argued by Hart, courts have no alternative but to apply a properly enacted statute however evil its aim may be.[15]

Natural law doctrine, on the other hand, defines the law in a more flexible, if not vague, way. Accordingly, the law involves a dualism of norms, in the form of the superior norms, which would be discovered via the exercise of human reasoning, and

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[13] *Reynolds*, 1993, "Natural Law v. Positivism: The Fundamental Conflict", 13 Oxford Journal of Legal Studies 441.

[14] See Chapter Two. Questions as to compatibility of a lower norm with a higher norm are decided by the competent court.

[15] *Hart*, 1958, "Positivism and the Separation of Law and Morals", 71 Harv. L. R. 593.

the inferior positive norms which are the product of legislation or court decisions. Positive norms have to match up to some standards in order to qualify as law.

The division of opinion between the natural law doctrine and legal positivism should not be assumed to have only academic significance. It has already caused practical problems in a variety of cases which came before the post-Nazi courts for decision. It has been recognised in a number of cases that positive legal norms which were enacted in Germany under Hitler, and which legalised cruelties and injustices were invalid.[16] Typical comments made in these cases reflect Radbruch's opinion that "the incompatibility of positive law with justice may reach such an intolerable degree that law becomes 'non-law'".[17]

2.3 Has Turkish Law Vacillated Between These Doctrines?

It is clear from the huge amount of discussion, which may be traced back to the days of ancient Greeks, that the term "law" can be employed in different contexts. The result of the inquiry into what the law- or breach of law (unlawfulness)- means, with regard to section 254 of the Turkish Code of Criminal Procedure, is strongly

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[16] For the detailed examination of these cases see, *Bodenheimer*, *supra* note 10, p. 374; *Pappe*, 1960, "On Validity of Judicial Decisions in the Nazi Era", 23 Modern Law Review 260; *Rommen*, 1959, "Natural Law in Decisions of the Federal Supreme Court and the Constitutional Courts in Germany", 4 Natural Law Forum 1; *Hippel*, 1959, "The Role of Natural Law in the Legal Decisions of the Federal Republic of the Germany", 4 Natural Law Forum 106.

[17] On *Radbruch* see, *Friedman*, 1949, Legal Theory 117-121; *Bodenheimer*, 1962, Jurisprudence: The Philosophy and Method of Law 296-299; *Wilk*, 1950, The Legal Philosophies of Lask, Radbruch and Dubin, vol.4 of Twentieth-Century Legal Philosophy Series.

related to the issue of whether Turkish jurisprudence is under the influence of legal positivism or natural law doctrine.

In Turkey, the law is stated in several forms. The 1982 Turkish Constitution is a legal text which holds pride of place in the theory of the sources of law. It basically determines the foundation and operation of the state and individuals' fundamental rights and arranges the relations between the individual and the state. It dictates the principles of the "binding force of the Constitution" and "the supremacy of the Constitution", by maintaining that

> "the provisions of the Constitution are the fundamental legal norms binding upon legislative, executive and judicial organs, and administrative authorities and other agencies and individuals. Statutes shall not be in conflict with the Constitution".[18]

This provision reflects Kelsen's definition of the law. According to him, *the law is a system of norms*[19] which mean criteria referred to for solving a problem and obtaining a satisfactory result; there is a hierarchical structure among the norms; thus the plurality of norms constitutes a unity or a system; all norms are derived from a single hypothetical norm called "the basic norm"[20]. Kelsen defines a basic norm as "a norm the validity of which cannot be derived from a superior norm".[21]

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[18] Article 11 of the Constitution.

[19] *Kelsen*, 1992, Introduction to the Problems of Legal Theory, (translated by B L Poulsen and S L Poulsen), p. 56.

[20] *Ibid*, p. 56.

[21] *Kelsen*, 1949, General Theory of Law and State 111.

At first sight, the above cited Article gives the impression that the norm at the top of the hierarchy in Turkey is the Constitution. Detailed examination of the subject, however, reveals that this is not the case. Indeed, in pursuant of their duty to ensure that legislation conforms to the constitution, not only constitutional norms but also supra-constitutional norms have been used by the Turkish Constitutional Court to justify their decisions.[22]

Supra-Constitutional norms may be divided into two main groups as "written norms" which are based on the thesis of positive law, and "unwritten norms" which are derived from the thesis of natural law.

Supra-Constitutional Written Norms: The typical examples of these kinds of norms are bilateral, multilateral or international conventions or treaties of which Turkey is a party. Although these transnational[23] norms, duly put into effect, carry the force of statute, non-conformity of the transnational norms to the Constitution cannot be claimed.[24] This regulation makes clear the superiority of the transnational norms over statutes. It does not, however, clarify whether there is a hierarchical order or an equal value between the constitutional norms and the provisions of the transnational agreements. The possible conflict between the constitutional norms and the transnational norms accepted by the Turkish Parliament seems to be solved in

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[22] See, for example, the Constitutional Court's Judgment of 29/1/1980 E 79/39. K 80/1, 18 Anayasa Mahkemesi Kararlari Dergisi 97-98.

[23] This term is intended to cover bilateral, multilateral and international conventions and treaties.

[24] Article 90 of the Constitution.

favour of the transnational norms for a number of reasons.[25] First, the preamble of the 1982 Constitution maintains that "Turkey with equal rights is an honourable member of the world family of nations"[26] Being an honourable member of this family requires an acceptance that norms of international (or transnational) law are superior to the national norms.[27] Second, the general structure of the 1982 Constitution implies the adaptation of the monist view derived from Kelsen's thesis[28] that national and international norms form an integrity and there is a superiority relationship between them in favour of the latter. Third, the transnational bodies such as the European Commission and Court of Human Rights examine and decide claims of non-conformity of domestic norms to the treaty and its protocols. Fourth, Article 15 of the Constitution maintains that " in times of war, mobilisation, martial law, or the state of emergency the exercise of fundamental rights and freedoms provided by the Constitution can be partially or entirely suspended.... *provided that obligations under international law are not violated*".[29] This provision also implies the superiority of international law to national law.

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[25] See for the detailed discussion of the subject, *Bilge*,1989, "Insan Haklari Sozlesmesinin Turk Hukukundaki Yeri" (The Place of the Human Rights Conventions in Turkish Law), Ankara Barosu Dergisi (The Journal of Ankara Bar), p. 988; *Gozubuyuk*, 1992, "The European Convention on Human Rights in the Legal Order of Turkey", in The Domestic Application of International Human Rights Norms, p. 19.

[26] The Preamble, para. 5.

[27] *Akipek*, 1970, Devletler Hukuku (International Law), 3 rd ed, p. 28.

[28] *Kelsen, supra* note 19, p. 61.

[29] emphasises added.

It is clearly evident from the above explanation that transnational norms are another source of Turkish law. Infringements of these norms may be classified as "unlawful". At present Turkey has ratified a number of transnational treaties including the European Convention on Human Rights, the United Nations and the European Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[30] The Turkish Courts at all levels have the obligation to apply the provisions of such treaties. In case any of these treaties include any provisions relating to obtaining evidence, the Turkish law enforcement agencies are bound to obey them. Non-obedience to these norms will constitute a breach of law (unlawfulness) and is capable of resulting in exclusion of evidence under article 254 of the CCP.

Supra-Constitutional Unwritten Norms: these types of norms are the concept of human rights, general principles of law, and the requirements of the democratic order of society.

Human Rights are said to be all the positive conditions in which a human being is expected to live in peace, security, happiness and free from anxiety.[31] Just being human is enough to entitle one to these rights which are innate, untouchable, untransferable and unalterable within time and space.[32] Existence of these rights in

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[30] For detail see Chapter Two 3.3.

[31] *Dogan*, 1979, Insan Haklarinin Milletlerarai Himayesi (International Protection of Human Rights), p. 260.

[32] See generally *John Locke*, 1954, Essays on the Law of Nature, ed. by Leyden.

the past, at the present and in the future is not dependent upon recognition of them by a legal system. Obviously, the concept of human rights is derived from the doctrine of natural law.

Although some of the human rights have been concretised in the Universal Declaration of Human Rights, the European Convention on Human Rights and several Constitutions, the abstract nature of the concept of human rights does not allow a definite catalogue of them. The concreted forms of human rights in these texts are called *the fundamental rights*. The concept in question covers not only the written forms by the positive law, but also unwritten ones inspired by the doctrine of natural law. However, the phrases "fundamental rights" and "human rights" are sometimes used as equivalents. The two concepts have been separated by the 1982 Constitution.[33]

"Being respectful to human rights" has been described as one of the characteristics of the Turkish Republic by Article 2 of the 1982 Constitution. The Turkish Constitutional Court also confirms the superior quality of the concept of human rights in its various decisions. To illustrate, despite non-existence in the text of the Constitution, "the right to resistance" was created by the Constitutional Court referring to the concept of human rights.[34]

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[33] See Article 11 and Article 2 of the Constitution.

[34] The issue in this case was the dissolution of the new-founded Socialist Party which has included the right to resistance in its program. E.1988/2, K.1988/1; *RG* 16.5.1989/220167, p. 57.

Accordingly, one may challenge the admissibility of evidence on the ground that it has been obtained in breach of the concept of human rights.

The General Principles of Law: Although there is a lack of agreement as to what the general principles of the law are, the Constitutional Court, in one of its decisions, maintains that being a state governed by rule of law[35] requires the recognition of the existence of the general principles of law which cannot be destroyed by the legislator. Accordingly, legislations contrary to the general principles of law in Turkey will be invalidated.[36] The significance of this case, for present purposes, is that the general principles of law are recognised as a source of Turkish law, and thus admissibility of evidence may be challenged and excluded by making reference to the general principles of law.

The Requirements of the Democratic Order of Society: Article 13 of the Constitution states that "... restrictions of fundamental rights and freedoms shall not conflict with the requirement of the democratic order of society". Although there is obvious need for the clarification of this phrase, it was not the subject of detailed discussion in legal literature, and without any clarification the Constitutional Court used it in several decisions.[37] At the risk of possible over-simplification, one may

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[35] Article 2 of the Constitution.

[36] E.1985/31, K 1986/1, dated 17 March 1986, 22 Anayasa Mahkemesi Kararlar Dergisi (Journal of The Constitutional Court's Decisions), p. 115.

[37] See for example, E.1985/8, K.1986/27- 22 Anayasa Makkemesi Kararlari Dergisi (Journal of the Constitutional Court Decisions), p. 365- in which it is stated that " kisinin sahip oldugu dokunulmaz, vazgecilmez, devredilmez, temel hak ve ozgurluklerin ozune dokunulup tunuyle kullanilmaz hale getiren kisitlamalar,

identify one of the elements of the democratic society as maintenance of a high degree of autonomy by individuals with regard to their behaviour. In other words, the autonomy of individuals can only be restricted in a democratic state when it is absolutely necessary for the continuity of democratic society. Seen in a comparative perspective, there is, however, little consensus among the alleged democratic countries as to the conditions which necessitate the restrictions. The only thing which is clear from the logical interpretation of this provision is that , however vague they are, "the requirements of the democratic order of society" are further source of Turkish law. Thus, admissibility of evidence may be challenged on these grounds.

Furthermore, Article 1 of the Turkish Constitution, establishing the characteristics of the Turkish Republic, states, *inter alia*, that "the Republic of Turkey is a *hukuk devleti* (a state of law or a state governed by the rule of law)". This characteristic of the state cannot be amended, nor can its amendment be proposed.[38] It is a guarantee for individuals against the arbitrariness of the legislature. The state of law, as understood by the Constitutional Court, is a state which regards itself bound by the superior norms and open to judicial review, and it is a state which acknowledges the existence of basic principles of law over the will of the legislator,

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demokratik toplum duzenini gerekleriyle uyum icinde sayilamaz. (Restrictions intervening in the substance of untouchable, indispensable and untransferable rights of human beings in changing them do not conform with the requirements of the order of democratic society)". See also, E.1985/21, K.1986/23; 22 Anayasa Mahkemesi Kararlari Dergisi (Journal of the Constitutional Court Decisions), p. 224.

[38] Article 4 of the Constitution.

which even the law-maker cannot destroy, and legislations will be invalid if they depart from them.[39]

What has emerged from the argument thus far in this section is that both the Constitution and the Constitutional Court keep the door open from natural law to legal positivism, that is to say, the judiciary should prevent conflicts from taking place between existing legal norms and justice. Practically, the unconstitutionality, and hence unlawfulness of a statute can be claimed any time by way of defence before an ordinary court; in this case the Constitutional Court decides in the last resort and has power of invalidating the norm.[40] Thus, legal positivism with its thesis that "any legislative act is unconditionally binding upon the judge" is not acceptable in Turkey. This approach should be welcomed in a country whose legal system has been interrupted thrice by military interventions in the last half of this century.[41]

2.4. Unlawfulness in the Context of Article 254

Although the meaning of "unlawfulness" has not been, or cannot be, stated with any mathematical precision in an universally applicable formula, the point to be noted

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[39] The exact words of the decision may worth quoting: "Hukuk Devleti ..... anayasa ve hukukun ustun kurallariyla kendini bagli sayip, yargi denetimine acik olan, yasalarin ustunde, yasa koyucununda bozamayacagi temel hukuk ilkeleri ve anayasa bulndugunu, ondan uzaklastiginda gecersiz kalacagini bilen devlettir". E. 1985/31 K.1986/11 T.27.3.1987, 22 Anayasa Mahkemesi Kararlar Dergisi (Journal of the Constitutional Court Decisions), p. 115.

[40] Article 152 of the 1982 Constitution.

[41] See Chapter Two 3.3.

is that "unlawfulness", in its widest sense, does not only derive from the act of the legislature, but also emanates from a body of written or unwritten norms. The phraseology of section 254 is wide enough to take such a broad view and to distinguish the concept of "unlawfulness" from the notion of "illegality". Accordingly, the term "illegality" refers only to the infringement of norms in positive law; the decisive element here is that the norm should exist. Obviously, the notion of "illegality" is relatively easy to interpret and enforce; evidence which is obtained by the law enforcement officers through violation of a written norm is illegally obtained.

The notion of "unlawfulness" is much wider than the concept of "illegality" in that although not illegally obtained, evidence procured in an unfair or unethical manner may be classified as unlawfully obtained evidence. For example, the method employed by the law enforcement officers may be so extraordinary that a norm forbidding it does not exist. Indeed, this was the case in the *Rachel Nickell*[42] undercover operation in which an undercover woman officer offered to the suspect not only sex but also an intimate and loving relationship in order to persuade him to confess or to reveal enough for the police to mount a case. The use of such an unusual tactic can hardly be considered as illegal in Turkey since there is no special provision prohibiting it. This practice may, however, be regarded as unlawful for the purpose of Article 254 in that it is hardly possible to claim that the line had not been crossed.

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[42] The Times, 15 September 1994.

Similarly, evidence obtained illegally does not necessarily have to be, at the same time, unlawful. To elaborate this point the following example may be given. Conducting a search during the night in homes, working places or other premises close to the public is not allowed unless a flagrant offence, danger in delay, or necessity to recapture a detained person exist.[43] The term "night" is defined in article 502 of the Tyrkish Criminal Code as the period of time which starts one hour after sunset and ends one hour before sunrise. Unlike the search carried out at midnight, conducting a search just 10 minutes before or after the permissible time may not constitute unlawfulness, though it is technically illegal.

To sum up, it is submitted that in Turkey there is great resemblance between "unlawfulness" and "inadmissibility"; in short, the courts are required to refuse evidence if it has been obtained unlawfully and not otherwise. Therefore, the standard of unlawfulness governing the process of obtaining evidence and the admissibility of improperly obtained evidence are two facets of the same phenomenon and are bound to overlap. What determines whether police activity is unlawful also determines whether evidence is inadmissible. Although it is correct, this explanation may create an inaccurate impression that whenever evidence is obtained in breach of rules, and however technical is the infringement complained of, the court will have to exclude the evidence. Such a conclusion is only correct if we equate "unlawfulness" to "illegality". It appears that "unlawfulness" and "illegality" in Turkish law are not the same concepts. Unlike illegality, unlawfulness is not a technical conception with a fixed content unrelated to time, place and circumstances. Having said that the legality

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[43] CMUK 96.

of the process of obtaining evidence is a relevant consideration in determining whether evidence is obtained unlawfully.

Expressing differences between these two concepts, however, does not rule out altogether the possibility of narrow interpretation of the concept of "unlawfulness" and equalization of "unlawfulness" to "illegality" by the Turkish Court of Appeal with regard to Section 254. The effect of such an approach will be that whenever evidence is obtained in breach of rules, and however technical is the infringement complained of, the court will have to exclude the evidence. It is not possible to state with any degree of certainty along which lines the court will interpret the concept of unlawfulness. At the present time, only one single decision has emerged or been reported from the Court of Appeal; in the case of *Alpaslan*[44], the accused, aged under 18, was prosecuted and convicted in compliance with then applicable procedural rules which did not require the involvement of an appropriate adult. After the initial court's decision to convict, new legislation (1992 Amendment) which required the compulsory involvement of a lawyer as an appropriate adult in the investigation and prosecution of those who need special care was enacted by the Parliament. According to Turkish law the initial court's decision is not a final one unless there is waiver of the right to appeal by the defendant or approval of the decision by the Court of Appeal. On appeal, which took place after the enactment of new provisions, it was argued that

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[44] Yargitay Ceza Genel Kurulu, *E.1993/5-15 K.1993/62 T.15.3.1993*, 19 Yargitay Kararlari Dergisi (Journal of the Court of Appeal Decisions), May 1993; In Turkey it is rare to refer to a case by the names of the parties. Citations normally include the court, date and registration number of the cases in the court. Following the English style, in citing to cases I have used the names of the parties where available. For some cases that did not appear in official public reports but rather were published only in private case reporters, the names of the parties did not appear.

non-involvement of a lawyer during the investigation and prosecution constitutes unlawfulness and the conviction should be quashed. By avoiding the employment of the concept of unlawfulness in this case the Court of Appeal, in effect, refused to apply the unlawfulness concept retroactively. It was held that the current provisions of the Code of Criminal Procedure cannot be taken into account when considering illegality(yasaya aykirilik)[45] of something done before the 1992 amendment came into effect. This statement is perfectly understandable with regard to the concept of illegality, but the existence of a new norm might well be relevant, although not decisive, when considering unlawfulness. As has been held by the English judiciary in the case of *R. v Ward*[46], a court could have regard to the current norm (Codes of Practice) when considering the fairness of something done before the norm came into force, since the new norm reflects current thinking of what is fair. Perhaps the use of the word "illegality" rather than "unlawfulness" in the case of *Alpaslan* is the first indication of how the exclusionary rule under section 254 will operate. As far as this single case is concerned, it is clear that application of the exclusionary rule has been restricted to technical illegality.

2.5. The Undesirability of Enforcing "Hukuka Aykirilik" as "Kanuna Aykirilik"

Equalising the concept of "unlawfulness" to the notion of "illegality is another way of stating that Turkey adopts a rule of mandatory exclusion. As has been

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[45] The term "yasaya aykirilik" (illegality) was employed. There is no indication whether this has been done intentionally.

[46] (1994) 98 Cr. App. R. 337; For the contrary judgment see, *R. v Purcell* [1992] Crim. L. R. 806.

examined in Chapter Three, such an approach requires exclusion of any evidence obtained in a situation which did not meet the standards laid down. The mandatory exclusionary rule has the advantage of being relatively easy to apply; once it is decided that a piece of evidence was obtained in breach of any rule, it must be excluded without any further consideration. One should not, however, ignore the American experience which clearly indicates a dissatisfaction with the mandatory exclusionary rule. In order to eliminate its disproportionate effects, there is recently a trend to modify it. It seems useful at this point to examine briefly the experience of the United States.

The first American case declaring the exclusionary rule was *Body v United States*[47]. The law enforcement officers in this case seized plate glasses which were allegedly brought into the country without having paid the required duty. At the initial trial, the defendant had to produce invoices and other import records in accordance with a statute requiring the production at trial of self-incriminating documents. The defendant's case on appeal was that the charge should be dismissed since the statute requiring production of the papers violated his constitutional rights. The U.S. Supreme Court held that the statute required the owner of the goods to be a witness against himself within the meaning of the fifth amendment[48], and constituted an unreasonable search and seizure within the meaning of the fourth

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[47] 116 U.S. 618 (1886).

[48] The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall ... be compelled in any criminal case to be a witness against himself ...".

amendment[49]. Thus, such papers could not be admitted into evidence by any federal courts.[50] The justification for the exclusionary rule was given as being to make meaningful the protection provided by the Constitution.[51] The rule is not confined to those rules derived from the Fourth Amendment. The Supreme Court has applied it to confessions[52], police line-ups[53], identification evidence[54] and the denial of due process[55].

The crucial feature of this exclusionary rule is that it results in absolutely mandatory exclusion. Where there is a violation, the resulting evidence must be excluded. Trial judges have no discretion; no further concepts such as fairness, trustworthiness, or lawfulness may be employed against exclusion. Consequently, failure of a trial judge to exclude such evidence is enough reason to reverse the verdict on appeal.

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[49] The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated ...".

[50] Until 1961, the exclusionary rule was applicable only to cases in the federal courts. The scope of it was expanded to state violations in the case of *Mapp v Ohio* - 367 U.S. 643 (1961).

[51] *Weeks v United States* 232 U.S. 383 (1914).

[52] *Miranda v Arizona*, 384 U.S. 436 (1966).

[53] *U.S. v Wade*, 388 U.S 218 (1967).

[54] *Gilbert v California*, 388 U.S. 263 (1967).

[55] *Rochin v California*, 342 U.S. 165 (1952).

The practical operation of the rule led to release of many suspects on technicalities. The far-reaching consequences of the mandatory exclusionary rule is well illustrated by the example that it was almost impossible to convict the murderer where the body of the murdered man is found as a result of illegal search.[56] Not only the body of the victim but also verbal evidence obtained as a result of illegal search cannot be taken into account since it could not have been obtained without illegal search.[57] Such cases led to severe criticisms of the rule by judges and legal scholars[58] and members of the federal judiciary increasingly urged its reconsideration in the 1970's[59]. Recently, the Supreme Court has been willing to find exceptions to the mandatory exclusionary rule.

In the case of *United States v Leon*[60] the Supreme Court modified the mandatory exclusionary rule by creating a major exception: the good faith exception. The facts of the case were as follows; the judge issued a warrant authorizing searches of two houses and two cars connected to suspected drug traffickers. Drugs were found

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[56] *People v Defore*, 242 N.Y. 13 (1926); *Killough v U.S.* 114 U.S. Appl D.C. (1962).

[57] *Wong Sun v United States*, 371 U.S. 471 (1963).

[58] See, *Burger*, 1964, "Who Will Watch the Watchman?", Am. U. L. Rev. 1; *Burns*, 1969, "Mapp v Ohio: An All-American Mistake", 19 De Paul L. Rev. 80; *Oaks*, 1969-70, "Studying the Exclusionary Rule in Search and Seizure", 37 University of Chicago Law Review 1169; *Schlesinger*, 1977 Exclusionary Injustice.

[59] See, *Bivens v Six Unknown Named Agents*, 403 U.S. 388 (1971); *Stone v Powell*, 428 U.S. 465 (1976); *Brown v Illinois*, 422 U.S. 590 (1975); *California v Minjares* 443 U.S. 916 (1979); *Stone v Powell* 428 U.S. 536 (1976); *Coolidge v New Hampshire* 403 U.S. 443 (1971).

[60] 468 U.S. 897 (1934).

in the execution of the warrant. The initial court excluded drugs on the ground that the affidavit for the warrant did not establish probable cause, although the officers requesting the warrant reasonably believed it did. The Court of Appeal affirmed, but the Supreme Court quashed the decision of exclusion, stating that the mandatory exclusionary rule should

> "be modified so as not to bar the use of ... evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause".[61]

Another example of the employment of the good faith exception is the case of *Massachusetts v Sheppard*[62] in which the officers had difficulty in finding a search warrant application form since it was Sunday. A form was finally found, but it was printed for a different district and was designed to search for controlled substances. The affidavit accompanying the warrant application form listed the murder evidence that the police were looking for. The judge who granted the warrant was informed about the problem with the form. In the execution of the warrant incriminating evidence was found. The defence submitted at the voir dire (suppression hearing) that since the reference to controlled substances was not deleted in the warrant form, the officer had executed a warrant for which there was not probable cause, and therefore the evidence obtained in the execution of this warrant should be excluded. The initial court's decision to admit the evidence for the reason that the officer acted in objectively reasonable good faith reliance on the warrant was confirmed by the Supreme Court of the United States.

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[61] *Ibid*, p. 900.

[62] 468 U.S. 981 (1984).

The good faith doctrine is not only the exception to the mandatory exclusionary rule. In *Nix v Williams*[63], the "inevitable discovery" exception was adopted, holding that evidence should not be excluded if it ultimately would have been discovered by legal means. In this case, the body of a murdered child discovered as a result of illegal interrogation was admitted into evidence since the prosecution established that searchers would have discovered the body irrespective of interrogation. Furthermore, the Supreme Court developed the third exception, known as "the public safety rule", in the case of *New York v Quarter*[64]. This exception allows the prosecution to introduce improperly obtained evidence if impropriety occurs to protect public safety. The facts of the case were that a woman approached two police officers and complained of being raped by a man who had just entered a nearby supermarket carrying a gun. In the store a man who matched the description given by the woman was caught. After handcuffing him, but prior to cautioning him, the officer asked where the gun could be found, and he revealed the location of it. At the initial trial, the judge excluded the statement "the gun is over there" and the gun since the man had not been cautioned. The Supreme Court, however, held that the evidence should be admitted because the need to ask questions to protect public safety outweighs the need for caution.

To sum up, recent judicial decisions undermine the mandatory exclusionary rule in the United States, restricting its application in a variety of situations. There

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[63] 467 U.S. 431 (1984).

[64] 104 S. Ct. 2626 (1984).

are valuable lessons to be learned from the American experience. Interpretation of "hukuka aykirilik" as "kanuna aykirilik" is to bring Turkey close to having the 1960's American exclusionary rule which is out of date in that recognition of significant exceptions to the general application of the exclusionary rule has minimised its automatic effect. To try to predict the future is very difficult, but if the concept of unlawfulness is being equalised to the notion of illegality one should expect the Turkish Court of Appeal to create exceptions emphasizing the difficulties that would be caused by the mandatory exclusionary rule. The American experience strongly indicates that the mandatory exclusion is likely to be, eventually, abandoned to arrive at a more flexible approach in dealing with particular cases.

3. The Concept of Unfairness

As has been seen in the previous chapter the English courts are not required to exclude improperly obtained evidence automatically. Such evidence ought to be excluded if it is established that its admission would have an adverse effect upon the fairness of the proceedings. Thus when trying to ascertain the admissibility of improperly obtained evidence in English law, the crux of the matter lies in the concept of "unfairness". The clarification of the meaning of the term "unfairness" is, therefore, likely to shed light upon the circumstances in which the exclusionary discretion is exercisable. The following pages are devoted to the analysis of what the nature of unfairness is and how one can identify the existence of unfairness.

3.1. Unfairness in International Law

Although this study is concerned mainly with national laws, in order to arrive at a sufficiently concrete view of the concept of unfairness related to trial, it may be helpful to look at international law.

The notion of fair or unfair trial has been the concern of the international community for a long time. Until recently, this interest was restricted to the protection of aliens abroad by their national State.[65] The developments reached after the Second World War by enactment of international treaties have certainly been remarkable. Provisions concerning fair trial have been, inter alia, included in the Universal Declaration of Human Rights[66], in the United Nations Covenant on Civil and Political Rights[67] as well as the European Convention on Human Rights[68]. They all provide that anyone charged with a criminal offence is entitled to a *fair hearing*. None of the international agreements give a general definition of the term "fair trial", instead they list certain requirements which are essential for ensuring the fairness of the proceedings. It is a fact that the list does not include provisions relating to the prejudicial effect upon the fairness of the trial of acceptance of improperly obtained

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[65] It was almost accepted by all the States that every State must treat foreigners in accordance with an international minimum standard of fairness, no matter what treatment the State concerned gives its own nationals.

[66] For the text, see Resolution 217(III), General Assembly, Third Sess, Off. Rec., pt.I, 71.

[67] In force since 1976. See *Harris*, 1991 Cases and Materials in International Law 610.

[68] European Treaty Series, No:5.

evidence as a basis for conviction. However, one should not assume that the conventions represent a comprehensive list of all the conditions which must be fulfilled for a trial to be fair. Indeed, it is stated before enumeration by all the conventions that "everyone ... has the following *minimum rights*". The term "minimum rights" indicates that there may be some other requirements which are not included in the conventions but are essential to a fair trial.

As far as European case law is concerned, there are some cases in which it has been held that the introduction of improperly obtained evidence in a criminal trial prejudices the fairness of the trial. To illustrate, in the case of *Austria v Italy*[69] the European Commission on Human Rights expressed the opinion that the fair trial requirement could be violated where confessions obtained by means of torture or ill-treatment were admitted as evidence. Furthermore, in the case of *Schenk v Switzerland*[70] it is proposed as a dissenting opinion that the necessity to scrutinize the law enforcement officer's behaviour in the course of investigation and to ensure esteem for the right of the individuals can only be served by the exclusion of improperly obtained evidence. However, the European Court on Human Rights, despite its overall responsibility to ensure the proceedings were fair, frequently recognises that admissibility of improperly obtained evidence is primarily the concern of domestic law.[71] The reason for taking this approach is said to be the lack of a

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[69] 6 Yearbook of the European Convention on Human Rights 740, (1963).

