REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2011

TURKEY

DİLEK KURBAN

State of affairs up to 1st January 2012

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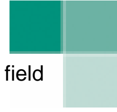

INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

Turkey is a unitary state with a continental legal system. It adheres to the principle of the hierarchy of laws, whereby the constitution is the supreme law of the land.

Legislative power is vested in the Turkish Grand National Assembly and this power cannot be delegated. Regulations which put forth in detail the ways in which laws are to be implemented are adopted by the government. The executive also issues internal decrees addressed to public institutions. While laws and regulations are published in the Official Gazette, circulars are not publicly available.

The competence to review the constitutionality of laws and of decrees having the force of law is vested with the Constitutional Court. The Court exercises this power either upon an annulment action brought by the president, the parliamentary groups of the governing party or the main opposition party, or a minimum of one-fifth of members of the parliament; or upon referral from a lower court. The Court's mandate is limited to reviewing the compatibility of the law in question with the principle of "equality before the law" enshrined in art. 10 of the Constitution.

According to art. 90 of the Constitution, international treaties which are duly ratified have the force of law.[1] If the language of the treaty provision is self-executing, it is directly applicable. In case of a conflict between provisions of domestic laws and international treaties on fundamental rights and freedoms duly put into effect, the provisions of international agreements shall prevail. Appeal cannot be made to the Constitutional Court claiming the unconstitutionality of international treaties. Turkey is a party to a considerable number of international treaties containing provisions on anti-discrimination and equal treatment.

Disputes arising from private law and criminal law, including discrimination cases are decided by the civil and criminal courts. The judgments given by these first instance courts are reviewed by the Court of Cassation.

Administrative cases are decided by the administrative courts, tax courts and regional administrative courts. The Council of State is the high court. However, the Council of State deals with some cases prescribed by law as a first instance court.

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[1] In order for an international treaty to be duly ratified, first the Parliament has to adopt a law approving the ratification of the treaty, then the Committee of Ministers must issue a decree of ratification.

While court decisions and judgments are in principle open to public, only some of the judgments and decisions of the Court of Cassation and the Council of State are published through a subjective selection which does not rest on any objective criteria. Some of the decisions and judgments of the Court of Cassation and the Council of State are published in the respective legal journals published by these courts based on the selection of the editors of these journals. Independent legal journals also selectively publish decisions and judgments they obtain directly from the high courts. The Legal Publishing House runs a website and issues a legal journal both of which publish decisions and judgments it deems to be innovative, solution-oriented and principled.[2] A third source is the judges and prosecutors of high courts, who “publish in their books ‘interesting’ decisions and judgments which they had set aside in order to increase the sales of their books”.[3] A professor of constitutional law summarized “the ‘secret criterion’ known to practitioners” as follows. “The presidents of chambers of Court of Cassation and the Council of State purposefully prevent the publication of potentially interesting decisions and either use these at later stages in books they publish or privately share them with publishers they reach an agreement with, turning these decisions into ‘commercial commodities.’ Decisions published at their own legal journals are those that have no practical use but further existing judicial interpretation or precedence. Important decisions that introduce a change in the case law are published commercially”.[4]

The Constitutional Court’s judgments concerning the dissolution of political parties and the constitutionality of laws and decrees are published in the Official Gazette, as required under the Constitution. The judgments the Court will give in cases to be brought by individuals after the constitutional complaint mechanism enters into force in August 2012 will be selectively published on the basis of criteria that will be laid out in a by law.

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of

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[2] Opinion expressed through e-mail by Mehmet Uçum, a lawyer who is among the directors of Legal Publishing House (http://www.legal.com.tr/).

[3] *Id.*

[4] Opinion expressed through e-mail by Ozan Erözden, associate professor of constitutional law, Yıldız Technical University.

complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

Structure of anti-discrimination law in Turkey

- Turkey is not a member of the European Union (EU). Consequently, the EU's Directives have not yet been transposed to Turkish Law.
- Turkey does not have an anti-discrimination law. More than two years after its preparation in March 2009, the draft Law on Combating Discrimination and Establishing an Equality Body has still not been adopted.
- The constitutional basis of legal framework on equality and anti-discrimination rests in Article 10 of the 1982 Constitution, which provides an open-ended list of enumerated protected grounds. A recent amendment to this clause now allows positive measures on behalf of women, elderly and persons with disabilities.
- There are anti-discrimination provisions in criminal, administrative and civil laws. These provisions put forth non-exhaustive protected grounds, which vary significantly.
- Ethnicity, age and sexual orientation are not enumerated in any of the laws or in the constitution. Therefore, the applicability of anti-discrimination clauses in the constitution and various laws to discrimination on these grounds is an uncertainty.

Protected grounds

Discrimination on all grounds enumerated in the EU Directives is not expressly covered under Turkish national law; ethnicity, age and sexual orientation are not explicitly mentioned in the constitution or any of the relevant laws. On the other hand, the lists of enumerated grounds set forth in the constitution and various laws are open-ended, which suggests that, in theory, courts are able to bring expansive and liberal interpretations of equality clauses. However, grounds explicitly enumerated in the constitution and various laws differ from each other. For a comprehensive list of grounds enumerated in the constitution and various laws, see section 1.1.

The initial text of the anti-discrimination draft law contained a non-exhaustive list of grounds, including "gender, race, colour, language, religion, belief, ethnicity, sexual identity, philosophical and political opinion, social status, marital status, health, disability and age." However, the government subsequently revised the draft law and removed from this list sexual identity, which had been "stated by drafters to

encompass gender identity and sexual orientation”.[5] This amendment, which was done quietly after the initial draft was submitted to public discussion, has been protested by civil society groups, in particular the LGBT movement.[6]

Scope of protection

The material scope of the Directives is not reflected in the Turkish legislation. Protection from discrimination in the employment context only applies after the employment relationship is established. There are no specific laws governing anti-discrimination in other realms of public life or prohibition of ethnic and racial discrimination in all walks of life.

The draft law on anti-discrimination, on the other hand, has a wide material scope that covers the provision of services in the spheres of education, judiciary, law enforcement, health, transportation, communication, social services, social security, social aid, sports, accommodation, culture and tourism. Its scope also extends to participation in public life including the right to elect and be elected, access to buildings where public services are provided and freedom of association. The prohibition of discrimination binds both public and private persons.

Definitions

Discrimination is not defined in Turkish law. With the exception of disability, none of the protected grounds are defined, whereas the definition of disability is not in accordance with the EU Directive or the relevant international instruments. The definition of persons with disabilities in the draft law on anti-discrimination, on the other hand, is in accordance with the definition in the UN Convention on the Rights of Persons with Disabilities (see below). However, the draft law is not a part of the Turkish law yet.

While not yet part of the Turkish legal system due to its non-adoption, the draft law on anti-discrimination contains definitions of a number of key concepts. These are: direct discrimination, indirect discrimination, harassment, segregation, victimization, instruction to discriminate, reasonable accommodation, hate speech, assumed discrimination, race, ethnicity, gender, disability and pregnancy. These definitions are by and large based on those in the EU equality directives. Before its removal by the government, sexual identity was also defined in the draft law as “heterosexual, homosexual, bisexual, transsexual, transvestite and similar sexual identities.”

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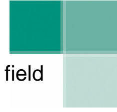
[5] Amnesty International (2011), “*Not an Illness nor a Crime”: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality* p. 10.

[6] “Press Release from LGBT Organizations in Turkey,” 2 February 2011, *available at:* http://ilga-europe.org/home/guide/country_by_country/turkey/press_release_from_lgbt_organizations_in_turkey [last accessed 6 November 2012].



Exceptions

Exceptions to prohibition of discrimination are not stipulated in Turkey's laws and positive actions are very limited. The constitutional amendments approved in a public referendum held in September 2010 allow the introduction of affirmative measures in favour of women (to ensure de facto equality between men and women) and positive discrimination for children, the elderly and persons with disabilities. The ways in which the revised Article 10 will be harmonized into the legal framework, implemented by national authorities and interpreted by courts remain to be seen.

The draft law on anti-discrimination also allows positive measures which aim to achieve de facto equality. In addition, the draft law introduces the following exceptions to the ban on discrimination: 1) distinctive treatment which seeks to achieve bona fide occupational qualifications and which is appropriate, necessary and proportional to this aim; 2) distinctive treatment based on sex and age, provided it pursues a legitimate aim and is appropriate, necessary and proportional to this aim; and 3) the exclusive admission of members of a particular religion to institutions providing services or education for that religion.

Sanctions

Sanctions are not explicitly mentioned in various laws containing anti-discrimination provisions, with the exception of the Penal Code, the Labour Law and to a certain extent the Law on Civil Servants. In most cases, general rules apply and these are not effective enough to eradicate discrimination.

The draft law on anti-discrimination considers positive measures adopted to ensure de facto equality to be legitimate exceptions and stipulates criminal and administrative sanctions in cases of discrimination.

Institutional framework

Turkey does not have a specialized equality body or a national human rights institution. While there are human rights boards established in districts and provinces, they are not independent from the executive and are extremely under-utilized. Victims of discrimination in most cases resort to human rights organizations and individual attorneys for legal assistance.

The draft law on anti-discrimination foresees the establishment of an equality body.

State of implementation

The national law falls far short of the standards set forth in the EU *acquis* on equality and anti-discrimination.

- The grounds of anti-discrimination in the constitution and various laws do not include age, ethnicity and sexual orientation.
- The scope of the duty to provide reasonable accommodation is more limited than the Framework Directive. The test regarding reasonable accommodation is non-existent; consequently there is no guidance for labour inspectors, judges, employers and persons with disabilities.
- There is no specific prohibition regarding instruction to discriminate.
- Burden of proof shifts only in limited situations, falling short of the rules governing burden of proof under the EU directives.
- Prohibition of victimization does not cover all areas.
- The material scope of the Directives is not reflected in the Turkish legislation. The Labour Law is only applicable after the employment relationship is established and does not govern the pre-employment phase.
- While the concept of indirect discrimination has entered into legislation very recently, it remains undefined.
- There does not exist a difference between the justifications of direct and indirect discrimination.
- Harassment is not defined in the laws.
- National law does not prohibit instructions to discriminate and there is no case-law on the issue. However, art. 10 of the Law on Civil Servants prohibits chiefs of civil servants to give orders to civil servants in violation of the law.
- Turkish law does not recognize the standing of non-governmental organizations to bring claims in support of victims of discrimination, with the exception of consumer protection associations and associations working for the protection and preservation of the environment, culture and history.
- There does not exist a specialized body for the promotion of equal treatment and prohibition of discrimination.

While courts are tasked with enforcing the anti-discrimination provisions in the constitution and various laws, the judiciary fulfils this mandate in extremely rare cases. In general, judges and prosecutors tend to have an authoritarian mind-set with very little concern for upholding human rights principles and strong ideological partiality towards the state and its officers. The fact that judges and prosecutors are not trained in anti-discrimination is an aggravating factor. Public authorities, including security personnel, are protected against accountability through a juridical shield of impunity.

The legislature and the executive engage in minimal legislative and policy efforts to the extent that they are necessary to fulfil the EU's accession criteria. The external EU pressure however, proves insufficient in forcing authorities to enact an effective legal framework, evident in the non-enactment of the draft law on anti-discrimination.

Individuals rarely bring discrimination cases before the courts. This is related not only to the low levels of societal awareness on anti-discrimination and distrust in the

courts but also the lack of sufficient knowledge and skills on anti-discrimination law among attorneys.

The constitutional reform package approved by a national referendum held on 12 September 2010 recognized, for the first time, the right to file a constitutional complaint.

0.3 Case-law

Provide a list of any important case law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of law and of the actual facts (no more than several sentences).

As the Directives have not been transposed yet, there is no case-law relating to their application and interpretation within the national legal system.

➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives.

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

Judgments of the European Court of Human Rights

Name of the court: European Court of Human Rights (Grand Chamber)
Date of decision: 15 March 2012
Name of the parties: Aksu v. Turkey
Reference number: 4149/04 and 41029/04
Address of the webpage:
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"docname":["aksu"],"documentcollectionid":["COMMITTEE","DECISIONS","COMMUNICATEDCASES","CLIN","ADVISORYOPINIONS","REPORTS","RESOLUTIONS"],"itemid":["001-109577"]} [last accessed 6 November 2012]
Brief summary: The applicant is of Roma origin. He brought a case against the Ministry of Culture of Turkey for having published a book called "The Gypsies of

Turkey" which, the applicant argued, contained derogatory, humiliating and insulting comments on the Roma. His request for the confiscation and banning of the book was rejected by the Ministry and his claim for compensation for non-pecuniary damages was rejected by national courts on the ground that the publication was based on academic research and did not constitute an insult to the applicant. The applicant did not appeal. The same applicant brought another civil case against the Language Association, an NGO, which published two dictionaries with identical comment with co-financing from the Ministry of Culture. He argued that the dictionaries had content which was discriminatory against the Roma. The national court dismissed the case on the ground that the dictionaries were based on scientific research. The applicant brought both cases to Strasbourg. In its judgment on 27 July 2010, the ECtHR had unanimously found that there was no violation of Article 14 in conjunction with Article 8. The applicant referred the case to the Grand Chamber, which limited its review to the right to privacy protected under Article 8. In a 16-1 judgment, the Grand Chamber noted that the applicant had not brought administrative proceedings against the Ministry, which co-financed the publication of the book, but against an NGO. In assessing whether the government complied with its positive obligation under Article 8 to protect the applicant's private life from interference by a third party (an NGO in this case). The ECtHR held that the dictionaries were not textbooks and were not distributed or recommended by the Ministry to schools. The Court held that the government did not overstep its margin of appreciation and did not violate article 8.

Name of the court: European Court of Human Rights
Date of decision: 2 February 2010
Name of the parties: Sinan Işık v. Turkey
Reference number: 21924/05
Address of the webpage:
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"docname":["ışık"],"documentcollectionid":["COMMITTEE","DECISIONS","COMMUNICATEDCASES","CLIN","ADVISORYOPINIONS","REPORTS","RESOLUTIONS"],"itemid":["001-97087"]} [last accessed 6 November 2012]
Brief summary: The case was brought to Strasbourg by an Alevi individual whose request for the identification of his religion as "Alevi" instead of "Islam" was rejected by national authorities. The applicant took the issue to court in 2004, at a time when it was still obligatory for the religion of the holders to be indicated on the official identity cards issued by the state. The district court in Izmir dismissed the applicant's request on the basis of an opinion it sought from the Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı- Diyanet*), a constitutionally endorsed public body regulating the state-religion affairs concerning Islam. Based on the opinion, the Court held that Alevis were a sub-group of Islam and therefore the word Islam on ID cards correctly referred to the applicant's religious identity. The Court of Cassation upheld the judgment. The ECtHR held the religion section in identity cards issued by the state in Turkey to be in violation of freedom of conscience and religion safeguarded under Article 9 of the ECHR. The court found the 2006 amendments introduced in the Law on the Civil Registry to be inadequate to fulfil Turkey's obligations under Article 9.

Pursuant to the changes introduced in the law, it is no longer compulsory to indicate one's religion in ID cards and persons may file a written request to have that section be left blank or the content to be changed. The Court held that the new regulation obliged individuals to apply to the authorities in writing for the deletion of religion in their ID cards and disclosed the religious or personal convictions of individuals who chose to have the religion box to be left blank. The Court found this to be in violation of the negative aspect of Article 9, namely the freedom not to manifest one's religion or belief. The ECtHR judgment waits to be implemented by national authorities.

Name of the court: European Court of Human Rights
Date of decision: 2 February 2010
Name of the parties: Kemal Taşkın and Others v. Turkey
Reference number: 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 and 45609/05
Address of the webpage:
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"itemid":["001-97088"]} (in French) [last accessed 6 November 2012]
Brief summary: The applicants were eight Turkish nationals of Kurdish origin. At the end of 2003 they each brought proceedings before the competent court seeking to have their Turkish first names changed to Kurdish names. Their requests were refused (or, at least, they were not allowed to spell the name in the way they wished) because the names they had chosen contained three letters commonly used in the Kurdish alphabet which are absent in the Turkish official alphabet. Relying on Article 8 (right to respect for private and family life) taken alone and in conjunction with Article 14 (prohibition of discrimination), they complained of the decisions refusing them permission. The Court found no violation of Article 8 or 14. The Grand Chamber rejected the applicants' requests for referral and thus the judgment has become final.

Name of the court: European Court of Human Rights
Date of decision: 9 January 2007
Name of the parties: Hasan and Eylem Zengin v. Turkey
Reference number: 1448/04
Address of the webpage:
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"docname":["\"Hasan and Eylem Zengin v. Turkey\""],"documentcollectionid":["COMMITTEE","DECISIONS","COMMUNICATED CASES","CLIN","ADVISORYOPINIONS","REPORTS","RESOLUTIONS"],"itemid":["001-82580"]} [last accessed 6 November 2012]
Brief summary: The ECtHR found the mandatory religion courses taught in public and private primary and secondary schools to violate the right to education protected under Article 2 of Protocol No. 1 of the ECHR. The court found that the content of the course books taught in these classes failed to meet the objectives of objectivity and pluralism required by the need to respect the convictions of parents. The judgment waits to be implemented by national authorities.

Judgments of the Constitutional Court and other high courts

Name of the court: Constitutional Court
Date of decision: 17 March 2011
Name of the parties:
Reference number: 2009/47E, 2011/51 K (published in Official Gazette No. 27992, dated 12 July 2011)
Address of the webpage:
http://www.resmigazete.gov.tr/eskiler/2011/07/20110713.htm (in Turkish) [last accessed 6 November 2012]
Brief summary: A Turkish national belonging to Syriac minority wanted to change his first and last names to Paulus Bartuma in the Syriac language. He unsuccessfully litigated in a district court in the province of Mardin, which referred the case to the Constitutional Court. The issue that was raised by the lower court was the constitutionality of Article 3 of the 1934 Law on Surnames which prohibits the use of surnames that, inter alia, belong to “foreign race and nation.” The Constitutional Court rejected the applicant’s appeal by a small margin of 9-8 and found Article 3 of the Law on Surnames to be compatible with the equality clause of the Constitution (art. 10). The majority stated that the restrictions on surnames introduced by the law aimed at “maintaining national unity among citizens” and fell within the discretionary powers of the legislative to limit the right to surnames on the basis of “public benefit and public order.” The majority found these restrictions to be necessary for “the perception of national unity” and “the development of a language identity within national identity and language” among citizens. The majority found the rule to be compatible with the equal protection clause of the constitution since the restrictions applied “without distinction to everyone who want to acquire a new surname belonging to a foreign race and nation.” The majority emphasized that its decision was in compliance with the relevant case law of the ECtHR which upheld legal restrictions on last names on the basis of public benefit.

Name of the court: Court of Cassation
Date of decision: 29 November 2011
Name of the parties: N/A
Reference number: 2009/19835 E, 2011/46440
Address of the webpage: N/A
Brief summary: The employee filed a discrimination case against her employer under Article 10 of the Constitution, Article 5 of the Labour Law and the ILO Conventions. She alleged that she was unlawfully dismissed from her job on the ground that she refused to accept the new (and lower) position she was offered when she returned to her job after having completed her maternity leave. She stated that her employer had, in her absence, given her position to another employee. The lower court rejected the claim that the applicant was discriminated on the basis of her gender and pregnancy, and held that the employer’s decision rested on an organizational restructuring. On appeal, the Court of Cassation, based on the witness testimonies of former and current female employees of the same employer and on the statistics provided by the employer which showed a decline in the number of

married female employees despite the increase in the overall number of female employees, found discrimination on the basis of gender and pregnancy.

Name of the court: 7th Chamber of the Court of Cassation
Date of decision: 25 November 2008
Name of the parties: N/A
Reference number: 2008/4109 E, 2008/5196 K
Address of the webpage: N/A
Brief summary: The high court overturned the decision of a lower court in Istanbul which had ordered the closure of Lambdaistanbul, an LGBT association, on the basis of the provisions of the Civil Code allowing the dissolution of associations whose aims are incompatible with morality. The verdict of the Court of Cassation, however, warned that Lambdaistanbul can be closed in the future under the Law on Associations if it "acts in a way to encourage lesbian, gay, bisexual and transgender relationships." In other words, the "judgment states that what is deemed to be violating public morality is not to be lesbian, gay, bisexual and transgender or to use these words, but to act in a way to encourage others to be so".[7]

The decision of the Court of Cassation did not prevent prosecutors from bringing similar dissolution cases against LGBT associations, though administrative courts have so far followed the judgment and rejected the cases.

Name of the court: 12th Circuit of the Council of State
Date of decision: 19 December 2008
Name of the parties: Mesut Bektaş v. General Directorate of Social Services and Children Protection Agency
Reference number: 2006/1098 E, 2008/5603 K
Address of the webpage: N/A
Brief summary: The applicant is a social worker. He chose to take the general exam, instead of the special exam for persons with disabilities, for national civil service recruitment. Having passed, he applied to work in the Artvin provincial branch of the Prime Ministry's General Directorate of Social Services and Children Protection Agency. However, he was not appointed to his post on the ground that he should have taken – and passed- the special exam instead of the general one. The applicant filed a case at the administrative court, which reversed the decision of the employer. However, upon a reversal by the 12th Circuit of the Council of State, the lower court changed its decision and held that there was no discrimination. The applicant appealed. The case is pending before the 12th Circuit of the Council of State. In an earlier decision, in 2006, the 12th Circuit had issued the following judgment: "It is in line with the law to not to appoint the plaintiff to the post that he was placed, since he has taken the general exam. Since his employment should be through quota for the persons with disabilities ... he should have taken and passed the special exam designed for the persons with disabilities." Council of the State 12th

[7] Amnesty International, p. 47.

Chamber, E. 2006/2864, K. 2006/4487, Date of the judgement: 8/11/2006 (www.danistay.gov.tr).

Name of the court: 8th Circuit of the Council of State
Date of decision: 28 December 2007
Name of the parties:
Reference number: E. 2006/4107, K. 2007/7481
Address of the webpage: http://www.danistay.gov.tr/
Brief summary: The Council of State ruled in favour of a parent who demanded the exemption of his child from mandatory religion course, finding the content of these classes against the law. The Court noted that the curriculum fails to meet the requirements of objectivity and pluralism and to respect the freedom of religion and conscience of parents. The Court based its reasoning on Article 24 of the Turkish Constitution and Article 9 of the ECHR guaranteeing freedom of religion and conscience as well as the right to education protected under Article 2 of Additional Protocol 1 of the ECHR. The Court cited the ECRI's 2005 report on Turkey and the ECtHR's January 2007 judgment in the case of Hasan and Eylem Zengin v. Turkey.

Name of the court: 10th Circuit of the Council of State
Date of decision:
Name of the parties: The Chamber of Architects and Engineers of Turkey v. the government
Reference number: 2009/9270 K
Address of the webpage: N/A
Brief summary: The Chamber of Architects and Engineers of Turkey brought a case for the stay of execution and annulment of an executive regulation dated 23 February 2009 which exempts "foreigners of Turkish race" who live in Turkey from the requirement to obtain work permit and allows them to become members of professional organizations. The Chamber argued that making a race based distinction among foreigners to exempt those of the Turkish race from requirements imposed on all other foreigners is unlawful. The Council of State rejected the request.[8]

Judgments of lower courts

Name of the court: The 16th Civil Court of First Instance in Ankara
Date of decision: October 2011
Name of the parties: N/A
Reference number:
Brief summary: The lower court rejected the dissolution case filed by the Ankara Chief Prosecutor's Office against the Çankaya Cemevi Construction Association on the grounds that the organization's charter referred to Alevi cem houses as houses of

[8] Seda Alp and Nejat Taştan (2011),*Türkiye'de Irk veya Etnik Köken Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-31 Temmuz 2010*, İstanbul Bilgi Üniversitesi, p. 22.

worship.[9] The origin of the case dates back to 2008, when the Ministry of Interior, based on Diyanet's opinion that "cem houses are not places of worship", informed the Ankara Governorship that Article 2 of the Association's charter should be repealed. When the Association failed to do so, the Governorship called on the prosecutor to file a case. In asking for the court to shut down the association, the prosecutor had argued that Alevism is not a religion and cem houses are not places of worship. The court ruled in favour of the association on the ground that Alevis had for centuries accepted and used cem houses as placed of worships and that the association's charter is not against the laws or the principle of laicism guaranteed under Article 2 of the Constitution. In its reasoning, the lower court had cited the European Court of Human Rights' judgment in February 2010 in the case of *Sinan Işık v. Turkey*. The prosecutor appealed to the Court of Cassation. The case is pending.

Name of the court: First Criminal Court of Peace of Beyoğlu
Date of decision: 5 May 2009
Name of the parties: N/A
Reference number: 2008/1680
Brief summary: In a criminal case brought against a bus driver, who refused to open the door of the bus to a woman who used a wheelchair, the Court found discrimination in the provision of transportation services on the ground of disability and held that art. 122 of the Turkish Criminal Code was violated. The bus driver was sentenced to 6 months of imprisonment. The Court converted imprisonment to confiscation of the bus driver's driving license for 6 months and suspended his operating rights for 6 months. The victim took no civil action against the bus driver or the bus company.

