



LEFT BEHIND TO DIE:

COVID-19 in Turkish Prisons and Discrimination Against Political Prisoners

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ABOUT STOCKHOLM CENTER FOR FREEDOM

Stockholm Center for Freedom (SCF) is a non-profit advocacy organization that promotes the rule of law, democracy and human rights with a special focus on Turkey.

SCF was set up by a group of journalists who have been forced to live in self-exile in Sweden against the backdrop of a massive crackdown on press freedom in Turkey.

SCF is committed to serving as a reference source by providing a broader picture of rights violations in Turkey, monitoring daily developments, documenting individual cases of the infringement of fundamental rights and publishing comprehensive reports on human rights issues.

SCF is a member of the Alliance Against Genocide, an international coalition dedicated to creating the international institutions and the political will to prevent genocide.

1. INTRODUCTION

Countries resort to different measures against COVID-19 depending on the severity of the pandemic and their capabilities. Among major measures are limiting inter personal physical contact, encouraging social distancing and promoting good hygiene such as frequent washing of the hands as well as mask wearing, testing, contact tracing and isolation. In the most serious pandemic of our century, many countries have also introduced special regulations to ensure the well-being of prisoners, who have limited means of protecting themselves against the virus and are more exposed to it due to the physical circumstances of prisons. As a general principle of law, the protection of the right to life and the well-being of prisoners is the sole responsibility of the government. The UN High Commissioner for Human Rights has thus called on all governments to release prisoners to stem the spread of coronavirus in prisons.¹ In the US, Canada, Germany, Iran, Poland and many other countries, some prisoners were released within the context of combating the spread of the coronavirus.²

Turkey, which ranks second in the number of inmates per capita among OECD countries³ and accommodates many more prisoners than the capacity of its prisons, has also taken some precautions to prevent the spread of the pandemic in prisons.¹ In this context, deputies from the ruling Justice and Development Party (AKP) and its ally the Nationalist Movement Party (MHP) drafted Law No. 7242 on Amendments to the Law on the Execution of Sentences and Security Measures as well as Certain Other Laws. The draft was adopted by parliament and the law entered into force on May 15, 2020 despite an outcry from the public, particularly concerning its discriminatory provisions.⁴

An amnesty law in essence, the amendments to the Law on the Execution of Sentences and Security Measures⁵ sparked much criticism in national and international circles.⁶ The focal point of the criticism was the exclusion of tens of thousands of political prisoners from the scope of the new law by an increasingly authoritarian government while releasing only those convicted of non-political crimes, irrespective of gravity.

¹ "UN urges prisoner releases to stem spread of coronavirus", France24, 25 March 2020,

<https://www.france24.com/en/20200325-un-urges-prisoner-releases-to-stem-spread-of-coronavirus>

² Kieran Oberman, "COVID-19 prisoner releases are not a matter of mercy, but of justice," World Economic Forum, April 27, 2020, <https://www.weforum.org/agenda/2020/04/covid-19-prisoner-releases-not-mercy-but-justice/>; Jago Russel, "Covid-19 in Europe's prisons and the response," Euobserver, 18 May 2020, <https://euobserver.com/opinion/148385>

³ Erin Duffin, "Incarceration rates in OECD countries as of May 2020," Statista, May 20, 2020, <https://www.statista.com/statistics/300986/incarceration-rates-in-oecd-countries/>

⁴ Law No 7242 dated 14/04/2020; Official Gazette (OG) dated 15/04/2020 numbered 31100, at <https://www.resmigazete.gov.tr/eskiler/2020/04/20200415-16.htm>

⁵ Law No 5275 on the Execution of Sentences and Security Measures is shortened as the Law on Execution of Sentences in the Turkish literature and legal practice.

⁶ Amnesty International, Joint Public Statement Turkey: 'Rights groups call for urgent release of imprisoned journalists, human rights defenders and others, now at risk of Covid-19', March 30, 2020; <https://www.amnesty.org/download/Documents/EUR4420472020ENGLISH.pdf>; Bar Human Rights Committee of England & Wales, "Statement: Political prisoners in Turkey in the face of the COVID-19 pandemic," April 3, 2020, <https://www.barhumanrights.org.uk/political-prisoners-in-turkey-in-the-face-of-the-covid-19-pandemic/>

This report details how the government is pursuing a political agenda by adopting such a law during the COVID-19 pandemic and how its discriminatory actions against dissidents continue without exception. The first chapter covers COVID-19 and the general state of prisons in Turkey. The second chapter explores how the concept of “terror offenses” has been instrumentalized and misused as a pretext to oppress and criminalize political dissidents, for the most part since a coup attempt on July 15, 2016. The third chapter examines blatantly discriminatory amendments to Law No. 5275 on the Execution of Sentences made by Law No. 7242 on April 14, 2020 targeting political prisoners. The fourth chapter includes a study of amendments to the Law on the Execution of Sentences with Law No. 7242 in light of the basic principles of the rule of law. The report ends with a discussion of the government’s responsibility, particularly in terms of the right to life resulting from the discriminatory nature of the amendments made to the Law on the Execution of Sentences.

2. THE GENERAL STATE OF PRISONS IN TURKEY FOLLOWING THE COUP ATTEMPT AND COVID-19

Turkey experienced a controversial military coup attempt on the night of July 15, 2016 which, according to many, was a false flag aimed at entrenching the authoritarian rule of President Recep Tayyip Erdoğan by rooting out dissidents and eliminating powerful actors such as the military in his desire for absolute power. The abortive putsch killed 251 people and wounded more than a thousand others. The next morn-



Speaking to press on the night of July 15, 2016, Erdoğan called the coup attempt ‘a gift from God’. His son-in-law, then-Energy Minister Berat Albayrak, sitting on his right, appeared quite happy.

ing, after announcing that the coup had been suppressed, the Turkish government immediately started a huge purge of military officers, judges, police officers, teachers and other government officials, which ultimately led to the summary dismissal of more than 130,000 public servants, including 4,156 judges and prosecutors, as well as 20,571 members of the armed forces for alleged membership in or relationships with “terrorist organizations” by emergency decree-laws subject to neither judicial nor parliamentary scrutiny.

Erdoğan immediately accused US-based Turkish cleric Fethullah Gülen and the group inspired by his teachings known as the Gülen or Hizmet movement of masterminding the coup attempt. According to a statement from Interior Minister Süleyman Soylu on February 20, a total of 622,646 people have been the subject of investigation and 301,932 have been detained, while 96,000 others have been jailed due to alleged links to the Gülen movement since the failed coup. The minister said there are currently 25,467 people in Turkey’s prisons who were jailed on alleged links to the Gülen movement.⁷ Thousands



Photos of former deputy policy inspector Mustafa Kabakçiođlu, 44, who died in a COVID-19 quarantine cell in prison on August 29, shed light on the unsanitary conditions in which he was forced to live.

of other political opponents of the government, such as Kurdish activists and human rights defenders, were also detained in the aftermath of the coup attempt.

Official records indicate that the first COVID-19 case in Turkey appeared on March 10, 2020.⁸ According to Ministry of Health data as of March 18, 2021, COVID-19 related deaths totaled 29,777.⁹ However, there have been claims that the real number of deaths is much higher than officials announce.¹⁰ Health Minister Fahrettin Koca acknowledged during a news conference on September 30, 2020 that since July 29, Turkey had been reporting the number of patients with symptoms being cared for in hospitals

or in their homes. The count did not include asymptomatic positive cases, he said, ignoring a question about the number of new positive coronavirus cases per day, a key indicator of where the outbreak is headed in any country.¹¹ After public criticism, Koca announced the total number of new positive cases on November 25, 2020. According to his statement, the number of daily cases was 28,351, the third highest in the world.¹²

It is, however, even more difficult to get reliable information on COVID-19 cases in prisons. In a press statement on November 8, 2020, the Directorate General for Prisons and Detention Centers said COVID-19 cases were seen in 117 of the country's 368 prisons. One hundred twenty inmates were undergoing treatment for COVID-19 and their general health was good.¹³ According to the statement, all 12 inmates who died of COVID-19 had histories of hospitalization and chronic disease. Ten of them had chronic illnesses such as tuberculosis, asthma, diabetes and chronic obstructive pulmonary disease (COPD). Two of them died due to complications with their immune systems.

