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# Country report

## Non-discrimination

Turkey

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**EUROPEAN COMMISSION**

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# **Country report**

# **Non-discrimination**

# **Turkey**

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Reporting period 1 January 2015 – 31 December 2015

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## EXECUTIVE SUMMARY

### 1. Introduction

Turkey is a multi-ethnic, multi-religious and multilingual society. There are no official data on the composition of the population on the basis of ethnicity, denomination and mother tongue, as the Government has refrained from asking such questions in censuses since the 1960s. Pursuant to the 1923 Lausanne Peace Treaty signed with the Allies, the Turkish Government reluctantly granted minority status to non-Muslim minorities, subsequently de facto limiting protection to Jews, and Armenian and Greek Orthodox Christians by excluding other non-Muslim groups such as Syriac and Protestant Christians. In 2013, a lower court challenged this official minority policy for the first time by holding that the Treaty of Lausanne granted minority status and rights to all non-Muslim citizens.<sup>1</sup> The decision concerned the denial by the Ministry of National Education of a request by the Syriac community for a kindergarten where children would also be taught their mother tongue. Due to its broad reasoning, which concluded that all non-Muslim communities are entitled to minority rights under the Treaty of Lausanne, it is likely that the decision will be used by other non-Muslim groups in challenging state policies.

While the policy of non-recognition towards Kurds, the largest minority in the country, has changed in recent years, the Government continues to deny legal or political recognition to Alevi, the largest religious minority, which practices a different interpretation of Islam to that of the Sunni majority. Despite the European Court of Human Rights (ECtHR) rulings that non-recognition of Alevi places of worship<sup>2</sup> and mandatory religion classes<sup>3</sup> are in violation of the right to freedom of religion, the Government refuses to bring an end to its assimilationist policies. For example, on 2 March 2015, the District Governor (*kaymakam*) of the Maltepe district of Istanbul filed a lawsuit against the decision of the democratically elected Maltepe Municipal Council to grant 'place of worship' status to *cemevis*<sup>4</sup> within the district boundaries.<sup>5</sup> The District Governor claimed that the decision posed a threat to the 'unity' of the people, would cause 'irreparable divisions in social life', the Municipal Council lacked the competence to grant place of worship status to *cemevis* and the decision was against the principle of laicism guaranteed under Article 2 of the Constitution.<sup>6</sup> Another group of ECtHR judgments which remain unimplemented concern conscientious objection,<sup>7</sup> which is unrecognised in Turkey, the only country in the Council of Europe which does not provide an alternative civilian service. Jehovah's Witnesses, as well as politically motivated conscientious objectors (pacifists and total objectors), continue to be subjected to a cycle of prosecution, imprisonment and forced military recruitment.

Non-Muslim minorities, including those officially recognised, face significant restrictions on their freedom of religion. The inability to train clergy due to absence of theological schools, and the Government's refusal to grant permission for the opening of new churches (for non-recognised Christian denominations) are among the main problems in this regard. Although the total number of people of the various non-Muslim communities is around 100 000 in a country with a population of 75 million, there is widespread, partially

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<sup>1</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf) [all hyperlinks accessed on 20 July 2016]

<sup>2</sup> ECtHR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, No. 32093/10, 2 December 2014.

<sup>3</sup> ECtHR, *Mansur Yalcin and Others v. Turkey*, No. 21163/11, 16 September 2014; ECtHR, *Hasan and Eylem Zengin*, No. 1448/04, 9 January 2007.

<sup>4</sup> *Cemevi* is the place of worship of the Alevi community. In accordance with their interpretation of Islam, Alevi do not go to mosque, but pray at *cemevis*.

<sup>5</sup> In Turkey, mayors and municipal councils are elected, whereas governors and district governors are appointed by the central Government and adhere to official policies and decisions.

<sup>6</sup> The lawsuit filed by the District Governor became known to the general public through news reports of 30 April 2015.

<sup>7</sup> ECtHR, *Buldu and Others v. Turkey*, No. 14017/08, 3 June 2014; ECtHR, *Tarhan v. Turkey*, No. 9078/06, 17 July 2012; ECtHR, *Savda v. Turkey*, No. 42730/05, 12 June 2012.

conspiracy-fed, partially irrational fear of Christian missionary activities and Zionism in society, fed by the anti-Semitic, anti-Western and anti-Christian rhetoric of politicians, government officials, opinion leaders and the media. The authorities utterly fail in their duties to protect non-Muslims, particularly Jews, against the prevalent hate speech, at times coupled with hate crimes, in the media, political discourse and daily life.

There is widespread discrimination against Roma, Kurds and LGBTI people in education, employment, health, housing and access to services. The Government's recent initiatives to address some of these problems, such as getting together with representatives of the Roma and Kurds and pledging to address the problems of these communities, have not produced tangible outcomes in this regard. LGBTI people face not only systematic discrimination but also physical insecurity, including killings, particularly targeting transgender people.<sup>8</sup> The Government refuses to include sexual orientation among the grounds of non-discrimination, finds homosexuality to be offensive and avoids addressing the demands for recognition of LGBTI people. This is a prevalent attitude in Turkish society at large, which refrains from public discussion of homosexuality due to a combination of religiosity and conservatism. While homosexuality has never been a criminal offence in Turkey, public authorities as well as private individuals use the amorphous concept of 'public morality' to dismiss LGBTI people from employment, refuse to give them housing, prosecute them and shut down their civil organisations.

Government representatives, public officials and politicians routinely make discriminatory statements against LGBTI people, non-Muslims, Roma and Kurds, which go unpunished. Coverage in mainstream media is notoriously hateful towards minorities. However, the judicial authorities do not enforce the laws against incitement of hatred. One exception is a court judgment of 23 December 2015 concerning a mob lynch attempt against a group of Roma in 2010. The court convicted 38 of the 80 defendants for incitement to enmity or hatred and denigration under Article 216 of the Turkish Penal Code, sentencing them to terms of imprisonment of between 8 months and 45 years.

## **2. Main legislation**

There is no specific anti-discrimination or equal treatment legislation in Turkey. As Turkey is not a member of the European Union, Directives 2000/43/EC and 2000/78/EC have not been implemented. There is a draft law on combating discrimination and on the establishment of an equality council, prepared by the Government in 2009 and submitted for public discussion in 2010. The draft was apparently inspired by the directives and the European experience. Both the list of prohibited grounds and the material scope of the draft are wider than the directives. More than six years after its preparation, the draft legislation has still not been adopted due to lack of political will.

The constitutional basis of the legal framework on equality and anti-discrimination rests in Article 10 of the Constitution, which provides an open-ended list of enumerated protected grounds. Since 2010, this clause allows positive measures on behalf of women, elderly persons and persons with disabilities. According to Article 90 of the Constitution, duly ratified international treaties have the force of law. If a treaty is self-executing, it is directly applicable. In cases of 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 for the unconstitutionality of international treaties. Turkey is a party to a considerable number of international treaties containing provisions on anti-discrimination and equal treatment, and has accepted the right to individual complaints under many of these treaties, except for the Convention on the Elimination of All Forms of Racial Discrimination. Turkey has also not accepted the collective complaint procedure under the Revised European Social Charter. On a positive note, on 26 March 2015, Turkey ratified the Optional

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<sup>8</sup> There are no publicly available official figures on these crimes.



Protocol to the Convention on the Rights of Persons with Disabilities, enabling individuals or groups subject to its jurisdiction to file complaints with the UN Committee on the Rights of Persons with Disabilities.<sup>9</sup>

The Law on Persons with Disabilities provides the most expansive protection against discrimination in Turkish law, though solely on the ground of disability. In addition, various laws, such as the Labour Law, the Penal Code and the Law on National Education, have provisions prohibiting discrimination on the basis of varying protected grounds. Ethnicity, age, sexual identity and sexual orientation are not enumerated in any of the laws or in the Constitution. While the draft law on anti-discrimination initially included sexual identity and sexual orientation as prohibited grounds of discrimination, references to these concepts were quietly removed by the Government after the draft law was submitted for public discussion.

In March 2014, the Turkish Parliament introduced hate crime for the first time to the Turkish legal framework (though with limited material scope).<sup>10</sup> While nationality was added to the enumerated prohibited grounds of discrimination, the open-ended nature of the discrimination ban was reversed, precluding judicial expansion of the protection to grounds of sexual orientation, age and ethnicity. In February 2014, the ground of disability was added to the anti-discrimination clauses of the Law on National Education and the Labour Law.<sup>11</sup>

### **3. Main principles and definitions**

Various laws which prohibit discrimination do not provide a definition of any of the terms designating the grounds, with the exception of disability. Age, ethnicity, sexual identity and sexual orientation are not listed among the prohibited grounds in any of the legal provisions mentioned above. Disability is mentioned explicitly only in the Turkish Criminal Code, the Law on Persons with Disabilities and, since February 2014, in the Labour Law and the Law on National Education.

The legislation prohibiting discrimination is general in nature and does not refer to different types of discrimination. There are a few laws which more explicitly prohibit direct and indirect discrimination, but within a limited material scope. The Labour Law prohibits both direct and indirect discrimination, but only with regard to sex and pregnancy. Amendments made to the Law on Persons with Disabilities in February 2014 introduced to the Turkish legal framework, for the first time, definitions of direct discrimination, indirect discrimination and reasonable accommodation, and an explicit prohibition of indirect discrimination. The definition of disability under the same law has been revised in accordance with the EU directives.

However, various laws and regulations providing disability-related benefits and positive measures continue to have their own definition of and/or criteria for disability. Disability can also be defined in a negative aspect in disqualifying individuals from certain professions. Discrimination by association, harassment and instruction to discriminate are neither defined nor explicitly prohibited. Victimisation is prohibited only in a very limited fashion. The legislation is silent on exceptions.

<sup>9</sup> Turkey had signed the Optional Protocol on 28 September 2009.

<sup>10</sup> Turkey, Law on the Amendment of Various Laws with the Purpose of Advancing the Fundamental Rights and Liberties, no. 6529 ( *Temel Hak ve Hürriyetlerin Geliştirilmesi Amacıyla Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun* ), 2 March 2014,, available at: <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm>.

<sup>11</sup> Turkey, Law on amendments to decree with the force of law concerning the organisation and duties of the Ministry of Family and Social Policies and to some laws and decrees with the force of law (no. 6518) ( *Aile ve Sosyal Politikalar Bakanlığının Teşkilat ve Görevleri Hakkında Kanun Hükmünde Kararname ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun* ), 6 February 2014, available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6518.pdf>.

The national legal framework is completely blind on sexual orientation, as evident also in the absence of any provision criminalising homosexual, bisexual or transsexual conduct. However, there is widespread and systematic discrimination against LGBTI people, stemming from either the blatantly discriminatory texts of the laws and regulations and/or their discriminatory interpretation and application by the judiciary.

While religion is not defined in the Constitution or the laws, there is case law concerning the definition of religion in general and of Islam/Muslims in particular. In a growing number of judgments, the Court of Cassation decided some belief systems to be ineligible as a religion and defined others in ways contrary to those of the holders of such beliefs. In both cases, the court based its judgments on the advisory opinion of the Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı*), a constitutionally endorsed public body which regulates affairs between the state and Islam. A further discriminatory treatment concerns the status of places of worship belonging to non-recognised religious minorities. By extension of the state's limitation of the definition of minority to Armenian and Greek Orthodox Christians as well as Jews, the places of worship of other religious or denominational minorities, such as Alevi and Protestants, are not recognised 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.

In Turkish law there is no clear and comprehensive guidance on positive action. While not explicitly stating it as such, Article 10 of the Constitution, revised in 2010, introduced the principle of positive action to the Constitution. The 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, persons with disabilities, widows and orphans of martyrs, invalids and veterans, shall not be considered as a violation of the principle of equality. Article 61 of the Constitution also requires the state to take protective measures for persons with disabilities, children and elderly persons. Although not named as positive action in 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.).

#### **4. Material scope**

The material scope of the directives is not reflected in Turkish legislation. Protection from discrimination in the employment context only applies after the employment relationship is established. This applies to both private and public sectors. 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 has a wide material scope which covers 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 vote and to be elected, access to buildings where public services are provided and freedom of association. The prohibitions of discrimination bind both public and private persons.

#### **5. Enforcing the law**

In the absence of an anti-discrimination body (which is foreseen under the draft anti-discrimination law yet to be adopted), discrimination claims are filed through civil, administrative and criminal courts as well as administrative mechanisms. At courts, victims of discrimination can claim compensation for pecuniary damages, loss of earnings and/or damages for pain and suffering. 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. If the discriminatory act or action is administrative in nature, before going to the court, the victim of discrimination has to request compensation from the administrative body responsible for the action. The decisions of the courts are binding by definition. While a court proceeding is the only procedure for victims to receive compensation, it is costly, legal aid is provided under very strict criteria, and cases are not decided until one or two years have passed.

If a victim seeks an amicable settlement instead of a court action, the alternative dispute settlement methods offered in the Turkish legal system are very limited.

Except in cases in criminal courts, litigants themselves have to collect evidence to establish the facts and prove their case, making the pursuit of a case without the support of a lawyer extremely difficult. Filing a lawsuit is costly and legal aid is provided under very strict criteria. Collective actions are not available. Victims of discrimination in most cases resort to human rights organisations and lawyers providing pro bono support for legal assistance.

In 2010, Turkey recognised the right to constitutional complaint. The right is limited to Turkish nationals and 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 to which Turkey is a party. Persons whose complaints are found inadmissible reserve the right to petition the European Court of Human Rights (ECtHR). From 23 September 2012, the Constitutional Court started to receive complaints filed against judicial decisions and actions that have become final. There are deterrents to filing a constitutional complaint, such as the 30-day time limit and the petition fee.

Another option for victims of discrimination is to apply to non-judicial bodies, such as human rights boards at province and district level and the Human Rights Inquiry Commission of the Turkish Grand National Assembly, which have competence to inquire into complaints of discrimination in employment. However, human rights boards are not independent from the executive and are extremely underused. Since September 2012, a new mechanism, the Human Rights Institution of Turkey, which has a mandate for human rights protection, though it lacks specific competence on anti-discrimination, has been in operation. The decisions of all of these bodies are non-binding and their powers of enforcement are weak. There are also labour inspectors, insurance inspectors and school inspectors tasked with inspecting compliance with 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.

In Turkey associations/organisations/trade unions are granted a very limited entitlement to act on behalf of victims of discrimination. They also have a limited legal standing to act on behalf of their members in limited circumstances. Human rights organisations and trade unions have standing to file complaints on behalf of victims of human rights violations with the newly established Human Rights Institution of Turkey. Associations/organisations/trade unions are not entitled to act in support of victims of discrimination. However, they can call on prosecutors to act to prosecute perpetrators and they can intervene in criminal cases initiated by the public prosecutors where they can demonstrate 'harm by the crime'. In recent years, LGBT organisations started to persistently ask to be involved in ongoing criminal cases to act on behalf of victims of hate crime and honour killings. While in many cases courts reject such requests, recently there have been a few instances where responses from the courts have been affirmative. In a landmark decision given in early 2015, the Constitutional Court granted a number of NGOs leave to submit amicus curiae briefs in an ongoing forced disappearance case.<sup>12</sup> While this

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<sup>12</sup> Turkey, Constitutional Court (*Anayasa Mahkemesi*), application no: 2013/2640, 8 April 2013.

is not a discrimination case nor has the applicant made a discrimination claim, the Court's decision to accept *amicus curiae* from civil society has set a significant precedent which is likely to be used by civil society organisations in supporting victims of discrimination.

In Turkey, national law permits a shift of the burden of proof from the complainant to the respondent. According to 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.

Sanctions in cases of discrimination vary. In cases of employment discrimination, employers are subject to a fine and employees may demand compensation of up to four months' wages plus claims for other benefits of which they have been deprived. In cases of unlawful termination of an employment contract (among other reasons, due to discrimination), the employer must re-instate the employee in work within one month. If not, the employee is entitled to compensation of between four and eight months' wages. Where discrimination in violation of the Penal Code is committed, then the sanction is a term of imprisonment of up to three years with no possibility of conversion to a fine. Where civil servants engage in discrimination, the sanction is suspension of promotion for one to three 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.

Among the five grounds covered by Directives 2000/43/EC and 2000/78/EC, Turkish national law provides for positive action only for persons with disabilities and elderly persons. 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.), including employment quotas for persons with disabilities. No positive action exists for Roma in Turkey, even after the Government launched its Roma initiative with the promise to enhance employment, education and housing conditions for Roma.

The Government develops policies, designs laws and adopts executive measures on human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does, without taking into account their suggestions or criticisms. A recent example of this was the drafting of the Action Plan for the Prevention of Violations of the European Convention on Human Rights, adopted in March 2014, without the involvement of civil society.

## **6. Equality bodies**

Turkey does not have a 'specialised body' for the promotion of equal treatment irrespective of racial or ethnic origin in accordance with Article 13 of the Racial Equality Directive. Arguably, the Human Rights Institution of Turkey comes closest to being an equality body. This Institution, which was established on 21 June 2012, has a general mandate to protect human rights and prevent violations, but does not have specific competence to review discrimination claims. The Turkish Government assured the UN Committee on the Elimination of Racial Discrimination that the Human Rights Institution's wide mandate to protect and promote human rights 'naturally includes combatting racial discrimination'.<sup>13</sup> Natural and legal persons can bring claims of discrimination against individuals, private legal entities and public institutions. Human rights organisations and trade unions can bring applications on behalf of victims, either on their own motion or on behalf of victims from whom they have received complaints. The Institution can also initiate investigations on its

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<sup>13</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, p. 11, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

own motion where it sees 'signs of a violation'. Applications to the Human Rights Institution are free of charge. However, national and international NGOs as well as UN bodies criticise the Institution's lack of independence and non-compliance with the Paris Principles. The Ombudsman Institution, also established in June 2012, is tasked with reviewing the acts and operations of the administration and making suggestions to ensure the administration's compliance with the principles of human rights, justice and the rule of law. The Ombudsman Institution started to receive complaints in March 2013. While it might also take on the function of an independent body on racial discrimination, the Ombudsman Institution lacks the power to carry out investigations on its own initiative and there are concerns regarding its impartiality and neutrality, as noted by the ECRI. While the Human Rights Institution and the Ombudsman Institution lack the mandate to assist victims in filing discrimination claims, the equality body envisioned under the draft anti-discrimination law is tasked with 'giving every kind of assistance to those who claim to have been subject to discrimination'.<sup>14</sup>

## 7. Key issues

- Turkey still does not have an anti-discrimination law or a special body on equality and anti-discrimination. The 2009 draft Law on Combating Discrimination and Establishment of an Equality Council is still pending at the Office of the Prime Ministry.
- Various laws prohibiting discrimination have limited material and personal scope; most importantly, age, sexual orientation and ethnicity are not among the enumerated grounds of non-discrimination under Turkish law.
- The positive action introduced to the Constitution in 2010 is limited to persons with disabilities and elderly persons.
- Discriminatory and hate speech and conduct against minorities, particularly Roma, LGBTI persons, Kurds and non-Muslims (particularly Jews) is rampant in daily life, political discourse and the media.
- The judicial authorities are notoriously reluctant to enforce existing legislation prohibiting hate speech and discrimination.
- The various government initiatives launched with the stated goal of addressing the problems of Kurds, Roma and Alevis have not produced tangible policy outcomes and legislative measures to address the discrimination these groups face in education, employment, housing, access to social services and freedom of religion.
- The ECtHR's rulings against mandatory religion courses,<sup>15</sup> the non-recognition of Alevi places of worship and the exclusion of these places of worship from social advantages granted to mosques,<sup>16</sup> and the mandatory indication of religion in official identity cards<sup>17</sup> remain unimplemented.
- Turkey continues to be the only member of the Council of Europe which does not recognise the right to conscientious objection of persons who refuse to serve in the military due to religious or political/philosophical beliefs. The ECtHR's three separate rulings against Turkey on this issue remain unimplemented.<sup>18</sup>

<sup>14</sup> Article 6(2)(ç) of the draft law on anti-discrimination.

<sup>15</sup> ECtHR, *Mansur Yalcin and Others v. Turkey*, No. 21163/11, 16 September 2014; ECtHR, *Hasan and Eylem Zengin*, No. 1448/04, 9 January 2007.

<sup>16</sup> ECtHR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, No. 32093/10, 2 December 2014.

<sup>17</sup> ECtHR, *Sinan Işık v. Turkey*, No. 21924/05, 2 February 2010.

<sup>18</sup> ECtHR, *Buldu and Others v. Turkey*, No. 14017/08, 3 June 2014; ECtHR, *Tarhan v. Turkey*, No. 9078/06, 17 July 2012; ECtHR, *Savda v. Turkey*, No. 42730/05, 12 June 2012.

- The recently established Human Rights Institution of Turkey, which comes closest to being an equality body in Turkey, lacks independence from the executive and is not in compliance with the UN Paris Principles.
- The Government continues to develop policies, design laws and adopt executive measures in the area of human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does, without taking into account their suggestions or criticisms. A recent example of this was the drafting of the Action Plan for the Prevention of the Violations of the European Convention on Human Rights, adopted in March 2014,<sup>19</sup> without the involvement of civil society.

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<sup>19</sup> Turkey, Action Plan for the Prevention of the Violations of the European Convention on Human Rights (*Avrupa İnsan Hakları Sözleşmesi İhlallerinin Önlenmesine İlişkin Eylem Planı*), Official Gazette, no. 28929, 1 March 2104, available at: <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/03/20140301.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/03/20140301.htm>.

## RÉSUMÉ

### 1. Introduction

La Turquie est une société multiethnique, multireligieuse et multilingue. Aucune donnée officielle ne permet de connaître la composition de la population en termes d'origine ethnique, de confession et de langue maternelle, étant donné que le gouvernement s'abstient de poser ces questions dans les recensements depuis les années 1960. Conformément au traité de paix de Lausanne signé avec les alliés en 1923, le gouvernement turc a accordé non sans réticence le statut de minorité aux «non-Musulmans», et limité de facto ensuite cette protection aux Juifs et aux chrétiens orthodoxes arméniens et grecs en excluant d'autres groupes non musulmans tels que les chrétiens syriaques et protestants. En 2013, un tribunal de première instance a contesté pour la première fois cette politique officielle vis-à-vis des minorités en affirmant que le traité de Lausanne accordait le statut de minorité et des droits à tous les citoyens non musulmans.<sup>20</sup> La décision faisait suite au refus du ministère de l'Éducation nationale d'accéder à une demande de la communauté syriaque visant à la création d'un jardin d'enfants où l'instruction se ferait également en langue maternelle. Vu le large raisonnement qu'il a développé et sa conclusion selon laquelle toutes les communautés non musulmanes peuvent bénéficier des droits accordés aux minorités par le traité de Lausanne, cet arrêt sera très probablement invoqué par d'autres groupes non musulmans qui contestent les politiques de l'État.

Si la politique de non-reconnaissance des Kurdes, qui forment la minorité la plus importante du pays, évolue depuis quelques années, le gouvernement continue de refuser toute reconnaissance légale ou politique aux Aléviens, principale minorité religieuse dont l'interprétation de l'islam diffère de celle de la majorité sunnite. En dépit des arrêts de la Cour européenne des droits de l'homme (CouEDH) déclarant que la non-reconnaissance des lieux de cultes alévis<sup>21</sup> et les cours de religion obligatoires<sup>22</sup> constituent une violation du droit à la liberté religieuse, le gouvernement refuse de mettre fin à sa politique assimilationniste. C'est ainsi notamment que le gouverneur (*kaymakam*) du district de Maltepe (Istanbul) a intenté le 2 mars 2015 une action en justice à l'encontre de la décision du conseil municipal de Maltepe, démocratiquement élu, d'accorder le statut de «lieu de culte» aux *cemevis*<sup>23</sup> situés sur le territoire du district.<sup>24</sup> Le gouverneur du district a affirmé que cette décision constituait une menace pour «l'unité» de la population; qu'elle allait causer des «scissions irréparables dans la vie sociale»; que le conseil municipal n'était pas compétent pour octroyer le statut de lieu de culte aux *cemevis*; et que la décision allait à l'encontre du principe de laïcité consacré par l'article 2 de la Constitution.<sup>25</sup> Une autre série d'arrêts de la CouEDH restant sans effet concerne l'objection de conscience,<sup>26</sup> que la Turquie ne reconnaît pas; elle est le seul pays du Conseil de l'Europe à ne pas proposer un service civil en remplacement du service militaire. Les témoins de Jéhovah, de même que les objecteurs de conscience ayant une motivation politique (pacifistes et objecteurs absolus), demeurent soumis à un cycle de poursuites, d'emprisonnement et de recrutement militaire forcé.

<sup>20</sup> Commission européenne (2013), *Rapport de suivi concernant la Turquie*, Bruxelles, p. 61, disponible sur: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf) [tous les hyperliens ont été consultés le 20 juillet 2016].

<sup>21</sup> CouEDH, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı c. Turquie*, requête n° 32093/10, 2 décembre 2014.

<sup>22</sup> CouEDH, *Mansur Yalcin et autres c. Turquie*, requête n° 21163/11, 16 septembre 2014; CouEDH, *Hasan et Eylem Zengin c. Turquie*, requête n° 1448/04, 9 janvier 2007.

<sup>23</sup> Le *cemevi* est le lieu de culte de la communauté alévie. Conformément à leur interprétation de l'islam, les Aléviens ne se rendent pas à la mosquée mais au *cemevi*.

<sup>24</sup> En Turquie, les maires et les conseils municipaux sont élus, tandis que les gouverneurs et gouverneurs de district sont nommés par le gouvernement central et adhèrent aux décisions et politiques officielles.

<sup>25</sup> L'action en justice intentée par le gouverneur de district a été portée à la connaissance du public par des dépêches d'actualité publiées le 30 avril 2015.

<sup>26</sup> CouEDH, *Buldu et autres c. Turquie*, requête n° 14017/08, 3 juin 2014; CouEDH, *Tarhan c. Turquie*, requête n° 9078/06, 17 juillet 2012; CouEDH, *Savda c. Turquie*, requête n° 42730/05, 12 juin 2012.

Les minorités non musulmanes, y compris celles qui sont officiellement reconnues, se heurtent à d'importantes restrictions à leur liberté de religion – les principales difficultés étant l'impossibilité de former les membres du clergé en raison de l'inexistence d'écoles théologiques, et le refus du gouvernement d'accorder l'autorisation d'ouvrir de nouvelles églises (pour les confessions chrétiennes non reconnues). Bien que le nombre total de personnes appartenant aux diverses communautés non musulmanes ne dépasse pas 100 000 environ dans un pays de 75 millions d'habitants, il existe au sein de la société une crainte générale, partiellement irrationnelle et partiellement entretenue par une conspiration à l'égard d'activités chrétiennes missionnaires et du sionisme – crainte alimentée par le discours antisémite, antioccidental et antichrétien de politiciens, de responsables gouvernementaux, de leaders d'opinion et des médias. Les autorités manquent totalement à leur devoir de protéger les non-Musulmans, et les Juifs en particulier, contre un discours haineux répandu, parfois associé à des crimes de haine, dans les médias, le débat politique et la vie quotidienne.

On observe une discrimination très répandue envers les Roms, les Kurdes et les personnes LGBTI dans les domaines de l'éducation, de l'emploi, de la santé, du logement et de l'accès aux services. Les récentes initiatives du gouvernement en vue de trouver des solutions à certains de ces problèmes – initiatives consistant par exemple à rencontrer des représentants des Roms et des Kurdes et à s'engager à résoudre les difficultés rencontrées par ces communautés – n'ont eu à ce jour aucun résultat concret. Les personnes LGBTI se heurtent non seulement à une discrimination systématique, mais également à une insécurité physique allant jusqu'à des meurtres, lesquels visent plus particulièrement les personnes transgenres.<sup>27</sup> Le gouvernement refuse d'inclure l'orientation sexuelle au nombre des motifs interdits de discrimination; considère l'homosexualité comme offensante; et évite de réagir aux demandes de reconnaissance des personnes LGBTI. Cette attitude prévaut dans l'ensemble de la société turque, qui s'abstient de débat public sur l'homosexualité pour une raison qui tient à la fois de la religiosité et du conservatisme. Si l'homosexualité n'a jamais constitué une infraction pénale en Turquie, les pouvoirs publics comme les particuliers font appel à la notion imprécise de «moralité publique» pour écarter les personnes LGBTI de l'emploi, pour leur refuser un logement, pour engager des poursuites à leur encontre et pour fermer leurs organisations civiles.

Des représentants du gouvernement, des agents de la fonction publique et des politiciens font régulièrement des déclarations discriminatoires à l'encontre des personnes LGBTI, des non-Musulmans, des Roms et des Kurdes, sans jamais être sanctionnés. La couverture des médias traditionnels est notoirement haineuse envers les minorités. Mais les autorités judiciaires n'appliquent pas les lois interdisant l'incitation à la haine. Il convient de citer une exception, à savoir un arrêt judiciaire du 23 décembre 2015 concernant une tentative de lynchage à l'encontre d'un groupe de Roms en 2010. La juridiction saisie a condamné 38 des 80 prévenus pour incitation à l'hostilité ou à la haine et pour dénigrement en vertu de l'article 216 du code pénal turc avec des peines d'emprisonnement allant de 8 mois à 45 ans.

## **2. Législation principale**

Il n'existe en Turquie aucune législation spécifique contre la discrimination ou en faveur de l'égalité de traitement. Le pays n'étant pas membre de l'Union européenne, les directives 2000/43/CE et 2000/78/CE n'y ont pas été mises en œuvre. Un projet de loi sur la lutte contre la discrimination et sur la création d'un conseil pour l'égalité a été préparé par le gouvernement en 2009 et soumis à un débat public en 2010. Il s'est apparemment inspiré des directives et de l'expérience européenne. Tant la liste des motifs interdits que le champ d'application matériel vont au-delà des directives. Plus de six ans après son élaboration, ce projet législatif n'a toujours pas été adopté par manque de volonté politique.

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<sup>27</sup> Aucun chiffre officiel n'est publiquement disponible à propos de ces crimes.



La base constitutionnelle du cadre législatif en matière d'égalité et de non-discrimination est l'article 10 de la Constitution, lequel contient une liste ouverte de motifs protégés. Cette clause autorise depuis 2010 l'adoption de mesures positives en faveur des femmes, des personnes âgées et des handicapés. En vertu de l'article 90 de la Constitution, les traités internationaux dûment ratifiés ont force de loi. Si le traité est directement applicable, aucune intégration en droit interne n'est requise. En cas de conflit entre les dispositions des lois nationales et celles de traités internationaux en matière de droits fondamentaux et de libertés fondamentales dûment appliqués, ce sont les dispositions des accords internationaux qui prévalent. La Cour constitutionnelle ne peut donc être saisie pour l'inconstitutionnalité d'un traité international. La Turquie est partie à bon nombre de traités internationaux contenant des dispositions visant à lutter contre la discrimination et à promouvoir l'égalité de traitement, et admet le droit au dépôt d'une plainte individuelle au titre de plusieurs de ces traités, hormis la Convention sur l'élimination de toutes les formes de discrimination raciale. La Turquie n'a pas admis non plus la procédure de recours collectif prévue par la Charte sociale européenne révisée. Sur une note plus positive, la Turquie a ratifié le 26 mars 2015 le protocole facultatif se rapportant à la Convention relative aux droits des personnes handicapées, permettant ainsi à des personnes ou des groupes relevant de sa juridiction d'introduire une plainte auprès du Comité des NU sur les droits des personnes handicapées.<sup>28</sup>

C'est la loi relative aux personnes handicapées qui assure dans l'ordre juridique turc la protection la plus large contre la discrimination, mais uniquement lorsque celle-ci se fonde sur le handicap. Diverses lois (loi sur le travail, code pénal et loi sur l'éducation nationale notamment) contiennent par ailleurs des dispositions qui interdisent la discrimination fondée sur différents motifs protégés. L'origine ethnique, l'âge, l'identité sexuelle et l'orientation sexuelle ne sont cités dans aucune loi ni dans la Constitution. Alors que le projet de loi antidiscrimination faisait initialement de l'identité sexuelle et de l'orientation sexuelle des motifs interdits de discrimination, la référence à ces concepts a été discrètement retirée par le gouvernement après que le projet de loi ait fait l'objet d'un débat public.

Le Parlement turc a inclus pour la première fois le crime haineux dans le cadre juridique national en mars 2014, mais avec un champ d'application matériel limité.<sup>29</sup> Si la nationalité a été ajoutée à la liste des motifs interdits de discrimination, le caractère ouvert de l'interdiction de discrimination a été supprimé de sorte que la protection judiciaire ne peut plus être étendue aux motifs de l'orientation sexuelle, de l'âge et de l'origine ethnique. Le motif du handicap a été ajouté en février 2014 aux clauses antidiscrimination de la loi sur l'éducation nationale et de la loi sur le travail.<sup>30</sup>

### 3. Principes généraux et définitions

Les diverses lois interdisant la discrimination ne définissent aucun des termes désignant les motifs, hormis le handicap. L'âge, l'origine ethnique, l'identité sexuelle et l'orientation sexuelle ne figurent parmi les motifs interdits dans aucune des dispositions juridiques susmentionnées. Le handicap est uniquement cité de manière explicite dans le code pénal, dans la loi relative aux personnes handicapées et, depuis février 2014, dans la loi sur le travail et la loi sur l'éducation nationale.

<sup>28</sup> La Turquie a signé le protocole facultatif le 28 septembre 2009.

<sup>29</sup> Turquie, loi n° 6529 portant modification de diverses lois en vue de promouvoir les libertés et droits fondamentaux (*Temel Hak ve Hürriyetlerin Geliştirilmesi Amacıyla Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun*), 2 mars 2014, disponible sur : <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm>.

<sup>30</sup> Turquie, loi n° 6518 portant modification du décret-loi relatif à l'organisation et aux obligations du ministère des politiques familiales et sociales, et de certaines lois et décrets-lois (*Aile ve Sosyal Politikalar Bakanlığının Teşkilat ve Görevleri Hakkında Kanun Hükmünde Kararname ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 6 février 2014, disponible sur <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6518.pdf>.

La législation interdisant la discrimination revêt un caractère général et ne fait pas référence à différents types de discrimination. Quelques lois interdisent la discrimination directe et indirecte de façon plus explicite, mais leur champ d'application matériel est limité. La loi sur le travail interdit la discrimination à la fois directe et indirecte, mais uniquement pour ce qui concerne le sexe et la grossesse. Les amendements apportés en février 2014 à la loi relative aux personnes handicapées introduit pour la première fois dans l'ordre juridique turc des définitions de la discrimination directe, de la discrimination indirecte et de l'aménagement raisonnable, ainsi qu'une interdiction expresse de la discrimination indirecte. La définition du handicap contenue dans la même loi a été révisée conformément aux directives de l'UE.

Diverses lois et réglementations prévoyant des prestations et des mesures positives liées au handicap conservent toutefois leurs propres définitions et/ou critères en matière de handicap. Ce dernier peut également être défini de manière négative par la disqualification de candidats à l'exercice de certaines fonctions professionnelles. La discrimination par association, le harcèlement et l'injonction de discriminer ne sont ni définis ni interdits de manière expresse. Les rétorsions ne sont interdites que de façon très limitée. La législation est muette en ce qui concerne les exceptions.

L'ordre juridique national ignore totalement l'orientation sexuelle, comme en témoigne également l'absence de toute disposition protégeant contre le comportement discriminatoire vis-à-vis de l'homosexualité, la bisexualité ou la transsexualité, ou pénalisant ce comportement. Or on observe une discrimination générale et systématique à l'égard des personnes LGBTI, qu'elle soit générée par le libellé clairement discriminatoire des lois et réglementations et/ou par leur interprétation et application discriminatoires de la part de l'appareil judiciaire.

Si la religion n'est définie ni dans la Constitution ni dans la législation, il existe une jurisprudence relative à la définition de la religion en général et de l'islam/des Musulmans en particulier. Dans un nombre croissant d'arrêts en effet, la Cour de cassation a déclaré que certains systèmes de croyances ne peuvent être admis en tant que religion et en a défini d'autres en contradiction avec les croyants concernés. Dans un cas comme dans l'autre, la Cour a fondé ses arrêts sur l'avis consultatif de la Direction des affaires religieuses (*Diyanet İşleri Başkanlığı*), organisme public avalisé par la Constitution qui régit les affaires entre l'État et l'islam. Un autre traitement discriminatoire concerne le statut des lieux de culte appartenant à des minorités religieuses non reconnues. L'État limitant la définition d'une minorité aux chrétiens orthodoxes arméniens et grecs ainsi qu'aux Juifs, les lieux de culte d'autres minorités religieuses ou confessionnelles (Aléviens et Protestants entre autres) ne sont, par extension, pas reconnus par la loi. Il en résulte que ces groupes se heurtent à d'immenses difficultés pour construire de nouveaux lieux de culte car les autorités leur refusent le permis de bâtir.

Le droit turc ne donne pas d'orientations claires et exhaustives en matière d'action positive. Sans l'affirmer explicitement en tant que tel, l'article 10 de la Constitution, révisé en 2010, introduit le principe de l'action positive dans la Constitution. Le nouvel article 10 dispose en effet que les mesures adoptées en vue d'assurer l'égalité entre les hommes et les femmes ainsi que les mesures en faveur des enfants, des personnes âgées, des personnes handicapées, des veuves, des orphelins de martyrs, d'invalides et de vétérans ne seront pas considérées comme un non-respect du principe d'égalité. L'article 61 de la Constitution exige pour sa part que l'État prenne des mesures de protection en faveur des personnes handicapées, des enfants et des personnes âgées. Sans que la législation les désigne sous le terme d'action positive, des mesures de ce type sont prévues par diverses lois et réglementations dans le domaine de l'enseignement, de l'emploi et de certains services (assurances sociales, transports, etc.).

#### **4. Champ d'application matériel**

La législation turque ne reflète pas le champ d'application matériel des directives. La protection contre la discrimination dans le cadre de l'emploi s'applique uniquement après que la relation de travail ait été établie, que ce soit dans le secteur privé ou dans le secteur public. Aucune loi spécifique ne régit la non-discrimination dans d'autres sphères de la vie publique, ni n'interdit la discrimination fondée sur la race ou l'origine ethnique dans tous les secteurs de la vie.

Le projet de loi antidiscrimination se caractérise par un vaste champ d'application matériel qui couvre la prestation de services en matière d'enseignement, de justice, de répression, de santé, de transports, de communication, de sécurité sociale, d'aide sociale, de sports, de logement, de culture et de tourisme. Son champ d'application s'étend en outre à la participation à la vie publique, y compris le droit de voter et d'être élu, l'accès aux bâtiments abritant des services publics et la liberté d'association. L'interdiction de discrimination s'applique à la fois aux personnes publiques et aux personnes privées.

## **5. Mise en application de la loi**

En l'absence d'organisme antidiscrimination (prévu dans le projet de loi antidiscrimination qui doit encore être adopté), les plaintes pour discrimination sont déposées auprès de juridictions civiles, administratives et pénales, ou en recourant à des dispositifs administratifs. En justice, les victimes de discrimination peuvent réclamer une indemnisation pour préjudice financier, pour perte de revenus et/ou pour préjudice moral. Des poursuites parallèles sont possibles devant des juridictions pénales, civiles ou administratives.

Il est admis en effet d'introduire une action civile en dommages-intérêts devant une juridiction civile ou du travail, une requête administrative ou une plainte au pénal. Si l'acte ou l'action discriminatoire est de nature administrative, la victime de discrimination est tenue de réclamer, avant de saisir la justice, une indemnisation de la part de l'instance administrative responsable de l'acte ou de l'action. Les décisions judiciaires sont, par définition, exécutoires. L'action en justice est la seule procédure permettant aux victimes d'être indemnisées, mais elle est onéreuse, l'octroi d'une assistance en justice est régi par des critères extrêmement stricts, et les arrêts ne sont pas rendus avant un ou deux ans. Lorsqu'une victime opte pour un règlement à l'amiable plutôt que pour une action en justice, les méthodes alternatives de règlement des litiges mises à sa disposition par le système juridique turc sont très limitées.

Hormis dans les affaires devant une juridiction pénale, les requérants doivent rassembler eux-mêmes les éléments probants permettant d'établir les faits et de démontrer le bien-fondé de leur cause – ce qui rend les poursuites extrêmement difficiles sans l'aide d'un avocat. Saisir la justice est une démarche onéreuse et des critères très stricts régissent l'octroi d'une assistance juridique. Les actions collectives n'existent pas. Les victimes de discrimination font le plus souvent appel à des organisations de défense des droits de l'homme et à des juristes pro bono pour obtenir une aide juridique.

La Turquie a reconnu en 2010 le droit au recours constitutionnel. Ce droit est limité au ressortissants turcs et l'objet du recours est limité aux droits et libertés protégés en vertu de la Constitution et relevant du champ d'application de la Convention européenne des droits de l'homme (CEDH) et de ses protocoles additionnels signés par la Turquie. Les personnes dont la plainte est jugée irrecevable se réservent le droit d'adresser une requête à la Cour européenne des droits de l'homme (CouEDH). La Cour constitutionnelle a commencé le 23 septembre 2012 d'être saisie de recours à l'encontre de mesures et décisions judiciaires passées en force de chose jugée. Plusieurs facteurs dissuadent d'introduire un recours constitutionnel: on peut citer à cet égard le délai de trente jours et les frais de requête, entre autres.

Une autre option offerte aux victimes de discrimination consiste à s'adresser à des instances non judiciaires telles que les conseils pour les droits de l'homme institués au niveau des provinces et des districts ou à la commission d'enquête sur les droits de l'homme de la Grande assemblée nationale turque – lesquels sont tous habilités à examiner les plaintes pour discrimination en matière d'emploi. Les conseils pour les droits de l'homme ne sont cependant pas indépendants de l'exécutif et ils restent largement sous-utilisés. Un nouveau mécanisme est en place depuis septembre 2012: il s'agit de l'Institution nationale turque pour les droits de l'homme, qui est chargée de la protection de ces droits mais qui n'a pas de compétence spécifique en matière de non-discrimination. Les décisions de ces différentes instances ne sont pas exécutoires et leurs pouvoirs contraignants sont faibles. Des inspecteurs du travail, des inspecteurs d'assurance et des inspecteurs scolaires sont également chargés de contrôler la conformité aux lois pertinentes. Les inspecteurs du travail et scolaires sont habilités à recevoir et à examiner des plaintes individuelles, y compris des allégations de non-respect des dispositions antidiscrimination de la loi sur le travail et de la loi sur l'éducation nationale.

