HUMAN RIGHTS ASSOCIATION RECOMMENDATIONS ON AMENDMENTS TO THE ENFORCEMENT LAW CONCERNING SICK PRISONERS

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SUMMARY

This report incorporates the Human Rights Association's (İnsan Hakları Derneği -İHD) findings on rights violations faced by sick prisoners. In light of these findings and upon the statements of the Ministry of Justice that new steps would be taken to address the issue, a "Public Perception Study on Conditional Release and Handcuffed Medical Examination" was conducted by our association. The results of this survey reveal that the majority of the people in Turkey support the release of sick prisoners and are against handcuffed medical examinations.

The report concludes that Turkey's Law No. 5275 on the Enforcement of Sentences and Security Measures does not comply with prisoners' rights regulated internationally, thus, particularly its incompatibility with the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) adopted on 17 December 2015 should be eliminated.

The report also holds that Law No. 5275 on the Enforcement of Sentences is in violation of the Constitution of the Republic of Turkey and domestic law and that the fundamental rights of prisoners are ignored.

İHD's reasons for the amendment of Law No. 5275 on the Enforcement of Sentences are presented in all its dimensions. In particular, it is concluded that there is a serious incompatibility between Law No. 5275 and the Turkish Penal Code (TPC) in terms of the principle of the legal benefit protected. In addition, it is found that there is discrimination in the enforcement of sentences in terms of various crime groups defined in the Enforcement Law.

The report concludes that Law No. 5275 on the Enforcement of Sentences is incompatible with the case law of the ECtHR as well and that regulations should be introduced especially in terms of the right to hope.

One of the findings of the report shows that especially sick prisoners convicted of criminal offenses under the Anti-Terrorism Law (ATL) face discrimination by the misuse of the ATL and therefore the problem gets even more serious.

The report finally concludes that fundamental amendments should be introduced to Articles 14, 16, 17, 25, 36, 57, 63, 72, 89, 107, 110, Annex 1, Provisional Articles 2, 6 and 9 of Law No. 5275 and Articles 5 and 17 of the ATL should be abolished.

Introduction

The most fundamental right is the right to life. This right is under absolute protection. The protection of human life is only possible through the protection of both the physical and mental well-being of human beings, and all rights regarding the continuation of a person's physical and mental existence in a healthy integrity are valid for every individual in prisons.

According to İHD's 2021 Prisons Report issued 28 June 2022, at least 52 prisoners lost their lives in prisons. 13 of them died by suicide, 15 of them died due to the COVID-19 virus, 18 prisoners lost their lives due to serious illnesses, 5 prisoners died under suspicious circumstances and the cause of death of 1 prisoner was unknown.[1]

İHD's data also shows that at least 69 prisoners lost their lives by 20 October 2022.

According to the data published on the official website of the General Directorate of Prisons and Detention Houses of the Ministry of Justice, there were 326,690 prisoners in 399 penitentiaries as of 30 September 2022. 13,190 of them are women prisoners and 2,448 of them are juvenile prisoners. It is stated that the total capacity of penitentiaries was 288,348. In this case, it is understood that 38,612 prisoners were being held over capacity.

Apart from the people held in prisons, according to the latest data released 418,852 people were under conditional release (probation) as of 30 June 2021.

The Ministry of Justice has not yet disclosed how many people were released after the introduction of amendments by Law No. 7242 on the Enforcement of Sentences and Security Measures, which came into force on 15 April 2020. However, our estimates are that approximately 100,000 people were released. Despite all these releases, the rapid increase in the number of prisoners shows that the enforcement regime in Turkey is highly problematic. We believe that this enforcement regime has an unjust and discriminatory character that is clearly contrary to the Constitution, aggravates the conditions of enforcement, especially against political prisoners, and, together with all these negative factors, leads to an increase in cases of sick prisoners.

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[1] https://ihd.org.tr/en/ihd-2021-prisons-report/

CONDITIONS OF SICK PRISONERS

Public Perception Study

İHD conducted "Public Perception Study on Conditional Release and Handcuffed Medical Examination of Sick Prisoners."[2] The aim of the study was to understand the perceptions of the respondents towards conditional release and handcuffed medical examinations of sick prisoners and the justice system in Turkey as well as to explain the possible reasons.

The survey was conducted between 15 and 30 August 2022 by face-to-face interviews with a total of 1,000 people in seven city centers. These cities are: İstanbul, Diyarbakır, İzmir, Ankara, Edirne, Hatay and Samsun.

In the study, the participants were asked how they identified themselves. The majority of the participants identified themselves as Kemalist, pro-freedom, Muslim, Turkish, conservative, nationalist, Kurdish and religious.

The participants were firstly asked questions to reveal their perceptions about the justice system and the conditions of prisoners in Turkey. These results coincided with those of the "Perception Study on Prisons and Prisoners"[3] conducted a year before. The older study showed that 69% of the population in Turkey did not trust the justice system, however, the distrust figure now amounts to 83%.

Further, most of the participants believed that prisoners were not treated well and were subjected to torture or ill-treatment. Additionally, most of the participants believed that all prisoners should have the same rights (61.2%), be subjected to the same rules in prisons (55.5%) and should have equal access to the right to health (89.8%).

It should be noted that the rate of distrust in the justice system was high, except for those who identified themselves as right-wing. Therefore, it would not be right to argue that the negative perception of the justice system was an attitude specific only to those who might be seen as opponents of the government, as we should emphasize that individuals from almost all segments of society have such a negative perception.

The respondents were asked about their opinions on handcuffed medical examination of prisoners, which is an important problem for prisons and sick prisoners today. The majority of the respondents (59.7%) thought that examination in handcuffs would mean violation of human rights. In addition, the majority of the respondents disagreed with the idea that sick prisoners could be

[2] https://ihd.org.tr/en/wp-content/uploads/2022/12/EN_IHD-Survey-on-Sick-Prisoners.pdf
[3] https://ihd.org.tr/en/wp-content/uploads/2021/10/IHD-KONDA-Report-on-Prisons-and-Prisoners-2021.pdf

examined in handcuffs by a doctor (%56.1).

The majority of the participants approved of conditional release for sick prisoners in critical condition (66.1%) and the Ministry of Justice's regulation on conditional parole (63.4%). Respondents also approved of the abolition of the practice of handcuffed medical examinations (61.4%) and disapproved of the practice of leaving the decision to examine prisoners in handcuffs (47.6%).

Those who answered "yes" to the statement "sick prisoners are discriminated against" were asked why they thought so. Most participants believed that political prisoners, Kurds, dissidents were negatively discriminated against. There was also a common belief that there was positive discrimination against the rich, influential people and those close to the government. When asked about the reason for their answer to the question "Do you think it is right to abolish the practice of medical examination in handcuffs?" the respondents who answered "yes" to this question mostly said that it was "against patient rights" and "against human dignity."

The most comprehensive conclusion that can be drawn from the public opinion survey we conducted is that the majority of the respondents supported conditional release for sick prisoners and the majority of them were against medical examination in handcuffs.

Moreover, leaving the decision to examine sick patients in handcuffs to the medical doctors was not supported by the majority either. Therefore, if the Ministry of Justice takes into account the public perception and the opinions of non-governmental organizations and professional chambers working in this field during the process of any legislative regulation on these issues, it will increase the credibility of the regulation in the eyes of the public.

Other Problems

The problems faced by sick prisoners are increasing and, unfortunately, no sound solution can be found and there are many obstacles before sick prisoners' access to health. These include but are not limited to the following:

- Prisoners are held in overcrowded wards. This situation causes various health problems. It has a negative impact on the health of prisoners, especially those who are sick and those who should be held in non-smoking wards. In some prisons, prisoners' requests to move to non-smoking wards are not met.