7 "İçişleri Bakanı Soylu, Gara'ya giden HDP'li vekili açıkladı" [Interior Minister Soylu revealed the identity of the HDP deputy who visited Gara], Anatolian News Agency, <https://www.aa.com.tr/tr/turkiye/icisleri-bakani-soylu-garaya-giden-hdpli-vekili-acikladi/2151784>

8 "Turkey confirms first coronavirus case, wins WHO praise for vigilance," Reuters, March 10, 2020, <https://www.reuters.com/article/us-health-coronavirus-turkey/turkey-confirms-first-coronavirus-case-wins-who-praise-for-vigilance-idUSKBN20X1PC>

9 "Türkiye'de COVID-19 Hasta Tablosu," [COVID-19 in Turkey, Patient Table], Ministry of Health of Turkey, <https://covid19.saglik.gov.tr/>

10 "Coronavirus Death Toll Soars in Turkey," The New York Times, April 20, 2020,

<https://www.nytimes.com/2020/04/20/world/coronavirus-cases-news.html#link-255b042a>

11 "Turkish govt accused of hiding true extent of virus outbreak", The Associated Press, October 1, 2020, <https://apnews.com/article/virus-outbreak-health-media-turkey-social-media-146084425135560e5e3f6c8961391cc8>

12 "Turkey's surge to top 3 in the world in daily coronavirus cases explained," Turkish Minute, November 26, 2020, <https://www.turkishminute.com/2020/11/26/turkeys-surge-to-top-3-in-the-world-in-daily-coronavirus-cases-explained/>

13 Kovid-19 Pandemi Sürecinde Ceza İnfaz Kurumları [Prisons During the COVID-19 Pandemic], Directorate General of Prisons and Detention Centers, <https://cte.adalet.gov.tr/Home/SayfaDetay/kovid-19-pandemi-surecinde-ceza-infaz-kurumlari08112020080948>



Turkey's prisons suffer from overcrowding since the July 15, 2016 coup attempt

At a press conference on November 19, 2020, the Prisons Commission of Turkey's Human Rights Association (İHD), however, said the number of sick inmates in Turkish prisons was considerably higher than revealed by the Ministry of Justice.¹⁴ According to the Turkish Statistics Institute (TurkStat), as of December 31, 2019 there were a total of 291,546 inmates (detained pending trial or imprisoned after sentencing) across 350 prisons in Turkey.¹⁵ Normally, Turkish prisons have a combined capacity of 114,000 people, while their "extended" capacity is 218,950 – extended by adding bunkbeds and limiting living space for inmates. Yet still, Turkish prisons house over 290,000 inmates in total. It is estimated that approximately 90,000 prisoners were released following the entry into force of Law

No 7242.¹⁶ Given that the Ministry of Justice does not publish current information on prisons, which have also been closed to civilian, independent monitoring, it is extremely hard to access audited, reliable statistics regarding prisons.

A report¹⁷ dated May 10, 2020 by the Human Rights Association's Prisons Commission reads:

"In all applications to our commission, it is stated that prisoners do not even have access to satisfactory infirmary services; there are no general hospitals on prison campuses; referrals to general hospitals could take months; and problems with access to health and medical care are ongoing. As reported, the right of prisoners to health and medical care is being violated by failure or belated referrals to infirmaries; referrals to general hospitals months later even in emergencies; failure to take inmates to check-ups, examinations and laboratory tests on time; rear handcuffing of prisoners on the way to hospitals; taking prisoners to hospitals in shuttles with cells, nicknamed 'cages'; refusal to take prisoners who object to strip-searches to hospitals; members of the gendarmerie not leaving rooms during medical examinations; keeping inmates handcuffed during examinations; and forcing examination or treatment in handcuffs and in the presence of gendarmes. Moreover, although it is well-known that prison conditions are conducive to the proliferation of the dead-

¹⁴ "Number of sick inmates considerably higher than revealed by Ministry of Justice: İHD," Stockholm Center for Freedom, November 25, 2020, <https://stockholmcf.org/number-of-sick-inmates-considerably-higher-than-revealed-by-ministry-of-justice-ihd/>

¹⁵ "Turkey's prison population increased by 10 percent to 291,546 in 2019: TurkStat," SCF, <https://stockholmcf.org/turkeys-prison-population-increased-by-10-percent-to-291546-in-2019-turkstat/> Genel Bilgi [General Information], Directorate General of Prisons and Detention Centers, <https://cte.adalet.gov.tr/Home/SayfaDetay/cik-genel-bilgi#:~:text=2019%20y%C4%B1%C4%B1nda%20%20adet,a%C3%A7%C4%B1k%20yap%C4%B1mlar%C4%B1%20tamamlanarak%20hizmete%20al%C4%B1n-m%C4%B1%C5%9Ft%C4%B1r>

¹⁶ "CHP, 90 bin kişinin cezaevinden tahliyesinin 1 Temmuz 2000'de yapılmasını istedi!", Sabah, April 14, 2020, <https://www.sabah.com.tr/gundem/2020/04/14/chp-90-bin-kisinin-cezaevinden-tahliyesinin-1-temmuz-2020de-yapilmasini-istedi>

¹⁷ "Marmara Bölgesi Hapishaneleri (Ocak – Şubat – Mart 2020) Hak ihlalleri Raporu," İnsan Hakları Derneği, [Marmara Region Prisons (January – February – March 2020) Report on Rights Violations, Human Rights Association] May 10, 2020. <https://www.ihd.org.tr/marmara-bolgesi-hapishaneleri-ocak-subat-mart-2020-hak-ihlalleri-raporu/>

ly coronavirus, appropriate preventative measures have not been taken. While prisoners should have been provided with personal hygiene products free of charge, inmates cannot access sufficient cleaning materials even with payment. These circumstances have increased the risk of contraction for all inmates, but put prisoners over 65 years of age and those with chronic and serious medical conditions at tremendous risk.”

As stated in detail in an extensive report on prisons in Turkey by the Platform for Peace and Justice¹⁸, most Turkish prisons do not meet the standards to accommodate detainees and prisoners:

“It has been observed that the facilities in 72 out of 80 prisons are inadequate. To name a few examples: the gym in the Karabuk Prison is used as a ward and there are only 3 shower facilities and 3 toilets in a ward where 100 detainees are staying together. In the women’s section of the Tarsus Prison, 70 women are detained in a ward for 17 people, and in the men’s section, 60 detainees are staying in a ward for 26 people. In the Düzce Prison, 25 people are detained in a ward for 8 people; in the Bursa TYPE H Prison, 18 detainees are staying in a ward for 8 people; in the Bandirma Type T Prison, 42 detainees are staying in a ward for 22 people, in the Izmir Aliaga Closed Prison, 28 detainees are staying in a ward for 12 people; in the Manisa Type T Closed Prison, 30 detainees are staying in a ward for 14 people; in the Osmaniye Type E T Closed Prison, 24 people are detained in a ward for 10 people; 42 detainees are staying in a ward for 15 people in the Burdur Type E Closed Prison; ...while in the Manisa Type E Closed Prison for women, in a space of 33 square meters, 30 inmates are being detained, which means only 1 square meter is allowed per

person. Since the number of toilets and shower facilities were built for the ideal capacity of the prisons and because the number of detainees staying in one ward is well over that capacity, every 25-30 detainees have to share 1 toilet and 1 shower and this causes long queues. Taking into consideration, the limited availability of hot water as well, the opportunity for taking a shower is very limited. For instance, in some prisons, such as the Bandirma Type T Prison, each detainee can only take a shower once a week, and for only 5 minutes. In prisons with poor conditions, due to the shortage of beds, some detainees have to sleep on bedding laid out on the floor.”

With widespread detention, lavatories and showers designed to accommodate the ward’s normal capacity can be insufficient in the “extended” capacity prisons with the addition of further bunkbeds and hence even exceeding the “extended” capacity. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) confirms the above detailed observations as follows:¹⁹

“The problem of prison overcrowding remained acute, and the steady increase in the size of the prison population already observed in the mid-2000s continued. With the exception of Diyarbakır Juvenile Prison, the official capacities of all the establishments visited were being greatly exceeded at the time of the visit. Consequently, a large number of inmates in these prisons did not have their own bed and had to sleep on mattresses placed on the floor. Moreover, in some living units, prisoners were even obliged to share mattresses, as no floor space was left for additional mattresses.”

