



Executive Summary

Country Report Turkey 2009 on measures to combat discrimination

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1. Introduction

There is no official data on the composition of the population in Turkey on the basis of the ethnicity, denomination and mother tongue. With regard to the religious composition in the country, the majority of the population indicates some degree of affiliation with Islam. Alevi constitute the largest religious minority in Turkey. According to different sources the percentage of the Alevi population changes from 10 to 40.¹ Greek Orthodox, Armenian Catholic, Gregorian, Roman Catholic, Protestant, Jewish, Assyrian, Yezidi, atheist and agnostic constitute 3 per cent of the population.²

The ethnic composition of the country is very mixed; however most of the population identifies her/himself as a Turk. Surveys report that from 60 to 75 per cent identify themselves as Turks. About 12 per cent of the population constitutes Kurds. Kurds are the largest linguistic and ethnic minority in Turkey. According to various sources, the estimated numbers range from 10 to 23 per cent of the population in Turkey. The majority of the Kurds are Sunni Muslims while a significant numbers are Alevi. The Laz population are of Caucasian origin and their estimated number range from 750.000 to 1,5 million. The number of the Roma in Turkey is estimated around million, according to a recent study. The majority of the Roma is Muslim. Various other ethnic and linguistic groups in Turkey are Arabs (Alevi, Sunni and Christian), Bulgarians, Bosnians, Pomacs and Albanians.³

Turkey recognizes as “minorities” only groups of persons defined and recognized as such on the basis of the Lausanne Peace Treaty of 1923. According to this Treaty, Turkish citizens belonging to non-Muslim minorities fall within the scope of the term “minority”. Religious minorities, not recognized by Turkey as minorities under the Lausanne Treaty are among the most vulnerable groups. They neither have the right to establish their own schools, places of worship, nor the right to teach their language and religion. Certain religions are not even recognized as religion. Despite explicit provisions of the Lausanne Treaty prohibiting discrimination, non-Muslim minorities are also vulnerable to discrimination. There are many problems, including the restrictions on the training of clergy and on the right to property. Although in recent years the situation has improved, there are still problems in practice. Roma population and Kurds also suffer from widespread discrimination.

¹ Kurban, Dilek (2007), A Quest for Equality: Minorities in Turkey, UK: Minority Rights Group International, available at: <http://www.minorityrights.org/?lid=4572>

² Kalaycioğlu, Ersin (2005), Turkish Dynamics: Bridge Across Troubled Lands, New York: Palgrave Macmillan

³ Kurban, Dilek (2007), A Quest for Equality: Minorities in Turkey, UK: Minority Rights Group International, available at: <http://www.minorityrights.org/?lid=4572>

Neither of these groups is recognized as minorities. Both groups suffer discrimination in education, employment, health and housing. National Unity and Brotherhood Project, the democratic initiative in short, inaugurated by the Government has three components: the Kurdish opening, the Alevi opening and the Roma opening. Particularly the Alevi and Roma opening take NGOs into consideration where the Government runs meetings and workshop with them for dialogue and consultation, but the participation is limited to certain groups and it is hard to measure the impact of these opening since it is an early stage. The preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council was prepared through consultative meetings with a group of representatives of a number of NGOs. The draft law was sent to various universities and NGOs, in order to get their opinions on the draft. A number of meetings were organized for the discussion of the preliminary draft.

Lesbian, Gay, Bisexual and Transgender persons are among the most vulnerable groups. The Turkish legislation does not refer to sexual orientation at all. Most anti-discrimination provisions are open-ended. Thus, it can be argued that discrimination based on sexual orientation is also covered by the legislation. In any case, the scope of the legislation is too narrow to provide an effective protection. Especially transsexuals and transvestites are forced to sell sex as employment opportunities do not exist.

The relation between human rights organisations and the central government was weak in previous years. This climate began to change with Turkey's EU accession process. However, there is still a significant degree of polarisation between the political parties and amongst the public on the Kurdish issue and issues regarding secularism and religion. Finally, denial of the existence of discrimination is widespread, not only in the general public, but also in most political parties and the Government. This is reflected in the reports submitted by the State to the United Nations Human Rights Committees.

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 and 2000/78 have not been transposed. However, in March 2010 a preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council was sent to various universities and non-governmental organizations, in order for them to express their opinions on the draft. 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.

Although there is no specific anti-discrimination legislation yet, there are various provisions prohibiting discrimination or providing for equal treatment in the Constitution, laws and regulations.

