A.Vahit BIÇAK*

INFRINGEMENT OF PROCEDURAL RIGHTS: Article 254/2 of CMUK**

INTRODUCTION

In 1992 the Turkish legal system reformulated its approach to the infringement of procedural rights. When other sanctions attached to procedural requirements fail to ensure compliance with the rules, exclusion of improperly obtained evidence provides an additional device. Indeed, the new sub-clause 254/2 of the Code of Criminal Procedure (hereafter CMUK) 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."[1]

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 (mandatory inclusion). 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 (mandatory exclusion). 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 new sub-section 254/2 is not denying the judicial control over the manner in which evidence was obtained; where evidence is secured *hukuka aykırı olarak* (hereafter unlawfully),[2] it is required to be suppressed. Obviously, the term "unlawfulness" gains importance in deciding the characteristic and scope of exclusionary rule. The concern of this article is, therefore, to seek an answer to the questions of "what is *hukuka aykırılık* (hereafter unlawfulness)?" in Turkish law.

---

* Dr., Lecturer in Criminal Law, Police Academy, Ankara.

** I would like to thank Professor D. J. Birch for commenting on an early draft of this article. Errors are, of course, solely my responsibility.

1 CMUK 254/2: "Soruşturma ve koğuşturma organlarının hukuka aykırı şekilde elde ettikleri deliller hükme esas alınamaz."

2 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.

UNLAWFULNESS AND ILLEGALITY

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 aykırılık*", "*yasaya aykırılık*" or "*mevzuata aykırılık*" (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.

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",[3]
>
> -"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",[4]
>
> -"a rule of human conduct sanctioned by human displeasure",[5]
>
> -"the aggregate of rules set by men as politically superior, or sovereign, to man as politically subject",[6]

---

[3] Holmes, cited by H. L. A. Hart, **The Concept of Law**, 1994, p. 1.

[4] Thomas Hobbes, **Leviathan**, , Part 2, Chapter 26, 1952, p. 203.

[5] E. C. Clark, **Practical Jurisprudence: A Comment on Austin**, 1883, p. 188.

[6] Austin, cited by E. C. Clark, **ibid**, p. 104.

-"highest reason, imbedded in nature, which commands what should be done and forbids the contrary",[7]

-"a device and gift of God, a decree of wise men, a setting right of all wrongs done voluntarily or involuntarily, a common agreement of all the state, according to which all in the state ought to live",[8]

-"a rule of moral actions obliging to that which is right",[9]

-"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",[10]

-"an order of commands whose obligatory force rests ultimately on the conformity of these commands with ethical postulates".[11]

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".[12] 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.[13]

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.[14]

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

---

7 Chrysippus, cited by C. J. Friedrich, **The Philosophy of Law in Historical Perspective**, 1969, p. 29.

8 Demostheness, cited by E. C. Clark, supra note 5, p. 97.

9 H. Grotius, cited by E. C. Clark, supra note 5, p. 101.

10 S. W. Blackstone, **The Commentaries on the Laws of England in Four Books**, Vol. 1, 1982, p. 39.

11 Coing, **Grundzuge der Rechtsphilosophie**, p. 18; cited by E. Bodenheimer, "German Legal Philosophy Since 1945", **American Journal of Comparative Law**, Vol. 3, 1954, p. 385.

12 H. L. A. Hart, supra note 3, p. 2.

13 G. L. Williams, "International Law and The Controversy Concerning the Word 'law'", **The British Yearbook of International Law**, Vol. 22, 1945, p. 163.

14 R. Reynolds, "Natural Law v. Positivism: The Fundamental Conflict", **Oxford Journal of Legal Studies**, Vol. 13, 1993, p. 441.

having force of statutes, degrees, regulations, customs, precedents.[15] 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.[16]

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 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.[17] 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'".[18]

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 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

---

[15] Questions as to compatibility of a lower norm with a higher norm are decided by the competent court.

[16] H. L. A. Hart, "Positivism and the Separation of Law and Morals", **Harv. L. R.**, Vol. 71, 1958, p. 593.

