

Conditional Release and De Facto Criminal Courts in Turkiye

Summary:

Conditional release and probation rights in Turkiye have faced challenges in implementation, particularly after legislative changes in April 2020. The amendments aimed at prison evacuation, favoring certain convicts over others, excluding those convicted of terrorism-related crimes. Criteria for determining "good behavior" were modified, adding factors like low risk of re-offending and remorse for the crime.

However, considering remorse as a criterion raises constitutional and legal concerns, blurring the line between substantive and execution law.¹

The amended regulations empower prison administrations to act as de facto criminal courts, judging convicts' affiliation with ostensible terrorist organizations and using parole as a punitive measure. This practice pressures convicts to express remorse, even if unjustly accused, to secure release. Murat Arslan's case exemplifies this; despite demonstrating good behavior, his parole application was denied due to abstract reasons like insufficient integration efforts and perceived risk of re-offending. This decision underscores arbitrary judgment, potentially prolonging Arslan's imprisonment until 2026 if rejections persist.

Legal Background:

Probation and the right to conditional release have not been exercised by some prison administrations and execution judgeships in Turkiye.²

¹ Remorse cannot be a criteria in parole assessment. See Lovashni Khalikaprasad, Journal of Race, Gender, and Ethnicity Volume 9 – May 2020 Touro College Jacob D. Fuchsberg Law Center. <https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1063&context=jrge> accessed 25 April 2024.

² See for some examples : <https://www.bbc.com/turkce/haberler-turkiye-56292598> accessed 19 April 2024. <https://artigercek.com/haberler/30-yildir-tutuklu-kalkan-in-tahliyesi-ertelendi> accessed 18 April 2024. , <https://artigercek.com/haberler/haklarindaki-cezalarin-infazini-tamamlamalarina-ragmen-66-siyasi-tutuklu-tahliye-edilmiyor> accessed 19 April 2024. <https://twitter.com/artigercek/status/1451076958629076994> accessed 19 April 2024. <https://www.gazeteduvar.com.tr/cezaevinde-iyi-hal-sorulari-ocalani-seviyor-musun-musulman-misin-haber1532725> accessed 19 April 2024. <https://kronos34.news/tr/hdp-keyfi-infaz-yakmalar-icin-meclis-arastirmasi-istedi/> accessed 20 April 2024 .<https://politikahaber.org/cezaevinin-iyi-hal-gerecesinde-yok-yok/> accessed 19 April 2024. <https://m.bianet.org/bianet/insanhaklari/237495-universiteliler-pisman-olmamis-diye-tahliye-edilmedi> accessed 21 April 2024. <https://m.bianet.org/bianet/saglik/251929-hasta-mahpusun-tahliyesine-iyi-hal-engeli> accessed 21 April 2024. <https://hdp.org.tr/Images/UserFiles/Documents/Editor/2022/hukuk-komisyonu-2021-insan-haklari-raporu.docx> accessed 19 April 2024.

The determination of the “good behavior” of the prisoners and thus their enjoyment of conditional release has become open to arbitrary provisions after the change in the legislation on the execution of sentences. Conditional release is to serve the remaining part of the prison sentence outside the prison, on the condition that the convict who has been sentenced to prison, spends the part determined by the law in prison with good behavior.³

With the Law No. 7242, which entered into force on April 15, 2020, important changes were made in the basic laws such as the Law No. 5275 on the Execution of Penalties and Security Measures (Execution Law), the Turkish Penal Code (TCK), the Code of Criminal Procedure (CMK), and the Law on Enforcement Judges. With this Law (7242), one of the purposes is evacuation of the prisons. The regulations are made in favor of convicts of crimes such as theft, fraud, assault, bribery, and the like other than those convicted of terrorism related crimes.⁴

Pursuant to the second paragraph of the provisional article 9 added to the No. 7242 Execution Law, it has been accepted that the amendments to the 89th article would enter into force on 01.01.2021, and the Regulation on the Observation and Classification Centers regarding the implementation of the 89th article and the Evaluation of the Convicts was published in the Official Gazette on 29/12/2020 and the new regulation started to be implemented in all penal institutions as of 01.01.2021.⁵

Accordingly, conditional release (parole) requires two conditions;

- Objective criterion: time spent in prison,
- Subjective criterion: to be well behaved (Good behavior).

Conditional release of convicts depends on the fulfillment of these two conditions together. Conditional release is not a blessing, on the contrary, it is an institution of execution and a right based on public interest, which must be enforced for the convict if the conditions are met. In addition, this is such a right that even the convict who is entitled to conditional release cannot waive this right.⁶

³ The Law on Execution of Penalty and Security Measures No. 5275 ARTICLE 89.

⁴ The Amendments can be reached at <https://www.resmigazete.gov.tr/eskiler/2020/04/20200415-16.htm>

⁵ The regulation on” the Observation and Classification Centers regarding the implementation of the 89th article and the Evaluation of the Convicts” can be reached at <https://www.resmigazete.gov.tr/eskiler/2020/12/20201229-3.htm> accessed 12 April 2024.

⁶ The Penal Code in Turkish: <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf>; Execution Law in Turkish <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5275.pdf> accessed 12 April 2024.

