An Evaluation of the Recent Proposal Aiming to Improve Conditions of "Children Throwing Stones to Security Forces" by Amending Certain Statutes

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INTRODUCTION

United Nations Convention on the Rights of the Child was adopted by United Nations General Assembly on November 20, 1989 and came into force on September 2, 1990. After the ratification of the Convention by TBMM (Grand National Assembly of Turkey) in 1995, the Convention is now the part of Turkish domestic law, and the coordination of the implementation of the Convention was assigned to SHÇEK (Directorate General for Social Services and Child Protection). Following the ratification, Child Protection Act (dated 3/7/2005, Statutory Number 5395) was enacted for the efficient implementation of the Convention. With this respect, 'Practice Direction on the Procedures and Principles Concerning the Implementation of Child Protection Act' and 'Regulation on the Implementation of the Protection and Support Orders Taken Pursuant to Child Protection Act' were put into effect after being promulgated in Official Gazette No 26386 on 24/12/2006. Furthermore, Turkish Penal Code (dated 26/09/2004, Statutory Number 5237), The Criminal Procedures Act (dated 04/12/2004, Statutory Number 5271), The Act on the Execution of Custodial Sentences and Security Measures , (dated 13/12/2004, Statutory Number 5275), The Act On Probation and the Establishment of Parole Boards, Assistance and Protection Centers (dated 3/7/2005, Statutory Number 5402) were enacted in order to harmonize domestic Turkish Law with the acquis of the European Union. When enacting all these acts, Child Protection Act was also taken into account and necessary amendments were made for the purpose of complying with the relevant law of European Union. In addition, The Act on Fighting against Terrorism (dated 12/04/1991, Statutory Number 3713) was significantly amended on 29/06/2006 (Statutory Number 5532). Despite mentioned changes in the legislation intended for the efficient implementation of United Nations Convention on the Rights of the Child, as will be discussed in details below, defects of the youth justice system and the violation of child rights remained intact. The perception of "child" and "childhood" in Turkey, which showed no significant change since the ratification, has impact on these defects and violations.

Since the ratification of the UN Convention on the Rights of the Child, children are no longer little people with little rights. Besides, what we used to call childhood is not a period spent with innocent games anymore. Nowadays, children can have responsibilities and rights depending on their age, and social and psychological development and can fulfill the relevant obligations and duties duly. For that reason, all States Parties are obliged to provide children with rights in accordance with their evolving decision making capacity as stated by Articles 3, 5, and 12 of the Convention, which are otherwise known as the locomotive articles of the Convention. This requires accepting that the

childhood period is not 'a waiting room' for children in which they are stuck until they attain adulthood and that children are individuals who have rights and responsibilities in accordance with their evolving decision making capacity.

Article 37 of the Convention concerning criminal responsibility of children and arrest, detention or imprisonment of a child provides that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Similarly, Article 40 of the Convention requires States Parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.

In the light of these provisions of the Convention, it is necessary to reform Turkish youth justice system. Though, the best interests of the child shall be a primary consideration of the new system, the new system also need to seek to secure social order by criminalizing and penalizing the act of children when they violate or infringe penal law. However, when doing this, the new system should also take into account the child's age, his physical, psychological and mental development and take all appropriate measures to promote physical and psychological recovery and social reintegration of a child.

Therefore, any regulation which will be introduced to improve youth justice system and will be applied to children accused of having infringed the penal law have to be constructed in accordance with this rationale. Whenever a child is accused of having infringed the penal law, such regulations should be implemented effectively

- at the stage of prosecution and investigation,
- in the implementation of arrest and defining the form of other security measures
- during trial
- in defining the form and duration of punishment if proven guilty
- in the execution of the custodial sentence
- in the determination of the conditions for qualifying to be released on parole after serving the custodial sentence.