  Denying prisoners the space necessary for a healthy life, access to natural daylight and fresh air can lead to physical illnesses, psychological disorders and endanger their lives.
- Delayed visits to the prison infirmary, delayed or denied hospital referrals pose threats to prisoners' health. Prisoners are kept waiting in line for months for referrals from infirmaries to outpatient clinics and from outpatient clinics to tertiary health services.

Prisons do not have quality healthcare and capacity that can handle the overcrowding. While these conditions are not sufficient even for the normal capacities of prisons, they cause much more violations in the current situation where the prison population is far above capacity.

- Prisoners are examined in handcuffs in prison infirmaries and hospitals. In some prisons, there are complaints that security guards do not take off the handcuffs and that physicians do not demand them to be taken off. Again, there are officers in the examination rooms in a way that leaves no room for privacy between patients and physicians. These practices violate the right of persons deprived of their liberty to access to health and the prohibition of ill-treatment.

  Article 38 of the "Protocol on the Administration, External Protection, Transfer and Transportation of Prisoners, and Health Services in Penal Institutions" signed among the Ministry of Interior, the Ministry of Justice, and the Ministry of Health states 1) In places where there is a penal institution directorate, guarded examination rooms with measures against escape will be established in hospitals, 2) Examination of prisoners in hospitals shall be carried out in guarded rooms with measures against escape. The gendarmerie shall be present outside the room during the examination and take the necessary security measures. If the physician requests in writing, the gendarmerie will be present in the examination room, and if the prisoner is a woman, female warden and protection officer, if any, will be present in the examination room, 3) However, all kinds of unlawful requests made by prisoners during the examination will be immediately reported to the gendarmerie patrol commander by the relevant healthcare staff, 4) Until guarded examination rooms are built for prisoners in hospitals, gendarmerie will be present in these rooms or in places where emergency interventions and procedures are carried out and will take protective measures at a distance that will prevent them from hearing the conversation between the doctor and the patient, and if the prisoner is a woman, female gendarmerie personnel will be assigned in the examination room or in the place where the examination is carried out to the extent possible, and if there is no female gendarmerie personnel or the number is not sufficient, the female warden and protection officer will provide security, 5) In cases where the security of the examination room or the place where the examination is carried out is provided by female wardens and protection officers, the gendarmerie shall take the necessary security measures against escape at the exit points of the examination room or the place where the examination is carried out.

- There are also problems such as not being able to benefit from the right to fresh air, late opening and early closing of ventilation doors. Especially in the newly opened maximum security closed prisons, prisoners are only allowed to have fresh air for one hour a day in a place other than their own wards and cannot benefit from daylight. It should be remembered that this situation can lead to various diseases.
- Patients are transferred in single-seater compartmented transport vehicles, which negatively affect both the health and psychology of the prisoners. Even the basic needs of prisoners are not met during these transfers. Prisoners with pulmonary diseases, especially

asthma, as well as epileptic prisoners and those with risky diseases are forced to be transferred with these transport vehicles and face significant rights violations.

- Some of the prisoners who are at risk of having an attack and/or those who cannot meet their own needs are also kept in single rooms.
- Prisoners are held in unheated and, in some prisons, damp rooms. This situation causes many cases of rheumatism and lung diseases.
- Prisoners are malnourished, ration allowances are not enough. In addition, sick prisoners and those who need dietary food cannot access dietary meals.
- There are problems in access to clean water and hot water. Water in prisons is provided on a quota basis and is not sufficient.
- The number of medical doctors and health personnel in prisons is limited. Doctors can examine patients only on certain days of the week and at certain hours, which makes access to health care impossible.
- In some prisons, prisoners who cannot survive on their own are kept in single rooms.
- Some prisoners with psychological disorders are not treated and are held in prisons. This situation poses a risk both for themselves and the prisoners they stay with.
- Upon decisions delivered by prison administrations and supervision boards, prisoners' releases are postponed on the grounds of "not being in good behavior" or their possible releases are rendered impossible due to the solitary confinement punishments they receive. There are also sick prisoners among these prisoners. Not releasing them affects their health even more negatively.
- In the last few years, metal utensils and spoons used by prisoners have been taken back and replaced with plastic materials. However, these plastic materials contain chemical substances that pose a health hazard.
- Another issue raised by prisoners is that sick prisoners are dismissed with temporary medication such as painkillers that prevent or eliminate the symptoms of the disease instead of being treated in prison infirmaries and hospitals.
- Sick prisoners in critical condition are not released even though they are in the last stages of their illnesses. The fact that the Forensic Medicine Institution makes release decisions following a political attitude, that hospital reports are not accepted by the Forensic Medicine Institution and that the reports or decisions taken are not implemented on the grounds of "security" increases the seriousness of the situation of sick prisoners and those in critical condition.

GENERAL GROUNDS

INTERNATIONAL LAW

Apart from the punitive nature of confinement, prisoners are subjected to many rights violations, suffer biological and psychological damage, and their right to life is not protected. International legislation imposes positive obligations on states regarding the right to life of persons deprived of their liberty. States are obliged to ensure that persons deprived of their liberty are on an equal footing with free individuals in terms of access to health care. Prisoners have the right to uninterrupted access to health care like all other individuals in society.

The right to health for prisoners is defined in the 1955 UN Minimum Standards for the Treatment of Prisoners, the 1982 UN Code of Medical Ethics, the 1988 UN Code of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the 1990 Basic Principles for the Treatment of Prisoners and the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The UN Minimum Standards for the Treatment of Prisoners stipulates that healthcare staff "shall protect and care for the physical and mental health of the prisoner, shall see all sick prisoners, those who complain of illness and those who are particularly noteworthy on account of their health on a daily basis, and shall see all sick prisoners, those who report illness or injury, and especially those who are under close observation, with a frequency and under conditions similar to the standards of health care in the community."

UN Mandela Rules

The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), adopted by the General Assembly of the United Nations on 17 December 2015, contain the most important and detailed provisions on prisoners' rights.[4]

The Mandela Rules specifically refer to the UN International Covenant on Civil and Political Rights, the UN International Covenant on Economic, Social and Cultural Rights and the UN Convention against Torture and its Optional Protocol, and state that prisoners' rights are protected based on various UN resolutions and principles. Therefore, the UN Mandela Rules should be taken into consideration in accordance with Article 90 of the Constitution when making regulations on the enforcement law. In this context, the basic principles of the rules should be taken as a guide. These principles consist of many principles such as treating all prisoners in accordance with human dignity and value, non-discrimination, and preserving their relations with the outside world.

[4] https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

Rule 1 of the Mandela Rules thus reads: “All prisoners shall be treated with respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.”

UN International Convention on Civil and Political Rights and General Comments by the UN Human Rights Committee

Particularly Articles 10 and 26 of the UN International Covenant on Civil and Political Rights are about the rights of detainees. Accordingly, Article 10 regulates the rights of persons deprived of their liberty:

> 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 regulates the principle of equality before the 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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In addition, Optional Protocols 1 and 2 to the International Covenant on Civil and Political Rights have also been ratified by Turkey and entered into force.

UN Convention against Torture and Resolutions by the UN Committee against Torture

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture. Many prohibited behaviors or acts that have recently been referred to as ill-treatment in Turkey are defined as torture according to the Convention. Article 1 reads:

“The 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 the 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 European Convention on Human Rights and Case Law of the European Court of Human Rights

Article 3 of the ECHR prescribes that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Further, Additional Protocol 7 to the ECHR prohibits double jeopardy, Protocol 12 regulates prohibition of discrimination, and Protocol 13 abolishes death penalty in all circumstances.

In accordance with the **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment** and the decisions of the **European Committee against Torture**, as well as Protocols 1 and 2 to this Convention have also been ratified and entered into force.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has also identified "access to a physician, equality of care, patient consent and confidentiality, preventive health care, humanitarian assistance, especially for the seriously ill and terminally ill, and the professional independence and professional competence of health personnel" as essential for prisoners' equal access to health care.

