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EVALUATION OF EFFECTIVE AND FULL INVESTIGATION IN THE CONTEXT OF THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON TERRORIST CRIMES AND RECOMMENDATIONS FOR A NEW CONSTITUTION FOR TÜRKIYE

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Abstract: *This study provided suggestions highlighting the need for a new and civil constitution, evaluating the effective and full investigation in the context of human rights. This study highlights that arbitrary or incomplete practices of prosecutors and judges in the investigation phase could be prevented with a new and civilian constitution and thus impartial and independent conduction of the investigation phase will have a constitutional guarantee. The adopted method of the study is to evaluate an effective and full investigation in the context of human rights and present recommendations accordingly. The introduction part of the study is about why a new constitution is needed in Türkiye. The concept of investigation is explained in the development section of the study. Then, the ethical principles that prosecutors and judges should consider, that is, the principles that may affect the investigation, are discussed through the allegations provided through concrete examples. Following the principles, the accessible decisions and case laws of the European Court of Human Rights regarding an effective and full investigation have been examined in the study. Suggestions are provided in the conclusion section of the study for a new and civil constitution based on the data obtained in the development section of the study.*

Keywords*: Human Rights, Investigation, Principles, Case Law, European Court of Human Rights, Recommendations, Constitution.*

Rezumat: Evaluarea investigației eficiente și complete în contextul deciziilor Curții Europene a Drepturilor Omului privind infracțiunile teroriste și al recomandărilor privind o nouă constituție pentru Turcia. *Studiul oferă sugestii care evidențiază necesitatea unei constituții civile noi, evaluând investigarea eficientă și completă în contextul problematicii drepturilor omului. Sunt evidențiate practicile arbitrare sau incomplete ale procurorilor și judecătorilor în faza de anchetă, care ar putea fi prevenite printr-o constituție civilă nouă, astfel ca desfășurarea imparțială și independentă a fazei de anchetă să aibă o garanție constituțională. Metoda de studiu adoptată este cea a întreprinderii unei investigații eficiente și complete în domeniul drepturilor omului și de a prezenta recomandările care rezultă de aici. Partea introductivă oferă o explicație privind motivul pentru care este necesară o nouă constituție în Turcia. Conceptul de investigație este explicat în secțiunea de dezvoltare a studiului. Ulterior sunt discutate principiile etice pe care procurorii și judecătorii ar trebui să le aibă în vedere, adică principiile care pot afecta ancheta. Totodată, sunt examinate deciziile accesibile și jurisprudența Curții Europene a Drepturilor Omului privitoare la o anchetă eficientă și completă. În secțiunea Concluzii sunt oferite sugestii privitoare la o proiectată nouă constituție civilă în Turcia.*

INTRODUCTION

The construction of norms in democratic societies governed by a republican regime belongs to the nation. The nation makes the constitution and other norms for itself. A nation that cannot participate directly in legislative activity can regulate all norms through its elected representatives. At this point, the role of the nation is to appoint representatives who will make the norms in the parliament through elections. In addition, the nation can participate in the constitution-making through the referendum, which is one of the basic instruments of democracy. For these reasons, all other norms that do not reflect the will of the nation are rejected in republican regimes. In other words, only the norms reflecting the will of the nation are valid in democratic societies governed by a republican regime. These statements may not apply to the constituent power. Nevertheless, the constituent power should not make regulations on norms despite the nation either because norms that do not reflect the will of the nation can cause a social explosion after a certain period. Such arrangements of collateral power also lead to such a result.

The 1982 Constitution of the State of the Republic of Türkiye was established after a coup by a group of soldiers. The 1982 Constitution, which was established under the shadow of weapons, was subjected to a referendum to be legitimized being approved by society. As far as what those experiencing those days

have told, great pressures were put on voters who voted "no" in the referendum. The principle of open-ballot voting was applied instead of the secret-ballot voting principle. Even these stories reveal that the Turkish Nation was not very interested in the constitution being voted and that the 1982 Constitution was established despite the Turkish Nation's will. Today, the Turkish Nation, which was under pressure from the coup plotters those days, rejects the 1982 Constitution in power, claiming that it did not have public's real approval.

The 1982 Constitution could be claimed to have emphasized human rights. However, both the constitution and practices seem to have excluded some social groups in the society. This is probably due to some concepts contained in the 1982 Constitution and the spirit of the Constitution. In particular, it does not meet the needs of the Turkish community with an intense Islamic faith. The phenomenon, which is called "nation" does not emerge all of a sudden and randomly. It has its own culture. Along with a cultural language, it also consists of the beliefs, and customs of society. The culture, customs and traditions of the Turkish Nation have been integrated with the Islamic faith. Although there have been some attempts in various forms to change the lifestyle of Turks with the decisions taken in some periods, the Islamic faith is still widespread and intense among Turks. This belief system, which exists in all areas of life, is still dominating the Muslim Turkish society. Therefore, the Muslim Turkish community has been demanding a constitution which will allow them to live as they believe comfortably. Some other demands have also been coming from other groups in the society. Although such demands have been tried to be met in the last twenty years, they cannot be met adequately and effectively due to the fundamental deficiencies in the constitutional context.

As the 1982 Constitution is a coup constitution, it does not fit the changing conditions and context of Türkiye, and it violates many human rights and freedoms. Although it seems, in forms, to respect human rights, the Turkish Nation has been demanding a new and civilian constitution. Even if this demand is not directly visible, it is reflected in the behaviour of the Turkish Nation. For this reason, the construction of a new and civil constitution which takes into account the history, language, religion, culture, and customs of Turkish society with an intense Islamic faith is an inevitable fact for the State of the Republic of Türkiye.

