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İHD Report and Recommendations on the Judicial Reform Strategy Document by the Ministry of Justice

Introduction:

İHD has repeatedly stated that in Turkey there was no judicial structure functioning in line with the principle of rule of law, there were grave barriers before the right to a fair trial, there was the threat of *Feindstrafrecht* or enemy criminal law implementation by way of courts with special powers, notably the rights to freedom of expression, peaceful assembly and association have completely been restricted by a rather broad definition of terrorism through the Anti-Terror Code (ATC), no distinctions were made between those who resorted to violence and those who did not, the political power has been subjecting social dissidence and dissident political parties to judicial harassment by instrumentalizing the ATC through public prosecutors' offices and courts with special powers. İHD has also drafted special reports and issued various studies on these issues.

The fact that the political power acknowledged there were problems in the judicial field in Turkey by its Judicial Reform Strategy Document made public by the political power on 30 May 2019 is indeed a remarkable development. İHD, hereby, identifies the shortcomings of this document, which does not mention any changes that are necessary to realize any kind of "reform," and offers its recommendations as to the ways in which such "reform" can be brought about.

When one talks about the judiciary in Turkey, cases of injustice within the penal legislation and fair trial problems spring to mind.[1] The Turkish Penal Code No. 5237 (TPC) (former TPC No. 765), ATC No. 3713, Code of Criminal Procedure No. 5271 (CCP) and the Law on the Enforcement of Sentences and Security Measures No. 5275 should be considered all together within the penal legislation. Moreover, it also proves to be vital to discuss the steps to be taken to remedy the cases of injustice found in these laws.

Although not officially announced, there are between 285 thousand and 300 thousand inmates and convicts incarcerated in prisons in Turkey. This figure is way above the current capacities of penitentiary institutions which is about 220 thousand. Furthermore, it is known that there are also 250 to 300 thousand persons who were released on probation to serve their remaining last two years without being remanded in prison. The number of persons under judicial control who have not been remanded during the investigation and prosecution stages is estimated to be around 450 thousand.

[1] https://ihd.org.tr/en/ihd-report-and-recommendations-for-the-elimination-of-injustice-in-penal-legislation/

This crisis of justice witnessed in Turkey can only be remedied through fundamental amendments and modifications to the penal legislation. It is also essential that these amendments be made in accordance with the international conventions Turkey is a party to, judgments and case law of the European Court of Human Rights (ECtHR), and universal human rights values. As a human rights body, İHD considers it a task to underline these points that have been ascertained to be problematic in the penal legislation of Turkey and to propose solutions to this end.

In order for Turkey to bring about a genuine judicial reform, primarily the current state of affairs should be explained in its constitutional and legal dimensions with regards to human rights. As is known, Turkey is a country conducting accession talks with the EU. As can also be seen in the EU Progress Reports, these negotiations are at a de facto halt. Turkey made commitments under "democracy, rule of law, human rights and minority rights," also known as the Copenhagen political criteria, while undertaking these negotiations. Within this process, however, a conception of anti-democratic government, which some dubbed as the "Ankara criteria," has replaced those of Copenhagen. The perspective on human rights, too, has been thoroughly shaped within the framework of security-based policies and enforced in the "first security then human rights" fashion. Therefore, Turkey needs to declare a political will that will re-demonstrate its commitment to the Copenhagen political criteria.[2]

Turkey is the only country against which the Council of Europe re-initiated the political monitoring procedure with the Parliamentary Assembly of the Council of Europe (PACE) Resolution 2156 (2017) of 25 April 2017. Unless the recommendations in the council's political monitoring resolution are complied with, the judicial reform strategy document cannot be materialized. Thus Turkey firstly needs to carry into effect constitutional and legal changes, and eliminate all cases of violation in practice in order to get out of the political monitoring procedure.[3]

Although the coup d'état attempt of 15 July 2016 was quenched merely a day after on 16 July 2016 and acts of violence were prevented, state of emergency (SoE) was declared on 20 July 2016. Turkey has been governed for two years under the SoE regime. A total of 32 SoE decree laws were issued during this period all of which were passed into laws. These decree laws have introduced permanent amendments into hundreds of fundamental laws and thousands of articles. These decree laws that restrict rights and freedoms giving way to impunity should absolutely be amended and revoked in their entirety.[4]

Law No. 7145 on the Amendment of Some Laws and Decree Laws that went into effect on 31 July 2018 after the lifting of the SoE introduced amendments that would enable the continuation of some SoE practices for another three years. The SoE has virtually been rendered permanent and extended for another three years with the extension of custody periods for up to 12 days, granting of power to governors to declare curfews for 15 days, enabling public institutions to dismiss personnel from their posts by way of a special commission for three more years and restrictions on peaceful assemblies and protests. All the amendments introduced by Law No. 7145 such as these should absolutely be repealed.[5]

Turkey introduced substantial amendments to its Constitution on 16 April 2017 under the reign of SoE and its political regime was replaced by one based on a one-man government known by the public as the "Turkish-Type Presidency." All these constitutional amendments fully entered into force after the presidential and general elections of 24 June 2018.

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[2] See EU's Turkey 2018 Progress Report: https://www.avrupa.info.tr/sites/default/files/2018-06/20180417-turkey-report_0.pdf

[3] See PACE's "The functioning of democratic institutions in Turkey": http://website-pace.net/documents/19887/3258251/20170308-TurkeyInstitutions-EN.pdf/bbd65de5-86d4-466f-9bc1-185d5218bce7

[4] See Human Rights Joint Platform's State of Emergency in Turkey: Updated Situation Report: https://www.ihop.org.tr/en/wp-content/uploads/2018/04/SoE_17042018.pdf

[5] See İHD's special report on "Law No. 7145 Regulation Permanent State of Emergency": https://ihd.org.tr/en/regarding-law-no-7145-regulating-permanent-state-of-emergency/

Council of Europe Venice Commission's "Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017"[6] of 13 March 2017 (No. 875/2017) contains rather significant points and recommendations. The Venice Commission stated, in paragraph 130 of this report, that the proposed constitutional amendments would introduce in Turkey a presidential regime which lacked the necessary checks and balances required to safeguard against becoming an authoritarian one. İHD would, therefore, like to state that it is necessary to meet the Venice Commission's main critical points on constitutional amendments and to draft a new constitution necessarily dependent on the principle of separation of powers, committed to the principle of rule of law, based on human rights guaranteeing all kinds of minority rights.

Further, two basic issues in the current Constitution that would prevent the enactment of the judicial reform should immediately be dealt with until the commencement of the process for drafting a new constitution. As the Venice Commission stated in its report, the president's powers on the judiciary should be reviewed and modifications that would contribute to the formation of an independent judiciary should be materialized (such as appointment of members to the Board of Judges and Prosecutors (BJP), and to the Constitutional Court), and the president's power to enforce legislative regulations in economic, social and cultural rights through presidential decrees should be revoked.

When one assesses the political climate of Turkey, the impasse over the Kurdish issue turns out to be even more significant. Turkey needs to materialize a genuine conflict resolution process within the framework of the principles[7] adopted by the UN General Assembly in 2006 and updated thereupon. Turkey should put an end to the ongoing conflict process and develop new policies that will resolve problems via peaceful dialogue for its very own democratization and to minimize its human rights problems.

İHD believes that the political power should first of all prioritize clearing the path without delay in order to materialize its proposed judicial reform. İHD, thus, considers it a necessity to remove the restrictions before the right to personal liberty and security through substantial amendments to the penal legislation.[8] To achieve this, particularly laws on the rights to freedom of expression and freedom of association should be amended and restrictions on freedoms should be removed; the process should be prepared by improvements in such fundamental laws as the Turkish Penal Code (TPC), Anti-Terror Code (ATC), Code of Criminal Procedure (CCP), and the Code on the Enforcement of Sentences (CES). İHD is of the opinion that substantial changes should be introduced, especially to the CES, taking into consideration the current over-population, isolation-related problems and other rights violations in prisons.

The work undertaken by the Ministry of Justice for the judicial reform strategy, on the other hand, was conducted without consulting social dissidence and opposition parties. Whereas it is of great significance to take the opinions of social segments who have to face injustice the most. Besides, overcoming problems brought about by the dismissal of about one third of members of the judiciary due to the SoE

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[6] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e

[7] https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
Also see:
https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf
https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf

[8] See "İHD Report and Recommendations for the Elimination of Injustice in Penal Legislation": http://ihd.org.tr/en/index.php/2018/09/26/ihd-report-and-recommendations-for-the-elimination-of-injustice-in-penal-legislation/

which, in turn, gave way to the inauguration of persons accounting for about half of the current members of the judiciary along with securing a practice committed to the case laws of the European Court of Human Rights (ECtHR) and the Constitutional Court should be provided for. It should be remembered even the best laws in the hands of poor practitioners do not serve justice. It should also be remembered that many current problems, notably those in freedom of expression cases, arise from practice.

İHD is of the opinion that effective dialogue should be engaged during the preparatory process for the omnibus bills on judicial reform by the Ministry of Justice. İHD would like to state that the problems in practice would be minimized if Turkey introduces necessary amendments to domestic legislation which will implement the provisions of the UN Declaration on Human Rights Defenders, adopted by the General Assembly Resolution A/RES/53/144 on 9 December 1998, and issues a presidential circular letter on the issue.

Further İHD would like to point out that holding regular meetings between the Ministry of Justice and human rights organizations and professional bodies would enhance the human rights approach and contribute to the effectiveness of the dialogue.

I- FREEDOM OF THOUGHT AND EXPRESSION

The Problem of the Obscure Definition of Terrorism in Anti-Terror Code No. 3713

Officials from the United Nations (UN), Council of Europe (CoE) and the European Union (EU) have often been stating that the "definition of terrorism in Turkey is too broad, therefore, Turkey needs to narrow it down." They are not wrong.

The fact that the definition of terrorism is maintained in such a broad frame merely serves to restrict and limit rights and freedoms. There are two trends about the ways in which terror can be defined: the first trend that keeps the complete establishment of democracy at arms length argues for an even further expansion of the definition having been unsatisfied with the current utterly broad definition. When this is not realized through normative regulations, the definition is further expanded and thusly implemented by creating de facto situations in practice. Today Turkey faces problems that are created both by the broad definition of terror within the scope of investigations, prosecutions, and trials and de facto expansion of the definition in practice that even goes beyond the former.

The second trend points out to the necessity that the definition should be narrowed down in order to protect democracy and human rights. The fact that those who have been advocating that the definition of terror was too broad and should be limited have been pointing to such a vital problem is better understood today.

