

“HANDCUFFS” FROM A HUMAN RIGHTS POINT OF VIEW IN TURKISH CRIMINAL LAW

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Abstract

Handcuffing, one of the forms of treatment does not normally give rise to an issue under the certain articles of ECHR. The limits of handcuffing are important in view of fundamental rights. The use of handcuffs must be justified by the legal authority. The handcuff is a kind of measure and has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence. Accordingly, the purpose of the handcuff in no way denotes contempt or lack of respect for a person. Nor is this measure designed to humiliate or debase a person. The publicity connected with the treatment is limited to a person's supporters getting a glimpse of the person in handcuffs. This study briefly provides the status of handcuffs in Turkish legal regulations and certain judicial decisions.

Keywords: Turkish criminal law, handcuffs, human rights, apprehension, minors.

1. Overview

Handcuffing, one of the forms of treatment does not normally give rise to an issue under Article 3 of the ECHR. The using handcuffs has been imposed in connection with lawful arrest or detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, fort the ECHR it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or try to abscond or cause injury or damage. Also, *the nature of the treatment or the fact that the victim is*

*humiliated in his own eyes may be a relevant consideration*¹ says ECHR.

Being among the fundamental rights and freedoms, bodily integrity and personality rights of a person may be restricted only in compulsory cases, without prejudice to their essences, based on the causes stipulated under the relevant articles of the Constitution and by application of law. We must consider the human rights are subjective rights and that they are essential for the life, freedom and dignity of human beings; they are also fundamental for the free development of human personality². The matter we would like to discuss in this article is about whether handcuffing a person who

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¹ See *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, p. 16, § 32, and *Raninen*, cited above, p. 2822, § 56, [https://hudoc.echr.coe.int/eng#{"fulltext":\["öcalan"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\["ER"\],"itemid":\["001-69022"\]}](https://hudoc.echr.coe.int/eng#{).

² Damaschin Mircea, “The Juridical Nature Of The Right To a Fair Trial” in: LESIJ, Nr.XVIII, Vol:2/2011, p.26 (pp.23-33).

is charged with a crime may be characterized as a compulsory case. Handcuffing the suspect or the accused who is the subject of the criminal procedure has been a matter that has engaged the attention of legal practitioners who advocate human rights, as well as people from other disciplines³. The limits of handcuffing are important in view of the presumption of innocence. Handcuffs are used to prevent the suspect or the accused from hurting himself/herself, as well as posing a danger for others and the environment and, therefore, their usage has gained recognition. However, it should also be remembered that while, on one hand, there exists the right to put handcuffs on someone, on the other hand there is the right to request not to be handcuffed in the context of presumption of innocence. And the limit of this is the presence of a compulsory case.

From past to present, several concepts regarding human rights have been changed and other fundamental rights have arisen from within those that had been defined as fundamental rights. And in our opinion, one of them is the presumption of innocence⁴. In the Western Europe, until the mid-18th century, the dominant approach was to consider the objective of criminal procedure as the punishment of the accused, and it was deemed impossible to presume that the accused was innocent or not guilty until the

end of the trial. In this period when legal evidence system was adopted, the burden of proof rested with the accused and all inhuman treatments towards this person applied for the sake of getting a confession were legitimate⁵. Such approach was started to be abandoned towards the end of this century, and under the influence of liberal and philosophical movement, scientists from both classical and positive schools emphasized that the objective of the criminal procedure was to protect the accused⁶. Expressing the change in the approach observed in the period, Montesquieu, one of the important philosophers of the era, also asserted that freedom did not exist where the innocence of the citizens was not secured⁷.

This change experienced as well as the metamorphosis of human rights caused the emergence of various claim rights, as a result of which several rights have become prominent and comprehensible. The concept that we will also tackle here is “handcuffs from the perspective of presumption of innocence”.

2. Concept

The reason of emergence of the concept of the right to request not to be handcuffed can be explained by the requirement to give as much consideration

³ In his article dated June 21, 2008 in Milliyet Newspaper, Çetin Altan wrote, “...there were times that 70 handcuffed people were placed in a vehicle with a capacity of 40 people. There was a dungeon at the lowest basement floor of the ‘Courthouse’ in Sultanahmet. Handcuffed suspects arriving from penitentiary institutions were withheld there and when their turn came up to appear before the Assize Court, they were taken before the court through the secret staircase that used to be inside the walls between the dungeon and the courtroom...” see; <http://www.milliyet.com.tr/Default.aspx?aType=YazarDetay&ArticleID=878901&AuthorID=53&Date=21.06.2008>; accessed on January 20, 2011.

