

EXECUTIVE SUMMARY

THE IMPUNITY

PROBLEM:

INVESTIGATION

PROCESS

GÜLŞAH KURT

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“Impunity”, a practice of the state that has displayed continuity in Turkey, is a massive field of problems that we encounter in cases when public officials are responsible for gross human rights violations. The legitimization of the unlawful acts of soldiers, military officials, village guards and police, and the legal and actual protection provided for perpetrators through the support of this practice both by administrative and judicial practice in addition to regulations constitute the primary field of the practice of impunity.

Although in recent times the possibility arose of fracturing the shield of impunity in public cases of great significance in terms of democratization, the problematic progress of judicial processes have made it clear for all to see that the will to shed light on gross human rights violations has not developed, that accountability has not been ensured and that the culture of impunity inherent to the system has not been broken. The stance of legal authorities and the way in which politicians and the press have responded to such cases have clearly revealed that the state-centric approach continues to hold sway.

Impunity in the judicial field can stem from a legal regulation, the interpretation of gaps in laws in favor of perpetrators, or the failure to implement laws. There can be no doubt that every field that enhances impunity requires deep analysis. It is also clear that it is a matter of first priority to determine and resolve issues related to regulations.

The report titled “The Impunity Problem: The Investigation Process” has been prepared as a contribution to previous work researching the relationship between the impunity problem in Turkey and corresponding regulations.

In order to carry out a detailed examination, the report focuses on the criminal investigation stage, and assesses this stage within the following scope in terms of the independence, impartiality and effectiveness of the investigation:

- The determination of the deficient, faulty or problematic areas of laws and their implementation as well as the mentality of judiciary power was an aim;
- A comparative analysis of the rulemaking of administration, legal amendments and old and new regulations was carried out;
- An analysis of the verdicts of domestic courts and ECHR verdicts and consideration of the issue in international legal documents including the Turkey reports of international human rights organizations was conveyed.

This summary, in addition to proposals of legislative changes included in the report, also touches upon the outlines of solution proposals aimed at the interpretation and implementation of existing legislation.

INDEPENDENT AND IMPARTIAL INVESTIGATION

A- ASSESSMENT OF LEGISLATION RELATED TO JUDGES AND PROSECUTORS IN TERMS OF “IMPARTIALITY” AND “INDEPENDENCE”

Despite their determining role in investigations, it has been observed that prosecutors shun their responsibilities despite being charged with immediately acting to initiate investigations, that they abstain from even the simplest procedures, and in cases where lawsuits are filed, that judges conduct proceedings in an unreasonably lengthy manner that leads to the expiration of the limitation period, and that ultimately, adequate and effective proceedings that would ensure the establishment of truth are not conducted.

1- THE CONCEPTS OF IMPARTIALITY AND INDEPENDENCE

The reliability of the judiciary is ensured via **the autonomy of judicial institutions, and the impartiality and independence of persons performing the profession of judge and prosecutor.**

It does not suffice for principles and institutions related to judicial independence to exist only in legislation. For independence, **both legal and actual independence must be ensured.**

2- THE REGULATION OF ISSUES RELATED TO THE PROFESSIONS OF JUDGE AND PROSECUTOR ACCORDING TO PRINCIPLES OF JUDICIAL INDEPENDENCE

The regulation of the qualifications, assignment, promotion, appointment, transfer, disciplinary procedures, suspension, dismissal, tenure and personal rights of judge and prosecutor candidates according to principles of judicial independence will prevent the executive power exercising direct or indirect pressure over judges and prosecutors.

Almost all interview council members who decide whether judge and prosecutor candidates who have passed the written test to enter the profession will be assigned are members of the executive power. **However, the authority that decides upon the selection and careers of judges and prosecutors must be independent of the government and administration. In order to ensure the independence of this authority, its members must be elected by the judiciary, and the method of election must also be determined by the judiciary.**

The authority to take decisions regarding the professions of judges and prosecutors belongs to the Supreme Council of Judges and Prosecutors, which is an administrative council. The broad authority invested in the Council, and the fact that a legal remedy cannot be sought regarding the verdicts of the Council with the exception of dismissal from profession show that prosecutors carry out their duty without security.

The fact that the Minister of Justice and the Undersecretary of the Ministry are natural

members of the Council exacerbates the conflict of interest, and exposes judges and prosecutors to pressures applied by the executive power. In order to prevent this, **the Supreme Council of Judges and Prosecutors should be independent of the executive branch of power, and must be formed of judges and prosecutors only.**

The practice of **appointing judges and prosecutors by change of place of duty** stipulates their appointment by the Supreme Council of Judges and Prosecutors via transfer and regardless of their tenure in the region, or their professional seniority. However, there are cases in which this practice is used as a punitive device.¹

3- ASSESSMENT OF THE ASPECTS OF “INDEPENDENCE” AND “IMPARTIALITY” IN THE SPECIFIC CASE OF PROSECUTORS

Although the independence of judges is arranged in legislature, **there is no arrangement made for the independence of prosecutors. It is essential for the necessary arrangements to be made in legislation regarding the independence of the prosecutor so that prosecutors, like judges, can carry out their duty without being subjected to pressure, obstruction, harassment, unlawful interference, or any claim of legal, criminal or other liability either from political authority or other persons.**

In addition to this, **the authority to rule on personnel affairs or disciplinary penalties should belong to an independent “Council of Prosecutors” in a manner that enables them to act with assurance in relation to the executive power.**

¹ The Report on the Independence of the Judicial System by the Venice Commission underlines that this can be used by the executive body as a device to intervene in the judicial system.