In this context, the bill of law submitted to the TBMM on 11/06/2010 and sent to the Parliament by the Commission of Justice on 24/06/2010 addresses only the solution of some problems pertaining to children commonly known as **"stone-throwing children"** and falls short in reflecting the principles and rationale defined above. The mentioned bill of law as it stands could

only provide remedy for some problems set forth by academics and SHÇEK officials during the preparation of the Child Protection Act (Statutory Number 5395). On the other hand, it will likely lead to new problems. In order for a better understanding of this situation, it is of use to explain how the process evolved to the present state.

I- SOURCE OF THE PROBLEM

A- PROBLEMS STEMMING FROM CHILD PROTECTION ACT, OTHER RELEVANT STATUTES AND THE PRACTICES OF THE APPEAL COURT (YARGITAY)

1- In accordance with the Article 26 of Child Protection Act (dated 3/7/2005, Statutory Number 5395) Magistrate and Crown Courts for Juveniles were established. Magistrate Courts for Juveniles are authorized to hear the cases falling within the jurisdiction of Magistrate Courts and Crown Courts for Juveniles are authorized to hear the cases falling within the jurisdiction of Crown Courts. Therefore, the crimes which fall within the scope of the Act on Fighting against Terrorism and supposed to be heard by Crown Courts, which are specifically authorized and assigned to hear such cases, in accordance with the Article 9 of that Act and Article 250 para.1 of the Criminal Procedures Act (dated 4/12/2004, Statutory Number 5271) were excluded from the scope of the Child Protection Act. **As a result, children aged 15 and over and accused of committing crimes which fall within the scope of The Act on Fighting against Terrorism have been tried and prosecuted in above mentioned Specific Crown Courts (which were formerly known as State Security Courts) in accordance with procedures applicable and suitable for only adults. It is evident that such practices are in direct contradiction with the principles set out in the UN convention on the rights of the child.**

2- This exceptional regulation established the ground for violation of rights that virtually turned into tortures for children known by the public as “stone-throwing children”, and the decisions of the Appeal Court made the issue much more complicated. **According to the Appeal Court,** acts of the stone-throwing children cannot simply be identified as the violation of Meeting and Marching Act (Statutory Number 2911). The Appeal Court suggests that children that do not leave the unlawful protests or that prevent security forces from executing their duty to disperse the meeting, have committed an offence which went beyond the scope of “resistance to prevent the execution of duty” which is defined as an offence in Article 265 of Turkish Penal Code. The Court states that these children participate in these activities upon call from a terrorist organization and conduct activities on behalf of this organization. Therefore, the Court in accordance with the Article 220 of

the Turkish Penal Code proposes that the children's act of throwing stone should be regarded as an act of a person who is actually not member of the terrorist organization but acts on behalf of this organization which constitutes a punishable offence within the scope of the Act on Fighting against Terrorism. According to Article 220 para. 6 of Turkish Penal Code, a person who commits an offence on behalf of an organization such as a terrorist or crime organization should be regarded as the member of such organization, though s/he is not actually member of that organization; and should be punished as if s/he is a member of that organization. In accordance with these rules and reasoning, Appeal Court rules that pursuant to Article 220 para.6 of the Turkish Penal Code, though s/he is not actually member of the organization, by throwing stones in marches and protests, the minor defendant committed an offence on behalf of the organization, therefore s/he should be regarded as the member of the organization and punished accordingly. However, in the view of Appeal Court, this is not enough, according to para. 4 of the Article 220, as they did not leave the unlawful protest despite warning and prevented security forces from executing their duty to disperse the meeting by throwing stones, these children should also be punished for violation of the Meeting and Marching Act, then for the offence of "resistance to prevent the execution of duty" as well as other offences that they might have committed during marching and protest such as causing damage to property.