This study provides suggestions and highlights the need for a new and civil constitution. This study aims to prevent arbitrary or incomplete practices of prosecutors and judges in the investigation phase with a new and civilian constitution in the country and to provide constitutional guarantees for the impartial and independent conduct of the investigation phase. Suggestions are provided in this direction. The method of the study consists of evaluating an effective and full investigation in the context of human rights and submitting relevant recommendations

accordingly. A detailed explanation of the methodology is provided below.

The introduction section of the study highlights why a new constitution is needed in Türkiye. The reasons why a new and civil constitution is needed in the country are that the 1982 Constitution is the coup constitution, it does not meet the changing needs of Türkiye; although it seems to respect human rights in form, it leads to the violations of human rights and freedoms.

The development section of the study examined the concept of investigation. After briefly mentioning the role of prosecutors and judges in investigations, the ethical principles that prosecutors and judges should consider before the investigation, during the investigation period and at the end of the investigation were discussed, providing examples based on the allegations put forward. These principles are to ensure justice, protect and implement human rights, and fulfil duty in a professional, impartial and independent manner. These principles also affect the investigation phase and the behaviour of prosecutors and judges at this phase. After reviewing the principles together with the relevant examples, suggestions were provided in the context of international conventions, decisions and ethical principles for prosecutors and judges to ensure justice during the investigation phase. After the recommendations, an effective and full investigation was examined together with the case laws of the European Court of Human Rights considering the accessed decisions. The purpose of this examination is to identify the case law that prosecutors and judges should consider during the investigation phase. Thus, it is aimed to prevent human rights violations during the investigation phase. Among the case laws that could be identified are; the predictability by law, investigations not taking long, everyone's participation in the investigation phase, the investigation's completion in full, the operation of the compensation institution effectively, the desire not to punish, the ability to take action ex officio, knowing that the purpose is important, not the result, explaining all the facts in the investigation document, taking all measures related to the right to life, and the prosecutor's hesitation for the investigation in suspicious cases.

The conclusion section of the study provides suggestions regarding a new and civil constitution with the data obtained from the development section of the study. Among the recommendations are the principles regarding the independence of courts, the guarantee of judgeship and prosecution, judicial accountability, the profession of judge and prosecutor, and rules for crimes and punishments. These suggestions also aim to ensure the impartiality and independence of prosecutors and judges during the investigation phase. Thus, prosecutors and judges can secure justice, which is the primary goal of the law, by staying away from both external and internal influences during the investigation phase.

THE CONCEPT OF INVESTIGATION

The criminal procedure process begins with the charge of a crime.[1] The prosecutor, who has received a crime charge, conducts a preliminary investigation. In other words, the prosecution is reported by the prosecution authority. However, when a secondary dispute arises that requires arrest during the investigation phase, the judges intervene in the investigation phase.[2] At the end of the examination, the prosecutor may decide for non-prosecution, or it may file an indictment. However, the prosecutor must comply with certain norms to make such decisions. These norms are regulated by the criminal procedure laws.

It may not be enough to simply apply the criminal court laws to a crime charge because criminal procedure consists of a process. There may be some shortcomings in this process. The main purpose of the investigation is to reach the material truth.[3] On the one hand, the material truth must be brought out so that the victim can be convinced and not feel victimized anymore; on the other hand, the suspect can be convinced in a positive or negative sense and prevent further unnecessary prosecution. Material truth cannot be reached only by applying the criminal procedure laws to the crime charge. This process should be considered together with human rights. For this reason, judicial authorities have great responsibility for this issue. Prosecutors and judges should fulfil these assigned duties during the investigation phase according to some law principles. These principles are to ensure justice, protect and implement human rights, and fulfil duty in a professional, impartial and independent manner.[4] Thus, we consider that the obligation of an effective and full investigation can be fulfilled duly.

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[1] Veli Özer Özbek, *Yeni Ceza Muhakemesi Kanununun Anlamı* [Meaning of the New Code of Criminal Procedure], Ankara, Seçkin Yayınevi, 2005, p. 680.

[2] Nur Centel and Hamide Zafer, *Ceza Muhakemesi Hukuku* [Criminal Procedure Law], İstanbul, Beta Basım Yayın, 2012, p. 75.

[3] Burak Bilge, *AİHM İçtihatları Bağlamında Etkin Soruşturma Yükümlülüğü* [The Obligation of Effective Investigation in the Context of ECHR Jurisprudence], in "İnönü Üniversitesi Hukuk Fakültesi Dergisi", 2014, Vol. 5, no. 2, p. 374.

[4] Türkiye İnsan Hakları Vakfı, *İşkence ve Diğer Zalimane, İnsanlık Dışı veya Aşağılayıcı Muamele veya Cezaların Etkili Biçimde Soruşturulması ve Belgelendirilmesi İçin El Klavuzu* [Istanbul Protocol: Manual for the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], Ankara, Türkiye İnsan Hakları Vakfı Yayınları, 2023, p. 28.

PRINCIPLES THAT AFFECT AN EFFECTIVE AND FULL INVESTIGATION

The primary task of prosecutors and judges upon complaint, processed upon either ex officio or a complaint, is to ensure justice. Prosecutors and judges educated in the faculty of law have learned from the course "Philosophy of Law" they have taken that the ultimate purpose of the law is to ensure justice.[5] Prosecutors and judges should fulfil this ultimate goal once they start their profession because this strengthens people's trust in the state and the government. Trust in the state can be ensured by the fact that the victim gets legal security and the suspect is prosecuted through a convincing investigation. Of course, justice is the most important issue that should also be considered in the prosecution process. However, this is not the focus of this study. The reason for the trust in the government is that the body that appoints prosecutors and judges serving in judicial authorities and prosecutors and judges serving in higher judicial bodies is the executive organ. Although there is an independent board that can supervise prosecutors and judges, the fact that the Ministry of Justice, which is administratively a branch of the government, conducts administrative affairs reveals the connection of judicial authorities with the executive body.