¹⁸ In Prison 2017, “A Comprehensive Report on the Prison Conditions in Turkey”, Platform for Peace & Justice, p. 8. <http://www.platformpj.org/wp-content/uploads/IN-PRISON-2017.pdf>

¹⁹ Council of Europe, Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 17 May 2019, CPT/Inf (2020) 24, p. 4, at <https://rm.coe.int/16809f20a1>

3. 'TERRORISM'²⁰ AND 'POLITICAL OFFENSES' IN TURKEY

Article 1 of Law No. 3713 on Counter-terrorism defines the terror offense:

"Terror(ism) is all criminal actions taken by a person or persons who are members of an organization with a view to altering the characteristics of the Republic enshrined in the Constitution, namely the political, legal, social, secular and economic order; disrupting the unity of the state with its country and people; disrupting the existence of the Turkish state and the Republic; endangering the internal and external security of the state; enfeebling, toppling or seizing the state authority; abolishing basic rights and freedoms; disrupting the internal and external security of the state, public health and order, through pressure, intimidation, attrition, suppression or threats by means of using force and violence."

Article 2 of Law No. 3713 defines the "terror offender" as:

"(1) Any person who is a member of an organization established to achieve the goals stated in Article 1 and who committed crimes in unison or with other members, or who is a member of such an organization even though that person did not commit the crime furthering the goals of the organization, is a terror offender.

(2) Those who are not members of a terror organization but commit offenses in the name of that organization shall also be deemed terror offenders."

The fact that the terror offense and the terror offender defined in such a broad sense is contrary to the principle of the legality of crimes and the principle of foreseeability as they are not clearly defined is

susceptible to arbitrary interpretation.²¹ This ambiguity enabled the government to instrumentalize the concepts of terror offense and terror offenders to suppress critics, especially in the aftermath of the coup attempt on July 15, 2016.

Erdoğan has stated that "there is no difference between a terrorist with arms and bombs and the person who subordinates his/her title, position and pen to terrorists to help them achieve their goals. The title of member of parliament, academic, author, journalist or NGO executive does not change the fact that these people really are terrorists. It could be that the ones who pull the trigger or set off the bombs are terrorists, but it is these aiders and abettors in the latter group that enable such actions to achieve their goals."²² This statement is just one example of the approach of Erdoğan's autocratic and dictatorial regime to dilute and misuse the concept of "terror(ism)." Under the pretext of the July 15, 2016 coup attempt, judges and prosecutors, including members of the Constitutional Court, the Supreme Court of Appeals, the Council of State and the Council of Judges and Prosecutors, and members of parliament, academics, authors, journalists, NGO representatives, teachers, police officers, human rights activists and many others were detained in the tens of thousands. Hundreds of thousands were the subjects of terrorism investigations and millions were labelled as terrorism affiliates.

²⁰ In the Turkish legislation and literature, the term 'terror' is often (albeit not always) used within the meaning of 'terrorism' without meaning any clear distinction between the both.

²¹ Sami Selçuk, "Hukukçuların Bildirisi Üzerine," [On Law Experts' Declaration] T24, May 12, /2020, <https://t24.com.tr/yazarlar/sami-selcuk/hukukcularin-bildirisi-uzerine,26587>

²² "Erdoğan: Terörün tanımı yeniden yapılmalı," [Erdoğan: Terror(ism) should be redefined] CNNTÜRK, March 11, 2016. <https://www.cnnturk.com/video/turkiye/erdogan-terorun-tanimi-yeniden-yapilmali>

The US State Department, in its Country Reports on Terrorism 2019: Turkey, states that Turkey defines terrorism very broadly to include “crimes against constitutional order and internal and external security of the state” and utilizes this definition “to criminalize exercise of freedom of expression, freedom of assembly, and other human rights.” Citing Turkey’s Ministry of Interior, the report states that the “authorities referred more than 10,000 social media accounts to judicial authorities for alleged terrorism-related propaganda in the first quarter of the year alone, with more than 3,600 users facing legal action for their social media activities.”²³

In fact, following the coup attempt on July 15, 2016, the government-controlled judiciary and law enforcement interpreted the concept of terrorism so broadly that it became virtually impossible to remain outside its scope as critics of the government. The dismissal of 4,463 judges and prosecutors on accusations of membership in an armed terrorist organization and investigations into hundreds of judges and prosecutors on the same charges²⁴ have led to the emergence of a judiciary totally dependent on and subordinate to the government. As a result, being a government critic in Turkey means assuming the risk of facing terrorism charges, detention and conviction.

Indeed, running for office in High Council of Judges and Prosecutors

(HSYK, currently Council of Judges and Prosecutors [HSK]) elections against candidates backed by the government, supporting opposition candidates²⁵ or signing a declaration titled “We Refuse to be Accomplices to this Crime” as an academic to halt the atmosphere of conflict and human rights abuses was enough to be charged with membership in a terrorist organization.²⁶ The following lawful and innocuous activities falling within the sphere of exercising basic rights and freedoms are considered criminal activities under the prevailing



judicial practice: depositing money in the Gülen-affiliated Bank Asya; enrolling one’s children in Gülen-affiliated schools; possessing US \$1 bills; using the ByLock instant messaging app; working at or subscribing to newspapers such as Zaman or Sızıntı; and sharing posts on social media critical of the government. Hundreds of thousands have been subjected to criminal prosecution based on such trumped-up terrorism charges, leaving tens of thousands imprisoned.²⁷

The government turned terrorism

²³ “Country Reports on Terrorism 2019: Turkey,” U.S Department of State, <https://www.state.gov/reports/country-reports-on-terrorism-2019/turkey/>

²⁴ “Turkey’s post-coup crackdown,” Turkey Purge, <https://turkeypurg.com/>

²⁵ Ufuk Yeşil, Hukuk ve İnsan Hakları Bağlamında Ohal Uygulamaları [State of Emergency Practices in the Light of the Law and Human Rights], May 2019, p. 153 et seq.

²⁶ “Turkey: Academics on Trial for Signing Petition,” Human Rights Watch, December 5, 2017, <https://www.hrw.org/news/2017/12/05/turkey-academics-trial-signing-petition>

investigations into a way to stifle the opposition, and there has been an increase in torture allegations for suspects taken into custody as part of those investigations. Many reports claim that the government adopted a policy of tolerating torture instead of conducting effective investigations into such allegations.²⁸ Moreover, there have been many instances in which Gülen-affiliated persons were abducted in black Transporter vans and were missing for long periods of time.²⁹

On another note, Turkey had blocked the publication of the CPT's reports on Turkey in 2017 and 2019 until August 5, 2020. According to the 2017 report:³⁰

"The delegation received a considerable number of allegations from detained persons (including women and juveniles) of recent physical ill-treatment by police and gendarmerie officers, in particular in the Istanbul area and in south eastern Turkey. Most of these allegations concerned excessive use of force at the time of apprehension. In addition, many detained persons claimed that they had been physically ill-treated inside law enforcement establishments, with a view to extracting a confession or obtaining information or as a punishment. Some detained persons alleged that electric shocks had been inflicted upon them by police officers with body-contact shock devices. In the CPT's

view, in a number of cases, the alleged ill-treatment was of such severity that it could be considered as amounting to torture."

The 2019 report also states that alleged ill-treatment in detention is still at an alarming level, despite a decrease in numbers compared to the 2017 figure.³¹

4. LAW NO. 7242 ON AMENDMENTS TO THE LAW ON THE EXECUTION OF SENTENCES AND SECURITY MEASURES

Law No. 7242 dated April 14, 2020 comprises 69 articles and amends 11 different laws, of which the primary one is Law No. 5275 on the Execution of Sentences and Security Measures.³² The overcrowding in prisons even under normal circumstances motivated the government to seek measures to decrease the prison population, and as a result Law No. 7242 on Amendments to the Law on the Execution of Sentences and Security Measures was enacted. It may be argued that the principal motivation of this law was to limit the number of cases and deaths in the event the COVID-19 pandemic spread to prisons by decreasing the number of inmates. Although the preamble of Law No. 7242 does not specifically refer to the pandemic, it would be correct to consider the

²⁷ Turkey's contempt for the rule of law, Report by Stockholm Center for Freedom, September 2017; <https://stockholmcf.org/wp-content/uploads/2017/09/Turkeys-Contempt-for-The-Rule-of-Law.pdf> ;

²⁸ "Turkey: Events of 2019," Human Right Watch, <https://www.hrw.org/world-report/2020/country-chapters/turkey>; "Turkey: Enforced Disappearances, Torture," Human Right Watch, April 29, 2020; <https://www.hrw.org/news/2020/04/29/turkey-enforced-disappearances-torture>; "Opposition MP says at least 46 people tortured in police custody in Turkish capital," December 21, 2019, <https://ahvalnews.com/torture/opposition-mp-says-least-46-people-tortured-police-custody-turkish-capital>

²⁹ "Turkey: Investigate Ankara Abductions, Disappearances," Human Right Watch, August 3, 2017, <https://www.hrw.org/news/2017/08/03/turkey-investigate-ankara-abductions-disappearances>; "Black Transporter Report: some of the abducted 28 people are still missing..." Bold, <https://boldmedya.com/en/2019/06/24/black-transporter-report-some-of-the-abducted-28-people-are-still-missing/>

³⁰ "Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 23 May 2017", <https://rm.coe.int/16809f209e>

³¹ "Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 17 May 2019" Council of Europe, August 05, 2020, <https://rm.coe.int/16809f20a1>

wording of Temporary Article 9/5 -- “due to the fact that the COVID-19 pandemic has been detected in our country” -- as the principal motivation behind the adoption of the law.