3- Any person who prevents any official from executing his duty by resisting commits an offence punishable from 6 months' to 3 years' imprisonment and the punishment can be extended by one third to half. When it comes to being a member to the criminal organization, it is punishable with imprisonment from 1 to 3 years and can be extended by one fourth to half, if the organization is armed. Coupled with the practices based on the above mentioned rulings and reasoning of the Appeal Court, such punishments are aggravated by ½ as they are regarded as crime which falls within the scope of article 4 and 5 of the Act on Fighting against Terrorism. Furthermore, , each act of throwing stones or participating in protests that takes place within short time periods or at the same date but in different locations is considered as a separate and independent crime and punishment with imprisonment for decades can be requested for a child. Since the Appeal Court considers that the act of children is an offence falling within the scope of the Act on Fighting against Terrorism and children over 15 should be tried in Special Crown Courts in accordance with the Article 9 of that Act, such Crown Courts, during prosecution or trial, are not authorized to suspend its own verdict for the defendant over 15, though necessary conditions are met. Likewise, they are not authorized to impose fine instead of custodial sentence for children, suspend the execution of imposed fine or custodial sentence, impose security measures or alternative sanctions, or drop the charge against the defendant even though the defendant is a first time offender. On the other hand, when a defendant

who received custodial sentence for an offence that did not fall within the scope of the Act on Fighting against Terrorism can be released on parole, if he serves two thirds of his sentence in a prison or a penal institution, these children cannot be regarded as eligible to be released on parole unless they serve three fourths of their sentences, since they are considered to have committed an offence in the scope of organizational or terrorist activity and the Article 107 para. 4 of The Act on the Execution of Custodial Sentences and Security Measures, (Statutory Number 5275) requires serving three fourths of the sentence in order to be released on parole for such offences.

With this approach, children are put in the status of notorious gang leaders or leaders of criminal organization, and these children have received sentences heavier than what such notorious gang leaders or violent criminals as Haluk Kırcı and Mehmet Ali Ağca has received. For instance, Haluk Kırcı received 3 years 1 month and 15 days imprisonment for Susurluk Case[1], whereas M.B. who threw stones and Molotov cocktail to security forces when he was at the age of 17 in 2008, received 10 years and 8 months imprisonment, namely 4 years and 2 months for violating Article 314/2 of Turkish Penal Code regulating "committing a crime on behalf of the organization without being a member of that organization"; 6 months for 'propagating the idea or the cause of a terrorist organization' and violating the Act on Fighting against Terrorism, 2 years and 9 months for "showing resistance to security forces with weapon or tools during dispersing" as specified in Article 33/c of Meeting and Marching Act (Statutory Number 2911) , 2 years and 10 months imprisonment for "carrying unlawful explosives", and finally 5 months' imprisonment for "damaging property" .[2]

B- PROBLEMS STEMMING FROM THE PROPOSED BILL OF LAW AND THE AMBIGUOUS WORDING OF THE PROPOSAL

1- The term "explosive" as given in Article 3 of the proposal is unduly vague and its scope is not clear. For instance, it is possible that children that carry fuel to be used for Newruz celebrations or fireworks or crackers to be used during the protests might be left out of the scope of the new regulation. However, intention to harm security forces is not evident in such cases. When it becomes a law, it would be unfair, if children in such cases are left out from the scope of the proposal, while children that deliberately carry stones, sticks or cranks to be used against security forces would be

[1] Yeni Şafak, 29 May 2010

[2] Yeni Şafak 23 June 2010 in reference to Anadolu News Agency.

considered in the scope of the proposal and exempted from a custodial sentence, provided that s/he did not commit the same offence before.

2- Also the term “persistent” in Article 3 of the proposal must be questioned. The proposal seems to have linked the issue of “persistence” to the condition that trial shall be carried out. To put it differently, the proposal does not attribute any meaning to the identification made by security forces. If the proposal becomes a law, children arrested for throwing stones to security forces will no longer be reprimanded and handed in to their families by security forces. The trial will be carried out and later such children will be released without any sanction upon the identification that s/he did not commit such an offence before. Nonetheless, the children will be forced to appear before the court and testify therefore, they will unnecessarily be victimized and traumatized though it is known in advance that no sanction will be imposed.