B- INVESTIGATION PROCEEDINGS AND THE DUTY OF THE PUBLIC PROSECUTOR

1- THE OBLIGATION OF INVESTIGATION AND PROSECUTION

The moment the prosecutor receives notification of a case which gives the impression that a crime has been committed; he or she is under the burden of initiating an investigation in order to decide whether there is grounds to file a criminal case. **There can be no grounds not to initiate an investigation.** Otherwise, the prosecutor would be criminally liable for professional misconduct.

Yet, in many claims regarding gross human rights violations occurring due to the actions of public officials, prosecutors have remained unwilling and inactive in initiating and conducting investigations, and have failed to show determination.

2- PROBLEMS ARISING FROM THE ABSENCE OF A SEPARATE JUDICIAL POLICE FORCE

In our legal system, the police force has the dual task of preventing crime, and investigating the crime and the criminal after the crime has been committed. The first task is of an administrative nature and is carried out by the “administrative police”, whereas the second task is of a judicial nature and is carried out by the “judicial police”.

The ambiguity of the legislation related to this issue makes it difficult to determine in which cases security forces conduct judicial, and in which cases administrative duties, and **creates serious problems** in terms of intervening in the investigation.

The overlapping between judicial security forces and perpetrators, or the existence of personal, professional or hierarchical relations, creates the

grounds for judicial security forces to obstruct the investigation, favor perpetrators and conceal evidence. Thus, it is possible to come across examples in which interventions have been carried out to the investigation process by extra-legal methods such as pressurizing witnesses in order to manipulate their testimonies, and spoiling or concealing adverse evidence. In order to prevent this, **arrangements must be made to implement a clear separation between the judicial and administrative duties of security forces.**

C- SPECIAL INVESTIGATION METHODS THAT CONSTITUTE AN EXCEPTION AND THEIR IMPACT ON IMPUNITY

1- THE PERMISSION SYSTEM ARRANGED IN LAW NO. 4483

The adjudication of civil servants and other public officials for crimes they have committed in office is subject to a permission to be received from the relevant competent administrative authority. If a request for permission is rejected, the prosecutor's investigation is blocked.

Although the necessity of the separate investigation method is defended on the basis that the continuous and regular functioning of public services in a manner that benefits public interest depends on public officials conducting their duty in a secure manner, it has been observed that in practice, this becomes a privilege, and by eliminating the accountability of public officials leads to a lack of confidence.

a- The General Scope of Law No. 4483

For the Law to be applicable, the public official must be assigned a duty within the framework

of the legislation in force, and the public official must have committed a crime while performing this duty. The Law only covers administrative duties; prosecutors can directly initiate an investigation in crimes arising from judicial duties.

The provisions of this Law are not applicable for crimes committed whilst in duty but not related to the duty itself. In other words, a lien of causality must exist between the crime committed and the duty.

b- Civil Servants and Public Officials Subject to Law No. 4483

The Law is applicable for civil servants and other public officials carrying out fundamental and continuous duties necessitated by public services they are charged with carrying out according to general administrative principles as pertaining to the state and other public entities.

According to the Turkish Penal Code, a "public official" is someone who takes part in the fulfillment of public activity by appointment, election or any other way on a permanent, periodical or temporary basis. The same law defines the concept of "public activity" as the conduct of a service on behalf of the public on the basis of a political decision taken according to methods determined in the Constitution or laws.

When this definition is understood within a broad scope including the concepts "public activity", "public duty" and "public service", then not only those carrying out public duties, but everyone carrying out any public service would be considered public officials, and the scope of persons subject to the permission system would be widened. **Therefore, it would be more appropriate to interpret the concept of public official as those persons who, in addition to those carrying out public duties, also those who carry out public services, but not those who participate in the conduct of an activity beneficial to the public.**

In consideration of the wording of the Turkish Penal Code, such a narrow interpretation seems quite difficult; therefore the provision that

defines a public official should be rearranged in a manner that only includes those who fulfill public services. **In its present state, this provision leads to the widening of the scope of those considered public officials in criminal law, and thus evidently broadens the scope of impunity.**

c- Restriction Imposed by Law No. 4483 on the Authorities of Public Prosecutors

Public prosecutors, upon receiving any notification or complaint regarding crimes committed by civil servants and other public officials within the scope of the law, or find out about such a case, must immediately apply for a permission to investigate, meanwhile carrying out no act other than the recording of evidence that must be collected and runs the risk of disappearance, and without taking the testimony of the civil servant or other public official about whom a notification or complaint has been received.

