

The Prohibition of Consideration of Illegally Obtained Evidence in Criminal Procedures

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The Function of Evidence in a Criminal Procedure

Evidence is one of the most important resources for criminal judgment authorities who need to perform their duties of determining the conditions of a dispute and the facts of a trial in accordance with legal norms. The true function of evidence is to help judicial authorities reach a verdict in accordance with legislation by ascertaining whether the accused has committed the alleged act or not.

The principle of total evidence is a valid principle suggesting that every piece of information should be used as evidence in the criminal procedure to resolve the material aspect of the dispute and find the truth. On the other hand, the judge must rule relying only on the evidence presented to the court and discussed in the hearing, and form an opinion with free consideration of the quality of the facts presented as evidence. In the Turkish Code of Criminal Procedure, the principle of free consideration of evidence is clearly asserted in Article 217: "The judge shall only rely upon evidence that is presented at the main hearing and has been discussed in his/her presence in forming his/her judgment. This evidence is subject to free consideration in the conscientious opinion of the judge."

The legitimacy of the conscientious opinion system does not mean that judges have the right to act arbitrarily. First of all, the principle of total evidence does not abolish the rule which asserts that the method and principles of obtaining evidence must be in accordance with the law. Free consideration in the conscientious opinion of the judge doesn't mean that the judge can convict on the basis of a piece of evidence which wasn't obtained by a legal procedure. Hence the principle of total evidence is not without boundary and the most important boundary of the principle is human rights and dignity and the obligation of obtaining and presenting evidence as established in the rules of procedural law.

Prohibition of Consideration

The purpose of criminal procedure has changed over its history. In earlier periods, the main goal of criminal procedure was to punish those who were found guilty in trial and therefore the method of finding evidence was not a concern. Today, it is considered unacceptable to reach the truth by violating human rights. Despite the purpose of criminal procedure being to avoid doubt and reveal the material truth, acceptance of this goal as the absolute and most important value has been abandoned in modern criminal law.

Today, it is accepted that states should use force temperately in their fight against crime and criminality and fulfill their purpose of investigating the material truth in accordance with the principles of the law of the state, and it has been accepted that illegally obtained evidence should be left out of trials to prevent violations of human rights.

In a positive law context, illegality has a broader meaning than being against the law, as it indicates being contrary to the universal principles of law in terms of fundamental rights and freedoms. First of all, it means being against all the provisions of law in our legal system. Within this scope, all practices against international treaties, laws, statutory decrees, regulations, ordinances, judicial opinions of higher courts, un-enacted laws and the general principles of law are all included in the concept of illegality.

Today, three fundamental opinions on the consideration of illegally obtained evidence in judicial decisions and restriction of evidence are enunciated and defended.

General Acceptance Approach

In the general acceptance approach, it is held that evidence should be subject to judicial consideration

without discriminating between legally and illegally obtained evidence. The most important justification of this view is that the fundamental principle of criminal procedure is to reveal totally and truly whether the alleged crime was committed; and for this reason, including all the evidence in consideration will only help the judicial authorities make the right judgment. This view maintains that if illegally obtained evidence is left out, it is harder to find the material truth about the alleged crime and the public interest in the punishment of criminals will be harmed.

This view is criticized by arguments suggesting that by accepting illegal evidence, the courts become participants in the illegitimate act, thus legitimizing the unlawful behavior of law enforcement, and as a result, people's belief in and respect for the rule of law may diminish.

General Refusal Approach

The general refusal approach asserts that only evidence obtained by legal methods can be brought to hearings. Even though it is possible to reach the material truth using illegally obtained evidence, there is a great risk of inducing significant harm to social and moral values. A legal system which respects the rights of individuals that it has recognized must protect them from any potential violation thereof.

Refusal to base judgments on unlawfully obtained evidence is a commitment to protect the accused from the disadvantages he/she may face from a violation of his/her rights.

The most criticized aspect of this approach is that if the refusal is applied strictly, it may be possible for criminals to go unpunished due to evidence being classified as unlawfully obtained for very simple, technical issues and this may derogate the respect that people have for the legal system.

Flexible Approach

The third solution to the problem of usage of illegally obtained evidence is the flexible approach. According to this approach, when the court makes a decision about the acceptability of illegally obtained evidence, it should always consider the conflicting interests involved instead of accepting a standard rule of consideration or an externalization of this decision. In this way, the court exercises its discretionary power in each material dispute.

This approach has been criticized because of the requirement for the judge to decide according to the

conditions of each actual case, which leads to the issue of inconsistent verdicts. Another criticized aspect of the flexible approach is that it makes it impossible to predict whether evidence will be used as a basis for the verdict.

