

The role of jurisdiction on persistence of torture in Turkey and public reflections

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Abstract

Torture still is a serious problem in Turkey. There has been a very effective struggle against torture, particularly for effective documentation by health professionals. The Istanbul Protocol has been taken into consideration by the ministry of health, and procedural safeguards with standardized medicolegal documentation had been a part of daily medicolegal practice. However, measures taken on the basis of effective documentation is not sufficient without effective investigation of which the role of jurisdiction is most prominent. Impunity is highly responsible for the persistence of torture, although procedural safeguards on medical examination and medicolegal documentation have had an influence for the decrease of the total number of cases. The Anatolia Agency had distributed information on the total number of punishments in 2007, which drew a more hopeful picture with 5,082 punishments among 33,000 law enforcement officials who had been taken to court. Nevertheless, a press conference held by the Human Rights Foundation of Turkey revealed that this information was not true. They revealed that the cases taken to the court were mostly because of ill treatment instead of torture, and a great majority of these officers had been acquit-

ted between the years 1989-2005. Administrative measures had also been highly insufficient, and among 922 personnel who had been under investigation, only 8 of them had had punishment. The Human Rights Association has had a research on impunity, and only 15% of law enforcement officials who had been taken to the court were ever convicted of their crimes, and all of these punishments had been suspended.

Research on cognitive behaviour of judges and prosecutors revealed that they think human rights might threaten the security of the state. This result only clarifies the cause of impunity, thus persistence of torture.

The Istanbul University Istanbul Faculty of Medicine, Department of Forensic Medicine, has an outpatient clinic in which torture survivors are examined, and alternative medicolegal documentation is carried out. These patients who were able to have a medicolegal document are observed to benefit from psychotherapy, thus impunity should not only be surmounted for the eradication of torture, but also the healing of the wounds of torture survivors.

Keywords: torture, impunity, medicolegal, documentation

Introduction

Torture is a worldwide public health problem, and impunity is one of the major reasons in the persistence of this widespread practice. The prohibition of torture is generally regarded as having the special status of a

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“peremptory norm” of international law, and states cannot choose to disregard or derogate from it. In addition to international law, many national laws will also include a prohibition of torture. However, even the lack of a clear prohibition in domestic law will not release the state from its international legal obligations to refrain from and prevent torture under all circumstances, and to investigate allegations, punish perpetrators, and provide reparation to victims.

Torture and ill treatment have long been criminal acts and quoted in two separate articles in The Criminal Code of the Republic of Turkey. A clear definition of torture which is similar to the definition in the Convention Against Torture (CAT) was included with the amendment of the criminal code in 2005; in addition a significant increase of punishment had also been ensured.^{1,2}

SECOND VOLUME

Special provisions

SECOND CHAPTER

Offenses against individuals

THIRD SECTION

Torture and torment

Torture

ARTICLE 94

(1) Any public officer who causes severe bodily or mental pain, or loss of conscious or ability to act, or dishonors a person, is sentenced to imprisonment *from three years to twelve years*.

(2) The punishment may not be reduced in case of commission of offense;

- a) Against a child who cannot protect himself due to corporal or spiritual disability,
- b) Against an attorney or another public officer by virtue of office, the offender is sentenced to imprisonment *from eight years to fifteen years*.

(3) In case of engagement in any act defined as *sexual harassment*, the offender is punished with imprisonment *from ten years to fifteen years*.

(4) Other persons who participate in commission of an offense are punished likewise the public officer.

(5) The punishment to be imposed may not be reduced even if the offense is committed by negligence.

Consequential severe torture

ARTICLE 95

(1) Punishment determined according to the above article is *increased by one half* if the offense results with;

- a) Weakening of sensual or bodily functions of the victim
- b) Continuous difficulty in speaking
- c) Distinct facial mark
- d) Risk of life
- e) Premature birth of a child.

(2) Punishment determined according to the above article is *increased by one fold* if the offense results with;

- a) Incurable illness or causes vegetative existence of the victim
- b) Loss of sensual or bodily functions
- c) Loss of ability to speak and to give birth to a child
- d) Distinct facial change
- e) Abortion, if the offense is committed against a pregnant woman.

(3) In cases where the torture causes *break of bones* in the body, the offender is sentenced to imprisonment *from eight years to fifteen years* according to affects of broken bone on vital functions.

(4) In case of *death of a person from torture*,

the offender is sentenced to *heavy life imprisonment*.²

Impunity is common practice in Turkey and torture has always been a serious problem, despite the fact that there has been, and still is, a domestic law. The failure to bring perpetrators of human rights violations to justice and, as such, a denial of the torture survivors' right to justice and redress, interferes with the well being of these patients.

The amended Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, submitted to the United Nations Commission on Human Rights on February 8, 2005, defines impunity as:³

“the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

The First Principle

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.”

Legislative measures necessary to ensure

protection of human rights and to safeguard democratic institutions and processes must be enacted. There are several reasons for impunity of law enforcement officials in such torture cases, and these need to be revealed and discussed in order to solve the problem. The main objective of this article is to define the situation and consequences of impunity, improvements achieved, and necessary further steps in Turkey.