According to **Article 1 of the Annex to Recommendation REC (2006)2 of the Committee of Ministers of the Council of Europe to Member States on the European Prison Rules (European Prison Rules), subtitled "Basic Principles"**: "All persons deprived of their liberty shall be treated with respect for human rights."

According to Article 3 of the European Prison Rules, subtitled "Basic Principles": "Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed."

Paragraph 162 of the **İstanbul Protocol** reads: "The ethical obligation of beneficence is reflected in many WMA declarations, which make clear that doctors must always do what is best for the patient, including persons accused or convicted of crimes. This duty of beneficence is also expressed through the notion of professional independence, requiring doctors to adhere to good and accepted medical practices despite any pressure that might be applied. The WMA International Code of Medical Ethics emphasizes doctors' duty to provide care in full professional and moral independence, with compassion and respect for human dignity. It also contains the duty to refuse to use medical knowledge to violate human rights, even under threat. WMA standing policy, such as the Declaration of Tokyo or the Declaration of Seoul on professional

autonomy and clinical independence, is unambiguous that doctors must insist on being free to act in patients' interests, regardless of other considerations, including the instructions of employers, prison authorities or security forces. Similar principles are prescribed for nurses in the ICN Code of Ethics for Nurses."

Paragraph 313 of the Protocol states: "Each detainee must be examined in private. Police or other law enforcement officials should not be present in the examination room. This procedural safeguard may be precluded only when, in the opinion of the examining clinician, there is compelling evidence that the detainee poses a serious safety risk to health personnel. Under such circumstances, the security personnel of the health facility, not the police or other law enforcement officials, should be available upon request by the clinician. In such cases, security personnel should remain out of earshot (i.e. be within only visual contact) of the interviewee." And Paragraph 310 states that examinations of detainees should be conducted at a location that the physicians deem most suitable. In some cases, it may be best to insist that the evaluation take place at the facility's medical unit or off-site from the prison or jail. In other cases, prisoners may prefer to be examined in the relative safety of their cell, if, for example, they are concerned that the medical premises may be under surveillance. However, interviewers should apply and adapt these basic principles on interviewing as much as possible. The best place will be dictated by many factors, but in all cases, interviewers should ensure that interviewees are not forced into accepting a place in which they do not feel comfortable or safe."

DOMESTIC LAW

According to Article 17 of the Constitution of the Republic of Turkey: “No one shall be subjected to torture or maltreatment; no one shall be subjected to penalties or treatment incompatible with human dignity.”

Also, Article 56 of the Constitution prescribes that “Everyone has the right to live in a healthy and balanced environment. … The State shall regulate central planning and functioning of the health services to ensure that everyone leads a healthy life physically and mentally and provide cooperation by saving and increasing productivity in human and material resources. The State shall fulfill this task by utilizing and supervising the health and social assistance institutions, in both the public and private sectors.”

According to Article 94 of the Turkish Penal Code: “A public officer who performs any act towards a person that is incompatible with human dignity, and which causes that person to suffer physically or mentally or affects the person’s capacity to perceive or his ability to act of his own will or insults them shall be sentenced to a penalty of imprisonment for a term of three to twelve years.”

Grounds for Amendments to Law No. 5275 on the Enforcement of Sentences and Security Measures

Law No. 5275 regulating the enforcement of sentences was drafted as a reform law during the EU accession negotiations and entered into force on 1 January 2005. We shared our main criticism with the public when the law entered into force and in its aftermath.[5]

Law No. 5275 has been amended 46 times in the 27 years since it entered into force and has gradually moved away from its initial purpose. Such a large number of amendments reveals that there are serious problems in the enforcement of sentences and security measures.

The most comprehensive amendment to Law No. 5275 was made by Law No. 7242 during the COVID-19 pandemic, and our views on this issue were not taken into consideration despite being communicated to the Presidency of the Grand National Assembly of Turkey’s Justice Commission, political parties and the Constitutional Court in the lawsuit filed by the main opposition party.[6]

Our views on the amendments introduced by Law No. 7242 were as follows:

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[5] https://www.ihd.org.tr/wp-content/uploads/2005/12/cezaevleri_ozel_sayisi_2005.pdf
[6] https://ihd.org.tr/en/ihds-amicus-curiae-submission-on-law-no-7242/

Law No. 7242 incorporates 69 articles including those on execution and force. İHD's review revealed that 28 articles were against rights guaranteed by the Constitution and international conventions. These include nine articles that extend the mandate and jurisdiction of enforcement judgeships while curbing the jurisdiction of courts, one article introducing a change to the detriment of persons within the scope of the Code of Criminal Procedure (CCP), two articles extending the jurisdiction of Criminal Peace Judgeships, one article that prescribes the rate of conditional release by increasing the rate within the scope of Anti-Terrorism Law No. 3713 (ATL), and 15 articles that are against equality, the principle of proportionality, principle of legal interest to be protected and numerous other fundamental principles. Moreover, it is İHD's opinion that the regulations put forth by Law No. 7242 in provisional Articles 6 and 9 § 6 of Law No. 5275 qualify as special amnesty. İHD's co-chairpersons in their legal opinion requested the Constitutional Court to take the following into account in its review:

1. "Legal interest to be protected" prescribed in the enforcement law and the TPC,
2. Prisoners' rights set forth in international documents,
3. Compliance with prohibition of discrimination by heeding calls by international bodies within the context of the COVID-19 pandemic,
4. The unlawfulness of the omnibus manner in which offense types that were named and classified under various titles were regulated, the aggravation of enforcement conditions for offenses under the ATL is against the principles of equality before law and equal protection of law,
5. Introduction of regulations disregarding the degree of crime and punishment principle by using template statements so as to create new offense types,
6. Cases of unlawfulness brought about by such regulations introduced regardless of necessity in a democratic society and legitimate aim,
7. Its own previous judgments on legal regulations providing for special amnesty,
8. Unconstitutionality of transition to a tripartite system in enforcement law through Law No. 7242,
9. Transfer of courts' jurisdiction to enforcement judgeships,
10. Extension of Criminal Peace Judgeships' jurisdiction.

Law No. 5275 has turned into an unsustainable enforcement regime law, which has been in violation of the basic principles set by the UN on Prisoners from the very beginning.

In this report, we focused especially on sick prisoners. The discrimination against sick prisoners according to the type of crime and the obstacles that make their release difficult should be removed.

We would like to emphasize that various issues should be clarified before making concrete recommendations regarding the Law No. 5275. In this regard, it is necessary to reiterate here the basic critical points we have expressed in our legal opinion on the unconstitutionality of Law No. 7242. Otherwise, the issue will not be fully comprehended.

Assessment in terms of the Justification of the Enforcement Law and the Turkish Penal Code and the Principle of Protected Legal Interest

1. The government stated the following in its general justification for Law No. 5275 on the Enforcement of Sentences and Security Measures of 13 December 2004:

> The sources of the enforcement law are the international conventions, resolutions and recommendations that our country has recognized, especially the provisions and principles regarding the de facto and material enforcement of prison sentences: These include the European Convention on Human Rights, the United Nations Declaration on Human Rights, the Convention on the Rights of the Child, the Covenant on Civil and Political Rights, other declarations of the United Nations, the recommendations of the European Committee of Ministers on Human Rights, the minimum standards established by the United Nations on sentences of imprisonment and the rules on imprisonment issued by the Council of Europe.
>
> There are national and international sources of the enforcement law, particularly the Constitution. Among these sources, the "European Prison Rules" adopted by the Committee of Ministers of the Council of Europe on February 12, 1987 (No. R (87) 3) and the "Minimum Standard Rules for the Treatment of Prisoners and the Convention against Torture" and the "Reports of the Committee for the Prevention of Torture" adopted by the United Nations are the most important ones. Therefore, when drafting the enforcement law, these principles in the aforementioned international texts must always be taken into consideration.