The violations brought about by the broad definition of terror can clearly be seen when one looks into reports drafted by human rights and journalists' bodies.[9]

Definition of Terror in Turkish Legislation

Martin Scheinin, the former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, undertook a fact-finding mission to Turkey in 2006 and delivered his first report to the UN Human Rights Commission which was deliberated at its 62nd session.[10] The rapporteur

[9] İHD Annual Report and Balance Sheet on Human Rights Violations in Turkey: https://ihd.org.tr/en/ihd-2018-report-on-human-rights-violations-in-turkey/
Also see http://www.cgd.org.tr/index.php?Did=222 and https://tgs.org.tr/cezaevindeki-gazeteciler/for data collected by Progressive Journalists Association and the the Journalists Union of Turkey, respectively.
[10] https://www.ohchr.org/Documents/Issues/Terrorism/HRC_oral_statement25sep2006.pdf

delivered his recommendations following his assessments on the definition of terrorism. These recommendations asked for a clear and precise definition of what constitutes terrorist acts and terrorist groups and entities alongside with bringing the definitions of terrorism and terrorist offenses into harmony with international norms and human rights standards, notably with the principle of legality enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) that limits such offenses to deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages. Moreover, the rapporteur asked for the consideration of a separate definition of "terrorism" beyond acts comprising terrorist offenses and to take note of international covenants while drafting new anti-terror legislation.

The Special Rapporteur recommended more dialogue before and during deliberations in the Grand National Assembly of Turkey (GNAT) pertaining to possible legal reforms. He underlined the necessity that the draft legislation on fundamental rights and freedoms should be deliberated in an open and transparent manner in a democracy and civil society needed to be included in such deliberations at all levels with full capacity. The Special Rapporteur believed that there was a need for precision and clarity in the definition of what constitutes terrorist acts in order to prevent the abuse of charges of membership and, aiding and abetting for reasons other than counter-terrorism and "thought crimes" sometimes referred to by authorities.

The UN Special Rapporteur criticized the definition of terrorism as prescribed by Article 1 of the Anti-Terror Code since the definition was not based on specific criminal acts but on intent or target. According to the Rapporteur, this definition was broad and vague. In such cases people and organizations could be criminalized as terrorists although they did not engage in any violent acts. This, indeed, is the case.

Journalists, authors, academics, human rights defenders, trade unionists, artists, women, mayors, members of the parliament, politicians, students, basically everyone can easily be accused of being terrorists. Those who express their opinions can be charged although they have not engaged in any violent act.

Article 90 of the Constitution prescribes that "in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail" and "no appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional." The Constitution, however, does not have any definition of "terrorism." Article 13 of the Constitution enshrines that the essence of fundamental rights and freedoms cannot be infringed. The ATC puts forth a rather broad definition of "terrorism" without any constitutional base and contrary to international conventions. It infringes upon the essence of the fundamental rights and freedoms of citizens through its definition and the pursuant articles prescribed therein.

İHD believes that the definition of terrorism in the ATC, just as was stated by the UN Rapporteur, contradicts the principle of legality of crime and punishment and the principle of compliance of laws with accessibility, clarity, precision, foreseeability, and the rule of law. In Turkey people who did not commit any deadly or otherwise serious violence against individuals can be considered to have committed a terrorist offense, can be criminalized as terrorists, and can be subjected to a special trial and enforcement regime specific to this merely because they expressed their opinions that were not embraced by the political power or the official view on account of this definition.

The Anti-Terror Code No. 3713 contradicts terror-related offenses and definitions adopted by conventions Turkey is a party to as per Article 90 of the Constitution. There is no definition of "terrorism" in international law. Solely offenses which constitute "terrorist offenses" are mentioned. Two conventions at the European level and various international conventions and protocols which specify terrorist offenses that these conventions refer to exist in the international field with regards to this issue.

Within this scope, the European Convention on the Suppression of Terrorism (1977), which went into force having been published in the *Official Gazette* of 26 March 1981, listed those offenses that should not be regarded as political offenses or as offenses connected with a political offense or as offenses inspired by political motives while indirectly referring to offenses that comprise terrorist offenses.

This Convention was amended in 2003. The protocol amending the European Convention on the Suppression of Terrorism, which was published in the *Official Gazette* of 8 April 2005 by the decision of the cabinet on 15 March 2005 (No. 2005/8613), sets forth which offenses constitute terrorist offenses and covers international conventions and protocols regarding these.

Accordingly, the following have been qualified as terrorist offences:

1. Offences listed within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents adopted on 14 December 1973 in New York;
2. Offences listed within the scope of the International Convention against the Taking of Hostages adopted on 17 December 1979 in New York;
3. Offences listed within the scope of the Convention on the Physical Protection of Nuclear Material adopted on 3 March 1980 in Vienna;
4. Offences listed within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done on 24 February 1988 in Montreal;
5. Offences listed within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation done on 10 March 1988 in Rome;
6. Offences listed within the scope of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf done on 10 March 1988 in Rome;
7. Offences listed within the scope of the International Convention for the Suppression of Terrorist Bombings adopted on 12 January 1998 in New York;
8. Offences listed within the scope of the International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999 in New York.

Another convention on the subject is the Council of Europe Convention on the Prevention of Terrorism (2005). This convention, which was adopted to enhance the effectiveness of existing international texts on the fight against terrorism, was published in the *Official Gazette* of 13 January 2012 with the decision of the cabinet on 28 November 2011 (No. 2011/2510). For the purposes of this Convention, "terrorist offense" signified any of the offenses within the scope of and as defined in one of the treaties and protocols listed in its appendix.

Moreover, in the concluding part of the report that the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism submitted to the Security Council, it was stated that the absence of a universal, comprehensive, and precise definition of "terrorism" posed a problem against active promotion of human rights while countering terrorism adding that a three-staged specification was needed to prevent –and to punish if failed— terrorism by the Security Council Resolution No. 1566 (2004). The resolution openly stated that "terrorist offenses" should be limited to cases where three cumulative characteristics of terrorist acts were present. These are, a) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; b) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refraining from doing something regardless of their political, philosophical,

ideological, racial, ethnic, religious, etc. motive; and c) the aim, which is to further an underlying political or ideological goal by acts covered within the scope of terrorism-related conventions and protocols and in definitions found in such texts. It is only when these three conditions are fulfilled that an act should be classified as terrorist; otherwise it loses its distinctive force in relation to ordinary crime. Similarly, it was also stated that when criminalizing conduct in support of terrorist offenses they should also be limited to the above-mentioned characteristics to provide definitions of offense. Furthermore, it was put forward that when states prohibited terrorist conduct the proscriptive provisions should comply with the requirements of accessibility, precision, applicability to counter-terrorism alone, non-discrimination, and non-retroactivity.

Review of Articles in the ATC

Article 1 of the ATC, which defines terrorism in a vague and broad way without framing it with the component of violence, should be amended within the framework of above-mentioned reasons.

Article 2 of the ATC, which designates criminalization of persons as guilty of terrorism who are members of an illegal organization although they did not commit a crime and those who committed a crime in the name of the organization as non-members, should be amended as it contains obscure and vague statements and provides an indirect definition of membership in an illegal organization.

Article 4 of the ATC should also be repealed in its entirety as it incorporates a broad range of terrorist offenses which go way beyond the above-mentioned definitions.

Article 5 of the ATC, which puts forth an extension in sentence terms by half that are imposed based on the same code, should be repealed as it prescribes a special double-sentencing because the imprisonment term in penal laws for this offense is already quite lengthy, its enforcement is heavy, and its term for conditional release is also lengthy.

Articles 6 and 7 of the ATC, entitled "Announcement and Publication" and "Terrorist Organizations" respectively, should particularly be pointed out as they are the ones the most commonly resorted to by Turkish judiciary and threaten freedom of expression. Articles 6 and 7 regulate the offence of terrorist propaganda and the following can be put forth as per ECtHR case-law:

The ECtHR judgment on *Gözel and Özer v. Turkey* (App. No. 43453/04, 31098/05) dated 6 July 2010 held that Article 6 § 2 of the ATC No. 3713 should be repealed or this paragraph should be redrafted in line with the ECHR and the ECtHR case law. Both articles maintain their positions as directly restricting and prohibiting freedom of expression since the changes put into effect through Code No. 6459 dated 11 April 2013 do not meet the below-described criteria referred to by the court's case law.

The distinctive characteristic of the ECtHR's *Gözel and Özer v. Turkey* judgment is that it was a semi-pilot judgment in which Article 46 of the ECHR was applied. Therefore, Turkey was obliged to implement this judgment. But the guilty verdict passed in spite of this reveals that the court's case law has not been complied with.

Venice Commission's "Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media"[11] (Op. No. 872/2016) dated 13 March 2017 stated that public prosecutors have been charging rights defenders and activists, notably journalists, under Article 314 or 220 of the TPC and Article 7 of the ATC due to their statements, demonstrations they attended and the articles they wrote. This, according to the opinion, was unlawful as it did not seek legality in an offence and led to very serious cases of victimization.

[11] See para. 63-72: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)007-e

Article 2 of the Constitution of the Republic of Turkey states that Turkey is a social state governed by rule law, while Article 13 proscribes infringing upon the essence of fundamental rights and freedoms, Article 36 provides for the right to a fair trial, Article 38 sets forth the principle of legality of crime and punishment, Article 90 puts forth that international agreements duly put into effect have the force of law and cannot be argued to be unconstitutional, and Article 138 regulates that review of compliance with law should be carried out during trials.

The declaration "We Will Not Be a Party to This Crime!" penned by "Academics for Peace Initiative" was publicized having been signed by 1,128 academics on 10 January 2016 to call for peace in an environment where curfews were declared and civilians had to face grave threats to their safety of life in Turkey and the signatories of the declaration went as high as 2,212 thereafter.

These academics have been charged with "propaganda for a [terrorist] organization" as per Article 7 § 2 of the ATC. According to data provided by Academics for Peace, lawsuits have been filed against a total of 789 academics as of 3 October 2019.[12] Of the academics whose cases have been finalized 204 were sentenced to imprisonment, and among these 36 academics were sentenced to imprisonment without postponement of the enforcement of their respective sentences. Prof. Dr. Zübeyde Füsun Üstel of Galatasaray University was, too, sentenced to imprisonment and the enforcement of her sentence was not postponed on the grounds that she did not request a suspension of the pronouncement of the judgment and the court was not convinced that she would not commit another offense. Professor Üstel was jailed on 8 May 2019 upon the finalization of the court's verdict and subsequently released through intensive efforts and legal initiatives on 22 July 2019 with a decision to halt the enforcement of the sentence. The Constitutional Court in its *Üstel and Others* judgment of 26 July 2019 ruled for violation. Following the Constitutional Court's violation judgment, the course of Academics for Peace trials has changed and first instance courts started to pass acquittal verdicts.

One of the worst implementations of the ATC, apart from this, was the fact that investigations were launched against 50 editors who acted as editors-in-chief on duty in solidarity with the daily *Özgür Gündem* in 2016; nolle prosequi was rendered for 11 of these and consequently lawsuits were filed against 39 persons as per Articles 6 § 2 and 7 § 2 of the ATC. In all these cases, courts imposed punitive fines and handed down imprisonment sentences. The sentence for human rights defender Murat Çelikkan was not deferred and he was released in accordance with supervised release provisions after having been incarcerated for several months. The Constitutional Court has yet to hear the individual applications launched by those whose sentences have been finalized.

The İHD report on the lawsuits filed against human rights activists, particularly İHD executives, offers significant information on the consequences of the broad definition of terrorism both in the ATC and the TPC, and the utter misuse of this definition.[13]

Similarly, lawsuits launched against lawyers who practice human rights law, notably those acting as defense attorneys in cases of social significance, in order to actively carry out the right to defense in Turkey also demonstrate the fact that how badly the ATC and the TPC are exploited.[14]

All these lawsuits against academics, human rights defenders, and lawyers reveal the immense exploitation of the definitions of terrorism and terrorist propaganda in spite of the ECtHR' judgments and case-law.

