



**BRIEFING NOTE
ON THE
ANTI-TERRORISM
LAW AND HUMAN
RIGHTS DEFENDERS
IN TURKEY¹**



1. Based on the IHD (HRA) report 'İnsan Hakları Savunucuları Üzerinde Demir Kafes: Terörle Mücadele Kanunu' (2022) by Öztürk Türkođan.



1. INTRODUCTION

Many governments employ counter-terrorism and national security legislation to partially or fully restrict freedoms and rights and to silence the voices of human rights defenders (HRDs), despite the fact that they are required to protect human rights in equal measure to protecting individuals from terrorist acts. Turkey is a prime example of this situation. Since the end of the peace process for the 'Kurdish Issue' in 2015, in particular, various repressive policies and laws have been introduced, alongside efforts to establish a permanent authoritarian regime in Turkey. A key part of this process was the creation of specialised courts in 2015, to try people for offences under the Anti-Terrorism Law of Turkey and the Domestic Security Package Law. Other measures soon followed, with the declaration of a two-year state of emergency (SoE) following the failed coup attempt in 2017, the introduction of a new regime known as 'the Turkish-style Presidential Regime' in 2017, and the adoption of Law No. 7154 making the SoE measures permanent, and amending the Criminal Code and the Anti-Terrorism Law of Turkey, among others. On 25 April 2017, the Parliamentary Assembly of the Council of Europe (PACE) reopened its monitoring process against Turkey, due to serious concerns about the respect for human rights, democracy, and the rule of law in the country.

Unfortunately, the ECtHR's constant referrals to the Constitutional Court of Turkey, in an attempt to reduce its caseload, is serving to erode the protection of human rights values. In this period, Turkey failed to abide by two judgements of the ECtHR which, as an exception to this

rule, did find Turkey had violated human rights (Kavala v. Turkey and Demirtaş v. Turkey). As a result, the Council of Ministers launched infringement proceedings under Article 46(4) of the ECHR and adopted a referral decision on Turkey's refusal to ensure the immediate release of Osman Kavala on 2 February 2022.² Turkey is the second country, after Azerbaijan, to be subject to these proceedings. Turkey's Justice Minister, Bekir Bozdağ claimed that Kavala's ongoing pretrial detention was based on other pending cases against him, despite the ECtHR having clearly stated that its rulings covered all cases against Kavala and Demirtaş.³



ON 25 APRIL 2022, ISTANBUL'S 13TH ASSIZE COURT ISSUED ITS FINAL VERDICT IN THE GEZI PARK CASE AGAINST KAVALA AND 16 OTHER HUMAN RIGHTS DEFENDERS, SENTENCING KAVALA TO AGGRAVATED LIFE IMPRISONMENT 'FOR ATTEMPTING TO OVERTHROW THE GOVERNMENT' AND SEVEN OTHER DEFENDANTS⁴ TO 18 YEARS IN PRISON FOR AIDING HIM.

This briefing note aims to reflect on the instrumentalization of the counter-terrorism legislation and policies in Turkey and their impact on HRDs.

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

3. <https://bianet.org/bianet/siyaset/259927-bozdog-dan-kavala-demirtas-ve-aihm-aciklamasi>.

4. Mücella Yapıcı, Çiğdem Mater, Hakan Altınay, Mine Özerden, Can Atalay, Tayfun Kahraman and Yiğit Ali Ekmekçi.

2.A SWEEPING AND VAGUE DEFINITION OF TERRORISM

Although there is no internationally-accepted definition of terrorism, substantial guidance can be found in the Suppression Conventions and the Declarations approved by the UN General Assembly.⁵ This guidance is intended to help States comply with the principles⁶ of legality, necessity and proportionality.

The Anti-Terrorism Law No. 3713 provides vague and excessively-broad definitions of terrorism⁷ and of terrorist offenders⁸, posing a serious threat to the freedoms of assembly, expression and opinion. These overly-broad definitions of types of behaviour constituting a criminal offence and their legal consequences can easily impinge on the exercise of freedoms and rights and can lead to 'arbitrary interference' (in the form of arbitrary arrest and detention), according to the ECtHR⁹. Under this legislation, the explicit requirement for a terrorist act to involve serious bodily harm or death is obscured, meaning that any protest, dissent or peaceful demonstration can be deemed a terrorist act and, as a result, human rights defenders and civil society can be arbitrarily labelled 'terrorist offenders.'