This general justification of the government was also accepted by the Parliamentary Justice Committee (No. 710).

2. The Law on the Enforcement of Sentences has been amended 46 times on different dates after its adoption and entry into force. Its provisions have been annulled by the Constitutional Court 6 times on different dates and applications. The Law on the Enforcement of Sentences has completely departed from its original form with the last amendment of Law No. 7242. It has moved away from the principles listed in Articles 2 and 3, which regulate the basic principles and main purpose of enforcement. Many basic principles of enforcement such as equality, proportionality, legality, necessity in a democratic society, legitimate purpose, the principle of legal benefit to be protected, and the priority of the violated right have been violated, especially in the regulations on conditional release terms and probation. New crime groups have been created and the enforcement regime has been further aggravated to their detriment.

3. The government's general justification of the new Turkish Penal Code, which was submitted to the Grand National Assembly of Turkey in the same year (2004) as the Law on the Enforcement of Sentences, also refers to the principles of contemporary criminal law and offers

very important observations. The most important of the new approaches is the determination of the legal interest violated and the ranking according to this interest.

4. Accordingly, the general justification of the government's draft law states:

> The second book of the TPC contains special provisions. In this book, crimes are grouped and classified into three major parts according to the nature of the legal interests they violate. As is known, every crime violates certain legal interests or is created to protect certain interests. The draft law classifies these interests into three major parts. Firstly, the interests of individuals. Secondly, the interests of society, and thirdly, the interests of the state, which constitutes the largest organization of society. In this respect, it has been deemed appropriate to classify crimes in three main sections. Within each main section, the crimes that have the main characteristic of being directed against individuals, society, and the state, but which also constitute an independent category, have been placed in separate sections. The classification of the special section within the framework of the stated principle is as follows:
>
> Chapter I, entitled crimes against persons, is divided into ten chapters, taking into account the nature of the human rights violated.
>
> Part One: Genocide and Offenses against Humanity
> Part Two: Migrant Smuggling and Human Trafficking
> Part Three: Offenses against Life
> Part Four: Torture
> Part Five: Offenses against Physical Integrity
> Part Six: Miscarriage and Illegal Abortion Offenses
> Part Seven: Offenses against Liberty
> Part Eight: Offenses against Honor
> Part Nine: Offenses against Privacy and Private life
> Part Ten: Offenses against Property
> Part Eleven: Joint Provisions
>
> Chapter II of the Second Book, entitled crimes against society, includes the following parts:
> Part One: Offenses Creating General Danger
> Part Two: Offenses against Public Health
> Part Three: Offenses against Public Trust
> Part Four Offenses against Public Order
> Part Five: Offenses against Means of Transportation and Communication
> Part Six: Offenses against Sexual Integrity and Decency
> Part Seven: Offenses against the Family
> Part Eight: Offenses Related to Economy, Industry and Trade
> Part Nine: Offenses in the Field of Informatics
> Part Ten: Joint Provisions
>
> Chapter III of the Second Book, entitled Crimes against the Nation, the State and Public Peace, and final provisions, the following parts were omitted:
> Part One: Offenses against the State's Country, Sovereignty and Unity
> Part Two: Crimes against the Constitutional Order and Forces of the State
> Part Three: Crimes against National Defense

Part Four: Crimes against State Secrets and Espionage
Part Five: Offenses against Public Service and Duties
Part Six: Offenses of Insulting the Symbols of Sovereignty, Organs and Officials of the State
Part Seven: Crimes against Judiciary
Part Eight: Offenses against Relations with Foreign States
Part Nine: Offenses Committed by Public Employees
Part Ten: Common Provisions
Part Eleven: Final Provisions

As can be seen from the above classification, the draft law places crimes against persons at the top of the special provisions and thus wishes to express the high value it attaches to the principle of protecting human beings and human rights and to emphasize once again the main objective of the criminal and penal policy that constitutes its basis.

5. In the government's draft law, the importance of crimes against persons was raised to the first rank. This new view was accepted by the Justice Commission of the Grand National Assembly of Turkey and in line with this view, the draft law was passed into law as Law No. 5237.

6. The first part of the second book of the new TPC regulates international crimes. The first part of this chapter regulates genocide and crimes against humanity, while the second part regulates migrant smuggling and human trafficking. The first part is essentially the crimes against persons, which are defined as the most serious crimes, in the international arena. The second part regulates crimes against individuals. The third part regulates crimes against society. The fourth part regulates crimes against the nation and the state and the final provisions.

7. The first chapter of the fourth part regulates crimes against the security and functioning of public administration, the second regulates crimes against the judiciary, the third regulates crimes against the sovereignty of the state and the dignity of its organs, the fourth regulates crimes against the security of the state, the fifth regulates crimes against the constitutional order and the functioning of this order, the sixth regulates crimes against national defense, the seventh part regulates crimes against state secrets and espionage.

8. The government draft law protects "the interest of individuals" first, followed by "the interest of society" and finally "the interest of the state."

9. When they came to power, the spokespersons of the political power frequently stated that "only crimes committed against the state can be pardoned" when it came to the controversy about amnesty. The reason for this is the principles of modern criminal law in the new penal code.

10. The new enforcement law also incorporates contemporary principles. However, the current political power has introduced many regulations that go against legal interests that should be protected in these basic laws, that is, by disregarding the principle of the rule of law. So much so that at the very end, they have turned the law upside down by rendering the legal benefit that needs to be protected the least as the most important benefit, and they have introduced an enforcement regulation that will leave crimes committed against individuals and society unpunished. In this way, they have virtually destroyed the rule of law.

11. How will the amendments to the Law on Enforcement of Sentences, which amount to a blanket amnesty for many types of crimes committed against individuals, be explained? Crimes against the state are excluded from the scope of the enforcement regulation and the enforcement regime is further aggravated. This contradictory attitude of the political power is clearly contrary

to the rights and freedoms guaranteed by the Constitution and the principle of legal interest to be protected.

12. The amendments introduced to Enforcement Law No. 5275 through Law No. 7242 have virtually reversed the principle of legal interest that should be protected in terms of many criminal offenses. This has, thus, led to controversies in the public in the form of a veiled amnesty against those who committed certain types of crimes. In fact, it has already been referred to as an "A.Ç. amnesty" named after a leader of a criminal organization. After his release, this person visited the Grand National Assembly of Turkey and paid a visit to the leader of the MHP, one of the parties that enacted Law No. 7242. Such conduct of the political power has destroyed the perception of crime and punishment.

Evaluation of the Types of Crimes Named and Grouped with Different Names with an Omnibus Approach

Anti-Terrorism Law No. 3713 (ATL)

1. Article 3 of the ATL specifies one by one which crimes constitute terrorist offenses. Article 4 of the ATL lists the crimes committed for the purpose of terrorism. In addition, crimes under Articles 6 and 7 of the ATL are evaluated in a separate category.
2. In the recent judicial practice, there is uncertainty in this regard that is not based on any legal criteria.
3. In this situation, we would like to emphasize that it is imperative to make an assessment, insisting that the Anti-Terror Law should be abolished in its entirety.
4. Articles 5 and 17 of the ATL are related to the enforcement of sentences. These articles should also be evaluated separately.

