Demanding Peace Is Not a Crime.
Füsun Üstel's Freedom Is the Freedom of Us All.
We Demand:
(16 July 2019)

- On 7 May 2019, Section One of the Constitutional Court of the Republic of Turkey decided on the joinder of the individual application of Prof. Dr. Füsun Üstel with a series of applications that were submitted by other Peace Academics on various dates. At its session held on 29 May 2019, when the file was included on the Section's agenda for examination, even though the application of Füsun Üstel includes a request of prioritized examination and halting of the execution of the prison sentence upon a request for an interim measure, the Court decided to adjourn the proceeding on the ground that the opinion of the Ministry of Justice had not been delivered yet. At its next session held on 3 July 2019, Section One of the Constitutional Court decided to transfer the file to the Plenary. We once more underline the importance of the fact that the individual application of Prof. Dr. Füsun Üstel includes a request for an interim measure and that an expeditious examination of the application is necessitated by the situation, where the execution of the prison sentence is already in process. As the Court has decided on the joinder of the applications, the necessity for an expeditious examination applies to the whole case file. We demand the examination of the file without any further delay.
- Regarding the transfer of convicts to open penal institutions and their avail of the terms of supervised release, we demand an end to ongoing practices that are contrary to both legislation and the jurisprudence of the Court of Cassation, and in this framework, we demand from the Ministry of Justice to exercise its authority for an extraordinary appeal as requested by the attorneys of Prof. Dr. Füsun Üstel and enable the relevant case to go before the Court of Cassation for a reversal of the the judgment,
- We demand that the Ministry of Justice informs the relevant administrative bodies of penal institutions about putting an end to these unlawful practices regarding convicts of Article 7/2 of the Turkish Anti-Terror Law.
- In addition to our abovementioned demands, we hereby also demand an immediate end to all legal processes imposed on Prof. Dr. Füsun Üstel and all the other signatories of the Peace Petition as they constitute a violation of the freedom of thought and expression guaranteed under Article 26 of the Constitution of the Republic of Turkey and Article 10 of the European Convention on Human Rights, and remind the Ministry of Justice of its binding responsibility.
- In this context, we also demand an end to legal and administrative cases that result in violations of the freedom of expression, the freedom of the press and academic freedom, for concrete steps to be taken for the protection of these rights and freedoms within the framework of international human rights law,

and for the Judicial Reform Strategy Plan, as also reported in the press, to be submitted to the Grand National Assembly of Turkey and the public without any further delay.

FACT SHEET REGARDING THE JUDICIAL PROCESSES THAT HAVE TAKEN PLACE FOLLOWING THE FINALIZATION OF THE VERDICT OF CONVICTION ISSUED FOR PROF. DR. FÜSUN ÜSTEL

On 4 April 2018, on the grounds that she undersigned the Peace Petition, which is actually an act carried out within the frame of freedom of expression, Prof. Dr. Füsun Üstel was sentenced to 15 months of imprisonment by the 32nd Assize Court of Istanbul, on the basis of Article 7/2 of the Turkish Anti-Terror Law, which enacts the crime of propagandizing for a terrorist organization. Prof. Dr. Füsun Üstel rejected the deferment of the announcement of the verdict, as regulated in Article 271 of Turkish Criminal Procedure Code. Although it is possible within the scope of Article 51 of the Turkish Penal Code to suspend the sentence of imprisonment, the 32nd Assize Court of Istanbul chose not to follow this path.

Upon the material dismissal of the request of appeal about Füsun Üstel by the 3rd Chamber of the Istanbul Regional Court of Justice on 25 February 2019, the verdict of conviction issued by the 32nd Assize Court of Istanbul became finalized.

The execution of the prison sentence has began on 8 May 2019 at Women's Prison of Eskişehir. **Today (16 July 2019) is the 70th day of the execution of the prison sentence.**

According to the legal status summary issued at the time of the commencement of the execution of imprisonment, the date for release on probation for Füsun Üstel is 13 April 2020. This date is important in understanding the information to be provided below with regards to the terms of "transfer of the convict to an open penal institution" and "supervised release".

Following the finalization of the verdict of conviction issued by the 32nd Assize Court of Istanbul, the attorneys of Füsun Üstel have sought to operate all kinds of ordinary and extra-ordinary legal remedies.

The Individual Application to the Constitutional Court

Upon the finalization of the verdict of conviction, firstly an individual application regarding the violations of the fundamental rights and freedoms of Füsun Üstel has been made to the Constitutional Court on 25 March 2019, solicited with the request of

prioritized examination and halting of the execution of the the prison sentence as an interim measure.

