

Human Rights Defenders in An Iron Cage:

The Anti-Terrorism Law in
Turkey

JANUARY 2022

BY
Öztürk Türkdoğan



1986

INTRODUCTION

What has been happening in the last 7 years since 2015 in Turkey reveals that a permanent authoritarian regime is sought after. Judicial harassment is employed to build this authoritarian regime while the Anti-Terrorism Law No. 3713 (ATL) is being instrumentalized under the disguise of “combatting terrorism” as its most significant apparatus.

The democratic resolution process for the “Kurdish issue,” the most important problem in Turkey, had been launched in 2013 but ended in failure in 2015. When it became clear that this process would not advance, various special laws and decisions were put into practice. The most prominent one among these was the establishment of special courts that would try criminal offenses under the ATL having replaced courts mandated by Article 10 of the ATL that had been closed down through a decision rendered by the Supreme Board of Judges and Prosecutors and published in the *Official Gazette* of 17 February 2015.¹ The second one was the Law of Police Powers No. 6638, a.k.a. homeland security package, of 27 March 2015 that was published in the *Official Gazette* of 4 April 2015.² The de facto authoritarian era thus commenced and the authoritarian process progressed step by step.

Law No. 7145 rendered the state of emergency (SoE) permanent;³ the SoE had been declared on 20 July 2016 on the grounds of armed conflict that started on 24 July 2015 and the subsequent attempted coup d'état on 15 July 2016 while it was lifted on 19 July 2018. Today, Turkey is going through an authoritarian era characterized by this very SoE regime. The regime was changed through the Constitutional Referendum of 16 April 2017 that was held under the SoE conditions, while this regime has been referred to as the “Turkish-type presidency model” or the “presidential cabinet.” The Venice Commission visited Turkey before the referendum and published its “Rule of Law Checklist” warning authorities that these constitutional amendments would seriously harm the fundamental democratic principle of the separation of powers.⁴ The typical characteristic of such regime is that it has an authoritarian government mentality. Prof. Dr. Nilgün Toker identifies this new authoritarian regime as the “regime of uncertainty.”⁵

Under such a regime, the deadlock in the Kurdish issue and the perpetuation of armed conflict have unfortunately been going on since 2015. Turkey continued with its military operations within the country non-stop and extended them so as to cover the north of Iraq, attempted to control certain regions in northern Iraq after Syria while the conflict zone has thus been broadened. The policy of appointing state trustees to municipalities in cities with an overwhelming Kurdish population and the utter disregard for people's will in local administrations have eradicated even the minimum requirements for local democracy. The Congress of Local and Regional Authorities of the Council of Europe published a report in 2017⁶ on these trustee appointments in Turkey, which is blatantly against the European Charter of Local Self-Government, and criticized Turkey.

¹ <https://www.resmigazete.gov.tr/eskiler/2015/02/20150217-3.pdf>

² <https://www5.tbmm.gov.tr/kanunlar/k6638.html>

³ <https://ihd.org.tr/en/regarding-law-no-7145-regulating-permanent-state-of-emergency/>

⁴ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)

⁵ <https://birartibir.org/toplumsuz-millet/>

⁶ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e)

Politicians and elected officials from the HDP (Peoples' Democratic Party) are still in jail in spite of judgments⁷ by the European Court of Human Rights (ECtHR).

The Parliamentary Assembly of the Council of Europe (PACE), too, took action as rights and freedoms in the country were restricted under the SoE regime transgressing the derogation criteria. On 25 April 2017, PACE reopened the political monitoring procedure in respect of Turkey until its concerns were addressed in a satisfactory manner.⁸ Yet, the ECtHR's stand in the face of the magnitude of problems in democracy and human rights in Turkey was a poorly handled case in point. Even the requirements of violation judgments delivered by the European court, having been limited to the cases of Demirtaş and Kavala, could not be met. The fact that the ECtHR, which has been digressing from the principle of rule of law, has constantly been pointing to the Constitutional Court in Turkey in order to avoid hearing cases most clearly reveals the corrosion in the protection of human rights values. On the other hand, the 2 February 2022 interim resolution⁹ of the Committee of Ministers of the Council of Europe that it would launch infringement proceedings against Turkey for the non-execution of ECtHR's Kavala judgment was important for the protection of the human rights system. On 3 February 2022, the Committee of Ministers referred the *Kavala v. Turkey* case to the ECtHR to determine whether Turkey failed to fulfill its obligation to implement the court's judgment in this case.¹⁰ It has been observed that the Constitutional Court did not render pro-human rights judgments particularly about the "state's national security policies" and took on a negative position. Further, the Constitutional Court's unfavorable position about emergency decree laws revealed that it was not an effective court to protect human rights. Yet, one can argue that some partial annulment judgments by the court in 2019 about emergency decree laws that had been passed into laws after the lifting of the SoE and the maintenance of this position were promising.

Authoritarian regulations in Turkey went on and legal regulations that specifically suffocated the civic space were given weight. For instance, Law No. 7262 on the Prevention of the Financing of the Proliferation of Weapons of Mass Destruction, which is clearly against the Constitution and freedom of association, was adopted in 27 December 2020. Before the adoption of the law a campaign was launched led by NGOs affiliated with the Human Rights Joint Platform (HRJP) and some of the wording could be changed.¹¹ Law No. 7262, however, amended particularly laws on associations and fundraising (aid collection) while paving the way for the Interior Ministry to keep a firm grip on associations and appointment of state trustees to associations. Such moves, also consolidated by the ATL and the Turkish Penal Code (TPC), not only did scythe rights and freedoms but also consolidated the climate of fear and frustration while legal regulations and practices aiming to smother rights defenders and civil society organizations and to raise even more challenges before them gradually intensified.

Many citizens' rights were restricted within the scope of ban measures taken in the face of pandemic conditions in 2020. Grave problems emerged because of these restrictive practices. A great majority of the restrictions and bans announced by the government because of the COVID-19 pandemic, which was admitted to be seen in Turkey on 11 March 2020, were implemented through the power vested in Article 11 of Law No. 5442 which had been amended by Law No. 7145 and granted governors SoE powers. Moreover, some powers defined in Law No. 1593 on Public Health were arbitrarily used by governors having their scope expanded.¹² İHD published a special report on the legality of these measures and administrative fines imposed revealing the degree to which de facto SoE powers were abused with a specific focus on firmer restrictions on freedoms of association and expression, most notably the right to defense, as well as attempts to make the pro-security perspective even more dominant and essentially an authoritarian presidency model was consolidated and built.

⁷ <https://hudoc.echr.coe.int/eng?i=001-215340>

⁸ <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23665&lang=en>

⁹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a56447

¹⁰ https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectID=0900001680a55b62

¹¹ <https://ihop.org.tr/kitle-imha-silahlarinin-yayilmasin-finansmaninin-onlenmesine-iliskin-kanun-teklifine-dair-degerlendirme/>

¹² For the legality of measures taken within the scope of the country's response to the COVID-19 pandemic and administrative fines, see the special report of 12 August 2020 drafted by İHD: https://www.ihd.org.tr/wp-content/uploads/2020/08/20200811_IHD-Kovid19TedbirleriRaporu.pdf

As if the COVID-19 pandemic and SoE restrictions were not enough, the political power further restricted rights and freedoms by introducing many laws. Law No. 7242 on Amendments to the Enforcement Law, Law No. 7245 on Marketplace and Neighborhood Guards, Law No. 7249 on Amendments to the Profession of Lawyers and Some Laws that introduced a system of multiple bar associations, Law No. 7252 on the Establishment of Digital Platforms, Law No. 7253 on the Regulation of Publications on the Internet further consolidated the authoritarian regime.

The alarmingly escalating repression and control of the political power over the press particularly following the declaration of the state of emergency held out in 2020 too. Restrictions on freedom of expression have further deteriorated by the introduction of amendments to Law No. 7252 on the “Establishment of Digital Platforms Commission and Amendments to Some Laws” and Law No. 7253 on the “Regulation of Publications on the Internet and Combatting Crimes Committed through these Publications.” The rights to freedom of expression and thought have sustained heavy blows. Criminal cases have been brought against numerous persons including journalists, authors, academics and human rights defenders leading to the detention of some, while journals and books were pulled off the shelves as well.

- According to the 2020-2021 Press Freedom report by the Journalists’ Union of Turkey, 44 journalists were deprived of their freedom in various prisons in Turkey as of 2 April 2021.¹³ The report also indicated that at least 57 journalists were taken into custody, while 116 investigations were launched into 101 journalists between April 2020 and April 2021.
- According to the 3 May 2021 report of Press in Arrest entitled “Anatomy of Journalist Prosecutions in Turkey”¹⁴ that incorporated data based on monitoring, documentation and reporting of trials against journalists, 356 journalists have stood trial since 2018 revealing the systematic abuse of criminal law measures targeting journalists’ legal activities.
- Turkey has ranked 153rd among 180 countries in the 2020 World Press Freedom Index¹⁵ issued annually by Reporters Without Borders (RSF). The country had ranked 99th in the index in 2002.

An ample number of individuals, including İHD’s Co-Chairperson Eren Keskin, who face hundreds of thousands of liras in fines and tens of years in prison because of their journalistic activities risk imprisonment any given time.

According to data provided by the Ministry of Justice, 10,745 people were prosecuted in 2013 under Articles 6 and 7/2 of the ATL and this figure steadily rose each year only to reach 24,585 in 2017. 2018 statistics also revealed that investigations were initiated into 46,220 persons with 17,077 lawsuits were brought against these persons. Ministry of Justice’s 2020 data show that while 26,225 persons faced investigations under these articles, 6,551 of them stood trial.¹⁶

Further, the number of prosecuted persons under Article 314/ 2 of the TPC, which is a commonly referred article in such cases, has shown a dramatic increase and amounted to 136,795 in 2017 which was 8,110 in 2013 according to data collected by the Ministry of Justice. The unbundled data of 2018 has not been issued yet. Instead collective data pertaining to “offenses against the constitutional order and the functioning of this order” covering Articles 309 to 316 have been provided. Accordingly, investigations have been initiated into 456,275 persons while civil lawsuits have been brought against 90,197 of them while non-prosecution decisions have been rendered for 149,680. In 2020 211,056 persons faced investigations under the said articles while 33,885 of them stood trial. It is observed that there has been a considerable hike in the number of people charged with membership in a terrorist organization even during the pandemic.

¹³ <https://tgs.org.tr/tgs-press-freedom-report-2020-2021/>

¹⁴ https://drive.google.com/file/d/1a5CxiJEI4uLayMu4isNC_T0oLpzUvo1I/view

¹⁵ <https://rsf.org/fr/classement>

¹⁶ <https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/22420211449082020H%C4%B0ZMETE%C3%96ZELK%C4%B0TAP.pdf>

Deputy Mustafa Yenerođlu, the former chairperson of the Grand National Assembly of Turkey's (GNAT) Human Rights Inquiry Commission, also presented quite important analyses and data in his September 2021 booklet "Hukuksuzluđun Sıradanlařtırılması" (Commonization of Unlawfulness).¹⁷

Investigations were initiated into a total of 50,503 persons in 2019 under Article 299 of the TPC that proscribes "insulting the president" along with Article 301 of the TPC that proscribes "insulting Turkishness" both of which incorporate directly prohibitive and punitive provisions as per freedom of expression. Of these, criminal cases were filed against 13,252. In 2020 44,717 persons faced investigations under these articles while 8,924 of them faced prosecution. The high number of lawsuits brought against individuals under insulting the president and Turkishness even during the pandemic shows how pressure and control over the social media further deteriorated.

We, as İHD, can rightfully argue that we fulfilled our responsibilities as part of the civic space by communicating our assessments and recommendations about the government's Judicial Reform Strategy¹⁸ document and the Human Rights Action Plans.

The will to engage in a joint struggle and to collaborate still persists in spite of all the repression on human rights defenders and the unprecedented attacks on fundamental rights and freedoms as well as principles of fair trial. We carry on the path and continue our struggle having been inspired by the lessons we learnt from the past to protect fundamental rights, human rights defenders and the right to a fair trial along with our achievements.

İHD has always voiced its concerns about the lack of a judicial structure in line with the principle of rule of law in Turkey, serious obstacles before the right to a fair trial, threat of enemy law trials by means of courts, ATL-related restrictions on freedoms of expression, association and assembly by keeping the definition of terrorism quite broad, lack of differentiation between those who resort to violence and who do not, judicial harassment of the political power against social dissidence using the ATL and by means of courts. İHD published special reports on these issues at various times.¹⁹ Particularly the İHD Report on the New Human Rights Action Plan presented to the Ministry of Justice in January 2020 incorporates comprehensive analyses and recommendations for the solution of problems.²⁰

While we were conducting preliminary research on this report, which focuses on the modus operandi of the ATL as well as its implementation against political and social dissidence along with human rights defenders, we realized in dismay how fitting was the metaphor "iron cage" in the booklet "Anti-Terrorism Law: Iron Cage" published by the Progressive Lawyers' Association (Çađdař Hukukçular Derneđi) in 1991.²¹ We would, therefore, like to note that this inspired the title of our report.

ATL No. 3713 is still being defined as a special criminal law. Yet, this law has today become a general law as per the stages it has gone through since its introduction in 1991, amendments introduced to the law and its mode of implementation and is being used against all political and social dissidence in its harshest form available. The mode of implementation of the ATL essentially shows how judicial harassment has become a primary policy of repression in Turkey. When we sometimes evaluate the state of human rights talking about the repressive policies of the state, we can safely argue that gross violations of the right to life like summary executions, murders by unknown assailants, enforced disappearances under custody had stood out in the 1980s and 1990s while violations of the right to life did not end, incarceration as a result of judicial harassment using the ATL, hence, the policy of confining individuals in an iron cage has been pursued even more effectively and commonly in the 2000s. Indeed we can readily say that the authorities have been pursuing an intensive policy of incarceration or threat of incarceration against human rights defenders specifically in the 2000s and the most important means of this policy is the ATL.

¹⁷ <https://www.perspektif.online/hukuksuzlugun-siradanlasmasi/>

¹⁸ <https://ihd.org.tr/en/ihd-report-and-recommendations-on-the-judicial-reform-strategy-document/>

¹⁹ This report covers the impact of the ATL on the human rights struggle and the civic space while excludes emergency decree laws. See the report "Emergency Decree Laws and Their Implications on Human Rights" by Hüsni Öndül drafted in parallel with the present report.

²⁰ <https://ihd.org.tr/en/ihd-report-on-the-new-human-rights-action-plan/>

²¹ "Terörle Mücadele Yasası: Demir Kafes" available at online bookstores.

The resolution for such crisis of justice in Turkey, as the manifestation of the atmosphere brought about by using various laws most notably the ATL, can only be possible by introducing radical amendments to the criminal legislation prominently the TPC, Code of Criminal Procedure (CCP) and the Enforcement Law, by total revision in many laws, and finally by the annulment of the ATL in its entirety. It is imperative that these changes should be done in line with international conventions and covenants Turkey is a party to, judgments and case law of the ECtHR and universal human rights values. In this respect, we are duty bound to emphasize the problematic areas in Turkey's criminal legislation and present our recommendations for the resolution of these issues as a human rights organization.

SPECIAL LAWS IN THE REPUBLICAN ERA AND THE STAGES OF THE ATL

The Anti-Terrorism Law No. 3713 was adopted at the GNAT on 12 April 1991 and was published in the *Official Gazette* on the same day.²² The ATL has been amended 58 times and subjected to annulment judgments by the Constitutional Court twice.

Prime Minister of the time, Yıldırım Akbulut, presented the anti-terrorism bill to the GNAT on 8 April 1991. The general justification for the bill mentioned the Italian Penal Code of 1889, commonly known as the Zanardelli Code, which was the basis for the TPC then in effect, referred to Articles 141 and 142 of TPC No. 765, and subsequently addressed “**resorting to violence**” in Article 141 regulated in the Italian Penal Code of 1930 (a.k.a. the Rocco Code) and provisions about disseminating propaganda for these criminal offenses in Article 142 but it was implicitly stated that Law No. 3713 presented before the GNAT could in fact be implemented without seeking the “violence factor” in Articles 141, 142 and 163 of TPC No. 765 indicating that the “violence factor” was excluded from the law, thus, it was differentiated from the original Rocco Code while these provisions were translated into Articles 141 and 142 of TPC No. 765 that was amended by Law No. 3038 of 11 June 1936. Indeed the ATL was often abused without taking into account the distinction of resorting to violence or not after it went into effect. The misuse of the ATL is thus discussed in detail below.