[70] Eur. Court H. R., *Schenk* Judgment of 12 July 1988, Series A, No;140.

[71] *Vidal v. Belgium*, Eur.Court H.R, 1992, Series A, No:235-B ; *Ludi v. Switzerland*, Eur Court H.R, 1992, Series A, No:238. One should also note that in the case of *Corfu Channal Case* (Judgment of 9 April 1949, ICJ Reports 1949, 32) the

common European ground in favour of exclusion of such evidence.[72] The hesitation to consider trial fairness with regard to admittance of improperly obtained evidence indicates that the concept of fairness in international law or in European law has not been developed as much as the idea of fairness in English law. This is understandable in that international norms generally fall behind the norms of developed legal systems since they are the result of a compromise between developed and less developed legal systems.

3.2. Two Different Types of Unfairness

When considering the exclusionary discretion bestowed by section 78(1), the distinction between unfairness arising from the use of the evidence at trial and unfairness in the method by which the evidence was obtained should be borne in mind. Although specific reference is made in section 78(1) to the circumstances in which the evidence was obtained as a factor to be taken into account, the evidence is to be rejected only where its admission would have such an adverse effect upon the fairness of the proceedings. In other words, the unfairness in the use of evidence at trial is the concern of the section in question; the fact that the police have acted unfairly will not necessarily lead to the exclusion of evidence unless the fairness of the criminal process is adversely affected. Some pre-PACE cases such as *R. v Court*[73] and *R. v Payne*[74],

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International Court of Justice, confronted by evidence obtained illegally by British ships in Albanian waters, treated the evidence as admissible.

[72] *Stavros*, 1993, The Guarantees for Accused Persons Under Article 6 of the European Convention of Human Rights 277.

[73] [1962] Crim. L. R. 697.

however, demonstrate a confusion between these two types of unfairness. They concentrate upon unfairness in the manner in which evidence was obtained rather than unfairness in the actual of the accused by reason of its admission. But in *R. v Sang*[75] there was unanimity over the fact that the rule of exclusion is concerned with trial fairness. This was clearly reflected by Lord Diplock's statement that

> "the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at trial is obtained by them.[76]

Nevertheless, the significance of the unfairness of police methods could hardly be entirely denied.

It should be noticed that this distinction provides a basis for comparison of the unlawfulness concept, in the sense suggested above, in Turkish law and the notion of fairness in English law. It is a fact that the state possesses enormous manpower and economic resources to aid in the process of criminal investigation , whereas the individual does not have similar resources at his disposal. The formulation of procedural rules relating to obtaining evidence may be seen as an attempt to establish a right balance between the law enforcement officers and the suspect. The strict adherence to these rules, however, would operate to tip the balance in concrete cases. The concept of unlawfulness is, therefore, another device to ensure the right balance

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[74] [1963] 1 W. L. R. 637.

[75] [1979] 2 All E. R. 1222.

[76] *ibid*, p. 1230.

in the context of the particular facts of a case. Accordingly, the Turkish unlawfulness test resembles unfairness in the manner in which evidence was obtained rather then trial unfairness.

The establishment of the balance between the law enforcement officers and the suspect regarding the collection of evidence is not an aim in itself. The overriding purpose of it is to ensure, or to contribute to ensuring, fairness of the criminal proceedings as a whole. In light of this assumption, one may speculate that fairness of the proceedings will be automatically affected where there exists unfairness in the manner in which evidence was obtained. The English Court of Appeal clearly confirms the interdependence of two types of unfairness. In the case of *R. v Keenan*[77] and *R. v Walsh*[78] a connection between the aims of the provisions and trial fairness was identified. Accordingly, infringement of the provisions, which had been designed to achieve fairness at the pre-trial stage, is likely to affect the fairness of the trial.[79]

3.3. Subjective or Objective Unfairness

Another crucial distinction can be made between fairness as a subjective psychological response and fairness as an objective state of affairs. The concern of

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[77] (1990) 90 Cr. App. R 1; [1989] 3 All E. R. 598.

[78] (1990) 91 Cr. App. R. 161.

[79] See Chapter Seven 2.1.2. See also *Birch*, 1994, "What is a Fair Cop?", 47 Current Legal Problems 73.

objective procedural fairness is mainly the capacity of a procedure to conform to normative standards of fairness, while the concern of subjective procedural fairness is the capacity of a particular procedure to reflect the fairness in judgement of those who are involved in such procedures. The possible effect of the admission of improperly obtained evidence upon procedural fairness can be discussed with reference to either objective or subjective standards. For example, instead of concentrating on the normative standards, one may examine the trial fairness in the context of persons with personal experiences of criminal proceedings.[80] Such an assessment may be based on interviews or questionnaires of judges, prosecutors, police officers, defence lawyers, suspects, or even ordinary citizens on the issue of whether the way in which evidence obtained in a particular case affects the fairness of the trial.[81] Although not empirically tested, one may expect different evaluations from each group of people depending upon the characteristic of the role they played in the criminal procedure. Since judges are the holders of discretionary power to conclude that admission of improperly obtained evidence would undermine the fairness of the trial, it may be worth concentrating on whether they do , or should, exercise this power in the day to day application of law.

The Law Lords in *R. v Sang* avoided making any exhaustive statement as to the parameters of trial fairness in this respect. Lord Scarman put it:

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[80] See generally, *Thibaut and Walker*, 1975, Procedural Justice: A Psychological Analysis.

[81] The idea that the results of public opinion pools can be taken into consideration in determining admissibility was rejected by the Canadian Supreme Court. See *R. v. Collins* (1987) 56 C. R. (3 rd) 193, at 209.

> "each case must, of course, depend on its own circumstances. All I would say is that the principle of fairness ... is not susceptible to categorisation or classification".[82]

Similarly, Lord Fraser states,

> "I do not think it would be practicable to attempt to lay down any more precise rules because the purpose of the discretion is that it should be sufficiently wide and flexible to be capable of being exercised in a variety of circumstances that may occur from time to time but which cannot be foreseen".[83]

As has been examined in the previous chapter, their Lordships' views have been shared by the House of Lords[84] and the Court of Appeal after the enactment of section 78.[85]

This rhetoric, however, does not offer much help on the practical operation of the concept of fairness. Unlike analysis of reported cases, there appears to be no academic interest in the empirical assessment of how the fairness discretion is exercised in practice. However, the pioneering study of Hunter, which may stimulate empirical studies, should not be ignored.[86] Hunter's empirical study is based on, inter alia, interviews with four Crown Court judges and one High Court judge. The principal question asked to the judges was whether they considered the reliability,

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[82] *R. v Sang* [1979] 2 All E. R. 1222, at 1247.

[83] *Ibid*, p. 1242.

[84] *R. v Preston and Others*, (1994) 98 Cr. App. R. 405, Lord Mustill maintains, "we are here concerned with the exercise of discretion by the trial judge. This should not lightly be overruled" (p. 434).

[85] See Chapter Four.

[86] *Hunter*, 1994, "Judicial Discretion: Section 78 in Practice", Crim. L. R. 558.

disciplinary or protective principles when exercising unfairness discretion. Although the question put by her to judges was flawed in omitting the principles of the legitimacy of the verdict and judicial integrity, the Crown Court judges' answers clearly indicate that they use their subjective sense of fairness rather than any normative test. For example, it is maintained that "we ask ourself 'is it fair to allow this evidence to be adduced?' If it is not fair, we don't admit it". Similarly, a feeling obtained through experience is said to be involved by another judge.[87]

Although the number of judges involved in this research makes hard any generalisation, it is perfectly enough to raise the issue of whether the standard of fairness is necessarily a matter of judges' personal moral judgement. If so, one could expect little more than irreconcilable opinions reflecting the moral sentiments of individual judges. This should not be the case, at least, for the sake of consistency. There should be attempts to condition or to structure the judges' subjective response to the circumstances of the individual case.

Attention has been devoted by legal scholars for a considerable time to establish some objective criteria the general procedural fairness, but there is hardly any consensus; what is fair and unfair with regard to criminal proceedings is still in dispute. This lack of agreement may derive from the fact that the meaning of procedural fairness changes according to cultural beliefs shared by members of

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[87] *Ibid*, p. 562.

society.[88] We should not ignore the fact that previous conceptions of fairness, although they may have been imperfect and unjust according to our current standard, were thought to be fair at one time. Thus, the concept of fairness has the advantage of not being static. As the perception of fairness changes with the lapse of time, it enables the courts to give effect to such changes without any formal change in the law.

Although disagreement as to the content of " the fairness of the proceedings" is possible, the judge's discretion is not unconstrained. The judge's task is to take into account all the circumstances of the case, and then answer the statutory question of whether the admission of the evidence does effect the fairness of the proceedings that it should not be admitted. The Court of Appeal will not interfere with the judge's decision unless he failed to take into account all the circumstances or he took into account irrelevant considerations, or he answered the statutory question unreasonably.[89] An illustration of failing to take into account relevant circumstances is the case of *R. v Twaites and Brown*[90] where a betting office manager and a clerk charged with theft made certain admissions to their employer's own company investigators, who failed to abide by relevant provisions of the Codes of Practice. The

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[88] As stated by May, "the concept of fair play which is at the heart of this section is very much part of our culture". *May*, 1988, "Fair Play at Trial: An Interim Assessment of Section 78 of the Police and Criminal Evidence Act 1984", Crim. L. R. 722, at p. 730.

[89] *R. v Christou*, [1992] 1 Q.B. 979; 95 Cr. App. R. 264; *R. v O'Leary*, 87 Cr. App. R. 387.

[90] 92 Cr. App. R. 106; [1990] Crim. L. R. 863; see also, *Joy v Federation Against Copyright Theft Ltd*, Queen's Bench Division, 14 January 1993, Lexis, Transcript by Martin Walsh Cherer.

trial judge failed to consider whether by virtue of section 67(9)[91] of PACE the Codes of Practice apply to commercial investigators. The Court of Appeal held that the verdict based on these admissions was unsafe and unsatisfactory in that failure to ask the right question must, to some extent, affect the answer to the question of whether the admission of the interview evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

One may also ask what unreasonableness means. It is said to be a situation that the material in the case discloses a state of affairs in which a reasonable judge must have concluded another way.[92] Although there is much room for differences of opinion as to what the reasonable judge would decide in a particular situation, the emergence of the reasonable judge concept is a clear sign of an objective test. Analysis of the cases in the following pages is likely to clarify who is a reasonable judge for the purpose of section 78.

3.4. Unfairness and Injustice

When examining the nature of the concept of unfairness one has to notice the existence of a distinction between the procedures (how decisions are made) and

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[91] Section 67(9) provides:

> "Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of such a code".

[92] *R. v Middlebrok and Caygill*, Court of Appeal, 18 February 1994, Lexis, transcript by John Larking.

outcomes (what the verdict is). It is a distinction between being fairly treated and receiving a fair outcome.[93] The latter, which is a matter of the right outcome of the criminal justice system, is stated by the term "justice", while the former which is a matter of the right structure for that system is called "fairness".[94] One may ask whether we can make the same distinction with regard to the concept of fairness regulated by section 78. If so, can the admission of improperly obtained evidence render unfairness of the procedure (unfairness), unfairness of outcome(injustice), or both? Which one is the focus of section 78? Although the phraseology of the section in question gives the impression that its main concern is procedural fairness, one has to accept that the fairness of the procedures is strongly linked to whether the procedures produce fair outcomes (justice). The concepts of fairness and justice are not totally independent from each other.[95] Justice is one thing which is expected to be produced by a fair procedure; a procedure that consistently produces unfair outcomes (injustice) will eventually be seen as unfair itself. This normative statement is supported to some extent by the empirical research conducted by Landis and Godstain using survey data collected from 619 prison inmates.[96] The data suggests

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[93] *Tyler*, 1990, Why People Obey the Law 5.

[94] *Dworkin* , 1986, Law's Empire 404.

[95] They often are used interchangeably, see Lord Scarman' speech in *R. v Sang*, [1979] 2 All E. R., p. 1247.

[96] *Landis and Godstein*, 1986, "When is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate", 4 American Bar Foundation Research Journal 675.

that procedural issues are more important than outcome issues in shaping the offender's perception of outcome fairness.[97]

In attempting to explain the conception of what is meant by the "fairness of proceedings", Dennis suggests that assessment of unfairness under s.78 should be based on fairness of the outcome (legitimacy of verdict).[98] As far as his theory of the legitimacy of the verdict is concerned, justifying the claim for condemnation and punishment includes both a factual and a moral dimension. "Guilt" is a word used internally in the criminal law and it must not be confused with lay views of whether "he did it". A guilty verdict requires two judgments. The first is a factual judgment which provides that the defendant did in fact commit the alleged offence. The second is a moral judgment which states whether the defendant deserves to be convicted and punished for it. These two judgments should exist in a conviction at the same time. A factually accurate conviction may not be legitimate if it lacks moral authority and vice versa. The publicly acceptable verdict is the one which is perceived as being factually accurate and as having moral authority. In the ordinary course of events the two dimensions of verdict march together; the defendant will not deserve to be convicted unless he committed the crime, and if he committed it, he deserves

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[97] If this is so, admission of unfairly obtained evidence may create, from a behavioral perspective, in the suspect a sense of unfairness that undermines the legitimacy of verdict and thereby allows justification for past criminal activity and increases the likelihood of future criminality. See generally *Casper*, 1972, American Criminal Justice: The Defendant's Perspective.

[98] See *Dennis*, 1989, "Reconstructing the Law of Criminal Evidence", Current Legal Problems 21; see also *Arenella*, 1983, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies", 72 Georgetown Law Journal 197.

conviction. However, the moral authority of the verdict should not be equated with the factual judgments; they may be separate. Dennis attempted to clarify this point by giving the example of a confession obtained by torture;

> "the confession may be perfectly reliable in proving that the defendant in fact committed the offence. But would a verdict of guilty be acceptable as a justification of punishment and as an expression of the values of the criminal law? I suggest it would not. The use of torture amounts to a gross violation of the principle of according all citizens respect and dignity. Such a violation destroys the moral authority of the verdict. This is because a verdict which is derived from a disregard for the core principle of criminal law is self-contradictory. It cannot function as an expressive message that the criminal law incorporates values which it is necessary to uphold while appearing to be based itself on a deliberate flouting of those values. This must inevitably lead to a loss of respect both for the trial process and for the criminal law itself."[99]

Dennis' work addresses the link between the admission of improperly obtained evidence and the legitimacy of the verdict. When he refers to the issue of fairness, the theory evaluates admissibility in terms of the outcome it produces. He focuses on legitimacy of verdict as a major determinant of the fairness of the proceedings because he believes that control over the admissibility of improperly obtained evidence leads to fairer outcomes (legitimate verdict). Thus, fairness (procedural fairness) is explained in terms of justice (outcome fairness). In other words, a trial is unfair if admission of improperly obtained evidence would harm the legitimacy of verdict. There is no doubt that this theory should be credited with producing a convincing explanation for the unfairness principle.

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[99] *Dennis, ibid*, p. 37.

Similar arguments may be found in the writings of other academics. Nesson argues, even before Dennis, in his Harvard Law Review article that many evidentiary rules may be explained by the need to promote the acceptability of the judicial verdict.[100] Accordingly, the goal of producing acceptable verdicts is not satisfied simply by choosing the verdict that is most probably accurate. Since one apparent way to achieve public acceptance is to search for truth, acceptable verdicts and probable verdicts might often coincide. The correlation between these two is not, however, precise: a probable verdict may not be acceptable. Choo, on the other hand, contends that the most appropriate rationale for the admissibility of improperly obtained evidence is the principle of legitimacy which is concerned with safeguarding both the legitimacy of the verdict and the legitimacy of the criminal process.[101] Such legitimacy, according to him, depends on two basic functions of criminal justice: the conviction of guilty which favours admission, and the moral integrity of the criminal process which favours exclusion. The admissibility of improperly obtained evidence involves an assessment of whether the public interest in the conviction of the guilty outweighs the public interest in the moral integrity of the criminal process.

The connection between the legitimacy of outcome and the admissibility of improperly obtained evidence is submitted to be very powerful. Accordingly, the

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[100] *Nesson*, 1985, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts", 98 Harvard Law Review 1357.

[101] *Choo*, 1990, The Relation Between Pre-Trial Executive Improprieties and the Outcome of the Criminal Trial 96, PhD Thesis, University of Oxford; See also *Choo*, 1993, Abuse of Process and Judicial Stays of Criminal Proceedings 98.

judicial duty to exercise the fairness discretion arises in cases where the legal system is likely to generate unacceptable or illegitimate verdicts. Can one criticise this rationale for lack of clarity? It is not accurate to assume that this principle has no guiding force since individual judgments cannot be derived automatically from rules. The need to balance fairness to the public with fairness to the accused is in itself a powerful device. Indeed, unlike the pre-PACE fairness discretion which was concerned with fairness to an accused,[102] the phraseology of "fairness of the proceedings" used in the legal text of section 78 implies that the court should take into consideration fairness not only to the accused but also to the public.[103]

How does the English judiciary respond to this theory? Does it consider the legitimacy of the verdict principle when it is confronted with an item of improperly obtained evidence? One can hardly find any judicial statement pronouncing this approach. At the same time, the judiciary has not disassociated itself from the idea of exclusion for the legitimacy of the verdict purpose, which it did more than once with regard to the deterrent rationale.[104] It is a fact so far that the judges have not articulated any theory, but have set out a number of factors which need to be taken into consideration. As will be seen below, the relevant factors which emerged case

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[102] *R. v Sang*, [1979] 2 All E. R., Lord Scarman's speech, at p. 1242; *Murphy* [1965] NIR 138, Lord McDermott, at p. 142.

[103] *R. v Smurthwaite*, [1994] 1 All E. R. 898, at 903; *R. v Pattemore*, [1994] Crim. L. R. 836.

[104] It is a typical comment of the judiciary that the object of a judge in considering the application of section 78 is not to discipline or punish police officers. *R. v Mason* [1987] 3 All E. R. 481; *R. v Delaney* (1989) 88 Cr. App. R. 338; *R. v Hughes (Patrick)*, [1994] W. L. R. 876.

by case, do not conform with the classic well-known rationales such as the reliability, the deterrent, the protective. One needs, therefore, to examine these factors to assess whether the legitimacy of the verdict is the key.

3.5. Relevant Factors and the Legitimacy of the Verdict Theory

In spite of the fact that the notion of procedural unfairness is quite new and it is still in its infancy, certain noticeable features of it are gaining clarity. Thus, without giving a definition or rationale of the concept of unfairness, a number of factors which may be relevant in applying the "unfairness test" to determine whether improperly obtained evidence should be excluded are identified by the English judiciary. In the following pages, these factors will be analyzed to see whether they give any support to the legitimacy of the verdict principle.

3.5.1. Unreliability of evidence

There is no doubt about the fact that an accused should only be convicted on the basis of evidence possessing a degree of trustworthiness. In cases where the reliability of evidence is in dispute, admission would substantially reduce the chances of the fact-finder reaching a correct decision. This danger is recognised and dealt with by the common law discretionary power to exclude evidence when its probative value is outweighed by its prejudicial effect.[105] Although this common law discretion is preserved by section 82(3) of the PACE Act, such evidence can be excluded under

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[105] *Selvey v. D.P.P.* [1970] A.C. 402.

section 78(1).[106] Accordingly, the evidence most likely to have adverse effect upon the fairness of proceedings is evidence which is unreliable. To illustrate, in the case of *R. v Gaynor*[107] section 78 was employed to exclude evidence of a formal "group identification" which had taken place in lieu of an identification parade which was practicable and was requested by the defendant. Since the regulation of an identification parade by Code of Practice D is based on the notion that the parade is the most reliable method of identification, the trial judge concluded that the breach of the Code of Practice for the Identification of Persons by Police Officers is capable of throwing the reliability of identification evidence into doubt and thus admission of it could adversely effect the fairness of the proceeding.

Excluding evidence depending on the risk of unreliability in the circumstances of the particular case is pretty consistent with the principle of the legitimacy of verdict. A conclusion that the evidence should be included despite its unreliability would be unacceptable since a factually inaccurate or doubtful conviction can never be legitimate.

Unlike unreliability, reliability is not considered by the judiciary as decisive, but as an important relevant factor in favour of inclusion. Non-existence of any dispute as to the accuracy of the disputed evidence consistently leads to inclusion,

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[106] *Matto v Wolverhampton Crown Court* [1987] R. T. R. 337, at p. 346 "in any case where the evidence could properly be excluded in common law it can certainly be excluded under section 78".

[107] [1988] Crim. L. R. 242; See also following commentary by Professor Birch.

especially in cases where secret electronic recording is involved.[108] Indeed, the reliability of evidence in these cases will not be the issue unless the methods employed provide the police with the opportunity to fabricate or tamper with the evidence.[109] Evidence, including electronic recordings[110], may, however, be excluded under section 78 where there is no significant risk of unreliability.[111] This is remarkable in that the courts are disassociating themselves from the reliability rationale. It may also be seen as a move towards the adoption of the principle in question. The factually accurate verdict and the legitimacy of verdict will coincide in most cases, given that one obvious way to gain legitimacy of the verdict is to search for truth. They may, however, fall apart in some cases.[112] Reliable evidence may be excluded if one accepts that the ultimate goal of the trial process is the legitimacy of the verdict, not

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[108] See *R. v Jalen and Katz* (1990) 90 Cr. App. R. 456; *R. v Bryce* [1992] 4 All E. R. 567; *R. v Christou and Wright* [1992] 4 All E. R. 559; *R. v Maclean and R. v Kosten* [1993] Crim. L. R. 687; *R. v Bailey and Smith* [1993] Crim. L. R. 681; *R. v Khan* [1994] 4 All E. R. 426, [1994] 3 W. L. R. 899.

[109] There are, in England, no statutory provisions which govern the use by police of secret listening devices on private property. It should, however, be noted that the Interception of Communications Act 1985 prohibits the interception of public telephone calls and postal communications.

[110] Section 9(1) of the Telecommunications Act 1985; *R. v Preston* (1994) 98 Cr. App. R. 405, Lord Templeman states that "the Act makes it impossible for a record of telephone conversation to be given in evidence", at p. 410; *R. v Effick and Mitchell* [1994] 3 All E. R. 458. In the case of *R. v Smurtwaite and Gill*, [1994] 1 All E. R. 898, at p. 908, it was stated that "the existence or absence of a total record (in undercover operations) is but one factor for the judge to consider when applying s. 78".

[111] See Chapter Three 3.1.2 and Chapter Seven (for the exclusion of improperly obtained evidence which does not carry significant risk of unreliability).

[112] One obvious example of such cases is given above. See accompanying text of the footnote 99.

the discovery of truth which is only an important means by which the legitimacy of the verdict is secured.

3.5.2. State of Mind of the Police Officer (Acting in Good or Bad Faith?)

Whether the law enforcement officers knowingly acted improperly is another factor which ought to be taken into account in applying the unfairness test. Bad faith on the part of the police will usually lead to an adverse effect upon the fairness of the trial.[113] A clear example of bad faith leading to the exclusion of evidence is the case of *R. v Nagah*[114] in which the suspect, on his way home after being released from the police station but required to participate in a parade later, was identified by his alleged victim who had been brought there in a police car, obviously for that purpose. By identifying the attitude of the police as a deliberate disobedience of the rules the Court of Appeal held that admission of such identification evidence would prejudice the fairness of the trial.

Existence of deception or trickery suggests a lack of good faith. Thus in *R. v Mason*[115] the admission made by the suspect after advice from his solicitor is held to have an adverse effect upon the fairness of the trial, because of the fact that the police had falsely told the accused and his solicitor that the accused's fingerprints had been found on the bottle used in an arson attack. The deceit practised by the police

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[113] *R. v Alladice* (1988) 87 Cr. App. R 380.

[114] (1991) 92 Cr. App. R 344.

[115] [1987] 3 All E. R. 481; (1988) 86 Cr. App. R 349.

was considered by the Court of Appeal as "a most reprehensible thing to do".[116] The cases decided after *R. v Mason*, however, suggest that not all deceits indicate bad faith. In *R. v Bailey and Smith*[117], for example, two suspects, who remained silent at the interview, were placed together in a bugged cell with an intent to obtaining an incriminating statement from them. In order to defuse their suspicions of being trapped, the investigating officers loudly displayed their anger at putting both men into the same cell. In actual fact this was conducted with the cooperation of the custody officer and the investigating officers. The operation worked and the suspects had a conversation which contained admissions of the charges. The Court of Appeal saw "no reason to decry the police's conduct" despite its awareness of the facts that the suspects were in custody and the questioning of those in police custody was strictly regulated by the legislation and the relevant Code.[118] One may reasonably argue that the trick was used, or at least such a risk was taken, so as to circumvent the provisions of the Code governing the detention, treatment and questioning of suspects. Even if the court accepted this argument and recognised the existence of bad faith on the part of the police, the admission of such self-incriminating evidence induced by trick could be justified by the existence of other evidence[119] or by the public interest in behaving improperly in serious crimes[120]. A somewhat different analysis may be

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[116] (1988) 86 Cr. App. R. 349, at p.354.

[117] (1993) 97 Cr. App. R. 365.

[118] *Ibid*, p. 375.

[119] *Ibid*, p. 367.

[120] *Ibid*, p. 375.

applied to the case of *R. v Christou and Wright*[121], in which a jeweller's shop was set up by undercover police officers in order to recover stolen property and collect evidence against the thieves and handlers. Transactions in the shop were recorded by hidden cameras and tape recorders. Admissibility of such evidence was challenged by the defence on the ground that the accused persons had been tricked into expressly or implicitly incriminating themselves. Besides acknowledging involvement of the police with a trick to produce evidence against the accused, the court pointed out that the police did not have any "dishonest intent" but acted in public interest to obtain evidence. The case of *R. v Christou and Wright* should be distinguished from the case of *R. v Bailey and Smith* in that the suspects were not in the control of the police and therefore the provisions of Code C did not apply. Thus, although importance is attached to the question of whether the police acted in bad faith, the answer to that question is not conclusive in every case.

Non-obedience of more than one part of the Code may also be held to imply deliberate breach of the rules by the police. In the identification case of *R. v Finley*[122] infringements of many parts of the Code, such as; showing the witnesses a photograph album containing 12 pictures only one of which bore a very good likeness to the suspect, keeping the witnesses together before the parade and failure to warn them about not discussing the case, and putting the suspect into a parade with others who did not resemble him good enough to conclude the existence of deliberate flouting of the Code and to exclude the evidence. The important point to be noted

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[121] [1992] 4 All E. R. 559.

[122] [1993] Crim. L. R. 50.

here is whether the violation of the procedure was an isolated incident or part of a deliberate pattern of infringements.

Like the existence of bad faith, the lack of bad faith or existence of good faith on the part of the police is also not conclusive.[123] In order that a premium is not placed on ignorance, in such a case the court should consider whether the breach was excusable by taking into account other factors. This view was supported by *R. v Anderson*[124] in which a misunderstanding by the police officer leading to non-involvement of a legal adviser before the crucial interview, did not itself result in the admission of the confession but some other factors such as the prior willingness of the suspect to be interviewed without legal advice did.

The fact that neither the existence not the absence of bad faith is conclusive may be seen as a natural consequence of the Court of Appeal's general approach to disassociate itself from the idea of exclusion for deterrent purposes. As has been seen in chapter 3 the officer's state of mind is crucial in the deterrent rationale. Although the officer's state of mind is not as decisive as to give support for the deterrent rationale, it is still a significant factor. It seem that the more a police officer acted in bad faith, the more the chance of excluding the evidence. Neither is such an approach consistent with the protective principle in that the harm which an individual suffers as a consequence of the violation is independent of the intention with which the act is performed. This approach is not, however, in conflict with the legitimacy of the

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[123] *R. v Alladice* (1988) 87 Cr. App. R. 380.

[124] [1993] Crim. L. R. 447, see also subsequent Commentary by Professor Birch.

verdict principle in that deliberate disregard of procedural rules would have a higher tendency to harm the legitimacy of the verdict than some genuine mistake on the part of the police.

3.5.3. The Non-Existence of Any Other Evidence

Allowing the accused to be convicted solely on the basis of improperly obtained evidence may also adversely affect the fairness of the proceedings. In *R. v Cochrane*[125], a first instance decision, it was held that under section 78, where evidence obtained in breach of the PACE was the only prosecution evidence, to admit it would have an overwhelming effect upon the "fairness" of the proceedings. This approach was backed by the Court of Appeal in *R. v Lawrence and Nash*[126]. In this case an undercover officer offered to buy cannabis resin from the suspects. There had been several unrecorded meetings between them. The officer's account was that the conversations in these meetings involved admissions. Although the contents of these conversations were challenged by the defence, the accused persons were convicted by the initial court. It was held by the Court of Appeal that the lack of corroboration of the officer's account of his conversations with the accused was a factor which the judge should have taken into account when considering the admissibility of the officer's admission.

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[125] [1988] Crim. L. R. 449, Acton Crown Court.

[126] Court of Appeal, 14 December 1993, Lexis, Transcript by John Larking.

