



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

COUNTRY REPORT 2009

TURKEY

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State of affairs up to 31 December 2009

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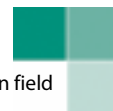
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INTRODUCTION

0.1 The national legal system

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

According to arts. 7 and 87 of the Turkish Constitution adopted in 1982, legislative power is vested in the Turkish Grand National Assembly and this power cannot be delegated. Consequently, the power to adopt laws on anti-discrimination and equal treatment lies with the Turkish Parliament. However, there are also other legal sources of Turkish Law, such as international treaties, regulations and by-laws. Regulations may be issued by the Committee of Ministers, to govern the mode of implementation of laws or to designate matters ordered by law. The Prime Ministry, the ministries and public corporate bodies may issue regulations in order to ensure the application of laws and by-laws. There is no separate anti-discrimination or equal treatment legislation in Turkey. However, there are various provisions prohibiting discrimination or providing for equal treatment in the Constitution, laws and regulations.

According to art. 148 of the Constitution, the Constitutional Court shall examine the constitutionality of laws. Constitutionality of a law passed by the parliament can be challenged in two ways. The first way is an annulment action. According to art. 150 of the constitution, "The President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly shall have the right to apply for annulment action to the Constitutional Court, based on the assertion of the unconstitutionality of laws in form and in substance, of decrees having the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles or provisions thereof." The application should be made within 60 days after the publication of the law in the official gazette.

The unconstitutionality of a law can also become an issue, when a law (or a provision of a law), is being applied in a case. If the court trying a case is of the opinion that the law which the court normally has to apply is in contradiction with the Constitution; or the parties of a case claim that the law is unconstitutional and the court is convinced of the seriousness of the claim, the court shall send the issue to the Constitutional Court and postpone the consideration of the case until the Constitutional Court decides on the issue.

In both cases, if the law is in contradiction with the principle of "equality before the law" which is enshrined in art. 10 of the Constitution, the Constitutional Court shall annul the law.

In the Turkish legal system it is not possible to make a constitutional complaint to the Constitutional Court.

According to art. 90 of the Turkish Constitution, international treaties which are duly ratified have the force of law.¹ 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.

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

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

Judgments and decisions of the high courts are published on their web-sites and journals. However, not all judgments and decisions are accessible. For example, the Court of Cassation publishes only selective judgments and the criteria for the selection of judgments to be published are unknown. Thus the case-law of the high courts cannot be accessed exhaustively.

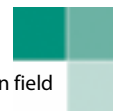
0.2 Overview/State of implementation

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

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

This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

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



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

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

Turkey is not a member of the European Union yet. Consequently, the Directives of the European Union are not transposed to Turkish Law yet. Although most of the recent legislative changes reflect an effort of harmonisation, there are still major shortcomings:

- The Turkish legislation does not prohibit all forms of discrimination. For example indirect discrimination is explicitly referred to only with regard to discrimination based on gender or maternity;
- Discrimination is not defined at all;
- Except for sexual harassment, harassment is neither prohibited explicitly, nor defined in the Turkish legislation;
- Exceptions to prohibition of discrimination are not stipulated in the legislation;
- List of prohibited grounds differ in different legislation and age and sexual orientation are not explicitly mentioned at all in the legislation;
- The scope of the duty to provide reasonable accommodation is more limited than the Framework Directive. The test regarding reasonable accommodation is non-existent; consequently there is no guidance for labour inspectors, judges, employers and persons with disabilities;
- There is no specific prohibition regarding instruction to discriminate;
- Burden of proof shifts only in limited situations;
- Prohibition of victimization does not cover all areas;
- The material scope of the Directives are not reflected in the Turkish legislation;
- In many cases sanctions are not explicitly mentioned. General rules apply and these are not effective enough to eradicate discrimination;
- There is no specialized body;
- Attorneys are not trained on discrimination. Consequently, the number of cases brought before the courts are few. However, as the judges and prosecutors are also not trained, the case-law is not satisfactory. Prosecutors are reluctant to bring charges against persons responsible for discrimination;
- Public bodies are not trained on discrimination. Consequently, the implementation is far behind the legislation;
- Positive actions are very limited.

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. Although the preliminary draft also has some shortcomings, most of the issues raised above will be solved if the draft is adopted.

The draft contains the definitions of sexual identity; race; ethnic origin and persons with disabilities. All types of discrimination covered by the Directives are prohibited and defined. The material scope of the draft law is wider than the Directives. Effective sanctions are stipulated. The burden of proof is shifted. Victimization is prohibited. Most importantly, the draft law requires the establishment of an equality body.

0.3 Case-law

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

As the Directives have not been transposed yet, there is no case-law relating to the application and interpretation of the Directives.

Name of the court

Date of decision

Name of the parties

Reference number (or place where the case is reported).

Address of the webpage (if the decision is available electronically)

Brief summary of the key points of law and of the actual facts (no more than several sentences)

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

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

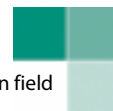
Only in a limited number of cases discrimination was claimed. Indeed, in most cases, attorneys or the applicants themselves base their cases on other grounds, such as the violation of the Building Law or the Law on Civil Servants. Thus typical discrimination cases are decided on other grounds. However, as the case-law is not accessible, it is hard to claim that the author was able to have access to all discrimination cases. The author of the report could only find one case where the court decided that there was discrimination. The case was brought before the court in 2008 and decided in 2009. The facts of the case are as follows: the applicant was a wheelchair user. She was waiting at the bus stop and when the bus arrived, the driver did not open the door for her. The Court decided that she was discriminated against in the provision of transportation services on the ground of disability. Consequently, art. 122 of the Criminal Code was violated.² The bus driver was sentenced to 6 months of imprisonment.

² 1st Criminal Court of Peace of Beyoglu, Dosya No. 2008/1680, Karar no. 2009/762, 5 May 2009.



The Court converted imprisonment to confiscation of the bus driver's driving license for 6 months and suspended his operating rights for 6 months. The victim took no civil action against the bus driver or the bus company.

There are a small number of other cases where discrimination was also claimed; however the courts have not decided these cases yet.



1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

Art. 10 of the Constitution on “Equality Before the Law” is found in the first part of the Constitution, titled “General Principles”. Art. 10 of the Constitution is as follows:

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

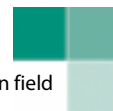
Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice.

No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in utilization of all forms of public services.”

The first paragraph of art. 10 explicitly refers to philosophical belief, religion and sect. Thus, religion and belief are covered by art. 10. Even though “ethnic origin”, “sexual orientation”, “age” and “disability” are not expressly referred to in art. 10 of the Constitution, the reference in the first paragraph to “any such considerations” clearly indicates that the list of grounds is not exhaustive. However, in lack of refined case law, there is always a risk that the Constitutional Court does not consider grounds protected by the Directives within the scope of “any such considerations”. If the Constitutional Court develops such a narrow interpretation, other courts will most likely follow the case law of the Constitutional Court. Consequently, in order to guarantee full harmonization with the EU Directives, “ethnic origin”, “sexual orientation”, “age” and “disability” should be added to the list found in the first paragraph.

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

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



Right to education:

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

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

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

Right to work:

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

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

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

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

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

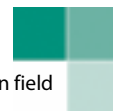
Minors, women and persons with physical or mental disabilities, shall enjoy special protection with regard to working conditions."

The scope of the reference to "persons with ... mental disabilities" is not clear from the text of art. 50, para. 2. There is no case-law specific to the interpretation of this reference either. However, in a recent judgment, the Constitutional Court interpreted this provision to cover all persons with disabilities.³ It can be inferred from this interpretation that, reference to "mental disabilities" covers both intellectual disabilities and psycho-social disabilities.

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

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

³ See Constitutional Court Judgment E. 2006/101, K. 2008/126 (19.06.2008).



Right to Establish and Join Unions

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

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

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

Membership in more than one labour union cannot be obtained at the same time and in the same work branch.

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

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

Right to Housing:

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

Right to Social Security:

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

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

Persons Requiring Special Protection in the Field of Social Security

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

The state shall take measures to protect the disabled and secure their integration into community life.

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

The provisions above indicate that age and disability found a place in the Constitution only in relation to situations where special protection needs to be afforded, but they are not considered adequately from an equality point of view. On the other hand, ethnic origin and sexual orientation are not mentioned at all in the Constitution.

All of the above constitutional provisions should be read in the light of art. 10 of the Constitution, as art. 10 is in the first part of the Constitution, among “the principles”. And all the legislation adopted for the implementation of the above provisions should also be in full compliance with art. 10. Otherwise, their constitutionality can be challenged before the Constitutional Court.

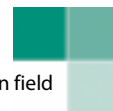
b) Are constitutional anti-discrimination provisions directly applicable?

Not all constitutional provisions are of the same nature. Thus, it would be wrong to say that all relevant constitutional provisions are or are not directly applicable and the case law of the Constitutional Court supports this claim.⁴ However, the key provision in the Constitution which is art. 10 of the Constitution on “equality before the law”, can be said to be directly applicable, as the wording is self-executing, does not require additional legislation to be adopted for the provision to be implementable. Indeed, in many cases courts, especially the Court of Cassation and the Council of State, refer to art. 10 in their judgments.⁵ However, in most cases, art. 10 of the Constitution is not the sole basis of the judgments. In other words, art. 10 is referred to in the judgments in addition to provisions of other laws. It can also be mentioned that art. 10 is more commonly used by the administrative courts and the Council of State (high administrative court) and civil courts, including labour courts tend to base their judgments not directly on the Constitution, but instead on laws and regulations prohibiting discrimination.

Although art. 10 is directly applicable, the same cannot be said for most constitutional provisions mentioned earlier. In most cases, constitutional provisions require laws to be adopted for their implementation. Art. 60 on right to social security is a typical example.

⁴ In a number of judgments, the Constitutional Court has stated that some of the provisions of the Constitution are directly applicable. According to the Constitutional Court, if the provision is detailed enough and does not require additional legislation to be adopted in order for it to be implementable, then such constitutional provisions are directly applicable. See Constitutional Court Judgment E. 1981/8, K. 1982/3 (06.05.1982). For a parallel view of the Civil General Council of the Court of Cassation see E. 1980/4-1714, K. 1983/803, YKD (Yargıtay Kararları Dergisi – Journal of the Court of Cassation Judgments) Vol. 9 No.11 November 1983, pp. 1589-1590; For a parallel view of the Fourth Chamber of Council of State see E. 2005/2134, K. 2006/2156 (13.11.2006).

⁵ Please see Ninth Civil Chamber of Court of Cassation Judgment E. 2008/27309, K. 2008/22094 (25.07.2008) (not published); Ninth Civil Chamber of the Court of Cassation Judgment E. 2004/25538, K. 2005/14932 (28.04.2005) (not published) where the Court of Cassation refers to art. 10 of the Constitution as one of the legal basis of its judgment.