This tie is of a more advanced dimension in Türkiye because the Minister of Justice in Türkiye is the chairman of the independent council, that is, the Council of Judges and Prosecutors.[6] The Deputy Minister of Justice is a natural member of the Council of Judges and Prosecutors.[7] For these reasons, when people feel a sense of injustice, the government has to bear the cost and then the state. As a result, a government reshuffle may happen in the country. If the injustices continue, people may start questioning the order or regime of the state and attempt to rebel. This can also prepare the ground for military coups. On the other hand, there may also be some illusions in these reasons. The state legal entity refers to an abstract concept. All those who make up the state, the state organization, and the government are people. However, the mechanism has an abstract nature. The reality of the state's legal personality, such as the fact that a person is a prosecutor or a judge, cannot be mentioned. Similarly, no one can be claimed to be the state. For this reason, even if there is injustice, attempts to rebel against the state are unfair to the people of that state. Because the decision-makers in the judiciary are prosecutors and judges. However,

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[5] Ahmet Gürbüz, *Hukuk Felsefesi Açısından Yararcılık Teorisinin Eleştirisi* [Critique of Utilitarianism Theory in Terms of Legal Philosophy], İstanbul, Beta Basım Yayın, 1999, p. 189.

[6] See https://www.hsk.gov.tr/.

[7] Mustafa Erdoğan, *Anayasa Hukuku* [Constitutional Law], Ankara, Orion Yayınları, 2011, p. 305.

the governments do not want any injustice against the people they govern by prosecutors judges and members of the supreme judicial branch that they appoint. Putting the other facts aside, since the regime of today's states is usually a republic, governments want judicial authorities to act fairly and ensure justice even just to come to power again through the following elections. For this reason, governments try to appoint capable people. What has been meant by all those mentioned above so far is that it is not the state or government with an abstract nature that causes injustices in a judicial process. It is not the people who are in these positions because of their most important interests. Those who cause injustice are the ones who apply the law.

Preliminary investigation, investigation and arrest decisions of law enforcement officers, prosecutors or judges acting on a complaint ex officio or in crimes related to the complaint may cause injustice in procedure or principle violating human rights. It should be noted here that applying the law and applying the law in the context of human rights is different.[8] For example, according to the criminal law of a state, it may be a crime to make propaganda for a terrorist organization. In such a case, the only thing that could be done is to detain, arrest and prepare an indictment for the prosecution of those making terrorism propaganda. However, if the constitution of this state highlights human rights or respects human rights in its constitution, the way how judicial authorities behave should change accordingly. A state based on human rights in its constitution considers human beings as a basic value and its primary purpose is to protect human beings. Being a state respecting human rights, on the other hand, changes the basic value of the state.[9] In this sense, a state respecting human rights should be regulated in a new and civilian constitution because the Turkish states have also adopted the understanding that "let the people in the state live under fair conditions and then the state will also do the same.

The judicial authorities of the states where human rights are favoured in their constitutions and those in these authorities should decide whether the propaganda is terrorist propaganda in the context of human rights. If propaganda is carried out together with violence or encourages violence among people, the judicial authorities must detain, arrest and prepare an indictment for prosecution. If propaganda is not carried out together with violence or does not encourage violence, it is considered within the scope of freedom of expression in the context of

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[8] Yılmaz Dönmez, Yargı Bağımsızlığının Yapısal Temellerini İncelemek [Examining the Structural Foundations of Judicial Independence], in "Special Issue of Yeni Türkiye Dergisi Yargı Reformu", 2013, Vol. 1, no. 52, p. 299.

[9] Erdal Merdol, *İnsan Hakları Hukuku mu? İnsan Haklarına Dayalı Hukuk mu?* [Human Rights Law or Law Based on Human Rights?], in "Ord. Prof. Dr. Sulhi Dönmezer Armağanı", Ankara, Atatürk Araştırma Merkezi Başkanlığı Yayınları, 2008, p. 1043.

human rights. There are many decisions of the European Court of Human Rights and the Constitutional Court of the State of the Republic of Türkiye on this issue.[10] The only difference between criminal procedure and human rights violation is to highlight human rights and freedoms in the procedure and principle. In this case, prosecutors and judges should apply these laws in the context of human rights, rather than just applying criminal and criminal procedure laws when performing their duties. For example, heavy penal judges in Türkiye should not consider only the Turkish Criminal Code, the Anti-Terror Law and the Code of Criminal Procedure in terrorism-related trials should also be considered.

When applying these laws to cases, the European Convention on Human Rights, the decisions of the European Court of Human Rights, the latest regulations on human rights in the Constitution of the State of the Republic of Türkiye and the decisions of the Constitutional Court of the State of the Republic of Türkiye should be considered. Personal opinions that may contribute to the realization of human rights should be reflected in the investigation and prosecution phases. Only with such an investigation and prosecution, the victim, the suspect and, most importantly, the community could be convinced that justice prevailed. In a case where human rights are not considered, the victim and/or suspect will consider the trial unfair due to procedure and principle-related deficiencies. Therefore, the fact that prosecutors and judges who are judging the lives of people act only in compliance with laws and consuetude as if they were filling out a printed document, will lead to violations of human rights in terms of procedure and principle.

Law enforcement officials, prosecutors or judges should be away from all external and internal factors, especially the executive organ, before taking action on a complaint ex officio or for crimes upon a complaint.[11] The ability of prosecutors and judges to act independently of external factors is closely related to the guarantee granted to them when performing their duty. However, these guarantees should not be of a nature to sweep the arbitrary behaviour of prosecutors and judges under the rug. Guarantees should be in the context of the principle of judicial accountability.[12] The independence of prosecutors and judges from external factors is judicial independence. Prosecutors and judges should not be subjected

[10]European Court of Human Rights [ECtHR] 28 October 1994, No. 14310/88, *Murray* v *The United Kingdom*. Anayasa Mahkemesi [Turkish Constitution] 08.01.2020, No. 2015/15566, *Esma Seydaoğlu*.

