



GENERAL REMARKS ON THE BILL ON THE PREVENTION OF THE FINANCING OF THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION¹

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"The Bill on Preventing the Financing of the Proliferation of Weapons of Mass Destruction (WMD)" was submitted to the Presidency of the Turkish Grand National Assembly on December 16, 2020, and was discussed and adopted by the Justice Commission, which was determined as the main commission by the TGNA Presidency, on December 18 and 19, 2020. This law proposal, which is essentially an omnibus bill, is expected to be placed on the agenda of the General Assembly in a short time.

Although the rationale of the proposed law is presented as the prevention of proliferation of WMD and of terrorist financing, the proposal also foresees a number of important changes in the Law on Associations No. 5253 and the Law on Aid Collection No. 2860. Moreover, the scope of these changes is not limited by United Nations Security Council resolutions on the proliferation of weapons of mass destruction and financing of terrorism, as stated in the introductory articles of the law.

This information note is prepared in order to present the problems that the law can cause in its implementation, in the light of the international human rights instruments and the Constitution and laws of the Republic of Turkey.

What is the Reasoning of the Bill?

In the general reasoning written on the bill, it is stated that the aim pursued is the fulfilment of a number of recommendations in the 2019 report on Turkey prepared by FATF (Financial Action Task Force), fighting global money laundering and terrorist financing.

The bill consists of 43 articles in total and envisages changes in 6 separate laws, and its first section comprising 6 articles constitutes the main body of the law in question, while the second section, which is an omnibus law, foresees changes in the Law on Associations and the Law on Aid Collection, among others. Although the 10 articles in the bill are related to these laws, the explanation about these articles in the general reasoning of the bill merely states, "In addition, by making amendments to the Law on Aid Collection dated 23/6/1983 and numbered 2860 and the Law on Associations dated 4/11/2004 and numbered 5253, the audits should be increased and the administrative sanctions should be implemented more effectively". When the reasonings and contents of the articles are examined, it is seen that the regulations that do not coincide with the general reasoning purposes and whose scope goes beyond the prevention of laundering proceeds from crime and financing of terrorism and that are not associated with any legitimate purpose are tried to be enacted.

Regarding the Proposed Amendments to the Law on Associations

Although it was stated in the general reasoning of the bill that the purpose was to fight against the laundering proceeds arising from crime and the financing of terrorism, it is seen that the individual reasonings for the second section of the bill deviate from the general reasoning and in this context, it was acted with a purpose that exceeded the general reasoning.

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It is understood that the article-based reasonings stated in the amendments to the Law on Associations are not specifically restricted by the issues of international money laundering and financing of terrorism, but make a general regulation.

When the amendments proposed with the bill are examined in general, it is seen that

- The associations and foundations which have headquarters abroad are included in the scope of the Law on Associations and will be under the control of the Ministry of Internal Affairs on the grounds that "the hesitations in practice shall be eliminated by including the foundations and associations which have headquarters abroad and are operating in our country within the scope of the Law";
- Those convicted of crimes within the scope of the Law on the Prevention of Financing of Terrorism No.6415 or of crimes of drug trafficking and laundering criminal proceeds are prohibited from being the manager of an association or foundation, even if the past sentences of those who were prohibited from exercising public rights in the past were pardoned;
- In order to ensure that the audits of the associations are carried out periodically, the audits can be carried out by any civil servant and annually, no later than every three years according to the risk assessments to be made;
- In addition, within the scope of the audit duty, relevant information and documents can be requested from institutions and organizations, an expert witness can be appointed during the audit if necessary, and all public institutions and organizations, banks and other institutions will be obliged to provide information and documents "limited to the scope of duty" upon the request of the auditors;
- Regarding the aids to be made abroad, the regulation on "notification of the administrative authority by the associations before sending aid abroad" has been introduced, and those who act against the regulation can be fined from 5 thousand TL to 100 thousand TL;
- In the event that an investigation is initiated against those who work in the organs other than the general assembly of the association or the relevant personnel due to the crimes of manufacturing and trade of drugs or stimulants or of laundering the proceeds of crime specified in the Turkish Penal Code and the Law on the Prevention of the Financing of Terrorism within the scope of the activities of the association, the Ministry of Internal Affairs can suspend these individuals or the organs that they work as a temporary measure and the Minister of Interior shall immediately apply to the court and can temporarily suspend the activities of the association in case the measure mentioned here is not sufficient and there is a drawback in its delay.