Other authorities and civil servants, and public officials are also obliged to notify any case to the authority authorized to issue permits when they find out about a crime within the scope of the Law having been committed via notification, complaint, information, document or evidence. However, in such cases, the public prosecutor may never be informed about the crime having been committed, **thus a method is set forth that goes beyond the permission system and in a way, eliminates the authorities of the public prosecutor, or the role of the prosecutor as an intermediary.**

d- Investigation Method Arranged in Law No. 4483

The Law sets forth that for the notifications and complaints about civil servants and other public officials to be processed concrete evidence must be presented, **thus creating a further obstruction** within the permission system.

The strict conditions attached to notifications and complaints leads to timid behavior in persons who may have notifications or complaints to make, and blocks the investigation process.

e- Right to Resort to Jurisdiction against Permission Decisions

The decision regarding investigation is inevitably, to a large extent, left to the discretion of the administration. As long as these legislative regulations stay in force, it is almost impossible to completely prevent the abuse of the authority to issue permission, or for this to become a privilege for public officials who commit crimes.

The most effective device on hand is judicial review. The right to appeal allows for this to a certain extent. In cases where the permission to investigate is rejected without sufficient and efficient preliminary examination, an appeal may be filed to demand an orderly preliminary examination.

Since in terms of its legal character, the permission is an administrative operation, it is also imperative that it is subject to judicial review. However, the State Council has ruled both for² and against judicial review in such cases.³ The existence of contrasting jurisprudence on the same issue gives rise to the thought that judicial review is not an adequate remedy to alleviate the drawbacks of the permission system.

f- The Delaying Impact of the Permission System on the Investigation

Taken into account along with the durations prescribed in the Law, and with the possibilities of objection or appeal to administrative justice, it becomes evident that the permission system has a delaying impact on the judicial process of a public official.

Even in cases when prescribed durations are observed, it takes time for the investigation to be initiated. In cases where a lawsuit is filed after a permission investigation has been issued, the risk arises of the period of limitation expiring.

² See State Council 1. Chamber, 21.02.2006, E:2006/7, K: 2006/217.

³ See State Council Plenary Session of the Chambers for Administrative Cases, 21.11.2007, E: 2994/125, K:2007/2320.

2- EXCEPTIONS TO THE PERMISSION SYSTEM ARRANGED IN LAW NO. 4483

a- In Terms of the Nature of the Crime

The Law arranges two types of exceptions in “crimes arising from administrative duties” and “crimes of torture and the transgression of the authority to use force”, **and in such exceptions bestows prosecutors with the authority to directly open an investigation according to general provisions.**

Crimes Arising from Administrative Duties

The failure of legislation to unambiguously distinguish between judicial and administrative duties **complicates the determination of what type of duty a public official is carrying out at the time he or she committed a crime, and of the method of investigation and trial procedure to be applied accordingly.**

The complexity of the distinction is used as a shield to protect public officials. In the majority of cases when a verdict is made that there is professional misconduct in gross human rights violations caused by the actions of public officials, it is possible to determine that the permission system is operated on the assumption that the duty was of an administrative nature.

Crimes of Torture and the Transgression of the Authority to Use Force

The overview of impunity related to crimes of torture and maltreatment, excluded from the permission system, reveals problems deriving from the way in which these crimes are arranged in the Turkish Penal Code. Interpretations by prosecutors that both reduce the lower level of the sentence and require an application for permission also indicate a problematic practice. **In order to prevent wrongful definitions of the crime, legislation must be amended with clear and precise arrangements that will not allow recourse to other alternatives.**

Although the crime of torture is arranged in the Turkish Penal Code, crimes of torture are,

in practice, interpreted as lighter crimes such as maltreatment, malicious injury, professional misconduct and forgery of official documents, and the perpetrator is protected from the sentence stipulated for the crime of torture, and included within the scope of the law protecting public officials.

For the crime of transgressing the authority to use force, the Turkish Penal Code stipulates the implementation of provisions related to malicious injury. Since this reference is only made to the sentence, a penalty increase should be ruled for, in view of the fact that the malicious injury has been carried out by a public official. However, often, the assessment is made that the crime of malicious injury has been carried out directly, and investigations face the obstruction of the permission system. **In order to prevent this, the aforementioned reference must be abolished, and the sentence regarding the right to use force must be stated separately.**

b- Persons Subject to Special Investigation Procedures Because of Their Title

The fact that persons who carry civil servant or public official status but are not subject to the permission system arranged in Law no. 4483 are subject to procedures arranged in special laws, **and the scope of personal immunity created for such persons causes further problems beyond the permission system.**

Military Personnel

Military personnel are subject to the scope of military jurisdiction in respect to crimes stated in their special laws.⁴

The existence of two different judicial systems, i.e. the civilian and military judicial systems, creates a situation that amplifies the problem of impunity. Worrisome regulations regarding independence and impartiality in the Law on the Establishment and Rules of Procedure for Military Courts increases the drawbacks of the

⁴ Law No. 353 on the Establishment and Rules of Procedure for Military Courts.

existence of two different judicial systems and enforces the necessity for the narrowing of the field the military judicial system applies to.