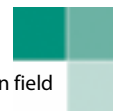
Although the first paragraph of the article recognizes everyone's equal right to social security, the second paragraph of the article continues by stating that the state shall take necessary measures in that direction and establish the organization for the provision of social security. Consequently, there are a number of laws in Turkey relating to social security.

In all situations, if a court, regardless of whether it is a civil, criminal or an administrative court, is of the opinion that the relevant legislation which it has to apply to the case before it is against the principle of equality found in art. 10 of the Constitution, then the court has to refer the matter to the Constitutional Court. The Constitutional Court shall decide on the matter and make its judgment public within five months. If no decision is reached within this period, the trial court shall conclude the case under existing legal provisions.

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

According to art. 11 of the Constitution "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals." Consequently, the principle of equal treatment is binding not only on state organs or persons representing the state, but also private persons, both legal persons and individuals. Indeed, in a number of judgments, the Court of Cassation has referred to article 10 (on "equality before the law") of the Constitution, regarding cases between employers and employees.⁶

⁶ See for example Ninth Civil Chamber of the Court of Cassation E. 2004/25538, K. 2005/14932 (28.04.2005) where the Court has referred to art. 10 of the Constitution along with a number of other provisions of the Labour Law, regarding a case of dismissal of a woman based on pregnancy.



2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

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

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

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

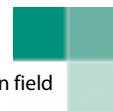
Art. 5 (1) of the Labour Law prohibits discrimination based on language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations (material scope limited).

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

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

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

Art. 4(a), 13, 14, 15 Law on Persons with Disabilities prohibit discrimination based on disability (material scopes of arts. 13 (vocational rehabilitation), 14 (employment), and 15 (education) are limited. However, art. 4(a) lists "anti-discrimination" among the general principles to be applied in the implementation of the Law. Thus, the wording of art. 4(a) suggests that the material scope of the prohibition is limited to the services covered by the Law itself).



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

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

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

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

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

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

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

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

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

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

Age and sexual orientation are not listed among the prohibited grounds in any of the legal provisions mentioned above and disability is mentioned explicitly only in the Turkish Criminal Code and the Law on Persons with Disabilities. However, most of the lists are open ended. So far, neither the Constitutional Court, nor any other court had a case before them where they had to decide whether disability, age or sexual orientation should be considered as "any such considerations". In a recent judgment the Court of Cassation said that art. 5 of the Labour Law prescribes an open ended prohibition of discrimination and should be interpreted as prohibiting discrimination based on sexual orientation (the term used by the Court is sexual preference) among other grounds.⁷ It has to be mentioned that the case was not a sexual orientation discrimination case.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*

Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

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. However, it might be said that disability is an exception. Actually, Law on Persons with Disabilities, which prohibit discrimination based on disability provides a definition. According to art. 3(a) of the Law on Persons with Disabilities (2005), "A disabled person is a person who has difficulties in adapting to the social life and in meeting daily needs due to loss of physical, mental, psychological, sensory or social capabilities at various levels by birth or by any reason thereafter and who therefore needs protection, care, rehabilitation, consultancy and support services."

⁷ See Ninth Civil Chamber of the Court of Cassation E. 2008/27309, K. 2008/22094 (25.07.2008).

Law on Persons with Disabilities does not only prohibit disability discrimination, but also lays down rules in many different areas. And the definition found in art. 3(a) did not intend to specify exclusively who should benefit from protection against disability discrimination or who should not. In other words, the definition was not intended to be used in the context of discrimination only. Disability discrimination cases are a new phenomenon in Turkey and the concepts of “disability discrimination” and “reasonable accommodation” are very new to courts. Thus, for the time being it is unknown how the courts will interpret the definition of disability in discrimination cases. There is a risk that the courts require the person to prove that she/he is disabled, in order to be able to benefit from the prohibition of discrimination based on disability. Until the adoption of prohibition of discrimination on the ground of disability by the Law on Persons with Disabilities in 2005, all the laws and cases on disability were about disability benefits, social services, early retirement etc. According to the legislation on these issues, in order for a person to be considered as a person with a disability, the person has to have a health board report indicating that s/he is at least 40% impaired.⁸ If the same criterion is applied by the courts in discrimination cases, only persons who prove by a health report that they are at least 40% impaired shall be able to benefit from the prohibition of disability discrimination. In sum, as the same disability definition is adopted with regard to disability discrimination, as well as in the context of social security, the definition falls short of the *Chacón Navas* definition.

It is also highly probable that courts will disregard the impact of reasonable accommodation. First of all, the concept is new and unknown to many judges. Secondly, Law on Persons with Disabilities does not use the term “reasonable accommodation, but provides an obligation for the employer to make arrangements in the work place which will facilitate persons with disabilities to work in that work place and to provide supportive gadgets and aids. Art. 53 of the Law on Civil Servants requires that civil servants with disabilities will be provided with the tools they need in order to do their job. The same provision provides that a regulation will be issued regarding what kinds of gadgets and aids will be given to disabled civil servants. The regulation has not been issued yet. Thus, for the time being, there is no guidance in the legislation regarding what is reasonable and what constitutes an accommodation.

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.

⁸ The reports should comply with the Regulation on Disability Criteria, Classification of Disability and Health Board Reports for Persons with Disabilities, published in the Official Gazette on 16 July 2006.

The preliminary draft contains the definitions of sexual identity (sexual identity covers heterosexuality, homosexuality, bisexuality, trans-sexuality, transvestism and such sexual identities); race (race means any constructed category of persons based on cultural, social or biological characteristics); ethnic origin (ethnic origin refers to the identity originating from the fact that the person belongs to a community differentiating from others based on cultural, religious, linguistic, behavioural or similar characteristics) and persons with disabilities (refers to those who have long-term physical, intellectual, mental or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others). The definition adopted with regard to persons with disabilities is taken from the United Nations Convention on the Rights of Persons with Disabilities.

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

Only the definition of "persons with disabilities" is found in Turkish legislation. As mentioned above, art. 3(a) of the Law on Persons with Disabilities (2005) which prohibits disability discrimination provides a definition. There are also other laws and regulations, where the term "persons with disabilities" is defined. Most of these definitions are found in laws and regulations which provide for disability related benefits. The definition found in art. 3 (c) of the Law on Social Services and Child Protection Institution is identical to the definition found in the Law on Persons with Disabilities. Most probably the definition found in Law on Persons with Disabilities was copied from the Law on Social Services and Child Protection Institution.

Only the first part of Recital 17 of Directive 2000/78 is reflected in some legislation, without any reference to the obligation to provide reasonable accommodation for persons with disabilities. For example according to article 8 paragraph (g) of the Law on Judges and Prosecutors (*Hakimler ve Savcılar Kanunu*) (Law No: 2802), in order to be appointed as a candidate judge or prosecutor, a person "should not have any physical or mental illness or disability that would prevent the person from carrying out his/her responsibilities as a judge or a prosecutor continuously in every part of the country; or any disabilities which cause limitations in controlling the movements of the organs; speech different than it is accustomed and would be found odd by people". There is no case-law which would indicate that the impact of reasonable accommodation shall be taken into consideration.

According to the legislation on disability (social security legislation, special education legislation, tax legislation etc.), in order for a person to be considered as a person with a disability, the person has to have a health board report indicating that s/he is at least 40% impaired.

Other grounds are not defined at all in any legislation. However, there are a number of judgments of the Court of Cassation, where the Court had decided that some belief systems cannot be considered as a religion. Both civil registries and identity cards of Turkish citizens indicate their religious beliefs.⁹ In a few situations where the applicants asked the registrar to change the indication from Islam to Bahaism and the issue came before the Court of Cassation. In all cases, the Court asked the Directorate of Religious Affairs, its expert opinion on the issue. Basing its judgments on the expert opinion of the Directorate, the Court decided that Bahaism is not a religion, without any explanation on what is considered a religion and what is not. Consequently the registrar was right to not to indicate the applicants' religion as Bahaism.¹⁰

The issue is not limited to what is considered a religion. Another important issue is, who is considered to be belonging to the Islamic faith; in other words who is considered to be Muslim by the state. Requests by *Alevi*s to change the indication on the identity card from Islam to *Alevi* are declined and all *Alevi*s are registered as Muslims. The issue was brought before the European Court of Human Rights and the Court on 2 February 2010 decided that the indication of religion on the identity card, regardless of whether it is obligatory or optional, is a breach of art. 9 of the Convention. The Court decided that it did not need to examine whether there had been a violation of art. 14 which prohibits discrimination.¹¹

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

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

⁹ According to art. 7(e) of the Law on Civil Registry Services (Law no. 5490), the religion of the person is indicated in the civil registries. This Law was adopted in 2006. The former law on the same issue also required the indication of religion in civil registries. The difference between the former and the previous laws is that, while the indication of religion was obligatory in the former law, it is optional in the new law. According to art. 35/2 of the new law, information on the religion of the individual is registered or modified in accordance with written statements of the individual. Again, based on the request of the individual, the box reserved for the indication of religion can be left blank (at initial registration) or the information may be deleted at anytime the individual so requests.

¹⁰ See for example Third Civil Chamber of the Court of Cassation E. 1988/8776, K. 1988/9515 (11.11.1988); Sixth Civil Chamber of the Court of Cassation E. 1974/2007, K. 1974/2242 (07.05.1974).

¹¹ ECHR, *Sinan Işık v. Turkey*, 21924/05, 02.02.2010.

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

There is no legislation or case-law which deals with situations of multiple discrimination. 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. In the preliminary draft, multiple discrimination was not mentioned. Only in the definitions of "segregation" and "institutional discrimination" reference was made to segregation/institutional discrimination based on one or more grounds.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

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

2.1.2 Assumed and associated discrimination

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

National law does not prohibit discrimination based on perception or assumption and there is no relevant case-law. However, the preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council defines (art. 2(1)(i)) and prohibits discrimination based on perception (art. 3(8)(g)).

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

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

Otherwise, the issue did not come before the courts. The preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council does not prohibit or even mention discrimination based on association.

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

a) *How is direct discrimination defined in national law?*

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

"The principle of equality, which is among the fundamental principles of law is enshrined in art. 10 of the Constitution. Equality before the law applies to persons whose legal status is the same. This principle aims *de jure* equality, not *de facto* equality. The aim of the principle of equality is to ensure that persons having the same status are treated by the law in the same way, as well as to avoid any differentiation or privileges. This principle requires that same rules apply to persons or groups having similar status, thus the principle prohibits violations of equality before the law. Equality before the law does not require same rules to apply to everyone in all situations. Particularities of the status of certain persons or groups might require different rules or practices to apply. If same rules apply to similar situations and different rules apply to different situations, then the principle of equality enshrined in the Constitution shall not be prejudiced.