Special Laws Implemented before the ATL

Special criminal codes and codes of criminal procedure have often been introduced in Turkey since the proclamation of the republic in order to protect the current official ideology of the state and to maintain this official ideology with an eye to sustain the pro-security mentality developed by the political power.

The Treason Act (Hiyanet-i Vataniye Kanunu), which went into effect on 29 April 1920 as the second law ever to be passed by the GNAT right after its establishment on 23 April 1920, was introduced as a special law regulating treason crimes while it was repealed and replaced by the ATL that went into effect on 12 April 1991.

Independence Courts (İstiklal Mahkemeleri) were established by the GNAT resolution no. 42 dated 18 September 1920 to hear criminal offenses regulated under the Treason Act. Such courts were especially established and active during certain periods. The Law of Independence Courts and its annexes were only repealed on 4 May 1949 through Law No. 5384. Yet, no Independence Court was established between 1927 and 1949. Although these courts were then abolished, their functions were assumed by military courts or courts martial established through various special laws.

Law No. 785 on the Maintenance of Order (Takrir-i Sükun Kanunu) dated 3 March 1925 granted full power to the government to prevent reactionary movements and insurrections; to ban organizations, provocations

²² Doublet No. 20843: https://www.resmigazete.gov.tr/arsiv/20843_1.pdf

and published/broadcast material that would lead to disruption of social order and peace, and established the Independence Courts that tried dissidents and came to be known for its numerous death penalties.

Dissidents constantly faced convictions under Articles 141, 142 and 163 of TPC No. 765 of 13 March 1926. Articles 141 and 142 of the TPC were amended through Law No. 3038 of 11 June 1936 while excluding the “violence factor” cited in the original Rocco Code and thus the authorities had no qualms to use the notorious Articles 141 and 142 against the political dissidents, intellectuals and authors of Turkey until the ATL went into effect.

Under the General Inspectorship Law (Umumi Müfettişlik Kanunu) No. 1164 of 25 June 1927, which was drafted within the framework of the Reform Plan for the Orient (Şark Islahat Planı), military courts could be established to hear cases. These courts were not subjected to any principle governing procedural and merits adjudication. For instance, the fact that the military court established by the 4th General Inspectorship to which Elaziğ was also included in 1936 sentenced Seyit Rıza and his friends to death and executed them without granting the right to appeal will always be remembered.

Unlawful trials were also held under Martial Law No. 1402 of 13 May 1971 and through Military Courts Martial. Then State Security Courts (SSC) were introduced to the judicial system in 1973 through an amendment to the Constitution of 1961 by Law No. 1699. The SSCs, established following the constitutional amendment through Law No. 1773, were abolished on 11 October 1976 when the Constitutional Court revoked the law pro forma. But Article 143 of the current Constitution, which was adopted in a referendum held in 1982 under martial law following the 12 September 1980 military coup d'état, regulated the establishment of SSCs.

Special courts involving military judges were established through Law No. 2845 on the Establishment and Trial Procedures of State Security Courts of 16 June 1983 and these courts were mandated to hear cases involving criminal offenses against the state and republic having been equipped with consolidated powers. Yet, the constitutional grounds for the SSCs were removed through a constitutional amendment introduced through Law No. 5170 in 2004. Following the constitutional amendment, these courts were closed down on 16 June 2004 and they were replaced by heavy penal courts mandated and authorized by Article 250 of the CCP. These courts then became authorized and mandated to hear cases that fell under criminal offenses covered by the ATL after it went into effect.

Law No. 2935 on the State of Emergency of 25 October 1983 granted quite broad powers to SoE governors that could not be subjected to trial. Novel types of criminal offenses were also created establishing a parallel with TPC No. 5237 of 26 September 2004 and the ATL that could be used in place of one another while articles in the former TPC were further expanded and sentences therein aggravated. Article 220/6-7-8 and Article 314/3 of the TPC were often used and a link to Article 2/2 of the ATL was established. Sometimes Articles 6 and 7 of the ATL were used instead of Article 220 of the TPC as the case required, while Article 314 of the TPC came to be the most commonly used criminal article.

Heavy Penal Courts with Special Authority and Mandate, which would replace the SSCs, were established through the CCP No. 5271 of 4 December 2004, while various special investigation and prosecution procedures in the ATL were transferred to this law. Special enforcement provisions regulated under Article 17 of the ATL were regulated in detail with the Enforcement Law as well.

When the ATL was first introduced it regulated, under the definition of terrorism, terrorist acts, terrorist organizations, terrorist offenses and offenses committed for the purpose of terrorism, aggravation of sentences for those convicted of these offenses, deliverance of special verdicts in cases where it was committed through the press, propaganda against the indivisibility of the state, special trial procedures for offenses under the ATL, the competent courts within these procedures, restrictions on conferences with lawyers, special custody periods, unavailability of deference of sentences and reductions in the form of fines, special protection and special investigation procedures for those serving in anti-terrorism efforts, special enforcement of sentences for those convicted of offenses under the ATL, the term for conditional release of these persons, and their incarceration in special prisons. It also incorporated regulations that qualified as special amnesty by excluding various special offenses through provisional articles, notably Articles 125 and 146 of the TPC. The ATL has basically digressed from the general provisions on crime and punishment, most prominently the right to a fair

trial, by regulating special provisions for sentences, special trial provisions, and special enforcement provisions around the notion of “anti-terrorism.”

ATL’s articles about trial procedures were transferred to the CCP when the new TPC went into effect, while some provisions on enforcement were transferred to the Enforcement Law. The authorized and mandated courts, among the trial procedures, have become common in time and came to be implemented in 81 cities all over Turkey.

While drafting this report, we saw once again that the academia in Turkey did not produce enough academic and scientific knowledge that highlighted freedoms in the criminal law doctrine, or at least, that paid regard to the freedom-security balance. We can readily argue that this material state of affairs depends on the tutelage of Law No. 2547 on the Board of Higher Education and the Board of Higher Education itself. Special trial procedures and special criminal laws in Turkey have in fact led to gross human rights violations so much so that they could be a subject for facing the past and have been used as the most significant repressive apparatus for the implementation of the state’s ethnic, religious, belief-related and linguistic assimilation policies. Authors started to write academic and scientific articles that prioritized freedoms thanks to judgments produced by the ECtHR upon Turkey’s recognition of the Strasbourg court’s jurisdiction.

AMBIGUITY OF THE DEFINITION OF TERRORISM AND TERRORIST OFFENSES

General Comments

The former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, 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.²³ The rapporteur 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 as well as making them comply with the definitions of terrorism and terrorist offenses 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 at the 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 ATL 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 in Turkey. Those who express their opinions can be charged although they have not engaged in any act of violence.

The ECtHR’s judgments in the cases of *İmret*, *Bakır* and *Işıkırık v. Turkey* holding that the principle of legality was not met based on the fact that the domestic courts’ opted for conviction under Article 314/2 of the TPC by applying Article 2/2 of the ATL, 220/6-7 and 324/3 of the TPC confirm the view of the UN rapporteur.

Freedom of expression is restricted and punished by using Articles 6 and 7 of the ATL.

Further, the ECtHR overtly criticized the unforeseeability of Article 314/2 of the TPC in its judgment in the case of *Demirtaş v. Turkey*.

²³ <https://digitallibrary.un.org/record/587281>

Article 15 of the ICCPR prescribes the principle of no punishment without law:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The same principle is prescribed as per Article 7 of the European Convention on Human Rights (ECHR) as well:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Article 38 of the Constitution, too, regulates the legality of crime and punishment.

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.” As Turkey is a party to the ICCPR and the ECHR and under Article 90 of the Constitution, it is not possible to argue unconstitutionality. Under such circumstances, it is an absolute imperative that the ATL should be assessed under these conventions and covenants.

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 ATL, on the other hand, puts forth a rather broad definition of “terrorism” without any constitutional basis and contrary to international conventions and covenants. It infringes upon the essence of the fundamental rights and freedoms of citizens through its vague definition and the pursuant articles prescribed therein.

IHD believes that the definition of terrorism in the ATL, just as was pointed out 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.

ATL No. 3713 contradicts terrorism-related offenses and definitions adopted by conventions and covenants Turkey is a party to as per Article 90 of the Constitution. There is no definition of “terrorism” in international law. Solely offenses that 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 could 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 upon the decision of the cabinet on 15 March 2005 (No. 2005/8613), sets forth which offenses constitute terrorist offenses and covers the related international conventions and protocols. Accordingly, the following have been qualified as terrorist offenses:

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). The ratification of 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. Accordingly, the offenses listed within the scope of the following conventions can be defined as terrorist offenses:

1. Convention for the Suppression of Unlawful Seizure of Aircraft signed in the Hague on 16 December 1970,
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done on 23 September 1971 in Montreal,

3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents adopted on 14 December 1973 in New York,
4. International Convention against the Taking of Hostages adopted on 17 December 1979 in New York,
5. Convention on the Physical Protection of Nuclear Material adopted on 3 March 1980 in Vienna,
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) signed on 24 February 1988 in Montreal,
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation done on 10 March 1988 in Rome,
8. 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,
9. International Convention for the Suppression of Terrorist Bombing done at New York on 15 December 1997,
10. International Convention for the Suppression of the Financing of Terrorism done at New York on 9 December 1999.

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.²⁴

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 arm’s 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

²⁴ https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1566%282004%29

be seen when one looks into reports drafted by human rights and journalists' bodies.²⁵

Review of ATL Articles

Article 1 of the ATL, which defines terrorism in a vague and broad way, is open to quite broad interpretations. In its current state, it is against the principle of legality.

Article 2 of the ATL, 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, is against the principle of legality as it contains obscure and vague statements and provides an indirect definition of membership in an illegal organization. The ECtHR openly indicated in its judgments in the cases of *Bakır v. Turkey*, *Işıkırık v. Turkey* and *İmret v. Turkey* that Article 2 of the ATL, Articles 220/6-7 and 314/2-3 of the TPC were unforeseeable and did not meet the principle of legality.

Article 3 of the ATL proscribes terrorist offenses while offenses listed within the scope of Articles 302, 307 and 309 of the TPC classified under the part offenses against the security of the state and those under Articles 311, 312, 313, 314 and 315 of the TPC classified under offenses against the constitutional order have been defined as terrorism offenses. Among these, Article 314 proves to be quite problematic. This article regulates armed organizations and prescribes the sentence to be handed down to organization leaders and members. Subclause 3 of the article prescribes that those held to have indirect membership in an organization would be sentenced as actual organization members. In practice, however, we have been witnessing that the political opposition or individuals who expressed their opinions seen to be in parallel with those of the goals of such organizations are often sentenced under this article despite the fact that they had never been in an armed act or resorted to any kind of violence. It should therefore be noted that Article 314 of the TPC cannot be regarded to directly describe a terrorist offense, those sentenced under Article 314 can only be categorized to have committed a terrorist offense only if they are sentenced for another armed act, and it cannot solely on its own constitute a terrorist offense. Thus it should also be indicated that particularly Sub-clauses 2 and 3 of Article 314 of the TPC must be evaluated like Article 220 of the TPC. 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"²⁶ (Op. No. 872/2016) dated 13 March 2017. Further, the ECtHR Grand Chamber judgment in the case of *Demirtaş v. Turkey* also found a violation of the ECHR as Article 314 of the TPC was held to be unforeseeable.

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

Article 5 of the ATL prescribes an extension in sentence terms by half. It 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. Further, prescription of an extension in a separate law regarding a sentence for an offense regulated under the TPC is rather problematic as per the principle of legality of offenses and sentences. It should be evaluated as an article for the aggravation of enforcement of a sentence. Offenses listed under TPC Articles 79, 80, 81, 82, 84, 86, 87, 96, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 142, 148, 149, 151, 152, 170, 172, 173, 174, 185, 188, 199, 200, 202, 204, 210, 213, 214, 215, 223, 224, 243, 244, 265, 294, 300, 310/2, 316, 317, 318 and 319 are among those committed with an intent to commit terrorism. Such categorization is against legal certainty and principle of legality as well.

Articles 6 and 7 of the ATL, entitled "Announcement and Publication" and "Terrorist Organizations" respectively, should particularly be pointed out as they are the ones the most commonly resorted to by the Turkish judiciary and threaten freedom of expression. Articles 6 and 7 regulate the offense of making terrorist propaganda while this goes against ECtHR case law. The Constitutional Court's judgments in the cases of

²⁵ See IHD's annual and special reports: www.ihd.org.tr/en

For data by Progressive Journalists' Association, see: <http://www.cgd.org.tr/index.php?Did=222>

For data by the Journalists Union of Turkey, see: <https://tgs.org.tr/cezaevindeki-gazeteciler/>

²⁶ For the full report see: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)007-e)

Zübeyde Füsün Üstel and Others, Sırrı Süreyya Önder and Ayşe Çelik actually reveal the need that these articles should definitely be repealed because they punish freedom of expression. Venice Commission's "Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media"²⁷ (Op. No. 872/2016) dated 13 March 2017 stated that public prosecutors often charged rights defenders and activists, most notably journalists, under Article 314 or 220 of the TPC and Article 7 of the ATC on the grounds of their press statements, protests and articles; this was unlawful with no substantiation in legality of offenses and led to serious deprivation of rights.

Article 17 of the ATL, which regulates that the conditional release term for those convicted under offenses within the ATL would be $\frac{3}{4}$ and these persons would be held in high security prisons, is clearly against the UN's Mandela rules, principle of rule of law, principle of legal interest to be protected and the principles of equality and proportionality as has been stated in İHD's amicus curiae submission on Law No. 7242.²⁸

Review of the ATL and the Related Articles in the TPC

Article 2/2 of the ATL No. 3713, Articles 220/6-7 and 314/3 of the TPC No. 5237 need to be analyzed together as they are handled together in criminal proceedings and practice. The essence of regulations in these laws is based on the provision that persons who commit crimes on behalf of an organization even if they are not members of that organization would be regarded as organization members and would be convicted accordingly. The ECtHR, thus, has delivered violation judgments stating that the legality requirement was not met and they were not foreseeable.

The Constitutional Court, too, rendered a violation judgment in the case of *Hamit Yakut* (application no. 2014/6548) on 10 June 2021 in line with the ECtHR judgments. The Constitutional Court in this judgment set forth that **pilot judgment procedure** should be implemented holding that Article 220/6 of Law No. 5237 was not foreseeable and the violation stemmed from a structural problem and to **notify** the legislative organ of the state of affairs for the resolution of this structural problem.²⁹

The ECtHR found violations in its judgments in the cases of *İmret v. Turkey* and *Bakır v. Turkey* on the grounds that Article 220/7 of Law No. 5237 was not foreseeable and was against the principle of legality. The Strasbourg court rendered a similar judgment in the case of *Işıkırık v. Turkey* in respect of Article 220/6 of Law No. 5237 and referred to reports by the Venice Commission and the Council of Europe Commissioner for Human Rights pertaining to Article 220/6-7 of Law No. 5237 in its judgment. The evaluation of the court leads to the conclusion that Article 220/6-7 of Law No. 5237 should be repealed, as they did not meet the legality requirement. The court held that these criminal law provisions in question were not legally foreseeable and held for a violation without the need to review whether the interference had a legitimate aim and was necessary in a democratic society or not.

Articles 2/1 and 3 of Law No. 3713 and Article 314/1-2 of TPC No. 5237 should be evaluated together. According to data provided by the Ministry of Justice, the number of persons facing investigations under Article 314 of Law No. 5237 increased dramatically to 36,425 in 2015, to 155,014 in 2016, to 547,423 in 2017, to 444,342 in 2018, to 310,954 in 2019 and to 208,833 in 2020. As is seen, the number of persons charged with membership in an armed organization as suspects is quite high.