Prohibition of Consideration of Illegally Obtained Evidence in Turkish Jurisprudence

There was no provision banning the use of illegally obtained evidence in Turkish criminal procedures until the amendment by Law no. 3842 to the previous Code of Criminal Procedure no. 1412 in 1992, which was in effect before the current Turkish Criminal Procedure Code. The only prohibition on use of illegally obtained evidence in this period was Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Law no. 3842 added Article 135(a), entitled 'Forbidden Methods of Interrogation,' to the Code of Criminal Procedure. This article only outlined prohibited acts and conduct in the interrogation process, and stated that evidence obtained with those banned methods could not be used in trial.

The clause added by Article 254 of the Code of Criminal Procedure, which stated, "Verdicts shall not be based on evidence illegally obtained by the investigating or prosecution authorities," created a fundamental principle on the prohibition of basing a verdict on illegally obtained evidence. Although the old Code of Turkish Criminal Procedure had banned basing verdicts on illegally obtained evidence, it didn't forbid this evidence to be the basis for prosecution, arrests, and search and seizure warrants.

A new clause was added to Article 38 of the Constitution by Article 15 of Law no. 4709 in 2001. This regulation declared that "findings obtained illegally shall not be considered evidence," thus elevating the principle of Article 254 of the Code of Criminal Procedure to a constitutional principle. As this standard is now a constitutional principle, another issue has been clarified: After the amendment, it became impossible to utilize and base a verdict on illegally obtained evidence in any court (private, administrative, criminal, constitutional, and disciplinary).

The Code of Criminal Procedure currently in force determines the status of illegally obtained evidence in separate articles, and contains proscriptive and compulsory rules on obtaining evidence. The clause forbidding use of illegally obtained evidence is Article

217 of the Code of Criminal Procedure. It became compulsory to prove the alleged offense with legitimate evidence. The argumentum a contrario of this obligation suggests that a crime shall not be proven with illegitimate evidence and it is possible to assert that the law orders an absolute prohibition on its use. It is accepted as a legal presumption that illegal evidence definitely affects the verdict. Even though the court of appeal has the right to investigate whether a verdict is based on illegal evidence, it does not have the right to approve the verdict with the assumption that the decision would have been the same without illegally obtained evidence.

Prohibition of Consideration in Comparative Law

The authority given by the legal system in the rules of prohibition of evidence is significant for the determination of the legal status of the obtained evidence. The reason behind the prohibition is protecting personal rights from illegitimate intervention or ensuring law enforcement forces act legitimately.

In common law criminal justice systems, the absolute prohibition of consideration is accepted for illegally obtained evidence. Even if there is a slight contradiction to the law, obtained evidence is not to be used because of this ban, which is in place to protect the integrity of law enforcement.

In this system, since the illegally obtained evidence ban is mainly considered a means of supervising law enforcement, rather than protecting the rights of the defendant, the rule prohibiting consideration is applied to any unlawful procedure even if does not harm any fundamental human rights or freedoms.

In civil law, the main reason for banning the use of illegally obtained evidence is to protect human rights as well as fundamental rights and freedoms. Maintaining the discipline of law enforcement is not the primary aim of the regulation on forbidden evidence; it is merely a desired side effect of the prohibition. In this system, it is possible to use illegally obtained

evidence in hearings without inflicting significant harm on the defendant's rights. The method of obtainment is important in the decision whether to include such evidence. German courts prefer to evaluate the illegitimacy of the act of obtaining this evidence and the violation of the rights of the accused caused by this act, and decide not to employ evidence if there is a great violation of the rights of the defendant. But if the violation is secondary or there is no harm done to the rights of the accused, such evidence is accepted in the hearing.

The Indirect Effect of Illegally Obtained Evidence

Legality and the possibility of using evidence obtained illegally is a debated issue. For example, if the accused has admitted his/her guilt under torture and confessed the location of the gun, is it possible to present this gun as an exhibit in the hearing? Or if the witness has the right to refuse to testify but has not been advised of this in the hearing and gives the names of other witnesses to the court, is it possible to accept the testimonies of these other witnesses as evidence?

The indirect effect of illegally obtained evidence is brought up in these exemplified situations. In common law, according to the "Fruit of the Poisonous Tree" doctrine, this kind of evidence is absolutely excluded from consideration, and it is forbidden to use it in the verdict. In civil law, this issue is still an ongoing debate. German courts do not want to broaden the indirect effect of prohibition of its use as they are concerned that procedural mistakes by the police bear a risk of excluding other evidence from consideration, and this situation may result in false acquittals.

Turkish criminal procedure enforces the rule of absolute prohibition of illegally obtained evidence, as legislated in Article 217 of the Criminal Procedure Code and Article 38 of the Constitution, so the use of new evidence acquired from illegal evidence is also considered illegal.