The Problem of the Ambiguity of the Definition of Terrorism in the ATL

5. Officials from the United Nations (UN), the Council of Europe (CoE) and the European Union (EU) often say "Turkey's definition of terrorism is too broad, therefore, Turkey should narrow down its definition of terrorism." They are not wrong.
6. Such a broad definition of terrorism serves to limit and restrict rights and freedoms. There are two tendencies on how to define terrorism: The first tendency, which is far from the full establishment of democracy, is not satisfied with the existing extremely broad definition and advocates further expansion of the definition. When this is not done through normative regulations, the definition is further expanded and applied in practice by creating de facto situations. Today in Turkey, there are problems in investigations, prosecutions and trials caused by both the broad definition of terrorism and the de facto extension of the definition in practice.
7. The second tendency, as mentioned above, points to the need to narrow down the definition in order to protect democracy and human rights. Today, it is better understood that those who argue that the definition of terrorism is broad and should be narrowed down are pointing to a crucial problem.

8. The violations brought about by the broad definition of terrorism can be clearly seen in the reports released by human rights organizations and journalists' organizations.[7]

The definition of terrorism in Turkish legislation

9. Martin Scheinin, the UN Special Rapporteur on counter-terrorism and human rights, visited Turkey in 2006 and submitted his first report to the UN Commission on Human Rights, which was deliberated at the 62nd session of the Commission.[8] Following his findings on the definition of terrorism, the rapporteur offered his recommendations. These recommendations called for the definition of terrorism offenses to be brought in line with international norms and standards, in particular the principle of legality as set out in Article 15 of the UN International Covenant on Civil and Political Rights (ICCPR), which limits the definition of terrorism offenses to acts of killing or serious violence against persons and hostage-taking. It was recommended that international conventions be taken into account when drafting new counter-terrorism legislation, considering that "terrorism" should be defined separately, beyond the acts that constitute terrorist offenses themselves.
10. Regarding possible legislative amendments, the Special Rapporteur recommended greater dialogue before and during parliamentary deliberations. The Special Rapporteur emphasized that draft legislation on fundamental rights and freedoms in a democracy should be discussed openly and transparently and civil society should be fully involved at all levels of such deliberations. The Special Rapporteur considered that it was necessary to clearly and precisely define what constituted a terrorist offense, in order to avoid the abuse of membership, aiding and abetting, and "thought crimes," as sometimes referred to by the authorities, for purposes other than combating terrorism.[9]
11. The UN Rapporteur criticized the definition of terrorism in Article 1 of the ATL on the grounds that it was not defined based on specific criminal acts but on the basis of aims or objectives. According to the Rapporteur, the definition was vague and broad. In this case, people and organizations can be accused of terrorism even if they have not been involved in any acts of violence.
12. It indeed is the case. Journalists, authors, academics, human rights defenders, trade unionists, artists, women, mayors, MPs, politicians, students can easily be charged with terrorism. Those who express their opinions can be accused even though they have never committed any act of violence.
13. Article 90 of the Constitution prescribes that "No appeal to the Constitutional Court shall be made with regards to these agreements, on the grounds that they are unconstitutional. 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." There is no definition of

[7] See İHD's report for a comprehensive analysis of the ATL: "Human Rights Defenders in an Iron Cage: The Anti-Terrorism Law in Turkey." https://ihd.org.tr/en/wp-content/uploads/2022/05/OzturkTurkdogan_ATL-Report_OMCT_EN.pdf
[8] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/149/42/PDF/G0614942.pdf?OpenElement
[9] https://www.ihop.org.tr/?p=248

"terrorism" in the Constitution. According to Article 13 of the Constitution, the essence of fundamental rights and freedoms cannot be infringed upon. The ATL, devoid of a constitutional basis, provides a very broad definition of "terrorism" in violation of international conventions. In this definition and other articles based on it, it has regulated in a way that infringes upon the essence of the fundamental rights and freedoms of citizens.

14. We believe, just as the United Nations Rapporteur has pointed out, that the definition of terrorism in the ATL is contrary to the principle of the legality of crime and punishment, and the principle that laws should be clear, precise, specific, predictable, and in accordance with the rule of law. As a result of this definition, people in Turkey who have not been involved in any serious and lethal acts of violence against individuals or hostage-taking can be deemed to have committed a terrorist offense, labeled as terrorists, and subjected to a special trial and enforcement regime just for expressing opinions that are not shared by the political power or the official opinion.
15. ATL Law No. 3713 is contrary to the offenses and definitions of terrorism adopted in accordance with the conventions to which Turkey is a party under Article 90 of the Constitution.
16. **There is no definition of "terrorism" in international law. It only specifies which crimes are "terrorist offenses."** In the international arena, there are two European conventions and various international conventions and protocols to which these conventions refer, and which specify what constitutes terrorist crimes. Within this scope:
17. The European Convention for the Suppression of Terrorism[10] (1977) specifies which crimes cannot be regarded as political offenses or offenses connected with a political offense or as offenses inspired by political motives and indirectly lists which ones are terrorist offenses.
18. This convention has been revised in 2003. Law No. 5288 on the Revised European Convention for the Prevention of Terrorism specifies which crimes are terrorist crimes and the related international conventions and protocols.[11]
19. Accordingly, the following are specified as terrorist offenses:

    a. 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;
    b. Offences listed within the scope of the International Convention against the Taking of Hostages adopted on 17 December 1979 in New York;
    c. Offences listed within the scope of the Convention on the Physical Protection of Nuclear Material adopted on 3 March 1980 in Vienna;
    d. 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;
    e. 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;

[10] Ratified by Law No. 2327 and entered into force with the decision of the Council of Ministers dated 24.02.1981 and numbered 8/2487 and published in the *Official Gazette* dated 26 March 1981 and numbered 17291.

[11] Ratified by Law No. 5288 and published in the *Official Gazette* dated 08.04.2005 with the decision of the Council of Ministers dated 15.03.2005 and numbered 2005/8613.

f. 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;
g. Offences listed within the scope of the International Convention for the Suppression of Terrorist Bombings adopted on 12 January 1998 in New York;
h. 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 is the Council of Europe Convention on the Prevention of Terrorism. The Council of Europe Convention on the Prevention of Terrorism (2005)[12] regulates that the crimes specified in the international conventions and protocols specified in the list annexed to the convention are terrorist crimes.

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

a. Convention for the Suppression of Unlawful Seizure of Aircraft signed in the Hague on 16 December 1970,
b. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done on 23 September 1971 in Montreal,
c. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents adopted on 14 December 1973 in New York,
d. International Convention against the Taking of Hostages adopted on 17 December 1979 in New York,
e. Convention on the Physical Protection of Nuclear Material adopted on 3 March 1980 in Vienna,
f. 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,
g. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation done on 10 March 1988 in Rome,
h. 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,
i. International Convention for the Suppression of Terrorist Bombing done at New York on 15 December 1997,
j. International Convention for the Suppression of the Financing of Terrorism done at New York on 9 December 1999.

20. 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

[12] Ratified by Law No. 6135 and published in the *Official Gazette* dated 13.01.2012 with the decision of the Council of Ministers dated 28.11.2011 and numbered 2011/2510.

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.[13]

Individual Evaluation of Articles of the ATL

21. 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.

22. 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.

23. 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

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

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"[14] (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.

24. 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. The crimes listed in 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, 265, 294, 300, 316, 317, 318 and 319 and the second paragraph of Article 310 of the Turkish Penal Code are among the crimes listed as committed with terrorist intent. The inclusion of offenses listed in this article in this category is contrary to the principle of legal certainty and the principle of legality.

25. Article 5 of the ATL prescribes an extension in sentence terms by half. It should be repealed as it puts forth 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, the 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.

26. 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.

27. The Constitutional Court's judgments in the cases of *Zübeyde Füsun Üstel and Others*, *Sırrı Süreyya Önder* and *Ayşe Çelik* reveal the need that these articles should definitely be repealed because they punish freedom of expression.

28. Venice Commission's "Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media"[15] (Op. No. 872/2016) dated 13 March 2017 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.

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

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

29. After the above-mentioned explanations regarding the ATL, it should be emphasized that the term “terrorist offenses” should not be used in Law No. 5275 amended by Law No. 7242. Instead, the crimes in the TPC should be listed by a counting method.

