



Opinion and Recommendations about Proposed Amendments to the Law on the Execution of Sentences for Prevention of COVID-19 Outbreak in Jails and Prisons

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I. The WHO declared COVID-19 Outbreak a Pandemic

We are passing through days of rapid losses of lives globally due to the COVID-19 outbreak. The speed manner of the infection, the increased human mobility between countries caused the virus to spread over a wide geography. COVID-19 constitutes the primary issue on the agenda of countries even in ongoing physical or cold war situations.

Considering that epidemics affected all aspects of life throughout history, questions such as what course the progress of human rights will take, and what developments will take place in the area are issues of concern. For instance, will it be possible to observe a concrete discussion on the right to health and environment, and the emergence of superior norms regarding those rights which are considered to be secondary in status today? It is clear that the struggle for human rights will develop novel ways and methods in the process, against the background of ongoing and new developments. However, we sadly need to emphasize that the most critical discussion of this period when the pandemic is increasingly raging is the right to life. It is observed that COVID-19 has stopped life in all areas, authorities are in crisis, unable to ensure the individuals' right to access to health care, and even the health care systems of well-developed countries are insufficient in the face of the pandemic.

II. Social Distancing Is Impossible in Prisons

As the pandemic has turned into a global peril, it should be noted that the disadvantaged individuals who are unable to access means to protect themselves against the outbreak in places of confinement find and will continue to find their various rights, primarily the right to health and the right to life, being violated. Therefore, we are deeply concerned about the fact that the pandemic which influenced almost the whole world might transform prisons, the places where confinement is most intense, into areas of disaster.

Turkey has 263 closed prisons, 76 open prisons, 4 juvenile correctional facilities, 9 women's closed prisons, 7 women's open prisons, and 7 juvenile closed prisons, which makes 366 prisons in total. During the Parliamentary budget discussions on 09.01.2019, it was noted that the total capacity of those prisons is 233,194 and that there are 282,703 inmates.¹ It is evident that the capacity for Turkish prisons is far exceeded. These figures unfold a horrid fact. In this context, the capacity occupancy ratio concretely exposes that it is impossible to perform the necessary social distancing and follow the rules of hygiene and disinfection imperative to stopping the spread of pandemic in jails and prisons.

No matter how strictly social distancing, hygiene and disinfection rules are followed and implemented to the point, it is absolutely obvious that an outbreak of COVID-19 cannot be avoided among inmates due to the physical conditions of jails and prisons. As a matter of fact, the sheer number of inmates in wards renders this purpose utterly unattainable and absolutely impractical. It might be helpful to illustrate the situation by providing details about the physical conditions in Silivri Prisons, for instance, which are alleged to have the best physical conditions among all Turkish prisons.

Silivri has 9 L-type prisons, and one of them, Prison No. 5 is assumed to have relatively better

¹ Civil Society in Penal System Association (10.01.2019)

conditions. Originally built for 7 inmates, the 2-story wards in this prison host 5 cells on the top floor, and 2 cells, two showers, two toilets, one kitchen sink and a dining/lounge space in which 7 tables for 4 people each are fitted, on the bottom floor. Each one of the 7 cells in the wards is approximately 8 square meters wide.

Although these are supposed to be single-bed cells, today each cell contains 3 double bunk beds, making them accommodate 6 inmates.

An estimation based on the number of beds shows that 30 to 40 inmates are kept in each ward. This being the case, 5-6 inmates share a single 8 square meter cell, 30-40 people share the same ward and leave for fresh air together to the 10 to 3 meters yard adjacent to the dining lounge and eat together, which practically means that the air they breathe mixes together and that they almost share the air they breathe. In this example, in Silivri L-Type Closed Prison, protection against the COVID-19 outbreak is virtually impossible, and we need to stress that the conditions in so many other prisons are unfortunately much worse than the example above. In such an environment, it is impossible to even entertain the notion that social distancing can actually be performed or considered as an effective precaution against the spread of the pandemic.

III. Necessary Measures for Prisons Should Be Taken Immediately

Alongside the limits of physical conditions, it should not be forgotten that the inmates have inadequate means in terms of hygiene as well. Although the conditions vary from prison to prison, the inmates have access to a rather limited number of hygiene products, which makes it extremely difficult for the inmates to ensure disinfection, the second most important precaution against the pandemic after social distancing.

The number of inmates is critically above the prison capacities and this means a much narrower social distance, increased contact between inmates and a rapid spread of the pandemic. Due to the country-wide COVID-19 outbreak, taking necessary measures for the health of inmates, prison staff, inmates' relatives and the lawyers who will be in contact is the responsibility of the public administration. Without a doubt, such measures should be taken in full compatibility with human dignity and equality, and without causing any violations of rights.