The ECtHR Grand Chamber's 22 December 2020 judgment in the case of *Selahattin Demirtaş v. Turkey* (No. 2) (Application No. 14307/17) set forth that Article 314/1-2 of Law No. 5237 did not bear the legality requirement and was unforeseeable.³⁰ The court importantly stated the following:

(2) The terrorism-related offenses: Article 314 §§ 1 and 2 of the Criminal Code

²⁷ See paras. 63-72: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)007-e)

²⁸ <https://ihd.org.tr/en/ihds-amicus-curiae-submission-on-law-no-7242/>

²⁹ <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/6548>

³⁰ <https://hudoc.echr.coe.int/fre?i=001-207173>

271. On 4 November 2016, the Diyarbakır public prosecutor asked the Diyarbakır 2nd Magistrate's Court to place the applicant in pre-trial detention on suspicion of two offences: membership of an armed terrorist organisation, punishable under Article 314 § 1 of the Criminal Code, and public incitement to commit an offence, punishable under Article 214 § 1 of the same Code.

272. On the same day, the Diyarbakır 2nd Magistrate's Court noted first of all, having regard to the tweets posted on the HDP Twitter account and the violent events of 6 to 8 October 2014, that there was a strong suspicion that the applicant had publicly incited others to commit an offence (see Article 214 § 1 of the Criminal Code). Next, taking into account a number of speeches by the applicant and the fact that he was the subject of several criminal investigations being carried out by the competent prosecuting authorities for terrorism-related offences (see paragraph 70 above), the magistrate concluded that there was a strong suspicion that the applicant had committed the offence of membership of an armed terrorist organisation (Article 314 § 2 of the Criminal Code). Furthermore, in view of the nature of the offence of forming and leading an armed terrorist organisation – of which the applicant was not accused until 11 January 2017, when the indictment was filed – and the fact that it featured among the offences listed in Article 100 § 3 of the CCP, the magistrate found that there was also a strong suspicion regarding the commission of that offence (Article 314 § 1 of the Criminal Code). Accordingly, the decision given on 4 November 2016 by the Diyarbakır 2nd Magistrate's Court does not give a clear indication of which offence(s) formed the basis for the applicant's detention. This uncertainty was exacerbated by the decisions on the extension of his pre-trial detention. In its decision of 11 November 2016, the Diyarbakır 3rd Magistrate's Court stated that the applicant was being detained in connection with two offences: membership of a terrorist organisation and public incitement to commit an offence. Yet the Diyarbakır 1st Magistrate's Court stated in a decision of 6 December 2016 that the applicant was being detained only on suspicion of membership of an armed terrorist organisation.

273. In an indictment filed on 11 January 2017, the Diyarbakır public prosecutor sought a sentence of between forty-three and 142 years' imprisonment for the applicant for the following offences: forming or leading an armed terrorist organisation, disseminating propaganda in favour of a terrorist organisation, public incitement to commit an offence, praising crime and criminals, incitement to hatred and hostility, incitement to disobey the law, organising and participating in unlawful meetings and demonstrations, and refusing to comply with orders by the security forces for the dispersal of an unlawful demonstration (see paragraph 78 above). Until 2 September 2019, at the end of each hearing the assize courts ordered the applicant's continued detention without specifying the offence(s), referring simply to all the evidence against him.

274. In any event, it is clear that the applicant's pre-trial detention was ordered and extended on the basis of his speeches for terrorism-related offences, in particular those provided for by Article 314 §§ 1 and 2 of the Criminal Code, namely forming or leading an armed terrorist organisation and membership of such an organisation (see paragraphs 143-146 above).

275. The Court is mindful of the difficulties linked to preventing terrorism and formulating anti-terrorism criminal laws. The member States inevitably have recourse to somewhat general wording, the application of which

depends on its practical interpretation by the judicial authorities. In that context, when interpreting the law, the national courts must give the individual adequate protection against arbitrary interference.

276. The Court recently held in two judgments against Turkey that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting an armed terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings (see Mehmet Hasan Altan, cited above, § 211, and Şahin Alpay, cited above, § 181).

277. The Court observes, in line with the Venice Commission's findings in its opinion on Articles 216, 299, 301 and 314 of the Criminal Code, that the Code does not define the concepts of an "armed organisation" and an "armed group". The qualifying criteria for a criminal organisation have been set out in the case-law of the Court of Cassation: such an organisation has to have at least three members; there should be a hierarchical connection between the members; they should have a common intention to commit crimes; the group has to display continuity in time; and the structure of the group, the number of its members, its tools and its equipment should be appropriate for the commission of the crimes envisaged. Regarding "membership of an armed organisation", the Court of Cassation takes into account the continuity, diversity and intensity of the acts attributed to the suspects in order to determine whether those acts prove that the suspect had an "organic relationship" with the organisation or whether the acts may be considered to have been committed knowingly and willingly within the "hierarchical structure" of the organisation (see paragraph 160 above).

278. In the present case, the national judicial authorities, including the public prosecutors who conducted the criminal investigation and charged the applicant, the magistrates who ordered his initial and/or continued pre-trial detention, the assize court judges who decided to extend his pre-trial detention, and lastly the Constitutional Court judges, adopted a broad interpretation of the offences provided for in Article 314 §§ 1 and 2 of the Criminal Code. The political statements in which the applicant expressed his opposition to certain government policies or merely mentioned that he had taken part in the Democratic Society Congress – a lawful organisation – were held to be sufficient to constitute acts capable of establishing an active link between the applicant and an armed organisation. The national courts do not appear to have taken into account the "continuity, diversity and intensity" of the applicant's acts or to have examined whether he had committed offences within the hierarchical structure of the terrorist organisation in question, as required by the case-law of the Court of Cassation.

279. In this connection, the Commissioner for Human Rights pointed out that it was increasingly common in Turkey for the evidence used to justify detention to be solely limited to statements and acts that were manifestly non-violent and should in principle be protected by Article 10 of the Convention. She viewed this as a systematic omission on the part of Turkish prosecutors and courts to perform an appropriate contextual analysis and to filter the

evidence in the light of the Court's well-established case-law concerning Article 10 of the Convention.

280. Furthermore, in its above-mentioned opinion, the Venice Commission stated that in applying Article 314 of the Criminal Code, the domestic courts often tended to decide on a person's membership of an armed organisation on the basis of very weak evidence (see paragraph 160 above). The present case appears to bear out that observation. The range of acts that may have justified the applicant's pre-trial detention in connection with serious offences punishable under Article 314 of the Criminal Code is so broad that the content of that Article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities. In the Court's view, such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.

As is seen, the ECtHR has quite clearly put forth that Article 314 of Law No. 5237 did not meet the legality requirement and was not foreseeable.

Each day increasing number of people comes to be charged with membership in an armed organization on the grounds of their non-violent political acts and statements because of the gap and uncertainty in the article content. Statistics provided by the Ministry of Justice support this view as well.

Aiding or indirect membership in an organization cases that had been initially brought under ATL Article 2/2, TPC Articles 220/6-7 and 314/3 against human rights defenders, have begun to be directly launched over time under TPC Article 314/2 following ECtHR violation judgments against these articles. The authorities have recently brought a lawsuit against İHD's co-chairperson under this article too.³¹

Articles 6/2 and 7/2 of Law No. 3713 and Article 220/8 of the TPC should be evaluated together.

According to data collected by the Ministry of Justice, 10,745 persons faced prosecution in 2013 under Articles 6/2 and 7/2 of Law No. 3713 while this figure went up annually to reach 24,585 in 2017. Further the 2018 statistics revealed that investigations were initiated into 46,220 persons while 17,077 faced prosecution and the 2019 statistics showed that 39,833 persons faced investigations while 12,417 of them stood trial.

TPC Article 220/8 is not quite used in practice. ATL Articles 6 and 7/2 are usually and commonly enforced.

Articles 6/2 and 7/2 of the ATL No. 3713 have contents that completely restrict and ban the right to freedom of expression enshrined by the Constitution and the ECHR while prescribing an unfair criminal sanction. The ECtHR judgment in the case of *Gözel and Özer v. Turkey* dated 6 July 2010 (app. nos. 43453/04, 31098/05) called on Turkey to repeal ATL Article 6/2 or to review it in line with the ECHR and the ECtHR case law.

Since the amendments introduced to both articles through Law No. 6459 on 11 April 2013 did not meet the criteria referred to in the Court's case law and explained below, their position directly restrictive and prohibitive of freedom of expression has been maintained. Thus Article 6/2 of ATL and its Article 7/2, which has a similar content, mentioned in the ECtHR case law are unconstitutional. Additional sentences amended to Article 7/2 of ATL through Article 13 of Law No. 7188 are far from solving the problem.

The ECtHR concluded, in brief, the following in its judgment in the case of *Gözel and Özer v. Turkey*:³²

63. Aux yeux de la Cour, la condamnation répétitive de propriétaires, éditeurs ou rédacteurs en chef de périodiques accompagnée d'une mesure d'interdiction de publication, au seul motif qu'ils avaient publié des

³¹ <https://ihd.org.tr/en/charges-against-ihds-chairperson-are-unacceptable/>

³² <https://hudoc.echr.coe.int/eng?i=001-99780> (paras. 63-64).

déclarations visées à l'article 6 § 2 de la loi no 3713, peut également avoir pour effet de censurer partiellement les professionnels des médias et de limiter leur aptitude à exposer publiquement une opinion – sous réserve bien sûr de ne pas préconiser directement ou indirectement la commission d'infractions terroristes – qui a sa place dans un débat public, d'autant plus que, comme le montre la présente espèce, les termes «des déclarations ou des tracts d'organisations terroristes» ont été interprétés d'une manière très vague. En particulier, la répression des professionnels des médias exercée de manière mécanique à partir de la disposition précitée sans tenir compte de leur objectif (comparer avec Jersild, précité, § 36) ou du droit pour le public d'être informé d'un autre point de vue sur une situation conflictuelle ne saurait se concilier avec la liberté de recevoir ou de communiquer des informations ou des idées.

64. A la lumière de ces considérations et de l'examen de la législation en cause, la Cour conclut que l'ingérence qu'ont entraînée les condamnations des requérants en vertu de l'article 6 § 2 de la loi no 3713 et les mesures d'interdiction de publication ne peut être considérée comme «nécessaire dans une société démocratique» et ne s'imposait pas aux fins de la réalisation des buts légitimes recherchés. Partant, il y a eu violation de l'article 10 de la Convention.

The significance of this judgment is that it was a semi-pilot one for which Article 46 of the ECHR was implemented. There is no doubt that Turkey is obliged to comply with this judgment.

And the ECtHR ascertained a set of criteria in this judgment:

Material Criterion: A statement should not be banned solely because it is expressed by organization members and/or harshly criticizes the government unless it provokes people to violence (i.e. unless it advocates resorting to acts of violence or bloody revenge, justifies acts of revenge in order to make its supporters fulfill their objectives and can be interpreted to encourage violence by leading to sentiments of profound and unreasonable hatred against certain people.

Procedural Criterion: Secondly, the regulation to be introduced should impose the obligation on judges not only to examine the identity of the person delivering the message and to whom it is addressed but also to inquire the content of the texts in their entirety and the context within which they were written by taking into account the criteria set forth in Article 10 of the ECHR and implemented by the ECtHR.

Instrumental Criterion: The first two criteria should be subjected to a closer scrutiny in cases where only statements by the organization or organization members are communicated by taking into account the public's right to access information as well.³³

These three criteria, which seem to be independent of one another at first sight, are in fact complementary. The clear and imminent relationship between the possible act of violence and statement, as prescribed within the first criterion, can only emerge when the following is taken into consideration: to whom the statement is addressed, how it was addressed, within which context it was addressed, and whether it actually led to a threat of violence. Such link must clearly be presented in the media that solely communicates statements by an organization or organization members without any comments. A legislative regulation that only meets one

³³ http://www.aihmiz.org.tr/files/04_Gozel_ve_Ozer_Report_EN.pdf

of the above-listed criteria, therefore, will not meet the general measure prescribed by the ECtHR's judgment.³⁴

The Constitutional Court, too, has found violations in many cases launched before it as per the implementation of Article 7/2 of Law No. 3713. For instance:

Sırrı Süreyya Önder, who was sentenced to imprisonment for making "propaganda for an organization" for using the statement "*I brought you Kurdish people's leader Esteemed Öcalan's greetings... Today, too, here in Kurdistan we take pride in the proud sons/daughters of [Kurdistan]*", is among the individuals facing political ban in both indictments because of the file in question. Your Court, however, had ruled for a violation of freedom of expression regarding the delivered sentence in the individual application lodged before it. (Constitutional Court, Sırrı Süreyya Önder [PA], App. No: 2018/38143, 3/10/2019).³⁵

The Court held the following in the mentioned ruling:

Expressions of opinion, which do not incorporate statements encouraging violence and do not lead to the risk of commission of terrorist crimes, **cannot be regarded as propaganda of terrorism solely on the allegation that they were similar to a terrorist organization's ideology, social and political goals, views on political, economic and social problems.** The expression, dissemination, indoctrination in an active, systematic and convincing way, instillation and recommendation of opinions about social and political climate or socioeconomic imbalance, ethnic problems, differences in the country's population, demands for more freedom or those critical of the country's mode of government –**even if they are disturbing to state officials or a significant part of the country, as had been stated before** (Abdullah Öcalan [PA], App. No: 2013/409, 25/6/2014, § 95)- are protected by freedom of expression (Zübeyde Füsün Üstel et al., § 80; Ayşe Çelik, § 44). It is also clear that freedom of expression is particularly valuable for elected persons who represent their constituents, relay their demands, concerns and ideas to the political space and defend their interests. Because elected persons like members of the parliament can only represent their constituents, participate in legislative and supervisory activities duly to the degree that they can freely express their views and ideas. (Constitutional Court, E.2017/162, K.2018/100, 17/10/2018). **(Sırrı Süreyya Önder, p. 65)**

The Constitutional Court, in many of its judgments, has also referred to the views in the ECtHR judgment (*Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 49) which held that freedom of expression is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population **(Sırrı Süreyya Önder, p. 78).**

It is clear that the public authorities had a very narrow margin of appreciation in interfering with the statements of the applicant, who at the time of the incident was an elected member of the parliament and an important actor of the then effective resolution process, and should have been much more meticulous in their assessments (see Mehmet Ali Aydın, § 85 for a similar

³⁴ http://www.aihmiz.org.tr/files/04_Gozel_ve_Ozer_Report_EN.pdf

³⁵ <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/38143?BasvuruNoYil=2018&BasvuruNoSayi=38143>

evaluation within the context of a mayor's statements) (**Sırrı Süreyya Önder, p. 84**)

(...) In its ruling, the court of first instance did not present any evaluation as to how the applicant's expression of his ideas had legitimized or praised the violent and threatening methods of the terrorist organization or encouraged resorting to such methods (**Sırrı Süreyya Önder, p. 85**).

The Constitutional Court also held in its judgment in the case of *Zübeyde Füsün Üstel* (App. No: 2018/17635, 26.07.2019), who was a signatory to the declaration by Academics for Peace, that the declaration fell within the bounds of freedom of expression and concluded that the applicants' conviction did not correspond to a pressing social need, was not proportionate, thus, did not comply with the requirements of a democratic social order, and therefore found a violation of freedom of expression.

Further the ECtHR presented a comprehensive explanation of Article 10 of the ECHR in its 31.03.2015 judgment in the case of *Öner and Türk v. Turkey* (App. No. 51962/12) and rendered a significant judgment about freedom of expression. The court indicated in its rendering of the scope of freedom of expression that even if the views expressed were disturbing they should have been evaluated within the scope of freedom of expression unless there was a direct call for violence in them.

Amendments introduced to Law No. 3713 in 2013 were not sufficient enough. The legislation in Turkey was also changed following the above-mentioned high court's landmark judgments.

For instance, Article 7/2 of Law No. 3713 was amended by Article 13 of Law No. 7188 published in the *Official Gazette* of 24 October 2019 and the following sentence was added to the article: "Expressions of thought that do not exceed the limits of reporting or for the purpose of criticism shall not constitute a crime." While this amendment appeared to be intended to prevent the use of this law for the prosecution of journalists or others criticizing the government, the wording was still too broad and failed to define what the "limits of reporting" were. Moreover, it also failed to address the issue of intent.³⁶ This amendment, too, failed to prevent the increase in the number of investigations and prosecutions originating from the related article.