There is no explicit provision in the law regarding what good behavior is. However, in Article 89 of the Execution Law, some issues that would be taken as a basis in determining good behavior are included. The article includes the criteria for good conduct/behavior and the determination procedure. Since good behavior is a prerequisite for many institutions, in the execution phase, the convicts' benefiting from certain opportunities and rights is dependent on this condition, and the amendments made to Article 89 have directly affected all these institutions.

With the Law No. 7242, the criteria for the determination of good behavior in the article have been changed. Before the amendment, 4 criteria were taken as basis for good behavior and these criteria were as follows;

- Abiding sincerely by the rules set for the order and security of the prison,
- Using her/his rights in good faith,
- Fulfilling her/his obligations completely,
- Being ready to integrate with the society.

After the amendment, the following two criteria have been added to these criteria;

- Low risk of re-offending,
- Low risk of harming the victim or others.

In addition, in the second paragraph of the article, some issues that shall be taken into account in the evaluation of good conduct/behavior are included and the number of good conduct/behavior criteria has been increased. According to the second paragraph, those criteria shall be effective in her/his good conduct/behavior decision:

- The programs and activities she/he participated in and the certificates received,
- Book reading habit,
- Relations with other convicts, detainees, and officials,
- **Remorse for her/his crime,**
- Compliance with the rules and
- The disciplinary punishments he/she receives

Furthermore, the concept of the "convict's relations with the outside" has been added to the Execution Law. Along with the amended regulation, all behaviors of the convicts related to outside the prison shall also be taken into account in the evaluation of conditional release.

Being well behaved in practice refers to an assessment of the convict's rehabilitation and ability to adapt to society.⁷ How to determine good behavior is shown in Article 89 of the Execution Law and with the Law No. 7242, "**the convict's regret for his crime**" has been added to the criteria to be taken into account in the evaluation of good behavior.

In fact, it is in conflict with the Constitution of Türkiye and the principles of criminal law to consider repentance as a criterion in institutions related to the execution regime.⁸ Repentance or remorse is regulated as a "material/substantive criminal law institution" in the Turkish legislation. Regret is accepted as a "personal reason" that may abolish the possible penalty or may require a reduction in the penalty.

The re-evaluation of repentance, which belongs to the substantive criminal law and shall be evaluated by the judge at the trial stage, by an administrative board, especially against the convict, during the execution stage is contrary to the "prohibition of double evaluation" prevailing in criminal law. In addition, it is not clear how the repentance will be evaluated by an administrative board during the execution phase.⁹ The penal code has linked effective repentance to conditions such as "repairing the harm of the victim or helping the other accomplices catch up". Shall the same conditions be sought in order to admit that the convict regrets during the execution phase? Shall new criteria such as "transfer to an impartial ward"¹⁰ be applied during the execution, or shall it be accepted that the person to whom the effective

⁷ In the cases brought to the European Court of Human Rights on this issue, the Court emphasized that conditional release should be evaluated based on objective, measurable and reviewable concrete criteria. [CASE OF MURRAY v. THE NETHERLANDS](#), (Application no. [10511/10](#)), Kafkaris v. Cyprus ([GC], no. [21906/04](#)). Also see: Coffey, G. (2021). An exploration of ECtHR jurisprudence governing the administration of release processes for life and long-term sentence prisoners: Perspectives from the United Kingdom. *New Journal of European Criminal Law*, 12(4), 594-621. <https://doi.org/10.1177/20322844211061551>

⁸ Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 *MO. L. REV.* (2020) Available at: <https://scholarship.law.missouri.edu/mlr/vol85/iss2/1> accessed 23 April 2024.

⁹Jennifer Lackey, 'Admissions of Guilt and Expressions of Remorse: Sentencing and Parole Hearings', *Criminal Testimonial Injustice* (Oxford, 2023; online edn, Oxford Academic, 23 Mar. 2023), <https://doi.org/10.1093/oso/9780192864109.003.0007>, accessed 24 Apr. 2024.

¹⁰ What is a "neutral (impartial) ward"?

A neutral ward is a term used to describe the ward where convicts who, due to their different organizational situations such as being "organization leaders," "active members of the organization," "those who have left the organization," and "those who are neutral," are grouped in prisons. It is where convicts who, due to their association with the organization, feel remorse, accept their crime, lose sympathy for the organization, and are sincere in this regard, are kept.

What are the conditions for transferring to the neutral ward?

Initially, convicts are held in the wards called "biased" wards, which are referred to as "active members of the organization." During their detention period, they are observed by the prison authorities, their interactions, the letters they receive, the repentance petitions they submit (or will submit) to the administration, their communication with other organization members in the ward, and their attitudes are evaluated. Based on this evaluation, the prison administration and observation board ensure that convicts who sincerely repent due to their association with the organization are transferred to the "neutral" wards.

repentance provision has been imposed has repentance in advance, also during the execution phase?¹¹

Regret/remorse at the stage of execution reminds the article 221 of the TCK, which is the effective repentance provision particularly in organized crimes. As "confession" and "remorse" are used in the same sense in the current trials. Thus and so, defendants who do not confess and who are not subject to Article 221 of the TCK will be punished again during the execution phase. They will be prevented from benefiting from their rights such as conditional release, transfer to open prison and excused leave on the grounds that they are not "repentant and therefore not well behaved". Thus, those who do not confess during trials are more likely to be forced to confess during the execution stage, and if they do not confess, they will be deprived of all opportunities and be punished a second time.