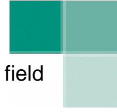
Name of the court: 2nd Chamber of the Civil Court of First Instance in Istanbul
Date of decision: pending
Name of the parties: Halil İbrahim Dinçdağ v. Turkish Football Federation
Reference number:
Address of the webpage: N/A
Brief summary: In a highly publicized case covered extensively by the mainstream media, a football referee filed a civil case against the Turkish Football Federation, claiming to have been discriminated on the basis of his sexual orientation. He was dismissed by the Federation on the ground that he was not fit for being a referee, despite his 14 years of experience as one. The Federation based its dismissal decision on its regulation which states that "individuals who are exempt from military service due to health reasons are not eligible for being a referee." The applicant, however, was not exempted from military service due to a health problem, but for being 'unfit' for the service due to his sexual orientation. The plaintiff also claimed that the Federation (and the Turkish Armed Forces) disclosed his sexual orientation

[9] Cem houses are place of worship where individuals belonging to the Alevi minority perform their religious duties. Alevis are a minority which differs from the Sunni majority in their interpretation and practice of Islam.

to the public by leaking to the press the information that he is gay. The case is pending and the next hearing will be on 5 June 2012.

Name of the court: 3rd Administrative Court of Antalya
Date of decision: pending
Name of the parties: Association for the Physically Disabled of Turkey in Antalya v. the Directorate of Registry and Citizenship in Antalya
Reference number: 2012/18
Address of the webpage: N/A
Brief summary: The Antalya branch of the Association for the Physically Disabled of Turkey filed a written application to the provincial branch of the Directorate of Registry and Citizenship in Antalya, requesting the entrance to the building of the Directorate to be made accessible for persons with disabilities. In its response dated 24 October 2011, the Directorate rejected the request on the ground that the building was a rental and its physical condition was not suitable for an adjustment. The Association's application to the 3rd Administrative Court of Antalya was found inadmissible on ground of lack of standing. The applicant appealed to the Council of State, where the case is currently pending.

Name of the court: Criminal Court of Uşak
Date of decision: pending
Name of the parties: criminal case launched by the prosecutor against 80 individuals
Reference number: N/A
Address of the webpage: N/A
Brief summary: A criminal case was opened against 80 individuals accused of having taken part in a mass attack of more than 1,000 people against the Roma community in the Selendi district of the province of Manisa. The defendants are alleged to have participated in the stoning and setting on fire of the houses of the Roma residents on 5 January 2010. The incident had resulted in the forced relocation of the victims from Selendi and their resettlement in another district in Manisa. The defendants are accused of having participated in an unlawful demonstration, of causing damage to property and inciting others to hatred and animosity. The prosecution asked that the defendants be sentenced to imprisonment from 3 to 150 years. Victims' request for the defendants to also be charged with discrimination under Article 122 of the Penal Code was not accepted. The first hearing was held on 16 December 2010. The case is pending.



1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

Art. 10 of the Constitution on "Equality before the Law" is found in the first part of the Constitution, titled "General Principles". In May 2010, the parliament adopted a constitutional reform package which also included significant amendments to this provision. Approved in a national referendum held on 12 September 2010, the revised Art. 10 of the Constitution reads:

"All individuals are equal without any discrimination before the law, irrespective of language, race, colour, gender, political opinion, philosophical belief, religion and sect, or any such considerations.

Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice. Measures to be adopted for this purpose cannot be interpreted to be against the principle of equality.

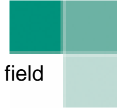
Measures to be adopted for children, elderly, persons with disabilities, widows and orphans of martyrs, ex-soldiers disabled in the war and veterans cannot be considered to be against the principle of equality.

No privilege shall be granted to any individual, family, group or class.

State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in utilization of all forms of public services."

The first paragraph of art. 10 explicitly refers to philosophical belief, religion and sect. Thus, religion and belief are covered by art. 10. Even though "ethnic origin", "sexual orientation", "age" and "disability" are not expressly referred to in clause 1, the reference in the first paragraph to "any such considerations" clearly indicates that the list of grounds is not exhaustive. Furthermore, the addition in 2010 of the principle of positive discrimination on behalf of children, the elderly and persons with disabilities has the potential to compensate for the non-enumeration of these grounds in clause 1.

Art. 10 of the Constitution is not limited in its material scope. Thus, it can be said that the material scope of this constitutional provision is wider than the Directives.



Besides art. 10 which is the general equality provision of the Constitution, there are a number of other constitutional provisions which are relevant:

Right to education:

Art. 42, para. 1: “No one shall be deprived of the right of learning and education.”

Art. 42, para. 7: “… The state shall take necessary measures to rehabilitate those in need of special training so as to render such people useful to society.”

Art. 42, para. 9: “No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved.”

Right to work:

Art. 18, para. 1: “No one shall be forced to work. Forced labour is prohibited.”

Art. 48, para. 1: “Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free.”

Art. 49: “Everyone has the right and duty to work.

The State shall take the necessary measures to raise the standard of living of workers, and to protect workers and the unemployed in order to improve the general conditions of labour, to promote labour, to create suitable economic conditions for prevention of unemployment and to secure labour peace.”

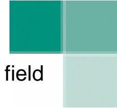
Art. 50, paras. 1 and 2: “No one shall be required to perform work unsuited to his/her age, gender, and capacity.

Minors, women and persons with physical or mental disabilities, shall enjoy special protection with regard to working conditions.”

The scope of the reference to “persons with … mental disabilities” is not clear from the text of art. 50, para. 2. There is no case-law specific to the interpretation of this reference either. However, in a recent judgment, the Constitutional Court interpreted this provision to cover all persons with disabilities.[10] It can be inferred from this interpretation that, reference to “mental disabilities” covers both intellectual disabilities and psycho-social disabilities.

Art. 70: “Every Turk has the right to enter public service.

[10] See Constitutional Court Judgment E. 2006/101, K. 2008/126 (19.06.2008).



No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service."

Right to Establish and Join Unions

The constitutional reforms approved in a national referendum on September 12th, 2010 removed a significant restriction on the right to join unions. The package repealed clause 4 of Article 51, which had stipulated that "membership in more than one labour union cannot be obtained at the same time and in the same work branch."

Art. 51: "Employees and employers have the right to form labour unions, employers' associations and higher organizations, without obtaining permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. No one shall be forced to become a member of a union or to withdraw from membership.

The right to form a union shall be solely restricted by law for purposes of safeguarding national security and public order and preventing crime and protecting public health and public morals and the rights and freedoms of others.

The formalities, conditions and procedures to be applied in exercising the right to form union shall be prescribed by law.

The scope, exceptions and limits of the rights of civil servants who do not have a worker status are prescribed by law in line with the characteristics of their job.

The regulations, administration and functioning of labour unions and their higher bodies should not be inconsistent with the fundamental characteristics of the Republic and principles of democracy."

Right to health

Article 56 of the Constitution grants "everyone" the right to health and to live in a clean environment.

Housing:

The constitution does not provide for a "right" to housing. Rather, it confers on the state the competence to undertake needs-based housing regulation.

Art. 57: "The state shall take measures to meet the need for housing within the framework of a plan which takes into account the characteristics of cities and environmental conditions and supports community housing projects."

Right to Social Security:

Art. 60: “Everyone has the right to social security.

The state shall take the necessary measures and establish the organisation for the provision of social security.”

Persons Requiring Special Protection in the Field of Social Security

Art. 61, paras. 1, 2 and 3: “The state shall protect the widows and orphans of those killed in war and in the line of duty, together with persons with disabilities and war veterans, and ensure that they enjoy a decent standard of living.

The state shall take measures to protect persons with disabilities and secure their integration into community life.

The aged shall be protected by the state. State assistance to the aged, and other rights and benefits shall be regulated by law.”

The provisions above indicate that age and disability found a place in the Constitution only in relation to situations where special protection needs to be afforded, but they are not considered adequately from an equality point of view. On the other hand, the above constitutional provisions written with a rather paternalistic approach need be read in the light of non-exhaustive nature of the prohibited grounds of discrimination as well as the principle of positive discrimination in Article 10 of the constitution. The constitutional endorsement of affirmative measures to ensure equality between men and women and to achieve the equality of children, elderly and persons with disabilities with the rest of society potentially provides a useful normative constitutional ground in cases to be brought by or on behalf of these groups. On the other hand, the absence of ethnic origin and sexual orientation among the enumerated grounds of anti-discrimination remains to be a cause of concern.

b) Are constitutional anti-discrimination provisions directly applicable?

In theory, yes, due to the well-established principle under constitutional law that laws cannot contradict with the fundamental rights and freedoms protected under the constitution, and where they do, the constitution applies. Therefore, in theory, Article 10 of the Constitution is directly applicable. However, in practice, national courts (including the high courts) and the administration follow a strict implementation of the laws, even where such laws are in contradiction with the constitution. While the Constitutional Court can directly apply Article 10, it can do so only within the framework of reviewing the constitutionality of legislation, which the Court can exercise in limited occasions (either upon an annulment action brought by the president, the parliamentary groups of the governing party or the main opposition party or a minimum of one-fifth of members of the parliament, or upon referral from a lower court). This situation, however, will change when constitutional amendment

recognizing the right of individuals to bring a constitutional complaint will enter into force in August 2012. From then on, Article 10 of the constitution will be directly applicable by the Constitutional Court in cases brought by individuals.

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

Yes. While Article 10 imposes on the state the duty to provide *de facto* equality, it brings on private actors the obligation to comply with the principle of equal treatment and to refrain from discrimination. As for associations (including political parties, trade unions, associations, foundations), Article 10 imposes both the duty to provide equality in practice and to not discriminate.

2 THE DEFINITION OF DISCRIMINATION

2.1. Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

Art. 10 of the Constitution prohibits discrimination based on language, race, colour, gender, political opinion, philosophical belief, religion and sect or any such considerations (material scope not limited).

Art. 3(2) of the Turkish Criminal Code prohibits discrimination based on race, language, religion, sect, nationality, colour, gender, political and other opinions and thoughts, philosophical beliefs, national or social origin, birth, economic and other social status (material scope limited to the application of the Turkish Criminal Code).

Art. 122 of the Turkish Criminal Code prohibits discrimination based on language, race, colour, gender, disability, political ideas, philosophical beliefs, religion and sect (material scope limited).

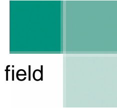
Art. 5 (1) of the Labour Law prohibits discrimination based on language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations (material scope limited).

Art. 5 (2) of the Labour Law prohibits discrimination between full-time and part-time employees and between employees working under fixed-term contracts (contracts made for a definite period) and open-ended contracts (contracts made for an indefinite period). Art. 12(1) also prohibits differential treatment against employees working under fixed-term contract and art. 13(2) against part-time employees (material scope limited).

Art. 5, paras. 3, 4 and 5 repeats prohibition of discrimination based on gender and pregnancy, in specific contexts (i.e. equal pay etc.) (material scope limited).

Art. 18, para. 3(a) (b) and (d) of the Labour Law prohibit discrimination based on membership to or participation in the activities of a trade union, being the trade union representative in the work place, race, colour, gender, marital status, family obligations, pregnancy, birth, religion, political opinion or any such considerations (material scope limited).

Art. 4(a), 13, 14, 15 Law on Persons with Disabilities prohibit discrimination based on disability. The material scopes of arts. 13 (vocational rehabilitation), 14 (employment), and 15 (education) are limited. However, art. 4(a) lists “anti-discrimination” among the general principles to be applied in the implementation of



the Law. Thus, the wording of art. 4(a) suggests that the material scope of the prohibition is limited to the services covered by the Law itself).

Art. 4 of the Basic Law on National Education prohibits discrimination based on language, race, gender and religion (material scope limited). Art. 7 lays down that education after compulsory primary education is open to all, based on their interest, capability and talent. Art. 8 of the same Law stipulates that equality of opportunities shall be provided to all, independent of their gender.

Art. 7 of the Law on Civil Servants prohibit discrimination based on language, race, gender, political thought, philosophical belief, religion and sect (material scope limited).

Art. 31 (1) and (5) of the Trade Unions Law prohibit differential treatment based on membership to a union and participation in union activities (material scope limited).

Art. 18 (1) (2) and (3) of the Law on Trade Unions of Public Servants prohibit discrimination based on membership to a union and participation in union activities (material scope limited).

Art. 68 of the Civil Code prohibits discrimination between members of associations based on language, race, colour, gender, religion and sect, family and class (material scope limited). Art. 101 (4) prohibits foundations to be established to support members of a certain race and religious community (material scope limited).

Art. 12 of the Law on Political Parties prohibits discrimination based on language, race, gender, religion, sect, family, class and profession (material scope limited to criteria for membership to political parties). Similarly, arts. 78, 82 and 83 of the same Law prohibit political parties to aim and carry out activities based on language, race, colour, gender, political opinion, philosophical belief, religion and sect.

Art. 4 of the Law on the Foundation and Broadcasting of Radio and Television Channels which lay down the principles of broadcasting stipulates that radio and television broadcasts are in principle in Turkish; however they can also be in languages which are used by Turkish citizens traditionally in their daily lives. According to art. 4(b), radio and television broadcasts should not be offensive on the basis of class, race, language, religion, sect and regional differences and shall not lead to violence, terror and ethnic discrimination. Art. 4(d) stipulates that no one should be insulted on the basis of language, race, colour, gender, political opinion, philosophical belief, religion and sect; and according to art. 4(u) and (v) the broadcasts should not provoke discrimination against women, vulnerable persons, persons with disabilities; and incite racial hatred (material scope limited).

Art. 4(d) of the Law on Social Services and Child Protection Institution prohibits in the provision of social services discrimination based on class, race, language, religion, sect and regional differences (material scope limited).

Art. 2(1) of the Law on the Execution of Penalties and Security Measures prohibits discrimination in the implementation of the Law based on race, language, religion, denomination, nationality, colour, gender, birth, philosophical belief, ethnic and social origin, political and other opinion, economic power or other social status.

Art. 5 of the Regulation on Minimum Wage prohibits discrimination based on language, race, gender, political opinion, philosophical belief, religion, sect or any other considerations (material scope limited). Art. 7 of the same Regulation states that a differentiation shall be made regarding minimum wage, depending on whether the employee is below or above the age of 16.

Age, ethnicity and sexual orientation are not listed among the prohibited grounds in any of the legal provisions mentioned above and disability is mentioned explicitly only in the Turkish Criminal Code and the Law on Persons with Disabilities. However, most of the lists are open ended. Furthermore, language or race could theoretically be interpreted by the courts to refer to ethnicity. One could also argue that the broad definition of race encompassing ethnicity in the International Convention on the Elimination of all Forms of Racial Discrimination which Turkey has ratified is directly applicable under Article 90 of the Turkish Constitution and thus extends protection to individuals against ethnicity based discrimination. However, in light of the high courts' reluctance to give direct effect to international human rights treaties, this remains to be seen.

So far, neither the Constitutional Court, nor any other court had a case before them where they had to decide whether disability, ethnicity, age or sexual orientation should be considered as "any such considerations". In a recent judgment the Court of Cassation said that art. 5 of the Labour Law prescribes an open ended prohibition of discrimination and should be interpreted as prohibiting discrimination based on sexual orientation (the term used by the Court is sexual preference) among other grounds.[11] It has to be mentioned that the case was not a sexual orientation discrimination case.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*
Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

[11] See Ninth Civil Chamber of the Court of Cassation E. 2008/27309, K. 2008/22094 (25.07.2008).

There is no national anti-discrimination law in Turkey; and various laws which prohibit discrimination do not provide a definition of any of these terms, with the exception of disability.

Art. 3(a) of the 2005 Law on Persons with Disabilities (no. 5378) puts forth the following definition of disability to be used as the implementing criterion for all purposes under the law, including the prohibition of discrimination against persons with disabilities and the determination of their eligibility for social benefits: "A disabled person is a person *who has difficulties in adapting* to the social life and in meeting daily needs due to loss of physical, mental, psychological, sensory or social capabilities at various levels by birth or by any reason thereafter and who therefore needs protection, care, rehabilitation, consultancy and support services" (emphasis added). Thus, in defining disability, Turkey's legal framework emphasizes "the deficiencies, shortcomings and inadequacies of the individual with proportional and percentage values".[12] This definition not only portrays a person with a disability as incapable of adapting to social life due to his/her own shortcomings, but also one in need of protection rather than a right-bearing citizen. Furthermore, in limiting the rehabilitation need to persons with disabilities, the law "ignores the fact that rehabilitation is a social phenomenon" and that the "full and effective participation" of the individual to social life requires the state to take measures.[13] Art. 3(c), (d) and (e) categorize disability as mildly disabled, severely disabled and disabled in need of care, respectively. The last category is defined as someone who is severely disabled as documented by an official health report and who cannot take care of his/her needs on a daily basis. Evidently, Turkey's definition of disability is significantly different from the one adopted by the ECJ in Chacón Navas. Art. 4(a) of the Law on Persons with Disabilities prohibits discrimination against "the disabled", without making a distinction between types or degrees of disability, and identifies the fight against discrimination as "the founding base of policies towards the disabled." The same provision tasks the state with the duty to "develop social policies against all forms of exploitation of the disabled and disability on the basis of the immunity of human pride and dignity."

Until the adoption of prohibition of discrimination on the ground of disability by the Law on Persons with Disabilities in 2005, the legal framework addressed disability only in the context of social benefits and social aid. Various laws and regulations providing disability related benefits and positive measures have their own definition of and/or criteria for disability. Since a comprehensive listing of various definitions and criteria in various laws and regulations governing social benefits is beyond the scope of this report, below are only a few examples.

The definition found in art. 3 (c) of the Law on Social Services and Child Protection Institution is identical to the definition found in the Law on Persons with Disabilities.

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[12] Arzu Şenyurt Akdağ *et al.*(2011),*Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010*, İstanbul Bilgi Üniversitesi, p. 13.
[13] *Id.*, p. 14.

In order to be eligible for disability benefits, the individual must receive a disability report from special health boards established pursuant to a regulation titled the "Criteria and Classification of Disability and Health Board Reports to be given to the Disabled".[14] As indicated by its name, the regulation puts forth the criteria for the classification of persons with disabilities into various categories based on the percentage of their disability, which determine his/her eligibility to receive special social services provided by the state. Making special social services to be provided by the state conditional on the degree of disability which is calculated through a technical process and on the basis of mathematical formulations not only "ignores the special circumstances of the individual"[15] but also shows that the Turkish state is far from adopting a rights-based perspective on disability.

Disability can also be defined in a negative aspect in disqualifying individuals from certain professions. For example according to article 8 paragraph (g) of the Law on Judges and Prosecutors (Hakimler ve Savcılar Kanunu) (Law No: 2802), in order to be appointed as a candidate judge or prosecutor, a person "should not have any physical or mental illness or disability that would prevent the person from carrying out his/her responsibilities as a judge or a prosecutor continuously in every part of the country; or any disabilities which cause limitations in controlling the movements of the organs; speech different than it is accustomed and would be found odd by people". Similarly, Article 74 of the Law on the Union of Chambers and Commodity Exchanges of Turkey (no. 5174) states that to be eligible to hold the position of the general secretary of the chambers and commodity exchanges, an individual "shall not have a physical or mental illness, or physical disability that shall prevent him performing his duties continuously." Sometimes, although the relevant law does not exclude persons with disabilities from entering to a certain profession, public institutions can apply the rules in an exclusionary and discriminatory fashion. A case in point is the Ministry of Education which, in its informative website on professions, introduced for the diplomatic profession an eligibility requirement not contained in any of the relevant laws.[16] The website states that to be a diplomat, an individual shall "not have a physical disability".[17]

The draft anti-discrimination law puts forth the following definitions:

Race: "Any constructed category of persons based on cultural, social or biological characteristics."

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[14] Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled, Official Gazette no. 26230, 16 July 2006.
[15] Arzu Şenyurt Akdağ *et al.,* p. 14.
[16] Eşit Haklar için İzleme Derneği, *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri*: *2011 İzleme Raporu,* p. 44, http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf.
[17] Id., citing http://okulweb.meb.gov.tr/42/01/246754/tm_meslekler.doc.

Ethnic origin: “The identity originating from belonging to a community differentiating from others based on cultural, religious, linguistic, behavioural or similar characteristics.”

Persons with disabilities: “Those who have long-term physical, mental, psychological or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” (This definition is adopted from the United Nations Convention on the Rights of Persons with Disabilities).

Sexual identity: While the initial text of the draft law on anti-discrimination did refer to and define sexual identity, all such references were removed by the government in 2011. The initial draft shared with the civil society defined sexual identity as covering “heterosexual, homosexual, bisexual, transsexual, transvestite and similar sexual identities.”

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a ‘religion’ for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?

Racial or ethnic origin: While ethnicity is not defined under the national legal framework, an international treaty enumerates the list of ethnic groups that Turkey officially and exclusively recognizes as minorities. The 1923 Treaty of Lausanne signed in its final years by the Ottoman Empire has a number of provisions concerning the protection of minorities. Having lost the First World War, the Empire was compelled by the Western powers to grant minority status and ensuing legal protection to its non-Muslim minorities. Accordingly, non-Muslim subjects of the empire were granted minority status and several rights, including the right to equality and to be free from discrimination, the right to establish and manage their educational, social, religious and charitable institutions, the right to give and take mother tongue education in private schools as well as a conditional right to limited public funding for such schools. The treaty does not contain a minority definition, but grants minority status to “non-Muslims.” In practice, however, the Republic of Turkey, founded a few months after the signing of the treaty, has since 1925 limited the protection of the treaty to Jews, Armenians and the Greek Orthodox , though none of these groups were specifically mentioned at Lausanne. Other non-Muslim groups, such as Syriacs, Christian Arabs and Chaldeans, who are also non-Muslim and therefore have de jure minority status under Lausanne, have been unlawfully denied their rights arising from this treaty. To this day, Turkey’s official policy on minorities is limited to the individual and material scope of Lausanne, as evident in its reservations to the relevant provisions of international treaties which may give rise to new minority rights or minority rights to new groups. The logic behind this policy is to prevent minorities within the Muslim majority, such as the Kurds, from gaining the

right to mother tongue education as well as to disable non-Muslim groups other than Jews, Armenians and Greek Orthodox to gain the limited rights that these three groups have been enjoying under Lausanne. Despite the advancements in international human rights regime since the 1920s and although Turkey is legally bound by all of the major human rights treaties which require the equal extension of minority rights to all ethnic and religious groups in Turkey, the state's policies remain unchanged.

Religion: Both civil registries and identity cards in Turkey indicate the religion of their holders.[18] One of only three religions can be indicated in the ID cards: Christianity, Islam and Judaism. The religion of persons belonging to other religions is decided upon by the state, which, in the case of anyone who is not Christian or Jewish, results in persons being automatically classified as Muslim. Thus, members of religions other than Christianity or Judaism are officially considered to be Muslims. This is the case for individuals belonging to the Bahai faith. In a few situations where the applicants asked the registrar to change the indication from Islam to Bahaism, the issue came before the Court of Cassation. In all cases, the Court consulted *Diyanet* on the issue. Basing its judgments on the expert opinion of the Directorate, the Court decided that Bahaism is not a religion, without any explanation as to how and on the basis of what criteria it defines religion. Consequently, the court ruled, the registrar was right to not to indicate the applicant's religion as Bahaism.[19]

This state practice also applies to atheists and agnostics, who are officially considered and identified as Jewish, Christian or Muslim.

Other than the definition of religion, and more specifically of Islam, another important issue is who is considered to be belonging to the Islamic faith, in other words who is considered to be Muslim, by the state. The official ID cards of persons belonging or assumed to be belonging to the Muslim faith indicate their religion to be "Islam", without specifying the denomination within Islam that the person adheres to. In a country extremely divided along religious/denominational lines, the difference matters since individuals belonging to non-Sunni denominations of Islam feel unrepresented and discriminated by state policies protecting the rights and interests of individuals

[18] According to art. 7(e) of the Law on Civil Registry Services (Law no. 5490), the religion of the person is indicated in the civil registries. This law was adopted in 2006. The former law on the same issue also required the indication of religion in civil registries. The difference between the former and the previous laws is that, while the indication of religion was obligatory in the former law, it is optional in the new law. The choice here is between the indication of the religions recognized by the state (Muslim, Jewish or Christian) and leaving the box blank. Non-believers, atheists, agnostics and believers of faiths, religions and denominations not recognized by the state cannot be explicitly mentioned. According to art. 35/2 of the new law, information on the religion of the individual is registered or modified in accordance with written statements of the individual. Again, based on the request of the individual, the box reserved for the indication of religion can be left blank (at initial registration) or the information may be deleted at any time the individual so requests.

[19] See for example Tenth Civil Chamber of the Court of Cassation E. 1992/3226, K. 1995/4872 (25.10.1995); Third Civil Chamber of the Court of Cassation E. 1988/8776, K. 1988/9515 (11.11.1988); Sixth Civil Chamber of the Court of Cassation E. 1974/2007, K. 1974/2242 (07.05.1974).

believing in the Sunni version of Islam. While vast majority of Muslims in Turkey belong to the Sunni-Hanefi denomination, there is a significant Alevi community and small Caferi and Nusayri communities who follow a different interpretation and practice of the Muslim faith than the Sunni majority. Just who these groups are and what their belief entails has become one of the most controversial issues in Turkey

Requests by *Alevi*s to change the indication on the identity card from Islam to *Alevi* are being declined by the courts and all *Alevi*s are registered as Muslims. The issue was brought before the European Court of Human Rights and the Court on 2 February 2010 decided that the indication of religion on the identity card, even where it is no longer obligatory since 2006, is a breach of art. 9 of the Convention. The Court held that the new regulation obliged individuals to apply to the authorities in writing for the deletion of religion in their ID cards and disclosed the religious or personal convictions of individuals who chose to have the religion box to be left blank. The Court found this to be in violation of the negative aspect of Article 9, namely the freedom not to manifest one's religion or belief. Though the judgment is binding on all national authorities in Turkey under Article 90 of the Constitution, it remains unimplemented (for details of the judgment, see section 0.3).

