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edited by Elettra Stradella

with the collaboration of Giovanna Spanò

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Effective Criminal Investigations in Combating Domestic Violence and the ECtHR: *Prima Ratio* v. *Ultima Ratio*?

Rahime Erbaş*

1. Introduction

According to data of the *World Health Organization* (WHO), nearly 30 per cent of women worldwide have experienced physical and/or sexual violence by an intimate partner in their lifetime[1] and the perpetrators of murder of women in a number between 38-50 per cent are women's intimate partners. Moreover, the majority (55-95 per cent) of women survivors of violence do not disclose or seek any type of services[2]. As an example, in Turkey, 44 per cent of women victims of physical or sexual violence by their husbands or intimate partners reported that they did not told anyone about

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[1] World Health Organization, *RESPECT Women: Preventing Violence against Women* (Geneva, 2019) ((WHO/RHR/18.19) Licence: CC BY-MC-SA 3.0 IGO), *https://apps.who.int/iris/bitstream/handle/10665/312261/WHO-RHR-18.19-eng.pdf?ua=1*, 4 (accessed: 16.08.2020).

[2] *Ibid.*, 5.

that violence[3]. And a study from Turkey shows that even if having high income or education does not prevent violence against women, the rates of violence against those with low level of income and of education are higher[4]. These facts affirm the importance of *an effective criminal investigation* and respectively *the vulnerability of women victims* in criminal procedure.

The ECtHR has paved a unique way throughout Europe and even throughout Europe on the protection of victims, in particular, the women victims of domestic or partner violence. As such, the case of *Opuz v. Turkey* symbolizes the long pathway of the Court on the protection of domestic violence victims. It was referred to as *Europe's Landmark Judgment on Violence against Women*[5]. Indeed, this appears as an emergence of the ECtHR's unique conceptualization of *positive procedural obligation of the State* in terms of domestic violence cases. This study considers the ECtHR's this conceptualization as a core proposition for conducting an effective criminal investigation in combating domestic violence. Contrary to traditional approach, this time human rights forces criminal law to take an (effective) action. That is to say, this is the very point where criminal law comes in as *prima ratio*, although *the ultima ratio* character of criminal law has been prominently emphasized due to the concerns on the overuse of criminal law. Indeed, where the tools of criminal law is necessary, underuse of criminal law that leads to impunity – is equally problematic with the overuse.

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[3] Hacettepe University, *Domestic Violence against Women in Turkey: Summary Report* (Ankara, December 2014), available at: *http://www.hips.hacettepe.edu.tr/ING_SUMMARY_REPORT_VAW_2014.pdf*, 24 (accessed: 12.06.2020.

[4] Tetikcok R. *et al.*, *Violence Towards Women is a Public Health Problem*, in *Journal of Forensic and Legal Medicine*, 2016, 44, 150-151, available at: *https://doi.org/10.1016/j.jflm.2016.10.009* (accessed: 16.08.2020).

[5] Abdel-Monem T., *Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women*, in *Human Rights Brief*, 2009, 17, 1 29-33, available at: *https://digitalcommons.wcl.american.edu* (accessed: 10.01.2020).

There is no general definition of what is an effective or ineffective criminal investigation as settled by the case-law of the ECtHR. Rather, the ECtHR, on a case by case basis, establishes whether investigation in a concrete case is effective or not. The facts on which the Court dealt with the effective investigation vary to a greater extent, such as the use of force by agents of the state, sexual assault cases, torture and inhuman or degrading treatment, vulnerable victims or domestic violence[6].

Domestic violence cases have their challenging features that that bring out some obstacles for carrying out an effective investigation such as victim's vulnerability, requiring a prompt response and taking reasonable and appropriate measures for protection of women victim and difficulties on obtaining evidence and the like. The ECtHR does not define what is an effective investigation for these cases, rather it reflects on the matter in each concrete case. It is purposeful to list these features with an hypothetical presumption aiming to change a country's system that fails to provide an effective criminal investigation in domestic violence cases by applying the reflections of the Court on the matter. However, this study confines itself by focusing on some of these features that of which arising in the realm of state responsibility and prevent *the prima ratio* application of criminal law for these cases. The study lists them under the title "Some challenges to an effective criminal investigation for victims of domestic violence" as (A) not creating a judicial system that is an independent from societies' misconceptions, (B) not qualifying violent acts as applicable in judiciary, (C) not forming labor division dedicated to domestic violence in prosecutorial system and (D) not taking into account victim's vulnerability (insisting in pursuance of complaint by victim).