On the other hand, all media outlets, including those close to the government, referred to the bill as an “amnesty” during preliminary debates, debates in the general assembly and after publication of the law in the Official Gazette and its entry into force.³³ As explained in detail in the following chapters, it is clear that Law No. 7242 constitutes “amnesty” legislation given that Temporary Article 6 allows for a once-only early release from prison for offenses committed before a designated date and the execution of sentences without imprisonment for certain other offenses. The detailed discriminatory amendments made with Law No. 7242 to Law No 5275 on the Execution of Sentences and Security Measures and various other laws are analyzed below.

4.1. Changes made to mandatory time served prior to eligibility for release on parole

Article 48 of Law No. 7242 amends the period of a prison sentence required to be served prior to eligibility for release on parole as stipulated in Article 107 of the Law on the Execution of Sentences. Accordingly, the mandatory time to be served was decreased from two-thirds to one half the original sentence for eligibility for release on parole for many types of offenses. However, persons convicted of specified offenses are excluded from this reduction of mandatory time served.

Exceptions are:

“Those who are convicted of:

a) murder (Articles 81, 82 and 83) and sentenced to a term of imprisonment;

b) aggravated injury on account of its consequences (Article 87, Paragraph 2, Subparagraph d) and sentenced to a term of imprisonment;

c) torture (Articles 94 and 95) and torment (Article 96) and sentenced to a term of imprisonment;

d) sexual assault (Article 102, excluding Paragraph 2), sexual intercourse with a minor (Article 104, excluding Paragraphs 2 and 3) and sexual harassment (Article 105) and sentenced to a term of imprisonment;

e) sexual offenses (Articles 102, 103, 104 and 105) and sentenced to imprisonment, committed by a minor;

f) offenses against privacy and confidentiality (Articles 132, 133, 134, 135, 136, 137 and 138) and sentenced to a term of imprisonment;

g) “production and trade” of narcotics or psychotropic substances (Article 188) and sentenced to imprisonment, committed by a minor; and

h) offenses against state confidentiality and espionage (Articles 326 to 339) and sentenced to a term of imprisonment

shall benefit from release on parole only if they complete two-thirds of their sentences in prison. Moreover, the mandatory time served shall be two-thirds of the original sentence in cases of establishing and managing organizations for the purpose of committing crimes or offenses committed in the course of the organization’s activities; minors convicted of offenses within the scope of the counterterrorism law; and convictions of offenses included within the scope of

³² For Law No. 5275 dated December 13, 2004, see OG dated 29/12/2004 numbered 25685; <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5275.pdf>

³³ “Ceza İnfaz Kanunu Af”, [The Law on Execution of Sentences Amnesty] June 25, 2020, https://www.google.com/search?q=ceza+infaz+kanunu+af&rlz=C1CHBF_en-GBGB777GB777&sxsrf=ALeKk02iHQxfh-qSj4fn75387s2oj8UqcZg:1591459858621&source=lnms&tbn=isch&sa=X&ved=2ahUKE-wiFlrD8ye3pAhWGOcAKHXtwAio4ChD8BSgCegQIDBAE&biw=1366&bih=625

Law No. 2937 on the National Intelligence Services and National Intelligence Agency, dated January 1, 1983.”

Although amendments to the Law on the Execution of Sentences decrease mandatory time served for benefiting from parole to half the original sentence, the bill introducing the amendment does not provide a reasoning as to why certain offenses are excluded. It is also not plausible why the offenses listed above are excluded from the application of the amendment because the exclusions are not based on the conduct of the offenders³⁴ nor on the upper limits of the crime in question or legal classifications of offenses. For instance, in the following offenses, whose prescribed upper sentence limits are very high, the mandatory time served will be one-half the original sentence: Offenses against property (Articles 141, 142, 143), 27 years; robbery (Articles 148, 149), 15 years; embezzlement (Article 247), 18 years; extortion (Article 250), 12 years; bribery (Article 252), 18 years; and calumny (Article 267), 45 years. On the other hand, in the following offenses, whose prescribed lower sentence limits are as follows, the mandatory time served will be two-thirds the original sentence: sexual harassment (Article 105), three months; sexual intercourse with a minor (Article 104), two years; violation of confidentiality of communication (Article 132),

one year; and violation of privacy (Article 134), one month. Moreover, the mandatory term served for the offense of membership of a terrorist organization, whose lower limit is five years’ imprisonment as per Article 314/2, has been amended to three-fourths the original sentence, specific only to this group of offenses. It is clear that the legislature paradoxically provides favorable conditions for the enforcement of certain offenses for which it normally foresees heavier penalties due to the nature of the wrongdoing. However, in doing so, the legislature ignores the subject of the offense, the way the offense is committed and the nature of the wrongdoing that the actions entail, and just lumps certain crimes together to exclude them from the scope of the law.³⁵ The fact that “terrorism” and “espionage”-related crimes, which could be regarded as “political crimes,” were not added to the scope of the law means the exclusions list was compiled with the government’s political priorities in mind.

Another category of crimes whose mandatory time served for release on parole has been changed is the crime of establishing and managing organizations for the purpose of committing crimes or offenses committed in the course of the organization’s activities (organized crime). Article 107/4 of Law No. 7242 reduces the mandatory time

34 İzzet ÖZGENÇ, Adem SÖZÜER, ve Mahmut KOCA, Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun İle Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Teklifi”nin Değerlendirilmesi, (Bilimsel Görüş) İstanbul Üniversitesi Hukuk Fakültesi [Özgenç-Sözüer-Koca], [İzzet ÖZGENÇ, Adem SÖZÜER, and Mahmut KOCA, A critique of the Draft Law on Amendments to the Law on Execution of Sentences and Security Measures as well as Certain Other Laws (Academic Opinion) Istanbul University Law Faculty] April 10, 2020, p. 7; <https://cezahukuku-hukuk.istanbul.edu.tr/tr/duyuru/anabilimdali-baskanimiz-prof-dr-adem-sozuerin-prof-dr-izzet-ozgenc-ve-prof-dr-ma-5700450059007600410046007500590058005900370039007900700046006200610041004F003200370077003200>

³⁵ Özgenç-Sözüer-Koca, p. 7.

served to two-thirds from three-fourths of the original sentence for organized crime. However, the “terror offenses” which have been recently instrumentalized by the government-controlled judiciary to purge critics in Turkey seem to be left out of the scope of the law with “specific intention.” Under the classification of the Turkish Criminal Code, terror offenses are a sub-category of organized crime. Although organized crime benefits from the advantageous terms of the amendment, the so-called “terror offenses” do not, which may, in current judicial practice, include actions such as posting a tweet critical of the president or having any link to or association with a social group without committing any actual offenses.

Article 17 of Counterterrorism Law No. 3713 stipulates that Article 107/4 of Law on the Execution of Sentences No. 5275 shall apply to parole conditions for convictions within its scope of application. As per Article 107/4, release on parole is normally subject to three-fourths of the sentence having been served in convictions related to organized crime. This is reduced to two-thirds of time served with Law No. 7242. As such, prisoners convicted on terrorism charges would also normally have benefitted from this new regulation. However, Article 65 of Law No. 7242 prevents prisoners convicted of terrorism to benefit from the reductions brought about by Article 107/4.