[11]Fatih Ozkul, *Anayasalarımızda Yargının Bağımsızlığı ve Tarafsızlığı* [Independence and Impartiality of the Judiciary in Our Constitutions], in "Ankara Barosu Dergisi", 2016, no. 3, p. 203.

[12]International Commission of Jurists, *Judicial Accountability A Practitioners' Guide*, Switzerland, International Commission of Jurists Publishing, 2016, p. 1-170.

to direct or indirect restrictions, influence, encouragement, pressure, threats and intervention of persons and/or institutions.[13] This is primarily the duty of the whole society because the judicial authorities give their verdict on behalf of the nation. Then the legislature should make regulations to help prosecutors and judges make decisions by staying away from external factors. The regulations of the legislative body should also cover independent boards to be established for prosecutors and judges. There should also be an independent board that will carry out the administrative affairs of prosecutors and judges. The administrative procedures of prosecutors and judges should be conducted independently from the executive organ. Such regulations should be primarily included in the constitutions. In this way, prosecutors and judges who stay away from external factors can give a fair verdict when applying the law by considering human rights. Thus, the victim and/or the suspect may be convinced that a fair trial has been held. Internal factors, on the other hand, are related to prosecutors' and judges' inner worlds.

Prosecutors and judges should be independent of external factors as well as neutral from internal factors. The problem of relative neutrality could be achieved when a concrete phenomenon matters. For example, if the prosecutor's fiancée complains about anyone, the prosecutor may be demanded to recuse. The same applies to the judge. The real problem starts after the prosecutor recuses and the recuse is accepted. In such cases, the other prosecutor taking the case may want to help his colleague's fiancée. Therefore, unnecessary arrests, detentions and arrests may be made. To ensure objectivity in such cases, prosecutors and judges must behave professionally during the trial phase. The law should help prosecutors and judges in this regard.

The other dimension of neutrality consists of arbitrary practices. Here, arbitrary applications could be divided into two parts. The first is arbitrary practices in investigations. The second is arbitrary practices in normal life. The subject of arbitrary practices is not someone outside the judicial authorities. The subjects of arbitrary practices are the prosecutors and judges themselves.

Arbitrary practices in investigations are practices that arise when prosecutors conduct investigations. Arbitrary practices include long-lasting investigation, gaps in the investigation, inability of the victim or suspect to participate in the investigation, lack of independence of the investigation, unwillingness to punish, desire to settle the investigation, leading the victim only to compensation penalty as a result of unwillingness to punish, lack of effective investigation due to state's policy

[13] İnanç İşten, *Yargının Bağımsızlığı ve Tarafsızlığı* [Independence and Impartiality of the Judiciary], in "Gaziantep University Journal of Social Sciences", 2014, Vol. 13, no. 2, p. 285.

adopted. Excuses can be found for arbitrary practices. It can even be argued that it is not arbitrary. For example, even if suspicion and concrete evidence exist, the prosecution of the suspect can be prevented by keeping the interpretation broad. However, if an investigation in which there is suspicion and concrete evidence is obtained is carried out by incorporating human rights, such arbitrariness may not happen. Therefore, considering this example, an indictment should be issued for the suspect. Thus, the victim's confidence in justice increases. Otherwise, the victim's trust in justice is lost.

The other aspect of arbitrary practices is the practices of prosecutors and judges in daily life. When the agencies of the State of the Republic of Türkiye are considered, this is seen. The detention of a doctor as he did not give priority to the prosecutor and the fact that the prosecutor detained a person only because of football-related tension could be given as a good example of this. Such behaviours of prosecutors in the daily course of life highlight the arbitrary practices. In cases of such arbitrary detention, the prosecutor abuses the authority granted by the legislative body. Judicial law enforcement is also used as an instrument in this situation. In such cases, prosecutors who issue an indictment due to their selfish feelings without considering human rights, that is, without subjecting the case to a narrow interpretation, should also be tried for the crime of fabricating a crime for personal reasons. In an administrative sense, he should be expelled from the profession. Moreover, to prove what is written in the indictment, a camera with an audio recording feature should be ready wherever the suspect is faced with law enforcement or judicial authorities. Our previous consideration was that the suspect should be asked if he demanded a camera recording, and this should also be video-recorded.[14] However, after the alleged incidents that have been reflected in the media recently, our belief in this study has changed in a way to claim that a camera with an audio recording feature is recording wherever the suspect is. In addition, sometimes prosecutors communicate with the judicial law enforcement department via mobile phone when transactions related to suspects are in progress.

He also briefs through this channel. Then the instructions are written to the minutes. The suspect has no involvement at this point. Accordingly, this cannot prove that the arrest and detention of suspect procedures are arbitrary. The actions of the prosecutor and the police against the suspect are within the scope of

[14] Burak Kaya, *İnsan Haklarının Korunması Bağlamında Avrupa Konseyi Terörizmin Önlenmesi Sözleşmesinin Değerlendirilmesi* [Evaluation of the Council of Europe Convention on the Prevention of Terrorism in the Context of the Protection of Human Rights], PhD Thesis, Dicle University, 2022.

public order. For this reason, measures should be taken either to prevent the abuse of cases that are not convenient for a delay or conversations between the police and the prosecutor over the mobile phone should be recorded and used as evidence in transactions that aim to ensure public order. This should not be considered against the law. In this context, amendments should be made to the Constitution of the State of the Republic of Türkiye and the Criminal Procedure Law No. 5271 because it provides very important evidence in proving arbitrary practices. On the other hand, keeping a camera with an audio recording feature ready may not serve the purpose.