[6] Mowbray A., *The Creativity of the European Court of Human Rights*, in *Human Rights Law Review*, 2005, 5, 1, 78.

2. Towards victim-focused approach in the case-law of the ECtHR

In 2009, in the landmark case *Opuz v. Turkey* it is mentioned that «in the context of domestic violence, victims were often intimidated or threatened into either not reporting the crime or withdrawing complaints. However, the responsibility to ensure accountability and guard against impunity lay with the State, not with the victim»[7].

For the first time, in 1985, in the case of *X and Y v. the Netherlands*, the ECtHR stated that the prosecutor's decision to not prosecute a sexual assault is a violation of right to privacy, stipulated in Art. 8 of the Convention. This judgment led to some diverging stances among scholars[8]. Why the failure to prosecute sexual assault constitutes a violation of the right to privacy is lacking legal theory to Prof. George P. Fletcher[9], whereas this should be welcomed as the Court's creativity to Mowbray[10]. Furthermore, the former Judge of the ECtHR, Françoise Tulkens, considers the case of *X and Y v. the Netherlands* as a leading judgment in the creation of the concept of *positive (procedural) obligation* of the state to secure the rights not only against the state itself but also against private individuals[11]. Ashworth welcomes this approach of the Court as minimum standard for Member States, '*albeit*', stating cautiously, that «these are criminal decisions that require principled debate»[12].

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[7] ECHR, *Opuz v. Turkey*, App n. 33401/02 (ECtHR, 9 June 2009), par. 126.

[8] Ashworth A.J., *Positive Obligations in Criminal Law*, Oxford, Hart Publishing, 2015, 199-200.

[9] Fletcher G.P., *Parochial Versus Universal Criminal Law*, in *Journal of International Criminal Justice*, 2005, 3, 1, 28-29.

[10] Mowbray A., op. *cit*., 79.

[11] Tulkens F., *The Paradoxical Relationship between Criminal Law and Human Rights*, in *Journal of International Criminal Justice*, 2011, 9, 3, 584. Also see Mowbray A., *op. cit*., 78.

[12] Ashworth A.J., *Positive Obligations in Criminal Law*, *op. cit.*, 209.

Indeed, overall, the ECtHR has adopted its own approach regarding the protection of victims, in particular, the women victims of domestic or partner violence since the 1980s, whilst, in 2013, the EU was asserted being wary of setting out European obligations in protecting victims of domestic violence[13]. Furthermore, in 2008, the Council of Europe, within which the ECtHR functions as a judicial body, took the issue even a step further by setting a convention that is solely/exclusively dedicated to the protection of women, and in 2011 it was opened for signature as the "Convention on preventing and combating violence against women and domestic violence", briefly known as the "Istanbul Convention" that today is widely considered «the most comprehensive legal instrument on violence against women in the world»[14].

The Convention, in particular its Art. 49, obliges contracting States to «ensure the effective investigation and prosecution of offences established in accordance with this Convention», such as in cases of psychological violence (Art. 33), stalking (Art. 34), physical violence (Art. 35), sexual violence and respectively rape (Art. 36) and forced marriage (Art. 37) etc. Furthermore, Art. 50, titled as "Immediate response, prevention and protection", urges the States to offer «adequate and immediate protection to victims» through their responsible law enforcement agencies. Given that the Council of Europe in itself holds a significant role in the world with its 47 European member and non-European observer states, it functions as an anchor for ensuring human rights, notably

[13] Bettinson V., *Sentencing Domestic Violence Offences and the Victim's Wishes: Wilson v United Kingdom (App. No. 10601/09, 23 October 2012*), in *The Journal of Criminal Law*, 2013, 17, 1, 30, *doi:10.1350/1740-5580-77.1.28* (accessed: 16.08.2020).

[14] Sainz-Pardo P.V., *Women and Children versus Domestic Violence. Legal Reflections, Needs and Challenges in Spain Today*, in *The International Journal of Human Rights*, 2014, 18, 6, 665, *https://doi.org/10.1080/13642987.2014.944812*, (accessed: 16.08.2020).

the ones of women. As matter of fact, that on the case of *Opuz v. Turkey*, the ECtHR's referring[15] to the *Inter-American Court of Human Right*'s approach as well as comparative analysis manifests its awareness on that role.