A further discriminatory treatment on the basis of definition of religion concerns the status of places of worship belonging to non-recognized religious minorities in Turkey. By extension of the state's limitation of the definition of minority to Armenians, Greek Orthodox and Jews, the places of worship of other religious or denominational minorities, such as Alevis, Protestants and Jehovah's Witnesses, are not recognized under the law. Consequently, these groups face extreme difficulties in building new places of worship due to the refusal of authorities to grant construction permits. The Protestant community faces extreme difficulties in issuing permits for constructing new churches or having their churches be officially recognized as places of worships. Despite an amendment in the Zoning Law no. 3194 in 2003 which replaced the word "mosque" by the word "place of worship", municipalities continue to arbitrarily refuse to issue construction permits to non-recognized religious minorities and practice "by local authorities differs from province to province".[20] While a Protestant church was officially opened in June 2011 in the eastern province of Van, "there has been no construction or designation of a plot for a new Protestant church or a Jehovah's Witness Kingdom Hall".[21] Where Protestant associations resort to the alternative strategy of using apartments or floors as churches, they are often blocked by local authorities. On 23 December 2011, municipality officials at a district of Istanbul sealed the floor that a Protestant association rented on grounds that the latter lacked license.[22] Courts, too, are adamant in preventing officially non-recognized religious minorities from opening their places of worship. In 2011, a court in the southern province of Mersin ordered the closure of a Kingdom Hall on grounds

[20] European Commission, *Turkey Progress Report 2011*, p. 30.
[21] *Id.*
[22] Association of Protestant Churches, *Report on Human Rights Violations of 2011*, 16 January 2012, https://docs.google.com/viewer?url=http://protestankiliseler.com/data/2011_Rights_Violations_Report.pdf [last accessed 6 November 2012].

of the violation of the Zoning Law. The case has been taken to the ECtHR.[23] In the case of Alevis, once again, the expert opinion of Diyanet on the definition of Islam and the Muslim faith plays a critical role in the acts and policies of national authorities. Based on Diyanet's opinion that Alevis are Muslims and the sole place of worship for Muslims is mosques, authorities reject to grant permit for the construction of cemevis. Currently, there is a case pending before the highest organ of the Council of State, which is expected to rule on whether cemevis are places of worship.

Sexual orientation: There is no reference to sexual orientation in the constitutional and legal framework. Consequently, it is not defined. The national legal framework, on its face, completely ignores sexual orientation, as evident also in the absence of any provision criminalizing homosexual, bisexual or transsexual conduct. However, there is widespread and systematic discrimination against LGBT individuals stemming from either the blatantly discriminatory texts of the laws and regulations and/or their discriminatory interpretation and application by the judiciary.

The principal way in which laws are applied in a discriminatory way against LGBT individuals is through the judicial interpretation of terms such as "morality", "indecent behaviour" and "dishonourable behaviour." Article 125 of the Law on Civil Servants allows the dismissal of public servants engaged in "immoral and dishonourable conduct." This term undefined in the law has been interpreted by the courts to cover homosexual conduct, as a result of which the dismissal from public service of LGBT employees has been upheld by the judiciary.[24] Most of these incidents of discrimination are not brought before the courts. In many cases, victims are afraid of the reaction of their families, friends and colleagues. Besides, victims are worried about media attention, which leads to their further victimization.[25]

There are similar provisions allowing dismissal from employment in various laws and regulations, which are not possible to list in an exhaustive manner in this report. Examples can be found in the Military Penal Code, Law on Military Judges, Law on

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[23] European Commission, *Turkey Progress Report 2011*, p. 30.

[24] In a report released in 2011, Amnesty International reported on two cases of sexual orientation discrimination where "gay men in public sector employment have been dismissed from their jobs for the explicit reason that they are gay." Amnesty International, p. 23. In one case, on 20 April 2004, the High Discipline Board of the Ministry of Interior dismissed a police officer upon oral evidence that the latter engaged in anal sex with another man. The decision was upheld by the Council of State on the basis of Article 125 of the Law on Civil Servants, which provides dismissal of persons who were found "to act in an immoral and dishonourable way which is not compatible with the position of a civil servant". The other case concerned the dismissal by the High Discipline Board of the Ministry of Education of a teacher for having engaged in "homosexual relationship." This dismissal, too, was upheld by the court. While the courts decisions in these two cases are not publicly available, Amnesty International reported to have seen the official court documents. *Id.* Another monitoring report also reported on the same two cases as well as the case of a public employee working at Revenue Administration Department of the Ministry of Finance, who was relocated on the basis of his sexual orientation. The victims asked the authors of the monitoring report to keep their identities and other details of the cases confidential.

[25] Opinion expressed orally by Fırat Söyle and Yasemin Öz, both of whom are leading lawyers in the area of sexual orientation discrimination cases.

Military Court of Cassation, Law on Lawyers, Law on Judges and Prosecutors, Regulation on Health Ability of the Turkish Armed Forces and Regulation on the Selection of Candidates for Military Judges.[26]

The authorization of the dissolution of associations on grounds of "public morality" under the Civil Code has been frequently resorted to by prosecutors against LGBT associations. In many cases, the courts ruled against the associations, as in the case of the confiscation by court order of all copies of a magazine published by Kaos-GL on the grounds that its content was obscene and against public morality. The case is pending before the ECtHR.[27]

c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?

Age discrimination is not explicitly prohibited in Turkish law. Consequently it is not possible to speak about restrictions. However, art. 10 of the Constitution and art. 5 of the Labour Law prohibit discrimination based on an open-ended list of grounds. Art. 5 of the Labour Law does not only prohibit discrimination, but also requires the employers to treat all employees equally in general. As the rule is not explicitly laid down, it is not possible to speak about restrictions. Consequently, judicial interpretation is needed.

d) Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.
Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?

There is no legislation or case-law which deals with situations of multiple discrimination.

The draft law on anti-discrimination does not mention multiple discrimination. Only in the definitions of "segregation" and "institutional discrimination" reference is made to segregation/institutional discrimination based on one or more grounds enumerated under the draft law (namely, sex, race, colour, language, religion, belief, ethnicity, sexual identity, philosophical and political opinion, social status, marital status, health, disability, age and the like).

e) How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and

[26] For a more detailed list of these laws and regulations as well as their relevant provisions, see Umut Güner *et al*. (2011), *Türkiye'de Cinsel Yönelim veya Cinsiyet Kimliği Temelinde Ayrımcılığın İzlenmesi Raporu,* İstanbul Bilgi Üniversitesi, p. 27-28.
[27] Amnesty International, p. 10. ECtHR, *Kaos GL vs. Turkey,* Application no. 4982/07, Admissibility decision 19 June 2009.

the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?

The number of discrimination cases is very small in Turkey. And the existing case-law suggests that so far discrimination claims were not based on multiple grounds. Consequently, cases were adjudicated based on one ground only.

2.1.2 Assumed and associated discrimination

a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

National law does not prohibit discrimination based on perception or assumption and there is no relevant case-law.

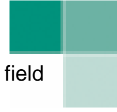
However, the draft of law on anti-discrimination defines (art. 2(1)(i)) and prohibits discrimination based on perception (art. 3(8)(g)).

b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

National law provides a very limited prohibition of discrimination based on association. According to art. 24 of the Labour Law, if the employer tells words that harm the honour and good name of the worker or one of the members of his/her family, behaves in such manner or attempts sexual harassment against the worker; teases or intimidates the worker or one of the members of his/her family or encourages, provokes and drives the worker or one of his/her family members to act unlawfully or commits an offense requiring conviction against the worker or one of his/her family members or makes grave attributions or accusations harming the worker's honour and dignity against the worker and if the required measures are not taken although the worker becomes subject to sexual harassment at the workplace by another worker or third persons, the worker has the right to terminate the labour contract before the expiry of the contract period or without waiting for the notification period. The worker might choose not to. In any case, the worker has the right to bring persons responsible for such acts before criminal and civil courts.

The issue did not come before the courts.

The draft Law on Combating Discrimination and Establishment of an Equality Council does not prohibit or even mention discrimination based on association.



2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law?

Direct discrimination is not defined in the legislation. However, while applying art. 10 of the Constitution on "equality before the law" both the Constitutional Court and other courts have put forth the elements of discrimination. According to the Constitutional Court:

> "The principle of equality, which is among the fundamental principles of law is enshrined in art. 10 of the Constitution. Equality before the law applies to persons whose legal status is the same. This principle aims *de jure* equality, not *de facto* equality. The aim of the principle of equality is to ensure that persons having the same status are treated by the law in the same way, as well as to avoid any differentiation or privileges. This principle requires that same rules apply to persons or groups having similar status, thus the principle prohibits violations of equality before the law. Equality before the law does not require same rules to apply to everyone in all situations. Particularities of the status of certain persons or groups might require different rules or practices to apply. If same rules apply to similar situations and different rules apply to different situations, then the principle of equality enshrined in the Constitution shall not be prejudiced.
>
> If the rule which is claimed to be in contradiction with equality has a legitimate aim or has been adopted for the purpose of public interest, then it cannot be said that this rule prejudices the principle of equality.
>
> However, "public interest" or "legitimate aim" should be a) clear b) relevant to the aim c) reasonable and just. If the rule adopted does not comply with one of these requirements which complement, support and strengthen each other, then it can be concluded that it is in contradiction with the principle of equality".[28]

Article 2(1)(a) of the draft law on anti-discrimination defines direct discrimination as "any differential treatment, based on one of the grounds enumerated in this law, which prevents or obstructs any natural or legal entity or group from the enjoyment of rights and freedoms on equal footing with others in comparable situation."

b) Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).

Discriminatory job vacancy announcements as well as discriminatory statements are capable of constituting direct discrimination under national law, though the grounds

[28] Constitutional Court, E. 2008/95, K. 2010/18, 28.01.2010, Official Gazette No. 27565, 28.04.2010.

for bringing legal action are very limited. In the absence of an anti-discrimination law and the limited material scope of Article 5 of the Labour Law (which is only applicable *after* an employment relationship is established between the employee and the employer), Art. 122 of the Turkish Criminal Code provides the only possible ground for legal action. The provision should also apply to discriminatory statements. On the other hand, while the list of protected grounds in the anti-discrimination provisions of the Labour Law and the Turkish Criminal Code are non-exhaustive, the fact that sexual orientation, age and ethnicity are not expressly stated creates legal uncertainty in a country where the judiciary is already unwilling to enforce these provisions even where discrimination on enumerated grounds is concerned.

The enforcement of Article 122 against discriminatory statements and discriminatory job vacancy announcements requires a strong will on the part of the judiciary, which is often lacking in Turkey. As noted by the European Commission against Racism and Intolerance (ECRI), there is “little statistical information” concerning the application of Article 122 and according to the information provided by national authorities, as of December 2010, “only two cases have been brought” on the basis of this article and “the proceedings have not yet been concluded”.[29]

In theory, prosecutors have the competence to bring criminal charges against these employers on grounds of Article 122 of the Turkish Criminal Code. In practice, however, the author is not aware of any example where the prosecutors launched criminal cases on their own initiative. Even where the victim of discrimination or NGOs representing victims made complaints, prosecutors have been extremely unwilling to enforce Article 122. It is noteworthy that in a few cases where individuals called on the prosecutors to enforce Article 122, employers accused of discrimination were public offices.

Discriminatory job vacancy announcements

There are ample examples of job vacancy announcements, which constitute direct discrimination practices. Of the incidents about which information is available to the public, many concern direct discrimination against individuals with disabilities in the public employment context.

Many of the publicly known job vacancy announcements have been made by public institutions, particularly in the context of university entrance examinations and public service recruitment examinations. For example, in 2009, an announcement by the “Executive Board of the Foreign Secondary Schools Enterance Exam” (*Yabancı Ortaöğretim Okulları Sınav Yürütme Kurulu*) was made on the web-site of the Ministry of National Education. The announcement read: “We cannot provide education to students in need of special education and to students who have physical disabilities. As those students will not be able to register to our schools, they will not be allowed to take the “Private Foreign Secondary Schools Enterance Exam” which

[29] ECRI, *Report on Turkey*, p. 16.

will take place on 31 May 2009." More recent examples of discriminatory job vacancies were announced by the Social Security Agency and the Ministry of Finance with regards to the elibigilty criteria for public service recruitment.[30]

In the 2009 University Entrance Exam Guidelines (*2009 Öğrenci Seçme ve Yerleştirme Sınavı Kılavuzu*), information was given about all university, faculty and departments. Istanbul Aydın University explicitly had warned candidates with disabilities, saying that "students with disabilities should not choose our University due to our lack of facilities to provide education to disabled students." Upon reactions by disability NGOs, it was accepted that the expression found in the Guidelines was inappropriate and against the law. However, although applications were made to the Prosecutor's Office claiming that there is a violation of art. 122 of the Turkish Criminal Code, so far there is no prosecution.

Discriminatory statements

Public officials, including senior government officials, routinely make overtly discriminatory statements, particularly against LGBT individuals and non-Muslims. These statements not only go unpunished, even where NGOs file complaints with prosecutors under Article 122, but also do not receive any condemnation by other authorities. The most notorious recent example of such statements was made by Aliye Kavaf, the former Minister of State responsible for Women and the Family, who in a press interview said the following: "I believe homosexuality is a biological disorder, an illness and should be treated".[31] While this statement received widespread coverage in the national media and was condemned by various NGOs, it "was not rejected by the government nor was an apology issued".[32] The Minister of Health, however, in response to reactions to Kavaf's discriminatory remarks, did state that "homosexuality is a difficult thing in Turkey and can be a ground for discrimination" though he also added that Turkish society cannot "accept" gay marriage.[33]

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[30] Arzu Şenyurt Akdağ *et al.*, p. 26-27. Both announcements introduced additional employment criteria for individuals who passed the national public service recruitment exam (and thus were eligible for employment). The information released on the website of the Social Security Agency required candidates of public service jobs who successfully passed the 2010 public service recruitment exam to declare that "they do not have 40% or more disability in their physical, mental, psychological, emotional and social skills." The Ministry of Finance required applicants who also successfully passed the 2010 exam and wanted to join the ministry as lawyers to provide "written declaration that they did not have an obstacle that would prevent them from working and that they are healthy and would endure all kinds of climate and travel conditions."

[31] "Bakan Kavaf: 'Eşcinsellik bir Hastalık", *CNNTÜRK*, 7 March 2010, http://www.cnnturk.com/2010/turkiye/03/07/bakan.kavaf.escinsellik.bir.hastalik/566620.0/index.html [last accessed 6 November 2012]

[32] Amnesty International, p. 9.

[33] "İki Bakanın arasına Eşcinseller Girdi," *Internethaber*, 10 March 2010, http://www.internethaber.com/iki-bakanin-arasina-escinseller-girdi-235796h.htm [last accessed 6 November 2012].

Where discriminatory statements are made by private individuals, again, courts show a lack of will to enforce the Turkish Criminal Code. Furthermore, such statements can often be supported by individuals and institutions of high standing. The defense lawyer of one of the defendants in the high profile criminal case of Ergenekon concerning alleged coup attempts against the government stated, during the trial and as part of his "defense", that "the best Kurd is a dead Kurd." Not only have prosecutors failed to bring charges against this statement but the Istanbul Bar Association interpreted this statement as "within the parameters of freedom of expression".[34] When the members and directors of the "Federation of Osmangazi Cultural Associations", a group based in the province of Eskişehir, made a demonstration carrying banners that read "no Jew or Armenian can enter through this door; Dogs are allowed", prosecutors did not bring any charges though the incident received widespread media coverage.

In rare cases, prosecutors brought charges against individuals and institutions engaged in discriminatory statements or hate speech. In 2008, upon a criminal complaint filed by the Progressive Lawyers Association, a prosecutor in the western province of Izmir issued an indictment against the Social Pan-Turkist Budun Association (*Türkçü Toplumcu Budun Derneği*), an ultra-nationalist organisation. The organisation was charged with having violated Article 216 of the Penal Code for having issued leaflets reading: "Dear Turkish women and men! Make another child for Turkishness, because you are being marginalized compared to the betrayers, pickpockets, drug dealers, who are spreading. We are the Social Pan-Turkist Budun People who can give the deserved reply to the Kurdish and Gypsy gangs and bigots." This was the first time when Article 216, which prohibits incitement to racial hatred and enmity, was invoked in connection with hate speech against the Roma in Turkey.[35] As of August 2012, the case continues and is expected to be concluded in September.[36]

In sum, discriminatory statements against minorities are routinely made by senior government and public officials as well as individuals. While these incidents receive media coverage and limited public reaction (from human rights NGOs) , neither do authorities condemn such statements and/or issue apologies nor do the courts systematically and uniformly enforce the law.

c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

The legislation neither defines direct discrimination, nor lays down permissible justifications. But the Constitutional Court has adopted a test which it applies in all cases:

[34] Seda Alp and Nejat Taştan, p. 73.
[35] Commissioner for Human Rights, *Human Rights of Roma and Travellers in Europe*, Council of Europe, February 2012, pp. 48-49.
[36] Information received through e-mail from the Progressive Lawyers Association.

> "If the rule which is claimed to be in contradiction with equality has a legitimate aim or has been adopted for the purpose of public interest, then it cannot be said that this rule prejudices the principle of equality.
>
> However, the "public interest" or "legitimate aim" should be a) clear b) relevant to the aim c) reasonable and just. If the rule adopted does not comply with one of these requirements which complement, support and strengthen each other, then it can be concluded that it is in contradiction with the principle of equality".[37]

Article 7 of the draft law on anti-discrimination contains a general exemption clause for all kinds of discrimination. Accordingly:

1) If differential treatment targets a legitimate aim such as eradicating inequalities or achieving qualifications required for the occupation and is suitable, necessary and proportionate for achieving such aim, it shall not be deemed to be discrimination.
2) Differential treatment based on gender and age shall not constitute discrimination where it has a legitimate aim and is suitable, necessary and proportionate for achieving such aim.
3) The exclusive acceptance to institutions which provide education and teaching or religious services geared towards a particular religion of persons belonging to such religion does not constitute discrimination.

d) In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?

The legislation does not define age discrimination. Consequently, judicial interpretation is needed.

2.2.1 Situation Testing

a) Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.

National law is silent on situation testing. There seems to be a consensus on the inadequacy of this method with respect to public authorities, as making false statements to public authorities constitutes a crime. Otherwise, as the law is silent on the issue, consideration of evidence obtained through situation testing is left to the discretion of the judge.

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[37] Constitutional Court, E. 2008/95, K. 2010/18, 28.01.2010, Official Gazette No. 27565, 28.04.2010.

b) Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc).

Situation testing is not a practice used in Turkey.

c) Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

As national law is silent on situation testing and this method is not known in general, it has not been used before courts.

There is no public discussion on situation testing in Turkey. It is also a method not yet known or used by NGOs combatting discrimination.

d) Outline important case law within the national legal system on this issue.

There is no case-law on this issue.

2.3 Indirect discrimination (Article 2(2)(b))

a) How is indirect discrimination defined in national law?

Indirect discrimination is not defined in national law.

The draft anti-discrimination law defines indirect discrimination as follows: “A real or legal person or a group being put in a disadvantageous situation in exercising his/her rights and liberties on the grounds prohibited under this law in such a way that cannot be objectively justified as a result of any action, procedure or practice of real and legal persons which do not appear discriminatory. In order for an action, procedure or practice to be objectively justified, it must have a legitimate aim and be proportionate.”

b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?

In Turkish law, the only explicit prohibition of indirect discrimination is found in art. 5(3) of the Labour Law. However, the mentioned paragraph does not define indirect discrimination and prohibits it only on the grounds of gender and pregnancy. According to the provision, except for biological reasons or reasons related to the nature of the job, the employer shall not discriminate either directly or indirectly, against an employee in making, implementing and ending an employment contract.

However, since the concept of indirect discrimination has entered into legislation only very recently and has not yet been defined, there is no case-law on the issue yet.

c) Is this compatible with the Directives?

The current situation is not compatible with the Directives, as indirect discrimination is prohibited only in a very limited fashion. The prohibition found in art. 5 (3) neither covers all grounds, nor the material scope is comparable to the Directives.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

As age discrimination is not explicitly prohibited in Turkish law, there is no specification on how the comparison is to be made.

e) Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?

The case-law suggests that, differences in treatment based on language are not considered as an issue of discrimination. In fact, the reverse situation is the case in Turkey, where courts find attempts by NGOs or municipalities to advocate the linguistic rights of minorities or provide multilingual services to ethnic/linguistic minorities to be unconstitutional on the basis of the equality provision of the constitution.

One significant example is the decision of the Eighth Division of the Council of State (22 May 2007) against the Sur Municipality, ordering the dissolution of the Council of the Municipality and the dismissal of Mayor Abdullah Demirbaş, on the basis of a resolution of the Council of the Municipality of Sur to issue information regarding the provision of certain public services in Kurdish, Armenian, Syriac, English, Arabic, as well as Turkish.[38] The state replaced the elected mayor of the Sur district with an appointed bureaucrat, the deputy governor of Diyarbakır, for two years until the next municipal elections. Demirbaş was re-elected as the Mayor of Sur district in the 2009 municipal elections.

Another example is the legal action taken against *Eğitim-Sen* (the largest teachers' union). On 25 May 2005 the Court of Cassation ruled that the statute of *Eğitim-Sen*

[38] For the English translation of the Council of State's decision, see the Bureau of the Congress of Local and Regional Authorities of the Council of Europe, *Local Democracy in Turkey: Situation in Sur/Diyarbakır (South-east Anatolia, Turkey)*, Report of the Congress Fact-Finding Mission to Turkey (8-10 August 2007), CG/BUR(14)29REV2, available at https://wcd.coe.int/ViewDoc.jsp?id=1183385&Site=Congress&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679#P97_13371 [last accessed 6 November 2012]. For the Recommendation to Turkey on this matter, see the Congress of Local and Regional Authorities, *Local Democracy in Turkey,* Recommendation 229(2007), available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1691602&SecMode=1&DocId=1167298&Usage=2 [last accessed 6 November 2012].

was in breach of several provisions of the Constitution, as well as art. 20/1 of the Law on Trade Unions of Public Servants and ordered the Union to shut down. According to the Statute of *Eğitim-Sen*, the Union "defends the individual's right to education in his or her mother tongue and to the development of cultures." The Court of Cassation ruled that this was in violation of articles 3 and 42 of the Constitution, which establish that the Turkish nation is an indivisible entity and that no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. In July 2005, the Union removed the provision which led to its closure from the Statute. Following this, it was decided by the court that charges against *Eğitim-Sen* were no longer valid. Consequently the Union did not shut down.

In its comments on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, the Turkish Government stated that the number of languages traditionally used in Turkey may reach hundreds, if not thousands and that "Turkey needs to observe non-discrimination principle in teaching all traditional languages other than Turkish. Any act in favour of one or two languages traditionally used can be interpreted as discrimination against other languages and their respective speakers".[39]

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?

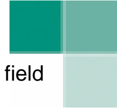
Law on Civil Procedure (Law no. 1086), Law on Administrative Procedure (Law no. 2577) and Law on Criminal Procedure (Law no. 5271) do not contain specific provisions regarding statistical evidence. There is no case-law regarding the use of statistical evidence either. However, as a rule, every claim can be proved by all types of evidence (although there are exceptions). Consequently, the courts can consider statistical evidence besides other evidence.

b) Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

Although use of statistical evidence is not prohibited by national law, it is not used by the courts.

c) Please illustrate the most important case law in this area.

[39] Committee on the Elimination of Racial Discrimination, Reports Submitted by State Parties under Article 9 of the Convention, *Comments by the Government of Turkey on the Concluding Observations of the Committee on the Elimination of Racial Discrimination,* CERD/C/TUR/CO/3/Add.1, 30 March 2009, Comment no. 6, available at http://www.unhcr.org/refworld/publisher,CERD,CONCOBSCOMMENTS,TUR,49eefe2a2,0.html [last accessed 6 November 2012].



There is no case-law in this area.

d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

The constitutional amendments approved by a national referendum in 2010 introduced a new clause guaranteeing the constitutional protection of personal data. The third clause added to Article 20 reads:

"Everyone has the right to request the protection of their personal data. This right encompasses the individual's right to be informed of personal data, to access such data, to request their correction or deletion, and to learn whether these are being used for their intended purpose. Personal data can only be recorded under circumstances prescribed by law or with the clear consent of the individual. The substantive and procedural matters concerning the protection of personal data are laid by law."

Art. 135/1 of the Turkish Criminal Code criminalizes recording of personal data unlawfully. The second paragraph of the same Code criminalizes the unlawful recording of political, philosophical or religious opinions of individuals or personal information relating to racial origins, ethical tendencies, sex lives, health conditions or connections to trade unions of individuals. Any person who violates this provision is liable to imprisonment for six months to three years. Although there is no clarification in the provision regarding what constitutes an "unlawful" recording, art. 26 stipulates that "no punishment shall be given to a person acting under the consent of a person relating to a right disposable by that person." Consequently, research to obtain such data shall not be punished if data is collected about individuals based on their consent.

In 2003, Turkey adopted its first law providing public access to data concerning the acts and policies of public institutions as well as public professional associations.[40] The law grants everyone the "right to information" and imposes on public bodies the corresponding duty to provide all kinds of information and documents within 15 days of the request. Certain information and documents enumerated in the law fall outside the scope of the law, including state secrets. There is insufficient public awareness about the law and public institutions do not respond to information requests on time and fully. It is quite common for public institutions not to respond to requests at all, to provide information other than the one requested or to deny access on grounds of an expansive interpretation of exceptions provided under the law.

[40] Bilgi Edinme Hakkı Kanunu, no. 4982, 9 October 2003, Official Gazette no. 25269, 24 October 2003.