A diametrically opposite situation may also be relevant. In cases where other evidence is available, admission of improperly obtained evidence is unlikely to cause unfairness since the same verdict would have been reached with or without the tainted evidence. If this is so, the legitimacy of the verdict principle gains explicit recognition. This point has been pronounced by the judiciary in the case of *R. v Okofor*[127]. The facts of the case were as follows: Pockets of cocaine were found in the accused's bags on his arrival at an airport in England. The accused was not informed of this fact in the hope that he would lead the police to others involved in drug trafficking. A conversation, which was technically an interview since the customs officers had reason to believe that an offence had been committed, took place between the custody officer and the accused without following the provisions of the Code. There were clear breaches of requirements relating to the caution, informing the suspect of his entitlement to legal advice and recording contemporaneously. The defence submission that the conversation ought to be excluded and thus the conviction should be quashed was rejected by the Court of Appeal. It was maintained that, although the interview had been wrongly admitted in evidence, admission of it did not cause unfairness since even if the conversation of the interview had been excluded, the jury could have come to no other verdict than the one they did.

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[127] (1994) 99 Cr. App. R. 97; See also *R v. Joseph* [1994] Crim. L. R. 48; *R. v Rowe*, [1994] Crim. L. R. 837.

3.5.4. The Significant and Substantial Breach

The relevance of the nature of violation has been acknowledged several times by judicial decisions.[128] Accordingly, a breach should be "significant and substantial" in order to have an adverse effect upon the fairness of proceedings. Such form of infringement is held to reveal that "*prima facie* at least the standards of fairness set by Parliament have not been met".[129] The more serious the breach, the greater the likelihood that trial fairness would be adversely affected and vice versa. This fact is likely to derive from the overall agreement that the courts can ignore the technical breaches since such an attitude is unlikely to have any effect upon legitimacy of verdict.

The purpose of the rule broken is highly relevant in assessing the significance and substantiality of the violation, and hence the effect of the breach of a rule upon the fairness of proceedings. In its several decisions the Court of Appeal has recognised that fairness of the trial is likely to be affected by the infringement of provisions which are intended to achieve the right balance of fairness at the pre-trial stage of criminal procedure. In the case of *R. v Keenan*[130], for example, it is held that the trial fairness has been affected by the infringement of the recording provisions aimed at preventing "verballing" and securing a record upon which the prosecution can

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[128] *R. v Absolam* (1989) 88 Cr. App. R. 332; *R. v Walsh* (1990) 91 Cr. App. R. 161; *R. v Keenan* (1990) 90 Cr. App. R. 1; *R. v Weekes*, [1993] Crim. L. R. 211.

[129] *R. v Walsh* (1990) 91 Cr. App. R. 161.

[130] [1989] 3 All E. R. 598.

rely. Similarly, in *R. v Welsh*[131], breaches of the provision related to the involvement of a legal adviser led to an adverse effect upon the fairness of the trial on the grounds that the object of the provision, which was to protect legal rights of the suspect and to lessen the occurrence of insubstantial allegations of malpractice, had not been met. Also, in the case of *R. v Weekes*[132] there had been a breach of the requirement of an appropriate adult's involvement. By considering the purpose of the provision, conversations which were not recorded in the presence of an appropriate adult were excluded under section 78 without examining the possibility of unfair questioning or the risk of an unreliable confession being obtained. The emphasis as to the link between the goals of the provisions and trial fairness also gives support to the legitimacy of the verdict principle since contributing to the legitimacy is not the purpose of all the procedural provisions.

3.5.5. Public Interest in Behaving Improperly

Another factor, which is clearly relevant under the principle of legitimacy, is the existence of a public interest in acting improperly. In the case of *R. v Chinoy*[133] it was held that the detection and proof of certain types of criminal activity may necessitate the employment of underhand and even unlawful means. Such a dictum may be, *inter alia*, the result of the recent sharp increase in the crime rate and in the number of sophisticated and violent criminals. The public, however, also have an

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[131] (1990) 91 Cr. App. R. 161.

[132] [1993] Crim. L. R. 211.

[133] [1992] 1 All E. R. 317.

interest in police compliance with the procedural rules. Thus, there is a need for balancing the rights of the suspect against the public's need for criminal procedure which will adequately protect the public.[134] The extent to which public interest allows limited infringement of procedural rights in the investigation of certain types of criminal activity cannot be determined with mathematical precision. It is possible, however, to identify certain types of situations where the police are allowed greater investigative freedom to protect public interest without threatening the fairness of the trial.

One criterion is the degree of danger the offence may cause to society.[135] The more serious the crime, the more flexibility the police are given. In the case of *R. v Smurthwaite and Gill*[136], (two separate cases the appeals in which were heard together because of their similarities) Smurthwaite solicited a contract killer to murder his wife, and Gill similarly to murder her husband. In each case the person solicited was, unknown to the accused, an undercover police officer. Incriminating conversations between the undercover police officers and the suspects were secretly tape-recorded. The Court of Appeal held on appeal that the admissions of such conversations is unlikely to cause unfairness of the trial in that undercover officers did not use their undercover pose to question suspects so as to circumvent the code but to prevent the commission of offences.

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[134] See, *Fellman*, 1976, The Defendant's Rights Today; Packer, 1964, "Two Models of Criminal Process", 113 University of Pennsylvania Law Review 1.

[135] Classifying crimes as more or less dangerous to society is a judgment that the courts or the police must make according to the facts in a given situation.

[136] [1994] 1 All E. R. 898.

Necessity may be stated as an another criterion; as the Court of Appeal noted in *R. v Christou and Wright*[137], to trap a blackmailer the victim may act as an agent of the police to arrange an appointment and false or marked money may be staked to catch the criminals. Such an arrangement or trick is said not to cause unfairness of the trial since it is not contrary to the public interest, and hence to the fairness of the trial.[138]

The public interest would also arise in cases where the police acted in the presence of circumstances of emergency. To illustrate, in the case of *R. v Hughes*[139] the accused was seen to take something from a pocket and put it into his mouth. He refused to spit it out and began to chew. The officer failed to carry out what the Codes required in relation to a search, but managed to extrude the cannabis from his mouth by using force. The contention for exclusion of this evidence under s.78 was withheld because of the public interest in preventing the destruction of evidence.

3.5.6. The Place of Breaches

As far as the deterrent or disciplinary rationale is concerned, evidence obtained by a foreign law enforcement officer in a foreign country should be admissible in English courts, even when the procedure does not meet the British standards. The

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[137] [1992] 4 All E. R. 559; (1992) 95 Cr. App. R. 264; [1992] 3 W. L. R. 228.

[138] [1992] 4 All E. R. 559, at p. 564; see also *R. v Williams*, (1994) 98 Cr. App. R. 209; *R. v Marshall*, [1988] 3 All E. R. 683.

[139] [1994] 1 W. L. R. 876.

rationale for this is that the English courts can do little, if anything, to deter improper practices by foreign officers. Although it is well established in England that the function of the judge in exercising his discretion under section 78 is not to discipline the police but to protect the fairness of the trial, one may observe that the Court of Appeal, without acknowledgment, has applied the deterrent rationale in deciding the admissibility of evidence obtained in a foreign country in breach of English procedural requirements. Such evidence was not required to be excluded by the Court of Appeal in the cases of *R. v Quinn*[140] and *R. v Konscol*[141]. In *R. v Quinn*, identification evidence had come into existence abroad as a result of an identification procedure which did not conform with the then applicable English standards on identification, nor with the current identification code which came into effect after the enactment of the PACE. It is maintained by the Court of Appeal that:

> "English courts cannot expect English procedural requirements to be complied with by the police forces operating abroad, even if, as in the present case, they have similar procedural requirements. The fact that identification was carried out in a way which did not conform with the requirements of the Home Office Circular 9/1969 cannot be disregarded if and insofar as it affects the intrinsic fairness of the identification procedure adopted. But the present case was not one where the procedural departures from the Circular were the responsibility of British authorities."[142]

Similarly, in the case of *R. v Konscol* the fact that the suspect was interviewed by Belgian authorities without cautioning and without informing him of the availability of a legal adviser is held not to threaten the fairness of English trial. It seems unlikely

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[140] [1990] Crim. L. R. 581.

[141] [1993] Crim. L. R. 950.

[142] *R. v Quinn* [1990] Crim. L. R. 581, at p. 582. Emphasises added.

that the Court of Appeal would take the same line if torture or other physical abuse was inflicted by foreign law enforcement officers.

Unlike the aforementioned factors which to some extent give support to the legitimacy of the verdict principle, a dictum to the effect that improprieties committed abroad are not relevant in deciding unfairness could hardly be reconciled with the legitimacy principle. The dilemma facing the trial judge is precisely the same in such situations with the occurrence of the impropriety within the jurisdiction. An examination of the recent illegal extradiction case of *ex parte Bennett*[143], however, casts doubt on the likelihood of this dictum to survive. The question faced by the House of Lords in this case was whether the English court has power to inquire into the circumstances under which a person had been brought within jurisdiction. The conclusion was reached by the Law Lords that "to maintain the purity of the stream of justice"[144] and "to protect its own process from being degraded and misused"[145], the court may not turn a blind eye to improprieties beyond the frontiers of its own jurisdiction. These words which almost pronounced the legitimacy of the verdict principle were used in the context of the abuse of process, but they are equally applicable to the improperly obtained evidence, given the fact that both the exclusion

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[143] *R. v Horseferry Road Magistrate Court, ex parte Bennett*, [1993] 3 W. L. R. 90; (1994) 98 Cr. App. R. 114.

[144] *ibid*, at p. 118.

[145] *ibid*, p. 117.

of improperly obtained evidence and a stay of proceedings, as argued by Choo [146], share the same foundation.

4. Comparison and Conclusion

The analysis so far presented has tried to establish a way of thinking about unlawfulness and unfairness in Turkish and English law respectively. It is noted that the Turkish legislature has not followed the English approach of determining the admissibility of improperly obtained evidence by making reference to the concept of an "unfair trial"; in the view of Turkish legislature evidence may be excluded if it has been obtained "unlawfully". Having said that, depending on the interpretation of the concept of unlawfulness and the concept of unfairness, Turkey and England may have a rigid or a flexible approach to the issue of admissibility of improperly obtained evidence. Narrow interpretation of the concept of unlawfulness may result in equalisation of it with the concept of illegality and may lead to an automatic exclusionary rule. By the same token, if the overriding purpose of procedural rules is to ensure fairness of the criminal proceeding as a whole, the breach of any of them may necessarily lead to an unfair trial and thus trigger to an automatic exclusionary rule. Such approaches, however, are unlikely to be taken in both jurisdictions.

It is submitted that, although these two concepts are not identical, they might be quite similar in respect to providing a flexible solution. The evidence can be

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[146] *Choo*, *supra* note 101, p. 107. For the contrary view see the speech of Lord Lowry in the case of *ex parte Bennett* (1994) 98 Cr. App. R. 114, at p. 136.

excluded by employing either unlawfulness and unfairness concepts, even if no breach of the express terms of the provisions was established. As has been established above, Turkish courts might be prepared to go direct to the supra-constitutional norms to exclude evidence, or to appeal to natural law or other extra-constitutional rules. This should also be possible for the English courts; the notion of unfairness is wide enough to allow taking into account breaches other than of specific statutory rules or the Code of Practice. Similarly, the fact that there have been breaches, even several breaches of the procedural norms, is not conclusive with regard to both notions. What is required in both jurisdictions is a balancing judgement. The possibility of whether the same amount of evidence may be excluded under these notions will be examined in Chapter Seven in the context of breaches of the rules safeguarding suspects in the police station.

The principle of the legitimacy of the verdict can also be accommodated within the Turkish framework, given the fact that a process of arriving of a legitimate verdict is a necessary part of the rule of law. Verdicts cannot legitimise themselves simply by being verdicts, but require legitimization by reference, inter alia, to proceedings by which they were reached. As Nesson maintains, "the extent to which the judicial system facilitates the generation of acceptable verdicts may express the intensity of our commitment as a society to the idea of government under the rule of law".[147]

The exact determination of what circumstances must exist before the fairness of the proceedings is adversely affected or before the lawfulness of a procedure is

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[147] *Nesson, supra* note 100, p. 1391.

breached will undoubtedly require decades of jurisprudence. Given the importance attached to the case law and the fact that the English statutory exclusionary rule was adopted several years before the Turkish counterpart, the concept of fairness is relatively well developed compared to the concept of unlawfulness. As far as Turkish judiciary is concerned, only one case so far has emerged from which the present judicial approach can hardly be deduced. For this reason, drawing a comparison between judicial approaches to these notions became hardly possible. Instead, attention has been concentrated on analyzing what English judges actually do, and what Turkish judges might decide to do.

To conclude, neither the concept of unlawfulness nor the notion of unfairness are technical conceptions with a fixed content unrelated to time, place and circumstances. They are rather products of social context and history. One should not ignore the fact that in many times and places torture was thought a perfectly proper means of obtaining evidence. Both concepts encompass the feelings or common sense which have been evolved through centuries of legal history and civilization, and cannot be imprisoned within the limits of any formula. Adjustments of them to specific issues inescapably involves the exercise of judgments by those whom the legal system entrusts with applying them. Since no society is static, there is every reason to believe that as Turkish and English society change, so will the concepts of "unlawfulness" and "unfairness". What goes against our sense of lawfulness and fairness at the present time may not have done so in the past and may not do in the future.

CHAPTER SIX

CONFESSIONS

1. Introduction

In several highly-publicized recent cases in England, individuals convicted of murder and sentenced to life imprisonment have been released after the overturn of their convictions by the Court of Appeal. These so-called "miscarriage of justice cases"[1] generated great controversy and considerable reflection about the criminal justice system. A central, substantive issue presented by these cases relates to the procurement and the usage of confessions; each of these cases- and several other recent English cases in which there were breaches of the rules governing interrogation- turned on the admissibility of improperly obtained confessions. Nor is the Turkish criminal justice system immune from such miscarriage of justice.[2] Not surprisingly, therefore, both legal systems have specifically focused on confessions. As has been seen in Chapter Four the admissibility of improperly obtained confessions has been regulated by special provisions both in Turkish and English law. Possible reasons behind such approaches have been discussed in the previous chapter and it is not

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[1] Such as *Callaghan and Others*, (1989) 88 Cr. App. R. 40 and *McIlkenny and Others* (1991) 93 Cr. App. R. 237 (the two "Birmingham Six" Appeals); *Armstrong and Others*, 1989, The Times, October 20, (The Guildford Four); *Ward*, (1993) 96 Cr. App. R. 1 (The Judith Ward); *Maguire and Others*, (1991) 94 Cr. App. R. 133 (The Tottenham Three), The Times, December 9, 1991); For a detailed commentary on these cases see also *Dennis*, 1993, "Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions", Public law 291.

[2] See generally *Gemalmaz*, 1992, "Turkiye Yargisinin Iskence Karsisinda Tavri (The Response of the Turkish Judiciary to Torture)", 14 Insan Haklari Yilligi (Turkish Yearbook of Human Rights). p. 65-107.

proposed to repeat that analysis here. In this chapter, by paying closer attention to these provisions an attempt will be made to compare and contrast them with each other.

2. The Current Laws of Turkey and England

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.[3] The heavy reliance on confessions subsequently led to the recognition of torture as a legitimate method for extracting confessions.[4] 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.[5] Obviously neither of these approaches reflects the current Turkish or English approaches to the issue.

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[3] In fact, they were equivalent to the English plea of guilt, precluding the need for a formal trial. It was clearly stated in the sixteenth century that " a confession is a conviction", cited in *Wigmore*, 1970, vol.3 (rev. by Chadbourn), p. 293.

[4] *Langbein*, 1976, Torture and the Law of Proof; *Heath*, 1982, Torture and English Law; *Lowell*, 1897, "The Judicial Use of Torture", 11 Harv. L. Rev. 290.

[5] *Cihan*, 1965, "Ceza Mukakemesi Hukukunda Ikrar" (Confessions in the Criminal Procedure Law), Istanbul Hukuk Fakultesi Mecmuasi (Journal of Istanbul Law Faculty), p. 121.

Since under the principle of "free evaluation of the evidence" the hearsay problem is regarded as an evaluation issue rather than an admissibility issue, the Turkish trial judge is trusted to be able to give to a pre-trial confession, which is technically hearsay, whatever weight he thinks it deserves. That means a pre-trial confession is admissible in principle. Having said that a number of provisions which seek to limit the use of out of court statements at trial is included by CMUK.[6]

In addition to Article 254 (examined in Chapter Four and Five), Article 135/A, 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."

At the other end of the spectrum, confessions made by the accused person are generally accepted by the English criminal justice system as capable of being given in evidence against the accused in any criminal proceedings. Section 76(1) provides that:

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[6] 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 247)

> "in any proceeding a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in the proceeding and it is not excluded by the court in pursuance of this section."[7]

It is clear from the wording of s.76(1) that confessions may only be given in evidence provided that firstly, the confession is relevant to any matter in issue in the criminal proceedings and; secondly, the confession is not excluded by the court. In this latter regard, several "hurdles"[8] which enable confessions to be introduced into trial are contained in PACE. The first hurdle relates to section 76 which is a specific provision regulating admissibility only of confessions. The second hurdle comes into effect where the admission of a confession would have an adverse effect on the fairness of proceedings [s.78(1)]. Thirdly, the trial judge may be invited to use his common law discretion to exclude a confession[s.82(3)]. Exclusionary rules regulated by section 78 (1) and section 82(2) have already been examined in previous chapters. Now the

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[7] The theory behind their reception in evidence is stated in *Sharpe* -[1988] 1 All E. R. 65, at 68- as follows;

> "...provided the accused had not been subjected to any improper pressure, it was so unlikely that he would confess to a crime he had not committed that it was safe to rely on the truth of what he said."

It was also stated by the Criminal Law Revision Committee that "although the statement is hearsay, it is admissible because what a person says against himself is likely to be true". Eleventh Report, Evidence (General), Cmnd. 4991, (1972), para. 53. However, psychological researches-mentioned earlier- have not served to reinforce this theory. In the absence of any improper pressure the trustworthiness of confession may still be in doubt. One should note that Professor Smith in his recent article argues that the rationale for reception of voluntary statements is that " a party to litigation cannot invoke the hearsay rule in respect of his own statement". That is to say, in the words of Morgan, cited by Professor Smith, "a party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath". Smith, 1995, "Exculpatory Statements and Confessions", Crim. L. R. 280.

[8] Legal tests are described as "hurdles" by Professor *Birch*, 1989, "The Pace Hots Up: Confessions and Confusions Under the 1984 Act", Crim. L. R. 94.

provision which specifically regulates admissibility of confession will be focused on.

Section 76(2) provides;

> "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained-
>
> a)by oppression of the person who made it; or
>
> b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

Since more than one test for admissibility of confessions is provided by both CMUK and PACE 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 and section 78 on the one hand, and article 135/A and section 76 on the other is that the former are general provisions regulating admissibility of all improperly obtained evidence, while the latter are special provisions which regulate only admissibility of confession evidence. It seems to me that in the application of the admissibility test, priority should be given to the special provisions rather than the general ones (*lex specials derogat generali*).[9]

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[9] For the detailed and comparative examination of statutory interpretation see, *MacCormick* and *Summers*, 1991, Interpreting Statutes: A Comparative Study.

3. What Kind of Statements are These Provisions Concerned With?

Comparing and Contrasting Article 135/A and Section 76 without conceptualising a precise idea about what kind of statements these provisions are concerned with may be described as "playing Hamlet without the ghost"[10]. It therefore seems necessary firstly to discuss what kind of statements in the Turkish and English legal systems are subjected to additional limitations to reception in criminal cases.

3.1. 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, magistrates, prosecutors or even defence lawyers may ask questions to the accused in a manner which may be considered as oppressive or deceptive. Moreover, in the light of psychological findings[11] which show that people may admit a crime which they did not commit, not only confessions but also other admissions are susceptible to unreliability. Nevertheless, Turkish and English legal systems show some diversity as to the treatment of an in-court statement.

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[10] This expression is used by *Weisberg*, 1962, "Police Interrogation of Arrested Persons: A Sceptical View", in Police Power and Individual Freedom, p. 155.

[11] See, *Gudjonsson*, 1992, The Psychology of Interrogations, Confessions and Testimony.

In Turkey 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 in question. Article 135/A provides that "statements of *ifade veren* (the interviewee) and *sanik* (the suspect) should be the result of their free will. ...". In Turkey, "suspect" status is received when an individual is questioned by the magistrate 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.[12] Thus, the use of the word *sanik* 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*[13] (interviewing) and *sorgulama*[14] (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,

> "[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*. ... ".[15]

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[12] See Chapter Two. An individual does not change his status when he is charged as "the accused".

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

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

[15] Emphasis added. The original version of Article 236 reads as follows:

> "Durusmaya taniklarin ve bilirkisinin yoklamasiyla baslanir. Bundan sonra sanigin acik kimligi ve sahsi durumu tesbit olunur. Daha sonra iddianame okunur ve 135 inci addeye gore sanik sorguya cekilir.... ".

As far as English law is concerned, Section 82(1), which defines " a confession", does not include any restriction such as whether the statement should be made in or out of court. This omission, however, is not conclusive: Section 82(1) is a definition of "a confession" for a particular purpose; specifically for section 76. Since Section 76 applies where the prosecution proposes to tender an out-court admission as an exception to the hearsay rule[16], in-court statements such as a guilty plea, formal admission and an incriminating statement made while testifying, which are tendered by the defence, cannot technically be subjected to the admissibility test under Section 76. Such a practice, it seems to me, is likely to increase the risk of false convictions. It is, however, consistent with the traditional adversarial thinking that a legal procedure is a contest between parties in a position of theoretical equality. Accordingly, the guilty plea, for example, may be seen as a vehicle to settle the dispute by enabling the suspect to waive the hearing, rather than having any evidential significance.

To conclude, in Turkey the admissibility test in question applies to in and out of court statements alike and taking these statements as a basis for conviction can be controverted by the defence on appeal, whereas an in-court statement in England cannot be subjected to the admissibility test under Section 76. The above stated risk needs to be taken into account in any reform in England, and the defendant must be given a chance to show that no weight should be placed on his in-court statement. Otherwise, policy considerations, such as the desirability of reducing cost and

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[16] This rule requires that witnesses must give their testimony orally in court and must testify only as to matters with their own first-hand knowledge.

workload, will override the normal judicial policy of convicting the suspect on evidence of probative value.

3.2. 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 PACE or CMUK standards with regard to safeguards[17] against likelihood of falsity.

Confessions were required to be formal in order to be subjected to the admissibility test at English common law.[18] This requirement obviously favoured informal confessions by allowing the introduction of them into trial without being subjected to the admissibility test. This favouritism, however, was not only difficult to justify[19], but also problematic in its day to day application[20]. Therefore, in its

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[17] Such as tape recording and contemporaneous note-taking of interviews, the right to legal advice. See Chapter Seven.

[18] *R. v Wilson* (1967) 51 Cr. App. R. 194; For a detailed discussion of this requirement at common law see *Mirfield*, 1981, "Confessions: The Person in Authority Requirement", Crim. L. R. 92.

[19] Indeed, informal statements carried no less risk of being untrustworthy than formal ones. This rule could only be justified by employing the deterrent rationale, which was not adopted as the underlying concern of the admissibility test by the English judiciary.

[20] In spite of the fact that literally a person in authority is one who occupies a position of authority over the suspect, there was no agreement on which categories of people qualified as persons in authority. See cases: *R. v Nowell* [1948] 1 All E. R.

Eleventh Report, the Criminal Law Revision Committee recommended that the requirement of confessions being made to a person in authority was unnecessary and should be abolished.[21] Consistent with this recommendation the common law rules have been superseded in that all statements by the accused are now by virtue of s. 82(1) subjected to the admissibility test under s. 76(2) regardless of whether they are made to a person in authority. This move may be perceived as a clear rejection of the deterrent rationale with regard to confession evidence.

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".[22] 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

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794; *R. v Smith* [1959] 2 Q.B. 35; *R. v Cleary* (1963) 48 Cr. App. R. 116; *R. v Wilson* (1967) 51 Cr.App. R. 194; *R. v Moore* (1972) 56 Cr. App. R. 373; *R. v Grewal* [1975] Crim. L. R. 159; in the case of *R v. Deokinanan* [1969] 1 A.C. 20 the matter was said to be considered by employing subjective test; the question which had to be asked was said to be whether the suspect truly believed, at the time he made a statement, that the person he spoke to had some degree of power over him.

[21] *Eleventh Report*, *supra* note 7, para. 58, p. 39.

[22] For specific meanings of these terms in Turkey see note 12 and accompanying text.

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[23]; 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.

In England an out of court formal statement is generally equated to a statement made to the police. However, this may not always be the case; the prosecution may seek to use a formal statement which is not made to the police. To illustrate, a previous plea of guilty which was made at the same proceeding but subsequently withdrawn[24], an unwithdrawn plea of guilty made in respect of another charge[25], a

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[23] 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 *Ozmen* and *Aktalay*, 1993, Ceza Muhakemeleri Usulu Kanunu (the Code of Criminal Procedure), p.341-342; *Ahmet*, Yargitay Ceza Genel Kurulu, E.1993/6-236, K. 1993/255, T.18.10.1993, Yargitay Kararlari Dergisi (Journal of the Court of Appeal Decisions), 1994, p. 804.

[24] In the case of *R. v Rimmer* -[1972] 1 All E.R 604 (CA)- the Court of Appeal disagreed with the proposition that a withdrawn plea of guilty "has simply no effect whatsoever"; it remains as "a confession of fact". For the detailed discussion of the use of a withdrawn plea of guilty as evidence see, *Welch*, 1962, "Propriety and Prejudicial Effect of Showing, in Criminal Case, Withdrawn Guilty Plea", 86 American Law Review 326, 2 nd ser.; and *Pattenden*, 1983, "Informal Judicial Admissions of Criminal Activity: A Comparative Study of England, Canada and the United States", 32 Int. Comp. L. Rev. 812.

[25] *R. v Bastin* [1971] Crim. L. R. 529 (CA).

voir dire statement[26], a statement made during an earlier trial for the same offence[27], and a statement made in other proceedings in which the accused was on trial[28] are allowed to be used as evidence against the accused. If this is so, courts should, in the opinion of this researcher, be ready to subject them to the admissibility test in question.

3.3. 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 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

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[26] In the case of *Brophy* -[1981] 2 All L. R. 705- it was recognised by the House of Lords that there can be circumstances in which a *voir dire* statement which is entirely unconnected to the issue raised on the *voir dire* would be admissible in the subsequent trial.

[27] *R. v McGregor* (1967) 51 Cr. App. R. 338.

[28] *R. v Laurent* (1898) 62 J. P. 250 (CCC); *R. v Chidley* (1860) 8 Cox C. C. 365.

whether such a statement could be subjected to the admissibility test under Article 135/A or Section 76.

As far as Turkish law is concerned the issue is not complicated. 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.

Such a wide approach, it seems to the present researcher, may be employed with regard to Section 76, even though there is considerable scepticism among English judges[29] and leading academics[30] to subject exculpatory statements to the admissibility test under section 76.

Since section 76 can only be employed in respect of "confession" evidence, what constitutes a confession is the key in discussing applicability of s. 76 to exculpatory statements. Fortunately, PACE introduced a statutory provision defining

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[29] See, *R. v Sat-Bhambra* (1989) 88 Cr. App. R. 55; *R. v Park* [1994] Crim. L. Rev. 285; *R. v Jelen & Katz* (1990) 90 Cr. App. R. 456; *R. v Pearce* (1979) 69 Cr. App. R. 365; *Anondagoda* [1962] 1 W. L. R. 817.

[30] *Smith*, 1988, "Commentary on *R. v Sat-Bhambra*", Crim. L. R. 453; *Birch*, 1990, "Commentary on *R. v Ismail*", Crim. L. R. 109; Birch, 1994, "Commentary on *R. v Park*" Crim. L. R. 286, note that Professor Birch holds a contrary view in her article, "The Pace Hots Up", *supra* note 8, p.115; *Wigmore*, 1940, A Treatise on the Anglo American System of Evidence in Trials of Common Law (3 rd ed.), vol.III, section 821, p. 930; *Tapper*, 1990, Cross on Evidence (7 th ed.), p.609.

confession as including "any statement wholly or partly adverse to the person who made it...".[31]

As far as literal interpretation[32] of this definition is concerned, there is nothing in the wording of s. 82(1) about "the timing" of adverse affect to its maker; a statement may be adverse either when it is made or when the prosecution wants to present it. Furthermore, the usage of the term "include" leaves the possibility open that it extends to other statements as well.[33] Having said that, the Court of Appeal has made a distinction between statements according to the timing of the adverse effect.

In the case of *R. v Sat-Bhambra*[34], the defendant's answers in the face of an accusation of drug dealing had consisted of:

> "obvious lies and prevarications compounded by an innate tendency to give convoluted and misleading answers"[35]

His defence at trial was that he, a journalist, was paid by the Indian Government to investigate whether an extremist Sikh organisation was financed by dealing in drugs. He justified his lies to the Custody officers by stating that telling the truth at that stage

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[31] PACE 82(1).

[32] In this method of interpretation we are bound by the very words of the provisions which we interpret.

[33] *Mirfield*, Confessions, p. 85.