If the rule which is claimed to be in contradiction with equality has a legitimate aim or has been adopted for the purpose of public interest, then it cannot be said that this rule prejudices the principle of equality.

However, “public interest” or “legitimate aim” should be a) clear b) relevant to the aim c) reasonable and just. If the rule adopted does not comply with one of these requirements which complement, support and strengthen each other, then it can be concluded that it is in contradiction with the principle of equality.”¹²

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

The issue has not come before the courts. However, art. 5 of the Labour Law which prohibits discrimination, applies only after an employment relationship is established between the employee and the employer. Consequently, that provision is not applicable to the stage before the employment. On the other hand, art. 122 of the Criminal Code prohibits discrimination in the selection process (both in the public and private sectors). The provision should also apply to discriminatory statements. Although the issue has not come before criminal courts yet, it can be said that art. 122 of the Criminal Code will be applicable only in situations where the victims of discriminatory statements are identifiable, their suffering is concrete and they bring charges against the author of the statement.

In 2009, an announcement by the “Executive Board of the Foreign Secondary Schools Entrance Exam” (*Yabancı Ortaöğretim Okulları Sınav Yürütme Kurulu*) was made on the web-site of the Ministry of National Education. The announcement read: “We cannot provide education to students in need of special education and to students who have physical disabilities. As those students will not be able to register to our schools, they will not be allowed to take the “Private Foreign Secondary Schools Entrance Exam” which will take place on 31 May 2009.” Similarly, in the 2009 University Entrance Exam Guidelines (*2009 Öğrenci Seçme ve Yerleştirme Sınavı Kılavuzu*), information was given about all university, faculty and departments. One University explicitly had warned the disabled candidates, saying that “students with disabilities should not choose our University.” Upon reactions by disability NGOs, it was accepted that the expression found in the Guidelines was inappropriate and against the law. However, although applications were made to the Prosecutor’s Office claiming that there is a violation of art. 122 of the Criminal Code, so far there is no prosecution.

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

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

¹² Constitutional Court, E. 2008/95, K. 2010/18, 28.01.2010, Official Gazette No. 27565, 28.04.2010.

"If the rule which is claimed to be in contradiction with equality has a legitimate aim or has been adopted for the purpose of public interest, then it cannot be said that this rule prejudices the principle of equality.

However, the "public interest" or "legitimate aim" should be a) clear b) relevant to the aim c) reasonable and just. If the rule adopted does not comply with one of these requirements which complement, support and strengthen each other, then it can be concluded that it is in contradiction with the principle of equality."¹³

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

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

2.2.1 Situation Testing

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

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.

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

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

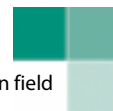
- c) *Outline important case law within the national legal system on this issue.*

There is no case-law on this issue.

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

Situation testing is not a practice used in Turkey.

¹³ Constitutional Court, E. 2008/95, K. 2010/18, 28.01.2010, Official Gazette No. 27565, 28.04.2010.



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

a) *How is indirect discrimination defined in national law?*

Indirect discrimination is not defined in national law.

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

In Turkish law, the only explicit prohibition of indirect discrimination is found in art. 5(3) of the Labour Law. However, the mentioned paragraph prohibits indirect discrimination only on the grounds of gender and pregnancy. According to the provision, except for biological reasons or reasons related to the nature of the job, the employer shall not discriminate either directly or indirectly, against an employee. However, as the concept of indirect discrimination has entered into legislation only very recently and because definition of the concept is not provided in the legislation, there is no case-law on the issue yet.

c) *Is this compatible with the Directives?*

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

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

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

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

The case-law suggests that, differences in treatment based on language is not considered as an issue of discrimination.

One significant example is the decision of the Eighth Division of the Council of State (22 May 2007) against the Sur Municipality, ordering the dissolution of the Council of the Municipality and the dismissal of the Mayor, on the basis of a resolution of the Council of the Municipality of Sur to issue information regarding the provision of certain public services in Kurdish, Armenian, Syriac, English, Arabic, as well as Turkish.¹⁴ Another example is the legal action taken against *Eğitim-Sen* (the largest teachers' union). On 25 May 2005 the Court of Cassation ruled that the statute of *Eğitim-Sen* was in breach of several provisions of the Constitution, as well as art. 20/1 of the Law on Trade Unions of Public Servants and ordered the Union to shut down. According to the Statute of *Eğitim-Sen*, the Union "defends the individual's right to education in his or her mother language and to the development of cultures." The Court of Cassation ruled that this was in violation of articles 3 and 42 of the Constitution, which establish that the Turkish nation is an indivisible entity and that no language other than Turkish shall be taught as a mother language to Turkish citizens at any institutions of training or education. In July 2005, the Union removed the provision which led to its closure from the Statute. Following this, it was decided by the court that charges against *Eğitim-Sen* were no longer valid. Consequently the Union did not shut down. Furthermore, in its comments on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, the Turkish Government stated that the number of languages traditionally used in Turkey may reach hundreds, if not thousands and that "Turkey needs to observe non-discrimination principle in teaching all traditional languages other than Turkish. Any act in favour of one or two languages traditionally used can be interpreted as discrimination against other languages and their respective speakers."¹⁵

2.3.1 Statistical Evidence

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

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

¹⁴ Please see the Report of the Congress Fact-Finding Mission to Turkey (8-10 August 2007) of the Congress of Local and Regional Authorities of the Council of Europe, which also includes the English Translation of the Council of State's decision at https://wcd.coe.int/ViewDoc.jsp?id=1183385&Site=Congress&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679#P97_13371 For the Recommendation to Turkey by the Congress of Local and Regional Authorities of the Council of Europe on this matter see <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1458880&SecMode=1&DocId=1167298&Usage=2> (accessed in February 2010)

¹⁵ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/413/87/PDF/G0941387.pdf?OpenElement>

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

Although use of statistical evidence is not prohibited by national law, it is not used at all.

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

There is no case-law in this area.

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

Art. 135/1 of the Turkish Criminal Code criminalizes recording of personal data unlawfully. The second paragraph of the same Code criminalizes recording of philosophical or religious opinions of individuals or personal information relating to racial origins, sexual life and health conditions of individuals unlawfully. Although there is no clarification in the provision regarding what constitutes an “unlawful” recording, art. 26 stipulates that “no punishment shall be given to a person acting under the consent of a person relating to a right disposable by that person.” Consequently, research to obtain such data shall not be punished if data is collected about individuals based on their consent.

A circular issued by the Ministry of Interior is cited regularly, as an administrative act prohibiting the production of statistical data on race and ethnicity by public institutions. However, the mentioned circular is not accessible. Otherwise, there are no specific rules on collection of data. In its written replies to the list of issues to be taken up by the Committee on the Elimination of Racial Discrimination in its consideration of the third periodic report of Turkey, the Turkish Government stated that the Government does not collect, keep or use qualitative or quantitative data on ethnic backgrounds of its citizens.¹⁶ In its Concluding Observations the Committee on the Elimination of Racial Discrimination took note of Turkey’s indication that academic institutions are not prohibited from carrying out research on this issue.¹⁷ Finally, in its comments on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, the Turkish Government has acknowledged that “disaggregated data on ethnicity may facilitate devising policies for special measure targeting a specific group.”¹⁸ This applies not only to ethnic origin, but also to race.

¹⁶ <http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/WrittenReplieTurkey74.pdf>

¹⁷ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/412/83/PDF/G0941283.pdf?OpenElement>

¹⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/413/87/PDF/G0941387.pdf?OpenElement>

The issue was also raised by *EDROM* (The Edirne Roma Association) and *ERRC* (the European Roma Rights Centre) in their NGO report to the Committee on the Elimination of Racial Discrimination, as an element which hinders tackling discrimination. Furthermore, EDROM and ERRC criticised lack of data regarding the application of certain provisions in Turkish law, which might have discriminatory impact on Roma. In the same report, it was mentioned that data on the health status of Roma does not exist, but that it is reasonable to assume that, with the effects of poverty and substandard housing, poor health conditions are very high amongst the Romani community.¹⁹ Lack of data on ethnicity was also raised as a problem by the NGO report submitted to the Committee on the Elimination of Racial Discrimination by Kurdish Human Rights Project.²⁰ In its third report on Turkey, the European Commission against Racism and Intolerance has recommended Turkish authorities to think about ways of introducing a coherent and comprehensive system of data collection.²¹

Data collection regarding religion is also problematic. In its first report on Turkey, the European Commission against Racism and Intolerance conveys the information given by the Turkish authorities on the number of non-Muslim minorities, i.e. 50000 Armenian Christians; 27000 Jews and 4000 Greek Orthodox.²² The numbers given by the authorities is limited to these 3 non-Muslim groups, which are recognized as minorities by the Turkish State. Other non-Muslim groups are not recognized as minorities, and apparently no data is being collected. The more problematic issue is the number of persons whom according to the Turkish State believe in Islam. Religion of Turkish citizens are indicated on the identity cards. The administrative practice is to refuse requests of *Alevi*s to change the indication on the identity card from Islam to *Alevi*. The issue was brought before the European Court of Human Rights and the Court on 2 February 2010 decided that the indication of religion on the identity card, regardless of whether it is obligatory or optional, is a breach of art. 9 of the Convention. The Court decided that it did not need to examine whether there had been a violation of art. 14 which prohibits discrimination.²³ This case, as well as other examples indicate that, although religions of individuals are indicated in civil registers and on identity cards, in practice accurate information is not collected. Indeed all *Alevi*s are registered as Muslims. As some religions or beliefs are unknown to or unrecognized by the registrars, persons belonging to various faiths are forced to be registered as Muslims. In 2006, the system had changed slightly. The new law adopted in 2006 enables individuals to ask the registrar to make no reference to their religious affiliation in the civil registers.²⁴

¹⁹ http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf

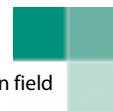
²⁰ Accessed at <http://www2.ohchr.org/english/bodies/cerd/cerds74.htm>

²¹ http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/TUR-CbC-III-2005-5-ENG.pdf, para. 111.

²² http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_01/01_CbC_eng/01-cbc-turkey-eng.pdf

²³ ECHR, *Sinan Işık v. Turkey*, 21924/05, 02.02.2010.

²⁴ Art. 35(2) of the Law on Civil Registry Services (Law No. 5490).



2.4 Harassment (Article 2(3))

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

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

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

Although other forms of harassment are not prohibited explicitly, it can be argued legally that harassment is a type of tort and is prohibited under art. 49 of the Law of Obligations.

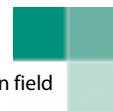
The preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council defines harassment as "any unwanted conduct, including psychological and sexual, related to any of the grounds referred to in this Law, which takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment, or considered by the person as such."