⁴ Spataru-Negura, Laura-Cristiana, *Protectia Internationala A Drepturilor Omului, Note De Curs*, Hamangiu Publishing House, 2019, Bucharest, pp. 150-151.

⁵ Foucault Michel, Hapishanenin Doğuşu (*The Birth of the Prison*), translated by Kiliçbay Mehmet Ali, İmge Kitabevi Publishing House, 2. Ed., November 2000, pp. 213-216.

⁶ Dönmezer Sulhi/ Erman Sahir, Nazari ve Tatbiki Ceza Hukuku, Genel Hükümler (*Theoretical and Applied Criminal Law, General Provisions*) v. I, Beta, Istanbul 1994, p. 29 et seq.

⁷ Montesquieu (Charles de Secondat), “De l’Esprit des Lois”, 1748, Edition Gallimard, 1995, Tome I, Livre XII, CH.II, p.377.

as possible to the human dignity of the suspect or the accused who has become the subject of the criminal procedure under the suspicion of a crime. This new concept, which we may consider as an extension of the presumption of innocence that is one of the hard-core rights among the fundamental principles of law contained in the right to a fair trial,⁸ emphasizes once more the importance of human dignity and honour. As a matter of fact, the person who is in the capacity of suspect or accused is investigated or prosecuted with a charge for a certain act that constitutes a crime, and there is no final judgment yet established against them indicating their guilt. Under these circumstances, it is clear that treating them as guilty and transporting them from one place to another in a handcuffed position does not accord with the presumption of innocence.

This claim right that we have demonstrated as the right to request not to be handcuffed is actually associated not only with the presumption of innocence, but also, more directly, with the personality rights, protection of the dignity and honour of the concerned person, and the right of the person not to be exposed to degrading treatment. Thus, compatibility between restriction of one's movement ability in a manner that offends their personal rights merely due to

the crime they are charged with, and the concept of human dignity is arguable.

It is important to ask why handcuffs are used, although it was ascertained that their use is directly related with fundamental rights. The main reason of the use of handcuffs is that they are a security device applied by the law enforcement officers. Being identified as a type of precaution for cases which necessitates law enforcement officers to use force, handcuffs are supplementary tools⁹. According to another opinion, use of handcuffs on a person, in other words, use of a device that restricts their movement ability, is an indication of the use of force by law enforcement officer¹⁰. The objective of handcuffing an apprehended person is to prevent the escape of the suspect or the accused when there is such a suspicion for his/her escape¹¹.

Given that a pair of handcuffs is a device, it is not mandatory to use it as a rule. Nevertheless, law enforcement officers may apply the measure of handcuffing an attacker who poses a danger to themselves and others, who may escape, who is deemed to be an outlaw or who has escaped at the time of his/her apprehension, during his transportation after the apprehension¹². The limits of the use of force by law enforcement officers are defined by the Constitution. Under Article 13, Article 15 and Article 17 of the Turkish Constitution, the cases in

⁸ Memiş Pinar, Adil Yargılanma Hakkının Unsuru Olarak Masumiyet Karinesi (*Presumption of Innocence as a Component of Right to a Fair Trial*), GSÜ SBE (Galatasaray University, Social Sciences Institute) Kamu Hukuku Yüksek Lisansı (Public Law Graduate Degree) Yayınlanmamış Yüksek Lisans Tezi (Unpublished Grade Degree Dissertation), January 2003, pp.72-73.

⁹ Yenisey, Feridun; Uygulanan ve Olması Gereken Ceza Muhakemesi, Hazırlık Soruşturması ve Polis (*Practiced and Expected Criminal Procedure, Preliminary Investigation and the Police*), 3. Ed., Beta Yayınevi Publication House, İstanbul,1993, p.219.

¹⁰ Dönmezer, Sulhi; Kolluğun Zor Kullanma Yetkisi ve İnsan Hakları-Kolluğun Silah Kullanma Yetkisi (*Power of Law Enforcement to Use Force and Human Rights - Power of Law Enforcement to Use Weapon*), Publication of Turkish Criminal Law Association, Beta, İstanbul 2005.