The disease spreads by the droplets present in the coughs and sneezes, and even in the air breathed by an infected person, and through touching contaminated surfaces or objects and then touching one's eyes, nose, or mouth. The virus settles in the lungs, passing through the respiratory tract, causing fever, cough, joint pain, fatigue, loss of appetite; and respiratory distress is experienced in advanced stages. A definitive diagnosis of the disease is established via tests. However, as medical experience shows, immediate treatment might be required even before test results are obtained, following the general medical situation and an evaluation of chest X-rays of the patient.

To avoid or decrease the contamination, washing hands with soap, cleaning the surfaces and living areas, and letting fresh air into the environment is required. Besides these measures, exercise, a sufficient and balanced diet, drinking plenty of water and resting is recommended. As is well known, the disease progresses more severely in people with chronic illnesses, compromised immunity and in elderly patients.

In the light of the information provided above:

1. It is highly important to inform all the personnel working in jails and prisons about matters

such as the modes of transmission of the virus, prevention measures, and symptoms in accordance with the announcements of the Turkish Medical Association, and to inform the inmates, via medical or education professionals when possible.

2. Hygiene products should be provided for free in jails and prisons, and common living areas should be disinfected by the administrations.

3. Providing a sufficient and balanced diet for inmates is more important than ever.

4. Those who are in the risk groups mentioned above and disabled inmates, inmates with children, and pregnant inmates should be kept in hygienic environments with convenient capacities, not in over-crowded wards.

5. Visitors should be informed about the rules and precautions; a convenient environment and protective material should be provided in cases of contact with inmates. Precautions should be taken to protect both sides during body and belonging searches.

6. It is clear that the concerns prevalent in society are felt more severely by the inmates and their relatives. Access to protective health care and treatment services should immediately be ensured for all inmates. Persons with relevant symptoms should rapidly get tested, and they should be kept in appropriate places without any contact with other inmates until their test results are obtained.

7. In cases where test results are positive, rapid tests should ensue for other inmates in contact, and all these should be made in compatibility with human dignity and the principle of protection of private data.

8. Decisions such as in-patient treatment, supervision in hospital or isolation outside of the hospital are medical decisions that can only be made by a physician's evaluation via admittance to a Medical Institution. Therefore, considering their conditions, inmates should be taken to health institutions and hospitals "without hesitation." More hygienic and sanitary vehicles should be provided for their transfer instead of the usual ring vehicles.

iv. Inmates Should be Released as a Requirement of the Right to Life

As is well known, jails and prisons are places of confinement where individuals are kept as either arrested or convicted inmates. Although demands for precautionary measures against a dangerous pandemic such as COVID-19 are important, it is clear that their efficiency is questionable and their effects are extremely limited. What is actually and absolutely necessary is the release of inmates without discrimination.

We need to make a distinction between our evaluations for and recommendations with regard to arrested inmates and convicted ones. The arrested are confined without a finalized court decision; as such, arrest is not a 'punitive' measure but a preventive one. Decision-making authorities for arrests are judges during the investigation and prosecution, and courts during the trial.

v. Inmates Should be Equal in Execution of Punishment, with No Discrimination

We also need to mention the amendment to the law of on the execution of sentences that is once again on the legislative's agenda due to the pandemic. It is often called "the amnesty discussion" in the public opinion, but technically cannot be considered as an amnesty.

The Turkish Parliament and the public opinion currently discuss certain amendments in the Legislative Proposal to Amend the Law on the Execution of Sentences and Security Measures and Other Laws. When the amendments in question are examined, it is observed that it contains regulations on the duration of sentence execution of convicted inmates, and it should be evaluated against the constitution and legislation. Although the proposal can be indicated as a possible solution to the question of how to decrease the number of inmates in the course of the pandemic, it should be noted that the proposal will violate the right to life, as certain crimes and groups of crimes are left out of the scope of the proposal. The proposal, in that sense, is against the principle of equality enshrined in the international law and the constitution, and presents discrimination in its current formulation.

The right to life is the most fundamental right. In the face of this right, other rights are derivative and secondary. The exercise and the existence of all other rights rely on this right. In this aspect, the right to life is the most important value protected by the law.

The right to life constitutes the core of the inalienable rights in the European Convention on Human Rights. If inmates are not released and in case they are not released if necessary measures are not taken, it is probable for the virus to rapidly spread and threaten the life of those in high risk or those in risk, such as those with chronic illnesses and the elderly.