MİT (National Intelligence Organization) Personnel

With changes made in 2012, the Prime Ministry was granted authority to issue permission to investigate MİT personnel. More recent changes introduced serious obstructions to the investigation to be presented to the Prime Minister for a request of permission.

The secret operational method of an organization like MİT, which is equipped with extensive authorities open to interpretation, makes it difficult to determine cases of misconduct and gross human rights violation. **The duties and authorities of the organization should be arranged by law in a clear and unequivocal manner. However, the Law on State Intelligence Services and the National Intelligence Organization arranges the duties and authorities of MİT Personnel in quite a broad and ambiguous manner.**

The activities of the organization's personnel **should be open to both internal and external inspection in a manner that reinforces the perception that the Organization is a transparent and accountable institution**, however changes made on 17 April 2014 to the Law on State Intelligence Services and the National Intelligence Organization added new authorities to existing ones, and the scope of authorities was broadened with the use of ambiguous expressions in the wording of these changes.

The MİT undersecretary was practically endowed with the authority to issue investigation permissions for personnel acting under the undersecretary's orders. **This means that the undersecretary is authorized on ruling on acts that would render him or her liable. This provision, which almost endows the undersecretary with absolute authority to opt for lack of inspection, is unique in legislation.**

A further change stipulated that judicial

authorities could not request intelligence under the MİT's charge. It is common knowledge that intelligence is collected in operations carried out by security forces and military personnel. **However, in order for the elucidation of crimes and determination and sentencing of those responsible in investigations regarding claims that security forces have violated human rights, this intelligence must at least be shared with and inspected by the investigating authority.**

Investigation Procedures Regarding Civilian Authorities and Highest Ranking Security Force Chiefs in Provinces and Districts

No exceptions are stipulated in the permission system for civilian authorities and highest ranking security force chiefs in provinces and districts. **This lack of exceptions which forms a significant basis for impunity shows that special investigation procedures have not been abandoned for certain high ranking officials.⁵**

In addition to this, other than provincial and district governors, there is ambiguity regarding who the highest ranking security force chiefs are. The attempt to resolve the issue via internal correspondence or by circulars indicates that provisions on this issue are not clear enough, administrative acts do not suffice to overcome complications, and all that can be done is to orient the practice in line with a certain tendency.

Investigation procedures stipulated for judges and prosecutors are implemented for crimes committed by highest ranking security force chiefs in the exercise of their duties. The application of procedures arranged for the security of judges and prosecutors creates **the impression that a protective shield is being formed for the highest ranking security chiefs. The opening of a path for a further permission system whereas the priority should be the abolition of the permission system appears as a conduct that needs to be criticized.**

⁵ This procedure has been criticized in the final observations of the UN Prevention of Torture Committee 2010 Report on Turkey.

c- Exceptions brought to the Permission System in Other Laws

During the time of the now abolished State Security Courts' Law of Establishment and Rules of Procedure, state prosecutors had the authority to directly carry out prosecutions regarding crimes arranged in this law.

Following the abolition of State Security Courts, as a change was brought to the CMUK for the establishment of specially authorized high criminal courts, a similar regulation was included. When the CMK took effect, the same regulation was included among provisions arranging specially authorized high criminal courts.

This provision was repealed with the 3rd Judicial Reform Package, and was included within provisions related to specially authorized high criminal courts established to rule in cases filed regarding crimes within the scope of the Anti-Terror Law.

The 4th Judicial Reform Package then repealed the related article⁶ of the Anti-Terror Law. However, the regulation related to public prosecutors not being authorized to directly investigate public officials for certain crimes was preserved with a clause added to the CMK.⁷

This new clause that includes an exception that direct investigations of public officials can be carried out by public prosecutors refers to the crimes of "disrupting the unity and territorial integrity of the state" and crimes "against the constitutional order and its functioning". **Thus it becomes evident that the state lifts the protective shield of civil servants and public officials only when it needs to protect itself.**

⁶ Anti-Terror Law Article 10.

⁷ CMK Article 161/8.

D- INFLUENCE OF SECURITY FORCES IN INVESTIGATIONS

In cases when it is claimed that security forces have violated human rights, perpetrators must be isolated from all types of influence for the investigation to be carried out in an independent and impartial manner.