The legal statistics provided by the Ministry of Justice show the magnitude of the problem in Turkey. According to the data collected by the Ministry of Justice with regards to Articles 6 and 7 § 2 of the ATC:

[12] https://barisicinakademisyenler.net/node/314
[13] https://ihd.org.tr/en/special-report-increased-pressure-on-hrds-ihd-and-its-executives/
[14] https://ihd.org.tr/en/lawyers-under-judiciary-pressure/

- In 2013 lawsuits were launched against 178 persons as per Article 6 and against 10,547 persons as per Article 7 § 2,
- In 2014 lawsuits were launched against 125 persons as per Article 6 and against 15,815 persons as per Article 7 § 2,
- In 2015 lawsuits were launched against 100 persons as per Article 6 and against 13,608 persons as per Article 7 § 2,
- In 2016 lawsuits were launched against 192 persons as per Article 6 and against 15,913 persons as per Article 7 § 2,
- In 2017 lawsuits were launched against 24,585 persons with no distinction between the said articles,
- In 2018 lawsuits were launched against 19,892 persons with no distinction between the said articles.

In the light of these data the following observations can be put forward without prejudice to the option to repeal the ATC in its entirety:

1. Article 1 of the ATC, which defines terrorism in a vague and broad way without framing it with the component of violence, should be amended.
2. Article 2 of the ATC, which designates criminalization of persons as guilty of terrorism who are members of an illegal organization although they did not commit a crime and those who committed a crime in the name of the organization as non-members, shall be amended as it contains obscure and vague statements and provides an indirect definition of membership in an illegal organization.
3. The category of offence committed for the purpose of terrorism incorporated in Article 4 of the ATC should be repealed in its entirety.
4. Article 5 of the ATC, which prescribes extension in sentence terms by half that are imposed based on the same code, should be repealed.
5. Article 6 of the ATC, which is characterized by its violation of the freedom of the press and the right to freedom of information, should be revoked. It is also crucial to repeal particularly Article 6 § 4 with the provision to impose fines on publication executives although they were not involved in committing an offense in accordance with the principle of individual criminal liability.
6. Article 7 § 2 of the ATC proscribing disseminating propaganda for a terrorist organization should be repealed.
7. The provision covered by Article 14 of the ATC, which puts forward that the identities of informants shall not be revealed, should be repealed as it protects informants even in the case of reports the authenticity of which has not been verified and encourages informing on statements that do not constitute an offense. The identity of the complainant should be known by the suspect just as is the case with other offenses.
8. The provision covered by Article 15 of the ATC that states "assignment of an attorney to staff standing trial for offenses while combating terrorism or is a complainant thereof" shall be

repealed as it provides safety of protection to public employees who forget about the fact that combating terrorism has a law as well and can commit such offenses as torture and ill-treatment.

9. The regulation on enforcement incorporated in Article 17 of the ATC should be revoked. The grounds for this matter is presented in the current report's part on Law on the Enforcement of Sentences.

Provisions Restricting and Criminalizing the Rights to Freedom of Expression, Association, and to Political Participation in the Turkish Penal Code

Code No. 5237, referred to as the new TPC, has been drafted in such a way that one does not need the ATC itself during its drafting and implementation. Thus, it constitutes provisions that meet Articles 2, 6, and 7 of the ATC that are still in effect. Article 220 § 6, 7, 8 of the TPC and Article 314 § 3 of the TPC are of particular significance. These are the most problematic articles commonly faced in practice.

It would be useful to look at Venice Commission's "Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media"[15] (Op. No. 872/2016 dated 13 March 2017. The part of the report entitled "Use of the Criminal Justice System against Journalists" is very important as it scrutinizes the ways in which the TPC and the ATC have been exploited in Turkey. Paragraphs 63 to 72 of the report point out to the errors in the implementation of material rules in the TPC and criticize them to that end. Paragraph 68 of the Venice Commission's report reiterates that "the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organization." Article Article 220 § 6, 7, 8 of the TPC and Article 314 § 3 of the TPC should either be repealed or modified in line with the ECtHR case law, as will be understood from the report and the below-mentioned ECtHR judgments.

In practice, however, lawsuits can be launched under Article 220 § 6-7 of the TPC with reference to Article 314 § 3 of the TPC directly instead of under Article 220 § 6-7 of the TPC which we can define as indirect membership in an illegal organization. Statistics provided by the Ministry of Justice also reveal a dramatic increase in this matter. Lawsuits were filed against 8,110 persons in 2013; 19,796 persons in 2014; 14,854 persons in 2015; 29,434 persons in 2016, 136,795 persons in 2017, and 123,207[16] in 2018 under Article 314 § 2 of the TPC, i.e. membership in an armed organization. In this case it is mandatory to revise Article 314 § 2-3 of the TPC considering its way of implementation.

Criminal proceedings against İHD's Co-Chairperson Emine Eren Keskin are exemplary in the sense that they show how the TPC and the ATC can be abused exactly in the way we are utterly critical of. Eren Keskin served as the "editor-in-chief" of *Özgür Gündem*, which was known for its reports on the Turkish-Kurdish conflict between 2013 and 2016 and was one of the few independent dailies critical of the government's acts, in order to defend the right to freedom of expression and to offer symbolic support to jailed journalists. More than 140 lawsuits were launched against Atty. Keskin due to her symbolic title as editor-in-chief and was targeted with penal sanctions because of other journalists' news reports and columns who had exercised their right to freedom of expression. Under the Press Law, in cases where the owner of the work cannot be held accountable, editors-in-chief can be held so for the texts in question.

While 6 of these lawsuits have been finalized, 69 are before the court of appeals or the Court of Cassation. If the related first instance courts' rulings are not reversed, Atty. Keskin will face a total of 12.5 years in prison and 460,000 TRY in fines. The charges within the scope of these lawsuits are: "terrorist propaganda" (ATC 7 § 2), "denigration of the Turkish nation, the State of the Turkish

[15] For the full report see: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)007-e
[16] The 2018 figure incorporates all Articles 309-316 of the TPC.

Republic, institutions and bodies of the State" (TPC 301), "insulting the president" (TPC 299), "failure to publish a correction and response letter in a newspaper" (Press Code Article 18), "revealing the identity of a perpetrator or victim of a crime" (Press Code Article 21 § c) and "insult" (TPC 125). Other pending cases include charges under TPC 314 § 2 and ATC.

Human rights defender Osman Kavala has been in prison for about two years having been charged with offenses under TPC 302 and 314 along with the easy resort to detention under CCP 100 § 3 which shows that the related legislation can be used rather arbitrarily.

Attorney Selçuk Kozağaçlı, the chairperson of Progressive Lawyers Association, along with 16 attorneys from the same association and People's Law Office were sentenced to prison terms ranging between 18 years and 9 months, and 3 years and 1 month 15 days by İstanbul 37th Heavy Penal Court on 20 March 2019. The attorneys had to face numerous violations including the right to a fair trial, right to defense, and the right to liberty of the person during the term beginning with their arrest on 12 September 2017 and detention on 20 September 2017. For instance, the court ruled for their release on 14 September 2018 but ordered for their detention once again not 24 hours later.

Article 220 § 7 of the TPC prescribing "anyone who aids an (illegal) organization knowingly and willingly, even if he does not belong to the hierarchical structure of the organization, shall be punished as a member of the organization" was criticized as being unforeseeable and broadly interpreted by the ECtHR in its *Abdulcelil İmret v. Turkey* judgment. The ECtHR offered a similar assessment about Article 220 § 6 in its *Işıkırık v. Turkey* judgment and referred to the reports drafted by the Venice Commission and the Council of Europe's Office of the Commissioner for Human Rights on Article 220 § 6 and 7 of the TPC. It ensues that Article 220 § 6 and 7 of the TPC should be amended to bear the legality principle.

Article 301 of the TPC, which was held to be a threat to freedom of expression in ECtHR's *Altuğ Taner Akçam v. Turkey* judgment, should absolutely be repealed. Article 305 of the TPC which has a similar content should also be repealed.

Conscientious objection is a human right. Article 318 of the TPC, which has become fairly inapplicable upon the binding judgment of ECtHR's Grand Chamber in the *Bayatyan v. Armenia* case, should be repealed taking into account *Erçep v. Turkey* and *Feti Demirtaş v. Turkey* judgments as well. Moreover, Article 45 of the Military Penal Code related to the right to conscientious objection and which restricts the right to freedom of religion and conscience should also be repealed.

Article 216 of the TPC, notably clause 3, prescribing the offense of inciting the public to hate and enmity should be modified as it involves vague statements and is open to subjective interpretations which allows public prosecutors and judges to rule according to their own personal convictions.

Article 299 of the TPC, which prescribes the offense of insulting the president, has been ascertained to be applied not only to statements involving strong language, as opposed to the government's claim, but also to matters of public interest such as corruption probes, refugee crises, and anti-terrorism methods as was stated in the report of 15 March 2016 penned by a delegation from the Venice Commission following a visit to Turkey upon the request of the Parliamentary Assembly of the Council of Europe. Therefore, the Commission stated that the related article should be abolished in its entirety. Statistics provided by the Ministry of Justice also demonstrate the fact that the number of lawsuits launched under this article has dramatically increased in time. According to the related data, lawsuits were launched against 139, 132, 1,952, 4,187 and skyrocketed to 6,033 and 6,326 individuals under this article in 2013, 2014, 2015, 2016, 2017 and 2018 respectively.

ECtHR also held in its judgment in the case of *Artun and Güvener v. Turkey* that it was not pertinent to subject the president to a privileged protection as per his/her position and adopted that states' presidents should not have a special and privileged status with regards to freedom of expression that persons had. Thus, the article in question should be repealed.

The offense of insult under Article 125 of the TPC and all the other similar insult offenses should be removed from penal codes since issues arising from expression of opinions should be handled within the field of civil/private law, not criminal law. The fact that expression of opinions becomes an issue for criminal law and especially statements directed at public employees or state institutions are subjected to punitive threats not only does increase the risk of self-censorship but also threatens the free discussion of public matters. The limit of criticism directed at public employees should be broader.

Articles 132, 133, and 134 of the TPC proscribing violations of communication and correspondence, and the right to respect for private life deserve specific attention with regards to the freedom of the press. These articles contain features that pose a threat to the function of the press to inform the public, people's right to access information, and the right of the media and its members to release news or information regarding the discussion of issues of public interest.

Articles 327, 329, 334, and 336 of the TPC concerning the procurement and disclosure of information about the security of the state also prove to be problematic with regards to freedom of expression and are not defined by law while being at odds with the principles of accessibility and foreseeability alongside with the principle of rule of law. These articles are particularly restrictive of the freedom of the press. The presence of these articles threatens the right of the people to access information as well.