According to art. 90 of the Turkish Constitution, international treaties which are duly ratified have the force of law. So, if the language of the treaty provision is self-executing, it will be directly applicable. As the language of the provisions of international treaties on anti-discrimination and equal treatment is self-executing, these provisions can be relied on before public authorities and courts, without need for further legislation. According to the same article of the Constitution, in case of a conflict between provisions of domestic laws and international treaties on fundamental rights and freedoms, the provisions of the treaty 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. Among these are: The European Convention on Human Rights; Revised European Social Charter; International Covenant on Civil and Political Rights; International Convention on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination Against Women; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities and ILO Convention No. 111 on Discrimination. Turkey has accepted right to individual complaint under many of the aforementioned treaties. However, it is still not possible to make individual complaints under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities. Turkey has not accepted the collective complaint procedure under the Revised European Social Charter either.

Art. 10 of the Constitution on "Equality Before the Law" is found in the first part of the Constitution, titled "General Principles". Art. 10 of the Constitution is as follows: "All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. ..." Although this provision provides an open ended list of prohibited grounds, in the Turkish legal system it is not possible to make a constitutional complaint to the Constitutional Court.

Other provisions prohibiting discrimination are found in the Turkish Labour Law, Turkish Criminal Code, Law on Persons with Disabilities, Basic Law on National Education, Law on Civil Servants, Political Parties Law, Law on the Foundation and Broadcasting of Radio and Television Channels and a number of other laws and regulations. However, most of the provisions found in the legislation are rather vague. The legislation is inconsistent regarding the list of prohibited grounds. Age and sexual orientation are not mentioned explicitly in any provisions prohibiting discrimination.

As discrimination is a new legal concept and as it is not defined anywhere in the legislation, the case-law is almost non-existent. Only in a limited number of cases discrimination was claimed. Indeed, in most cases, attorneys or the applicants themselves base their cases on other grounds, such as the violation of the Building Law or the Law on Civil Servants.

Thus typical discrimination cases are decided on other grounds. However, as the case-law is not accessible, it is hard to claim that the author was able to have access to all discrimination cases.

NGOs have been organizing events on anti-discrimination and trying to force the Parliament to enact an anti-discrimination law. The efforts of the NGOs and the need to harmonize the Turkish legislation with the *acquis communautaire* in order for full membership led the Government to take action. Consequently a preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council was sent to various universities and non-governmental organizations, in order for them to express their opinions on the draft. Also, a task force on anti-discrimination was established to monitor and coordinate the steps to be taken in the fight against discrimination. The news reports state that the task force shall include representatives from the Ministry of Justice, Ministry of Interior, Ministry of Foreign Affairs, Ministry of Labour and Social Security, Human Rights Institution, General Directorate on the Status of Women, Disability Administration and Agency for Social Services and Child Protection. These representatives will be in touch with 81 deputy governors. These efforts will be coordinated by the Secretariat General for EU Affairs.

3. Main principles and definitions

The legislation prohibiting discrimination is general in nature and it does not refer to different types of discrimination at all. Only with regards to sex and pregnancy, art. 5 para. 3 of the Labour Law prohibits both direct and indirect discrimination. As only in one case it was decided that prohibition of discrimination was violated, there is no judicial interpretation either. Consequently, it is unknown how the courts will interpret what constitutes discrimination. Only in the case-law of the Constitutional Court, one can found certain principles. According to the Constitutional Court, "Equality Before the Law" stipulated in art. 10 of the Constitution applies to persons whose legal status is the same and this principle aims *de jure* equality, not *de facto* equality. If the rule which is claimed to be in contradiction with equality has a legitimate aim or has been adopted for the purpose of public interest, then it cannot be said that this rule prejudices the principle of equality. However, "public interest" or "legitimate aim" should be a) clear b) relevant to the aim c) reasonable and just. If the rule adopted does not comply with one of these requirements which complement, support and strengthen each other, then it can be concluded that it is in contradiction with the principle of equality.

In Turkish Law there is no clear and comprehensive guidance on positive action. According to art. 10(2) of the Constitution, the State has the obligation to ensure equality between men and women in practice. According to art. 61 of the Constitution, the State shall take protective measures for persons with disabilities, children and elderly. Despite lack of reference to positive action in the legislation, there are a number of positive measures which fall within the scope of the Directives. However, it is very hard to say that a holistic approach is adopted. Consequently, a concerted action is lacking.

Discrimination by association, harassment and instruction to discriminate are neither defined nor prohibited explicitly. Thus, judicial interpretation is needed. Victimization is prohibited only in a very limited fashion. Reasonable accommodation is required for persons with disabilities. However, it is not defined. The legislation is also silent on exceptions.

4. Material scope

The material scope of the legislation is hard to determine in many cases, as provisions prohibiting discrimination are rather general and vague. Besides, there is no consistency in the legislation. For example, not all laws and regulations on education or employment explicitly prohibit discrimination. In such cases, "equality" is applied to the case as a general principle of law or a reference is being made to art. 10 of the Constitution on "Equality Before the Law."