1- CASES IN WHICH SECURITY FORCES CARRYING OUT THE INVESTIGATION ARE SUSPECTS

In practice, the security official who carries out the investigation is also often the perpetrator. This leads to serious abuse and deficiencies in the collection and preservation of evidence, and the spoliation of evidence. Investigations carried out in this manner often end with a verdict that there is no need for the filing of a criminal case, or, in the event that a criminal case is filed, with a verdict of acquittal.

Claims regarding security forces violating human rights should be examined by independent investigation units specifically formed for this aim. An environment should be created within which complaints and notifications can be made independently of the organizations to which public officials who are suspects are affiliated with, and of the executive power.

2- PROFESSIONAL AND HIERARCHICAL RELATIONSHIP BETWEEN PERPETRATORS AND THE AUTHORITY CHARGED WITH CARRYING OUT THE INVESTIGATION

In cases where perpetrators are not the investigators in person, other persons, or units, affiliated with the same organization, and with which the perpetrator has professional, hierarchical and personal relationships have been observed to carry out investigations. Ensuring the independence and impartiality

of the investigation necessitates that the institutions and persons conducting the investigation belong to a **separate, autonomous structure** from the institution claimed to have carried out actions that constitute a crime, or other state units.

Although a project was proposed in 2006 under the title, "Commission of Independent Police Complaints, and the Complaint System for the Turkish Police and Gendarme", such a mechanism does not exist as of yet.

On the other hand, **public officials who witness a crime being committed during their service in the same institution or units, are also under the liability to prevent the committing of a crime, or to report any crime they witness as part of their duty of crime prevention.** However, in the present situation, there are no examples where an investigation of rights violations has been initiated directly via the information provided by a security force member's witness account.

3- PROBLEMS ARISING FROM PROSECUTORS NOT CONDUCTING PROCEEDINGS IN PERSON

The conduct in criminal procedure of the great majority of proceedings directly by security forces is a long-established practice. **The fact that prosecutors do not conduct proceedings in person, and the excessive involvement of security forces results in the failure to collect evidence promptly and in due form.**⁸

Although security forces were authorized to conduct proceedings alone only in urgent cases during the CMUK period, the fact that prosecutors delegated all preliminary investigation proceedings apart from major

important tasks and the presentation of the security forces of their reports known as 'fezleke' (summary of proceedings) to the prosecutor or in some cases even directly to the justice of the peace was a topic of criticism.

During the CMK period, new regulations were introduced stating that prosecutors are the principal authority in investigation proceedings and security forces act as assistant to the prosecutor. However, these regulations were not implemented in practice, **in cases where the prosecutor was prescribed as authorized to proceed, investigations continued to be mostly based on security proceedings and the involvement of security forces in investigations increasingly continued.**

That judicial authorities **issue verdicts on the sole basis of data provided by security forces** is another practice that needs to be criticized. The failure to take precautions despite the frequent occurrence of manipulation or fabrication of evidence by security forces is another sign of the protection provided for public officials.

⁸ For a more detailed account of this issue in enforced disappearance cases see Ataktürk Sevimli, E., *Zorla Kaybetmelerde Yargının Tutumu* [The Stance of the Judiciary in Enforced Disappearance Cases], in *Zorla Kaybetmeler ve Yargının Tutumu* [Enforced Disappearances and the Stance of the Judiciary], Hakikat Adalet Hafıza Merkezi Yayınları, 2013, p.27. This topic has also been taken up in the HSYK Circular no. 8 dated 18.10.2011 on Investigations Regarding Claims of Human Rights Violations and Torture and Maltreatment. See p. 105.

EFFECTIVE INVESTIGATION

The eradication of impunity in gross human rights violations requires the implementation of an effective investigation that adheres to the criteria of **adequacy, thoroughness, impartiality and independence, promptness and public scrutiny.**⁹

A- ASSESSMENT OF ECHR VERDICTS ON TURKEY'S VIOLATION OF ITS RESPONSIBILITY TO CONDUCT AN EFFECTIVE INVESTIGATION

According to the ECHR, the obligation to conduct an effective investigation requires that the investigation is carried out infallibly and precisely by a body independent from those bodies involved in the crime and by securing the active participation of applicants, that it should be open to public scrutiny, and that it should be carried out conclusively regarding the determination and sentencing of those responsible for the violation. The investigation should bear these qualifications with the aim of preserving public trust and abstaining from creating the impression

⁹ These are the investigation criteria determined by the European Council for the Eradication of Impunity in Gross Human Rights Violations. 2013:10-11.

of all manners of tolerance or complicity in unlawful acts.