[34] 88 Cr. App. R. 55 (1989).

[35] *Ibid.* at p. 58.

would risk his own and his family's life. There were also failures on the part of the Custody officers to charge the accused before the initial interview and to allow him to see a solicitor. Furthermore, the accused was a diabetic, and he did not receive adequate medication at the time of the questioning. After the trial judge's refusal to exclude these statements on the voir dire, fresh medical evidence suggesting their unreliability was given. The trial judge decided that he was powerless to reconsider his earlier decision on admissibility. The main concern of the appeal was whether this was the case. The Court of Appeal held, obiter, that even if this evidence had come to light earlier the statements could not have been excluded under Section 76 since they were not "confessions": a statement must have adverse effect *when it is made* in order to be subjected to the admissibility test under Section 76. It seems to me that considering the criminal procedure as a whole unit[36] will prevent us from adopting this restricted approach.

Leaving aside the failure of the Court of Appeal as to the literal interpretation, the case of *R. v Sat-Bhambra* is also unconvincing with regard to its perception of exculpatory statements: they are perceived as "containing nothing which the interrogator wished the defendant to say and nothing apparently adverse to the defendant's interests".[37] If this is so, there would be no question of the prosecution using them. Obviously, the prosecution does not wish to use them in favour of the accused but contrary to his interest. Moreover, the police may wish the defendant to make inconsistent exculpatory statements as well as inculpatory ones if the former

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[36] See Chapter Three note 8.

[37] *Ibid*, p. 61.

would be introduced to trial much more easily. For instance, in relation to a murder charge, instead of persuading the suspect to admit killing they may pressure him into stating that he did not know the victim. Proving at trial that he knew the victim is likely to damage the defendant.

One may attempt to justify this restricted approach by referring to something technical and peculiar to English law such as the hearsay rule and the previous inconsistent statement rule.[38] Indeed, the hearsay rule and the previous inconsistent statement rule are not quite the same. The former deals with the use of previous pre-trial statements to prove their truth, while the latter deals with the use of such statements to attack the credit of maker (to show he is not a reliable witness). The two rules are working on different things. Differences between them, however, do not necessarily suggest that only the first of them should be subjected to safeguards provided by Section 76. The previous pre-trial statements should not prove anything if they are obtained by oppression. They should not be relied upon for any purpose. If the suspect is tortured, the value of his statement for any purpose should be doubted. Moreover, it could simply be argued that other common law countries such as the United States[39] or Canada[40] which have similar technical rules did not face any difficulty when they accepted that exculpatory statements should be governed by the same rules regulating inculpatory statements.

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[38] See *Smith*, 1988, "Commentary on *R. v Sat-Bhambra*" Crim. L. R. 453; *Tapper*, *Supra* note 30.

[39] *Miranda v Arizona*, 384 U.S. 436, 377 (1975).

[40] *Piche* (1970) 11 D. L. R 700.

The underlying rationales of Section 76 may also shed some light. If the concern of the section is to prevent reliance upon potentially unreliable statements, exculpatory statements in respect of which there is not only a danger of their being unreliable but which are already said by the prosecution to be unreliable should be subjected to the Section 76 test. The reliability of any inferences from them would be doubtful since there may be many reasons unrelated to the alleged offence, such as hiding something immoral, for making exculpatory statements rather than consciousness of guilt. The deterrent rationale leads to a similar conclusion because the contrary solution would encourage the police to employ improper tactics during the interrogation in the hope of obtaining, at least, some inconsistent exculpatory statements. The protective theory is remedial in nature and therefore concerned with ensuring the suspect is not placed at a disadvantage by evidence procured by improper conduct. Since not only inculpatory but also exculpatory statements will disadvantage the suspect, such a distinction cannot be justifiable. As far as the judicial integrity theory is concerned, the aim of section 76 is to prevent the judiciary from partnership in police impropriety. Accepting any statements obtained improperly is likely to make the judiciary a party to improper conduct. Thus, none of the rationales cited so far does dictate the applicability of s. 76 to only inculpatory statements.

My position is further supported by Article 15 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[41] which provides;

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[41] 10 December 1984, G. Re. 39/51, in force 26 June 1987.

> "Each State Party shall ensure that *any statement* which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".

It clearly states that a statement made by a victim of torture cannot be used for any purpose. It is ratified by England as well as Turkey.[42] Unlike Turkish law, this provision does not have direct application in English law, but England, by signing it, undertakes a responsibility to change its domestic law in order to bring English law into conformity with the Convention.

To sum up, it seems to me that making distinction between inculpatory and exculpatory statements with regard to the admissibility test cannot be justifiable. A proper scope of section 76 should cover any pre-trial acknowledgements of facts by the accused. The terms "statement" and "confession" may be used interchangeably. Professor Smith has already recognized that the term "voluntary statement" is commonly used when "confession" is meant.[43] So why cannot it be the other way around? In the case of *R. v Ismail*[44], the Court of Appeal came close to taking a step towards the suggested direction by failing to criticise the trial judge who employed Section 76 to exclude a purely exculpatory statement.[45]

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[42] See Chapter Two 3.3.

[43] *Smith*, 1988, "Commentary on *R. v Sat-Bhambra*", Crim. L. R. 455.

[44] [1990] Crim. L. R. 109.

[45] This case, obviously, is not an authority to support the researcher's suggestion in that the Court of Appeal did not discuss the point , and, therefore, it could have failed to notice the fact that Section 76 was employed to exclude exculpatory statement.

3.4. Forms of Statements: Made in Words or Otherwise

3.4.1. In General

In both jurisdictions a statement may be made in speech or in writing, and in neither is it necessarily the case that words must be used.[46] 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 this situation has arisen under common law. In the case of *Li Shu Ling*[47] 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. With regard to the recording provisions there is also no difference in England between a video recording of the re-enactment and the tape recording of an oral confession. Unfortunately Turkish law enforcement officials do not have such advanced

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[46] For English law see, Section 82(1) of PACE, For Turkish law see, *Sahin*, 1994, Sanigin Kolluk Tarafindan Sorgulanmasi (Questioning of the Suspect by the Law Enforcement Officers), 166.

[47] [1989] A. C. 270.

technological equipment at the moment, and therefore the re-enactments are generally written down.

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 in both jurisdictions. 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.[48]

3.4.2. Implied Confessions and Silence

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

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[48] These examples are commonly given. See, *May*, 1986, Criminal Evidence 170; *Mirfield*, *supra* note 33, p. 88; *Murphy*, 1992, Blackstones Criminal Practice 2052.

be taken as an implied confession.[49] 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 and Section 76 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 both countries' procedural rules regulating the criminal investigation.[50] 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".[51] This requirement makes it technically impossible to consider post-caution silence as an implied confession in that silence following "the caution" may be nothing more than the exercise of the cautioned right. Having said that, 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). One may expect to find the reflection of such culture in the form of prejudice

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

[50] *Rice v Connolly* [1966] 2 Q.B. 414, the Turkish Constitution 38/5.

[51] CMUK 135/4.

against the suspect at the level of the courts, but it should not be possible to consider silence as an implied confession and thus there would not be any need for the application of article 135/A.

In England, there has been a recent and dramatic change in respect to the drawing of adverse inferences from the suspect's silence by the enactment of the Criminal Justice and Public Order Act 1994. Until 1995, in English law a caution had to be administered before any period of questioning in the form that, "you do not have to say anything unless you wish to do so, but what you say may be given in evidence".[52] Pre-1994 law allowed inferences from silence in limited circumstances. In the case of *R. v Mitchell*[53] it was stated

> "when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."[54]

The question of when parties are on equal terms obviously needed clarification. In cases where accusations were made by the police it was held that the parties were not on even terms[55] unless a legal adviser was present[56]. The drawing of adverse

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[52] The 1991 edition of Code C 10.4.

[53] (1892) 17 Cox C. C. 503.

[54] *Ibid*, p. 508; see also *Parkes v R.* [1976] 3 All E. R. 380.

[55] *Hall v R.* [1971] 1 W. L. R. 298

[56] *R. v Chandler* [1976] 1 W. L. R. 585; *R. v Alladice* (1988) Cr. App. R. 380.

inferences in the pre-1994 law was restricted to pre-caution silence in that the post-caution silence was considered the exercise of the cautioned right.[57]

The Criminal Justice and Public Order Act 1994 introduces much wider circumstances in which adverse inferences may be drawn from silence. Section 34 of the Act enables adverse inferences to be drawn if the accused fails, on being questioned under caution or on being charged with the offence, to mention any fact, which he may reasonably be expected to mention and which he subsequently relies on in his defence later at trial. Section 36 and 37 permits the drawing of adverse inferences from pre-trial silence in cases where the suspect does not account for objects, substances or marks, or his presence in a particular place.[58] The caution has also been replaced in order to notify the suspect as to the possible inferences.[59]

As far as the present English law is concerned, silence may form the basis for some adverse inferences against the suspect. Having said that, the nature and the extent of the adverse effect of silence depends on the circumstances of individual

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[57] *R. v Chandler* [1976] 1 W. L. R. 585.

[58] For the detailed examination of these provisions see Murphy, 1995, Blackstone's Criminal Practice, F.19. Another provision, section 35, deals with the accused's silence at trial. In-court statements, let alone the use of silence, cannot be subjected to the admissibility test under section 76, because the section in question applies when the prosecution proposes to tender an out of court admission as an exception to the hearsay rule. See note 16 and accompanying text.

[59] The new caution reads,

> "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence".

(The 1995 edition of Code C 10.4)

cases. Silence, unlike statements, does not clearly connect the suspect with the commission of the alleged offence. An inference drawn under the new provisions is not by itself sufficient to support a determination of guilt.[60] Rather, silence may make it less plausible for the suspect to raise a defence for the fist time at trial. One needs, therefore, to take a cautious approach to classifying silence as an implied confession and consequently subjecting it to the admissibility test under section 76. This does not mean to rule out the possibility that silence may be obtained involuntarily. Nothing, however, prevents such silence from being subjected to the admissibility test under section 78 as, *inter alia*, section 34 of the Criminal Justice and Public Order Act 1994 refers to silence as evidence.[61]

4. The Criterion of Admissibility

4.1. Under A. 135/A: Emergence of the Involuntariness Test

It may be useful to repeat article 135\A which states that,

> " 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.

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[60] The Criminal Justice and Public Order Act 1994 34(2)(d).

[61] For the possible exclusionary scenarios of silence under section 78 see, *Dennis*, 1995, "The Criminal Justice and Public Order Act 1994: The Evidence Provisions", Crim. L. Rev. 4, at p. 14.

> Statements obtained in violation of these prohibitions may not be used in evidence even if the accused consents to its use."

This article would seem the result of the postulate that individuals ordinarily have freedom of choice[62] 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 unacceptable risk of depriving the suspect of his free will.[63] Obviously, prohibiting certain categories of police tactics provide concrete guidance for the law

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[62] 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 *Beardsley & Beardsley*, 1972, Invitation To Philosophical Thinking.

[63] 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.

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.

4.2. Under S.76/2: Re-Emergence of the Involuntariness Test

Section 76(2) reads:

> "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained-
>
> a)by oppression of the person who made it; or
>
> b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

> the court shall not allow the confession to be given in evidence against him except in so far the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

Under this section a court is empowered to exclude a confession which was or may have been obtained by oppression or in consequence of anything said or done which is likely to render it unreliable. It is a general misconception that section 76 has replaced the common law test of voluntariness with a dual statutory test of oppression and unreliability to determine whether a confession is admissible. As far as the present researcher is concerned, this section does not represent a break with the traditional English test of voluntariness. In the following pages it will be advocated that section 76 requires a voluntariness test which the present researcher calls a "qualified voluntariness test". To put this argument as convincingly as possible, some clarification as to the admissibility of confessions prior to the enactment of PACE, and the Parliamentary history of the section in question would seem to be necessary.

4.2.1. **Can Oppression be Considered Separately From Involuntariness?**

Long before PACE came into force, it had been established that confessions should not be received in evidence unless voluntary.[64] A confession was regarded as voluntary if, in the phraseology of Lord Sumner, "it [h]as not been obtained ... either by fear of prejudice or hope of advantage..."[65]. Such an explanation could

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[64] *R. v Warickshall* (1783) 1 Leach C. C. 263; *White* (1741) 17 How. St. Tr. 1079; *R. v Ibrahim* [1914] A.C. 599.

[65] *R. v Ibrahim* [1914] A.C. 599.

hardly be seen as being comprehensive in that there was no reference to torture or other forms of physical compulsion. This omission was noticed in subsequent cases and "oppression" was recognised as an another factor which could lead to exclusion.[66] In the case of *Callis v Gunn* it was held that:

> "a fundamental principle of law that no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has been obtained by threats or inducement".[67]

The important point to be noted in this case is that oppression was considered separately from voluntariness. In other words, oppression, which would obviously make a confession involuntary, was introduced into English law as an additional test to the existing test of voluntariness. This approach rightly did not receive the endorsement of the 1964 version of the Judges' Rules in which it was stated that:

> "... it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear or prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression".[68]

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[66] *Callis v Gunn* [1964] 1 Q. B. 495; *R. v Priestley* (1965) 51 Cr. App. R. 1; *R. v. Prager* (1971) 56 Cr. App. R. 151, [1972] 1 All E.R. 1114; see also the introduction of Judges' Rules.

[67] [1964] 1 Q. B. 495, at 501, [1963] 3 All E. R. 667, at 680. Emphasis added.

[68] The preamble of the Judges' Rules. See Home Office Circular HO 31/1964, reissued in circular 89/1978. This pronouncement is confirmed by *the Criminal Law Revision Committee* as representing the law at that time. Eleventh Report, *supra* note 7, para. 60.

Accordingly, oppression was not a separate test for admissibility, but another element, like threat or inducement, of the notion of involuntariness. Thus, all three-threat, inducement, and oppression- were at that time capable of rendering a resulting confession involuntary and therefore inadmissible. Subsequently, s.76(2)a has preserved the common law voluntariness test with regard to oppression.

4.2.2. From "Threats or Inducements" to "Anything Said or Done"

As far as sub-section 76(2)(b) is concerned, it has been stated in the Parliamentary Debates by Lord Denning that,

> "we are having new case law altogether in our criminal law. It is not a question of whether the confession was voluntary but whether it is reliable".[69]

This statement reflects a general misconception that section 76(2)(b) has introduced a new test based upon the likelihood of the confession's reliability. This is, however, not the case.

As has been mentioned above, the voluntariness test had generally been expressed in the terms pronounced by Lord Sumner in the case of *Ibrahim*. Accordingly,

> "... no statement by an accused is admissible... unless it is... a voluntary statement in the sense that it has not

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[69] Parliamentary Debates, House of Lords, Weekly Hansard, No:1262, 31 July 1984, p. 688.

been obtained from him either by fear of prejudice or hope of advantage...".[70]

Although Lord Sumner's phrase, "fear of prejudice (threats) or hope of advantage (inducement)" was considered, after half a century[71], to be a sufficient guide to trial judges in deciding the voluntariness of a confession, articulation of it was naturally needed to state what circumstances are to be regarded as rendering a confession legally, rather than psychologically, involuntary.[72]

In 1972, the Criminal Law Revision Committee, besides expressing an opinion in favour of preserving the sub-notion of "oppression", recommended the modification of the other sub-notions "threat" and "inducement". The core of the recommendation was that not all threats or inducements, but only those likely to produce an unreliable confession, had to result in exclusion.[73]

These recommendations served as a model for section 76 of PACE. Indeed, s. 76(2)(a) preserves the common law voluntariness test with regard to oppression, while s.76(2)(b) redefines the scope of the common law voluntariness test related to

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[70] [1914] A.C. 599 at p.609; approved in *Commissioners of Customs and Excise v. Harz and Power*, [1967] 1 A.C. 760, at p. 818 and 821.

[71] *DPP v Ping Lin* [1976] A.C. 574.

[72] The Philips Report draws attention the divergence between legal and psychological definitions of "voluntariness". The Research of the Royal Commission on Criminal Procedure suggests that, "in psychological terms custody in itself and questioning in custody develop forces upon many suspects which so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent". The Philips Report, *supra* note ?, p. 4.73.

[73] Eleventh Report, *supra* note 7, para 65.

threat and inducement. By replacing the terms "threats or inducements" with the phrase "anything said or done", the Act broadens the category of factors to be taken into account in determining the voluntariness of confession (e.g. prolonged detention or deception). At the same time it narrows the scope of the voluntariness test by qualifying the circumstances under which the tendered confession is made; "anything said or done" is limited to those things said or done which are likely to produce an unreliable confession. Accordingly, confessions will not be excluded simply because a person has been pressured, through the use of threats or inducements, into confession unless pressure (anything said or done) is likely to render unreliable any confession which might be made by virtue of things said or done. The important points to be noted are that the Act attempts to qualify, or to reconcile, the traditional voluntariness test with the reliability concern, and that s.76(2)(b) is still focused on the types of pressure which may be applied to a suspect rather than reliability of the actual confession.

The reliability of the actual confession is specifically excluded from consideration. Under subsection 76(2)(b) the court's duty to exclude the confession comes into play whenever 'anything said or done' may cause any confession to be potentially unreliable.[74] In other words, because of the words 'any' and 'might' this subsection is concerned not with actual but with potential unreliability. Even if a confession subsequently was admitted to be true, it may still be inadmissible under this

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[74] The first draft of PACE included a clause-60(4) which required that evidence of the truth or falsity of the confession might be admitted where it is relevant in determining the admissibility of confessions. The final version of the Act, however, does not contain this provision.

section. In the case of *R. v Cox*[75], for example, a mentally handicapped suspect charged with burglary was interviewed by the police in the absence of an appropriate adult and admitted taking part in the commission of the alleged offence. The trial judge held that his confession should be admitted due to the fact that it was likely to be true in the light of the testimony he gave on the voir dire. The Court of Appeal held that the judge should have asked himself not whether the confession in the police interview was true but whether it was made in consequence of anything said or done likely to render it unreliable.[76]

The 'potential unreliability' approach is derived from the recommendation of the Criminal Law Revision Committee in its Eleventh Report[77]. The Committee not only recommended a hypothetical test but also noted the need to make clear its application for judges; it is said that the judge should imagine himself present at the interview and hearing anything said or watching anything done[78]. He then should consider whether any confession made as a result would be likely to be unreliable. If so, the confession would thus be excluded. To make it clearer two examples were given as follows; if the suspect faces a threat by the police of charging his wife jointly with him, this would be likely to render such a confession unreliable, even of a serious offence . Similarly, if the suspect confesses as a result of a promise to release him on

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[75] [1991] Crim. L. R. 276.

[76] A Similar point was made in the cases of *R. v Crampton* (1991) 92 Cr. App. R. 372 and *R. v Kenny* [1994] Crim. L. R. 284.

[77] *Eleventh Report, supra* note 7, para. 65.

[78] Note that, unlike PACE, the Committee used 'threat or inducement' instead of 'anything said or done'.

bail to visit a sick relative, it would be unlikely to give rise to an unreliable confession of a serious offence, but likely to do so in the case of a minor offence.

It is said that adopting the hypothetical test rather than the actual one is the result of the division of functions between the judge and jury. Accordingly, deciding as to the truth or falsity of the confession is an assignment belonging to the jury; if the judge decides whether the actual confession is reliable it would encroach on the jury's function.[79] This line of reasoning may be disputed on the grounds that, firstly, even if the judge were to consider the circumstances likely to render the actual confession unreliable, he would only be deciding whether the jury should hear of the confession, not the weight they should give it.[80] Secondly, such a functional division cannot be said to be absolute. In some cases- for example, in the application of the admissibility test to "similar fact" evidence-the judge is allowed to assess the probative value of evidence.[81] Thirdly, the "division of functions" argument cannot be employed in the Magistrates' Courts in which the trier of fact and the trier of law are the same body.

To conclude, the reliability of the actual confession itself is not able to dictate the admissibility of a confession. This approach should not only be welcomed for the support it gives to "the qualified voluntariness test", but also for the fact that it is

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[79] *Mirfield, supra* note 18, p. 70.

[80] *Zuckerman*, The Principles of Criminal Evidence, p. 366.

[81] *DPP v P* [1991] 3 W. L. R. 166; (1991) Cr. App. R. 267; [1991] 2 A.C. 447; [1991] 3 All E. R. 337.

likely to create a normative test rather than a factual one. Indeed, it is likely to encourage the court to concentrate its attention on the propriety of the standard of interrogation to enable the exercise of free will, regardless of whether the particular confession was itself reliable.

The assertion that s. 76(2)(b) is still focused on the types of pressure rather than reliability of a confession is also justified by the Court of Appeal's approach to the question of whether the phrase 'anything said or done' includes things said or done by the suspect himself. In *R. v Goldenberg*[82] the suspect was convicted of conspiracy to supply diamorphine on the basis of his confession which was made during the interview requested by the suspect. As a basis for appeal it was submitted that as he was a heroin addict his motive in requesting interview and making confession was to gain his release and feed his addiction. Therefore, the confession could be seen to have been made in consequence of what the suspect himself said or did, and thus the confession was unreliable and should have been excluded under s.76(2)(b). The Court of Appeal dismissed the appeal on the ground that the words 'said or done' do not extend so as to include anything said or done by the person making the confession. In other words, it is limited to something external to the person making the confession and to something which is likely to have same influence on him.[83] This judgment is criticised by stating that it is capable of giving rise to an odd result in that a different conclusion may be reached where the suspect is given a drug by a police

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[82] (1988) 88 Cr. App. R. ; [1988] Crim. L. R. 678.

[83] *R. v Goldenberg* (1989) 88 Crim. App. R. 290.

doctor before confessing and where the drug is taken by the suspect himself[84]. Of course the suspect's own act may cause a confession to be unreliable, but the correct mechanism to exclude such a confession seems to this researcher to be not section 76 but section 78. Undoubtedly,accepting unreliable evidence into trial will have an adverse effect upon the fairness of the proceedings.

4.3. Comparison

There are, to a great extent, similarities between the laws relating to the admissibility of confession in England and Turkey. As has been seen in chapter three, besides giving general authority to exclude improperly obtained evidence, the judiciaries of both legal systems have been specifically empowered recently to refuse to admit confession evidence in some cases. The above analysis in this chapter reveals that exclusionary rules of each country with regard to confessions are not as different from each other as might be expected. In order to ensure that questionable confessions have not been taken as evidence, both systems require an assessment of the facts and circumstances leading a suspect to confess. There is a clear consensus that involuntariness is a decisive criterion for the admissibility of confession evidence under section 76, and that exclusion is mandatory if involuntariness has been established. The question of whether a similar standard of voluntariness is required by each of them will be examined in the following pages.

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[84] *Birch*, *supra* note 8, p. 112.

One should not ignore the fact that, unlike Turkey, the voluntariness test is well developed in England and it is particularly qualified by the enactment of PACE. In Turkey the question of admissibility of confessions obtained involuntarily has not yet reached the level of debate found in England. This derives, among other things, from the late introduction of this test (two years ago)[85] and a lack of academic attention to the subject. Undoubtedly, determination of what circumstances have to exist for the voluntariness of a confession requires decades of jurisprudence. As far as Turkish law is concerned, this period of time may be shortened by benefiting from the experience of the English judiciary in the application of this test.

5. The Burden and Standard of Proof

It has been emphasised that voluntariness has emerged or reemerged as a central concept in determining the admissibility of confessions in both jurisdictions. The implementation of this concept, however, may become a source of controversy.

The procedure to be followed in deciding voluntariness, or more generally admissibility, has already been examined in Chapter four. Now 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. As far as English law is concerned, both aspects of the issue

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[85] Compare the fact that the voluntariness rule has governed the admissibility of confessions in England for almost two centuries.

are statutorily regulated.[86] Accordingly, where there is an objection as to the admissibility of a confession under s. 76, the burden to prove, beyond reasonable doubt, that the objection is unfounded is imposed upon the prosecution. Failure to do so will prevent introduction of a confession into trial. To illustrate, in the case of *R. v Harvey*[87] the confession was excluded on the grounds that the trial judge was not satisfied beyond reasonable doubt that it was not obtained involuntarily.

In contrast to the English position, in Turkish law there is no specific provision. 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

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[86] Section 76 (2). The position at common law was the same; see, *DPP v Ping Lin* [1976] A.C. 574, at 599.

[87] [1988] Crim. L. R. 241.

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. In the case of *Osman, Huseyin and Haci Osman*[88] 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.[89]

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[88] Yargitay 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 Yargitay Kararlari Dergisi (Journal of The Court of Appeal's Decisions) 1994, p. 450.

[89] *Ahmet*, E.1993/6-236, K.1993/255, T.18.10.1993, 20 Yargitay Kararlari Dergisi (Journal of the Court of Appeal's Decisions), 1994, p. 804.

6. The Theoretical Basis of the Involuntariness Notion

In the process of attempting to provide standards to identify improper tactics that create an unacceptable risk to the voluntariness of a confession, examination of the possible rationales that dictate a requirement of voluntariness may provide some assistance. More than one rationale has been suggested. Each of them will be examined in turn.

6.1. Untrustworthiness

One of the common reasons that has been given for the rule excluding involuntary confessions is the "untrustworthiness" of such evidence. Tactics that would overcome the person's voluntariness are believed likely to create the risk of an untrustworthy confession. Since the state has no legitimate interest in convicting innocent people, conduct which is likely to produce involuntary confessions cannot be justified and, therefore, confessions obtained consequently should be excluded. One of the main advocates of this justification is Dean Wigmore; according to him, voluntariness guarantees the probable truthfulness of the confession; involuntary confessions should be rejected because of the risk that they may be untrue or at least untrustworthy.[90] Support was also given to this view as early as 1783; in the case of *R. v Warickshall*[91] it was stated that,

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[90] *Wigmore, supra* note 30, vol III, para. 822.

[91] [1783] 1 Leach C. C. 263.

> "a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilt that no credit ought to be given to it."

The interaction between the untrustworthiness and involuntariness of a confession is complicated. An involuntary confession is more likely to be untrustworthy than one elicited in the absence of such pressure. But the untrustworthiness of a confession is not a matter which is conclusively determined by the operation of an involuntariness test. Psychological researches have proved that people may voluntarily confess crimes which they have not committed.[92] Similarly, involuntarily obtained confessions may be trustworthy; indeed, the discovery of real evidence as a result of the suspect's involuntary confession may remove the danger of untrustworthiness. A clear example of this is that when faced with coercion a suspect involuntarily discloses that he killed somebody and hid the body in a certain location, and the police subsequently discover the body in that place. The rationale in question cannot explain exclusion of confessions in such cases. However, one may assert that since the primary aim of the criminal process is to search for truth, accepting a trustworthy confession obtained by coercion, even by torture, would not be harmful to the public interest in bringing criminal offenders to justice in order to protect the community from crime. It is doubtful, however, that the public is only concerned with the outcome of criminal proceedings. The public also has an interest in being free from the exercise of excessive police power. There is normally a great need and public concern in a civilised society for the protection of the suspect against

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[92] See Chapter Four 3.2.3.4.2.

human rights violations such as torture, or inhuman or degrading treatment. There is almost a consensus as to the fact that gross violations of human rights, such as torture, should not be regarded as an aid to fact finding in criminal investigation. Thus, this justification does not adequately explain the voluntariness test with regard to confessions obtained by gross violation of free will. It may, however, offer some help to explain involuntariness caused by minor improprieties. For example, under sub-section 76 (2)(b) involuntariness caused by minor violations would only render a statement inadmissible if it was capable of creating the risk of an inaccurate statement.

6.2. **Prevention (Deterrence) of Malpractice**

Another rationale behind the voluntariness rule is the concern that law enforcement officers must obey the criminal procedure law while detecting criminals. This reasoning suggests that in the absence of the voluntariness test with regard to the admissibility of a confession, malpractice of law enforcement officers will inevitably show a tendency to increase. This does not mean to suggest that the maltreatment of a suspect is the only result of a system which fails to provide a voluntariness test. Undoubtedly there may be other factors which lead to malpractice, and there may be a number of other tools other than the voluntariness rule for preventing malpractice. As a matter of fact substantial criminal law systems generally prohibit the maltreatment of suspects.[93] Having said that, one has to still acknowledge that admission of involuntary confessions as evidence is likely to be perceived as giving

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[93] Maltreatment of suspects is also banned by international agreements; see Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedom (Rome , November 4, 1950).

approval to the particular method by which the involuntary confession was obtained. Prohibition of the use of such involuntary confessions is expected to reduce (or prevent) the employment of techniques which may be described as malpractice. This hope can be better explained by drawing an analogy between the trial judge and the receiver of stolen goods; by admitting an involuntary confession which was obtained as a result of malpractice, the trial judge is likely to effectively adopt the role of the receiver of stolen goods. Like the fact that non-existence of receivers will decrease the amount of thefts, it may be assumed that the non-acceptance of confessions obtained involuntarily (by employing malpractice) would reduce the occurrence of such practices. This analogy, however, would only be justifiable where the objective of the malpractice is to secure confession for evidential use in trial.

6.3. The *Nemo Tenetur Seipsum Accusare* Principle

In the case of *R. v Sang*[94], Lord Diplock maintained that the underlying rationale of excluding involuntary confessions may be found in the maxim of "*nemo tenetur seipsum accusare*"[95]. This principle, however, is not an easy concept to define; it has several aspects. It is said to be the freedom to refrain from providing information that could establish one's own guilt.[96] However, neither Turkish nor English legal systems seek to prevent, or even discourage, individuals from

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[94] [1979] 2 All E. R. 1222, at p. 1230.