Article 65 states that “The following sentence shall be appended to Article 17, Paragraph 1 of Counterterrorism Law No. 3713 dated 12/04/1991. “Mandatory time served for eligibil-

ity for release on parole, however, shall be three-fourths of the original sentence.”

Two matters deserve scrutiny regarding the legislature’s approach to terrorism offenses. First, the Law on the Execution of Sentences prescribes a mandatory time served of three-fourths of the original sentence solely for offenses falling within the scope of the Counterterrorism Law instead of the usual two-thirds. Second, although all release on parole matters are regulated by Law on the Execution of Sentences No. 5275, Law No. 7242 (the early release law) adds a parole



Devlet Bahçeli seen during his visit to Alaattin Çakıcı in the hospital.

provision exclusive to terrorism offenses as an addition to Article 17 of the Counterterrorism Law.³⁶ In other words, the Counterterrorism Law is the only statute that includes a release on parole provision other than those found in the Law on the Execution of Sentences in contradiction to the judicial system and the legislature’s law-making procedures. The fact that Law No. 7242 does not reduce the mandatory time served to qualify for parole for terrorism offenders while reducing the same for the offenders of creating and leading crime organizations (excluding terrorism) reveals that the government pursued a

particular agenda when drafting this law. Alaattin Çakıcı, a notorious organized crime boss who had been incarcerated for 16 years, was released under Law No. 7242. Devlet Bahçeli, chairman of the MHP, an ally of the ruling AKP, had visited the mob boss in the hospital and pressed for the adoption of a law that would ensure Çakıcı's release.³⁷ The government's fine tuning allowed for political prisoners to remain incarcerated for longer periods as "terror offenders," while mob bosses were released as "ordinary" organized crime offenders.

Rights organizations, including Amnesty International, published a joint statement arguing that Law No. 7242 would block the release of political prisoners and called on the government not to discriminate in measures taken to mitigate the serious health risks posed by COVID-19.³⁸ Similarly, the Bar Human Rights Committee of England & Wales criticized the fact that political prisoners were not released from prison and called on the government not to discriminate.³⁹

4.2. Amendments to special procedures for the execution of sentences

Article 50 of the early release law amends Article 110 -- "Special Procedures for the Execution of Sentences" -- of the Law on the Execution of Sentences. Paragraph 1 of the amended article stipulates that "upon the request of a person convicted of a premediated crime, a sentence of a total of one year, six months and in offenses involving negligence, with the exception of involuntary manslaughter, three years or less" may be served by spending either the weekends or the nights in prison. According to Paragraph 2 of the same article, a judge "may decide that convicts may serve time in their residences in cases where the sentences are

- a) a total of one year for women, minors and people over the age of 65;
- b) a total of two years for people over 70; and
- c) a total of four years or less for people over 75."

Amendments to Article 110/9.a of the Law on the Execution of Sentences stipulates that terror offenders may not benefit from the provisions of special procedures for execution of sentences set out in Paragraphs

³⁶ Vildan Yirmibeşoğlu, "İnfaz Kanununda 7242 Sayılı Yasa İle Yapılan Değişiklikler Bağlamında Terörle Mücadele Kanunu Kapsamında Verilen Hapis Cezalarında Şartlı Salıverme Oranı", [The Rate of Executed Imprisonment Sentences within the Scope of Counter-terrorism Law for Eligibility to Parole within the Context of Amendments made to the Law on Execution of Sentences with Law No. 7242] TURKAY Journal, 2020 May, Y: 4, V: 33, p. 3.

³⁷ "Alaattin Çakıcı: İnfaz düzenlemesiyle tahliye edilen organize suç örgütü lideri kimdir?," [Alaattin Çakıcı: Who is the 'organized crime boss' released with the new executions regulation] BBC, 16 April 2020, <https://www.bbc.com/turkce/haberler-turkiye-52296799>; "Alaattin Çakıcı da tahliye edildi," [Alaattin Çakıcı is released too] DW, April 16, 2020, <https://www.dw.com/tr/alaattin-%C3%A7ak%C4%B1c%C4%B1-da-tahliye-edildi/a-53142459>

³⁸ Amnesty International, 'Joint Public Statement Turkey: Rights groups call for urgent release of imprisoned journalists, human rights defenders and others, now at risk of Covid-19', March 30, 2020; <https://www.amnesty.org/download/Documents/EUR4420472020ENGLISH.pdf>

³⁹ Bar Human Rights Committee of England & Wales, "Statement: Political prisoners in Turkey in the face of the COVID-19 pandemic," April 3, 2020, <https://www.barhumanrights.org.uk/political-prisoners-in-turkey-in-the-face-of-the-covid-19-pandemic/>

1 and 2 of Article 110. Excluding political prisoners from these special provisions for women, minors and those over the age of 65, 70 and 75 demonstrates that the government specifically targeted and discriminated against political prisoners.

4.3. Changes in mandatory time served periods

One of the major changes introduced by the early release law involves mandatory time to be served periods. Probation constitutes an alternative method of the execution of sentences that entails the discharge of a convicted person under certain conditions before release on the parole date with a view to rehabilitating that person. Article 105/A of the Law on the Execution of Sentences titled “Execution of sentences by means of probation” stipulates that a convict who has “equal to or less than one year” to serve until the parole date may be released from prison on probation.

Temporary Article 6/1 of Law No. 7242 introduces a “three year” period instead of a “one year” period as originally foreseen in Article 105/A of the Law on the Execution of Sentences for crimes committed before March 30, 2020 with the exception of certain offenses. Offenses that may not benefit from this amendment which are depicted as a “special collective amnesty”⁴⁰ are:

- Murder
- Willful injury and aggravated injury on account of its consequences to lineal kinship, spouse, sibling or

those who are mentally or physically incapacitated and unable to defend themselves

- Torture
- Torment
- Sexual offenses
- Offenses against privacy and confidentiality
- Production and trade of narcotics or psychotropic substances
- Offenses defined in Book 2, Part 4, Chapters 4, 5, 6 and 7 of the Turkish Criminal Code as well as crimes that fall within the scope of Law on Counterterrorism No. 3713 dated April 12, 1991

“Offenses that fall within the scope of the amnesty are:⁴¹

- Threat
- Blackmail
- Coercion
- Deprivation of liberty
- Prevention of the right to education and training
- Prevention of the right to enjoy public services
- Prevention of the exercise of political rights
- Prevention of the exercise of freedom of belief, thought and conviction
- Home invasion
- Polluting the environment
- Counterfeiting money or documents
- Bid rigging
- Unlawful money lending
- Embezzlement
- Extortion
- Bribery
- Influence peddling
- Calumny
- Laundering proceeds of crimes

⁴⁰ Selami Er, “AYM eski raportörü yazdı: ‘İnfaz indirimi’ yasası iptal edilir mi?”, [Former Constitutional Court Rapporteour: Will ‘execution reduction’ law be annulled ?] Kronos, April 21, 2020, <https://kronos34.news/tr/aym-eski-raportoru-yazdi-infaz-indirimi-yasasi-iptal-edilir-mi/>

(money laundering)

- Acting contrary to measures to contain contagious disease

It is clear that in determining the scope of the law, the characteristics or gravity of offenses are not used as guidelines.⁴² When considered together with the regulations on release on parole (see section 3.1 above), for instance, a six-year sentence for one of the offenses listed above (offenses falling within the scope of an amnesty) would be served without any actual imprisonment by direct transfer to probation. That is because the mandatory time served required for eligibility for parole for the offenses listed in the case of a six-year imprisonment is one-half the original sentence, which makes the sentence three years for the purposes of release on parole and at the same time renders the offender eligible for release on probation. As a result, a six-year sentence would be considered to have been served without any actual time in prison. Similarly, a person sentenced to eight years of imprisonment due to a bribery conviction (Article 252 of the Turkish Penal Code) would be released after serving only one year in prison.

Conversely, a person sentenced to eight years of imprisonment for membership in a terrorist organization because of his/her lawful activities such as exercising freedom of expression and conscience or freedom of assembly, which do not constitute crimes in their own right, could only be released after serving five years of their sentence.

It would be too difficult to reconcile this understanding of justice with the principles of the rule of law or any modern criminal justice system because these amendments obligate political offenders with lighter prescribed sentences to effectively serve longer terms of imprisonment, while more serious offenders are set free.

