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Country report

Non-discrimination

Turkey

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Country report

Non-discrimination

Turkey

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EXECUTIVE SUMMARY

1. Introduction

On 15 July 2016, the Turkish Government survived a coup attempt, in response to which the Government launched a crackdown on democratic political opposition, purging tens of thousands of civil servants, including judges, prosecutors, teachers, artists, academics, members of the security apparatus including the military and the police, members of the intelligence community, governors and district governors, and municipal authorities including elected mayors. Of the more than 100 000 individuals purged from the civil service, over 40 000 have been imprisoned on accusations of being affiliated with or supporting the Gülen movement, which the Government holds responsible for staging the coup attempt.¹

Among individuals held in pre-trial detention without evidence to support the accusation of terrorism are 2 386 judges and prosecutors, including 2 members of the Turkish Constitutional Court, 109 members of the High Court of Appeals, 41 members of the Council of State and 5 members of the High Council of Judges and Prosecutors,² 13 members of the Parliament including the two co-chairs, 89 elected mayors and over 3 000 members of the pro-Kurdish Peoples' Democracy Party,³ business people, and over 150 journalists and activists.⁴ Around 180 media organisations⁵ and over 1 500 associations have been closed down.⁶ The state of emergency declared by the Government on 20 July, in response to the coup attempt, has been extended several times and remains in force as of January 2017. During this period, the Government ruled the country by executive decrees, without parliamentary oversight or judicial review.

These developments followed alarming allegations of human rights abuses by the Turkish security forces in the Kurdish region. In an operation launched in July 2015 and continued into 2017, the military carried out raids into densely populated towns with thousands of combat-ready troops, tanks, armoured vehicles and heavy artillery to remove the barricades and trenches that the PKK had built in residential areas, and bombed and razed entire towns, without any regard for the presence of civilians trapped in the midst of the operations. According to the UN Human Rights Office of the High Commissioner, during July 2015-December 2016, some 2 000 people were killed in the curfew areas, of whom 1 200 were civilians including women and children.⁷ Many of them died for lack of urgent health care. Over 355 000 residents were displaced, and numerous people were disappeared, tortured and subjected to excessive use of force.⁸

¹ These numbers are based on the report published by the main opposition Republican People's Party in March 2017. Karabağlı, H., 'CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kıydı' (CHP's report on the 'Balance of the State of Emergency': The number of suspects exceeded 100 000; at least 25 people committed suicide), *T24*, 2 March 2017, available at <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

² European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 9.

³ Information received from the Peoples' Democracy Party, 4 March 2016.

⁴ Karabağlı, H., 'CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kıydı' (CHP's report on the 'Balance of the State of Emergency': The number of suspects exceeded 100 000; at least 25 people committed suicide), *T24*, 2 March 2017, available at <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

⁵ Karabağlı, H., 'CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kıydı' (CHP's report on the 'Balance of the State of Emergency': The number of suspects exceeded 100 000; at least 25 people committed suicide), *T24*, 2 March 2017, available at <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

⁶ <http://t24.com.tr/haber/tam-liste-15-temmuzdan-sonra-kac-khk-cikarildi-kac-kurum-kapatildi-hangi-kurumdan-toplam-kac-kisi-ihrac-edildi,374482>.

⁷ Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

⁸ Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7.

In January 2017, the Turkish Parliament adopted constitutional amendments for the purpose of changing Turkey's political system from parliamentary democracy to a 'Turkish-style' presidential system.⁹ If adopted in the popular referendum to be held on 16 April 2017, the amendments threaten to erode the checks and balances on the executive branch and lead Turkey into an authoritarian regime.