[95] The same principle is expressed by different latin maxims. Lord Diplock used the maxim *nemo debet prodere se ipsum.*

[96] *Zuckerman, supra* note 80, p. 306.

incriminating themselves. The clearest example of this is that the law enforcement may continue to question the suspect regardless of his preference not to answer. This principle is also stated as the freedom of individuals not to be compelled to make self-incriminatory statements.[97] In this sense, the scope of the principle changes depending upon the interpretation of "compelled". Also, considering the maxim as valuable in itself is misleading. It is desirable to have the rationale for the maxim identified. Unfortunately, there is substantial confusion as to the rationale of the maxim which is offered as a rationale for the voluntariness notion.[98] Finally, this principle was not historically a value lying at the foundation of the voluntariness notion; in tracing the history of the voluntariness notion and the maxim in question at common law, Wigmore has concluded that each of them have separate and independent origins.[99]

6.4. The Legitimacy of The Verdict

Each of the above theories have an important element of truth embedded in them. None of them, however, is entirely adequate to account for the notion of voluntariness. A preferable theory to explain the concept of voluntariness, it seems to me, is to employ the theory of the legitimacy of the verdict which has been developed by Dennis.[100] The emphasis of this theory is upon the fact that a verdict

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[97] *Mirfield, supra* note 33, p. 65.

[98] See generally, *Zuckerman*, supra note 80, p. 314.

[99] *Wigmore, supra* note 30, & 823, p. 250, n. 5.

[100] See Chapter Five 3.4.

is an expression not only of factual but also of moral condemnation. The former states whether the defendant in fact committed the alleged offence, while the latter is concerned with whether he deserves to be convicted. Non-existence of one of these expressions of condemnation will destroy the legitimacy of the verdict which is the ultimate goal of the criminal process.

The moral condemnation of a verdict depends both on its factual accuracy and its consistency with other fundamental values embedded in the criminal justice system. That is to say, the goal of generating a legitimate verdict is not met simply by choosing the verdict that is factually most accurate. Legitimate verdicts and factually accurate verdicts might appear to coincide, given that one obvious way to gain legitimacy is to search for truth. Having said that, the correlation between accuracy and legitimacy is not exact; an accurate verdict may not necessarily be a legitimate one. A guilty verdict based on a confession obtained by torture presents the most familiar example of a verdict that is lacking in moral authority. Such a verdict is self-contradictory irrespective of its factual accuracy or the confession's reliability. This is because, in the words of Dennis,

> "it cannot fulfil its integral functions of making a morally justified statement of the defendant's blameworthiness and fitness for punishment and of conveying an expressive message that the criminal law incorporates values which it is necessary to uphold by punishment"[101]

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[101] *Dennis*, 1995, "Instrumental Protection, Human Rights or Functional Necessity? Reassessing The Privilege Against Self-Incrimination", 54 Cambridge Law Journal 343, at p. 353.

As far as the substantive criminal law[102] is concerned, moral condemnation is only possible for those who choose to break the law. Imposing moral blame without being concerned with the individual's ability to have done otherwise is hardly possible. It is a fundamental principle that there is in general no criminal liability without *mens rea*. Thus, mental freedom or free will is required for the verdict to have moral authority. The free will postulate seems more relevant to the substantive criminal law; much of the debate in the context of blame and punishment, however, has relevance for the free will or voluntariness issue in the law of admissibility of confessions.

The requirement of free will in the context of blame and punishment in substantive criminal law resembles the requirement of the suspect's voluntariness as to whether to confess.[103] Human actions which lack free will or confessions which lack voluntariness will have no legal consequences in criminal law.[104] One can justify blame or inclusion as long as the defendant retains some degree of mental freedom or voluntariness. Accepting the contrary is likely to destroy the moral authority, or legitimacy, of the subsequent verdict. In other words, rules, *inter alia*,

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[102] It is stated by Dennis that theorising about the law of criminal evidence needs to begin with the substantive law. *Dennis*, 1989, "Reconstructing the Law of Evidence", 42 Current Legal Problems 21, at p. 35.

[103] *Grano*, 1979, "Voluntariness, Free Will, and the Law of Confessions" 65 Virginia Law Review 859, at 874.

[104] There is a moral value in a legal system that, even outside the context of criminal law, encourages the belief that individuals should be free from mental impairment. The law of contracts or wills says, for example, that an individual's decision can affect legal outcome provided that it is free from significant inducement.

requiring the exclusion of involuntary confessions prevent the legal system from generating illegitimate verdicts.

The voluntariness test may thus be seen as a very sophisticated mechanism for implementing an important aspect of the legitimacy of the verdict principle within the context of improperly obtained confessions. Concerns other than the impairment of mental freedom may also play a role in the admissibility of confessions; when a confession is voluntary the trial judge may, in his discretion under s. 78, refuse to admit it in evidence. It has been demonstrated in Chapter Four that the exercise of the fairness discretion is not limited to confession evidence, it applies to all prosecution evidence including confessions.[105] In Chapter Five, it is shown that factors considered by the courts to be relevant in exercising their discretion support the view that the fairness test is also best explained by the legitimacy of the verdict principle.[106] It follows that one rationale, that is the legitimacy of the verdict, governs the admissibility of all improperly obtained evidence. This is not surprising because the inclusion of a statement obtained by any practice which impairs the mental freedom of the suspect may be regarded as adversely affecting the fairness of the proceedings in English law. Indeed, as argued convincingly by Professor Birch, "if section 76 were to be repealed tomorrow, it would remain possible to exclude all the evidence which that section excludes by invoking section 78 instead".[107] The same argument is valid in Turkish law; involuntary confessions may be legitimately

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[105] See Chapter Four 3.2.2.2.2.

[106] Chapter Five 3.5.

[107] *Birch*, *supra* note 8 p. 105.

excluded under either A. 135/A or A. 254. Obtaining a statement by any practice which impairs the mental freedom of the suspect will constitute not only illegality but also unlawfulness. Existence of clear overlap between the scope of article 135/A and section 76(2) on the one hand, and article 254 and section 76 on the other has already been the subject of argument above.[108] The possible causes for the independent existence of article 135/A and section 76(2) have also discussed in Chapter Four.[109]

In addition to those reasons, article 135/A and section 76(2) deserve a separate existence because they clarify the degree of mental freedom that will excuse a defendant from accountability for his confession.

7. Analysis of the Notion of "Involuntariness"

It has been identified that involuntariness has emerged in both jurisdictions 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.[110] Looking at the issue from an extremist point of

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[108] See above note 9 and accompanying text.

[109] See Chapter Four 3.2.3.3.

[110] *Ibid*, p. 887.

view is inappropriate. To be able to apply this notion, voluntariness of a confession must be affected in some circumstances but not in others. Such an approach was adopted at English common law. The extent of it, however, was restricted to the presence of promises, threats, and oppression. The current notion of voluntariness may extent this list to include some other circumstances such as are included in Article 135/A. The border of the extension needs to be carefully drawn since not every confession which may be said to be involuntary in some psychological sense is necessarily legally involuntary. It is therefore appropriate next to consider the distinction between legal and psychological involuntariness.

7.1. Do Legal and Psychological Voluntariness Match?

The need to make a decision is faced by the suspect in any type of interrogation. From the psychological perspective, making a decision involves,

> "a choice between alternative courses of action in the light of the consequences which (the decision maker) thinks will follow from each course of action and the value, either positive or negative, he places on those consequences"[111]

Options available to the suspect may be stated in general as confessing, giving evasive answers, refusing any involvement with the alleged offence, and declining to answer.

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[111] *Irving and Hilgendorf*, 1980, Police Interrogation: The Psychological Approach, Royal Commission on Criminal Procedure, Research Study no: 1, p. 12; See also *Irving and Hilgendorf*, Police Interrogation: A Case Study of Current Practice, Royal Commission on Criminal Procedure, Research Study no: 2. They are the source of much of the discussion in this section.

In psychological terms, a variety of different factors may impair the ability to make free decisions and render a confession involuntary. Factors include not only the more obvious ones such as hunger, exhaustion, and pain, but also the less obvious ones such as providing information and stress. The latter deserves more attention. The psychological literature suggests that information provided to the suspect by the police may cause a confession to be involuntary because relevant information is an inherent part of the decision making process.[112] Three types of information are identified to have such an effect: the first is related to the issue of what will happen to the suspect, such as how he will be treated, how long detained, the nature of the charge, bail recommendations, etc. The second is to offer to the suspect to win or lose social approval or self-esteem. The third is supplying or withholding information about which the suspect is likely to be unaware, such as the probability of conviction, the probable length of sentence for the charge. Furthermore, stress is identified as an another factor leading to involuntariness.[113] Stress which is relevant to the issue may arise from the physical environment which is generally unfamiliar to the suspect and controlled by the police, or from confinement and the isolation of the suspect from his natural social environment, or from the suspect's obedience to authority.[114] Obviously these factors develop forces on many suspects which cause them to speak when they would otherwise have stayed silent , but they do not necessarily render a confession involuntary in a legal sense. A distinction is needed to be made between the manipulation of decisionmaking and the collapse of the machinery of the mind.

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[112] *Ibid*, p. 23.

[113] *Ibid*, p. 28.

[114] For detail see *ibid*, p. 29-38.

In other words, the concern of legal voluntariness is, and should be, a certain degree of mental freedom, not an absolute one. Extending the meaning of voluntariness to the latter would weaken the police's power of arrest and interrogation in that the suspect would not confess if the arrest or interrogation did not happen. Nothing seems to me wrong in permitting law enforcement officers to try to overcome the suspect's initial unwillingness to confess without creating a risk that an innocent person will falsely confess.

In addition to the lack of consensus as to approaches regarding the degree of mental freedom necessary to produce a voluntary confession, the problem may arise on how to measure voluntariness. Psychologists focus on the condition of the suspect's state of mind, rather than the improprieties which may cause involuntariness. Such an approach makes the operation of a voluntariness test difficult in that it requires inferences about the suspect's subjective state of mind. It is almost impossible to know exactly in relation to any particular suspect whether his will was impaired at the time of confessing. Even if it would be possible to inquire about the internal workings of the suspect's mind, involuntariness could derive from so many different motives including impropriety of detention or questioning conditions. Identifying the cause of a confession is only picking out a single cause from a group of factors which might only be sufficient in combination. As far as the legal concept of voluntariness is concerned, attention should be given to the question of whether improprieties impaired the suspect's decision to make a confession, rather than the issue of what psychologically motivated him to confess. In other words, unlike the concept of psychological voluntariness which involves in general an <u>empirical</u>

assessment of what lead a particular suspect to confess, the concept of legal voluntariness is " a normative concern about the degree to which it was legitimate to interfere with an accused's decision to confess".[115] In determining the extent of the illegitimate degree of pressure, the courts should principally be required to focus on the probable effect of improper conduct upon the average person. In doing that, certain improprieties will be impermissible regardless of the actual impact of improper behaviour upon a particular suspect at the time of confessing. Some additional improprieties would be impermissible, causing involuntariness, with regard to vulnerable suspects because justice should not expect a child or severely ill person to resist improper conduct as would be expected from a normal adult. This should not, however, be taken as far as including the suspect's individual characteristics.

7.2. Is Impropriety Required?

With regard to the Turkish voluntariness test, the structure of Article 135/A provides some indication. Although the methods enumerated as capable of causing involuntariness are not exhaustive, all the practices listed as examples are forms of improper conduct. One may conclude from such a formulation that impropriety is required for the application of Article 135/A.

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[115] *Jackson*, 1986, "In Defence of a Voluntariness Doctrine for Confessions: The *Quenn v Johnston* Revisited", 21 The Irish Jurist 208, at 236. See also *R. v L.* [1994] Crim. L. R. 839.

As far as the English voluntariness test is concerned, two decisions of the Court of Appeal, *R. v Fulling*[116], and *R. v Harvey*[117], provide a useful starting point. In the former case it is stated, obiter, that, unlike subsection 76(2)(a), a confession may be excluded under s.76(2)(b) where no suspicion of impropriety exists. In the latter case, a women who is lower than normal intelligence and suffering from psychopathic disorder heard her lover confess to murder and the following day she confessed to the murder. Although in the circumstances of this case there were no breaches of rules or misconduct on the part of the police, it was held that hearing her lover's confession may have had influence on her and may have caused her to make a false confession in order to protect her lover. Her confession was, therefore, not reliable and section 76 was employed to exclude it. Furthermore, it is suggested by one respected author that arresting a suspect, taking him to the police station, placing him in a cell, and questioning him may be sufficient for excluding confessions under the subsection in question due to the employment of the words "anything said or done".[118] However, as pointed out above[119], statutory interpretation of these terms in the light of their origin does not allow expanding the scope of the test that far. The draft version of the provision included the words "threats or inducement" which are undoubtedly improper. The replacement of them by "anything said or done" should have been made because they missed out some other improper tactics such as prolonged detention and deception. Accordingly, the confession in *R. v Harvey* should have been rejected

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[116] [1987] All. E. R. 65.

[117] [1988] Crim. L. R. 241.

[118] *Mirfield, supra* note 18, p. 70; *Mirfield*, supra note 33, p. 110.

[119] See the above paragraph followed by note 73.

under s.78 rather than s.76. Indeed, the judgment of the Court of Appeal in *R. v Goldenberg*[120] indicates a departure from its early interpretation that s. 76(2)(b) may be employed where there is no suspicion of impropriety. In this case, submission for exclusion, under the sub-section in question, of the confession of a drug addict which was allegedly made to obtain bail and to feed his addiction was refused. Obviously, if the suspect had been questioned when he was unfit due to his addiction the result would be different. Similarly, in the more recent case of *R. v Brine*[121] the trial judge's opinion that the target of section 76 is possible misconduct has been confirmed by the Court of Appeal. Although the cases of *R. v Goldenberg* and *R. v Brine* are positive steps in the process of distinguishing legal voluntariness from psychological one, they both failed to address to the question of whether the suspect was fit to be interviewed. If the answer to such a question is negative, than impropriety of questioning is obvious. As far as the latter case is concerned, there was, in fact, impropriety in that the psychologist's evidence established the suspect was unfit to be interviewed. Failure of the police to aware of such a situation should make no difference. The act of subjecting an unfit suspect to interrogation whether knowingly or mistakenly itself is improper and capable of causing involuntariness.

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[120] (1988) 88 Cr. App. R. 285.

[121] [1992] Crim. L. R. 122.

7.3. A Typology of Improprieties

7.3.1. In General

Having concluded in the previous section that the admissibility of confessions in both jurisdictions 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"[122] 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.

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[122] Article 17, emphasises added.

Contrary to the Turkish position, English authorities have been willing to define the concept of voluntariness in the abstract form rather than referring to specific practices. In spite of the fact that "oppression" was pronounced by the judiciary as capable of causing an involuntary confession as early as 1964[123], the amount of pressure required for the existence of it was not well stated. In one of the earlier cases a definition, to which reference was made quite often, was given as follows;

> "[the] word [oppression]... imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary".[124]

As far as the post-PACE English law is concerned, although the concept of "oppression" is statutorily defined as including "torture", inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)", this is ignored by the Court of Appeal. To illustrate, in the case of *R. v Fulling*[125] the suspect contended that she only confessed because the police told her that her

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[123] *Callis v Gunn* [1964] 1 Q.B. 495.

[124] *R. v Priestley* (Note) (1965), 51 Cr. App. R. 1, originally reported on 50 Cr App. R. 183 (CA); This definition was approved in the case of *R. v Prager* -[1972] 1 W. L. R. 260 (CA)-. In this case a more concrete statement is made in the form that the existence of oppressive conduct depends on, inter alia, these elements;

> "... the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or nor, and the characteristics of the person who makes the statement"

Besides non-existence, from the list, of the way in which a suspect has been questioned, one has to notice that the last mentioned element obviously required a subjective oppression test. Accordingly, what may be oppressive with regard to a person who has not previously been in trouble with the police may not be oppressive in the case of experienced criminals.

[125] [1987] All E. R. 65, at p. 69.

boyfriend was having an affair with another woman whom the police had also arrested and who was being held in the cell next to hers. According to the accused, these revelations so distressed her that she couldn't stand being in the cell any longer and she then confessed in order to escape from the police station. This allegation was denied by the police. The court ruled that even if the accused's assertion was wholly true, the information given to her by the police did not amount to oppression. Furthermore, it has been held that the word "oppression" should be given its ordinary dictionary meaning as stated in the Oxford English Dictionary;

> "exercise of authority or power in a burdensome,harsh or wrongful manner; unjust or cruel treatment of suspect, inferiors etc, the imposition of unreasonable or unjust burdens"[126].

It was further quoted from the dictionary that "there is not a word in our language which expresses more detestable wickedness than oppression". Without making reference to the definition of oppression in s.76(8), the court went on to say that "it is hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator". The Court's approach as to the definition of oppression in *Fulling* is widely criticised. It is maintained by Professor Birch that the Court of Appeal's definition is susceptible to the risk of being interpreted too widely in that "the word 'wrongful' is capable of being understood as including any breaches of the rules by which the police are bound, whether accidental or deliberate, fundamental or trivial"[127]. She further points out that it would be "unfortunate" if

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[126] *Ibid*, p. 69.

[127] *Birch*, supra note 8, p. 102.

every breach of the rules were considered as oppression[128]. I am inclined to agree with the argument put forward by Professor Birch. No doubt, there can be some illegality or impropriety which does not lead to the conclusion that the evidence is obtained by oppression, and thus it may not be right to say that every illegality or impropriety constitutes oppression. In a more recent case Professor Birch's approach was confirmed by the Court of Appeal.[129] Furthermore, the Court of Appeal's "dictionary approach" is criticised by Zuckerman as follows;"a perfunctory reference to a dictionary entry can hardly provide the guidelines for the conduct of interrogation that the police and the courts require"[130]. He further maintains that the same dictionary also includes two further definitions for the phrase of "oppression" and the second definition, which states that "the feeling of being oppressed or weighed down: bodily or mental uneasiness or distress", was not quoted by the Court without giving any explanation for not doing so. In addition, it should be borne in mind that since dictionaries seek to employ both current usage and to trace a historical developments of the meaning of words, they cannot be taken as an authoritative exponent of the meaning of words used in Act of Parliament.[131] As one writer observed, "a dictionary is not merely a home for living words; it is a hospital for the sick; it is also a cemetery for the dead".[132]

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[128] Birch, 1988, "Commentary on *R. v Davison*" Crim. L. R. 444.

[129] See *R. v Emmerson* (1991) Cr. App. R. 284.

[130] *Zuckerman*, 1987, "Evidence" All. E. R. Annual Review 121.

[131] *R. v Peters* (1886) 16 Q.B. 636, at p. 641.

[132] *Dale*, 1878, Nine Lectures on Preaching, second ed., p. 181.

Practices which fall short of "oppression" may also lead to involuntary confessions provided that they are likely to render any subsequent confession unreliable. This regulation should be credited for its usefulness in providing a yardstick to the issue of distinguishing legal and psychological voluntariness which particulary differ with regard to less serious improprieties.

7.3.2. 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.[133] More recently, it has also been defined by an International Covenant as, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ...".[134] 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".[135] Similarly, the use of five interrogation techniques including wallstanding,

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[133] *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.

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

[135] *The Greek Case*, *supra* note 133, p.505.

hooding, subjection to continuous noise, deprivation of sleep, and deprivation of adequate food was considered to amount to torture.[136] 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.[137] 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".[138] 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.

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[136] *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".

[137] *Bazzano and Massera v Uruguay* (5/1977), Report of the Human Rights Committee, GAOR, 34 the Session, Supplement NO.40 (1979), Annex 7; *Grille Motta v Uruguay* (2/1977), Report of the Human Rights Committee, GAOR, 35 th Session, Supplement no.40 (1980), Annex 11; *Lopez v Uruguay* (52/1979), Report of the Human Rights Committee, GAOR, 36 the Session, Supplement No. 46 (1981, Annex 19; cited in *Rodley*, 1987, The Treatment of Prisoners Under International Law

[138] *The Greek Case*, *supra* note 133, p. 461.

As far as Turkish law is concerned, although torture is prohibited by a number of legal texts[139], there is no statutory definition of it. Examples of torture, however, can be found in the judgments of the Court of Appeal. In the case of *Gazi, Faik and Ziya*[140], 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 involvement, 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

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

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

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.[141]

7.3.3. **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*[142] , 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 courts's approach is obviously a move towards limiting the meaning of torture to its general understanding, extreme barbarity.[143] The practices of inhuman treatment vary from trivial beating to forcing to stand against a wall and beating severely.[144] The presence of such a practice was found by the Turkish Court of Appeal in cases where

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[141] *Sanik Bedediye Baskani*, Y.1.C.D. 13.1.1970, E. 1969/1730, K.1970/118 cited by *Donmezer*, 1984, Ozel Ceza Hukuku Dersleri p. 131; *Hirsizlik zanlilari*, YCGK T. 22.3. 1976, E.1976/8-100 K.1976/133, 3 Yargitay Kararlari Dergisi (Journal of Court of Appeal Decisions), 1977, p. 412; *Jandarma Erleri*, 6.10.1976, Y.1.C.D. E.1976/3053, K. 1976/3167, 3 Yargitay Kararlari Dergisi (Journal of Court of Appeal Decisions) p. 106; *Mustafa*, Y.8.C.D. 20.2.1986 E.1985/6399 K.1986/1151, 12 Yargitay Kararlari Dergisi (Journal of Court of Appeal Decisions), 1986, p. 1556; *Ridvan*, 17.6.1986, 3320/3733, cited in *Malkoc*, 1988, Memurlar ve Suclar: Mumurlar ve Kamu Gorevlilerinin Hukuki Sorumluluklari (Public Servants and Crimes: Responsibility of Public Servants), p. 86.

[142] *Supra* note 136, p. 76-85.

[143] See *Sarup*, 1979, "Torture Under the European Convention on Human Rights", 73 American Journal of International Law 267.

[144] *Ireland v United Kingdom*, supra note 136, para 110, 115 and 174.

the suspect was beaten so badly that he had marks and was unable to work for seven days.[145]

7.3.4 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"[146]. 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.[147]

Neither Turkish nor English courts , to the researcher's knowledge, has 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;

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[145] *Hasan*, YCGK, 5.10.1987, E.1987/8-186 K.1987/423, 14 Yargitay Kararlari Dergisi (Journal of Court of Appeal Decisions), 1986, p. 102-105; *Erdogan*, YCGK 17.4 1989, E.1989/3-87, K.1989/143.

[146] *The Greek Case*, *supra* note 133, p. 500.

[147] *Rodley*, 1987, The Treatment of Prisoners Under International Law, p. 93.

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.[148] 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.[149] 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.

7.3.5. 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

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[148] *Ireland v United Kingdom*, *supra* note 136, para. 162.

[149] *The Greek Case*, *supra* note 133, p. 501.

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 whatsoever on taking these substances, questioning a suspect who has no control over his decision making is itself improper.

7.3.6. **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[150], 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.[151] A similar conclusion was reached for the confession of a retired public servant who had been subjected to a

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[150] 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. *Katiksiz Hapis Case*, 27/12/1965, E.1963/57, K.1965/65, D.4/3-9, Official Gazette no: 12520 of 6/2/1967.

[151] *R. v Trussler* [1988] Crim. L. R. 446.

total of 700 questions for 25 hours out of 50 spent in custody during a hot summer.[152]

7.3.7. 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.[153] 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. To illustrate, in the case of *R. v Sparks*[154], the suspect, accused of indecent assault, was told that unless he confessed he would be prosecuted in a civil rather than a military court, that additional motoring charges would be brought against him, that his family and friends would be embarrassed by the publicity and finally that his wife would not be permitted to leave the Island (Bermuda). His statements were held involuntary and hence inadmissible by the Privy Council.

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[152] *Hudson* (1980) 72 Cr. App. R. 163.

[153] *R. v McGovern* (1992) 92 Cr. App. R. 228.

[154] [1964] Crim. L. R. 298.

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*[155], 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 was found to be rude and discourteous, it was not regarded as capable of causing involuntariness. More recently in *R. v Paris, Abdullahi and Miller*[156] it was, however, held by the Court of Appeal 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.[157] 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.[158]

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[155] (1991) 92 Cr. App. R. 284.

[156] (1993) 97 Cr. App. R. 99.

[157] *Ibid*, p. 100.

[158] *Ibid*, p. 100.

7.3.8. **Promise**

A promise to the suspect that if he confesses he will be released on bail or that he will not be prosecuted, at least for some other accusations, may damage the voluntariness of a confession.[159] 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".[160] The promise does not need to be made directly to the suspect, it may be sufficient if it comes to his knowledge.[161]

7.3.9. **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.[162] Indeed, a sociological study examining changes in the nature of police interrogation in America reveals that "deception and manipulation have replaced force and direct

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[159] *R. v Everet* [1988] Crim. L. R. 826; *R. v Barry* (1992) 95 Cr. App. R. 334; *R. v Conway* [1994] Crim. L. R. 838.

[160] *R. v Northam* (1967) 52 Cr. App. R. 97; *R. v Zaveckar* (1969) 54 Cr. App. R. 202; [1970] 1 All E. R. 413.

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

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

coercion as the strategic underpinning of information-gathering techniques that police now employ during criminal investigation".[163] Unfortunately there is no empirical data to prove or disprove such a trend in Turkey and England. Research conducted in England to examine strategic changes in the police questioning of suspects in the Metropolitan Police district between 1983 and 1988[164] has not addressed this issue.

For the present purposes two different forms of interrogatory deception may be identified as maximisation and minimisation.[165] The former generally involves attempts to 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[166], 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[167]

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

[164] *Williamson*, 1990, Strategic Changes in Police Interrogation: An Examination of Police and Suspect Behaviour in the Metropolitan Police in Order to Determine the Effects of New Legislation, Technology and Organisational Policies, PhD Thesis, University of Kent.

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

[166] *R. v Mason* [1987] 1 W. L. R. 139; *R. v Blake* [1991] Crim. L. R. 119.

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

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.

In this section 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. Such tactics, however, appear to be disappearing from the English scene. As one's attention moves from harder to softer improprieties, they become less visible and therefore it becomes more difficult to draw the line between tactics which cause involuntariness and which do not. Obviously, the voluntariness test allows some pressures. To assess the permissible degree of pressure the "qualified voluntariness test" of s.76 offers some help; accordingly, the improprieties give rise to involuntariness only if they are likely to cause an unreliable statements. Involuntariness effect of oppression has been presumed in every case, and therefore it causes automatic exclusion. Obviously, the

reliability of a particular suspect's confession is beyond the concern of the qualified voluntariness test. The assessment of the reliability of an actual confession can only be made by taking into account other corroborating evidence, not by the admissibility test. As pointed out by Jackson, "an admissibility test based on reliability is a small step away from the abondonment of any admissibility test at all".[168]

8- Evidence Discovered in Consequence of Involuntary Confessions

It is argued above that confessions must be voluntary before they are admissible in evidence; involuntary confessions are inadmissible as evidence against the accused in both jurisdictions irrespective of reliability.[169] In some circumstances, however, evidence incriminating the accused may be discovered by law enforcement officers in consequence of an inadmissible confession. In this section the issues of admissibility which are posed by such "consequently obtained evidence" will be examined.[170]

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[168] *Jackson*, *supra* note 109, p. 254.

[169] In addition to this, confessions may also be excluded if admission would adversely affect the fairness of the proceedings in English law and in Turkish law if they are secured unlawfully.

[170] The terms primary and secondary evidence are used for the direct and indirect result of an impropriety respectively. A confession obtained as a direct result of an impropriety is the primary evidence, whereas the body of the victim found as a result of that confession is the secondary evidence. *La Fave*, 1987, Search & Seizure: A Treatise on the Fourth Amendment 369.

8.1. Refusal of Mandatory Exclusion and Inclusion

In Turkey the issue has not been addressed. In England some aspects of this issue have been regulated by PACE. Section 76(4)(a) provides:

> "The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence ... of any facts discovered as a result of the confession".[171]

The subsection forbids the mandatory exclusion of subsequently discovered evidence; it is a clear rejection of the U.S fruits of the poisonous tree doctrine[172], the deterrent rationale[173] and the *Nemo Tenetur Seipsum Accusare* principle.[174] The statutory approach reflects the position at common law. In the case of

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[171] One should note that s. 76(4)(b), unlike s. 76(4)(a), is not concerned with the admissibility of subsequently obtained evidence. Instead, it regulates the admissibility of evidence coming to light in the confession itself. Accordingly, an involuntary confession is admissible, subject to s. 78 discretion, as evidence showing that the accused speaks, writes or expresses himself in the same way as the offender, though not of the truth of the confession. It is hardly possible to agree with the proposition that "it cannot make any difference to the admissibility of handwriting whether it is written voluntarily or under the compulsion of threats" (*Obiter*, *R. Voisin* [1918] 1 KB 533). As has already been argued, an involuntary confession should not be relied upon for any purpose; if the suspect is tortured, the value of his statement for any purpose should be doubted. See above note 38 and accompanying text.

[172] As far as this doctrine is concerned, all evidence which can be considered to be a "fruit" of an impropriety is regarded as tainted by the impropriety. *Nordone v US*, 308 US 338 (1939).