4.4. Convicted women with children aged 0-6

As per Article 105/A Paragraph 3/a of the Law on the Execution of Sentences, “convicted women with children aged 0-6 who have less than or equal to two years to serve until their parole” may be released on probation. Temporary Article 6/2 of Law No. 7242 stipulates that for offenses committed before March 30, 2020 by women with children aged 0-6, the two-year period as originally set out in Article 105/A be applied as “four years” excluding the offenses listed below. This would mean, taking into account that release on parole will be granted after serving half the sentence, an eight-year sentence, for instance, would be executed without spending any time behind bars for convicted women with children aged 0-6.

The offenses excluded from the scope of Temporary Article 6/2 are:

- Murder
- Sexual offenses
- Offenses against privacy and confidentiality
- Offenses defined in Book 2, Part 4, Chapters 4, 5, 6 and 7 of the Turk-

⁴¹ Adem Sözüer, Twitter, April 12, 2020, <https://twitter.com/AdemSozuer/status/1249443049182199809?s=20>

⁴² Özgenç-Sözüer-Koca, p. 10

ish Criminal Code as well as offenses falling within the scope of the Counterterrorism Law.

“Terrorism offenses,” a government instrument to prevent political prisoners from benefitting from any favorable regulations, are again at play within this context. The difference is that in this instance not only the prisoner herself but her children aged 0-6 are also targeted. This regulation not only ignores the best interest of the child as enshrined in the UN Convention on the Rights of the Child but also disregards the scientifically proven, destructive effects of incarceration on children’s physical, mental and social development for the sake of keeping political prisoners behind bars for longer periods.

4.5. Elderly, ill and frail, and disabled prisoners

Article 105/A, Paragraph 3/b of the Law on the Execution of Sentences provides that “Elderly, ill and frail, and disabled prisoners who cannot look after themselves and have less than or equal to three years to serve until parole” may be released on probation. Temporary Article 6/2 of Law No. 7242 stipulates that for offenses committed before March 30, 2020, sentences of “convicted persons who are over 70 years of age” and “ill, frail or disabled convicted persons who are over 65 years of age and cannot look after themselves may be served by way of the application of probation as stipulated in Article 105/A regardless of the prison term left to be served until parole and of the maximum prison term limits.”

However, the following offenses

were excluded from this regulation as well:

- Murder
- Sexual offenses
- Offenses against privacy and confidentiality
- Offenses defined in Book 2, Part 4, Chapters 4, 5, 6 and 7 of the Turkish Criminal Code as well as the offenses falling within the scope of the Counterterrorism Law.

The last sentence of Article 105/A, Paragraph 3 of the Law on the Execution of Sentences stipulates that “illness and frailty, disability or elderliness shall be documented by a panel of physicians of a full-fledged hospital as determined by the Ministry of Justice or by the Council of Forensic Medicine.” That is to say, even though a state of illness, disability or elderliness has been officially and positively documented by a panel of physicians in the case of political prisoners, such persons would be discriminated against without a legitimate basis as they are excluded from the scope of the legislation. It is inexplicable why a 75-year-old incarcerated due to his political convictions who cannot take care of himself would remain behind bars, while another person in a similar condition but convicted of other ordinary crimes would be released. The government demonstrates a clear discriminatory stance even against vulnerable political prisoners.

Professor of criminal law Adem Sözüer criticized these regulations in an interview, saying:⁴³

“The amendments stipulate that if a mother has a child of up to six years of age, she should be released, but [the legislature] has inserted an exception for offenders of

certain offenses. If the legislation introduces a regulation for women with children, you cannot discriminate between women on the basis of the offense. Similarly, the Ministry of Justice can obtain a medical report for people over 65 if they suffer from certain illnesses and their symptoms go beyond elderliness and can release them. There are no maximum prison term limits, either. Regardless of the sentence ... even there, [you] discriminate based on certain offenses.”

The World Health Organization (WHO) declared (a) people over 60 years old and (b) people with underlying health conditions such as lung or heart disease, diabetes or conditions that affect the immune system to be vulnerable and at high risk.⁴⁴

Despite these warnings, the government made special efforts to keep political prisoners from these two high-risk groups behind bars where they are most vulnerable against COVID-19. Preventing women with children aged 0-6 and elderly, ill and frail or disabled people who cannot take care of themselves from benefitting from the new legislation through targeted provisions clearly shows that the government intentionally discriminates against political prisoners.

4.6. Lifting disciplinary punishments

Articles 38 and the provisions that follow it of the Law on the Execution of Sentences regulates disciplinary punishments and sanctions

that may be imposed by the prison administration such as restricting or barring communications, limiting visitations and placing the prisoner in solitary confinement. In the event a disciplinary punishment is given to an inmate, varying periods up to a year, depending on the punishment as prescribed by Article 48 of the Law on the Execution of Sentences, must elapse after the execution of the sanction so that the offender’s disciplinary penalty can be lifted by the prison administration.

Lifting disciplinary penalties is crucial in two respects: a) If an inmate’s conduct requires additional disciplinary action within the prescribed time period after the execution of a disciplinary penalty, a more severe sanction shall be applied; and b) the prescribed time period must also elapse in order for inmates to obtain a certificate of good standing. Without a certificate of good standing, prisoners may not be released on probation.

Temporary Article 9/1 of Law No. 7242 stipulates that disciplinary penalties will be immediately lifted if they have already been served, regardless of the time and the decision required under Article 48. Even in such a critical regulation the following provision has been added to the relevant article: “with the exclusion of offenses defined in Article 220 and Book 2, Part 4, Chapters 4,

⁴³ “Prof. Adem Sözüer'den infaz paketi değerlendirmesi: Bu yasa Anayasa Mahkemesi’ne gider, 'Raşan Affi' gibi kapsamı genişleyebilir.” [Prof. Adem Sözüer on executions bill: This will go to the Constitutional Court, its scope may expand as in ‘Raşan Amnesty.’] T24, April 13, 2020. <https://t24.com.tr/haber/prof-adem-so-zuer-den-infaz-paketi-degerlendirmesi-bu-yasa-anayasa-mahkemesi-ne-gider-rahsan-affi-gibi-kapsami-genisleyebilir,872519>

⁴⁴ “COVID-19: vulnerable and high risk groups” World Health Organization, <https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups>

5, 6 and 7 of Criminal Code No. 5237, sexual offenses and offenses that fall within the scope of Law No. 3713 as well as Article 9 Paragraph 3 of the Law.” As such, terrorism offenders and thus political prisoners are once again excluded from the benefits of the legislation.

5. CRITIQUE OF AMENDMENTS TO THE LAW ON THE EXECUTION OF SENTENCES INTRODUCED BY LAW NO. 7242

5.1. Structure of the law and legislative procedure

There is a plethora of legislative acts under Turkish criminal law that prescribe sentences of imprisonment for various offenses. Forestry Law No. 6831, Anti-Smuggling Law No. 5607, Check Law No. 5941, Banking Law No. 5411, Turkish Criminal Code No. 5237, Enforcement and Bankruptcy Law No. 2004 and Tax Law No. 213 are some examples of laws that prescribe terms of imprisonment. However, the rules relating to the execution of sentences and the calculations of mandatory time served are carried out in accordance with the Law on the Execution of Sentences. Article 65 of Law No. 7242 appends to Article 17 of the Counterterrorism Law the following provision: “However, the mandatory time served in matters of probation shall be three-fourths of the original sentence.” This article has altered the structure of the Law on the Execution of Sentences by introducing a stand-alone time to serve regulation exclusive to the

Counterterrorism Law.⁴⁵ In other words, “terror offenders” has become a unique group to which the most severe probation regime is exclusively applied.

There is no legal justification in terms of the structure of the law or legislative procedure for the government to add a special execution clause to Article 17 of the Counterterrorism Law. The goal here seems to be clearly political: to keep political prisoners incarcerated as long as possible. In other words, the government uses its majority in parliament to adopt laws that target its critics.

The following statement of professor of criminal law Adem Sözüer demonstrates how Law No. 7242 was drafted behind closed doors to serve the government’s particular political goals: “The draft had not been sent to any member of academia who was specialized in these issues. Nobody had this text beforehand. It was brought to the parliament at the last minute. When we met with the speaker of parliament or group deputy chairmen, we figured that unfortunately there was not much we could do.”⁴⁶

⁴⁵ Vildan, p. 2.