As is seen, there are significant problems of legality and unforeseeability in the implementation of Articles 6 and 7 of Law No. 3713.

³⁶ <https://rm.coe.int/09000016809a5726>

The Problem of Special Courts Mandated to Try Crimes under the ATL and Special Investigation Procedures

Anti-Terrorism Law No. 3713 went into effect after having been published in the *Official Gazette* of 12 April 1991 (doublet no. 20843). The ATL has been amended 54 times since its introduction. 2nd section of the original ATL listed trial procedures and its Article 9 indicated that the provisions of Law No. 2845 on the Establishment and Trial Procedures of State Security Courts would be implemented in the proceedings.

The State Security Courts (SSCs) had been established in 1973 but were closed down in 1976 upon a Constitutional Court judgment. Yet, the SSCs gained constitutional grounding through Article 143 of the 1982 Constitution, which was adopted in an anti-democratic climate under martial law that was declared following the 12 September 1980 coup d'état, and were reinstated on 1 April 1984 through Law No. 2845.

The following general reasoning was included in the government bill for Law No. 5190 of 16 June 2004 that abolished the SSCs:

The foundation of state security courts were laid down by the provisions related to the establishment of State security courts that were added to Article 136 of the 1961 Constitution through Law No. 1699 of 15 March 1973. State security courts were then established by Law No. 1773 of 26 June 1973 and this law went into effect on 11 July 1973. Law No. 1773 was abolished pro forma by the 6 May 1975 judgment of the Constitutional Court (Merits No. 1974/35 E., Judgment No. 1975/126 K.).

Article 143 of the 1982 Constitution stated that the State security courts would be established as well as mentioning some provisions about their establishment and functioning. As per this mandatory provision of the Constitution, Law No. 2845 on the Establishment and Trial Procedures of State Security Courts went into effect and these courts went into action on 1 April 1984. State security courts were established in the cities listed in Article 2 of Law No. 2845 in order to try crimes committed against the country of the State and its nation and indivisible unity, free democratic order and those whose characteristics are mentioned in the Constitution that are committed against the Republic and those that directly concern the domestic and external security of the State.

Article 9 of Law No. 5170 on Amendments to Some Articles of the Constitution of the Republic of Turkey of 7 May 2004 abolished Article 143 of the Constitution that provided the establishment grounds of State security courts. It, thus, became imperative that the rules to be implemented in the investigation and prosecution of crimes that had fallen under the jurisdiction of these courts should be redesignated and reidentified.

As is known, Turkey-European Union relations gained a new dimension upon the acceptance of our country for full membership in the European Union meeting held in Helsinki on 10-11 December 1991. In the light of the latest developments, Turkey was presented a new Accession Partnership Document with the document adopted by the Council of the European Union on 14 April 2003. The National Program was reviewed in consideration of this document and was published in the *Official Gazette* of 24 July 2003. Our country endeavored to reform the legal and judicial field too on the path to the European Union. Meeting the requirements of particularly Article 6 "right to a fair trial" of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which we are a party to, has also become an obligation in respect of our country too. The adoption of a trial procedure based on human rights regardless of the form and nature of the crime,

structuring of courts through the establishment of fair and modern legal norms, exclusion of regulations in non-compliance with these principles from our positive law order as a requirement of a democratic and modern state governed by rule of law have become an expectation and need for our State and society. One of the steps to be taken in this direction are the regulations concerning the State security courts that had in the past occupied the agenda of the public and the European Court of Human Rights for long and resulted in the conviction of our State to reparations as per their trial procedures.

In parallel with technological developments terrorist and organized crimes also increase day by day and the forms of commission of these crimes emerge in more complicated appearances. The establishment of specialized courts served by expert judges and prosecutors for the more serial investigation and prosecution of such crimes is a commonly adopted approach. The bill abolishes Law No. 2845 which regulated the establishment and trial procedures of State security courts as well as abolishing State security courts. It is, however, a known fact that the expected benefit and goal from the trial and investigation of some crimes cannot be achieved by implementing the techniques and procedures in classical criminal procedures due to the variety and structure in the commission methods of crimes.

The law was adopted with this reasoning and went into effect, abolishing the SSCs. Although the SSCs were abolished by Law No. 5190, it was stated that the trials of crimes within the scope of the SSCs, particularly the ATL, would be held at heavy penal courts to be established in regions through the decision of the Supreme Court of Judges and Prosecutors under the name of specialization and the SSC tradition was virtually continued by the amendment of additional articles to Article 394 of the Turkish Code of Criminal Procedure (CMUK -TCCP) No. 1412.

After the new CCP went into effect, the trial of crimes under the ATL was transferred to the new law.

Article 9 of the ATL was amended through Article 8 of Law No. 5532 on Amendments to the ATL, which was published in the *Official Gazette* of 18 July 2006 (No. 26232), and it was stated that the cases would be heard by heavy penal courts mandated and authorized by Article 250 of the CCP.

The ATL was then amended by Law No. 6352 which went into effect on 5 July 2012 and heavy penal courts with special powers were established with a regulation in Article 10 of the ATL, while Article 250 of the CCP abolished the authorized courts.

Law No. 6526, which went into effect on 6 March 2014, abolished the heavy penal courts mandated and authorized by Article 10 of the ATL. Reasons for their closure included:

Our country signed and ratified the fundamental conventions/covenants on human rights and freedoms, further, adopted the European Convention on Human Rights that prescribed the judicial review of human rights violations and recognized the right to individual application before the European Court of Human Rights. The right to a fair trial and the ensuing principles like presumption of innocence, right to remain silent, equality of arms and the right to defense are incorporated in these conventions/covenants, while these principles have become rules of domestic law that have to be directly complied with under Article 90 of the Constitution. Article 36 of the Constitution prescribes that everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. Meeting the requirements of particularly Article 6 "right to a fair trial" of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which we are a party to, has also

become an obligation in respect of our country too. The leading debates on fair trial in our country are courts with special powers that began with state security courts and maintained by heavy penal courts established by Article 250 of the Code of Criminal Procedure and Article 10 of the Anti-Terrorism Law as well as investigations and prosecutions conducted in care of public prosecutors. Further, three different heavy penal courts emerged as a result of the practice of heavy penal courts with special powers and a de facto hierarchical perception emerged among judges and public prosecutors by means of virtually qualifying them as special judges, special courts, special prosecutors in the public. The bill abolishes the practice of courts and public prosecutors' offices with special powers as well as special investigation and prosecution procedures, which are quite controversial with respect to fair trial, and provides for the subjection of all heavy penal courts to the same procedural rules.

As will also be understood from this justification, it is obvious that heavy penal courts mandated by CCP Article 250/ATL Article 10, which continued state security courts, did not provide fair trials. The report "Administration of Justice and the Protection of Human Rights in Turkey"³⁷ released on 10 January 2012, and drafted by the Commissioner for Human Rights of the Council of Europe following his visit to Turkey from 10 to 14 October 2011 clearly stated that heavy penal (assize) courts with special powers were not needed and should be abolished. Turkey complied with this recommendation in 2014, but we believe that the country returned to the old system a year later in 2015.

Council of Europe Venice Commission's opinion of 13 March 2017 (No. 852/2016) on the "duties, competences and functioning of criminal peace judgeships"³⁸ in Turkey proves to be quite important as well. The opinion clearly reveals the fact that criminal peace judgeships, which had an even more special place within the system of heavy penal courts and prosecutors' offices with special powers, were used as the most important tools of judicial harassment. Turkey needs to comply with the recommendations of the Venice Commission without delay.

The special trial method prescribed in the ATL was abolished by the repeal of Article 10 of the ATL by Law No. 6526. These courts were closed down and the files before them were transferred to normal heavy penal courts.

Yet, such state of affairs did not last long. Additional sentences were amended through Article 39 of Law No. 6572 of 2 December 2014 to Article 9/5 of Law No. 5235 and it was regulated that the Supreme Board of Judges and Prosecutors might designate the distribution of work among the departments by taking into account the intensity and quality of the incoming work in order to provide for specialization if there were no other provisions in special laws.

This time an era of heavy penal courts with special powers established by the Board of Judges and Prosecutors was initiated just like firstly the addition of clauses to Article 394 of the TCCP upon the closure of SSCs, then the establishment of special courts by introducing regulations to Article 250 of the new CCP when it went into effect.

The first decision about the heavy penal courts mandated and authorized to try crimes under the ATL was rendered by the Supreme Board of Judges and Prosecutors on 12 February 2015 (No. 224) that was published in the *Official Gazette* of 17 February 2015 and thus the practice began.³⁹ When we study the reasoning for the decision, it was seen that there were no special investigation procedures, no trial system based on region while the only objective was to achieve specialization and distribution of work.

We do not think that this is the case.

³⁷ <https://rm.coe.int/16806db70f>

³⁸ <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282017%29004-e>

³⁹ <https://www.resmigazete.gov.tr/eskiler/2015/02/20150217-3.pdf>

When one studies the ATL, it will be seen that Article 9 in the second part of the law entitled “designation of competence and jurisdiction” about criminal procedures, Article 10 “procedure of investigation and trial”, Article 11 “period of detention”, Article 12 “testimonies of persons keeping records”, and Article 13 “non-applicability of the decision to suspend the pronouncement of the judgment, ban of commutation of sentences to alternative sanctions or suspension of sentences” were all annulled.

Article 142 of the Constitution prescribes that the formation, duties and powers, functioning and trial procedures of courts shall be regulated by law.

When one looks at the current article text of Law No. 3713, it will be seen that provisions about special trials were annulled. In this case when there is an annulled law article the fact that the Board of Judges and Prosecutors revived the annulled ATL Article 9 with an administrative decision and under the name of specialization is clearly unconstitutional and unlawful.

The 12 February 2015 decision of the Board of Judges and Prosecutors (No. 224) argued that there were no special investigative procedures.

When the ATL first went into effect and in its aftermath, it was regulated that the competent court was special, representation by a lawyer was limited with a maximum of 3 lawyers, conferences between lawyers and prisoners could be held in the presence of prison officials and the period of custody was designated as different from the normal period of custody.

Restrictions and limitations specially regulated within the ATL are now individually regulated in the CCP No. 5271 and it is especially stated that these regulations are for crimes under the ATL. One can conclude that the annulled provisions of the ATL were placed within the CCP and special trial procedures were essentially generalized by the following regulations:

CCP Article 149/2 prescribes that the maximum number of lawyers allowed to be present at the hearing within the scope of prosecutions undertaken for crimes committed within the framework of organizational activity would be 3;

CCP Article 151/3 regulates banning lawyers from acting as defense counsels;

CCP Article 154 puts forth that the suspects in custody might be banned to confer with lawyers for 24 hours;

CCP Article 188 states that the hearing might resume if a defense counsel leaves the hearing without excuse.

Further, CCP Article 139/3 sets forth that if the anonymous investigator has to be heard as a witness, they could be heard without being present at the hearing while CCP Article 216/3 regulates that the absence of a defense counsel at the time of the pronouncement of the judgment about a defendant would not pose an obstacle to the pronouncement, CCP Article 299 transfers the special prosecution method even to the Court of Cassation by regulating that reviews with hearings at the Court of Cassation could be undertaken if the Court of Cassation sees it fit.

The special regulation in CCP Article 100/3, which states that the grounds for detention can be presumed in cases where a person is charged with “catalogue” crimes, reveals that the state of restriction of liberty of person targeted by the ATL is still ongoing. Besides the fact that the period of detention in crimes under the ATL was increased up to 5 years also shows that a special regulation about detention is maintained.

The period of custody for crimes under the ATL was especially regulated to be implemented up to 12 days. The provisional Article 19 was added to Law No 3713 through Law No. 7145 essentially reinstating special investigation and prosecution measures with the following provisions:

PROVISIONAL ARTICLE 19- With regards to crimes defined in the Second Volume, Fourth Part, Fourth, Fifth, Sixth and Seventh Sections of the Turkish Penal Code No. 5237 and crimes that fall within the scope of Anti-Terrorism Law No. 3713 or crimes committed within the framework of organizational

activity the following shall apply for a period of three years upon the entry into force of this article:

a) The period of custody cannot exceed 48 hours beginning with the time of apprehension, except for the mandatory period for the transfer to the closest judge or court to the place of apprehension, and it cannot exceed four days for crimes committed collectively. The period of custody can be extended for a maximum of two times due to challenges in collecting evidence or comprehensive file provided that the periods in the first sentence are complied with. The decision to extend the period of custody shall be rendered by a judge upon the request of the public prosecutor by means of hearing the apprehended person. The provisions of this sub-paragraph shall be applied to the person apprehended upon the arrest/apprehension warrant as well.

b) When the need to retake the statement of the suspect about the same incident arises, this procedure can be undertaken by the public prosecutor or the law enforcement upon the writ of the public prosecutor.

c) 1. Objections to detention and release requests can be concluded over the file.

2. Release requests can be concluded over the file upon detention review for periods of 30 days each at the latest.

3. Detention reviews conducted as per Article 108 of the Code of Criminal Procedure No. 5271 of 4 December 2004 shall be conducted over the file in 30-day periods the latest, and in 90-day periods ex officio by means of hearing the person or the defense counsel.

Moreover, the regulation of criminal peace judgeships in Law No. 5235 put the SSC reserve judgeship system in place just as was the case at the beginning of the ATL but the rule to review objections by a panel of judges was even considered too much in this new system. The right to objection only against detention and judicial control measures to be lodged before Criminal Courts of First Instance was granted by Law No. 7331 of 8 July 2021 and began to be implemented since 1 January 2022 at a time when the rulings by criminal peace judgeships have been a subject of much controversy but no difference has been seen yet.

One should also review a report by the GNAT Justice Commission on the sentences added to Article 9/5 of Law No. 5235 through Article 39 of Law No. 6572. Five different bills were tabled about the law in question and the Justice Commission adopted these merged bills as a single one and sent it to the general assembly. The dissenting opinion of opposition MPs about this change, which we find to be unconstitutional, is quite important. MPs from the ruling party, though, did not include any other grounds than the sentences used in the related regulation. I believe that an evaluation, in this case, is called for based on the opposition MPs' grounds for dissent because the political power did not provide a justification for such an important regulation. Even this state of affairs on its own shows that the intention is to secretly and silently revive the former courts with special powers.

Article 37 of the Constitution regulates the principle of natural judge stating that "No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established." As per the above-listed grounds, the decision by the Board of Judges and Prosecutors to establish heavy penal courts competent to only prosecute crimes under the ATL is against the principle of natural judge.

ATL and the Problem of Criminal Peace Judgeships

Criminal peace courts, regulated under Article 10 of Law No. 5235 on the Establishment, Duties and Capacities of First Instance Courts and Regional Courts of Appeal in Civil Jurisdiction which went into effect in

2004, were changed by Law No. 6545 of 18 June 2014 and these courts were replaced by criminal peace judgeships.

Judgeships competent and mandated by ATL Article 10 to conduct investigation procedures were abolished in 2014 and, as is mentioned in the above paragraph, criminal peace judgeships operational all over Turkey were established.

The Venice Commission, the Council of Europe's advisory body on constitutional matters, published an opinion on the "duties, competences and functioning of the criminal peace judgeships" in Turkey in March 2017.⁴⁰ This opinion that presented recommendations by shedding light on to the problems brought about by the criminal peace judgeships within the judicial system was adopted by the Commission's 110th Plenary Session.

The International Commission of Jurists (ICJ), too, offered fundamental criticism about these judgeships in parallel with the above-mentioned opinion. According to the ICJ, the criminal peace judgeships have been the focus of much criticism since their creation in 2014 with regard to violations of human rights, as they are at the forefront of the authorization or judicial review of decisions restricting the right to liberty and other human rights. These briefing papers assess the institution of criminal peace judgeships and their compliance with Turkey's obligations under international human rights law.⁴¹

The problem of special provisions on the enforcement of sentences under the ATL

The application of Articles 5 and 17 of Law No. 3713 and provisions about enforcement of Law No. 5275 on Enforcement of Sentences must be handled together. Article 5 of Law No. 3713 prescribes that sentences shall be aggravated by half for terrorist crimes and those committed for the purpose of terrorism along with those clearly specified within the ATL.