[173] If the officer knows that the subsequently obtained evidence, unlike confessions, can be used at a later trial he will not be deterred from violating procedural rules.

[174] If the rationale of the exclusion of involuntary confession is the principle of *Nemo Tenetur Seipsum Accusare* it would be rational to lengthen the exclusion to other evidence obtained in consequence of the confession.

Warickshall[175], the accused confessed to receiving stolen goods. As a result of the confession the stolen goods were found concealed in her bed. The confession was held inadmissible since it was induced by promises of a favour, but the contention to the effect that, as the goods were discovered as a result of an inadmissible confession, the evidence of actual discovery should also be excluded was rejected. It was stated that the principle requiring the exclusion of confessions in evidence,

> "has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner whether the confession from which it is derived be in other respects true or false"[176]

This approach should be welcomed in that it rejects a mandatory exclusion of subsequently obtained evidence.[177]

The subsection and the common law approach as stated in *Warickshall*, at the same time, does not require mandatory inclusion; it does not provide that subsequently obtained evidence is necessarily or automatically to be admitted. It only states that consequently obtained evidence may be given in evidence as a matter of law[178], but

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[175] (1783) 1 Leach 263.

[176] (1783) 1 Leach 263, at p. 264.

[177] For the criticism of the mandatory exclusionary rule see Chapter Three 3.2.

[178] Section 76(4) is concerned with facts discovered as a result of a confession which is inadmissible under s. 76(2). Confession evidence may also be excluded by employing section 78. Facts discovered as a result of a confession excluded under s.78 may, and should, also be adduced as evidence, if not because of the analogous application of s. 76 (4), because of the common law principle stated in the case of *Warickshall*.

such evidence is still prone to be subjected to the general exclusionary discretion regulated by section 78.[179] Factors taken into account by the court in the exercise of their "unfairness" discretion in respect to any evidence may also be relevant to the admissibility of the subsequently obtained facts.[180]

Turkish law has not directly dealt with the issue of subsequently obtained evidence, but this should not be taken as indicating a lack of sensitivity to the problem. Nothing prevents the application of Article 254 which also requires, as argued in the previous chapter, a flexible solution. Thus, Turkish and English legal systems' general attitude towards admissibility of improperly obtained evidence does not differ when faced with the admissibility of subsequently obtained evidence. This is a compelling illustration of the point that the function of the criminal justice system is not solely to generate factually accurate verdicts, as it is clear that the approach may result in the exclusion of subsequently obtained evidence which is perfectly reliable.

8.2. Is the Voluntariness Test Applicable?

Evidence obtained in consequence of an inadmissible confession is subject to the admissibility test under s. 78 in English law and under article 254 in Turkish law.[181] One may ask whether consequently obtained evidence should be subjected to the involuntariness test. At present, in both jurisdictions, it is not; in Turkey article

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[179] For the operational scope of s. 78 see Chapter Four 3.2.2.2.2.

[180] These factors are considered in Chapter Five 3.5.

[181] For the operation of these tests see Chapter Five.

135/A applies only to "statements". In England s. 76(2) is only applicable to confessions as defined by s. 82 of PACE.[182] Things which come within the definition of s. 82 cannot be treated as "facts" for the purpose of s. 76 (4)(a).[183] It is submitted that, in principle, these approaches are correct, as has already been stated, because there is a fundamental difference between a confession and other evidence, including evidence coming to light as a result of a confession.[184] Having said that it may be difficult sometimes to decide where the "confession" terminates and "subsequently obtained facts as a result of it" begin. An interesting example of such a difficulty would be the common law case of *R. v Barker*[185]. The accused was convicted of conspiring with another to defraud the Inland Revenue. He was promised immunity from criminal prosecution at an interview, as a result of which he produced books and documents which disclosed tax irregularities. A prosecution was subsequently launched and the trial judge admitted the books and documents. The Court of Appeal, however, quashed the conviction on the ground that,

> "documents stand on precisely the same footing as an oral or written confession which is brought into existence as a result of such a promise, inducement or threat"[186]

The act of producing some incriminating document or article may constitute a "confession", but not the documents or articles themselves. The reason for this is that

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[182] See above note 47 and accompanying text.

[183] *Murphy*, 1995, Blackstone's Criminal Practice, p. 2109.

[184] See Chapter Four 3.2.3.4.1.

[185] [1941] 2 K.B 381.

[186] [1941] 2 K.B. 381, at p. 384-385.

books and documents which were produced in consequence of the inducement were in existence before and independently of any inducement or threat. Thus, regarding such books and documents as the equivalent of a confession does not seem satisfactory unless an improper inducement led the accused to re-write them. In another case, it was rightly held that the re-enactment of a murder, in which a defendant was shown disposing of the murder weapon, should be regarded as a confession rather than as a subsequently obtained fact.[187] The question in this case was "where exactly is the murder weapon (a knife)?". Such a question might have been answered by an oral description of the place where it was, or by going to the place and pointing to that place. It should not make any difference which method of answering the question was adopted. Thus, it is important to distinguish the confession from subsequently obtained evidence, because the involuntariness test applies to the former not to the latter.

8.3. Non-Permission of Linking

In some cases consequently obtained evidence can "stand alone"[188] without making any reference to the fact that it was obtained in consequence of an inadmissible confession. For example, the stolen property found concealed in an accused's bed itself incriminates the accused. There is no need to show that it was discovered as a result of the inadmissible confession. In some cases, however,

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[187] *Lam Chi-ming v The Queen* [1991] 2 A.C 212. See also above note 47 and accompanying text.

[188] This phrase is used by *Choo*, 1993, "Evidence Obtained in Consequence of an Inadmissible Confession", 57 Journal of Criminal Law 195, at p. 197.

consequently obtained evidence will have little relevance or value in the absence of evidence of how it was discovered. To illustrate, the recovery of a knife without any fingerprint on it in the sea will not itself indicate the accused's involvement in a murder unless it is permitted to adduce evidence that it was discovered as a result of an inadmissible confession. As far as the latter situation is concerned, adducing subsequently obtained evidence only has practical value if it "stands with the inadmissible confession". Thus, the question whether the prosecution are allowed to adduce evidence to show that consequently obtained evidence was discovered as a result of an inadmissible confession gains importance. This problem had arisen in a number of common law cases. Several different answers were given. Before discussing the present state of the law, it may be useful to examine these authorities.

In the case of *R. v Garbett*[189] the widest approach was adopted. According to this judgement, subsequent facts and the inadmissible confession that led to their discovery were admissible. This approach results from the assumptions that inadmissible confessions were excluded merely because they were not entitled to trustworthiness; and that once their trustworthiness is confirmed the whole confession is admissible in that "it can hardly be supposed that at certain parts the possible fiction stopped and the truth began... if we are to cease distrusting any part, we should cease distrusting all"[190] One should, however, note that both assumptions are open to

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[189] (1847) 2 C & K 474, at p. 490, cited by *Gotlieb*, 1956, "Confirmation by Subsequent Facts", 72 Law Quarterly Review 209, at p. 215.

[190] *Wigmore*, 1940, Treatise on the Law of Evidence, 3 rd ed., sect. 847.

criticism. Inadmissible confessions, as argued above[191], are not excluded for the possibility that they may be unreliable but because they are involuntary. In any event, the assumption that a confession confirmed in part is true altogether ignores the fact that a confession may include true and false statements.

The other approach was to admit those parts of a confession that have been actually confirmed by subsequently obtained evidence.[192] Parts of a confession not linking the subsequently obtained evidence with the accused were excluded. Again here, the rationale for excluding forced confessions was assumed to be the likelihood of unreliability. Unlike the first approach, a line is drawn between the aspects of the confession that have been actually confirmed and those which have not.

Another approach was to accept that the subsequently obtained evidence alone is admissible and that it cannot be connected with the confession in any way. In the case of *Warickshall*, in which the consequently obtained evidence could stand alone, it was held that no part of the otherwise inadmissible confession could be heard and that "it can never be legally known whether the fact was derived through the means of such confession or not"[193]. Similarly, in the case of *R. v Berriman*[194] the

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[191] See above note 64 and accompanying text.

[192] *R. v Thurtell* (1824) Annual Register 4; *R. v St Lawrence*, [1949] Q.R. 215; *R. v Griffin*, (1909) Russ & Ry 151; *R. v Gould* (1940) 9 C & P 364, these cases cited by *Gotlieb*, *supra* note 189, p.213, 214, 215.

[193] (1871) 1 Leach C. C. 263, at p. 264.

[194] (1854) 6 Cox C.C 388, at p. 389; See also, *R. v Mosey* (1783) 1 Leach C.C. 265; *R. v Cain* (1839) 1 Crownford & Dix 36.

witness was allowed to testify that stolen property was found in a certain place, but he was not permitted to say that it was discovered as a result of a statement made by the accused.

It is clear that there was authority at common law for each of these different approaches. The law was confused and uncertain as to whether an inadmissible confession could be used to link the subsequently obtained facts with the accused. These approaches were considered by the Criminal Revision Committee in its Eleventh Report and the issue was taken as a question of "policy".[195] The first approach, examined above, was opposed by the Committee. The majority expressed the view that the second approach should be adopted. A minority did not support this proposal on the ground that it would be wrong to admit a confession indirectly when it was thought that the interests of justice required that it should not be admitted directly. The minority view, which is also a reflection of the third approach, was the one adopted by PACE. Subsection 76(5) and (6) clearly state that the prosecution[196] are not permitted to show that the relevant facts were discovered as a result of a confession excluded under s. 76.[197]

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[195] Eleventh Report , *supra* note 7, para. 69.

[196] The defence may, however, adduce such evidence, if they wish.

[197] One may fairly ask whether linking the subsequently obtained evidence with the confession is possible where the confession is excluded under s. 78. This issue was not addressed in PACE. Professor Birch (*Murphy*, *supra* note 183, p. 2110) argues that a court should not feel compelled to follow the principle laid down by s. 76(5), whereas it is argued by Choo (*Supra* note 188, p. 197) that "an analogous principle should apply" in relation to confessions excluded under s. 78. The researcher inclines to agree with the view that, as far as the consequently obtained evidence is concerned, confessions excluded under s. 78 and confessions excluded under s. 76(2) should be treated alike. Exclusion of the same confession may be justified, in many

The legislative strategy of not permitting the prosecution to adduce evidence that facts were discovered as a result of an involuntary confession seems to be not only convincing, but also consistent with the legitimacy of the verdict principle in two respects.[198] Firstly, the prosecution cannot reveal such a link, whereas the defence can, if they wish. This distinction conforms with the view that state reliance on an involuntary confession weakens the moral authority of the verdict.[199] Secondly, and more importantly, the justification for the exclusion of involuntary confessions should have been put upon wider grounds than its mere potential unreliability. In these cases the reliability of a confession has been confirmed by other independent evidence insufficient in itself to prove guilt. If unreliability were the sole ground for rejecting involuntary confessions, than that part of a confession which can be proved to be reliable by the subsequent discovery of facts that show it to be reliable ought to be admitted in evidence. One has to accept that allowing the prosecution to establish the link will contribute to the factual accuracy of a verdict. Although the legitimacy of the verdict principle generally derives from factual accuracy, however, this is not always so. As argued above[200], perfectly reliable confessions may be excluded if they carry significant risk of harming the moral authority of the verdict. In the context of the admissibility of subsequently obtained evidence, the judiciary, by excluding an involuntary confession, makes the judgement that admission of the

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instances, under either s. 76(2) or s. 78. As argued by Choo, in some cases it may be just a matter of chance whether a particular confession has been excluded by employing s.76(2) or s. 78.

[198] The same approach should be adopted by Turkish law.

[199] *Dennis*, *supra* note 101, p. 360.

[200] See above note 100 and accompanying text.

confession harms the legitimacy of the verdict. If direct admission of a confession harms the legitimacy of the verdict, indirect admission of the same confession should also have the same effect.

9. Conclusion

Not only the criteria which are used to determine the admissibility of confessions by Article 135/A and Section 76, but also the more fundamental question of the extent of these provisions is sought to be examined in this chapter. Neither great differences nor a consensus has been found in the latter regard. After identifying that exculpatory statements are not treated differently from inculpatory ones by Article 135/A, it is argued that there is no merit excluding exculpatory statements from the scope of Section 76.

A contention is made to the effect that the key test employed with regard to admissibility of confession by both countries is mainly voluntariness. Some may hesitate about the correctness of this argument with regard to English law. The literal meaning, however, of section 76(2) in the light of Parliamentary history reveals that in order to be admitted as evidence confessions should be obtained voluntary in the sense that it has not been obtained by methods conducive to unreliability or by oppression.

The concept of voluntariness, however, has been proved not to be self-defining and thus there is a need to qualify it. One has to accept that English law has made

considerable progress in this direction. There is every reason for Turkish judiciary to benefit from that experience. The usage of the same framework, voluntariness, is likely to contribute the adoption of similar views about the application of this test in each country. This trend has already started by the perception by each jurisdiction of the voluntariness test as a vehicle for evaluating not only the effect of interrogative techniques on a suspect's will but also the propriety of police conduct regardless of its impact on the suspect.

CHAPTER SEVEN

BREACH OF THE RULES SAFEGUARDING THE SUSPECT IN POLICE CUSTODY

1. Introduction

Recently the vulnerable position in which suspects are placed at the police station has become too obvious to ignore. The widely publicised English cases such as *the Birmingham Six*, *the Guildford Four*, *the Maguires* and *Judith Ward* are perhaps best illustrative of the vulnerability of suspects in police custody.[1] Similar cases revealing the vulnerability of the suspect at the police station are also seen in Turkey. To illustrate, in 1992 the Human Rights Commission of the Grand National Assembly received 74 applications of mishandling during custody.[2] More recently, the Human Rights Association, which is a leftist non-governmental organization[3], reported receiving 645 allegations of mistreatment by law enforcement officers during 1994.[4]

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[1] See Chapter Six note 1 and accompanying text.

[2] *Kazanci*, 1992, "TBMM Insan Haklarini Inceleme Komisyonu ve Ulkemizde Insan Haklari (The Human Rights Commission of the Grand National Assembly and the Human Rights in Turkey)", 14 Insan Haklari Yilligi (Turkish Yearbook of Human Rights), p. 55.

[3] *Evinch*, 1992, "An Introduction to the Turkish Human Rights System", 1 (Turkish) Human Rights Review 43.

[4] *Sik*, 1995, "CMUK Iskencede Etkisiz (CMUK is ineffective in Preventing Torture)", Cumhuriyet (Daily Newspaper), 12 February; The question of compliance with human rights was also raised with respect to Turkey at an international level. Both governmental and non-governmental international organizations (such as the EC and the Counsel of Europe's Parliamentary Assembly, as well as Amnesty International and Helsinki Watch), and even states (such as the US,, which produces the State department Annual Report on Human Rights in the World) have repeatedly

Such cases reemphasise the susceptibility of suspects to two particular risks of harm. These are, as identified by Zuckerman, the risk of abuse of the suspect's person or self-esteem, and the risk of alteration or manipulation of the suspect's statement so as to bring him into connection with the crime.[5]

Even without the employment of any impropriety, the distressing effect of being in custody has been recognised by the Royal Commission in England[6] as well as by psychological researchers[7]. Indeed, such factors as isolation from the outside world and the general environment of the police station create an atmosphere where law enforcement officers have a major psychological advantage over the suspect.

Against this background, one may reasonably ask which safeguards should be adopted to protect suspects held in police custody and subjected to interrogation. Traditionally both the Turkish and English law recognised some kind of protective regime: the former through the written constitution, as well as subsequent statutes and

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issued reports on this subject. More recently, on December 1992, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment issued an alarming public statement on this issue. For the detail of this statement see, *Tanca*, 1993, "The Public Statement on Turkey by the European Committee for the Prevention of Torture", 4 European Journal of International Law 115.

[5] *Zuckerman*, 1989, The Principles of Criminal Evidence, p. 302.

[6] *Royal Commission on Criminal Procedure*, 1981, Report (Philips Report), Cmnd 8092, para 4.73.

[7] *Gudjonsson* and *Clerk*, 1986, "Suggestibility in Police interrogation: A Social Psychological Model" 1 Social Behaviour 83-104 ; Gudjonsson, 1992, The Psychology of Interrogations, Confessions and Testimony; *McConville* and *Sanders*, 1991 The Case for The Prosecution.

court decisions, while the latter, having no written constitution, took its guidance from the common law and Act of Parliament. Recent growing public awareness to ensure that this vulnerability of the suspect is not exploited led to the introduction of the PACE in England and the amendment of the CMUK in Turkey. Both legislations laid down a much more comprehensive framework of protective measures for suspects in police custody than had been provided by the previous laws of each country. The main concern of the legislatures in both jurisdictions was a central question for any criminal justice system: striking the necessary compromise between individual rights and law enforcement needs. How a society establishes that balance affects not only the system's efficiency but, more importantly, shapes the society itself. This is because safeguards belong not just to the criminally accused but to all persons confronted with the state's police power.

The safeguards provided by PACE and CMUK may be classified as the involvement of third parties in the detention and questioning process, the time limits for the detention of suspects and the requirements for documented procedures and record making. Once the importance of the suspect's rights is recognised, it then becomes important to ensure that remedies are available when such requirements have not been met. Having said that, the legal effect of non-observance of these requirements by the police is not made explicitly clear by the statutory provisions either in England nor in Turkey. It seems to have been left entirely to the judiciary to determine what effect a police officer's non-compliance legally has in relation to statements and other evidence obtained as a result.

The examination of the concepts of unlawfulness and unfairness in Chapter Five and the criteria for the admissibility of confessions in Chapter Six have disclosed the possibility of the same amount of evidence being excluded in both jurisdictions. This possibility will be tested in the following pages by specifically focusing on the admissibility of evidence obtained as a result of depriving the suspect from procedural safeguards such as the involvement of third parties, time limits for detention, or recording provisions. Although these improprieties often occur in conjunction, for the sake of simplicity only their individual effects will be considered. The type of evidence most likely to be in issue as a result of these breaches is confession evidence. This does not necessarily cause a problem of overlap with the previous chapter in that failure to comply with any of these procedural safeguards generally raise the admissibility issue under the unlawfulness and unfairness concepts rather than involuntariness.

2. The Involvement of Third Parties

In order to prevent the traditional secretiveness and exclusivity of police stations, the involvement of third parties such as legal advisers, family, friends, appropriate adults, custody officers, and public prosecutors is allowed, indeed some of them are required, in both legal systems. These involvements may, *inter alia*, contribute to the monitoring of those events that occur during the detention of suspects. Failure to comply with these requirements may be challenged to be capable of resulting in the exclusion of evidence under article 135/A and 254 of the CMUK in Turkey, and section 76, 78 and 82 of the PACE in England. The amount of

evidence which may be excluded and the more relevant provision to be employed in each system as a result of these infringements deserves closer examination.

2.1. Legal Adviser

The involvement of a legal adviser at the pre-trial stage of the criminal process, which may be called *the right to legal advice*[8], is one of the most significant safeguards for the suspect. With regard to evidence obtained in breach of this right, neither CMUK nor PACE name with precision what legal consequences may flow from such infringements. However, where any breach occurred, the suspect may, logically, apply, under section 78 of the PACE and under the provision of 254 of CMUK, at the subsequent trial for exclusion of evidence obtained as a result of that breach. Similarly, more specific provisions, PACE 76 and CMUK 135/A, regulating admissibility of improperly obtained confessions may be applied to exclude confessions obtained from a suspect who has not been given the opportunity of obtaining legal advice.[9]

Where admissibility of evidence obtained in breach of the right to legal advice is challenged under article 254 of CMUK or under section 78 of PACE, almost the

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[8] Different terms such as "access to a solicitor", "right to see a solicitor", " right to legal advice" etc. are used in order to refer to obtaining legal advice during the pre-trial stage of criminal process as though they are synonymous. I am inclined to use the term "right to legal advice" since advisers are not only solicitors in England, but also their clerks, representatives etc.

[9] Exclusion of evidence under section 76 of PACE and 135/A of CMUK has already been examined in some detail in the previous Chapter.

same stages should be followed by the courts in both jurisdictions in the process of deciding whether to exclude evidence. The list of stages could easily be lengthened[10], but the identification of two main steps will serve to bring out the important facts which need to be stressed. Each of these will be examined in turn.

2.1.1. **Infringement of the Right to Legal Advice**

The first step is to determine whether there is a breach of the right to legal advice. Three different forms of infringements amy be identified: active, passive and inadequate assistance.

2.1.1.1. **Active Mode of Infringement**

The involvement of the legal adviser in pre-trial investigation has been recognised and regulated by statutory provisions in both jurisdictions. In Turkey the 1992 Amendment guarantees the suspect's right to legal advice in the following form:

> "The apprehended person or the suspect may avail themselves of the assistance of one or more than one legal adviser (*mudafi*) at any stage of criminal investigation...."[11]

In England, the right in question is governed clearly and in detail by section 58 of the PACE which provides;

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[10] For example, whether or not a request for the legal adviser has been made. If it has, consideration is to be given to whether that request has been refused. If the request has been made and refused, another stage would be to consider whether the delay or refusal was permissible so on.

[11] Article 14/1 of the 1992 Amendment replacing Article 136 of CMUK.

> "a person arrested and held in custody in a police station or other premises shall be entitled, if he so request, to consult a solicitor privately at any time".

Furthermore, The Code of Practice for Detention, Treatment and Questioning of Persons by Police Officers[12] accompanies PACE to regulate the right to legal advice.

To guarantee that the right to legal advice is not a privilege only of the rich, the law in both countries provides a duty solicitor scheme. In each country, under the present arrangement, it is possible to obtain free legal advice while being held in police custody at any time within 24 hours.[13] The Duty Solicitor arrangement is organised by the Bar in Turkey and by the Law Society in England, and whenever a suspect requests legal advice, the police make a phone call to the relevant body and inform them that a duty solicitor is requested.

The active mode of infringement takes the form of refusal or rejection by the law enforcement officers of the suspect's request to consult a legal adviser. Obviously, in such a case the suspect is not ignorant about his right in question. His awareness may derive from notification to him by the law enforcement officers of his statutory right. Alternatively, he may have prior knowledge about his right to legal advice.

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[12] The revised code C come into force on 10 April 1995 and superseded the 1991 version.

[13] For the practical difficulties of implementation of this scheme in Turkey see, *Safak*, 1993, "CMUK ve Polis (CMUK and the Police", Zaman (Daily Newspaper), 20-21-22 and 23 February.

In some cases refusing access to legal advice would not be illegal in either jurisdiction. As far as Turkish law is concerned, subsection three of article 135/A reads,

> "legal adviser's right to communicate with the suspect or the apprehended person, to be present during interview and questioning, to provide legal assistance shall not be restricted and prevented(deprived) in any stage of investigation, including interviews conducted by the police and the gendarmerie".[14]

Although the wording of this subsection suggests otherwise, in the case of offences against state security, safeguards provided by the 1992 amendment, including right to legal advice, will never come into play. In such cases CMUK's previous provisions, which were amended in 1992, requiring the preliminary investigation to be conducted in secrecy will be applied.[15] This is a very strange position in that the same legal norms are repealed in some cases but they are still in force in others.

In England, on the other hand, there are circumstances under which the police may delay access to legal advice.[16] However, in any case, all persons have an

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[14] Article 14/3 of the 1992 Amendment replacing Article 136 of CMUK.

[15] Article 31 of the 1992 Amendment. The first draft, which had been approved by the Turkish Grand National Assembly on 21 May 1992, did not make such a distinction. However, the draft was returned by the President of the Republic to the Assembly for reconsideration. Meanwhile, there were significant terrorist activities in the south of Turkey, which supported the law and order lobby's argument to make such a distinction. For a detailed examination of this process see, *Sahin*, 1993, "Savunma Hakkinin Gelisimi ve CMUK degisikligi (Improvement of the Right to Defence and the Amendments in CMUK)", 3 Izmir Bar Dergisi (Journal of Izmir Bar). p. 73.

[16] In England access to a solicitor can only be delayed if the offence is a serious arrestable offence and then only if there are reasonable grounds for believing that the exercise of the right would result in the interference with or harm the evidence; the

absolute right of access to legal advice after 36 hours detention except for suspected terrorist cases where the period is 48 hours.

To determine whether a refusal of access to a legal adviser can be considered improper, it is necessary to take into account the explanation or reason given by the law enforcement authorities for the refusal. Existence of some reasons will, in both countries, weight in favour of a conclusion that the refusal was not improper and, therefore, did not technically infringe the right to legal advice.[17] That means that this right is not absolute; under certain circumstances it may be withheld. The English judiciary, however, has played its part, by narrow interpretation of the provisions relating to delay, to meet its obligation to help ensure that an increasing number of suspects receive legal advice. Indeed, in order to justify denial of the right, a reference to specific circumstances including evidence about the person detained or the actual solicitor involved is required.[18] Further it has been held that to refuse access to legal advice the police officer should have the belief that a specific solicitor would, if allowed to consult the person in police detention, subsequently assist in the concealment of a criminal offence.[19] Evidence obtained after the refusal, which did not meet these requirements is consistently considered to have been obtained in breach of the right to legal advice. This narrow interpretation makes the grounds for refusal

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alerting of other suspects or hinderance of the recovery of property: PACE 58(8) There are also additional grounds for delaying access to legal advice for terrorism suspects: Annex B of Code C.

[17] Section 58(8), Code C, Section 6 , Annex B.

[18] *R. v Samuel* [1988] All. E. R. 135.

[19] *R. v Silcott, Braithwaite, Raghip*, 1991, The Times, December 9.

of access to legal advice entirely hypothetical in that even if there exist the above-mentioned risks in relation to a particular solicitor, the assistance of another solicitor can always be requested.

2.1.1.2. **Passive Mode of Infringement**

The passive mode of infringement arises when law enforcement officers do not inform the suspect of his right to legal advice. The right in question has automatic effect in neither jurisdiction. In order to avail himself of the right a request by the suspect is required. This regulation may be criticised in that lack of knowledge of the right by the suspect may be exploited by the police. Thus, one may recommend that all suspects should have the right in question unless they specifically reject the offer. Instead of adopting this recommendation, both systems, like the famous American case of *Miranda v Arizona*[20], stipulate that a suspect must be informed of the right to legal advice and of the availability of the duty solicitor scheme.[21] Unlike *Miranda* , neither CMUK nor PACE mandates the right to be informed of that right at an early stage of contact between the law enforcement officer and the suspect. The Turkish and English approaches with respect to the time of informing also differ; in England the suspect should be informed about his right to legal assistance when he is brought to a police station under arrest or arrested at the police station having attended there voluntarily.[22] In Turkey, before the beginning of the police interview or questioning

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[20] 384 U.S. 436 (1966).

[21] CMUK 135/3; Code C 11.2, 6.5 and 15.3.

[22] Code C 3.1; see also *RSPCA v Eager*, [1995] Crim. L. R. 59.

by the prosecution, the suspect should be notified of his right either to choose his counsel or to have the police or the prosecution designate one for him.[23]

In addition to the notification requirement, the Code in England requires advertisement of the availability of free legal advice on request in the shape of posters in the charging area of every police station. The Code also stimulates the translation of this poster into other languages such as the main minority language, and the principal E.C languages.[24] The same regulation should be recommended for Turkey.

Although the wording of these provisions are quite promising, one may ask to what extent, in practice, these provisions ensure adequate notification to the suspect before facing any question. Published researches, unfortunately, indicate that police officers are generally reluctant to inform arrested suspects of their rights.[25]

There is no reason why passive breach of the right to legal advice should be treated with the same gravity as active breach of the right in question. This is recognised by several decisions in England.[26] For example, in the case of *R. v*

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[23] CMUK 135/3.

[24] Code C 6.3, 6H.

[25] Empirical research conducted by Sanders and Bridges in England reveals that the police used various ploys to deflect the proper way of informing suspect of their right in question (rule bending); the most common ploy -42%- was that suspects were told of the right to legal advice "too quickly, incomprehensibly, and incompletely". *Sanders and Bridges*, 1990, "Access to Legal Advice and Police Malpractice" , Crim. L. R. 498.

[26] *R. v Absolam*, (1989) 88 Cr. App. R. 332; *R. v Vernon*, [1988] Crim. L. R. 445; *R. v Mary Quayson*, [1989] Crim. L. R. 218; *R. v Sanusi*, [1991] Crim. L. R. 43.

Beycan[27] after arrival at the police station the suspect was asked "are you happy to be interviewed in the normal way we conduct these interviews without a solicitor..?". This phraseology, the Court of Appeal held, did not amount to a proper way of informing the suspect of his right to legal advice and, therefore, the right in question was infringed. Similarly, in the case of *R. v Vernon*[28], after the suspect's request to access to legal advice and the nomination of a solicitor who was unavailable, she was told that the interview would therefore be delayed overnight if she adhered to her insistence upon the solicitor's presence. She was not told of the duty solicitor scheme as an alternative. This was obviously a passive breach of the right to legal advice. The trial judge exercised his discretion and excluded the interviews.