3. The interaction between human rights and criminal law: a supra-national Court's awareness?

The task of criminal law begins exactly where a person takes the path of crime *(iter criminis)* which means *legal goods* (*e.g.,* life and limb, liberty, property) are being (at least) near endangered. And, when the violence become known by judicial authorities, that means a harm is already occurred, for example, a woman is injured or even killed by her partner or husband. It, thus, may be argued that preventive measures in domestic violence are more important than the tools of the criminal law that have a *repressive* character, namely criminal investigation. Yet, particularly because of the deterrent effect of the criminal punishments, providing an effective criminal investigation for women victims of domestic violence may serve the aim of prevention in a broader sense as well. It was only 1968 on which *Herbert L. Packer* stated that «The criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely it is guarantor; used indiscriminately and coercively, it is threatener»[16].

In a similar vein, in 2006, *Claus Roxin*, a German criminal law scholar, drew attention to the criminal law's this dual effect on human rights in performing its protecting duty of human rights, stat-

[15] ECHR, *Opuz v. Turkey*, parr. 83-90.

[16] Packer H.L., *The Limits of the Criminal Sanction*, Paolo Alto, Stanford University Press, 1968, 366. See Tulkens F., *The Paradoxical Relationship between Criminal Law and Human Rights*, *op. cit.*, 578.

ing that on the one hand a state under the rule of law has to protect the individuals through criminal law but on the other hand, it has to protect individuals against criminal law[17].

This is a conceptualization of the relationship between criminal law and human rights from the standpoint of criminal law. But this relationship has another conceptualization, this time, from the standpoint of human rights, particularly by the International Criminal Court and the ECtHR, which is stated that: «[...] Human rights, which were traditionally viewed as a defensive weapon for the individual, have over the past few decades gradually become an offensive weapon»[18].

The function of human rights for individual vis-à-vis criminal law as a defensive weapon refers to restraining the limits of criminal law, whilst its offensive weapon function refers to triggering the criminal law to take an action. And this represents a *paradoxical relationship* between human rights and criminal law[19].

The traditional role of human rights in criminal law is *defensive* against criminal law[20], given the fact that the overuse of criminal law has been on the rise today as a common problem in the world. The rights and freedoms of individuals are to be protected against criminal law. Therefore, criminal law appears as a last resort (*ultima ratio*), *i.e.* takes on a subsidiary (fragmentary) character. This role receives worldwide acknowledgment. As for the offensive role of human rights, as *Tulkens* articulates that «the criminal law is called into play to protect human rights»[21], which involves the places where criminal law comes in as *prima ratio*.

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[17] Roxin C., *Strafrecht: allgemeiner Teil Band I, Grundlagen, der Aufbau der Verbrechenslehre*, Beck C.H., 4th ed., 2006, 138, Rn:1.

[18] Tulkens F., *op. cit*., 577.

[19] *Ibid.*

[20] *Ibid.*, 579.

[21] *Ibid.*, 582.

Tulkens explains that this implies the extension of positive obligation that is divided into two types as substantive and procedural one[22]. The concept of positive obligation in the case law of the ECtHR appears in two types as *substantive* and *procedural*. The substantive positive obligation urges a State to ensure the existence of the effective criminal law provisions, *e.g.*, definition of crimes, to deter the commission of crimes[23]. As for the procedural positive obligation, it refers setting up an effective criminal procedural system as well as a proper execution of punishment[24]. As opposed to the defensive role, this role does not receive a concrete acknowledgement at a national level.

For the first time, in 1985, in the case of *X and Y v. the Netherlands*, where a mentally handicapped young woman was sexually assaulted and her father's criminal complaint was not accepted by the prosecutor as substitute of his daughter, the ECtHR stated that the prosecutor's decision to not prosecute a sexual assault constituted a violation of right to privacy, Art. 8 of the Convention. However, why the failure to prosecute sexual assault constitutes the violation of the right to privacy is lacking legal theory to Prof. George P. Fletcher[25], whilst to Prof. Mowbray this implies a significant method of interpretation brought by the creativity of the Court for ensuring the practical and effective rights[26]. In that regard, Prof. Mowbray concludes that "we should welcome the Court's creativity"[27]. Prof. Ashworth welcomes this approach of the Court as minimum standard for Member States, albeit, he states that 'these are

[22] *Ibid.*, 584-585.

[23] *Ibid.*, 585.