Under Article 38/1 of the Constitution, no one shall be given a heavier penalty for an offense other than the one applicable at the time when the offense was committed. Besides, there is no legal provision about terrorist offenses and those committed for the purpose of terrorism as has been explained above. International law regulates which offenses are terrorist offenses in individual conventions/covenants. Aggravation of sentences by half for terrorist offenses in spite of this is clearly against Articles 38 and 90 of the Constitution. Moreover, while there is no aggravation of sentences for the offense of armed organization (çete), aggravation of sentences by half for the offense of armed terrorist organization is also against the principle of equality because while the offenses are defined their related punishment was ascertained accordingly. While 1 year of imprisonment is prescribed for the offense of armed organization, 5 years of imprisonment is prescribed for the offense of membership in a terrorist organization. Criminal code clearly states the punishment for a particular offense; further aggravation of a sentence through another law is openly against Article 38 of the Constitution, Article 7 of the ECHR and Article 15 of the ICCPR.

ATL Article 17 sets forth a special regulation for the enforcement of sentences for crimes committed within the scope of this law bringing about aggravation and discrimination in enforcement as it states that Articles 25, 107/4 and 108 of Law No. 5275 would be applied.

An assessment is thereby called for about the inequitable Law No. 7242 that went into effect on 14 April 2020 introducing quite important changes to ATL Article 17 and to Law No. 5275 on the Enforcement of Sentences as well as further deepening the inequality between the enforcement of ATL-related crimes and that of others.

Assessment as per the Principle of Legal Interest Protected by the Reasoning of the Turkish Penal Code and the Enforcement Law

⁴⁰ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)004-e)

⁴¹ <https://www.icj.org/wp-content/uploads/2019/02/Turkey-Judgeship-Advocacy-Analysis-brief-2018-ENG.pdf>

The government argued in the general reasoning for Law No. 5275 on the Enforcement of Sentences and Security Measures of 13 December 2004:

In the origins of enforcement law there are provisions and principles about the de facto and material enforcement of especially imprisonment sentences in international conventions/covenants, resolutions and recommendations adopted by our country: These include the European Convention on Human Rights, United Nations Declaration of Human Rights, Convention on the Rights of the Child, Covenant on Civil and Political Rights, other declarations by the United Nations, recommendations by the Europe Human Rights Committee of Ministers [sic.], the minimum standards set by the United Nations with regards to custodial sentences and rules for imprisonment sentences published by the Council of Europe.

There are also national and international origins of the enforcement law, most notably the Constitution. Among these origins, the "European Prison Rules" (No. R (87) 3) adopted by the Council of Europe Committee of Ministers on 12 February 1987 and the "Minimum Standard Rules for the Treatment of Prisoners and the Convention against Torture" adopted by the United Nations and "Reports by the Committee against Torture" are the most important. Therefore, these principles enshrined in the international texts in question must absolutely be taken into account at all times while drafting the enforcement law.

The general reasoning of the government was also adopted by the GNAT's Justice Commission (No. 710).

Judicial review should be conducted in line with the principles regulated in international documents in enforcement law based on the general reasoning of the legislator.

The Enforcement Law was amended 32 times at different dates after it went into effect. It was subjected to annulment judgments by the Constitutional Court six times at different dates. The Enforcement Law has completely digressed from its original form through amendments introduced by Law No. 7242. It also digressed from the principles listed in Articles 2 and 3 that regulated the fundamental principles and objective of enforcement. Particularly, many fundamental enforcement principles like equality, proportionality, legality, necessity in a democratic society, legitimate aim, legal interest to be protected, primacy of the violated right were violated. New crime groups were formed and the enforcement regime was further aggravated in their detriment.

The government's general reasoning for the new Turkish Penal Code, which was tabled before the GNAT the same year as the Enforcement Law (2004), also refers to the principles of modern criminal law and makes quite important points. The most important one among the new approaches is the identification of the violated legal interest and ranking is determined according to this interest.

The second volume of the TPC incorporates special provisions. Criminal offenses are collected and classified in three large parts according to the nature of the legal interest they violate within this volume. As is known, each criminal offense violates some legal interests or is formed in order to protect some interests. The bill subjects these interests to a classification in three large parts. The leading interest is the interest of persons. The second one is that of the society, the third is the interest of the state that forms the largest organization of the society. As such, the classification of criminal offenses in three main parts was regarded to be fitting. Under each main part, criminal offenses that also form an independent category in addition to the fact that

their actual characteristics are against persons, society and the state are placed in individual parts.

...

As will also be understood from the above-stated classification, the bill lists the crimes against persons at the beginning of special provisions and thus wishes to express the higher value it attaches to the principle of the protection of human beings and human rights and to emphasize once again the fundamental objective of the policy of crime and punishment that forms its merits.

The government's bill moves the severity of crimes against persons up to the first degree. The GNAT Justice Committee adopted this new view as well and the bill was passed into law as Law No. 5237 in line with this view.

The first part of the second volume of the new TPC regulates international offenses. The first part of this chapter regulates genocide and crimes against humanity, the second one regulates migrant smuggling and human trafficking. Part one incorporates offenses that are in fact committed against persons and they are those defined to be the gravest offenses in the international field. Part two regulates offenses committed against persons. Part three regulates offenses against the society. Part four regulates offenses against the nation and state and final provisions.

Part one of chapter four regulates offenses against the reliability and functioning of the public administration, part two regulates offenses against the judicial bodies or courts, part three regulates offenses against the symbols of state sovereignty and the reputation of its organs, part four regulates offenses against state security, part five regulates offenses against the constitutional order and its functioning, part six regulates offenses against national defense and part seven regulates offenses against state confidentiality and espionage.

As is seen, "interest of the person" in the government's bill was primarily protected, followed by the protection of social interest and finally state interest.

The speakers of the political power had often repeated the statement "only crimes against the state can be pardoned" when debates about amnesty was at stake. The reason for this was the principles of modern criminal law in the new TPC.

Modern principles are written in the new Enforcement Law as well but they are not implemented. The current political power set forth a regulation through Law No. 7242 in violation of legal interests that should have been protected by these main laws, in other words, it disregarded the principle of state of law. So much so that they reversed the law by making the legal interest that needed to be least protected appear like the most important one and introduced an enforcement regulation that provides impunity especially for crimes against persons and the society. They, in this way, virtually destroyed the principle of rule of law. While criminal organization leaders and members that had committed numerous crimes were released, groups that had not been charged with any act of violence whatsoever and that we call "political prisoners" were kept behind bars.

Amendments in Law No. 5275 introduced through Law No. 7242 virtually reversed the principle of legal interest to be protected with regards to many criminal offenses. It, therefore, led to public discussions about a covert amnesty for perpetrators of certain criminal offenses. It has already been a part of collective memory as the "A.Ç. Amnesty," named after a leader of a criminal organization. This person visited the GNAT after he was released and met with the leader of the MHP, one of the political parties that passed Law No. 7242.

Prisoners' Rights in International Documents

UN Mandela Rules

UN's Minimum Rules for the Treatment of Prisoners (the Mandela Rules), adopted by its general assembly on 17 December 2015 (Resolution 70/175), incorporates the most important and most detailed regulations about prisoners' rights.

The Mandela Rules particularly refer to the ICCPR, UN International Covenant on Economic, Social and Cultural Rights, UN Convention against Torture and its optional protocol and indicate that prisoners' rights are protected by various resolutions and principles of the UN. It is, therefore, clear that the Mandela Rules must be taken into account under Article 90 of the Constitution when regulating the Enforcement Law. The fundamental principles of the rules must be taken as a guide within this scope. These principles include treatment of all prisoners in line with human dignity and value, prohibition of discrimination, protection of relations with the outside world.

European Convention on Human Rights and the ECtHR Case Law

Article 3 of the ECHR prohibits torture setting forth that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Further, Additional Protocol 7 to the ECHR bans double jeopardy, or the right not to be tried or punished twice, while Protocol 12 regulates prohibition of discrimination and Protocol 13 regulates abolition of the death penalty.

ICCPR and the UN Human Rights Committee General Comments

Articles 10 and 26 of the ICCPR are particularly about prisoners' rights. Accordingly, Article 10 regulates the rights of detainees:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 26 sets forth the principle of equality before law:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Turkey also ratified Optional Protocols 1 and 2 to the ICCPR.

UN Convention against Torture and Resolutions by the Committee against Torture

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture. Numerous prohibited treatments or acts that have been identified as ill-treatment in Turkey recently are defined as acts of torture under this convention:

[T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment was adopted by General Assembly resolution 43/173 of 9 December 1988.

The **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment** and Protocol Nos. 1 and 2 to this convention were ratified and went into effect as per resolutions by the European **Committee for the Prevention of Torture (CPT)**.

An Assessment on Discriminatory Regulations Despite the COVID-19 Pandemic

Coronavirus (COVID-19) that appears to have first emerged in Wuhan, China in December 2019 has been described as a global outbreak (pandemic) by the World Health Organization. Turkey's Ministry of Health has also stated that the first coronavirus case in the country was diagnosed on 11 March 2020. Following the first case many public and private bodies have started taking measures against the pandemic, notably the government.

As is known prisons are enclosed spaces with little personal space and hygiene. Dense and mobile population, material conditions and organization of prisons provide a quite favorable medium for the spread of such communicable diseases. Human rights organizations shared with the public their concerns about this with a joint statement in Turkey.⁴² The CPT, too, published "Statement of Principles Relating to the Treatment of Persons Deprived of Their Liberty" in the context of the coronavirus disease on 20 March 2020.⁴³

Council of Europe Commissioner for Human Rights, Dunja Mijatovic, called on member states to safeguard the rights and health of all persons in prison during the COVID-19 pandemic on 6 April 2020 stating that urgent steps needed to be taken.⁴⁴ Further, UN High Commissioner for Human Rights, Michelle Bachelet, stated of 25 March 2020 that "Now, more than ever, governments should release every person detained without sufficient legal basis, including political prisoners and others detained simply for expressing critical or dissenting views."⁴⁵ Boriss Cilevics, Council of Europe Parliamentary Assembly Turkey rapporteur, called on Spain and Turkey to include politicians in early prison releases prompted by the threat posed by the Coronavirus in overcrowded prisons.⁴⁶

Further, International Federation of Human Rights (FIDH), Amnesty International, Human Rights Watch drew attention to prisons in their statements and requested rapid release from prisons beginning with disadvantaged groups.

⁴² <https://ihd.org.tr/en/joint-statement-covid-19-pandemic-and-urgent-measures-in-prisons/>

⁴³ <https://www.coe.int/en/web/cpt/-/covid-19-council-of-europe-anti-torture-committee-issues-statement-of-principles-relating-to-the-treatment-of-persons-deprived-of-their-liberty->

⁴⁴ https://www.coe.int/en/web/commissioner/news-2020/-/asset_publisher/Arb4fRK3o8Cf/content/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe?

⁴⁵ <https://news.un.org/en/story/2020/04/1061002>

⁴⁶ <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7837&lang=2>

In a joint statement on 7 April 2020 by İHD and the Human Rights Foundation of Turkey (HRFT), it was stated that a physician working at İzmir Şakran Prison's campus hospital tested positive for COVID-19 and emphasized that urgent measures should be taken in prisons without discrimination.⁴⁷

In spite of all these developments and the increased risk of COVID-19 spread in prisons, the bill to amend the Enforcement Law which was deliberated and ratified at the GNAT included discriminatory regulations and excluded prisoners according to types of crime and particularly those incarcerated under the ATL.

The authorities should have taken a series of measures based on the fact that the COVID-19 pandemic threatened the rights to life and health of prisoners, and the threat was quite imminent. Yet, Law No. 7242 did not sufficiently provide for these measures and the prisoners were kept vulnerable to the COVID-19 risk by forming some categories and excluding some types of criminal offenses. The authorities should have taken the following measures within this context without discrimination:

- Sick prisoners should have been released and the enforcement of their sentences should have been delayed as they were in the critical risk group for such outbreaks.
- Prisoners older than 60 years of age should have been released as a precaution and the enforcement of their sentences should have been delayed, non-convicted ones should have been released taking into account the fatal effects of the virus particularly on the elderly.
- Pregnant prisoners and those with children (780 children were held in prison with their mothers) should have been released the enforcement of their sentences should have been delayed in compliance with the principle of the best interest of the child.
- All minor prisoners should have been immediately released.
- Political prisoners charged with offences under the ATL (such as deputies, co-mayors, city council and general provincial assembly members, lawyers, journalists, human rights defenders, intellectuals and authors, activists, trade unionists, students) should have been immediately released.
- Law No. 7242 ratified by the GNAT should have been made as comprehensive as possible without discrimination having taken into account the principle of equality in the enforcement of sentences, sentence terms should have been reduced and the aggravation of disadvantaged prisoner groups should have been taken into consideration.
- All prisoners' legal statuses should have been reviewed over their files to enable their immediate release based on the rule that detention was an exception.

The authorities, however, introduced regulations only about some of these points and these regulations were discriminatory.

Some provisions in Law No. 7242 regulated supervised release because of the COVID-19 pandemic but the authorities even discriminated prisoners in defiance of Articles 10 and 56 of the Constitution itself. For instance, the regulation excluded prisoners incarcerated under the ATL among those with severe and chronic conditions who were covered within the scope of Article 16 of Law No. 5275.

An Assessment on the “Omnibus” Tendency to Regulate Types of Crimes Named and Classified under Different Names

⁴⁷ <https://ihd.org.tr/en/ihd-thiv-call-for-urgent-action-to-prevent-the-spread-of-covid-19-in-prisons/>

Some of the newly coined terms and definitions in Law No. 7242 are rather problematic. They are ill-advised and objectionable in terms of legal certainty. A perspective that collects criminal offenses in an “omnibus” group and utterly disregards matters like the severity of the offense has been devised. The most important one is the fact that all the offenses under the ATL No. 3713 are considered to have the same severity and are thus subjected to the same conditional release rates, while they are excluded from the group eligible for supervised release and transfer to open prisons. These include the group of “offenses defined in Volume 2, Chapter 4, Parts 4-7 of the TPC” and offenses of “establishing or leading an organization to commit criminal offenses or offenses committed within the framework of organizational activity.”

ATL No. 3713

Article 3 of ATL No. 3713 individually identifies which criminal offenses are terrorist offenses. ATL Article 4 individually lists criminal offenses committed for the purpose of terrorism. Further, offenses listed under ATL Articles 6 and 7 are evaluated under a different category.

The Problem of the Obscure Definition of Terrorism in the ATL

Officials from the UN, Council of Europe (CoE) and the EU have often been stating that the “definition of terror in Turkey is too broad, therefore, Turkey needs to narrow it down.” They have a point.

The fact that the definition of terror 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 problems, which 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, are faced in Turkey.

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. When one studies the reports published by human rights organizations and journalists’ organizations, violations brought about by the broad definition of terrorism can clearly be seen.⁴⁸

An Assessment on ATL Articles on the Enforcement of Sentences

The former TPC and the former Law on the Enforcement of Sentences had prescribed 2/3 conditional release terms for political prisoners while it was 1/2 for others. When the new TPC and the Enforcement Law went into effect, these conditional release terms were changed to 3/4 and 2/3. Law No. 7242 upset this balance and maintained 3/4 in respect of ATL No. 3713 while reducing these figures to 2/3 and most of them to 1/2 in respect of other criminal offenses further deteriorated discrimination and went against the principle of proportionality. Besides, criminal offenses under the ATL come last as per legal interest to be protected. Law No. 7242 is against the principle of rule of law in this respect as well.

ATL Article 5, which puts forth the regulation that the sentences to be delivered under the ATL would be aggravated by half, is against Articles 13 and 38 of the Constitution as it infringes upon the principle of legality of crime and punishment and the principle of legal interest to be protected.

The provision in Article 17/4 of the ATL and provisional Article 2 of Law No. 5275 stating “Terrorist offenders, whose death sentences have been commuted to life sentences; terrorist offenders, whose death sentences have been commuted to aggravated life sentences and terrorist offenders, who have been sentenced to an aggravated life sentence cannot benefit from a conditional release. For these persons, the

⁴⁸ <https://ihd.org.tr/en/wp-content/uploads/2019/05/2018-IHD-Violations-Report.pdf>
For data by Progressive Journalists Association, see: <http://www.cgd.org.tr/index.php?Did=222>
For data by Turkish Union of Journalists, see: <https://tgs.org.tr/cezaevindeki-gazeteciler/>

aggravated life sentence continues until death” should be repealed and those whose death sentences had been commuted to imprisonment sentences should also be made eligible for conditional release like those who had been handed down aggravated imprisonment sentences.