Les associations/organisations/syndicats ne jouissent en Turquie que d'un droit très limité d'agir au nom de victimes de discrimination. Leur droit d'ester en justice au nom de leurs membres est lui aussi limité à certaines circonstances précises. Les organisations de défense des droits de l'homme et les organisations syndicales sont habilitées à déposer plainte auprès de l'Institution nationale turque pour les droits de l'homme, récemment instituée, au nom de victimes d'un non-respect de ces droits. Les associations/organisations/syndicats ne sont pas habilitées à agir en soutien de victimes de discrimination. Ils peuvent néanmoins inviter les procureurs à intenter des poursuites à l'encontre des auteurs d'infractions et intervenir dans des affaires pénales intentées par des procureurs généraux pour autant qu'ils soient en mesure de démontrer le préjudice causé par l'infraction. Des organisations LGBT demandent avec insistance depuis quelques années à intervenir dans des affaires pénales en cours pour agir au nom des victimes de crimes haineux et de crimes d'honneur. Si de nombreux tribunaux rejettent souvent ces demandes, on a assisté récemment à quelques cas dans lesquels ils ont répondu favorablement. Dans un arrêt marquant prononcé début 2015, la Cour constitutionnelle a autorisé plusieurs ONG à soumettre un mémoire en qualité d'*amicus curiae* dans une affaire en instance de disparition forcée.<sup>31</sup> Bien qu'il ne s'agisse pas d'une affaire de discrimination et que la partie requérante n'ait pas introduit de recours pour discrimination, la décision de la Cour d'accepter l'intervention d'un *amicus curiae* de la société civile crée un précédent majeur sur lequel s'appuieront probablement les organisations de la société civile pour soutenir des victimes de discrimination.

Le droit national turc autorise un renversement de la charge de la preuve de la partie requérante vers la partie défenderesse. La loi sur le travail prévoit que cette charge incombe au salarié en cas de non-respect du principe d'égalité, mais que si le salarié expose une situation suggérant une forte probabilité quant à l'existence d'une infraction de ce type, c'est à l'employeur qu'il incombe alors de prouver que tel n'est pas le cas.

Les sanctions en cas de discrimination varient. Lorsqu'il s'agit de discrimination en matière d'emploi, les employeurs sont condamnés à une amende et les salariés peuvent réclamer une indemnité allant jusqu'à quatre mois de rémunération plus d'autres prestations dont ils ont été privés. En cas de résiliation illégale d'un contrat de travail (pour cause de discrimination entre autres), l'employeur doit rétablir le salarié dans ses fonctions dans un délai d'un mois; faute de cette réintégration, le salarié a droit à une indemnité représentant entre quatre et huit mois de rémunération. Lorsque la discrimination constitue une violation du code pénal, la sanction est une peine d'emprisonnement pouvant aller jusqu'à trois ans sans aucune possibilité de convertir cette condamnation en amende. Lorsque des fonctionnaires commettent des faits de discrimination, la sanction est une suspension de promotion pendant une période de un à trois ans. Les inspecteurs du travail, les inspecteurs

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<sup>31</sup> Turquie, Cour constitutionnelle (*Anayasa Mahkemesi*), requête n° 2013/2640, 8 avril 2013.

d'assurance et les inspecteurs scolaires, de même que certains représentants de l'exécutif (dans le domaine de la protection des consommateurs), peuvent prendre des sanctions administratives et pécuniaires.

Parmi les cinq motifs couverts par les directives 2000/43/CE et 2000/78/CE, la législation nationale turque prévoit uniquement une action positive en faveur des personnes handicapées et des personnes âgées. Il existe cependant, bien qu'elles ne soient pas désignées en tant que telles par la législation, plusieurs lois et réglementations prévoyant des mesures d'action positive dans les domaines de l'éducation, de l'emploi et d'une série de services (assurances sociales, transports, etc.), y compris des quotas concernant les personnes handicapées. Aucune action positive n'est prévue à l'intention des Roms, bien que le gouvernement se soit engagé, lors du lancement de son initiative en leur faveur, à améliorer leurs conditions d'emploi, d'enseignement et de logement.

Le gouvernement élabore des politiques, conçoit des lois et adopte des mesures d'exécution en matière de droits de l'homme et de non-discrimination sans consulter d'ONG ou, dans les rares cas où il le fait, sans tenir compte de leurs suggestions ou critiques. Cet état de fait a été illustré récemment encore par la préparation du plan d'action pour la prévention des violations de la Convention européenne des droits de l'homme, qui a été adopté en mars 2014 sans la moindre implication de la société civile.

## **6. Organismes de promotion de l'égalité de traitement**

La Turquie ne s'est dotée d'aucun «organisme spécialisé» pour la promotion de l'égalité de traitement sans distinction de race ou d'origine ethnique conformément à l'article 13 de la directive sur l'égalité raciale. L'Institution nationale turque pour les droits de l'homme est sans doute ce qui se rapproche le plus d'un organisme pour l'égalité: instituée le 21 juin 2012, elle a pour mission générale de protéger les droits fondamentaux et d'en prévenir le non-respect, mais elle n'a pas pour compétence spécifique d'examiner les plaintes pour discrimination. Le gouvernement turc a assuré au Comité des Nations unies pour l'élimination de la discrimination raciale que l'Institution nationale pour les droits de l'homme est dotée d'un vaste mandat au regard de la protection et de la promotion des droits de l'homme et «qu'il va de soi que le mandat couvre la lutte contre la discrimination raciale».<sup>32</sup> Les personnes physiques et les personnes morales peuvent, en cas de discrimination, déposer plainte à l'encontre de particuliers, d'entités juridiques privées et d'institutions publiques. Les organisations de défense des droits de l'homme et les syndicats peuvent introduire des requêtes au nom des victimes, de leur propre initiative ou pour le compte de victimes dont elles ont reçu des plaintes. L'Institution peut elle aussi ouvrir une enquête de sa propre initiative lorsqu'elle constate «les signes d'une infraction». Les requêtes peuvent être adressées gratuitement à l'Institution pour les droits de l'homme, mais des ONG nationales et internationales, de même que des organes des Nations unies, critiquent son manque d'indépendance ainsi qu'un non-respect des principes de Paris. L'Institution du Médiateur, également créée en juin 2012, est chargée pour sa part d'examiner les actes et interventions de l'administration et de formuler des suggestions afin que cette dernière agisse conformément aux principes des droits fondamentaux, de la justice et de la primauté du droit. L'Institution du Médiateur a commencé de recevoir des plaintes en mars 2013. Alors qu'elle pourrait également assumer la fonction d'organisme indépendant en matière de discrimination raciale, l'Institution du Médiateur n'est pas compétente pour mener des enquêtes de sa propre initiative et certaines préoccupations ont été exprimées quant à son impartialité et sa neutralité, comme le constate l'ECRI. Si l'Institution pour les droits de l'homme et l'Institution du Médiateur ne sont pas habilitées à aider des victimes à introduire des

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<sup>32</sup> Nations unies, Comité pour l'élimination de la discrimination raciale (CERD) (2014), *Examen des rapports soumis par les États parties en application de l'article 9 de la Convention, Quatrième à sixième rapports périodiques des États parties attendus en 2013: Turquie*, CERD/C/TUR/4-6, p. 12, disponible sur [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=fr](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=fr).

recours pour discrimination, l'organisme pour l'égalité envisagé dans le cadre du projet de loi antidiscrimination est chargé «d'apporter tout type d'assistance à ceux qui allèguent avoir été victimes de discrimination».<sup>33</sup>

## 7. Points essentiels

- La Turquie ne s'est toujours pas dotée d'une loi antidiscrimination ni d'un organisme spécialement chargé de promouvoir l'égalité et la non-discrimination. Le projet de loi de 2009 sur la lutte contre la discrimination et la création d'un conseil pour l'égalité est toujours en instance au niveau du cabinet du Premier ministre.
- Plusieurs lois interdisant la discrimination ont un champ matériel et personnel limité; et, surtout, l'âge, l'orientation sexuelle et l'origine ethnique ne figurent pas dans la liste des motifs interdits de discrimination en vertu du droit turc.
- L'action positive introduite dans la Constitution en 2010 se limite aux personnes handicapées et aux personnes âgées.
- Les discours et comportements discriminatoires et haineux envers les minorités, et plus particulièrement envers les Roms, les personnes LGBTI, les Kurdes et les non-Musulmans (les Juifs surtout), sont omniprésents dans la vie courante, dans le débat politique et dans les médias.
- Les autorités judiciaires se montrent notoirement réticentes à faire appliquer la législation existante interdisant le discours haineux et la discrimination.
- Les diverses initiatives gouvernementales lancées avec l'objectif déclaré d'améliorer la situation des Kurdes, des Roms et des Alévis, ne se sont concrétisées par aucun résultat tangible en termes d'actions ou de mesures législatives visant à remédier à la discrimination à laquelle ces groupes se trouvent confrontés dans les domaines de l'éducation, de l'emploi, du logement, de l'accès aux services sociaux et de la liberté de religion.
- Les arrêts de la Cour européenne des droits de l'homme à l'encontre des cours de religion obligatoires,<sup>34</sup> de la non-reconnaissance des lieux de culte alévis et de l'exclusion de ces lieux de culte des avantages sociaux accordés aux mosquées,<sup>35</sup> et de la mention obligatoire de la religion sur les cartes d'identité officielles<sup>36</sup> demeurent sans effet.
- La Turquie reste le seul membre du Conseil de l'Europe à ne pas reconnaître le droit à l'objection de conscience des personnes qui refusent de servir dans l'armée en raison de leurs convictions religieuses ou politiques/philosophiques. Les trois arrêts distincts prononcés par la CouEDH sur cette question restent sans suite.<sup>37</sup>
- L'Institution pour les droits de l'homme, récemment instituée en Turquie et qui se rapproche le plus d'un organisme pour la promotion de l'égalité, n'est pas suffisamment indépendante de l'exécutif et ne respecte pas les principes de Paris (Nations unies).

<sup>33</sup> Article 6, paragraphe 2 sous c), du projet de loi antidiscrimination.

<sup>34</sup> CouEDH, *Mansur Yalcin et autres c. Turquie*, requête n° 21163/11, 16 septembre 2014; CouEDH, *Hasan et Eylem Zengin*, requête n° 1448/04, 9 janvier 2007.

<sup>35</sup> CouEDH, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı c. Turquie*, requête n° 32093/10, 2 décembre 2014.

<sup>36</sup> CouEDH, *Sinan Işık c. Turquie*, requête n° 21924/05, 2 février 2010.

<sup>37</sup> CouEDH, *Buldu et autres c. Turquie*, n° 14017/08, 3 juin 2014; CouEDH, *Tarhan c. Turquie*, requête n° 9078/06, 17 juillet 2012; CouEDH, *Savda c. Turquie*, requête n° 42730/05, 12 juin 2012.

- Le gouvernement continue d'élaborer des politiques, de concevoir des lois et d'adopter des mesures exécutives en matière de droits fondamentaux et de non-discrimination sans consulter les ONG ou, dans les rares cas où il le fait, sans prendre leurs suggestions ou critiques en compte. La préparation du plan d'action pour la prévention des violations de la Convention européenne des droits de l'homme, adopté en mars 2014<sup>38</sup> sans aucune implication de la société civile, en est un exemple récent.

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<sup>38</sup> Turquie, Plan d'action pour la prévention des violations de la Convention européenne des droits de l'homme (*Avrupa İnsan Hakları Sözleşmesi İhlallerinin Önlenmesine İlişkin Eylem Planı*), Journal officiel, n° 28929, 1<sup>er</sup> mars 2014, disponible sur: <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/03/20140301.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/03/20140301.htm>.

## ZUSAMMENFASSUNG

### 1. Einleitung

Die Türkei ist eine multiethnische, multireligiöse und mehrsprachige Gesellschaft. Es liegen keine offiziellen Daten über die Zusammensetzung der Bevölkerung hinsichtlich der ethnischen Zugehörigkeit, Konfession und Muttersprache vor, da die Regierung seit 1960 im Zuge von Volkszählungen von solchen Fragen absieht. Gemäß des 1923 mit den Alliierten unterzeichneten Friedensvertrags von Lausanne gewährte die türkische Regierung nicht-muslimischen Minderheiten widerwillig den Minderheitenstatus, wobei daraufhin de facto der Schutz auf Juden und armenische sowie griechisch-orthodoxe Christen beschränkt wurde und andere nicht-muslimische Gruppen, wie syrische und evangelische Christen, ausgegrenzt wurden. Im Jahr 2013 wurde diese offizielle Minderheitenpolitik zum ersten Mal von einer Vorinstanz durch die Entscheidung angefochten, dass der Vertrag von Lausanne allen nicht-muslimischen Bürgern den Minderheitenstatus und entsprechende Rechte gewährt.<sup>39</sup> In der Entscheidung ging es darum, dass das Ministerium für Nationale Bildung einen Antrag der syrischen Gemeinde auf einen Kindergarten, in dem die Kinder auch ihre Muttersprache erlernen sollten, abgelehnt hatte. Aufgrund der breit angelegten Begründung, die zu dem Ergebnis kam, dass nach dem Friedensvertrag von Lausanne alle nicht-muslimischen Gemeinden Anspruch auf Minderheitenrechte haben, wird die Entscheidung wahrscheinlich von anderen nicht-muslimischen Gruppen herangezogen werden, um gegen staatliche Entscheidungen vorzugehen.

Während sich die Politik der Nichtanerkennung gegenüber den Kurden, der größten Minderheit des Landes, in den letzten Jahren geändert hat, verweigert die Regierung weiterhin die rechtliche oder politische Anerkennung der Alewiten, der größten religiösen Minderheit, deren Interpretation des Islam sich von der sunnitischen Mehrheit unterscheidet. Trotz der Urteile des Europäischen Gerichtshofs für Menschenrechte (EGMR), dass es sich bei der Nichtanerkennung der Gebetsstätten der Alewiten<sup>40</sup> und dem obligatorischen Religionsunterricht<sup>41</sup> um eine Verletzung des Rechts auf Religionsfreiheit handelt, weigert sich die Regierung, ihrer Assimilationspolitik ein Ende zu setzen. Am 2. März 2015 erhob zum Beispiel der Distrikt-Gouverneur (*kaymakam*) von Maltepe (Provinz Istanbul) Klage gegen die Entscheidung des demokratisch gewählten Gemeinderats von Maltepe, den *cemevis*<sup>42</sup> innerhalb des Distrikts den Status einer „Gebetsstätte“ zu gewähren.<sup>43</sup> Die Entscheidung, so der Gouverneur, stelle eine Bedrohung für die „Einheit“ des Volkes dar, würde zu „irreparablen Spaltungen im sozialen Leben“ führen, der Gemeinderat sei nicht befugt, den *cemevis* den Status von Gebetsstätten zu verleihen und die Entscheidung verstoße gegen den in Artikel 2 der Verfassung verankerten Grundsatz des Laizismus.<sup>44</sup> Weitere, bisher nicht umgesetzte Urteile des EGMR beziehen sich auf die Wehrdienstverweigerung aus Gewissensgründen,<sup>45</sup> die von der Türkei bisher nicht anerkannt wurde, dem einzigen Land im Europarat, das den Zivildienst nicht als Alternative anbietet. Sowohl Zeugen Jehovas als auch politisch motivierte

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<sup>39</sup> Europäische Kommission (2013), *Turkey Progress Report*, Brüssel, S. 61, verfügbar unter: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf) (letzter Zugriff auf alle Hyperlinks am 20. Juli 2016).

<sup>40</sup> EGMR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, Nr. 32093/10, 2. Dezember 2014.

<sup>41</sup> EGMR, *Mansur Yalcin and Others v. Turkey*, Nr. 21163/11, 16. September 2014; EGMR, *Hasan and Eylem Zengin*, Nr. 1448/04, 9. Januar 2007.

<sup>42</sup> *Cemevis* sind die Gebetsstätten der alevitischen Glaubensgemeinschaft. Entsprechend ihrer Auslegung des Islam gehen Alewiten nicht in die Moschee, sondern beten in *cemevis*.

<sup>43</sup> In der Türkei werden die Bürgermeister und Gemeinderäte gewählt, während Gouverneure und Distrikt-Gouverneur von der Zentralregierung ernannt werden und sich nach offiziellen Vorgaben und Beschlüssen richten.

<sup>44</sup> Die Klage des Distrikt-Gouverneurs wurde aufgrund von Nachrichtenmeldungen vom 30. April 2015 öffentlich bekannt.

<sup>45</sup> EGMR, *Buldu and Others v. Turkey*, Nr. 14017/08, 3. Juni 2014; EGMR, *Tarhan v. Turkey*, Nr. 9078/06, 17. Juli 2012; EGMR, *Savda v. Turkey*, Nr. 42730/05, 12. Juni 2012.



Wehrdienstverweigerer (Pazifisten und Totalverweigerer), werden noch immer einem Kreislauf von Strafverfolgung, Inhaftierung und Zwangsrekrutierung unterworfen.

Nicht-muslimische Minderheiten, auch die offiziell anerkannten, sehen sich mit erheblichen Einschränkungen ihrer Religionsfreiheit konfrontiert. Die wichtigsten Probleme in diesem Zusammenhang bestehen darin, dass aufgrund eines Mangels an theologischen Schulen kein Klerus ausgebildet werden kann und dass sich die Regierung weigert, eine Genehmigung für die Eröffnung neuer Kirchen (für nicht anerkannte christliche Konfessionen) zu gewähren. Obwohl sich die Gesamtzahl der Menschen der verschiedenen nicht-muslimischen Gemeinschaften in einem Land mit einer Bevölkerung von 75 Millionen auf etwa 100.000 beläuft, herrscht weit verbreitete, teils durch Verschwörungstheorien befeuerte, teils irrationale Angst vor christlicher Missionstätigkeit und Zionismus in der Gesellschaft, geschürt durch die antisemitische, antiwestliche und antichristliche Rhetorik der Politiker, Regierungsbeamten, Meinungsbildner und Medien. Die Behörden vernachlässigen ihre Pflicht vollkommen, Nicht-Muslime, vor allem Juden, gegen vorherrschende Hassreden, manchmal verbunden mit Hassverbrechen, in den Medien, dem politischen Diskurs und dem täglichen Leben zu schützen.

Es herrscht eine weit verbreitete Diskriminierung von Roma, Kurden und LGBTI-Personen in den Bereichen Bildung, Beschäftigung, Gesundheitsversorgung, Zugang zu Wohnraum und Dienstleistungen. Jüngste Initiativen der Regierung zur Lösung einiger dieser Probleme – u. a. Treffen mit Vertretern der Roma und Kurden sowie Zusagen, die Probleme dieser Gemeinschaften anzugehen – haben zu keinen greifbaren Ergebnissen geführt. LGBTI-Personen, insbesondere transsexuelle Menschen, sehen sich nicht nur systematischer Diskriminierung, sondern auch physischer Bedrohung, einschließlich Todesgefahr, ausgesetzt.<sup>46</sup> Die Regierung weigert sich, die sexuelle Orientierung als Grund der Diskriminierung aufzunehmen, findet Homosexualität anstößig und vermeidet es, den Forderungen nach Anerkennung von LGBTI-Personen zu entsprechen. Hierbei handelt es sich um eine weit verbreitete Haltung in der gesamten türkischen Gesellschaft und aufgrund einer Kombination von Religiosität und Konservatismus wird in der Öffentlichkeit nicht über Homosexualität besprochen. Obwohl Homosexualität in der Türkei zu keinem Zeitpunkt eine Straftat darstellte, nutzen Behörden und Privatpersonen das amorphe Konzept der „öffentlichen Moral“, um LGBTI-Personen aus Beschäftigungen zu entlassen, ihnen Wohnraum zu verweigern und sie strafrechtlich zu verfolgen sowie ihre zivilgesellschaftlichen Organisationen schließen zu lassen.

Regierungsvertreter, Beamte und Politiker machen routinemäßig ungestraft diskriminierende Aussagen gegen LGBTI-Menschen, Nicht-Muslime, Roma und Kurden, die ungestraft bleiben. Die Berichterstattung in den Massenmedien ist gegenüber Minderheiten notorisch hasserfüllt. Allerdings werden die Gesetze gegen Aufstachelung zum Hass von den Justizbehörden nicht durchgesetzt. Eine Ausnahme bildet ein Gerichtsurteil vom 23. Dezember 2015, in dem es um den Lynchversuch eines Mobs gegen eine Gruppe von Roma im Jahr 2010 ging. 38 der 80 Angeklagten wurden vom Gericht der Anstachelung zu Feindseligkeit oder Hass und der Verunglimpfung nach Artikel 216 des türkischen Strafgesetzbuchs für schuldig befunden und zu Freiheitsstrafen zwischen 8 Monaten und 45 Jahren verurteilt.

## **2. Wichtigste Gesetze**

Es gibt in der Türkei keine spezifische Gesetzgebung in Bezug auf Antidiskriminierung oder Gleichbehandlung. Da die Türkei kein Mitglied der Europäischen Union ist, wurden die Richtlinien 2000/43/EG und 2000/78/EG nicht umgesetzt. Es gibt einen Gesetzesentwurf zur Bekämpfung von Diskriminierung und zur Einrichtung eines Gleichstellungsrates, der im Jahr 2009 von der Regierung vorbereitet und im Jahr 2010 für die öffentliche Diskussion vorgelegt wurde. Der Entwurf geht offenbar auf die europäischen Richtlinien und

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<sup>46</sup> Es gibt keine öffentlich zugänglichen Zahlen zu diesen Verbrechen.

Erfahrungen zurück. Sowohl die Liste der verbotenen Gründe als auch der sachliche Anwendungsbereich des Entwurfs sind umfassender als die Richtlinien. Aus Mangel an politischem Willen wurde der Gesetzesentwurf, mehr als sechs Jahre nach seiner Ausarbeitung, noch nicht verabschiedet.

Die verfassungsrechtliche Grundlage des Rechtsrahmens für die Gleichstellung und Antidiskriminierung liegt in Artikel 10 der Verfassung, der eine nicht erschöpfende Liste der genannten geschützten Diskriminierungsgründe umfasst. Seit 2010 ermöglicht diese Klausel positive Maßnahmen zugunsten von Frauen, älteren Menschen und Menschen mit Behinderungen. Gemäß Artikel 90 der Verfassung sind ordnungsgemäß ratifizierte internationale Verträge rechtskräftig. Wenn ein Vertrag „selbstvollziehend“ ist, dann ist dieser unmittelbar anwendbar. Im Falle eines Konflikts zwischen innerstaatlichen Gesetzen und ordnungsgemäß umgesetzten internationalen Verträgen über Grundrechte und Freiheiten haben die Bestimmungen der internationalen Abkommen Vorrang. Es kann keine Beschwerde bezüglich der Verfassungswidrigkeit von internationalen Verträgen an das Verfassungsgericht gerichtet werden. Die Türkei ist Vertragspartei in einer Vielzahl internationaler Abkommen, die Bestimmungen zu Antidiskriminierung und Gleichbehandlung enthalten, und hat im Rahmen vieler dieser Verträge das Recht auf Beschwerden von Einzelpersonen anerkannt, mit Ausnahme des Übereinkommens zur Beseitigung jeder Form von Rassendiskriminierung. Zudem hat die Türkei das Kollektivbeschwerdeverfahren im Rahmen der revidierten Europäischen Sozialcharta bisher nicht akzeptiert. Positiv ist, dass die Türkei am 26. März 2015 das Fakultativprotokoll zum Übereinkommen über die Rechte von Menschen mit Behinderungen ratifiziert hat, so dass Personen und Gruppen, die ihrer Gerichtsbarkeit unterstehen, Beschwerden beim UN-Ausschuss für die Rechte von Menschen mit Behinderungen einreichen können.<sup>47</sup>

Das Gesetz über Personen mit Behinderungen bietet den umfassendsten Schutz vor Diskriminierung des türkischen Rechts, wenn auch ausschließlich aus Gründen der Behinderung. Darüber hinaus enthalten verschiedene Gesetze entsprechende Vorschriften zum Verbot der Diskriminierung auf der Grundlage der unterschiedlichen geschützten Gründe, darunter das Arbeitsrecht, das Strafgesetzbuch und das Gesetz für nationale Erziehung. Herkunft, Alter, sexuelle Identität und sexuelle Orientierung werden in keiner der Rechtsvorschriften oder in der Verfassung genannt. Zwar enthielt der Gesetzesentwurf zur Bekämpfung von Diskriminierungen zunächst sexuelle Identität und sexuelle Orientierung als verbotene Diskriminierungsgründe, jedoch wurden Verweise auf diese Konzepte still und leise von der Regierung entfernt, nachdem der Gesetzesentwurf zur öffentlichen Diskussion vorgelegt wurde.

Im März 2014 führte das türkische Parlament zum ersten Mal Hassverbrechen in den türkischen Rechtsrahmen ein (wenn auch mit begrenztem sachlichem Anwendungsbereich).<sup>48</sup> Während Staatsangehörigkeit in die Liste der verbotenen Diskriminierungsgründe aufgenommen wurde, wurde der offene Charakter des Diskriminierungsverbots aufgehoben und die gerichtliche Erweiterung des Schutzes auf Grund der sexuellen Orientierung, des Alters und der ethnischen Zugehörigkeit ausgeschlossen. Im Februar 2014 wurde Diskriminierung aufgrund einer Behinderung in die Antidiskriminierungsklauseln des Gesetzes für nationale Erziehung und des Arbeitsgesetzes aufgenommen.<sup>49</sup>

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<sup>47</sup> Die Türkei hatte das Fakultativprotokoll am 28. September 2009 unterzeichnet.

<sup>48</sup> Türkei, Gesetz über die Änderung verschiedener Gesetze mit dem Ziel der Förderung der Grundrechte und Freiheiten, Nr. 6529 (*Temel Hak ve Hürriyetlerin Geliştirilmesi Amacıyla Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun*), 2. März 2014, verfügbar unter: <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/03/20140313.htm>.

<sup>49</sup> Türkei, Gesetz über Änderungen des Dekrets mit Gesetzesrang über die Organisation und Aufgaben des Ministeriums für Familie und Sozialpolitik und von einigen Gesetzen und Verordnungen mit Gesetzesrang (Nr. 6518) (*Aile ve Sosyal Politikalar Bakanlığının Teşkilat ve Görevleri Hakkında Kanun Hükmünde Kararname ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 6. Februar 2014, verfügbar unter <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6518.pdf>.

### 3. Wichtigste Grundsätze und Begriffe

Verschiedene Gesetze, die Diskriminierung verbieten, enthalten keine Definition der jeweiligen Diskriminierungsgründe, mit Ausnahme von Behinderung. Alter, ethnische Zugehörigkeit, sexuelle Identität und sexuelle Orientierung werden in keiner der oben genannten gesetzlichen Bestimmungen unter den verbotenen Gründen aufgeführt. Behinderung wird explizit nur im türkischen Strafgesetzbuch, im Gesetz über Personen mit Behinderungen und seit Februar 2014 im Arbeitsrecht und dem Gesetz über nationale Erziehung erwähnt.

Die Gesetzgebung zum Verbot der Diskriminierung ist allgemeiner Natur und bezieht sich nicht auf verschiedene Arten von Diskriminierung. Es gibt ein paar Gesetze, die direkte und indirekte Diskriminierung explizit verbieten, jedoch innerhalb eines eingeschränkten sachlichen Anwendungsbereichs. Das Arbeitsrecht verbietet sowohl direkte als auch indirekte Diskriminierung, jedoch nur in Bezug auf Geschlecht und Schwangerschaft. Im Februar 2014 führten Änderungen des Gesetzes über Personen mit Behinderung zum ersten Mal Definitionen der unmittelbaren Diskriminierung, mittelbaren Diskriminierung sowie angemessene Vorkehrungen und ein explizites Verbot der mittelbaren Diskriminierung in den türkischen Rechtsrahmen ein. Die Definition von Behinderung desselben Gesetzes wurde in Übereinstimmung mit den EU-Richtlinien überarbeitet.

Jedoch geben verschiedene Gesetze und Vorschriften im Zusammenhang mit der Bereitstellung von Leistungen und positiven Maßnahmen für Personen mit Behinderungen weiterhin ihre eigenen Definitionen von Behinderung bzw. Kriterien dafür. Weiterhin kann Behinderung als ein negativer Aspekt hinsichtlich des Ausschlusses von Personen aus bestimmten Berufen angegeben werden. Diskriminierung durch Assoziierung, Belästigung und Anweisung zur Diskriminierung werden weder definiert noch ausdrücklich untersagt. Viktimisierung wird nur sehr begrenzt verboten. Das Gesetz schweigt zu Ausnahmen.

Der nationale Rechtsrahmen ignoriert sexuelle Orientierung vollkommen, was auch im Fehlen jeglicher Bestimmungen zutage tritt, die Homosexualität und bisexuelles bzw. transsexuelles Verhalten unter Strafe stellen. Allerdings liegt eine weit verbreitete und systematische Diskriminierung von LGBTI-Personen vor, die entweder von den eklatant diskriminierenden Texten der Rechts- und Verwaltungsvorschriften bzw. deren diskriminierender Auslegung und Anwendung durch die Justiz herrührt.

Während Religion nicht in der Verfassung oder den Gesetzen definiert ist, gibt es Rechtsprechung betreffend der Definition von Religion im Allgemeinen und im Besonderen des Islam/der Muslime. In einer wachsenden Anzahl von Urteilen entschied der Kassationshof, dass manche Glaubenssysteme nicht als Religion gelten und definierte anderen abweichend davon, wie dies Gläubige dieser Religion tun würden. In beiden Fällen gehen die Urteile des Gerichts von den Gutachten der Direktion für religiöse Angelegenheiten (*Diyanet İşleri Başkanlığı*) aus, einer verfassungsrechtlich unterstützten öffentlichen Einrichtung, die Angelegenheiten zwischen dem Staat und dem Islam regelt. Eine weitere Diskriminierung betrifft den Status der Gebetsstätten von nicht anerkannten religiösen Minderheiten. Aufgrund der staatlichen Beschränkung der Definition von Minderheit auf armenische und griechisch-orthodoxe Christen sowie Juden werden die Gebetsstätten anderer religiöser oder konfessioneller Minderheiten wie Alewiten und Protestanten gesetzlich nicht anerkannt. Infolgedessen stehen diese Gruppen beim Bau neuer Gebetsstätten vor extremen Schwierigkeiten, da sich die Behörden weigern, entsprechende Baugenehmigungen zu erteilen.

Im türkischen Recht liegen keine klaren und umfassenden Leitlinien für positive Maßnahmen vor. Obwohl nicht explizit als solches benannt, führte der im Jahr 2010 überarbeitete Artikel 10 der Verfassung den Grundsatz der positiven Maßnahmen in die Verfassung ein. Der neue Artikel 10 sieht vor, dass Maßnahmen für die Gleichstellung von Frauen und Männern ergriffen werden sollen sowie dass für Kinder, ältere Menschen,

Menschen mit Behinderungen, Witwen und Waisen von Märtyrern, Invaliden und Veteranen ergriffene Maßnahmen nicht als Verstoß gegen den Grundsatz der Gleichbehandlung angesehen werden können. Artikel 61 der Verfassung verlangt, dass der Staat entsprechende Schutzmaßnahmen für Menschen mit Behinderungen, Kinder sowie ältere Menschen ergreift. Es gibt eine Reihe von Gesetzen und Verordnungen, die positive Maßnahmen in den Bereichen Bildung, Beschäftigung und bei einer Reihe von Dienstleistungen (Sozialversicherung, Transport etc.) vorsehen, obwohl diese nicht als positive Maßnahmen in den Rechtsvorschriften benannt werden.

#### **4. Sachlicher Anwendungsbereich**

Der sachliche Anwendungsbereich der Richtlinien spiegelt sich nicht in türkischen Rechtsvorschriften wider. Der Schutz vor Diskriminierung in der Beschäftigung gilt nur, nachdem das Arbeitsverhältnis bereits besteht. Dies gilt sowohl für den privaten als auch den öffentlichen Sektor. Es gibt keine geltenden Gesetze gegen Diskriminierung in anderen Bereichen des öffentlichen Lebens oder ein Verbot von Diskriminierung aufgrund der ethnischen Zugehörigkeit und Rasse in allen Lebensbereichen.

Der Gesetzesentwurf zur Bekämpfung von Diskriminierungen verfügt über einen breiten sachlichen Anwendungsbereich, der die Erbringung von Dienstleistungen in den Bereichen Bildung, Justiz, Strafverfolgung, Gesundheitswesen, Transport, Kommunikation, Sozialdienste, Sozialversicherung, Sozialhilfe, Sport, Unterkunft, Kultur und Tourismus umfasst. Der Anwendungsbereich des Gesetzesentwurfs erstreckt sich zudem auf die Teilnahme am öffentlichen Leben, darunter das Stimm- und Wahlrecht, den Zugang zu Gebäuden, in denen öffentliche Dienstleistungen erbracht werden sowie das Recht auf Vereinigungsfreiheit. Die Diskriminierungsverbote binden sowohl öffentliche als auch private Personen.

#### **5. Rechtsdurchsetzung**

In Abwesenheit einer Antidiskriminierungsstelle (die im Entwurf des Antidiskriminierungsgesetzes vorgesehen ist, jedoch noch nicht eingeführt wurde), werden Verfahren wegen Ungleichbehandlung in Zivil-, Verwaltungs- und Strafgerichten sowie Verwaltungsmechanismen bearbeitet. Vor Gericht können Opfer von Diskriminierung Entschädigungen für Vermögensschäden, entgangenen Gewinn und/oder Schadenersatz und Schmerzensgeld fordern. Parallele Verfahren sind in Straf-, Zivil- oder Verwaltungsgerichten möglich.

Personen können zeitgleich eine zivilrechtliche Schadenersatzforderung in Zivil- oder Arbeitsgerichten, eine verwaltungsrechtliche oder eine strafrechtliche Beschwerde anstrengen. Sollte eine diskriminierende Handlung oder Aktion administrativer Natur sein, muss das Diskriminierungsopfer eine Entschädigung von der für die Aktion verantwortlichen Verwaltungsbehörde fordern, bevor die Sache vor Gericht gebracht wird. Die Entscheidungen der Gerichte sind per Definition verbindlich. Zwar sind Gerichtsverfahren die einzig möglichen Vorgehensweisen für Opfer, um eine Entschädigung zu erhalten, jedoch sind diese kostspielig, die Vergabe von Prozesskostenhilfe unterliegt sehr strengen Kriterien und Fälle werden erst nach ein oder zwei Jahren entschieden. Wenn ein Opfer eine gütliche Beilegung anstatt einer Klage wünscht, sind die alternativ angebotenen Streitbeilegungsverfahren im Rechtssystem der Türkei sehr begrenzt.

Außer in Fällen, die vor Strafgerichten verhandelt werden, müssen Prozessparteien selbst Beweise sammeln, um den Tatbestand zu belegen und ihre Ansprüche nachzuweisen, was die Verfolgung eines Falls ohne die Unterstützung eines Anwalts extrem schwierig gestaltet. Die Einreichung einer Klage ist kostspielig und Prozesskostenhilfe wird nur unter sehr strengen Kriterien zur Verfügung gestellt. Sammelklagen sind nicht möglich. Opfer von Diskriminierung wenden sich in den meisten Fällen an Menschenrechtsorganisationen und Rechtsanwälte, die kostenlose juristische Unterstützung leisten.

Im Jahr 2010 erkannte die Türkei das Recht auf Verfassungsbeschwerde an. Dieses Recht ist auf türkische Staatsangehörige beschränkt und der Umfang der Beschwerde ist auf die Rechte und Freiheiten im Rahmen der Verfassung begrenzt, die in den Rahmen der Europäischen Menschenrechtskonvention (EMRK) und ihrer Zusatzprotokolle fallen, denen die Türkei angehört. Personen, deren Beschwerden für unzulässig erklärt werden, können eine Petition an den Europäischen Gerichtshof für Menschenrechte (EGMR) richten. Seit dem 23. September 2012 erhält das Verfassungsgericht Beschwerden gegen rechtskräftige gerichtliche Entscheidungen und Handlungen. Es gibt abschreckende Maßnahmen für die Einreichung einer Verfassungsbeschwerde, wie die 30-Tage-Frist und die Überprüfungsgebühr.

Eine weitere Option besteht für die Opfer von Diskriminierung darin, einen Antrag bei nichtjuristischen Organen zu stellen, wie den Menschenrechtsausschüssen auf Provinz- und Kreisebene und der Kommission zur Untersuchung von Menschenrechtsverletzungen der Großen Nationalversammlung der Türkei, die befugt sind, Beschwerden über Diskriminierung im Beschäftigungsbereich nachzugehen. Allerdings sind Menschenrechtsausschüsse nicht von der Exekutive unabhängig und werden kaum genutzt. Seit September 2012 gibt es die Menschenrechtsinstitution der Türkei und somit einen neuen Mechanismus mit einem Mandat für die Wahrung der Menschenrechte, jedoch besitzt dieser keine spezifische Kompetenz im Bereich der Antidiskriminierung. Die Beschlüsse dieser Organe sind unverbindlich und ihre Vollstreckungsbefugnisse sind gering. Es gibt zudem Arbeitsinspektoren, Versicherungsinspektoren und Schulinspektoren, die mit der Überprüfung der Einhaltung der jeweiligen Gesetze beauftragt sind. Arbeits- und Schulinspektoren verfügen über die Kompetenz, um individuelle Beschwerden zu empfangen und zu überprüfen, auch solche, die einen Verstoß gegen die Antidiskriminierungsbestimmungen des Arbeitsgesetzes und des Gesetzes über die nationale Erziehung darstellen.

In der Türkei erhalten Verbände/Organisationen/Gewerkschaften nur sehr begrenzte Befugnis, im Namen von Diskriminierungsopfern zu handeln. Sie verfügen zudem über begrenzte Klagebefugnis und können nur unter bestimmten Umständen im Namen ihrer Mitglieder handeln. Menschenrechtsorganisationen und Gewerkschaften haben Befugnis, um Beschwerden im Namen der Opfer von Menschenrechtsverletzungen bei der neu gegründeten Menschenrechtsinstitution der Türkei einzureichen. Verbände/Organisationen/Gewerkschaften sind nicht berechtigt, Opfer von Diskriminierung zu unterstützen. Jedoch können sie Staatsanwälte ernennen, um die Täter strafrechtlich zu verfolgen und sie können in Strafverfahren eingreifen, die durch die Staatsanwaltschaft eingeleitet wurden, sofern „Schaden durch das Verbrechen“ nachgewiesen werden kann. In den vergangenen Jahren begannen LGBTI-Organisationen konsequent zu fordern, dass sie in laufende Strafverfahren mit einbezogen werden, um im Namen der Opfer von Hassverbrechen und Ehrenmorden zu handeln. Während Gerichte solche Forderungen in vielen Fällen ablehnen, gab es vor kurzem wenige Fälle, in denen von den Gerichten eine positive Antwort erteilt wurde. In einer wegweisenden Entscheidung im Frühjahr 2015 gestattete das Bundesverfassungsgericht einer Reihe von Nichtregierungsorganisationen, Amicus-Curiae-Schriftsätze im laufenden Fall einer Zwangsverschleppung vorzulegen.<sup>50</sup> Zwar handelt es sich hierbei weder um einen Fall von Diskriminierung noch hat die Klägerin einen Anspruch aufgrund einer Diskriminierung, dennoch hat die Entscheidung des Gerichts zur Annahme der Amicus-Curiae-Schriftsätze aus der Zivilgesellschaft einen bedeutsamen Präzedenzfall geschaffen, der wahrscheinlich von Organisationen der Zivilgesellschaft bei der Unterstützung der Opfer von Diskriminierung verwendet werden wird.

In der Türkei ermöglicht das nationale Recht eine Umkehr der Beweislast vom Kläger an den Beklagten. Laut Arbeitsrecht liegt im Hinblick auf eine Verletzung des Gleichheitsgrundsatzes die Beweislast beim Arbeitnehmer. Wenn der Mitarbeiter jedoch

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<sup>50</sup> Türkei, Verfassungsgericht (*Anayasa Mahkemesi*), Antragsnummer: 2013/2640, 8. April 2013.

eine Situation vorträgt, die stark auf die Wahrscheinlichkeit einer solchen Verletzung hinweist, dann ist der Arbeitgeber verpflichtet, zu beweisen, dass keine solche Verletzung besteht.

Die in Fällen von Diskriminierung verhängten Sanktionen variieren. In Fällen von Diskriminierung am Arbeitsplatz erhalten Arbeitgeber eine Geldstrafe und Mitarbeiter eine Entschädigung von bis zu vier Monatslöhnen sowie Ansprüche auf andere Leistungen, die ihnen vorenthalten wurden. In Fällen einer rechtswidrigen Kündigung eines Arbeitsvertrags (unter anderem aufgrund von Diskriminierung) muss der Arbeitgeber den Arbeitnehmer innerhalb von einem Monat wieder einstellen. Sollte dies nicht der Fall sein, steht dem Arbeitnehmer eine Entschädigung in Höhe von vier bis acht Monatslöhnen zu. Diskriminierungen, die einen Verstoß gegen das Strafbgesetzbuch darstellen, werden mit Freiheitsstrafen von bis zu drei Jahren, ohne die Möglichkeit der Umwandlung in eine Geldstrafe, geahndet. Diskriminierungen, die von Staatsbediensteten begangen werden, werden mit einer Aussetzung der Beförderung für ein bis drei Jahre bestraft. Darüber hinaus können Arbeitsinspektoren, Versicherungsinspektoren und Schulinspektoren sowie leitende Beamte (im Bereich des Verbraucherschutzes) verwaltungsrechtliche und monetäre Sanktionen erlassen.

Unter den fünf in den Richtlinien 2000/43/EG und 2000/78/EG erfassten Gründen sehen die nationalen türkischen Rechtsvorschriften positive Maßnahmen nur für Menschen mit Behinderungen und ältere Menschen vor. Es gibt eine Reihe von Gesetzen und Verordnungen, die positive Maßnahmen in den Bereichen Bildung, Beschäftigung und einer Reihe von Dienstleistungen (Sozialversicherung, Transport etc.) vorsehen, einschließlich der Beschäftigungsquoten für Menschen mit Behinderungen, jedoch werden diese nicht als positive Maßnahmen nach den Rechtsvorschriften bezeichnet. Es bestehen keine positiven Maßnahmen für Roma in der Türkei, auch nachdem die Regierung eine Roma-Initiative mit dem Versprechen eingeführt hatte, die Beschäftigungs- und Bildungsaussichten sowie Wohnverhältnisse der Roma zu verbessern.

Die Regierung entwickelt Strategien, verfasst Gesetze und beschließt Durchführungsmaßnahmen für Menschenrechte und gegen Diskriminierung ohne vorherige Rücksprache mit NRO oder sollte es in seltenen Fällen doch zu einer Rücksprache kommen, ohne Berücksichtigung ihrer Anregungen oder Kritikpunkte. Ein aktuelles Beispiel hierfür war die Ausarbeitung des Aktionsplans zur Verhinderung von Verletzungen der Europäischen Menschenrechtskonvention, der im März 2014 ohne die Beteiligung der Zivilgesellschaft verabschiedet wurde.