Turkey is a multi-ethnic, multi-religious and multilingual society. There are no official data on the composition of the population on the basis of ethnicity, denomination and mother tongue, as the Government has refrained from asking such questions in censuses since the 1960s. Pursuant to the 1923 Lausanne Peace Treaty signed with the Allies, the Turkish Government reluctantly granted minority status to non-Muslim minorities, subsequently de facto limiting protection to Jews and Armenian and Greek Orthodox Christians by excluding other non-Muslim groups such as Syriac and Protestant Christians. In 2013, a lower court challenged this official minority policy for the first time by holding that the Treaty of Lausanne granted minority status and rights to all non-Muslim citizens.¹⁰

While the policy of non-recognition towards Kurds, the largest minority in the country, has changed, the Government continues to deny legal or political recognition to Alevi, the largest religious minority, which practices a different interpretation of Islam to that of the Sunni majority. Despite the European Court of Human Rights (ECtHR) rulings that non-recognition of Alevi places of worship,¹¹ mandatory religion classes,¹² the mandatory indication of religion in official identity documents¹³ and the refusal to grant Alevi foundations the exemption from paying electricity bills granted to Sunni places of worship¹⁴ are in violation of the right to freedom of religion, the Government refuses to bring an end to its assimilationist policies. This led the Grand Chamber of the ECtHR to conclude on 26 April 2016 that Turkey's policies on the Alevi in their entirety violate the rights of the Alevi minority under Article 9 (freedom of religion) and Article 14 (non-discrimination).¹⁵ Another group of ECtHR judgments which remain unimplemented concern conscientious objection,¹⁶ which is unrecognised in Turkey, the only country in the Council of Europe which does not provide a civilian alternative to military service. Jehovah's Witnesses and politically motivated conscientious objectors (pacifists and total objectors), continue to be subjected to a vicious cycle of prosecution, imprisonment and forced military recruitment.

Non-Muslim minorities, including those officially recognised, face significant restrictions on their freedom of religion. The inability to train clergy due to absence of theological schools, and the Government's refusal to grant permission for the opening of new churches (for non-recognised Christian denominations) are among the main problems in this regard. Although the total number of people of the various non-Muslim communities is around 100 000 in a country with a population of 75 million, there is widespread, conspiracy-fed, irrational fear of Christian missionary activities and Zionism in society, fed by the anti-Semitic, anti-Western and anti-Christian rhetoric of politicians, government officials, opinion leaders and the media. The authorities utterly fail in their duties to protect non-Muslims, particularly Jews, against the prevalent hate speech, at times coupled with hate crimes, in the media, political discourse and daily life.

⁹ Bora, B., 'Turkey's constitutional reform: All you need to know', Al Jazeera, 17 January 2017, available at: <http://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html>.

¹⁰ European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

¹¹ ECtHR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, No. 32093/10, 2 December 2014.

¹² ECtHR, *Mansur Yalcin and Others v. Turkey*, No. 21163/11, 16 September 2014; ECtHR, *Hasan and Eylem Zengin*, No. 1448/04, 9 January 2007.

¹³ ECtHR, *Sinan Işık v. Turkey*, Application no. 21924/05, 2 February 2010.

¹⁴ ECtHR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, Application no. 32093/10, 2 December 2014.

¹⁵ ECtHR, *Case of İzzettin Doğan and Others v. Turkey*, Grand Chamber, Application no. 62649/10, 26 April 2016.

¹⁶ ECtHR, *Buldu and Others v. Turkey*, No. 14017/08, 3 June 2014; ECtHR, *Tarhan v. Turkey*, No. 9078/06, 17 July 2012; ECtHR, *Savda v. Turkey*, No. 42730/05, 12 June 2012.

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

Government representatives, public officials and politicians routinely make discriminatory statements against LGBTI people, non-Muslims, Roma and Kurds, which go unpunished. Coverage in mainstream media is notoriously hateful towards minorities. However, the judicial authorities do not enforce the laws against incitement of hatred.

2. Main legislation

As Turkey is not a member of the European Union, Directives 2000/43/EC and 2000/78/EC have not been implemented. On 6 April 2016, the Turkish Parliament adopted the Law on the Human Rights and Equality Institution of Turkey, Turkey's first anti-discrimination law. It prohibits direct, indirect and multiple discrimination as well as instructions to discriminate, discriminations by assumption, segregation, harassment, and mobbing at workplaces. Victimisation and discrimination by association are not included.