⁴⁶ “Prof. Adem Sözüer’in infaz paketi değerlendirmesi: Bu yasa Anayasa Mahkemesi’ne gider, #Rahşan Affi gibi kapsamı genişleyebilir.” [Prof. Adem Sözüer on executions bill: This will go to the Constitutional Court, its scope may expand as in ‘Rahşan Amnesty’.] T24, April 13, 2020, <https://t24.com.tr/haber/prof-adem-sozuer-den-infaz-paketi-degerlendirmesi-bu-yasa-anayasa-mahkemesi-ne-gider-rahshan-affi-gibi-kapsami-genisleyebilir.872519>

5.2. Principle of the rule of law

Article 2 of the Turkish Constitution stipulates that Turkey is a country governed by the rule of law. According to the Constitutional Court, “In a state governed by the rule of law, the law and the Constitution have absolute overarching authority on all state organs including the legislature. The legislature is always bound by the superior provisions of the law and the Constitution.”⁴⁷

In other words, even though the legislature has discretion, within the confines of the general principles of law and the constitution, over how to make laws, it is essential that they strive to draft them in such a manner that the laws benefit the entire public and contain general, objective and fair measures that fulfil equitable principles.⁴⁸

Yet, it appears that the underlying motive behind the introduction of Law No. 7242 has been, from the start, not to strive for the public good but to prevent the release of political prisoners at all costs. The whole process of lawmaking, from the moment the bill is introduced until its adoption by parliament, clearly demonstrates that.

A joint statement on Law No. 7242 by 11 renowned Turkish legal experts underscores that regulations on reducing mandatory time served do not seek the public good but criminalize the political opposition, lay the groundwork for violations of the right to life and dam-

age the public peace.⁴⁹ Moreover, the joint statement says that “Constitutional rights such as freedom of expression and the right to a fair trial, of those who were convicted on ambiguous charges of aiding and abetting or membership in a terrorist organization or disseminating terrorist propaganda are simply disregarded. These people were in reality tried and convicted only because they expressed their thoughts, through journalistic activities or through other means, or attended demonstrations.”

5.3. Equality before the law

Article 14 of the European Convention on Human Rights (ECHR) and Article 10 of the Turkish Constitution safeguard the principle of equality before the law. This principle is considered to be one of the building blocks of a democratic society because it protects individuals from the arbitrary actions of governments. Both the ECHR and the Constitution explicitly and positively bar discrimination on the basis of political convictions. Indeed, according to the Constitutional Court, a violation of the principle of equality is considered to be a violation of the principle of the rule of law.⁵⁰

In fact, Article 2/1 of the Law on the Execution of Sentences (Basic Principle of the Execution of Sentences) states that “rules pertaining to the execution of sentences and security measures shall be applied without any discrimination whatsoever in regards to philosophical convic-

⁴⁷ Constitutional Court Decision of 27/05/1999, Case No. 1998/58, Decision No. 1999/15, OG dated 4/03/2000 numbered 23983.

⁴⁸ Alparslan Altan, Kanun Yapma Tekniği [Legislative Techniques], Symposium, Ankara 2015, p.12 <http://tbbyayinlari.barobirlik.org.tr/TBBBooks/545.pdf>

tions, ethnic or social roots, political or other opinions and thoughts, economic/financial means and other social statuses.”

Likewise, all the relevant international and domestic legal instruments prohibit discrimination on different grounds including those based on “political opinions.”

Despite these safeguards and as discussed above in detail:

- The mandatory time served for eligibility for release on parole is reduced to one-half from two-thirds of the original sentence with the exception of political prisoners (Article 107 of the Law on the Execution of Sentences);
- Certain categories of prisoners are allowed to spend weekends or nights in prison as part of the execution of their sentences with the exception of political prisoners (Article 110 of the Law on the Execution of Sentences);
- A “special collective amnesty” provision allows for early release with three years to serve remaining instead of one year as originally set out in Article 105/A of the Law on the Execution of Sentences, entailing a two-year reduction in sentences with the exception of political prisoners;
- Women with children aged 0-6 shall be released on probation four

years before parole instead of two years as originally stipulated in Article 105/A with the exception of political prisoners;

- “Convicted persons over 70 years of age” and “elderly, ill and frail or disabled prisoners over 65 years of age who cannot take care of themselves” are allowed to be released regardless of the remaining prison sentence with the exception of political prisoners (Temporary Article 6 of the Law on the Execution of Sentences); and
- Disciplinary penalties and sanctions are lifted “if they are executed regardless of the time and the decision prescribed by Article 48” with the exception of political prisoners.

Under Article 61 of the Turkish Criminal Code, courts determine sentences considering the individual circumstances and consequences of the offense as well as the characteristics of the offender (the so-called individualization of sentencing). After sentencing, the execution of sentencing phase begins, and the goal in this phase is to rehabilitate the prisoner and integrate them back into the society. In fact, in a 1991 decision regarding the Counterterrorism Law the Constitutional Court stated the following:

“... the execution of a sentence aims to rehabilitate the convict and to reintegrate them back into society, regardless of the nature of the offense in question.

⁴⁹ For the joint statement of former member of the Constitutional Court Ali Güzel, Prof. Dr. Cem Eroğul, Prof. Dr. Ergun Özbudun, Ass. Prof. Kerem Altıparmak, Prof. Dr. Köksal Bayraktar, Prof. Dr. Oktay Uygun, Prof. Dr. Osman Can, Prof. Dr. Ozan Erözden, Dr. Rıza Türmen, the first Turkish judge to serve in ECtHR, Prof. Dr. Rona Aybay and Prof. Dr. Yaman Akdeniz, see T24, May 04, 2020, <https://t24.com.tr/haber/11-hukukcudan-infaz-yasa-si-aciklamasi-anayasa-mahkemesi-nin-esitlik-gozetmeyen-toplumsal-barisa-zarar-veren-yanlisliklari-duzeltecegine-inaniyoruz.876453>

⁵⁰ İNCEOĞLU, Sibel (2001) ‘Türk Anayasa Mahkemesi ve İnsan Hakları Avrupa Mahkemesi Kararlarında Eşitlik ve Ayrımcılık Yasağı Çerçevesinde Af, Şartla Salıverme, Dava ve Cezaların Ertelenmesi’, Anayasa Yargısı, [Amnesty, Probation, Postponement of Trials and Sentences within the Context of the Principle of Equality and Prohibition of Discrimination in Turkish Constitutional Court and European Court of Human Rights Decisions. Constitutional Law] 17 (1): 41-70, <https://dergipark.org.tr/en/pub/anayasayargisi/issue/52001/678098>

Fulfilling this aim requires the implementation of a separate program irrespective of the offenses. All efforts are aimed at eliminating the psychological, environmental, social and individual factors [that led to the offenses] through a specific program for the execution of sentences that prevents the repeat of offenses. Such a program should be regulated based on the observable good conduct of the offender during the execution of the sentence, not on the offense itself. This in turn necessitates an execution of sentence regime based on the same principles for all convicts, without any discrimination, and the monitoring of the outcomes. Early release of one of two convicts who were sentenced to an equal prison term based solely on the type of offense entails differential execution of the same sentence and leads to inequality.

The modern approach to probation is to determine the time to release on probation based on observations regarding the improvement of the convict's behavior, provided that the minimum term is served for the offense in question. According to this approach, the offense that led to conviction does not have a determining role in the probation decision.

As such, a discriminatory approach to probation among offenders who are sentenced to equal prison terms is not compatible with the principle of equality before the law enshrined in Article 10 of the Constitution, and there is no legitimate basis for such discrimination.⁵¹ “

The joint statement of 11 law experts mentioned above criticizes the fact that acts in the “nature of political opposition” are excluded from the scope of the new execution of sentence regulations by maintaining that: “Although COVID-19 is cited as the main motive for the new regulation, discriminatory provisions violate the right to health, which is directly related to the right to life,

and as such, pave the way for violations of the right to life. Lenient execution of sentences and special amnesty provisions are enacted based on political choices or as a favor. Acts of political opposition, however, are excluded regardless of whether they include any element of violence or not. Thus, the public good is not strived for and the principle of equality is violated without any legitimate grounds.”⁵²

5.4. The principle of non-retroactivity

Article 65 of Law No. 7242 adds the following provision to Article 17/1 of the Counterterrorism Law: “However, the mandatory time served in matters of probation shall be three-fourths of the original sentence.” As discussed in detail above, the motive behind adding this provision to the Counterterrorism Law is to prevent political prisoners from benefitting from the provisions introduced by Law No. 7242. By introducing a new provision to the Counterterrorism Law and applying it retroactively, the principle of non-retroactivity is violated.