5. Communication by Special Rapporteurs. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunication-File?gId=25482>.

6. Article 15(1), ICCPR.

7. Article 1. Any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardising the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism.

8. Article 2. Any person, who, being a member of organisations formed to achieve the aims specified under Article 1, in concert with others or individually, commits a crime in furtherance of these aims, or who, while not committing the targeted crime, is a member of the organisations, is defined as a terrorist offender. Persons who, not being a member of a terrorist organisation, commit a crime in the name of the organisation, are also considered as terrorist offenders and shall be punished as members of such organisations.

9. *Işıkırık v. Turkey*.

3. COUNTER-TERRORISM LEGISLATION AND HUMAN RIGHTS DEFENDERS

This flawed 'security versus liberty' discourse has resulted in the development of counter-terrorism legislation at the expense of the respect for, and the protection of, human rights and fundamental freedoms. In fact, human rights defenders play a significant role in enabling States to meet these obligations, by 'channelling discontent and allowing for constructive engagement with States, which in turn provides peaceful alternatives for those who may be tempted to resort to unacceptable violent action.'¹⁰ However, Turkey, which is bound under several international and regional declarations¹¹ to protect human rights and fundamental freedoms, is failing to do so in practice, defying both its international obligations and the rule of law. Specific recommendations were made in this regard in several Venice Commission reports¹² and in reports by other international regional bodies¹³.

10. OBS, Briefing Note on the impact of national security and counter-terrorism laws and policies on the protection of human rights defenders worldwide.

11. Inter alia, the UN Declaration on Human Rights Defenders (General Assembly Resolution A/RES/53/144), Declaration of Council of Europe Action on human rights defenders Council of Europe action (<https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/DeclarationHRDCoECommitteeMinisters.pdf>), OSCE Parliamentary Assembly Resolution on Strengthening OSCE Engagement with HRDs and NHRIs (<https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/DeclarationHRDCoECommitteeMinisters.pdf>) and EU Guidelines on HRDs (https://www.eeas.europa.eu/eeas/eu-guidelines-human-rights-defenders_en).

12. Venice Commission's Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of Expression (2017), and Opinion on the Duties, Competencies and Functioning of Criminal Judgeships (2017).

13. UN General Assembly resolution 60/288; Security Council resolution 2178 (2014).

Counter-terrorism legislation in Turkey goes beyond Anti-Terrorism Law No. 3713 to include the terrorism-related provisions in the Criminal Code No. 5271, Criminal Procedure Law No. 9105 and other laws on the execution of sentences and security measures. The Anti-Terrorism Law and the Criminal Code treat non-members of a terrorist organisation as terrorists, considering they committed offences in the name of a terrorist organisation and imposing sentences accordingly. Both the law and the code fail to clarify the definition of the offence and how it is linked with the aims of the terrorist association. The combination of the Anti-Terrorism Act and certain provisions of the Criminal Code also allows for a very wide margin of interpretation in the cases of those charged with disseminating terrorist propaganda on behalf of a criminal organisation. Consequently, 'even non-violent statements can be subject to proceedings when they are seen to overlap with any one of the aims of a terrorist organisation.'¹⁴ This ambiguity has been used to target and prosecute human rights defenders under the guise of counter-terrorism measures or as threats to national security.

ACCORDING TO OFFICIAL DATA, UNDER ARTICLES 6 AND 7/2 OF THE ANTI-TERRORISM LAW:



10,745
PEOPLE WERE
PROSECUTED
IN 2013
& **24,220**
IN 2017



IN 2018,
46,220
PEOPLE WERE
INVESTIGATED AND
10,077
PROSECUTED.

IN 2020,
THERE WERE
26,225
INVESTIGATIONS
AND **6,551**
PROSECUTIONS.

SIMILARLY, UNDER ARTICLE 314 (MEMBERSHIP TO AN ARMED ORGANISATION)



36,425
PEOPLE WERE
INVESTIGATED
IN 2015,
155.014
IN 2016

547,423
IN 2017
444,342
IN 2018

&
208,833
IN 2020.

