



## Executive Summary

### Country Report Turkey 2011 on measures to combat discrimination

By Dilek Kurban

#### 1. Introduction

There is no official data on the composition of the population in Turkey on the basis of the ethnicity, denomination and mother tongue. With regard to the religious composition in the country, the majority of the population indicates some degree of affiliation with Islam. Alevis, who belong to a non-Sunni denomination of Islam, constitute the largest religious minority in Turkey. The total number of various non-Muslim communities (Greek Orthodox, Armenian Catholic, Gregorian, Roman Catholic, Protestant, Jewish, Assyrian, Yezidi) is around 100,000 in a country with a population of around 75 million. The ethnic composition of the country is very mixed; however most of the population identifies her/himself as a Turk. Kurds are the largest linguistic and ethnic minority in Turkey, whose numbers are unknown and a matter of controversy.<sup>1</sup> The majority of the Kurds are Sunni Muslims while a significant numbers are Alevis. There are various other ethnic minority groups in Turkey, such as the Laz, Roma, Arabs, Bulgarians, Bosnians, Pomacs and Albanians.<sup>2</sup>

The legal status of minorities in Turkey was established by the 1923 Lausanne Peace Treaty, which defined minorities solely on the basis of religion, excluding linguistic and ethnic minorities. While the treaty grants minority status to “non-Muslims” in Turkey, in practice, the state has since 1925 limited the protection of the treaty to Jews, Armenians and the Greek Orthodox. The limitation of the scope of the Treaty to these three communities is reminiscent of the Ottoman Empire’s *millet* system. Thus, other groups, such as Syriacs, Christian Arabs and Chaldeans, who are also non-Muslim and therefore have de jure minority status under Lausanne, have been unlawfully denied of their rights arising from this treaty. They neither have the right to establish their own schools, places of worship, nor the right to teach their language and religion. Even the three non-Muslim communities granted minority status under Lausanne face many problems, including restrictions on their property rights, the ban on the training of clergy, limitations on their autonomy in running their own affairs and significant financial constraints in running their community organizations, first and foremost schools. Although some of these issues have been addressed in recent years in the EU accession process, significant problems remain.

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<sup>1</sup> The estimated numbers of the Kurds claimed by various academic sources range from 10 to 23 per cent of the population. Dilek Kurban, *A Quest for Equality: Minorities in Turkey*, Minority Rights Group International, 2007, p. 11.

<sup>2</sup> The estimated numbers and ratios of some of these groups are as follows: Laz: 750,000-1,500,000; Roma: 2-5 million; Alevis: 10-40 per cent. Id., p. 12.



While a separate legal regime was created for the non-Muslim minority under the Treaty of Lausanne, all Muslims were categorized as 'Turks' and became subject to homogenisation policies aimed at eradicating their cultural differences. To this day, Turkey's official policy on minorities is limited to the individual and material scope of Lausanne, as evident in its reservations to the relevant provisions of international treaties which may give rise to new minority rights or minority rights to new groups. The logic behind this policy is to prevent minorities within the Muslim majority, such as the Kurds, from gaining the right to mother tongue education as well as to disable non-Muslim groups other than Jews, Armenians and Greek Orthodox to gain the limited rights that these three groups have been enjoying under Lausanne.

There is widespread discrimination against the Roma and the Kurds in education, employment, health, housing and access to services. The political initiatives the government has started in 2009 to address the problems of the Kurds, the Alevis and the Roma did not produce any tangible outcomes. Lesbian, Gay, Bisexual and Transgender persons are among the most vulnerable groups, who face not only systematic discrimination but also physical insecurity. Transsexuals and transvestites are forced to work in the sex industry as employment opportunities do not exist and they suffer from police brutality and social violence. And yet, the denial of the existence of discrimination is widespread, not only in the general public, but also in most political parties and the Government. This is reflected in the reports submitted by the Turkish government to the United Nations Human Rights Committee. Government representatives, public officials and politicians routinely make discriminatory statements, which go unpunished.

The number of persons with disabilities in Turkey is also unknown. In 2002, the Presidency on Disabled People under the auspices of the Prime Ministry commissioned the State Statistical Institute a survey on persons with disabilities in Turkey. The only statistical research on disability identified the number of persons with disabilities in Turkey to be 8,431,937, which makes 12.29 per cent of the total population. The real number is claimed to be much higher. Persons with disabilities suffer from discrimination in every walk of life and due to the severe inaccessibility of public places, they are rendered "invisible" in public life.