Furthermore, there are anti-discrimination provisions in the Constitution and several laws. The equality protection clause of the Turkish Constitution, Article 10, provides a non-exhaustive list of enumerated protected grounds. Most notable among the laws with anti-discrimination clauses is the Law on Persons with Disabilities, which could be considered an anti-discrimination law. However, the law prohibits discrimination solely on the ground of disability and has limited material scope. In addition, various laws including the Labour Law, the Penal Code and the Law on National Education have anti-discrimination clauses, but again with limited material scopes. Sexual orientation is not enumerated in any of the laws or in the Constitution.

While hatred and incitement to hatred are prohibited under the Penal Code, as noted by the European Commission against Racism and Intolerance (ECRI), the 'definition of hate crime is excessively narrow and the Criminal Code does not explicitly provide that racist and homo/transphobic motivation constitutes an aggravating circumstance.'¹⁷ Moreover, hate speech grounds are exhaustive and do not include ethnicity, age and sexual orientation. The new anti-discrimination law does not prohibit hate speech or hate crime.

According to Article 90 of the Constitution, duly ratified international treaties have the force of law. If a treaty is self-executing, it is directly applicable. In cases of conflict between domestic laws and international human rights treaties, the latter shall prevail. Appeal cannot be made to the Constitutional Court for the unconstitutionality of international treaties. Turkey is a party to a considerable number of international treaties containing provisions on anti-discrimination and equal treatment, has accepted the right to individual complaints under many of these treaties, except for the Convention on the Elimination of All Forms of Racial Discrimination. Turkey has also not accepted the collective complaint procedure under the Revised European Social Charter.

¹⁷ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 9, p. 15 and p. 39, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

3. Main principles and definitions

The only ground defined under Turkish law is disability. The Law on the Human Rights and Equality Institution of Turkey (no. 6701) and the Law on Persons with Disabilities (no. 5378) contain identical definitions, which are in line with the UN Convention on the Rights of Persons with Disabilities and the European Court of Justice's judgment in the case of *Ring and Skouboe Werge*.¹⁸

While Turkey's constitutional and legislative framework explicitly avoids providing any definition or categorisation based on ethnicity, race or religion, there are a number of relevant laws and policies where equivalent definitions and categorisations are made which cause direct or indirect discrimination on grounds of religion. There is also case law concerning the definition of religion in general and of Islam/Muslims in particular. The Court of Cassation decided that some belief systems are ineligible as a religion and defined others in ways contrary to those of the holders of such beliefs. In both cases, the Court based its judgments on the advisory opinion of the Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı*, Diyanet), a constitutionally endorsed public body which regulates affairs between the state and Islam.

The national legal framework is completely blind on sexual orientation, as evident also in the absence of any provision criminalising homosexual, bisexual or transsexual conduct. However, there is widespread and systematic discrimination against LGBTI people, stemming from either the blatantly discriminatory texts of the laws and regulations and/or their discriminatory interpretation and application by the judiciary. The principal way in which laws are applied in a discriminatory way against LGBTI people is through the judicial interpretation of terms such as 'morality,' 'indecent behaviour' and 'dishonourable behaviour'.

The Law on the Human Rights and Equality Institution of Turkey prohibits direct and indirect discrimination; multiple discrimination; discrimination by assumption; harassment; mobbing; segregation; instruction to discriminate and compliance with such instruction; failure to provide reasonable accommodation. The Labour Law, the Law on Persons with Disabilities, the Penal Code, the Law on national Education and the Law on Civil Servants also prohibit one or more of these types of discrimination, each on limited grounds. The Turkish legal framework is silent on discrimination by association and situation testing. Victimisation is prohibited only in a very limited fashion.

Among the five grounds covered by Directives 2000/43/EC and 2000/78/EC, Turkish national law provides for positive action on grounds of race/ethnicity, religion/belief, age and disability. Positive action in respect of sexual orientation is not permitted. While not explicitly stating it as such, Article 10 of the Constitution entails the principle of positive action, but only on grounds of age and disability. The Law on the Human Rights and Equality Institution of Turkey provides an exception to the prohibition of discrimination for 'treatment which is necessary, appropriate and proportional towards eliminating inequalities' on grounds of race/ethnicity, religion/belief, disability and age.