Various Special Codes Other Than the TPC

There are restrictive provisions in Turkish legislation that are related to freedom of the press and freedom of expression, which cannot be argued to be in line with the regulations in supranational documents, in a minimum of 17 laws, including the Constitution itself, state of emergency decree laws issued in the aftermath of July 20 2016 and in the internal regulations of the GNAT. This legislation can be listed as such:

1. The Constitution
2. Turkish Penal Code No. 5237
3. Code No. 5816 on Offenses Committed Against Atatürk
4. Anti-Terror Code No. 3713
5. Code No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services
6. Code No. 5651 on the Regulation of Publications on the Internet and Suppression of Offenses Committed by means of such Publications
7. Code No. 2820 on Political Parties
8. Code No. 1117 on the Protection of Children from Obscenity
9. Press Law No. 5187
10. Passport Law No. 5682
11. Code No. 6458 on Foreigners and International Protection
12. Code No. 2935 on State of Emergency
13. Code No. 2911 on Assemblies and Demonstrations
14. Code No. 5442 on Provincial Administration
15. Code No. 2559 on Police Powers

16. Military Penal Code No. 1632
17. Code No. 5275 on the Enforcement of Sentences and Security Measures

The issues/fields in the legislation involving restrictions on freedom of expression can be summarized as such:

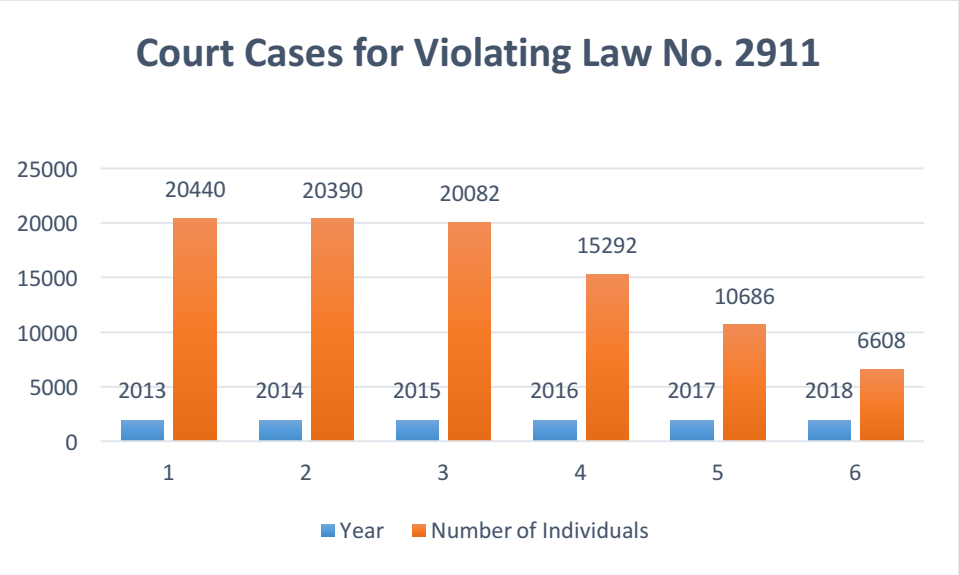
1. Print and visual media (press, radio, television, the Internet)
2. Professional chambers and unions, non-governmental organizations, trade unions and confederations, political parties and formations,
3. Assemblies and rallies,
4. Education and university students, academics
5. Cinema, theatre, shows and similar visual arts,
6. Books, journals, magazines, brochures, posters,
7. Legislation regulating provincial administration and exceptional procedures like the state of emergency.

The absence of a normative regulation specific to media ownership and capital structure should also be added to this list.

Moreover, İHD should also note that there are restrictive/limiting provisions in some articles in Turkish legislation concerning especially the right to access information/truth. For instance, there are legal regulations expressed by conceptions like "secret," "state secret" in 32 codes while there are others using words like "privacy, "prohibition," "cannot be disclosed" in 60 separate codes. Such regulations are problematic with regards to the right to access information, truth and news. GNAT ROP Article 105 § 5 regulates parliamentary inquiries as such: "State secrets and commercial secrets fall outside the scope of parliamentary inquiry." The fact, however, is that to what the conception of "state secret" refers and its definition do not appear in any law whatsoever. "State secret," in practice, is the title given to the thing called to be "state secret" by the authority handling that information.

Law No. 2911 prescribing the right to freedom of peaceful assembly and protest is one that prioritizes the restriction of the right, not of its exercise in contradiction with the ECtHR case law involving prohibitions and penal sanctions that set forth heavy penalties. As is known, the right to protest is the active form of freedom of expression. Criticism and protest are thus being penalized by preventing social dissidents' right to demonstration. The statistics of the Ministry of Justice reveal an interesting state of affairs. While the number of lawsuits launched due to violation of Law No. 2911 was high during the years when the TPC and ATC were less resorted to, the same figure dropped in years during which the TPC and ATC were used more. According to data collected by the Ministry of Justice, lawsuits were launched against 20,440; 20,390; 20,082; 15,292; 10,686 and 6,608 individuals for violating Law No. 2911 in 2013, 2014, 2015, 2016, 2017 and 2018 respectively. The drop in the number of cases, of course, reflect the fact that provincial governors constantly imposed bans during and after the state of emergency. Nevertheless, almost all who exercise their constitutional rights have been facing criminal charges. Turkey needs to draft a new law on assemblies and rallies in concordance with the ECtHR case law taking into account the court's points in its *Oya Ataman and Others v. Turkey* group judgments.[17]

[17] http://aihmiz.org.tr/?q=tr/content/aihm-kararlarinin-uygulanmasinin-izlenmesi-izleme-raporu-20142



There are provisions that restrict and criminalize freedoms of expression and the press within the Press Code No. 5187. Therefore, these should be revised to comply with freedom of expression. The special report drafted by the Human Rights Joint Platform can be consulted about this matter.[18]

Several provisions that criminalize press conferences, peaceful assemblies and protests staged against various administrative decisions of the SoE governors are prescribed within the State of Emergency Act No. 2935. These infringe upon the rights to freedom of expression and peaceful assembly. According to the data provided by the Ministry of Justice, while lawsuits were launched against 86 individuals for opposing Act No. 2935 in 2016, the number goes up to 374 in 2017. It should, however, be stated that administrative fines imposed for failure to obey orders are not included in these figures.

Provisions regarding failure to comply with city governors' various decisions which generally restrict and prohibit the right to peaceful assembly and protest prescribed in Code No. 5442 on Provincial Administration should also be modified.

The Misdemeanor Code No. 5326 also covers an ample number of provisions that prohibit the right to freedom of expression and impose administrative fines, notably the prohibition of posting bills and of holding press conferences at specific places. These also need to be repealed or reformed in a way that will not restrict the right to freedom of expression. The ECtHR judgment on *Yılmaz Yıldız and others v. Turkey* is unfortunately not being implemented in Turkey.

Article 1 of Code No. 5816 on Offenses Committed Against Atatürk designates overtly insulting the memory of Atatürk as an offense. This issue can be evaluated within the scope of Article 8 of the ECHR. The current regulation, however, can also give way to practices rendering Atatürk uncriticizable. Thus, it will be useful to amend the article with freedom of criticism. The article in its current form has the potential to restrict freedom of expression. It cannot, therefore, be considered to have adequate accessibility and foreseeability as per its consequences.

Code No. 5651 on the Regulation of Publications on the Internet and Suppression of Offenses Committed

[18] For the full report see: https://ihop.org.tr/turkiyede-ifade-ozgurlugu-mevzuat-ve-yargi-gozlem-raporufreedom-of-expression-in-turkey-observations-on-legislation-and-judiciary/

by means of such Publications should be repealed.[19] Although the objective of the code was stated to prevent children from accessing illegal and harmful Internet sites, the issue has reached the level of censorship for everyone. A new policy is thus needed in the field. As has been suggested by Akdeniz and Altıparmak, a new Internet regulation "should be developed based on respect for freedom of expression and the rights of Turkish adults to access and consume all kinds of online content. This new initiative should function through a transparent, open, and pluralistic method in order to put these principles into practice. These four fundamental principles should specifically be taken into consideration to this end:

1. The regulation of the Internet should respect the principles of international human rights law, notably freedom of expression and privacy of communication and correspondence.
2. Restrictions should be prescribed by law, should be proportionate and in line with the requirements of democracy.
3. Preservation, perusal, or viewing of content that is not regarded to be an offense should not be included in the regulation of online content.
4. As was stated by the Commission of European Communities, 'Categories of [illegal and harmful content] pose radically different issues of principle, and call for very different legal and technological responses. It would be dangerous to amalgamate separate issues such as children accessing pornographic content for adults, and adults accessing pornography about children.'[20] The new initiative should definitely take this significant differentiation into account."

The provisions of "interlocutory injunction" in laws reported by the Information and Communication Technologies Authority (BTK) enabling blocking access to the Internet should be modified (without prejudice to the request that they should be entirely repealed, including the provisions in the related code).

"Procedures and Principles Regarding the Safe Use of the Internet" that went into effect on 22 November 2011 should also be repealed since Internet filtering is being implemented by the state itself. Moreover, the idea of a uniform child/family has been rendered absolute and imposed. The fact that the state is authorized to impose filtering and is in a position to decide which sites users can get access to is unacceptable with regards to freedom of expression. The only OSCE country that implements central filtering is Turkey.[21]

Articles 78-90 and 96 of Code 2820 on Political Parties should be modified because these articles contain vague statements that are at odds with the principles of accessibility and foreseeability regarding freedom of expression. Furthermore, there are prohibitions and restrictions that contradict Article 10 § 2 of the ECHR which cover a broad area (on various rights and freedoms ranging from minorities to religious and belief-related issues, from the character of the regime to the inability to discuss official ideology and opinions, to the prohibition of using another language other than Turkish).

Code 1117 on the Protection of Minors from Sexually Explicit Material should be repealed. A regulation should be put forward respecting international human rights law and the right to freedom of expression as a whole. The code on children should be based on the principles set forth in the UN Convention on

[19] The same recommendation has also been rendered in *Internet: Girilmesi Tehlikeli ve Yasaktır* by Yaman Akdeniz and Kerem Altıparmak, p. 168.
[20] Commission of the European Communities, "Illegal and Harmful Content on the Internet" p.10 http://aei.pitt.edu/5895/1/5895.pdf
[21] Academic awareness and call to all university rectors against online filtering by the Information and Communication Technologies Authority, 9 January 2012, *Bianet*/ ANF.

the Rights of the Child and the principle of the best interests of the child.

Vague articles of the Radio and Television Higher Council Code 6112, which are not adequately accessible and restrict freedom of expression by prescribing larger restrictions than the restrictive criteria under Article 10 § 2 of the ECHR, should be modified. These articles can be listed as 5, 7, 8, 18, 32, 33, and 46. Publication/broadcast ban provisions brought about by the emergency decree no 680 to Article 7 should especially be repealed.