While periodical censuses conducted by the government used to contain questions regarding ethnic origin, the 1965 census was the last one where individuals were asked about their mother tongue and ethnicity. Consequently, there is no longer publicly available official data on the ethnic background of individuals collected on the basis of their informed consent and the principle of confidentiality. To the contrary, the collection of such data is de jure prohibited by the government. A circular issued by the Ministry of Interior is cited regularly, as an administrative act prohibiting the production of statistical data on race and ethnicity by public institutions. However, the mentioned circular is not accessible. Otherwise, there are no specific rules on collection of data and no "coherent, comprehensive system of data collection … to assess the situation of the various minority groups or the scale of racism and racial discrimination in Turkey".[41] In its comments on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, the Turkish Government has, while "acknowledging that disaggregated data on ethnicity may facilitate devising policies for special measure targeting a specific group," stated that "this is a sensitive issue, especially for those nations living in diverse multicultural societies for a long period of time".[42]

In its written replies to the list of issues to be taken up by the Committee on the Elimination of Racial Discrimination in its consideration of the third periodic report of Turkey, the Turkish Government stated that the Government does not collect, keep or use qualitative or quantitative data on ethnic backgrounds of its citizens.[43] However, in reality, various public bodies are reported to unlawfully collect data on the ethnic backgrounds of citizens. Such profiling appears to target, in particular, ethnic minorities such as the Kurds and the Roma. While it is not possible to put together an exhaustive list of official profiling of ethnic minorities, a few examples of such practices have been inadvertently made available to the public by public institutions engaged in such profiling. According to the monitoring report on ethnic and racial discrimination published by Bilgi University, the official website of the Konya Provincial Police Department contained information about the ethnic background of residents living in certain neighbourhoods within the borders of Konya. The information note stated that "families of kurdish[44] dissent who migrated from eastern provinces" resided in neighbourhoods located near the highways while

[41] ECRI, *Report on Turkey*, p. 9.
[42] Committee on the Elimination of Racial Discrimination, Reports Submitted by State Parties under Article 9 of the Convention, *Comments by the Government of Turkey on the Concluding Observations of the Committee on the Elimination of Racial Discrimination,* CERD/C/TUR/CO/3/Add.1, 30 March 2009, Comment no. 5, available at http://www.unhcr.org/refworld/publisher,CERD,CONCOBSCOMMENTS,TUR,49eefe2a2,0.html [last accessed 6 November 2012].
[43] Written replies by the Government of Turkey to the list of issues to be taken up by the Committee on the Elimination of Racial Discrimination in its consideration of the third periodic report of Turkey (CERD/C/TUR/3), p. 1, available at http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/WrittenReplieTurkey74.pdf [last accessed 6 November 2012].
[44] Spelling mistake does not belong to the author.

"gypsies[45] resided in the neighbourhoods of yeni mahalle and mezbaha." While "it was observed that the public residing in areas that fell within [the] responsibility [of the Police Department] do not have a specific political-ideological aim and thought", the Police Department has ascertained that residents of certain other neighbourhoods were "people who came from the east and the southeast" who "committed crimes such as battery and theft".[46]

Thus, in practice, public authorities in Turkey do collect data on the ethnic and racial origin of citizens; however they do so not for the purpose of sharing such data with the public for its use in research and litigation. Rather, the state collects data for the purpose of profiling and policing ethnic minorities. Furthermore, despite clear legal obligations under a 2003 law on right to information, it fails to share such data with the public even where it is explicitly requested to do so.

In its fourth monitoring report on Turkey, published in 2011, ECRI issued a set of recommendations concerning the collection of data for the purposes of developing policies in favour of minorities. ECRI recommended the Turkish government to identify "ways of measuring the situation of minority groups in different fields of life … in compliance with relevant requirements on data protection and the protection of privacy" and to implement them "with due regard for the principles of confidentiality, informed consent and voluntary self-identification."

Data on persons with disabilities: General censuses conducted in 1985 and 2000 contained information on the quantitative dimension of disability in Turkey, though the data collected was deemed to be insufficient.[47] In 2002, the Presidency on Disabled People under the auspices of the Prime Ministry commissioned the State Statistical Institute a survey on persons with disabilities in Turkey.[48] The only statistical research on disability in Turkey, the study identified the number of persons with disabilities in Turkey to be 8,431,937, which makes 12.29 per cent of the total population.

Disability data collection for the purposes of benefits in employment: The 2002 survey on disability in Turkey found that only 20 per cent of persons with disabilities were employed, while the ratio of employed women with disabilities is as low as 6,7 per cent (compared to 32,2 for men). Official data on sector-specific employment does not contain segregated data on persons with disabilities. For example, the Ministry of Justice's data on the number of female and male licensed judges,

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[45] Spelling mistake does not belong to the author.
[46] Seda Alp and Nejat Taştan, p. 77, citing information available on 11 May 2010 on the website of the Köprübaşı Police Station of the Konya Police Department, which was no longer accessible at the time of the writing of this report.
[47] Arzu Şenyurt Akdağ *et al.*, p. 13.
[48] For the results of the 2002 Disability Survey of Turkey, see İsmail Tufan and Özgür Arun (2006), *Türkiye Özürlüler Araştırması 2012 İkincil Analizi,* Sosyal ve Beşeri Bilimler Araştırma Grubu, Türkiye Bilimsel ve Teknik Araştırma Kurumu, available at: http://www.ozida.gov.tr/default20.aspx?menu=arastirma&sayfa=ilerianaliz [last accessed 6 November 2012].

prosecutors and lawyers does not contain any information on the number of members of these professions who have disabilities.[49]

2.4 Harassment (Article 2(3))

a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Harassment is not defined in the laws.

Sexual harassment, while not defined, is the only kind of harassment explicitly prohibited in Turkish Law (art. 24 and 25 of the Labour Law and arts. 94 and 105 of the Turkish Criminal Code). If harassment constitutes defamation as defined and prohibited by the Turkish Criminal Code, then it will be punishable.

According to art. 24 of the Labour Law, if the employer tells words that harm the honour and good name of the worker or one of the members of his/her family, behaves in such manner or attempts sexual harassment against the worker; teases or intimidates the worker or one of the members of his/her family or encourages, provokes and drives the worker or one of his/her family members to act unlawfully or commits an offense requiring conviction against the worker or one of his/her family members or makes grave attributions or accusations harming the worker's honour and dignity against the worker and if the required measures are not taken although the worker becomes subject to sexual harassment at the workplace by another worker or third persons, the worker has the right to terminate the labour contract before the expiry of the contract period or without waiting for the notification period. The worker might choose not to. In any case, the worker has the right to bring persons responsible for such acts before criminal and civil courts.

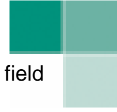
Although none of the forms of harassment other than sexual harassment are explicitly prohibited, it can be argued legally that harassment is a type of tort and is prohibited under art. 49 of the Law of Obligations.

The draft law on anti-discrimination defines harassment as “any unwanted conduct, including psychological and sexual, related to any of the grounds referred to in this Law, which takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment, or considered by the person as such.”

b) *Is harassment prohibited as a form of discrimination?*

Harassment is not prohibited as a form of discrimination.

[49] *Id.,* p. 24.



The draft law on anti-discrimination, however, does prohibit harassment as a form of discrimination.

c) *Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

There are no additional sources on the concept of harassment.

2.5 Instructions to discriminate (Article 2(4))

Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

National law does not prohibit instructions to discriminate and there is no case-law on the issue. However, art. 10 of the Law on Civil Servants prohibits chiefs of civil servants to give orders to civil servants in violation of the law.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*
Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

The constitutional and the legal framework in Turkey do not refer explicitly to the concept of reasonable accommodation. However, there are various constitutional and legal provisions that could be interpreted to impose a duty of reasonable accommodation.

The revised Article 10 of the constitution provides for positive discrimination measures on behalf of persons with disabilities, without specifically enumerating the sectors or spheres of life where such measures shall be introduced. Thus, there is now a constitutional basis for the duty to provide reasonable accommodation for persons with disabilities in, among others, employment.

The United Nations Convention on the Rights of Persons with Disabilities identifies the denial of reasonable accommodation as discrimination. According to art. 90 of the Constitution, the Convention has the force of law. Thus, persons with disabilities could in theory rely on the Convention before national authorities and courts and claim that denial of reasonable accommodation should be considered as discrimination.

The material scope of the Convention is wider than the Directives. Consequently, depending mostly on the number and diversity of requests and applications, the Convention can become an important tool to widen the areas where reasonable accommodation is provided. However, in light of the fact that the concept of reasonable accommodation is largely unknown to judges, the success of such claims remains to be seen.

The Law on Persons with Disabilities aims at enabling the participation of persons with disabilities to society through taking the requisite measures for removing the barriers to their access to “health, education, rehabilitation, employment, care and social security”.[50]

Law on Persons with Disabilities does not use the term “reasonable accommodation,” but provides an obligation for the employer to make arrangements in the work place which will facilitate persons with disabilities to work in that work place and to provide supportive gadgets and aids. Art. 14(3) requires both public and private employers to take necessary measures to eliminate or alleviate the barriers and hardship faced by employees or job applicants with disabilities in employment processes and to make physical adjustments. In cases of denial of reasonable accommodation to persons with disabilities, employers are fined by labour inspectors. However, the criteria used by labour inspectors are unknown. Denial of reasonable accommodation is not identified by labour inspectors as discrimination. They are only referred to as breaches of the legislation requiring the employer to take certain measures. Persons who request accommodations should apply to the employer and if their requests are denied, they can make an application to labour inspectors. Labour inspectors are responsible for monitoring the observance of the Labour Law by the employers. Neither the inspectors nor the labour courts can order the employer to provide reasonable accommodation.

A very limited duty to provide reasonable accommodation for employees with disability is also found in the Law on Civil Servants, limited to individuals working in the public sector. Article 53 prescribes a duty limited to the provision of tools which would enable the civil servant to carry out his/her duties. Again, breaches of this obligation are not considered as discrimination. In February 2011, a number of amendments were introduced in Articles 100 and 101 of the law. The provisions added to Article 100 of the law authorize the public sector employers to adapt the

[50] Özürlüler ve Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun, 1 July 2005, Official Gazette no. 25868, 7 July 2005,Art. 1.

starting and ending of the working hours and the duration of lunch breaks according to the needs of persons with disabilities, the requirements of the job and climate and transportation conditions. It is notable, however, that the amendments did not impose a *duty* to accommodate, rather than a power to do so and left the discretion to the employers. Thus, failure of employers to take such measures will not deemed to be discrimination. The amendment in Article 101 of the Law on Civil Servants, on the other hand, introduced a negative duty, whereby persons with disabilities working in the public sector cannot be forced to work in night shifts or night duty, unless s/he wants to do so.[51]

b) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?

There is no constitutional or legal provision referring explicitly to reasonable accommodation in areas outside employment either. However, the constitution and various laws require the introduction of special measures and positive discrimination on behalf of persons with disabilities.

The revised Article 10 of the constitution provides for positive discrimination measures on behalf of persons with disabilities, without specifically enumerating the sectors or spheres of life where such measures shall be introduced. Thus, there is now a constitutional basis for the duty to provide reasonable accommodation for persons with disabilities in all areas. Article 42(7) of the Constitution specifically imposes on the state the duty to accommodate the special needs of people with disabilities in education; the state shall "take the measures to make beneficial to society those who need special education."

There are various laws that impose on the state to take the requisite measures to enable the access of persons with disabilities to public services in the areas of education, health and social services.

Article 15 of the Law on Persons with Disabilities requires the provision of education to persons with disabilities on equal terms with the others and imposes on the authorities to provide students with disabilities with the tools and special course materials they need to further their education. The provision also imposes on the state the duty to develop "the Turkish sign language" for students with hearing impairment. While the Turkish Language Institution has developed the Turkish Sign Language Alphabet, the regulative framework of the Ministry of Education prohibits the use of this language in the education system.[52] Moreover, there does not yet

[51] Bazı Alacakların Yeniden Yapılandırılması ile Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu ve Diğer Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun, no. 6111, 13 February 2011, Official Gazette no. 27857 (bis no.1), 25 February 2011.
[52] Arzu Şenyurt Akdağ *et al.*, p. 32.

exist expert staff to teach the use of the sign language. Under the current system, the acquisition of the ability to use the sign language takes at least 10 years.[53]

The regulatory framework governing the area of education obliges schools to accommodate the needs of students with disabilities. Article 12 of the Law on Primary Education stipulates that "the mentally, physically, emotionally and socially disabled children shall receive special education."

c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

The law on Persons with Disabilities does not prohibit denial of reasonable accommodation as a form of discrimination. However, the United Nations Convention on the Rights of Persons with Disabilities prohibits denial of reasonable accommodation as a form of discrimination. According to art. 90 of the Constitution, the Convention has the force of law.

d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

There is no national law (including case law) setting forth such an obligation.

e) *Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

There is no provision on this issue, consequently general rules apply.

f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

Provisional Articles 2 and 3 of the Law on Persons with Disabilities (no. 5378) require the physical accessibility of all public buildings, public infrastructure and public places as well as public and private transportation vehicles regulated by the municipalities within seven years after the law entered into force. It is notable that the law does not extend the duty of accessibility to public services. In this sense, the material scope of the law is more limited than that of the UN Convention, which requires accessibility to both public places and public services. The grace period set forth under Law no. 5378 will expire on 7 July 2012. And yet, the law does not foresee any sanctions for failure to comply. The Prime Ministry issued a circular in 2006, calling on relevant authorities to develop short, medium and long term plans on the implementation of

[53] Id.

the law within the 7 years period.[54] In a statement it issued in 2008, the Prime Ministry noted that the limited measures adopted so far failed short of the legal standards.[55] The extremely poor awareness of public authorities on the rights of persons with disabilities, coupled with the lack of effective enforcement mechanisms and sanctions under Law no. 5389, result in an utter disregard of the legal obligations stipulated under the law. Even the new public buildings built after the entry into force of this law lack the minimum facilities to enable the access of persons with disabilities, preventing persons with disabilities from entering the public sphere.[56] After more than five years since the entry to force of Law no. 5389, the government does not have statistics on the number of public buildings, infrastructure and facilities which are accessible for persons with disabilities.[57]

The Municipality Law (Law no. 5393) requires the services provided by municipalities to be accessible to persons with disabilities. Accessibility is not defined anywhere in the legislation; however Additional Article 1 of the Zoning Law (Law no. 3194) requires compliance with the standards adopted by the Turkish Standards Institute concerning the zoning plans and urban, social, technical infrastructure in order for the physical environment to be accessible for persons with disabilities. So far, the Institute has adopted standards on wheelchairs (TS ISO 7176-7); public information symbols (TS 4802); lift installation (TS8237); public toilets (TS 8357); structural preventive and sign (pigtograph) design criteria on street, boulevard, square and roads for persons with disabilities and the elderly in urban areas (TS 12576); hearing aids (TS 8066 HD 450.3 S1); technical aids for persons with disabilities (TS EN 12182); rules on the adaptation of buildings where persons with disabilities reside (TS 9111); inner-city roads - railway transportation design rules (TS 12460); and railway vehicles– passenger coaches – adaptation of the coaches to the needs of wheelchair users (TS 12694). Unfortunately, the standards cannot be accessed free of charge.

Despite these legal requirements, neither the private nor the public sector has "made serious planning based on a calendar and with allocated resources concerning accessibility".[58] In cases brought before the courts regarding inaccessible services, environment and public transportation, the prosecutors and judges are reluctant to define these as discrimination.

g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

[54] Id., p. 50.
[55] Id.
[56] Eşit Haklar için İzleme Derneği, p. 18.
[57] Id., pp. 18-20.
[58] Arzu Şenyurt Akdağ *et al.*, p. 50.

The Turkish national system is based on anticipation. The Law on Persons with Disabilities and the Municipality Law require all public buildings, public infrastructure and public places as well as public and private transportation provided by municipalities to be accessible to persons with disabilities. However, accessibility is not defined under the Turkish laws. Instead, there are set out standards for making infrastructure to be accessible for persons with disabilities. See section (f) generally for the definition of accessibility, and the fields and subjects of obligations.

Disability is at times explicitly stated as a ground for exclusion from access to social protection. For example, an executive regulation issued in 1998 by the General Directorate on the Status Women puts forth the criteria for admission to women's shelters run by the state. According to Article 9 (d), (e) and (g) of this regulation, the following women are ineligible: women with mental health problems, women with mental disabilities, and women with physical disabilities who need care.[59]

h) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

Before the adoption of the Law on Persons with Disabilities (Law No. 5378) in 2005, there was no law which exclusively dealt with the rights of persons with disabilities. Although this Law was intended to be comprehensive, many issues are still regulated by other legislation, i.e. Special Education Law, Social Insurance and General Health Insurance Law, Property Tax Law, Labour Law, Turkish Civil Code, Turkish Criminal Code, etc. According to the list published on the web-site of the Turkish Disability Administration, there are 46 Laws, 4 Decrees; 4 Council of Ministers Decisions; 41 Regulations; 17 Directives and 8 Circulars on issues directly relevant to persons with disabilities.[60] However, this list is not exhaustive.

All of the above legislation provide for special rights for persons with disabilities, such as early retirement, tax reduction or exemption, special education support, cash benefits, disability quota both in private and public employment, rehabilitation, parking lots for persons with disabilities, sheltered employment, welfare homes etc.

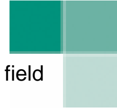
2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?

There is no legislation on sheltered or semi-sheltered accommodation for workers with disabilities. The Law on Persons with Disabilities of 2005 has introduced the

[59] Regulation on Women's Guesthouses under the Social Services and Child Protection Agency, Official Gazette no. 23400, 12 July 1998, available at: http://www.kadininstatusu.gov.tr/upload/mce/kadin_konukevleri_yonetmeligi2.pdf [last accessed 6 November 2012].

[60] http://www.ozurluveyasli.gov.tr/tr/html/201/Ulusal+Mevzuat/ [last accessed 6 November 2012].



concept of sheltered employment in art. 14. In May 2006 Regulation on Sheltered Workplaces was adopted. According to art. 4(1) of the Regulation, in order for a workplace to be considered as sheltered workplace, the number of employees should not be less than 30 if the workplace is within the borders of a metropolitan municipality, and not less than 15 if the workplace is outside the borders of a metropolitan municipality. 75% of the employees should be at least 40% impaired or 60% impaired (depending on the type of impairment). However, the Regulation makes no reference to any state support such as tax reduction or exemption. Art. 30 of the Labour Law stipulates that social insurance premiums which should normally be paid by the employer will be covered by the state. This seems to be the only support provided to the sheltered employment by the state.

b) *Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?*

Such activities are considered as employment under national law.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There is no law transposing the Directives.

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

The national law does not distinguish between natural persons and legal persons. Both natural and legal persons can be held liable for discrimination or be victims of discrimination. Criminal law is an exception. According to art. 20(2) of the Turkish Criminal Code "no punitive sanctions may be imposed on legal persons." However, sanctions in the form of security precautions stipulated in the law are reserved.[61] In certain situations, natural persons can be held liable for discrimination along with a legal person. For example, criminal charges can be brought against a person working in the human resources department of a company; while a civil case for compensation can be taken before the courts against the company.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

In criminal law, because of the principle of individuality of criminal responsibility, employers cannot be held liable for the discriminatory behaviour of their employees

[61] Security precautions are sometimes alternatives to typical criminal sanctions (imprisonment, fine etc), sometimes complementary to sanctions. Security precautions can be anything from rehab to community service. According to the new Turkish Criminal Code, legal persons can also be held responsible for crimes. As imprisonment is not an option for legal persons, the law says security precautions can be imposed by the courts. If the organs or representatives of a legal person are involved in a crime, the court might decide for example that license of the legal person is suspended, or certain property which are fruits of the crime are confiscated etc.

or third persons. However, this does not apply to civil liability. According to art. 55 of the Law on Obligations, employers are responsible for the wrongdoings of their employees. According to the same article, the employer has the right to have recourse against the employee.

Unless explicitly stipulated in the law, persons cannot be held liable for actions of third parties. Everyone is liable for their own actions. Thus, in principle only the individual harasser or discriminator can be held liable under criminal and civil law.

In order for civil servants to face prosecution, their superior's permission is required (Law on the Prosecution of Civil Servants and Other Public Employees (Law no. 4483)).

Trade unions and professional organizations cannot be held responsible for the actions of their members, unless the actions of the members are attributable to these unions or organizations.

3.2 Material Scope

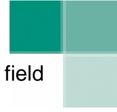
3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

It can be claimed that all persons outside the protection of specific anti-discrimination provisions outlined below can benefit from the protection prescribed in art. 10 of the Constitution. However, art. 10 of the Constitution is too vague to provide adequate protection.

Art. 122 of the Turkish Criminal Code prohibits discrimination in hiring on grounds of, *inter alia*, language, race, colour, gender, disability, political opinion, philosophical belief, religion and denomination. Limiting the protection to the hiring process, the Article is applicable only to the process before the employment relationship is established but not after the employment relationship is established (both in the public and private sectors). Although there is no case-law on this issue, it can be argued that art. 122 of the Turkish Criminal Code is applicable in all sectors, where the selection criteria or recruitment conditions are discriminatory.

According to art. 13 of the Law on Persons with Disabilities, persons with disabilities have the right to freely choose their profession. The most specific provision in the legislation which prohibits discrimination in the selection and recruitment conditions is art. 14. The provision prohibits discrimination "in any of the stages from the job selection, to application forms, selection processes, technical evaluation, suggested working periods and conditions". Although promotion is not explicitly mentioned, as the provision refers to "all stages," it might be interpreted to cover promotion.



In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

General rules for recruitment of public servants

According to art. 70 of the Constitution, "every Turk has the right to enter public service and no criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service."

According to art. 48 of the Law on Civil Servants, recruitment as a civil servant is subject to general and special conditions. General conditions are:

- To have Turkish citizenship;
- To be above 18 years old;
- To be at least a secondary school graduate;
- To not to be deprived of public rights;
- To not to have been punished for certain offences (offences against the constitutional system, offences against national defence, embezzlement etc.);
- To be exempt from military service; to have completed the military service or not to be called for military service at the time of the application;
- To not to have a mental illness which will prevent the person from fulfilling his/her duties permanently (subject to art. 58 on the employment of persons with disabilities as civil servants).

In addition to general conditions, special conditions are prescribed in the legislation of the relevant public offices. According to art. 3 (b) and (c) of the Law on Civil Servants, promotion is based on merits. However, special categories of public employees, such as academic personnel employed in universities are subject to special legislation.

There is no provision in the Law on Civil Servants which prohibits discrimination in the selection, recruitment or promotion of civil servants. The Law only prohibits discrimination by civil servants while carrying out their duties (Article 7). In the legislation regarding the selection, recruitment and promotion of public employees, whether they are civil servants or working under various types of contracts, there are limited specific provisions prohibiting discrimination based on grounds covered by the Directives. For example, according to the Regulation on the Promotion of Civil Servants, objective criteria such as education, achievement in exams, working

period, positive employment record shall be taken into account in the promotion of the civil servants.

Public employees are selected by a general exam, i.e. Public Employee Selection Exam. Those who pass the exam are subject to a trial period, prior their full appointment. Additional art. 3 of the "Regulation on the exams organized for those who will be appointed to public offices for the first time" stipulates that, unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who will be placed through central exams.

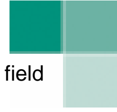
The recruitment of persons with disabilities in the public sector is also regulated under the Law on Civil Servants. Art. 53 of the law, as revised in February 2011, stipulates that separate exams shall be organized for persons with disabilities for recruitment to the quotas set aside for them. Although separate exams for candidates with disabilities are seen as a positive measure taken by the state to facilitate the employment of persons with disabilities in the public sector; the measure turned out to be a requirement rather than an opportunity. In cases where candidates with disabilities choose to take the general exam, instead of the exam for candidates with disabilities, the placements were annulled on the basis that, they have taken general exams. When the case came before the Council of State (Danıştay), the judgment was as follows: "It is in line with the law to not to appoint the plaintiff to the post that he was placed, since he has taken the general exam. Since his employment should be through quota for the persons with disabilities ... he should have taken and passed the special exam designed for the persons with disabilities".[62]

Special rules for recruitment of civil servants for certain professions

Separate exams are held for recruitment of public employees to certain professions, such as judges and prosecutors. Persons who are qualified to take these exams are prescribed by laws.

The qualifications required to be appointed as a candidate judge or prosecutor are listed in art. 8 of the Law on Judges and Prosecutors (Hakimler ve Savcılar Kanunu) (Law No: 2802). Among others, there are two requirements relevant to the Directives. According to para. (b) candidates should not be older than 30 years old (candidates who has a bachelor or masters degree) or should not be older than 35 (if they have a PhD degree). According to para. (g) candidates should "not have any physical and mental illness or disability that would prevent from conducting the duties as a judge or a prosecutor continuously and in every part of the country; not have disabilities such as having difficulties in controlling the movements of the organs, speaking different than it is accustomed and which would be found odd by people". In most cases, if not all, if a separate exam is organized for the selection, written exams are followed by interviews. There are no provisions which guarantee the objectivity of

[62] 12th Circuit of the Council of State, 19 December 2008, 2006/1098 E, 2008/5603 K.



these interviews. There is no reference to the duty to provide reasonable accommodation either. Judges and prosecutors with at least one year experience in the position they hold and who have not been convicted by a final court judgment or who have not been subject to disciplinary measures are eligible for promotion.

Contract-based recruitment to public and private sector

The Labour Law applies only to persons working under a labour contract irrespective of whether they work in the public sector or the private sector. If the person is working in the public sector as a civil servant (memur), the Law on Civil Servants apply. Persons who work in the public sector under contracts are subject to special regulations.