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

Harassment is not prohibited as a form of discrimination. The preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council prohibits harassment as a form of discrimination.

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

There are no additional sources on the concept of harassment.



2.5 Instructions to discriminate (Article 2(4))

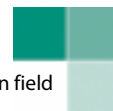
Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

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

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

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

The legislation does not refer explicitly to the concept of reasonable accommodation. However, art. 14(3) of the Law on Persons with Disabilities requires both public and private employers to take necessary measures to eliminate or alleviate the barriers and hardship faced by disabled employees or job applicants in employment processes and to make physical adjustments. The Law does not refer to reasonableness. In cases of denial of reasonable accommodation to persons with disabilities, employers are fined by labour inspectors. However, the criteria used by labour inspectors are unknown. Denial of reasonable accommodation is not identified by labour inspectors as discrimination. They are only referred to as breaches of the legislation requiring the employer to take certain measures. Persons who request accommodations should apply to the employer and if their requests are denied, they can make an application to labour inspectors. Labour inspectors are responsible for monitoring the observance of the Labour Law by the employers. Neither the inspectors nor the labour courts can order the employer to provide reasonable accommodation. However, the United Nations Convention on the Rights of Persons with Disabilities identify the denial of reasonable accommodation as discrimination. According to art. 90 of the Constitution, the Convention has the force of law. Thus, persons with disabilities can rely on the Convention before national authorities and courts and claim that denial of reasonable accommodation should be considered as discrimination.



A very limited obligation to provide reasonable accommodation is also found in art. 53 of the Law on Civil Servants. This article prescribes a duty limited to the provision of tools which would enable the civil servant to carry out his/her duties. Again, breaches of this obligation is not considered as discrimination. The United Nations Convention on the Rights of Persons with Disabilities can also be used in these cases. But so far, there are no examples of such cases.

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

There is no provision referring explicitly to reasonable accommodation in areas outside employment either. However, especially in the area of education, schools are under an obligation to accommodate the needs of students with disabilities. Teachers should also take into consideration the impairments of the students when designing exams, etc. In any case, the United Nations Convention on the Rights of Persons with Disabilities prohibits denial of reasonable accommodation as a form of discrimination. According to art. 90 of the Constitution, the Convention has the force of law. Thus, persons with disabilities can rely on the Convention before national authorities and courts. The material scope of the Convention is wider than the Directives. Consequently, depending mostly on the number and diversity of requests and applications, the Convention can become an important tool to widen the areas where reasonable accommodation is provided.

The legislation does neither refer to nor define the terms “reasonable” and “disproportionate burden.” There is no case-law either.

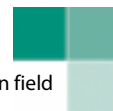
- c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

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

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

Reasonable accommodation is not provided in respect of any other grounds.

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



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

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

The Municipality Law (Law no. 5393) requires the services provided by municipalities to be accessible to persons with disabilities. Both the Building Law (Law no. 3194) and the Law on Persons with Disabilities (Law no. 5378) require the physical environment as well as public transportation to be accessible. However, in cases brought before the courts regarding inaccessible services, environment and public transportation, the prosecutors and judges are reluctant to define these as discrimination.

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

The Municipality Law (Law no. 5393) requires the services provided by municipalities to be accessible to persons with disabilities. Both the Building Law (Law no. 3194) and the Law on Persons with Disabilities (Law no. 5378) require the physical environment as well as public transportation to be accessible. Accessibility is not defined anywhere in the legislation; however Additional art. 1 of the Building Law requires that "in order for the physical environment to be accessible to persons with disabilities, the standards adopted by the Turkish Standards Institute shall be followed." So far, the Institute has adopted standards on wheelchairs (TS ISO 7176-7); public information symbols (TS 4802); lift installation (TS8237); public toilets (TS 8357); structural preventive and sign (pictograph) design criteria on street, boulevard, square and roads for persons with disabilities and the elderly in urban areas (TS 12576); hearing aids (TS 8066 HD 450.3 S1); technical aids for persons with disabilities (TS EN 12182); rules on the adaptation of buildings where persons with disabilities reside (TS 9111); inner-city roads - railway transportation design rules (TS 12460); and railway vehicles- passenger coaches – adaptation of the coaches to the needs of wheelchair users (TS 12694). Unfortunately, the standards cannot be accessed free of charge.²⁵

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

²⁵ <http://www.tse.org.tr/english/tsedefault1.asp>

Before the adoption of the Law on Persons with Disabilities (Law No. 5378) in 2005, there was no law which exclusively dealt with the rights of persons with disabilities. Although this Law was intended to be comprehensive, many issues are still regulated by other legislation, i.e. Special Education Law, Social Insurance and General Health Insurance Law, Property Tax Law, Labour Law, Turkish Civil Code, Turkish Criminal Code, etc. According to the list published on the web-site of the Turkish Disability Administration, there are 44 Laws, 2 Decrees; 3 Council of Ministers Decisions; 38 Regulations; 13 Directives and 6 Circulars on issues directly relevant to persons with disabilities.²⁶ However, this list is not exhaustive.

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

2.7 Sheltered or semi-sheltered accommodation/employment

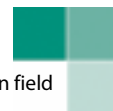
- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

There is no legislation on sheltered or semi-sheltered accommodation for workers with disabilities. The Law on Persons with Disabilities of 2005 has introduced the concept of sheltered employment in art. 14. In May 2006 Regulation on Sheltered Workplaces was adopted. According to art. 4(1) of the Regulation, in order for a workplace to be considered as sheltered workplace, the number of employees should not be less than 30 if the workplace is within the borders of a metropolitan municipality, and not less than 15 if the workplace is outside the borders of a metropolitan municipality. 75% of the employees should be at least 40% impaired or 60% impaired (depending on the type of impairment). However, the Regulation makes no reference to any state support such as tax reduction or exemption. Art. 30 of the Labour Law stipulates that social insurance premiums which should normally be paid by the employer will be covered by the state. This seems to be the only support provided to the sheltered employment by the state.

- b) *Would such activities be considered to constitute employment under national law?*

Such activities are considered as employment under national law.

²⁶ <http://www.ozida.gov.tr/>



3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

There is no law transposing the Directives.

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

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

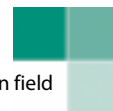
The national law does not distinguish between natural persons and legal persons. Both natural and legal persons can be held liable for discrimination or be victims of discrimination. Criminal law is an exception. According to art. 20(2) of the Turkish Criminal Code “no punitive sanctions may be imposed on legal persons.” However, sanctions in the form of security precautions stipulated in the law are reserved.²⁷ In certain situations, natural persons can be held liable for discrimination along with a legal person. For example, criminal charges can be brought against a person working in the human resources department of a company; while a civil case for compensation can be taken before the courts against the company.

3.1.3 Scope of liability

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

²⁷ Security precautions are sometimes alternatives to typical criminal sanctions (imprisonment, fine etc), sometimes complementary to sanctions. Security precautions can be anything from rehab to community service.

According to the new Turkish Criminal Code, legal persons can also be held responsible for crimes. As imprisonment is not an option for legal persons, the law says security precautions can be imposed by the courts. If the organs or representatives of a legal person is involved in a crime, the court might decide for example that license of the legal person is suspended, or certain property which are fruits of the crime are confiscated etc.



In criminal law, because of the principle of individuality of criminal responsibility, employers cannot be held liable for the discriminatory behaviour of their employees or third persons. However, this does not apply to civil liability. According to art. 55 of the Law on Obligations, employers are responsible for the wrongdoings of their employees. According to the same article, the employer has the right to have recourse against the employee.

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

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

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

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

Turkish Labour Law applies only to persons working under a labour contract irrespective of whether they work in the public sector or the private sector. If the person is working in the public sector as a civil servant (*memur*) the Law on Civil Servants apply. Persons who work in the public sector under contracts are subject to special regulations.²⁸

If the person is employed under a labour contract, then in principle the Labour Law applies. However, some sectors or group of persons are outside the scope and application of the Labour Law. Because of the special nature of the media and maritime sectors, the Turkish legislator had opted for special labour laws for these two sectors.²⁹ Other exceptions to the application of the Labour Law are found in the Law itself, at art. 4. According to art. 4, the following are excluded from the application of the Labour Law:

²⁸ Statutory Decree No. 399, 22 January 1990 and Decision of the Council of Ministers, 6 June 1978, No. 7/15754.

²⁹ Maritime Labour Law (Law No. 854), 29 April 1967; Law Concerning the Regulation of Relations Between Employers and Employees Working in the Profession of Press (Law No. 5953), 20 June 1952.

- a) Sea and air transport activities,
- b) In establishments and enterprises employing fewer than 50 employees where agricultural and forestry work is carried out,
- c) Any construction work related to agriculture which falls within the scope of family economy,
- d) In works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3rd degree (3rd degree included),
- e) Domestic services,
- f) Apprentices, without prejudice to the provisions on occupational health and safety,
- g) Sportsmen,
- h) Those undergoing rehabilitation,
- i) Establishments employing three or fewer employees and falling within the definition given in Article 2 of the Tradesmen and Small Handicrafts Act.³⁰

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

Art. 5 of the Labour Law which prohibits discrimination, applies only after an employment relationship is established between the employee and the employer. Consequently, prohibition of discrimination is not applicable to the stage before the establishment of the employment relationship. On the other hand, art. 122 of the Criminal Code prohibits discrimination before the employment relationship is established (both in the public and private sectors). Thus, although there is no case-law on this issue, it can be concluded that art. 122 of the Criminal Code is applicable in all sectors, when the selection criteria or recruitment conditions are discriminatory.

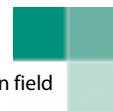
There are special laws regarding the employment and promotion of the military personnel and the civil personnel employed in Turkish Armed Forces.³¹ There is no umbrella legislation regulating self-employment and statutory office.

³⁰ Art. 4 of the Law not only enlists exceptions to the scope of application of the Labour law, but also stipulates exceptions to exceptions. These are:

- a) Loading and unloading operations to and from ships at ports and landing stages,
- b) All ground activities related to air transport,
- c) Agricultural crafts and activities in workshops and factories manufacturing implements, machinery and spare parts for use in agricultural operations,
- d) Construction work in agricultural establishments,
- e) Work performed in parks and gardens open to the public or subsidiary to any establishment,
- f) Work by seafood producers whose activities are not covered by the Maritime Labour Act and not deemed to be agricultural work.

Consequently, for example, while sea and air transport activities are excluded from the scope of application of the Labour Law, loading and unloading operations to and from ships at ports and landing stages and all ground activities related to air transport are subject to Labour Law.

³¹ Law on the Personnel of the Turkish Armed Forces (Law No. 926), 10 August 1967; Law on Officers and Noncommissioned Officers to be Recruited Under Contracts (Law No. 4678), 21 June 2001; Law on Expert Jandarmerie (Law No. 3466), 04 June 1988 etc.