According to 17 February 2014 data provided by the Ministry of Justice, there were 1,453 prisoners with aggravated life sentences in Turkey. We estimate that this figure is multiplied a couple of times now. Aggravated life sentences replaced the death penalty in Turkey after 2002 when capital punishment was abolished.

These prisoners, who were handed down sentences according to commission of offenses under Parts 4 (“Offenses against the Security of the State”), 5 (“Offenses against the Constitutional Order and the Functioning of This Order”) and 6 (“Offenses against National Defense”) of Chapter 4 of Volume Two of the TPC within the framework of organizational activity, cannot benefit from conditional release based on the regulations in Article 107/16 of the Enforcement Law and its provisional Article 2 and the enforcement of their sentences is sustained “until death.” Further, the enforcement of sentences for these convicted prisoners is under no circumstances suspended as per Article 25/1-ı of the Enforcement Law.

It is clear that this punishment is one that is inhuman because it is enforced in solitary confinement until the death of the prisoner and has aggravated enforcement conditions. The **ECTHR, in its judgments in the cases of Öcalan, Gurban and Kaytan, found violations of Article 3 of the ECHR on the grounds that the applicants were “deprived of hope of being released again” holding that such deprivation was torture and ill-treatment** with regards to this enforcement regime that qualifies as a separate punishment within a life-long punishment. As has also been indicated in the ECTHR judgments, the enforcement of a sentence never lasts until the death of the prisoner; prisoners are released when they meet certain criteria having their cases legally reviewed at certain intervals. *Gurban* group cases are under the supervision of the Council of Europe’s Committee of Ministers and Turkey received recommendations on the matter on 2 December 2021.⁴⁹

Death penalty is prohibited both in Turkey’s national legislation and international legislation it undertakes. ATL Article 17/4, which means prolonged death penalty, infringes upon the essence of the right. It is not proportionate. It is also clear that such regulations that bring about rights deprivations for good are against Article 13 of the Constitution. Provisions in Articles 107/16 and 25 as well as provisional Article 2 of Law No. 5275, which are related to the above article, should be handled together and all should be annulled.

The gravest ban imposed on prisoners sentenced to aggravated life is the fact that they are condemned to death in prisons because they are not eligible for conditional release due to the ban in Article 25 even if they are critically sick to live in prisons on their own and have a medical report to this end.

However Article 16 of the same law entitled “Postponement of execution due to illness” and its 2nd paragraph states that “if the execution of the prison sentence (...) presents an absolute danger for the life of the convict, its execution shall be postponed until he is cured” while its 6th paragraph puts forth that the “enforcement of the sentence of a prisoner, who cannot maintain their lives under prison conditions on their own due to a critical illness or disability and are evaluated not to pose a grave and concrete threat to public safety, may be deferred until they are healed according to the procedure set in the 3rd paragraph.”

The enforcement of sentences particularly for sick prisoners according to this regime leads to their death, each prisoner whose treatment is not undertaken timely and under appropriate conditions is being dragged to death each passing day.

Moreover, while the enforcement of sentences of sick prisoners should have been continued in prisoner wards of official healthcare institutions even if their conditions are not life-threatening, the failure to suspend the enforcement of sentences of prisoners with life-threatening conditions qualify as a violation of the right to life.

The Template of Terrorist Offenses; Offenses of Establishing, Leading or Being a Member of an Organization and Offenses Committed within the Framework of Organizational Activity

⁴⁹ https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a4acba

Such template sentences in the Enforcement Law virtually create new offense types. Yet, types of criminal offenses are regulated in the TPC and some special laws in our criminal legislation. None of these laws have such a definition.

Only ATL Article 3 provides a definition for terrorist offenses. TPC Article 220 regulates organization offenses, while TPC Article 314 regulates armed organization offenses. TPC Article 220 regulated under Chapter 3 on offenses against the society and Part 5, is regulated within offenses against public peace. TPC Article 314 is regulated under Chapter 4, Part 4. As is seen, creating such a category in such an enforcement law not only is against the principle of proportionality but also is absolutely against the principle of legal interest to be protected. It would, therefore, be more accurate to introduce a regulation directly writing the titles and numbers of offenses notably in the TPC and other special laws rather than creating new types of offenses with such unlawful template sentences in the enforcement law. The political power creates such new types of offences that are against criminal law according to its policy of combatting crime that it conjecturally designates. Such state of affairs is against the principle of legality of crime and punishment as well as being against the principle of universality and continuity of laws.

When we consider the principles of legal interest to be protected and proportionality, the rate of conditional release for these types of offenses named in this way should be $\frac{1}{2}$, which is the normal rate. Further, they should not be exempt from supervised release.

Also the same enforcement regime should be applied to Articles 314 and 220 of the TPC that are among the types of offenses defined within this template.

An Assessment Based on Constitutional Court Judgments

Article 1/2 of Law No. 4616 on the “Conditional Release and the Deferral of Trials and Sentences for Offenses Committed until 23 April 1999” of 21 December 2000, commonly known as the “Rahşan Ecevit Amnesty” had put forth the following:

10 years shall be reduced from the total sentence to be served by those convicted to aggravated life sentence; from the term of total conviction of those sentenced to imprisonment and from those whose sentences were commutated to imprisonment sentence for any reason. The reduction shall be granted one-off over the total sentence, not individually for each sentence delivered. But even if the sentences were delivered at different dates for various offenses of a person, the reduction cannot be more than 10 years.

Those who served their sentences term or conviction terms, following the 10-year reduction from the total sentence they needed to serve or from the total term of conviction according to the enforcement provisions they are subjected to, shall be conditionally released immediately without taking into account whether they were in good conduct or not and without their request; while those who have more than ten years in total sentences shall be conditionally released after serving their longer sentence according to the enforcement provisions they are subjected to.

On 18 July 2001, the Constitutional Court rendered a judgment (No. E.2001/4, K.2001/332) annulling the sentences in the first paragraph stating “10 years shall be reduced from the term of total conviction of those sentenced to imprisonment and from those whose sentences were commutated to imprisonment sentence for any reason” and in the second paragraph stating “or from the term of total conviction” while it was decided that the annulment judgment would go into effect 6 months after it was published in the Official Gazette since the legal gap that would be brought about by such annulment was regarded to pose a threat to public order and violate public interest. The Constitutional Court held in the reasoning for its annulment judgment that this regulation qualified as “amnesty” and it should be annulled because there was no qualified majority.

Following this judgement by the Constitutional Court, Article 1/2 of Law No. 4616 that was reregulated through Article 1 of Law No. 4758 on the “Conditional Release and the Deferral of Trials and Sentences for Offenses Committed until 23 April 1999” of 21 May 2002 had put forth the following rule:

10 years shall be reduced from the total sentence to be served by those convicted to aggravated life sentence, those sentenced to imprisonment and those whose sentences were commuted to imprisonment sentence for any reason according to the enforcement provisions they are subjected to. The reduction shall be granted one-off over the total sentence, not individually for each sentence delivered. But even if the sentences were delivered at different dates for various offenses of a person, the reduction cannot be more than 10 years.

Those who served their sentences following the 10-year reduction from the total sentence they needed to serve according to the provisions in the first paragraph, shall be conditionally released immediately without taking into account whether they were in good conduct or not and without their request; while those who have more than ten years in total sentences shall be conditionally released after serving the rest of their sentences.

The president then applied to the Constitutional Court arguing that this regulation too was unconstitutional. The Constitutional Court also annulled this regulation in its judgment of 28 May 2002 (No. 2002/99 E, 2002/51 K) on the following grounds:

Under Article 98 of the Turkish Penal Code, a “special amnesty” that can terminate or reduce or change a sentence can be collective or conditional.

Prescription of a ten-year reduction from the total sentence to be served by those convicted to aggravated life sentence, those sentenced to imprisonment and those whose sentences were commuted to imprisonment sentence for any reason according to the enforcement provisions they are subjected to in the first paragraph of the 2nd subparagraph, and the stipulation of those who served their sentences following the ten-year reduction from the total sentence they needed to serve according to the provisions in the first paragraph to the (dissolving) condition of not committing a crime for a specific period of time show that the regulation introduced qualifies as a collective and conditional special amnesty.

Since it was stated in Article 1/8 of Law No. 4616 that prisoners, who were handed down disciplinary action punishment due to their conduct disruptive of the discipline of the prison after the publication of the Law, could not benefit from the provisions in Article 1 unless their disciplinary punishment was lifted according to the provisions of the bylaw, these convicts’ serving a part of their sentences in prison does not affect the qualification of “special amnesty” incorporated in the 2nd subparagraph as it is a condition of implementation.

The Constitutional Court in its judgment of 18 July 2001 (No. E: 2001/4, K: 2001/332) held that the regulation in the 2nd subparagraph of Article 1 of Law No. 4616, which did not differ in essence from the rule under review, was also a collective and conditional special amnesty.

Article 87 of the Constitution, which was amended through Law No. 4709 of 3 October 2001, lists the proclamation of general and special amnesties with the majority of three-fifths of the total number of deputies among the duties

and powers of the Grand National Assembly of Turkey. Accordingly, it is clear that legislative measures qualifying as “amnesty” should be passed into laws with the majority three-fifths of the total number of members of the GNAT. The rule under review, however, was passed into law with 174 votes disregarding this rate.

Based on the explained reasons, the 2nd subparagraph of Article 1 of Law No. 4616 that was reregulated through Law No. 4758 is in violation of Article 87 of the Constitution. It should therefore be repealed.

Law No. 7242, too, qualifies as special amnesty. Article 65 of TPC No. 5237 prescribes:

Article 65- (1) A general amnesty shall have the effect of discontinuing the criminal proceedings and setting aside any penalty imposed and its consequences.

(2) Where there is a special amnesty, the offender may be released from the enforcement institution where he is serving his sentence of imprisonment or the term of imprisonment may be reduced or converted to a judicial fine.

(3) The sentence relating to the revocation of certain rights which is, either, identified in a judgment or consequent upon a penalty, shall continue to be effective despite any special amnesty.

The articles of Law No. 7242 should have been repealed which qualified as special amnesty violating the principle of equality before law and infringing the prohibition of discrimination among prisoners as well as disregarding the legal interest to be protected.

Besides, even if it is not recognized as special amnesty, an objection application was lodged regarding Article 192 of the TPC that was excluded from the scope of the regulation in Article 1/5a that designated the offenses to be excluded in Law No. 4616 on the “Conditional Release and the Deferral of Trials and Sentences for Offenses Committed until 23 April 1999” stating:

However;

a) The provisions of this article are no applicable to the perpetrators of offenses listed in articles 125 to 157, 161, 162, 168, 171, 188, 191, 192, 202, 205, 208, 209, 211 to 219, 240, 243, 264, 298, 301 to 303, 305, 312/2, 313, 314/1, 339 to 349, 366, 367, 383, 394, 403 to 408, 414 to 418 and 503 to 506 of the Turkish Penal Code.

The Constitutional Court declared the application admissible on 17 April 2002 (No. 2002/61 E, 2002/43 K) and repealed the law with regards to Article 192 of the TPC. The Constitutional Court stated the following in its reasoning:

A state governed by Rule of Law defined in Article 2 of the Constitution is a state that respects human rights and protects these rights, establishes a legal order compliant with justice and equality in social life and regards itself obliged to maintain this order, complies with legal rules and the Constitution in all its conducts, whose procedures and acts are dependent on judicial review.

Article 192 of the Turkish Penal Code was excluded, even though criminal offenses in Article 179 of the Turkish Penal Code on “deprivation of liberty” that is included in the same chapter and has similar elements but requires a heavier sentence, Article 495 regulating the offense of “usurpation” in other chapters where the offense of threat is included as an element, Article 429

on “kidnapping a woman,” Article 430 on “kidnapping or detaining a minor,” Article 308 on getting a right by using violence and threatening persons, Article 201 on “restricting or proscribing freedom of art or commerce through force and violence or threat” were included within the scope of the Law.

Thus, the opportunities made available for those who had committed more aggravated crimes of similar nature were not granted to the perpetrators of the crime in question, an unjust consequence was brought about with respect to offenses under Article 192.

Based on the explained reasons, the rule is in violation of Article 2 of the Constitution in respect of Article 192 of the Turkish Penal Code. It should therefore be repealed.

When the Constitutional Court’s above-mentioned reasoning was taken into account, regulations of Law No. 7242 should have been repealed which violated the principle of equality before law and infringed upon the prohibition of discrimination among prisoners as well as disregarding the legal interest to be protected.

The main opposition party CHP lodged two separate applications before the Constitutional Court on the grounds that Law No. 7242 qualified as special amnesty and its numerous articles were unconstitutional. The first of these applications argued pro forma unconstitutionality for failure to adopt with qualified majority at the GNAT as Law No. 7242 was a covert amnesty. The Constitutional Court rejected the application with 7/8 votes.⁵⁰ The second one appealed for repeal with respect to merits as various articles of Law No. 7242 and its entirety was unconstitutional. The Constitutional Court also rejected this one by majority of votes.⁵¹ Such state of affairs reveals that the Constitutional Court has digressed from its former case law and the majority of its members have been wary of the pressure of the political power.

Humanitarian Law and the Problem of ATL in Practice

Under additional Article 2, which was amended to the ATL through Law No. 4178 of 29 August 1996, the following provision was added: “During operations carried out against terrorist organizations, in case of disobedience to a call to surrender or an attempt to use firearms, security forces are entitled to the use of firearms towards the target directly and without hesitation, to the degree and proportion as to neutralize the threat.” This provision was reregulated through Law No. 5532 of 29 June 2006 in the same way although it had been repealed by the Constitutional Court’s judgment of 6 January 1999.

Turkey ratified and put into effect four fundamental Geneva Conventions that regulate humanitarian law. Yet, it did not ratify Protocols 1 and 2 to these conventions. Nevertheless, the common Article 3 of the four conventions can be implemented in internal armed conflict to prevent civilians from suffering if armed conflict occurs within the country.

Courts in Turkey have never engaged in any debate about humanitarian law concerning the implementation of additional Article 2 of the ATL. Since the legal process about armed conflict especially in cities where curfews were declared following the restart of armed conflict on 24 July 2015 is still ongoing with procedural discussions, there no judicial ruling has been rendered on this matter yet. Further, the ECtHR has also declared applications on the matter inadmissible, as related domestic remedies have not been exhausted.

One can see the article by Selahattin Esmer that focuses on the qualification of the protracted conflict in Turkey or of its place in humanitarian law and the clarification of the level of violence defined as the “minimum threshold of armed violence” or “minimum threshold of armed conflict.”⁵² We believe that the current state cannot be maintained with the ATL.

The ECtHR referred to humanitarian law and found violation in applications lodged before it about the damages sustained by civilians during the period of armed conflict in the 1990s in Turkey. For instance, the

⁵⁰ <https://normkararlarbilgibankasi.anayasa.gov.tr/ND/2020/41?EsasNo=2020%2F44&KelimeAra%5B%5D=7242>

⁵¹ <https://normkararlarbilgibankasi.anayasa.gov.tr/ND/2021/55?EsasNo=2020%2F53&KelimeAra%5B%5D=7242>

⁵² <https://ihd.org.tr/en/article-international-humanitarian-law/>

ECtHR referred to humanitarian law and found a violation in its judgment in the case of *Benzer and Others v. Turkey* (App. No. 23502/06).⁵³ The reason why we included this part in our report is to contribute to humanitarian law debates in Turkey, to emphasize the need to implement humanitarian law to the protracted armed conflict in Turkey, and to indicate that additional Article 2 of the ATL should be repealed because it leads to violations of the right to life.

Enemy Criminal Law and the Problem of ATL in Practice

ATL is the most fundamental special procedure and criminal law used in enemy criminal trials. In Turkey, the National Security Council drafts a National Security Policy Document every 5 years. İHD and HRFT brought an annulment lawsuit against this document before the Council of State in 2006. Yet, the Council of State delivered a rejection decision on merits. Then an individual application was lodged before the Constitutional Court but the high court declared it inadmissible on the grounds that İHD and HRFT had no interest in bringing a lawsuit on this matter. The ECtHR has yet to rule on the application lodged before it.