On 7 May 2019, the individual application of Füsun Üstel was joindered with a series of applications submitted by other Peace Academics on various dates and it has been taken on the agenda of the Constitutional Court for being examined on the session dated the 29th of May, 2019. On the session held on 29 May 2019, Section One of the Constitutional Court decided to adjourn the examination of the joindered applications on the ground that the opinion of the Ministry of Justice had not been delivered yet, even though the individual application of Füsun Üstel includes a solicit that requests a prioritized examination and halting of the execution of the prison sentence as an interim measure.

In accordance with Article 49/2 of the Law on the Establishment and Rules of Procedures of the Constitutional Court, numbered 6216, and in accordance with Article 71 of the Internal Regulations of the Court, in the case that the Court decides on the admissibility of an individual application, a copy of the application shall be sent to the Ministry of Justice for informatory purposes. If it deems necessary, the Ministry of Justice submits its opinion on the case file to the Court in thirty days and in written form. When requested, this deadline can be extended for up to thirty more days. In the case that the Ministry does not submit an opinion within this mentioned timeframe, the Court gives its decision in the absence of the ministerial opinion. **In cases of urgency or if the matter is well-settled in the case law** the Court can issue a judgment on the merits of the application without waiting the ministerial opinion.

In other words, **on matters of urgency**, the Constitutional Court is not obliged to wait for the ministerial opinion. The fact that the execution of the prison sentence of Prof. Dr. Füsun Üstel has commenced is in itself a legal ground for the admittance of the urgency claim.

It is clear that the application of Füsun Üstel, which is submitted with the request of prioritized examination and halting of the execution of the prison sentence as an interim measure, should be examined without having need to wait for the delivery of the ministerial opinion. Unfortunately, just like it had not exhibited any discretion in examining the application prior to the commencement of the execution of the prison sentence, at its relevant session, the Constitutional Court also decided to wait for the ministerial opinion.

The opinion of the Ministry of Justice began to be served to the attorneys of the applicants almost a month after the session dated the 29 May 2019 of Section One of the Constitutional Court. In accordance of Article 71 of the Internal Regulations of the Court applicants have the right to respond to the relevant opinion in 15 days, however Section One of the Constitutional Court included the joindered file on its agenda on 3 July 2019, in other words, without waiting for the expiration of this period. And at

this session, the decision was taken to transfer the file to the Plenary. The application should be examined without delay; however, it is not known when the Plenary will include the application on its agenda for examination.

For that reason, Prof. Dr. Füsun Üstel remains deprived of her freedom for 70 days.

The Plea for the Stay of Execution

Secondly, on 29 April 2019, the attorneys of Füsun Üstel submitted a plea for the stay of execution to the 32nd Assize Court of Istanbul, the court that had originally issued the verdict of conviction, on the grounds that (i) an application with the request of prioritized examination and halting of the execution of the prison sentence as an interim measure has been made to the Constitutional Court, (ii) there has arisen a just expectation in the public about the enactment of a new law regarding the right to appeal, which is advantageous for the convict with regards to the execution law, and (iii) it is contrary to the principle of equality that the adjudication of the cases regarding the Peace Academics are being carried out inconsistently, with different courts basing their judgments on different norms.

The 32nd Assize Court of Istanbul rejected this plea on 30 April 2019.

On 13 May 2019, a plea of objection was submitted to the 33rd Assize Court of Istanbul with the request of rescission of the decision on the rejection of the plea for the stay of execution that was given by the 32nd Assize Court of Istanbul.

Meanwhile, the decision of the Constitutional Court issued on the individual application of **Ayşe Çelik** (Application No: 2017/36722) was published in the Official Gazette dated May the 10th, 2019.

Accordingly, in this objection plea, **it is underlined that the decision regarding Ayşe Çelik, which constitutes a precedent for the cases regarding Academics for Peace**, should be taken into consideration by the examining court. However, unfortunately, the 33rd Assize Court of Istanbul, as the examining court, carried out no legal discussions whatsoever and rejected the objection by a majority vote on 20 May 2019, on the claim that the decision of the 32nd Assize Court of Istanbul is duly given and is in accordance with law.

Whereas, there exists **a statement of dissenting opinion** lodged by one of the judges in the text of the decision: The dissenting opinion argues **that the statements found in the Peace Petition should be evaluated within the scope of freedom of expression**, therefore the imputed crime has not occurred, adding that the individual application of Füsun Üstel might be concluded in a way that is similar to the case of Ayşe Çelik, and therefore, in order to prevent any possible violation of rights, the request for the stay of execution of the prison sentence should be accepted. But

despite the existence of the decision given by the Constitutional Court regarding Ayşe Çelik, the relevant arguments were not discussed while the court reached its majority opinion.