With the Law No. 7242, the amendments regarding the "good conduct/behavior criteria" in the 89th article of the Execution Law are clearly against the convicts. Therefore, it is not possible for these amendments to be used in good conduct reports that will be taken as a basis for conditional release decisions regarding crimes committed before 01.01.2021, when they entered into force (non-retroactivity as a general principle of law). These reports should be prepared according to the criteria in the pre-amendment text of the article. In other words, the new criteria added to Article 89 of the Execution Law with the Law No. 7242 can only be taken as a basis for the evaluation of the conditional release decisions for crimes committed after 01.01.2021.

Pursuant to the amendment made in the Execution Law in April 2020, new rules regarding "good conduct or good behavior" were introduced with the lower regulation that came into force on January 1, 2021. Accordingly, in the crimes of membership of a terrorist organization, it is necessary to reveal the state of remorse regarding leaving the terrorist organization. The committee convened under the chairmanship of the Public Prosecutor examines the situation of the convict and, if it comes to the conclusion that the remorse has occurred, allows the convict to benefit from parole. In other words, the convict is released before completing his sentence. However, after July 15, 2016, the conditional release application has become an exception. With the regulation that entered into force on January 1, 2021, prison administrations assumed

¹¹ There are many examples and reports regarding "transfer to an impartial ward" <https://artigercek.com/guncel/cezasi-biten-tutuklu-bagimsizlar-kogusuna-gecmedig-i-gerekesiyle-tahliye-163737h> <https://www.indyturk.com/node/692741/t%C3%BCrki%C3%87yeden-sesler/cezaevinde-ya%C5%9Fam-bask%C4%B1-%C3%A7%C3%B6z%C3%BCms%C3%BCz-sorunlar-veyoksunluklaryuma%C4%9F%C4%B12> <https://www.ozgurpolitika.com/haberi-70-yasindaki-tutsagabagimsiz-kogus-baskisi-161551> <https://www.ihd.org.tr/wp-content/uploads/2023/07/2022-Hapishane-Raporu-1.pdf> accessed 22 April 2024.

the role of the criminal court, and started to make judgments based on arbitrary opinions on fundamental criminal law subjects such as whether people are affiliated with the terrorist organization.

Those who reject the allegations of membership of a terror organization during their trial are threatened with additional time in prison sentence. The prison administrations shall evaluate the actions of the convict in the prison. However, the administrations act as criminal courts and use parole as a new method of punishment for convicts. Convicts who do not want to stay in prison for more year express remorse for the crime they did not commit. On the other hand, it is seen that even those who are forced to express regret or remorse in practice may not benefit from parole.

Murat Arslan's Case:

Murat Arslan must have been released on probation last year (April 2023), but he was not given it and was kept in prison for another year. In the "good behavior" evaluation reports prepared about Murat Arslan by the Administration and Observation Board in accordance with the "execution law" in the last year, it was decided that Murat Arslan was of "good behavior".

Murat Arslan has completed 3/4 of his sentence as of April 16, 2024 and has gained the right to be released on condition (parole/conditional release).¹² However, the Conditional Release application made by Murat Arslan's lawyer on April 5, 2024 was refused by the Administration and Observation Board. In the refusal decision, it was stated that "the convict acted in accordance with all the rules of the penal institution and was of good behavior." However, it was emphasized that the convict was not ready to integrate into society, that he did not make an effort to be integrated into society and reach a sufficient level of recovery, and that the risk of re-offending or harming the victim or others was not low. It was also stated that there was no evaluation in favor of the convict regarding the fact that he would feel remorse for the crime and that he would not risk harming others.

As a result, the right to parole was taken away based on completely arbitrary and abstract reasons. There is no single fact supporting the decisions but only abstract, unsubstantiated statements. The Administration and Observation Board will re-evaluate Murat Arslan's situation on July 17, 2024. If the decisions are rejected every three months, Murat Arslan will be kept in prison until October 17, 2026.

¹² Release Request for Murat Arslan, <https://www.birgun.net/haber/yarsav-baskani-arслан-hakkinda-tahliye-talebi-520610> Accessed 24 April 2024.

Conclusion:

The situation surrounding conditional release and probation rights in Türkiye reflects a troubling trend of arbitrary decision-making and the erosion of fundamental legal principles. The inclusion of subjective criteria such as remorse for the crime in determining "good behavior" raises constitutional and legal concerns, blurring the line between substantive and execution law.

The amendments have effectively empowered prison administrations to act as de facto criminal courts, leading to unjust outcomes where convicts are pressured to express remorse for crimes they may not have committed to secure release. Murat Arslan's case serves as a poignant example of this phenomenon, where despite demonstrating good behavior, arbitrary and abstract reasons without a single fact were cited to deny his parole application.