¹¹ Centel Nur/ Zafer Hamide, Ceza Muhakemesi Hukuku (*Criminal Procedure Law*), Beta 16. Ed., İstanbul, 2019.

¹² Yenisey Feridun, Kolluk Hukuku (*Law Enforcement Law*), 2. Ed., Beta, Publication House, İstanbul, 205, p. 70. "Yenisey states that handcuffs should be used in compulsory cases by placing the hands of the suspect or the accused behind their back in order to prevent them from posing a danger for themselves or others".

which the exercise of fundamental rights and freedoms will be limited and suspended are specified. Accordingly, being among the fundamental rights and freedoms, bodily integrity and personality rights of a person may be restricted only in compulsory cases, without prejudice to their essences, based on the causes stipulated under the relevant articles of the Constitution and by application of law¹³. These limitations shall not be contrary to the wording and spirit of the Constitution, the requirements of the democratic order of the society and the secular Republic, and the principle of proportionality.

3. Handcuffs in Legal Regulations

Determination of the legal grounds of handcuffing is important primarily in terms of personality right and secondly in terms of presumption of innocence. Having emerged as one of the fundamental characteristics of law since 1215 Magna Carta and 1679 Habeas Corpus, the presumption of innocence is one of the fundamental rights which is contained in the right to a fair trial and which involves the principle of *in dubio pro reo* - when in doubt, in favor of the accused.

The presumption of innocence indicates the idea that a person who becomes the subject of a criminal investigation or prosecution on the grounds of suspicion of a crime should be considered innocent until sentenced by virtue of a final court decision. The principle stipulated in Article 38 of the Constitution of Republic of Turkey which states, "No one shall be deemed guilty until proven guilty in a court of law" has been expressed in Article 6 of the European Convention on Human Rights (ECHR) as

"Everyone charged with a criminal offense shall be presumed innocent until proven guilty according to law". This principle is stipulated also in international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These are the reasons why the presumption of innocence does not accord with the use of handcuffs. The appropriateness of use of handcuffs is arguable in an approach that considers the person to be innocent until a final court decision is given. In order to avoid the use of handcuffs arbitrarily, in violation of the presumption of innocence, the use of handcuffs should be stipulated by laws and, at the same time, be legitimate¹⁴.

When considering the use of handcuffs as a police tool for the use of force, it makes sense to think that the issue might have first been regulated under the Law No. 2559 on the Powers and Duties of Police Officers. Hence, Article 16 of the Law on Powers and Duties of Police Officers stipulates that if police officers encounter any resistance while carrying out their duties, they are entitled to use force for the purpose of and to the extent required for eliminating this resistance, and 2nd paragraph of the same article defines the use of force as, "*Within the scope of the entitlement to use force; bodily force, physical force, and provided that the necessary legal conditions exist, weapons, may be used in order to immobilize those who resist, by being applied in a gradually increasing manner and in proportion to the nature and degree of resistance*". It is noted that sub-paragraph b) of the 3rd paragraph of the same article defines physical force and states that handcuffs are also included among the tools used to exercise physical force.

¹³ İnceoğlu Sibel, İnsan Hakları Avrupa Sözleşmesi ve Anayasa (European Convention of Human Rights and Constitution), 3. Ed., Beta Publication House, İstanbul, 2013, p.7.

¹⁴ Memiş, pp. 72-74.

Another relevant provision in the Turkish legislation dated 2005 is the handcuffing by the police in criminal proceedings as specified in Article 93 of the Code of Criminal Procedure No. 5271¹⁵. This provision, which considers handcuffing to be acceptable only under certain conditions,¹⁶ stipulates as follows; “*Individuals who have been apprehended, or who have been arrested and are being transported from one place to another, may be handcuffed if there are indications that they may escape or that they pose a danger to life or bodily integrity of themselves or others.*”¹⁷“.

The law does not prescribe how the handcuffs should be applied. Nevertheless, authority to handcuff a person has been set forth in Article 7 of the Regulation on Apprehension, Detention and Interrogation dated 2005, and accordingly the authority to handcuff a person has been prescribed by the provision that reads as follows: “*Individuals who have been apprehended, or who have been arrested and are being transported from one place to another, may be handcuffed if there are indications that they may escape or that they pose a danger to life or bodily integrity of themselves or others.*”¹⁸. It is clear that in the apprehension measure, law enforcement officers may use

force, and place handcuffs when necessary, only if the person shows resistance and the circumstances also necessitate doing so. Otherwise, there may be a violation of the presumption of innocence due to “wrongful apprehension”¹⁹.