The proposal proposes that children known to get into habit of throwing stones to security forces and handed in to their families without initiating any legal procedure shall not be deemed to be persistent. In this context, if a child is accused of participating in meetings or protests within short time periods but in different locations or at different dates and of preventing the security forces from executing the duty of dispersing the meeting by throwing stone, that child will not be considered as persistent. But, if a child who previously went to trial and was found guilty for throwing stones repeats the same act after release for somewhat reason will be subjected to criminal sanction even the number of criminal acts is less than other, since the act was previously identified by judicial institutions. To put it differently, a child who gets into habit of throwing stones will not be considered persistent as did not went to trial before and thus will benefit from the new regulation while a child who committed such an offence once, previously went to trial and was found guilty for throwing stones, repeats the act of throwing stone for somewhat reason will be subjected to criminal sanction. This obviously is not fair, either.

Furthermore, it is not clear whether a child who received custodial sentence for his involvement in more than one protest but was tried by only one court and therefore only one verdict is available for him, will be considered persistent if the bill becomes a law. In other words, it is not clear whether the term ‘persistent’ was used in legal sense or literal sense in the proposal. In legal sense, being persistent means that the defendant is previously found guilty of committing the same offence before a court of law. In literal sense, being persistent means that the defendant has repeated the same act more than once regardless of how many verdicts is available for him. If the

term is understood in literal sense, a child who received custodial sentence for his involvement in more than one protest but was tried by only one court and therefore only one verdict is available for him will be regarded as persistent, s/he will stay in jail. If not s/he will be released upon request for executing the provisions in favor, and will benefit from security measures.

II- PROBLEMS WITH RESPECT TO THE UNCONSTITUTIONALITY OF THE PROPOSAL

1- The proposal introduces tacit amnesty for children, the number of whom is claimed to be 206[3] but the number is said to be over 4000 according to Human Rights Association's ,"Children in Conflict with the Law, 2008 report ", Diyarbakır Bar Association, and other independent sources. Article 87 of the Constitution of the Republic of Turkey stipulates that the Grand National Assembly of Turkey can declare general amnesty or pardoning with the votes of the three fifths of total number of its members. Therefore, the proposal will not become a law unless 330 members cast affirmative votes. If it becomes a law after the President's approval and promulgation in Official Gazette, it can be annulled by the Constitutional Court. Although the members of parliament from the ruling party suggest that the proposal is not a bill of amnesty[4], if the proposal becomes a law children serving, their sentence in prisons for offences that fall within the scope of the proposal can be released from prisons, if they apply to benefit from introduced ameliorations. Instead of custodial sentence, the implementation of security measures specific to minors can be arranged for these children and release is secured accordingly. Therefore, under the guise of the suspension of the execution of custodial sentence or the implementation of alternative sanctions to custodial sentence, the main and implicit objective of the proposal, is nothing but introducing tacit amnesty.

2- The proposal provides the implementation of security measures specific to minors for children that participated in meetings or protests without using any firearm, bullet, knife or explosive and that are not deemed persistent. According to Article 56 of Turkish Penal Code "forms of security

[3] AKP MP from Diyarbakır, Abdurrahman Kurt, Kanal 7 News 16.06.2010

[4] AKP MP from Diyarbakır, Abdurrahman Kurt, Kanal 7 News 16.06.2010

measures specific to minors and procedures concerning their application shall be defined in the relevant law." In line with this provision of the Penal Code, Child Protection Act (Statutory Number 5395) introduces a provision to this purpose in Article 11 which provides that: "The protection and support orders set out in this Act (referring to Child Protection Act Article 5) shall be deemed as security measures specific to minors for children who are in conflict with the law and who do not have criminal responsibility." In short, orders specified in the Article 5 of the Child Protection Act, -namely, care, accommodation, health, education and consultancy orders- are considered as security measures specific to minors for children who are in conflict with the law and who do not have criminal responsibility. As the Act on the Execution of Custodial Sentences and Security Measures (Statutory Number 5275) does not stipulate any additional measure, these are sole measures that can be applied to children who are in conflict with the law. Article 5 of the Child Protection Act defines these orders which will be applied as measures, Article 45 defines agencies that are responsible for the implementation of these orders and finally Article 47 of the Act provides that procedures concerning the implementation of these orders will be prescribed in a joint regulation issued by the Ministry of Justice and SHÇEK. However, this provision is unconstitutional. Article 19 of the Constitution of Republic of Turkey bearing the title of "Personal Liberty and Security" provides that:

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except in the following cases where procedure and conditions are prescribed by law; execution of sentences restricting liberty and the implementation of security measures decided by courts; apprehension or detention of a person as a result of a court order or as a result of an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor or for bringing him before the competent authority; execution of measures taken in conformity with the relevant legal provision for the treatment, education or correction in institutions of a person of unsound mind, an alcoholic or drug addict or vagrant or a person spreading contagious diseases, when such persons constitute a danger to the public, apprehension or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued."

To put it differently, forms, procedures and conditions of the security measures taken by Courts should be prescribed by a law specifically by an act; not a regulation. Therefore, the Child Protection Act to which the proposal implicitly refers and the proposal itself are unconstitutional since they do not prescribe procedures and other rules concerning the implementation of these

measures or orders in the Act. So, Article 47 of the Child Protection Act and Article 3 of the proposal are unconstitutional.

Even though it is claimed that the Regulation on the Implementation of the Protection and Support Orders Taken Pursuant to Child Protection Act' [5] does not go beyond the limits drawn by the Child Protection Act and therefore does not violate the Constitution, the fact is that wording and drafting Article 47 of the Child Protection Act in a way which provides that **procedures and other rules concerning the implementation of protection and support orders will be prescribed in a joint regulation is itself unconstitutional.**

3- If a child attains adulthood when serving his sentence in a prison, could he benefit from the proposal and be released by requesting the application of security measures specific to minors? First of all, as evident from the term itself, security measures specific to minors can only be applied to individuals under 18 years of age as stipulated by Articles 5, 6, and 7/6 of the Child Protection Act. Although the proposal does not introduce any time limit, it uses the phrase 'children'. Therefore, children who serve their sentence in prisons for throwing stones to security forces and attain adulthood when serving that sentence will not be able to benefit from the mentioned proposal since security measures and orders cannot be applied to adults. In other words, the proposal brings different treatments for stone- throwing children who attain adulthood when serving sentence and children who do not attain adulthood when serving sentence, despite the fact both group of children committed the same offence. As a result, when the proposal becomes a law, children who attain adulthood when serving sentence will not be released, however, children who do not attain adulthood when serving sentence will be released. This practice will be the violation of the principle of equality before law prescribed in the constitution. Therefore, an explicit provision providing that 'regardless of whether s/he has attained adulthood when serving sentence in the prison, when a child, in order to secure release, applies to benefit from provisions that are in his favour, s/he will be released, if necessary conditions specified here are met. But security measures specific to minors or judicial control mechanism will be applied for the child 'must be added to Article 3 of the proposal that seeks to amend Article 24 of Meeting and Marching Act (Statutory Number 2911)

III- PROBLEMS WITH RESPECT TO THE IMPLEMENTATION OF THE PROPOSAL

The substantial part of the security measures or orders specific to minors, particularly care and accommodation orders, will be carried out by Directorate General for Social Services and Child

[5] 24.12.2006 dated No 26386 Official Gazette

Protection. This is another problem stemming from the proposal. If the court before which the child appears takes the view that the habit of throwing stones will continue, if the child in question is handed in to his /her parents, the court may order that the child shall be separated from his or her parents and placed in an institution run by the Directorate General for Social Services and Child Protection or Ministry of National Education. No matter what forces these children to throw stone, these children are more or less politicized and commit the mentioned act in accordance with a certain political identity. However, SHÇEK would not be able to take an approach that respects political motives or stances of these children due to the principles set out in Social Services and Child Protection Act. These children, who are in need of protection, as they are in conflict with the law, will be treated in accordance with the general principles defined in Article 4 /k of the Social Services and Child Protection Act (Statutory Number 2828). This article provides that "It is fundamental that children in need of protection are raised in line with Kemalist thought and with principles and reforms of Atatürk, and raised as individuals who are respectful to Turkish manners, customs, beliefs, and national morals; self-confident, humanistic and respectful to human rights; are provided with a job and profession; and shall be monitored and if possible will be supported in the society after the termination of the care order." Any measure to be introduced in the light of these principles by Directorate General of SHÇEK, which will be obliged to provide care and accommodation services and carry out security measures for these politicized children, could further radicalize these children. SHÇEK is not established to "rehabilitate" or "reintegrate" these more or less politicized children with the society. It is likely that these politicized children who are likely going to be put under care order might pressurize other children placed into the same institution; and due to peer pressure the number of children throwing stones might increase. So, seen from this perspective, the proposal has the potential to make the current situation worse rather than better.