30. Pursuant to the principle of legal interest to be protected, the conditional release rate for the crimes categorized as terrorist offenses under Chapter 4 of the TPC should be ½ of the normal rate. When the rule of law principle, the legal interest to be protected, and the principle of equality are evaluated together, the term “terrorist offenses” should be removed from the text of the law.

31. In addition, due to its transitivity with Article 220 of the TPC, Article 314 cannot be considered to fall under the term “terrorist offenses” in accordance with the principle of equality, therefore the conditional release term should be ½ as in Article 220.

32. It should be emphasized that those convicted under Articles 6 and 7 of the ATL should benefit from the provisions in the enforcement package regarding the application of ½ of the conditional release period because these are offenses of freedom of expression, they are not terrorist offenses.

33. Appellate remedy before the Court of Cassation had been made available with Article 29 of Law No. 7188,[16] known as the First Judicial Package, that introduced an additional paragraph to Article 286 of Law No. 5271 for those who were convicted of criminal offenses of insult, threat to create fear and panic among the public, incitement to commit crimes, praising crimes and criminals, inciting the public to hatred and enmity or insulting the public, incitement to disobey the law, insulting the president, insulting the signs of sovereignty of the state, insulting the Turkish nation, the state of the Republic of Turkey, the institutions and organs of the state, ARMED ORGANIZATION, disinclining the public from military service crimes as well as those convicted under Article 6, paragraphs 2 and 4 and the second paragraph of Article 7 of the ATL, and those convicted of crimes under Articles 28/1, 31 and 32 of the Law on Assemblies and Demonstrations. The legislators had thus accepted that these were offenses of freedom of expression. In this case, armed organization crimes should not be included in “terrorist offenses” just like Article 220 of the TCC. The principle of proportionality requires this.

34. Due to the large number of crimes committed with the aim of terrorism listed in Article 3 of the ATL and the principle of the legal interest to be protected, the rate of conditional release should be ½ for these crimes, since they protect the interest to be protected and are not included in crimes against persons. The principle of proportionality requires this.

35. Under the former TPC and the former enforcement law, the conditional release period for political prisoners was 2/3 and ½ for ordinary prisoners. When the new TPC and the enforcement law came into force, these ratios were changed to ¾ and 2/3. With the Law No. 7242, this balance was disrupted and ¾ was kept for the ATL, while it was reduced to 2/3 and the vast majority to ½ for other crimes, which further increased discrimination and contradicted the principle of proportionality. Moreover, the crimes within the scope of the ATL are the last ones in terms of the legal interest to be protected. In this respect, Law No. 7242 is clearly against the rule of law.

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[16] Published in the *Official Gazette* dated 24 October 2019.

Evaluation of ATL Articles on Enforcement

36. Article 5 of the ATL stipulates that the penalties to be imposed for offenses subject to this law will be increased by half, which is contrary to the principle of legality of crimes and punishments and the legal interest to be protected, and therefore contrary to Articles 13 and 38 of the Constitution.

37. The provision in Article 17/4 of the ATL and provisional Article 2 of Law No. 5275 states "Terrorist offenders, whose death sentences have been commutated to life sentences; terrorist offenders, whose death sentences have been commutated 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 aggravated life sentence continues until death" should be repealed and those whose death sentences had been commutated to imprisonment sentences should also be made eligible for conditional release like those who had been handed down aggravated imprisonment sentences.

38. According to the data released by the Ministry of Justice dated 17 February 2014, there are 1453 prisoners sentenced to aggravated life imprisonment in Turkey. Aggravated life imprisonment was introduced in the country after the abolition of the death penalty in 2002. It is estimated that approximately 4000 people are currently in this group.

39. Prisoners who have been sentenced for committing one of the crimes under Book Two, Part Four, Chapter Four titled "Crimes against the Security of the State," Chapter Five titled "Crimes against the Constitutional Order and the Functioning of this Order," Chapter Six titled "Crimes against National Defense" within the framework of an organization's activity, cannot benefit from conditional release and the enforcement of their sentence continues "until death" due to the regulations in Article 107/16 and Provisional Article 2 of the Enforcement Law. According to Article 25/1-ı of the Enforcement Law, the enforcement of a convict's sentence cannot be interrupted under any circumstances.

40. This punishment is inhumane because it is enforced in solitary confinement until death and the aggravated conditions of enforcement. The ECtHR in its judgments in the cases of *Öcalan, Gurban, Boltan and Kaytan* ruled for violation of Article 3 of the Convention on the grounds that this enforcement regime, which is a separate punishment within punishment that continues until death, is considered torture and ill-treatment due to the "lack of hope of release." As stated in the ECtHR judgments, the enforcement of a sentence can never last until death, and people's cases go under legal review at certain periods and are released upon fulfillment of certain conditions.

41. The death penalty is prohibited in Turkey's domestic legislation and international legislation to which Turkey is committed. Article 17/4 of the ATL, which amounts to the prolonged death penalty, infringes upon the essence of the right. It is not proportionate. Such regulations that lead to permanent deprivation of rights are contrary to Article 13 of the Constitution. Paragraph 107/16 and provisional Article 2 of Law No. 5275 and the phrases in Article 25, which are related to this article, should be considered together and all of them should be removed from the law.

42. The most serious of the prohibitions imposed on aggravated life sentences is that even if those sentenced to aggravated life are too seriously sick to survive in prison on their own, and even if they have medical reports to that effect, they are not released due to the prohibition on conditional release in Article 25 and are sentenced to die in prison.
43. However, Article 16/2 of the same law, under the title of "Postponement of the enforcement of prison sentences due to sickness" states that "if the enforcement of the prison sentence constitutes a definite danger to the life of the convict, enforcement of the convict's sentence shall be postponed until he/she recovers," while its paragraph 6 states that "The enforcement of the sentence of the prisoner who, due to a severe illness or disability, cannot manage his/her life alone in the conditions of the penal institution and is considered not to pose a serious and concrete danger to public safety, shall be postponed until he/she recovers according to the procedure set out in the third paragraph."
44. Especially the enforcement of sentences of sick prisoners according to this regime leads to their deaths, and every sick prisoner, whose treatment is not carried out in appropriate times and conditions, is dragged to death day by day.
45. Even if it does not pose a risk to the life of the prisoner, the enforcement of the sentence of sick prisoners should continue in the sections of official health institutions reserved for prisoners, while not suspending the enforcement of the sentences of sick prisoners who are in critical condition is a violation of the right to life.

Template for Book 2, Chapter 4, Sections 4-7

1. We have already discussed at length the ranking of the legal interests to be protected in the new TPC.

2. Conditional release periods should be determined in accordance with the purpose of the legislator stated in the general justifications of the new Turkish Penal Code No. 5237 and the new Enforcement Law No. 5275, and eligibility for probation should be regulated accordingly. The conditional release period of those who have been sentenced to a term of imprisonment for the crimes in Sections 4, 5, 6, and 7 of Chapter 4, which are defined in this section and virtually pulled together in an omnibus, should be 1/2 and should not be subject to exceptions in eligibility for probation. Although this is our main opinion, when we offer more detailed explanations, it will become clear how great the injustice is. When one studies the criminal offenses herein within this scope:

3. The legislator regulated the crimes against the state in the fourth part of Book 2 of the TPC. Section 4 of Part 4 regulates crimes against the security of the state. Article 305 of the TPC is also included in these offenses. Equating this article with other articles in the same section in terms of the enforcement law is contrary to the gravity of the offense, the principle of proportionality, and the principle of the legal interest to be protected. Article 305 of the TPC regulates short-term imprisonment starting from one year and is a type of crime that should be handled directly within the scope of freedom of expression. Therefore, the enforcement of sentences for crimes under Article 305 of the TPC should be ½ of the conditional release period, as in other crimes, and those

convicted under this article should benefit from the temporary articles on conditional release without exception.