There are common points in cases where the ECHR has ruled that Turkey has violated its obligation to conduct effective investigation. These include: Unwillingness of prosecutors to initiate investigations and sentencing those responsible, and a tendency to remain inactive; contentment with the abstract denial or statements of security forces involved in the event such as gendarmes or military personnel despite evidence presented by victims or victims' relatives; prevarication of the investigation on the basis of assumptions that there is a connection with the PKK although there is no concrete data to this effect, the waste of time caused by such practices and the failure of the prosecutor to conduct proceedings in person, and security forces directly conducting the investigation.¹⁰

In cases where the ECHR has ruled that an effective investigation has not been conducted, the implementation of the verdict does not only mean the payment of the compensation that has been determined, but the conduct of an adequate and effective investigation in a manner that reveals those responsible also needs to be ensured.¹¹

¹⁰ See Verdict in the Case of *Kaya v. Turkey* dated 19.02.1998, Application No: 22729/93, Verdict in the Case of *Kurt v. Turkey* dated 25.03.1998, Application No: 15/1997/799/1002, Verdict in the Case of *Akdeniz and Others v. Turkey*, dated 31.05.2001, Application No: 23954/94, Verdict in the Case of *Benzer and Others v. Turkey* dated 12.10.2013 Application No: 23502/06, Verdict in the Case of *Aksoy v. Turkey* dated 18.12.1996, Application No: 21987/93.

¹¹ Decree No. 1675(2009) of the Council of Europe Parliamentary Assembly, parag.8.1.

A positive development is that, according to the provision added to the CMK with the 4th Judicial Reform Package, when by an ECHR verdict it is determined that a decision for non-prosecution has been taken without conducting an effective investigation, a re-investigation can now be requested. **In practice, it must be carefully observed whether this path is followed, and that the omissions that caused the violation are dispelled in investigations opened in this manner.**

B- ASSESSMENT OF REGULATIONS IN RESPECT OF THE RESPONSIBILITY TO CONDUCT AN EFFECTIVE INVESTIGATION

1- POWERS OF INVESTIGATING AUTHORITIES

It has been observed that legislation restricts the authority of the prosecutor in investigations only in terms of certain protective measures that limit basic rights and freedoms, and the prosecutor has adequate devices and authorities to carry out an effective investigation. The main problem is experienced in the actual implementation of these authorities.

The Ministry of Justice lists the circumstances that lead to the violation of the obligation to conduct an effective investigation as follows:

- The failure to examine detention/arrest records;
- Contentment with inadequate medical examination and doctor's reports of persons in detention/under arrest;

- Failure to conduct adequate examination of contradictions, irregularities and gaps in documents presented by security forces;
- Failure to remedy deficiencies in minutes related to the case drawn up by security forces and the failure to take photographs of the crime scene;
- Lack of necessary details in autopsy reports;
- Delay, and at times failure of the public prosecutor to initiate an investigation;
- Ruling of a verdict of non-prosecution or non-competence without the collection of necessary evidence;
- Failure to provide information regarding the investigation to victims and those harmed because of the crime.¹²

The Supreme Board of Judges and Prosecutors lists the procedures and principles that need to be observed as follows:

- Suspect, witness, complainant and victim statements related to the case must be taken thoroughly and in due form.
- Examination and reconnaissance must be carried out at the crime scene.
- The outcome of investigations delegated to security forces must be called up at appropriate intervals, and special care must be taken in investigations pertaining to past years so that they are not impeded, and any omission observed in such investigations must be dispelled by public prosecutors in person.¹³

However, this constitutes merely a repeat of what needs to be done, and falls short of remedying problems that exist in practice.

¹² Circular no. 8 dated 18.10.2011 on "Investigations Regarding Claims of Human Rights Violations and Torture and Maltreatment".

¹³ HSYK Circular no. 8 dated 18.10.2011 on, "Procedures and Principles of Investigation".

2- PARTICIPATION OF THE VICTIM IN THE INVESTIGATION PROCESS

The neglect of duty in investigations regarding public officials by competent authorities leads to victims or victims' relatives having to conduct a struggle to overcome the barriers raised in their path, and to have the necessary proceedings carried out. Cases in which even the victim's statement has not been taken are quite widespread.

Yet a relationship to be established with the victim or victims' relatives will act as a guide to the investigative authorities and enable the investigation to be completed promptly.

The CMK features a regulation that could cause a drawback in the victim's participation in the investigation.¹⁴ No further notification is sent to victim and complainants or their attorney if they do not respond to the notification sent to the address on their petition, or statement included in the proceedings. **In view of the fact that the victim or complainant might provide a false or deficient address since he or she is anxious about the security of himself or herself, or family, this provision needs to be rearranged in a manner that the participation of persons in the investigation is not easily given up on.**

3- SUBJECTION OF THE VICTIM, COMPLAINANT AND THEIR RELATIVES TO VIOLENCE, THREATS AND OPPRESSION DURING THE INVESTIGATION

The fear the position and authorities of public officials creates upon victims and complainants, leads, in practice, to hesitation regarding applications against public officials, the changing of testimonies as a result of the threats and pressures they face, or the withdrawal of applications.

It is a necessity to prevent the occurrence of such situations and to provide protection against all manners of violence, threats and pressure to ensure effective participation in

the investigation. Officials who in any way might have been involved in rights violations must be removed from all types of positions that would allow them to exert control over complainants, witnesses and their families.