## **6. Gleichbehandlungsstellen**

Die Türkei verfügt über keine „Fachstelle“ zur Förderung der Gleichbehandlung ohne Unterschied der Rasse oder der ethnischen Zugehörigkeit im Sinne von Artikel 13 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse. Die Menschenrechtsinstitution der Türkei kommt einer Gleichbehandlungsstelle wohl am nächsten. Diese am 21. Juni 2012 gegründete Einrichtung verfügt über ein allgemeines Mandat, Menschenrechte zu schützen und Menschenrechtsverletzungen zu verhindern, hat jedoch keine spezielle Befugnis zur Prüfung von Diskriminierungsansprüchen. Die türkische Regierung versicherte dem UN-Ausschuss für die Beseitigung der Rassendiskriminierung, dass das breit angelegte Mandat der Menschenrechtsinstitution zum Schutz und zur Förderung der Menschenrechte „natürlich die Bekämpfung der Rassendiskriminierung umfasst“.<sup>51</sup> Natürliche und juristische Personen können Ansprüche der Diskriminierung gegenüber Einzelpersonen, privaten juristischen Personen und öffentlichen Einrichtungen erheben.

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<sup>51</sup> Vereinte Nationen (UN), Ausschuss für die Beseitigung der Rassendiskriminierung (CERD) (2014), *Prüfung von Berichten der Vertragsstaaten nach Artikel 9 des Übereinkommens, kombinierter vierter bis sechster periodischer Bericht der Vertragsstaaten im Jahr 2013: Türkei*, CERD/C/TUR/4-6, S. 11, verfügbar unter [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

Menschenrechtsorganisationen und Gewerkschaften können Anträge im Namen der Opfer entweder auf eigene Initiative oder im Namen der Opfer, von denen sie Beschwerden erhalten haben, einreichen. Die Institution kann zudem eigene Ermittlungen einleiten, sobald ein „Anzeichen für eine Verletzung“ vorliegt. Beschwerden bei der Menschenrechtsinstitution sind kostenlos. Nationale und internationale Nichtregierungsorganisationen sowie UN-Organisationen kritisieren jedoch die mangelnde Unabhängigkeit der Institution sowie die Nichteinhaltung der Pariser Grundsätze. Die ebenfalls im Juni 2012 gegründete Ombudsmann-Institution ist mit der Überprüfung der Handlungen und Tätigkeiten von Behörden beauftragt sowie mit der Einreichung von Vorschlägen, um die Einhaltung der Grundsätze der Menschenrechte, Gerechtigkeit und der Rechtsstaatlichkeit durch die Behörden zu gewährleisten. Die Ombudsmann-Institution nimmt seit März 2013 Beschwerden entgegen. Zwar kann die Ombudsmann-Institution auch die Funktion einer unabhängigen Stelle zum Thema Rassendiskriminierung übernehmen, sie ist jedoch nicht befugt, auf eigene Initiative Untersuchungen durchzuführen, und zudem gibt es, wie von der ECRI festgestellt, Bedenken hinsichtlich ihrer Unparteilichkeit und Neutralität. Während die Menschenrechtsinstitution und die Ombudsmann-Institution kein Mandat haben, Opfer bei der Einreichung von Diskriminierungsklagen zu unterstützen, ist im Entwurf des Antidiskriminierungsgesetzes vorgesehen, die Gleichbehandlungsstelle damit zu beauftragen, „Personen, die sich wegen Diskriminierung für beschwert halten, jede Art von Unterstützung zukommen zu lassen“.<sup>52</sup>

## 7. Wichtige Punkte

- Die Türkei verfügt noch immer über kein Antidiskriminierungsgesetz oder eine spezielle Institution zum Thema Gleichberechtigung und Antidiskriminierung. Der Gesetzesentwurf von 2009 zur Bekämpfung der Diskriminierung und Einrichtung eines Gleichstellungsrates steht vom Amt des Ministerpräsidenten noch immer aus.
- Verschiedene Gesetze zum Verbot von Diskriminierung haben einen beschränkten sachlichen und persönlichen Geltungsbereich; insbesondere gehören jedoch weder Alter noch sexuelle Orientierung noch ethnische Zugehörigkeit zu den im türkischen Recht aufgezählten geschützten Diskriminierungsgründen.
- Die im Jahr 2010 in die Verfassung eingeführte positive Maßnahme ist auf Menschen mit Behinderungen und ältere Menschen beschränkt.
- Diskriminierende Äußerungen und Hassreden sowie diskriminierendes Verhalten gegenüber Minderheiten, vor allem Roma, LGBTI, Kurden und Nicht-Muslimen (vor allem Juden) sind im täglichen Leben, dem politischen Diskurs und in den Medien weit verbreitet.
- Die Justizbehörden sind offenkundig widerwillig, die bestehenden Rechtsvorschriften zum Verbot von Hassreden und Diskriminierung zu vollstrecken.
- Die verschiedenen, von der Regierung ins Leben gerufenen Initiativen mit dem erklärten Ziel, sich der Probleme der Kurden, Roma und Alewiten anzunehmen, haben zu keinen greifbaren politischen Ergebnissen und legislativen Maßnahmen geführt, um die Diskriminierung dieser Gruppen in den Bereichen Bildung, Beschäftigung, Wohnraum, Zugang zu sozialen Dienstleistungen und der Religionsfreiheit anzugehen.
- Die Urteile des EGMR gegen obligatorischen Religionsunterricht,<sup>53</sup> die Nichtanerkennung der Stätten der Religionsausübung für die Alewiten und den Ausschluss dieser Kultstätten aus sozialen Vergünstigungen, die Moscheen gewährt

<sup>52</sup> Artikel 6(2)(c) des Gesetzesentwurfs zur Bekämpfung von Diskriminierungen.

<sup>53</sup> EGMR, *Mansur Yalcin and Others v. Turkey*, Nr. 21163/11, 16. September 2014; EGMR, *Hasan and Eylem Zengin*, Nr. 1448/04, 9. Januar 2007.

werden,<sup>54</sup> sowie die verpflichtende Angabe der Religion in amtlichen Ausweisen<sup>55</sup> wurden noch nicht umgesetzt.

- Die Türkei ist weiterhin das einzige Mitglied des Europarats, von dem das Recht auf Kriegsdienstverweigerung durch Personen, die den Militärdienst aufgrund religiöser oder politischer / philosophische Überzeugungen verweigern, nicht anerkannt wird. Drei separate Urteile des EGMR gegen die Türkei in dieser Frage wurden noch nicht vollstreckt.<sup>56</sup>
- Der vor kurzem gegründeten Menschenrechtsinstitution der Türkei, die einer Gleichbehandlungsstelle in der Türkei am nächsten kommt, fehlt die Unabhängigkeit von der Exekutive und zudem mangelt es an der Einhaltung der Pariser Grundsätze.
- Die Regierung entwickelt weiterhin Strategien, verfasst Gesetze und beschließt Durchführungsmaßnahmen für Menschenrechte und gegen Diskriminierung ohne vorherige Rücksprache mit NRO oder sollte es in seltenen Fällen doch zu einer Rücksprache kommen, ohne Berücksichtigung ihrer Anregungen oder Kritikpunkte. Ein aktuelles Beispiel hierfür ist die Ausarbeitung des Aktionsplans zur Verhinderung von Verstößen gegen die Europäische Menschenrechtskonvention, der im März 2014, ohne Beteiligung der Zivilgesellschaft, verabschiedet wurde.<sup>57</sup>

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<sup>54</sup> EGMR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, Nr. 32093/10, 2. Dezember 2014.

<sup>55</sup> EGMR, *Sinan Işık v. Turkey*, Nr. 21924/05, 2. Februar 2010.

<sup>56</sup> EGMR, *Buldu and Others v. Turkey*, Nr. 14017/08, 3. Juni 2014; EGMR, *Tarhan v. Turkey*, Nr. 9078/06, 17. Juli 2012; EGMR, *Savda v. Turkey*, Nr. 42730/05, 12. Juni 2012.

<sup>57</sup> Türkei, Aktionsplan zur Verhinderung von Verstößen gegen die Europäische Menschenrechtskonvention (*Avrupa İnsan Hakları Sözleşmesi İhlallerinin Önlenmesine İlişkin Eylem Planı*) Amtsblatt, Nr. 28929, 1. März 2014, verfügbar unter:

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/03/20140301.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/03/20140301.htm>.



## INTRODUCTION

### The national legal system

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 country. 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. Laws and regulations are published in the Official Gazette. On the other hand, circulars are not systematically published but can be made accessible selectively at the discretion of individual ministries on the relevant ministry's website. Otherwise, access to circulars by citizens and lawyers is not possible, unless obtained through personal connections.

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 Article 10 of the Constitution.

According to Article 90 of the Constitution, international treaties which are duly ratified have the force of law.<sup>58</sup> If the language of the treaty provision is self-executing, it is directly applicable. In cases of 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, though with significant reservations and declarations aimed at precluding the extension of minority protection under the national legal framework (for an overview, see Annex 2: Table of International Instruments). This is the case, for example, with the UN Convention on the Rights of the Child, where Turkey has inserted a reservation with respect to Articles 17, 29 and 30, which concern the linguistic, cultural and religious rights of children in minority groups and the rights of their parents to give their children an education in accordance with their cultural identity and language. When it comes to human rights conventions which do not entail provisions specifically concerning minorities, Turkey does not insert such reservations, as in the case of the UN Convention on the Rights of Persons with Disabilities.

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. The Council of State also acts as a first instance court to deal with some cases prescribed by law.

While court decisions and judgments are in principle available to the public, the judgments and decisions of the Court of Cassation and the Council of State are published selectively on the basis of subjective criteria. Some of the decisions and judgments of these courts are published in the Official Gazette and in their respective legal journals, based on the selection of the editors. Independent legal journals also selectively publish decisions and judgments they obtain directly from the higher courts. For example, the Legal Publishing

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<sup>58</sup> 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.

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. A third source is the judges and prosecutors of higher courts, who 'publish in their books "interesting" decisions and judgments which they had set aside in order to increase the sales of their books'.<sup>59</sup> A professor of constitutional law summarised 'the "secret criterion" known to practitioners' as follows. 'The presidents of chambers of the Court of Cassation and the Council of State intentionally 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 in their own legal journals are those that have no practical use but further existing judicial interpretation or precedents. Important decisions that introduce a change in the case law are published commercially.'<sup>60</sup>

The Constitutional Court's judgments concerning the dissolution of political parties and the constitutionality of laws and decrees are published in the Official Gazette (*Resmi Gazete*), as required under the Constitution. The Court's judgments in cases brought before it by individual claimants under the constitutional complaint mechanism which entered into force in September 2012 will be published selectively. The selection criteria are laid out in the Constitutional Court's revised by-laws, which were published in the Official Gazette on 12 July 2012.<sup>61</sup> Accordingly, judgments on the merits and those admissibility decisions which 'carry importance as a matter of principle' are published on the website of the Court.<sup>62</sup> Pilot judgments and precedent-setting judgments 'which are important as a matter of principle' are published in the Official Gazette.<sup>63</sup> On 17 September 2013, the Constitutional Court published on its website its first judgments in cases brought by individual claimants. The first time a judgment based on an individual petition was published in the Official Gazette was on 30 October 2013.<sup>64</sup> The cases mostly concern unfair and/or prolonged trials, inadequate compensation or non-compensation for violations of the right to life or property rights. In a precedent-setting judgment dated 25 June 2014, the Constitutional Court issued its first finding of discrimination (on grounds of freedom of religion) in a case brought through the individual petition mechanism. The Constitutional Court found that a lower court's decision to bar a female lawyer from attending a court hearing on the ground that she wore a headscarf violated the applicant's freedom of religion and conscience. It also held that in allowing lawyers who do not wear the headscarf to attend hearings and solely barring those whose heads are covered from representing their clients in the courtroom, the lower court discriminated against the applicant on the basis of her religious belief.<sup>65</sup>

Turkey does not have an anti-discrimination law, though there are anti-discrimination clauses in the Constitution and various criminal, administrative and civil laws which provide protection on various grounds. The equality protection clause of the Turkish Constitution, Article 10, provides a non-exhaustive list of protected grounds, allows positive measures for elderly persons and for persons with disabilities and entrusts the state with the task of ensuring equality between men and women. Most notable among the laws which have anti-discrimination clauses is the Law on Persons with Disabilities, which could be considered an anti-discrimination law. However, the law prohibits discrimination solely on the ground of disability and has a limited material scope. The Labour Law also has several anti-discrimination clauses, but again with a material scope limited to employment relations. The draft law on combating discrimination and on the establishment of an equality council (the draft anti-discrimination law) has been pending at the Prime Ministry since 2009 and the Government refrains from giving a specific date for its enactment.

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<sup>59</sup> Mehmet Uçum, human rights lawyer.

<sup>60</sup> Ozan Erözden, associate professor of constitutional law, Yıldız Technical University.

<sup>61</sup> Turkey, By-Laws of the Constitutional Court (*Anayasa Mahkemesi İçtüzüğü*), 12 July 2012.

<sup>62</sup> Turkey, By-Laws of the Constitutional Court, 12 July 2012, Article 81(4).

<sup>63</sup> Turkey, By-Laws of the Constitutional Court, 12 July 2012, Article 81(5).

<sup>64</sup> Turkey, Official Gazette (*Resmi Gazete*), 30 October 2013.

<sup>65</sup> Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Application no. 2014/256, 25 June 2014.

## **List of main legislation transposing and implementing the directives**

Labour Law (no. 4857)

Date of adoption: 22 May 2003

Entry into force: 10 June 2003

Latest amendments: 4 April 2105

Grounds covered: language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect, or any such considerations.

Material scope: employment (public and private).

Principal content: direct discrimination, indirect discrimination (gender- and pregnancy-based), (sexual) harassment, victimisation (very limited).

Turkish Penal Code (no. 5237)

Date of adoption: 26 September 2004

Entry into force: 1 June 2005

Latest amendments: 12 November 2015

Grounds covered: language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect, or any such considerations.

Material scope: access to services (could be interpreted to include education, social protection and social advantages); access to goods (limited to foodstuffs); public and private employment.

Principal content: direct discrimination, (sexual) harassment.

Law on Persons with Disabilities (no. 5378)

Date of adoption: 1 July 2005

Entry into force: 7 July 2005

Latest amendments: 18 November 2014

Grounds covered: disability.

Material scope: public and private employment.

Principal content: direct discrimination, reasonable accommodation.

Basic Law on National Education (no. 1739)

Date of adoption: 14 June 1973

Entry into force: 24 June 1973

Latest amendments: 19 November 2014

Grounds covered: language, race, gender, religion, disability.

Material scope: education.

Principal content: direct discrimination.

Law on Civil Servants (no. 657)

Date of adoption: 14 July 1965

Entry into force: 23 July 1965

Latest amendments: 27 March 2015

Grounds covered: language, race, gender, political thought, philosophical belief, religion and sect.

Material scope: 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.

Principal content: direct discrimination.

## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The Turkish Constitution includes the following articles dealing directly and indirectly with non-discrimination.

Article 10, Equality before the Law, is a general equality clause. It explicitly covers the grounds of language, race, colour, gender, political opinion, philosophical belief, religion and sect and implicitly covers the remaining grounds with reference to 'any such considerations'. This provision applies to all areas covered by the directives and its material scope is broader than those of the directives. However, in not explicitly referring to sexual orientation and ethnic origin among the grounds of equality, the personal scope of the provision is more limited than that of the directives. These excluded grounds have not been involved before the courts under Article 10. The provision is directly applicable and can be enforced against private actors. While not explicitly stating it as such, Article 10, as revised in 2010, introduced the principle of positive action to the Constitution. It stipulates that measures to be adopted to ensure equality between men and women as well as measures to be adopted for children, elderly persons, persons with disabilities, widows and orphans of martyrs, ex-soldiers disabled in the war and veterans shall not be considered as violations of the principle of equality.

Article 48 is a specific clause which guarantees the freedom to work, conclude contracts and establish private enterprises without referring to any particular ground. It is directly applicable and can be enforced against private actors. Article 50 is a specific clause stating that 'no one shall be required to perform work unsuited to his/her age, gender, and capacity' and entitling persons with physical or mental disabilities to 'special protection with regard to working conditions'. The Constitutional Court interpreted this provision to cover all persons with disabilities.<sup>66</sup> Thus, it can be inferred that reference to 'mental disabilities' covers both intellectual disabilities and psychosocial disabilities. The material scope of these articles is not broader than that of the directives. The articles are directly applicable and can be enforced against private actors.

Article 70 is a specific clause implicitly prohibiting discrimination in entry to public service without explicitly specifying any grounds: 'Every Turk has the right to enter public service. No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service.' It is directly applicable and can be enforced against private actors.

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<sup>66</sup> Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Judgment, E. 2006/101, K. 2008/126, 19 June 2008.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law (the amendments made in the Law on Persons with Disabilities on 6 February 2014 added disability to the protected grounds in the Law on National Education and the Labour Law): race,<sup>67</sup> language,<sup>68</sup> colour,<sup>69</sup> gender,<sup>70</sup> disability,<sup>71</sup> political opinion/thought,<sup>72</sup> philosophical

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<sup>67</sup> Turkey, Constitution (*Türkiye Cumhuriyeti Anayasası*), Article 10, 7 November 1982; Turkey, Penal Code (*Türk Ceza Kanunu*), Article 3(2), 26 September 2004; Turkey, Labour Law (*İş Kanunu*), Article 5(1), 22 May 2003; Turkey, Basic Law on National Education (*Milli Eğitim Temel Kanunu*), Article 4, 14 June 1973; Turkey, Law on Civil Servants (*Devlet Memurları Kanunu*), Article 7, 14 July 1965; Turkey, Civil Code (*Medeni Kanun*), Article 68, 22 November 2001; Turkey, Law on Political Parties (*Siyasi Partiler Kanunu*), Article 12, 22 April 1983; Turkey, Law on Social Services (*Sosyal Hizmetler Kanunu*), Article 4(d), 24 May 1983; Turkey, Law on the Execution of Penalties and Security Measures (*Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*), Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution (*Kamu Denetçiliği Kanunu*), Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law (*Türk Silahlı Kuvvetleri Disiplin Kanunu*), Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports (*Sporda Şiddet ve Düzensizliğin Önlenmesine Dair Kanun*), Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage (*Asgari Ücret Yönetmeliği*), Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels (*Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkında Kanun*), Article 8(e), 15 February 2011.

<sup>68</sup> Turkey, Constitution, Article 10, 7 November 1982; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

<sup>69</sup> Turkey, Constitution, Article 10, 7 November 1982; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

<sup>70</sup> Turkey, Constitution, Article 10, 7 November 1982; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004.

<sup>71</sup> Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on Persons with Disability (*Engelliler Hakkında Kanun*), 1 July 2005; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

<sup>72</sup> Turkey, Constitution, Article 10, 7 November 1982; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

belief/opinion,<sup>73</sup> religion,<sup>74</sup> sect,<sup>75</sup> denomination,<sup>76</sup> nationality,<sup>77</sup> national origin,<sup>78</sup> ethnic origin,<sup>79</sup> social origin,<sup>80</sup> birth,<sup>81</sup> economic or other social status,<sup>82</sup> family,<sup>83</sup> class,<sup>84</sup> profession,<sup>85</sup> regional differences.<sup>86</sup> Sometimes, discrimination is prohibited more generally, without enumerating any specific grounds.<sup>87</sup>

There is still no legislation listing age, ethnicity and sexual orientation among the prohibited grounds of discrimination. The exclusion of ethnicity from grounds of anti-discrimination 'affects especially ... minorities as Roma and Kurds that are the most disadvantaged groups'.<sup>88</sup> However, most of the lists are open-ended. Furthermore, language or race could theoretically be interpreted by the courts to refer to ethnicity. On the other hand, 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. While the Turkish Government has repeatedly confirmed

<sup>73</sup> Turkey, Constitution, Article 10, 7 November 1982; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

<sup>74</sup> Turkey, Constitution, Article 10, 7 November 1982; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 18, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

<sup>75</sup> Turkey, Constitution, Article 10, 7 November 1982; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

<sup>76</sup> Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011.

<sup>77</sup> Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

<sup>78</sup> Turkey, Penal Code, Article 3(2), 26 September 2004.

<sup>79</sup> Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011.

<sup>80</sup> Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004.

<sup>81</sup> Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004.

<sup>82</sup> Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004.

<sup>83</sup> Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983.

<sup>84</sup> Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983.

<sup>85</sup> Turkey, Law on Political Parties, Article 12, 22 April 1983.

<sup>86</sup> Turkey, Law on Social Services, Article 4(d), 24 May 1983.

<sup>87</sup> Turkey, Law on the Establishment and Duties of the Turkish Football Federation (*Türkiye Futbol Federasyonu Kuruluş ve Görevleri Hakkında Kanun*), 5 May 2009, Article 3, (prohibiting the Federation from engaging in racism and any kind of discrimination).

<sup>88</sup> European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 59, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-turkey-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf) (All hyperlinks accessed on 20 July 2016).

this interpretation,<sup>89</sup> in light of the reluctance of the higher courts to give direct effect to international human rights treaties (increasingly with the exception of the European Convention on Human Rights (ECHR)), the extent to which individuals can invoke the UN Convention in their discrimination claims is uncertain. So far, neither the Constitutional Court, nor any other court has had a case before them where they had to decide whether ethnicity, age or sexual orientation should be considered as 'any such considerations'. In 2008, the Court of Cassation said that Article 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.<sup>90</sup> In a precedent-setting judgment issued on 7 November 2014 and published in March 2015, the Council of State found the Ministry of National Education's dismissal from the profession of a teacher due to his/her sexual orientation to be unconstitutional. While the applicant based his/her claim on the equality and non-discrimination clauses of the Turkish Constitution (Article 10) and the ECHR (Article 8), the Court did not frame the case as an equality issue, but rather restricted its analysis to the right to privacy, finding Article 20(1) of the Turkish Constitution and Article 8 of the European Convention to have been violated.<sup>91</sup>

In addition to the constitutional and legislative provisions listed above which prohibit discrimination, a number of laws prohibit hatred or incitement to hatred on enumerated grounds.<sup>92</sup> While hate crime has thus been introduced into the Turkish legal system, amendments removed the word 'discrimination' from the text of this provision (though retaining it in its title 'hatred and discrimination') and, most importantly, changed the open-ended nature of the article. While nationality has been added to the enumerated grounds, a flexible judicial interpretation of Article 122 to encompass discrimination based on ethnicity, age and sexual orientation has thus been foreclosed with the abolishment of the open-ended nature of this article.

### **2.1.1 Definition of the grounds of unlawful discrimination within the directives**

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. On the other hand, the draft anti-discrimination law, which remains pending at the Prime Ministry, contains a comprehensive definition.<sup>93</sup>

While Turkey's constitutional and legislative framework explicitly avoids providing any definition or categorisation based on ethnicity, race or religion, Turkey's founding

<sup>89</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 4, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en); Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 3, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en) (saying that the UN Convention on the Rights of Persons with Disabilities 'like all other conventions on human rights – has the same force with the Constitution in the hierarchy of norms'.)

<sup>90</sup> Ninth Civil Chamber of the Court of Cassation, E. 2008/27309, K. 2008/22094, 25 July 2008.

<sup>91</sup> 12th Circuit of the Council of State, 7 November 2014, E. 2011/750, K. 2014/7169.

<sup>92</sup> Article 216 of the Turkish Penal Code criminalises (1) incitement to enmity or hatred on grounds, inter alia, of race, religion or denomination in a manner which may present a clear and imminent danger to public safety, (2) open denigration of a section of the population on grounds, inter alia, of race, religion or denomination, and (3) open denigration of religious values of a part of the population. Article 8(b) of the Law on the Foundation and Broadcasting of Radio and Television Channels prohibits the encouragement of hatred through making distinctions based on race, language, religion, sect and regional differences. Article 8(ğ) bans broadcasts which exploit children, the weak and persons with disabilities and provoke violence against them (material scope limited). As revised in February 2014, Article 122 of the Turkish Penal Code prohibits hatred based on language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect (material scope limited to the sale or transfer of movable or immovable property, the execution of a service, employment, the provision of food services and the undertaking of economic activity).

<sup>93</sup> These definitions are given below in Sections 2.2 and 2.3 on direct and indirect discrimination.

international Treaty of Lausanne (1923) makes a distinction between non-Muslim citizens and the rest, by conferring minority status on the former (without providing a definition for minority). While this distinction de jure refers to categorisation on the basis of religion, in practice since 1925 the Turkish Government has limited the protection of the Lausanne Treaty to Jews, and Armenian and Greek Orthodox Christians, whose identities refer to both a specific religion and a specific ethnic origin. In August 2013, a lower court challenged this policy for the first time by holding that the Treaty of Lausanne granted minority status and rights to all non-Muslim citizens, without enumerating any specific group.<sup>94</sup> The decision was given in a case brought by the Syriac community (a group which also has a distinct religious and ethnic identity), whose request for opening a kindergarten where children would also be taught their mother tongue was rejected by the Ministry of National Education. However, due to the broad reasoning of the court, which concluded that all non-Muslim communities are entitled to minority rights under the Treaty of Lausanne, and the fact that the Ministry decided not to appeal the decision, it is likely that the decision will be used by other non-Muslim groups in challenging state policies. Following the court decision, the Syria community set up a kindergarten, its first educational institution, which started to operate in the 2014-2015 academic year.

### **Race and Ethnic origin**

Racial origin is not defined in any current law, whereas it is defined in the draft anti-discrimination law, which defines race as 'any of the categories created on the basis of any cultural, societal or biological trait' and ethnic origin as 'identity which derives from belonging to groups which have formed on the basis of cultural, religious, linguistic or similar differences'.

Ethnic origin is not defined in any current law, whereas it is defined in the draft anti-discrimination law.<sup>95</sup>

A series of legislative and constitutional reforms in recent years granted ethnic minorities limited linguistic and cultural rights without extending them minority status.

### **Religion**

Religion is not defined under Turkish legislation. However, there are a number of relevant laws and policies where equivalent definitions and categorisations are made which cause direct or indirect discrimination on grounds of religion.

Civil registries and identity cards in Turkey indicate the religion of their holders. One of only three religions can be indicated on identity cards: Christianity, Islam and Judaism.

Pursuant to a 'reform' introduced in 2006, all Turkish citizens, irrespective of religion or denomination, have the right, upon submission of a petition and payment of a small fee, to leave blank the box on their identity card indicating religion.<sup>96</sup> Thus, the choice now is between indication of one of the three religions recognised by the state or leaving the box blank. Other believers are still not allowed to indicate their faiths, religions or denominations on their identity cards. In rare cases where such people have applied for the identification of their true faith, their requests have been denied. In a case concerning a request of this kind by a Bahá'í, whose religion was indicated by the state as Islam, the Court of Cassation, on the basis of the opinion of the Directorate of Religious Affairs

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<sup>94</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>95</sup> The draft law defines race as 'any of the categories created on the basis of any cultural, societal or biological trait' and ethnic origin as 'identity which derives from belonging to groups which have formed on the basis of cultural, religious, linguistic or similar differences'.

<sup>96</sup> Turkey, Law on Civil Registry Services (*Nüfus Hizmetleri Kanunu*), 29 April 2006.



(*Diyanet İşleri Başkanlığı*, Diyanet), decided that the Bahá'í faith is not a religion, without defining religion or elaborating any criteria by which it determines a faith as a religion.<sup>97</sup>

Another important issue in this regard is the definition of a Muslim. The official identity cards of persons who belong or are assumed to belong to the Muslim faith indicate their religion to be 'Islam', without specifying a denomination. In a country extremely divided along religious/denominational lines, the difference matters, since people belonging to non-Sunni denominations of Islam<sup>98</sup> feel discriminated against by state policies protecting the rights and interests of people believing in the Sunni version of Islam. While the 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 different interpretations and practices of the Muslim faith from those of the Sunni majority. Requests by Alevis to change the indication on the identity card from Islam to Alevi are declined by the courts and all Alevis are registered as Muslims.

This issue was brought before the European Court of Human Rights (ECtHR or the Court). On 2 February 2010, the Court issued its judgment in the case of *Sinan Işık v. Turkey*, ruling that the indication of religion on the identity card, even where it is no longer obligatory, is a breach of Article 9 of the European Convention on Human Rights (ECHR).<sup>99</sup> The Court held that the new regulation obliged individuals to apply to the authorities in writing for the deletion of religion from their identity cards and disclosed the religious or personal convictions of individuals who chose to have the religion box 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.

The choice between leaving the box blank and being officially identified against their true conviction or faith leaves many individuals in a dilemma. A blank box in official identity cards, which are used on a daily basis in access to public services, serves to detect religious minorities such as Alevis, Protestants, Baha'is and Syriacs, as well as atheists and agnostics, and exposes them to discriminatory treatment. The European Commission reported 'discriminatory practices or harassment by local officials of persons who converted from Islam to another religion and thereafter sought to amend their ID cards'.<sup>100</sup> Therefore, few persons dare to leave the religion section blank for fear of discrimination. As far as Armenian, Greek Orthodox and Jewish people are concerned, choosing not to identify their religion on their identity cards may mean that their children are not exempt from mandatory religion courses (see Section 3.2.8).

## Disability

When it was comprehensively revised on 6 February 2014, the Law on Persons with Disabilities (no. 5378) introduced a new definition of a person with disability as 'an individual who is influenced by attitudes and environmental factors which hinder his/her full and effective participation in social life on an equal basis with others due to loss of physical, mental, psychological or sensory capabilities at various levels'. The law defines discrimination based on disability as 'every kind of difference, exclusion or restriction based on disability which hinders the full exercise of human rights and liberties on equal footing with others in political, economic, social, cultural, civil or any other area'. These definitions

<sup>97</sup> See for example: Tenth Civil Chamber of the Court of Cassation, E. 1992/3226, K. 1995/4872, 25 October 1995; Third Civil Chamber of the Court of Cassation, E. 1988/8776, K. 1988/9515, 11 November 1988; Sixth Civil Chamber of the Court of Cassation, E. 1974/2007, K. 1974/2242, 7 May 1974.

<sup>98</sup> The majority of Muslims in Turkey belong to the Sunni denomination of Islam.

<sup>99</sup> ECtHR, *Sinan Işık v. Turkey*, No. 21924/05, 2 February 2010.

<sup>100</sup> European Commission (2012), *Turkey Progress Report*, Brussels, 10 October 2012, p. 25, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2012/package/tr\\_rapport\\_2012\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf).

are in line with the UN Convention on the Rights of Persons with Disabilities and the European Court of Justice's judgment in the case of Ring and Skouboe Werge.<sup>101</sup>

Various laws and regulations providing disability-related benefits and positive measures have their own definitions of and/or criteria for disability, which do not yet reflect this revised definition of disability. In light of the Turkish courts' unwillingness to expand legal protection through judicial interpretation and lack of a tradition of judicial activism, it is highly unlikely for judges to interpret other laws in accordance with the Law on Persons with Disability.

Under Article 3(c) of the Law on Social Services, a person with disability is defined as someone who 'does not adapt to the needs of normal life and is in need of protection, care, rehabilitation, consulting and support services'. Under Article 3(d), in order to be eligible for disability benefits, the person with disability must receive a disability report from special health boards established pursuant to the Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled, most recently revised in 2013 without substantial changes.<sup>102</sup> 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'<sup>103</sup> 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 (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 from that which is customary and would be found odd by people'. Similarly, Article 74(e) 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 general secretary of the Union of Chambers and Commodity Exchanges, a person 'shall not have a physical or mental illness, or physical disability that shall prevent him performing his duties continuously'. In some cases, although the relevant law does not exclude persons with disabilities from entering a certain profession, public institutions can apply the rules in an exclusionary and discriminatory fashion. A case in point is the Ministry of National Education which, on its informative website on professions, introduced an eligibility requirement for the diplomatic profession not contained in any of the relevant laws.<sup>104</sup> The website stated that to be a diplomat a person shall 'not have a physical disability'.<sup>105</sup>

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<sup>101</sup> Court of Justice of the European Union (CJEU), No. C-335/11 and C-337/11, *Ring and Skouboe Werge v. Denmark*, 11 April 2013.

<sup>102</sup> Turkey, Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled (*Özürlülük Ölçütü, Sınıflandırması ve Özürlülere Verilecek Sağlık Kurulu Raporları Hakkında Yönetmelik*), Official Gazette, 30 March 2013.

<sup>103</sup> Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birer, L., Kara, Ö. (2011), *Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), İstanbul Bilgi Üniversitesi, p. 14.

<sup>104</sup> Eşit Haklar için İzleme Derneği (Association for Monitoring Equal Rights) (2011), *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu* (Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report), p. 44, <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

<sup>105</sup> Eşit Haklar için İzleme Derneği (Association for Monitoring Equal Rights) (2011), *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu* (Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report), p. 44, <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

A law adopted on 25 April 2013 replaced the terms *özürlü* (handicapped, defective, deficient), *sakat* (crippled, defective) and *çürük* (rotten, unfit) with that of *engelli* (disabled) in a total of 96 laws and decrees with the force of law, including the Civil Code, Anti-Terror Law, Law on Civil Servants, Law on Social Services, Law on Persons with Disabilities, the Penal Code, Law on Social Insurance and General Health Insurance and various laws concerning the families of martyrs, war veterans and retired members of the military.<sup>106</sup> However, the Constitution, various other laws, official documents and government offices continue to use the rather pejorative term *özürlü*.

## Age

Age is not defined in any law or the draft anti-discrimination law.

## Sexual orientation

Sexual orientation is not defined or prohibited in any law in Turkey. While the initial text of the draft anti-discrimination law referred to and defined 'sexual identity', all such references were removed by the Government in 2011. The initial draft shared with civil society provided the definition of 'sexual identity' as covering 'heterosexual, homosexual, bisexual, transsexual, transvestite and similar sexual identities'.

On the face of it, the national legal framework completely ignores sexual orientation, as evident also in the absence of any provision criminalising homosexual, bisexual or transsexual conduct. However, there is widespread and systematic discrimination against LGBTI people 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 LGBTI people is through the judicial interpretation of terms such as 'morality,' 'indecent behaviour' and 'dishonourable behaviour'. Article 125 (E)(g) of the Law on Civil Servants allows the dismissal of public servants who are found to have acted 'in a shameful and embarrassing way unfit for the position of a civil servant'. This phrase, 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 LGBTI employees has been upheld by the judiciary.<sup>107</sup> In 2012, a police officer was dismissed under Article 125 (E)(g) due to his perceived gender identity;<sup>108</sup> his appeal against the dismissal was awaiting a trial date as of the end of

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<sup>106</sup> Turkey, Law on Making Amendments in Various Laws and Decrees with the Force of Law with the Purpose of Changing References to Persons with Disabilities in Laws and Decrees with the Force of Law (*Kanun ve Kanun Hükmünde Kararnamelerde Yer Alan Engelli Bireylere Yönelik İbarelerin Değiştirilmesi Amacıyla Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 25 April 2013, <http://www.resmigazete.gov.tr/eskiler/2013/05/20130503-1.htm>.

<sup>107</sup> 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 (2011), 'Not an Illness nor a Crime': Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality, London, Amnesty International, p. 23, available at: <http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf>. 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 for 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 National Education of a teacher for having engaged in a '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 having seen the official court documents.

<sup>108</sup> Kaos GL, LGBTI News Turkey, IGLHRC (2014), *Human Rights Violations of LGBT Individuals in Turkey*, p. 5, available at: <http://iglhrc.org/sites/default/files/uprSubTurkey.pdf>, a joint report submitted by national and international LGBTI NGOs to the UN Human Rights Council Working Group on the Universal Periodic Review, twenty-first session, January-February 2015.

2015.<sup>109</sup> While in 2013 the European Commission reported three more ongoing court cases concerning discrimination at the workplace on grounds of sexual orientation, no further information was available on the outcome of these cases.<sup>110</sup> In most cases, individuals dismissed by their employers due to their sexual orientation do not go to courts due to fear of rejection by their families, friends and colleagues and due to negative media attention to such court cases, which leads to further victimisation of victims.<sup>111</sup>

There are similar provisions in various laws and regulations allowing dismissal from employment of individuals due to their sexual orientation, which are not possible to list in an exhaustive manner. Examples can be found in the Military Penal Code, Law on Military Judges, Law on the Military Court of Cassation, Law on Lawyers, Law on Judges and Prosecutors, Regulation on Health Capability of the Turkish Armed Forces and Regulation on the Selection of Candidates for Military Judges.<sup>112</sup> The Turkish Armed Forces Discipline Law of 2013 despite protests from LGBTI groups added a new discriminatory provision to this list.<sup>113</sup> Article 20 of this law enumerates homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces. According to Article 20 (ğ), 'engaging in unnatural intercourse or voluntarily submitting oneself to such an act' is a ground for dismissal from the army. It is common knowledge in Turkey that the term 'unnatural intercourse' refers to anal intercourse and hence homosexual relationships. There are several cases of dismissal of homosexual men from public service or the military<sup>114</sup> on the basis of oral evidence of their engagement in anal sex with other men.

In a precedent-setting judgment issued on 7 November 2014 and published in March 2015, the Council of State ruled on the issue. The Court found the Ministry of National Education's rejection from the profession of a teacher due to his/her sexual orientation to be in violation of the right to privacy and to the protection of family life protected under Article 20(1) of the Turkish Constitution and Article 8 of the European Convention. It is notable that the Court cited the ECtHR's relevant jurisprudence.<sup>115</sup> This is the first time that the high court found a public institution to have discriminated against its employee on the basis of his/her sexual orientation.

On the other hand, in another significant court ruling in 2015, the Constitutional Court declined the request of a lower court for the annulment of the phrase 'in unnatural ways' from Article 226 of the Turkish Penal Code on the ground that it violated, among others,

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<sup>109</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 59, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf). Information received from lawyer Firat Söyle, 7 April 2016.

<sup>110</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 59, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>111</sup> Opinion expressed by Firat Söyle and Yasemin Öz, both of whom are leading lawyers in the area of sexual orientation discrimination cases. For an overview of case law concerning dismissal of LGBTI individuals from the civil service, see Öz, Y., *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Turkey*, Danish Institute for Human Rights, p. 19, available at [http://www.coe.int/t/commissioner/source/lgbt/turkeylegal\\_e.pdf](http://www.coe.int/t/commissioner/source/lgbt/turkeylegal_e.pdf).

<sup>112</sup> For a more detailed list of these laws and regulations as well as their relevant provisions, see Güner, U., Kalkan, P., Öz, Y., Özsoy, E.C., Söyle, F. (2011), *Türkiye'de Cinsel Yönelim veya Cinsiyet Kimliği Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Sexual Orientation or Gender Identity in Turkey: 1 January-30 June 2010), pp. 27-28.

<sup>113</sup> Turkey, Turkish Armed Forces Discipline Law, 31 January 2013.

<sup>114</sup> For examples of dismissal of homosexual personnel from the Turkish Armed Forces and the jurisprudence of military courts upholding this practice, see Güner U., Kalkan, P., Öz, Y., Özsoy, E.C., Söyle, F. (2011), *Türkiye'de Cinsel Yönelim veya Cinsiyet Kimliği Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Sexual Orientation or Gender Identity in Turkey: 1 January-30 June 2010), pp. 28-29.

<sup>115</sup> 12th Circuit of the Council of State, E. 2011/750, K. 2014/7169, 7.11.2014 (citing ECtHR, *Dudgeon v. UK*, Application no. 7525/76, 22 October 1981; ECtHR, *Smith and Grady v. UK*, Application no. 33985/96, 27 September 1999; ECtHR, *Lustig/Prean and Beckett v. UK*, Application no. 31417/96, 27 September 1999; ECtHR, *Perkins and R. v. UK*, Application no. 43208/98, 22 October 2002; ECtHR, *Beck, Copp and Bazeley v. UK*, Application no. 48535/99, 22 October 2002; ECtHR, *Özpınar v. Turkey*, Application no. 20999/04, 19 October 2010).

the constitutional right to privacy. Article 226, titled 'obscenity', criminalises the production, sale, transfer, storage, sharing and ownership of print, audio or visual materials depicting sexual behaviour conducted 'through violence, with animals, on dead human bodies or in unnatural ways.'<sup>116</sup> In a divided opinion released on 1 April 2015, the Constitutional Court upheld the provision on the ground that the prohibition of the storage of materials depicting sexual behaviour in unnatural ways for the purpose of dissemination was proportionate to the legitimate aim of protecting public morality and was in accordance with the ECtHR jurisprudence on obscenity. A minority of 4 dissenting judges raised issues that the majority of 12 judges evaded addressing. They pointed out that the provision was in violation of the principles of equity and proportionality because it penalised equally individuals who produced such materials for commercial purposes and those who owned them for personal use. They also pointed out that in its case law the Court of Cassation had also interpreted the phrase 'unnatural ways' to refer to oral, anal, group sex, lesbian and homosexual relationships, even when such relationships were consensual. Noting that all kinds of consensual sexual relationships which do not contain violence are protected by the right to privacy, the dissenting judges argued that the Court should have annulled the phrase.<sup>117</sup>

Authorisation of the dissolution of associations on grounds of 'public morality' under the Civil Code has been frequently resorted to by prosecutors against LGBTI 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.<sup>118</sup> In rare cases where courts ruled against the dissolution of LGBTI associations, the reasoning reflected a homophobic mentality which associates homosexuality with morality. For example, in 2008, in overturning the decision of a lower court to dissolve Lambdaistanbul, the Court of Cassation based its decision on the fact that the association did not pursue the goal of 'encouraging others to be an LGBTI person'. The Court reasoned as follows. 'The fact which is deemed to be immoral by society at large is not to be lesbian, gay, bisexual, transvestite or transsexual and the use of these words, but for these individuals to promote and to encourage with their lifestyles others' to follow an LGBTI lifestyle.'<sup>119</sup>

In a similar vein, the authorities interpret the above-mentioned Article 226 of the Penal Code, titled 'obscenity', to unlawfully limit freedom of expression. In August 2013, the Fourteenth Penal Chamber of the Court of Cassation in Istanbul overturned a lower court judgment acquitting the publisher and translator of a French book, on the ground that the book's homosexual content was offensive.<sup>120</sup> The Law on the Foundation and Broadcasting of Radio and Television Channels is also used by the Turkish courts to block gay social networking websites and by the Supreme Board of Radio and Television to fine broadcasters for airing programmes with homosexual content.<sup>121</sup>

### 2.1.2 Multiple discrimination

In Turkey, prohibition of multiple discrimination is not included in the current law and there is no case law dealing with multiple discrimination.

<sup>116</sup> Article 226(4) of the Turkish Penal Code, penalising such offences with one to four years of imprisonment.

<sup>117</sup> Constitutional Court, E. 2014/118, K. 2015/35, 1 April 2015.

<sup>118</sup> Amnesty International (2011), *'Not an Illness nor a Crime': Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, London, Amnesty International, p. 10, available at: <http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf>; ECtHR, *Kaos GL vs. Turkey*, No. 4982/07. Admissibility decision, 19 June 2009.