It is seen that the prison sentence of maximum 3 months is increased from 3 months to 1 year in case the association's supervisory boards do not carry out legal audits or the executives of the association do not submit their annual statements on time.

In addition, the provisions of the Law on Associations, including the criminal sanctions, will be applicable to the activities undertaken in Turkey by any civil society organization based abroad.

Although the fight against laundering of proceeds from crime and financing of terrorism is a sensitive issue for our country, it is understood from the general reasoning of the bill and the overall regulation per se that the amendments made in the Law of Associations completely go beyond this scope and do not have any limitations in this regard.

It is known that the international conventions, duly put into effect, have the force of law in accordance with the Article 90 of the Constitution of the Republic of Turkey. In this connection, it should be recalled that the Republic of Turkey is a party to the International Covenant on Civil and Political Rights and the European Convention of

Human Rights safeguarding the freedom of association. According to the last sentence of Article 90 of the Constitution, it is not possible to apply in Turkey the laws that contradict the standards in the international conventions. It should be noted that the provisions limiting the freedom of association in the bill are against international law in many respects.

The bill is also in contravention of many other articles of the Constitution of the Republic of Turkey. Article 11 of the Constitution regulates the binding force and supremacy of the Constitution. Accordingly, the provisions of the Constitution are the basic legal rules that bind the legislative, executive and judicial organs, administrative authorities and other organizations and persons, and laws cannot be contrary to the Constitution. In this respect, it is clear that no piece of legislation can be against the Constitution.

In Article 5 of the Constitution, the fundamental aims and duties of the State are listed as, inter alia, safeguarding the Republic and democracy; ensuring the welfare, peace, and happiness of the individual and society; striving for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and providing the conditions required for the development of the individual's material and spiritual existence.

Again, according to Article 10, state bodies and administrative authorities are obliged to act in accordance with the principle of equality before the law in all their proceedings.

Another consideration is the Articles 13 and 15 of the Constitution of the Republic of Turkey. Article 13 of the Constitution states that fundamental rights and freedoms can be restricted "without infringing upon their essence" and only as stated in the relevant articles of the Constitution and only by law. This restriction must also comply with the requirements of the "democratic social order" and the principle of proportionality. Similarly, Article 15 of the Constitution accepts that even in a state of emergency, the fundamental rights and freedoms of a person can only be restricted to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. The Constitution guarantees freedom of association under Article 33 under the heading of "freedom of association".

Within the scope of all these regulations, there is no doubt that freedom of association is essential, and restriction of freedom has to be proportionate, duly framed and in exceptional circumstances. As the Constitutional Court states, "(...) in accordance with the principle of proportionality, there must be a reasonable balance between the legislation introduced and the aim to be achieved. This underlying principle of proportionality, allows the necessary measures to be taken in order to achieve the aim, but does not allow resorting to measures unnecessary for the aim and the disproportionate restriction of the right in question. In a democratic society, the restrictions on fundamental rights and freedoms should not be more than the aim pursued by this limitation. The principle of proportionality does not allow the use of a heavier restrictive means, while a lighter means of restriction can be preferred to achieve a legitimate aim. "(AYM, E. 2014/140, K. 2015/85, 08.10.2015).

With the amendment made in the Article 3 of the Law on Associations, persons convicted of certain crimes are indefinitely prohibited from taking responsibility in organs other than the general assembly of associations. During the enactment of Article 53 of the Turkish Penal Code, the principle that the deprivation of rights, which was indefinite in the past, has to be time-bound, was adopted. As stated in the reasoning of the aforementioned article, the main purpose of punishment is to make the person feel effective regret for the crime committed and reintegrate the person in the society, therefore any deprivation of right due to a crime should also be limited to a certain time period. For this reason, it is stipulated that deprivation of right will continue until the execution of the sentence is completed. The amendment made in the Law of

Associations makes this indefinite and is not in line with the principle of proportionality.