On the Proposed Changes in Freedom of Thought and Expression within the Scope of the 1st Judicial Reform Package Announced by Political Parties:

Proposed legislative amendments related to freedom of thought and expression within the 1st Judicial Reform Package, which the ruling AKP tabled before the GNAT Speaker's Office on 1 October 2019, are rather limited and insufficient. The additional sentence amended to Article 7 § 2 of the ATC had already been added to Articles 216 and 301 of the TPC but it had failed to overcome the malpractice cases after a while. İHD's concrete recommendation, therefore, is to repeal Article 7 § 2 of the ATC in its entirety and, if this cannot be done, to amend the text of the article so as to prevent punishment other than those that overtly call for violence. Further, imprisonment sentences prescribed for such "thought crimes" should not exceed the maximum limit of two years and, as statements of thought are often done via press and media, this point should no longer be considered a ground for increase in sentences.[22]

Proposal to Defer Investigations and Prosecutions

A regulation that will remove pending investigations and lawsuits within the scope of freedom of thought and expression in the short term should be adopted. If legislative amendments in line with the points İHD has put forth in this part of this report are put into practice, this problem will be solved in any event. Nevertheless, İHD believes that an interim measure should be taken until such amendments are adopted.

Thus, İHD suggests a concrete proposal to defer sentences for offenses committed through the press and media, just like it had been done in 2012, in order to eliminate current cases of injustice and to alleviate the pressure over social dissidence to some extent until İHD's above-mentioned recommendations regarding freedom of thought and expression are adopted. Accordingly, the said regulation failed to remove the threat over freedom of expression in spite of the fact that it provided partial improvement by deferring sentences for crimes committed via press and the media. Freedom of expression should absolutely be protected under all circumstances. To this end, an article should be added to the judicial reform package in order to eliminate all offenses argued to have been committed via the press and media and social media along with the related sentences with all their consequences.

II. ENFORCEMENT REGULATIONS AND THE STATE OF AFFAIRS IN PRISONS

Inequality and Discriminatory Provisions in Code No. 5275 on the Enforcement of Sentences and Security Measures

Article 107 of the Code on the Enforcement of Sentences and Security Measures prescribes provisions on conditional release.[23] Article 107 § 4 of the code disregards the principle of equality in the enforcement

[22] See the joint press release by human rights bodies on the 1st Judicial Reform Package: "Reform Değil Tadilat!": https://ihop.org.tr/reform-degil-tadilat/

[23] Conditional release and supervised release are different legal terms in Turkish law. Conditional release (koşullu

of sentences and the term of enforcement which was normally 2/3 was raised to 3/4 with the provision that states "in case of conviction because of an offense committed by founding or leading or acting within the framework of the activities of an illegal organization; if those who were sentenced to aggravated life sentence served 36 years, if those who were sentenced to life sentences served 30 years, if those who were sentenced to determinate imprisonment served three fourths of their terms in penitentiary institutions, they can benefit from conditional release." The practice that forces people, whose sentences have already been extended by half within the scope of terrorist offenses under Article 5 of the ATC, to serve their sentences under more aggravated circumstances should be put to an end. The provisional Article 6 amended to the code through the emergency decree no. 671 of 17 June 2016, the term of enforcement of sentences was reduced to 1/2 from 1/3 for ordinary inmates. TPC's premeditated murder offenses, intentional injury and aggravated injury offenses as per their consequences against kin, spouses, or siblings or a person who could not physically or mentally defend himself/herself, offenses committed against sexual inviolability, offenses committed against private life and the private field of life, manufacturing and trafficking narcotics, the offenses defined under the 4th, 5th, 6th, and 7th Parts of Chapter 4 of the 2nd Book, and the offenses covered by the ATC No. 3713 of 12 April 1991 have been excluded from this new regulation.

The provision prescribing "[T]errorist offenders whose death penalty sentences were reduced to aggravated life or terrorist offenders who were sentenced to aggravated life imprisonment cannot benefit from conditional release provisions. Aggravated life sentences imposed upon these continue for the rest of their lives" regulated simultaneously both under the provisional Article 2 of the Code of Enforcement of Sentences and the Article 17 § 4 of the ATC should be repealed, the opportunity to benefit from conditional release should also be rendered possible for those whose death penalty sentences were reduced to imprisonment.

The ECtHR found life sentences to be in violation of Article 3 of the ECHR in its *Vinter and Others v. the United Kingdom* and *Öcalan v. Turkey* judgments and held that legal reforms that might provide any hope of release in the future should be adopted for the rehabilitation of inmates.

Article 6 § 1 of the Directive on the Transfer to Open Penitentiary Institutions designates the conditions under which convicts can be allocated to open penitentiary institutions. This regulation stipulates that convicts should serve a specific term in good conduct in the institution. Article 6 § 2, however, lists some offenses and stipulates serving in prison for a longer period of time. The most important of these was prescribed in the subparagraph (ç) of Article 6 § 2 as "to have less than a year until the date of conditional release for those convicted of terrorism and organized crime offenses whose termination of their membership to such organizations have been ascertained by the administration's observation board." Since transfer to an open penitentiary institution would also indirectly enable benefitting from conditional release provisions, it is related to persons' freedoms and the principle of legality has been destroyed by

salıverilme/şartlı tahliye) is an instrument of enforcement of sentences law that provides a convict, who served a part of his/her imprisonment sentence with "good conduct," to conditionally serve the remainder of his/her sentence under supervision outside the prison (Art. 107 of the Code on the Enforcement of Sentences No. 5275). A convict who is conditionally released is legally obliged not to commit a new offense and to comply with legal obligations until his/her ipso jure release date. If these conditions are not met by the released convict, he/she has to serve the remainder of his/her term in prison through a revoking of the conditional release ruling. Supervised release (denetimli serbestlik), on the other hand, is an instrument of criminal law that provides the enforcement of a person's sentence in social life within a probation period prescribed by law (Art. 105 § A of the Code on the Enforcement of Sentences No. 5275). A person who committed an offense is observed within social life through supervised release. The code on supervised release is one that went into force on the grounds that enables a person to maintain his/her ties with his/her family and adopt to the outside world. A convict is released when there is a specific amount of time until his/her conditional release while serving in prison and is thusly supervised within the outside social life.

prescribing in the directive the "on condition of a decision to be rendered by the administration's observation board" which was not prescribed by law. Article 6 § 2 of the directive and specifically the subparagraph (ç) alongside with Article 8 § 1-ç, which has also been designated to the same end, should be repealed.

Supervised release conditions prescribed under Article 105 § A of the code have not been put forth in concordance with the principle of equality either. It has been regulated that convicts with good conduct who served the last six months of their sentences in an open prison and who have a year or less until conditional release could benefit from supervised release and the provisional Article 4 prescribes that the condition to serve the last 6 months of their sentences in an open prison would not be stipulated until 21.12.2020. The term of benefitting from supervised release was extended to 2 years from the initial 1 year under the provisional Article 6 that was amended to the code through the emergency decree no. 671 of 17.08.2016. TPC's premeditated murder offenses, intentional injury and aggravated injury offenses as per their consequences against kin, spouses, or siblings or persons who could not physically or mentally defend themselves, offenses committed against sexual inviolability, offenses committed against private life and the private field of life, manufacturing and trafficking narcotics, the offenses defined under the 4th, 5th, 6th, and 7th Parts of Chapter 4 of the 2nd Book, and the offenses covered by the ATC No. 3713 of 12 April 1991 have been excluded from this new regulation.

Exclusion of terrorism offences and illegal organization-related offences from the deferral of enforcement of sentences through Article 17 § 6a of Code No. 5275 is against Articles 10 and 19 of the Constitution. The provision to exclude prisoners incarcerated for offences under the ATC within the provisional Article 8 of Code No. 5275 based on similar grounds is unconstitutional as well.

When the provisions set forth by Articles 10 and 19 of the Constitution are evaluated together, it becomes clear that the principle of equality before law should also be taken into consideration in the enforcement of sentences. Moreover, when Law No. 3713 went into effect the Constitutional Court's judgment of 31.03.1992 (E.: 1991/18, K.: 1992/20) on its provisional Article 1's implementation should be taken into account.

Additional Article 1, which was added through the decree law no. 696 to Law No. 5275 and passed into law with Article 97 of Law No. 7079, prescribes uniforms for prisoners. It was also stated that a directive would be issued to implement this provision, though the said directive has yet to be issued. This amended provision is completely against prisoners' rights. This provision should be acknowledged to fall under conduct incompatible with human dignity and should be sent to the Constitutional Court for repeal as per UN's Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) that was adopted and revised on 17 December 2015 through UN Resolution 70/175 which Turkey has to comply with.

Enforcement of Aggravated Life Sentences and the Condition of Sick Prisoners

According to the data of 17 February 2014 provided by the Ministry of Justice, there are 1,453 inmates who were sentenced to serve aggravated life sentences in Turkey. Aggravated life sentences in prison replaced the death penalty in Turkey following 2002.

Inmates, who were sentenced as per offenses listed under the 4th Part entitled "Offenses against the Security of the State," under the 5th Part entitled "Offenses against the Constitutional Order and the Functioning of This Order" and under the 6th Part entitled "Offenses against National Defense" of the 2nd Book of the TPC having committed such an offense within the framework of organizational activity, cannot benefit from conditional release because of Article 107 § 16 of the Code on the Enforcement of Sentences and the provisions set forth in the provisional Article 2 and the execution of the sentence continues "until death." Moreover, according to Article 25 § 1-ı of the Code on the Enforcement of Sentences, the enforcement of the sentence of the convict cannot be suspended by any means.

Yet Article 16 § 2 of the same code entitled "Suspension of the execution of the sentence due to sickness" prescribes "if [the sickness] poses a vital threat to the inmate's life, the enforcement of his/her sentence is suspended until the inmate recuperates" and paragraph 6 also designates stay of enforcement of the sentence of inmates who cannot live on their own under incarceration conditions and who do not pose a grave and concrete threat to public safety until they recuperate.

The ECtHR ruled for violation in its judgments on *Öcalan*, *Gurban*, and *Kaytan* on the grounds that "the absence of the possibility of release" was classified as torture and ill-treatment with regards to this regime of enforcement of sentences, which qualifies as a separate punitive practice within the scope of a life sentence that would go on until the inmate died. Specifically, the enforcement of the sentences of sick prisoners according to this regime gives way to their death and each sick inmate is not treated in appropriate periods and conditions is gradually driven to death each day.

While the enforcement of the sentences of sick convicts should be undertaken in official healthcare services' departments allocated to inmates although the ailment does not pose a risk to the inmate's life, the non-suspension of the enforcement of the sentences of inmates with life-threatening conditions is a violation of the right to life.

Therefore, the provision "the enforcement of the sentence cannot be suspended by any means" in Article 25 § 1-ı of the Code on the Enforcement of Sentences should be removed alongside with the above-mentioned modifications in conditional release pertaining to aggravated life sentences; sick inmates should be treated at official healthcare institutions, the enforcement of the sentence of the inmate should be deferred in cases where the sickness poses a definitive threat to the life of the inmate.

Discrimination in the deferral of enforcement of sentences should be ruled out

Exclusion of terrorism offences and illegal organization-related offences from the deferral of enforcement of sentences through Article 17 § 6a of Code No. 5275 is against Articles 10 and 19 of the Constitution. The provision to exclude prisoners incarcerated for offences under the ATC within the provisional Article 8 of Code No. 5275 based on similar grounds is unconstitutional as well since it is discriminatory.

When the provisions set forth by Articles 10 and 19 of the Constitution are evaluated together, it becomes clear that the principle of equality before law should also be taken into consideration in the enforcement of sentences. Moreover, when Law No. 3713 went into effect the Constitutional Court's judgment of 31.03.1992 (E.: 1991/18, K.: 1992/20) on its provisional Article 1's implementation should be taken into account.