Let's suppose that the suspect filed a complaint with the police and the prosecutor. The prosecutor conducting the investigation may not collect the camera recording evidence or may not guard the evidence by prolonging the investigation. Thus, there is a failure of evidence. Thus, a decision of non-prosecution is made about the police and the prosecutor. This is another injustice that a prosecutor is involved in to protect one of his colleagues. However, the primary reason for people to file complaints is to see justice ensured. Prosecutors who are quick in starting an investigation that concerns their benefit, conduct a detailed examination and prepare an indictment should do the same in every case. For justice to be ensured, prosecutors and judges must put their concerns aside and make their decisions in the context of human rights and legal norms.

For justice, which is the ultimate purpose of the law, to be ensured, prosecutors and judges should stick to the above principles during the investigation phase. Sanctions should be applied to prosecutors and judges who act against these principles. These sanctions should have two aspects, administrative and judicial. By the principle of legality in crime and punishment, these sanctions should have a legal ground. These regulations should not be vague and broadly interpretable. It should be clear, understandable, precise and predictable in the context of the principle of predictability in law. Such sanctions should be regulated in the new constitution and laws of the State of the Republic of Türkiye. The State of the Republic of Türkiye, which strives to protect human rights, especially integrating into the international political and legal system, should make such regulations in its new constitution and laws, considering and referring to international rules.

In this context, new regulations could be made considering the European Convention on Human Rights, the International Covenant on Civil and Political Rights, Human Rights Council Resolution 35/12, the Bangalore Principles of Judicial Conduct of 2007, the Principles on the Role of Prosecutors adopted by the United Nations in 1990, the Bologna and Milan Global Rules of Judicial Ethics of 2015, the Guide to Judicial Accountability of the International Commission of Jurists of 2016,

the Standards of Professional Responsibility of Prosecutors of 1999, as well as the Declaration of Basic Duties and Rights of Prosecutors of 1999, the International Association of Prosecutors, The Status and Role of Prosecutors prepared by the United Nations in 2014: The United Nations Office on Drugs and Crime and the International Association of Prosecutors Guidelines, the International Code of Conduct for Lawyers prepared by the International Bar Association in 2011, the Model Judicial Code of Conduct prepared by the American Bar Association in 2020, the European Principles of Ethics and Conduct of Prosecutors adopted by the Council of Europe in 2005, the General Comment No. 32 of the Human Rights Committee of 2007, the Principles of the International Commission of Jurists 2017 on the Role of Judges and Lawyers in Relation to Refugees and Migrants.[15]

Nevertheless, prosecutors and judges who do not comply with the regulations made for the investigation phase should be punished in proportion to their breach of duty. For example, it is not only unfair, but treason to impose relocation penalties on the prosecutors and judges who created a bribery exchange and participated in this exchange with members of a terrorist organization who tried to overthrow the government and the state because the same prosecutors or judges may continue to engage in such illegal activities in their new place of duty. In addition, freeing members of a terrorist organization who committed crimes against the government, the state and the nation from prison to earn money is equal to supporting that terrorist organization. When considered in the context of human rights, it is obvious that such acts have reached a certain intensity. In our opinion, such prosecutors and judges should be given a dismissal penalty, not a relocation penalty. Any prosecutor or judge who causes someone to be detained for four years without any concrete evidence should also be dismissed from the profession. Such suggestions may seem to be too heavy penalties.

People want to use the methods of punishment used in the early ages against judicial decisions that affect people's lives most. This cannot be interpreted as that the prosecutor who requested an arrest and the judge who issued the arrest warrant should be detained for four years considering that the innocent was unnecessarily detained for four years without any concrete evidence. Because the modern legal system does not work in that way. Instead, prosecutors and judges should be dismissed from the profession. The right of recourse should be brought against such acts that have not reached a certain intensity. Compensation should be paid to the persons whose rights have been violated and this compensation should be

[15] Türkiye İnsan Hakları Vakfı, *supra* n. 4, p. 28.

recoursed to prosecutors and judges violating the rights. This should also be applied in violation and following compensation decisions issued by an international court. Thus, arbitrary or negligent behaviour of prosecutors and judges can be prevented. If there is such judicial accountability, prosecutors and judges will now decide more carefully at every phase of the trial or at every step they will take in normal life, and they will not abuse the authority given to them violating the nation's rights. These are the proposals presented especially for the State of the Republic of Türkiye. In our opinion, reaching material truth and justice can also be ensured following the recommendations above.

EVALUATION OF AN EFFECTIVE AND FULL INVESTIGATION IN CONSIDERATION OF HUMAN RIGHTS

An effective and full investigation must be conducted to identify and punish.[16] For an investigation to be effective and full, the European Court of Human Rights has set some criteria through its case laws. According to the European Court of Human Rights, states have obligations such as ensuring justice, being a deterrent to violations of human rights and freedoms, avoiding being a partner in criminal acts, ensuring people's trust in the rule of law and judicial jurisdiction, and combating authorities' desire not to punish.[17] The European Court of Human Rights's criteria may not be sufficient. Even some decisions of the European Court of Human Rights could be criticized in this regard. However, we believe that it is one of the few courts that can conduct a detailed examination in the context of human rights. For this reason, the criteria determined for some events and conditions will be examined respectively below.

The first criterion that should be considered in order for an investigation to be effective and full is the principle of predictability of law.[18] In order for an investigation to be conducted effectively and completely, there must first be a legal ground to ensure this. This ground is the principle of legality. Thus, if a prosecutor issues an arrest request during the investigation phase, the judge will have a legal basis to search. The legal basis should not only provide prosecutors and judges with instruments to be used in the investigation but also prevent arbitrary practices of those actively participating in the investigation process. Law enforcement officials, prosecutors and judges

[16] ECtHR 17 July 2008, No. 28433/02, *Çamdereli* v *Turkey*.

[17] ECtHR 13 December 2012, No. 39630/09, *El Masri* v *The Former Yugoslav Republic of Macedonia*.