In some cases, the legislation does not refer to the material scope, but prohibits discrimination in general by certain individuals. For example, art. 7 of the Law on Civil Servants prohibits discrimination by civil servants while carrying out their duties. Although there is no explicit provision in the Law on Civil Servants prohibiting discrimination in the selection, recruitment or promotion of civil servants or in the provision of public housing or any other action, this article should be interpreted to cover all acts which are decided or carried out by civil servants. If interpreted and applied this way, then it can be concluded that the material scope of the legislation prohibiting discrimination, at least in the public sector, is unlimited and accordingly wider than the Directives. However, the same cannot be said for the acts of private persons. Although art. 11 of the Constitution stipulates that the provisions of the Constitution are binding upon individuals, as well as the legislative, executive and judicial organs, administrative authorities and other institutions, it is unseen that this rule is applied by courts in private law matters. Consequently, if a person who wants to rent an apartment is discriminated against or a restaurant owner does not allow a person in, most probably articles 10 and 11 of the Constitution will not be much of a help. However, as in many issues, judicial interpretation is needed.

Consequently, the material scope of the prohibition of discrimination is not clear in many situations and falls short of the Directives.

5. Enforcing the law

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

Victims of discrimination can ask for the compensation of pecuniary damages, loss of earnings, or damages for pain and suffering, or all. Parallel proceedings are possible with regard to criminal, civil or administrative courts. Persons may simultaneously pursue a civil claim for compensation in civil or labour courts, an administrative application or a criminal complaint. In the Turkish legal system it is not possible to make a constitutional complaint to the Constitutional Court. Consequently, violations of art. 10 of the Constitution stipulating the principle of equality before the law cannot be brought before the Constitutional Court by individuals.

Although there are advantages of bringing a case to the court, there are also disadvantages. First of all, taking a case to the court is costly. Legal aid is provided under very strict criteria. Cases are not decided before 1 or 2 years. Consequently, in many cases taking a case to the court does not solve the problem.

According to the information provided by the Ministry of Justice regarding the number of cases brought before civil courts, data is not collected based on specific articles of laws. Thus, the number of the cases brought before civil courts is unknown. The situation is slightly better regarding criminal cases. Statistics are published on criminal cases based on certain criteria. According to 2008 statistics 6 cases were brought before criminal courts claiming the violation of art. 122 of the Turkish Criminal Code which prohibits discrimination. However, there is no aggregated data neither on the grounds of discrimination nor the area which discrimination had taken place.⁴

National law is silent on situation testing. There seems to be a consensus on the inadequacy of this method with respect to public authorities, as making false statements to public authorities constitutes a crime. Otherwise, as the law is silent on the issue, consideration of evidence obtained through situation testing is left to the discretion of the judge. There is neither practice nor case-law on situation testing and statistical evidence.

The national law require a shift of the burden of proof only in 2 situations, both of which are stipulated in the Labour Law. Other related legislation (including the Law of Administrative Procedure) does not provide for shifting or sharing of the burden of proof.

In Turkey, trade unions are authorized by the Trade Unions Act (Law no. 2821) to act as representatives on behalf of their members in legal proceedings. However, although individuals can be represented by their unions before judicial organs, they cannot be represented by their unions before administrative organs.

⁴http://www.adlisicil.adalet.gov.tr/ISTATISTIKLER/1996/ac_cik/2008%20YILI%20CEZA%20MAHKEMELE%20RINE%20TCK%20MADDELERI%20ILE%20ILGILI%20ACILAN%20DAVA,%20SANIK%20VE%20MAGDUR%20SAYILARININ%20SUÇ%20TÜRÜNE%20GÖRE%20DAĞILIMI.pdf

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

Class actions are not possible at all.

All court decisions are not accessible. Consequently, it is not hard to evaluate the efficacy of the legislation in general and the sanctions in specific. However, so far only one court decision holding that the complainant was discriminated could be reached by the author of the report. This, in itself should be considered as an indicator. Because of a combination of reasons, the number of cases where discrimination is claimed is extremely low. In many cases, the prosecutors do not identify the act as an act of discrimination and do not instigate a prosecution. As a result, the number of discrimination cases decided by courts is too minimal.

6. Equality bodies

There is no equality body in Turkey. Victims of discrimination can apply to human rights boards which are established in every province and districts and Human Rights Inquiry Commission of Turkish Grand National Assembly. Both the boards and the commission have the competence to inquire complaints of discrimination in employment. The Human Rights Presidency, Human Rights Boards and Human Rights Inquiry Commission of Turkish Grand National Assembly can give a decision that describes the situation as a violation or non-violation of the right to equal treatment and these decisions are not enforceable and are not legally binding.