The relation between human rights organisations and the central government was weak in previous years. This climate began to change with Turkey's EU accession process. However, there is still a significant degree of polarisation between the political parties and amongst the public on the Kurdish issue and issues regarding secularism and religion. On a positive note, the preliminary draft of the Law on Combating Discrimination and Establishment of an Equality Council was prepared through consultative meetings with a group of representatives of a number of NGOs. The draft law was sent to various universities and NGOs, in order to get their opinions on the draft. A number of meetings were organized for the discussion of the preliminary draft. After the conclusion of the consultative process and the publication of the draft on the website of the Ministry of Interior, the government was found to



have made a significant revision in the final draft and removed sexual orientation from among the enumerated grounds of discrimination prohibited under the law.

## 2. Main legislation

There is no specific anti-discrimination or equal treatment legislation in Turkey. As Turkey is not a member of the European Union, Directives 2000/43 and 2000/78 have not been transposed. There is a draft Law on Combating Discrimination and Establishment of an Equality Council prepared by the government in 2009 and submitted to public discussion in 2010. The draft was apparently inspired by the Directives and the European experience. Both the list of prohibited grounds and the material scope of the draft are wider than the Directives. More than two years after its preparation, the draft legislation has still not been adopted.

The constitutional basis of legal framework on equality and anti-discrimination rests in Article 10 of the 1982 Constitution, which provides an open-ended list of enumerated protected grounds. A recent amendment to this clause now allows positive measures on behalf of women, elderly and persons with disabilities. There are anti-discrimination provisions in criminal, administrative and civil laws, such as the Labour Law, Turkish Criminal Code, Law on Persons with Disabilities, Basic Law on National Education, Law on Civil Servants and Law on Political Parties. These provisions put forth non-exhaustive protected grounds, which vary significantly. Ethnicity, age and sexual orientation are not enumerated in any of the laws or in the constitution. Therefore, the applicability of anti-discrimination clauses in the constitution and various laws to discrimination on these grounds is an uncertainty.

However, most of the provisions found in the legislation are rather vague. The legislation is inconsistent regarding the list of prohibited grounds. Age, ethnicity and sexual orientation are not mentioned explicitly in any provisions prohibiting discrimination. While the draft law on anti-discrimination initially included “sexual identity” as grounds of anti-discrimination, references to these concepts were quietly removed by the government after the draft law was submitted to public discussion.

According to art. 90 of the Constitution, international treaties which are duly ratified have the force of law. If the language of the treaty provision is self-executing, it is directly applicable. In case of a conflict between provisions of domestic laws and international treaties on fundamental rights and freedoms duly put into effect, the provisions of international agreements shall prevail. Appeal cannot be made to the Constitutional Court claiming the unconstitutionality of international treaties. Turkey is a party to a considerable number of international treaties containing provisions on anti-discrimination and equal treatment. Among these are: The European Convention on Human Rights; Revised European Social Charter; International Covenant on Civil and Political Rights; International Convention on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination Against Women; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities and ILO



Convention No. 111 on Discrimination. Turkey has accepted right to individual complaint under many of the aforementioned treaties. However, it is still not possible to make individual complaints under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities. Turkey has not accepted the collective complaint procedure under the Revised European Social Charter either.

The constitutional reform package approved by a national referendum held on 12 September 2010 recognized, for the first time, the right to file a constitutional complaint. The implementing legislation was adopted in March 2011, which laid down the procedures of the constitutional complaint mechanism. The scope of the complaint is limited to those rights and liberties protected under the constitution which fall within the scope of the European Convention on Human Rights (ECHR) and its additional protocols which Turkey is a party to. The Constitutional Court will receive complaints filed against judicial decisions and actions that will have become final on 23 August 2012.

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

There is no national anti-discrimination law in Turkey; and various laws which prohibit discrimination do not provide a definition of any of the grounds, with the exception of disability. Age, ethnicity, sexual identity and sexual orientation are not listed among the prohibited grounds in any of the legal provisions mentioned above and disability is mentioned explicitly only in the Turkish Criminal Code and the Law on Persons with Disabilities.

The legislation prohibiting discrimination is general in nature and it does not refer to different types of discrimination. Only with regards to sex and pregnancy, the Labour Law prohibits both direct and indirect discrimination. Discrimination by association, harassment and instruction to discriminate are neither defined nor prohibited explicitly. Thus, judicial interpretation is needed. Victimisation is prohibited only in a very limited way. Reasonable accommodation is required for persons with disabilities. However, it is not defined. The legislation is also silent on exceptions.