The provision setting forth uniforms for prisoners should be removed

Additional Article 1, which was added through the decree law no. 696 to Law No. 5275 and passed into law with Article 97 of Law No. 7079, prescribes uniforms for prisoners. It was also stated that a directive would be issued to implement this provision, though the said directive has yet to be issued. This amended provision is completely against prisoners' rights. This provision should be acknowledged to fall under conduct incompatible with human dignity and should be sent to the Constitutional Court for repeal as per UN's Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) that was adopted and revised on 17 December 2015 through UN Resolution 70/175 which Turkey has to comply with.

All practices against human dignity, particularly isolation, in prisons should be put to an end and the legislation should be adapted under UN's Mandela Rules

Isolation should be ended and legislative regulations should be provided for in order to harmonize domestic law with UN's Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) that was adopted and revised on 17 December 2015 through UN Resolution 70/175; punitive isolation should be discarded from the legislation and the law, bylaws and directive on enforcement should be redrafted. The following should specifically be taken into account:

1. Respect for the human dignity and value of prisoners,
2. Compliance with medical and healthcare rules,
3. The role of medical staff,
4. Effective investigations into the signs or allegations of all torture or inhuman or degrading treatment or punishment cases about prisoners and into all mortality cases under custody,
5. Protection of fragile groups deprived of their liberty and meeting their special needs taking into account the countries under challenging conditions,
6. Providing access to the right to legal representation,
7. Providing for lodging complaints and materializing independent audits,
8. Providing for countries' compliance to UN's Mandela Rules,
9. Providing for the training of prison staff and other personnel implementing UN's Mandela Rules.[24]

III- THE RIGHT TO LIBERTY AND SECURITY OF PERSON

Provisions against the Rights to a Fair Trial and to Liberty and Security of Person within the Code of Criminal Procedure No. 5271

Anonymous witnesses, prescribed by Article 58 of the CCP and Articles 5 and 9 of the Code on Witness Protection, should be repealed in its entirety having regard to the Constitutional Court's *Serdar Batur* (2014/15652), *Baran Karadağ* (2014/12906), and *Önder Sığırcıkoğlu* 2014/13176) judgments. The failure of courts to accurately appreciate whether the necessary conditions have been formed or not when having recourse to evidence by anonymous witnesses, accepting evidence by anonymous witnesses as the sole and decisive evidence, failure to extend defendants the opportunity to examine such witnesses at an open hearing, failure to determine the reasons why the identity of the witness is kept anonymous according to objective criteria, which thusly give way to violations of the right to defense and the right to a fair trial. For all these reasons it will be more appropriate to completely remove the opportunity to use this kind of evidence in organized crime-related offenses.

There are provisions within the CCP against the right to liberty of person. Article 100 of the CCP covers provisions that provide for the easy pre-trial detention of persons. Human rights defenders can easily be detained because of these. The above-mentioned report by the Council of Europe's Commissioner for Human Rights offers concrete statements about the necessity that CCP 100 should be amended. Pre-trial detention is a typical example of judicial harassment against human rights defenders. Turkey never complies with such recommendations. It was seen most particularly after the declaration of the state of

[24] https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf

emergency that individuals were detained even for charges that did not necessitate resorting to detention measures under CCP 100. For instance, individuals have often been detained in spite of the fact that there was no need for detention under Article 7 § 2 of the ATC and Article 216 of the TPC.

Recommendations to Repeal the Amendments Introduced by Emergency Decree Laws

Emergency decrees numbered 676, 680, 694, and 696 that went into force during the SoE period modified the CCP. A total number of 36 modifications was put into effect by these 4 emergency decree laws. The ones that need to be changed primarily are listed as follows:

Articles 149, 151, 154, 178, and 188 of the CCP were amended by the Emergency Decree No. 676.

Article 149 § 2 entitled "A Suspect's or a Defendant's Selection of a Defense Lawyer" prescribed a modification stating that "A maximum of three lawyers can be present at a hearing as per prosecutions conducted with regards to offenses committed within the framework of organizational activity" and this restricted the right to defense in many types of offenses that were under the jurisdiction of Heavy Penal Courts.

Article 151 § 3 entitled "Procedures to be Followed and Banning Defense Lawyers from Undertaking their Tasks When They Fail to Fulfil Their Duty" puts forth the provision that "a lawyer who was selected under Article 149 or was assigned under Article 150 and who undertook the task of defending or representing 'suspects, defendants', or convicts who stood trial as per offenses listed in Articles 220 and 314 of the TPC and as per terrorism charges can be banned from undertaking their defense or representative task if an investigation or prosecution has been lodged against them based on the offenses listed in this paragraph" and this modification has thus abolished the right to defense and the right of the suspect, defendant, or the convict to select their own lawyer.

Article 154 entitled "Conferring with a Defense Lawyer" was amended with a new subparagraph that put forth the possibility that a person held under custody could be barred from conferring with his/her lawyer for 24 hours, thereby, rendering it impossible to determine torture and ill-treatment that the suspect could be exposed to by the law enforcement.

Article 178 entitled "Direct summoning of witnesses and specialists who were previously denied" was amended to prescribe that the court was obliged to hear witnesses or experts in the case that these persons were made available to the court by the suspect or the intervening party although such a request was rendered previously but denied by the court however this request could also be denied by the court if it "sought to prolong the proceedings." Thus parties' right to freely present their evidence and defense has been revoked.

Article 188 entitled "Those who shall be present at hearings" was amended by the statement "a hearing can proceed if the defense lawyer leaves the hearing unexcused" but then this statement was not found to be sufficient enough either and the statement "not attending the hearing or" was added through emergency decree no. 696 prescribing that the proceedings could continue without a defense lawyer in such a case as well. This also restricts the defendants' right to defense.

Articles 102, 139, 140, 158, 161, 196, and 216 of the CCP were amended and provisional Article 3 was added through the Decree Law no. 694.

Article 102 § 2 entitled "Term to be served under arrest" was amended by the statement "the term of imprisonment cannot exceed 5 years for offenses defined under the 4th, 5th, 6th, and 7th Parts of Chapter 4 of the 2nd Book of the TPC No. 5237 and the offenses covered by the ATC No. 3713 of 12 April 1991" and this extended the term of imprisonment which could be 3 years in total to 5 years.

Article 139 § 3 entitled "Assignment of an Anonymous Investigator" was amended by the statement "without the presence of those who are obliged to be present at the hearing or by modifying sound or image" which prescribed that the confidential investigator could thusly be heard if the confidential investigator's testimony as a witness was obligatory. This modification is one that prevents the defendant or the defense lawyer or the intervening party to exercise their right to ask questions to the confidential investigator.

Article 140 entitled "Surveillance by Technical Equipment" was also amended to extend the procedure of surveillance and recording, which could be conducted for a maximum of 2 months previously, up to 4 months within the scope of files in which confidential investigators were assigned alongside with surveillance by technical equipment.

Article 158 entitled "Reports and complaints" prescribes that a "decision regarding there was no room for investigation" can be rendered although the article suggests that there is no need for launching investigations and prosecutions without necessitating any exploration of reports and complaints. Thus, the liability of the state to conduct effective investigations has been disregarded.

Article 216 § 3 entitled the "Discussion of Evidence" was also amended by a statement that said the absence of the defense lawyer at the hearing when the sentence imposed on the defendant was announced did not constitute an impediment and the right to a fair trial and the right to defense were thusly ruled out.

Decree Law No. 696 amended Articles 280 and 299 of the CCP.

The provisions "lack of justification for the judgment" and "restriction of the right to defense for matters necessary for the judgment" were removed from Article 280 § 1 (d) entitled "Investigation and prosecution at the regional courts of justice" with reference to Article 289 and the regional courts of justice were thusly barred from overturning the rulings of local courts on these grounds.

Article 299 entitled "Review with Hearing" at the Court of Cassation, which is an appellate court, was modified to restrict the right of defense before the Court of Cassation by adding the statement "can be conducted through a hearing if seen fit."

The primary problem with the CCP is the provision that allows the assumption that reasons for detention exist in cases where individuals are charged with a "catalogued offense" under Article 100 § 3 of the code. The repeal of this provision to be replaced by general grounds for detention would suffice.

The 1st Judicial Package sets forth that the 5-year maximum term of detention for offenses that fall under the ATC can be maintained up to two years at the investigation stage. However, detention should have been an exception, whereas liberty was fundamental. İHD believes that such regulations will encourage detention. The issue of detention should be approached through a holistic perspective and the rule that stipulates that detention is the last resort should be written in the CCP.

The right of appeal for offenses that warrant imprisonment sentences without any discrimination

The 1st Judicial Package grants the right of appeal before the Court of Cassation following appeal review for some offenses which limit and punish freedom of thought and expression warranting less than five years of imprisonment. These offenses include those that fall under Articles 213, 214, 215, 216, 217, 299, 300, 301, 314, 318 of the TPC, Article 7 § 2 of the ATC, and Articles 28, 31, 32 of Law No. 2911.

İHD is of the opinion that the legal remedy of appeal should be granted without discrimination in cases where individuals are handed down custodial sentences and are imprisoned because the right to liberty of person is a fundamental right and its essence cannot be infringed upon, which in the end dictates that all kinds of legal remedies should be granted about this very right.

Article 286 § 2d of the CCP No. 5271 was repealed by the Constitutional Court's judgment of 27 December 2018 (Merits No. 2018/71, J. No. 2018/118) which was published in the *Official Gazette* of 15 February 2019. When the grounds of the judgment are studied, it is seen that the court clearly underlined the significance of review for sentences resulting in restriction of liberty of person having deliberated on the issue comprehensively and stated that the rule in question was against Article 36 of the Constitution and thusly repealed it.

The last sentence in the 34th paragraph of the reasoned judgment of the Constitutional Court reads: "Under these circumstances the rule, which sets forth that verdicts upholding conviction sentences by first instance courts and conviction sentences passed for the first time after the reversal of acquittal rulings without any discrimination covering all kinds of rulings passed by Regional Courts of Justice regarding offenses warranting a maximum prison term up to 2 years (including 2 years) and the related punitive fines cannot be appealed, should be repealed in its entirety." This judgment of the Constitutional Court proves to be very important and in fact it designates that the rule, which stipulates that imprisonment sentences passed under Article 286 § 2d cannot be repealed, is against Article 36 of the Constitution in its entirety.

The GNAT reformulated Article 7 of Law No. 7165 and the rule in question upon the repeal judgment of the Constitutional Court and prescribed that the verdicts passed for the first time by Regional Courts of Justice are eligible for appeal.

The reasoned judgment of the Constitutional Court states that conviction sentences with imprisonment should be subjected to review by the Court of Cassation. No grounds were offered only for verdicts passed by the Regional Courts of Justice for the first time. Therefore, limiting the upholding and finalization of sentences passed by first instance courts by courts of appeal with the term of imprisonment is against the right to a fair trial.