On the other hand, if the proposal on stone-throwing children, also considered as children who are in conflict with law, becomes a law, it is slightly possible that these children might be put under judicial control mechanism in accordance with Article 20 of Child Protection Act and Article 109 of the Criminal Procedures Act. Nonetheless, it is not clear how to monitor and who will monitor whether the measures imposed for the purpose of judicial control mechanism, such as "not leaving a defined specific environment, not going to some certain places or not getting in touch with certain individuals or organizations", are effectively applied. As a result, the proposal in question does not have any capacity to make a substantial contribution to youth justice system and provide remedy for the problems related to stone-throwing children since some of its provisions are unconstitutional and it reflects an attitude which defers the problem and postpones finding a solution to the problem.

CONCLUSION

Youth justice system must be restructured. In this context, in the light of the principles set out in the decision of European Courts of Human Rights, *Venables and Thompson v UK* (16 December 1999) [Grand Chamber] and the practices in the UK, each session of the trial where a child appears before the court should not be longer than 45 minutes, which is equal to one-hour teaching period, and regular breaks should be taken. In these breaks, children should be allowed to consult with their counsels and parents provided that it shall not jeopardize the outcome of the trial. Children should be informed about the charges against them and the possible outcomes of the trial through pedagogues and psychologists by taking into account their intellectual capacity; and which defense strategy will be followed in the trial should be decided upon active participation and involvement of the child and his/her parents. When conducting the trial, the child should not be traumatized or victimized apart from facing the immorality of the malice act that s/he committed. Uniforms or the formal environment in which the trial is conducted might have possible harmful psychological impact on children, in order to eliminate these, in juvenile courts judges and prosecutors must not wear gowns and officials must not wear any uniform. In order to maintain eye contact between the child and the judge, court rooms must not have any dock, children must not be made to stand at the raised dock; and a seating plan where the defense team, the judge and the prosecutors sit at the same level shall be established in all juvenile courts. In settlements such as Bağlar district, 5 Nisan district or Yeniköy district in Diyarbakır, in which even armored vehicles cannot move easily and where stone-throwing acts take place frequently, urban-planning must be revised, urban transformation projects must be accelerated, and finally the number of playgrounds and social spaces for children must be increased. Otherwise, for children who do not have a play ground other than streets within a distance of at least 3 kilometers, streets will remain as an area for socialization and children will continue to engage in this act due to peer pressure or its attractiveness. It is already in question to transfer the stone-throwing children to other prisons or institutions. However, the intellectual, physical and psychological development of these children has not been completed yet. Therefore, it is a must that they maintain personal relations and direct contact with their parents on a regular basis for the sake of their healthy development. According to Article 9 para.3 of the UN Convention on the Rights of the Child, “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.” Therefore, the transfer of these children to other institutions or prisons which are too far away from their home town and in

practice makes it impossible to maintain personal relations with parents will be the violation of the child's right to maintain personal relations and direct contact with parents on a regular basis. To sum up, due to reasons discussed here, the proposal submitted to the Commission of Justice and sent to the Parliament does not have any capacity to make a substantial contribution to youth justice system and provide remedy for the problems related to stone-throwing children, since some of its provisions are unconstitutional and it reflects an attitude which defers the problem and postpones finding a solution to the problem.

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