[17] For the detailed examination of these cases see E. Bodenheimer, supra note 11, p. 374; H. O Pappe, "On Validity of Judicial Decisions in the Nazi Era", **Modern Law Review**, Vol. 23, 1960, p. 260; H. Rommen, "Natural Law in Decisions of the Federal Supreme Court and the Constitutional Courts in Germany", **Natural Law Forum**, Vol. 4, 1959, p. 1; E. V. Hippel, "The Role of Natural Law in the Legal Decisions of the Federal Republic of the Germany", **Natural Law Forum**, Vol. 4, 1959, p. 106.

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

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."[19]

This provision reflects Kelsen's definition of the law. According to him, *the law is a system of norms*[20] 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".[21] Kelsen defines a basic norm as "a norm the validity of which cannot be derived from a superior norm".[22]

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.[23]

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.

The typical examples of supra-constitutional written norms are bilateral, multilateral or international conventions or treaties of which Turkey is a party. Although these transnational[24] norms, duly put into effect, carry the force of statute, non-conformity of the transnational norms to the Constitution cannot be claimed.[25] 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

---

[19] Article 11 of the Constitution.

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

[21] **Ibid**, p. 56.

[22] Hans Kelsen, **General Theory of Law and State**, 1949, p. 111.

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

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

[25] Article 90 of the Constitution.

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 favour of the transnational norms for a number of reasons.[26] First, the preamble of the 1982 Constitution maintains that "Turkey with equal rights is an honourable member of the world family of nations"[27] Being an honourable member of this family requires an acceptance that norms of international (or transnational) law are superior to the national norms.[28] Second, the general structure of the 1982 Constitution implies the adaptation of the monist view derived from Kelsen's thesis[29] 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.*"[30] This provision also implies the superiority of international law to national law.

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. 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 are the concept of human rights, general principles of law, and the requirements of the democratic order of society.

---

[26] See for the detailed discussion of the subject, Suat Bilge, "İnsan Hakları Sözleşmesinin Türk Hukukundaki Yeri" (The Place of the Human Rights Conventions in Turkish Law), **Ankara Barosu Dergisi** (The Journal of Ankara Bar), 1989, p. 988; Şeref Gözübüyük, "The European Convention on Human Rights in the Legal Order of Turkey", in **The Domestic Application of International Human Rights Norms**, 1992, p. 19.

[27] The Preamble, parag. 5.

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

[29] Hans Kelsen, supra note 20, p. 61.

[30] Emphasises added.

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 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]

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

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.

---

[31] İzzettin Doğan, **İnsan Haklarının Milletlerarası Himayesi** (International Protection of Human Rights), 1979, p. 260.

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

[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; **Resmi Gazete**, 16. 5. 1989/20167, p. 57.

[35] Article 2 of the Constitution.

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

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 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, 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.

---

[37] See for example, E. 1985/8, K. 1986/27- **Anayasa Makkemesi Kararları Dergisi**, Vol. 22, p. 365- in which it is stated that " kişinin sahip olduğu dokunulmaz, vazgeçilmez, devredilmez, temel hak ve özgürlüklerin özüne dokunulup tümüyle kullanılmaz hale getiren kısıtlamalar, demokratik toplum düzeninin gerekleriyle uyum içinde sayılamaz. (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; **Anayasa Mahkemesi Kararları Dergisi**, Vol. 22, p. 224.

[38] Article 4 of the Constitution.

[39] The exact words of the decision may worth quoting: "Hukuk Devleti . . . . . anayasa ve hukukun üstün kurallarıyla kendini bağlı sayıp, yargı denetimine açık olan, yasaların üstünde, yasa koyucununda bozamayacağı temel hukuk ilkeleri ve anayasa bulunduğunu, ondan uzaklaştığında geçersiz kalacağını bilen devlettir". E. 1985/31 K. 1986/11, 27. 3. 1987, **Anayasa Mahkemesi Kararları Dergisi**, Vol. 22, p. 115.

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.

UNLAWFULNESS IN THE CONTEXT OF ARTICLE 254/2

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 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*[41] 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.

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.[42] The term

[40] Article 152 of the 1982 Constitution.

[41] **The Times**, 15 September 1994.