THE STEEP RISE IN NUMBERS INDICATES JUST HOW WIDELY COUNTER-TERRORISM LEGISLATION HAS BEEN USED IN RECENT YEARS.

14. CoE HR Commissioner Hammarberg's Report on Turkey (2011), <https://rm.coe.int/16806db752>

HUMAN RIGHTS DEFENDERS AND ORGANISATIONS ARE SUBJECT TO CONTINUOUS AND INCREASING JUDICIAL HARASSMENT.

For instance, the Human Rights Association (HRA) and the Human Rights Foundation of Turkey (HRFT) have been specifically targeted and at least 30 investigations and prosecutions against their executive board members and other members are currently pending.

For many years now, co-chairs of HRA, Eren Keskin and Öztürk Türkdoğan, have been subjected to intimidation and judicial harassment for their peaceful and legitimate human rights activities.

IN THE LAST THREE MONTHS OF 2021 ALONE, 1,220 HRDS SUFFERED ONE OR MORE TYPES OF JUDICIAL HARASSMENT OR REPRISALS.¹⁵

While it is not possible to make an exhaustive list of these practices against HRDs, some examples include the cases of Büyükada, the Confederation of Public Employees' Unions (KESK) and Boğaziçi University students, as well as the intimidation of LGBTI+ activists.

Despite the recommendations of the Financial Action Task Force (FATF) and threats to place Turkey on its

grey list, Law No. 7262 on Preventing Financing of Proliferation of Weapons of Mass Destruction was adopted on 27 December 2020, amid criticism from civil society organisations (CSOs)¹⁶ and opposition parties. The adoption of this law, which contravenes the FATF's recommendations on curbing the financing of terrorism and fails to satisfy FATF requirements, resulted in Turkey being placed under increased monitoring by the FATF.¹⁷ Under the guise of combatting terrorist financing and money laundering, this law targets civil society, particularly CSOs operating in the areas of human rights, women, LGBTIQ+ and refugees' rights. It gives the Ministry of Interior the power to replace the board members of associations with trustees, to suspend their operations if their members are prosecuted on terrorism charges, to impose high monetary fines on CSOs –potentially resulting in the closure of many– and to suspend their activities without the possibility of appeal, among others.

THE LAW INFRINGES THE FREEDOM OF ASSOCIATION AND THE CONSTITUTION OF THE REPUBLIC OF TURKEY, AND CREATES AN UNSAFE ENVIRONMENT FOR CIVIL SOCIETY.



15. https://tihv.org.tr/wp-content/uploads/2022/01/ihs_bilginotu_ocak2022.pdf

16. See İHOP Statement, <https://ihop.org.tr/kitle-imha-silahlarinin-yayilmasin-finansmaninin-onlenmesine-iliskin-kanun-teklifine-dair-degerlendirme/> and <https://siviltoplumsusturulamaz.org>

17. <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html>

4. SPECIALISED COURTS AND SPECIAL PROCEDURES



The independence of the judiciary in Turkey has long been debated. Changes introduced to the formation of the Council of Judges and Prosecutors (CJP) following the 2017 Constitutional referendum were criticised by international bodies and human rights circles for failing to offer 'adequate safeguards for the independence of the judiciary and considerably increasing the risk of it being subjected to political influence.'¹⁸ The CJP's role is to oversee the professional conduct of judges and prosecutors, including appointments, promotions, transfers, disciplinary measures and dismissals of judges and public prosecutors.

Currently, criminal courts of Turkey hear criminal proceedings but criminal investigations are carried out by criminal judgeships of the peace, which replaced Turkey's criminal courts of peace in 2014. Under the Turkish Law on Criminal Procedure, their powers include issuing search, arrest and detention warrants and judicially reviewing prosecutor's decisions not to prosecute. Since the introduction of this law, these powers have been further extended to include the removal of the right to legal counsel and internet bans. The Venice Commission has firmly criticised the closed appeals system, which operates under a limited number

of peace judges in each region or courthouse, as well as the lack of case-specific reasoning in decisions handed down on detention and website bans.¹⁹