For that reason, Prof. Dr. Füsun Üstel remains deprived of her freedom for 70 days.

On the other hand, in the case of her retrial following the Constitutional Court's decision that there had been a violation of freedom of expression, **Ayşe Çelik** was acquitted at the first hearing held on 26 June 2019.

The Application Regarding the Transfer to an Open Penal Institution and Avail of the Convict of the Terms of Supervised Release

Thirdly, following the commencement of the execution of the prison sentence of Füsun Üstel in Women's Prison of Eskişehir on 13 May 2019, a petition was submitted to the Eskişehir Penitentiary Administration by the attorneys of Füsun Üstel in order to make her to be transferred to an open penal institution with the aim of enabling her avail of the terms of supervised release.

It should be primarily noted that, there exists a problematic *de facto* practice of execution in Turkey regarding the avail of convicts of the terms of supervised release and the transfer of convicts to an open penal institution. Even though this practice also includes positive exceptions especially in the presence of the judges of execution, with regards to convicts of Article 7/2 of the Turkish Anti-Terror Law, it creates extremely negative outcomes that are contrary to the principle of equality. It is also contrary to the writ issued by the Court of Cassation as a precedent (dated 29.04. 2019, Docket No: 2017/3312) and incompatible with the general legal concern of "interpreting the legislation in accordance with the law".

In short, according to Article 6 of the Regulation on Transfer of Convicts to Open Penal Institutions, in order to impose the execution of the prison sentence to be carried out compulsorily in a closed penitentiary institution, the relevant person must be convicted of the crimes that are stated in the article. **Article 7/2 of the Turkish Anti-Terror Law is not among these crimes**. Therefore, in accordance with the relevant legislation on execution, the convicts of Article 7/2 of the Turkish Anti-Terror Law can be transferred to an open penal institution and can have an avail of the terms of supervised release, on the condition that there should be less than a year to the date for their release on probation.

Thus, the decision given by the **1st Penal Chamber of the Court of Cassation** on 29 April 2019 upon a request for an "extraordinary appeal" is also in parallel with the opinion stated above. The relevant decision, which has also been published in the media, is about the execution of the prison sentence of Sezgin Kartal, a convict held in Silivri Prison upon a verdict of 15 months of imprisonment issued by the 13th

Assize Court of Istanbul on the grounds of propagandizing for a terrorist organization. When examining the request for a "extraordinary appeal" the Court of Cassation openly ruled that a person who has committed the crime of propagandizing a terrorist organization, cannot be deemed as a member of a terrorist organisation just upon the nature of the crime. The Court then concluded that it is legally not proper that while examining his request for being transferred to an open penal institution and availing of the terms of supervised release, the administration of the penitentiary and the judge of execution have deemed him as a member of a terrorist organisation and given their decisions on that ground.

But in practice, even though it exhibits certain positive exceptions (such as the decision of the Judge of Execution of Bakırköy regarding **journalist Ayşe Düzkan**), the process is not being duly operated. Contrary to the relevant legislation and to the precedent of the Court of Cassation, the convicts of Article 7/2 of the Turkish Anti-Terror Law are deemed as perpetrators of terrorism. Even though they have less then one year until their date of release on probation, they are being obstructed from having an avail of their right to become transferred to an open penal institution without having one third of their total punishment executed in closed penitentiary institutions in good conduct. They are also kept unable to benefit from the terms of supervised release. It is possible for them to benefit from these opportunities only upon legal remedies, however, these people are kept in closed penitentiary institutions until their applications are processed and decided upon. Yet, it is not possible to compensate for the cost of even one day that is spent away from freedom in a way that is unlawful and contrary to their fundamental rights.

In this context, it should be underlined that the date for release on probation for Füsun Üstel is 13 April 2020 and the execution of the prison sentence has began on 8 May 2019. When the attorneys of Füsun Üstel submitted the petition for her transfer to an open penal institution with the aim of enabling her avail of the terms of supervised release, there was less than a year to the date for her release on probation. However, the process initiated with the application made to the administration of the penitentiary in order to enable the transfer of Füsun Üstel to an open penal institution and let her benefit from the terms of supervised release is unfortunately tangled with unlawful legal assessments.

On 13 May 2019, the Evaluation Board of the Directorate of Eskişehir Type H Penitentiary Institution rejected the request regarding the transfer of Füsun Üstel to an open penal institution.

On 15 May 2019, an application was made to the Judge of Execution of Eskişehir with the requests of the annulment of the evaluation report and the approval of the request regarding the transfer to an open penal institution.