[42] CMUK, Art. 96.

"night" is defined in article 502 of the Turkish 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 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*,[43] 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

[43] Yargıtay Ceza Genel Kurulu, E. 1993/5-15 K. 1993/62, 15. 3. 1993, **Yargıtay Kararları Dergisi** (Journal of the Court of Appeal Decisions), Vol. 19, 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.

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 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 aykırılık)[44] 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*,[45] 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.

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. 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*.[46] The law enforcement officers in this case seized plate glasses

---

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

[45] **Criminal Appeal Reports**, Vol. 98, 1994, p. 337; For the contrary judgment see, R. v. Purcell, **Criminal Law Review**, 1992, p. 806.

[46] U. S. , Vol. 116, 1886 p. 618 .

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,[47] and constituted an unreasonable search and seizure within the meaning of the fourth amendment.[48] Thus, such papers could not be admitted into evidence by any federal courts.[49] The justification for the exclusionary rule was given as being to make meaningful the protection provided by the Constitution.[50] The rule is not confined to those rules derived from the Fourth Amendment. The Supreme Court has applied it to confessions,[51] police line-ups,[52] identification evidence[53] and the denial of due process.[54]

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.

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.[55] 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.[56] Such cases led to severe criticisms of the rule by judges and legal scholars[57] and members of the

---

[47] 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 . . . ".

[48] 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 . . . ".

[49] 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 - U. S. , Vol. 367, 1961, p. 643 .

[50] Weeks v. United States, 232 U. S., Vol. 323, 1914 , p. 383.

[51] Miranda v. Arizona, U. S., Vol. 384, 1966, p. 436.

[52] U. S. v. Wade, U. S. , Vol. 388, 1967, p. 218.

[53] Gilbert v. California, U. S. , Vol. 388, 1967, p. 263.

[54] Rochin v. California, U. S. , Vol. 342, 1952, p. 165.

[55] People v. Defore, N. Y., Vol. 242, 1926, p. 13; Killough v. U. S. , U. S. , Appl D. C. , Vol. 114, 1962.

[56] Wong Sun v. United States, U. S. , Vol. 371, 1963, p. 471.

[57] See, W. E. Burger, "Who Will Watch the Watchman?", **American U. Law Review**, 1964, p. 1; R. E. Burns, "Mapp v Ohio: An All-American Mistake", **De Paul Law Review**, Vol. 19, 1969, p. 80; D. Oaks,

federal judiciary increasingly urged its reconsideration in the 1970's.[58] Recently, the Supreme Court has been willing to find exceptions to the mandatory exclusionary rule.

In the case of *United States v. Leon*[59] 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 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".[60]

Another example of the employment of the good faith exception is the case of *Massachusetts v. Sheppard*[61] 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.

"Studying the Exclusionary Rule in Search and Seizure", **University of Chicago Law Review**, Vol. 37, 1969-70, p. 1169; Steven R. Schlesinger, **Exclusionary Injustice**, 1977.

[58] See, Bivens v. Six Unknown Named Agents, U. S. , Vol. 403, 1971, p. 388; Stone v. Powell, U. S. , Vol. 428, 1976, p. 465; Brown v. Illinois, U. S. , Vol. 422, 1975, p. 590; California v. Minjares, U. S. , Vol. 443, 1979, p. 916; Stone v. Powell, U. S. , Vol. 428, 1976, p. 536; Coolidge v. New Hampshire, U. S. , Vol. 403, 1971, p. 443.

[59] U. S. , Vol. 468, 1934, p. 897.

[60] **Ibid**, p. 900.

[61] U. S. , Vol. 468, 1984, p. 981.

The good faith doctrine is not only the exception to the mandatory exclusionary rule. In *Nix v. Williams*,[62] 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*.[63] 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.

CONCLUSION

Recent judicial decisions undermine the mandatory exclusionary rule in the United States, restricting its application in a variety of situations. There are valuable lessons to be learned from the American experience. Interpretation of "hukuka aykırılık" as "kanuna aykırılık" 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.

---

[62] U. S., Vol. 467, 1984, p. 431.

[63] S. Ct., Vol. 104, 1984, p. 2626.