[18] ECtHR 11 July 2017, No. 19867/12, *Moreira Ferreira* v *Portugal*.

are not only the parties involved in the investigation phase. The victim and the suspect are also involved in the investigation phase. Therefore, the legal basis should be precise, clear, understandable and predictable.[19]

The second criterion that prosecutors should consider in order for an investigation to be effective and full is that investigations do not take long.[20] Investigations should be carried out quickly and in-depth. However, decisions that are not based on a legal foundation should not be made to keep the investigation short.[21] In other words, the investigation should be carried out within a reasonable period. However, reasonable duration and long duration are different things. Sometimes it may be considered reasonable for the investigation to take a long time to uncover the material truth. Sometimes, although the case is very simple, the investigation may take a long time exceeding the reasonable time. The concept of duration here is determined by the simplicity, and intricacy of the case and the number of people involved in the case. Sometimes the attitude of the prosecutor can also be a determinant factor. New investigations may take a longer time for several reasons. The first may be to ensure that the images obtained from devices that record for a certain period, such as video recordings, are deleted automatically depending on the storage capacity of the recorder and the prosecutors' being slow in taking action as s/he avoids punishment could help this.

Thus, a non-prosecution decision may be made due to a lack of evidence. The second may be due to the intricate structure of the case. For example, the FETO terrorist organization, which is a parallel state structure, is a secretly organized terrorist organization and has infiltrated all the institutions of the State of the Republic of Türkiye. Many things about this terrorist organization need to be solved and made clear. Therefore, the investigation process may take a long time. However, the investigation duration should be considered reasonable.[22] More than one person might have been involved in the case. Therefore, The indictment should be prepared and filed after the ties between these people and the case are examined in detail. For example, tens of thousands of events occurred at once during the FETO terrorist organization's coup attempt. These events can't be resolved in a short time. Therefore,

[19] ECtHR 20 December 2016, No. 58630/11, *Ljaskas* v *Croatia*.

[20] ECtHR 17 September 2014, Nos. 10865/09, 45886/07 and 32431/08, *Mocanu and Others* v *Romania*.

[21] ECtHR 3 June 2004, Nos. 33097/96 and 57834/00, *Bati and Others* v *Turkey*.

[22] Anayasa Mahkemesi [Turkish Constitution] 20.06.2017, No. 2016/22169, *Aydın Yavuz ve Diğerleri*.

long-term investigations should be considered reasonable for such cases considering their nature.[23] However, the investigation of incidents involving more than one person may not be considered reasonable for some reasons. On June 13 and 15, 1990, for example, the Romanian government tried to neutralize hundreds of protesters. Then, more than a thousand victims have filed complaints claiming some human rights violations. Although not as many as the number of people involved in the cases and incidents in the FETO uprising, more than a thousand victims could be considered many and it should not be underestimated.

The case took place in 1990, law enforcement agencies handed over the files to the military prosecutor in 1997, the second applicant applied to the military prosecutor in 2001, a decision of non-prosecution on the complaint was made in 2009, and the Supreme Court upheld this decision in 2011. In this case, the investigation was filed twenty-three years after the complaint of the first applicant to the judicial authorities in Romania, and the investigation of the second applicant was completed twenty-one years later. The decision of non-prosecution of the second applicant was upheld ten years later. According to the European Court of Human Rights, this does not justify such a long period, even for political or other reasons. Moreover, the fact that the completion of investigations takes so long is equal to tolerating or contributing to such arbitrariness (illegality) of the actions of law enforcement officials who act illegally and prosecutors who extend the investigation process. The court, therefore, has decided on the violation in terms of procedure.[24] In the Gordiyenko v. Russia case, the European Court of Human Rights stated that the prosecutor conducted the investigation impartially and independently, listened to all witnesses, revealed contradictions in witnesses' statements, collected evidence regarding all alleged allegations, evaluated evidence in line with Russia's domestic law, so the investigation lasted one year and 10 months.

The European Court of Human Rights decided that the investigation period was reasonable because an effective and full investigation was carried out considering the events and circumstances. Therefore, It did not make a violation decision in terms of procedure.[25] In the Agdas v Turkey case, the prosecutor issued the indictment on 03.04.1997 and the return of a verdict of not guilty of the Court of Cassation was upheld on 01.07.2002. In other words, the completion of the case took five years. One of the defendants who were called to testify did this four

[23] Anayasa Mahkemesi [Turkish Constitution] 04.11.2020, No. 2018/30756, *K.D*.

[24] ECtHR 17 September 2014, Nos. 10865/09, 45886/07 and 32431/08, *Mocanu and Others* v *Romania*.

[25] ECtHR 6 March 2014, No. 21462/06, *Gordiyenko v Russia*.

months later and the others a year later. Only one of the policemen who collected the empty casings testified about two years after the incident, about a year after the court summons. The court demanded to see the empty casings. The court could see the empty casings three and a half years after the incident took place and fifteen months after its claim. As these deficiencies caused by the prosecutor in the preliminary investigation could not be corrected by the court, the European Court of Human Rights decided that it was a procedural violation.[26]

In order for an investigation to be effective and full, the third criterion that prosecutors should consider is that everyone can participate in the investigation phase.[27] In particular, the victim's participation in the investigation phase only by giving a statement is not enough on its own. The principle of effectiveness matters even at this point. For example, even though he was not arrested and detained, an academician was arrested by Ankara Chief Public Prosecutor's rogatory letter at the 100. Yıl Şehit Oğuzhan Duyar Police Station and he was shown to have been detained for sixteen days. When he demanded that his witnesses be heard in his statement, the police who took the statement stated that they had was too much, and refused to hear, which reveals that the victim could not participate effectively in the investigation. The fact that the police, not the prosecutor, took the statement also shows that the victim could not effectively participate in the investigation. As a matter of fact, in the case of Mocanu and Others v.Romania, the victim demanded to involve his relatives in the investigation, but he was not informed about this issue and the progress of the investigation. In addition, the prosecutor heard the victim only once. For these reasons, the European Court of Human Rights has decided on violation in terms of procedure.[28]