Background

There has been a very effective struggle against torture in Turkey for many years, particularly for effective documentation by health professionals. A manual on effective investigation and documentation of torture, the Istanbul Protocol (IP), had been put on paper with great efforts from a wide circle of human rights activists, academics and scientists, particularly with active involvement from Turkey.²

The Turkish Medical Association (TMA) and Human Rights Foundation of Turkey (HRFT) have supported getting a second opinion for medicolegal examination of torture survivors, since an existing official institute of forensic medicine which is considered as the main source for medicolegal expertise to the courts could easily be considered as biased. Alternative reports for some of the well known torture cases have occasionally been considered and reflected in court decisions. However, the common practice for medicolegal evaluation of detainees had many inadequacies for years.

There was a limited number of forensic medicine specialists, and most of the cases had been examined by general practitioners who did not have any experience with medicolegal evaluation. Most of the faculties of medicine did not even have training courses on forensic medicine. The general practitioners were vulnerable to any kind of

intimidation due to inexperience, and lack of knowledge caused them to write inappropriate medicolegal reports. The TMA decided to organize postgraduate training courses for general practitioners, and implemented these trainings with close collaboration of the Society of Forensic Medicine Specialists (SFMS) from 1996 to 1998 in 11 different cities, while in the meantime a basic textbook of forensic medicine for general practitioners had also been published. The TMA, HRFT and SFMS had also organized postgraduate IP trainings for both medical and legal professionals.

The TMA had also strongly advocated for undergraduate forensic medicine training in the faculties of medicine, and all of them now have departments of forensic medicine with effective curricula, except for six faculties out of 21 in the early 1990's.

The IP has been promoted in Turkey by these three organizations, and the principles of the IP have been taken into consideration by the ministry of health after several workshops. Procedural safeguards with standardized medicolegal documentation had been a part of daily medicolegal practice. However, measures taken on the basis of effective documentation is not sufficient without effective investigation of which the role of jurisdiction is most prominent. Impunity is highly responsible for the persistence of torture, although procedural safeguards on medical examination and medicolegal documentation have had an influence for the decrease of the total number of cases.⁴

The Anatolia Agency had distributed information on the total numbers of punishments in 2007, which drew a more hopeful picture with 5,082 punishments among 33,000 law enforcement officials who had been taken to court from 1989 to 2007. Nevertheless, a press conference held by the Human Rights Foundation of Turkey

revealed that this information was not true. They revealed that the cases taken to the court were mostly because of ill treatment instead of torture regarding the criminal code before 2005, and a great majority of these officers had been acquitted between the years 1989-2005. The news of the Anatolia Agency was based on a file which is maintained through intensive efforts of HRFT in the parliament. However, giving a total sum without any explanation leads to misinterpretation of the results. The documentation of court decisions for torture and ill treatment cases did not exist from 1989 to 1993. The total number of cases taken to the court from 1989 to 2005 was 17,517, and the total sum of officers who had been sued was 33,281.⁵

Torture cases consisted of 20% of all cases, and the majority of cases could be defined as ill treatment cases by the public prosecutor. Since court decisions of the years 1989 to 1993 are not known, the only numbers that could be revealed are 12,215 court cases with a final decision from 1994 to 2005. Nevertheless, court decisions of the cases from 1994 to 2001 did not contain the number of officers who had undergone trials, but only the number of court cases of which 2,422 had been found guilty. The only data including the numbers of officers belongs to the years after 2002 with a number of 2,660 officers who had been convicted for torture or ill treatment.⁵

Although these court decisions seem to comprise convicted crimes, there are no law enforcement officials put into prison, or punished by any means. Nearly all of these punishments have been suspended because they were reported to be the first criminal act of the person, though some of them are well known to have had several court cases throughout many years.^{5,6}

Administrative measures had also been

highly insufficient, and among 922 personnel who had been under investigation, only eight of them have had punishment.⁵ The Human Rights Association (HRA) has also conducted research on impunity, and only 15% of law enforcement officials who had been taken to the court were ever convicted of their crimes, and all of these punishments had been suspended.⁶ Both HRFT and HRA data indicate a more than 80% rate of impunity.

Research on cognitive behaviour of judges and prosecutors revealed that more than two thirds of them consider human rights as a threat to the security of the state. They describe their position as a state officer, and emphasize their responsibility to protect the state rather than the community.⁷ This result sheds light on the cause of impunity, and the resulting situation of persistence of torture in spite of procedural safeguards and enhancement in medicolegal care services.

Conclusion

There are three cornerstones of evaluation for torture cases: Investigation, documentation and a fair trial. These three should be combined in order to struggle against impunity. Impunity has a significant influence on the persistence of torture, since this result indicates a state policy for torture, despite ratified international treaties, and the expression of "zero tolerance for torture". Besides, impunity not only should be surmounted for the eradication of torture, but also for healing the wounds of torture survivors.

The Istanbul University Istanbul Faculty of Medicine, Department of Forensic Medicine, has an outpatient clinic in which torture survivors and/or their lawyers can apply for a secondary opinion. They are either examined, or the documents are reviewed, and an alternative medicolegal documentation is carried out. These patients who were

able to have a medicolegal document regarding their findings are observed to benefit from psychotherapy more than some of the cases followed up by the department of psychiatry that had not been admitted for a medicolegal documentation, and did not have an appropriate medicolegal evaluation in the past. These results need to be considered in future studies. Nevertheless, this sole observation, although limited, is consistent with the studies on the role of impunity on rehabilitation and recovery of torture survivors.^{8,9}

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