On 21 May 2019, the 1st Judge of Execution of Eskişehir decided on the annulment of the decision of the Evaluation Board dated May the 13th, 2019, which states that Füsun Üstel is not eligible for being transferred to an open penal institution. The request about having the punishment of Füsun Üstel executed on the terms of supervised release was rejected on the grounds that Füsun Üstel had not been transferred to an open penal institution yet and there exists no good conduct report issued for her.

On the same day, the Office of the Chief Public Prosecutor of Eskişehir objected to the decision of the 1st Judge of Execution of Eskişehir, claiming that Article 7/2 of the Turkish Anti-Terror Law corresponds to a terror crime and basing this claim on *de facto* practice. **The day after**, the 1st Assize Court of Eskişehir, as the competent court on examining the objection, accepted the objection of the Prosecutor's Office and decided that the decision of the 1st Judge of Execution of Eskişehir about the transfer of Füsun Üstel to an open penal institution should be revoked.

The 1st Assize Court of Eskişehir grounded its decision on the "ongoing practice of execution" where the Article 7/2 of the Turkish Anti-Terror Law is deemed as a terror crime. It also claimed that the writ issued by the Court of Cassation, which, as shown above, in fact presents a very clear evaluation of the issue, does not include an open and clear evaluation regarding whether Article 7/2 of the Turkish Anti-Terror Law constitutes a terror crime or not. Therefore, **it issued a decision which is both contrary to the lawful interpretation of the legislation and the precedent of the Court of Cassation.**

The decision of the 1st Judge of Execution of Eskişehir became definitive on 22 May 2019. Thereupon, on 27 May 2019, the attorneys of Füsun Üstel issued a motion for **"Extraordinary Appeal"**, which is an extraordinary legal remedy.

According to the Turkish Criminal Procedure Code, "extraordinary appeal" is a remedy that can be requested in cases where the decisions and judgments that become finalized without being reviewed by the regional or supreme court of appeals are contrary to the law. When it is ruled that there exists a contradiction to the law in such a decision or judgment, the Ministry of Justice shall apply to the Chief Public Prosecutor of the Court of Cassation with the request of the reversal of the decision or the judgment. That is to say, **it is the Ministry of Justice that is authorized to request an "extraordinary appeal".** It is available to file a motion to the Ministry of Justice to make it issue this request, but the Ministry is not bound by this application.

The Ministry of Justice has not taken any action regarding the motion filed by the attorneys of Füsun Üstel as of yet.

For that reason, Prof. Dr. Füsun Üstel remains deprived of her freedom for 70 days.

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Considering the above mentioned precedent of the Court of Cassation, it can be expected that, in the case that the Ministry of Justice takes action and requests for an "extraordinary appeal", the Court of Cassation might give a similar decision on the case of Füsun Üstel. Unfortunately, the actual stance of paralysis has occurred even though the relevant precedent of the Court of Cassation has been submitted to all the authorities during the relevant applications by Füsun Üstel's attorneys. However, in order for the Court of Cassation to rule for the reversal of the judgement, firstly the Ministry of Justice should take action.

As can be seen, **in the legal course of the events, the process about the transfer of Füsun Üstel to an open penal institution and her release upon the terms of supervised release are now bound to the will of the executive organ with regards to the Ministry of Justice. The conclusion of the individual application, on the other hand, has been postponed to a date to be set by the Plenary of the Constitutional Court, a date which we cannot foresee at this stage.**

Although it should be seen as unacceptable that our beloved Professor Füsun Üstel spends even a single day in prison just because she is a signatory of a petition that can solely be evaluated under the freedom of expression, she remains deprived of her freedom, her family and her friends for 70 days.

We demand, from both the Constitutional Court and the Ministry of Justice, to take the necessary steps for this chain of rights' violations to end.

The decisions to be given both by the Constitutional Court upon the individual applications and the Ministry of Justice about the possible request for a reversal of the judgment do not only concern our beloved Professor Füsun Üstel. Since, as of today, there exists 35 more academics who either have not accepted the terms of the deferment of the announcement of the verdict and also have not had their punishments postponed by the relevant court; or, as they are condemned to more than 24 months of imprisonment, cannot either benefit from the deferment of the announcement of their verdicts or from the postponement of execution. The punishments imposed on the signatories, who have carried out the same action of having undersigned the very same petition, vary from 15 to 36 months and this variation fails to provide any legal or rational explanation. Considering the fact that new penal cases are being filed each new day and hundreds of cases are still being held in process, there exists a sign that violations of rights might become scaled up in a severe manner. Therefore, the necessary steps that are provided in the Constitution and international agreements should be taken immediately.