İHD's special report "Legal Certainty and the Right to a Fair Trial for Everyone"⁵⁴ and the process about the annulment of the National Security Policy Document partially talked about the ways in which the ATL was instrumentalized in enemy criminal law proceedings. In fact a large number of emergency decree laws were issued during the state of emergency that was declared on 20 July 2016 following the coup d'état attempt of 15 July 2016. The same phrase was used in almost all these decree laws which showed that the main function of the National Security Council was sustained and it exercised its power to designate groups and individuals that would pose an internal threat which meant internal enemy. The authorities fight against individuals and institutions defined in this way as internal enemies through the judiciary and particularly use the ATL because the problem of uncertainty of the definition of terrorism in the ATL enable the National Security Council to identify individuals and groups as "terrorists" as it wishes.

The structure of the National Security Council, the influence and power of the president over the Board of Judges and Prosecutors, heavy penal courts with special powers established through the decision of this board to hear cases under the ATL basically reveal the fact that a special and unnamed "enemy criminal law system" has been established. This process, which had essentially began with the Treason Law and the Liberty Courts, has been maintained by the ATL and it has almost become the main proceedings system by expanding many special procedural provisions in the ATL to other laws.

ATL and Special Laws Introduced on Financing of Terrorism

The provision in ATL Article 8, which had been regulated by Law No. 5532 of 29 June 2006 to prevent financing of terrorism, was repealed by Law No. 6415 of 7 February 2013 and the type of criminal offense designated in this article was specially regulated through Law No. 6415 on the prevention of financing of terrorism.

The authorities held that these legal regulations were not sufficient enough and introduced Law No. 7262 on the Prevention of the Financing of the Proliferation of Weapons of Mass Destruction while this law introduced important amendments to Law No. 5253 on Associations and Law No. 2860 on Collection of Aid (fundraising). These amendments interfered with the field of civic society and attempts were made to make human rights organizations vulnerable to the repressive policies of the political power by clamping down on them with audits. The Human Rights Joint Platform (HRJP) shared its reaction on the issue with the public and issued several statements.⁵⁵

⁵³ http://www.aihmiz.org.tr/files/Benzer_ve_digerleri_rapor.pdf

⁵⁴ <https://www.ihd.org.tr/rgm20120215/>

⁵⁵ <https://ihop.org.tr/kitle-imha-silahlarinin-yayilmasin-finansmaninin-onlenmesine-iliskin-kanun-teklifi-anayasaya-ve-orgutenme-ozgurlugune-aykiridir/>

The Venice Commission published an opinion⁵⁶ on the compliance of amendments introduced by Law No. 7262 to international human rights standards. The opinion (No. 1028/2021) of 20 April 2021 indicated that the introduced law did not comply with the recommendations in OECD Financial Action Task Force's (FATF) 2019 Turkey Report while the amendments hit freedom of association hard. Indeed, the FATF downgraded Turkey to its "grey list" on the grounds that it did not introduce legislative changes in line with its recommendations.⁵⁷

<https://ihd.org.tr/en/joint-statement-civil-society-cannot-be-silenced/>

⁵⁶ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)036](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)036)

⁵⁷ <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-october-2021.html>

INCESSANT USE OF THE ATL AGAINST HUMAN RIGHTS DEFENDERS

The ATL and its use in practice show that Turkey does not comply with the guidelines on the protection of human rights defenders. The Guidelines on the Protection of Human Rights Defenders,⁵⁸ drafted and published by the OSCE Office for Democratic Institutions and Human Rights, have unfortunately not been implemented in Turkey. The UN Declaration on Human Rights Defenders⁵⁹ adopted by the General Assembly on 9 December 1998 was also sent to governors' offices with a circular letter of the Office of the Private Secretary to the Ministry of Interior in 2004 in Turkey but not much has changed in practice. The declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities⁶⁰ adopted by the committee on 6 February 2008 has unfortunately not been implemented either. Further, PACE adopted resolution 1891 on the situation of human rights defenders on 27 June 2012.⁶¹ The OSCE Parliamentary Assembly, too, adopted a resolution⁶² on strengthening engagement with human rights defenders and national human rights institutions on 5-9 July 2007 at its 16th annual meeting. The EU also adopted the EU Guidelines on Human Rights Defenders⁶³ in 2008 as well.

There are many reports on the use of the ATL against human rights defenders. İHD has particularly produced various reports in its dialogue with the government and identified the problem as well as providing recommendations to solve problems. İHD issued its "Report on the Elimination of Injustice in Penal Legislation"⁶⁴ in 2018, its views on the new human rights action plan⁶⁵ and the judicial reform strategy document⁶⁶ in 2019; sent these reports to the Ministry of Justice and shared them with the public. İHD also presented its views on the new human rights action plan, the preparations of which it participated in person, at the beginning of 2020.⁶⁷ All these reports argued that the main problem was the ATL itself and it should be repealed, if not, it should be made to comply with the related international documents.

Dunja Mijatovic, the Commissioner for Human Rights of the Council of Europe, released a country report⁶⁸ following her visit to Turkey from 1 to 5 July 2019 and provided a comprehensive assessment of particularly the protection of human rights in the justice system and the judiciary as well as on the situation of human rights defenders and civil society and provided various recommendations. The Commissioner criticized the investigations and prosecutions faced by human rights defenders and recommended that Turkey amend its legislation in compliance with the principle of rule of law.

⁵⁸<https://www.osce.org/files/f/documents/2/d/230596.pdf>

⁵⁹ <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

⁶⁰<https://www.ohchr.org/Documents/Issues/Defenders/DeclarationHRDCECommitteeMinisters.pdf>

⁶¹ <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18948&lang=en>

⁶² <https://www.osce.org/files/f/documents/f/3/29714.pdf>

⁶³ https://eeas.europa.eu/sites/default/files/eu_guidelines_hrd_en.pdf

⁶⁴ <https://ihd.org.tr/en/ihd-report-and-recommendations-for-the-elimination-of-injustice-in-penal-legislation/>

⁶⁵ https://ihd.org.tr/en/wp-content/uploads/2019/06/20190306_New-Human-Rights-Action-Plan_Report.pdf

⁶⁶ <https://ihd.org.tr/en/ihd-report-and-recommendations-on-the-judicial-reform-strategy-document/>

⁶⁷<https://ihd.org.tr/en/ihd-report-on-the-new-human-rights-action-plan/>

⁶⁸<https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e>

IHD provided samples of investigations and trials brought against human rights defenders in Turkey in its special report “Human Rights Advocacy and Repressive Policies against IHD”⁶⁹ issued in June 2020. IHD’s central office along with FIDH and EuroMed Rights, of which IHD is a member, have been publishing special reports on this important issue emphasizing judicial harassment against human rights defenders focusing on the degrees to which the ATL has been abused. For instance, IHD and the Observatory for the Protection of Human Rights Defenders (FIDH-OMCT) published a special report in July 2020 entitled “A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society.”⁷⁰ IHD and OBS also issued a special report in May 2021 entitled “Turkey’s Civil Society on the Line: A Shrinking Space for Freedom of Association”⁷¹ focusing on repressive policies against human rights defenders in the country.

Repressive Policies against Human Rights Defenders

2020 and 2021 have also witnessed numerous human rights defenders, notably executives, members and staff of human rights organizations, arrested, detained and attacked in transgression of the principles enshrined in the UN Declaration on the Protection of Human Rights Defenders. This protracted policy of repression by the political power has also been maintained in 2021 and the Interior Minister himself targeted IHD at the GNAT on 15 February 2021. Following this development, IHD’s Co-Chairperson Öztürk Türkdoğan was arrested by the police on 19 March 2021 and released on the same day under judicial control. The investigation initiated into Mr. Türkdoğan has become a trial and the first hearing of the case will be held on 22 February 2022. In the indictment Öztürk Türkdoğan was charged with “acting on behalf of an (armed) organization using the statements he made in his capacity as chairperson of the association as an excuse” under TPC Article 314/2.⁷² The harsh critical points made by the Venice Commission in its 2017 Media Freedom report have been disregarded, the ECtHR’s *Demirtaş v. Turkey* judgment has been set at naught. Yet, this was not enough. Türkdoğan faces another trial on the charges of “degrading the Turkish nation, state of the Turkish Republic, the Organs and Institutions of the State” under TPC Article 301 on the grounds of a statement on the Armenian Genocide by the association. Türkdoğan faces a third trial on the charges of “insulting a public officer” under TPC Article 125 on the grounds of another statement by IHD about the Interior Minister Süleyman Soylu. Such state of affairs shows that the repressive policies faced by IHD on a regular basis will increasingly go on.⁷³

IHD has been regularly been publishing special reports on repressive policies against human rights defenders and IHD in order to paint a detailed picture of the conditions faced by IHD and human rights defenders in Turkey. The latest report⁷⁴ by IHD was updated on 13 April 2020 and was shared with the public and related institutions. The report presents investigations and prosecutions against the legal personality of IHD as well as its executives and members.

The report entitled “A Perpetual Emergency: Attacks on Freedom of Assembly in Turkey and Repercussions for Civil Society”⁷⁵ drafted by IHD and the Observatory for the Protection of Human Rights Defenders (FIDH-OMCT) was published in July 2020. One of the important points of this study was the fact that freedom of assembly sustained a heavy blow because individuals who wanted to express their dissident views had less and less access to public space following the 2013 Gezi Park protests. While common bans on assemblies most often withheld civil society organizations and human rights defenders to express their opinions by holding meetings and assemblies, those who took to the streets despite these bans faced police brutality, judicial harassment and stigmatization. These restrictions bring along a climate of fear in which many civil society actors feel under pressure, are silenced and the expression of their legitimate concerns about

⁶⁹ <https://ihd.org.tr/en/ihd-special-report-on-human-rights-advocacy-and-repressive-policies-against-ihd/>

⁷⁰ <https://ihd.org.tr/en/a-perpetual-emergency-attacks-on-freedom-of-assembly-in-turkey-and-repercussions-for-civil-society/>

⁷¹ <https://ihd.org.tr/en/obs-ihd-report-turkeys-civil-society-on-the-line-a-shrinking-space-for-freedom-of-association/>

⁷² https://ihd.org.tr/en/wp-content/uploads/2022/01/Info-Note_O-Turkdogan_Jan-2022.pdf

⁷³ <https://ihd.org.tr/en/charges-against-ihds-chairperson-are-unacceptable/>

⁷⁴ <https://ihd.org.tr/en/ihd-special-report-on-human-rights-advocacy-and-repressive-policies-against-ihd/>

⁷⁵ <https://ihd.org.tr/en/a-perpetual-emergency-attacks-on-freedom-of-assembly-in-turkey-and-repercussions-for-civil-society/>

human rights, rule of law and democratic principles is curbed. "Turkey's Civil Society on the Line: A Shrinking Space for Freedom of Association,"⁷⁶ the second part of the former report, was published in May 2021. This report, too, presents a comprehensive and detailed panorama of repressive policies against human rights defenders.

In addition to the repressive policies against İHD's executives and members, repression against the founders, president, board members and volunteers of the Human Rights Foundation of Turkey (HRFT) has been on the rise while at least 30 investigations and prosecutions are pending against them. One can also list the Büyükada trial, the trial against the Turkish Medical Association's (TMA) central council members; investigations, trials and other administrative measures against members of the Confederation of Public Employees' Trade Unions (KESK), trial against the Progressive Lawyers' Association, Anadolu Kültür and Osman Kavala trial, Gezi trial, Diyarbakır Bar Association and Ankara Bar Association trials can be listed among the numerous repressions. The above-mentioned reports talk about these trials but these repressive policies have so wide a coverage as to include all social dissidence.

According to the information note⁷⁷ based on data collected by HRFT's Documentation Center, between 1 March 2021 and 31 August 2021:

- A total of a 729-day ban on assemblies and demonstrations were imposed in 19 provinces and 3 districts. In a district, a blanket ban was enforced.
- 1,098 HRDs, including 119 women and LGBTI+ rights defenders and 14 environmental activists, were taken into custody.
- 107 HRDs were sentenced to various judicial control measures, while 33 were arrested.
- The police intervened in at least 124 assemblies and demonstrations, including 23 on women's and LGBTI+ rights, 21 on union rights and 11 on environmental rights. The number of prohibited events was 21.
- Indefinite curfews were declared in 80 villages of 2 districts.
- 290 HRDs were fined 909,598 TRY on the grounds of the violation of Covid-19 measures for participating in demonstrations.
- 55 hearings were held in which 338 HRDs were tried, including more than 20 lawyers, 87 women and LGBTI+ rights defenders and 7 environmental activists.
- Criminal proceedings were launched against the Izmir Bar Association and Diyarbakır Bar Association's executive councils for their statements regarding LGBTI+ rights.
- Criminal proceedings were launched against 26 HRDs, 18 of whom were lawyers.

According to the latest information note covering the period between 1 September 2021 and 31 December 2021,⁷⁸ drafted by HRFT and İHD within the scope of the project undertaken in collaboration with OMCT and FIDH, 1,220 human rights defenders were targeted by at least one or more interventions including judicial harassment, administrative harassment, threats and reprisals. Within this scope, between 1 September 2021 and 31 December 2021:

- 833 human rights defenders faced judicial harassment.
- Criminal proceedings were initiated into 519 human rights defenders. Among these defenders 305 individuals faced prosecution between 1 September and 31 December 2021. Pending criminal proceedings into

⁷⁶ <https://ihd.org.tr/en/obs-ihd-report-turkeys-civil-society-on-the-line-a-shrinking-space-for-freedom-of-association/>

⁷⁷ <https://en.tihv.org.tr/alternative-shadow-reports/fact-sheet-hrds-in-turkey-facing-excessive-oppression/>

⁷⁸ https://en.tihv.org.tr/wp-content/uploads/2022/01/EN_ihs_bilginotu_ocak2022.pdf

214 individuals were maintained in this same timeframe as well, while judicial harassment was perpetuated. 21 individuals were convicted and sentenced to imprisonment or administrative fines, while 15 individuals were acquitted.

- Criminal investigations were launched into 314 human rights defenders. While criminal investigations were launched into 301 individuals between 1 September and 31 December 2021, pending investigations into 4 were maintained during the same timeframe. Non-prosecution decisions were rendered for 9 individuals.
- A total of 353 human rights defenders faced administrative harassment:
- 343 human rights defenders were among Academics for Peace who had been dismissed from their posts at universities through decree-laws. The State of Emergency Measures Inquiry Commission rejected reinstatement applications lodged by the academics in spite of the violation judgment rendered by the Constitutional Court and more than 400 acquittal rulings delivered by heavy penal courts, hence, the administrative harassment was sustained.
- 8 human rights defenders were dismissed from their public posts. The aim of the dismissal measures is to intimidate public employees who are human rights defenders.
- 1 administrative harassment case identified was about the pending administrative trial of an association that had been closed down because of its human rights advocacy activities. The pending trial and the fact that the association cannot carry out its activities provide for the perpetuation of administrative harassment.
- 1 administrative harassment case was implemented through imposition of denial of access order to the website of a news agency with a rights-based reporting approach.
- 34 human rights defenders were subjected to threats, targeting and reprisals.
- 11 civil society organizations working to promote human rights were targeted by the government by naming each and were criminalized in the public space arguing that they would be subjected to judicial and administrative scrutiny.

Use of the ATL against Rights Defenders

According to data provided by the Ministry of Justice, 10,745 persons stood trial under ATL Articles 6 and 7/2 in 2013, while this figure constantly went up to reach 24,585 in 2017. According to the 2018 statistics, investigations were initiated into 46,220 persons while 17,077 of these persons stood trial. The 2020 statistics provided by the Ministry of Justice revealed that 26, 225 persons faced investigations while 6,551 of them stood trial. 2021 data have not been disclosed yet.

According to the İHD's updated data, there are at least 200 cases against İHD's executives and members. Yet, this figure does not include about 50 cases brought against İHD's Co-Chairperson Eren Keskin. We see that a significant portion of these cases have been brought under the ATL. There are also cases under TPC Articles 299, 301 and 302. We would like to note some prominent cases to reveal the scope of repression İHD executives and members face under the ATL.⁷⁹

⁷⁹ See İHD's special reports on judicial harassment against its legal personality, its executives and members.