With the amendment introduced in Article 19 of the Law on Associations by the bill, it is foreseen that the audits of the associations will be made "annually, no later than every three years, according to the risk assessments to be made". With the aforementioned regulation, some associations will be classified as "risky" associations within the framework of criteria to be determined arbitrarily by the administration and may be subject to strict supervision accordingly. The amendment paves the way for interferences with freedom of association by enabling the administration to put pressure on associations deemed "unfavourable" for arbitrary reasons, and there is no adequate guarantee against this. Moreover, contrary to the previous legislation, it will be possible for a civil inspector or any public official who has no knowledge and experience in the field to carry out the audit of an association. It is intended to make the audits, which were not applied regularly in the past, permanent, and to make way for the annual audits of more than 120,000 associations despite of having no risk that would require such an audit.

The amendment in question is also against the Constitution. Even if the restrictions on the freedom of association are intended to be introduced by a law amendment and in this sense, it seems to meet the "legality" criterion in Article 13 of the Constitution, the criterion of legality is not limited to the imposition of a restriction by a law. A law restricting a right is expected to comply with the principles of predictability and certainty. According to the principle of predictability, a provision of law should be easily accessible and comprehensible even if it requires professional help when necessary and should be clearly formulated so that the relevant person can determine his/her behaviour. Secondly, the provision of law, which is the basis of the restriction, should be written in a way that does not allow arbitrariness, in other words, it should comply with the principle of certainty. The principle of certainty means that "the legal regulations are clear, understandable and applicable in a way that does not leave any hesitation and doubt in terms of both the individuals and the administration, and also includes safeguards against arbitrary practices of public authorities (Constitutional Court (AYM), Youtube LLC Corporation Service Company and Others, B. No: 2014/4705, 29.05.2014, para 56-57). It is left completely unclear how, within which criteria and by which institution the said "risk assessment" will be carried out. In addition, the scope of the discretionary power of the administration in this area is not limited in any way. This constitutes a legal formulation that is against the principles of both predictability and certainty, and this situation constitutes a clear violation of Article 13 of the Constitution.

The most problematic aspect of the bill is the provision that requires the addition of a new article numbered 30/A in the Law on Associations. According to the first paragraph of the aforementioned new article, in the event that an investigation is initiated against those who work in the organs other than the general assembly of the association or the relevant personnel due to the crimes of manufacturing and trade of drugs or stimulants or of laundering the proceeds of crime specified in the Turkish Penal Code and the Law on the Prevention of the Financing of Terrorism within the scope of the activities of the association, the Ministry of Internal Affairs can suspend these individuals or the organs that they work as a temporary measure. With this regulation, the law enforcement will initiate an investigation first, and then, the Ministry to which the law enforcement is affiliated, will be able to "temporarily" suspend certain organs of the associations or the individuals working on these organs. Although it is stated in the text of the article that the measure is temporary, there is no temporal limit for this period. Considering that the investigations opened in our country can last for years, it is possible that these "temporary" measures may last for many years. Again, such a decision taken by the Ministry of Interior will not be subject to judicial review. On the other hand, following the implementation of this measure, it becomes possible to appoint a trustee to the association in question with reference to the articles of the Law of Associations and the Turkish Civil Code. Finally, the measure in question also bears risks that may violate the

presumption of innocence.

In the second paragraph of Article 30/A to be added to the Law on Associations, the Minister of Interior is given the authority to temporarily suspend the activities of an association in case the measure specified in the first paragraph is not sufficient and there is a drawback in its delay. However, in this case, contrary to the first paragraph, it is necessary to apply to the court immediately after this measure. Upon this application, the court will give its decision on the suspension of activities within 48 hours and the proceedings will turn into a case concerning the closing of the association. It is possible for associations to demand the annulment of the decision on temporary suspension of activities. According to the article, such an application will be decided without delay by the courts. In the aforementioned regulation, if the decision of the Minister of Internal Affairs to temporarily suspend the activity is not submitted to the court "immediately" and the objections made against the decisions approved by the courts are not examined "without delay", it is possible that the "temporary" measure may become de facto "permanent". In the concrete case, it does not seem possible to accept that this authority to be used by the Ministry of Interior is proportionate. Although Article 33 of the Constitution allows such an intervention "where it is required for, and a delay constitutes a prejudice to...", the article in question does not mention such conditionality. Again, according to Article 33 of the Constitution, the decision of suspension of activity must be submitted to the approval of the judge in charge within 24 hours, but there is no such statement in the text of the article. As can be seen, the second paragraph contradicts not only the principle of proportionality but also the word of the Constitution.