The principle of no punishment without law as enshrined in Article 7 of ECHR and Article 38/1 of the Constitution prohibits retroactive application of a new law unfavorable to the offenders, while allowing such an application if the later law is favorable to the offenders (*lex praevia*). In this context, Article 7/2 of the Criminal Code stipulates that if laws in force at the time of the offense and laws adopted later on are different, the provisions favorable to

⁵¹ Constitutional Court Decision of 08/10/1991, Case No. 1991/34, Decision No. 1991/34, Official Gazette dated 12.12.1991 numbered 21079, <https://normkararlarbilgibankasi.anayasa.gov.tr/ND/1991/34?EsasNo=1991%2F34>

the offender should be applied and enforced. In Turkish criminal law, the non-retroactivity of laws is iron clad and there are no alternative interpretations in this regard.

Article 17/1 of the Counterterrorism Law reads: “For persons convicted of crimes that fall within the scope of this law with regard to parole and probation sanctions, Article 107, Paragraph 4 and Article 108 of Law No. 5275 on the Execution of Sentences and Security Measures dated December 13, 2004 shall be applied.” Until the adoption of Law No. 7242, the provisions of Article 107/4 of the Law on the Execution of Sentences had applied to persons convicted under the Counterterrorism Law in regards to the matter of probation. Law No. 7242 has amended Article 107/4 and decreased the mandatory time served to two-thirds instead of three-fourths of the original sentence. Under Article 7/2 of the Criminal Code, this favorable provision should have been applicable to all offenses committed before the law entered into force. With the sentence appended to Article 17/1 of the Counterterrorism Law, the mandatory time served has remained three-fourths of the original sentence for crimes under the scope of the law. However, the provision added to Article 17/1 of the Counterterrorism Law is explicitly unfavorable for offenders and was adopted later. Therefore, it may be argued that it shall not be applicable to offenses committed before its date of entry into force.

The government’s intent to aggravate the execution of sentences for political offenders is obvious not only in the way new laws are enacted in a manner contrary to the basic principles of criminal law, but also in the manner of how such laws are enforced by the government-controlled judiciary. Indeed, Chairman of the 3rd Criminal Chamber of the Supreme Court of Appeals Osman Atalay prepared a note titled “Mandatory Time Served for Probation” that was “especially for the benefit of judges and prosecutors.” According to the note, “in offenses in which the date of the offense is prior to March 30, 2020,” “mandatory time served for terror offenders convicted under the Counterterrorism Law shall be three-fourths of the original sentence.” This note was also shared on social media by AKP Deputy Chairman Yılmaz Tunç.⁵³

It goes without saying that such a “note” would be perceived as “instructions” and that judges and prosecutors would act accordingly. This is especially true given the constant anxiety that judges and prosecutors have been living through since the huge purge that started in the aftermath of the coup attempt of July 15, 2016. After all, one-third of all members of the judiciary (4463 judges and prosecutors) were dismissed on accusation of links to terrorist organizations; many judges and prosecutors including members of the Constitutional Court, the Supreme Court of Appeals and the Council of State were imprisoned;

⁵² “11 hukukçudan ‘infaz yasaşı’ açıklaması: Anayasa Mahkemesi’nin; eşitlik gözetmeyen, toplumsal barışa zarar veren yanlışlıkları düzelteceğine inanıyoruz,” [A statement on the Law on Execution of Sentences by 11 law experts: We believe the Constitutional Court will correct the fallacies that disregard equality and disturb communal peace.] T24, May 4, 2020, <https://t24.com.tr/haber/11-hukukcudan-infaz-yasasi-aciklamasi-anayasa-mahkemesi-nin-esitlik-gozetmeyen-toplumsal-barisa-zarar-veren-yanlisliklari-duzeltecegine-inaniyoruz,876453>

and new investigations into serving judges and prosecutors on terrorism charges still continue.⁵⁴



World Health Organization

European Court of Human Rights building in Strasbourg

5.5. The right to life

States have positive obligations to ensure the right to life as enshrined in Article 2 of the ECHR. That is to say, a state must not only refrain from intentionally and unlawfully killing a person but also take positive steps to protect the right to life and eliminate threats to life. Article 17 of the Turkish Constitution also safeguards the right to life as an inalienable right.

The World Health Organization (WHO) called for special precautions in prisons, saying inmates are particularly vulnerable to the COVID-19 pandemic.⁵⁵ Turkey's prison population is especially vulnerable due to severe overcrowding, difficulty in accessing health services and a shortage of cleaning products⁵⁶. As such, special precautions

against COVID-19 are of tremendous importance.

Under these circumstances, excluding political prisoners from the early release regulations introduced by Law No. 7242 paves the way for violations of the right to life and in cases of actual death, it constitutes a violation of the right to life. The fact that such discriminatory regulations are not applied even to “elderly, ill and frail, and disabled who cannot take care of themselves,” who are in the high-risk group, demonstrates the scale of violations posed to the right to life of inmates in Turkish prisons.

⁵³ Yılmaz Tunç, Twitter, April 18, 2020, <https://twitter.com/yilmaztunc/status/125157838966655041?s=20>

⁵⁴ “Turkey’s post-coup crackdown,” Turkey Purge, <https://turkeypurg.com/>

⁵⁵ “Prevention and control of COVID-19 in prisons and other places of detention,” World Health Organization, <https://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/focus-areas/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention>

⁵⁶ “Marmara Bölgesi Hapishaneleri (Ocak – Şubat – Mart 2020) Hak İhlalleri Raporu,” İnsan Hakları Derneği, [Marmara Region Prisons (January – February – March 2020) Report on Rights Violations, Human Rights Association] May 10, 2020, <https://www.ihd.org.tr/marmara-bolgesi-hapishaneleri-ocak-subat-mart-2020-hak-ihlalleri-raporu/>

6. CONCLUSION

As the global war on the COVID-19 pandemic started to gain traction, the Turkish government enacted Law No. 7242 on Amendments to the Law on the Execution of Sentences to reduce the number of inmates in severely overcrowded prisons. The new law allowed for the early release of prisoners by decreasing the period of time required to be served for eligibility for parole and probation as set by Law No. 5275 on the Execution of Sentences.

Law No. 7242 was drafted in secrecy by the government in such a way as to prevent any political prisoner from benefitting from its provisions. As explained above, political prisoners have been excluded with specific intent from all reductions in prison terms for eligibility for parole and probation. This approach is obvious in the letter of the law in question. The early release law even excluded women with children and the highest risk groups of political prisoners, such as the elderly, from its scope. The government was clearly intent on punishing political prisoners once again through a discriminatory regime of the execution of sentences.

Discriminatory provisions of the early release law violate the principles of the rule of law, equality before the law and the right to life as defined in the ECHR and the Turkish Constitution. As a matter of fact, the main opposition CHP took the

issue to the Constitutional Court for annulment.

On July 17, 2020 the Constitutional Court partly rejected the CHP's application, which argued that some of the provisions of Law No. 7242 had the characteristics of an amnesty and therefore the parliamentary quorum should have been three-fifths rather than a simple majority. This part of the application was rejected by the Constitutional Court, but by only nine votes to seven. In other words, seven members of the Constitutional Court had the view that some of the provisions of the Law on the Execution of Sentences were of the nature of an amnesty.⁵⁷ The substantive issues of the application filed by the CHP are still expected to be examined separately by the Constitutional Court.⁵⁸

Discriminatory provisions of Law No. 7242 continue to pave the way for violations of the right to life safeguarded by the Turkish Constitution and basic international legal norms. States' responsibility for deaths in prison is strictly regulated and regarded as an objective responsibility giving rise to positive rights for individuals under international law. Therefore, it could be argued that the government shall be responsible for all deaths in prison after the enactment of Law No. 7242 due to the discriminatory provisions excluding political prisoners from its scope.

⁵⁷ For Constitutional Court Decision of 17.07.2020, Case No. 2020/44, Decision No. 2020/41, see Resmi Gazete [Official Gazette] dated 07/10/2020 and numbered 31267, available at <https://www.resmigazete.gov.tr/eskil-er/2020/10/20201007-7.pdf>

⁵⁸ "AYM CHP'nin infaz yasaşı başvurusunu reddetti" [Constitutional Court rejects CHP's enforcement law petition], Birgün, July 17, 2020, <https://www.birgun.net/haber/aym-chp-nin-infaz-yasasi-basvurusunu-reddetti-308703>