According to art. 71 of the Labour Law, minimum age of employment is 16. However, children who have completed the full age of fourteen and have also completed their primary education, may be employed on light works that will not hinder their physical, mental and moral development, and for those who continue their education, in jobs that will not prevent their school attendance. There is no general upper age limit for employment. However, minimum and/or maximum age limits exist in access to certain professions, occupations and employment. For example, according to Article 8 of the Law on Judges and Prosecutors (Hakimler ve Savcılar Kanunu) (Law No: 2802), persons who are older than 35 years cannot be appointed as candidate judge or prosecutor.

Art. 5 of the Labour Law prohibits discrimination based on language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations. Sexual orientation, disability, age and ethnic origin are not explicitly referred to. It, however, applies only after an employment relationship is established between the employee and the employer and is not applicable to the pre-employment stages such as job announcements and recruitment processes.

Sectors governed by special labour laws

Some sectors or group of persons are outside the scope and application of the Labour Law. Because of the special nature of the media and maritime sectors, the Turkish legislator had opted for special labour laws for these two sectors. Other exceptions to the application of the Labour Law are found in the Law itself, at art. 4. According to art. 4, the following are excluded from the application of the Labour Law:

1) Sea and air transport activities,
2) In establishments and enterprises employing fewer than 50 employees where agricultural and forestry work is carried out,
3) Any construction work related to agriculture which falls within the scope of family economy,

4) In works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3 rd degree (3 rd degree included),
5) Domestic services,
6) Apprentices, without prejudice to the provisions on occupational health and safety,
7) Sportsmen,
8) Those undergoing rehabilitation,
9) Establishments employing three or fewer employees and falling within the definition given in Article 2 of the Tradesmen and Small Handicrafts Act.

As Labour Law does not apply to the above, prohibition of discrimination prescribed in art. 5 of the Labour Law does not apply either.

Recruitment to the military

There are special laws regarding the employment and promotion of the military personnel and the civil personnel employed in Turkish Armed Forces.

A long list of laws and regulations within the separate realm of military legal system explicitly discriminate on the basis of sexual orientation. Article 153 (2) of the Military Penal Code allows the dismissal of military personnel who engages in homosexual conduct. The dismissal of gay soldiers from the military on the basis of this article has been upheld by the High Military Administrative Court.[63] Gay military personnel who are found to have engaged in homosexual conduct can be dismissed from graduate education, refrained from promotion to assistant professorship in the Military Medical Academy, and excluded from professional exams required for entry to various professions.

Military regulations governing exemption from mandatory military service not only explicitly discriminate on the basis of sexual orientation, but also result in multiple discrimination against homosexual conscientious objectors, who refuse to serve in the military due to their political belief and/or conscience. A well-known example is Mehmet Tarhan, a leading conscientious objector and LGBT activist, who has been subjected to consecutive and multiple arrests, imprisonments and convictions as well as forced military recruitment for having refused to serve in the army. While military authorities attempted to force Tarhan to undergo physical examination to prove his homosexuality, they were unable to do so when he refused. A fugitive since March 2006 and convicted by a military court in October 2006,[64] Tarhan eventually petitioned the ECtHR, where his case is pending.[65]

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[63] High Military Administrative Court, E. 1998/888, K. 1999/482, 11.05.1999, *available at*: http://www.msb.gov.tr/ayim/Ayim_karar_detay.asp?IDNO=1316&ctg=000002000002000001[last accessed 6 November 2012].

[64] Turkish Land Forces, 5th Infantry Training Brigade Commandership Military Court, E. 2006/772, K. 2006/871,10.10.2006.

[65] Information received through e-mail from Mehmet Tarhan's lawyer.

In assessing eligibility for exemption, the regulation of the Turkish Armed Forces considers homosexuality as a psychosexual disorder and individuals having such 'condition' to be "unfit for military service." To be exempt from military service, gay men were routinely required to 'prove' their homosexuality by either going through a forced anal examination or providing photographic evidence of being engaged in passive anal sex.[66] In recent years, due to wide media coverage and international pressure, this practice seems to have been abandoned. Instead, authorities now subject individuals to psychological tests to test their homosexuality and, where they find the test results unconvincing, request a "family meeting," forcing individuals to make a choice between coming out to their families and military service. In cases where a family meeting does take place, authorities may still not be convinced, in which case they require the individual to be admitted to the psychiatry wards of military hospitals known as "the pink ward".[67] A referee who was expelled from his profession by the Turkish Football Federation when the "unfit for military service" report he had received was leaked, had spent a total of 22 days at three different hospitals such a ward before he was provided with the report (for more on this case, see section 0.3).[68] The process of psychological tests and family meetings typically last days and requires multiple visits to more than one military hospital.[69]

Self-employment and statutory office

According to art. 48(1) of the Turkish Constitution: "Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free."

There is no umbrella legislation regulating self-employment and statutory office. There are various laws on certain professions, such as Law on Attorneys (Law No. 1136), Law on Pharmacists and Pharmacies (Law No. 6197), Law on Notaries (Law No. 1512) etc. There are no specific provisions in any of these laws on the prohibition of discrimination.

The constitutional and legal provisions enumerated above do not have aspects which constitute direct discrimination in the selection, recruitment and promotion of both public and private sector employees. However, there are also no specific provisions which comprehensively prohibit discrimination based on all of the grounds covered by the Directives in access to employment, self-employment and occupation. In the

[66] For examples, see Amnesty International.
[67] Elif İnce, " 'Pembe Tezkere'ye Koğuş İşkencesi", *Radikal*, 15 April 2012, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1084969&CategoryID=77 [last accessed 6 November 2012].
[68] *Id.* For more on the ill treatment homosexuals are subjected at military hospitals, see the website of LGBT news portal Kaos GL: http://www.kaosgl.org/sayfa.php?id=11810 [last accessed 6 November 2012].
[69] For a detailed self-account by a trans-gender individual of a six days process involving multiple visits to four different military hospitals, see http://www.kaosgl.org/sayfa.php?id=9147 [last accessed 6 November 2012].

absence of data and case-law, it is not possible to assess the current situation.[70] In situations where data exists, -such as data regarding the incompliance with the quota requirements for persons with disabilities- clearly indicate that discrimination exists (see below on quotas).

As in the headscarf ban at universities, which was at issue in the ECtHR's judgment in the Leyla Şahin case,[71] the headscarf ban in public or private service jobs does not have a constitutional or legal ground.[72] There does not exist any provision in the constitution or the above mentioned laws prohibiting the wearing of the headscarf in employment. And yet, there is widespread employment discrimination against headscarved women on the basis of a de facto ban precluding their employment in the public sector. The 'legal' basis of this ban is an executive regulation which was adopted in 1982, during the military regime.[73] The regulation requires female employees to have their "heads uncovered." Though neutral when taken at face value, this stipulation has been relied on by the state in refusing to hire headscarved women to the public sector as well as firing in mass numbers at certain moments of high political tension public service employees wearing the headscarf.[74] Although the same regulation prohibits female public service employees also from, inter alia, wearing sandals or long nails, it has been used systematically against headscarved women. The ban in the public sector has had a "spill over effect" and spread to the private sector over time.[75]

The extra-legality of the headscarf ban creates significant uncertainty as to presence and the limits of the ban and leads to arbitrary employment practices both at the public and private sectors.

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[70] According to the information provided by Turkish authorities in the State report submitted to the United Nations Committee on the Elimination of Racial Discrimination and in the replies to the list of issues, there have been no complaints concerning acts of racial discrimination during the reporting period. See UN Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of all Forms of Racial Discrimination : 3rd periodic reports of States parties due in 2007: addendum: Turkey*, 13 February 2008, CERD/C/TUR/3, para. 211, available at: http://www.unhcr.org/refworld/docid/4885cfa60.html [last accessed 6 November 2012]. In its report to the Committee Turkey has stated that "the Business Inspection Board of the Ministry of Labour and Social Security is tasked with investigating allegations of discrimination in business relations. To date, the Board has not found any acts of discrimination, including racial discrimination, during its inspections." *Id.*, para. 145.

[71] ECtHR, *Leyla Şahin v. Turkey*, 29 June 2004.

[72] The ECtHR's judgment was limited to the headscarf ban at universities and did not address the ban in employment.

[73] Regulation Concerning the Attire of Personnel Working at Public Institution, Official Gazette no. 17849, 25 October 1982.

[74] The dismissal of headscarved women from the public sector has not been a continuous or consistent policy. Rather, it was employed at extraordinary political periods in Turkey's history such as during the military regime of 1980-1983 and the period following the 'soft coup d'état' of February 28th, 1997. NGOs representing headscarved women claim that 5,000 headscarved women were dismissed and another 10,000 were forced to resign between 1998-2002. Dilek Cindoğlu (2010), *Başörtüsü Yasağı ve Ayrımcılık: Uzman Meslek Sahibi Başörtülü Kadınlar,* TESEV Publications, p. 35.

[75] *Id.*

Another group which suffers employment discrimination through seemingly neutral hiring criteria is homosexual men. Many jobs in the public and private sector in Turkey require men to have fulfilled their military service duties upon proof of documentary evidence of either having served in the military or having been lawfully exempted on health grounds. Homosexual men who can 'prove' their homosexuality are exempted for being 'unfit' to serve in the military. This exemption can cause serious impediments to their ability to find an employment, both in the public and private sector. In 2011, a homosexual man filed a discrimination claim with the provincial human rights board of Istanbul against a private company which refused to hire him after having found out about his sexual orientation. While the applicant was initially verbally told that he was accepted for the job, the employer changed her mind when the applicant revealed, upon a query, that the ground of his exemption from military service was his sexual orientation.[76]

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

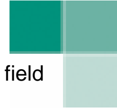
According to art. 55 of the Constitution, wage is in return for work and the state shall take the necessary measures to ensure that workers earn a fair wage commensurate with the work they perform and that they enjoy other social benefits.

The prohibition of discrimination prescribed in art. 122 of Turkish Criminal Code does not cover employment and working conditions. There is no umbrella legislation on the conditions of work and employment, including pay and dismissals. Different categories of employees are subject to different legislation.

Art. 5 of the Labour Law prohibits discrimination in the employment relationship. Although discrimination in remuneration is prohibited expressly only in relation to gender, art. 5 should be interpreted to cover prohibitions of discrimination in pay, based on all grounds. The provision does not refer to ethnic origin, sexual orientation, disability or age explicitly. So far there is no case-law on the issue, which might give an opinion regarding the interpretation adopted by the courts.

Before the adoption of the Labour Law, women's organizations in Turkey lobbied for an anti-discrimination article, which would cover all types of discrimination and in all

[76] "Cinsel Yöneliminizden Dolayı İşe Alımınızı İptal Etmek Zorundayız", *KaosGL*, 15 June 2011, http://www.kaosgl.com/sayfa.php?id=7159 [last accessed 6 November 2012].



stages of employment. The outcome was positive for women. Art. 5 (2) prescribes that “except for biological reasons or reasons related to the nature of the job, the employer must not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of the employment contract due to the employee’s gender or maternity.” However, a similar comprehensive prohibition is not found for any other grounds.

According to art. 18 of the Labour Law, the employer should have a valid reason for the termination of the contract. According to the same article, race, colour, gender, marital status, family responsibilities, pregnancy, religion, political opinion, national origin or social origin are not valid reasons. However, as mentioned earlier, the material scope of the Labour Law is limited.

Art.29 of the Labour Law prohibits and defines collective dismissals. Although prohibited grounds of discrimination are not mentioned explicitly, this provision should also be applicable when dismissals are based on prohibited grounds.

Civil servants are employed on a permanent basis. Thus unless a concrete reason for termination occurs, their position as a civil servant is secure. According to art. 125 of the Law on Civil Servants, there are categories of reasons to terminate the employment relationship, before compulsory retirement age. The first category is prescribed in art. 120 of the Law on Civil Servants. According to this provision, if the civil servant receives bad records from two different superiors consecutively, then the civil servant is dismissed. The second category is prescribed in art. 125. According to this article, civil servants are dismissed if they join political parties, reveal classified information, attack superiors or colleagues physically, participate in strikes, boycotts and similar activities, etc. There is no reference to any of the prohibited grounds in the Law of Civil Servants. However, especially in relation to sexual orientation, civil servants receive bad records, which lead to their dismissal or relocation.

Art. 14 of the Law on Persons with Disabilities prescribes that “no discriminative practices can be performed against persons with disabilities in any of the stages from the job selection, to application forms, selection process, technical evaluation, suggested working periods and conditions and they cannot be subjected to any differential treatment with respect to their disability which will be unfavourable for them.” This provision is clearer than most other legislation. Again pay is not explicitly mentioned, but as the provision prohibits all unfavourable differential treatment, it should also be interpreted to cover pay. Unfortunately, the reality is far from the ideal situation this provision aims for.

According to Article 39 of the Labour Law No. 4857, minimum limits of wages are determined every two years at the latest by the Ministry of Labour and Social Security through the Minimum Wage Determination Committee for regulating the economic and social conditions of all workers working on labour contracts, which are covered or not by this Law. Surprisingly, the Regulation on Minimum Wages has an explicit provision prohibiting discrimination. According to art. 5 of the Regulation

"without prejudice to art. 7, differentiation cannot be made on grounds of language, race, gender, political opinion, philosophical belief, language, sect and any such considerations in deciding the amount of minimum wage." The list is identical to the list of prohibited grounds found in most other laws and regulations. In art. 7 of the Regulation, a distinction is made between workers older and workers at the age of 16. For 2009, the gross daily wage for workers older than 16 was 27.90 TL (approximately 12 Euros); and for workers at the age of 16 and younger was 23.85 TL (approximately 10 Euros).

Until recently, there were three different social security institutions for public employees, for the self-employed and for the workers. In 2006, all 3 systems were merged by Law on Social Insurance and General Health Insurance (Law No. 5510). In 2001, the Law on Individual Pension Savings and Investment System (Law No. 4632) was adopted to complement the state social security system on the basis of voluntary participation. There are no provisions in these laws on any of the prohibited grounds, except for disability. The provisions on disability are on positive measures, such as early retirement (art. 25 of the Law on Social Insurance and General Health Insurance (Law No. 5510).

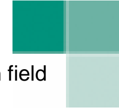
Statistical data in the field of employment is collected by the Turkish Statistical Institute.[77] *Employment, Unemployment and Wage* data are collected. Data is disaggregated only on the basis of gender. Thus it is not possible to make an evaluation based on facts. But as a general observation, it can be stated that most vulnerable groups, such as Roma people, work in the informal sector and as a rule their earnings are less than the earnings of persons in the formal sector. Even though the quota system should in principle guarantee a minimum wage for persons with disabilities, the employment conditions and pay on paper is different from the actual situation.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses?

As there does not exist a national anti-discrimination law, evaluation can only be based on various laws and regulations on vocational guidance, training and education. Provision of vocational training and career counselling services are among the responsibilities of *İŞKUR* (Turkish employment institution). *İŞKUR*

[77] See www.turkstat.gov.tr.



organizes special training courses for persons with disabilities. Although this is another positive measure taken by the state, the practice can be criticised for a number of reasons. First of all, mainstreaming aspect is lacking in *İŞKUR's* training courses as courses are designed exclusively for persons with disabilities. Second, courses do not provide a real choice, as courses are given on very limited areas. Lastly, when designing these courses market needs are not taken into consideration. Consequently, persons are trained in areas where there is no need for new employees.

In formal education institutions, students can attend vocational education after the completion of their primary school education. 9th and 10th grade students are given vocational education at school, and 11th grade students are given theoretical education at school for 2 days per week and practical training at workplaces for 3 days per week. Students who do not continue their vocational training at workplaces must complete, in order to graduate, 160 hours as interns at workplaces in three-year programmes or 300 hours in four-year programmes.

In higher (university) education, there are high schools (polytechnics) of pre-graduate level for technical and vocational education, along with faculties for technical and vocational education at the graduate level.

The general principles of vocational education are prescribed in the Law on Vocational Education (Law No. 3308). There are no specific provisions prohibiting discrimination. According to art. 10, in order to be an apprentice (*çırak)* the person has to be between 14 and 19. However, there are exceptions to the upper age limit. According to art. 13, workplaces falling within the scope of this Law can only employ apprentices (*çırak)* who are younger than 18 under an apprenticeship contract. This rule does not apply to persons who are graduates of vocational and technical education schools and to those who have a certificate of assistant-mastership (*kalfa).* As stipulated in art. 4 of the Labour Law and art. 13 of the Law on Vocational Education, Labour Law does not apply to those who work under apprenticeship contracts (without prejudice to the provisions of the Labour Law on occupational health and safety).

As seen above, age limitations apply in apprenticeship. Otherwise, there are no other limitations based on prohibited grounds. However, there are also no specific provisions for protection against discrimination. Although along with *İŞKUR* municipalities also open vocational training courses, opportunities of vocational training for older persons is still very limited.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

According to art. 51 of the Constitution both employees and employers have the right to form unions, associations and higher organizations (i.e. federations and confederations), join these organizations and freely withdraw from membership. No one shall be forced to join or withdraw from membership. Although prior permission is not needed to form these organizations, there are formalities. According to the same provision, the scope, exceptions and limits of the rights of civil servants who do not have a worker status are prescribed by law in line with the characteristics of their job. According to art. 129 of the Constitution, members of public professional organizations or their higher bodies shall not be subjected to disciplinary sanctions without being granted the right to defence. Disciplinary sanctions shall be subject to judicial review, with the exception of warnings and reprimands. Article 135 of the Constitution define Public Professional Organizations as follows:" Public professional organisations and their higher organisations are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public; their organs shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision.

It can be concluded that there are no discriminatory provisions in the Constitution regarding membership of or involvement in unions or professional organizations. However, there are no specific protections either.

According to art. 20 of the Law on Unions (Law No. 2821) persons who are 16 or more can become members to workers' unions. Individuals who are below 16 years old can become members to a union upon consent of their parents. There are no other provisions in the Law relevant to the prohibited grounds.

There are numerous laws regarding professional organizations, such as Turkish Medical Association, Bar Associations, Turkish Pharmacists' Association etc. It is obligatory to register to these organizations in order to practice these professions. However, according to art. 135 of the Constitution, persons employed in public institutions or in state economic enterprises are not required to become members of professional organizations.

There are neither discriminatory provisions nor any explicit prohibitions of discrimination on grounds listed in the Directives.

According to art. 122 of the Turkish Criminal Code, anyone "who prevents a person from undertaking a regular economic activity shall be sentenced to imprisonment for

a term of six months to one year or a judicial fine" on the grounds of language, race, colour, gender, disability, political opinion, philosophical belief, religion or sect. Ethnic origin, sexual orientation and age are not covered by the prohibition. Consequently, if an individual is prevented from registering to a professional organization based on race, disability or religion, then this provision might apply. However, there is no case-law.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

According to art. 60 of the Constitution "Everyone has the right to social security." Until recently, there were 3 different social security institutions for public employees, for the self-employed and for the workers. In 2006, all 3 systems were merged by Law on Social Insurance and General Health Insurance (Law No. 5510). In 2001, the Law on Individual Pension Savings and Investment System (Law No. 4632) was adopted to complement the state social security system on the basis of voluntary participation. There are no provisions in these laws on any of the prohibited grounds, except for disability. The provisions on disability are on positive measures, such as early retirement (art. 25 of the Law on Social Insurance and General Health Insurance (Law No. 5510).

Law on Social Insurance and General Health Insurance requires that, apart from the premiums paid, in order to receive health services contributions should also be paid. These contributions have become a barrier for poor sectors of the society. Although in certain cases these contributions are reimbursed, first the contributions have to be paid and applications for imbursement have to be made. Poor and mostly uneducated sectors of the society do not know about the reimbursement and it is hard to deal with the bureaucracy.

In 2009 art. 68 of the Law on Social Insurance and General Health Insurance was amended by Law No. 5917. This amendment extended the health services which require contributions to cover inpatient treatments and orthesis and prosthesis. Although there is an upper limit to the contributions to be paid, this new amendment makes it harder for persons with disabilities to afford some of the health services. Again, art. 7 of the Law on Civil Servants prohibits discrimination by civil servants, while carrying out their duties. This prohibition should also cover the provision of social protection.

As there is no specific law transposing either of the Directives, there are no exceptions.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

Social advantages are provided generally on the basis of income and old age. Irrespective of income, everyone above the age of 65 can use public transportation free of charge. Again, persons with disabilities can benefit from free or discounted public transportation provided by various municipalities. Both the central government and local governments give welfare benefits to poor individuals and families. Both persons with disabilities and their families can under certain conditions benefit from cash benefits.

A government policy initiated in 2002 with the support of the World Bank provides conditional child grants to lower income families who do not have any social security coverage. Known as "conditional cash transfer", the program provides monthly stipends per child at both pre-school and school aged. Payment is conditional to school enrolment for school aged children and regular health controls for pre-school children. The amounts range, based on the gender of the child (more for girls than boys) and the level of schooling (more for secondary than elementary school).[78] Started as a pilot program in six provinces, the policy was started to be implemented across the country in 2005.

Although the category of social advantages is not addressed by the national legislation from a discrimination point of view, provision of social advantages can be interpreted as a category of services and art. 122 of the Turkish Criminal Code prohibits discrimination in the provision of services. Again, art. 7 of the Law on Civil Servants prohibits discrimination by civil servants, while carrying out their duties. This prohibition should also cover the provision of social advantages. Still, judicial interpretation is required.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases

[78] On average, the payments are 27 TL (12 Euro) per child.

and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.
Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

According to art. 42 of the Constitution "no one shall be deprived of the right of learning and education" and "primary education is compulsory for all citizens of both sexes and is free of charge in state schools". According to the same article "no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of training and education.

Education at various levels is covered by the following legislations: Law No. 222 on Primary Education; Basic Law No. 1739 on National Education; Law No. 3308 on Vocational Training; Higher Education Law No. 2547; Law No. 430 on Unification of Education; Law No. 4306 on Eight-year Compulsory and Uninterrupted Education; and Law No. 5580 on Private Education Institutions.

Prohibition of discrimination in education is found in art. 4 of the Basic Law on National Education, where the only prohibited grounds are language, race, gender and religion.

In recent years, the government started to take minimal steps to educate pupils on anti-discrimination. As reported by ECRI, "an obligatory anti-discrimination class was taught to all pupils as their first class of the school year" at the start of the 2009-2010 school year.[79] The Ministry of Education also carried out a study to review all textbooks to eliminate discriminatory content, although "a subsequent study has highlighted the need for further progress in this field".[80]

<u>Mandatory religion courses in primary and secondary education</u>
Under Article 42 of the constitution, religion courses are mandatory in primary and secondary schools in Turkey. While non-Muslim students are exempt from these classes pursuant to a 1990 decision of the Ministry of Education,[81] in practice, the exemption is – again- limited to the three non-Muslim groups that Turkey officially recognizes as minorities, excluding other non-Muslim groups such as Protestants. Furthermore, many school administrators are unaware of this decision and may require written request from families or arbitrarily refuse requests for exemption. The obligation to disclose religion or faith can also lead to the stigmatization of students, turning them into targets of discrimination and hatred. In Diyarbakır, in 2010, the teacher singled out a Protestant student who was present at the religion course, outing his religious identity by telling the rest of the class that he goes to church. The

[79] ECRI report, p. 7.
[80] Id.
[81] Ministry of Education, Religious Education General Directorate for Higher Education and Training Committee decision, 9 July 1990. Accordingly, non-Muslim students may be granted exemption upon submission proper documentation of their religious beliefs.

student was beaten by the teacher and several other students. The Ministry of Education opened an investigation upon an official complaint by the parents of the victim, but did not impose disciplinary measures for lack of evidence. In 2011, the student continued to be abused by teacher and other students and his parents' request for transfer to another school was turned down by the Ministry.[82]

The minority group which has been most vocal and critical on mandatory religion classes has been the Alevis, who took the issue to the ECtHR and won a judgment ruling that the content of these classes did not meet the objectivity and pluralism criteria and violated Article 9 of the ECHR. However, the Court did not find the classes to be in violation of the convention as such. This led the government to continue to reject the Alevis' demands for abolition of these classes altogether or making them optional. Instead, the government committed to revise the content of the courses in accordance with the ECtHR judgment. Towards that end, the government established a commission made up of experts and Alevi representatives, which has not yet concluded its work. The execution of the ECtHR judgment is still pending before the Committee of Ministers.

The case law of the administrative courts on the issue of mandatory religion courses has generally been favourable to Alevis. Lower courts at several cities ruled in favour of parents who brought cases for the exemption of their children from these classes and issued stay of execution decisions.[83] On 28 December 2007, the Eighth Circuit of the Council of State issued a very important decision where it held that the content of these classes fails to meet the requirements of objectivity and pluralism and respect for the religious and philosophical opinions of parent (for more on the decision, see section 0.3).[84] The Court cited the ECtHR's 2007 judgment on the issue (see section 0.3). Despite the judgments of the national courts and the ECtHR, Alevi children continue to be forced to take religion classes at primary and secondary level. While the government revised the content of the curriculum taught in these classes in response public reaction and to implement the ECtHR judgment, Alevis are not satisfied with this measure, continuing to demand the abolishment of these classes (for more on recent government measures on this issue, see section 8.1.b.).