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

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

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

According to the art. 70 of the Constitution, “every Turk has the right to enter public service and no criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service.” 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 in art. 7 discrimination by civil servants while carrying out their duties.

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

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

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

In the legislation regarding the selection, recruitment and promotion of public employees, whether they are civil servants or working under various types of contracts, there are limited specific provisions prohibiting discrimination based on grounds covered by the Directives.

For example, according to the Regulation on the Promotion of Civil Servants, objective criteria such as education, achievement in exams, working period, positive employment record shall be taken into account in the promotion of the civil servants. There are also certain provisions regarding persons with disabilities. According to art. 53 of the Law on Civil Servants, which was amended in 2005 by the Law on Persons with Disabilities, persons with disabilities should be appointed to vacant positions in accordance with their professional qualifications. This provision aimed to change the practice of recruitment of persons with disabilities in positions where they are overqualified (such as recruitment of blind law school graduates in call centers). This provision can be interpreted as a limited anti-discrimination provision.

Public employees are selected by a general exam, i.e. Public Employee Selection Exam. Those who pass the exam are subject to a trial period, prior their full appointment. For persons with disabilities, a separate exam is organized.³² According to Additional art. 3 of the "Regulation on the exams organized for those who will be appointed to public offices for the first time"³³ stipulates that, unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who will be placed through central exams.

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

³² Although separate exams for disabled candidates are seen as a positive measure taken by the state to facilitate the employment of persons with disabilities in the public sector; the measure turned out to be a requirement rather than an opportunity. In cases where disabled candidates choose to take the general exam, instead of the exam for disabled candidates, the placements were annulled on the basis that, they have taken general exams. When the case came before the Council of State (*Danıştay*), the judgment was as follows: "It is in line with the law to not to appoint the plaintiff to the post that he was placed, since he has taken the general exam. Since his employment should be through quota for the persons with disabilities ... he should have taken and passed the special exam designed for the persons with disabilities." Council of the State 12th Chamber, E. 2006/2864, K. 2006/4487, Date of the judgement: 8/11/2006 (www.danistay.gov.tr).

³³ As amended in 2006. The original Regulation was published in the Official Gazette on 3 May 2002. Regulation was amended many times. The amendment regarding "age limits" was published in the Official Gazette on 4 March 2006.

This is also the case for the selection of candidate judges and prosecutors. There are no provisions which guarantee the objectivity of these interviews. There is no reference to the duty to provide reasonable accommodation either.

Art. 5 of the Labour Law prohibits discrimination in employment relations. Thus only covers the period after the labour contract is made. The article prohibits discrimination based on language, race, gender, political opinion, philosophical belief, religion and sect or any such considerations. Sexual orientation, disability, age and ethnic origin are not explicitly referred to.³⁴

According to art. 71 of the Labour Law, minimum age of employment is 16. However, children who have completed the full age of fourteen and have also completed their primary education, may be employed on light works that will not hinder their physical, mental and moral development, and for those who continue their education, in jobs that will not prevent their school attendance. There is no general upper age limit for employment. However, minimum and/or maximum age limits exist in access to certain professions, occupations and employment. For example, as mentioned earlier, according to art. 8 of the Law on Judges and Prosecutors (*Hakimler ve Savcılar Kanunu*) (Law No: 2802) persons who are older than 30 years (candidates who has a bachelor or masters degree) or older than 35 (if they have a PhD degree) cannot be appointed as candidate judge or prosecutor.

According to art. 30(1) of the Labour Law and art. 53 of the Law on Civil Servants, both public and private employers are obliged to employ persons with disabilities. The quota is 4% for public employers and 3% for private employers. However, the quota obligation only applies to workplaces where 50 or more persons are employed. According to art. 101 of the Labour Law, if the employers do not employ the necessary number of persons with disabilities, they are charged with a fine. The fine in 2009 was 1519 TL (approx. 780 Euro) per month for every disabled person who is not employed. The same article explicitly prescribes that public employers cannot be exempt from this fine. In 2009, a member of the Turkish Parliament Mr. Ufuk Uras has asked information regarding the compliance of the state with the quota requirement. According to the written reply given by the Prime Ministry State Personnel Presidency in June 2009, the total number of persons with disabilities who should be employed by public employers is 51.419 and the number of disabled public employees is only 10.300. Accordingly, 41.119 positions which should be reserved to persons with disabilities are vacant. A list attached to the reply indicates that, although the Ministry of Justice is under an obligation to employ 2.143 persons with disabilities, it has employed none. Some of the other public employers who has not employed a single disabled person and the number of persons they should employ are: Ministry of Interior (606), Ministry of Foreign Affairs (80), Ministry of Health (8080), Ministry of Transport and Communication (33), Ministry of Industry and Trade (92), Presidency of Council of State (22), Presidency of Turkish Court of Accounts (38), Undersecretariat of Treasury (44), Secretariat General for EU Affairs (2), and many public universities.

³⁴ See 3.2.1 for the scope of application of the Labour Law, as well as exceptions.

The quota regime is favourable as it guarantees access to employment to a degree. However, in many, if not all cases, it is observed that the number of persons with disabilities employed in a workplace is equal to or below the number of persons they have to employ under the quota regime. In other words, the quota system is applied, as if it prescribes an upper limit for the employment of persons with disabilities. Another problem regarding the quota system is the lack of effective monitoring. Employers who are under a quota obligation employ the required number of persons with disabilities on paper and ask them not to come to work. In many cases the workplaces are not accessible or there is no accessible transportation to the work place.

The quota system is understood as an alternative to prohibition of discrimination. In other words, when employers comply with their quota obligations, they feel that they are not under an equal treatment obligation any more. The quota system enhances the perception of persons with disabilities as persons in need of help and protection.

Differing from the Labour Law, art. 122 of the Turkish Criminal Code prohibits discrimination in the selection process, but not after the employment relationship is established (both in the public and private sectors). Thus it does not cover the conditions of work or promotion. Although there is no case-law on this issue, it can be concluded that art. 122 of the Criminal Code is applicable, when the selection criteria are discriminatory. Although the provision explicitly refers to race, disability, religion and sect, there is no reference to sexual orientation and age.

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

Access to self employment and occupation is not governed in details by Turkish legislation. There are various laws on certain professions, such as Law on Attorneys (Law No. 1136), Law on Pharmacists and Pharmacies (Law No. 6197), Law on Notaries (Law No. 1512) etc. There are no specific provisions in any of these laws on the prohibition of discrimination. However, according to art. 48(1) of the Turkish Constitution: “Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free.”

The provisions mentioned above indicate that there are no discriminatory legal provisions regarding 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 not possible to assess the current situation. However, in situations where data exists, -such as data regarding the incompliance with the quota requirements for persons with disabilities- clearly indicate that discrimination exists.³⁵

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

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

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

There is no umbrella legislation on the conditions of work and employment, including pay and dismissals. Different categories of employees are subject to different legislation.

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

Before the adoption of the Labour Law, women's organizations in Turkey lobbied for an anti-discrimination article, which would cover all types of discrimination and in all stages of employment. The outcome is positive for women. However, the provision is inconsistent. For example, art. 5 (2) prescribes that "except for biological reasons or reasons related to the nature of the job, the employer must not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of the employment contract due to the employee's gender or maternity." However, a similar comprehensive prohibition is not found for any other grounds.

³⁵ According to the information provided by Turkish authorities in the State report submitted to the United Nations Committee on the Elimination of Racial Discrimination and in the replies to the list of issues, there have been no complaints or court decisions in civil or administrative proceedings concerning acts of racial discrimination during the reporting period. See Concluding Observations of the Committee on the Elimination of Racial Discrimination, Turkey, 24 March 2009, CERD/C/TUR/CO/3, para. 21 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/412/83/PDF/G0941283.pdf?OpenElement>). In its report to the Committee Turkey has stated that "the Business Inspection Board of the Ministry of Labour and Social Security is tasked with investigating allegations of discrimination in business relations. To date, the Board has not found any acts of discrimination, including racial discrimination, during its inspections." See Third periodic reports of States parties due in 2007, Addendum, Turkey, 13 February 2008, CERD/C/TUR/3, para. 145.

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

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

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

Civil servants are employed on a permanent basis. Thus unless a concrete reason for termination occurs, their position as a civil servant is secure. According to art. 125 of the Law on Civil Servants, there are categories of reasons to terminate the employment relationship, before compulsory retirement age. The first category is prescribed in art. 120 of the Law on Civil Servants. According to this provision, if the civil servant receives bad records from two different superiors consecutively, then the civil servant is dismissed. The second category is prescribed in art. 125. According to this article, civil servants are dismissed if they join political parties, reveal classified information, attack superiors or colleagues physically, participate in strikes, boycotts and similar activities, etc. There is no reference to any of the prohibited grounds in the Law of Civil Servants. However, especially in relation to sexual orientation, civil servants receive bad records, which leads to their dismissal or relocation.³⁶ Most of these incidents of discrimination are not brought before the courts. In many cases, victims are afraid of the reaction of their families, friends and colleagues. Besides, victims are worried about media attention, which leads to their further victimization.³⁷

The prohibition of discrimination prescribed in art. 122 of Turkish Criminal Code does not cover employment and working conditions.

³⁶ In a monitoring report prepared by Firat Söyle, Yasemin Öz, Umut Güner, Elif Ceylan and N. Pelin Kalkan (to be published in 2011 by Istanbul Bilgi University) 3 ongoing cases of sexual orientation discrimination were reported in 2009. In one of these cases, the plaintiff claims that he was dismissed from his job as a teacher on the basis of his sexual orientation. In the other case, the plaintiff was working at Revenue Administration Department of the Ministry of Finance and he was relocated on the basis of his sexual orientation. In the third case, a police officer has lost his job because of his sexual orientation. As the victims asked the authors of the monitoring report to keep their identities and other details of the cases confidential, it is not possible to cite the cases.

³⁷ Opinion expressed orally by Firat Söyle and Yasemin Öz, both of whom are leading lawyers in the area of sexual orientation discrimination cases.

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

According to Article 39 of the Labour Law No. 4857, minimum limits of wages are determined every two years at the latest by the Ministry of Labour and Social Security through the Minimum Wage Determination Committee for regulating the economic and social conditions of all workers working on labour contracts, which are covered or not by this Law. Surprisingly, the Regulation on Minimum Wages has an explicit provision prohibiting discrimination. According to art. 5 of the Regulation “without prejudice to art. 7, differentiation cannot be made on grounds of language, race, gender, political opinion, philosophical belief, language, sect and any such considerations in deciding the amount of minimum wage.” The list is identical to the list of prohibited grounds found in most other laws and regulations. In art. 7 of the Regulation, a distinction is made between workers older and workers at the age of 16. For 2009, the daily wage for workers older than 16 was 22.20 TL; and for workers at the age of 16 and younger was 18.90 TL.