However, the proposed amendment stipulates release for some inmates and leaves others out of its scope. Such a difference in conduct constitutes discrimination according to Article 14 of the European Convention on Human Rights, unless it relies on an objective justification, has a legitimate purpose, and unless the purpose and the method has reasonable proportionality. The amendment proposal in question does not feature any reasonable and objective reason, and particularly discriminates against the inmates arrested or convicted within the scope of Anti-Terror Law No. 3713.

On the other hand, Article 2 of the Law on the Execution of Sentences and Security Measures specifies the essential principle of execution. According to this, rules regarding the execution of penalties and security measures shall be applied without discrimination of race, language, religion, sect, nationality, color, gender, philosophical opinion, national or social origin, political or other views or opinions, economic power and social status in any other way. The amendment proposal in question is discriminatory, and all inmates who are left out should be included in its scope. Otherwise, the amendment does not comply with the requirements of the rule of law.

On the other hand, it should be noted that a great number of inmates are only arrested ones who have not been convicted to any sentence yet, and they should be immediately released. The release of arrested inmates is only possible via court and judge decisions. Article 13 of the Constitution of Turkey features criteria regarding restriction on fundamental rights and liberties, and the Criminal Procedure Code No. 5271 clearly states that in the investigation carried out for a crime, if there are reasons for the arrest, it may be decided to put the suspect under judicial control instead of arrest. As arrest is the severest protection measure, primarily applying various other judicial control provisions are necessary.

Particularly in recent years, we witness that arrest warrants are almost used as a means of punishment. As a result of excessive and disproportionate decisions that do not meet the criteria foreseen either the in Turkish Constitution or the Criminal Procedure Code, individuals' rights to liberty and the right to a fair trial are violated. If simply the Criminal Procedure Code is applied in a just and meticulous manner, it is clear that a large number of inmates would be released.

It is crucial to state that, with regard to the release of inmates under pre-trial detention, judicial control provision of "not to leave the place of residence" regulated in Article 109 of Criminal Procedure Code No. 5271 and other optional measures should be considered. The manner of application of the mentioned measure is regulated in Regulation on Probation Services No. 28578, and according to the regulation, the individual liable for the measure shall be confined at home via an electronic ankle monitor.

Certainly, individuals' freedom is essential, especially during the COVID-19 pandemic, for suspects or defendants who are not directly eligible to be released, a release for protection against the pandemic is legally possible. We would like to remark that a decision for judicial control measures can only be given when there are reasons for arrest as required by legal regulations, and essentially, it is compulsory to replace them with judiciary control measures when an arrest is deemed necessary.

In this respect, as lawyers and human rights defenders, we state that the right to life is an absolute right. We remind that numerous decisions have been ruled against the country by the European Court of Human Rights due to false imprisonment, the benefits expected from arrest can be ensured through judiciary control, and the application of arrests as a policy of punishment should be immediately abandoned.

vi. The Road to Social Peace Goes Through Justice

The right to life is one of the most important rights and is a fundamental value of the rule of law. This right is one of the few ECHR provisions which features obligations that cannot be suspended even in extraordinary situations. The State's responsibility to protect the right to life is not restricted to the prohibition on intentional deprivation of life, stated in Article 2, Paragraph 1 of the Convention. The State is also obliged to take active preventive measures against the risks of the violation of the right to life that might be brought upon persons through neglect or gross negligence. The State is under the obligation to protect the right to life of inmates in prisons as well, which is protected by the ECHR and the Constitution, to develop effective countering mechanisms against the spreading risk of the pandemic in prisons and to prevent prisons from becoming areas of disaster.

- 1- Measures should immediately be taken to enhance medical facilities in prisons, to provide inmates with health care services that are compatible with human dignity, to maximize access to hygienic products for disinfection in order to prevent the spread of

COVID-19 contagious disease in prisons.

- 2- The right to life and the right to a fair trial for inmates pending trial should be respected and all inmates under arrest should be immediately released without discrimination. In addition, while releasing the inmates pending trial for crimes of violence against women and children, these individuals should be kept away from their victims by meticulous implementation of the provision of the Law No. 6284 on Protection of the Family and Prevention of Violence Against Women and judicial control provisions.

- 3- As it is impossible to prevent the spread of the pandemic due to prison conditions, the proposal for amendment of the law on execution of sentences should be readjusted within the frame of the right to life, the principle of equality, and prohibition of discrimination, to ensure the inclusion of all inmates who are currently left outside of the scope.

Respectfully announced to the general public and public opinion.

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