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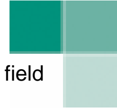
[82] Association of Protestant Churches, , p. 5.
[83] For example, on 30 December 2005, the Fifth Administrative Court in Istanbul approved on the basis of freedom of religion and conscience a parent's petition for the exemption of his child from the religion course. "Zorunlu Din Dersi İstemeyen Yargıya Gitmeli," *Bianet*, 24 November 2006, http://www.bianet.org/bianet/insan-haklari/88237-zorunlu-din-dersi-istemeyen-yargiya-gitmeli [last accessed 6 November 2012] A similar decision was issued in December 2010 by the Regional Administrative Court in İzmir, approving the decision of the 1st Administrative Court to the same effect. 17 December 2010, "Zorunlu Din Dersi yine Yargıdan Döndü," *Bianet,* 17 December 2010, http://www.bianet.org/bianet/egitim/126667-zorunlu-din-dersi-yine-mahkemeden-dondu [last accessed 6 November 2012].
[84] 8th Circuit of the Council of State, 28 December 2007, E. 2006/4107, K. 2007/7481, published at the court's website at E. 2006/4107, K. 2007/7481.



Headscarf ban at universities

As in the case of public sector employment, there is no constitutional or legal basis of the headscarf ban at universities in Turkey. The ban was initiated with an executive circular adopted by the High Board of Education during the military regime in 1982, which prohibited female (public and private) university students from covering their heads. The ban has since been 'legalized' through the judgments of the Constitutional Court, despite the absence of any constitutional provision precluding the headscarf. After transition to the civilian rule in 1983, attempts by various governments to adopt legislative and constitutional amendments in order to bring an end to the ban have been precluded by the Constitutional Court. Most recently, in 2008, the Court overturned a constitutional amendment adopted by the Parliament on the basis of the principle of secularism. The Constitutional Court also relied, in part, to the ECtHR's upholding of the headscarf ban at universities in Turkey in its judgment in the *Leyla Şahin* case.

Ever since its inception, the ban has been enforced in various different ways by different universities. While some universities strictly enforced the ban by not allowing headscarved student to enter the campus, others limited the scope of the ban to classrooms. The degree of enforcement also depended on the political climate in Turkey; while headscarved women were allowed to enter their universities during periods of 'normality', the same universities precluded access at 'extraordinary' times.

The latest attempt to bring an end to the ban was made through an executive measure. On 4 October 2010, the then new Director of the High Board Education issued a written statement prohibiting university administrations from dismissing from classrooms students on the basis of violations of disciplinary rules. While the statement did not explicitly mention the headscarf and looked as a general stipulation concerning all disciplinary measures, it was clear from the statements of authorities that the goal was to bring a (de facto) end to the headscarf ban. The outcome of this executive attempt to solve the problem is mixed. While there has been a significant improvement in headscarved women's ability to enter campuses and classrooms, there are reports that some universities continue to prevent access.[85]

Minority schools

According to art. 40 of the Lausanne Treaty of 1923, non-Muslim minorities shall have the right to establish at their own expense any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion. However, in such cases where the Law allows the establishment of such schools and allows for education in mother tongue, there are

[85] According to a news report, Ankara University and Middle East Technical University continued the ban. "Başörtüsü Yasağı iki Üniversitede Sürüyor", *on5yirmi5*, 7 September 2011, http://www.on5yirmi5.com/genc/haber.58205/basortusu-yasagi-iki-universitede-suruyor.html [last accessed 6 November 2012].

serious limitations upon these institutions as well. These schools operate under the supervision of Turkey/ Ministry of National Education. The curriculum of mother tongue education provided in these schools which include Greek Orthodox, Armenian Orthodox, and Jewish instruction is strictly controlled and supervised by Turkey/ Ministry of National Education.[86] ECRI notes that "minority religious groups have difficulty in finding teachers or procuring a sufficient number of recent school textbooks. It would seem that the regulations governing these schools are particularly complex and make school management very difficult, to the extent of jeopardising the existence of some schools."

Students with disability

Art. 15 of the Law on Persons with Disabilities stipulates that persons with disabilities shall not be prevented from enjoying their right to education. According to the same provision, in principle children with disabilities shall attend mainstream education. Although inclusion of students with disabilities to mainstream education is a positive step, for the time being it is not possible to talk about inclusive education. First of all, mainstream education facilities, transportation to these schools, educative tools (charts, maps etc.) and other education materials are not accessible to most of the children with disabilities. Neither the teachers in mainstream education, nor students without disabilities and their families are trained. Consequently, students without disabilities exclude students with disabilities; families of students without disabilities express their uncomfort regarding the presence of students with disabilities in classrooms and the teachers do not know what to do in these situtations.

Accessibility of public buildings is a widespread problem. The same is valid also for school buildings. All school buildings in Turkey are built based on a few different projects and these projects are not in compliance with the universal accessiblity standards. Although the Ministry of National Education has taken some steps, most school buildings are still inaccessible. In November 2009 the Ministry of National Education has published a circular which required action to be taken "to make all schools accessible." No disciplinary or legal action is taken against persons who have shown neglect in this regard.

Students with disabilities also have difficulty in having access to support materials. Especially students with visual disabilities cannot have access to materials distributed in class, maps, globes, rulers and other materials used to facilitate learning.

The legislation has also recognized the right of students with disabilities to receive special education support they need because of their impairments. However, only 8 hours of individual special education support or 4 hours of group special education support monthly is covered by the State financially. This means 1 or 2 hours of

[86] Such as "Regulation on Armenian Schools", "Regulation on Armenian High Schools and Middle Schools", "Regulation on Greek Minority Primary Schools".

special education support per week. Students who need more hours of special education support have to cover the costs themselves.

The problems about the full participation of students with disabilities in mainstream education is not limited to accessibility problems. Apart from a small number of teachers who are graduates of "special education" departments of education faculties who work in special education schools, teachers employed in mainstream education do not know anything about "inclusive education" or education of students with disabilities. The Ministry of Education conducted a number of trainings for teachers in mainstream education (a few hours to big groups of teachers), however the scope of these trainings are far from solving the problem. At the end of 2009, the Ministry of Education and the Anatolian University have signed a protocol. According to this protocol, teachers who are willing shall be able to attend a 3 months distance learning programme. After the completion of the programme, the candidates will take a test, and if they pass, they will be qualified as special education teachers.

Although statistics are available on the number of children with disabilities registered, there is no up to date data on the number or percentage of students with disabilities, who have successfully completed their primary education and have continued their education in secondary schools. The 2002 Disability Survey of Turkey provides the following statistics on the education levels of persons with disabilities: 34,5 per cent who are graduates of elementary school and primary education; 5,4 per cent with junior high school diploma; 6,9 per cent who are graduates of a high school or equivalent. The survey results show that the rate of illeteracy among persons with disabilities (36,3 per cent) is three times as much as the general population level (12,9 per cent).[87]

Students with intellectual disabilities who are older than the compulsory education age have difficulties in finding a school to continue their education. As the capacity of schools for students with intellectual disabilities is very limited, students with intellectual disabilities are forced to leave when they reach the upper limit of the compulsory education age. This is a typical case of multiple discrimination.

According to the State Report submitted to the United Nations Committee on Economic, Social and Cultural Rights, the number of male students in special education schools is 20,262, where as the number of female students is only 11,765. The huge difference between these figures not only show that female children with disabilities are discriminated against based on their gender, but also that the State fails in the realization of compulsory education for all.

Although discrimination based on disability in education is prohibited, as this prohibition is not internalized, even explicit direct discrimination cases go unnoticed by the authorities. Two concrete examples can be given: In 2009, an announcement by the "Executive Board of the Foreign Secondary Schools Enterance Exam"

[87] İsmail Tufan and Özgür Arun, p. 21.

(*Yabancı Ortaöğretim Okulları Sınav Yürütme Kurulu*) was made on the web-site of the Ministry of National Education. The announcement read: "We cannot provide education to students in need of special education and to students who have physical disabilities. As those students will not be able to register to our schools, they will not be allowed to take the "Private Foreign Secondary Secondary Schools Enterance Exam" which will take place on 31 May 2009." Similarly, in the 2009 University Entrance Exam Guidelines (*2009 Öğrenci Seçme ve Yerleştirme Sınavı Kılavuzu*), information was given about all university, faculty and departments. One University explicitly had warned candidates with disabilities, saying that "students with disabilities should not choose our University." Upon reactions by disability NGOs, it was accepted that the expression found in the Guidelines was inapporpriate and against the law. These two examples indicate that when relevant public authorities are publishing announcements on their web-sites or publishing Guidelines which are official documents, or carrying their other daily work, they do not pay attention whether their actions are discriminatory or not.

According to the statistics published on the website of the Ministry of Education, in the school year 2009-2010, there were 36,599 students with disabilities in schools, while the number of children with disabilities at schooling age is stated to be in hundreds of thousands.[88]

According to the State report submitted to the United Nations Committee on Economic, Social and Cultural Rights, in 2006-2007 academic year, the total number of students in "nursery classes within special education schools" is only 503 and only 187 of these students are female. According to the information published on the Ministry of National Education's web-site, the number has reached only to 659 in 2009-2010 academic year.[89]

According to art. 15 of the Law on Persons with Disabilities of 2005, Turkish Official Sign Language shall be developed. However, 5 years after the adoption of the Law, the process is still ongoing**.** There is no information on when the process will be finalized and education will be provided through sign-language.

Persons with disabilities who for various reasons did not attend school or persons who became disabled beyond school age have very limited education and rehabilitation opportunities. For example, for adults who have lost their sight, there are only 2 rehabilitation centres in Turkey (one in Ankara and other is in Istanbul) where they can learn how to move around independently and how to read *braille.* The total capacity of these centres is around 70 persons.

Public training centres under the Ministry of National Education provide vocational courses for persons with disabilities. However, instead of mainstreaming these

[88] Arzu Şenyurt Akdağ *et al.*, p. 32.
[89] Milli Eğitim Bakanlığı, Milli Eğitim İstatistikleri: Örgün Eğitim (2009-2010), p. 34, available at: http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2009_2010.pdf [last accessed 6 November 2012].

courses, specific courses are organized for persons with disabilities in limited areas. So persons with disabilities are not free to choose the area they want to receive vocational training, but they have to make choices within limited options.

Special situation of the Roma children

The greatest hurdle to the Roma's access to education is poverty. Due to their dire socio-economic conditions, exacerbated by the forced displacement generated by urban transformation projects in Roma neighbourhoods (see section 3.2.10), Roma families are unable to meet the minimum education needs of their children. Textbooks and other course material, school uniforms and clothing are prohibitively expensive for the Roma, causing low schooling and high drop-out rates. According to a research conducted among Roma communities, high school is the highest level of schooling. Roma children face widespread discrimination and exclusion from their teachers and classmates, are seated separately from other children and often at the back of the classrooms. Roma parents who file complaints with school administrators do not receive a reply. Parents of non-Roma students often transfer their children to other schools, which result in de facto segregation. There have been reports of collective resignations of teachers from schools where majority of the student population becomes Roma as a result of the flight of other students. Some families displaced as a result of the demolition of their houses in gentrified neighbourhoods have reportedly been unable to enrol their children at schools on grounds that they no longer resided in these neighbourhoods. There have been government initiatives at the national and local level to meet the educational needs of Roma children. For example, in the province of Edirne, which hosts a significant Roma population, the British Council, the Ministry of Education and its provincial representation cooperated in a project which sought to improve the situation of the Roma children during the 2005-2006 school year.[90] However, these positive examples are the exception rather than the rule, as evident in the fact that the government's Roma opening has not produced any policy or strategy for enabling the Roma's equal access to education (on the Roma opening, see section 8.1.d).

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

There is no single and comprehensive law on the issue. Only art. 122 of the Turkish Criminal Code explicitly prohibits discrimination in the provision of services available to the public. However, it does not make a distinction between available to the public

[90] Edirne Roman Derneği, European Roma Rights Centre, Helsinki Yurttaşlar Derneği, *Biz Buradayız! Türkiye'de Romanlar, Ayrımcı Uygulamalar ve Hak Mücadelesi*, 2008, pp. 92-95.

and those only available privately. With regards to goods, art. 122 only refers to foodstuff.

Art. 7 of the Law on Civil Servants prohibit discrimination by civil servants in the conduct of their duties. Thus, provision of public services is comprehensively covered by this provision.

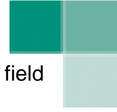
In any case, equality before the law, stipulated in art. 10 of the Constitution should apply to all cases of discrimination regarding access to and supply of goods and services. However, such a general provision is not enough to satisfy the requirements of the Directive.

b) Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?

Art. 91 of the Regulation on the Law on Notaries stipulates that, notaries can ask for a health report if there is suspicion regarding the legal capacity of the person who requires the services of the notary. A similar rule applies to transactions at land registry offices. Although the registrars are not under an obligation to ask for a health report, they are recommended to ask questions in order to test the capacity of the individual who is a party to the transaction. In case the registrar is not convinced regarding the capacity of the person, a health report might be required. However, there is no legal basis for this. The practice is based on a general order issued by the General Directorate of Land Registry and Cadastre.[91]

Another limitation was found in art. 14 of the Law on Obligations and art. 73 of the Law on Notaries (Law no. 1512). According to these provisions, transactions and signatures of deaf or blind persons are not valid unless they are carried out in the presence of two witnesses. However, this requirement was annulled by the Law on Persons with Disabilities in 2005 (Law no. 5378). According to the amended art. 73, the proceedings shall be carried out in the presence of two witnesses, only if the person with disability requests. While a draft of the Law on Obligations introduced to the Turkish Parliament in 2009 had brought back the requirement of two witnesses for the validity of financial transactions, the final text of the law adopted in January 2011 does not include such a restriction. According to Article 15 of the law, blind persons cannot be bound by their signatures unless it is proven that they were informed about the content of the text upon signature or unless the transaction has been properly approved.[92]

[91] TKGM 14 May 2003, 074/148-1568.
[92] Türk Borçlar Kanunu, no. 6098, 11 January 2011, Official Gazette no. 27836, 4 February 2011. The law will enter into force on 1 July 2012.



Information is not available regarding differences in treatment in banking and insurance sectors.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

There are a number of laws which might have an impact on housing, such as the Law on Municipalities (Law no. 5393), Law on Metropolitan Municipalities (Law no. 5216), Law on Privatization Arrangements (law no. 4046), Coastal Law (Law no. 3621), Law on Housing Aid for Employed and Retired Public Servants and Workers (Law no. 3320), Mass Housing Law (Law no. 2985), Expropriation Law (Law no. 2942), Law on Prevention of Slums (Law no. 775), Decree Law on the Amendment of Certain Provisions in the Law on Prevention of Slums, Urban Renewal Law (Law no. 5366), etc. But there is no specific legislation which prohibits discrimination in housing in general.

One major problem regarding housing is the situation of internally displaced persons (IDPs), most of whom are of Kurdish origin. While a government programme titled Return to Village and Rehabilitation Project and in force since 1999 provides in kind aid to IDPs who wish to return to their homes, the assistance is insufficient for returnees to build back their houses and to restart their lives in villages. There are also other obstacles to the return to villages, first and foremost the presence of landmines in rural areas, the continuation of the village guards system, the lack of sufficient economic means of living and the continuance of armed conflict in the Kurdish region. [93] While there is a compensation law enacted in 2004 to provide IDPs compensation for their pecuniary losses, the substance and implementation of the law suffer major setback such as the slow handling of applications, a high rate of rejections (around 30 per cent nationwide), low amounts of compensation and high evidentiary burden of proof.[94]

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[93] Dilek Kurban *et al.(2007), Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey,* TESEV, http://www.tesev.org.tr/Upload/Publication/9327b591-52c8-4392-8dc2-821a2c1a764a/zgoc_yuzlesmek_ENG_kitap_24_10_08_pdf.pdf [last accessed 6 November 2012];
Kurdish Human Rights Project, Submission and List of Issues to be Taken up in Connection with the Consideration of Turkey's Initial Report Concerning the Rights Covered by Articles 1-15 of the International Covenant on Economic, Social and Cultural Rights, May 2010, available at: http://www2.ohchr.org/english/bodies/cescr/docs/ngos/KurdishHRP_Turkey_44.pdf [last accessed 6 November 2012].

[94] For the latest study on the implementation of the law in the province of Van, see Dilek Kurban and Mesut Yeğen (2012), *Adaletin Kıyısında: 'Zorunlu' Göç Sonrasında devlet ve Kürtler/ 5233 Sayılı Tazminat Yasası'nın bir Değerlendirmesi- Van Örneği*, TESEV; http://www.tesev.org.tr/Upload/Publication/0d2ecdeb-a40a-4c0a-b66c-

Housing problems of Kurds are not limited to their status as internally displaced persons. Except for the predominantly Kurdish towns, cities and neighbourhoods, Kurds face difficulties in finding a house to rent.

The Urban Renewal Law of 2005 had a disparate impact on the Roma, as it gave impetus to a number of urban transformation projects, most of which resulted in massive destruction and dislocation of Roma neighbourhoods throughout Turkey.[95] In most, if not in all cases displaced Roma had to move to neighbourhoods where rent is several times higher than in their old neighbourhoods or to high rise buildings constructed by the Housing Development Administration of Turkey (*Toplu Konut İdaresi Başkanlığı- TOKİ*) in neighbourhoods which are outside city centres, which posed serious problems regarding access to employment. Many families could not afford increases in their rental payments and had to move out from their news apartments, to live with their relatives. Home owners had to sell their houses, but they could not afford to buy houses in other neighbourhoods.

Unquestionably, the most high profile and controversial of the urban transformation project was the one carried out by the government-run *Faith* Municipality in the historical Roma neighbourhood of *Sulukule*. The residents and civil society organizations filed a case at the Istanbul Administrative Court in December 2007 and requested the suspension of the implementation of the project. While the Court was waiting for the response of the municipality (and did not issue preliminary injunction), more than 50 houses were demolished, two of which were officially registered cultural heritage sites. Eventually, despite appeals from the international community, "the neighbourhood was razed in 2009 to make way for middle-income housing, its inhabitants displaced far from the centre and some of them compelled into forced nomadism".[96] The demolishment of *Sulukule* and the ensuing resettlement "caused dislocation and disruption";[97] unable to afford life at TOKİ houses outside of the city centre, all but three of the families returned[98] back "to live in much poorer conditions".[99] In late June 2011, more Roma houses were demolished as part of another urban transformation project in the neighbourhood of *Küçükbakkalköy*.

On 5 January 2010, a crowd of more than 1,000 locals in the district of Selendi in the province of Manisa attacked the Roma residents living in the same town. The crowd

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d0d02c235542/12045TazminatRapor31_01_12.pdf [last accessed 6 November 2012] . See also, Kurban *et al., Coming to Terms.*

[95] European Roma Rights Centre and the Edirne Roma Association, Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session, http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf [last accessed 6 November 2012].

[96] Commissioner for Human Rights, Human Rights of Roma and Travellers in Europe, Council of Europe, February 2012, p. 151.

[97] European Commission, Turkey Progress Report 2011, p. 40.

[98] Nilay Vardar, "Sulukule Gönüllüleri Romanlara Destek Oluyor," *Bianet*, 5 May 2011, http://bianet.org/bianet/toplum/129771-sulukule-gonulluleri-romanlara-destek-oluyor [last accessed 6 November 2012].

[99] European Commission, Turkey Progress Report 2011, p. 40.

threw stones at and set on fire the houses of the Roma and set cars on fire, causing panic and disorder. Slogans such as “Get the Gypsies out” were chanted in the streets. The local police could not control the situation and sought reinforcements to assist. The pretext for the attack was a fight between a Roma man and the owner of a coffeehouse over the former’s refusal to abide by the smoking ban on 31 September 2009. However, it has become clear after the incidents that the attack was planned, systematic and the outcome of long time tensions between the Roma and other residents of Selenli. Instead of providing the Roma families with protection, the Governor of Manisa forcefully relocated the victims to the district of Gördes and subsequently to the district of Salihli on the ground that local authorities would not be able to ensure their security in Selendi. The displaced Roma continue to live in exile in Salihli. Having lost their houses, furniture, businesses and savings, they live in economic hardship. After some delay, a criminal case was launched against the perpetrators (see section 0.3. for details on the case).

Housing is a big problem for gays, lesbians and transgender persons, as many people decline from selling or renting houses to persons belonging to these groups. They either have to pay more than the normal rent or forced to live in certain neighbourhoods. In many cases they are harassed by other residents of the neighbourhood or by shop owners.

Persons with disabilities and elderly persons have difficulties in finding physically accessible houses. If there is a family member with an intellectual or psycho-social disability in the household, it is hard for the family to find a house to rent. Even if they can find a house to rent, it is not exceptional that they are harassed through continuous complaints to various authorities because of noise, etc.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Art. 30/7 of the Labour Law stipulates that persons with disabilities cannot be employed in underground and underwater work.

According to art. 71 of the Labour Law, persons under the age of 18 can only be employed in certain jobs. Children who have completed the age of 14 and have also completed their primary education may be employed in light works that will not hinder their physical, mental and moral development, and for those who continue their education, in jobs that will not prevent their school attendance.

Art. 85 of the Labour Law stipulates that young employees who have not completed the age of 16 and children must not be employed on arduous or dangerous work.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

National law does not provide an exception for employers with an ethos based on religion or belief.

The draft law provides an ethos based exception for employers which provide services, education or teaching on a particular religion, allowing exclusive admission to such religious or educational institutions members of the religion concerned. No similar ethos based exemption is provided for associations working for the preservation of environmental, historical and cultural heritage.

b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).*

There are neither specific provisions, nor case-law in this area.

c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy*

or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?

There are no such cases. Mandatory religion courses at primary and secondary schools are currently taught by graduates of special departments at faculties of education which were established for the sole purpose of training individuals to teach these classes. Neither religious groups nor Diyanet has a role in the selection or training of these teachers.

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

Law on Persons with Disabilities prohibits discrimination on the grounds of disability in employment. However, the legislation on recruitment, appointment and promotion in the armed forces provides for exceptions. These exceptions do not apply to disability only but also to all health problems. The major legislation is the Turkish Armed Forces Regulation. This regulation applies to military students, all civil and military personnel of the Turkish Armed Forces and all persons who are under an obligation to serve in the military.[100] Decisions regarding these persons depend on the health board reports of the Gülhane Military Medical Academy.[101] Health board reports are based on the "Regulation on Disability Criteria, Classification of Disability and Health Board Reports for Persons with Disabilities."

There are general and special laws regarding employment in the public sector and different requirements are laid down with regard to age limits. According to Additional art. 3 of the "Regulation on the exams organized for those who will be appointed to public offices for the first time",[102] unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who will be placed through central exams. Indeed Law on the Personnel of the Turkish Armed Forces (Law No. 926) of 10 August 1967; Law on Commissioned and Non-commissioned Officers to be Recruited Under Contracts (Law No. 4678) of 21 June 2001 and Law on Expert Gendarmerie (Law No. 3466) of 04 June 1988 provide upper age limits. However, this is not to say that exceptions are provided only for the armed forces.

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

[100] Military service is obligatory in Turkey.
[101] Turkish Armed Forces Health Regulation, published in the Official Gazette on 24 November 1986.
[102] As amended in 2006. The original Regulation was published in the Official Gazette on 3 May 2002. Regulation was amended many times. The amendment regarding "age limits" was published in the Official Gazette on 4 March 2006.

There are maximum age limits for many professions, including police, prison and emergency services. According to Additional art. 24 of the Law on Police Organization (Law no. 3201), the maximum age limit is 27.

According to art. 29 of the Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres,[103] in order to be accepted as a candidate student for becoming a prison or detention centre guard, the candidate should not be younger than 18 and older than 30. However, as age discrimination is not prohibited explicitly in the legislation and as numerous laws stipulate age limits, it is not possible to say that limitations constitute exceptions.

Legislation regarding entry to certain professions, including police, prison and emergency services require the candidate to not to have a health problem, that would prevent the person from conducting his/her professional duties continuously.[104]

4.4 Nationality discrimination (Art. 3(2)

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

a) *How does national law treat nationality discrimination? Does this include stateless status?*
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?

While national law does not cover nationality as a prohibited ground, certain professions, activities and opportunities are confined to Turkish citizens. For example, only Turkish citizens can work as civil servants, pharmacists, attorneys, etc.

Until recently, some laws and especially regulations referred not only to Turkish citizens, but also individuals of Turkish descent. While many of these provisions were annulled in recent years, discriminatory references to race remain in various laws and regulations. Under Article 3 of the Settlement Law (Law no. 5543), only individuals "from the Turkish race and belonging to the Turkish culture" are admitted to Turkey as migrants. An executive regulation dated 23 February 2009 exempts "foreigners of Turkish race" who live in Turkey from the requirement to obtain work permit and allows them to become members to professional organizations. The case brought by the Chamber of Architects and Engineers of Turkey for the annulment of

[103] Published in the Official Gazette on 4 May 2004.
[104] See Additional art. 24 of the Law on Police Organization (Law no. 3201) and art. 29 of the Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres.

the execution was rejected by the Council of State (see section 0.3. for details of the case).
A similar favourable treatment exists in a regulation which exempts foreign students and trainees of Turkish descent from tuition in private education institutions and provides them with scholarship.[105]

b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

As national law does not cover nationality as a prohibited ground, it is not possible to speak about exceptions.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?*

Article 5 of the Labour Law provides an open-ended protection against discrimination. While marital status is not listed among the enumerated grounds in the provision, the non-exhaustive nature of the list suggests that employers are also prohibited from discriminating against their employees on the basis of their marital status. In practice, national courts interpret this article in a way that they do not deem all kinds of differential treatment among employees based on their marital status to constitute discrimination. Rather, courts apply an arbitrariness test to determine whether such differential treatment is discriminatory. For example, where employers provide benefits (such as an annual one salary bonus) exclusively to married employees whose spouses are unemployed (and does not provide the same benefit to single employees or married employees whose spouses are employed), this is not interpreted to constitute discrimination. Under Turkish law, while marriage is a legal status defined under Civil Law, in practice courts also recognize “living together” as a life style and grant rights to couples who live together, including those who are married by religious ceremony and lack civil marriage. Thus, employees who provide exclusive benefits to married employees with unemployed spouses are also required to extend these benefits to unmarried employees whose spouses are unemployed, so long as the latter submit proof of living together with their spouses (such as a document of residence). The employer’s failure to do so would constitute an arbitrary

[105] Published in the Official Gazette on 9 February 2009.

distinction not justified on objective grounds. Where, however, the employer acts out of his moral, religious, philosophical convictions and categorically excludes all unmarried or divorced employees from benefits it provides to married employees, courts find this to be discriminatory.[106]

b) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?