<sup>119</sup> Seventh Chamber of the Court of Cassation, 2008/4109 E, 2008/5196 K, 25 November 2008.

<sup>120</sup> Radikal (2013), 'Yargıtay Fransızca Kitabı Müstehcen Buldu' ('The Court of Cassation Held the French Book to be Obscene'), 6 August 2013, available at: [http://www.radikal.com.tr/turkiye/yargitay\\_fransizca\\_kitabi\\_mustehcen\\_buldu-1145084](http://www.radikal.com.tr/turkiye/yargitay_fransizca_kitabi_mustehcen_buldu-1145084).

<sup>121</sup> Kaos GL, LGBTI News Turkey, IGLHRC (2014), *Human Rights Violations of LGBT Individuals in Turkey*, available at: <http://iglhrc.org/sites/default/files/uprSubTurkey.pdf>; a joint report submitted by national and international LGBT NGOs to the UN Human Rights Council Working Group on the Universal Periodic Review, twenty-first session, January-February 2015.



The draft anti-discrimination law does not mention multiple discrimination. Reference is only made indirectly in the definitions of 'segregation' and 'institutional discrimination' to segregation/institutional discrimination based on one or more grounds enumerated under the draft anti-discrimination 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).

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Turkey, national law does not prohibit discrimination based on perception or assumption of what a person is and there is no relevant case law. However, the draft anti-discrimination law defines (Article 2(1)(i)) and prohibits (Article 3(8)(g)) discrimination based on perception.

#### **b) Discrimination by association**

In Turkey, the national law (including case law) does not prohibit discrimination by association.

The draft anti-discrimination law also does not prohibit or even mention discrimination based on association.

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

#### **a) Prohibition and definition of direct discrimination**

In Turkey, direct discrimination is prohibited in national law under Article 10 of the Constitution, Articles 3(2) and 122 of the Penal Code, Article 5(1) of the Labour Law, Articles 4 and 4/A of the Law on Persons with Disabilities, Article 4 of the Basic Law on National Education, Article 68 of the Civil Code, Article 12 of the Law on Political Parties, Article 8 of the Law on the Foundation and Broadcasting of Radio and Television, Article 4(d) of the Law on Social Services, Article 2(1) of the Law on the Execution of Penalties and Security Measures and Article 7 of the Law on Civil Servants. However, these laws prohibit direct discrimination within their respective limited material scopes. Moreover, with the exception of the Law on Persons with Disabilities, none of these laws define direct discrimination.

The definition of direct discrimination was introduced to the Turkish legal framework for the first time on 6 February 2014, under the amendments made to the Law on Persons with Disabilities. The revised Article 3(a) of this law defines direct discrimination as 'any differential treatment, based on disability, which limits or obstructs a person with disability from the enjoyment of rights and freedoms on equal footing with others in comparable situations'. Discrimination on the basis of disability is prohibited not only in job applications, recruitment processes, working hours and terms (as in the pre-amendments version of the law) but in all issues relating to employment, including continuity of employment, career development and healthy and safe working conditions (changes made in Article 14).

In their application of the Constitution's equality clause (Article 10), the Constitutional Court and other courts have developed the elements of discrimination. According to the Constitutional Court:

The principle of equality, which is among the fundamental principles of law, is enshrined in Article 10 of the Constitution. Equality before the law applies to persons whose legal status is the same. This principle aims for 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 the 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 the 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 the 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 to 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 to the principle of equality.<sup>122</sup>

Article 2(1)(a) of the draft anti-discrimination law 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 situations'.

#### b) Justification of direct discrimination

The law does not permit justification of direct discrimination. On the other hand, based on the Constitutional Court's 2010 judgment cited above, it seems that, in practice, Turkey's highest court does permit the justification of direct discrimination.

### **2.2.1 Situation testing**

#### a) Legal framework

In Turkey, national law is silent on situation testing. Therefore, consideration of evidence obtained through situation testing is left to the discretion of the judge.

#### b) Practice

In Turkey, situation testing is not used in practice. Anti-discrimination NGOs are either not knowledgeable about the method<sup>123</sup> or do not believe in its effectiveness in the Turkish context, where LGBTI associations do not dare to use this method due to the risk of violence and the ideological stance of the law enforcement authorities and the judiciary.<sup>124</sup> An anti-discrimination lawyer representing an LGBTI association stated that in the only incident he knows – and was a part of – where situation testing was used, a group of transgender individuals were thrown out of a bar. The management justified the act on the ground that 'women with headscarves and people with uniforms were also not allowed'.<sup>125</sup>

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

#### a) Prohibition and definition of indirect discrimination

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<sup>122</sup> Constitutional Court, E. 2008/95, K. 2010/18, 28 January 2010.

<sup>123</sup> In answer to a query, a lawyer representing one of the leading LGBTI associations stated that she is not familiar with situation testing methods. Email correspondence with Yasemin Öz, 23 April 2013.

<sup>124</sup> Email correspondence with Murat Köylü, an anti-discrimination lawyer representing an LGBTI association, 22 April 2013.

<sup>125</sup> Email correspondence with Murat Köylü, an anti-discrimination lawyer representing an LGBTI association, 22 April 2013.

In Turkey, indirect discrimination is prohibited only under Article 4/A of the Law on Persons with Disabilities and prohibition is limited to the ground of disability. The revised law prohibits discrimination on the basis of disability not only in job applications, hiring processes, working hours and terms (as the pre-amended law) but in all issues relating to employment, including continuity of employment, career development and healthy and safe working conditions (changes made in Article 14).

The definition of indirect discrimination introduced on 6 February 2014 to Article 3(b) of the Law on Persons with Disabilities is as follows: '[a] person with disability being put in a disadvantageous situation in exercising his/her rights and liberties due to discrimination based on disability in such a way that cannot be objectively justified as a result of any action, procedure or practice which does not appear discriminatory.' This definition is based on the individual person with a disability and does not seem to require persons with disabilities as a general group to be disadvantaged, and thus arguably goes beyond the EU law which bases the definition of indirect discrimination on group disadvantage.

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 does not appear discriminatory. In order for an action, procedure or practice to be objectively justified, it must have a legitimate aim and be proportionate.' Again, with the individual focus of its definition of indirect discrimination, this definition goes beyond the EU law.

The current situation is not compatible with the directives, as indirect discrimination is prohibited only on grounds of disability and its material scope is not comparable to the directives.

b) Justification test for indirect discrimination

Under Article 3(b) of the Law on Persons with Disabilities, the justification test for indirect discrimination is 'objective' justification. The law does not elaborate on what can be considered a legitimate aim for the purpose of objective justification and there is no case law on this very recently introduced concept in Turkish law.

c) Comparison in relation to age discrimination

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

### **2.3.1 Statistical evidence**

a) Legal framework

In Turkey there are no national rules permitting data collection for the purpose of proving discrimination. On the contrary, there are rules limiting the collection of personal data. While there are several institutions conducting public opinion surveys entailing questions about ethnic origin and religious background, their data has not been used as statistical evidence for the purpose of proving discrimination in courts of law.

As revised in 2010, Article 20(3) of the Constitution 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 down by law.

In spite of this new constitutional right, an implementing law on data protection is yet to be adopted and an independent data protection supervisory authority is still to be established.<sup>126</sup> The democratisation package announced by the Government on 30 September 2013 contains a commitment to the adoption of such a law, though no timeline has been given for this.

Article 135(1) of the Turkish Penal Code criminalises the unlawful recording of personal data and Article 135(2) considers unlawful recording of personal data concerning a person's political, philosophical or religious opinions, racial origins, moral tendencies, sexual life, health conditions and connections to trade unions as an aggravating factor in sentencing. Any person who violates this provision is liable to imprisonment for six months to three years.

### **Ethnicity and race**

While periodic censuses conducted by the Government previously contained questions regarding ethnic origin, the 1965 census was the last one where people were asked about their mother tongue and ethnicity. Consequently, there is no longer any publicly available official data on the ethnic background of people collected on the basis of their informed consent and the principle of confidentiality. On 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, this circular is not publicly 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'.<sup>127</sup>

The Turkish Government has time and again reiterated to the Committee on the Elimination of Racial Discrimination that it does not collect, keep or use qualitative or quantitative data on ethnic backgrounds of its citizens,<sup>128</sup> noting that this is 'a sensitive issue, especially for those nations living in diverse multicultural societies for a long period of time'.<sup>129</sup>

However, public authorities in Turkey do collect data on the ethnic and racial origin of citizens, not to use such data in research and litigation but for the purpose of profiling and policing ethnic minorities, particularly Kurds and Roma. A few examples of such practices have been inadvertently made available to the public by government institutions, such as a provincial police department whose website contained information about the ethnic background of residents. The information note stated that 'families of kurdish<sup>130</sup> dissent [sic] who migrated from eastern provinces' resided in neighbourhoods located near the

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<sup>126</sup> European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 63, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-turkey-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf).

<sup>127</sup> European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, 8 February 2011, p. 9, available at <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-CBC-IV-2011-005-ENG.pdf>.

<sup>128</sup> Turkey, *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/WrittenRepliesTurkey74.pdf>.

<sup>129</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 3, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>130</sup> Spelling mistake in original text, not by author.

highways while 'gypsies [sic]<sup>131</sup> 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 had 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'.<sup>132</sup>

In its fourth monitoring report on Turkey, published in 2011, the European Commission against Racism and Intolerance (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 these 'with due regard for the principles of confidentiality, informed consent and voluntary self-identification'.

A news report published in August 2013 revealed not only that racial profiling of minorities is continuing but also how deeply rooted this discriminatory state practice is. The Armenian-Turkish weekly newspaper *Agos* published official correspondence within the provincial representation of the Ministry of National Education in Istanbul, which revealed that the population registry records contain a confidential 'racial code.' The news concerned the attempts of a parent who had converted from Islam to the Armenian Orthodox religion to register her child at an Armenian kindergarten, for which she needed to receive authorisation from the Ministry of National Education. Upon the parent's application, the provincial representation of the Ministry in Istanbul sent an official letter to its district branch, stating that the parent in question could only be given authorisation if her 'confidential racial code' in her population registry record is 2, which is the racial code given to Armenian citizens.<sup>133</sup> According to the news report, not only Armenian but all citizens in Turkey are racially profiled, and not only for the purpose of identifying the eligibility of students for enrolment in non-Muslim schools. According to an undisclosed source in the population registry services, there are racial codes for Greek Orthodox, for Jews, for Syrians and for 'others.' In his May 2014 response to queries on this issue submitted by a member of the Parliament in August 2013,<sup>134</sup> the Minister of the Interior simply stated that 'procedures concerning registry incidents are being conducted in accordance with the law'.<sup>135</sup>

## Disability

General censuses conducted in 1985 and 2000 contained insufficient information on the quantitative dimension of disability in Turkey.<sup>136</sup> In 2002, the Presidency on Disabled People under the auspices of the Prime Ministry commissioned the Turkish Statistical Institute to conduct a survey.<sup>137</sup> This study, the first statistical research on disability in

<sup>131</sup> Spelling mistake in original text, not by author.

<sup>132</sup> Alp, S., Taştan, N. (2011), *Türkiye'de Irk veya Etnik Köken Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-31 Temmuz 2010* (Monitoring Report on Discrimination on Grounds of Race or Ethnic Origin in Turkey: 1 January-31 July 2010), Istanbul, Istanbul Bilgi Üniversitesi, 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.

<sup>133</sup> For the official letter from the Istanbul branch of the Ministry of National Education to its district representation in Şişli, see <http://www.agos.com.tr/haber.php?seo=90-yildir-soy-kodu-ile-fislemisler&haberid=5479>.

<sup>134</sup> For the text of the MP's written queries to the Prime Minister, see <http://www2.tbmm.gov.tr/d24/7/7-29686s.pdf> and for the text of the MP's second written query to the Prime Minister, see <http://www2.tbmm.gov.tr/d24/7/7-29694s.pdf>.

<sup>135</sup> For the text of the Minister's written response, see <https://www2.tbmm.gov.tr/d24/7/7-29686sgc.pdf>.

<sup>136</sup> Şenyurt Akdağ A., Tanay, G., Özgül, H., Kelleci Birer L., Kara, Ö. (2011), *Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010 (Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010)*, İstanbul, İstanbul Bilgi Üniversitesi, p. 13.

<sup>137</sup> For the results of the 2002 Disability Survey of Turkey, see Tufan, İ., Arun, Ö. (2006), *Secondary Data Analysis of Disability Survey of Turkey (Türkiye Özürlüler Araştırması 2002 İkincil Analizi)*, available at: [www.dezavantaj.org/files/ilerianaliz.doc](http://www.dezavantaj.org/files/ilerianaliz.doc).

Turkey, identified the number of persons with disabilities in Turkey to be 8 431 937, which is 12.29 % of the total population. This was the first and last official survey on disability in Turkey and 12 years later, government policies are still developed on the basis of the data generated by this study. In addition, in 2010, the Ministry of Family and Social Policies and the Turkish Statistical Institute conducted a needs assessment survey.<sup>138</sup>

The 2002 survey on disability in Turkey found that only 20 % of persons with disabilities were employed, while the rate of women with disabilities who were employed was as low as 6.7 % (compared to 32.2 % for men). Only 14.8 % of persons with disabilities with a disability level of 20 % or more were employed, putting the unemployment rate in this group at 85.7 %; 6.3 % of the individuals surveyed were actively looking for a job.

The Prime Ministry's State Personnel Presidency regularly publishes up-to-date statistics on persons with disabilities employed in the public sector. The data are segregated according to the provinces, sectors, public institutions where persons with disabilities are employed, as well as on the basis of the 'disability levels', education levels and types of disability of these persons. The data include information about vacancies available at each public institution which is legally obliged to fulfil an employment quota of 3 %.<sup>139</sup> In addition, until 2013 the Turkish Statistical Institute released annual data on the number of persons with disabilities employed in both the public and the private sectors and the number of vacancies in both sectors, where there are legal obligations to fulfil employment quotas.<sup>140</sup>

In Turkey, the national law is silent on the use of statistical evidence in order to establish indirect discrimination. The Law on Civil Procedure (no. 1086), the Law on Administrative Procedure (no. 2577) and the Law on Criminal Procedure (no. 5271) do not contain specific provisions regarding statistical evidence. There is no case law regarding the use of statistical evidence. However, as a general 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.

Statistical data are not used for the design of positive actions.

#### b) Practice

In Turkey statistical evidence in order to establish indirect discrimination is not used in practice.

Although use of statistical evidence is not prohibited by national law, it is not used by the courts and there is no case law in this area.

## 2.4 Harassment (Article 2(3))

#### a) Prohibition and definition of harassment

In Turkey, harassment is not prohibited in national law, with the exception of sexual harassment, which is prohibited under the Labour Law and the Penal Code. Sexual harassment is not defined. On the other hand, one can argue that harassment in general is a type of tort and is prohibited on all grounds under Article 49 of the Law of Obligations.

The draft anti-discrimination law defines harassment as 'any unwanted conduct, including psychological and sexual, related to any of the grounds referred to in this Law, which takes

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<sup>138</sup> Turkey, Ministry of Family and Social Policies and Turkish Statistical Institute (2011), *Survey on Problems and Expectations of Disabled People 2010*, available at [http://www.tuik.gov.tr/Kitap.do?metod=KitapDetay&KT\\_ID=1&KITAP\\_ID=244](http://www.tuik.gov.tr/Kitap.do?metod=KitapDetay&KT_ID=1&KITAP_ID=244).

<sup>139</sup> <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

<sup>140</sup> This information is no longer publicly available on the website of the Turkish Statistical Institute.

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’.

In Turkey, harassment does not explicitly constitute a form of discrimination. The draft law on anti-discrimination, however, prohibits harassment as a form of discrimination.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Turkey the employee is criminally and civilly liable. Article 25 of the Labour Law enables employers to terminate the work contract of an employee who commits sexual harassment against another employee. The employee is criminally liable under Article 105 and (if a government employee) Article 94 of the Penal Code.

In order for civil servants to face prosecution, Law no. 4483 on the Prosecution of Civil Servants and Other Public Employees and Article 129 of the Constitution require their superior’s permission. In other words, civil servants cannot be prosecuted for crimes unless their superior consents to prosecution.

While employers are not criminally liable, they are subject to civil liability for the wrongful acts of their employees. According to Article 55 of the Law of Obligations, employers are responsible for the wrongdoings of their employees and have the right to seek recourse against employees engaged in wrongdoing.

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

## **2.5 Instructions to discriminate (Article 2(4))**

a) Prohibition of instructions to discriminate

In Turkey, instructions to discriminate are not expressly prohibited in national law. Instructions are not defined. However, Article 10 of the Law on Civil Servants prohibits superiors of civil servants from giving orders to civil servants in violation of the law. When considered together with the prohibition of discrimination under Turkish law, this article can be construed to prohibit instructions to discriminate. There is no case law on the issue.

In Turkey, instructions do not explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

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

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

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Turkey, the duty to provide reasonable accommodation is included in the law, but only in respect to persons with disabilities. It is defined, but again only in the context of the employment of persons with disabilities. The denial of reasonable accommodation is not considered to be a form of discrimination.

The duty to provide reasonable accommodation and the definition of reasonable accommodation were both introduced to the Law on Persons with Disabilities on 6 February 2014. Article 4/A stipulates that 'requisite measures for providing the reasonable accommodation of persons with disabilities in order to ensure equality and remove discrimination' be taken and Article 14(4) requires employers as well as relevant government institutions to undertake reasonable accommodation measures in workplaces employing persons with disabilities. Article 3(j) defines reasonable accommodation as 'necessary and appropriate changes and precautions which do not impose a disproportionate and excessive burden and which are needed in a certain situation in order to ensure that the disabled exercise or benefit from their human rights and fundamental freedoms fully and on equal footing with others'. The legal commitment to reasonable accommodation under Article 4/A is not limited to employment – since the duty of employers to undertake reasonable accommodation is explicitly stated under Article 14(4) – and the reference to 'the disabled' in general arguably renders this duty proactive, although the subject of this general duty is left unclear. On the other hand, contrary to the UN Convention on the Rights of Persons with Disabilities, lack of reasonable accommodation is not considered to be discriminatory even after these amendments.

A very limited duty of reasonable accommodation for employees with disability is 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 those civil servants to carry out their duties. Noticeably, the limited duty of reasonable accommodation brought upon employers does not rest on a rights-based or anti-discrimination perspective. This is evident, for example, in the fact that disability is not a protected ground under the Law on Civil Servants. Consequently, breaches of the duty of reasonable accommodation are not considered as discrimination. Article 100 of the law authorises public sector employers to adapt the start and end of 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. However, the article does not impose a *duty* to accommodate, rather than a power to do so and this is left at the discretion of the employers. Thus, failure of employers to take such measures is not necessarily discrimination. Article 101 entails a negative duty, whereby persons with disabilities working in the public sector cannot be forced to work on night shifts or night duty, unless they want to do so.<sup>141</sup>

There are various constitutional and legal provisions which, while silent on reasonable accommodation, can be interpreted to impose an implicit duty of reasonable accommodation. 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.

The United Nations Convention on the Rights of Persons with Disabilities identifies the denial of reasonable accommodation as discrimination. According to Article 90 of the Constitution, the Convention has the force of law and, as acknowledged before the UN Committee on the Rights of Persons with Disabilities, has the same force as the Constitution in the hierarchy of norms.<sup>142</sup>

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 that of the directives. Consequently, depending mostly on the number and diversity of requests

<sup>141</sup> Turkey, Law on the Restructuring of Certain Debts and on the Amendment of Social Securities and General Health Insurance Law and of Various Other Laws and Decrees with the Force of Law (*Bazı Alacakların Yeniden Yapılandırılması ile Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu ve Diğer Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun*), 13 February 2011.

<sup>142</sup> Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 3, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en).

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.

b) Practice

The Law on Persons with Disabilities does not introduce any criteria for assessing the extent of the duty of reasonable accommodation and does not define 'reasonable'. It also does not define 'disproportionate burden' for employers. The law is silent on the assessment of such burdens.

c) Definition of disability and non-discrimination protection

The constitutional provision on anti-discrimination and the anti-discrimination clauses in various laws do not define disability. The Law on Persons with Disabilities is the only law which defines disability. Thus, the question of whether there is a discrepancy between the definition of disability for the purposes of claiming a reasonable accommodation and that for claiming protection from non-discrimination in general is not applicable in the Turkish context. As far as the Law on Persons with Disabilities is concerned, the two definitions are the same.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Turkey, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. However, unlike the field of employment, such fields are not specified.

Article 4/A of the Law on Persons with Disabilities states that 'necessary measures will be taken for the reasonable accommodation of the disabled to ensure equality and bring an end to discrimination'. While the law has a specific provision concerning reasonable accommodation in employment, no corresponding provisions exist for fields outside employment. Consequently, this is an area which will be clarified through judicial interpretation.

There is no constitutional or other legal provision with an explicit reference to reasonable accommodation in areas outside employment. However, the Constitution and various laws require the introduction of special measures and positive discrimination on behalf of persons with disabilities.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Turkey, failure to meet the duty of reasonable accommodation does not count as 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 Article 90 of the Constitution, the Convention has the force of law. Thus, persons with disabilities could in theory rely on the Convention to claim that denial of reasonable accommodation should be considered as discrimination. 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. There is not yet a case law on this issue.

f) Duties to provide reasonable accommodation in respect of other grounds

In Turkey, there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

In recent years, the Parliament adopted a practice of accommodating members of the Parliament belonging to the Alevi religious faith during their fasting period in the month of Muharrem. Upon the petition of an Alevi parliamentarian, the Speaker of the Turkish Parliament authorised the serving of special food in accordance with the dietary restrictions of Alevi deputies in restaurants within the premises of the Parliament during the month of Muharrem in 2012. This was the first time ever a public office has accommodated Alevis during their fasting period. The practice was repeated during the Muharrem fast in 2013, but not in 2014 nor in 2015.

g) Accessibility of services, buildings and infrastructure

In Turkey, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. Article 7 of the Law on Persons with Disabilities, as revised on 6 February 2014, requires compliance with accessibility standards in the planning, design, construction, production, licensing and inspection of buildings. It also requires information services and information and communication technologies to be accessible for persons with disabilities. Provisional Article 3 of the law, as amended on 6 February 2014, introduced specific accessibility requirements to the general and unspecified duty under the previous version of the law. Among others, the revised Provisional Article 3 requires all public and private systems providing mass transportation services and all public and private mass transportation vehicles which have, in addition to the driver's seat, at least nine seats to be accessible for persons with disabilities.

The redefined concept of accessibility under the February 2014 amendments is now in line with the UN Convention on the Rights of People with Disabilities. At the same time, the changes introduced in the Law on Persons with Disabilities extended, once again, the deadline for compliance with these accessibility requirements. Already extended until 7 July 2015 through a last-minute legal amendment made on 19 June 2012,<sup>143</sup> the grace period for accessibility set forth under the 2005 Law on Persons with Disability has been further extended for another 3 years until 7 July 2018, 13 years after the law's adoption. Mass transportation vehicles which have 9 to 16 seats (in addition to the driver's seat), passenger ferries, vehicles used in intercity public and private mass transportation and vehicles providing tourist transportation are also given time until 7 July 2018 to comply with the accessibility requirement. Until then, where they receive an accessibility demand from a person with disability, providers of these services must comply within 72 hours. Providers of transportation to schools and workplaces which receive accessibility demands are required to meet such demands without waiting for the 2018 deadline. Vehicles with nine or more seats in addition to the driver's seat which are produced more than six months after the amended law enters into force and which do not comply with accessibility requirements will not be given licences to provide urban and intercity transportation services. There is no publicly available information on compliance on this issue.

Despite these legal requirements, neither the private nor the public sector has 'undertaken serious planning based on a calendar and with resources specifically allocated to accessibility'.<sup>144</sup> According to a report published by Sabancı University, 66.9 % of persons with disabilities in Turkey cannot access pavements, and 55-60 % cannot access pedestrian crossings, shopping centres, restaurants, public buildings, post offices and banks. The report states that a mere 0.44 % of the GDP is allocated for persons with

<sup>143</sup> Turkey, Law on the Amendment of Various Laws and Decrees with the Force of Law (*Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 4 July 2012.

<sup>144</sup> Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birer L., Kara, Ö. (2011), *Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), İstanbul, İstanbul Bilgi Üniversitesi, p. 50.



disabilities, 70 % of which is in the form of cash transfers. According to official figures for 2002, around 12 % of the population is made up of persons with disabilities.<sup>145</sup>

An executive regulation adopted on 20 July 2013, eight years after the adoption of the Law on Persons with Disabilities, established a mechanism for monitoring and auditing the enforcement of accessibility of goods and services.<sup>146</sup> The regulation foresees the establishment of provincial commissions which are presided over in every province by the governors or their deputies and are composed of six members. In addition to public servants, there are two representatives of disability NGOs, who preferably have disabilities themselves. Effective immediately, the regulation tasked the commissions with issuing administrative fines in cases of non-compliance. The fines are set to be in the range of around EUR 330-1 660 (TRY 1 000-5 000) per each non-compliant private facility (not to exceed a total of EUR 16 600 (TRY 50 000) per year for each private legal or natural person), and EUR 1 660-8 300 (TRY 5 000-25 000) where the facility belongs to a public institution (not to exceed a total of EUR 166 000 (TRY 500 000) per year for each institution). The commissions may decide to give non-compliant facilities an additional grace period of two years until 7 July 2015 instead of issuing a fine. The funds to be collected will be channelled to the Ministry of Family and Social Policies to be used for accessibility projects. The regulation requires governors to establish the provincial commissions within one month (i.e. by 20 August 2013).

The extremely poor awareness of the rights of persons with disabilities on the part of public authorities, coupled with the hitherto lack of effective enforcement mechanisms and sanctions under Law no. 5378, result in an utter disregard of the legal obligations stipulated under the law. Even new public buildings built after the entry into force of this law lack the minimum facilities to enable access for persons with disabilities, preventing persons with disabilities from entering the public sphere.<sup>147</sup> More than a decade after the entry to force of Law no. 5378, the Government still does not have statistics on the number of public buildings, infrastructure and facilities which are accessible for persons with disabilities.

In cases regarding inaccessibility of services, buildings and infrastructure, and public transportation brought before the courts, prosecutors and judges are reluctant to define these as discrimination. A rare positive example in this regard was a court judgment delivered in December 2012 against the High Board of Elections for its failure to make election facilities accessible for a person with disability who could not cast his vote in the general elections of June 2011. Though the claimant had registered his disability with the authorities long before the elections, his polling station was situated on the third floor of a building which did not have a lift. The court awarded the claimant around EUR 1 660 (TRY 5 000).<sup>148</sup>

In most cases, public and private entities are extremely dismissive when handling requests for accessibility. As far as private housing is concerned, tenants are in a particularly vulnerable position. An amendment made to the Apartment Ownership Law through the Law on Persons with Disabilities of 2005 imposes an obligation on private homeowners living in apartment buildings to accommodate accessibility requests brought by a neighbour

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<sup>145</sup> Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 22, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

<sup>146</sup> Turkey, Regulation on the Monitoring and Auditing of Accessibility (*Erişilebilirlik İzleme ve Denetleme Yönetmeliği*), Official Gazette, 20 July 2013.

<sup>147</sup> Eşit Haklar için İzleme Derneği (2011), Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report (*Türkiye’de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu*), Istanbul, Eşit Haklar için İzleme Derneği, p. 18, <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

<sup>148</sup> Bianet (2012), ‘Engelli Seçmen YSK’yı Mahkum Etti’ (‘The Voter with Disability won Judgment against the High Board of Elections’), 4 November 2012, available at <http://www.bianet.org/bianet/ayrimcilik/142560-engelli-secmen-yskyi-mahkum-etti>.



and a duty on the local government authorities to enforce this obligation.<sup>149</sup> Where the accessibility request comes from a tenant, this obligation does not apply. Though the Additional Article 1 of the Zoning Law brings a general duty of accessibility, in practice private homeowners living in apartment buildings do not comply. A news article in 2013 describes a case in point. The residents of an apartment building refused to allow the family of a small girl with a physical disability who used a wheelchair to build a ramp to make the main door of the building accessible. The municipal authorities to which the tenant family applied for help agreed to construct a ramp only if the neighbours agreed.<sup>150</sup>

On 26-27 November 2013, the Ministry of Family and Social Policies organised a briefing meeting in Ankara for the purpose of informing the members of the provincial commissions about their tasks, duties and responsibilities. Following up on this meeting, on 27 December 2013, the Ministry sent to the governorships of all 81 provinces its Accessibility Monitoring and Auditing Plan for the year 2013-2014, in accordance with the terms of the executive regulation.<sup>151</sup> The plan, also uploaded on the Ministry's website,<sup>152</sup> provides the list of buildings, open areas and mass transportation vehicles which are to be monitored and audited. In 2015, the Ministry released an updated and expanded Accessibility Monitoring and Auditing Plan for the year 2015.<sup>153</sup> The 2015 plan expanded the list of buildings, open areas and mass transportation vehicles which are to be monitored and audited. The Ministry asked the 81 governorships to prepare provincial monitoring and auditing programmes to comply with the national plan and to submit these to Ministry by 6 March 2015.<sup>154</sup> Also available on the Ministry's website are application forms for citizens' complaints<sup>155</sup> and assessment forms<sup>156</sup> to be used by the commissions in their monitoring and auditing activities.

In Turkey, national law contains a general duty to provide accessibility by anticipation for people with disabilities. Article 3(f) of the Law on Persons with Disabilities defines accessibility as follows: 'that the buildings, open areas, transportation and information provision services, and information and communication services are reachable and usable in a safe and independent manner by the disabled.' Article 14 of the Municipality Law (Law no. 5393) of 2005 requires municipal services to be provided to persons with disabilities 'through methods most suitable to their situation'. However, this vague wording does not explicitly require municipal services to be accessible to persons with disabilities nor does it impose legal obligations on municipalities.

The Law on Persons with Disabilities does not require public services other than transportation, information provision and information and communication services to be accessible to persons with disabilities. In this sense, the material scope of the law is more

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<sup>149</sup> Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 22, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

<sup>150</sup> Bianet (2013), 'Rampaya İzin Yok, Kızını Arabasıyla Taşı Dıyorlar' ('No Permission for a Ramp: "Carry your Daughter by Car"'), 26 September 2013, available at <http://www.bianet.org/bianet/toplum/150194-rampaya-izin-yok-kizini-arabasiyla-tasi-diyorlar>.

<sup>151</sup> Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2013), [http://eyh.aile.gov.tr/data/5511712d369dc57100ffbfb0/eid\\_plani\\_ust\\_yazi.pdf](http://eyh.aile.gov.tr/data/5511712d369dc57100ffbfb0/eid_plani_ust_yazi.pdf).

<sup>152</sup> Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2013-2014), [http://eyh.aile.gov.tr/data/5511712d369dc57100ffbfb0/eid\\_plani\\_2013-2014.pdf](http://eyh.aile.gov.tr/data/5511712d369dc57100ffbfb0/eid_plani_2013-2014.pdf).

<sup>153</sup> Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/yayin-ve-kaynaklar/erisilebilirlik/erisilebilirlik-izleme-ve-denetleme-komisyonlari/eid-plani-ust-yazi-ve-eid-plani-2015>.

<sup>154</sup> Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/data/552f7cd5369dc5a424235ee9/%C3%BCstyaz%C4%B1.pdf>.

<sup>155</sup> Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/yayin-ve-kaynaklar/erisilebilirlik/erisilebilirlik-izleme-ve-denetleme-komisyonlari/erisilebilirlik-izleme-ve-denetleme-komisyonlari-vatandaslar-tarafindan-yapilacak-basvuruda-kullanilacak-formlar>.

<sup>156</sup> Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/yayin-ve-kaynaklar/erisilebilirlik/erisilebilirlik-izleme-ve-denetleme-komisyonlari/erisilebilirlik-izleme-ve-denetleme-programi-formati>.

limited than that of the UN Convention, which requires accessibility to both public places and public services.

Until 2013, disability could be explicitly stated as a ground for exclusion from access to social protection. A regulation issued in 1998 by the General Directorate on the Status of Women put forth the criteria for admission to government-run women's shelters (named 'guesthouses' by the government). According to Article 9(d), (e) and (g) of this regulation, the following women were ineligible: women with 'mental health problems', 'women with mental disabilities', and women with physical disabilities who need care.<sup>157</sup> This regulation was repealed by a new regulation which came into effect on 5 January 2013 and which introduced the principle of non-discrimination in admission to shelters for all women (and their children) who are subjected to or at risk of being subjected to violence. With regard to disability, admission criteria are slightly qualified. Women who have children with disabilities will be placed in private apartments or flats, provided that they are not in a life-threatening situation, and their rent and utility costs will be paid by the shelter. Women with intellectual or psychological disabilities will be placed in appropriate social service institutions. The regulation requires all shelters to be accessible to persons with disabilities.<sup>158</sup>

#### h) Accessibility of public documents

There is no law which universally requires translation / interpreting of public services for deaf or blind persons. There are, however, laws and regulations which provide the legal basis for the needs-based provision of interpreting services in sign languages.

Article 56(2) of the Turkish Code of Criminal Procedure grants persons with hearing or speech disabilities the right to take an oath in court by sign language and with the help of a sign language interpreter, but limits this right to illiterate persons only. Those that are literate are required to take an oath by writing and signing the oath. The provision of an interpreter for persons with hearing or speech disabilities is limited to oath taking and does not extend to the use of sign language in court hearings in general. Instead, Article 150 of the Turkish Code of Criminal Procedure requires courts to appoint a lawyer for persons with hearing or speech difficulties who lack a legal representative.

Additional Article 8, added to the Law on Social Services in 2005, requires the availability at public offices of personnel to provide, where necessary, translation / interpreting services for persons with hearing and visual impairments. The article also requires provision of tutorial courses to teach public personnel sign language. The executive regulation adopted in 2006 to implement this provision requires each provincial representation of the General Directorate for Social Services and Child Protection to hire at least one person qualified as a sign language interpreter.<sup>159</sup> As at December 2013, only 18 of the 81 provinces comply with this requirement.<sup>160</sup>

For the standardisation of sign language interpreting services, the Ministry of Family and Social Policies and the Ministry of National Education organised the first national examination to determine the personnel eligible to receive the official certificate of qualification. In 2013, 87 persons were found to qualify as sign language interpreters and they received the first batch of certificates issued by the Government.<sup>161</sup> At the award

<sup>157</sup> Turkey, Regulation on Women's Guesthouses under the Social Services and Child Protection Agency (*Sosyal Hizmetler ve Çocuk Esirgeme Kurumu'na Bağlı Kadın Konukevleri Yönetmeliği*), Official Gazette, 12 July 1998.

<sup>158</sup> Turkey, Regulation on the Opening and Management of Women's Guesthouse (*Kadın Konukevlerinin Açılması ve İşletilmesi Hakkında Yönetmelik*), Official Gazette, 5 January 2013.

<sup>159</sup> Turkey, Regulation on the Training and Working Conditions of Personnel to Provide Sign Language Services (*İşaret Dili Tercümanlığı Hizmeti Verecek Personelin Yetiştirilmesi ile Çalışma Esasları Hakkında Yönetmelik*), Official Gazette, 19 August 2006, Article 6.

<sup>160</sup> Up-to-date information is not available.

<sup>161</sup> Announcement made through the website of the Ministry of Family and Social Policies, 19 December 2013.

ceremony, the representative of the General Directorate for Social Services and Child Protection announced that 63 of these persons would be hired to fill the vacant posts in the provincial representations of the Directorate. In 2014, the Ministry organised another national examination to hire a total of 75 sign language interpreters across Turkey.<sup>162</sup>

There is no legal provision concerning the universal translation of public documents into Braille print, though there are a few laws that grant persons with visual disabilities limited rights to access public documents in very restricted areas. The Law on the Execution of Penalties and Security Measures allows individuals with visual and hearing disabilities who are convicted in a criminal case to be informed about their rights and responsibilities through booklets printed in Braille and through a sign language interpreter respectively.

The practice on this issue is not systematic. While some municipalities and government offices have developed some projects in recent years to make their services accessible for deaf and blind persons, these non-systematic efforts are not representative of practice nationwide.

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<sup>162</sup> <http://pdb.aile.gov.tr/haberler/isaret-dili-tercumani-sinav-i%CC%87lani>.

### **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)**

In Turkey, there is no national law transposing these directives. There are no residence or nationality requirements for the use of relevant national laws.

##### **3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)**

###### **a) Natural and legal persons**

In Turkey, there is no anti-discrimination law. The Law on Persons with Disabilities provides protection against discrimination on the exclusive ground of disability. Article 4 of this law, *inter alia*, bans discrimination against persons with disabilities, and endorses the principles of equal opportunity and accessibility in ensuring their access to all rights and services and their full and effective participation to public life. Articles 13, 14 and 15 of this law express the commitment of the state to taking all necessary measures for the occupational rehabilitation, employment and education of persons with disabilities.

Various laws have provisions on anti-discrimination, the scope of which is limited to the areas/sectors they govern. For example, the broad ban on discrimination on grounds of language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect under Article 3(2) of the Penal Code is limited to the application of this law. Other similar examples are Article 5(1) of the Labour Law, Article 4 of the Basic Law on National Education, Article 7 of the Law on Civil Servants, Article 12 of the Law on Political Parties, Article 8(e) of the Law on the Foundation and Broadcasting of Radio and Television, Article 4(d) of the Law on Social Services and Article 2(1) of the Law on the Execution of Penalties and Security Measures. In most cases, these provisions do not explicitly distinguish between natural persons and legal persons, which gives rise to the assumption that both natural and legal persons are protected against discrimination and can be held liable for discrimination. There is limited case law confirming the protection of natural persons against discrimination (e.g. the above mentioned Constitutional Court ruling finding the barring of a lawyer wearing a headscarf from courtroom to constitute discrimination). There is no case law regarding legal persons.

Civil law does explicitly refer to the distinction between natural and legal persons. Article 48 of the Civil Code, Article 68 of which prohibits associations from discriminating among its members based on the grounds enumerated, stipulates that legal persons have all the rights and obligations other than those which are tied to qualities which are specific to natural persons (such as birth and age). Criminal law also contains an explicit reference to legal persons, exempting them from criminal liability. According to Article 20(2) of the Turkish Penal Code 'no punitive sanctions may be imposed on legal persons'. However, sanctions in the form of 'security precautions' stipulated in the law are reserved.<sup>163</sup>

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

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<sup>163</sup> '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 Penal 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 the licence of the legal person is to be suspended, or certain properties which are fruits of the crime are confiscated etc.

human resources department of a company, while a civil case for compensation can be taken before the courts against the company.

In terms of protection against discrimination, the various laws containing anti-discrimination provisions again do not make an explicit distinction between natural and legal persons. However, the object of protection against discrimination is the individual person.

b) Private and public sector including public bodies

In Turkey, the personal scope of national law covers private and public sectors, including public bodies, for the purpose of protection against discrimination.

The legislative framework which prohibits public bodies from engaging in discrimination is as follows:

Article 10(5) of the Constitution obliges public bodies to act in compliance with the principle of equality before the law in all their proceedings. Article 7 of the Civil Servants Law prohibits civil servants from discriminating in the course of their duties on the basis of language, gender, race, political view, philosophical belief, religion or sect. Civil servants engaged in discrimination are subject to disciplinary sanction under Article 125 of the same law. Article 18 of the Turkish Armed Forces Discipline Law subjects members of the organisation engaged in discrimination to disciplinary sanctions. Article 4(d) of the Social Services Law prohibits discrimination in the execution and provision of social services on grounds of class, race, language, religion, sect or religious differences.

In regard to discrimination in the private sector, the following laws apply:

Article 5 of the Labour Law prohibits discrimination on the grounds of language, race, gender, political thought, philosophical belief, religion, sect and similar grounds in employment relations. Article 82 of the Law on Political Parties prohibits political parties from pursuing the aims of racism. Article 83 prohibits political parties from engaging in discrimination on grounds of language, race, colour, gender, political opinion, philosophical belief, religion and sect, or other similar considerations. Article 12 prohibits discrimination against applicants for membership to political parties on grounds of language, race, gender, religion, sect, family, group, class or profession. Article 30 of the Law on Associations prohibits the establishment of associations for objectives prohibited under the Constitution and laws, which includes discrimination. Article 68 of the Civil Code prohibits discrimination among members of associations on the basis of language, race, gender, religion, sect, family, group or class. Finally, Article 122 of the Penal Code prohibits hate acts based on language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect in the sale or transfer of movable or immovable property, the execution of a service, employment, the provision of food services and the undertaking of economic activity. While legal persons cannot be held criminally liable, Article 20 of the Penal Code exempts from that ban sanctions to be introduced for violation of this law.

In Turkey the personal scope of anti-discrimination law covers private and public sectors, including public bodies, for the purpose of liability for discrimination.

## **3.2 Material scope**

### **3.2.1 Employment, self-employment and occupation**

In Turkey, national legislation does not apply to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds.

Turkey does not have a national anti-discrimination law. There are various other laws that address discrimination in employment and occupation.

Article 122 of the Penal Code prohibits hate crimes in recruitment for employment on grounds of language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect. In limiting protection to the selection and recruitment process, the Article is applicable only to the process before an employment relationship is established, and not after (both in the public and private sectors). Although there is no case law on this issue, it can be argued that Article 122 of the Turkish Penal Code is applicable in all sectors, where the selection criteria or recruitment conditions are discriminatory. Article 5 of the Labour Law prohibits discrimination in employment relations by private actors on grounds of language, race, sex, political thought, philosophical belief, religion, sect and similar grounds.

According to Article 13 of the Law on Persons with Disabilities, as revised in February 2014, the Government has the responsibility to take the requisite measures for persons with disabilities to choose their profession and to receive education towards that end. The article requires the relevant ministries to develop professional training, retraining and education programmes for persons with disabilities. The most specific provision in the legislation is Article 14 of this law, as revised in February 2014, which prohibits discrimination in any matter concerning employment, including 'job application, hiring, suggested working hours and conditions and the continuity of employment, career development, healthy and safe working conditions'. Although promotion is not explicitly mentioned, as the provision refers to 'any matter' and expressly refers to career development, it might be interpreted to cover promotion.

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

### **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))**

In Turkey, national legislation includes 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, for the five grounds in both private and public sectors as described in the directives. These issues are dealt with by various laws which are sector-specific (the Law on Civil Servants being specific to the public sector and the Labour Law to the private sector) and specific to certain professions. The Law on Persons with Disabilities prohibits discrimination against persons with disabilities in access to employment, recruitment, professional development and working conditions. There is no umbrella legislation regulating self-employment and statutory office, but there are various laws governing recruitment to specific professions, which do not have provisions on discrimination. In such cases, the general constitutional provisions on anti-discrimination apply.