[24] *Ibid.*

[25] Fletcher G.P., *Parochial Versus Universal Criminal Law*, *op. cit.*, 28-29.

[26] Mowbray A., *The Creativity of the European Court of Human Rights*, *op. cit.*, 72; 78.

[27] *Ibid.*, 79.

criminal decisions that require principled debate'[28]. As for the former Judge of the ECtHR, Françoise Tulkens, she argues that this is the very point where "the criminal law is called into play to protect human rights"[29]. In contrast to Prof. Fletcher's view, she considers the case of *X and Y v. the Netherlands* as a leading judgment on the matter[30]. This case was regarded right to privacy, Art. 8.

It was indeed the case of *McCann and Others v. United Kingdom* in 1995 that appears as a turning point on which the Court established the duty to scrutinize State action as a result of positive obligation, this time in terms of right to life (Art. 2)[31].

> "The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State"[32].

The same approach has been just recently reiterated by the Court for the prohibition of torture (Art.3), stating that:

> "The Court reiterates that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals

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[28] Ashworth J., *Positive Obligations in Criminal Law*, *op. cit.*, 209.

[29] Tulkens F., *The Paradoxical Relationship between Criminal Law and Human Rights*, *op. cit.*, 582.

[30] *Ibid.*, 584. Also see Mowbray A., *The Creativity of the European Court of Human Rights*, *op. cit.*, 78.

[31] Chevalier-Watts J., *Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?*, in *The European Journal of International Law*, 2010, 21, 3, 702-703.

[32] ECHR, *McCann and Others v. United Kingdom*, App n. 18984/91 (ECtHR, 27 September 1995), par. 161. See also Chevalier-Watts J., *op. cit.*, 703.

within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals"[33].

These sort of cases represent "the development and extension of the theory of positive obligations" by the ECtHR[34]. That is to say, this is a human rights perspective on which the role of human rights on criminal law is not limited to defensive role, but it has also *offensive role* vis-a-vis criminal law[35]. As such, the State has responsibility also for the violations of human rights by private individuals within a positive obligation. This constitutes *horizontal effects* of the rights ensured in the ECHR[36], which Prof. Fletcher considers as lacking legal basis and as a challenge against the *ultima ratio* principle[37]. This is the ECtHR's embracement of the German constitutional theory of *third-party effect (Drittwirkung)*, without any reference to the German doctrine, rather conceding vaguely to the positive obligation[38].

Indeed, from the standpoint of criminal law, this conceptualization as defensive and offensive role of human rights *vis-à-vis* criminal law by the ECtHR stands as a reflection to the misapplication of the tools of criminal law on a national level, that appears either in a form of either in *overuse* or in *underuse*. Although traditionally criminal law experts have more tendency to be focused on the overuse than the underuse, the big title of problem lies in the

[33] ECHR, *Valiulienė v. Lithuania*, App n. 33234/07 (ECtHR, 26 June 2013), par. 74.

[34] Tulkens F., *op. cit*., 583.

[35] *Ibid.*, 579.

[36] *Ibid.*, 583; Mirandola S., *The Protection of Human Rights Through Criminal Justice: The Right To Effective Criminal Investigations In Europe - An Integrate Analysis between the ECHR and EU Law*, PhD Thesis, University of Bologna, 2017, 5.

[37] Fletcher G.P., *Parochial Versus Universal Criminal Law*, cit., 28-29.

[38] *Ibid.*, 29. For the same approach, see Ashworth J., *op. cit.*, 209.

misapplication of criminal law, in fact. Where the tools of criminal law is necessary, underuse of criminal law that leads to impunity is equally problematic with the overuse. As a matter of fact, to put an end to impunity lies as one of the core grounds that created the International Criminal Court[39].

The ECtHR, as a Court at international level, faces this reality more clearly than national courts, although in drafting ECHR process there was no aim to impose state positive obligation[40]. From the view of criminal law, the Court finds a solution through *a manual operation*, as such, interpreting of Arts. 1 and 2 of the Convention as a formal basis rather building a legal theory automatically compatible with the system of criminal law to bring justice, in particular serious crimes. This is the main reason why the concept of the positive obligations developed by the ECtHR and its application faces insufficient scholarly attention which also prevents giving a precise scope and implication of this concept on the national criminal procedure[41]. In that regard, *Tulkens*' article, "the Paradoxical Relationship between Criminal Law and Human Rights", is an attempt to seek to form a legal theory to the view of the Court rather than analyzing existing legal theories settled by the Court.