Article 5 of the Labour Law provides an open-ended protection against discrimination. While sexual orientation is not listed among the enumerated grounds in the provision, the non-exhaustive nature suggests that employers are also prohibited from discriminating between their homosexual and heterosexual employees. Therefore, in theory, yes, such an employer practice would constitute discrimination. However, the author is not aware of a court case where the issue was raised.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

a) Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Disability discrimination is prohibited explicitly only in a limited number of laws and the material scope of prohibition of disability discrimination is rather limited. Neither in the laws which prohibit disability discrimination, nor in other legislation, are there exceptions which are explicitly laid down.

However, there are certain restrictions regarding persons with disabilities which might be considered as exceptions in relation to health and safety. One of the most controversial restrictions was contained in art. 53/b(4) of the Road Traffic Regulation, which requited a special sign on the license plates of cars used by persons with disabilities. This provision was unsuccessfully challenged in 2009 before the Council of State by an applicant with disability. In September 2011, Article 53 was revised and the requirement for individuals with disabilities to have a special sign on their license plates was removed for new plates to be issued after the entry into force of the revised regulation on 9 September 2011.[107]

b) Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc)?

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[106] Opinion expressed through e-mail by Mehmet Uçum, a leading human rights lawyer specialized in employment law.

[107] Karayolları Trafik Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik, Official Gazette no. 28049, 9 September 2011.

There are no exceptions relating to health and safety law in relation to other prohibited grounds.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold?*

There is no provision in Turkish Law prohibiting age discrimination generally. Although prohibitions of discrimination stipulated in art. 10 of the Constitution and art. 5 of the Labour Law can be interpreted to cover age as a prohibited ground, judicial interpretation is needed.

The rule is not there. As there is no clear rule against age discrimination, it is not meaningful to speak about justifications.

b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

See 3.7.1(a) above.

c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2)?*

There is no specific provision on this issue.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

The regulation adopted in 2006 regarding persons with disabilities who are in need of care, in art. 13/1(d) stipulates that relatives who assume caring responsibilities for persons with disabilities shall be paid a minimum wage by the state.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

According to art. 71 of the Labour Law, minimum working age is 16. However, this applies only to the private sector.

According to the art. 4/1(b) of the "Regulation on the conditions and procedure regarding recruitment of workers in public institutions" applicants should not be below the age of 18.[108]

There are general and special laws regarding employment in the public sector and different requirements are laid down with regard to age limits. According to Additional art. 3 of the "Regulation on the exams organized for those who will be appointed to public offices for the first time",[109] unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who will be placed through central exams. According to art. 48 of the Law on Civil Servants, in order to be recruited as a civil servant, the individual should not be below the age of 18. The regulation on the exams organized for those who will be appointed to public offices for the first time also refers to art. 48 of the Law on Civil Servants regarding recruitment conditions, including 18 years age limit. There are numerous special laws which stipulate minimum and/or maximum age requirements. For example, according to art. 8 of the Law on Judges and Prosecutors (Law no. 2802) the maximum entry age is 35.

Age limits also apply to training.

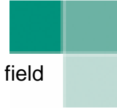
4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

[108] Published in the Official Gazette on 9 August 2009.

[109] As amended in 2006. The original Regulation was published in the Official Gazette on 3 May 2002. Regulation was amended many times. The amendment regarding "age limits" was published in the Official Gazette on 4 March 2006.



a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

There is a pension age stipulated in the Law on Social Insurance and Universal Health Insurance Law (Law no. 5510). Those who became insurance holders after the adoption of the Law shall be retired at the age of 58 (women) and 60 (men). According to the Law (art. 28), the retirement age will increase gradually and will reach 65 in 2048 both for men and women.

If the individual wishes to work after the retirement age, there is no legal barrier to doing so. If the individual wishes to continue working after the retirement age, the individual can still collect a pension. However, a special premium has to be paid.

The above mentioned does not apply to persons who wishes to work in the public sector after retirement. According to Law no. 5335, individuals who work in the public sector after retirement cannot continue collecting a pension.

b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

The rules of various occupational pension schemes differ regarding age. However, if the individual wishes to continue to work longer, the individual can still collect a pension.

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

There are state-imposed mandatory retirement ages for public employees. According to art. 40 of the Law no. 5434, the mandatory retirement age is 65. For university professors, the mandatory retirement age is 67 (this only applies to public universities). The mandatory retirement age for military personnel and the police varies depending on the rank.

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

Employers cannot set retirement ages lower than the state pension age. If there is agreement between the employee and the employer, the employee can continue working beyond state pension age.

e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*

The general protections against dismissal apply regardless of the age of the worker.

4.7.5 Redundancy

a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

One of the most established principles of the labour law is that, in the selection of the workers for redundancy, the employer should take into account the period the employee worked for the employer. The shorter the period of work, the bigger the risk of selection for redundancy.

b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

The national law provides compensation for redundancy. However, in determining this compensation, the duration of work is taken into account.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

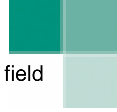
Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

As the Directives have not been transposed and there is no comprehensive anti-discrimination legislation, it is not possible to speak about exceptions based on art. 2(5) of the Framework Employment Directive.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

Provisions prohibiting discrimination are far from being detailed and the legislation does not provide any specific exceptions to the prohibition of discrimination. Although there are many laws providing different age limits in different areas, it is hard to interpret these as exceptions, as age discrimination is not explicitly prohibited.



5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.

While not explicitly stating it as such, the revised Article 10 of the Constitution approved by a national referendum in September 2010 introduced the principle of positive action to the Constitution. New Article 10 stipulates that, measures to be adopted to ensure equality between men and women as well as measures to be adopted for children, elderly, persons with disabilities, widows and orphans of martyrs, ex-soldiers disabled in the war and veterans shall not be considered as a violation of the principle of equality.

Although not named as positive action by the legislation, there are a number of laws and regulations stipulating positive measures in the areas of education, employment and a number of services (social insurance, transportation etc.).

The discussions regarding discrimination in Turkey are still very new. Legal and political discussions focus more on the existence of discrimination and inequalities in Turkey. In other words, at this point the State and the general public are still not convinced that discrimination and inequalities exist in Turkey and some groups are more disadvantaged than others.

b) Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.

In its initial reports to the United Nations Committee on Economic, Social and Cultural Rights and Committee on the Elimination of Racial Discrimination, Turkey has claimed that "there exists no distinction, exclusion, restriction or preference, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, gender, religion, political opinion, nationality or social origin, which would have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation".[110] Consequently, specific programmes targeting specific groups are very rare.

[110] UN Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of all Forms of Racial Discrimination : 3rd periodic reports of States parties due in 2007: addendum: Turkey*, 13

In its Concluding Observations regarding Turkey's initial report, Committee on the Elimination of Racial Discrimination had recommended Turkey to consider further amendments to the legislation to allow teaching of languages traditionally used in Turkey in the general public education system. In its comments on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, the Turkish Government stated that the number of languages traditionally used in Turkey may reach hundreds, if not thousands and that "Turkey needs to observe non-discrimination principle in teaching all traditional languages other than Turkish. Any act in favour of one or two languages traditionally used can be interpreted as discrimination against other languages and their respective speakers".[111] Again, in reply to the Committee's criticism regarding lack of data on the ethnic composition of the population, Turkey has stated that the "Turkish Government does not collect, maintain or use either qualitative or quantitative data on ethnicity. Although acknowledging that disaggregated data on ethnicity may facilitate devising policies for special measures targeting a specific group, as is the case in some other countries, it is believed that this is a sensitive issue, especially for those nations living in diverse multicultural societies for a long period of time. Diversity has deep roots in Turkey. Hence, Turkey has rather focused on commonalities and common aspirations in the legislative and policy framework, rather than measuring differences and making policies thereon. Some historical events particularly in recent European history are also a reminder of dangers and threats involved in such practices".[112] These replies indicate that, Turkey considers some special measures as discrimination against other groups and some other measures as a threat to unity.

With regard to grounds covered by the 2000/43 and 2000/78, positive action is taken only for persons with disabilities and the elderly. There is a quota system in both private and public sector employment. According the Labour Law and the Law on Civil Servants, private and public sector employers are obliged to employ persons with disabilities respectively.

The revised Article 53(1) of the Law on Civil Servants, as amended in February 2011, requires the quota for civil servants with disabilities working in public institutions to be 3%.

Under Article 30(1) of the Labour Law, the ratio of employees with disabilities to total number of employees must be 3% in private sector establishments and 4% in public enterprises. However, this quota obligation only applies to workplaces where 50 or more persons are employed. According to Article 30, if the employer has employed

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February 2008, CERD/C/TUR/3, para. 142, available at: http://www.unhcr.org/refworld/docid/4885cfa60.html [last accessed 6 November 2012].

[111] Committee on the Elimination of Racial Discrimination, Reports Submitted by State Parties under Article 9 of the Convention, *Comments by the Government of Turkey on the Concluding Observations of the Committee on the Elimination of Racial Discrimination,* CERD/C/TUR/CO/3/Add.1, 30 March 2009, Comment no. 6, available at http://www.unhcr.org/refworld/publisher,CERD,CONCOBSCOMMENTS,TUR,49eefe2a2,0.html [last accessed 6 November 2012].

[112] *Id.*, Comment no. 5.

more persons with disabilities than the quota requires; or if an employer who is not under an obligation to do so has employed persons with disabilities; or if an employer has employed a person who is more than 80% disabled, than half of the insurance premiums which normally have to be paid by the employer shall be paid by the Treasury. According to Article 101, if the employers do not employ the necessary number of persons with disabilities, they are charged with a fine. Fines collected are used to fund vocational training projects targeting persons with disabilities. The fine is 1,700TL (approximately 740 Euros) per month for every person with disability who is not employed. The same article explicitly prescribes that public employers cannot be exempt from this fine.

The quota regime is favourable as it guarantees access to employment to a degree. However, in many, if not all cases, it is observed that the number of persons with disabilities employed in a workplace is equal to or below the number of persons they have to employ under the quota regime. In other words, the quota system is applied, as if it prescribes an upper limit for the employment of persons with disabilities. Another problem regarding the quota system is the lack of effective monitoring. Employers who are under a quota obligation employ the required number of persons with disabilities on paper and ask them not to come to work. In many cases the workplaces are not accessible or there is no accessible transportation to the work place. The quota system is also understood as an alternative to prohibition of discrimination. In other words, when employers comply with their quota obligations, they feel that they are not under an equal treatment obligation any more. The quota system enhances the perception of persons with disabilities as persons in need of help and protection.

In response to a query by a member of the parliament, the Minister of Employment and Social Security released the statistics on the performance of the private sector in complying with its quota obligations. Accordingly, as of the end of September 2011, of the 18.004 workplaces employing 50 or more individuals, 4.272 failed to fill its quota. Of the 3.417.745 employees working in these workplaces, 87.519 were persons with disabilities. Of the 4.272 non-complying employers, 156 were fined.[113]

Despite explicit legal obligations to employ a minimum number of individuals with disabilities, public institutions fare worse than private employers. According to the August 2011 statistics of the Prime Ministry's State Personnel Presidency, while the total number of persons with disabilities who should be employed by public institutions is 44.189, in reality the number of public employees with disabilities is only 20.829.[114] Accordingly, 23.360 positions which should be reserved to persons with disabilities are vacant. It should be noted, however, that these numbers were 51.419, 10.300 and 41.119 in June 2009;[115] and 48.943, 14.329 and 34.614 in

[113] Ministry of Employment and Social Security, response to a written query, 11 January 2012, http://www2.tbmm.gov.tr/d24/7/7-1220sgc.pdf [last accessed 6 November 2012].
[114] http://www.dpb.gov.tr/dosyalar/excel/istatistikler/is4.xls [last accessed 6 November 2012].
[115] See earlier national report on Turkey authored by İdil Işık Gür, p. 50.

January 2010.[116] As of August 2011, these figures were 44.189, 20.829 and 23.360, respectively.[117] Thus, there has been a remarkable increase in the number of individuals with disabilities employed in the public institutions in the past few years. On the other hand, the upward trend in the past few years seems to have stopped in 2011, when no recruitment of persons with disabilities was realized in the public sector. In response to a query of a member of the parliament, the Minister of Employment and Social Security said that this was due to the preparatory work carried out to hold centralized exams in 2012 for the recruitment of around 3,500 persons with disabilities.[118] There is also a disproportionate under representation of women among individuals with disabilities employed in the public sector. Of the 20.829 public servants with disabilities employed as of August 2011, only 4.232 were women.

The performance of select ministries in the fulfilment of their quota obligations is as follows. As of August 2011, while the Ministry of Justice was under an obligation to employ 1.825 persons with disabilities, it was employing 207. The numbers of individuals with disabilities various other ministries should be employing and are in fact employing are as follows. Ministry of Interior (580; 38), Ministry of Foreign Affairs (89; 33), Ministry of Health (8.010; 4.285), Ministry of Transport and Communication (47; 35), Ministry of Industry and Trade (97; 27); Ministry of Education (21.137; 8.465).

The Turkish Employment Organization provides vocational training to persons with disabilities; however these trainings are limited to handicraft, knitting, computer etc. There is no data needed to evaluate the effectiveness of these measures.

The Law on Persons with Disabilities (art. 14) (Law no. 5378) lays down the legal basis for sheltered workplaces. However, as State support is minimal, only a handful of workplaces exist.

Besides, persons with disabilities have the right to retire earlier than other individuals. Those who are 60-100% disabled can retire in 15 years, if they have paid premium for 3600 days. Those who are 50-59% disabled can retire in 18 years if they have paid premium for 4000 days and those who are 40-49% disabled can retire in 20 years, if they have paid premium for 4400 days.

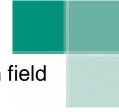
Under Law no. 2022, persons with disabilities who do not have any income or who have an income which is below an amount designated every year shall be paid cash benefits. Persons who are in charge of care of a person with disability are also paid an allowance. There is also an income tax discount for persons with disabilities and for persons who are in charge of the care of a person with disability.

[116] Arzu Şenyurt Akdağ *et.al.*, p. 26.
[117] Ministry of Employment and Social Security, response to a written query, 28 March 2012, http://www2.tbmm.gov.tr/d24/7/7-4705c.pdf [last accessed 6 November 2012]..
[118] *Id.*

Civil servants can be appointed to any place in Turkey. However, if there is a person with disability within the civil servant's family who is in need of special education or rehabilitation, then the civil servant has to be appointed to a place where special education and rehabilitation services exist.

Students with disabilities in principle attend mainstream schools. If they need special education support, the state covers a portion of the costs of special education. General Directorate of Higher Education Credit and Hostels Institution gives priority to university students with disabilities in awarding scholarships.

Positive action with regard to age is taken for the elderly and for children. Persons who are 65 years old or older can get discounts in transportation, cultural activities etc. They have to be given priority in health institutions. Most municipalities issue cards for 65 or older for free transportation within the municipality. Under Law no. 2022 on social aid, individuals who are above the age of 65 and do not have any income can benefit from cash benefits. They can also benefit from health services free of charge. Similarly, children (below 18 years old) are covered by the General Health Insurance.



6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.
In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).
Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?

There are no special bodies established to receive applications from victims of discrimination. Consequently, in cases of allegations of discrimination, the complainants have to follow general administrative and legal venues. If the victim seeks an amicable settlement instead of a court action, alternative dispute settlement methods offered in the Turkish legal system are very limited. Except in criminal courts, the litigants have to collect all the facts and evidence and they have to prove their case. As the procedure is quite complicated, it is extremely hard for anyone to pursue a case without the support of a lawyer.

Victims of discrimination can ask for the compensation of pecuniary damages, loss of earnings, or damages for pain and suffering, or all. Parallel proceedings are possible with regard to criminal, civil or administrative courts. Persons may simultaneously pursue a civil claim for compensation in civil or labour courts, an administrative application or a criminal complaint.

The advantage of a court proceeding is that, this is the only procedure for the victims, where the victim may receive compensation. If the discriminatory act or action is an administrative act or action, before going to the court, the victim of discrimination has to request compensation from the administrative body responsible for the action.

Although there are advantages of bringing a case to the court, there are also disadvantages. First of all, taking a case to the court is costly. Legal aid is provided under very strict criteria. Cases are not decided before 1 or 2 years. Consequently, in many cases taking a case to the court does not solve the problem. For example, if a student is expelled from school on the basis of his/her ethnicity, or if the employment contract was terminated because the employer had thought that the employee was gay, a court decision given 2 years after the discriminatory act will have a limited effect.

In Turkey there are labour courts in every province which deal with employment related issues. In order to obtain a legal remedy, employment related discrimination claims (under art. 5 of the Labour Law) must be brought before a labour court. Upon appeal, employment related discrimination cases come before 9th Civil Chamber of the Court of Cassation. The possible remedies for a termination of work agreement based on discrimination may be but not limited to an order to continue employment relationship, payment of lost income, compensation etc. It is important to mention that an existing labour relationship is a precondition for launching a labour law suit and those who face discrimination in the recruitment process cannot pursue such a way.

Judicial control of the acts and actions of administrative authorities are done by the administrative courts. According to Article 125 of the Turkish Constitution "all acts and actions of the administration shall be subject to judicial review" and "the administration shall be liable for the damage caused by its own acts and actions". Three principles derived from this provision are as follows: i) lawsuits need to be filed within a time limit; ii) judicial power is limited to the control of the legality of administrative acts and actions; iii) judicial control cannot eliminate the discretionary power of the administrative organs. In cases of acts, if the administrative court finds a violation, it can order the annulment of the administrative act and/or a full compensation. In cases of actions, the remedy is full compensation.

When discrimination arises from the acts of civil servants, those who face with discrimination may first make a complaint and subsequently file a case in administrative courts. These courts decide disputes arising from discriminatory acts of the governorships, district governorships, local administrative bodies and provincial administration of ministries and other public establishments and institutions concerning temporary appointment or disciplinary suspension of civil servants, their allowances, leaves and residence provided to them by the authorities. The applicant may ask for full compensation only, or a full compensation as well as the annulment of the act. The applicant can appeal to the Council of State.

In order for civil servants to face prosecution, their superior's permission is required (Law on the Prosecution of Civil Servants and Other Public Employees (Law no. 4483)). This is one of the major barriers before the victims of discrimination, as in many cases permission is not given.

The constitutional amendments approved by a national referendum in September 2010 granted individuals with the right to make a constitutional complaint to the Constitutional Court under certain conditions. The implementing legislation was adopted in March 2011, which laid down the procedures of the constitutional complaint mechanism. Accordingly, the right to file a constitutional complaint is limited to Turkish nationals, who are required to exhaust the national judicial remedies prior to filing a petition with the Constitutional Court. The scope of the complaint is limited to those rights and liberties protected under the constitution which fall within the scope of the European Convention on Human Rights (ECHR)

and its additional protocols which Turkey is a party to. Individuals can file a complaint for the infringement of any of these rights by public authorities. Filling a constitutional complaint is not free of charge. The assessment of the complaints will be subject to a two-tiered process: admissibility and substantive review. Individuals whose complaint is found inadmissible reserve their right to petition the European Court of Human Rights (ECtHR). Complaints must be filed within 30 days after the violation takes place or the judicial remedies are exhausted. The Constitutional Court will receive complaints filed against judicial decisions and actions that will have become final on 23 August 2012.

According to the information provided by the Ministry of Justice regarding the number of cases brought before civil courts, data is not collected based on specific articles of laws. Thus, the number of the cases brought before civil courts is unknown. The situation is slightly better regarding criminal cases. Statistics are published on criminal cases based on certain criteria.

According to 2008 statistics 6 cases were brought before criminal courts claiming the violation of art. 122 of the Turkish Criminal Code which prohibits discrimination. However, there is no aggregated data neither on the grounds of discrimination nor the area which discrimination had taken place.[119]

With regard to the sufficiency and the effectiveness of judicial protection available to all persons who consider themselves wronged by failure to apply the principle of equal treatment, the authorities state that Article 74 of the Constitution (right of petition), Article 7 of Law No. 3071 on the Right to Petition and Article 91 of the Labour Law No. 4857 are considered to be effective legal provisions providing judicial protection to victims of discrimination.

Along with these official channels for application, there are also “unofficial” means, particularly mediation, that deal with resolution of disputes in civil matters. Collective bargaining by trade unions, internal complaint procedures, administrative channels including referrals to the labour inspectors are also available for those who face discrimination. There is no equality commission, an ombudsperson or other channels such as local councils and according to Turkish law collective actions are not available. In March 2010 a preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council was sent to various universities and non-governmental organizations, in order for them to express their opinions on the draft.

Another option for the victims of discrimination is to apply to human rights boards which are established in every province and districts and Human Rights Inquiry Commission of Turkish Grand National Assembly. Both the boards and the commission have the competence to inquire complaints of discrimination in

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119 http://www.adlisicil.adalet.gov.tr/ISTATISTIKLER/1996/ac_cik/2008%20YILI%20CEZA%20MAHKEMELERİNE%20TCK%20MADDELERİ%20İLE%20İLGİLİ%20AÇILAN%20DAVA,%20SANIK%20VE%20MAĞDUR%20SAYILARININ%20SUÇ%20TÜRÜNE%20GÖRE%20DAĞILIMI.pdf

employment. The Human Rights Presidency, Human Rights Boards and Human Rights Inquiry Commission of Turkish Grand National Assembly can give a decision that describes the situation as a violation or non-violation of the right to equal treatment and these decisions are not enforceable and are not legally binding. In 2011, a total number of 1.171 people applied to Human Rights Presidency and Human Rights Boards. Only 42 applications were related to claims of discrimination. In 2008 101 out of 5458, in 2009 41 out of 2562 and in 2010, 144 out of 8795 applications are related to claims of discrimination.[120] The statistics for 2011 were as follows: Of the 5.289 total applications filed, 81 were discrimination claims.[121]

After the local remedies are exhausted, a person who considers that his fundamental rights as defined in the European Convention on Human Rights have been violated, may institute proceedings within six months before the European Court of Human Rights. Turkey is not a party to the First Optional Protocol to the Covenant on Civil and Political Rights of the United Nations. Consequently, it is not possible for individuals to make an individual complaint to the Human Rights Committee.

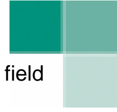
Art. 14(3) of the Law on Persons with Disabilities requires both public and private employers to take necessary measures to eliminate or alleviate the barriers and hardship faced in employment processes by employees or job applicants with disabilities and to make physical adjustments. In cases of denial of reasonable accommodation to persons with disabilities, employers are fined by labour inspectors. Persons who request accommodations should apply to the employer and if their requests are denied, they can make an application to labour inspectors. Labour inspectors are responsible for monitoring the observance of the Labour Law by the employers. Neither the inspectors nor the labour courts can order the employer to provide reasonable accommodation.

A very limited obligation to provide reasonable accommodation is also found in art. 53 of the Law on Civil Servants. This article prescribes a duty limited to the provision of tools which would enable the civil servant to carry out his/her duties.

In case of a breach of the duty to provide reasonable accommodation in the private sector, the employee can go to the labour courts and in the public sector to the administrative courts.

There are also labour inspectors, insurance inspectors and school inspectors tasked under the Labour Law, the Social Security Institution Law and laws governing education respectively, with inspecting compliance. Inspection under the Consumer Protection Law is done by executive officials at the national and local level (governors and district governors). These inspectors have the powers to issue

[120] For annual reports for 2008, 2009 and 2010, see the website of the Prime Ministry's Human Rights Presidency: http://www.ihb.gov.tr/RaporlarIstatistikler.aspx [last accessed 6 November 2012].
[121] Başbakanlık İnsan Hakları Başkanlığı, "2011 Yılı İnsan Hakları İhlal İddiası Başvurularına İlişkin Sayısal Veriler," *İnsan Hakları Bülteni,* No: 2012/1, Mart 2011, p. 4, available at: http://www.ihb.gov.tr/dosyagoster.ashx?id=278 [last accessed6 November 2012].



administrative and monetary fines where they identify violations of the respective laws. Labour and school inspectors have competence to receive and review individual complaints, including those alleging violation of the anti-discrimination provisions of the Labour Law and the Law on National Education.

b) Are these binding or non-binding?

The Human Rights Presidency, Human Rights Boards and Human Rights Inquiry Commission of Turkish Grand National Assembly can give a decision that describes the situation as a violation or non-violation of the right to equal treatment and these decisions are not enforceable and are not legally binding.

If an administrative organ concludes that there is discrimination and a fine is imposed, this decision can be challenged before the courts.

The decisions of the courts are binding by definition.

c) What is the time limit within which a procedure must be initiated?

The time limits depend on the type of application.