#### **General rules for recruitment of public servants**

According to Article 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 Article 48 of the Law on Civil Servants, recruitment as a civil servant is subject to general and special conditions, including citizenship, a minimum age limit of 18 years, minimum level of education (secondary school graduate), exemption from military service and not to have a mental

illness which will prevent the person from permanent fulfilment of their duties (subject to Article 58 on the employment of persons with disabilities as civil servants).

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, length of service and positive employment record shall be taken into account in the promotion of civil servants. Public employees are selected by the Public Employee Selection Examination. Those who pass the examination are subject to a trial period, prior to their full appointment. Additional Article 3 of the Regulation on the examinations organised for those to 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 upper age limit for those to be placed through central examinations.

## **Special rules for recruitment of civil servants for certain professions**

Separate examinations are held for recruitment of public employees to certain professions, such as judges and prosecutors. The qualifications required to be appointed as a candidate judge or prosecutor are listed in Article 8 of the Law on Judges and Prosecutors. Two of these requirements are relevant to the directives. According to Paragraph (g) candidates should 'not have any physical and mental illness or disability that would prevent from the conduct of his/her duties as a judge or a prosecutor and in a continuous manner and in every part of the country; not have disabilities such as having difficulties in controlling the movements of the organs, speech different from that which is customary and which would be found odd by people'. The former Paragraph (b), which required candidates not to be older than 35 years of age, was repealed by the Constitutional Court on 14 February 2013 on the ground that it was in violation of Article 91 of the Constitution, which prohibits issues pertaining to fundamental rights and liberties to be regulated by executive decrees with the force of law.<sup>164</sup> The judgment entered into force on 30 September 2014.

In most, if not all, cases, if a separate examination is organised for selection purposes, written examinations are followed by interviews. There are no provisions which guarantee the objectivity of these interviews, nor is there any reference to the duty to provide reasonable accommodation. Judges and prosecutors with at least one year's experience in their current position 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 sectors**

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, the Law on Civil Servants applies. Persons who work in the public sector under contracts are subject to special regulations.

According to Article 71 of the Labour Law, the minimum age for employment is 15 years. However, children who have reached the age of 14 years and have also completed their primary education may be employed on light work which 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.

Article 5(1) of the Labour Law prohibits discrimination based on language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect, or any such considerations. Sexual orientation, age and ethnic origin are not explicitly mentioned. However, these prohibitions only apply after an employment relationship between employee and employer is established, and is not applicable to the pre-employment stages such as job announcements and recruitment processes.

## **Sectors governed by special labour laws**

Under Article 4 of the Labour Law, the following sectors or groups of persons are outside the scope and application of the law: sea and air transport activities; establishments and enterprises employing fewer than 50 employees where agricultural and forestry work is carried out; any construction work related to agriculture which falls within the scope of family economy; works and handicrafts performed in the home without any outside help by members of the family or close relatives up to the third degree; domestic services; apprentices; sportsmen and sportswomen; those being treated in physical, drug or alcohol rehabilitation programmes; and establishments with 3 or fewer employees and falling within the definition in the Tradesmen and Small Handicrafts Act. Consequently, the

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<sup>164</sup> Constitutional Court, Judgment E. 2011/89, K. 2013/29, 14 February 2013.



prohibition of discrimination prescribed in Article 5(1) of the Labour Law does not apply to these categories.

### **Recruitment to the military**

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

A long list of laws and regulations within the separate realm of the 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 engage in homosexual conduct, a practice upheld by the High Military Administrative Court.<sup>165</sup> Gay military personnel who are found to have engaged in homosexual conduct can be dismissed from graduate education, excluded from promotion to assistant professorship in the Military Medical Academy, and debarred from professional examinations required for entry to various professions. On 31 January 2013, the Turkish Armed Forces Discipline Law was adopted by the Turkish Parliament despite protests from LGBTI groups.<sup>166</sup> Article 20 of the law enumerates homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces. According to Clause (ğ), 'engaging in unnatural intercourse or voluntarily submitting oneself to such an act' is a ground for dismissal from the army. In the Turkish context, the term 'unnatural intercourse' refers to anal intercourse and hence homosexual relationships. There are several cases of dismissal of homosexual men from public service or the military upon oral evidence of their engagement in anal sex with other men (see section 3.2.3).

Military regulations governing exemption from mandatory military service result in multiple discrimination against homosexual conscientious objectors, who refuse to serve in the military due to their political beliefs and/or conscience. A well-known example is Mehmet Tarhan, a leading conscientious objector and LGBTI activist, who has been subjected to multiple consecutive arrests, imprisonments and convictions, as well as forced military recruitment for having refused to serve in the army. Military authorities had failed in their attempts to force Tarhan to undergo physical examination to prove his homosexuality. A fugitive since March 2006 and convicted by a military court in October 2006,<sup>167</sup> Tarhan eventually petitioned the ECtHR. In a judgment delivered on 17 July 2012, the ECtHR held that Mr Tarhan's rights under Article 3 (prohibition of inhuman or degrading treatment) and Article 9 (freedom of thought, conscience and religion) were violated due to the non-recognition of his right to conscientious objection and by the criminal proceedings launched against him on that basis.<sup>168</sup> The ECtHR judgment was restricted to Mr Tarhan's political convictions as a conscientious objector and did not address his sexual orientation. Furthermore, the Court did not address the discrimination issues under Article 14 of the Convention which the case raised, arguably due to the applicant's failure to make a discrimination claim.

In assessing eligibility for exemption, the regulations of the Turkish Armed Forces consider homosexuality as a psychosexual disorder and individuals having such a '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.<sup>169</sup> In recent years, due to wide media coverage and international pressure, this practice seems to have

<sup>165</sup> High Military Administrative Court, E. 1998/888, K. 1999/482, 11 May 1999, available at [http://www.msb.gov.tr/ayim/Ayim\\_karar\\_detay.asp?IDNO=1316&ctg=000002000002000001](http://www.msb.gov.tr/ayim/Ayim_karar_detay.asp?IDNO=1316&ctg=000002000002000001).

<sup>166</sup> Turkey, Turkish Armed Forces Discipline Law, 31 January 2013.

<sup>167</sup> Turkish Land Forces, 5th Infantry Training Brigade Commandership Military Court, E. 2006/772, K. 2006/871, 10 October 2006.

<sup>168</sup> ECtHR, *Tarhan v. Turkey*, No. 9078/06, 17 July 2012.

<sup>169</sup> For examples, see Amnesty International (2011), *'Not an Illness nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality'*, London, Amnesty International, p. 23, available at: <http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf>.

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 or 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 wards'.<sup>170</sup> 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 3 different hospitals which have such wards before he was provided with the report.<sup>171</sup> The process of psychological tests and family meetings typically lasts several days and requires multiple visits to more than one military hospital.<sup>172</sup>

Mandatory military service also infringes freedom of religion and conscience. As the only country in the Council of Europe which does not allow alternative civilian service, the Turkish legal framework is discriminatory against individuals who refuse to serve in the military due to religious or political/philosophical beliefs, namely Jehovah's Witnesses and pacifists. This issue was also taken to the ECtHR. In the case of *Halil Savda v. Turkey*, for the first time in a case filed by a conscientious objector from Turkey, the ECtHR filed a violation of Article 9 of the European Convention on Human Rights, which protects freedom of religion.<sup>173</sup> The Court held that the absence of any procedure to examine requests for exemption from military service on grounds of conscientious objection constituted an 'insurmountable conflict' between that obligation and an individual's deeply and genuinely held beliefs. A system which did not provide such a procedure or alternative civilian service violated the positive obligations of states under Article 9. The Court also found the applicant's repeated prosecution by military courts for refusing to wear military uniform constituted degrading treatment and violated the applicant's right to fair trial. Soon after, the Court gave its ruling in the case of *Tarhan v. Turkey*, mentioned above. In June 2014, the ECtHR addressed the issue from the perspective of religious freedom, finding the prosecution and sentencing of four Jehovah's Witnesses who refused to serve in the military to be in violation of Articles 3 and 9 of the European Convention on Human Rights (see Section 12.2).<sup>174</sup>

### **Self-employment and statutory office**

According to Article 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 the Law on Attorneys (no. 1136), the Law on Pharmacists and Pharmacies (no. 6197) and the Law on Notaries (no. 1512), none of which contain specific provisions on the prohibition of discrimination. These constitutional and legal provisions 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 absence of data and case law, it is

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<sup>170</sup> Elif İnce (2012), "'Pembe Tezkere"ye Koğuş İşkencesi' ('Ward Torture for "Pink Certificate"') *Radikal*, 15 April 2012, available at

<http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1084969&CategoryID=77>.

<sup>171</sup> Elif İnce (2012), "'Pembe Tezkere"ye Koğuş İşkencesi' ('Ward Torture for "Pink Certificate"'), *Radikal*, 15 April 2012, available at

<http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1084969&CategoryID=77>. For more on the ill treatment homosexuals are subjected to at military hospitals, see the website of LGBTI news portal Kaos GL: <http://www.kaosgl.com/anasayfa.php>.

<sup>172</sup> For a detailed first-hand account by a transgender person of a six-day process involving multiple visits to four different military hospitals, see <http://www.kaosgl.org/sayfa.php?id=9147>.

<sup>173</sup> ECtHR, *Savda v. Turkey*, No. 42730/05, 12 June 2012.

<sup>174</sup> ECtHR, *Buldu and Others v. Turkey*, No. 14017/08, 3 June 2014.

not possible to assess the current situation.<sup>175</sup> In situations where data exist – such as data regarding non-compliance with quota requirements for persons with disabilities – they 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,<sup>176</sup> the headscarf ban in public and private service jobs never had a constitutional or legal ground.<sup>177</sup> And yet, until recent years, there was widespread employment discrimination against women who wear the headscarf on the basis of a de facto ban precluding their employment in the public sector. The 'legal' basis of this ban was an executive regulation which was adopted by the military regime in 1982, requiring female employees to have their 'heads uncovered'.<sup>178</sup> This stipulation has been relied on by the state in refusing to hire headscarved women in the public sector as well as firing public service employees who wear headscarves in mass numbers at certain moments of high political tension.<sup>179</sup> The ban in the public sector has had a 'spill-over effect' and has spread over time to the private sector.<sup>180</sup>

On 5 November 2012, the Eighth Chamber of the Council of State held that the headscarf ban does not apply to lawyers, who are not public servants although they provide a public service.<sup>181</sup> Delivered in a case brought by a female lawyer against the Union of Turkish Bar Associations, which declined to issue her a new professional identity card on the ground that she submitted a photograph with a headscarf, the judgment drew the boundaries of the ban, restricting it to the public sector. This decision has enabled lawyers who wear a headscarf to enter into court hearings for the first time in decades. Notwithstanding this, there have been attempts by lower courts to bar lawyers wearing headscarves from entering courtrooms. The issue was finally brought to the Constitutional Court. On 25 June 2014, the Court found a lower court's barring of a lawyer from a courtroom on the basis of her headscarf to violate the applicant's freedom of religion and conscience and to constitute discrimination on the basis of religious belief. The Court reversed its prior case law, which had formed the sole juridical basis for the headscarf ban in Turkey. This was also the first time the Court found discrimination in a case brought through the individual petition mechanism, which was introduced by the Turkish Parliament in September 2012.

Political developments followed these court decisions. On 8 October 2013, the Government removed the headscarf ban for those in public office, with the exception of the military,

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<sup>175</sup> According to the information provided in 2008 by the 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, '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.' See United Nations (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. 145, available at: <http://www.unhcr.org/refworld/docid/4885cfa60.html>.

<sup>176</sup> ECtHR, *Leyla Şahin v. Turkey*, No. 44774/98, 29 June 2004.

<sup>177</sup> The ECtHR's judgment was limited to the headscarf ban at universities and did not address the ban in employment.

<sup>178</sup> Turkey, Regulation Concerning the Attire of Personnel Working at Public Institutions (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetlerine Dair Yönetmelik*), Official Gazette, 25 October 1982.

<sup>179</sup> 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 28 February, 1997. NGOs representing headscarved women claim that 5 000 headscarved women were dismissed and another 10 000 were forced to resign between 1998 and 2002. Dilek Cindoğlu (2010), *Headscarf Ban and Discrimination: Professional Headscarved Women in the Labor Market (Başörtüsü Yasağı ve Ayrımcılık: Uzman Meslek Sahibi Başörtülü Kadınlar)*, Istanbul, p. 35.

<sup>180</sup> Dilek Cindoğlu (2010), *Headscarf Ban and Discrimination: Professional Headscarved Women in the Labor Market (Başörtüsü Yasağı ve Ayrımcılık: Uzman Meslek Sahibi Başörtülü Kadınlar)*, Istanbul.

<sup>181</sup> The unofficial text of the judgment is available at: <http://www.istanbulgercegi.com/danistay-8-dairesinin-turbana-iliskin-kararinin-tam-metni-3143451.html>.

judiciary and police.<sup>182</sup> On 31 October 2013, four members of the Parliament (MPs) from the governing Justice and Development Party (JDP) entered the Parliament wearing headscarves, bringing an end to the de facto ban applying to female parliamentarians. In 2015, several political parties nominated female candidates who wear headscarves for the general elections to be held in June 2015. In a related development, on 15 November 2013, an anchorwoman wearing a headscarf presented the news on Turkish Radio and Television (TRT), bringing to an end the de facto ban on journalists in public broadcasting wearing the headscarf.

Another group which suffers employment discrimination through seemingly neutral selection criteria is homosexual men. Many jobs in the public and private sectors require men to have fulfilled their military service duties and provide 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 employment. 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, in answer to a query, that the ground of his exemption from military service was his sexual orientation.<sup>183</sup> Homosexual men who are able to hide their sexual orientation in the recruitment phase are always faced with the risk of losing their jobs if and when their employers are informed about health reports exempting them from military service. A case in point is an experienced referee who was dismissed from his profession by the Turkish Football Federation after 14 years of service after the unlawful disclosure of a health report issued by a military hospital certifying his 'unfitness for military service' on the basis of his sexual orientation (see Section 3.2.3).

Roma in Turkey face an 'extremely high' degree of structural unemployment and 'face specific disadvantages and prejudices in employment related to their ethnicity'.<sup>184</sup> Field research conducted by Roma associations produced empirical evidence of employment discrimination against Roma.<sup>185</sup>

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

In Turkey, national legislation includes working conditions, including pay and dismissals, for all five grounds and for both private and public employment.

According to Article 55 of the Constitution, wages are paid 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 Article 122 of the Turkish Penal Code is limited to recruitment and does not cover employment and working conditions. Article 5 of

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<sup>182</sup> Turkey, Regulation Amending the Regulation Concerning the Attire of Personnel Working at Public Institutions (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelikte Değişiklik Yapılmasına İlişkin Yönetmelik*), Official Gazette, 8 October 2013.

<sup>183</sup> Kaos GL (2011), 'We Need to Revoke the Decision to Hire you due to your Sexual Orientation' (*'Cinsel Yöneliminizden Dolayı İşe Alımınızı İptal Etmek Zorundayız'*), 15 June 2011, <http://www.kaosgl.com/sayfa.php?id=7159>.

<sup>184</sup> 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*, p. 18, available at [http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC\\_Turkey\\_CERD74.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf).

<sup>185</sup> 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*, pp. 18-20, available at [http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC\\_Turkey\\_CERD74.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf).

the Labour Law prohibits discrimination in the employment relationship, based on an open-ended list of enumerated grounds, including language, race, colour, gender, political opinion, philosophical belief, religion and sect and which, since February 2014, also explicitly mentions disability but not ethnic origin, sexual orientation or age. While Article 5 could and should be interpreted to cover all grounds, so far there is no case law on the issue.

According to Article 18 of the Labour Law, as revised in June 2014, business owners employing at least 30 employees must have a valid reason arising from the adequacy or behaviour of the employee or the necessities of the business, workplace or job for termination of the contracts of employees with a minimum of 6 months' tenure in that business. According to Paragraph (d), 'race, colour, gender, marital status, family responsibilities, pregnancy, birth, religion, political opinion and similar reasons' are not valid reasons. However, as mentioned earlier, the material scope of the Labour Law is limited and the ban is valid only for medium- and large-sized businesses for employees with a minimum of six months of contract. Article 29 of the Labour Law defines collective dismissals as the dismissal of at least 10 workers in a business employing 20-100 employees, at least 10 % of the workers in a business employing 101-300 employees and at least 30 workers in a business employing 301 or more employees. While the provision does not entail a blanket ban on collective dismissals, it states that collective dismissal cannot be used to circumvent Article 18.

Civil servants are employed on a permanent basis; unless a concrete reason for termination occurs, their position as a civil servant is secure. According to Article 125 of the Law on Civil Servants, there are enumerated grounds for irreversible dismissal from civil service. The relevant ground for the purposes of this report is in Clause (E)(g), according to which disgraceful and dishonourable acts which are irreconcilable with the title of civil servant are cause for dismissal from the service. This clause is being used for the dismissal of homosexual civil servants. For example, a police officer was dismissed from the Turkish Police Force for having engaged in anal intercourse with another man. The decision of the High Disciplinary Board of the Ministry of Interior was upheld by the courts, including the Council of State, and the case was closed.<sup>186</sup> On the other hand, in 2014, the Council of State changed its jurisprudence on the issue, finding the dismissal from the profession of a teacher due to his/her sexual orientation<sup>187</sup> to be in violation of the Turkish Constitution and the ECHR (see section 2.1.1.).

Homosexual individuals are also routinely discriminated against in the private sector. A high-profile case concerning the Turkish Football Federation's dismissal from the profession of a referee with 14 years' experience on the basis of his sexual orientation resulted in a precedent-setting, though not entirely satisfactory, judgment by a lower court. On 29 December 2015, the 20th Civil Court of First Instance in Istanbul ordered the Federation to pay the applicant EUR 950 (TRY 3 000) in pecuniary damages and EUR 6 300 (TRY 20 000) in non-pecuniary damages.<sup>188</sup> This is the first court judgment against employment discrimination on the basis of sexual orientation in the private sector and the first time a Turkish court awarded compensation to an applicant in a claim under private law on the basis of discrimination on the ground of sexual orientation.<sup>189</sup> The applicant was represented by a lawyer who is known for his legal representation of LGBT individuals and

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<sup>186</sup> Sosyal Politikalar, Cinsiyet Kimliği ve Cinsel Yönelim Çalışmaları Derneği (SPoD) (2012), LGBT Cases: The Jurisprudence of the ECtHR, Court of Cassation and the Council of State (*LGBT Davaları: AİHM, Yargıtay ve Danıştay İçtihatları*), p. 68, available at: [http://www.spod.org.tr/turkce/eskisite/wp-content/uploads/2012/12/LGBT\\_ictihat\\_kitap\\_web\\_son.pdf](http://www.spod.org.tr/turkce/eskisite/wp-content/uploads/2012/12/LGBT_ictihat_kitap_web_son.pdf).

<sup>187</sup> The dismissal was based on law no. 4357 governing the recruitment, promotion, punishment and dismissal of elementary school teachers employed in private schools. Article 7(e) of this law requires the dismissal of individuals engaged in behaviours 'lacking chastity and dignity'.

<sup>188</sup> The legal basis of the judgment became clear when the Court published the judgment containing its reasoning in early February 2016, where it found the dismissal to be in violation of the equality clause of the Constitution and the by-laws of the Turkish Football Federation.

<sup>189</sup> Istanbul Twentieth Civil Court of First Instance, E. 2010/399, K. 2015/554, 29 December 2015.



affiliation with Turkey's leading LGBT NGOs, and the case was followed closely by the human rights and LGBT community. However, it failed to generate public debate or political discussion on discrimination against LGBT persons. No government official has publicly commented on the case.

As amended in February 2014, Article 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 of employment', including 'job application, hiring, suggested working hours and conditions and the continuity of employment, career development, healthy and safe working conditions'. This provision is clearer than most other legislation. Again, pay is not explicitly mentioned, but as the provision prohibits all unfavourable differential treatment, it is conducive to wider interpretation to also cover pay. The reality, however, is far from the ideal situation this provision aims for.

According to Article 39 of the Labour Law, minimum limits for wages are determined at intervals of no longer than two years 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, whether covered or not by this law. Surprisingly, the Regulation on Minimum Wages has an explicit provision prohibiting discrimination. Revised in February 2014 to add disability and colour among the enumerated grounds, Article 5 of the Regulation states that 'no discrimination can be made on grounds of language, race, colour, gender, disability, political opinion, philosophical belief, religion and denomination and similar reasons in the determination of minimum wage'. The pre-2014 version of Article 5 exempted from this prohibition Article 7, which, until February 2014, allowed an age-based distinction between workers above and below the age of 16 years. The revised Article 7 makes no such distinction. In 2014, the gross minimum wage was around EUR 330 (around TRY 1 000) per month.

The Law on Social Insurance and General Health Insurance (no. 5510) regulates social security coverage for public employees, for the self-employed and for workers. There is no provision in this law on any of the prohibited grounds, except for disability. The law's provisions on disability concern positive measures, such as early retirement, provided under Article 25.

Statistical data in the field of employment are collected by the Turkish Statistical Institute.<sup>190</sup> Employment, unemployment and wage data are collected, but disaggregated only on the basis of gender. Thus it is not possible to make an evaluation based on facts. However, as a general observation, it can be stated that most vulnerable groups, such as Roma, work in the informal sector and as a rule their earnings are less than the earnings of persons employed in the formal sector. According to the European Commission, Roma are 'employed in mostly unregistered, temporary, low-paid jobs requiring low or unskilled manual labour'.<sup>191</sup> The European Network against Racism's 2013 report on Turkey states the unemployment rate among Roma to be 85 %.

Even though the quota system should in principle guarantee a minimum wage for persons with disabilities, employment conditions and pay on paper differ from the actual situation.

### 3.2.3.1 Occupational pensions constituting part of pay

Turkey does not have a national anti-discrimination law. Whether occupational pensions constitute part of pay is not dealt with in any other legislation.

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<sup>190</sup> See [www.turkstat.gov.tr](http://www.turkstat.gov.tr).

<sup>191</sup> European Commission (2014), *Progress Report on Turkey*, Brussels, October 2014, p. 62, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-turkey-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf).

### **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))**

In Turkey, national legislation does not apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or on adult lifelong learning courses.

İŞKUR (Turkish Employment Agency) organises special training courses exclusively for persons with disabilities. However, these courses suffer from lack of mainstreaming, do not offer a real choice, since they are provided in very limited sectors, and are not designed to take market needs into consideration, resulting in training persons with disabilities in sectors where there is no shortage of employees.

In formal education institutions, students can attend vocational education after the completion of their primary school education. Ninth- and tenth-grade students are given vocational education at school, and eleventh-grade students are given theoretical education at school for two days per week and practical training at workplaces for three days per week. In order to graduate, students who do not continue their vocational training at workplaces must complete 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) at pre-graduate level for technical and vocational education, along with faculties for technical and vocational education at graduate level.

The general principles of vocational education are prescribed in the Law on Vocational Education (no. 3308). There are no specific provisions prohibiting discrimination. According to Article 10, in order to be an apprentice (*çırak*) a person has to be between 14 and 19 years of age. However, there are exceptions to the upper age limit. According to Article 13, workplaces falling within the scope of this law can only employ apprentices (*çırak*) who are younger than 18 years 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 Article 4 of the Labour Law and Article 13 of the Law on Vocational Education, labour law does not apply to those who work under apprenticeship contracts.<sup>192</sup>

Age limits apply to apprenticeships. 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 provide vocational training courses, opportunities for vocational training for older persons are 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))**

In Turkey, national legislation does not include membership of, and involvement in, workers' or employers' organisations, as formulated in the directives, for all five grounds and for both private and public employment. Various laws have provisions concerning membership of workers' or employers' organisations. However, these provisions are not discriminatory nor do they explicitly prohibit discrimination on the grounds listed in the directives.

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<sup>192</sup> The phrase 'without prejudice to the provisions on occupational health and safety' in this clause was deleted on 20 June 2012 by Law no. 6331.

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

In Turkey, national legislation does not include social protection, including social security and healthcare as formulated in the Racial Equality Directive (2000/43/EC).

Constitutional and legal provisions which regulate social protection do not contain a prohibition of discrimination. According to Article 60 of the Constitution, 'everyone has the right to social security'. The Law on Social Insurance and General Health Insurance (no. 5510) and the Law on Individual Pension Savings and Investment System (no. 4632) do not have provisions on any of the prohibited grounds, except for disability. The provisions on disability are on positive measures, such as early retirement (Article 25 of the Law on Social Insurance and General Health Insurance). Persons with disability who have never been employed or who cannot work due to disability are awarded a disability pension (under Law no. 2022). The amount of disability pension varies in accordance with the degree of disability.

The 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 people in poor sectors of society. Although in certain cases these contributions are reimbursed, such reimbursements are only made after payment of the contributions, subject to submission of the requisite documents. Persons with low income and education levels often may not know about the possibility of reimbursement and are not equipped with the resources to deal with bureaucracy.

Amendments made to Article 68 of the Law on Social Insurance and General Health Insurance in 2009 extended the health services which require contributions to cover inpatient treatments and orthoses and prostheses. Although there is an upper limit to the contributions to be paid, the amendment made it harder for persons with disabilities to afford some health services.

Again, Article 7 of the Law on Civil Servants prohibits discrimination on enumerated grounds by civil servants while carrying out their duties. While the provision does not explicitly mention the provision of social services, since these services are provided by the civil services, this prohibition also covers discrimination in the provision of social services.

#### **3.2.6.1 Article 3.3 exception (Directive 2000/78)**

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)**

In Turkey, national legislation does not include social advantages as formulated in the Racial Equality Directive.

Social advantages are provided generally on the basis of income, old age and disability. Irrespective of income, everyone above the age of 65 years can use public transportation free of charge. Persons with disabilities can benefit from free or discounted public transportation provided by various municipalities. Both the national Government and local governments give welfare benefits to poor persons and families. 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 which do not have any social security coverage. Known as 'conditional cash transfer', the programme provides monthly stipends per child of both pre-school and school age. Payment is conditional on school enrolment for children of school age and regular health checks for children of pre-school age. The



amounts vary, based on the gender of the child (more for girls than boys) and the level of schooling (more for secondary than elementary school).<sup>193</sup> Initially introduced as a pilot programme in six provinces, the policy began to be implemented across the country in 2005. A similar social subsidy to increase schooling is the free distribution by the Ministry of Family and Social Policies of school materials and lunch assistance to families in need.

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 Article 122 of the Turkish Penal Code prohibits discrimination in the provision of services available to the public. Article 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. Nevertheless, judicial interpretation is still required.

In Turkey, the lack of definition of social advantages, combined with the discriminatory definition of minorities adopted by the state raises problems.

Until 2013, the Turkish Government provided an exclusive social advantage to mosques, covering their electricity bills from the budget allocated to the Directorate of Religious Affairs (*Diyanet*), a subsidy denied to other places of worship belonging to the Christian, Jewish and Alevi faiths. Pursuant to an amendment in the Electricity Market Law (no. 6446) on 30 March 2013, electricity bills of all places of worship are now covered by the state. In its report to the UN Human Rights Council's Working Group on the Universal Periodic Review, the Turkish Government reported that 387 churches and synagogues were benefiting from 'this right' at the beginning of 2014.<sup>194</sup>

However, since definition of what constitutes a 'place of worship' continues to be in the exclusive domain of the Government, only those faiths which are recognised by the Government are entitled to this social advantage. The Alevis, whose religion/denomination is not officially recognised, continue to be excluded from this social advantage, a practice the ECtHR has recently ruled to be discriminatory in its unanimous judgment in the case of *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*.<sup>195</sup> The ECtHR concluded that *cemevis* were places of worship for the Alevis and that the Turkish Government's exclusion of *cemevis* from a social advantage granted to places of worship under the Turkish law amounted to discrimination. The ECtHR held that the exclusion of *cemevis* from the exemption from paying electricity bills granted to other places of worship violated Article 14 in conjunction with Article 9 of the European Convention.

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

In Turkey, national legislation does not include education as formulated in the Racial Equality Directive.

According to Article 42 of the Constitution, primary education is compulsory and free of charge in public schools, and Turkish is the sole language of instruction in education. Education at various levels is covered by the following legislation: Law on Primary Education (no. 222); Basic Law on National Education (no. 1739); Law on Vocational Training (no. 3308); Higher Education Law (no. 2547); Law on Unification of Education (no. 430); Law on Eight-year Compulsory and Uninterrupted Education (no. 4306); and Law on Private Education Institutions (no. 5580). Prohibition of discrimination in education, however, is only found in Article 4 of the Basic Law on National Education, where the only

<sup>193</sup> On average, the payments are around EUR 13 (TRY 40) per child.

<sup>194</sup> Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 7, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>.

<sup>195</sup> ECtHR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, application no. 32093/10, 2 December 2014.

prohibited grounds are language, race, disability, gender and religion. The mandatory school age is 69 months and the mandatory minimum period of schooling is 12 years.

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.<sup>196</sup> The Ministry of National 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'.<sup>197</sup> On the other hand, despite some improvements in recent years, the textbooks used in secondary education have discriminatory content against non-Muslim minorities. This is the case, in particular, for the sections in history textbooks on the National Liberation War and the establishment of the Republic of Turkey. While the tenth-grade history textbook was amended in 2013 in response to complaints from the Syriac community,<sup>198</sup> discriminatory content about missionaries and minorities remains.<sup>199</sup>

### **Students belonging to religious minorities**

In Turkey, the general approach to education for pupils belonging to religious minorities raises problems, some of which are common to all minorities, while others are specific to certain groups. An example of the former is the mandatory religion courses taught in primary and secondary schools pursuant to Article 42 of the Constitution. While a 1990 decision of the Ministry of National Education exempted Christian and Jewish students from these classes,<sup>200</sup> in practice the exemption is limited to the three officially recognised non-Muslim minorities (Jews, Armenian and Greek Orthodox Christians), excluding other Christian groups. Moreover, exemption requests by students belonging to officially recognised minorities may arbitrarily be refused by school administrators, though the Ministry of National Education has taken steps in recent years to counter this.<sup>201</sup>

To be exempted, Armenian, Greek Orthodox and Jewish students are required to submit a request signed by their parents and 'prove' their faith by producing official identity documents where their religion is indicated. This requirement poses a contradiction with a 2006 law which allows citizens to leave – upon paying, as of May 2015, around EUR 2.3 (TRY 7) – the religion section on their identity document blank.<sup>202</sup> For non-Muslim parents who want their children to be exempt from religion courses, exercising the right not to identify their religion on their identity documents is practically not an option. In fact, requests submitted by parents who had opted to leave the religion section on their identity documents blank have been rejected.<sup>203</sup> A second issue in respect to exemption concerns the lack of adequate and rights-based arrangements to accommodate students who request to be exempt. Such students are not offered alternative classes and have to spend idle time on school premises during the hours of religion courses. Finally, requesting

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<sup>196</sup> European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, ECRI, 8 February 2011, p. 7.

<sup>197</sup> European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, ECRI, 8 February 2011, p. 7.

<sup>198</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>199</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 62, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>200</sup> Turkey, Ministry of National Education, Religious Education General Directorate for Higher Education and Training Committee decision, 9 July 1990.

<sup>201</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>202</sup> The ECtHR had, however, found this 'reform' to be inadequate to ensure the protection of freedom of religion. ECtHR, *Sinan Işık v. Turkey*, No. 21924/05, 2 February 2010. This ECtHR judgment remains unimplemented.

<sup>203</sup> Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, p. 10, available at: [http://aihmiz.org.tr/files/01\\_Hasan\\_ve\\_Eylem\\_Zengin\\_Rapor\\_TR.pdf](http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf) (citing decision: Ankara First Administrative Court, E.2012/1133, K. 2012/2367, 11 October 2012).

exemption may cost students exclusion from school, which results in families refraining from filing complaints with the authorities for fear of further stigmatisation of their children.<sup>204</sup>

The minority group which has been most vocal against mandatory religion classes has been Alevis, who took the issue to the ECtHR. In 2007, the Court found the content of these classes to be in violation of Article 9 of the ECHR,<sup>205</sup> on the ground that the textbooks gave disproportionate weight to teaching Islam in relation to other religious and philosophical beliefs. The ECtHR also found the obligation of non-Muslim parents to disclose their identity and religion in order to get an exemption for their children to be in violation of the right to freedom of religion, noting that the absence of a legal basis leaves exemption decisions to the discretion of school administrators, leading to arbitrary rejections. However, the ECtHR did not find the classes as such to be in violation of the ECHR.

While the ECtHR did not prescribe a general measure to the Turkish Government, the judgment made clear that authorities were obliged to unconditionally grant exemptions to all students, irrespective of their religion, denomination or belief. Turkey could have chosen any one of the following general measures: making the courses optional, completely revising the content of the courses or taking measures to ensure that parents and students are provided with exemption without having to disclose their faith.<sup>206</sup> Opting for the second of these, the Ministry of National Education revised the textbooks, seemingly in accordance with the demands expressed by Alevi representatives within the framework of the 'Alevi opening' (for more on the Alevi opening, see Section 8.1.). The new textbooks were formally adopted on 30 December 2010 and started to be used during the 2011-2012 school year.<sup>207</sup> An expert evaluation found that, notwithstanding a few additions and editorial changes, the general content, values and concepts of the old books were preserved.<sup>208</sup> The course continues to teach a particular religion and fails to fulfil the criteria of inclusiveness, impartiality and lack of indoctrination.<sup>209</sup>

Up until the revision of the textbooks, the administrative courts were favourable to Alevis. Lower courts in several cities had ruled in favour of parents who brought cases for the exemption of their children from these classes and ordered the stay of execution.<sup>210</sup> On 28 December 2007, the Eighth Circuit of the Council of State, citing the ECtHR judgment, held that the content of these classes failed to meet the requirements of objectivity, pluralism

<sup>204</sup> Norwegian Helsinki Committee (2014), *The Right to Freedom of Religion or Belief in Turkey - Monitoring Report January-June 2013*, p. 45, available at <http://inancozqurluguqirisi.org/wp-content/uploads/2014/01/NHC-1%CC%87O%CC%88G-FoRB-Report-Eng.pdf>.

<sup>205</sup> ECtHR, *Hasan and Eylem Zengin v. Turkey*, No. 1448/04, 9 January 2007.

<sup>206</sup> Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, pp. 3-4, available at: [http://aihmiz.org.tr/files/01\\_Hasan\\_ve\\_Eylem\\_Zengin\\_Rapor\\_TR.pdf](http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf).

<sup>207</sup> The written response of the Strategic Development Presidency of the Ministry of National Education, no. 337, 17.1. 2012, cited in Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, p. 8, available at: [http://aihmiz.org.tr/files/01\\_Hasan\\_ve\\_Eylem\\_Zengin\\_Rapor\\_TR.pdf](http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf).

<sup>208</sup> Yıldırım, M. (2012), *2011-2012 Öğretim Yılında Uygulanan Din Kültürü ve Ahlak Bilgisi Dersi Programına İlişkin bir Değerlendirme* (An Evaluation of the Curriculum of the Religious Culture and Ethics Course Instructed during the 2011-2012 Academic Year), available at: <http://www.aihmiz.org.tr/aktarimlar/dosyalar/1349647350.pdf>.

<sup>209</sup> Yıldırım, M. (2012), *2011-2012 Öğretim Yılında Uygulanan Din Kültürü ve Ahlak Bilgisi Dersi Programına İlişkin bir Değerlendirme* (An Evaluation of the Curriculum of the Religious Culture and Ethics Course Instructed during the 2011-2012 Academic Year), pp. 7-8, available at: <http://www.aihmiz.org.tr/aktarimlar/dosyalar/1349647350.pdf>.

<sup>210</sup> 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. Bianet (2006), 'Zorunlu Din Dersi İstemeyen Yargıya Gitmeli' ('Whoever Objects the Compulsory Religion Course should go to Court'), 24 November 2006, <http://www.bianet.org/bianet/insan-haklari/88237-zorunlu-din-dersi-istemeyen-yargiya-gitmeli>. A similar decision was issued in December 2010 by the Regional Administrative Court in İzmir, approving the decision of the First Administrative Court to the same effect. Bianet (2010), 'Zorunlu Din Dersi yine Yargıdan Döndü' ('Another Court Judgment against the Compulsory Religion Course'), 17 December 2010, <http://www.bianet.org/bianet/egitim/126667-zorunlu-din-dersi-yine-mahkemeden-dondu>.

and respect for the religious and philosophical opinions of parents.<sup>211</sup> Nevertheless, Alevi children continued to be forced to take religion classes at primary and secondary level. The Government's revision of the textbooks had a reverse effect on the national courts' jurisprudence. The Eighth Circuit of the Council of State reversed its jurisprudence, on the basis that the revisions changed the curricula of the courses from religious education to the teaching of different religions and faiths, including the Alevi faith.<sup>212</sup>

In 2014, the ECtHR revisited the issue in the case of *Mansur Yalcin and Others v. Turkey*. It held that the revisions did not introduce a real change in the curriculum, which continued to focus predominantly on the knowledge of Islam as interpreted by the Sunni majority and violated the state's duty of neutrality and impartiality in regulating matters of religion. The Court noted that the absence of an appropriate exemption procedure left pupils, including Alevis, caught between the religious instruction given in schools and their parents' religious and philosophical convictions. Noting that the violation had arisen out of a 'structural problem', the ECtHR called on the Government 'to remedy the situation without delay' in particular by introducing a system to allow the exemption of pupils without requiring their parents to disclose their religious or philosophical convictions. The reactions of government officials indicate that this ruling too may face resistance. Prime Minister Ahmet Davutoğlu implied his disagreement with the ruling, stating that his Government 'cannot accept the attempts to reflect [the religion courses] as an instrument of religious pressure'. The President of the Directorate of Religious Affairs (*Diyanet*) stated that the ECtHR ruling may arise from the conflation of religious education with religious culture classes, arguing that the pupils are not instructed in accordance with any particular religion but taught about the cultural aspects of various religions.

At a time when there was an intense public debate on the teaching of religion at schools and amidst expectations for the abolition of the religion classes altogether, the JDP Government introduced an extremely controversial law on 30 March 2012. This 'education reform bill draft' not only did not abolish the religion classes or make them elective, but introduced new elective courses on religion in secondary schools.<sup>213</sup> The two elective courses explicitly identified in the law are on the Kor'an and the life of the Prophet Mohammed, both concerning the Muslim faith.<sup>214</sup> A circular subsequently adopted by the Ministry of National Education<sup>215</sup> identified a number of further elective courses to be offered in secondary education, including 'Fundamental Religious Knowledge'. Thus, the law increases from two to eight per week the number of hours of religion courses students can potentially take. From the outset, religious minorities faced difficulties in the implementation of the new law. Where non-Muslim students are granted exemption from the mandatory religion course, they may find themselves having to take an elective course on Islam, due to the obligation to obtain a minimum of elective credits and the fact that opening a new elective course requires the written request of at least 10 students. The case of a Protestant student is a telling example. While she was granted an exemption, since only three elective courses were available in her school, she had to choose between the elective courses on the Kor'an, the Prophet Mohammed and Fundamental Religious Knowledge or lose one year's credits. The provincial authorities offered to transfer the

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<sup>211</sup> 8th Circuit of the Council of State, 28.12.2007, E. 2006/4107, K. 2007/7481.

<sup>212</sup> 8th Circuit of the Council of State, 13.7.2010, E. 2009/10610, K. 2010/2413. For a critical and detailed analysis of this and subsequent similar judgments of the 8th Circuit as well as the impact of this new case law on lower courts, see Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, p. 13-16, available at: [http://aihmiz.org.tr/files/01\\_Hasan\\_ve\\_Eylem\\_Zengin\\_Rapor\\_TR.pdf](http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf).

<sup>213</sup> Turkey, Law on Amendments in Law on Primary Education and Various Other Laws (*İlköğretim ve Eğitim Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun*), 30 March 2012, available at <http://www.resmigazete.gov.tr/eskiler/2013/05/20130503-1.htm>.

<sup>214</sup> Turkey, Law on Amendments in Law on Primary Education and Various Other Laws, Article 9, 30 March 2012.

<sup>215</sup> Turkey, Ministry of National Education, Circular no. 2012/37, 31 August 2012, available at [http://tegm.meb.gov.tr/meb\\_iys\\_dosyalar/2012\\_08/31022530\\_semeliders.pdf](http://tegm.meb.gov.tr/meb_iys_dosyalar/2012_08/31022530_semeliders.pdf).

student to another school.<sup>216</sup> Upon the family's application, the Ministry of National Education intervened and the school provided a special elective course for this student.<sup>217</sup>

Another disconcerting recent government practice concerns the centralised competitive examinations for entrance into higher education. The Administration for the Selection and Placement of Students decided to include 13 questions based on the religion courses in the 2013 national examination. Non-Muslims protested against the decision on the ground that it would result in unequal treatment of minority children who had received an exemption. In response, the Ministry of National Education declared that there would be alternative questions for such students.<sup>218</sup> The 2014 national examination was the first where students were tested on religion, though the Administration claimed that the questions resembled the questions on philosophy.<sup>219</sup> For 2015, the Administration applied yet another system, whereby students who were not 'legally obliged' to take the religion courses were allowed to answer alternative questions based on the philosophy course, where the rest of the students were tested on religion.<sup>220</sup> Thus, students from unrecognised religious minorities continued to be tested on religion.

In addition, non-Muslim minority schools authorised under the Lausanne Treaty face serious and arbitrary limitations, making their management 'very difficult, to the extent of jeopardising the existence of some schools'.<sup>221</sup> Until 2007, the teachers of 'Turkish culture' classes and the deputy principals of these schools were required to be 'of Turkish origin' (read 'Muslim'), appointed by the Ministry of National Education.<sup>222</sup> An amendment to the Law on Private Education Institutions in 2007 removed this restriction, enabling the recruitment of minority teachers to these positions.<sup>223</sup> However, the implementing regulation has not yet been adopted and 'the situation remains the same'.<sup>224</sup> Minority schools do not have any say in the selection of these teachers, who are appointed by the Ministry of National Education and are not subject to the supervision of the non-Muslim principal.

### **Students belonging to ethnic minorities**

In Turkey, the general approach to education for pupils belonging to ethnic and linguistic minorities also raises problems. Tens of millions of such students are denied the right to learn and/or receive education in their mother tongue, a right granted on a limited basis to Armenians, Jews and Greek Orthodox communities in accordance with the minority status they were granted on the basis of their religious (but not ethnic) identity. With the initiation of the EU accession process in 1999, a new phase in the state's approach to non-recognised ethnic and linguistic minorities commenced. Permitting the teaching of minority languages in private courses in 2002 was followed by the opening of Kurdish language and literature departments at public universities after 2009 and the introduction of on-demand

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<sup>216</sup> Association of Protestant Churches (Turkey) (2013), *2012 Human Rights Violations Report*, Konak, Izmir, Association of Protestant Churches (Turkey), 15 January 2013, p. 6, available at: [http://www.iirf.eu/fileadmin/user\\_upload/PDFs/2012\\_Rights\\_Violations\\_Report.pdf](http://www.iirf.eu/fileadmin/user_upload/PDFs/2012_Rights_Violations_Report.pdf).