After specifying the persons who may be so handcuffed, the issue is further clarified by stipulating that children cannot be handcuffed. It is then a principle that children shall not be handcuffed²⁰. It is further stipulated in Article 18 of the Law on Protection of Children²¹ dated 2005, that children cannot be handcuffed. In parallel with this, Article 19/paragraph c /item 10 of the Regulation on Apprehension, Detention and Interrogation stipulates that handcuffs or similar devices may not be used for children, and law enforcements officers may take the necessary measures only in compulsory circumstances, in order to prevent children from escaping or from posing a danger to the life or bodily integrity of themselves or others²². In our opinion, a juvenile who is pushed into crime should not be handcuffed. The objective should not be to protect the society from such juvenile who is rebelling against the society but to protect the juvenile and reintroduce them to society.

Another regulation regarding handcuffing concerns the convicted persons

¹⁵ The Code of Criminal Procedure no. 5271 dated 2005, see Official Journal Issue Date: 17/12/2004; Official Journal Issue no. : 25673.

¹⁶ Yenisey Feridun/ Nuhuğlu Ayşe, Ceza Muhakemesi Hukuku (*Criminal Procedure Law*), Seçkin, Ankara, 8. Ed., 2020, p.332.

¹⁷ Yenisey/ Nuhuğlu, p.332.

¹⁸ For the Regulation on Apprehension, Detention and Interrogation, see Official Journal Issue Date: 01/06/2005; Official Journal Issue no. : 25832.

¹⁹ Memiş, p. 73-74.

²⁰ Öztürk Bahri/TEZCAN Durmuş/ Erdem Mustafa Ruhan/Gezer Sirma Özge/ Kirit Saygılar Yasemin/ Akcan Alan Esra/ Özaydın Özdem/Tütüncü Erden Efser/Villemin Altınok Derya/ TOK Mehmet Can, Nazari ve Uygulamalı Ceza Muhakemesi Hukuku (*Theoretical and Applied Criminal Procedure Law*), Seçkin, 13. Ed. Ankara, 2019, p. 849.

²¹ For the Law no. 5395 dated 2005 on Protection of Children, see Official Journal Issue Date: 15/7/2005; Official Journal Issue no. : 25876.

²² Özbek Veli Özer/ Doğan Koray/Bacaksız Pınar, Ceza Muhakemesi Hukuku (*Criminal Procedure Law*), Seçkin, 12. Edition, Ankara 2019, p.272.; Şen Ersan, “Kelepçe (*Handcuffs*)”, <https://www.haber7.com/yazarlar/prof-dr-ersan-sen/1188054-kelepce>, accessed on 01/10/2020.

under the Code No. 5275 dated 2005 on Execution of Sentences and Security Measures²³. Article 50 and Article 115 of the Code No. 5275 stipulates the conditions in which convicted persons may be handcuffed.

4. Handcuffs in Judicial Decisions

In Turkish Law, it is clear that handcuffs shall be used in limited cases, that otherwise, it should be considered within the scope of mistreatment of persons by exceeding the limit in the use of force. As per the decision of Criminal Law Department No.1 of the Turkish Court of Appeals, granted on 11.11.1970 (3191/3085)²⁴, the act committed by the gendarmerie (*military police*) by shooting and killing the accused after the accused's attempt to escape by freeing himself from the handcuffs while being transported, while he was accompanied by two gendarmerie officers, was considered as self-defence and the fact that the gendarmerie used excessive force against the attempted escape was not taken into account.

The European Court of Human Rights ("ECtHR") evaluates the issue within the framework of Article 3 of the European Convention on Human Rights ("ECHR") and grants a decision on violation in the case of disproportional use of handcuffs when the use thereof is not compulsory²⁵. The criteria

that are specified by the ECtHR while evaluating the use of handcuffs were stated in *Öcalan v. Turkey* (application no: 46221/99)²⁶ case as follows; "*Handcuffing, one of the headings of complaint raised in the present case, does not give rise to a violation of Article 3 of the Convention when it is used in connection with a lawful apprehension or detention and does not indicate public exposure or a use of force that exceeds what is reasonably considered necessary in the circumstances. In this regard, it is of importance to determine whether or not there is sufficient reason to believe that the person concerned would resist arrest or try to escape or cause injury or damage. In this context, the public nature of the behaviour may be considered as a criterion. In addition, the public nature of the treatment or the fact that the victim is humiliated before their own eyes may be a relevant factor to consider*"²⁷.