Time limits in administrative law: The time limit to repeal regulations and administrative decisions is 60 days after the day of promulgation of the regulation or notification of the decision to the concerned individuals. For compensation of damages which are the result of administrative action, applications should be submitted within 1 year after the victim is informed and in any case within 5 years of the date of the action causing damage.[122] The appeals should be made in 30 days after the notification of lower courts' decisions.[123]

Time limits in civil law including labour law: Civil law suits for compensation of damages should be filed within 1 year of the victim being informed and in any case within 5 years after the date of the action causing damage for tort cases.[124] If the case relates to wages, the time limit is 5 years.[125] For all the other matters, the time limit is 10 years.[126] The appeals should be made within 8 days of the notification of lower courts' decisions.[127]

Time limits in criminal law: In Turkish criminal law, time limits are designated depending on the punishment. For offences resulting less than 5 years of punishment, the limit is 8 years. If the punishment is 5 to 20 years the limit is 15 years, if the punishment is more than 20 years, the limit is 20 years and finally for life

[122] Art. 7 of the Law on Administrative Procedure (Law no. 2577).
[123] Art. 46(2) of the Law on Administrative Procedure (Law no. 2577).
[124] Art. 60(1) and (2) of the Law of Obligations (Law no. 818).
[125] Art. 126 of the Law of Obligations (Law no. 818).
[126] Art.125 of the Law of Obligations (Law no. 818).
[127] Art. 8 of the Law of Labour Courts (Law no. 5521).

time imprisonment it is 25 or 30 years depending on the type of life time imprisonment.[128] For some offences investigation and prosecution is bound to a complaint. Unless a complaint is brought within 6 months after the complainant becomes aware of the malicious act and the offender, an investigation or prosecution cannot proceed.[129]

d) Can a person bring a case after the employment relationship has ended?

A person can bring a case before the court after the employment relationship has ended. However, the person has to abide with the time limits. If the person has found out after the employment relationship has ended, that he was discriminated against in the employment relationship, or the termination of the employment contract was discriminatory, the case can be brought before the court within respective time limits.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).

Turkish law does not fully guarantee the right of associations, organizations or other legal entities with a legitimate interest to engage in judicial or administrative procedures, on behalf of victims of discrimination. Exceptions are trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and history. Thus, specialised NGOs do not have legal standing before the courts. NGOs only provide legal assistance and due to restricted funding and professionalism they are not able to take all the cases.

b) What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?

[128] Art. 66 of the Turkish Criminal Code (Law no. 5237).
[129] Art. 73 of the Turkish Criminal Code (Law no. 5237).

Turkish law does not fully guarantee the right of associations, organizations or other legal entities with a legitimate interest to engage in judicial or administrative procedures in support of victims of discrimination. Exceptions are consumer protection associations and associations working for the protection and preservation of the environment, culture and history. Such associations must be duly incorporated/registered under Turkish law. There are no membership or permanency requirements imposed on associations which are granted standing, since this right is already very limited and granted under rare circumstances.

Consumer protection associations have standing to act on behalf of consumers where they can show the presence of "legitimate interests" of consumers to bring a case against unjust clauses in contracts signed between consumers and service providers or companies.

Consumer protection associations, chambers of commerce and industry, associations of artisans and stock markets have standing to bring cases on behalf of their unions against unjust competition.

Associations working for the preservation of environmental, historical and cultural heritage are accepted to have a legitimate interest in bringing cases against the administration and seek preliminary injunctions from courts. To be able to do so, such associations must prove the existence of a legitimate, personal and current interest in the administrative action in question. The Court of Council has ruled that for an interest to be "personal", the administrative actions sought to be annulled need not to directly target the applicant.

Trade unions are authorized by the Trade Unions Act (Law no. 2821) to act as representatives of their members in legal proceedings. They have legal standing to represent their employer and employee members in legal disputes arising from employment, laws and contracts. However, although individuals can be represented by their unions before judicial organs, they cannot be represented by their unions before administrative organs.

As far as criminal law is concerned, associations cannot act on behalf of victims of discrimination neither can they file cases on their own initiative. All they can do is to call on prosecutors to act to prosecute perpetrators. Here, the applicable legal standard is not legitimate interest but the requirement to demonstrate "harm by the crime." However, the elements of this concept have not been elaborated by the courts. Thus, this legal standard can be interpreted both widely and narrowly, depending on the discretion of the courts.

c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

In criminal cases, associations cannot act on behalf or in support of victims of discrimination; they can only call on the prosecutors to bring a criminal case. Therefore, they are not eligible to receive authorization from victims.

In some civil cases, there may be special circumstances where associations are required to obtain formal authorization from the parents of minors or guardians of victims who are under guardianship.

d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

Under Law no. 2821, actions by trade unions are discretionary. The same applies to professional associations representing lawyers, doctors etc.

e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

Since legal standing is granted to a few categories of associations in limited circumstances, there are no further restrictions on the type of proceedings associations can bring. While associations are granted standing in civil cases in rare circumstances, they are not allowed to intervene in criminal cases on behalf of or in support of victims of discrimination. Turkish courts are notorious in the persistent way in which they deny requests by human rights organizations to intervene on behalf of or in support of victims. The most high profile recent example of this phenomenon occurred in a pending criminal case against a number of police officers in Istanbul who were charged with torture and murder of an African immigrant named Festus Okey who was killed in police custody. Since the beginning of the case, the Association of Contemporary Lawyers – as well as hundreds of individual lawyers- have unsuccessfully attempted to intervene in the case on behalf of the deceased victim, who is not represented in the case by a lawyer. And yet, each time, the court has denied such requests and continues to do so.

f) What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.

Associations can seek the annulment of discriminatory laws, regulations and circulars. Where associations can show direct harm to themselves –such as a statement by a public official against the association which constitutes label -, they can also claim compensation for non-pecuniary harm. In the latter case, individual members of the association can also open individual cases seeking compensation for emotional pain and suffering. There does not exist a legal provision setting the standards concerning the compensation amounts to be paid to associations and to actual victims; the issue is left to the discretion of the judge. According to established case law, compensation amounts can not be too high to cause unjust enrichment.

Also, courts can tend to award higher compensation amounts to individuals than to associations due to the concrete nature of the harm individuals suffer. But again, there do not exist established rules on compensation amounts.[130]

g) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?

No. The evidentiary rules concerning burden of proof are already very difficult for victims of discrimination in a legal system which favours the state vis-à-vis the individual. Associations are not held to different standards.

*h) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

The new Law on Procedure adopted on 12 January 2011 and entered into force on 1 October 2011 introduced the principle of *action popularis* into Turkish law.[131] According to Article 113, grants standing to associations and other legal entities to initiate a "group action" to protect their interests or the interests of their members or the sector they represent "for the determination of the rights of the related parties on their behalf, removal of the illegal situation or the prevention of any future breach of their rights." They can bring cases at administrative courts or courts of laws, depending on the party they sue. General rules concerning the shifting of the burden of proof apply.

*i) Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

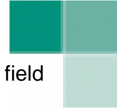
Class actions are not possible at all.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of

[130] Opinion expressed through e-mail by Mehmet Uçum, , a leading human rights lawyer specialized in employment law.

[131] Hukuk Muhakemeleri Kanunu, no. 6100, 12 January 2011, Official Gazette no. 27836, 2 February 2011.



existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

According to art. 5 of the Labour Law, with regard to a violation of the principle of equality, the burden of proof rests with the employee. However, if the employee puts forward a situation strongly suggesting the probability of such a violation, then the employer is obliged to prove that no such violation exists.

According to art. 20 of the Labour Law, in cases of the termination of the contract by the employer, the employer is under the obligation to prove that the termination is based on a valid reason. If the employee alleges that the termination is based on discrimination, the employee has to prove such allegation.

Other related legislation (including the Law of Administrative Procedure) does not provide for shifting or sharing of the burden of proof. Law on Civil Servants does not contain a special provision on burden of proof, which means that general rules shall apply. Law of Persons with Disabilities does not contain a special burden of proof provision either. Consequently, apart from these 2 exceptions found in the Labour Law, the general rules apply.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

Turkish legislation does not provide a comprehensive protection against victimization. According to art. 18 of the Labour Law (Law no. 4857), application to administrative or judicial authorities against the employer with a view to seeking the rights arising from laws or the labour contract will not constitute a valid reason for the termination of the contract. This provision only protects the person making administrative or judicial applications, but not any other person who supports the applicant employee.

The other provision prohibiting victimization is found in the Regulation on Complaints and Applications of Civil Servants. According to art. 10 of the said Regulation, civil servants who exercise their right of complaint cannot be subjected to disciplinary measures. Again, the protection covers only the person who makes the complaint. Art. 4 of the same Regulation prohibits collective complaints by civil servants.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

If the employer violates art. 5 prohibiting discrimination, the employee may demand compensation up to his (her) four months' wages plus other claims of which he (she) has been deprived of. According to art. 99 of the Labour Law, in case of a violation of art. 5, employer shall also be subject to a fine.

According to art. 21 of the Labour Law, if the court or the arbitrator concludes that the termination is unjustified (among other reasons because the termination was based on discrimination), the employer must re-engage the employee in work within one month. If, upon the application of the employee, the employer does not re-engage him in work, compensation to be not less than the employee's four months' wages and not more than his eight months' wages shall be paid to the employee by the employer. In its judgment ruling the termination invalid, the court shall also designate the amount of compensation to be paid to the employee in case he is not re-engaged in work.

Individuals who violate the prohibition of discrimination stipulated in art. 122 of the Turkish Criminal Code shall be sentenced to imprisonment for a term of six months to one year or be fined.

Art. 125 of the Law on Civil Servants prescribes that if civil servants discriminate on the grounds of language, race, gender, political opinion, philosophical belief, religion or sect in carrying out their duties, their promotion shall be suspended from 1 to 3 years.

In addition, labour inspectors, insurance inspectors and school inspectors as well as executive officials (in the area of consumer protection) can issue administrative and monetary sanctions.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

Art. 5 and 21 of the Labour Law stipulates an upper limit for compensation that can be awarded. Although according to art. 5, the employee may demand other claims of which he (she) has been deprived of in addition to compensation up to his (her) four months' wages, these claims are limited to actual damage suffered. For example, if there was discrimination suffered regarding wages, only the wage difference can be claimed.

Except for the Labour Law, there are no specific provisions regarding compensation. Thus, general rules of Turkish law on compensation should apply, the major principle being the prohibition of enrichment.

c) Is there any information available concerning:

- *the average amount of compensation available to victims?*

- *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

Information is not available regarding the average amount of compensation. The number of cases where discrimination is claimed is very small. The court decisions regarding most of these cases are not accessible. Consequently, it is not possible to provide any information regarding the amount of compensation, as well as the effectiveness of sanctions in general.

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).

Currently, there is no specialized body established for the promotion of equal treatment. The draft law on anti-discrimination stipulates the establishment of one.

There are a number of human rights bodies in Turkey, which can receive applications regarding violations of human rights, including discrimination, such as Human Rights Presidency affiliated with the Prime Ministry, Human Rights Province Boards, Human Rights District Boards and Human Rights Inquiry Committee of the Turkish Grand National Assembly. Both the boards and the commission have the competence to inquire complaints of discrimination in employment. The Human Rights Presidency, Human Rights Boards and Human Rights Inquiry Commission of Turkish Grand National Assembly can give a decision that describes the situation as a violation or non-violation of the right to equal treatment and these decisions are not enforceable and are not legally binding.

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.

Not applicable.

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

Not applicable.

d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?

Not applicable.

e) Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).

Not applicable.

f) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

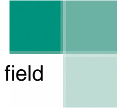
Not applicable

g) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).*

Not applicable.

h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

Not applicable.



8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

As the Directives are not transposed, no specific action has been taken by the Government to disseminate information about legal protection against discrimination.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

The political culture in Turkey is one which excludes NGOs from the legislative processes. One of the recent exceptions of this phenomenon is the preparation of the draft law on anti-discrimination, whose initial version was shared with universities and non-governmental organizations for their comments and contributions and was revised on the basis of their feedback. However, the government subsequently amended the agreed upon text and removed 'sexual identity' from the grounds of non-discrimination, which received protests from the LGBT movement as well as NGOs that had collaborated with the government.

A number of meetings have been organized by the Government to discuss, identify and seek solutions to the legal, political and social problems of the Kurds, Alevis and Roma. The government dubiously named these initiatives "opening" (*açılım*), referring to its opening up to these groups or opening to public discussion their problems and demands through a consultation mechanism, and has never explained clearly what was intended.

The Kurdish, Alevi and Roma opinion leaders, civil society representatives and political leaders were invited to a series of group-specific closed workshops hosted and presided by a minister of state to communicate to the government the needs, problems and demands of these communities. Though these initiatives were welcomed by the Kurdish, Alevi and Roma communities and raised hopes and expectations for the development of policies, they have not so far produced structural reforms or government strategies to address the needs and demands voiced by these communities.

While the government published an official report on the outputs of the workshops held on the Alevi question and took some symbolic steps on the Roma (see section d below), the Kurdish initiative has not been formally brought to an end, although it

seems to have practically halted due to the escalation of tensions between the government and the Kurdish armed movement.

The government published the minutes of each of the seven workshops and two meetings held in the context of the Alevi opening, and issued a final report in 2010.[132] The report summarizes the issues raised and highlights the problems and demands Alevis expressed during the discussions. The final section puts forth a number of general recommendations for, among others, the eradication of discrimination against the Alevis, the redefinition of laicism, the constitutional protection of the Alevi identity, the adoption of legal reforms, the rethinking of the status and competences of Diyanet to ensure equal access of all religious and faith groups to government services, making the mandatory religion courses optional and redesigning their curriculum, the granting of legal status to cem houses, and the appropriation of the Madımak Hotel in Sivas (where 34 Alevi poets, writers and singers who were in town for an annual Alevi festival were burned alive by a mob who besieged the hotel after the Friday prayers) and the commemoration of victims at the lobby of this building.

The concrete steps taken by the government after the closure of the Alevi opening are as follows: The Ministry of National Education included information on the Alevi faith in the religious education textbooks, which started to be used during the 2011-2012 school year. Alevi associations protested this step on the ground that they Alevis were not consulted on the type of information included about their faith in the books and that the mandatory nature of the classes was preserved. Madımak Hotel was expropriated but not turned into a museum, as Alevis had demanded. The bulletin board honouring the victims also included the names of the deceased perpetrators. Cem houses have not been granted legal status and no steps were taken to open the status, powers and competences of *Diyanet.*

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

No specific action is taken in this regard.

d) to specifically address the situation of Roma and Travellers.

On 10 December 2009, a Romani Workshop was organized and representatives from 5 Romani Federations and 80 Romani associations participated in the workshop. In March 2010 the Government organized a Romani gathering to meet with persons belonging to the Roma Community in Turkey. The meeting was attended by more than 10 thousand Roma and was more of a celebratory event. In his speech, the Prime Minister said that discrimination against Roma people is unacceptable and persons belonging to the Roma Community are first class citizens. The representatives of Roma associations expressed the Roma's expectations for

[132] Türkiye Cumhuriyeti Devlet Bakanlığı, *Alevi Çalıştayları Nihai Rapor*, 2010, Ankara.

employment, housing in a healthy environment, access to social programs and benefits, high quality education for their children. They also demanded an end to discrimination, exclusion and stigmatization by society and the media.

The concrete steps taken by the government in the aftermath of this meeting were as follows: the amendment in January 2011 of a discriminatory clause in the Law on the Movement and Resident of Aliens which had authorized the Ministry of Interior to “expel stateless and non-Turkish gypsies and aliens that are not bound to the Turkish culture”; the announcement in March 2011 of the construction of nearly 9,000 housing units for the Roma by TOKİ; and the establishment in April 2011 of a Roma Research and Implementation Centre at Adnan Menderes University in the province of Aydın. However, the involvement of TOKİ, which is associated with the destruction of Sulukule, in government solutions developed for alleviating the housing problems has been protested on the ground that TOKİ’s unaffordable houses outside city centres do not meet the Roma’s demands for the development of the housing and living conditions in their historical neighbourhoods. Furthermore, the government’s rejection of the Roma community’s plea to participate in the 2005-2015 "Decade of Roma Inclusion" increased doubts about the political will behind the Roma opening. The European Commission noted that “the Roma opening has not led to a comprehensive strategy to address the problems of the Roma population, who still face social exclusion, marginalisation and discrimination in access to education and health services due to their lack of identity cards, and also to housing, employment and participation in public life”.[133]

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

Art. 5 of the Labour Law prohibiting discrimination applies to employment contracts. However, the Labour Law is not applicable in all areas or in all employment relationships. According to art. 5 of the Law on Collective Agreements, Strikes and Lock-Outs (Law no. 2822), collective agreements shall be in compliance with the provisions of laws and by-laws. In any case, art. 10 of the Constitution provides a general provision which is binding on all persons.

b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

[133] European Commission, Turkey Progress Report 2011, p. 40.

In recent years, most discriminatory legislation has been annulled. However, there are still provisions in a number of laws and regulations which are discriminatory or are interpreted in a discriminatory manner. However, it is hard to make an exhaustive list of discriminatory legislation.

One major example to the violation of the principle of equality is found in art. 42 of the Constitution. According to para. 9 of art. 42, "No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education." This provision explicitly denies the existence of, or at least respect for mother tongues, other than Turkish. Consequently, if a Turkish citizen of Kurdish origin attends a Kurdish language course, than this person should not learn the language as her/his mother tongue.

Another issue which needs to be discussed here is the legislation which indirectly prohibits wearing of headscarf. Legislation does not prohibit headscarf explicitly. However, the dressing rules do not allow the person to wear a headscarf. This applies not only in the context of education, but also to employment and access to services. Female parliamentarians are not allowed to cover their heads in the Parliament. Public employees cannot wear headscarf either. This prohibition in public employment is rather strict. Women with headscarves are not welcome in part of the private sector. Older women are allowed in military premises if they are wearing headscarf, but younger women are not allowed.

The issue was brought before the European Court of Human Rights, which has decided that regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as "necessary in a democratic society".[134]

Art. 50, para. 3 of the Law on Civil Servants (Law no. 657) requires that, for persons with disabilities who want to become civil servants, separate exams to be given. These exams will be given either simultaneous with the general exam, or at a different time. Although this provision can be interpreted as a positive action, its interpretation and implementation is in the negative. First of all, persons with disabilities are forced to take the special exam. Secondly the special exams are mainly given to fill in low-end positions in the public sector. As the highest administrative court, the Council of State held that, persons with disabilities can only be employed through separate exams. In one example, the plaintiff with disability had succeeded in the Selection Examination for Professional Posts in Public Organizations and was placed as a civil servant. But his placement was annulled on the basis that, he had taken the general exam, instead of the special exam for persons with disabilities. According to the Council of State: "It is in line with the law to not to appoint the plaintiff to the post that he was placed, since he has taken the

[134] *Leyla Sahin v. Turkey*, 44774/98, decided on 10 November 2005 by the Grand Chamber of the ECHR.

general examination. Since his employment should be through quota for persons with disabilities ... he should take and pass the special examination designed for the persons with disabilities".[135] There are other cases before the Council of State on the same issue.

Some provisions of the legislation are not discriminatory *per se.* However, they are interpreted and implemented in a discriminatory manner. For example according to article 8 paragraph (g) of the Law on Judges and Prosecutors (*Hakimler ve Savcılar Kanunu*) (Law No: 2802), in order to be appointed as a candidate judge or prosecutor, a person "should not have any physical or mental illness or disability that would prevent the person from carrying out his/her responsibilities as a judge or a prosecutor continuously in every part of the country; or any disabilities which cause limitations in controlling the movements of the organs; speech different than it is accustomed and would be found odd by people". In practice, this provision leeds to the elimination of all candidates with disabilities.

So far, no study has been carried out in order to identify the discriminatory legislation exhaustively.

[135] The case law was reached through the website of the Council of the State (*Danıştay*). Council of the State 12th Chamber, E. 2006/2864, K. 2006/4487, Date of the judgement: 8/11/2006.

9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

Currently there is no coordination body. However, according a press statement issued on April 2010 by the Secretariat General for EU Affairs, a task force on anti-discrimination was established to monitor and coordinate the steps to be taken in the fight against discrimination.[136] The news reports state that the task force shall include representatives from the Ministry of Justice, Ministry of Interior, Ministry of Foreign Affairs, Ministry of Labour and Social Security, Human Rights Institution, General Directorate on the Status of Women, Disability Administration and Agency for Social Services and Child Protection. These representatives will be in touch with 81 deputy governors. These efforts will be coordinated by the Secretariat General for EU Affairs.[137]

[136] Republic of Turkey Prime Ministry Secretariat General for EU Affairs, Press Statement, Conclusions of the 20th Reform Monitoring Group Meeting, 9 April 2010, available at: http://www.abgs.gov.tr/files/Bas%C4%B1nMusavirlik/20.rig/20rig_press.pdf [last accessed 6 November 2012].
[137] Okan Müderrisoğlu, "Ayrımcılık için Özel Görev Gücü Kuruluyor", *Sabah*, 14 March 2010, http://www.sabah.com.tr/Gundem/2010/03/14/ayrimcilik_icin_ozel_gorev_gucu_kuruluyor [last accessed 6 November 2012].

ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Turkey Date: 1 January 2012

Title of Legislation (including amending legislation)	Date of adoption: Day/month /year	Date of entry in force from: Day/month /year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year				e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Türk Ceza Kanunu (no. 5237) http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=1.5.5237&MevzuatIliski=0&sourceXmlSearch=	26.09.2004	01.06.2005	Language, race, colour, gender, disability, political opinion,	Criminal Law	Access to services (could be interpreted to include education, social protection and social	Generic prohibition of discrimination on covered grounds, with no elaboration as to the kind of

Title of Legislation (including amending legislation)	Date of adoption: Day/month /year	Date of entry in force from: Day/month /year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Turkish Criminal Code (Law no. 5237) available in English at http://www.legislationline.org/documents/action/popup/id/6872/preview (unofficial translation)			philosophical belief, religion and sect, or any such considerations.		advantages); access to goods (limited to food stuffs); public and private employment.	discrimination prohibited.
İş Kanunu http://www.mevzuat.adalet.gov.tr/html/1243.html **Labour Law** (Law no. 4857) available in English at http://www.iskanunu.com/4857-sayili-is-kanunu/4857-labor-law-english/4857-labor-law-english-plain-text.html (unofficial translation)	22.05.2003	10.06.2003	Language, Race, Gender, Political opinion, Philosophical belief, Religion or sect, or any such considerations.	Civil law	Private employment	Discrimination between full-time and part-time employees and employees working under fixed-term and open-ended contracts. Indirect discrimination (but only on the grounds of

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Title of Legislation (including amending legislation)	Date of adoption: Day/month /year	Date of entry in force from: Day/month /year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
						gender and pregnancy) Harassment Victimization
Özürlüler Hakkında Kanun http://www.ozida.gov.tr/mevzuat/kanun.htm **Law on Persons with Disabilities** (Law no. 5378) available in English at http://www.ozida.gov.tr/web_english/index.htm	01.07. 2005	07.07.2005	Disability	Civil law and Administrative law	Public and private employment, Education, Vocational training.	Limited duty of reasonable accommodation.
Milli Eğitim Temel Kanunu http://www.mevzuat.adalet.gov.tr/html/505.html	14.06.1973	24.06.1973	Language, Race, Gender, Religion	Administrative law	Education	Generic prohibition of discrimination on covered grounds, with no

Title of Legislation (including amending legislation)	Date of adoption: Day/month /year	Date of entry in force from: Day/month /year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Basic Law on National Education (Law no 1739)						elaboration as to the kind of discrimination prohibited.
Devlet Memurları Kanunu http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=1.5.657&sourceXmlSearch=&MevzuatIliski=0 **Law on Civil Servants** (Law no. 657)	14.07.1965	23.07.1965	Language, Race, Gender, Political thought, Philosophical belief, Religion and sect	Administrative Law	All acts of civil servants – unlimited material scope (Public employment, access to goods or services (including housing) provided by the public sector, social protection, social advantages, public education)	Generic prohibition of discrimination on covered grounds, with no elaboration as to the kind of discrimination prohibited.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Turkey

Date: 1 January 2012

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4/11/1950	18/5/1954	No	Yes	Yes
Protocol 12, ECHR	18.04.2001	Not ratified	Not applicable	Not applicable	Not applicable
Revised European Social Charter	06/10/2004	27/6/2007	No	Ratified collective complaints protocol? No	Yes
International Covenant on Civil and Political Rights	15.08.2000	23.09.2003	"The Republic of Turkey reserves the right to	Yes, however while ratifying the Optional Protocol, Turkey has put a reservation in order to limit	Yes

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923	individual applications regarding the violation of art. 26 of the ICCPR on equality: “The Republic of Turkey formulates a reservation concerning article 5 paragraph 2(a) of the Protocol to the effect that the competence of the Committee: a) ... b) ... c) shall not apply to communications by means of which a violation of article 26 of the International Covenant on Civil and Political Rights	

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Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			and its Appendixes."	is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."	
Framework Convention for the Protection of National Minorities	No	No	Not applicable	Not applicable	Not applicable
International Covenant on Economic, Social and Cultural Rights	15.08.2000	23.09.2003	The Republic of Turkey reserves the right to interpret and	No	Yes

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			apply the provisions of the paragraph (3) and (4) of the Article 13 of the Covenant on Economic, Social and Cultural Rights in accordance to the provisions under the Article 3, 14 and 42 of the Constitution of the Republic of Turkey.		

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of All Forms of Racial Discrimination	13.10.1972	16.09.2002	No	No	Yes
Convention on the Elimination of Discrimination Against Women		20.12.1985	No	Yes	Yes
ILO Convention No. 111 on Discrimination		19.07.1967	No	No	Yes
Convention on the Rights of the Child	14.09.1990	04.04.1995	“Reservation made upon signature and confirmed upon ratification: The Republic of Turkey	No	Yes

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			reserves the right to interpret and apply the provisions of articles 17, 29 and 30 of the United Nations Convention on the Rights of the Child according to the letter and the spirit of the Constitution of the Republic of Turkey and those of the Treaty of Lausanne of		

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Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			24 July 1923.”		
Convention on the Rights of Persons with Disabilities	30.03.2007	28.09.2009	No	No	Yes