<sup>217</sup> Norwegian Helsinki Committee (2014), *The Right to Freedom of Religion or Belief in Turkey - Monitoring Report January-June 2013*, p. 44, available at <http://inancozqurlugugirisimi.org/wp-content/uploads/2014/01/NHC-I%CC%87O%CC%88G-FoRB-Report-Eng.pdf>.

<sup>218</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 54.

<sup>219</sup> Statement made by the Administration for the Selection and Placement of Students regarding the religion course questions in the 2015 national examination. Statement no longer publicly available on the Internet.

<sup>220</sup> Statement made by the Administration for the Selection and Placement of Students regarding the religion course questions in the 2015 national examination. Statement no longer publicly available on the Internet.

<sup>221</sup> European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, ECRI, 8 February 2011, p. 33.

<sup>222</sup> The law required teachers of Turkish culture classes and the deputy principal in schools opened by 'foreigners' to be 'of Turkish origin and a citizen of the Turkish Republic'. Turkey, Law on Private Education Institutions (*Özel Öğretim Kurumları Kanunu*), Article 24, 8 June 1965.

<sup>223</sup> Turkey, Law on Private Education Institutions, 8 February 2007.

<sup>224</sup> Kaya, N. (2009), *Forgotten or Assimilated? Minorities in the Education System of Turkey*, Minority Rights Group International, January 2009, p. 17, available at: <http://minorityrights.org/publications/forgotten-or-assimilated-minorities-in-the-education-system-of-turkey-march-2009/>.



elective courses in selected minority languages in secondary schools.<sup>225</sup> As of the academic year 2012-2013, public secondary schools started to offer elective courses upon demand in selected minority languages (the Kurmanji and Zazaki dialects of Kurdish, the Adige and Abkhaz dialects of Circassian and the Laz language). The various Roma languages were not included among the selected languages. During the academic year 2012-2013, a total of 28 587 students nationwide opted for these elective courses. While 9 714 did not express a demand for a specific language, the rest demanded classes in Kurdish and Caucasian languages.<sup>226</sup> The number of students enrolled in Kurdish language courses during the academic year 2012-2013 was 18 847.<sup>227</sup> According to the Turkish Government's report to the UN, a total of 23 697 fifth-graders and 19 896 sixth-graders enrolled in Kurdish, Circassian and Laz language classes in the academic years 2012-2013 and 2013-2014.<sup>228</sup>

On 2 March 2014, the Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens was amended to allow the opening of secondary schools providing education in non-official languages.<sup>229</sup> However, the scope of this right is limited to private secondary schools and does not extend to elementary schools or to public secondary schools. There is also a content restriction; history, Turkish language and literature, history of the revolution and Atatürkism, geography, social sciences, religion and ethics, and other courses related to the Turkish language can only be taught in Turkish.<sup>230</sup> The Government's limitation of education in minority languages to private institutions was received with criticism by the pro-Kurdish movement across the political spectrum. Pointing out that the majority of Kurds in the region are very poor, critics find the privatisation of education in the mother tongue to be discriminatory in socio-economic terms. Further, they find the denial to Kurds and other minority groups of a right granted to Turks to constitute ethnic discrimination.

The dispute between the Government and the Kurdish national movement over the issue culminated in a political crisis with the opening of the academic year 2014-2015, when Kurdish civil society commenced a civil disobedience campaign to provide alternative education without authorisation from the central authorities. Three non-governmental organisations established private elementary schools in Turkey's Kurdish region and commenced providing education on 15 September 2014. The schools, each given a Kurdish name, were opened in the predominantly Kurdish populated provinces of Diyarbakır, Hakkari and Yüksekova. Opened, funded and run on the civil initiative of three NGOs, the schools were immediately closed down by the judicial authorities upon the instruction of the Ministry of Interior. Furthermore, criminal investigations were commenced against the school administrators on charges of opening educational institutions without authorisation and committing offences in the name of a terrorist organisation. Defying the court orders, families, Kurdish politicians and civil society broke the seals on the schools and recommenced education provision. The authorities replied by closing down the schools once again. During the one week which had passed since the beginning of the new academic year, the schools were closed down by the Government and reopened by Kurdish society three times. Violent clashes occurred between the security forces and Kurdish youth and a number of public schools in the area were set on fire by Kurdish protestors. The

<sup>225</sup> Turkey, Law on Amendments in Law on Primary Education and Various Other Laws, 30 March 2012.

<sup>226</sup> Hürriyet (2013), 'İşte "Seçmeli Kürtçe"nin Türkiye Haritası' ('And here is the Turkey Map of the "Elective Kurdish"'), 6 February 2013, available at <http://www.hurriyet.com.tr/gundem/22534618.asp>.

<sup>227</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 62, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>228</sup> Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 14.

<sup>229</sup> Turkey, Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens (*Yabancı Dil Eğitimi ve Öğretimi ile Türk Vatandaşlarının Farklı Dil ve Lehçelerinin Öğrenilmesi Hakkında Kanun*), 2 March 2014.

<sup>230</sup> Turkey, Regulation on the Amendment of the Regulation on Private Educational Institutions of the Ministry of National Education (*Millî Eğitim Bakanlığı Özel Öğretim Kurumları Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), Official Gazette, 5 July 2014.

Minister of National Education and other high-level government officials condemned the civil disobedience as unlawful and stated that they would not allow the opening of any school without authorisation from the Ministry of National Education.

From the perspective of discrimination against ethnic minority students, the most significant development in recent years has been the removal of the national oath which pupils were required to make every school day. Removed first in secondary schools in 2012, the oath was entirely abolished in 2013.<sup>231</sup> Introduced in 1933 as mandatory for all primary and secondary students, including non-Muslim pupils in minority schools, the oath was perceived as discriminatory and assimilationist by ethnic minorities.

#### a) Pupils with disabilities

In Turkey, the general approach to education for pupils with disabilities raises problems. After decades of endorsing the principle of segregation for the education of children with disabilities, which went against its commitments under international human rights norms,<sup>232</sup> today Turkey formally endorses integrated/mainstream education as the principle and special education as the exception.<sup>233</sup>

The following provisions regulate the special education of pupils with disabilities. Article 42 of the Constitution entrusts the state with the duty to 'take necessary measures to rehabilitate those in need of special education due to their conditions so as to render such people useful to society'; Article 8 of the Basic Law on National Education stipulates that the state shall adopt special measures for 'children who need special education and protection'; Article 12 of the Law on Primary Teaching and Education requires children with disabilities to be provided with special education and teaching at primary school level; and Article 39 of Law on Vocational Education provides for special vocational courses in order to prepare students with special needs for professional life. Article 35 of the Law on Persons with Disabilities imposes a duty on the state to meet a portion of the education costs of children with disabilities attending special education institutions.

The principle of mainstream education was introduced for the first time in 1983, with the adoption of the Law on Children in Need of Special Education.<sup>234</sup> Article 4 on the one hand recognises the right of children with disabilities to special education based on their needs, and on the other tasks the state with the duty to 'take the requisite measures' to enable children with disabilities 'whose conditions and characteristics are appropriate' to attend schools with 'normal children'. A circular adopted in 1988 put forth the conditions for the successful application of the principle of integration.<sup>235</sup> In 1997, a decree was adopted, establishing the 'Integration Implementation System' and emphasising the individualised education of every child with disability based on their needs and through the use of

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<sup>231</sup> Turkey, Regulation on the Amendment of the Regulation on Institutions of Primary Education of the Ministry of National Education (*Millî Eğitim Bakanlığı İlköğretim Kurumları Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), Official Gazette, 8 September 2013.

<sup>232</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 20, available at: [http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>233</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: [http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>234</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: [http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>235</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: [http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

appropriate techniques and tools.<sup>236</sup> The Law on Persons with Disabilities of 2005 also endorses the principle of mainstream education. Article 15 recognises the rights of children with disabilities to have access to integrated education on the basis of their special situations. While the provision states that the education of students with disabilities 'cannot be prevented on the basis of any reason', it does not prohibit discrimination. The 2006 Regulation on Special Education Services puts forth the rules and principles to be followed for the establishment of special education schools, but stresses that special education is the exception to mainstream education.<sup>237</sup> The July 2012 amendments made in the Regulation on Special Education Services were largely terminological, with very little potential positive impact in implementation.<sup>238</sup>

The implementation of these laws and regulations concerning mainstream education lags far behind the legal framework. 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. Students with disabilities tend to be excluded by their peers, whose families express discomfort regarding the presence of students with disabilities in classrooms. Studies conducted in these schools show that the teachers lack the training and skills to address these problems, feeling very desperate and frustrated as a result. Of the teachers working in integrated schools, 86.4 % felt they lacked sufficient knowledge about mainstream education for students with disabilities, 77.1 % said individualised education programmes were not being prepared for students with disabilities in their classrooms, and 70.9 % said they simply implement the standard curricula for these students.<sup>239</sup>

In response to these problems, the Ministry of National Education conducted limited training for teachers in mainstream education, signed a protocol with the Anatolian University for a 3-month distance learning programme to train special education teachers, and commenced, in cooperation with civil society, pilot projects for the improvement of mainstream education.<sup>240</sup> However, the scope of these efforts, significant as they are, remains very limited in comparison to the magnitude of the problem.

Although statistics are available on the number of children with disabilities registered, there are 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 % are graduates of elementary school and primary education; 5.4 % have a junior high school diploma; 6.9 % are graduates of a high school or equivalent. The survey results show that the rate of illiteracy among persons with disabilities (36.3 %) is three times that of the general population (12.9 %).<sup>241</sup>

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<sup>236</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye’de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: [http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>237</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye’de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 21-23, available at: [http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>238</sup> Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 179, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

<sup>239</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye’de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 29, p. 13, available at: [http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>240</sup> For the website of the project, see <https://www.tohumotizm.org.tr/proje/kaynastirma-ve-butunlestirmenin-etkinligini-artirmak-ic-politika-ve-uygulama-onerileri-2010>.

<sup>241</sup> Tufan, İ., Arun, Ö. (2006), Secondary Data Analysis of Disability Survey of Turkey (*Türkiye Özürlüler Araştırması 2002 İkincil Analizi*), p. 21, available at: [www.dezavantaj.org/files/ilerianaliz.doc](http://www.dezavantaj.org/files/ilerianaliz.doc).



Certainly, the laws, regulations and circulars adopted since 1983 which endorse the principle of mainstream education led to relative progress in the integration of children with disabilities.

According to government statistics, the number of students with disabilities in mainstream education was 10 156 in the academic year 1997-1998.<sup>242</sup> Since the adoption of the Integration Implementation System in 1997, there has been a sharp increase in the number of students with disabilities receiving formal education. According to the Ministry of National Education's annual report, during the academic year 2014-2015, the total number of students with disabilities receiving integrated or special education was 259 282<sup>243</sup> (compared to 261 726 in the academic year 2013-2014,<sup>244</sup> 252 025 in the academic year 2012-2013,<sup>245</sup> 238 917 in 2011-2012<sup>246</sup> and 61 801 in 2009-2010).<sup>247</sup> Despite a sharp increase after 2010, the numbers decreased in the academic year 2014-2015 and continue to be extremely low in comparison to the estimated total number of children with disabilities of school age. In 2009-2010, the total number of children with disabilities in the age group 0-19 years who received half- or part-time education at pre-school, primary and secondary levels was 116 031, which fell far below the overall population of children with disabilities in that age group, whose estimated number in 2010 was 1 105 630.<sup>248</sup>

The gap between the goals and the situation on the ground is also reflected in the findings of international organisations. In its 2014 Progress Report on Turkey, the European Commission reported that while public schools are legally obliged to accommodate students with disabilities, 41 % of persons with disabilities are illiterate and that 'the number and ratio of students with disabilities declined sharply from primary school through to university'.<sup>249</sup> The UN Committee on the Rights of the Child (CRC), noting that a large number of school-age children with disabilities did not enjoy their rights to education, urged the Turkish Government to further encourage the integration of these children in the regular education system.<sup>250</sup> Similarly, UNESCO encouraged Turkey to intensify its efforts towards integration of children with disabilities in the regular education system.<sup>251</sup> In its

<sup>242</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 26, available at:

[http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>243</sup> Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2014-2015), p. 36, available at:

[http://sgeb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_orgun\\_egitim\\_2014\\_2015.pdf](http://sgeb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2014_2015.pdf).

<sup>244</sup> Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2013-2014), p. 36, available at:

[http://sgeb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_orgun\\_egitim\\_2013\\_2014.pdf](http://sgeb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2013_2014.pdf).

<sup>245</sup> Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2012-2013), p. 36, available at:

[http://sgeb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_orgun\\_egitim\\_2012\\_2013.pdf](http://sgeb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2012_2013.pdf).

<sup>246</sup> Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2011-2012), p. 34, available at:

[http://sgeb.meb.gov.tr/meb\\_iys\\_dosyalar/2012\\_12/06021046\\_meb\\_istatistikleri\\_orgun\\_egitim\\_2011\\_2012.pdf](http://sgeb.meb.gov.tr/meb_iys_dosyalar/2012_12/06021046_meb_istatistikleri_orgun_egitim_2011_2012.pdf).

<sup>247</sup> Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2013-2014), p. 34, available at:

[http://sgeb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_orgun\\_egitim\\_2009\\_2010.pdf](http://sgeb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2009_2010.pdf).

<sup>248</sup> Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 26, available at:

[http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum\\_Kaynastirma\\_Durum\\_Raporu.pdf](http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf).

<sup>249</sup> European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 58.

<sup>250</sup> United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 13.

<sup>251</sup> United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 13.

report to the UN Human Rights Council for the Universal Periodic Review, the Turkish Government stated that '[e]xcept for moderately or severely disabled persons, students with mild disabilities were included in the integration program within the twelve-year compulsory education plan'.<sup>252</sup>

Turkish legislation recognises the right of students with disabilities to receive the special education support they need because of their impairments. However, only eight hours of individual special education support or four hours of group special education support monthly is covered financially by the state. This means one or two hours of special education support per week. This support education is provided at private rehabilitation centres for students enrolled in mainstream schools. Students who need more hours of special education support have to cover the costs themselves. However, there is also a scarcity of special education institutions. On 5 May 2012, in response to a parliamentary query, the Ministry of National Education stated that there are 667 special education institutions within the mandate of the Ministry, 38 of which are fully physically accessible for students with disabilities.<sup>253</sup> That a mere 5.7 % of educational institutions specially established for students with disability are accessible for them speaks volumes about the state's deliberate neglect of persons with disabilities and the absence of comprehensive planning and coherence in government policies.

An additional problem is the under-representation of girls among the population of students with disabilities.<sup>254</sup> According to the State report submitted to the United Nations Committee on Economic, Social and Cultural Rights, in the academic year 2006-2007, the total number of students in 'nursery classes within special education schools' was 503, only 187 of whom were female. The Ministry of National Education's annual report for the academic year 2009-2010 shows these numbers as 659 and 258 respectively.<sup>255</sup> The numbers were reported in the following years as follows: 890 and 374 in the academic year 2011-2012,<sup>256</sup> 1 006 and 442 in the academic year 2012-2013,<sup>257</sup> 1 225 and 478 in the academic year 2013-2014,<sup>258</sup> and 1 631 and 578 in the academic year 2014-2015.<sup>259</sup> Of the 261 726 students with disabilities enrolled in integrated or special education institutions in the academic year 2013-2014, the number of female students was 100 733.<sup>260</sup> In the 2014-2015 academic year, these numbers were 259 282 and 98 416

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<sup>252</sup> Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 14, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>.

<sup>253</sup> Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 186, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

<sup>254</sup> No data exist on the proportion of ethnic or religious minority students among the students with disabilities receiving education. As part of its general policy, the Turkish state does not collect data on minorities.

<sup>255</sup> Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2013-2014), p. 34, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2009\\_2010.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2009_2010.pdf).

<sup>256</sup> Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2011-2012), p. 34, available at: [http://sgb.meb.gov.tr/meb\\_iys\\_dosyalar/2012\\_12/06021046\\_meb\\_istatistikleri\\_organ\\_egitim\\_2011\\_2012.pdf](http://sgb.meb.gov.tr/meb_iys_dosyalar/2012_12/06021046_meb_istatistikleri_organ_egitim_2011_2012.pdf).

<sup>257</sup> Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2012-2013), p. 36, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2012\\_2013.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2012_2013.pdf).

<sup>258</sup> Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2013-2014), p. 36, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2013\\_2014.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2013_2014.pdf).

<sup>259</sup> Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2014-2015), p. 36, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2014\\_2015.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2014_2015.pdf).

<sup>260</sup> Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2013-2014), p. 36, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2013\\_2014.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2013_2014.pdf).

respectively.<sup>261</sup> The large difference between these figures not only shows that female children with disabilities are lagging behind male children, but also that the state is failing in the realisation of compulsory education for all.

Finally, 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 age limit for compulsory education. This is a typical case of multiple discrimination.

Students with disabilities also have difficulty in gaining access to support materials. In particular, students with visual disabilities cannot have access to materials distributed in class, maps, globes, rulers and other materials used to facilitate learning. According to Article 15 of the Law on Persons with Disabilities, Turkish Official Sign Language shall be developed. However, more than a decade after the adoption of the Law, there is no information on when this process will be finalised and education will be provided through sign language. While the Turkish Language Institution has developed the Turkish Sign Language Alphabet, the regulative framework of the Ministry of National Education prohibits the use of this language in the education system.<sup>262</sup> Moreover, as yet there are no expert staff to teach the use of sign language. Under the current system, acquisition of the ability to use sign language takes at least 10 years.<sup>263</sup> At the level of higher education, as of the academic year 2013-2014, sign language was included among elective courses offered at public universities. In the academic year 2014-2015, it was included in the mandatory curriculum for university training for Teaching for Hearing Disability. However, in the absence of an official sign language and of coursebooks, dictionaries, educational or grammar books on sign language in Turkey, how this education will be provided remains to be seen. The only (unofficial) source on Turkish sign language is a website prepared by an academic as part of a research project supported by Koç University.<sup>264</sup> According to this website, there is no sign language education at schools for deaf pupils, where students are instructed orally. As a result, there are variations in the use of sign language among the seven schools for deaf students in Istanbul. While the UN estimates the number of deaf people in Turkey to be 2.5 million, in 1998 the Turkish Ministry of National Education reported this number to be 400 000, of whom 120 000 were reportedly children.<sup>265</sup> The current official schooling data of the Ministry indicate the extremely low level of schooling of deaf children. In the academic year 2013-2014, the total number of deaf children in primary and secondary schools, including 'special vocational high schools' was 5 482.<sup>266</sup> This number fell to 5 069 in the 2014-2015 academic year.<sup>267</sup>

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 two

<sup>261</sup> Turkey, Ministry of National Education (*Millî Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Millî Eğitim İstatistikleri: Örgün Eğitim*) (2014-2015), p. 36, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2014\\_2015.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2014_2015.pdf).

<sup>262</sup> Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birir, L., Kara, Ö. (2011), *Türkiye’de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), Istanbul, İstanbul Bilgi Üniversitesi, February 2011, p. 32.

<sup>263</sup> Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birir, L., Kara, Ö. (2011), *Türkiye’de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), Istanbul, İstanbul Bilgi Üniversitesi, February 2011, p. 32.

<sup>264</sup> Turkish Sign Language, prepared as part of Dr Asli Ozyurek’s research project, <http://turkisaret dili.ku.edu.tr/>.

<sup>265</sup> Turkish Sign Language, prepared as part of Dr Asli Ozyurek’s research project, <http://turkisaret dili.ku.edu.tr/en/tid.aspx>.

<sup>266</sup> Turkey, Ministry of National Education (*Millî Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Millî Eğitim İstatistikleri: Örgün Eğitim*) (2013-2014), p. 36, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2013\\_2014.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2013_2014.pdf).

<sup>267</sup> Turkey, Ministry of National Education (*Millî Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Millî Eğitim İstatistikleri: Örgün Eğitim*) (2014-2015), p. 36, available at: [http://sgb.meb.gov.tr/istatistik/meb\\_istatistikleri\\_organ\\_egitim\\_2014\\_2015.pdf](http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_organ_egitim_2014_2015.pdf).

rehabilitation centres in Turkey (one in Ankara and the other 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 courses, specific courses are organised for persons with disabilities in limited areas. So persons with disabilities are not free to choose the area in which they want to receive vocational training, but have to make choices within a limited range of options.

#### b) Trends and patterns regarding Roma pupils

In Turkey, there are specific patterns in education regarding Roma pupils such as in-class segregation and de facto segregation and exclusion due to economic hardship.

The greatest hurdle to access for Roma 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 Roma families, causing low schooling levels and high drop-out rates. According to research conducted among Roma communities, high school is the highest level of schooling attained. Roma children face exclusion and widespread discrimination from their teachers and classmates, and are seated separately from other children, often at the back of classrooms. Roma parents who file complaints with school administrators do not receive replies. Parents of non-Roma students often transfer their children to other schools, which results in de facto segregation. There have been reports of collective resignations of teachers from schools where the majority of the student population becomes Roma as a result of the 'white 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 the ground that they no longer resided in these neighbourhoods.<sup>268</sup> In its 2014 report on Turkey's progress for EU accession, the European Commission reported high school drop-out levels, absenteeism and child labour among Roma children.<sup>269</sup> There is no publicly available information on the Roma school-age population. In its 2015 progress report, the European Commission noted that absenteeism of Roma pupils in school 'remained high'.<sup>270</sup>

There have been government initiatives at national and local level to meet the educational needs of Roma children. For example, in the province of Edirne, which has a significant Roma population, the British Council, the Ministry of National Education and its provincial representation cooperated during the 2005-2006 school year on a project which sought to improve the situation of Roma children.<sup>271</sup> However, these positive examples are the exception rather than the rule, as evident in the fact that the Government's Roma opening initiative has not produced any policy or strategy for enabling equal access to education for Roma (on the Roma opening, see Section 8.1).

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

<sup>268</sup> Kemal Özmen, 'Evsiz Kalan Roman Çocuklar Okula da Alınmıyor', *Bianet*, 20 September 2006, available at: <http://m.bianet.org/biamaq/bianet/85495-evsiz-kalan-roman-cocuklar-okula-da-alinmiyor>.

<sup>269</sup> European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 62.

<sup>270</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 69, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).

<sup>271</sup> Edirne Roma Association, European Roma Rights Centre, the Helsinki Citizens' Assembly (*Edirne Roman Derneği, European Roma Rights Centre, Helsinki Yurttaşlar Derneği*) (2008), *We are Here! Discriminatory Exclusion and Struggle for Rights of Roma in Turkey (Biz Buradayız! Türkiye'de Romanlar, Ayrımcı Uygulamalar ve Hak Mücadelesi)*, Istanbul, pp. 92-95, available at: <http://www.hyd.org.tr/tr/yayinlar/30-biz-buradayiz-turkiye-de-romanlar>.

In Turkey, national legislation does not include access to and supply of goods and services as formulated in the Racial Equality Directive.

Turkey does not have a national law on discrimination. A limited number of laws address the issue. In principle, the principle of equality before the law, stipulated in Article 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 Racial Equality Directive.

Article 122 of the Turkish Penal Code prohibits discrimination in the provision of services available to the public, though less explicitly after the revisions of February 2014. This article prohibits hatred based on language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect in the sale or transfer of movable or immovable property, the execution of a service, employment, provision of food services and undertaking economic activity. Hate offences based on ethnic origin are not included.

According to Article 73 of the Law on Notaries (no. 1512), transactions and signatures of deaf or blind persons shall be carried out in the presence of two witnesses only if the person with disability requests this. Under Article 15 of the Law of Obligations, 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 was properly approved.<sup>272</sup>

Article 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 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 person who is a party to the transaction. In cases where 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.<sup>273</sup>

#### 3.2.9.1 Distinction between goods and services available publicly or privately

In Turkey, national law does not 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).

Article 122 of the Turkish Penal Code prohibits 'hatred' in the execution of a service, without making a distinction between public and private services. With regards to goods, Article 122 only refers to foodstuffs.

Article 7 of the Law on Civil Servants prohibits discrimination by civil servants in the conduct of their duties. Thus, prohibition of discrimination in the provision of public services is implicitly covered by this provision.

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

In Turkey, national legislation does not include housing as formulated in the Racial Equality Directive.

Turkey does not have a national law on discrimination. Several laws and decrees have an impact on housing, such as the Law on Municipalities (no. 5393), Law on Metropolitan

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<sup>272</sup> Turkey, Law of Obligations (*Türk Borçlar Kanunu*), 11 January 2011. The law entered into force on 1 July 2012.

<sup>273</sup> Turkey, General Directorate of Land Registry and Cadastre (*Tapu Kadastro Genel Müdürlüğü*), TKGM no. 074/148-1568, 14 May 2003.



Municipalities (no. 5216), Law on Privatisation Arrangements (law no. 4046), Coastal Law (no. 3621), Law on Housing Aid for Employed and Retired Public Servants and Workers (no. 3320), Mass Housing Law (no. 2985), Expropriation Law (no. 2942), Law on Prevention of Slums (no. 775), Decree Law on the Amendment of Various Provisions in the Law on Prevention of Slums, Urban Renewal Law (no. 5366). However, 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 entitled Return to Village and Rehabilitation Project, in force since 1999, provides aid in kind to IDPs who wish to return to their homes, the assistance is insufficient for returnees to rebuild their houses and to restart their lives in their villages.

There are also other obstacles to the return to the villages, first and foremost the presence of landmines in rural areas, the continuation of the village guards system, the lack of sufficient economic means for living and the continuance of armed conflict in the Kurdish region.<sup>274</sup> While there is a compensation law enacted in 2004 to provide IDPs with compensation for their pecuniary losses, the substance and implementation of the law suffer major setbacks, such as the slow handling of applications, a high rate of rejections (around 30 % nationwide), low amounts of compensation and the high burden of evidentiary proof.<sup>275</sup> Housing problems for 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 houses to rent.

Although the Turkish Government claims that racial discrimination 'by those who rent or sell houses or apartments is alien to Turkish society',<sup>276</sup> there is widespread discrimination by private individuals.

Housing is a big problem for LGBTI individuals, especially for transgender persons. Many landowners decline to sell or rent houses to transgender individuals. Consequently, they can only rent apartments in certain areas of big cities and often have to pay rent above the market rates. Where they can find housing, they are harassed by other residents of the neighbourhood or by shop owners. In addition, since the areas where transgender individuals live are publicly known, they face physical attacks which aim at their displacement.<sup>277</sup>

Persons with disabilities and elderly persons have difficulties in finding physically accessible houses. If there is a family member with an intellectual or psychosocial disability in their

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<sup>274</sup> Kurban, D., Yüksek, D., Çelik, A. B., Ünal, T., Aker, T. (2007), *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey*, available at: <http://tesev.org.tr/wp-content/uploads/2015/11/Coming-To-Terms-With-Forced-Migration-Post-Displacement-Restitution-Of-Citizenship-Rights-In-Turkey.pdf>; 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](http://www2.ohchr.org/english/bodies/cescr/docs/ngos/KurdishHRP_Turkey_44.pdf).

<sup>275</sup> For the latest study on the implementation of the law in the province of Van, see Kurban, D., Yeğen, M. (2012), *On the Verge of Justice: The State and the Kurds in the Aftermath of Forced Migration- An Assessment of the Compensation Law no. 5233- The Case of Van (Adaletin Kiyısında: 'Zorunlu' Göç Sonrasında devlet ve Kürtler/ 5233 Sayılı Tazminat Yasası'nın bir Değerlendirmesi- Van Örneği)*, <http://tesev.org.tr/wp-content/uploads/2015/11/Adaletin-Kiyisinda-Zorunlu-Goc-Sonrasında-Devlet-Ve-Kürtler-Düzeltilmiş-2-Baskı.pdf>.

<sup>276</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), Consideration of reports submitted by States parties under article 9 of the Convention, *Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, p. 22, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>277</sup> Öz, Y., *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Turkey*, Danish Institute for Human Rights, p. 36, available at [http://www.coe.int/t/commissioner/source/lgbt/turkeylegal\\_e.pdf](http://www.coe.int/t/commissioner/source/lgbt/turkeylegal_e.pdf).

household, it is hard for families 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.

### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Turkey, there are patterns of housing segregation and discrimination against Roma people.<sup>278</sup>

The Urban Renewal Law of 2005 had a disparate impact on Roma people, giving impetus to urban transformation projects, most of which resulted in massive destruction and dislocation of Roma neighbourhoods throughout Turkey.<sup>279</sup> According to a joint report submitted by the Habitat International Coalition and its national partners for Turkey's Universal Periodic Review by the UN Human Rights Council, the number of Roma displaced due to the Government's urban transformation projects by 2014 was about 10 000.<sup>280</sup> In many cases, the 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 (TOKİ) (*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 new apartments to live with their relatives. Homeowners had to sell their houses, but they could not afford to buy houses in other neighbourhoods.

The most high-profile and controversial urban transformation project was carried out in Istanbul's historical Roma neighbourhood of Sulukule. The residents and civil society organisations filed a court case in December 2007, requesting the suspension of the project. 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'.<sup>281</sup> The demolition of Sulukule and the ensuing resettlement 'caused dislocation and disruption';<sup>282</sup> unable to afford life in TOKİ houses outside the city centre, all but three of the families returned<sup>283</sup> 'to live in much poorer conditions'.<sup>284</sup> The court case was finalised in June 2012 with a unanimous judgment ordering the revocation of the project. In the meantime, the project had reached near completion. The mayor of Fatih Municipality declared that they would not abide by the court's judgment, pointing out that 95 % of the construction of houses and shops was completed.<sup>285</sup>

On 12 December 2013, Amnesty International issued an urgent action on behalf of around 30 Roma families who were under the threat of forced eviction by municipal authorities to

<sup>278</sup> Regarding parliamentary discussions in 2015 on the segregation of Roma in housing, see chapter 7(h).

<sup>279</sup> 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 74<sup>th</sup> Session*, available at: [http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC\\_Turkey\\_CERD74.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf).

<sup>280</sup> United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Summary prepared in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 9.

<sup>281</sup> Council of Europe, Commissioner for Human Rights (2012), *Human Rights of Roma and Travellers in Europe*, Strasbourg, Council of Europe, February 2012, p. 151, available at: [https://www.coe.int/t/commissioner/source/prems/prems79611\\_GBR\\_CouvHumanRightsOfRoma\\_WEB.pdf](https://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf).

<sup>282</sup> European Commission (2011), *Turkey Progress Report*, Brussels, 12 October 2011, p. 40, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2011/package/tr\\_rapport\\_2011\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf).

<sup>283</sup> Vardar, N. (2011), 'Sulukule Gönüllüleri Romanlara Destek Oluyor' ('Sulukule Volunteers Give a Hand to the Roma'), *Bianet*, 5 May 2011, available at: <http://bianet.org/bianet/toplum/129771-sulukule-gonulluleri-romanlara-destek-oluyor>.

<sup>284</sup> European Commission (2011), *Turkey Progress Report*, Brussels, 12 October 2011, p. 40, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2011/package/tr\\_rapport\\_2011\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf).

<sup>285</sup> Vardar, N. (2013), 'Yeni "Sulukule" Yıkılmayacak' ('The New "Sulukule" will not Come Down'), *Bianet*, 19 June 2013, available at: <http://www.bianet.org/bianet/bianet/139176-yeni-sulukule-yikilmayacak>.

make way for road construction.<sup>286</sup> Amnesty called on the authorities to alleviate the living conditions of around 120 people, including 37 children, 2 of whom had disabilities, and prevent their eviction. The group had been living in conditions of extreme poverty since their forced eviction on 19 July 2006 from their homes in the district of Küçükbakkalköy as part of a municipal urban regeneration project. They had been living on vacant land in Pendik since early 2008, without access to electricity, clean water, basic sanitation, health, education and employment. In response to Amnesty's call for action, the authorities informed the Roma families that they would receive fuel and cash assistance during the winter period. In addition, the mayor of Pendik stated that his municipality did not have any plans for eviction.<sup>287</sup> In November 2013, officials from the Ministry of Family and Social Policies visited the site to identify the conditions and needs of the Roma families. The delegation found that the vast majority of the children living at the site did not go to school and half of them were not officially registered. In response to Amnesty's urgent action, the Ministry of Families and Social Policies stated that they were looking into the case.

The Roma evictions drew reaction from the UN treaty bodies. In its feedback for the 2014 Universal Periodic Review of Turkey by the UN Human Rights Council, the Committee on Economic, Social and Cultural Rights 'noted with concern that forced evictions had taken place in Istanbul, without adequate compensation or alternative accommodation' and emphasised their adverse effects on the schooling of children. The Committee urged the Government to review the legal framework governing urbanisation projects 'to ensure those affected received adequate compensation and/or relocation'.<sup>288</sup> In its 2015 report, the European Commission noted that urban development projects 'continued to disadvantage the Roma by depriving them of traditional job opportunities and solidarity networks'.<sup>289</sup>

In many recent instances, hate-driven lynching attempts targeting Roma, Kurds and Alevi deprived them of their houses and living environment and turned them into displaced persons. In all cases, the authorities failed to act effectively and promptly to protect the victims and in most cases asked them to leave the district or provincial borders 'for their safety'. One such attack took place on 5 January 2010, when a crowd of more than 1 000 locals in the district of Selendi in the province of Manisa attacked Roma residents. The crowd threw stones at and set fire to the houses of 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 coffee house on 31 September 2009 over the former's refusal to abide by the smoking ban. However, it became clear after the incidents that the attack was planned, systematic and the outcome of long-term tensions between Roma and other residents of Selendi. Instead of providing the Roma families with protection, the Governor of Manisa forcibly 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. On 23 December 2015, five years after the first hearing was held on 16 December 2010, the court delivered its judgment, convicting 38 of the 80 defendants for incitement to enmity or hatred and denigration under Article 216 and for property damage under Articles 151 and 152 of the Turkish Penal Code, sentencing them to terms

<sup>286</sup> Amnesty International, Urgent Action, 'Children, Elderly at Risk of Forced Eviction, Turkey', EUR 44/030/2013, 12 December 2013, available at: <http://ua.amnesty.ch/urgent-actions/2013/12/331-13>.

<sup>287</sup> Amnesty International, Urgent Action, 'Roma Families to Receive Winter Aid,' 18 December 2013, available at: <https://www.amnesty.org/en/documents/EUR44/032/2013/en/>.

<sup>288</sup> United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 12.

<sup>289</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 69, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).



of imprisonment of between 8 months and 45 years. The rest of the defendants were acquitted.

Roma face discrimination in access to housing. Private individuals are reported to refuse housing to Roma on the basis of their identity.<sup>290</sup>

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<sup>290</sup> 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*, p. 18, available at [http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC\\_Turkey\\_CERD74.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf).

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Turkey, there is no law on anti-discrimination and national legislation does not provide for an exception for genuine and determining occupational requirements.

Article 30 (4) of the revised Labour Law stipulates that persons with disabilities cannot be employed in underground and underwater work.

According to Article 71 of the Labour Law, children under the age of 15 years cannot be employed. However, children who have reached the age of 14 years and have also completed their primary education may be employed on light work which will not hinder their physical, mental and moral development, and for those who continue their education, in jobs which will not prevent their school attendance. Persons between the ages of 15 and 18 years can only be employed in certain jobs identified by the law.

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

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

The draft law on discrimination 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 to members of the religion concerned. No similar ethos-based exemption is provided for associations working for the preservation of the environmental, historical and cultural heritage. The ethos-based exemption in the draft law is limited to admission to religious institutions and is hence narrower than Article 4(2) of the Employment Equality Directive 2000/78/EC.

### **4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)**

In Turkey, national legislation provides for an exception for the armed forces in relation to health problems, which implicitly implies persons with disabilities (Article 3(4), Employment Equality Directive 2000/78/EC). While numerous laws stipulate age limits, since age discrimination is not prohibited explicitly in the legislation, it is not possible to say that limitations constitute exceptions.

The Turkish Armed Forces 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.<sup>291</sup> Decisions regarding these persons depend on the health board reports issued by the Gülhane Military Medical Academy.<sup>292</sup> Health board reports are based on the Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled, most recently revised in 2013.

General and special laws regarding employment in the public sector contain age restrictions: however, these are not limited to the armed forces. The Law on the Personnel of the Turkish Armed Forces (no. 926) of 10 August 1967, Law on Commissioned and Non-commissioned Officers to be Recruited under Contracts (no. 4678) of 21 June 2001 and Law on Expert Gendarmerie (no. 3466) of 4 June 1988 provide upper age limits.

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<sup>291</sup> Military service is obligatory in Turkey.

<sup>292</sup> Turkey, Regulation on Health Capability of the Turkish Armed Forces (*Türk Silahlı Kuvvetleri Sağlık Yeteneği Yönetmeliği*), Official Gazette, 24 November 1986.

There are maximum age limits for many professions, including the police, prison and emergency services. According to Additional Article 24 of the Law on Police Organisation (no. 3201), the maximum age limit for recruitment is 27 years. According to Article 29 of the Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres,<sup>293</sup> 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 years of age or older than 30 years of age.

Various laws and regulations pertaining to the armed forces have discriminatory provisions against LGBTI individuals. Most recently, a 2013 law<sup>294</sup> explicitly enumerates homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces (see section 2.1.1).

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Turkey, national law does not include exceptions relating to difference of treatment based on nationality.

Article 16 of the Turkish Constitution stipulates that the fundamental rights and freedoms of foreigners can only be limited in accordance with international law. With the exception of political rights and the right to enter public service, fundamental rights and freedoms set forth in the Constitution do not foresee any distinction between citizens and foreigners. In addition, certain professions such as pharmacists and lawyers are restricted to Turkish citizens.

As for the legislative framework, Article 3(2) of the Turkish Penal Code prohibits discrimination based on nationality. Revisions made in 2014 in Article 122 of the same law added nationality to the grounds of 'hatred and discrimination', prohibiting the prevention of the sale, transfer or rental of movable or immovable property offered for public use, of access to public services, of recruitment and of the exercise of a regular economic activity with a hate motive based, among others, on nationality. Article 8(e) of the Law on the Foundation and Broadcasting of Radio and Television Channels prohibits broadcasts which make discrimination on the basis of nationality. Article 2(1) of the Law on the Execution of Penalties and Security Measures prohibits discrimination based on nationality. However, the material scope of these prohibitions is limited to areas where the relevant laws are applicable.

##### **b) Relationship between nationality and 'race or ethnic origin'**

Until recently, some laws and especially regulations referred not only to Turkish citizens, but also to persons 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 (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 permits and allows them to become members of professional organisations. The case brought by the Chamber of Architects and Engineers of Turkey for the annulment of this exemption was rejected by the Council of State.

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<sup>293</sup> Turkey, Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres (*Ceza İnfaz Kurumları ve Tutukevleri Personeli Eğitim Merkezleri Kuruluş, Görev ve Çalışma Yönetmeliği*), Official Gazette, 4 May 2004.

<sup>294</sup> Turkey, Turkish Armed Forces Discipline Law (*Türk Silahlı Kuvvetleri Disiplin Kanunu*), 31 January 2013.

Similarly favourable treatment exists in a regulation which exempts foreign students and trainees of Turkish descent from payment for tuition in private education institutions and provides them with scholarships.

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

##### **a) Benefits for married employees**

In Turkey, it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married. Turkey only recognises marriage between two persons of opposite sex.

Article 5 of the Labour Law provides 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 such 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 recognise 'living together' as a lifestyle and grant rights to heterosexual couples who live together, including those who are married by religious ceremony but lack a civil marriage. Thus, employers 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 distinction not justified on objective grounds. Where, however, the employer acts out of moral, religious, or philosophical convictions and categorically excludes all unmarried or divorced employees from benefits provided to married employees, courts find this to be discriminatory.<sup>295</sup>

##### **b) Benefits for employees with opposite-sex partners**

In Turkey, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. Article 5 of the Labour Law provides open-ended protection against discrimination. While sexual orientation 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 between their homosexual and heterosexual employees. Therefore, in theory, an employment practice of this kind would constitute discrimination. However, there is no case law on the issue.

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

##### **a) Exceptions in relation to disability and health/safety**

In Turkey there are no exceptions in relation to disability and health and safety (Article 7(2), Employment Equality Directive 2000/78/EC).

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

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<sup>295</sup> Opinion expressed through email by Mehmet Uçum, a leading human rights lawyer specialising in employment law.

restrictions was contained in Article 53/b(4) of the Road Traffic Regulation, which required a special sign on the registration plates of cars used by persons with disabilities. This provision was unsuccessfully challenged in 2009 before the Council of State by an applicant with disabilities. In September 2011, Article 53 was revised and the requirement for persons with disabilities to have a special sign on their registration plates was removed for new plates issued after the entry into force of the revised regulation on 9 September 2011.<sup>296</sup>

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Turkey, national law is silent on the issue of exceptions for direct discrimination on the ground of age.

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

a) Justification of direct discrimination on the ground of age

In Turkey, national law is silent on direct discrimination on the ground of age.

b) Permitted differences of treatment based on age

In Turkey, national law permits differences of treatment based on age for any activities within the material scope of the Employment Equality Directive 2000/78/EC.

Social advantages are provided generally on the basis of income and old age. Irrespective of income, everyone above the age of 65 years can use public transportation free of charge. 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 persons and families. 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 programme provides monthly stipends per child of both pre-school and school age. Payment is conditional on school enrolment for school-age children and regular health checks for pre-school children. The amounts vary, based on the gender of the child (more for girls than boys) and the level of schooling (more for secondary than elementary school).<sup>297</sup> Started as a pilot programme in six provinces, the policy began to be implemented across the country in 2005.

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Turkey, there are two mandatory occupational schemes for the armed forces (Turkish Army Members Solidarity Fund- *Ordu Yardımlaşma Kurumu- OYAK*) and for employees of the state-owned coal mining enterprise (Labor Union- *Amele Birliği*). In addition, there are

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<sup>296</sup> Turkey, Regulation on the Amendment of the Regulation on Traffic on Highways (*Karayolları Trafik Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), Official Gazette, 9 September 2011.

<sup>297</sup> On average, the payments are EUR 11.5 (TRY 30) per month per child.

voluntary occupational schemes established by numerous private sector corporations.<sup>298</sup> In 2014, there have been news reports about government preparatory work to introduce an OYAK-inspired occupational pension scheme for retirees of specific sectors such as steel and automobile manufacturing, which are regarded as sectors with difficult working conditions.<sup>299</sup> There is no public information about the preparatory work done in this regard, neither has there been a development.

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

In Turkey, there are 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.

The Turkish Employment Agency (İŞKUR) organises special training courses exclusively for persons with disabilities. Article 13/1(d) of a 2006 regulation regarding persons with disabilities who are in need of care stipulates that relatives who assume caring responsibilities for persons with disabilities shall be paid a minimum wage by the state.<sup>300</sup> No special conditions exist for carers who are in employment.