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

Statistical data in the field of employment is collected by the Turkish Statistical Institute.³⁸ *Employment, Unemployment and Wage* data are collected. Data is disaggregated only on the basis of gender. Thus it is not possible to make an evaluation based on facts. But as a general observation, it can be stated that most vulnerable groups, such as Roma people, work in the informal sector and as a rule their earnings are less than the earnings of persons in the formal sector. Even though the quota system should in principle guarantee a minimum wage for persons with disabilities, the employment conditions and pay on paper is different from the actual situation.

³⁸ See www.turkstat.gov.tr

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

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

As there is no national anti-discrimination law exists, evaluation can only be based on various laws and regulations on vocational guidance, training and education. Provision of vocational training and career counselling services are among the responsibilities of İŞKUR (Turkish employment institution). İŞKUR organizes special training courses for persons with disabilities. Although this is another positive measure taken by the state, the practice can be criticised for a number of reasons. First of all, mainstreaming aspect is lacking in İŞKUR's training courses as courses are designed exclusively for persons with disabilities. Second, courses do not provide a real choice, as courses are given on very limited areas. Lastly, when designing these courses market needs are not taken into consideration. Consequently, persons are trained in areas where there is no need for new employees.

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

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

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

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

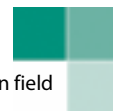
3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

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

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

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

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



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

According to art. 122 of the Turkish Criminal Code, anyone “who prevents a person from undertaking a regular economic activity shall be sentenced to imprisonment for a term of six months to one year or a judicial fine” on the grounds of language, race, colour, gender, disability, political opinion, philosophical belief, religion or sect. Ethnic origin, sexual orientation and age are not covered by the prohibition. Consequently, if an individual is prevented from registering to a professional organization based on race, disability or religion, then this provision might apply. However, there is no case-law.

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

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

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

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

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

In 2009 art. 68 of the Law on Social Insurance and General Health Insurance was amended by Law No. 5917. This amendment extended the health services which require contributions to cover inpatient treatments and orthosis and prosthesis. Although there is an upper limit to the contributions to be paid, this new amendment makes it harder for persons with disabilities to afford some of the health services.

Again, art. 7 of the Law on Civil Servants prohibits discrimination by civil servants, while carrying out their duties. This prohibition should also cover the provision of social protection.

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

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

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

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

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

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

This covers all aspects of education, including all types of schools. Please also consider cases and/or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported

According to art. 42 of the Constitution "no one shall be deprived of the right of learning and education" and "primary education is compulsory for all citizens of both sexes and is free of charge in state schools".

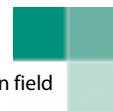
According to the same article “no language other than Turkish shall be taught as a mother language to Turkish citizens at any institution of training and education. Education is covered by the following legislation: Law No. 222 on Primary Education; Basic Law No. 1739 on National Education; Law No. 3308 on Vocational Training; Higher Education Law No. 2547; Law No. 430 on Unification of Education; Law No. 4306 on Eight-year Compulsory and Uninterrupted Education; and Law No. 5580 on Private Education Institutions. Prohibition of discrimination in education is found in art. 4 of the Basic Law on National Education. However, the said provision only refers to language, race, gender and religion as prohibited grounds.

According to art. 40 of the Lausanne Treaty of 1923, non-Muslim minorities shall have the right to establish at their own expense any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion. However, in such cases where the Law allows the establishment of such schools and allows for education in mother tongue, there are serious limitations upon these institutions as well. These schools operate under the supervision of Turkey/ Ministry of National Education. The curriculum of foreign language in these schools which include Greek Orthodox, Armenian Orthodox, and Jewish instruction is strictly controlled and supervised by Turkey/ Ministry of National Education.³⁹ ECRI notes that “minority religious groups have difficulty in finding teachers or procuring a sufficient number of recent school textbooks. It would seem that the regulations governing these schools are particularly complex and make school management very difficult, to the extent of jeopardising the existence of some schools.

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

Accessibility of public buildings is a widespread problem. The same is valid also for school buildings. All school buildings in Turkey are built based on a few different projects and these projects are not in compliance with the universal accessibility standards. Although the Ministry of National Education has taken some steps, most school buildings are still inaccessible.

³⁹ Such as “Regulation on Armenian Schools”, “Regulation on Armenian High Schools and Middle Schools”, “Regulation on Greek Minority Primary Schools”.



In November 2009 the Ministry of National Education has published a circular which required action to be taken “to make all schools accessible.” But no disciplinary or legal action is taken against persons who have shown neglect in this regard.

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

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

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

Although statistics are available on the number of children with disabilities registered, there is no 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. Disaggregated data is needed in this regard.

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

According to the State Report submitted to the United Nations Committee on Economic, Social and Cultural Rights, the number of male students in special education schools is 20262, whereas the number of female students is only 11765. The huge difference between these figures not only show that disabled female children are discriminated against based on their gender, but also that the State fails in the realization of compulsory education for all.

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

The number of disabled students in vocational schools is very low. According to the information received from official sources by the authors of this report, in 2008-2009 academic year, while the number of students with disabilities in mainstream primary schools was 42647, the number of students with disabilities in mainstream secondary schools was only 2663. These figures give an idea about the number of students in higher-education.

According to the State report submitted to the United Nations Committee on Economic, Social and Cultural Rights, in 2006-2007 academic year, the total number of students in “nursery classes within special education schools” is only 503 and only 187 of these students are female. According to the information published on the Ministry of National Education’s web-site, the number has reached only to 659 in 2009-2010 academic year.⁴⁰

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

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

⁴⁰ http://orgm.meb.gov.tr/Istatistikler/2009-2010_GENEL_SONUC.pdf

Public training centers under the Ministry of National Education provide vocational courses for persons with disabilities. However, instead of mainstreaming these courses, specific courses are organized for persons with disabilities in limited areas. So persons with disabilities are not free to choose the area they want to receive vocational training, but they have to make choices within limited options.

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

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

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

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

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

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

Art. 91 of the Regulation on the Law on Notaries stipulates that, notaries can ask for a health report if there is suspicion regarding the legal capacity of the person who requires the services of the notary. A similar rule applies to transactions at land registry offices. Although the registrars are not under an obligation to ask for a health report, they are recommended to ask questions in order to test the capacity of the individual who is a party to the transaction. In case the registrar is not convinced regarding the capacity of the person, a health report might be required. However, there is no legal basis for this. The practice is based on a general order issued by the General Directorate of Land Registry and Cadastre.⁴¹

Another limitation was found in art. 14 of the Law on Obligations and art. 73 of the Law on Notaries (Law no. 1512).

⁴¹ TKGM 14 May 2003, 074/148-1568.

According to these provisions, transactions and signatures of deaf or blind persons are not valid unless they are carried out in the presence of two witnesses. However, this requirement was annulled by the Law on Persons with Disabilities in 2005 (Law no. 5378). According to the amended art. 73, the proceedings shall be carried out in the presence of two witnesses, only if the disabled person requests. The draft Law on Obligations which is being discussed in the Turkish Parliament currently, brings back the requirement of two witnesses for the validity of financial transactions.

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

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

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

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

One major problem regarding housing is the situation of internally displaced persons, most of whom are of Kurdish origin. In July 2004, the Law on Compensation for Damage Arising from Terrorism or the Struggle to Combat Terrorism (Law no. 5233) was adopted. However, reports indicate that the Law suffers from limitations and falls short of what is needed. Consequently, since the adoption of the Law, a fundamental change did not occur. Landmines, village guards system, the economic situation and the continuance of armed conflict in the eastern and south-eastern regions of Turkey are shown among barriers before re-settlement.⁴²

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

⁴² http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/TESEV_UYE_Grubu_Raporu.pdf;
http://www2.ohchr.org/english/bodies/cescr/docs/ngos/KurdishHRP_Turkey_44.pdf

The Urban Renewal Law of 2005 had a disparate impact on Romanis, as it gave impetus to a number of urban transformation projects, most of which resulted in massive destruction and dislocation of Romani neighbourhoods throughout Turkey.⁴³ In most, if not in all cases displaced Romanis had to move to neighbourhoods where rents are several times higher than in their old neighbourhoods or to neighbourhoods which are outside city centers, 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. Home owners had to sell their houses, but they could not afford to buy houses in other neighbourhoods.

According to a report submitted to the United Nations Committee on Economic, Social and Cultural Rights, the urban renovation project for *Sulukule* neighbourhood was taken before the Istanbul Administrative Court in December 2007, where the applicants requested the suspension of the implementation of the urban project. While the Court was waiting for the response of the relevant Municipality (*Fatih Municipality*), more than 50 houses were demolished, two of which were officially registered cultural heritage sites. According to the same report, on 13 March 2008 another seven houses belonging to Romani families were demolished in *Sulukule* regardless of the fact that the notice for demolition stated that the houses should be evacuated by the end of March 2008. Two of the houses were destroyed while they were still inhabited by tenants. No alternative accommodation has been provided to the tenants.

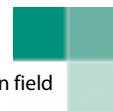
On 31 December 2009, Burhan Uçkun, a Turkish citizen of Roma origin was beaten by customers when trying to light a cigarette in a coffeehouse in the district of *Selendi* which is in the province of *Manisa*. After this the owner refused to serve Burhan. In an act of revenge relatives of Burhan vandalized the coffeehouse. This sparked an outrage which resulted in a group of 1000 locals throwing stones at all houses occupied by Roma people in the district and setting their cars on fire. 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. There have been no arrests relating to the incident however, the judiciary is considering whether any action should be taken. Instead of providing them with protection following this incident the Governor of *Manisa* decreed together with the Security director and the head of the police forces that the Roma people should leave the district resulting in a total of 74 Roma people, of which 15 were children being forced to sign a document stating that they would leave the district on the 6 January 2010. It is understood that those people who were forcibly displaced have now settled in a town called *Gördes*.

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

⁴³ http://www2.ohchr.org/english/bodies/cerdd/docs/ngos/ERRC_Turkey_CERD74.pdf



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



4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

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

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

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

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

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

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

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

c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

There are no such cases.

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

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

There is no provision in Turkish Law prohibiting age discrimination generally. Although prohibitions of discrimination stipulated in art. 10 of the Constitution and art. 5 of the Labour Law can be interpreted to cover age as a prohibited ground, judicial interpretation is needed. The situation is different with regards to disability. Law on Persons with Disabilities prohibits discrimination on the grounds of disability in employment. However, the legislation on recruitment, appointment and promotion in armed forces provides for exceptions. These exceptions do not apply to disability only but also to all health problems. The major legislation is the Turkish Armed Forces Regulation. This regulation applies to military students, all civil and military personnel of the Turkish Armed Forces and all persons who are under an obligation to serve in the military.⁴⁴ Decisions regarding these persons depend on the health board reports of the Gülhane Military Medical Academy.⁴⁵ Health board reports are based on the "Regulation on Disability Criteria, Classification of Disability and Health Board Reports for Persons with Disabilities."