The fourth criterion that prosecutors consider in order for an investigation to be effective and full is that the investigation should be full. Prosecutors must be aware that, apart from individual or state-related political reasons, the incomplete investigation will fail to reveal the material truth. Such an investigation will mean a show investigation. This can greatly abuse the victim's or suspect's trust in justice. As stated in the decisions above, everything claimed by the victim or suspect must be investigated, if they seem to be worth considering and to have value for the prosecution, and all witnesses must be heard, and incoherences in the statements of the victim, suspect and witnesses must be revealed. The suspect and the victim should

[26] ECtHR 27 July 2004, No. 34592/97, *Agdas* v *Turkey*.

[27] ECtHR 17 December 2009, No. 32704/04, *Denis Vasilyev* v *Russia*.

[28] ECtHR 17 September 2014, Nos. 10865/09, 45886/07 and 32431/08, *Mocanu and Others* v *Romania*.

be informed about the progress of the investigation, thus opening the way to access new information and collection of all the evidence. Otherwise, the material truth will not be revealed. For example, three Sudanese and two Bulgarians fought in Bulgaria. The Bulgarian prosecutor did not conduct a full investigation. The allegations made by Sudanese people and whether it was a racist attack were not taken into consideration and ignored by the Bulgarian prosecutor. Even though Sudanese people stated that the dressing style of the people that they fought with was similar to those of racists and therefore they should be questioned, in spite of this claim, the Bulgarian prosecutor did not consider it. Then, the European Court of Human Rights decided on a violation in terms of procedure.[29]

The fifth criterion that prosecutors must consider in order for an investigation to be effective and full is the effective operation of the compensation institution. It must be stated here that compensation alone is not sufficient for reparation. Especially if the suspicion of a crime is strong, prosecutors should not directly choose a compensation penalty. In other words, such a compensation penalty will mean that there is no need for prosecution in criminal proceedings. On the contrary, what should be done is to file an indictment. This is related to the prosecutor's reluctance to punish. If there are issues in the case that should be considered for pecuniary and non-pecuniary damages, reparation should also be done through compensation penalty. During the investigation steg, prosecutors should avoid behaviour that would prevent compensation. The door to applying for compensation must be kept open and the amount of compensation to be paid must be sufficient. In summary, the compensation institution must be operated effectively.[30] Judges should not enact symbolic fines. For example, in the Gafgen v. Germany case, the European Court of Human Rights sentenced one of the alleged criminals to a judicial fine of sixty Euros per day for sixty days and the other alleged criminal to a judicial fine of one hundred and twenty Euros for ninety days. The European Court of Human Rights ruled for a violation due to both the ineffective operation of the compensation penalty and the symbolic fines.[31]

The sixth criterion that prosecutors must consider in order for an investigation to be effective and full is the punishment of the suspect when there is a strong suspicion of crime. In other words, prosecutors[32] should not have any reluctance

[29] ECtHR 11 March 2014, No. 26827/08, *Abdu* v *Bulgaria.*
[30] ECtHR 29 March 2006, No. 36813/97, *Scordino* v *Italy.*
[31] ECtHR 1 June 2010, No. 22978/05, *Gafgen* v *Germany.*
[32] ECtHR 15 October 2015, No. 16664/07, *Abakarova* v *Russia.*

to punish, for whatever reason and reparations should not be based on only compensation.[33] For these reasons, no decision of non-prosecution should be made. Prosecutors' reluctance to punish may be due to individual reasons or the inability of prosecutors to remain independent and impartial. Administrative and judicial sanctions should be applied in the context of the principle of judicial accountability to prosecutors failing to conduct an effective and full investigation based on individual reasons despite strong suspicion of a crime. Ensuring independence and impartiality, as stated above, can be achieved first by the demands of the nation and then by the regulations made by the legislative organ. In any case, in which an investigation is conducted in the context of human rights, the prosecutor must deliver a judgement staying away from internal or external factors. Otherwise, human rights are violated.

Apart from the criteria stated above, the prosecutor in charge should be able to take action ex officio when conducting an investigation, should be aware that the purpose is important, not the result, should explain all the facts in the investigation file, should take all precautions regarding the right to live and should recuse from the investigation if s/he is suspicious.[34]

CONCLUSIONS

During the investigation phase, prosecutors and judges have great responsibilities regarding individual investigations at two points. Prosecutors who conduct prosecution activities during the investigation phase and judges who resolve subsidiary disputes have individual responsibilities such as ensuring justice, protecting and implementing human rights, and fulfilling their duties in a professional, impartial and independent manner. They are also responsible for ensuring that the investigation is conducted completely in compliance with human rights. The safest way to fulfil these responsibilities is to carry out the investigation phase in compliance with human rights. Justice can be achieved in this way while protecting human rights. Professionalism could be achieved by making unbiased decisions. The ability of prosecutors and judges to make independent decisions can be ensured by the regulations legislated by the legislative body regarding the tenure of judges and prosecutors.

In line with the explanations and examples stated above, the statement "a

[33] ECtHR 7 July 2011, No. 55721/07, *Skeini and Others* v *The United Kingdom.*

[34] ECtHR 6 March 2014, No. 21462/06, *Gordiyenko* v *Russia*. ECtHR 7 July 2011, No. 55721/07, *Skeini and Others* v *The United Kingdom.*

state prioritising human rights" should be included in the new and civilian constitution of Türkiye. Thus it can be made clear that the focus of the complaint is human not the legal technique adopted. Even though it is an act being complained about, all of the investigations are for people. Since a human rights-based prosecution will consider all allegations and counteraccusations of the victim and the suspect, a full investigation could be conducted. All evidence that will shed light on the case and affect the merits can be collected. Avoidance from punishment due to individual or state-related policies may be eliminated. Unnecessary prosecutions can be avoided. In order to achieve all these, title lines should be constituted in the new and civil constitution of Türkiye regarding the independence of the judiciary, tenure of a judge and prosecutor, judicial accountability, the principles of the profession of judge and prosecutor, and principles regarding criminal penalties.