Until the adoption of prohibition of discrimination on the ground of disability by the Law on Persons with Disabilities in 2005, the legal framework addressed disability only in the context of social benefits and social aid. Various laws and regulations providing disability related benefits and positive measures have their own definition of and/or criteria for disability. Disability can also be defined in a negative aspect in disqualifying individuals from certain professions, such as judges and prosecutors.

There is no reference to sexual orientation in the constitutional and legal framework. Consequently, it is not defined. The national legal framework is completely blind on sexual orientation, as evident also in the absence of any



provision criminalizing homosexual, bisexual or transsexual conduct. However, there is widespread and systematic discrimination against LGBT individuals stemming from either the blatantly discriminatory texts of the laws and regulations and/or their discriminatory interpretation and application by the judiciary. The principal way in which laws are applied in a discriminatory way against LGBT individuals is through the judicial interpretation of terms such as “morality”, “indecent behaviour” and “dishonourable behaviour.”

While religion is not defined in the constitution or the laws, there is case law concerning the definition of religion in general and of Islam/Muslims in particular. In a growing number of judgments, the Court of Cassation decided some belief systems to be ineligible to be defined as a religion and defined or interpreted others in ways contrary to the holders of such beliefs. In both cases, the court based its judgment on the advisory opinion of Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı*), a constitutionally endorsed public body regulating the state-religion affairs concerning Islam. A further discriminatory treatment on the basis of definition of religion concerns the status of places of worship belonging to non-recognized religious minorities in Turkey. By extension of the state's limitation of the definition of minority to Armenians, Greek Orthodox and Jews, the places of worship of other religious or denominational minorities, such as Alevis and Protestants, are not recognized under the law. Consequently, these groups face extreme difficulties in building new places of worship due to the refusal of authorities to grant construction permits.

In Turkish Law there is no clear and comprehensive guidance on positive action. While not explicitly stating it as such, the revised Article 10 of the Constitution approved by a national referendum in September 2010 introduced the principle of positive action to the constitution. New Article 10 stipulates that, measures to be adopted to ensure equality between men and women as well as measures to be adopted for children, elderly, persons with disabilities, widows and orphans of martyrs, invalids and veterans shall not be considered as a violation of the principle of equality. Article 61 of the Constitution also requires the state to take protective measures for persons with disabilities, children and elderly. 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.).

#### 4. Material scope

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





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

## **5. Enforcing the law**

There are no special bodies established to receive applications from victims of discrimination. In cases of allegations of discrimination, 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 are very limited. Except in criminal courts, 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 to pursue a case without the support of a lawyer. According to Turkish law collective actions are not available.

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. A court proceeding has the advantage of being the only procedure by which victims may obtain compensation. On the other hand, bringing a court case is costly, legal aid is provided under very strict criteria and cases are not decided before 1 or 2 years.

The constitutional amendments approved by a national referendum in September 2010 granted individuals the right to make a constitutional complaint to the Constitutional Court under certain conditions. The scope of the complaint is limited to those rights and liberties protected under the constitution which fall within the scope of the European Convention on Human Rights (ECHR) and its additional protocols which Turkey is a party to. The Constitutional Court will receive complaints filed against judicial decisions and actions that will have become final on 23 August 2012.

Turkish law does not fully guarantee the right of associations, organizations or other legal entities with a legitimate interest to engage in judicial or administrative procedures on behalf of victims of discrimination. Exceptions are trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and history.

National law is silent on situation testing and consideration of evidence obtained through situation testing is left to the discretion of the judge. 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. It is also a method



not yet known or used by NGOs combatting discrimination. The Turkish law does not contain specific provisions regarding statistical evidence and there is no case-law on the issue. However, as a rule, every claim can be proved by all types of evidence (although there are exceptions).

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.

Another option for the victims of discrimination is to apply to province and district level human rights boards and the Human Rights Inquiry Commission of Turkish Grand National Assembly, which have the competence to inquire complaints of discrimination in employment. However, human rights boards established in districts and provinces are not independent from the executive and are extremely under-utilized. Victims of discrimination in most cases resort to human rights organizations and individual attorneys for legal assistance.

## **6. Equality bodies**

Currently, there is no specialized body established for the promotion of equal treatment. The draft law on anti-discrimination stipulates the establishment of one. On the other hand, there are a number of human rights bodies in Turkey, which can receive applications regarding violations of human rights, including discrimination. Among these are the 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. All of these are government bodies and their independence and impartiality are highly contested.