There are general and special laws regarding employment in the public sector and different requirements are laid down with regard to age limits. According to Additional art. 3 of the "Regulation on the exams organized for those who will be appointed to public offices for the first time"⁴⁶, unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who will be placed through central exams. Indeed Law on the Personnel of the Turkish Armed Forces (Law No. 926) of 10 August 1967; Law on Commissioned and Non-commissioned Officers to be Recruited Under Contracts (Law No. 4678) of 21 June 2001 and Law on Expert Gendarmerie (Law No. 3466) of 04 June 1988 provide upper age limits. However, this is not to say that exceptions are provided only for the armed forces.

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

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

⁴⁴ Military service is obligatory in Turkey.

⁴⁵ Turkish Armed Forces Health Regulation, published in the Official Gazette on 24 November 1986.

⁴⁶ As amended in 2006. The original Regulation was published in the Official Gazette on 3 May 2002. Regulation was amended many times. The amendment regarding "age limits" was published in the Official Gazette on 4 March 2006.

According to art. 29 of the Regulation on the Establishment, Duties and Functioning of Staff Training Centers for Prison and Detention Centers⁴⁷, in order to be accepted as a candidate student for becoming a prison or detention center guard, the candidate should not be younger than 18 and older than 30. However, as age discrimination is not prohibited explicitly in the legislation and as numerous laws stipulate age limits, it is not possible to say that limitations constitute exceptions. Legislation regarding entry to certain professions, including police, prison and emergency services require the candidate to not to have a health problem, that would prevent the person from conducting his/her professional duties continuously.⁴⁸

4.4 Nationality discrimination (Art. 3(2))

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

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

National law does not cover nationality as a prohibited ground. Actually certain professions, activities and opportunities are confined to Turkish citizens. For example, only Turkish citizens can work as civil servants, pharmacists, attorneys, etc. Until recently, some laws and especially regulations referred not only to Turkish citizens, but also individuals of Turkish descent. However, in recent years, most of those provisions were annulled. Currently, the Settlement Law (Law no. 5543) and Regulation regarding students and trainees who will study in private education institutions free of charge or with scholarship⁴⁹ refer to individuals of Turkish descent.

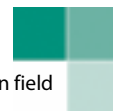
- b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

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

⁴⁷ Published in the Official Gazette on 4 May 2004.

⁴⁸ See Additional art. 24 of the Law on Police Organization (Law no. 3201) and art. 29 of the Regulation on the Establishment, Duties and Functioning of Staff Training Centers for Prison and Detention Centers.

⁴⁹ Published in the Official Gazette on 9 February 2009.



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

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

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

No, it would not constitute unlawful discrimination.

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

Judicial interpretation is needed.

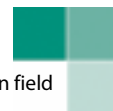
4.6 Health and safety (Art. 7(2) Directive 2000/78)

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

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

Disability discrimination is prohibited explicitly only in a limited number of laws and the material scope of prohibition of disability discrimination is rather limited. Neither in the laws which prohibit disability discrimination, nor in other legislation, there are no exceptions which are explicitly laid down. However, there are certain restrictions regarding persons with disabilities which might be considered as exceptions in relation to health and safety. For example, according to the art. 53/b(4) of the Road Traffic Regulation, there has to be a special sign on the license plates of cars used by persons with disabilities. This provision of the Regulation was brought before the Council of State with a claim of discrimination. The Council of State had rejected the case. The applicant has appealed against the decision. However, the Council of State has not given its final decision on this issue yet.

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



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

4.7.1 Direct discrimination

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

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

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

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

See 4.7.1(a) above.

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

There is no specific provision on this issue.

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

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

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

4.7.3 Minimum and maximum age requirements

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

According to art. 71 of the Labour Law, minimum working age is 16.

However, this applies only to the private sector. According to the art. 4/1(b) of the “Regulation on the conditions and procedure regarding recruitment of workers in public institutions” applicants should not be below the age of 18.⁵⁰

There are general and special laws regarding employment in the public sector and different requirements are laid down with regard to age limits. According to Additional art. 3 of the “Regulation on the exams organized for those who will be appointed to public offices for the first time”⁵¹, unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who will be placed through central exams. According to art. 48 of the Law on Civil Servants, in order to be recruited as a civil servant, the individual should not be below the age of 18. The regulation on the exams organized for those who will be appointed to public offices for the first time also refers to art. 48 of the Law on Civil Servants regarding recruitment conditions, including 18 years age limit. There are numerous special laws which stipulate minimum and/or maximum age requirements. For example, according to art. 8 of the Law on Judges and Prosecutors (Law no. 2802) the maximum entry age is 30 for applicants who have completed their undergraduate and graduate studies and 35 for applicants who have completed their PhD studies.

Age limits also apply to training.

4.7.4 Retirement

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

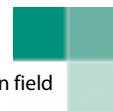
For these questions, please indicate whether the ages are different for women and men.

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

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

⁵⁰ Published in the Official Gazette on 9 August 2009.

⁵¹ As amended in 2006. The original Regulation was published in the Official Gazette on 3 May 2002. Regulation was amended many times. The amendment regarding “age limits” was published in the Official Gazette on 4 March 2006.



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

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

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

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

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

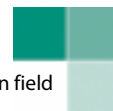
There are state-imposed mandatory retirement ages for public employees. According to art. 40 of the Law no. 5434, the mandatory retirement age is 65. For university professors, the mandatory retirement age is 67 (this only applies to public universities). The mandatory retirement age for military personnel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

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

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

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

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



4.7.5 Redundancy

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

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

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

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

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

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

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

4.9 Any other exceptions

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

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

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

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

National law does not refer to “positive action” at all. However, there are a number of provisions found in the legislation, which can be defined as positive action. The basis for positive action is found in art. 10 and 61 of the Constitution. 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.

The discussions regarding discrimination in Turkey are still very new. Legal and political discussions focus more on the existence of discrimination and inequalities in Turkey. In other words, at this point the State and the general public are still not convinced that discrimination and inequalities exist in Turkey and some groups are more disadvantaged than others. Consequently, even though a number of initiatives are taken by the Government recently (i.e. the Kurdish opening, the *Alevi* opening and the Roma opening), there is not much substance to it. The Government has not explained clearly what they intend by these initiatives. However, at least these openings brought the problems of these groups to the forefront and those problems are being discussed by some circles of the society. Unfortunately, these discussions are not informed discussions and they do not include the positive action to be taken.

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.).

Art. 1 of the Law no. 5982 adopted in May 2010 amending the Constitution stipulates that, positive action taken for the children, elderly, persons with disabilities, widows and orphans of martyrs, invalids and veterans shall not be considered as a violation of the principle of equality. However, the Law has not entered into force yet. A referendum will take place in 2010 regarding Constitutional amendments.

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

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

In its Concluding Observations regarding Turkey’s initial report, Committee on the Elimination of Racial Discrimination had recommended Turkey to consider further amendments to the legislation to allow teaching of languages traditionally used in Turkey in the general public education system. In its comments on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, the Turkish Government stated that the number of languages traditionally used in Turkey may reach hundreds, if not thousands and that “Turkey needs to observe non-discrimination principle in teaching all traditional languages other than Turkish. Any act in favour of one or two languages traditionally used can be interpreted as discrimination against other languages and their respective speakers.”⁵² Again, in reply to the Committee’s criticism regarding lack of data on the ethnic composition of the population, Turkey has stated that The Turkish Government does not collect, maintain or use either qualitative or quantitative data on ethnicity. Although acknowledging that disaggregated data on ethnicity may facilitate devising policies for special measures targeting a specific group, as is the case in some other countries, it is believed that this is a sensitive issue, especially for those nations living in diverse multicultural societies for a long period of time. Diversity has deep roots in Turkey. Hence, Turkey has rather focused on commonalities and common aspirations in the legislative and policy framework, rather than measuring differences and making policies thereon. Some historical events particularly in recent European history are also a reminder of dangers and threats involved in such practices.”⁵³ These replies indicate that, Turkey considers some special measures as discrimination against other groups and some other measures as a threat to unity.

With regard to grounds covered by the 2000/43 and 2000/78, positive action is taken only for persons with disabilities and the elderly. There is a quota system in employment, which requires both public and private sector to employ person with disabilities. This requirement is valid only for employers who employ 50 or more employees. If the employer does not meet this obligation, a fine is imposed. Fines collected are used to fund vocational training projects targeting persons with disabilities.

⁵² <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/413/87/PDF/G0941387.pdf?OpenElement>

⁵³ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/413/87/PDF/G0941387.pdf?OpenElement>

According to art. 30 of the Labour Law, if the employer has employed more disabled persons than the quota requires; or if an employer who is not under an obligation to employ disabled persons has employed persons with disabilities; or if an employer has employed a person who is more than 80% disabled, than half of the insurance premiums which normally have to be paid by the employer shall be paid by the Treasury.

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

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

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

Under Law no. 2022, persons with disabilities who do not have any income or who have an income which is below an amount designated every year shall be paid cash benefits. Persons who are in charge of care of a disabled person 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 disabled person.

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

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

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

6 REMEDIES AND ENFORCEMENT

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

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

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

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

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

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

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

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

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

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

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

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.

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.⁵⁴

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

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

Another option for the victims of discrimination is to apply to human rights boards which are established in every province and districts and Human Rights Inquiry Commission of Turkish Grand National Assembly. Both the boards and the commission have the competence to inquire complaints of discrimination in employment. The Human Rights Presidency, Human Rights Boards and Human Rights Inquiry Commission of Turkish Grand National Assembly can give a decision that describes the situation as a violation or non-violation of the right to equal treatment and these decisions are not enforceable and are not legally binding. In 2007 a total number of 1171 people applied to Human Rights Presidency and Human Rights Boards. Only 42 applications were related to claims of discrimination. In 2008 101 out of 5458, in 2009 41 out of 2562 and in the first 3 months of 2010, 26 out of 961 applications are related to claims of discrimination.⁵⁵

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

⁵⁴http://www.adlisicil.adalet.gov.tr/ISTATISTIKLER/1996/ac_cik/2008%20YILI%20CEZA%20MAHKEMELERINE%20TCK%20MADDELERI%20ILE%20ILGILI%20ACILAN%20DAVA,%20SANIK%20VE%20MAGDUR%20SAYILARININ%20SUÇ%20ÜRÜNE%20GÖRE%20DAĞILIMI.pdf

⁵⁵ <http://www.ihb.gov.tr/>

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

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

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

b) Are these binding or non-binding?