The legislators' seeking finalization at the appeals stage not based on types of offense but only on terms of punishment for offenses is against the principle of legality of crime and punishment as well. The fact that the review power of the appeals authority is left to the objecting authority has rendered it almost impossible to review whether crime and punishment bear the elements of legality. Thus finalization of offenses under the ATC based on the proposed term of punishment is clearly against this rule. For instance, as the minimum limit of a direct imprisonment sentence under Article 314 § 2 of the TPC exceeds 5 years, it is subject to appeals review before the Court of Cassation. But individuals cannot appeal if imprisonment sentences handed down under Article 314 § 2 of the TPC with the application of Articles 220 § 7 and 314 § 3 of the TPC the upper limit of which does not exceed 5 years. As is seen, not only the review power of the Court of Cassation, which in fact is the one to conduct the review, is restricted but also is the right to a fair trial of the suspect seeking justice also infringed upon. The inequality will be removed with regards to this article with the 1st Judicial Package.

IV- THE RIGHT TO A FAIR TRIAL

On detention verdicts by Criminal Peace Judgeships and Heavy Penal Courts with special powers

Heavy penal courts and prosecutor's offices with special powers were reinstated by the decision of the Supreme Council of Judges and Prosecutors (SCJP –dec. no. 224) which was published in the *Official Gazette* of 17 February 2015. There are no legal grounds for the operation of heavy penal courts and prosecutor's offices with special powers that are still in office. This state of affairs is a clear manifestation of the degree to which the judiciary, which is supposed to be the guarantee for fundamental rights and freedoms, is controlled by the political power.

As is known, Article 143 of the Constitution was repealed through an amendment in 2014 and State Security Courts were closed down. Similar provisions, however, were introduced to Articles 250, 251, and 252 of the new CCP providing for a continuation of such courts and heavy penal courts and prosecutor's offices with special powers were sustained.

Articles 250, 251, and 252 of the CCP were repealed by Code No. 6352 that went into force on 5 July 2012 and these special courts that were the continuations of State Security Courts were closed down as well. The same code established heavy penal courts and prosecutor's offices with special powers under Article 10 of the ATC which replaced the former. These courts were also closed down by means of Code No. 6526 that went into effect on 6 March 2014. The overall grounds for this code proves to be rather significant. Article 250 of the CCP and Article 10 of the ATC admitted that heavy penal courts with special powers did not provide fair trials. The first three paragraphs of the overall grounds read as follows:

> Our country has signed and ratified fundamental conventions on human rights and freedoms, further, it has adopted the European Convention on Human Rights which prescribed the judicial review of human rights violations while acknowledging the right to lodge individual applications before the European Court of Human Rights. These conventions incorporate such principles as the right to a fair trial and the presumption of innocence that provided grounds for this, the right to remain silent, equality of arms, and the right to defense; these mentioned principles have become mandatory rules with which domestic law should directly comply under Article 90 of the Constitution. Article 36 of the Constitution prescribes that everyone has the right of litigation as plaintiff or defendant and the right to a fair trial through legitimate means and procedures. Our country is liable to meet the requirements of Article 6 "the right to a fair trial" of the European Convention on Human Rights which we are a party to. The controversy on fair trial in our country is led by investigations and proceedings undertaken first by state security courts then by heavy penal courts established under Article 250 of the Code of Criminal Procedure and Article 10 of the Anti-Terror Code and finally by courts and public prosecutors with special powers. Furthermore, the practice heavy penal courts with special powers has given way to three different heavy penal courts and a de facto hierarchical perception regarding judges and public prosecutors has emerged among the public by merely qualifying them as special judges, special courts, and special prosecutors. This draft puts an end to the practice of courts and public prosecutor's offices with special powers alongside with procedures of special investigation and prosecution, which have led to grand controversies about fair trial, and enables all heavy penal courts to be subjected to the same procedural rules.

As can be understood from these grounds, it is obvious that these heavy penal courts did not provide fair trials. The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, announced a report entitled "Administration of Justice and Protection of Human Rights in Turkey"[25] on 10 January 2012 following a visit to Turkey on 10-14 October 2011 and openly stated that there was no need for assize courts with special powers and they should be closed down.[26] Turkey complied with this recommendation in 2014 but went back to the former system in 2015.

Heavy penal courts with special powers established by the CJP and mandated with prosecuting offenses within the ATC are against the natural judge principle. The authority of such courts to prosecute offenses especially during the state of emergency will be a subject of much debate in the future and we will face many instances of the violation of the right to a fair trial.

The opinion of the Venice Commission of the Council of Europe (Op. No. 852/2016) dated 13 March 2017 regarding the duties, competences, and functioning of the criminal peace judgeships in Turkey is also very important.[27] The opinion has overtly revealed the fact that criminal peace judgeships, which had an even more special place within the system of heavy penal courts and prosecutors with special powers, have been utilized as the most significant instruments of judicial harassment. Turkey should comply with these recommendations of the Venice Commission without delay.

Cases requiring retrial

The ECtHR judgments on applications by Leşker Acar, Şehmus Yıldız, Abdullah Altun et al. held that Article 6 § 1 of the ECHR was violated due to trials by military judges in State Security Courts and such judgments are now a part of the court's case law. The court also stated within the scope of such judgments that the applicants be retried and the consequences of the violation should be remedied.

Accordingly, the Constitutional Court concluded that a trial by a board including a military judge was on its own a reason leading to the violation of the right to a fair trial and stated that it would be appropriate that the trial should go back to its starting point with a board that did not have a military judge since this was not only a matter of procedure but also a factor that affected the trial from beginning to end.

Abdullah Altun's request for retrial was sustained on 8 October 2018 and he was released on 19 June 2019. Further, Leşker Acar and Şehmus Yıldız who had been tried in similar cases and faced life in prison sentences were released on 30 January 2019 and 13 March 2019 respectively.

The ECtHR judgment on Leşker Acar's application is among those referred to by Article 21 of Law No. 6459 and the provisional Article 2 of Law No. 5271 and is monitored by the Council of Europe's Committee of Ministers. The 16th Penal Circuit of the Court of Cassation held in its judgment on the same applicant's file (merits 2015/1217 and no. 2017/4202) that "the request for a retrial should be sustained and a merits review should be undertaken for judgments being monitored by the European Court of Human Rights" and concluded that the local court's verdict to the contrary should be reversed for the public weal.

Moreover, it is known that retrials ended up in a couple of releases in PKK cases whereas they led to an

[25]To read the full report see:
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-tr/dv/0131_04/0131_04en.pdf
[26]To read the full report see:
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-tr/dv/0131_04/0131_04en.pdf
[27]To read the full report see:
https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282017%29004-e

ample number of releases in Hezbollah cases. Insomuch that numerous convicted prisoners, who had not applied to the ECtHR, were released after their request was accepted (we are not at liberty to disclose their identities).

It is also noteworthy to see that Diyarbakır 6th Heavy Penal Court is virtually the only court that ruled in line with both the ECtHR judgments and the case law of the Constitutional Court. Although there are some other courts in İstanbul and Van that passed a couple of release orders, it is also observed that Diyarbakır 6th Heavy Penal Court has been specially authorized about this matter and has not been using its authority in an equal and fair manner.

The judicial package should remedy the problem regarding this matter and should provide for retrial.

Regarding legal security,

The ECtHR's *Selahattin Demirtaş v. Turkey* judgment (app. no. 14305/17) was announced on 20 November 2018. In this judgment the court held that there had been a violation of Article 5 § 3 of the European Convention on Human Rights (ECHR) (the right to trial within a reasonable time or to release pending trial), Article 18 of the Convention in conjunction with Article 5 § 3 (the restrictions permitted under the Convention to the said rights and freedoms cannot be applied for any purpose other than those for which they have been prescribed) and Article 3 of Protocol No. 1 to the Convention (the right to free elections) regarding Selahattin Demirtaş's detention. This judgment proves to be the first of its kind within the scope of which Turkey was found to have violated Article 18 of the ECHR.

Although Selahattin Demirtaş should have been released in compliance with the ECtHR judgment, the Ankara 19th Heavy Criminal Court did not rule for his release on 30 November 2018 arguing that the ECtHR judgment was not legally binding on the grounds that it was not finalized. Then, 4 years and 8 months of imprisonment sentence handed down by the İstanbul 26th Heavy Criminal Court within the scope of another file was upheld on 4 December 2018, merely within 40 days, by İstanbul Regional Court of Appeals' Second Criminal Chamber. Demirtaş became a convicted prisoner by this upholding ruling. HDP's former Ankara Deputy Sırrı Süreyya Önder facing trial along with Mr. Demirtaş was also detained because of the imprisonment sentence handed down to him.[28]

Mr. Demirtaş's attorneys launched an application before the ECtHR on 19 February 2019 requesting a revision of the case regarding the rights that the ECtHR's Second Section had not evaluated, found no violation and declared inadmissible. The government, too, appealed the case requesting a revision of violation rulings passed by the Second Section. Thus the case was referred to ECtHR's Grand Chamber which heard the case on 18 September 2019.

Ankara 19th Heavy Criminal Court, which had not ruled for Mr. Demirtaş's release in spite of the ECtHR Second Section's judgment, ruled for his release within the scope of the main case he has been standing trial merely two weeks before the hearing at the Grand Chamber. The prosecutor's office objected to the release verdict passed on 2 September 2019 before Ankara 20th Heavy Criminal Court but this objection was overruled on 10 September 2019. Selahattin Demirtaş was now eligible for supervised release within the framework of this latest verdict after the deduction of the period of time he spent in detention from his finalized imprisonment sentence of 4 years and 8 months but he was not released. On 20 September 2019, İstanbul 26th Heavy Penal Court ruled on the application lodged on 10 September 2019. Mr. Demirtaş was detained once again having another investigation file used as an excuse this time. This was

[28] Mr. Önder was released on 4 October 2019.

about an investigation from 2014 conducted by Ankara Prosecutor's Office with charges against Selahattin Demirtaş and Figen Yüksekdağ because of Kobane protests. The fact, however, is that this investigation was merged with the main investigation into Mr. Demirtaş in 2016. Under these circumstances Mr. Demirtaş and Ms. Yüksekdağ were detained for the second time within the scope of the same investigation.

This state of affairs clearly reveals that nobody in Turkey has legal security.[29]

V- REMOVAL OF LEGISLATION AND JUDICIAL PRACTICE AGAINST PRESUMPTION OF INNOCENCE

The matter of junction (iltisak) and contact (irtibat)

The state of emergency declared on 20 July 2016 and the subsequent SoE decree laws introduced the terms junction and connection into Turkish legislation and were placed in numerous laws: "[B]ecause of their membership in or junction or connection with structures, formations or groups or terrorist organizations identified to pose a threat to national security." İHD would like to state that it shares the views presented by academics on state of emergency atypical decree laws and permanent unlawfulness.[30]

Not only does Turkish legislation lack explanatory definitions on "junction" and "contact," it is also evident that these are against the principle of personality in crime and punishment, the principle of legality of crime and punishment, and therefore violates the right to presumption of innocence. Thus these conceptions should absolutely be removed from the legislation.