Civil servants can be appointed to places of employment anywhere in Turkey. However, if there is a person with disability within the 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. Pursuant to amendments made on 6 February 2014 in the Law on Civil Servants, the transfer requests of civil servants who have a first-degree relative with disability in their care will now be accommodated.

#### **4.7.3 Minimum and maximum age requirements**

In Turkey there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

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

According to Article 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 years.<sup>301</sup>

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 Article 3 of the Regulation on the examinations organised for those to be appointed to public offices for the first time,<sup>302</sup> unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who are to be placed through central examinations. According to Article 48 of the Law on Civil Servants, in order to be recruited as a civil servant, a person should not be below the age of 18 years. The

<sup>298</sup> OECD, Private Pensions Outlook 2008, Pension Country Profile: Turkey, at pp. 289-290, available at: <http://www.oecd.org/finance/private-pensions/42575085.pdf>.

<sup>299</sup> Hacer Boyacıoğlu, "OYAK modeli mesleki emeklilik", *Hürriyet*, 3 September 2014, available at: <http://www.hurriyet.com.tr/oyak-modeli-mesleki-emeklilik-27128112>.

<sup>300</sup> Turkey, Regulation on the Identification of Persons with Disabilities who are in Need of Care and on the Determination of the Needs for Care Services (*Bakıma Muhtaç Özürlülerin Tesbiti ve Bakım Hizmeti Esaslarının Belirlenmesine İlişkin Yönetmelik*), Official Gazette, 30 July 2006.

<sup>301</sup> Turkey, Regulation on the Conditions and Procedure Regarding Recruitment of Workers in Public Institutions (*Kamu Kurum ve Kuruluşlarına İşçi Alınmasında Uygulanacak Usul ve Esaslar Hakkında Yönetmelik*) Official Gazette, 9 August 2009.

<sup>302</sup> As amended in 2006. The original Regulation was published in the Official Gazette on 3 May 2002. The Regulation was amended many times. The amendment regarding 'age limits' was published in the Official Gazette on 4 March 2006.

Regulation on the examinations organised for those to be appointed to public offices for the first time also refers to Article 48 of the Law on Civil Servants regarding recruitment conditions, including the minimum age limit of 18 years. There are numerous special laws which stipulate minimum and/or maximum age requirements. For example, according to Article 8 of the Law on Judges and Prosecutors (no. 2802) the maximum entry age is 35 years.

Age limits also apply to training.

#### **4.7.4 Retirement**

##### **a) State pension age**

In Turkey, there is a state pension age, at which persons begin to collect their state pensions. The pension age is 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 retire at the age of 58 years (women) and 60 years (men). According to Article 28 of this law, the state pension age will increase gradually and will reach 65 years for both men and women, for the former from 2044 onwards and for the latter from 2048 onwards.

If a person who has reached the state pension age wishes to work longer, the pension cannot be deferred.

A person can collect a pension and continue to work. However, a special premium has to be paid. The premium that needs to be paid varies depending on the date of entry into the work force, the type of retirement pension and the type of occupation. The law in this area is in constant flux.<sup>303</sup>

Persons with disabilities have the right to retire earlier than other persons. Those who are 60-100 % disabled can retire after 15 years of work, if they have paid premiums for 3 600 days. Those who are 50-59 % disabled can retire after 18 years of work if they have paid premiums for 4 000 days and those who are 40-49 % disabled can retire after 20 years of work, if they have paid premiums for 4 400 days. Persons with disabilities who run their own businesses and mothers with children with disabilities in need of special care can also retire early.

##### **b) Occupational pension schemes**

In Turkey, there are no occupational pension schemes, with the exception of the mandatory occupational schemes for the armed forces and the mining industry. Under the OYAK mandatory occupational pension scheme, since 1961, the armed forces pay a supplementary pension to retired members in addition to the state pension they receive. Armed forces members who have made monthly contributions to the pension scheme for at least 10 years are eligible for this supplementary pension. Recipients can no longer work in the Armed Forces. This does not preclude their employment elsewhere.

##### **c) State imposed mandatory retirement ages**

In Turkey, there are state-imposed mandatory retirement ages for public employees. According to Article 40 of Law no. 5434, the mandatory retirement age is 65 years. For university professors, the mandatory retirement age is 67 years (this only applies to public

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<sup>303</sup> After the cut-off date of this report, changes were introduced to the state pension system whereby individuals who had worked under a service contract in private or public sector and who continue to work after retirement have to pay a premium amounting to 32 percent of their new salaries. Individuals who were self-employed until their retirement and who continue to work in a self-employed fashion no longer have to pay the 10 percent premium.

universities). The mandatory retirement age for military personnel and the police varies depending on rank.

d) Retirement ages imposed by employers

In Turkey, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining. If there is agreement between an employee and an employer, the employee can continue working beyond state pension age.

e) Employment rights applicable to all workers irrespective of age

Laws protecting employment rights in regard to dismissal apply to all workers, irrespective of age, if they remain in employment.

f) Compliance of national law with CJEU case law

In Turkey, national legislation is not in line with the CJEU case law on age in regard to compulsory retirement.

#### **4.7.5 Redundancy**

a) Age and seniority taken into account for redundancy selection

In Turkey, national law permits age and 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 has worked for the employer. The shorter the period of work, the bigger the risk of selection for redundancy.

b) Age taken into account for redundancy compensation

In Turkey, national law provides compensation for redundancy. This is not affected by the age of the worker, but by seniority (length of employment).

#### **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)**

In Turkey, the question whether national law includes exceptions which seek to rely on Article 2(5) of the Employment Equality Directive is not relevant since there is no national anti-discrimination law and the directives have not been transposed.

#### **4.9 Any other exceptions**

In Turkey, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.



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

### **a) Scope for positive action measures**

In Turkey, positive action in respect of disability and age is provided for in national law.

While not explicitly stating it as such, the revised Article 10 of the Constitution introduced the principle of positive action to the Constitution. It stipulates that measures to be adopted to ensure equality between men and women, as well as measures to be adopted for children, elderly persons, 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 designated 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.), including employment quotas, for persons with disabilities. The special situation of non-Muslim groups under the Lausanne Treaty does not confer on them a right to positive discrimination based on religion. On the contrary, the state in Turkey continues to limit the state funding for religious services to the Sunni Muslim majority by paying the salaries of Sunni preachers (*imams*) and providing free electricity and water to mosques.

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 that some groups are more disadvantaged than others. In the past, demands by women's organisations for quotas for women in political participation have been dismissed by the Prime Minister as against international practice.

### **b) Main positive action measures in place on national level**

Among the five grounds covered by Directives 2000/43 and 2000/78, the Turkish Constitution provides for positive action only for persons with disabilities and elderly persons. Other than the positive action measures which existed for employees with disabilities under the Labour Law, no specific measure has been adopted to implement the principle of positive discrimination introduced to the Constitution in 2010. No positive action exists for Roma in Turkey, even after the Government launched the Roma initiative with the promise to enhance employment, education and housing conditions for Roma.

## **Quotas**

There is a quota system in both private and public sector employment. Article 53(1) of the Law on Civil Servants requires a 3 % quota for civil servants with disabilities working in public institutions. Under Article 30(1) of the Labour Law, the percentage 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. If an employer has employed 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, then 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 employers do not employ the number of persons with disabilities necessary to fulfil their quotas, they are penalised with a fine of EUR 562 (as of May 2015) (TRY 1 700) per month for every person with disability 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, the quota system is applied as if it prescribes an upper limit for the employment of persons with disabilities. 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, 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 no longer under any equal treatment obligation.

Despite an increase in recent years, in 2013, the employment rate of persons with disabilities in public institutions remained low at less than 2 % of the total number of persons employed in public institutions.<sup>304</sup> According to the Prime Ministry's State Personnel Presidency, as of November 2015, of the 2 099 838 persons employed in public institutions, 40 656 are persons with disabilities, 22 551 short of the 63 207 target and disproportionately low when considering the rate of persons with disabilities in the general population.<sup>305</sup> In early 2015, the number of persons with disabilities employed in public institutions was 36 165, 24 566 short of the 60 731 quota target. In early 2014, these numbers were 32 877, 25 872 and 58 749, respectively.

At the end of 2012, the required and actual numbers of employees with disabilities at selected ministries were as follows: the Ministry of Justice (2 345: 366), the Ministry of Interior (664: 243), the Ministry of Foreign Affairs (103: 22), the Ministry of Health (937: 898), the Ministry of National Education (21 137: 8 465), the Ministry of Labour and Social Security (73: 7), the Ministry of Family and Social Policies (327: 278). As of April 2016, the comparable data were as follows: the Ministry of Justice (2 971: 1 608), the Ministry of Interior (732: 764), the Ministry of Foreign Affairs (110: 25), the Ministry of Health (1 303: 893), the Ministry of National Education (28 990: 14 008), the Ministry of Labour and Social Security (75: 14), the Ministry of Family and Social Policies (450: 469). According to these figures, two of these ministries have in 2015 for the first time fulfilled and exceeded their quotas, including the Ministry of Family and Social Policies, which is in charge of policies for persons with disabilities. The total number of persons with disabilities employed in public institutions was 40 656, 22 551 short of the 63 207 target set by the quota.<sup>306</sup> In May 2015, these numbers were 36 165, 24 566 and 60 731 respectively.

Until 2012, recruitment of persons with disabilities for employment in public institutions was carried out on the basis of special examinations held separately by each institution. This decentralised system had caused major problems when public employers rejected candidates who chose to take the general and centralised examination instead of the special examinations for candidates with disabilities. In response and to strengthen enforcement of the 3 % quota in public service recruitment, the Government amended Article 53(2) of the Law on Civil Servants<sup>307</sup> and introduced a new system for the recruitment of persons with disabilities, based on a centralised examination. The first such examination was held on 29 April 2012. There was great confusion as to the number of employees with disabilities the public sector was required to employ. While the Minister for Family and Social Policies stated that the shortfall of employees with disabilities in the public sector was 20 000, the Minister of Labour and Social Security announced the number as 3 512. The discrepancy between the two figures drew protests from disability

<sup>304</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 52, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).

<sup>305</sup> See <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

<sup>306</sup> All the figures have been obtained over the years from the website of the Prime Ministry's State Personnel Presidency, which provides updated statistics regarding the employment of persons with disabilities in the public sector. Since the website does not keep statistics from previous years, statistics cited in this report which are no longer up-to-date can no longer be reached on this website. <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

<sup>307</sup> Turkey, Law on the Restructuring of Certain Debts and on the Amendment of Social Securities and General Health Insurance Law and of Various Other Laws and Decrees with the Force of Law, Article 99, 13 February 2011.

organisations, which claimed that the actual number was 50 000, taking into consideration the newly established ministries. Amidst protests from disability organisations, the Ministry of Family and Social Policies announced that 3 512 was the number of persons to be recruited initially and that more recruitments would follow. Of the 120 750 persons with disabilities who took the examination, only a total of 9 601 were placed in public service (4 266 in 2012 and 5 335 in 2013).<sup>308</sup> In 2014, the examination for the placement of 4 000 persons with disabilities for employment in public institutions was held on 27 April. In 2015, a total of 4 682 persons with disabilities who successfully passed the examination were placed for employment in public institutions. This number falls far short of the 22 551 positions that, as of April 2016, the Government is legally obliged to allocate to persons with disabilities.

In addition to recruitment by examination, persons with disabilities who do not have education higher than primary level are employed in public institutions through a lottery system. In 2012 and 2013, 1 579 individuals out of a total of 131 600 applicants were placed in public institutions through the lottery system. Thus, in 2012 and 2013, a total of 11 180 persons with disabilities were employed by public institutions through the national examination and lottery. In December 2015, the Government announced that 1 950 persons with disabilities would be placed for employment in public institutions through the lottery system.

In July 2013, the Government reported the number of persons with disabilities employed in public and private sectors to be 23 384 (up from 10 883 in 2002). It further reported the number of persons with disabilities employed in the public and private sectors through the quota system to be 93 056 as of June 2013 (up from 66 383 in 2008).<sup>309</sup>

### **Preferential treatment narrowly tailored**

Article 14 of the Law on Persons with Disabilities lays down the legal basis for sheltered workplaces. The Sheltered Workplace Project, developed by the Ministry of Family and Social Policies' General Directorate of Services for Persons with Disabilities and Elderly People and the Turkish Employment Agency (İŞKUR) and prepared by public institutions, universities, trade unions and NGOs, provides financial support to employment projects aimed at employing persons with intellectual, emotional and psychological disabilities. The project provides financial support of up to around EUR 46 000 (TRY 150 000) (as of April 2016) to sheltered workplaces to enable their employment of persons with disabilities for one year after their establishment. The project is funded by fines imposed on workplaces violating their quota obligations.<sup>310</sup> However, as state support is minimal, only a handful of sheltered workplaces exist. A study conducted with 13 workplaces considered to qualify as sheltered produced the following findings: the vast majority of the employees did not have social security coverage, 70 % of the employees were men, more than half of the employers were paying rent, and employers faced serious financial difficulties due to their inability to participate in public tenders.<sup>311</sup>

On 6 February 2014, a number of legal amendments were introduced to improve access to employment for persons with disabilities, including the introduction of tax incentives and

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<sup>308</sup> <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

<sup>309</sup> Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 8, available at: [http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm\\_kitapciqi\\_ingilizce\\_tumu\\_23.05.2014.pdf](http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf).

<sup>310</sup> Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 9, available at: [http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm\\_kitapciqi\\_ingilizce\\_tumu\\_23.05.2014.pdf](http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf).

<sup>311</sup> Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 251, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

state financial support for sheltered workplaces.<sup>312</sup> Accordingly, sheltered workplaces which employ persons with intellectual,<sup>313</sup> psychosocial or physical disabilities who find it difficult to be employed on the open labour market will be given a tax discount per employee with disabilities for a maximum of five years. With a provision added to the Labour Law, the Government will refund a minimal percentage (around 20 %) of the costs incurred by employers in order to receive sheltered workplace status.

Another project developed in recent years by the Ministry of Family and Social Policies' General Directorate of Services for Persons with Disabilities and Elderly People aims at integrating persons with disabilities into the labour market. The project provides entrepreneurship training, coaching support at the stage of business development and subsidies.<sup>314</sup> Applications which are 'assessed to have the potential of creating a suitable working environment in current labour market conditions will be awarded with maximum 30.000 Turkish Liras' (as of April 2016, around EUR 9 250).<sup>315</sup>

Since 2005, all persons with disabilities in need of care are provided with care, free of charge, in public or private care centres and their fees are paid by the Government. According to the Government, all eligible persons with disabilities benefit from these services.<sup>316</sup>

### **Broad social policy measures**

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. Immovable properties belonging to persons with disabilities and measuring up to a maximum of 200 square metres are exempt from property tax. The equipment and software which persons with disabilities use in their daily lives, including in areas of education and employment, are exempt from value added tax. In addition, items imported from abroad and used for enhancing education, employment and personal development of persons with disabilities, as well as adapted motor vehicles, are exempt from customs duties. Such exemptions are valid at the time of purchase. Private cars bought by persons with a degree of disability equal to or above 9 % are exempted from private consumption tax for five years.

Families who provide home care to children with severe disability are paid a net minimum wage. Pursuant to amendments made on 6 February 2014 to the Law on Social Services, households where the average monthly income per person is below two thirds of the minimum wage, and where there is at least one person with disability who is in need of special care, will be given financial assistance. Such assistance will either be social aid to support home care or direct care services provided by public or private institutions. Persons

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<sup>312</sup> Turkey, Law on Amendments to Decree with the Force of Law concerning the Organisation and Duties of the Ministry of Family and Social Policies and to some Laws and Decrees with the force of Law (*Aile ve Sosyal Politikalar Bakanlığının Teşkilat ve Görevleri Hakkında Kanun Hükmünde Kararname ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 6 February 2014.

<sup>313</sup> The legal framework in Turkey employs the term 'mental' disability, which is explained as covering both psychosocial and intellectual disability. See website of the Ministry of National Education, available at: [http://nenehatunisokulu.meb.k12.tr/meb\\_iys\\_dosyalar/19/09/749106/icerikler/zihinsel-engel-nedir\\_1008868.html](http://nenehatunisokulu.meb.k12.tr/meb_iys_dosyalar/19/09/749106/icerikler/zihinsel-engel-nedir_1008868.html).

<sup>314</sup> Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 10, available at: [http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm\\_kitapciqi\\_ingilizce\\_tumu\\_23.05.2014.pdf](http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf).

<sup>315</sup> Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 11, available at: [http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm\\_kitapciqi\\_ingilizce\\_tumu\\_23.05.2014.pdf](http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf).

<sup>316</sup> Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 15, available at: [http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm\\_kitapciqi\\_ingilizce\\_tumu\\_23.05.2014.pdf](http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf).

with disabilities and elderly persons who are in the care of public or quasi-public social services institutions will now be given a monthly 'pocket money' allowance, the amount of which will be determined by a regulation. Furthermore, pursuant to Additional Article 10 of Law on Social Services, persons above the age of 65 years whose average household monthly income is less than one third of the minimum wage are entitled to government assistance for home care.

Article 35 of the Law on Persons with Disabilities provides that the state covers a portion of the costs of students with disabilities who are recommended by the special education assessment boards to attend special education and rehabilitation centres. The General Directorate of Higher Education Credit and Hostels Institution gives priority to university students with disabilities in awarding scholarships. Students with disabilities attending public special education schools are transported to their schools free of charge. In the academic year 2012-2013 a total of 46 095 students benefited from this service.<sup>317</sup> Students with special education needs also receive free lunches, education materials and course books, including in Braille alphabet for students with visual disabilities.

Persons with disabilities benefit from reduced rates in urban and intercity transportation and benefit free of charge from national parks, museums, state theatres, operas and ballet performances. Some municipalities give persons with disabilities reductions on water bills.<sup>318</sup>

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

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<sup>317</sup> Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 27, available at: [http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm\\_kitapciqi\\_ingilizce\\_tumu\\_23.05.2014.pdf](http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf).

<sup>318</sup> Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 50, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en).

## **6 REMEDIES AND ENFORCEMENT**

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

- a) Available procedures for enforcing the principle of equal treatment

In Turkey, the following procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative).

In the absence of an anti-discrimination body (which is foreseen under the draft anti-discrimination law yet to be adopted), discrimination claims are filed through general administrative and legal channels.

In the courts, victims of discrimination can claim compensation for pecuniary damages, loss of earnings and/or damages for pain and suffering. 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. If the discriminatory act or action is administrative in nature, before going to court the victim of discrimination has to request compensation from the administrative body responsible for the action. The decisions of the courts are binding by definition.

In order to obtain a legal remedy, employment-related discrimination claims filed under Article 5 of the Labour Law must be brought before a labour court. There are labour courts in every province which deal with employment-related issues. Upon appeal, employment-related discrimination cases come before the Ninth Civil Chamber of the Court of Cassation. The possible remedies for a termination of a work agreement based on discrimination may be, but are not limited to, an order to continue the employment relationship, payment of lost income, compensation etc. An existing labour relationship is a precondition for bringing a labour lawsuit and those who face discrimination in the recruitment process cannot take this route.

Judicial control of the acts and actions of the governorships, district governorships, local administrative bodies and provincial administration of ministries and other public establishments and institutions is undertaken 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 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 full compensation. In cases of actions, the remedy is full compensation.

Since 2010, Article 74 of the Constitution guarantees the right of complaint to the Constitutional Court. 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 to which Turkey is party. Persons can file a complaint against infringement of any of these rights by public authorities. Assessment of complaints is subject to a two-tier process: admissibility and substantive review. Persons whose complaints are found inadmissible reserve the right to petition the European Court of Human Rights (ECtHR). On 23 September 2012, the Constitutional Court started to receive complaints filed against judicial decisions and



actions that have become final (for details on the implementation of the mechanism, see Section 0.1).

There are also non-judicial mechanisms available to victims of discrimination: human rights boards, which are established in every province and district, the Human Rights Inquiry Commission of the Turkish Parliament and the newly established Human Rights Institution of Turkey.

The Human Rights Inquiry Commission of the Turkish Parliament 'functions as a parliamentary monitoring mechanism' and examines the extent to which human rights practices comply with obligations under the Constitution, national legislation and international conventions to which Turkey is party.<sup>319</sup> In 2011, the Commission 'gained a status of legislation commission' by being authorised to examine draft laws concerning human rights.<sup>320</sup> It has investigatory powers to request information from the Government, public institutions, local authorities and private establishments. However, there is no corresponding duty and in the past government institutions and the military have often refrained from sharing 'sensitive' information. The Commission has the power to conduct on-site inspections without prior notification in detention centres and prisons. It has the power to establish, on its own motion, ad hoc inquiry commissions on specific issues. Between 2010 and 2014, the Commission worked on, among others, racism, labour rights, rights of persons with disabilities, allegations of profiling and nurseries.<sup>321</sup> It publishes annual and ad hoc reports, with recommendations to relevant government bodies. However, its recommendations are not binding and often remain unimplemented.

On 5 December 2012, the Human Rights Inquiry Commission of the Turkish Parliament decided to establish a sub-commission to investigate disability rights and violations of human rights of persons with disabilities. Based on its investigations, the sub-commission published a report in 2013.<sup>322</sup> The report concluded, *inter alia*, that the derogatory term "özürlü" continued to be used by government agencies and in legislation; both the private and public sector do not comply with the legal obligation to hire persons with disabilities, warranting criminal sanctions; the payment of monthly salary to persons with disabilities has served to encourage them not to work and separated them from social life; reports prepared by labour inspectors do not include any findings regarding physical conditions at workplace, which disabled the Commission to make assess the accessibility of the workplace for persons with disabilities; measures must be adopted to ensure that individuals with hearing and sight disability can use emergency police, ambulance and other hotlines; measures must be adopted to ensure the accessibility of sidewalks, public institutions and schools for persons with disabilities; and measures must be adopted to ensure the participation of persons with disabilities to public life.

Established pursuant to the Law on the Human Rights Institution of Turkey of 21 June 2012, the Human Rights Institution of Turkey has a general mandate to protect human rights and prevent violations, and does not have specific competence to review discrimination claims. The Turkish Government assured the UN Committee on the

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<sup>319</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, p. 12, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>320</sup> Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 5.

<sup>321</sup> Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 5.

<sup>322</sup> TBMM İnsan Haklarını İnceleme Komisyonu (2013), *Engelli Hakları İnceleme Raporu* (Investigatory Report on the Rights of the Disabled), available at: [https://www.tbmm.gov.tr/komisyon/insanhaklari/docs/2013/raporlar/engelli\\_haklari\\_inceleme\\_raporu.pdf](https://www.tbmm.gov.tr/komisyon/insanhaklari/docs/2013/raporlar/engelli_haklari_inceleme_raporu.pdf).

Elimination of Racial Discrimination that the Institution's wide mandate to protect and promote human rights 'naturally includes combatting racial discrimination'.<sup>323</sup>

The terms and conditions for filing a petition with the Human Rights Institution of Turkey are laid out in an executive regulation which was adopted after considerable delay on 17 May 2014,<sup>324</sup> nearly two years after the adoption of the Law on the Human Rights Institution of Turkey on 21 June 2012. In accordance with this, natural and legal persons bring claims of discrimination against individual persons, private legal entities and public institutions. Human rights organisations and trade unions can bring applications on behalf of victims either on their own motion or on behalf of victims from whom they have received complaints. The Human Rights Institution can also initiate an investigation on its own motion where it sees 'signs of a violation'. Applications to the Institution are free of charge.

The human rights boards, the Human Rights Institution and the Human Rights Inquiry Commission of the Turkish Parliament have competence to inquire into complaints of discrimination in employment. The decisions and reports of the Human Rights Institution, the human rights boards, Human Rights Inquiry Commission of the Parliament and the Ombudsman Institution are not legally binding.

In March 2004, the Bureau for Inquiry on Allegations of Human Rights Violations was established within the Inspection Board of the Ministry of the Interior and tasked with receiving complaints concerning allegations of human rights violations, including claims of discrimination related to law enforcement officers.<sup>325</sup>

After local remedies are exhausted, claimants can file a discrimination claim with the European Court of Human Rights under Article 14 of the ECHR, in conjunction with a substantive right protected under that Convention. Since Turkey has not ratified the optional Protocol 12 to the ECHR, which recognises a free-standing right to non-discrimination, claimants cannot bring a claim against Turkey on the basis of this protocol. Turkey is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) of the United Nations and individual persons can also make an individual complaint to the Human Rights Committee under the anti-discrimination provision of Article 26 of the ICCPR. On 26 March 2015, Turkey ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities, enabling individuals or groups subject to its jurisdiction to file complaints with the UN Committee on the Rights of Persons with Disabilities.<sup>326</sup>

If the victim seeks an amicable settlement instead of a court action, there are limited alternative dispute settlement methods, such as mediation for disputes in civil matters. There are also labour inspectors, insurance inspectors and school inspectors tasked under the Labour Law, the Social Security Institution Law and the laws governing education respectively with inspecting compliance. Inspection under the Consumer Protection Law is carried out by executive officials at national and local levels (governors and district governors). These inspectors have powers to issue administrative and monetary fines where they identify violations of the respective laws. Labour and school inspectors have

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<sup>323</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 11, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>324</sup> Turkey, Regulation on the Procedure and Substance of Processing Claims of Human Rights Violations (*İnsan Hakları İhlali İddialarına İlişkin Başvuruların İncelenmesine Dair Usul ve Esaslar Hakkında Yönetmelik*), Official Gazette, 17 May 2014.

<sup>325</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 9, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>326</sup> Turkey had signed the Optional Protocol on 28 September 2009.



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.

Persons whose requests for reasonable accommodation are denied by their employers can ask labour inspectors to monitor the observance of the Law on Persons with Disabilities. However, the inspectors do not have the power to order employers to provide reasonable accommodation. In cases of a breach of the duty to provide reasonable accommodation, employees in the private sector can go to the labour courts and in the public sector to the administrative courts. However, the labour courts do not have the power to order employers to provide reasonable accommodation or to award compensation in cases of denial of reasonable accommodation.

b) Barriers and other deterrents faced by litigants seeking redress

There are various barriers faced by litigants seeking redress through a court judgment. Except in cases in criminal courts, the litigants themselves have to collect evidence to establish the facts and prove their case, making pursuit of a case without the support of a lawyer extremely difficult. Filing a lawsuit is costly and legal aid is provided under very strict criteria. Unlike filing an individual petition with the ECtHR, filing a constitutional complaint is not free of charge: in 2015, the fee was around EUR 70 (TRY 226.90). Litigants often face lengthy judicial proceedings. As a result, 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 ethnicity, or if an employment contract was terminated because the employer had thought that the employee was gay, a court decision given two years after the discriminatory act will have limited effect. Similarly, administrative court cases filed by parents for the exemption of their children from mandatory religion courses last years, finalising long after the students concerned complete their secondary school education. In criminal cases brought against civil servants alleged to have engaged in discrimination, their superior's permission is required under the Law on the Prosecution of Civil Servants and Other Public Employees and Article 129 of the Constitution. This is one of the major barriers facing the victims of discrimination, as in many cases permission is not given.

Finally, there are strict time limits, which vary according to the type of legal remedy sought. Under 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 persons concerned. For compensation for damages which are the result of administrative action, applications should be submitted within one year after the victim is informed and in any case within five years of the date of the action causing damage.<sup>327</sup> Appeals should be made within 30 days of the notification of lower courts' decisions.<sup>328</sup> Under criminal law, time limits depend on the punishment. For offences resulting in less than 5 years' imprisonment, the limit for exercising the right of appeal is 8 years. If the term of imprisonment is 5 to 20 years the limit is 15 years, if the term of imprisonment is more than 20 years, the limit is 20 years and finally, for life imprisonment it is 25 or 30 years, depending on the type of life imprisonment.<sup>329</sup> For some offences, investigation and prosecution is bound to a complaint. Unless a complaint is brought within six months after the complainer becomes aware of the malicious act and of the offender, an investigation or prosecution cannot proceed.<sup>330</sup> Finally, constitutional complaints must be filed within 30 days after the exhaustion of domestic judicial remedies, or after the occurrence of the alleged human rights violation, where there are no other remedies available.

c) Number of discrimination cases brought to justice

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<sup>327</sup> Turkey, Law on Administrative Adjudication Procedure, (*İdari Yargılama Usulü Kanunu*), Article 13, 6 January 1982.

<sup>328</sup> Turkey, Law on Administrative Adjudication Procedure, Article 46, 6 January 1982.

<sup>329</sup> Turkey, Penal Code, Article 66, 26 September 2004.

<sup>330</sup> Turkey, Penal Code, Article 73, 26 September 2004.

In Turkey there are no available statistics on the number of cases related to discrimination brought to justice.

The Ministry of Justice does not collect data on the number of the cases brought before civil courts. Statistics on criminal cases are selectively published. The most up-to-date publicly available statistics, as of May 2015, are for 2013, when 11 new cases were opened under Article 122, in all of which suspects were accused of discrimination in the sale, transfer or rent of properties.<sup>331</sup> Out of the 15 cases which resulted in a judgment in 2015, only one resulted in conviction.<sup>332</sup> There are no disaggregated data on the grounds of discrimination in any of these statistics.

There is better access to data on the use of newly available judicial and non-judicial mechanisms. Between 23 September 2012, when the right of constitutional complaint entered into force, and 10 April 2015, the Constitutional Court received a total of 38 067 valid applications, of which 8 066 concerned the right to 'equality before the law'. No breakdown of the discrimination grounds on which these petitions are based is available. Of the 19 529 applications which were assessed by the Court, only 559 resulted in the finding of a violation. Of these, only one entailed a substantive ruling finding discrimination<sup>333</sup> (see Section 12.2 for a summary of this judgment).

The only publicly available statistics on discrimination claims made through the constitutional complaint mechanism have been reported by the Government to the Committee on the Elimination of Racial Discrimination. In its combined fourth to sixth report presented in February 2014, the Government reported that of the more than 10 000 individual complaints filed with the Constitutional Court between September 2012 and December 2013, 48 applications concerned racial discrimination. Of these, seven were found inadmissible, four were refused due to improper application and the rest were under review.<sup>334</sup>

The Ombudsman Institution began receiving complaints as of 29 March 2013. By the end of 2014, the Ombudsman Institution had received a total of 13 277 complaints, of which 686 concerned human rights, 1 307 concerned 'employment and social security', 2 259 concerned 'education, youth and sports', 289 concerned health, 193 concerned 'rights of persons with disabilities' and 119 concerned 'social services'.<sup>335</sup> The Ombudsman Institution has not yet released its annual report for 2015, though the European Commission reported that the caseload of this body increased sharply and reached 25 000 as of the end of August 2015.<sup>336</sup> There are no statistics on discrimination complaints made to the Ombudsman Institution. In early 2014, the Turkish Government reported to the Committee on the Elimination of Racial Discrimination that four of the complaints received that year involved discrimination. Of these, one was found inadmissible, one was conveyed to the Ministry of Justice due to the non-exhaustion of administrative remedies and two were under preliminary review.

In 2014, the Human Rights Institution of Turkey received 900 complaints, of which 59 concerned psychological harassment in the workplace (mobbing), 29 concerned disability

<sup>331</sup> <http://www.adlisicil.adalet.gov.tr/ISTATISTIKLER/1996/2013-acilantck.pdf>.

<sup>332</sup> <http://www.adlisicil.adalet.gov.tr/ISTATISTIKLER/1996/2013-karartck.pdf>.

<sup>333</sup> [http://www.anayasa.gov.tr/files/bireyselBasvuru/23\\_eylul\\_2012\\_10\\_nisan\\_2015.pdf](http://www.anayasa.gov.tr/files/bireyselBasvuru/23_eylul_2012_10_nisan_2015.pdf).

<sup>334</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 31, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>335</sup> The Ombudsman Institution of Turkey (*Türkiye Kamu Denetçiliği Kurumu*), 2014 Activities Report (2014 *Faaliyet Raporu*), p. 45, available at: [http://www.ombudsman.gov.tr/contents/files/2014%20YILI%20FAAL%C3%84%C2%B0YET%20RAPOR-son\(1\).pdf](http://www.ombudsman.gov.tr/contents/files/2014%20YILI%20FAAL%C3%84%C2%B0YET%20RAPOR-son(1).pdf).

<sup>336</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 10, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).

rights, 26 concerned the prohibition of discrimination and 12 concerned freedom of religion.<sup>337</sup> In the same year, the provincial and district human rights boards received 2 717 complaints, of which 22 concerned disability rights, 8 concerned prohibition of discrimination and 5 concerned freedom of religion.<sup>338</sup> In 2015, the Human Rights Institution received 715 complaints, of which 46 concerned psychological harassment in the workplace (mobbing), 30 concerned disability rights, 2 concerned the prohibition of discrimination, 8 concerned the right to equality and 5 concerned freedom of religion and conscience.<sup>339</sup> The Human Rights Institution has so far concentrated on violations of civil and political rights, and released several reports on prison conditions, allegations of torture and ill treatment, refugees and asylum seekers, freedom of assembly, freedom of expression, the right to life and the use of excessive force by security forces.<sup>340</sup>

As of the end of 2015, only one decision of the Human Rights Institution of Turkey is publicly available. The decision was issued on 25 June 2015 in a complaint filed by the Monitoring Association for Equal Rights, an NGO, which alleged that the voter training materials prepared by the High Council on Elections were designed exclusively for Turkish speaking and literate individuals and disregarded the needs of those who are illiterate and those who do not speak Turkish. The NGO filed the complaint on behalf of two Kurdish women and alleged that the non-availability of voter training materials in Kurdish inhibited their right to have equal access to information, prevented their ability to cast their votes freely and constituted discrimination. In a unanimous decision, the Human Rights Institution concluded that there was no reasonable justification for the state's failure to fulfil its positive obligations under the equality clause of the Constitution and recommended that the High Council on Elections also disseminate public information in languages other than Turkish.<sup>341</sup>

#### d) Registration of discrimination cases by national courts

In Turkey, discrimination cases are not registered as such by national courts.

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

#### a) Engaging on behalf of victims of discrimination (representing them)

In Turkey, associations/organisations/trade unions are granted very limited entitlement to act on behalf of victims of discrimination. They also have limited legal standing to act on behalf of their members in limited circumstances.

The executive regulation of the Human Rights Institution of Turkey, adopted on 17 May 2014,<sup>342</sup> grants human rights organisations and trade unions standing to file complaints with the Institution on behalf of victims of human rights violations. While the Human Rights

<sup>337</sup> The Human Rights Institution of Turkey (2015), *Numerical data concerning allegations of human rights violations in 2014 (2014 Yılı İnsan Hakları İddialarına İlişkin Sayısal Veriler)*, p. 6, available at: <http://www.tihk.gov.tr/tr/Duyuru-ve-Haberler/ArtMID/477/ArticleID/11/2014-Y%C4%B1%C4%B1-%C4%B0nsan-Haklar%C4%B1-%C4%B0hlal-%C4%B0ddialar%C4%B1na-%C4%B0li%C5%9Fkin-Say%C4%B1sal-Veriler>.

<sup>338</sup> The Human Rights Institution of Turkey (2015), *Numerical data concerning allegations of human rights violations in 2014 (2014 Yılı İnsan Hakları İddialarına İlişkin Sayısal Veriler)*, p. 8, available at: <http://www.tihk.gov.tr/tr/Duyuru-ve-Haberler/ArtMID/477/ArticleID/11/2014-Y%C4%B1%C4%B1-%C4%B0nsan-Haklar%C4%B1-%C4%B0hlal-%C4%B0ddialar%C4%B1na-%C4%B0li%C5%9Fkin-Say%C4%B1sal-Veriler>.

<sup>339</sup> The Human Rights Institution of Turkey (2015), *2015 Activity Report (2015 Faaliyet Raporu)*, p. 168-169, available at: [http://www.tihk.gov.tr/Portals/0/y/TIHK\\_2015\\_faaliyet\\_raporu.pdf](http://www.tihk.gov.tr/Portals/0/y/TIHK_2015_faaliyet_raporu.pdf).

<sup>340</sup> The reports are available at: <http://www.tihk.gov.tr/tr/Raporlar-ve-Kararlar#45619-raporlar>.

<sup>341</sup> The Human Rights Institution of Turkey, *Eşit Haklar için İzleme Derneği-Yüksek Seçim Kurulu*, Application no. 2015/1344, 25 June 2015, available at: <http://www.tihk.gov.tr/Portals/0/b/13-Temmuz-YSK-karari.pdf?ver=2015-10-01-152336-483>.

<sup>342</sup> Turkey, Regulation on the Procedure and Substance of Processing Claims of Human Rights Violations, Official Gazette, 17 May 2014.

Institution does not have an explicit anti-discrimination mandate, it is tasked with general human rights protection, which covers discrimination issues.

According to Article 26(2) of the Law on Unions and Collective Agreements, trade unions have the right to initiate cases and to intervene in ongoing cases on behalf of their members concerning the latter's rights arising from employment contracts and social security rights. Since the Labour Law provides legal protection against discrimination, the legal standing granted to trade unions is arguably also applicable in discrimination cases. However, this requires judicial interpretation.

b) Engaging in support of victims of discrimination

In Turkey, associations/organisations/trade unions can be allowed to act in support of victims of discrimination, depending on judicial interpretation.

Article 237(1) of the Law on Criminal Procedure allows legal personalities 'harmed by the crime' concerned in the case to join already existing proceedings launched by public prosecutors. Since the provision does not explicitly mention discrimination cases and puts forth a requirement of being harmed by the crime, the implementation of this provision in discrimination cases requires judicial interpretation. There are two instances where NGOs are allowed limited legal standing under this provision. The first concerns a standing of general nature restricted to trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and history. 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. The second concerns standing in criminal cases for any legal entity which can demonstrate harm from the crime at issue. Associations or organisations cannot act on behalf of victims of discrimination nor can they file cases on their own initiative. However, they can call on prosecutors to act to prosecute perpetrators and they can intervene in criminal cases launched by public prosecutors where they can 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.

Turkish courts are notorious for the way in which they persistently deny requests by human rights organisations to intervene on behalf of or in support of victims of discrimination. The most high-profile example of this phenomenon occurred in a 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 Progressive Lawyers Association – as well as hundreds of individual lawyers – have unsuccessfully attempted to intervene under Article 237(1) in the case on behalf of the deceased victim, who is not represented in the case by a lawyer. However, on each occasion, the court has denied such requests on the ground that the association failed to demonstrate harm. On 13 December 2011, the lower court convicted one police officer and sentenced him to 4 years and 2 months imprisonment. The Court of Cassation found the sentence to be too low and overturned the judgment, stating that the prosecutor should ask for 20 years imprisonment. The case was reopened in June 2014.

In recent years, LGBTI organisations started to use Article 237(1) to be involved in criminal cases to act on behalf of victims of hate crime and honour killings. While in many cases courts reject such requests, recently there have been a few instances where courts accepted requests for intervention from LGBTI organisations. In a decision on 26 March 2012, a court in Izmir granted the request of Black Pink Triangle Izmir Association on Sexual Orientation and Sexual Identity Studies and Solidarity against Discrimination to intervene in a criminal case concerning the killing of a transgender woman.<sup>343</sup> The court

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<sup>343</sup> Izmir 7th Heavy Penal Court, no. 2010/224, 26 March 2012.

did not elaborate on the reasoning for this decision. The contradictory stance of lower courts continued in 2013. On 18 January 2013, a favourable decision was given by a criminal court in Diyarbakır, which accepted the request of the Social Policies, Gender Identity and Sexual Orientation Studies Association (*Sosyal Politikalar, Cinsiyet Kimliği ve Cinsel Yönelim Çalışmaları Derneği*, SpoD), a national LGBTI organisation, to act on behalf of the victim in a case concerning a so-called 'honour killing'.

Soon after this decision, two different courts in Istanbul gave opposite decisions concerning the standing of LGBTI groups. On 25 January 2013, during the twelfth hearing of a criminal case concerning the 'honour killing' of a homosexual man by members of his family,<sup>344</sup> and on 13 February 2013, in a criminal case concerning the killing of a transgender woman,<sup>345</sup> the courts rejected SpoD's request to intervene on the ground that the association did not suffer direct harm from the crimes committed in both cases.<sup>346</sup>

#### c) Actio popularis

In Turkey, national law allows associations / organisations / trade unions to act in the public interest on their own initiative, without a specific victim to support or represent (*actio popularis*), but does not refer to discrimination specifically. Therefore, judicial interpretation is needed.

The Law on Civil Procedure of 2011 introduced the principle of *actio popularis* into Turkish law.<sup>347</sup> 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. The *actio popularis* has not yet been used in practice.

#### d) Class action

In Turkey, national law does not allow associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

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

In Turkey, national law permits a shift of the burden of proof from the complainant to the respondent.

According to Article 5 of the Labour Law, with regard to violations of the principle of equality, the burden of proof rests with employees. However, if an 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 Article 20 of the Labour Law, in cases of termination of contract by employers, 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 this allegation. According to Article 18, the following cannot be valid

<sup>344</sup> Üsküdar 1st Heavy Penal Court, no. 2009/166, 25 January 2013.

<sup>345</sup> Bakırköy 4th Heavy Penal Court, no. 2012/74, 13 February 2013.

<sup>346</sup> After the cut-off date of this report, in a landmark decision constituting a first in Turkey, the Constitutional Court granted seven national NGOs and a European NGO leave to submit amicus curiae briefs in an ongoing case. While this is not a discrimination case nor has the applicant made a claim for equal treatment, the decision of the Constitutional Court to accept amicus curiae from civil society has set a significant precedent which is likely to be used by civil society organisations in supporting victims of discrimination.

<sup>347</sup> Turkey, Law on Civil Procedure (*Hukuk Muhakemeleri Kanunu*), 12 January 2011.

reasons for the termination of an employment relationship: race, colour, sex, civil status, family responsibilities, pregnancy, religion, political opinion and ethnic and social origin. However, under the same article, the obligation to justify dismissal is only binding on employers employing a minimum of 30 employees and only if the dismissed employee has completed a minimum of 6 months' employment. This results in the non-applicability of the reversal of burden of proof under Article 20 in around 80 % of dismissal cases.<sup>348</sup>

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

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

In Turkey, there are limited legal measures of protection against victimisation.

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

The other provision prohibiting victimisation is found in the Regulation on Complaints and Applications of Civil Servants. According to Article 10 of the 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. Article 4 prohibits collective complaints by civil servants.

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

##### **a) Applicable sanctions in cases of discrimination – in law and in practice**

If employers violate Article 5 of the Labour Law prohibiting discrimination, employees may demand compensation of up to four months' wages plus other benefits of which they have been deprived. According to Article 99 of the Labour Law, in cases of violation of Article 5, employers shall also be subject to a fine.

According to Article 21 of the Labour Law, if a court or arbitrator concludes that a termination is unjustified (among other reasons because the termination was based on discrimination), the employer must re-instate the employee within one month. If, upon the application of the employee, the employer does not re-engage the employee in work, compensation of not less than four months' wages and not more than 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 if they are not re-engaged.