4. Section 5 of Part 4 of the TPC regulates crimes against the constitutional order and its functioning. Among these crimes, Article 314 of the TPC regulates membership in an organization. It is a type of crime that should be handled within the scope of expression and association, especially within the scope of paragraphs 2 and 3 of the article. As a matter of fact, in the regulation introduced by Law No. 7188, known as the 1st Judicial Package, the Court of Cassation made available the remedy of appeal in case of a prison sentence of fewer than 5 years under Article 314 of the TPC. Therefore, Article 314 has been accepted as an article that violates freedom of expression. Furthermore, there is a transitivity between Article 220 of the TPC and Article 314 of the TPC. Therefore, the enforcement regime utilized by Article 220 and the one utilized by Article 314 should be the same. To subject two articles that have transitivity between each other to different enforcement regimes is contrary to the principle of equality and proportionality of the constitution.

5. Section 6 of Part 4 of the TPC regulates crimes against the national defense. Among these crimes, Article 318 of the TPC regulates the crime of alienating the public from military service. Article 319 of the TPC regulates the crime of inciting soldiers to disobedience. Article 324 of the TPC regulates the neglect of the relevant duty in mobilization. Putting these three crimes in the same category as other crimes in this section is contrary to the gravity of the crime and the principle of proportionality, as well as the principle of the legal interest to be protected. These three offenses are the types of offenses that concern freedom of expression. The ECtHR ruled in its judgment in the case of *Bayatyan v. Armenia* that the right to conscientious objection must be recognized in member states of the Council of Europe. All three offenses are contrary to the human rights principles stated in the ECtHR judgment.

6. Section 7 of Part 4 of the TPC regulates crimes against state secrets and espionage. It is clear that Articles 327, 329, 330, 332, 334, 338, 334, 338, and 339 of the TPC are contrary to the constitutionally guaranteed rights to freedom of expression and freedom of the press. Due to these articles, lawsuits are frequently filed against journalists in particular. In accordance with the gravity of the offense, the principle of proportionality, and the principle of the legal interest to be protected, it is unconstitutional to evaluate these articles in the same way as other offenses in this section.

Template for terrorist offenses, offenses of establishing, leading, or membership in an organization, and offenses committed within the scope of organizational activity

1. New types of criminal offenses have virtually been created with such template sentences in the enforcement law. However, in the criminal legislation of Turkey, crime types are regulated by the TPC and some special laws. There is no such definition in any of these laws.

2. The definition of terrorist offenses is found only in Article 3 of ATL No. 3713.

3. Article 220 of the TPC regulates offenses of organization and Article 314 of the TPC regulates offenses of armed organization. Article 220 of the TPC is regulated under crimes against public peace in Chapter 5 of the crimes against society in Section 3. Article 314 of the TPC is regulated in

Part 4, Section 4. As can be seen, creating such a category in such an enforcement law is not only contrary to the principle of proportionality but also completely contrary to the principle of legal interest to be protected. Therefore, instead of creating new types of crimes with such unlawful template sentences in the enforcement law, it would be more accurate to introduce regulations by directly writing the names and numbers of the crimes in special laws, especially the TPC. The political power creates such new types of crimes contrary to the criminal law according to the policy of combating crime that it determines conjecturally. This is contrary to the principle of legality of crime and punishment as well as the principle of universality and continuity of laws.

4. When one considers the legal interest to be protected and the principle of proportionality, the conditional release rate for the types of crimes listed here should be ½ of the normal rate. In addition, they should not be subjected to exceptions in eligibility for supervised release.

5. Further, the same enforcement regime should be applied to Article 314 of the TPC and Article 220 of the TPC, which are the types of crimes defined in this template.

RECOMMENDATIONS FOR AMENDMENTS TO LAW NO. 5275

1- Article 14 of the Law No. 5275 regulates open penal institutions. Article 14/2a states that the sentences of those convicted of these crimes cannot be enforced directly in open penal institutions by including the phrase "terrorist crimes, crimes of establishing, leading or membership in an organization and crimes committed within the scope of organization's activities." In practice, especially for those convicted under ATL Articles 6 and 7/2 and 220/6, 7 and 8, although the sentence terms are between 9 months and 2 years, 1 month and 15 days in practice, they cannot be enforced directly in open penal institutions due to this provision. Considering a large number of people in this situation, this provision must necessarily be amended.
   Furthermore, this article has been substantially amended by Law No. 7242 and needs to be revised in its entirety within the framework of the above-mentioned principles.
2- Article 16 of the Law No. 5275 regulates the postponement of the enforcement of prison sentences due to illness. We believe that the provision in Article 16/3 of the Law that prescribes the approval of the Forensic Medicine Institute should be removed. In practice, the Forensic Medicine Institute does not take into account the principle of legal interest that should be protected by the TPC, acts on par with the suggestions of the political power, and produces reports contrary to medical ethics, especially against prisoners convicted under the ATL. Thus, the approval of the Forensic Medicine Institute should be abolished or regulated in very exceptional cases.
   Moreover, the phrase "those not considered to pose a grave and concrete danger to public safety" for prisoners who cannot manage their lives alone in Article 16/6 should be removed. It is unacceptable to hold a prisoner who is unable to manage his/her life alone in prison under the pretext of public security. If there is any suspicion about such a prisoner after his/her release, the state's security units should carry out the necessary monitoring and prevention activities.
3- Article 17 of the Law No. 5275 regulates the postponement of enforcement of sentences upon the request of convicts. It is discriminatory to deprive those who are convicted of terrorist crimes, crimes committed within the scope of organization activities, and those who are sentenced to imprisonment for up to 3 years from this right as prescribed in Article 17/6 of the Law. This provision should also be abolished.
4- Article 25 of the Law No. 5275 regulates the enforcement of aggravated life imprisonment. We believe that this article should be abolished completely. Due to this article, aggravated life imprisonment convicts are held under strict isolation, which causes their diseases to progress rapidly. The last subparagraph of paragraph 1 of the article stipulates that the enforcement of the sentence of the convict cannot be interrupted under any circumstances, which prevents the release of sick prisoners in this situation. Therefore, this sentence must be removed from the text of the law.
5- Article 36 of the Law No. 5275 regulates searches in penal institutions. In the 2nd paragraph of the article, the regulation of joint searches with external security officers or law enforcement officers, or other public officials causes great problems in practice. In cases

where security and law enforcement officers are involved in the search, prisoners are ill-treated and are sometimes subjected to acts of torture and ill-treatment. This paragraph must be removed as well.

6- Article 57 of the Law No. 5275 regulates transfers due to illness. There is a need for a sub-regulation regarding the implementation of this article. In practice, this problem has been attempted to be solved with protocols under the name of a three-way protocol, but no concrete progress has been made. Therefore, the implementation of Article 57 of the law needs to be laid down more concretely.

7- Article 63 of the Law No. 5275 regulates the accommodation and hospitalization of convicts. According to paragraph 4 of Article 63 of the Law, it is stated that sufficient space, light, heating, ventilation, and hygiene must be provided in the wards. Recently, it has been determined that there is no ventilation in high-security prison wards. Therefore, this type of prison model must be abandoned, and it must be ensured that prisoners are held in wards with at least 3 people with whom he/she will establish social relations, with ventilation and full hygiene.

8- Article 72 of the Law No. 5275 regulates the nutrition of convicts. We believe that a separate special nutrition regulation should be introduced regarding the implementation of this article, just like Article 57. Diseases spread faster among prisoners who do not have adequate and balanced nutrition.