2.1.1.3. **Inadequate Legal Assistance**

Presence of a legal adviser at the police station, or more specifically at the interview, should not lead us to assume that all legal advisers fulfil the exact duty of assisting a suspect during interview. Various studies have indicated that in actual practice ineffective counselling by the legal adviser is too common. In a recent English study for the Royal Commission on Criminal Justice, McConville and Hodgson found that legal advisers were performing badly at police interviews by adapting a passive stance;

> "Despite the fact that the police might resort to overt psychological manipulation, accusation and abuse, and might lose their tempers with the suspect, legal advisers

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[27] [1991] Crim. L. R. 185.

[28] [1988] Crim. L. R. 445.

> usually continue to act as spectators and make no attempt to alter the interrogation dynamics".[29]

This fact has obviously been contributed to, by the use of non-solicitor advisers.[30]

The Law Society guidelines enables the attendance of non-solicitors, stating that:

> "Solicitors organise their work in a variety of ways and it is acceptable for solicitors to give general authority to their clerks to undertake this work without the necessity of a decision by a solicitor in each individual case."[31]

It would not be realistic to expect that this work will be provided by lawyers in Turkey. During the daytime it would be hard for lawyers to attend the police station due to the workload at courts, whereas attendance at the police station at night time will affect their performance the next day.

If the poor quality of legal advice offered to suspects at the police station becomes the norm rather than exception, the involvement of a legal adviser would be little more than an act of legitimising the criminal process. Indeed, some other breach of procedural safeguards may be overlooked because of the presence of a legal

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[29] *McConville and Hodgson*, 1993, Custodial Legal Advice and the Right to Silence, Royal Commission Research Study No:16, p. 163-164; For similar conclusions see, *Baldwin*, 1992, The Role of Legal Representatives at Police Stations, Royal Commission Research Study No:3, p. 49; *Dixon, Bottemley, Coleman, Gill, and Wall*, 1990, "Safeguarding the Rights of Suspects in Police Custody", 1 Policing and Society 123.

[30] It is not possible to state the extent of the use of non-solicitor advisers since no official record is kept of the status of those attending police stations to provide legal advice. Observation conducted by Dixon, however, revealed that "most solicitors' firms with substantial criminal practices employ ex-police officers as runners". *Dixon, ibid*; For similar findings see *McConville* and *Hodgson, ibid.*

[31] *The Law Society*, 1991, Advising a Suspect in the Police Station.

adviser.[32] To avoid such a conclusion it should be accepted that infringement, of the spirit if not the letter, of the right to access a solicitor may occur in cases where a legal adviser is present. In such a case legal advisers themselves are responsible for the breach rather than police officers. This is, however, not an excuse as far as the legitimacy of the verdict principle is concerned.

Information about quality of of legal advice needs to be made available to the court in order to assess the existence of infringement of the right to legal advice. Difficulties may arise in deciding what constitutes inadequate advice, but these difficulties should not prevent the courts from scrutinizing the legal adviser's conduct more carefully, if necessary, by recognising a test for the legal adviser's performance. Of course, such a test may develop, on a case by case basis, as courts assessed what a specific legal adviser had or had not done in a given case. Such a process has already started in England. In the case of *R. v Paris and others*[33] the solicitor was found to be severely at fault for staying passive throughout the miscarriage of the interview. It was held that a solicitor fulfilling the duty of assisting a suspect during interviews should follow the guidelines[34] issued by the Law Society and perform his

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[32] *R. v Dunn*, (1990) 91 Cr. App. R. 237.

[33] (1993) Cr. App. R. 99.

[34] Guidelines for solicitors on "Advising a Suspect in the Police Station" were first issued in 1985, second and third editions were published in 1988 and 1991 respectively. As far as the current edition is concerned, there is a need to intervene "if the questions are .. oppressive, threatening or insulting (6.3.2), if the officer is not asking questions but only making his own comments (6.3.3), if questions are improper or improperly put (6.4.1)". Furthermore, where improprieties remain uncorrected or continue, the suspect should be advised to remain silent (6.4.2).

function responsibly and bravely. In *R. v Glaves*[35], failure to discharge this function lead to exclusion. It was clearly stated by the English Court of Appeal that, "it behoved the solicitor representing (the suspect) to ensure there was somebody present who would interfere if questioning apparently went too far. There was no point in a solicitor's representative going along and doing nothing but taking a note". Questioning may go too far, to become unfair, in a number of ways. To illustrate, firstly, the content of the question may be unfair if it is ambiguous, hypothetical or based on non-existent evidence. Secondly, the form of the question may be unfair if it is a leading question or one which involves a legal concept not understood by the suspect. Thirdly, the style of the questioning may be unfair if it is overbearing or bullying.

Establishment of any of these breaches will not automatically lead to exclusion of subsequent evidence in either jurisdiction. There is another requirement to be satisfied.

2.1.2. Infringement Causing Unlawfulness or Unfairness

As has been argued in Chapter Five, both unlawfulness and unfairness concepts require ignorance of technical breaches; the right in question is no exception. The main reason for this is that the exclusion of evidence on the grounds of merely technical improprieties is likely to erode public confidence in the legitimacy of the verdict. One should notice that the most common forms of technical violations are

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[35] [1993] Crim. L. R. 685.

made in good faith. However, the existence of good faith cannot be conclusive in that a premium is not placed on ignorance and the legitimacy of the verdict may still be harmed.

Given the importance of the right in question, breaches of it may, and should, only be overlooked in exceptional circumstances. As far as Turkish law is concerned, the infringements will normally constitute unlawfulness; a justification should be needed if the judge considers the impropriety was excusable. Similarly, it is now well established in English law that failure to comply with the requirement of the involvement of a legal adviser amounts a serious inroad on a suspect's rights. In *R. v Walsh*[36], the Court of Appeal held that a non-technical breach of the suspect's pre-trial right to legal advice will prima facie have an adverse effect on the fairness of proceedings but that the court must consider in each case whether that effect is such that evidence should be excluded. It appears that exclusion, in either jurisdiction, will depend on the extent to which the infringement undermines the functions, or underlying rationales, of the right.

Several functions of the involvement of a legal adviser at the police station may be identified.[37] Besides safeguarding, to some extent, the suspect against the

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[36] (1990) 91 Cr. App. R 161.

[37] As far as the police are concerned there are even considerable advantages in having a legal adviser present; the legal adviser may improve communications between police and the suspect by explaining the situation and technicalities of law to the suspect and the police. Dixon quoted from one officer who said that "most prisoners are brain dead and we get more sense out of them if they've got a solicitor".-*Dixon*, 1991, "Common Sense, Legal Advise and the Right to Silence", Public Law, 233. p. 240-. Furthermore, where unfounded allegations of police malpractice are raised or

risk of abuse of his person and dignity, it will provide psychological support for the citizen whether he is a witness or a suspect. Being deprived of such support, even in the absence of any abuse of his person or dignity which is likely to cause involuntariness, may itself be adequate for unlawfulness in Turkey and may cause an adverse effect upon the fairness of proceedings in England. The reason for this is that false or misleading admissions are likely to arise in the absence of a legal adviser. It may be argued that the suspect made a false or misleading admission as a result of his assumption that something had to be said in response to police questions, but at the same time being uncertain as to what to say. This may be particularly true in England following the new-style caution[38]. The core of the argument here is that the absence of a legal adviser may cast doubt as to the reliability of a confession.

Further, it facilitates the fact-finding function of the court in attempting to assess what occurred during police questioning, how effectively the suspect was informed of his rights and how well protected he was from adverse manipulation of his statement. As far as this function is concerned the legal adviser is an independent

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the accuracy of incriminating statements is challenged, the presence of a legal adviser as unbiased witness will protect officers against public criticism, official complaints or disciplinary proceeding against them, and will give weight to police evidence. This function of legal adviser may be particularly important in interrogations which are not tape-recorded. One may perhaps find this rather naive given the fact that not all legal advisers came near these standards. But the solicitor in England is assumed to be an officer of the Court: *R. v Samuel*, 87 Cr. App. R. 232, at p. 242, who often has to make decisions which put considerations of justice above his duty to the lay client.

[38] The new caution reads,

> "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence". (Code C 10.4)

witness and validatory of the result of the police interrogation. Where there is dispute between the prosecutor and the suspect as to whether an admission took place or whether the suspect was tricked into providing the evidence, non-involvement of a legal adviser will deprive the court of the chance "to get to the bottom of things"[39] and will also deprive the suspect from telling his side of the story with the support of a witness. Had the right in question been observed, this would not have been the case. Therefore, in such a case, disputed evidence should be excluded in Turkey, but not necessarily in England since the conflict may be resolved by tape-recording.[40]

Furthermore, one should acknowledge that, because of unfamiliarity with the rules of evidence and substantial criminal law, even the intelligent and educated layman has few and sometimes no skills when confronted with the police. The involvement of a legal adviser may, therefore, help the suspect to give their account coherently in the face of police questioning and may remind the suspect of his rights such as the privilege against self incrimination, the length of time he can be held without being charged etc. All this is likely to provide the suspect with a more advantageous legal position at trial. Having said that, in some cases the prosecution may contend that the legal position of the suspect at the trial would not have been better even if his right to access to legal advice had been observed. Deciding upon the plausibility of such an assertion requires the court to engage in a hypothetical inquiry into whether compliance with the right to legal advice would have put the suspect in a better position in a subsequent trial.

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[39] *Birch*, 1989, "Commentary on *R. v Walsh*", Crim. L. R. 822.

[40] *R. v Parris* (1989) 89 Cr App. R. 68.

Such a dispute arises, firstly, in the context of the right to silence. For example, courts may face the defence's submission that had the suspect's right in question been observed he would have been advised to exercise his right to silence and thus confession evidence would never have been emerged.[41] Alternatively, a submission, where silence has evidential value, may be made to the effect that if the suspect had legal advice he would not have remained silent. The poor quality of legal advice offered to the suspect may lead the suspect to speak in cases where silence would be more favourable and vice versa. In cases where active or passive breaches are involved, it is never possible to state with certainty what kind of advice the legal adviser would have given in a particular situation. Therefore, the task of the judge is to weight the plausibility of different hypothetical speculations. For instance a suspect's refusal to say anything after the arrival of the solicitor[42], or the confused or emotional position of a suspect would be reasons for concluding that the suspect would have been advised to stay silent had the legal adviser been present at the prior interviews.

As far as English law is concerned, after the enactment of the Criminal Justice and Public Order Act 1994, which enables the drawing of adverse inferences from the suspect's silence in the face of police questioning, situations in which silence would have been advised may be expected to be limited. As a natural consequence of this, testimony from the adviser to the effect that he would have advised the suspect to remain silent is likely to be less convincing. That is not to say that silence would

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[41] *R. v Samuel* [1988] 1 Q.B. 615.

[42] *R. v Parris* (1989) 89 Cr. App. R. 68, at p. 73.

never be advised after the new provisions came into force. The particular circumstances of the case may still justify the submission that, had the right to legal advice been complied with, the suspect would have been advised to remain silent. To illustrate, speaking may cause greater harm to the suspect than remaining silent, or the questioning, though pertinent to the alleged offence, may be directed to facets of the event which may appear to fall outside the provisions of the new Act.[43]

Of course, it does not follow that the suspect would necessarily take the solicitor's advice to remain silent. Even had a solicitor been present and advised the suspect not to speak, it is not certain that the suspect would have acted upon such advice. Factors such as the suspect's early consent to be interviewed in the absence of a legal adviser and his subsequent admission of responsibility in the presence of a legal adviser powerfully indicate that the solicitor's advice to say nothing would not have changed his mind.[44] That is to say that if the evidence had been obtained in any event, infringement of the right to legal advice is no more than a technical breach.

Secondly, the prosecution may contend that the presence of a solicitor would not add anything to the suspect's knowledge of this rights. In the case of *R. v Sanusi*[45], where a passive infringement of the suspect's right in question occurred, the Court of Appeal expressed the opinion that since the suspect was unfamiliar with

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[43] Silence may not cause adverse effect in circumstances which has not be specified by the provisions 34, 36 and 37. See Chapter Six 3.4.2.

[44] *R. v Anderson* [1993] Crim. L. R. 448; see also following commentary by Professor Birch.

[45] [1992] Crim. L. R. 43.

the rights of a suspect in that he was a foreigner and had no previous convictions, admitting the evidence obtained as a result of that breach would have an adverse effect upon the fairness of proceeding. In another case, however, the suspect's previous convictions and his answers, prior to his alleged confession, to police questions in the form of "no comment" lead to the conclusion that the presence of a solicitor would add nothing to the suspect's knowledge of his rights, and therefore admission of the evidence obtained in breach of the right in question would not lead to unfairness.[46] Three assumptions[47] may be identified behind the Court of Appeal's recognition of what I call the "no contribution exception". Firstly, the function of legal advisers is limited to advising silence. The inevitable conclusion of this assumption is that if the suspect knows his right to legal silence, breach of the right to legal advice functionally will not lead to unfairness. However, one can hardly justify reducing the function of legal advisers to advising silence.[48] Secondly, the knowledge of the right is equivalent to knowing how to exercise it well and effectively. If this was so, the involvement of a legal adviser would not be needed at all in the first place, because the suspect's rights, including the right to silence was already being cautioned by the police. Thirdly, in the words of Hodgson, "once given, legal advice need not to be

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[46] *R. v Dunford* (1990) The Times, 16 March, (CA). A similar decision was reached in the case of *R. v Alladice* (1988) 87 Cr. App. R. 380 where the suspect required a solicitor only to ensure that the police acted properly, not to obtain legal advice.

[47] Two of them was mentioned by *Hodgson*, 1992, "Tipping the Scales of Justice: The Suspect's Right to Legal Advice", Crim. L. R. 854, at p. 859.

[48] Dixon identifies many occasions in which silence will not be advised- *Dixon, supra* note 37, p. 233-. The infringement of the right to legal advice may even lead to exclusion of the fact of silence in that if the suspect had legal advice he would not have remained silent.

renewed; it applies to the future as much as the present".[49] It is, however, hardly possible to give legal advice which does not change depending on the changing circumstances of the case. Thus, it seems to the researcher that the notion that the presence of a solicitor would add nothing to the direction and outcome of a police interview is seriously open to debate, as an interview in the presence of a legal adviser would very likely have been carried out in a markedly different manner.

Establishing that law enforcement officers or the legal adviser acted in bad faith in breaching the right to legal advice constitutes a strong case for exclusion. This is not only to conform with the deterrent rationale, but also with the legitimacy of the verdict principle. Admission of evidence gained as a result of wilful conduct which has deprived the suspect of the right to legal advice casts overwhelming doubt on the legitimacy of the verdict.

2.2. **Friends and Relatives** (Intimation)

Under CMUK and PACE all persons who are arrested and held in custody are entitled, upon request, to have a friend, relative or other person informed " as soon as practicable" that they have been arrested.[50] The purpose of the right is twofold: since it is natural that a detained person's family will be concerned as to his whereabouts, some device other than the right to legal advice is required to make sure

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[49] *Hodgson*, *supra* note 47, p. 859.

[50] CMUK, 135/3 and Article 19/6 of the Turkish Constitution; PACE 56 and Code C 5.1.

his whereabouts can be ascertained. Secondly, the right also serves the indirect purpose of facilitating legal advice, in that either the suspect may ask the third party to make the necessary arrangements, or the third party may decide for himself that legal advice is essential.

Infringements of the right not to be held incommunicado are generally accompanied by breaches of other safeguards such as the right to legal advice. In such cases the courts should have little difficulty in excluding evidence obtained subsequently. A wrongful denial of notification to a friend or relative itself is unlikely to cause exclusion.[51] In comparing the aims of the involvement of friends or relatives to those of the legal adviser, it must be accepted that their functions are not entirely the same: unlike the latter, the former's concern is not directly evidential.

2.3. Appropriate Adults or Compulsory Involvement of Legal Adviser

Compulsory involvement of an appropriate adult to the criminal investigation, particularly to the pre-trial interrogation and identification procedure, is required in both jurisdictions where a vulnerable person is involved.[52] The list of vulnerable persons, however, are not exactly the same: in England it includes persons who are juvenile under 17, mentally ill, mentally handicapped, blind, visually handicapped, deaf, unable to read, and unable to speak[53]; while in Turkey people considered

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[51] For the contrary decision see *R. v Cochrane* [1988] Crim. L. R. 449 (CC).

[52] CMUK 138 and 136; Code C Sections 1 and 11, Code D Subsection 1.14.

[53] Code C, Subsection 1.4, 1.5 and 1.6; Code D, Subsection 1.3, 1.4 and 1.5.

vulnerable include those who are under 18[54], deaf, unable to speak, or unable to defend themselves.[55] The catalogues in both jurisdictions seem to me illustrative rather than restrictive.

The role of an appropriate adult may be performed in England by a relative, a guardian, a person who has experience of dealing with mentally handicapped and mentally disordered people, a social worker[56] or as a last resort, an independent responsible adult.[57] The appropriate adult should have some empathy for the suspect, and thus someone cannot act as an appropriate adult if the suspect objects to his presence.[58] The suspect's legal adviser cannot also function as an appropriate adult.[59] This is the result of the recognition of a distinction between the role of the legal adviser and that of the appropriate adult. The main concern of the former is to determine the legal strategy to be employed on behalf of the suspect. This does not, in general, require any personal experience of the suspect. The concern of the appropriate adult, on the other hand, is the physical and emotional welfare of the suspect rather than the issue of innocence or guilt of the suspect. In Turkey, the boundary between the respective functions of the legal adviser and the appropriate

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[54] Also, suspects under 15 can only be questioned by the public prosecutor, not by the law enforcement officers. The Establishment of Children' Courts Act, Article 19, Statute No. 2259 of 7 December 1979, RG No.16816 of 21 December 1979.

[55] CMUK 138.

[56] See *Haley and Swift*, 1988, "PACE and Social Worker; A Step in the Right Direction?", Journal of Social Welfare Law 355.

[57] Code C, Subsection 1.7; Code D, Subsection 1.6.

[58] *D.P.P. v Blake* [1989] 1 W. L. R. 432.

[59] Code C, Notes For Guidance 1F.

adult is ignored, and thus lawyers are required to perform the role of the appropriate adult too.[60]

The rationale behind the special care for these groups is that they are rightly regarded to be potentially more vulnerable to pressure, suggestion, intimidation and fear than those who are normal and adult. Indeed, "they may without knowing or wishing to do so be particularly prone in certain circumstances to providing information which is unreliable , misleading or self incriminating".[61] The presence of an appropriate adult is likely to decrease the likelihood of any evidence being unreliable. The appropriate adult has an important role to play at the police station, particularly in any interview he attends. He is not there to act simply as an observer. He is also there to advise the person being questioned, to observe whether the interview is being conducted properly or fairly and to facilitate communication with the person being involved.[62]

Given the value of the involvement of an appropriate adult as a fair process norm, evidence obtained in breach of the right to the support of an appropriate adult is likely to be excluded in both jurisdictions. In Turkey the infringement of the right in question is likely to occur spontaneously with the right to legal advice since the compulsory involvement of legal adviser as an appropriate adult is required. Thus, there can hardly be any justification to excuse the infringement. The Court of Appeal

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[60] CMUK 138.

[61] Code C 11B.

[62] Code C, 11.16.

has not, so far, hesitated in quashing the judgment of the initial courts where a breach of the right in question was involved.[63] Such a tough line is quite consistent with the legitimacy of the verdict principle given the fact that one of the main functions of the involvement of an appropriate adult is to filter out unreliable evidence.[64] Evidence obtained in breach of the right in question is likely to be more unreliable than one produced in the observance of the right in question. Lack of this function alone will provide a very strong reason for excluding any subsequent evidence under section 78 of the PACE in England[65], as it will under article 254 of CMUK in Turkey. Failure to observe the requirement in question may even lead to exclusion of confession subsequently made by the suspect under the involuntariness test examined in the previous chapter.[66]

As far as the type of infringement of the right to the support of an appropriate adult is concerned, two forms may be identified. First is the failure of the law enforcement officer to procure the attendance of an appropriate adult. All persons at risk must benefit from the presence of an appropriate adult in both jurisdictions. Like all general rules, this rule may be subject to exceptions. Unlike Turkish law, English

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[63] *Orman Yasasini Ihlal*, E. 1993/11595, K.1993/15592, T. 30.11.1993, [1994] 20 Yargitay Kararlari Dergisi (Journal of the Court of Appeal Decisions), p. 298; *Kemal*, E.1994/2793, K.1994/3060, T. 7.4.1994, [1994] 20 Yargitay Kararlari Dergisi (Journal of the Court of Appeal Decisions), p. 1180.

[64] See Chapter Five 3.5.1.

[65] *R. v Dutton*, 1988, Lexis, 11 November, Unreported, Transcript Marten Walsh Cherer; *R. v Delroy Fogah* [1989] Crim. L. R. 141; *R. v Weekes*, [1993] Crim. L. R. 211.

[66] *R. v Cox* [1991] Crim. L. R. 276; *R. v Blake* (1989) Cr. App. R. 179.

law clearly recognises that the police may conduct an "urgent interview" defined in Code C with the suspect in the absence of an appropriate adult. The reasons for permission to conduct an urgent interview are that delay will involve, "an immediate risk of harm to person or serious damage to property".[67] Furthermore, a police officer is allowed to ask questions at or near the scene of a suspected crime to elicit explanations which if true or accepted would exculpate the suspect and the person at risk is no exception.[68]

Secondly, the mere presence of a person who is not a police officer will itself not necessarily lead to the achievement of the objective of the appropriate adult being of assistance and being a safeguard to the suspect at risk at the police station. Naturally, in some cases an independent person may not be able to meet the function of an appropriate adult. One needs to recognise that in such a case there would be a clear breach of the right to the support of an appropriate adult. For instance, in the case of *DPP v Blake*[69] a juvenile was interviewed, contrary to her wishes, in the presence of her estranged father with whom the suspect did not wish to have any further contact. The only conversation that took place between the suspect and her father was for him to ask her if she was all right, to which she did not reply. No other conversation took place between them regarding the alleged offence, or the reason for her detention. Throughout the interrogation she ignored him. All these facts lead to the conclusion that the spirit of the requirement of an appropriate adult's

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[67] Code C, Annex C, para 1.

[68] *R. v Weekes* [1993] Crim. L. R. 211; *R. v Maguire* (1990) 90 Cr. App. R. 115.

[69] (1989) 89 Cr. App. R 179; 153 J.P. 425.

involvement was breached and therefore it is hardly possible to claim that the interview was conducted in the presence of an appropriate adult who fulfils the objectives described in Code C. Similarly, in the case of *DPP v Morris*[70] the issue was whether the manager of the children's home, who notified the police of the alleged offence, was a suitable person to play the role of the appropriate adult. The independent person(manager) acting as an appropriate adult was not keen to approach the suspect for any advice and therefore he did not attempt to converse privately with the suspect. These circumstances are naturally capable of raising doubt as to whether the appropriate adult was on the suspect's side, and consequently whether the requirement of somebody with the vulnerable suspect's interest in mind and aware of his duty to advise the suspect was satisfied. More recently, the question was raised as to whether a suspect's mother who was herself entitled to the protection of an appropriate adult because of her mental handicap was capable of fulfilling the role of appropriate adult. The divergency of medical experts' opinion on the matter enabled the judge to choose the opinion that she was able to act as appropriate adult despite her illness.[71] The problem in this case is primarily a medical rather than legal one. Firm judgment by medical experts stating whether she could appreciate the gravity of the situation in which the child was placed and could give appropriate support to the suspect would very likely have been respected by the judiciary.

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[70] Lexis, 1990 , transcript by Martin Walsh Cherer, 8 October.

[71] *R. v W. and another* [1994] Crim. L. R. 130.

2.4. Custody Officer and Republic Prosecutor

The systems of criminal procedure in England and in Turkey reflect two different methods of regulating events before the trial. In England, the pre-trial stage is left entirely in the hands of the executive officer -the police-, whereas in Turkey the pre-trial stage of criminal procedure is subject to the control and guidance of the republic prosecutor. In spite of this fundamental difference, traditionally in both jurisdictions police powers in the preliminary stages of a criminal investigation were considerably large. By introducing the PACE and the CMUK, both countries attempted to protect the interests of the suspect and that of the public to the extent to which they think it safe to do so. As mentioned earlier in Chapter Two, both PACE and CMUK seek to achieve better protection of the suspect and to reduce the risk of the miscarriage of justice. To that end a legal official (the republic prosecutor) in Turkey, and an officer who is independent of the investigation (Custody officer) in England are required to be involved in the investigative process.[72] Both are regarded as guardians of the suspect, a kind of barrier to protect him from police pressure. Having said that it may be questioned whether either the republic prosecutor or the custody officer can ever perform the role of "guardian of the suspect", since, in the mind of the suspect, they are inevitably be identified with the police.

The involvement of the republic prosecutor in the criminal investigation was strengthened by the 1992 amendment. Under the present Code of criminal procedure

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[72] Article 23 of the 1992 Amendment replacing Article 154 of CMUK; Section 36 of PACE.

the prosecutor supervises the work of the judicial police and gendarmerie. The prosecutorial division is in theory a judicial one; prosecutors are magistrates separate and distinct from the private bar of defence lawyers (avukats). Their role, inter alia, is to control how a suspect is treated by the law enforcement officers during the pre-trial investigation. In this respect their function is much wider than that of custody officers, who are mainly responsible for ensuring detained persons are treated in accordance with the provisions of the Act and Codes of Practice. This comparison is, however, more theoretical than real since the prosecutors generally do not attend police stations.

The requirement of the involvement of a republic prosecutor or custody officer is mainly related to the general welfare of the suspect at the police station rather than in obtaining evidence. Thus the infringement of this requirement does not itself, it seems to me, generally cause exclusion in either jurisdiction. It is hardly possible to claim, for example, that a person confessed because the prosecutor or the custody officer was not involved. Having said that, such a breach may provide the law enforcement officers with an opportunity to fabricate or tamper with the evidence. In such cases non-involvement of the prosecutor or the custody officer will be followed by other improprieties which have a stronger chain of causation with the emergence of the evidence. If this is so, there will be little difficulty in excluding the evidence both under Article 254 and Section 78.

3. Record Making

The monitoring of the use of powers given to the police will undoubtedly provide a safeguard against the mistreatment of suspects and planting evidence. To this end, both legal systems require record-keeping of what took place between the police and the suspect when they encounter. A variety of recording requirements are laid down in both countries for almost all exercises of powers.[73] To illustrate, the law enforcement officers in Turkey maintain a detention register which gives full information concerning the details of detention. Similarly English law requires opening of a separate custody record for every arrested person.[74] All information such as the grounds of detention[75], all visits to the detained person[76], the times at which meals are served to the suspect[77], any medical treatment[78], the time the suspect is handed over by the custody officer for questioning[79] should be recorded as soon as practicable in the custody record. All entries in custody records should be timed and signed by the maker.[80] In exercising any power, not only detention conditions, but also every significant action should be written down and the record

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[73] Articles 99, 101, 106 and 135 of CMUK; Sections 3, 50, 60 of PACE and Section 4 of Code A.

[74] Code C para. 2.1.

[75] Code C, para. 3.7.

[76] Code C, para. 5.8.

[77] Code C, para. 8.12.

[78] Code C, para. 8.12 and para 9.8.

[79] Code C, para. 12.9.

[80] Code C, para 2.6.

should be signed by an officer who can later be held individually accountable for what occurred. The suspect should also be asked to confirm with a signature what occurred; if he refrains from doing that the reasons for it should be recorded. The length of this study does not, unfortunately, allow examination of the consequences of the failure to obey all recording provisions. In the following pages, only the infringement of the rules relating to interview records will be examined, owing to its importance on admissibility of confessions.

Traditionally, statements of the suspect were not recorded verbatim in either country. Rather, investigators summarised them in writing; subsequently, the suspect acknowledged the statement's summary. It seems likely that, either deliberately or unconsciously, investigators may eliminate aspects of the statement that appears to them to be irrelevant, inconsistent or unnatural. One may ask whether this danger may be prevented by the requirement that the statement should be acknowledged by the suspect who has an opportunity to amend it. This mechanism is unlikely to provide an effective guarantee that statements exactly represent what the suspect said, as by that time the suspect may come to believe the account or feel that he has no other choice. In any event, it seems unlikely that a suspect would often challenge omissions. Furthermore, it is a fact that over the years the accuracy of interrogation records have been amongst the most controversial issues in criminal justice systems: allegations that the police attribute false statements to the suspect have been made for many years.[81]

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[81] Royal Commission on the Police, Cmnd 1728 of 1962, para. 369.

One may suggest as a solution to this problem the adoption of mechanisms which offer greater visibility to the circumstances of questioning, such as tape-recording or videotaping. Such mechanisms might provide certain safeguards for the factfinding process, both by permitting scrutiny of the actual manner of questioning and by ensuring the availability of a verbatim record of the interrogation. Equally important, such measures would enable the judiciary and the public to make more informed judgements about whether existing interrogation practices are acceptable as they are or should be reregulated.

The question of whether police interrogations should be tape recorded has been subjected to discussion for a long time in England. As early as 1957 Professor Williams suggested routine tape recording of interrogations.[82] In 1972 the majority of the Criminal Revision Committee recommended that experiments should be conducted to assess the value of tape-recording police interrogations.[83] In 1976 the Hyde Committee, which was appointed only to study the feasibility of an experiment in the tape recording of police questioning reported that such an experiment was indeed feasible.[84] In 1979, Barnes and Webster undertook a study on behalf of the

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[82] *Williams*, (1957-1958), " The Reform of the Criminal Law and of Its Administration" 4 The Journal of the Society of Public Teachers of Law 217 at 226; also see *Williams*, 1960, "Questioning by the Police: Some Practical Considerations", Crim. L. R. 325.