Individuals who violate the prohibition of hatred and discrimination based on the limited grounds and limited material scope stipulated in Article 122 of the Turkish Penal Code face imprisonment. Pursuant to changes made in February 2014, the criminal penalty for these offences increased to a maximum of three years imprisonment, with no possibility of conversion to a fine.

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<sup>348</sup> Levent Korkut (2003), *Report on Measures to Combat Discrimination in the 13 Candidate Countries (VT/2002/47)*, Country Report Turkey, May 2003, p. 35, available at <http://www.humanconsultancy.com/project?pid=22>.

Article 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 for a period of from one to three years.

In addition, labour inspectors and school inspectors can issue sanctions for violations of anti-discrimination provisions or positive obligations. In cases of discrimination in violation of Article 5 of the Labour Law, the monetary sanction as of 2015 is EUR 41 (TRY 134) per employee who has been proven to have experienced discrimination. Where employers fail to fulfil their obligation to employ persons with disabilities, the sanction is EUR 646 (TRY 2 096) per month per employee with disabilities who is not employed.

b) Ceiling and amount of compensation

Articles 5 and 21 of the Labour Law stipulate an upper limit for compensation. Although employees may claim other benefits of which they have been deprived in addition to compensation of up to four months' wages, these claims are limited to actual damage suffered. For example, if discrimination was suffered regarding wages, only the wage difference can be claimed. Moral damages cannot be claimed.

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

c) Assessment of the sanctions

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 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

Turkey does not have a national anti-discrimination law or a 'specialised body' for the promotion of equal treatment irrespective of racial or ethnic origin in accordance with Article 13 of the Racial Equality Directive. There are, however, the National Human Rights Institution and the Ombudsman Institution, both established by laws adopted in June 2012, which partially fulfil the requirements of the Racial Equality Directive.

Since 2000, human rights boards established at district and province levels also accept complaints from individuals and issue non-binding decisions. At national level, the Human Rights Inquiry Commission of the Turkish Grand National Assembly issues non-binding special investigation reports.

The draft anti-discrimination law foresees the establishment of an 'Anti-Discrimination and Equality Board', which will receive complaints regarding discrimination in the public and private sectors. No development has taken place in 2015 regarding the draft law.

- b) Status of the designated body/bodies – general independence

There is no specialised equality body in Turkey.<sup>349</sup>

The independence of the Human Rights Institution of Turkey has been a contentious issue since its establishment. National human rights organisations consider the body to lack independence due to the appointment of most of its members by the Government, the lack of financial or administrative safeguards to ensure the independence of its members, and the non-pluralistic and non-participatory ways in which its members are appointed.<sup>350</sup> Of the ten members, only two are women. Both the president and the vice-president of the Institution are men. A number of national and international NGOs, in their submissions and joint submissions to the UN Human Rights Council for the Universal Periodic Review of Turkey, pointed out that the Institution lacks independence and urged the Turkish Government to amend the law founding the Institution to ensure its compliance with the Paris Principles.<sup>351</sup>

The Human Rights Institution's lack of independence and non-compliance with the Paris Principles has also been pointed out by the UN Country Team (UNCT) Turkey. In its submission for Turkey's Universal Periodic Review, the UNCT pointed out that the Institution had not yet requested accreditation from the International Coordinating Committee of National Human Rights Institutions and that the law establishing the Institution falls short of the Paris Principles. The UNCT also recommended legal amendment 'so as to guarantee the organic and financial independence' of the Institution.<sup>352</sup> In its response to the recommendations made by UN Member States during the Universal

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<sup>349</sup> Article 5 of the draft anti-discrimination law stipulates that the Anti-Discrimination and Equality Body to be established under the law will have administrative and financial autonomy.

<sup>350</sup> İnsan Hakları Ortak Platformu (IHOP) (2014), *UPR Stakeholders Report*, submitted to the UN Universal Periodic Review, twenty-first session of the Working Group on the UDR, UN Human Rights Council: January-February 2015, 14 June 2014, p. 3.

<sup>351</sup> United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Summary prepared in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 3.

<sup>352</sup> United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/210/44/PDF/G1421044.pdf?OpenElement>.



Periodic Review sessions held in January 2015, the Turkish Deputy Prime Minister said that efforts were 'underway to enable the Institution to apply for accreditation'.<sup>353</sup> In its 2015 report, the European Commission noted that the functional independence of the Institution needs to be strengthened and its capacity needs to be built further.<sup>354</sup>

According to ECRI, there are 'concerns regarding the impartiality and neutrality of the Ombudsmen'.<sup>355</sup>

c) Grounds covered by the designated body/bodies

There is no specialised equality body in Turkey.<sup>356</sup> The Human Rights Institution of Turkey, the Ombudsman Institution and the human rights boards do not have an explicit mandate to receive discrimination claims. Their mandate for general human rights protection covers discrimination issues. However, one of the five Ombudsmen is responsible for disability issues.

d) Competences of the designated body/bodies – and their independent exercise

There is no specialised equality body in Turkey.<sup>357</sup>

The Human Rights Institution of Turkey has competence over protecting human rights, preventing human rights violations, combating torture and maltreatment, receiving and processing claims, and providing education and conducting research on human rights. Combating discrimination is not explicitly stated among the competences outlined in Article 4 of the law. However, the Turkish Government assured the UN Committee on the Elimination of Racial Discrimination that the Institution's wide mandate to protect and promote human rights 'naturally includes combatting racial discrimination'.<sup>358</sup> Nevertheless, it remains to be seen whether the Institution will indeed protect LGBTI persons against discrimination, in light of the strong negative prejudices and discriminatory attitudes prevalent in public institutions in Turkey. Among the powers and duties of the Human Rights Institution outlined in Article 7 is monitoring the implementation of the international conventions Turkey is party to, including the UN Convention on the Rights of Persons with Disabilities. The Institution has the power and duty to provide input to the state reports Turkey is required to submit to various treaty bodies and to participate in meetings where these reports are presented (for more on the Institution, see Section 6.1). The executive regulation of the Human Rights Institution of Turkey, adopted on 17 May

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<sup>353</sup> United Nations (UN), Human Rights Council Working Group on the Universal Periodic Review (2015), *Draft report of the Working Group on the Universal Periodic Review: Turkey*, submitted to the UN Human Rights Council, twenty-first session: 19-30 January 2015, p. 4, available at: [http://www.upr-info.org/sites/default/files/document/turkey/session\\_21\\_-\\_january\\_2015/a\\_hrc\\_wg.6\\_21\\_l.12.pdf](http://www.upr-info.org/sites/default/files/document/turkey/session_21_-_january_2015/a_hrc_wg.6_21_l.12.pdf).

<sup>354</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 62, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).

<sup>355</sup> Council of Europe, ECRI (2013), *Conclusions on the implementation of the recommendations in respect of Turkey subject to interim follow-up*, Strasbourg, Council of Europe, p. 6, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-IFU-IV-2014-006-ENG.pdf>.

<sup>356</sup> The Anti-Discrimination and Equality Body to be established if and when the draft law is adopted will cover the grounds covered under the law. For a list of these grounds, see Section 2.1.2.

<sup>357</sup> The Anti-Discrimination and Equality Body to be established if and when the draft law is adopted will have competence to raise awareness and provide training on anti-discrimination, investigate allegations of discrimination upon complaints or on its own initiative, engage in mediation in discrimination cases, monitor the execution of court judgments on discrimination, issue recommendations to the relevant authorities on measures to be adopted against discrimination, provide 'every kind of assistance' to victims, issue annual reports and ad hoc special reports on discrimination for submission to public authorities, prepare publications to combat discrimination and cooperate with NGOs and public institutions to organise campaigns against discrimination.

<sup>358</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 11, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

2014,<sup>359</sup> grants human rights organisations and trade unions standing to file complaints with the Institution on behalf of victims of human rights violations.

The Ombudsman Institution is tasked with reviewing the acts and operations of the administration and making suggestions to ensure the administration's compliance with the principles of human rights, justice and the rule of law. With the adoption of the executive regulation implementing the Ombudsman Law, the Ombudsman Institution started to receive complaints in March 2013 (for more on the Human Rights Institution, see Section 6.1). According to ECRI, the Ombudsman Institution might also take on the function of an independent body on racial discrimination, but it 'lacks the power to carry out investigations on its own initiative'.<sup>360</sup> The Ombudsman is therefore dependent on information provided to it by third parties (NGOs, government) to exercise its review powers. National human rights NGOs point out the low level of implementation by the public authorities of the recommendations of the Ombudsman Institution.

The boards are not independent from the executive and are extremely underused.

e) Legal standing of the designated body/bodies

There is no specialised equality body in Turkey.<sup>361</sup>

The Human Rights Institution of Turkey has the legal standing to file criminal complaints or inform the authorities where it is informed about the commission of a crime arguably covers discrimination complaints. The Ombudsman lacks such standing.

f) Quasi-judicial competences

The Human Rights Institution of Turkey has competence to inquire into complaints of discrimination. Natural and legal persons file claims of discrimination, free of charge, with the Institution against individual persons, private legal entities and public institutions. Human rights organisations and trade unions can bring applications on behalf of victims either on their own motion or on behalf of victims from whom they have received complaints. The Institution can also initiate an investigation on its own motion where it sees 'signs of a violation'. The decisions and recommendations of the Institution are not legally binding.

The Ombudsman Institution can also receive complaints from individual persons regarding human rights violations, including discrimination. However, it lacks a mandate to carry out investigations on its own initiative and its reports and recommendations are also not binding.

g) Registration by the body/bodies of complaints and decisions

N/A.

h) Roma and Travellers

There is no specific body tasked with treating Roma as a priority issue. Since 2011, the Ministry of Family and Social Policies has been tasked with the coordination of all initiatives undertaken by the Government under the 'Roma opening', declared in 2009 'with a view

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<sup>359</sup> Turkey, Regulation on the Procedure and Substance of Processing Claims of Human Rights Violations, Official Gazette, 17 May 2014.

<sup>360</sup> Council of Europe, ECRI (2013), *Conclusions on the implementation of the recommendations in respect of Turkey subject to interim follow-up*, Strasbourg. Council of Europe, p. 6, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-IFU-IV-2014-006-ENG.pdf>.

<sup>361</sup> The Anti-Discrimination and Equality Body to be established if and when the draft law is adopted will have the power to open investigations on its own initiative on cases of alleged discrimination brought to its attention.

to identifying and seeking solutions for the problems faced by the Roma particularly in the fields of employment, housing, health and education through increasing dialogue between the Roma and relevant Government units'.<sup>362</sup> Towards that end, since December 2009 a series of workshops and meetings have been held between senior government leaders, including the Prime Minister and relevant ministers, and representatives of the Roma community.<sup>363</sup> The tangible outcomes of this deliberative process have been as follows. An action plan to detect irregular school attendance and to prevent dropping out of school among Roma children has been drafted; the Turkish Employment Agency has initiated various programmes to enhance Roma participation in the labour market; all governorates have been instructed to issue identity cards to Roma citizens; and housing has been constructed for Roma. A national Roma integration strategy and action plan has begun to be drafted but has not been adopted.

On the other hand, despite this recent evidence of political will and the considerable lip service paid to addressing the problems of Roma, the Government has not joined the international 2005-2015 Decade of Roma Inclusion initiative.<sup>364</sup> Neither the Human Rights Institution nor the Ombudsman Institution has a Roma strategy.

On 7 January 2016, the Turkish Parliament debated the motion submitted by Özcan Purçu, a parliamentarian of Roma ethnic origin, and 22 other deputies from the main opposition Republican People's Party (*Cumhuriyet Halk Partisi-CHP*) for a parliamentary inquiry into the housing conditions of the Roma minority in Turkey to be undertaken.<sup>365</sup> The proposal, submitted to the Parliament on 8 December 2015, was rejected due to the negative votes of the deputies from the governing Justice and Development Party (*Adalet ve Kalkınma Partisi-AKP*), who constitute the majority. The AKP deputies did not make a public statement as to the grounds for their negative vote. The motion emphasised the importance of the right to housing as a fundamental human right necessary for the exercise of other fundamental rights. Pointing out the close link between the right to housing and the right to be free from discrimination, the motion referred to the Roma neighbourhoods in Turkey as 'the personification of discrimination in urban settings'. The motion then problematised ongoing urban renewal projects carried out across Turkey from the perspective of the right to housing of the Roma community. Pointing out that these projects have been carried out in neighbourhoods where Roma and other socially marginalised and impoverished communities lived, the motion laid out the following problems with these projects: lack of information available to the public as to the number, location and nature of urban renewal projects; lack of transparency; the exclusion of Roma residents from the decision-making processes, which are exclusively carried out between private companies and local municipalities; the low amounts of compensation paid to Roma individuals who had been forced to move out of their homes due to urban renewal projects; the lack of affordable, alternative housing for the displaced Roma; the fact that many Roma citizens had become homeless or have to live in poor conditions in their new residences; and that the legal framework in which these projects are carried out virtually deprives the Roma of their right to seek legal remedy in courts and causes their forced displacement. The motion

<sup>362</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 5, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>363</sup> For a detailed listing of these events until 2014, see United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, pp. 12-15, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en).

<sup>364</sup> European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 62, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-turkey-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf).

<sup>365</sup> Motion for the Opening of a Parliamentary Inquiry for the Purpose of Inquiring into the Housing Needs of Roma Citizens and Identifying the Measures that Need to be Taken, no. 10/50, submitted by Izmir deputy Özcan Purçu and his 22 friends, submitted to the Parliament on 8 December 2015.

also pointed out there are still Roma neighbourhoods where residents live in tents in extremely poor conditions, without access to water, electricity and sewage. Purçu reacted strongly against the rejection of the proposal, particularly due to the death of a 55-year-old bedridden Roma woman on 2 January 2016 due to cold weather.<sup>366</sup> Ünzile Türkmen froze to death in the tent she lived in with her husband in the Ezine district of Çanakkale province in north-western Turkey.<sup>367</sup>

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<sup>366</sup> Habertürk (2016), 'Çanakkale'de Barakada Yaşayan Kadın Donarak Öldü!' (Woman living in a hut in Çanakkale froze to death), 3 January 2016, <http://www.haberturk.com/gundem/haber/1175781-canakkalede-barakada-yasayan-kadin-donarak-oldu>.

<sup>367</sup> See Chapter 3.2.10 on the trends and patterns regarding housing segregation for Roma.

## 8 IMPLEMENTATION ISSUES

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

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

In recent rare cases where NGOs are invited to provide their opinions and proposals on pending legislation, their input is not (fully) taken into consideration at the drafting stage. For example, an initial version of the draft anti-discrimination law was distributed to universities and NGOs for their contributions and was revised on the basis of their feedback. However, the Government subsequently amended the text which had been agreed upon and removed 'sexual identity' from the grounds of non-discrimination against the protests of the LGBTI movement and the NGOs which had collaborated on the draft.

In recent years, the Government organised a number of meetings to discuss, identify and seek solutions to the problems of designated ethnic and religious minorities, i.e. Kurds, Alevis and Roma. The Government dubiously named these initiatives 'opening' (*açılım*), referring to its opening up to these groups or opening their problems and demands to public discussion through a consultation mechanism. 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 over by a minister of state, to communicate to the Government the opinions expressed. However, whether and how the opinions provided by the NGOs and social partners at these meetings have been used for policy development is very unclear.

The Government issued a final report on its 'Alevi opening',<sup>368</sup> putting forth general recommendations on the basis of the demands expressed by Alevi representatives. Among the recommendations are: eradication of discrimination against Alevis; constitutional protection of the Alevi identity; rethinking the status and competences of the Directorate of Religious Affairs (*Diyanet*) to ensure equal access of all religious and faith groups to government services; making the mandatory religion courses optional and redesigning their curriculum; granting legal status to *cem* houses and expropriation 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 Friday prayers) and commemoration of the victims.

Since the release of the report, the Ministry of National Education has included information on the Alevi faith in the religious education textbooks, effective from school year 2011-2012, much to the protests of Alevi associations on the grounds that they were not consulted on the type of information included and that the classes were still mandatory. The Madımak Hotel was expropriated but not turned into a museum and the bulletin board honouring the victims also included the names of the deceased perpetrators. On a positive note, in 2012 the Parliament responded positively to the petition of an Alevi parliamentarian for the accommodation of the Alevi Muharrem fast in parliament restaurants, which served food in accordance with the dietary restrictions of Alevi deputies. This was the first time ever that a public institution accommodated Alevis during their fasting period. In 2013, the Parliament repeated this accommodation, but not in 2014 nor in 2015.

However, the Government still refuses to recognise *cem* houses as places of worship and to grant them legal status. The ECtHR's case law on this issue remains unimplemented. While the electricity bills of churches and synagogues are now being paid by the *Diyanet*,

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<sup>368</sup> Turkey, State Ministry of the Republic of Turkey (*Türkiye Cumhuriyeti Devlet Bakanlığı*) (2010), Final Report of the Alevi Workshops (*Alevi Çalıştayları Nihai Rapor*).

which until recently provided this advantage exclusively to mosques, *cem* houses continue to be excluded, despite a recent ECtHR ruling which found this practice to be discriminatory. In 2012, requests from Alevi parliamentarians for a place of worship within the premises of the Parliament were rejected by the Speaker, who reasoned as follows: 'According to the Directorate of Religious Affairs, Alevism is not a separate belief but "a formation within Islam, a richness of Islam which has emerged over historical processes" and "Islam's places of worship are mosques."'

On 2 March 2015, the District Governor (*kaymakam*) of the Maltepe district of Istanbul filed a lawsuit against the decision of the democratically elected Maltepe Municipal Council to grant 'place of worship' status to *cemevis*.<sup>369</sup> The Maltepe Municipal Council, run by the main opposition Republican People's Party (RPP), had adopted a majority decision on 3 December 2014 to grant place of worship status to all *cemevis* within the district boundaries.<sup>370</sup> In his application to the Istanbul Regional Administrative Court, the Maltepe District Governor claimed that the decision of the Maltepe Municipal Council posed a threat to the 'unity' of the people and would cause 'irreparable divisions in social life.' The District Governor argued that the Municipal Council lacked the competence to grant place of worship status to *cemevis*, which rested solely with the Turkish Parliament. He also claimed that the decision was against the principle of laicism guaranteed under Article 2 of the Constitution.<sup>371</sup> The court has not yet issued a ruling.

With regard to the Kurdish question, the state-owned Turkish Radio and Television (TRT) launched a new channel, TRT 6 (Şeş), which broadcasts exclusively in Kurdish; the Government approved the establishment of Kurdish institutes and departments at selected public universities; the restriction on the use of Kurdish by prison inmates and the blanket ban on the use of Kurdish in political campaigning were lifted; Kurdish was introduced as an elective class in public secondary schools and private education in Kurdish was allowed in private secondary schools; defendants in criminal cases were allowed to use their mother tongue during oral defence in courts; the national oath of allegiance in schools was abolished; and the restoration of the old (Kurdish and other) names of villages, districts and provinces was allowed. Elective courses in Kurdish and other selected minority languages began to be offered for two hours per week in the academic year 2012-2013 to students of fifth grade and above. According to the European Commission's 2015 report, while the Ministry of National Education appointed 28 teachers of the Kurdish language as permanent staff, this number falls far short of the demand.<sup>372</sup> In September 2013, the Anadolu Agency (Anadolu Ajansı), the official news agency of Turkey, started broadcasting in Kurdish (in addition to Arabic, Bosnian, Croatian, Serbian, Russian and English).<sup>373</sup>

Under the 'Roma opening' initiative launched in 2009, the Government has been engaging in dialogue with Roma organisations, organising high-level workshops with the participation of government ministers and key bureaucrats. The highest level gathering of this kind occurred in March 2010, attended by more than 10 000 Roma across the country and presided over by the Prime Minister. In his speech, the Prime Minister said that discrimination against Roma people is unacceptable. Roma representatives expressed their

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<sup>369</sup> In Turkey, mayors and municipal councils are elected, whereas governors and district governors are appointed by the central government and adhere to official policies and decisions.

<sup>370</sup> The Maltepe Municipal Council had adopted the decision upon a written order sent by the RPP to all municipalities it governs across Turkey, asking them to grant place of worship status to *cemevis* in order to comply with the ECtHR's ruling of 2 December 2014 in the case of *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*. Maltepe Municipal Council, decision no. 2014/115, 3 December 2014.

<sup>371</sup> The lawsuit filed by the District Governor became known to the general public with news reports of 30 April 2015.

<sup>372</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 69, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).

<sup>373</sup> United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 25, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FTUR%2F4-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FTUR%2F4-6&Lang=en).



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

The concrete measures taken by the Government as part of the 'Roma opening' are as follows. In January 2011 a discriminatory clause in the Law on the Movement and Resident of Aliens, which had authorised the Ministry of Interior to 'expel stateless and non-Turkish gypsies and aliens that are not bound to the Turkish culture' was amended; the construction of nearly 9 000 housing units for Roma by TOKİ was announced in March 2011; in April 2011 a Roma Research and Implementation Centre was established at Adnan Menderes University in the province of Aydın, which has, however, never become operational; and finally, the Institute on the Study of Roma Language and Culture at the University of Trakya was opened in 2014.<sup>374</sup> The Institute is expected to contribute to the development of government policies on the Roma community and has the mandate to conduct academic research and issue publications on Roma, to partner with national and international institutions pursuing similar goals, and to engage in training, consulting, monitoring and data collection activities.<sup>375</sup> The Institute is located in the province of Edirne, which hosts one of the largest Roma communities in Turkey. The opening of the new Institute has been cautiously welcomed by Roma associations, which expect the Institute, as a matter of priority, to collect data on the needs and problems of the Roma community. There is no specific body tasked with treating Roma as a priority issue in Turkey. Since 2011, the Ministry of Family and Social Policies has been tasked with coordination of all initiatives undertaken by the Government under the 'Roma opening'.

The involvement of TOKİ, which is associated with the urban renewal projects in Roma neighbourhoods, in government solutions developed for alleviating the housing problems of Roma is a contentious aspect of the 'Roma opening'. 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'. In its 2015 report, the European Commission noted the lack of official statistics on the number of undocumented Roma, and concluded that 'Roma groups continue to face discrimination in social and economic life and in accessing employment and quality education'.<sup>376</sup>

In terms of NGO participation in legislative processes, the most significant progress has been the invitation to civil society to participate in the process of constitutional revision. Launched in October 2011, the constitutional process was, procedurally speaking, the most democratic and inclusive political process in Turkey. The Parliamentary Commission, made up of equal number of deputies from each of the four political parties represented in the Parliament, invited all NGOs to submit their written proposals and drafts to the Commission, which committed to publishing them on its website. In addition, selected NGOs were invited to present their expectations of a new constitution. Among these were those representing non-Muslim minorities, LGBTI groups, conscientious objectors, Kurds and Alevis. On what was a historic occasion, the Greek Orthodox and Armenian Patriarchs also participated, upon invitation, in the deliberations of the Commission. However, in a fashion characteristic of the political culture in Turkey, which does not fully tolerate diversity, following the reaction caused by the publication of the proposals of an LGBTI group and the Human Rights Association, the Commission removed all NGO proposals from

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<sup>374</sup> The announcement on the University of Trakya's website: <http://www.trakya.edu.tr/news/roman-dili-ve-kulturu-arastirmalari-enstitusu-kuruldu>.

<sup>375</sup> The decision to open a university institute specialising in Roma was announced as part of the 'democratisation package' launched by the Prime Minister on 30 September 2013. On 5 November 2013, the High Council on Education decided that the Institute should be opened at the University of Trakya. Turkey, Council of Ministers decision no. 2014/6070, Official Gazette, 23 March 2014.

<sup>376</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 69, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).

its website.<sup>377</sup> Furthermore, the 'sensitive' demands of minorities were rejected by the Commission. The Commission refused to include sexual orientation among the protected grounds of anti-discrimination, despite not only the specific demands of LGBTI groups but also the persistent proposals of two of the opposition parties represented on the Commission. The drafting process for the Constitution formally came to an end on 25 December 2013, when the Commission abolished itself, citing as a reason the deadlock in the drafting process due to political divisions among the four parties represented.

Another positive example of cooperation with NGOs was during the drafting of amendments to the Law on Persons with Disabilities in 2013. In a rare demonstration of political will for cooperation with civil society, the Turkish Government shared with NGOs representing persons with disabilities the draft of the first national report which Turkey was to present to the UN Committee on the Rights of Persons with Disabilities and asked for their feedback. The Ministry of Family and Social Policies organised an evaluation meeting to receive in person the opinions and assessments of the relevant NGOs on the draft national report. The Ministry also formed a special section on the official website of its General Directorate of Services for Persons with Disabilities and the Elderly in order to raise awareness on the efforts for the implementation of the UN Convention on the Rights of Persons with Disabilities.<sup>378</sup>

Overall, however, the Turkish Government continues to develop policies, design laws and adopt executive measures in the area of human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does, without taking into account their substantive suggestions or criticisms. A recent example of this was the drafting of the Action Plan for the Prevention of Violations of the European Convention on Human Rights, adopted in March 2014,<sup>379</sup> without the involvement of civil society.<sup>380</sup> The Government defines the purpose of the Action Plan as the more effective protection of fundamental rights and liberties and the minimisation of the number of applications against Turkey brought before the ECtHR.<sup>381</sup>

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

### **a) Mechanisms**

Article 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 Article 5 of the Law on Collective Agreements, Strikes and Lock-Outs (no. 2822), collective agreements shall be in compliance with the provisions of laws and by-laws. In any case, Article 10 of the Constitution provides a general provision which is binding on all persons.

### **b) Rules contrary to the principle of equality**

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

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<sup>377</sup> Civil society inputs submitted to the Parliamentary Commission were subsequently published online by the Turkish Economic and Social Studies Foundation (TESEV). For these inputs and a comprehensive monitoring of the constitution-making process, see TESEV project website: [www.anayasaizleme.org](http://www.anayasaizleme.org).

<sup>378</sup> Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 14, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en).

<sup>379</sup> Turkey, Action Plan for the Prevention of Violations of the European Convention on Human Rights (*Avrupa İnsan Hakları Sözleşmesi İhlallerinin Önlenmesine İlişkin Eylem Planı*), Official Gazette, 1 March 2014.

<sup>380</sup> European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 48, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-turkey-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf).

<sup>381</sup> Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 3.



in a discriminatory manner. However, it is difficult to make an exhaustive list of discriminatory legislation.

One major example of the violation of the principle of equality is found in Article 42 of the Constitution. According to Paragraph 9 of Article 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 constitutes discrimination against ethnic and linguistic minorities.

Under Article 3 of the Settlement Law (no. 5543), only individuals 'from the Turkish race and belonging to the Turkish culture' are admitted to Turkey as migrants. Article 81 of the Law on Political Parties prohibits political parties from (a) claiming that 'minorities exist (...) based on national, religious, confessional, racial or language differences', (b) 'protecting, developing or disseminating language or cultures other than the Turkish language and culture' and (c) using languages other than Turkish in their party programmes, meetings, and written and visual propaganda materials.

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, 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 from that which is customary and would be found odd by people'. In practice, this provision leads to the elimination of all candidates with disabilities.

So far, no study which exhaustively identifies discriminatory legislation has been carried out.

## 9 COORDINATION AT NATIONAL LEVEL

Turkey does not have a government department/other authority tasked with dealing with or coordinating issues in regard to anti-discrimination. According to 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.<sup>382</sup> The task force was reported to 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 would be in touch with 81 deputy governors. These efforts would be coordinated by the Secretariat General for EU Affairs.<sup>383</sup> No further information is available on this. In 2013, the Disabled Rights Monitoring and Evaluation Board was established to 'carry out necessary administrative and legal arrangements for the protection and promotion of the rights of the disabled'.<sup>384</sup>

Turkey has no anti-racism or anti-discrimination national action plans. Instead, since March 2014, it has had a National Human Rights Action Plan, which was prepared by the Ministry of Justice, in cooperation with the Council of Europe. National human rights organisations criticise the government for not having consulted civil society in drafting the National Human Rights Action Plan and for not having taken account of recommendations it had accepted from the UN in the first Universal Periodic Review.<sup>385</sup>

As far as persons with disabilities are concerned, the General Directorate of Services for Persons with Disabilities and the Elderly within the Ministry of Family and Social Policy is the focal point designated for the implementation of the UN Convention on the Rights of Persons with Disabilities. The Strategy Paper on Accessibility and the National Action Plan (SPANAP), which were adopted in November 2010 pursuant to a government decision which had declared 2010 the year of accessibility for persons with disabilities, exist only on paper.<sup>386</sup> SPANAP is based on the premise that, despite a number of laws and regulations adopted since the late 1990s, the central Turkish Government and local municipalities fail to work in a holistic and systematic manner, rules concerning accessibility are being implemented in an inadequate and inaccurate fashion and many of the limited measures adopted to ensure accessibility are not usable. To remedy these problems, SPANAP aims for the following three goals: revising the legislative framework, raising societal awareness and ensuring implementation. However, as of the end of 2013, the implementation of SPANAP 'remains limited'.<sup>387</sup> While a Board on Monitoring and Evaluating the Rights of People with Disabilities was set up to 'promote the implementation and monitoring' of the UN Convention on the Rights of Persons with Disabilities,<sup>388</sup> a

<sup>382</sup> Turkey, Republic of Turkey Prime Ministry Secretariat General for EU Affairs (2010), Conclusions of the 20<sup>th</sup> Reform Monitoring Group Meeting, Konya, Press Statement, 9 April 2010, available at: [http://www.abgs.gov.tr/files/Bas%C4%B1nM%C3%9csavirlik/20.rig/20rig\\_press.pdf](http://www.abgs.gov.tr/files/Bas%C4%B1nM%C3%9csavirlik/20.rig/20rig_press.pdf).

<sup>383</sup> Müderrisoğlu, O. (2010), 'Ayrımcılık için Özel Görev Gücü Kuruluyor' ('New Task Force to be Established against Discrimination'), *Sabah*, 14 March 2010, [http://www.sabah.com.tr/Gundem/2010/03/14/ayrimcilik\\_in\\_ozel\\_gorev\\_gucu\\_kuruluyor](http://www.sabah.com.tr/Gundem/2010/03/14/ayrimcilik_in_ozel_gorev_gucu_kuruluyor).

<sup>384</sup> Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 18.

<sup>385</sup> United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Summary prepared in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 3.

<sup>386</sup> Turkey, The Strategy Paper on Accessibility Strategy and the National Action Plan (*Ulaşılabilirlik Stratejisi ve Eylem Planı*) (2010-2011), Official Gazette, 12 November 2010.

<sup>387</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 58, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>388</sup> Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 8, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en).

national monitoring mechanism as required by the Convention has not yet been established.<sup>389</sup>

Turkey does not have an official strategy on the Roma community. The Roma opening, despite its claimed good intentions, lacks the clear goals, timelines and indicators which would be expected from a strategy. In 2013, the European Commission reported that, to remedy this, the Ministry of Family and Social Policies, the Ministry of Labour and the Ministry of National Education worked on a National Strategic Action Plan and held consultations with NGOs.<sup>390</sup> Following up in its 2015 report, the Commission noted that a 'national strategy and action plan for Roma citizens have yet to be adopted' and called on the Government to establish 'measures, budget and timeline for implementation'.<sup>391</sup> Turkey did not become a party to the 2005-2015 International Decade of Roma Inclusion, which officially closed in September 2015.<sup>392</sup>

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<sup>389</sup> European Commission (2013), *Turkey Progress Report*, Brussels p. 58, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>390</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 62, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

<sup>391</sup> European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 69, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf).

<sup>392</sup> European Commission (2013), *Turkey Progress Report*, Brussels, p. 62, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/turkey\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf).

## **10 CURRENT BEST PRACTICES**

- The introduction to the Law on Persons with Disabilities of definitions of direct discrimination, indirect discrimination and reasonable accommodation and the revision of the definition of disability under the same law in accordance with EU directives.
- The introduction of hate crime to Turkish legislation, albeit with a limited personal and material scope.
- The granting by the Parliament of limited language rights (inter alia, to private education in students' mother tongues) to ethnic and linguistic minorities.
- The Constitutional Court's decision, for the first time in its jurisprudence, to grant a group of NGOs leave to submit amicus curiae briefs in an enforced disappearance case.
- The ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities on 26 March 2015.<sup>393</sup>

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<sup>393</sup> Turkey had signed the Optional Protocol on 28 September 2009.

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

### **11.1 Potential breaches of the directives (if any)**

The directives have not (yet) been transposed to national law.

### **11.2 Other issues of concern**

Although the directives have not (yet) been transposed into national law, the following issues do raise concern.

- The grounds of anti-discrimination in the Constitution and various laws do not include age, ethnicity and sexual orientation.
- Discrimination is not defined. With the exception of disability, none of the protected grounds is defined.
- The scope of the duty to provide reasonable accommodation is more limited than the Employment Equality Directive 2000/78/EC. 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 victimisation does not cover all areas.
- The material scope of the directives is not reflected in Turkish legislation. The Labour Law is only applicable after the employment relationship is established and does not govern the pre-employment phase.
- No difference between the justifications of direct and indirect discrimination exists.
- Harassment is not defined in the laws.
- Exceptions to prohibition of discrimination are not stipulated.
- Positive actions are very limited.
- Sanctions are not explicitly mentioned in various laws containing anti-discrimination provisions. Where they are mentioned, they are not dissuasive. Violations which are criminal offences are punishable with short prison sentences which are often transferable to small fines.
- National law does not prohibit instructions to discriminate and there is no case law on the issue. However, Article 10 of the Law on Civil Servants prohibits superiors of civil servants giving orders to civil servants which are in violation of the law.
- Turkish law does not explicitly recognise the standing of non-governmental organisations to bring claims in support of victims of discrimination, with the exception of trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and heritage. In addition, in criminal cases, any legal entity which can demonstrate harm is de jure entitled to be granted standing. However, court practice varies.
- A specialised body for the promotion of equal treatment and prohibition of discrimination does not exist.
- The mandates of the national and local human rights bodies and the Ombudsman Institution do not explicitly refer to protection from discrimination and have limited possibility of intervention and influence.

## 12 LATEST DEVELOPMENTS IN 2015

### 12.1 Legislative amendments

On 15 September 2014, at the opening of the new school year, the Turkish Government shut down the private elementary schools established in the Kurdish region and commenced criminal investigations against school administrators.

The Institute on the Study of Roma Language and Culture became operational in June 2014. Established by the Government as part of its 'Roma opening', the Institute is located within the University of Trakya.

On 2 March 2014, the Turkish Parliament introduced hate crime for the first time to the Turkish legal framework (though with a limited material scope). While nationality was added to the enumerated grounds of non-discrimination, the open-ended nature of the discrimination ban was reversed, precluding judicial expansion of protection to grounds of sexual orientation, age and ethnicity.<sup>394</sup>

On 2 March 2014, the Turkish Parliament amended a number of laws to grant language rights to selected ethnic minorities, including the right to have mother-tongue education in private secondary schools and to use minority languages in election campaigns.<sup>395</sup>

On 6 February 2014, the Turkish Parliament introduced new and enhanced rights for persons with disabilities and to a lesser extent for older people.<sup>396</sup> The ground of disability was added to the anti-discrimination clauses of the Law on National Education and the Labour Law. Definitions of direct discrimination, indirect discrimination and reasonable accommodation were introduced to the Law on Persons with Disabilities, which now explicitly prohibits indirect discrimination. The definition of disability under the same law has been revised in accordance with EU directives. No development has taken place in this regard in 2015.

### 12.2 Case law complete

**Name of the court:** Constitutional Court

**Date of decision:** 1 April 2015

**Name of the parties:** N/A

**Reference number:** E. 2014/118, K. 2015/35

**Brief summary:** The Constitutional Court declined the request of a lower court for the annulment of the phrase 'in unnatural ways' from Article 226 of the Turkish Penal Code on the ground that it violated, among others, the constitutional right to protection of privacy. Article 226, titled 'obscenity', criminalises the production, sale, transfer, storage, sharing and ownership of print, audio or visual materials depicting sexual behaviour conducted 'through violence, with animals, on dead human bodies or in unnatural ways'. In a divided opinion, the Constitutional Court upheld the provision on the ground that the prohibition of the storage of materials depicting sexual behaviour in unnatural ways for the purpose of dissemination was proportionate to the legitimate aim of protecting public morality and was in accordance with the ECtHR jurisprudence on obscenity.

**Name of the court:** 12th Circuit of the Council of State

**Date of decision:** 7 November 2014

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<sup>394</sup> Turkey, Law on the Amendment of Various Laws with the Purpose of Advancing Fundamental Rights and Liberties (*Temel Hak ve Hürriyetlerin Geliştirilmesi Amacıyla Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun*), 13 March 2014.

<sup>395</sup> Turkey, Law on the Amendment of Various Laws with the Purpose of Advancing Fundamental Rights and Liberties, 13 March 2014.

<sup>396</sup> Turkey, Law on Amendments to Decree with the Force of Law concerning the Organisation and Duties of the Ministry of Family and Social Policies and to some Laws and Decrees with the force of Law, 6 February 2014.

**Name of the parties:** N/A

**Reference number:** E. 2011/750, K. 2014/7169

**Brief summary:** The Council of State held that the Ministry of National Education's dismissal from the profession of a teacher due to his/her sexual orientation was unconstitutional. The Court did not frame the case as an equality and non-discrimination issue and restricted its analysis to the right to privacy, finding Article 20(1) of the Turkish Constitution and Article 8 of the European Convention to have been violated.

**Name of the court:** 20th Civil Court of First Instance in Istanbul

**Date of decision:** 29 December 2015

**Name of the parties:** N/A

**Reference number:** E. 2010/399, K. 2015/554

**Brief summary:** The Court issued its ruling in an employment discrimination claim filed in 2010. The case concerned the dismissal from the profession of a homosexual football referee by the Turkish Football Federation (TFF) due to his sexual orientation. The Court ordered the Federation to pay the applicant EUR 950 (TRY 3 000) in pecuniary damages and EUR 6 300 (TRY 20 000 NTL) in non-pecuniary damages. This is the first court judgment against employment discrimination on the basis of sexual orientation in the private sector and the first time a Turkish court has awarded compensation to an applicant in a claim under private law on the basis of discrimination on the ground of sexual orientation.

**Name of the court:** 2nd Civil Court of First Instance in Istanbul

**Date of decision:** 23 December 2015

**Name of the parties:** N/A

**Reference number:** N/A

**Brief summary:** Five years after the first hearing held in a case concerning mob lynch attempts against a group of Roma residents in Selendi in the province of Manisa, the lower court delivered its judgment. The court convicted 38 of the 80 defendants for incitement to enmity or hatred and denigration under Article 216 and for property damages under Articles 151 and 152 of the Turkish Penal Code, sentencing them to periods of imprisonment of between 8 months and 45 years. Since this was a criminal and not a civil case, the Roma victims were not awarded any compensation.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country: Turkey**

**Date: 31 December 2015**

<b>Title of legislation (including amending legislation)</b>	Title of the law: Labour Law (no. 4857) Date of adoption: 22 May 2003 Latest amendments: 4 April 2015 Entry into force: 10 June 2003 Web link: <a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf</a> Grounds covered: Language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect or any such considerations
	Civil law
	Material scope: Employment (public and private)
	Principal content: Direct discrimination, indirect discrimination (gender and pregnancy based), (sexual) harassment, Victimisation (very limited)
<b>Title of legislation (including amending legislation)</b>	Title of the law: Turkish Penal Code (no. 5237) Date of adoption: 26 September 2004 Latest amendments: 12 November 2015 Entry into force: 01 June 2005 Web link: <a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf</a> Grounds covered: Language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect
	Criminal law
	Material scope: Access to services (could be interpreted to include education, social protection and social advantages); access to goods (limited to food stuffs); public and private employment.
	Principal content: Direct discrimination, (sexual) harassment
<b>Title of legislation (including amending legislation)</b>	Title of the law: Law on Persons with Disabilities (no. 5378) Date of adoption: 01 July 2005 Latest amendments: 18 November 2014 Entry into force: 07 July 2005 Web link: <a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5378.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5378.pdf</a> Grounds covered: Disability
	Civil law
	Material scope: Public and private employment
	Principal content: Direct discrimination, reasonable accommodation
<b>Title of legislation (including amending legislation)</b>	Title of the law: Basic Law on National Education (no. 1739) Date of adoption: 14 June 1973 Latest amendments: 19 November 2014 Entry into force: Entry into force: 24 June 1973 Web link: <a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.1739.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.1739.pdf</a> Grounds covered: Language, race, gender, religion, disability
	Civil law
	Material scope: Education
	Principal content: Direct discrimination
<b>Title of legislation (including amending legislation)</b>	Title of the law: Law on Civil Servants (no. 657) Date of adoption: 14 July 1965 Latest amendments: 27 March 2015 Entry into force: 23 July 1965 Web link: <a href="http://www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf">http://www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf</a> Grounds covered: Language, race, gender, political thought, philosophical belief, religion and sect



	Civil law
	Material scope: 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)
	Principal content: Direct discrimination

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country: Turkey**

**Date: 31 December 2015**

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogation s/ reservation s relevant to equality and non- discriminati on</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	4.11.1950	18.05.1954	No	Yes	Yes, particularly in constitutional complaints
Protocol 12, ECHR	18.04.2001	Not ratified	N/A	No	N/A
Revised European Social Charter	16.10.2004	27.06.2007	Article 4 (3), 7(5), 8, 15, 19, 20, 23, 27	Ratified collective complaints protocol?  No	No
International Covenant on Civil and Political Rights	15.08.2000	23.09.2003	Article 27	Yes	In theory yes, but courts are reluctant to accept
Framework Convention for the Protection of National Minorities	Not signed	N/A	N/A	N/A	N/A
International Covenant on Economic, Social and Cultural Rights	15.08.2000	23.09.2003	Articles 13(3) and 4	N/A	In theory yes, but courts are reluctant to accept
Convention on the Elimination of All Forms of Racial Discrimination	13.10.1972	16.09.2002	No	No	In theory yes, but courts are reluctant to accept
Convention on the Elimination of All Forms of Discrimination	14.10.1985	19.01.1986	No	No	In theory yes, but courts are reluctant to accept

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations/ reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
n Against Women					
ILO Convention No. 111 on Discrimination	13.12.1966	21.09.1967	No	Yes	In theory yes, but courts are reluctant to accept
Convention on the Rights of the Child	14.09.1990	4.04.1995	Articles 29 and 30	N/A	In theory yes, but courts are reluctant to accept
Convention on the Rights of Persons with Disabilities	30.03.2007	28.09.2009	None	No	In theory yes, but courts are reluctant to accept
Optional Protocol to the Convention on the Rights of Persons with Disabilities	28.09.2009	26.03.2015	None	Yes	In theory yes, but courts are reluctant to accept

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