Although not designated as positive action by the legislation, there are a several laws and regulations stipulating positive measures in the areas of education, employment and a number of services (social insurance, transportation etc.), including employment quotas for persons with disabilities. No positive action exists for Roma in Turkey, even after the Government launched its Roma initiative with the promise to enhance employment, education and housing conditions for Roma. The special situation of non-Muslim groups under the Lausanne Treaty does not confer on them a right to positive discrimination based on religion. On the contrary, the state in Turkey continues to limit state funding for religious

¹⁸ Court of Justice of the European Union (CJEU), No. C-335/11 and C-337/11, *Ring and Skouboe Werge v. Denmark*, 11 April 2013.

services to the Sunni Muslim majority by paying the salaries of Sunni preachers (*imams*) and providing free electricity and water to mosques.

4. Material scope

The new Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in employment, self-employment, access to employment, access to self-employment, including selection criteria, recruitment conditions and promotion, and working conditions, including dismissals, for the grounds of race/ethnicity, religion/belief, age and disability only (excluding sexual orientation), in both private and public sectors. It does not prohibit discrimination in pay. It also prohibits discrimination in: vocational guidance, vocational training and retraining, including practical work experience, and on-the-job training; membership of and involvement in 'vocational organisations'; the provision of social security, healthcare and social advantages; education; access to and supply of goods and services; and housing.

The law applies to both natural and legal persons in both public and private sectors.

5. Enforcing the law

In Turkey, discrimination claims are filed through civil, administrative and criminal courts as well as administrative mechanisms. Victims of discrimination can claim compensation for pecuniary damages, loss of earnings and/or damages for pain and suffering through the courts. Parallel proceedings are possible with regard to criminal, civil or administrative courts.

Persons may simultaneously pursue a civil claim for compensation in civil or labour courts, an administrative application or a criminal complaint. If the discriminatory act or action is administrative in nature, before going to the court, the victim of discrimination must request compensation from the administrative body responsible for the action. The decisions of the courts are binding by definition. While a court proceeding is the only procedure for victims to receive compensation, it is costly, legal aid is provided under very strict criteria, and cases are not decided until one or two years have passed.

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

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

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

Another option for victims of discrimination is to apply to non-judicial bodies, such as human rights boards at province and district level and the Human Rights Inquiry Commission of the Turkish Grand National Assembly, which have the competence to inquire into complaints of discrimination in employment. However, human rights boards are not

independent from the executive and are extremely underused. The Human Rights and Equality Institution of Turkey, to be set up in early 2017 under the new law and to replace the Human Rights Institution of Turkey which was established in 2012, will have the competence to impose administrative sanctions (in the form of monetary fines) against legal and natural persons who engage in discrimination. The decisions of all these bodies are non-binding and their powers of enforcement are weak. There are also labour inspectors, insurance inspectors and school inspectors tasked with inspecting compliance with the respective laws. Labour and school inspectors have competence to receive and review individual complaints, including those alleging violation of the anti-discrimination provisions of the Labour Law and the Law on National Education.

In Turkey, associations/organisations/trade unions are granted a very limited entitlement to act on behalf of victims of discrimination. They also have limited legal standing to act on behalf of their members in limited circumstances. The defunct Human Rights Institution of Turkey had granted human rights organisations and trade unions standing to file complaints with the Institution on behalf of victims of human rights violations. The regulations of the yet to be established Human Rights and Equality Institution of Turkey have not yet been published.

Associations/organisations/trade unions are not entitled to act in support of victims of discrimination. However, they can call on prosecutors to act to prosecute perpetrators and they can intervene in criminal cases initiated by the public prosecutors where they can demonstrate 'harm by the crime'. In recent years, LGBT organisations have persistently asked to be involved in ongoing criminal cases to act on behalf of victims of hate crime and honour killings. While in many cases courts reject such requests, there have been a few instances where responses from the courts have been affirmative. In a landmark decision given in early 2015, the Constitutional Court granted several NGOs leave to submit amicus curiae briefs in an ongoing forced disappearance case.¹⁹ While this is not a discrimination case nor has the applicant made a discrimination claim, the Court's decision to accept amicus curiae from civil society has set a significant precedent which is likely to be used by civil society organisations in supporting victims of discrimination.