İstanbul 23rd Heavy Penal Court handed down a 6 year-3 months of imprisonment sentence for İHD's Co-Chairperson Eren Keskin under TPC Article 314/2 on 15 February 2021 within the scope of the *Özgür Gündem* trial, and the court denied the universality of human rights in its judgment astonishingly arguing for the "necessity of an understanding of local and national human rights."⁸⁰ This is a quite dangerous tendency.

Criminal investigations were launched into İHD's former Vice Secretary-General Atty. Hasan Anlar, former chair of the Ankara branch Atty. Halil İbrahim Vargün, Central Executive Board Member Atty. Filiz Kalaycı in 2012 due to their professional and advocacy activities. Our friends were targeted by the Ankara anti-terror police because of their human rights activities and they reminded suspects in custody of their right to silence. The trial was finalized at the Ankara 11th Heavy Penal Court on 24 January 2013. The court convicted the defendants on charges of "membership in an illegal organization" and sentenced Nedim Taş to 10 years and 6 months, Filiz Kalaycı to 7 years and 6 months; Hasan Anlar, Halil İbrahim Vargün and Murat Vargün to 6 years and 3 months imprisonment. This judgment was finalized.

An investigation was initiated into İHD's Disciplinary Board member Ragıp Zarakolu claiming that he taught a course with an "organizational" content at the politics academy of the Peace and Democracy Party and was charged with "aiding and abetting an illegal organization" under Article 314 of the TPC and Article 7/1 of the ATL. Mr. Zarakolu was detained on 1 November 2011 and released pending trial on 10 April 2012 and had to leave Turkey. He has been living in Sweden since 2013. A red notice was issued against him on 5 September 2018. His trial is still pending.

İHD's local Bitlis representative office chair Hasan Ceylan was sentenced to 6 years and 3 months imprisonment under TPC Article 314/2 by Bitlis 2nd Heavy Penal Court which held anonymous witness testimonies alleging that his conciliation initiatives during the 2013-2015 peace process were done on behalf of an organization were truthful. Our friend was detained pending trial. He is still in prison. The judgment was finalized. His individual application is pending before the Constitutional Court.

İHD's former central executive board member and former chair of its local Mersin branch, Ali Tanrıverdi was detained on the grounds of his advocacy activities and statements about tortured children in his capacity as İHD executive in 2012 and he was released after 7 months, in 2013. A case was brought against him under TPC Article 314/2, which is still pending. There are also other investigations and trials against Ali Tanrıverdi.

İHD's former local Ağrı representative office chair Atty. Olcay Öztürk was sentenced to 2 years and 15 days imprisonment by Ağrı 2nd Heavy Penal Court under ATL Article 2/2, TPC 314/3 and 220/7 for taking part in the deliverance of a body as İHD representative. The case is pending at appeals. Repression in Ağrı has been non-stop. İHD's former local Ağrı branch chairs Abdulhadi Karakurt and Atilla Özbey were sentenced to 6 years and 3 months imprisonment by Ağrı 2nd Heavy Penal Court under TPC Article 314/2 on the grounds of assemblies and meetings they participated within the scope of association's activities. Their trial is at the appeals stage.

Gönül Öztürkoğlu, chair of İHD's local Malatya branch, is standing trial on the charges of "acting on behalf of a terrorist organization" and "disseminating propaganda for a terrorist organization" on the grounds of her work she undertook in the name of İHD. Malatya 5th Heavy Penal Court sentenced her to 6 years and 3 months imprisonment for "membership in an armed terrorist organization" in its final hearing on 18 December 2019. Her case is pending at the appeals stage.

İHD's former Hakkâri branch chair İsmail Akbulut faced an investigation for membership in an organization under ATL Article 7/1 and TPC Article 314 for sharing press statements drafted by the İHD central office, drafting a report on the destruction of dead bodies of organization members, and filing criminal charges against public officials for malfeasance in office. Mr. Akbulut was taken into custody on 18 November 2016 within the scope of the investigation and released on 29 October 2016 under judicial control. Hakkâri 2nd Heavy Penal Court sentenced him to 6 years and 3 months imprisonment on 24 May 2019. The case is pending at the appeals stage. There are also other pending investigations into İsmail Akbulut under the ATL. Another executive of İHD in Hakkâri, Sait Çağlayan, was also sentenced to 6 years and 3 months imprisonment by Hakkâri 3rd Heavy Penal Court under TPC Article 314/2 for his human rights work between

⁸⁰ <https://ihd.org.tr/en/ihd-statement-journalism-and-human-rights-advocacy-are-not-crimes/>

2000 and 2012 having used the libelous claims of an anonymous witness as an excuse. His case is pending at the appeals stage.

İHD's former Dersim branch executive, Atty. Suna Bilgin, faced an investigation charged with membership in an armed organization under TPC 314 and ATL 7/1 alleging that there was an anonymous witness testimony against her and on the grounds of the branch's press statements about rights violations, her professional activities like following up on the custody procedures of persons taken into custody in Dersim who applied to İHD. The lawsuit brought against her as a result of the investigation at Tunceli 1st Heavy Penal Court was merged with other files within the scope of which she was being tried. She was sentenced to 6 years and 3 months imprisonment at the final hearing of the case on 11 April 2018. The case is pending at the appeals stage. There are also many investigations and trials against İHD's Dersim branch chair Gürbüz Solmaz on the grounds of meetings and assemblies he took part in as the chair of the association's branch.

İHD's former Van branch executive Atty. Cüneyt Caniş was sentenced to 15 years imprisonment for "membership in an armed organization" under TPC 314 and ATL 7/1 on the grounds of his participation in press conferences held on days like World Peace Day and the Human Rights Week along with assemblies and rallies. The judgment was finalized.

İHD's Kahramanmaraş Branch executive board member Ümit Çoğan was taken into custody for "membership in an organization and disseminating propaganda" on 5 December 2017 on the grounds of his advocacy for the right to life and peace as a human rights defender and his family visit in Kahramanmaraş, Pazarcık in respect of the deceased person's family. He was then released. But Kahramanmaraş 3rd Heavy Penal Court started proceedings against him on the charges of "membership in and disseminating propaganda for an organization" under ATL 7/2-3 and TPC 53 and 63.

The following part will present examples of the ways in which the ATL is being used as a repressive tool against organizations and rights defenders active in various parts of Turkey and in various rights fields in addition to the repressive policies against İHD. We took special care to select cases to the best we could among those that were not covered by reports by İHD and other human rights organizations and those that were not known by the general public.

Musician İlyas Arzu and Jiyan Savcı, who were working to improve Kurdish culture in Adana and for cultural rights, were taken into custody on 24 May 2021 and then detained. They were released pending trial on 7 December 2021 at the hearing held by Adana 2nd Heavy Penal Court. İlyas Arzu and Jiyan Savcı are charged with "membership in and disseminating propaganda for an organization" under TPC 314/2 and ATL 7/2.

Activists, Ahmet Güleş and Anıl Mansuroğlu, as well as Labor and Democracy Platform activist Süleyman Can Güleş were taken into custody in Hatay on 1 May 2019 before they were to take part in the 1 May Labor Day rally and an investigation was launched into them. Hatay 2nd Heavy Penal Court brought a lawsuit against them on 22 September 2021 for "disseminating propaganda for a terrorist organization" under ATL 7/2. The trial is pending.

A lawsuit was brought against Gülseren Tural at Mersin 7th Heavy Penal Court on the charges of "disseminating terrorist propaganda" under ATL 7/2 on the grounds that she participated a commemoration at a graveyard for Leyla Şaylemez, who was one of the three women politicians killed in France, which was held by Mersin Women's Platform calling an end to violence against women and politicians, and for the advancement of rights and freedoms. Gülseren Tural was acquitted on 14 September 2021.

ATUHAY-DER (Adana Association for Solidarity with the Families of Prisoners) executive Sinan Balduz was arrested and detained on the charges of acting on behalf of an organization for his involvement with prisoners and their families and advocating for their rights. Sinan Balduz is charged with "membership in and disseminating propaganda for an organization" under TPC 314/2 and ATL 7/2.

Photographer Mehmet Özer was sentenced to 1 year and 3 months imprisonment under the ATL by Ankara 2nd Heavy Penal Court for "disseminating terrorist propaganda" on 8 October 2021 on the grounds of sharing his photographs in the "Museum of Shame," which presented art work on rights violations during the 12 September period, on social media. Mr. Özer's sentence was deferred.

The lawsuit that was brought in 2012 on charges of "membership in the KCK" against the members and executives of KESK, including İHD's executive board member Osman İşçi, is pending with the next hearing to

be held on 24 March 2022. The defendants are charged with “membership in a terrorist organization” under TPC 314/2.

Human rights defender and journalist Nurcan Kaya, too, faced a trial under ATL 7/2 for “terrorist propaganda” on the grounds of her anti-war social media posts. Ms. Kaya was sentenced to imprisonment on 27 September 2021 and her sentence was commuted to “suspension of the pronouncement of judgement.”

A lawsuit was brought against women’s rights defender and member of Rosa Women’s Association in Diyarbakır, Figen Ekti, on the charges of “membership in an organization” under TPC 314/2 and ATL 7/2 on the grounds of her work to eliminate violations of women’s rights within the scope of works undertaken by Rosa Women’s Association and the TJA. There are also finalized and pending cases under the ATL against Rosa Women’s Association members Adalet Kaya, Nurcan Yalçın, Figen Aras, Ayla Akat Ata.

“Aiding an organization” charges under TPC 314 and ATL 5 were brought against Mahmut Oral, a journalist and a member of Sarmaşık Association for Combatting Poverty and Sustainable Development that had been fighting poverty in Diyarbakır and had been closed down for its aid activities assessed to fall under aiding an (illegal) organization. Mr. Oral was acquitted subsequently. Selim Ölçer, a member of the founders’ board of the HRFT and the former president of the TMA, was sentenced to 2 years and 15 days imprisonment under TPC 220/7 applying ATL 2/2 and TPC 314/3 within the scope of the same investigation for aiding an organization for taking part in activities undertaken by the Sarmaşık Association. His case is pending at the appeals stage.

Ali Ekber Barmağış, the chair of Munzur Environmental and Cultural Association, stood trial on the charges of “membership in an organization” under TPC 314 and ATL 7/1 on the grounds of his rights advocacy in his capacity as chairperson of the association. Mr. Barmağış was detained for 3 months and was subsequently sentenced to 2 years and 4 months and 3 days imprisonment by Tekirdağ 2nd Heavy Penal Court on 16 November 2021. His case is pending at the appeals stage.

Former executive board members Ahmet Ertaş and Şükriye Kızıldağ and current board members Ramazan Yavuz, Murat Biçici and Adnan Turan of Aegean Association for Solidarity with Prisoners’ Families (EGE-TUHAYDER) were taken into custody after raids to their residences for their activities in the association on the charges of membership in an illegal organization. A lawsuit was then brought against them for membership in an illegal organization under TPC 314/2 and ATL 7/2. The case is pending before İzmir Heavy Penal Court.

The final hearing of the lawsuit brought against 22 members and executives of the KESK on the charges of “membership in an illegal organization” at İzmir 12th Heavy Penal Court was held on 14 October 2021. The court acquitted all 22 persons who had been detained on 28 May 2009 and were sentenced to imprisonment for “membership in an illegal organization” in 2011. The Constitutional Court, however, ruled for a retrial in 2020. At the end of the retrial all defendants were acquitted after 12 years, which reminds us of the maxim “justice delayed is justice denied.”

The first hearing of the case brought against Ersin Berke Gök and Caner Perit Özen, who had been arbitrarily detained for their participation in the peaceful Boğaziçi University protests in İstanbul, was held on 7 January 2022 while the İstanbul 22nd Penal Court of First Instance ruled for their release at the first hearing but the case is still pending.⁸¹ Boğaziçi University students face many investigations and lawsuits for their press statements and peaceful protests.

As if the fact that LGBTI+ pride parades were banned and the LGBTI+ were battered was not enough, they often face investigations and cases particularly in cities like İstanbul and Ankara.⁸²

Court cases brought against rights defenders, human rights organizations and activists in Turkey under the ATL are of course not limited with these. On the contrary, there are hundreds of cases brought under the ATL. Here we only tried to present a limited number of cases with a certain power of representation revealing the ways in which the ATL was used as a repressive apparatus against organizations and rights defenders working in different parts of Turkey and in different rights fields. Besides we did not generally include the repressive policies against political parties, media outlets, and political groups in our study.

⁸¹<https://ihd.org.tr/en/joint-statement-immediately-release-ersin-berke-gok-and-caner-perit-ozen/>

⁸² <https://ihd.org.tr/en/lgbti-rights-are-human-rights/>

When we inquire into the geographical distribution of the investigations and lawsuits against human rights defenders and rights organizations under the ATL and the fields the victims work in, we can better understand how radical and grave the problem is. Therefore, we can readily argue that one of the most important obstacles before the enhancement of the human rights environment and democracy in Turkey is the ATL and its arbitrary use.

CONCLUSION AND RECOMMENDATIONS

Comprehensive legislative changes should be introduced in compliance with universal human rights values as well as the judgments and case law of the ECtHR in order to eliminate judicial harassment against human rights defenders and to empower fundamental rights and freedoms in Turkey. It is imperative that these changes should be introduced in harmony with international conventions and covenants Turkey is a party to. Moreover, some of the much-needed changes are also included in Human Rights Action Plan documents announced by Turkey at different dates.

There indeed is a series of measures that can urgently be taken in order to solve this crisis of justice happening in Turkey as a manifestation of the climate brought about by using various laws, most notably the ATL. The empowerment of the human rights struggle and democracy in Turkey can only be possible through radical changes in criminal legislation, redrafting of many laws prominently the TPC, CCP and the Enforcement Law, and the repeal of ATL in its entirety.

We, thus, are duty bound to emphasize the problematic points in Turkey's criminal legislation and to present our recommendations for solution as a human rights organization:

- 1- ATL should absolutely be repealed.
- 2- Legislative regulations should be introduced in line with resolutions by the UN Security Council identifying which offenses are designated as terrorist offenses and under which conditions terrorist offenses occur.
- 3- Law articles firstly regulated in the ATL, then those of ATL origin that were placed in general and special laws like the CCP, TPC, Enforcement Law as well as those on establishing courts should absolutely be repealed.
- 4- Principles and declarations on the protection of human rights defenders should be made a part of domestic law, while the UN Declaration on the Protection of Human Rights Defenders should be put into effect through a presidential circular letter until a legislative regulation is introduced.
- 5- The judiciary in Turkey should be encouraged to act in line with the case laws of both the ECtHR and the Constitutional Court; retrials should be provided for finalized sentences delivered for human rights defenders whose activities advocating for the rights to freedom of expression, association, assembly, private life and protection of personal data were regarded to be criminal offenses.
- 6- State of emergency decree laws and subsequent laws like Law No. 7145 that provide for the perpetuation of the state of emergency should be repealed in their entirety.

- 7- Retrials should be made available in respect of trials that had been held at SSCs, courts mandated and authorized by CCP Article 250 and ATL Article 10.
- 8- A special law should be introduced to terminate investigations and proceedings initiated under the ATL as well as those that actually fall under freedoms of expression, association and assembly against persons like those exercising their right to criticism within social dissidence, journalists, politicians, elected representatives, activists, HRDs, trade unionists, lawyers, students, representatives and members of labor-professional organizations, intellectuals, authors, artists, academics even if they had not been charged with acts of violence as has been indicated by the Venice Commission in its 2017 opinion on Media Freedom.
- 9- Courts with special powers, which actually are continuations of SSCs, should be abolished.
- 10- Equality in enforcement of sentences should be ensured; all forms of discrimination should be put to an end.
- 11- ECtHR judgments as well as resolutions and recommendations by the Council of Europe's Committee of Ministers should be carried into effect without delay.



This report was produced with the financial support of the European Union within the scope of the ProtectDefenders program of which the OMCT is a member. Its contents are the sole responsibility of the Human Rights Association and do not necessarily reflect the views of the European Union and the OMCT.

Human Rights Association | January 2022