In addition to this, investigation proceedings must be conducted in consideration of the psychological condition of the victim due to the crime that has occurred. The conduct of proceedings must be accompanied by an expert in the field of psychology, psychiatry, medicine or education, and **especially in relationships to be formed with torture victims, principles set out in the Istanbul Protocol must be adhered to.**

4- PROVIDING LEGAL SUPPORT FOR VICTIMS

The right of the victim and complainant to legal support is clearly defined as a right in the CMK. However, a change brought in 2008 has restricted the right to appoint an attorney according to the request of the victim. Under the present legislation, in the case that he or she has no attorney, the victim or complainant has the right for an attorney to be appointed by the bar only in cases of sexual assault, and for crimes for which a sentence of more than five years is stipulated as a lower limit. Cases where the victim can benefit from the right to mandatory attorney are reserved.

A restriction imposed without taking into account other characteristics of the crime, and for a stage [of the case] when the bill of indictment has not yet been prepared is not an appropriate approach. **In cases when prosecutors, having wrongfully characterized the crime, initiate proceedings according to crimes for which a lighter sentence is stipulated, it is unacceptable that this mistake also restricts the right to legal support. Therefore, legislation must be reverted back to its state before the change.**

5- DETERMINATION AND HEARING OF WITNESSES

In investigations on crimes carried out by public officials that constitute gross human rights

¹⁴ CMK, Article 235.

violations, the witness' statement is the type of evidence that is subject to the lowest risk of being spoliated or altered, however in practice, it is often the case that witnesses are bullied and intimidated. Therefore, **witnesses must be protected from potential threats and pressure, and necessary measures must be taken to provide their security.**

The scope of protection measures stipulated in the CMK and the Witness Protection Law is restricted to certain crimes. **It would be more appropriate to determine the scope in view of the perpetrator's position to cause harm to the witness and his or her relatives, and the extent of such potential danger.**

Although only the prosecutor's office and the court should be authorized to demand and rule on witness protection measures, members from security forces form the majority in the Witness Protection Council that is authorized to rule on protective measures.

Another practice that is frequently encountered is the hearing as witnesses of public officials whose signatures feature on the minutes of the crime. The number of case examples in which a verdict of non-prosecution has been ruled on the basis of minutes and the accounts of officials who prepared the minutes are significantly high. However, barring cases for which there exists no further evidence supporting the facts, the prosecutor should not base a decision only on such evidence.

6- COLLECTION AND ASSESSMENT OF MEDICAL EVIDENCE

Physical Examination

According to legislation, **the physician and victim must be allowed privacy during physical examination.** However, in practice, this is prevented on the basis of various pretexts. Often, law enforcement officials do not leave the room claiming security related reasons, or pressurize doctors. **Such incidents must be recorded in official minutes.**

In the event that the accused is to be taken under custody, his or her medical condition must be determined by physical examination, however, in practice, it is often the case that the person is taken to detention units without instantly notifying a prosecutor, and that the prosecutor is only notified after the detention minutes and related documents are prepared, and that a physician's examination is only conducted after a decision for arrest is taken.

In cases of detention or arrest, victims are often presented as suspects of a number of crimes, first and foremost resisting to prevent the fulfilling of duty. Therefore **their physical examination is carried out at the point when they have been designated as suspects.**

Autopsy

One of the most important reasons leading to impunity in crimes of murder is **the inadequate performance of the autopsy procedure.** There have even been cases in which the autopsy procedure was not performed at all.

Autopsy procedures must be carried out according to rules set forth in the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and the UN Minnesota Protocol. In order to secure objective outcomes, those who carry out the autopsy should be able to fulfill their duties in a manner impartial to and independent from persons, organizations or institutions that may potentially have been involved in the incident. In this context, the approach that carries out an autopsy that focuses only on the reason of death must also be abandoned.

On the other hand, there is the issue of mass graves, which has now come to the knowledge of the public in Turkey. Investigations must immediately begin regarding graves that have emerged in areas where enforced disappearances and unlawful and arbitrary executions were carried out in the 1990s, and all

examinations to be conducted after the opening of these graves must be carried out in line with the **UN Minnesota Protocol** which contains detailed regulations on this issue.

7- EXPERT EXAMINATION AND SPECIALIST VIEW

In view of the fact that expert reports have a significant impact as part of the investigation file, **the conditions in which the expert can conduct his or her duty independently and impartially must be provided without fail.** However, provisions that may be implemented in cases when there is suspicion over the impartiality of the expert are far from satisfying the need to solve basic problems that arise in practice.

In practice, the Institute of Forensic Medicine is the first institution assigned in investigations [examinations, reviews] related to crimes of torture or other maltreatment, or murder committed by public officials. In addition to this, **units such as the Criminal Police Laboratory Department Directorate that operates within the body of the Security General Directorate and the Gendarmerie General Command which may act as experts are also official experts.**

In crimes committed by public officials, it is clear that the independence and impartiality of reports prepared by units or institutions under the same organization will be suspect. The inadequacy of reports prepared by the Institute of Forensic Medicine, and its partiality which does not deviate from official discourse are also subject to frequent criticism.