Another decision of the ECtHR that may be mentioned in this respect is *Raninen v. Finland*, dated December 16, 1997 (152/1996/771/972)²⁸. Raninen was arrested for not fulfilling his military duty and he was handcuffed after the trial when he was being taken to his troop²⁹. As per his petition, Raninen walked by the people in handcuffs from the moment he went out of the courthouse until he got on the vehicle and remained handcuffed for 2 hours, the time needed to reach to his troop. Raninen filed a

²³ For the Code no. 5275 dated 2005 on Execution of Sentences and Security Measures, see Official Journal Issue Date: 29/12/2004; Official Journal Issue no. : 25685.

²⁴ KILIÇ Ali, Kolluğun Zor Kullanma Görevi ve Yetkisi (*Duty and Power of Law Enforcement Officers to Use Force*), Ankara University SBE (*Social Sciences Institute*) Kamu Hukuku YL(*Public Law Graduate Degree*) Yayınlanmamış Yüksek Lisans Tezi (*Unpublished Graduate Degree Dissertation*), 2003, p. 85, footnote.251.

²⁵ SPATARU-NEGURA, *Protectia Internationala A Drepturilor Omului*, p. 126-134.

²⁶ For the judgement of the the case *Öcalan v./ Turkey* (*Application no. 46221/99*), see [https://hudoc.echr.coe.int/eng#{"fulltext":\["öcalan"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\[""\],"itemid":\["001-69022"\]}](https://hudoc.echr.coe.int/eng#{) and for the definif judgement see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-142086"\]}](https://hudoc.echr.coe.int/eng#{).

²⁷ *Ibidem*.

²⁸ Fort the judgement of the case see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-58123"\]}](https://hudoc.echr.coe.int/eng#{).

²⁹ For more detail, see, Spataru-Negura, *Protectia Internationala A Drepturilor Omului*, p. 133.

lawsuit stating that he was subjected to a degrading treatment pursuant to Article 3 of the ECHR, and the ECtHR determined that “*bringing someone before the public and making him walk in front of his supporters in handcuffs is a degrading treatment which damages his dignity and reputation*”.

In its Erdogan/Turkey decision, the ECtHR decided that the applicant was rightful in his application, determining that there exists no conditions requiring the acceptance of his exposure to public in handcuffs or making of a search while he was in handcuffs and concluding that this was done to intimidate and to damage the reputation of the concerned person³⁰.

5. Conclusion

In conclusion, handcuffing an accused while he or she is being brought to a hearing, keeping him or her handcuffed during the hearing in some cases, and handcuffing an apprehended person is not a fact that can be overlooked and disregarded on every occasion. It is mandatory to recognize

handcuffs as a device that may be used in exceptional, necessary and compulsory cases. It is clear that, despite being regulated in the laws, handcuffing, except where it is compulsory, is an inhuman treatment and damages the concerned person’s dignity. During the enforcement of the apprehension measure, the person should be handcuffed only if there is suspicion that they may escape or they pose a danger to the life or bodily integrity of themselves or others³¹. The fact that use of this device should not be resorted to unless it is compulsory, should be considered primarily in terms of bodily integrity, personality rights, and presumption of innocence.

Although it is not possible in today’s world to put forth an idea suggesting to abolish the use of handcuffs completely, at least the exceptional nature of this tool should be taken into consideration and it should be noted that there exists a right to claim for it not to be used in each and every case. Doctrine says for understand the human rights “*we will never find the perfect typologies, in order to achieve a real typology, it takes a lot of work synthesis*”³².

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³⁰ Özbek/Doğan/Bacaksız, p. 272.

³¹ Öztürk /Tezcan /Erdem/Gezer Sirma/ Kirit Saygılar / Akcan Alan/ Özeydin/Tüttüncü Erden/Villemin Altinok/ Tok, p. 452.

³² Spataru-Negura Laura-Cristiana, “Old and New Legal Typologies” in LESIJ, no.XXI, Vol 2/2014, p.62 (pp.48-63).

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