However, it should be emphasized that the concept of positive obligation by the ECtHR is of a highly practical meaning as well as creative. It lays on the core of combating domestic violence. In fact, all measures originate from that core concept. It is useless to address the actions for providing an efficient investigation where

[39] The Preamble of Rome Statute of the International Criminal Court states that the Court is «[...] determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes» (International Criminal Court, *Rome Statute of the International Criminal Court*, The Hague, 2011, 1, available at: *https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf* (accessed: 16.08.2020).

[40] Ashworth J., *op. cit*., 198.

[41] Mirandola S., *op. cit*., 4.

a state in which either the concept of positive obligation does not exist or its approach towards the citizens is not entirely surrounded with the conscious of that obligation. Furthermore, regardless of human rights perspective based conceptualizations or the critiques on lack of legal theory on positive obligation, by virtue of aim and scope of criminal law, there are significant moments where criminal law comes in as *prima ratio* especially in terms of Arts. 2 and 3 of the ECHR[42]. And a civil law compensation cannot satisfy these violations. As such, a necessity exists to determine the components of an effective investigation on domestic violence cases.

The ECtHR has responded to this necessity in a form of *positive procedural obligation* of state, developing a large body of case law regarding the positive obligations to conduct effective investigation through its criminal justice authorities[43].The cases linked to domestic violence had a significant contribution in the development of the concept of positive obligations. As such, *Tulkens* goes on the claim that:

> "...in subsequent judgments, the ECtHR has had no hesitation in using, some would say exploiting, the criminal law to reinforce and safeguard more effectively the rights of victims of infringements of fundamental rights"[44].

Therefore, the discussion on whether the positive obligation to the state set out by the ECtHR causes *an onerous burden on a state*[45] or not takes place. Rather, the challenges preventing *the prima ratio* application of criminal investigations for domestic violence cases is to be elaborated.

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[42] See Ashworth J., *op. cit*., 200-206.

[43] Tulkens F., *op. cit*., 580; Mirandola S., *op. cit*., 4.

[44] Tulkens F., *op. cit*., 584.

[45] Chevalier-Watts J., *op. cit*., 701.

4. Some challenges to an effective criminal investigation for victims of domestic violence

A. The absence of an independent judicial system from societies' misconceptions

The existence of an independent and efficient judicial system is a fundamental perquisite of every democratic state under rule of law. In the *Opuz* case on which the applicant's mother was killed by applicant's husband, the ECtHR stresses that independent and efficient judicial system is *derivation of the positive* obligations laid down in the first sentence of Article 2 of the Convention to enable the establishing the cause of a murder and punishing the guilty parties[46].

Regarding independency of judicial system, one significant point stemming from peculiarities of domestic violence is a sociological acceptance of domestic violence as a family matter. "*Women who go to police stations because they are subjected to domestic violence are confronted with attitudes which tend to regard the problem as a private family matter into which the police are reluctant to interfere*"[47]. This refers society's influence on judicial system, although traditionally criminal law experts struggle against political influence impairing judicial independency.

In the *Opuz* case, Turkish law had included measures in legislation. But the ECtHR states that:

> *"*...when victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this connection, police officers consider the problem as a "family matter with which they cannot interfere"[48].

[46] ECHR, *Opuz v. Turkey*, par. 150.

[47] *Ibid.*, par. 96.

[48] *Ibid.*, par.195.

As a result of that, domestic violence appears to be tolerated by the national authorities whereas the available remedies do not function effectively in that case[49]. Therefore, even if a state promises to fulfill its positive obligation to protect women victim of domestic violence, the behavior of public officers that are prone to be influenced by perceptions of their society on family matters became a determinant[50].

B. The term "domestic violence" v. legal qualification of an act by criminal law

Domestic violence refers a meaning more than the concept of the act of criminal law. In terms of its dimensions, the definition by WHO is remarkable that reads as "violence against women (VAW) is a violation of human rights, is rooted in gender inequality, is a public health problem, and an impediment to sustainable development"[51]. In addition to this, given the scope and aim of criminal law, the question on how criminal law can effectively react on domestic violence cases arises.

The importance of case based analysis in determining an effective investigation is more obvious, given that the term "domestic violence" in itself is broad term, even if the Istanbul Convention attempts to define it as "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim"[52]. In that regard, from the view of the applied criminal law,

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[49] *Ibid.*, par.197.