Independent institutions need to be established, and their transparency needs to be secured for expert investigations. In addition to this, in cases when reports are claimed to fail to meet standards of impartiality and independence, alternative reviews that would enable the deliberation of data included in expert reports prepared by official institutions must be allowed, and it must be ensured that judicial authorities base their assessments on such reports.

8- CRIME SCENE INVESTIGATION – RECONNAISSANCE

Since persons accused with being perpetrators also occupy positions in investigating bodies, or are affiliated with them, there is the possibility that they are informed of crime scene investigation and reconnaissance procedures in advance, in a manner that allows them to destroy, conceal or spoil evidence.

A critical defect in the Law on Police Duties and Powers, and the Legislation on the Duties and Powers of the Gendarme Organization is that they do not feature the requirement of the presence of a prosecutor in crime scene investigations carried out by the Gendarme. It is known that inadequate investigations have been carried out in the absence of a prosecutor, and that investigations are not conducted effectively for this reason.¹⁵ **In order to prevent this, a legal modification that renders obligatory the presence of a prosecutor needs to be made.**

According to the CMK, the reconnaissance process cannot be carried out in the absence of a judge, or in cases when a delay in the process is unfavorable, in the absence of a prosecutor. Reconnaissance is a process that can be beneficial in shedding light on cases when only limited evidence exists. The ECHR also has verdicts where it has stated that, since it seriously impedes the possibility of national authorities elucidating the case, that the rejection of a demand for reconnaissance constitutes a violation of the right to life due to inadequate investigation.¹⁶

9- QUESTIONS REGARDING THE DETERMINATION OF THE PERPETRATOR / IDENTIFICATION

The scope of perpetrators should not be

¹⁵ In the 1990's, because the prosecutor would not visit the crime scene due to security reasons, almost all crime scene investigations were carried out by gendarme forces in a deficient and inadequate manner.

¹⁶ Verdict in the Case of Makbule Kaymaz and Others v. Turkey dated 25.02.2014, Application No:651/10, para.143.

restricted to those who directly carry out the act that constitutes the crime. **High-ranking officials that have given orders to public officials or civilians who carry out the act, and persons who conceal the crime or harbor perpetrators, or prevent the disclosure of these acts have also committed a crime.**

Yet in practice, one comes across incidents where, in the scope of investigations where public officials are suspects, responses are provided to requests of information from personnel in charge intended to determine the perpetrators that hamper or render inconclusive investigations, or no action is taken in cases when helmet numbers are erased, although it is an offense that requires sentencing according to the Disciplinary Regulation.

10- IDENTIFICATION

The identification procedure is carried out upon the prosecutor's instruction under the supervision of the police by the victim or witnesses. The fact that it is not carried out under the supervision of the prosecutor in person, raises the suspicion that an accurate and reliable result is obtained.

In practice, the procedure is carried out on the basis of photographs procured from security units. However, in the case of gross human rights violations caused by the actions of the security forces, practices such as requesting the victim to identify the perpetrator from within the photographs of all officials at the unit or units subject to complaint have been recorded instead of determining the person responsible through sufficient investigation.

11- MEASURES TO PREVENT THE PERPETRATOR CONTINUING TO SERVE DUTY

That public officials facing claims that they have committed crimes continue to serve while the investigation continues forms an obstruction to the appropriate and reliable conduct of the investigation. For the effectiveness of the investigation, public

officials need to be suspended from duty from the moment that they assume the title of suspect. The implementation of this hinges on the decision of the institution such public officials work under. This system, which relies on the arbitrary decision of administrative authorities, **must be abandoned since it leads to impunity, and the implementation of a precautionary measure should be possible not only in cases of criminal investigation, but also when a disciplinary investigation is initiated.**

In addition to administrative measures, it is possible to remove the risk of intervention in the investigation by implementing a criminal procedure measure or ruling for the arrest of suspects. However, the number of cases where precautionary arrest is implemented for public officials for which an investigation or criminal proceeding has been initiated is significantly low. **In order to enable the implementation of precautionary arrest, the crime of transgressing the authority to use force must be included among the catalogue of crimes listed in the provision of the CMK which arranges conditions of arrest.**

12- THE PROBLEM OF COUNTERSUITS

The filing of counter investigations and countersuits on the basis of various allegations against persons who have made complaints or filed notifications claiming they are victims of gross human rights violations carried out by public officials is very common practice. The aim here is to pressurize victims, induce fear and discourage them from seeking their rights, or to punish the "audacity to demand justice".

In many such examples, while it either proves impossible, or takes a long period of time to initiate an investigation against the public official who has carried out a gross human rights violation, allegations against the victim are swiftly investigated, and trial processes begin, and sentences may be given.