In the bill, the last regulation on the Law of Associations is related to the sanctions in Article 32. The sentence of imprisonment up to 3 months foreseen in the first paragraph (k) of the article has been increased from 3 months to 1 year. Accordingly, the amount of judicial fines that can be given as an alternative to imprisonment has been increased. The article also stipulates an administrative fine from 5,000 Turkish Liras to 100,000 Turkish Liras for violation of the obligation to notify about the aid sent abroad and the aid received from abroad and the obligation to transfer the aid through a bank. The sanction in question is valid for all cases beyond the laundering of proceeds of crime and financing of terrorism given in the general reasoning of the law. Therefore, it is regulation that exceeds the intended purpose. In addition, the high level of the prescribed administrative fines is against the principle of proportionality, and leaving such a wide discretionary power to the administration is against the principle of legality in crime and punishment.

The above-mentioned amendments impose restrictions on freedom of association in an ordinary period, even exceeding the permitted limitations during periods of emergency administration procedures. For this reason, the bill as a whole should be rejected in the General Assembly, and in case no such emerges, the above-mentioned provisions should be removed from the bill during the discussions held at the General Assembly.

Regarding the Proposed Amendments to the Law on Aid Collection

The proposed amendments to the Law on Aid Collection No. 2860 are unrelated to the prevention of proliferation of weapons of mass destruction. There are discrepancies between the proposed changes in the bill and the reasonings of its articles.

Restrictive and prohibitive measures in the second section of the bill are not seen in the civil society legislation of countries such as the EU, EU member states and the USA, which are among the 39 FATF member countries.

The "right to seek and secure resources" of civil society organizations is guaranteed by the Constitution and the international law. Article 22 of the International Covenant on Civil and Political Rights limits the restriction of the exercise of these rights with obligations such as obtaining permission only to the extent that it is "necessary in a democratic society".

The conditions stipulated by the current Law on Aid Collection of 23 June 1983, which is a by-product of the September 12 military coup, are already far behind the modern universal norms of freedom of association. The European Commission's Turkey Report 2019 (SWD (2019) 220 final) states that the current law "imposes burdensome requirements that discourage fundraising activities by civil society organisations". With the provisions in the bill, these conditions are further exacerbated, and the intent is to introduce new provisions that are much more restrictive than Cem'i-i İlan Nizâmnamesi (Law on Aid Collection) dated December 15, 1915, the first regulation on this subject matter in our country.

The Law on Aid Collection No. 2860 is based on an extremely vague distinction between "aids" and "donations". While the law stipulates that "donations and aids to be made to the civil society organizations by their members and other persons according to their statuses and their income from their own resources" are out of the scope of the law, on the other hand, the voluntary and purposeful aids are included in the scope of the law. In practice, this distinction is developed as follows: it is a "donation" if civil society organizations make their income or income calls on their own domains, and an "aid" if area falling outside of their domain is used for the call. This distinction is far from being capable of making any classification under the changing conditions of the modern world. Therefore, in order to eliminate this uncertainty, the Ministry of Interior issued many circulars and legal office opinions. However, the legal status of these opinions is controversial and they not sufficient to eliminate the said uncertainty.

While we need to improve the Law on Aid Collection in the light of international standards under these circumstances, the existing uncertainties disproportionately increase the penalties with the bill in question. These penalties will have a deterrent effect in seeking resources for many local civil society organizations working with small budgets. In addition to this, there is a major difference between the lower limits and upper limits of the prescribed administrative fines (5.000-100.000 or 10.000-200.000) and this constitutes a violation of the principle of legality of crimes and punishments, which is one of the basic principles of the criminal law and safeguarded by Article 38 of the Constitution.

The bill gives the Ministry of Internal Affairs or the governorships the duty to apply to the Criminal Judgship of Peace for websites that they consider collecting aid without permission, and the judge the duty to make a decision without a hearing within 24 hours. As mentioned above, while the distinction between aid and donation is so uncertain, it raises the concern that these decisions blocking access to websites, which will be made without hearing any defence statements, will lead to the victimization of many.