[50] Sokullu-Akıncı F., Dursun S., *Viktimoloji- Mağdurbilim*, Bruxelles, Beta, 2nd edn., 2008, 72.

[51] World Health Organization, *op. cit.*, 4.

[52] Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, Art. 3/b, available at: *https://*

on the one hand, not all acts listed in this definition falls with the scope of criminal law. On the other, the term "domestic violence" does not appear as a crime type such as *crime of domestic violence* or as a defined term in penal codes (at least in the Continental European jurisdictions), rather it refers very much a criminological and sociological phenomenon or even a public health issue as it is seen in the WHO's definition[53]. As such, the major challenge lies on the fact that a case is linked to domestic violence or partner violence can be figured out once a look into the facts in case files. For example, a bodily injury as an act of violence against a woman by her partner falls with a category of crime against bodily integrity in the penal law, one of which the crime of injury.

C. An appropriate labor division in prosecutorial system

Domestic violence acts take place within a relationship, *e.g.*, a family sphere, that means this act is likely to repeat time to time (some frequently; some rare and even some uninterrupted). Once an act takes place, the public prosecutor qualifies this act as one single. And then another act appears and the same routine legal process is applied. At the end, every incidents occurred in different time may be dealt with a different public prosecutor. Even some cases, the competent prosecutor may change. This all prevents the prosecutors from seeing the whole picture of the domestic violence.

In order to avoid this, as opposed the period in which the *Opuz* judgment came out, in Turkey, today, a specialization for the domestic violence and respectively violence against women among the prosecutors are constructed. The legal framework stems from

www.coe.int/fr/web/conventions/full-list/-/conventions/rms/0900001680084 82e (accessed: 16.08.2020).

[53] World Health Organization, *op. cit.*, 4.

the Code of 2012 (no. 6284)[54] as "Protection of the Family and Prevention of Violence against Women". The Directive of the Ministry of Justice in 2019 (no: 154/1) establishes prosecution bureaus which are dedicated to protection of the family and prevention of violence against women.

D. Victim's vulnerability and pursuance of complaint by victim

In the *Opuz* case, the applicant and her mother were bodily and verbally assaulted several times by the husband of the applicant and the father of the applicant's husband. As such, in the first assault the applicant and her mother were beaten and threatened to be killed by him. The investigation was initiated and then *the complaints were withdrew*[55]. And in the second assault the applicant was very badly beaten by him and the injuries were sufficient to endanger her life and he was remanded on custody[56]. After one month the husband was released from custody, the applicant *withdrew the complaint*[57]. In the fourth assault, the husband pulled a knife on the applicant, but in this case, the prosecutor decided not to prosecute. In the fourth one, the husband ran a car into the applicant and her mother. Although the applicant's mother was found to be suffering from life-threatening injuries[58], they *withdrew their complaints*. However, the Court rejected the mother's withdrew as the crime committed against her was serious and thus prosecuted *ex officio* and he was sentenced to three months' imprisonment and a

[54] The Code n. 6284 of 8 March 2012 (Official Gazette [Resmî Gazete], n. 28239, 20 March 2012, available at: *https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=6284&MevzuatTur=1&MevzuatTertip=5* (accessed: 16.08.2020).

[55] ECHR, *Opuz v. Turkey*, parr. 9-11.

[56] *Ibid.*, par. 13.

[57] *Ibid.*, parr. 17, 18.

[58] *Ibid.*, parr. 20-23.

fine which was later commuted to a fine[59]. In the fifth one, the husband was imposed a fine for the knife assault on the applicant. In the sixth assault, the applicant was threatened, but the prosecution drops due to lack of concrete evidence[60]. In the final assault, the applicant's mother filed a complaint after she was threatened to be killed by the husband of the applicant and the father of the applicant's husband[61]. While the trial was holding[62], the husband of the applicant killed the mother of the applicant[63]. He was sentenced to fifteen years and ten months' imprisonment and a fine of 180 Turkish liras after mitigating the original sentence due to provocation by the deceased and his good conduct during the trial[64].