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

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

The decisions of the courts are binding by definition.

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

The time limits depend on the type of application.

Time limits in administrative law: The time limit to repeal regulations and administrative decisions is 60 days after the day of promulgation of the regulation or notification of the decision to the concerned individuals. For compensation of damages which are the result of administrative action, applications should be submitted within 1 year after the victim is informed and in any case within 5 years of the date of the action causing damage.⁵⁶ The appeals should be made in 30 days after the notification of lower courts' decisions.⁵⁷

⁵⁶ Art. 7 of the Law on Administrative Procedure (Law no. 2577).

⁵⁷ Art. 46(2) of the Law on Administrative Procedure (Law no. 2577).

Time limits in civil law including labour law: Civil law suits for compensation of damages should be filed within 1 year of the victim being informed and in any case within 5 years after the date of the action causing damage for tort cases.⁵⁸ If the case relates to wages, the time limit is 5 years.⁵⁹ For all the other matters, the time limit is 10 years.⁶⁰ The appeals should be made within 8 days of the notification of lower courts' decisions.⁶¹

Time limits in criminal law: In Turkish criminal law, time limits are designated depending on the punishment. For offences resulting less than 5 years of punishment, the limit is 8 years. If the punishment is 5 to 20 years the limit is 15 years, if the punishment is more than 20 years, the limit is 20 years and finally for life time imprisonment it is 25 or 30 years depending on the type of life time imprisonment.⁶² For some offences investigation and prosecution is bound to a complaint. Unless a complaint is brought within 6 months after the complainant becomes aware of the malicious act and the offender, an investigation or prosecution cannot proceed.⁶³

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

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

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

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

a) in support of a complainant

Turkish law does not fully guarantee the right of associations, organizations or other legal entities with a legitimate interest to engage in judicial or administrative procedures in support of victims of discrimination. Exceptions are consumer protection associations and associations working for the protection and preservation of the environment. Otherwise, associations cannot actively engage in judicial or other procedures in support of a complainant. NGOs provide legal assistance and due to restricted funding and professionalism they are not able to take all the cases.

b) on behalf of one or more complainants (please indicate if class actions are possible)

⁵⁸ Art. 60(1) and (2) of the Law of Obligations (Law no. 818).

⁵⁹ Art. 126 of the Law of Obligations (Law no. 818).

⁶⁰ Art. 125 of the Law of Obligations (Law no. 818).

⁶¹ Art. 8 of the Law of Labour Courts (Law no. 5521).

⁶² Art. 66 of the Turkish Criminal Code (Law no. 5237).

⁶³ Art. 73 of the Turkish Criminal Code (Law no. 5237).

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.

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.

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

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

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

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

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

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

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

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

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

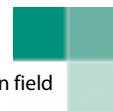
- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

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

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

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

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



Except for the sanctions mentioned under this title, no sanctions are explicitly attached to the violations of prohibitions of discrimination.

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

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

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

- c) *Is there any information available concerning:*
- *the average amount of compensation available to victims*
 - *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

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

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

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

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

Currently, there is no specialized body established for the promotion of equal treatment. 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.

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

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

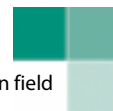
Not applicable.

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

Not applicable.

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

Not applicable.



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

Not applicable.

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

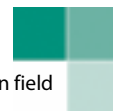
Not applicable.

- g) *Is the work undertaken independently?*

Not applicable.

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

Not applicable.



8 IMPLEMENTATION ISSUES

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

Describe *briefly* the action taken by the Member State

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

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

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

A number of meetings have been organized by the Government to discuss issues relating to Kurds, Alevis and Romanis.

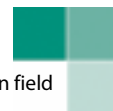
Normally the Government does not include NGOs in the legislative process. However, in March 2010 a preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council was sent to various universities and non-governmental organizations, in order for them to express their opinions on the draft. It has to be mentioned that this was a first.

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

No specific action is taken in this regard.

- d) *to specifically address Roma and Travellers*

On 10 December 2009, a Romani Workshop was organized and representatives from 5 Romani Federations and 80 Romani associations participated in the workshop. In March 2010 the Government organized a Romani gathering to meet with persons belonging to the Roma Community in Turkey. The meeting was in a sports hall and it was more of a social event. In his speech the Prime Minister said that discrimination against Roma people is unacceptable and persons belonging to the Roma Community are first class citizens.



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

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

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

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

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

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

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

The issue was brought before the European Court of Human Rights, which has decided that regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as "necessary in a democratic society".⁶⁴

Art. 50, para. 3 of the Law on Civil Servants (Law no. 657) requires that, for persons with disabilities who want to become civil servants, separate exams to be given. These exams will be given either simultaneous with the general exam, or at a different time. Although this provision can be interpreted as a positive action, its interpretation and implementation is in the negative. First of all, persons with disabilities are forced to take the special exam. Secondly the special exams are mainly given to fill in low-end positions in the public sector. As the highest administrative court, the Council of State held that, persons with disabilities can only be employed through separate exams. In one example, the disabled plaintiff had succeeded in the Selection Examination for Professional Posts in Public Organizations and was placed as a civil servant. But his placement was annulled on the basis that, he had taken the general exam, instead of the special exam for persons with disabilities. According to the Council of State: "It is in line with the law to not to appoint the plaintiff to the post that he was placed, since he has taken the general examination. Since his employment should be through quota for persons with disabilities ... he should take and pass the special examination designed for the persons with disabilities."⁶⁵ There are other cases before the Council of State on the same issue.

Another discriminatory provision is found in the Road Traffic Regulation. According to the art. 53/b(4) of the Road Traffic Regulation, there has to be a special sign on the license plates of cars used by persons with disabilities. This provision of the Regulation was brought before the Council of State with a claim of discrimination. The Council of State had rejected the case. The applicant has appealed against the decision. However, the Council of State has not given its final decision on this issue yet.

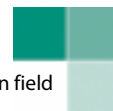
Some provisions of the legislation are not discriminatory *per se*. However, they are interpreted and implemented in a discriminatory manner. For example according to article 8 paragraph (g) of the Law on Judges and Prosecutors (*Hakimler ve Savcılar Kanunu*) (Law No: 2802), in order to be appointed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

⁶⁴ Leyla Sahin v. Turkey, 44774/98, decided on 10 November 2005 by the Grand Chamber of the ECHR.

⁶⁵ The case law was reached through the website of the Council of the State (*Danıştay*). Council of the State 12th Chamber, E. 2006/2864, K. 2006/4487, Date of the judgement: 8/11/2006.



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



9 CO-ORDINATION AT NATIONAL LEVEL

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

Currently there is no coordination body. However, according a press statement issued on April 2010 by the Secretariat General for EU Affairs, a task force on anti-discrimination was established to monitor and coordinate the steps to be taken in the fight against discrimination.⁶⁶ 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.⁶⁷

⁶⁶ http://www.abgs.gov.tr/files/Bas%C4%B1nMusavirlik/20.rig/20rig_press.pdf

⁶⁷ http://www.sabah.com.tr/Gundem/2010/03/14/ayrimcilik_icin_ozel_gorev_gucu_kuruluyor



ANNEX

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

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Turkey

Date: 31 December 2009

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Türk Ceza Kanunu http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=1.5.5237&MevzuatIliski=0&sourceXmlSearch= Turkish Criminal Code (Law no. 5237) available in English at http://www.legislationline.org/documents/action/popup/id/6872/preview (unofficial translation)	June 2005	Language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect, or any such considerations.	Criminal Law	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.	No reference to the type of discrimination prohibited.

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
İş Kanunu http://www.mevzuat.adalet.gov.tr/html/1243.html Labour Law (Law no. 4857) available in English at http://www.iskanunu.com/4857-sayili-is-kanunu/4857-labor-law-english/4857-labor-law-english-plain-text.html (unofficial translation)	June 2003	Language, Race, Gender, Political opinion, Philosophical belief, Religion or sect, or any such considerations.	Civil law	Private employment	No reference to the type of discrimination prohibited. Victimization
Özürlüler Hakkında Kanun http://www.ozida.gov.tr/mevzuat/kanun.htm Law on Persons with Disabilities (Law no. 5378) available in English at http://www.ozida.gov.tr/web_english/index.htm	July 2005	Disability	Civil law and Administrative law	Public and private employment, Education, Vocational training.	No reference to the type of discrimination prohibited.
Milli Eğitim Temel Kanunu http://www.mevzuat.adalet.gov.tr/html/505.html	June 1973	Language, Race, Gender, Religion	Administrative law	Education	No reference to the type of discrimination prohibited.

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Basic Law on National Education (Law no 1739)					
Devlet Memurları Kanunu http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=1.5.657&sourceXmlSearch=&MevzuatIliski=0 Law on Civil Servants (Law no. 657)	July 1965	Language, Race, Gender, Political thought, Philosophical belief, Religion and sect	Administrative Law	All acts of civil servants – unlimited material scope (Public employment, access to goods or services (including housing) provided by the public sector, social protection, social advantages, public education)	No reference to the type of discrimination prohibited.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Turkey

Date: 31 December 2009

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes	Yes	No	Yes	Yes
Protocol 12, ECHR	Yes	No	Not applicable	Not applicable	Not applicable
Revised European Social Charter	Yes	Yes	No	Ratified collective complaints protocol? No	Yes
International Covenant on Civil and Political Rights	Yes	Yes	"The Republic of Turkey reserves the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and	Yes, however while ratifying the Optional Protocol, Turkey has put a reservation in order to limit individual applications regarding the violation of art. 26 of the ICCPR on equality: "The Republic of Turkey formulates a reservation concerning article 5 paragraph	Yes

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes."	2(a) of the Protocol to the effect that the competence of the Committee: a) ... b) ... c) shall not apply to communications by means of which a violation of article 26 of the International Covenant on Civil and Political Rights is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."	
Framework Convention for the Protection of National Minorities	No	No	Not applicable	Not applicable	Not applicable

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
International Convention on Economic, Social and Cultural Rights	Yes	Yes	The Republic of Turkey reserves the right to interpret and apply the provisions of the paragraph (3) and (4) of the Article 13 of the Covenant on Economic, Social and Cultural Rights in accordance to the provisions under the Article 3, 14 and 42 of the Constitution of the Republic of Turkey.	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	No	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	No	No	Yes

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of the Child	Yes	Yes	"Reservation made upon signature and confirmed upon ratification: The Republic of Turkey reserves the right to interpret and apply the provisions of articles 17, 29 and 30 of the United Nations Convention on the Rights of the Child according to the letter and the spirit of the Constitution of the Republic of Turkey and those of the Treaty of Lausanne of 24 July 1923."	No	Yes
Convention on the Rights of Persons with Disabilities	Yes	Yes	No	No	Yes