On the other hand, getting permission to collect aid, which can be considered as an option, is extremely difficult in practice. The Law on Aid Collection No. 2860 prescribes highly subjective criteria for fundraising permit applications such as "the importance of the work, the competencies of those who will engage in fundraising activities, the suitability of the service for the purpose and public interest, whether the fundraising activity will be successful and other matters deemed necessary". These criteria leave an unlimited discretionary power to the administration and render all decisions made contested. Moreover, if the authority giving such permits considers that the collected aids will not be sufficient to achieve the purpose, it has the authority to transfer the collected aid to another organization it decides. This is an important problem that deters the civil society organizations from applying for a fundraising permit.

With this bill, a second paragraph is added to Article 9 of the Law on Collecting Aid, stating that "the procedures and principles regarding the aid to be provided domestically and abroad are set out by the regulation". All regulations made since the Ottoman Empire until today have covered the activity of "collecting" aid. With the bill, for the first time in the history of our country, the activity of "making aid" is tried to be limited. The choice to give aid can only be determined by the free will of natural persons and by the

status of legal persons. Financial transactions involving a criminal element are already the subject of criminal law. At the same time, this regulation gives the administration the authority to make arrangements by means of a regulation like an "open cheque" without setting any criteria in terms of the aid to be made abroad or in the country. This situation constitutes a violation of the principle of legality in Article 13 of the Constitution, as discussed above regarding the proposed amendments to the law on Associations.

In Finland, which is also a member of the FATF -the organisation said to have provided the main justification for the bill-, no permission is required for non-large-scale fundraising activities. Thus, the obligation to obtain a permit for aid and donations is not compulsory for compliance with FATF's recommendations. According to the law that entered into force in Finland in 2020, civil society organizations -even if they do not have any legal personality- can organize aid collection campaigns for a three-month period, twice a year. In these campaigns, they can collect up to 10,000 Euros per campaign. This right granted to civil society organizations does not make Finland a risky country for the Proliferation of Weapons of Mass Destruction, and a similar amendment in the Law on Aid Collection will not make our country risky and instead this will make it more liberal. Yet, the proposed amendments in the bill under parliamentary review will further distance the existing highly anti-democratic aid collection legislation from the condition of "being necessary in a democratic society". In the light of all these reasons, as in the case of the provisions of the Associations Law, the proposed amendments to the Law on Aid Collection should be removed from the bill during the discussions to be held at the General Assembly.

Conclusion and Recommendations

In conclusion, the proposed amendments to the Law on Associations with the "Bill on the Prevention of the Financing of the Proliferation of the Weapons of Mass Destruction" does not seem to be in line with the other regulations in the domestic law, in particular the Constitution of the Republic of Turkey.

- 1- If the purpose of the relevant amendments is to prevent the financing of the proliferation of weapons of mass destruction, the articles in the law should be written within this framework, the scope of the regulation should be limited to the specified issues and the objectives set out in the reasoning should be clearly specified.
- 2- The second section of the bill, and in particular the proposed amendments to the Law on Associations and the Law on Aid Collection, should be examined separately.
- 3- Due to the fact that the authority given to the executive body to suspend activities or to dismiss the organs of the associations or their members on these organs are not in line with the Constitution and international law, there is no doubt that it needs to be re-evaluated on the basis of freedom of association.
- 4- An excessive measure put in place for a case under investigation may lead to loss of rights and victimization. In this sense, the regulation should seek a Court decision for cases within a specific and limited framework.
- 5- It is essential that these amendments restricting the freedom of association are re-drafted in consultation with the civil society organizations. The civil society should be consulted on all matters, including the bill and the relevant regulations to be prepared, with a focus on the basic principles and norms, this work should be completed in a process ensuring genuine participation.

As a matter of fact, the international law also requires consultation with the civil society on matters that are of direct concern to them.

- 6- There should be no rush to submit such an important law to the parliament. The contributions of civil society organizations and experts on the subject should be

sought, and the bill should be prepared in order to facilitate the organization and fundraising activities of civil society organizations, and to encourage individuals and institutions to make donations.

7- The current Law on Aid Collection No. 2860 and Law on Associations No. 5253 should be reviewed and improved in line with the Constitution and the following international legal instruments and guidelines:

- Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe
- UN Declaration on Human Rights Defenders, Article 13
- UN Human Rights Council Resolution No. A/HRC/22/L.13
- Report of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, No. A/HRC/23/39
- Guidelines on Freedom of Association (OSCE and Venice Commission)