We would also like to state that cases of injustice especially in the dismissal of individuals from public posts through the state of emergency decree laws do not have an equivalent in international law. Under Article 6 of the ECHR, it is evidently unlawful to presume individuals guilty and take actions against them without any concrete charges and a criminal trial ruling. This criterion is valid even if this situation is related to civil rights. Lustration principles are set in ECtHR judgments and Council of Europe criteria. These principles are specifically referred to in ECtHR judgments on cases related to Poland.

Under Article 15 of the ECHR, contracting parties can in no way violate Articles 2, 3, 4 and 7 of the convention. Article 17 of the convention prohibits abuse of rights while Article 18 prescribes limitation on use of restrictions on rights. Article 46 of the convention prescribes the binding force and execution of judgments. State of emergency decree laws presented a new crime definition like "junction" and under this definition gross sanctions that led to civil death were undertaken. All these actions were taken in violation of Articles 17, 18 and 46 of the convention.

Turkey is a party to the revised European Social Charter which, after ratification, entered into force. Under Article 1 § 2 of the European Social Charter, the Contracting Parties pledge "to protect effectively the right of the worker to earn his living in an occupation freely entered upon." Article E of the revised charter prescribes non-discrimination, while Article G states that the rights and principles set forth in the charter "shall not be subject to any restrictions or limitations […] except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals."[31] In other words, the measure taken on the grounds of national security against the right to earn one's living in an occupation freely

[29] See IHD press release: "Why is Selahattin Demirtaş in Jail?" https://ihd.org.tr/en/ihd-statement-on-selahattin-demirtas/
[30] Kerem Altıparmak, Dinçer Demirkent and Murat Sevinç: "Atypical Decree Laws and Permanent Unlawfulness." 8 March 2018. https://www.ihop.org.tr/wp-content/uploads/2018/04/Atipik-OHAL-KHKleri_II-1.pdf https://www.ihop.org.tr/wp-content/uploads/2018/03/Atipik_OHAL_-KHKleri-1.pdf
[31] The European Social Charter (Revised). p. 16. https://rm.coe.int/168007cf93

entered upon does not suffice. This measure needs to have a legal basis and should, at the same time, be taken as one that is necessary in a democratic society.

The European Committee of Social Rights (ECSR) has implemented the criterion "necessary in a democratic society" to the concept "occupation freely entered upon" while reviewing the case of those dismissed from public posts due to services they provided in communist regimes. One may summarize the committee's conclusion as such: The individual subject to restriction was responsible for public order and national security, and since there is a causal relation between serving the privileges of public force and the restriction, the restriction in question can be evaluated to have been necessary in a democratic society. However, preventing specific employment opportunities for individuals who will not undertake duties of the same nature for good cannot be accepted in a democratic society. Depriving individuals, against whom there is no concrete proof that they pose a threat to public order and national security, of entry into public service for good is unlawful.

International Labor Organization (ILO) conventions should necessarily be implemented.

ILO Convention No. 111 on Discrimination (Employment and Occupation), published in the *Official Gazette* of 21.09.1967 and adopted by Law No. 811, is still in force. Under Article 4 of the convention, it has been clearly prescribed that "any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice." Therefore, this provision under the convention refers to the fact that dismissals from public office should be heard by the administrative courts as per procedural law. Again under the provisions of the convention, states have pledged to remove all legal provisions and change administrative orders and practices that brought about discrimination in work life and did not comply with the provisions of the convention.

Article 5 of the ILO Convention No. 158 on Termination of Employment, published in the *Official Gazette* of 12 October 1994 and adopted by Law No. 3999, prescribes that political opinion, family responsibilities, religion, national extraction or social origin, inter alia, shall in no way constitute valid reasons for termination while Article 7 openly regulates that the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he/she is provided an opportunity to defend himself/herself against the allegations made. Dismissals from public posts during and after the state of emergency in Turkey through decree laws are blatantly against the ILO Convention No. 158 due to their procedure and the grounds they are supposedly based on.

The concepts of "iltisak" (junction) and "irtibat" (contact) have been added to Law No. 7145 and Decree Law no. 375. Dismissals from public office are thusly being maintained today. Additional Article 35 of Decree Law No. 375 prescribed the sanction to dismiss from public office "the members or those in junction or connection with terrorist organizations or structures, formations or groups decided to have been acting against the national security of the State by the National Security Council." This regulation is a "criminal charge" within the framework of its autonomous meaning in the European Convention on Human Rights.

According to the ECtHR case law, any law that provides the basis for interventions and restrictions into private life and the rights to freedom of expression and to work should be "accessible" and "foreseeable" (*Sunday Times v. the United Kingdom*; *Larissis and Others v. Greece*, 140/1996/759/958-960, 24.02.1998; *Rotaru v. Romania*, 28341/95, 04.05.2000). In other words, the law should be easily accessible and understandable, even though through professional help when needed, open, clear and manifest enough in order for the related person to adjust his/her conduct (*Altuğ Taner Akçam v. Turkey*, App. No: 27520/07, 25.10.2011, § 87; *Yıldırım v. Turkey*, App. No: 3111/10, 18.12.2012, para. 57). A norm which does not bear such qualities will not be seen as law (*Sıryk v. Ukraine,* App. No. 6428/07, 30.06.2011, para. 34). If a point which was not openly prescribed by the rule has been formed, one can talk about law within the meaning of Article

10 § 2 (*Huvig v. France,* no. 11105/84, 24.4.1990, para. 28). One can expect that abstract rules may be interpreted according to novel conditions (*S.W. v. the United Kingdom*, no. 20166/92, 22.11.1995, para. 36).

In practice however it is not possible to make a provision clear which was offered as grounds for the dismissal of a public employee from public office. There are no rules, exercise, administrative practice whatsoever that shows which acts fall under "junction," which others fall under "contact."

Use of conceptions "junction" and "contact" in security clearance checks

The Constitutional Court's General Secretariat offered quite an insightful assessment on Law No. 4045 and concluded that this regulation did not bear the legality requirement in its judgment of 27.02.2019 pertaining to *Fatih Saraman*'s application (App. No. 2014/7256) which was published in the *Official Gazette* of 27 March 2019.

Despite the Constitutional Court's judgment, not only was poor implementation maintained but also amendments were introduced that enabled the use of these conceptions in security clearance investigations within the scope of numerous laws, prominently Law No. 657.

Moreover, the ECtHR's *İhsan Ay v. Turkey* judgment of 21 January 2014 sets a precedent. Within the scope of this application, the applicant started working on contract at a private teaching center in Diyarbakır on 10 December 1985 but his contract was not renewed and terminated on the grounds of a security clearance investigation conducted by the governor's office. The ECtHR concluded in its judgment that ECHR Article 8 which set forth the right to respect for private and family life along with Article 6 § 1 which prescribes the right to a fair trial were violated.

The issue of loyalty to the state

Unprecedented novel conceptions like "to be in junction or contact with" an illegal organization were introduced to Turkish law with the declaration of the state of emergency. Since conceptions "membership and involvement" (üyelik and mensubiyet) are also used along with these concepts, they should each be distinguished.

Such conceptions, which are impossible to foresee as they were non-existent before, have not even been defined by the judiciary itself within the last three years. Neither the Inquiry Commission on the State of Emergency Measures that has been reviewing objections to the dismissal of public employees nor the administrative courts have been willing to define these conceptions in an accessible and foreseeable manner.

Furthermore, the legal status of the dismissal procedure which has been put into practice through the state of emergency decree laws based on such conceptions and without granting individuals the right to defense has not been defined, while the Constitutional Court and the Council of State have argued that this procedure was an exceptional type which involved continuity.

When the victims underlined such obscurity about the conceptions before various courts or authorities, the judicial authorities this time stated with reference to ECtHR case law that all public employees had duty of loyalty or allegiance to the state and public employment could be terminated in cases where this duty was not undertaken.

A novel concept with no consistent content has thusly been introduced to Turkish law now. The limits of this concept, which was put into practice through a very grand misinterpretation of the ECtHR case law, are entirely unclear.

First of all, it is observed that loyalty to the state is mistaken for loyalty to the government. On the other

hand, the question whether this duty of loyalty would equally apply to a public officer using the privileges of public power and to a lower level public employee has not been cleared yet. Moreover, the issue of what kind of conduct would be seen as conforming to a level of disloyalty that would require dismissal from public service is equally obscure.

The ECtHR established the distinction between loyalty to rule of law and loyalty to governments in its *Petropavlovskis v. Latvia* (App. No. 44230/06, 13 January 2015) and the Grand Chamber's *Tanase v. Moldova* (App. No. 7/08, 27 April 2010) judgments and qualified loyalty to the state as loyalty to the governmental mode of the state written in the constitution which we can define as social state governed by rule of law.

All these conceptions which had tremendous impact on the lives of hundreds of thousands of individuals should be clarified and revised to genuinely comply with the ECtHR case law and international standards if they are to stay in the legislation. Currently conceptions like loyalty to the state, junction and contact operate as the most significant instruments of the de facto extension of the state of emergency and lead to the systematic violation of the right to enter public service under the disguise of security clearance investigations. The judicial package needs to address all these structural problems.

Conclusion:

İHD has presented the primary problematic areas in the proposed Judicial Reform Strategy Document and proposed its recommendations to solve problems. İHD's report should necessarily be taken into account. İHD will also share with the public its views on judicial package bills. At this stage, however, legislative amendments should be introduced to meet the following concrete demands:

1. The definition of terrorism in the TPC should be revised to comply with international conventions Turkey is a party to and they should be redrafted so as to incorporate the points put forth in the UN Security Council Resolution No. 1566 (2004). Accordingly, the current ATC should be repealed in its entirety.
2. Articles 220 and 314 of the TPC should be amended in compliance with the opinion of the Venice Commission and ECtHR judgments. The distinction between those who resort to violence and who do not should be set definitively; those who do not use violence should not be punished. Articles 220 § 6-7 and 314 § 3 of the TPC should be repealed as they are not foreseeable.
3. Provisions preventing the rights to freedom of expression and association, to political participation, to peaceful assembly and demonstration should be removed from the legislation. The related articles referred to in this report should be repealed.
4. Heavy penal courts and prosecutor's offices with special powers should be closed down. New regulations should be introduced in line with the report of the Venice Commission on Criminal Peace Judgeships.
5. The provision set forth in Article 100 § 3 of the CCP that enables easy detention of individuals when charged with "catalogued offenses" should be repealed and all CCP regulations preventing the right to a fair trial, notably those before the collection of evidence, should be repealed. All regulations put into force through the state of emergency decree laws should be revoked.
6. Discrimination in the enforcement law should be eliminated, terms of enforcement for all prisoners should be rendered equal.
7. Privileges before the use of supervised release should be removed.
8. Legal and administrative barriers preventing the release of sick prisoners should be removed.

9. Enforcement of aggravated life sentences until the prisoner is dead should be put to an end, a conditional release term should definitely be set so as to take the prisoner's age into account in line with ECtHR judgments.
10. Such subjective concepts as junction (iltisak) and contact (irtibat) that were introduced to the legislation first by state of emergency decree laws and subsequently by Law No. 7145 should be removed, judicial practices concerning loyalty to the government should be replaced by loyalty to the social state governed by rule of law in line with ECtHR case law.
11. A single-article law should immediately be adopted to defer cases of crime and punishment stated to have been committed through the media and social media until permanent regulations are set.

Human Rights Association

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