[83] *Criminal Law Revision Committee*, 1972, Eleventh Report, Evidence (General), Cmnd 4991, paras. 52 and 50; A minority of the three members of the Committee went further and suggested that all interrogations in police stations in the large centres of population should be tape-recorded, and confessions not recorded when they ought to have been should be excluded.

[84] *The Hyde Committee*, 1976, The Feasibility of an Experiment in the Tape recording of Police Interrogation, Cmnd. 6630.

Royal Commission to examine the cost and organisational implications of taping interrogations and to conduct a limited experiment in order to assess the technical and operational problems of such recording. Although they identified several practical and technical difficulties, they were generally in favour of tape-recording.[85] Then, the Royal Commission on Criminal Procedure adopted the view that tape-recording should be introduced on a gradual basis.[86] Subsequently, it has been stated by Section 60 of PACE that it shall be the duty of the Secretary of State to issue a code of practice in connection with the tape recording of police interrogations and to make an order requiring tape recording of interrogations in accordance with the Code. In pursuance of this provision a Code of Practice on Tape Recording (Code E) was issued in 1988.[87]

According to the provisions of Code E, all interviews at the police station should be tape recorded.[88] This requirement, however, is not free from exceptions: interviews with suspects in connection with terrorism; interviews with persons suspected of offences triable summarily only and interviews with persons suspected of espionage under the Official Secrets Act 1989 are not required to be tape-recorded.[89]

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[85] *Barnes* and *Wester*, 1980, Police Interrogation: Tape Recording, Royal Commission on Criminal Justice Research Study No:8.

[86] *Royal Commission on Criminal Procedure*, *supra* note 6, para. 4.29.

[87] House of Commons, Hansard, vol:138, July 27, 1988, Cols 444-463; House of Lords, Hansard, vol. 500, July 28, 1988, cols. 443-453.

[88] Code E, para 3.1(a).

[89] Code E, para 3.2.

The Code requires that tape recording should be conducted openly "to instil confidence in its reliability as an impartial and accurate record of the interview".[90] For this purpose, the whole of the interview should be recorded on two tapes.[91] One of these tapes should be sealed in the presence of the suspect and should be kept securely and treated as an exhibit for the purpose of any criminal proceedings. The suspect has to be asked to sign the label of the tape. Police officers do not have authority to break the seal on this master copy.[92] The other copy may be used as a working copy to which the police and the defence may have access.[93] Having said that, an empirical study conducted by Baldwin and Bedward revealed that only very small numbers of tapes are being played either by courts, prosecutors, and even defence solicitors. Instead a transcript or summary of tapes, carried out by police officers, has been relied upon.[94] In the light of this finding, the success of tape recording requirement would depend on the quality of transcripts or summaries. Assessments of the quality of the transcripts by the same authors showed that "a half of all summaries cannot be regarded as fair and balanced accounts of what took place in the interview".[95]

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[90] Code E, para 2.1.

[91] Code E, para 3.5.

[92] Code E, para 6.2.

[93] Code E, para 4.1 and 4.15.

[94] *Baldwin and Bedward*, 1991, "Summarising Tape Recording of Police Interviews", Crim. L. R. 671, p. 672.

[95] A parallel conclusion has also been reached by *Baldwin*, 1992, Preparing Records of Taped Interview, The Royal Commission on Criminal Justice Research Study no:2.

The tape recording requirement applies to interviews at the police station, not to interviews elsewhere. Since the word "interview" has been held[96] to include any series of questions and answers regardless of however brief and wherever held (on the street, in a police car, in a corridor on the way to the interrogation room)[97], there is a need, and indeed a requirement in English law, to record them accurately.[98] Under the Code C para 11.5 the interview must be recorded contemporaneously, wherever it takes place, unless this would not be practicable.

If we turn our attention to the present Turkish position, there is neither a requirement for the use of a tape recorder at interviews in the police station, nor a requirement for recording of questioning outside the police station. There is, however, a duty to make an accurate record of *ifade alma* (interview) conducted by the police at the police station or by a public prosecutor and an accurate record of *sorgulama* (questioning) carried out by a judge. The suspect should be given an opportunity to read the records and to sign them to confirm that they exactly represent what he said or wished to say. Where the suspect refrains from signing, the reason for such an

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[96] *R. v Absolam* (1988) 88 Cr. App. R. 332 and *R. v Mathews*, (1990) 91 Cr. App. R. 43; Code C 11A.

[97] Code C, 11.13, 11.5 ; "Asking questions at or near the scene of a suspected crime to elicit an explanation which if true or accepted would exculpate the suspect" does not constitute an interview. See *R. v Maguire*, (1990) 90 Cr. App. R. 115, *R. v Cox* (1993) 96 Cr. App. R. 464; see also Code C, Note 11A.

[98] The use of hand-held tape recorders would obviously be a greatly improved method of recording interviews outside the police station. The use of pocket type recorders was suggested by *Wolchover and Heaton-Armstrong*, 1990, "The Questioning Code Revisited and the Flaws Persist", 140 New Law Journal 369-371. The Royal Commission on Criminal Justice has not ruled out the use of tape recorders outside the police station (para 11).

action should be noted.[99] The record should include the place and the time of the interview, the names of all those present, and so on.

Unlike Turkey, tape recording is now a permanent feature of police interviews in England. The existing gulf concerning the recording of statements made by the suspect in Turkish and English law derives to a large extent from cost objections on the Turkish side. This gulf needs closing, yet the trend is in the opposite direction. Video taping of interviews is currently at the experimental stage in England and there is a possibility of the general introduction of interview video recording.[100] This is a significant step in opening the interview room to external scrutiny.[101] As pointed out by Davis, "openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice".[102] Thus, there is every reason for the Turkish police to follow the same direction.

The need to record the interview may be overlooked or deliberately ignored by the law enforcement officers. Such a failure obviously constitutes a breach of norms requiring the accurate record keeping of an interview. As far as the admissibility issue

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[99] CMUK 135/7.

[100] See, *Baldwin*, 1992, Video Taping Police Interviews with Suspects- An Evaluation, Police Research Series Paper 1.

[101] Video technology is not free from potential dangers: It has been shown that where and how the camera is focused will in itself strongly influence the impression that observers have of a suspect. See, *Lassiter and Irvine*, 1986, "Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion", 16 Journal of Applied Social Psychology 268.

[102] *Davis*, 1969, Discretionary Justice, p. 98.

is concerned, a breach of recording provisions may be ignored if there is no dispute as to the content of the conversation. In most cases, however, failure to record the interrogation is followed by allegations that the interview (ifade alma) or questioning (sorgulama) did not take place, that alleged responses to the questions were fabricated, or recording was made inaccurately.

Since the recording requirement is one of the main safeguards against fabrication of evidence, the courts in both countries will find little difficulty in excluding confessions where there has been a non-technical breach of these provisions. Hesitation may, however, arise as to which article or section is to be employed to exclude such evidence.

As far as English law is concerned, in some cases the Court of Appeal took the view that failure of the interviewing officer to comply with recording provisions in itself may justify the exclusion of a confession under s.76(2)(b)[103]. As has been argued in the previous Chapter, section 76(2)(b) is concerned with involuntariness of confessions. To bring this sub-section into operation it should be established that the suspect made the confession in consequence of 'something said or done'. Failure by the interviewing officer to record properly the questioning can hardly lead to an unreliable confession because the failure occurs after the confession was made. Professor Birch argues convincingly that the concern of sub-section 76 (2)(b) is not

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[103] *R. v Doolan* [1988] Crim. L. R. 747; *R. v Chung* (1991) 92 Cr. App. R. 314 (CA); *R. v Joseph* [1993] Crim. L. R. 206.

about the doubts which may arise as to whether a confession was actually made.[104] Although this is an issue of reliability in whether the evidence of the police officer claiming that the suspect confessed is reliable or not, it is not the kind of reliability to which this sub-section is directed. It is doubtless for this reason that the failure to comply with recording provisions cannot by itself give rise to the exclusion of the confession under s. 76(2)(b), but it may be an indirectly relevant factor, as pointed out by Professor Birch, in deciding whether the unreliability arises from 'anything said or done'. Since the burden of proof to show that the confession is not obtained in the way claimed by defence is upon the prosecution, if a confession was challenged under section 76(2)(b), inaccurate recording of the interview is likely to prevent the prosecution from proving that it was not obtained in the way claimed by the defence. This was the case in *R. v Delaney*[105] in which the issue was whether the methods used during police interrogation were capable of giving rise to improper pressure on the suspect to confess. It was maintained that, "by failing to make contemporaneous notes the officers deprived the court of what was the most cogent evidence as to what did happen during these interviews and what did induce the appellant to confess"[106], and the conviction based on this confession was excluded.

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[104] *Birch*, 1991, "Commentary on *R. v Chung*", Crim. L. R. 624; see also, Profesor Birch's Commentaries on *R. v Doolan* -[1988] Crim. L. R. 748- and on *R. v Delaney* -[1989] Crim. L. R. 140- which are the source of much of the comment presented in this paragraph.

[105] (1989) 88 Cr. App. R. 338.

[106] *R. v Delaney* (1989) 88 Cr. App. R. 343; This dictum is confirmed in *R. v Joseph* [1993] Crim. L. R. 206.

In cases where the failure to record the interaction between the law enforcement officer and the suspect or to show the record to the suspect afterwards occurred, it seems more suitable to employ section 78(1) rather than section 76(2)(b) in England and article 254 rather than article 135/A in Turkey. The reason for this may be stated by making reference to the object of the rules relating to contemporaneous recording. Three concerns, inter alia, of these provisions may be identified.[107] The first aim is to ensure that suspects were not subjected to improper pressure or oppression. The second object is to provide safeguards against inaccurate recording or inventing the words used in interrogation. The last but not the least goal is to make it difficult for the suspect to make unfounded allegations against the police which might otherwise appear credible. All these concerns are the result of the more general concern of achieving the correct balance of fairness at the pretrial stage between the police power to bring offenders to justice and safeguards to ensure that these powers are used properly. Non-technical infringement of the recording provisions is likely to affect trial fairness in England and cause unlawfulness in Turkey. Exclusion of unrecorded interviews should not depend on showing that the breach was "flagrant, cynical or even deliberate".[108] Although such a finding will be likely to guarantee exclusion[109], the mere fact that the interview went unrecorded is capable of giving rise to exclusion in that the court will be deprived of the most cogent version of what happened in the interview.

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[107] *R. v Keenan* (1990) 90 Cr. App. R. 1, at p. 7.

[108] *R. v Barry* (1992) 95 Cr. App. R. 384.

[109] *R. v Canale* (1990) 91 Cr. App. R. 1; *R. v Ismail* [1990] Crim. L. R. 109.

One may ask whether failure to record an interview may cause exclusion of a subsequent interview which is properly conducted and recorded. This was the issue in the English case of *R. v Canale*[110] in which the suspect was interviewed on four occasions. At two of the interviews he allegedly admitted the accusation. However, those interviews were neither contemporaneously recorded nor were the reasons for failing to do so was noted. Each of these unrecorded interviews was followed by another interview which was properly recorded and in those the suspect repeated the admissions allegedly made at the previous unrecorded interviews. It was held that breaches of the recording provisions in early interviews not only render them inadmissible, they also contaminate later interviews which are properly recorded. Indeed, later interviews may have been affected by what took place earlier. Having said that, it does not make sense to suggest a universal rule that whenever the recording provisions have been infringed in one or more interviews, all subsequent interviews should be affected and should therefore be excluded. There needs to be a connection between the inadmissible earlier interviews and the properly recorded subsequent interviews.[111]

Failure to keep a contemporaneous record may derive from the suspect's request not to write down or record what he says. In such a situation the English Court of Appeal suggested that the interviewing officer should make a note of the content of conversation after the event and show the document to the suspect. If he refuses

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[110] (1990) Cr. App. R. 1.

[111] *R. v Gillard and Barrett* (1991) 92 Cr. App. R. 61. In this case there was no claim to the effect that promises or other inducements was made in the flawed interviews so that their effect may continue in the later interviews.

to read or to sign it, a copy of it should be given to his solicitor.[112] Failure to submit the notes of the interview to the suspect or to the solicitor after the suspect declined to be interviewed with contemporaneous recording is capable of resulting in exclusion of evidence.[113]

The formal recording of interviews entails awareness in the suspect as to the fact that the interview is being recorded. In some cases, however, the law enforcement officers record a conversation of the suspect without letting him know. The typical examples are bugging cells or interception of communications. A comprehensive analysis of the admissibility of such evidence, however, deserves a separate examination beyond the scope of the thesis.

4. Time Limits

Other safeguards to protect the suspect against abuse of police powers may be placing limits on the length of time for which a suspect may be detained and requiring adequate reviews of detention during that time. Attempts were made by both countries' Parliaments to regulate the length and review of pre-charge detention.

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[112] *R. v Matthews and Others* (1990) 91 Cr. App. R. 43.

[113] *R. v Saunders* [1988] Crim. L. R. 521.

In both countries ordinary suspects may generally be subject to detention which may last up to twenty-four hours.[114] They are to be brought within this time before a judge or a magistrate who either proceeds to arrest or free them. These time limits do not apply to all offences; in some cases there may be a need to extend these limits. Since detention operates on the necessity principle, the need to maintain the suspect's detention further should only be decided after determining that conditions for detention continue to exist.

In England, periods of detention over 24 hours are only possible in the case of a serious arrestable offence. Extra detention of 12 hours may be authorised by an officer of the rank of superintendent or above.[115] If more time is needed at the expiry of 36 hours, the authorization of a magistrate is required. The magistrates may extend the period of detention for up to 36 hours a time, but the total duration of detention may not go beyond 96 hours(4 days).[116] In addition to this, the Act requires detention to be reviewed by a custody officer to see whether the grounds for keeping the suspect in custody still exist.[117] The first review is to occur within 6

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[114] PACE 41(1), CMUK 128. One should note that the Turkish Constitution allows detention on the authority of the police for up to 48 hours. 1992 Amendment of CMUK shortened this period in favour of the suspect to 24 hours. At the present there is a conflict between constitutional and statutory provisions. Although the provisions of the Constitution are theoretically superior to those of CMUK, provision which are more favourable to individuals rather than to the public authorities should have enforcement.

[115] PACE 42.

[116] PACE 42(10) and 43(1).

[117] PACE 40 (1)(a).

hours of detention and subsequent reviews are to be at intervals not exceeding nine hours.[118]

In Turkey, the detention period for those suspected of common, individual crimes is 24 hours. Those detained for common, collective crimes may be held for four days, and detention period may be extended for an additional four days. The republic prosecutor is empowered to extend detention for up to four days on his own, whereas a further extension of up to eight days is subject to an order by the *sulh hakimi* (justice of peace) acting on a request of the republic prosecutor.[119]

The European Convention on Human Rights also includes time limits. Article 5(3) of the Convention requires that individuals who are arrested or detained are to be "brought promptly before a judge or other officer authorised by the law to exercise judicial power". The precise meaning of the terms "promptly" and "other officer" requires clarification. As far as the former term is concerned, in the case of *Egue*[120], the Commission declared that domestic law which allows detention for up to four days without the decision of a judge or other officer conforms, in principle, with the Convention. The matter also came before the European Court of Human Rights: in

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[118] PACE 40(3).

[119] CMUK 128. One should note the existence of different time limits concerning the suspect of terrorism. Persons detained for individual crimes which fall under the Anti-Terror Act must be brought before a judge within 48 hours, while those charged with crimes of a collective, political or conspiratorial nature may be detained up to 15 in normal times and up to 30 days when a state of emergency is declared.

[120] Appl. 11256/84, dec. 9 May 1988.

the case of *McGolf* [121] detention for 15 days without judicial involvement was accepted, without any hesitation, as excessive. Furthermore, in the case of *Brogan and Others v U.K.*[122], a detention period of four days and six hours without judicial involvement was held to constitute a violation of Article 5(3). More recently in the case of *Koster*[123], in spite of finding a detention of 5 days a breach of the Convention, the Court avoided pronouncing a firm four-days time limit in response to the allegation by the State party that the Convention did not command any specific time limit. Thus, these rulings indicate that a period of four days is the maximum the Convention permits; detaining the suspect without judicial involvement beyond this period is likely to result in an infringement of the Convention. As far as the term "other officer" is concerned, it should be interpreted narrowly for two reasons. Firstly, since the objective of the Convention is mainly to establish individuals' rights which are to be secured by the state, the rights should be interpreted in favour of individuals. Secondly, the text of Article 5(3) gives the impression that the authorities should fulfil a similar function to that of the judges. Questions may arise as to the position of public prosecutors or high-ranking police officers. In the case of *Schiesser*[124], the Court held that public prosecutors are not "other officers" in the sense of Article 5(3) of the Convention, let alone high-ranking police officers.

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[121] Judg. 26 Oct. 1984, E.C.H.R ser. A no:83.

[122] Jud. 29 Nov. 1988, E.C.H.R Ser. A no:145-B.

[123] Jud. 28 Nov. 1991, E.C.H.R ser. A no:221.

[124] Judgment of 4 December 1979, ECHR, Series A, Volume 34.

The revision of European Convention jurisdiction reveals that English and Turkish law both comply with the requirement of the Convention: as has been noted above, judicial involvement is normally required within 24 four hours in both countries. In some cases, however, detention without judicial involvement may be extended for up to 36 hours in England and up to 4 days in Turkey.

Within these time limits the law enforcement officers may collect evidence of every description and, in particular, interrogate the suspect. The infringement of the limits constitute an illegal deprivation of liberty. It seems to me that exclusion cannot be justified in both jurisdictions solely on the grounds that fixed time limits have been exceeded. Instead of counteracting such breaches by prohibiting the use of all evidence obtained in violation of the set limits, circumstances of an individual case should be given priority. Although it is difficult to draw a just borderline between admissible and inadmissible evidence in such cases, some factors may be identified as relevant in deciding the admissibility issue. To illustrate, these are, first, the reason for excessive detention. Detention for a period exceeding the permitted limits may be employed as a tactic to weaken the suspect's insistence of not incriminating himself or to gain the suspect's consent to a procedure in which he is unwilling to participate. In such cases exclusion should follow. In some other cases, however, explanations offered for the excessive detention may reveal that it is only a technical breach. Second is the length of the excessive detention. Obviously, a longer excessive detention would weigh more heavily in favour of a conclusion that subsequent evidence should be excluded. Another relevant factor for consideration relates to whether the evidence emerged within or outside the permissible limits.

As far as English case law is concerned, it is recognised that prolonged periods of detention may be oppressive[125], and may affect the reliability of statements made by the suspect[126]. Such breaches should also be capable of affecting the fairness of the proceeding. Having said that it is extremely rare to find post-PACE cases in which infringement of time limits is considered with regard to the admissibility rules. One exception is *R. v Taylor*[127]. The question in this case was whether under section 78 the judge should have ruled the evidence of confrontation, which was outside the time limits, inadmissible. It was held that since an identification parade, group identification, or confrontation was going to happen at some stage in any event, detention exceeding permitted limits did not have any effect upon the conduct or fairness of the confrontation, let alone upon fairness of the proceeding. Similarly, in the case of *R. v Canale*[128] the periodical review of the suspect's detention (after six hours of detention and subsequently thereafter every nine hours) did not take place until 48 hours. Such breaches was not considered by the Court of Appeal as capable of having effect in the outcome in a way which was prejudicial to the suspect. These two cases emphasise the fact that similar to the breach of the Codes of Practice, not every breach of the provisions of the PACE will necessarily affect fairness of the proceeding.

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[125] *R. v Hudson* (1980) 72 Cr. App. R. 163; *R. v Gowan and Others,* [1982] Crim. L. R. 821.

[126] *Irving and Hilgendorf*, 1980, Police Interrogation: A Case Study of Current Practice, Royal Commission on Criminal Procedure Research Study No:2.

[127] Lexis, Court of Appeal (Criminal Division), Tran. by Martin Walsh Cherer, 12 Dec 1990; [1991] Crim. L. R. 541; The Times, 11 Jan. 1991.

[128] [1990] 2 All E. R. 187.

5. Conclusion

The goal here has been to examine the concepts of unfairness and unlawfulness in the context of the specific breaches of safeguards provided for the suspect at the police station. Non-extensiveness of the case law on the Turkish side has forced the researcher to concentrate on cases raised in the English legal system. It is hoped that the discussion in this Chapter has demonstrated that differences between English and Turkish law and therefore differences between civil and common law should not be exaggerated. In the abstract, the CMUK and PACE's approaches to protecting the individual in criminal process appear to have much in common. Despite the anthropologists' long recognition that different cultural and political traditions result in equally different social values and different approaches towards law and rights[129], both legislations basically adopt the same safeguards. They have in common, inter alia, the requirement of record making, the time limits, and the involvement of third parties such as legal adviser, friends and relatives, and appropriate adults. A point of difference is, *inter alia*, the type of the recording which drives basically from the cost objection on the Turkish side. Another point of difference is the involvement of the public prosecutor in the pre-trial investigation in Turkey. This does not, however, appear to be an essential difference since it is more theoretical than real.

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[129] See *Hatch*, 1983, Culture and Morality: The Relativity of Values In Anthropology; *Herskovits*, 1972, Cultural Relativism: Perspectives in Cultural Pluralism; *Bozeman*, 1971, The Future of Law in a Multicultural world; *Milne*, 1986 Human Rights and Human Diversity.

It is highly likely that these similarities derive from the adherence of both systems to the European Convention on Human Rights: under the Convention, England and Turkey are obliged to provide a minimum standard of protection for certain human rights and freedoms.

Implementations of these safeguards by exclusionary machinery are likely to follow in both jurisdictions. There are already strong indications that the pre-trial stage of criminal investigations will be more closely scrutinised by the courts than it has been in the past. This is not to suggest that, upon finding that the law enforcement officer had violated the procedural safeguards, courts will automatically exclude the subsequent evidence. As has been argued in Chapter Five both jurisdictions declined to adopt a mandatory exclusionary rule in favour of a more flexible approach. Indeed, it is not reasonable to claim that the PACE or the CMUK achieved the final balance in investigating crimes between society's interest in repressing crime and the individual's interest in his own personal liberty. The particular circumstances of an individual case may require resetting that balance. That is to say that unconscious, accidental or trivial improprieties will not be treated in the same manner as deliberate and serious ones. Also, in response to social and political changes that balance may change over time. Even the guarantees contained in the PACE and the CMUK are not static; their meaning and scope is capable of changing over time. It seems to me that with these new improvements come a new dimension, a new yardstick of reconciliation between the individual and community and their respective rights, a dimension which remains to be interpreted and applied by the Courts of each country. Obviously in such a process, the objectives of the safeguards

gain importance. In other words, in order to justify exclusion in both Turkey and England there needs to be a destruction of the functions of the procedural safeguards rather than the letter of them. This represents a welcome step in the right direction, which is consistent with the legitimacy of the verdict principle.

CHAPTER EIGHT

CONCLUSION

Three basic solutions to the problem of the admissibility of improperly obtained evidence have been identified. The first is to admit the evidence without inquiring as to its origin. The diametrically opposite solution is to exclude all improperly obtained evidence. Between these rigid solutions lies a flexible way of dealing with the issue: improperly obtained evidence is included in some cases, but excluded in others depending of the circumstances of the individual case. With this solution the trial judge exercises his discretion which is guided by relevant criteria. An examination of the pros and cons of these approaches reveals that the first two solutions are extreme, although in opposite directions, and that the flexible approach would be the most desirable one to adopt. Indeed, forms of impropriety might differ widely in terms of the gravity of the interest violated and in terms of the intensity of the relationship between the improper action and the evidence obtaining process. One can foresee a continuum in cases of impropriety varying from the insignificant and irrelevant to the serious and essential. The difficulty in objectively drawing a line in advance between cases which do or do not justify exclusion suggests that a certain amount of discretion should be given to the judiciary to determine the matter in individual cases. Furthermore, it is argued that the legitimacy of the verdict principle, which has been advanced by Professor Dennis, seems to be the most appropriate principle to guide the exercise of discretion. One also has to accept that exclusion of improperly obtained evidence as a way of ensuring the legitimacy of the verdict may

result in some side effects such as protecting judicial integrity, or the suspect, and deterring the law enforcement officers from future violations.

Despite the fact that Turkey and England do not share the same legal tradition, a comparison of Turkish and English approaches to the admissibility of improperly obtained evidence reveals that there are, to a great extent, similarities in the ways the two countries deal with such an issue.

Traditionally, it was well established as a general rule in both jurisdictions that the means by which evidence was obtained was immaterial to its admissibility in criminal proceedings. Besides this, dicta were occasionally expressed both in Turkey and in England to the effect that some form of exclusionary rule was recognised in exceptional circumstances. The extent and the scope of these exceptional circumstances, however, were not clear. Recently, both countries have adopted express legislative provisions regulating the admissibility of improperly obtained evidence: the 1992 Amendment on the Code of Criminal Procedure for Turkey and the Police and Criminal Evidence Act 1984 for England. These legislative activities indicate that there is agreement between the Turkish and English legal system as to the fact that Parliament should take the responsibility for deciding what the rules regulating the admissibility of improperly obtained evidence should be. The similar attitudes of the Parliaments is a clear illustration of the fact that both countries are moving towards a more careful review of the methods of pre-trial investigation. More importantly, the principle emerging in both legislations is that when sanctions, disciplinary or criminal, attached to procedural requirements fail to ensure compliance

with them, exclusion of evidence obtained as a result of that breach may become an option.

Both legislations mainly include two provisions: one is a general provision for any improperly obtained evidence[1], and one is a specific provision for improperly obtained confession evidence. As far as the general provisions are concerned, evidence may be excluded in England if it has an adverse effect upon the fairness of the proceedings, whereas in Turkey, where evidence is secured "hukuka aykiri olarak" (unlawfully), it is required to be suppressed. The amount of evidence excluded under these two provisions may or may not be similar depending on how the Turkish and English judges interpret the key words, "unlawfulness" and "unfairness" respectively. Although the exact determination of what circumstances must exist before the fairness of the proceedings is adversely affected or before the lawfulness of a procedure is breached will undoubtedly require decades of jurisprudence, it is submitted that they may be interpreted quite similarly in related to providing a flexible solution.

As far as the Turkish general provision, article 254/2, is concerned, the standards of unlawfulness governing the process of obtaining evidence and the admissibility of improperly obtained evidence are two aspects of the same event. What determines whether police action is unlawful also determines whether evidence obtained as a result of that action is inadmissible. In this respect, there is a slight difference between the Turkish and English approaches; unlawfulness arises from the

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[1] Although England has a third provision [s.82(3)], the fact that evidence which could be excluded under this section may also be excluded under s.78(1) reduces the function of this section to procedural issues.

method used to obtain the evidence, whereas unfairness emanates from the use of the evidence at trial. This difference, however, does not remove the possibility that both provisions will exclude roughly the same amount of evidence. It is argued that unlawfulness is not simply a breach of a normative texture which can be reduced to a set of formally defined procedural provisions. A distinction between the notion of unlawfulness and the concept of illegality should be made. The latter refers only to the infringement of prescribed procedural norms, whereas the former is much wider than this. It is true that in most cases unlawfulness and illegality overlaps, but not always. Evidence gathered by an unfair or unethical, although not illegal, means may be considered as unlawfully obtained. Also, illegality in the way of procuring evidence does not have to constitute, at the same time, unlawfulness in that there may be circumstances which excuse the illegality. The facts of individual cases will no doubt lead to different excusing circumstances. It should be noted that most of the excusing circumstances will be the versions of factors taken into account in exercising the unfairness discretion. The only difference between section 78 and article 254 would be reduced to the fact that the Turkish trial judge exercises a discretion to include otherwise inadmissible evidence while the English judge exercises a discretion to exclude otherwise admissible evidence. The possibility of whether the same amount of evidence will be excluded by the operation of these provisions has been tested in the context of evidence obtained in breach of procedural safeguards such as the involvement of third parties, time limits for detention, or recording provisions. It was revealed that under both provisions the decisive factor is the destruction of the functions of the procedural safeguards rather than the letter of them.

The specific provision in both legal systems regulates the admissibility of confessions. As far as English law is concerned, it is generally agreed that the law relating to the admissibility of confession evidence has been changed by the enactment of the Police and Criminal Evidence Act; section 76(2) replaced the common law test of involuntariness with a dual statutory test of oppression and unreliability. It has been questioned in this thesis whether there has indeed been a change in the law of the admissibility of confessions or just the illusion of change. It is submitted that the test of admissibility employed in section 76 with its reference to "oppression" and "unreliability" is not as radical as it first appears. The Parliamentary history of the section and the interpretation of it after coming into force by the judiciary clearly suggest that section 76 does not represent a break with the traditional English test of involuntariness. The Turkish provision, on the other hand, clearly requires the exclusion of involuntary confessions. It enumerates a series of improper techniques which are likely to create a risk of causing involuntariness. Thus, there is a clear consensus between Turkish and English law as to the fact that voluntariness is the decisive criterion for the admissibility of improperly obtained confession evidence.

This study, by revealing remarkable similarities in the treatment of improperly obtained evidence, contributes to deepen the belief in the existence of a unitary sense of criminal justice.

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