9- Article 89 of the Law No. 5275 regulates the evaluation of convicts and the determination of good behavior. This article was rearranged with Law No. 7242 together with its title. This new regulation has caused major problems in practice. This article led to complaints by prisoners that their conditional releases became impossible. It is necessary to return to the previous version of the article. It is not possible to implement the conditional release period under this article. This article is a violation of all the rules of criminal law by granting the authority of the courts to the prison observation boards. It must necessarily be abolished. Many prisoners' enforcement periods are prolonged due to this article and their diseases progress due to this article.

10- Article 107/2 of Law No. 5275 should be amended per the principles set out by the ECtHR in its judgment in the case of *Vinter and Others v. United Kingdom* (2013) where the court held that it was a violation of human dignity to deny life prisoners any prospect of release or review of their sentences. Thus, the 30 years for aggravated life sentences should be reduced to 25 years and the article should be rearranged in this context.

    Article 107/16 of the Law should be completely removed from the text of the article. By stipulating that those sentenced to aggravated life imprisonment will not benefit from conditional release, this article aims to keep certain people in prison until death by making an exception to the principle in the general enforcement regime. Turkey is a country that abolished the death penalty. Therefore, such regulation should not exist in any way. Moreover, the ECtHR in the *Gurban and Others v. Turkey* group of cases clearly explained the right to hope and stated that all prisoners should benefit from the right to hope. Turkey is under the monitoring of the CoE Council of Ministers in the *Gurban and Others* group of cases. According to our estimates, there are currently around 4 thousand prisoners incarcerated under this article.

11- Article 110 of the Law No. 5275 regulates special enforcement provisions. In Article 110 of the Law, more favorable enforcement regulations have been introduced especially for disadvantaged groups. The inclusion of subparagraph a in the 9th paragraph of the law, however, causes many problems. Especially the release of elderly prisoners is prevented. In this respect, subparagraph a of Article 9 of the law must be removed.
12- Additional Article 1 of Law No. 5275 should be abolished as it regulates uniform clothing. This article is not suitable for Turkey's social, cultural, religious, moral, and socio-political structure.
13- Provisional Article 2 of Law No. 5275 stipulates that for prisoners whose death sentences have been commuted to life imprisonment, aggravated life imprisonment will continue throughout their lives, which is clearly an extended death penalty. This article is unacceptable and must be abolished.
14- Various exceptions in the provisional Article 6 of the Law No. 5275 have led to very clear discrimination, especially the exception in paragraph 2 for the crimes covered by the ATL prevents release and creates a situation to the detriment of sick prisoners. This article needs to be amended.
15- The exceptions in the provisional Article 9 of Law No. 5275 should be abolished, just like Article 6, and discrimination between prisoners must be ended.

RECOMMENDATIONS ON ATL NO. 3713

In 2004, when the new TPC, the new CCP, and the new Law on the Enforcement of Sentences were being prepared, the idea of making new laws in such a way that the ATL No. 3713 would not be needed was adopted both by the political power and in the deliberations held in the Justice Commission of the Grand National Assembly of Turkey, and these new laws were drafted accordingly.

The penalties in the TPC for terrorism and crimes committed with terrorist intentions as defined in the ATL were increased with the idea that the ATL would be abolished. The period of conditional release was increased from 2/3 to ¾ for those convicted of crimes within the scope of the ATL in the new enforcement law and especially the provision in Article 17 of the ATL was written separately in many articles of the new enforcement law based on this assumption. The conditional release period was increased for ordinary prisoners from ½ to 2/3. The special trial procedures and forms of trial regulated under the ATL were written into Articles 250 et seq. of the CCP also based on this assumption.

However, the period of non-conflict between 2002 and 2004 in the Kurdish issue, which is Turkey's most important problem, was not well utilized, and unfortunately, armed clashes restarted on 1 June 2005. As a result, the ATL was not abolished. Thus, the sentences imposed according to the new TPC were increased by 50% per Article 5 of the ATL, and the period of conditional release was increased in the new enforcement law, leading to overcrowding in prisons.

This structural problem must now be understood, and a solution must be found to this fundamental problem. For this reason and based on the evaluations we have made above regarding the ATL, we advocate that the ATL should be abolished in its entirety.

Regarding sick prisoners, we would like to remind all once again that Articles 5 and 17 of the ATL must certainly be abolished.

GENERAL RECOMMENDATIONS

- Domestic legislation in Turkey must comply with international human rights law, particularly prisoners' rights.
- The increasingly severe conditions of isolation must be lifted and living standards in prisons must be brought in line with human dignity. The practice of holding prisoners in single-person rooms without ventilation must be ended, especially in maximum security closed prisons.
- Prison administrators and staff should be provided with human rights training to ensure that they adopt an ethical and dignified approach.
- All sick prisoners in critical condition currently in prisons should be released immediately based on a full-fledged hospital report, their treatment should be continued with their families and their health insurance should be covered by the state.
- The İstanbul Protocol sets forth the right of persons deprived of their liberty to have access to a physician, including, if they so wish, a physician of their own choosing and have their medical reports prepared by independent experts. University hospitals, training and research hospitals, and full-fledged state hospitals can conduct objective processes and prepare reports on the health status of sick prisoners.
- The Forensic Medicine Institute must be removed from being the final and sole authority for reports on the postponement of enforcement of sentences due to health reasons. The Forensic Medicine Institute must deliver decisions in line with medical science and ethics, not according to the pressure of political authority.
- One of the biggest problems is that Article 16 of the Enforcement Law titled "Postponement of the enforcement of prison sentences due to illness" was amended with the Law No. 6411 on 24 January 2013 to include the provision that "the enforcement of the sentence of the prisoner who, due to a severe illness or disability he/she has suffered, is unable to maintain his/her life alone under the conditions of the penal institution and who is considered not to pose a danger to public safety, may be postponed until he/she recovers according to the procedure set out in the third paragraph" and practice, the element of "danger to public safety" is left to the mercy of law enforcement officers. The addition of the criterion of "grave and concrete danger" to the element of "danger to public safety" instead of taking medical evaluations of sick prisoners as a basis is an unacceptable approach that is far from solving the problem. The discretionary power of public prosecutors should be abolished in decisions to postpone the enforcement of sentences due to health reasons, and the enforcement of sentences should be postponed based on hospital reports.
- The provision in Article 25 of the Enforcement Law stating that "enforcement cannot be suspended" and the provision in paragraph 16 of Article 107, which constitute obstacles to the postponement of enforcement of sentences of sick prisoners, should be abolished.
- Pursuant to the ECtHR's *Kaytan v. Turkey* judgment, prisoners' legal status summaries must include a suitable date for their release, taking into account their age and state of health.

- The ECtHR’s ruling in the case of *Gülay Çetin v. Turkey* must be complied with and it must be kept in mind that failure to release sick prisoners is a violation of Article 3 of the ECHR.
- The circular regulating the president’s authority to pardon prisoners on health grounds should be amended, and the president must use his/her authority regarding seriously ill prisoners without discrimination.
- Effective investigations must be initiated into the deaths of sick prisoners and those who are negligent and responsible must face criminal sanctions.
- The state must cover the health insurance of prisoners whose enforcement of sentences is postponed due to illness.
- Prisoners with psychological disorders and schizophrenic patients are held in wards in prisons. These prisoners should be treated in hospitals in line with their diagnoses and/or their release should be ensured. These prisoners’ conditions worsen during their incarceration.
- The practice of holding prisoners in prisons far away from their families should be ended. It must be kept in mind that especially for sick prisoners' physical and psychological health, being in prisons close to their families is a supportive factor for their health.
- Prisoners with permanent disabilities must be provided with conditions that eliminate the problems they face, and those who are severely disabled and cannot continue their lives on their own should be released.
- The state should cover electricity usage fees and ration allowances demanded from prisoners.
- Penal institutions should be opened to monitoring by civil society organizations and independent monitoring boards.

Human Rights Association