The whole course of criminal proceedings displays the vulnerability of the applicant and her mother in the process. Though, the criminal authorities sought a complaint by victim in assaults they are not serious enough to prosecute *ex officio*[65]. The ECtHR considers that insisting in pursuance of complaint by victim where there is a life threating incidents using lethal weapons such as knife and shotguns[66] is a failure of positive obligation to protect the right to life of the applicant's mother in Art. 2[67]. The courts urges State not to be binding formal conditions, but to strike a balance between a victim's rights ensured in Arts. 2, 3 or 8[68]. Further, in striking this balance, it provides some indication points that are not exhaustive, stemming from such as the seriousness of crime and household

[59] *Ibid.*, par. 36
[60] *Ibid.*, parr. 44, 45, 46.
[61] *Ibid.*, parr. 47, 51.
[62] *Ibid.*, parr. 49-52.
[63] *Ibid.*, par. 54.
[64] *Ibid.*, par. 57.
[65] *Ibid.*, par. 145.
[66] *Ibid.*, par. 141.
[67] *Ibid.*, par. 149.
[68] *Ibid.*, par. 138.

conditions or the defendant's criminal history[69]. In that regard, the court states that:

> "...the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints"[70].

The Court acknowledges that there is no general consensus among the Member States to prosecute crimes where they are regulated as *ex officio* prosecuted crimes and the victim does not file a complaint does exist[71]. However, it refers the remarkable amount of Member States such as Albania, Austria, Bosnia and Herzegovina, Estonia, Greece, Italy, Poland, Portugal, San Marino, Spain and Switzerland in which criminal proceedings despite the victim's withdrawal of complaint in cases of domestic violence continue[72].

The criminal proceedings of the facts of the case of *Opuz* were carried out during the former Penal Code 765, although the judgment come out in a time of the new Code 5237 in 2005. One novelty of the new Code is stipulating the mitigated form of crime of injury which is described as injury curable by a small and quick medical intervention (Art. 86/2) as an *ex officio* prosecuted crime, when the crime is committed against the spouse, descendants, ascendant and brothers and sisters (Art. 86/3-a). Furthermore, in this case the punishment shall be increased by half. As such, a woman is injured by her husband and even if the injury is petty, the complaint of the victim is not sought and the perpetrator shall be sentenced to the punishment half times more[73]. This provision was argued as unconstitutional in 2005. However, in 2008, the Turkish Constitution

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[69] For more details, see *ibid.*, par. 138.

[70] *Ibid.*, par. 139.

[71] *Ibid.*, par. 138.

[72] *Ibid.*, par. 87.

[73] See also Sokullu-Akıncı F., Dursun S., *Viktimoloji- Mağdurbilim*, *op. cit.*, 78.

Court rejected this argument by pointing that it is obvious to the Court that this provision is a part of the recent legislative attempts that aims to prevent domestic violence and punish effectively the perpetrators of domestic violence and that perpetrators may coercive the women victims to withdraw their compliant in the case on which injury is curable by a small and quick medical intervention[74].

5. Concluding remarks

> «...The state can today potentially be called to account before the ECtHR: was its "criminal arm" strong enough to prevent and, where necessary, punish infringements of the most fundamental rights occurring within its jurisdiction, whether they were committed by a public official or a private individual?»[75].

How could a criminal arm of a state be strong enough to combat domestic violence and respectively violence against women? It is obvious that the effectiveness of a criminal investigation plays a pivotal role on the matter. However, criminal procedure system faces challenges to deal with these type cases. As the WHO stresses in defining[76], violence against women either at home or outdoor implies a public health problem rather than a single commission of burglary crime, crime of forgery and the like. By doing so, it necessitates some special approach to be taken.

As an initial step, before creating an effective criminal investigation for women victims of violence including domestic ones, the study aimed to begin by pointing out challenges with ones oc-

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[74] Mahkemesi Karari A. (The Turkish Constitutional Court), E: 2005/151, K: 2008/37, Datum: 03.01.2008, available at: *http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/f484812e-be14-4ea8-8cab-17e9692cde6c?excludeGerekce=True&wordsOnly=False* (accessed: 17.08.2020). See also Sokullu-Akıncı F., Dursun S., *op. cit*., 78; 79.

[75] Tulkens F., *op. cit.*, 586-587.

[76] World Health Organization, *op. cit.*, 4.

curred within state's responsibility, which prevent *the prima ratio* application of criminal law for these cases. As such, it emphasizes (1) creating a judicial system that is an independent from societies' misconceptions, (2) qualifying violent acts as applicable in judiciary, (3) forming labor division dedicated to domestic violence in prosecutorial system and (4) taking into account victim's vulnerability and thereby striking a balance between rights in terms of pursuance of complaint by victim.