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

Under Article 21 of the Law on Human Rights and Equality Institution of Turkey (no. 6701), once an applicant puts forward a prima facie case of discrimination, the burden of proof shifts back to the respondent to prove that discrimination has not occurred. However, this provision 'seems to be restricted to applications to the Human Rights and Equality [Authority] and does not apply to court proceedings'.²⁰ The Labour Law has the only provisions containing rules on the burden of proof in discrimination cases. While the burden of proof rests with employees, if an employee puts forward a situation strongly suggesting the probability of such a violation, then the employer is obliged to prove that no such violation exists.

Sanctions in cases of discrimination vary. Under the new equality law, where it finds breaches of non-discrimination, the Human Rights and Equality Institution of Turkey will have the power to issue administrative sanctions by way of monetary fine ranging between TRY 1 000 and TRY 15 000 (EUR 250-3 800), depending on the gravity of the impact and consequences of the breach, the financial status of the perpetrator and the aggravating effect of multiple discrimination, if any. Where the Council, the Institution's decision-making body, deems necessary, the fine may be converted into a warning on one occasion only. In cases of repetition, the fine will be increased by 50 %.

¹⁹ Turkey, Constitutional Court (*Anayasa Mahkemesi*), application no: 2013/2640, 8 April 2013.

²⁰ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 16, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

In cases of employment discrimination, employers are subject to a fine and employees may demand compensation of up to four months' wages plus claims for other benefits of which they have been deprived. In cases of unlawful termination of an employment contract (among other reasons, due to discrimination), the employer must re-instate the employee in work within one month. If not, the employee is entitled to compensation of between four and eight months' wages. Where discrimination in violation of the Penal Code is committed, then the sanction is up to three years imprisonment with no possibility of conversion to a fine. Where civil servants engage in discrimination, the sanction is one to three years suspension of promotion. In addition, labour inspectors, insurance inspectors and school inspectors, as well as executive officials (in the area of consumer protection), can issue administrative and monetary sanctions.

The Government develops policies, designs laws and adopts executive measures on human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does, without taking into account their suggestions or criticisms. A recent example of this was the adoption of the national strategy for the Roma in 2016. Representatives of civil society organisations who had taken part in the deliberative process during 2009-2016 criticised the Government for significantly shortening and watering down the draft strategy shared with them in February 2016, on which they had provided feedback.²¹

6. Equality bodies

Pursuant to the new Law on the Human Rights and Equality Institution of Turkey, Turkey will have a 'specialised body' for the promotion of equal treatment irrespective of racial or ethnic origin, which, however, is not in accordance with Article 13 of the Racial Equality Directive. National and international NGOs as well as UN bodies criticise the Institution's lack of independence and non-compliance with the Paris Principles.

The Institution will have a mandate to receive discrimination claims on grounds of race/ethnicity, religion/belief, age and disability. Sexual orientation is excluded from the mandate of the Institution. The Institution will have the competence to receive discrimination complaints from natural and legal persons. Filing a complaint will be free of charge. Acts relating to the exercise of legislative and judicial competences, decisions of the High Council of Prosecutors and Judges and acts that are exempt from judicial review under the Constitution cannot be subject of complaints filed with the Institution. In addition, the Institution will have ex officio powers to initiate investigations on its own motion into violations of human rights and non-discrimination. The Institution will have legal standing to bring discrimination complaints on behalf of identified victim(s) by filing a criminal complaint where it finds violations of non-discrimination or human rights which constitute crimes. The Institution replaces the National Human Rights Institution established in 2012. The new equality body has not yet been established.