In the section regarding the judiciary in the new and civilian constitution, no title line "*independence of the courts"* should be opened. The title line should be "*independence of the judiciary"*. In order for an effective and full investigation to be conducted under this title line, "prosecutors" must also be covered. For example, there may be a regulation in the new and civilian constitution of Türkiye such as:

*'**Prosecutors** and judges are independent in fulfilling their duties; They render judgement according to their conviction, in line with the Constitution and the law. No organ, authority or person can give orders or instructions to **prosecutors**, **judges and courts** in the exercise of their judicial power; cannot send circulars; cannot give advice or suggestions. No questions could be asked, no discussions could be held or any statements could be made regarding the exercise of judicial power in the Legislative Assembly regarding an ongoing **investigation** or case. Legislative and executive bodies and the administration must comply with the decisions of **prosecutors, judges** and courts; These bodies and the administration cannot change the **investigation** and court decisions in any way or delay their implementation.'*

Prosecutors can act independently with such a regulation. However, this is not enough on its own.

In addition to the independence of prosecutors and judges, new regulations also need to be made to the title line of the legal *guarantee of judge and prosecutor*. The statement "*judges and prosecutors cannot be dismissed"* should not be included in the new civilian constitution of Türkiye. Prosecutors and judges should be dismissed from their positions when necessary, based on objective criteria. Exceptions regarding this are regulated in the 1982 Constitution. However, these statements are vague.

The ambiguity regarding exceptional reasons should be resolved. The regu-

lation regarding the dismissal of prosecutors and judges should be expanded, together with objective criteria. A new title line should be opened regarding exceptions in the new and civilian constitution. The name of this title line should be *Judicial Accountability*. Under this title side, vague expressions such as "*exceptions in the law are reserved for those who have been convicted of a crime requiring dismissal from the profession or those who have been decided inappropriate to remain in the profession"* should not be included in the new constitution. Such statements affect the future of both the nation and the prosecutors and judges who deliver judgment on behalf of the nation. The objectivity criteria of the statements have not been made clear, which increases unpredictability. In this case, prosecutors and judges have not received a constitutional guarantee for their profession. Even if it is necessary to have such a statement, the statement "*crimes requiring dismissal from the profession are regulated by law"* should also be added to the constitution. Then such crimes should be listed one by one in the relevant law. The statement "*exceptions in the law are reserved for those who are deemed unsuitable to remain in the profession"* should not be included in the new and civilian constitution of Türkiye because it is not clear according to which objective criteria it is not suitable to stay in the profession. This is another unpredictability. It should always be remembered that such vague statements make prosecutors and judges dependent on someone. It is a kind of implicit threat in a constitutional context. If it is the purpose to have prosecutors and judges make fair decisions, prosecutors and judges must be free from any direct or indirect external influence, which is another form of dependence.

The following statement can be added to the title line of "*judicial accountability"* to be included in the new and civil constitution of Türkiye: *Judges and prosecutors could use their constitutional, legal and other powers only in activities conducted for the trial purpose. Judges and prosecutors have the same rights as citizens apart from judicial activities.* The statement "*Administrative and judicial sanctions are imposed on prosecutors and judges who use their constitutional powers outside of judicial activities and law enforcement officers who carry out their illegal orders" could be included in the constitution. The administrative and judicial sanctions to be applied in such cases are regulated by code*. Then administrative and judicial sanctions should be listed one by one in the relevant code. Unlawful practices of prosecutors and judges resulting from the abuse of their constitutional power can be prevented with such a regulation.

The following statement can be added to the title line of "*judicial accountability"* to be included in the new and civil constitution of Türkiye: *In case of a violation decision in national or international courts prosecuting human rights and*

freedoms, recourse is made to the prosecutors and judges who caused a compensation penalty as a result of hir/her violation. The rules and procedure of recourse are regulated by code. The impartiality of prosecutors and judges could be ensured by preventing human rights violations that may occur for any reason during the investigation and prosecution phases with this regulation.

The following statement could be added to the title line of "*judge and prosecutor profession"* to be included in the new civil constitution of Türkiye: *Prosecutors, judges or law enforcement officers must take statements accompanied by audio and video recording devices. Its principles and procedures are regulated by code.* Thus the rights of the suspect, accused or victim could be protected. If an unlawfulness occurs, the audio and video records can be used as a means of proof.

The following statement can be added to the title line of "*principles regarding crimes and punishments"* to be included in the new and civil constitution: *All means and methods used by prosecutors or judges in their instructions other than written instructions may be accepted as evidence provided that they are limited to investigation and prosecution* under the title of "*evidence obtained through violation of the law cannot be accepted as legal evidence.*" Thus, unlawful proceedings of independent or impartial prosecutors, judges and law enforcement officers who give orders could be revealed because the victim, suspect or accused cannot participate in these proceedings.

If the suggestions stated above could be cumulatively included in the new and civilian constitution, the independence and impartiality of prosecutors and judges could be objectively ensured. Arbitrary and inadequate practices of prosecutors or judges can be prevented. Prosecutors and judges who take immediate action on matters concerning themselves, interpreting the law broadly, could do the same for the entire nation. The quality of law may also increase with new case laws. Prosecutors, judges and the Council of Judges and Prosecutors, who protect prosecutors and judges from committing unlawful acts or actions with the motivation to defend colleagues or friends, may be prevented by these regulations. Thus, ideal justice can be ensured.

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