The rules for criminal proceedings relating to the Anti-Terrorism Law, which include the removal of the right to legal counsel and permit a maximum of three lawyers to attend hearings, the continuation of hearings in the absence of legal counsel, the admission of witness statements from anonymous investigators who are not required to attend the hearing, the prohibition of lawyer visits for the first 24 hours of detention and the extension of pre-trial detention to up to five years, are replicated in the Law on Criminal Procedure. Furthermore, the CJP decisions opened new courts of assize under the Anti-Terrorism Law for the prosecution of crimes committed prior to its adoption. This alone contravenes the principle of natural justice, which requires the court ruling on the case to be determined by law prior to the dispute in question being brought to court. The above demonstrates that specialised courts and procedures have been introduced in connection with the Anti-Terrorism Law, which raises real concerns regarding both the right to a fair trial and the rule of law.

18. https://www.coe.int/en/web/commissioner/country-monitoring/turkey/-/asset_publisher/IK6iqfNE1t0Z/content/turkey-new-council-of-judges-and-prosecutors-does-not-offer-adequate-safeguards-for-the-independence-of-the-judiciary?inheritRedirect=false.

19. Venice Commission Opinion on the Duties, Competencies and Functioning of the Criminal Peace Judgeships, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282017%29004-e>.

5. THE PROBLEM OF EXECUTION OF SENTENCES

The Law No. 5275 on the Execution of Penal and Security Measures imposes an alternative regime of execution for prison sentences under the Anti-Terrorism Law. On 14 April 2020, Turkey passed Law No. 7242 amending Law No. 5275 to reduce the prison population in general and in response to Covid-19, through a provision for the temporary release of convicts already serving or sentenced to serve time in a minimum-security institution and those on probation. The Government of Turkey ignored the requests human rights organisations to have a say in the amendment process and refused to take their views into consideration.²⁰

The amendments, which among other things, reduced parole eligibility from two-thirds of the sentence served to half, were not in line with the principle of proportionality and further increased discrimination among the prison population. Individuals convicted of certain crimes under the Anti-Terrorism Law and certain other provisions of the Criminal Code of Turkey –such as crimes against national security, the constitutional order, national defence, State secret, and espionage,



among others– were excluded from eligibility. These individuals were also ineligible for the early or temporary release measures for remand prisoners relating to Covid-19. The exclusion of individuals convicted or on pre-trial detention for offenses under the anti-terrorism laws or crimes against the State is a clear indication of the Government’s abuse of the execution regime to punish dissidents and a violation of the international standards in this regard.

ECtHR’s decisions on the Öcalan, Gurban, Kaytan and Boltan Cases, which found Turkey in breach of Article 3 of the ECHR for handing down sentences of aggravated life imprisonment without the possibility of conditional release, are also of note. Human rights organisations have criticised these decisions for making no reference to prisoners’ extreme isolation conditions.²¹

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

21. <https://medyanews.net/how-to-read-council-of-europes-decision-regarding-abdullah-ocalan-the-absence-of-reference-to-isolation-is-open-to-criticism/>.

6. RECOMMENDATIONS:

The OMCT urges the authorities of the Government of the Republic of Turkey to:

- make comprehensive legislative changes in line with the ECtHR's decisions and case law and Turkey's international obligations on the protection of fundamental rights and freedoms;
- restore the rule of law and repeal any decrees or laws rendering the SoE measures permanent;
- enshrine the principles relating to the protection of human rights defenders in its domestic law and implement the UN Declaration of Human Rights Defenders through a Presidential Circular, until such revisions are made;
- abolish Anti-Terrorism Law No. 3713;
- review and reconsider the Articles relating to counter-terrorism in the Criminal Code No. 5271, Criminal Procedure Law no. 9105 and other laws on the execution of sentences and security measures, to ensure they comply with Turkey's international human rights obligations;
- reform the judiciary and provide the necessary guarantees for the judiciary in Turkey to adopt and implement the decisions and jurisprudence of the ECtHR and the Constitutional Court of Turkey and ensure the retrial of the human rights defenders sentenced for carrying out legitimate human rights activities;
- guarantee the right to a fair trial for all individuals and institutions under investigation or on trial and ensure an independent case-by-case review.