The Ombudsman's Office, also established in June 2012, is tasked with reviewing the acts and operations of the administration and making suggestions to ensure the administration's compliance with the principles of human rights, justice and the rule of law. The Ombudsman's Office started to receive complaints in March 2013. While it might also take on the function of an independent body on racial discrimination, the Ombudsman's Office lacks the power to carry out investigations on its own initiative and there are concerns regarding its impartiality and neutrality, as noted by ECRI. While the Institution and the Ombudsman's Office lack the mandate to assist victims in filing discrimination claims, the equality body envisaged in the draft anti-discrimination law is tasked with

²¹ Foggo, H., 'Ulusal Roma Strateji Planı "İzleme Kurulu"na Öneriler-1' (Proposals for the National Roma Strategy Plan "Monitoring Council"), Facebook entry, 23 February 2017, available at: <https://www.facebook.com/377799739037919/photos/pcb.783857811765441/783857395098816/?type=3>.

'giving assistance of every kind to those who claim to have been subject to discrimination'.²²

7. Key issues

- The yet to be established equality body will also function as the National Prevention Mechanism on Torture, which may dilute its strength and effectiveness.
- The equality body's independence has not been ensured in line with the Paris Principles and the EU *acquis*.
- The grounds of anti-discrimination in the Law on the Human Rights and Equality Institution of Turkey, the Constitution and various laws still do not include sexual orientation.
- Positive action in respect of sexual orientation is not allowed.
- Various laws prohibiting discrimination have limited material and personal scopes.
- The scope of the duty to provide reasonable accommodation is more limited than the Employment Equality Directive 2000/78/EC. The test regarding reasonable accommodation is non-existent; consequently, there is no guidance for labour inspectors, judges, employers and persons with disabilities.
- There is no specific prohibition regarding victimisation, discrimination by association and hate speech.
- The Law on the Human Rights and Equality Institution of Turkey and the Law on Disabilities do not elaborate on what can be considered a legitimate aim for the purpose of objective justification of indirect discrimination.
- Sanctions are not explicitly mentioned in various laws containing anti-discrimination provisions. Where they are mentioned, they are not dissuasive. Violations which are criminal offences are punishable with short prison sentences which are often convertible to small fines.
- Turkish law does not explicitly recognise the standing of non-governmental organisations to bring claims in support of victims of discrimination, with the exception of trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and heritage. In addition, in criminal cases, any legal entity which can demonstrate harm is de jure entitled to be granted standing. However, court practice varies.
- The mandates of the national and local human rights bodies and the Ombudsman Institution do not explicitly refer to protection from discrimination and have limited possibilities for intervention and influence.
- Discriminatory and hate speech and conduct against minorities, particularly Roma, LGBTI persons, Kurds and non-Muslims (particularly Jews) is rampant in daily life, political discourse and the media.
- The judicial authorities are reluctant to enforce legislation prohibiting hate speech and discrimination.
- The various government initiatives launched with the stated goal of addressing the problems of Kurds, Roma and Alevis have not produced tangible policy outcomes and legislative measures to address the discrimination these groups face in education, employment, housing, access to social services and freedom of religion.
- The ECtHR's rulings against mandatory religion courses, the non-recognition of Alevi places of worship and the exclusion of these places of worship from social advantages granted to mosques, and the mandatory indication of religion in official identity cards remain unimplemented.
- Turkey continues to be the only member of the Council of Europe which does not recognise the right to conscientious objection to military service. The ECtHR rulings on this issue remain unimplemented.
- The Government continues to develop policies, design laws and adopt executive measures in the area of human rights and anti-discrimination without consulting

²² Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), April 2016, Article 6(2)(ç).

NGOs or, in the rare cases where it does, without taking into account their suggestions or criticisms.

RÉSUMÉ

1. Introduction

Le 15 juillet 2016, le gouvernement turc a survécu à une tentative de coup d'État à laquelle il a réagi en lançant une vague de répression contre l'opposition politique démocratique et en pratiquant des purges ciblant des dizaines de milliers de fonctionnaires, y compris des juges, des procureurs, des enseignants, des artistes, des universitaires, des membres des services de sécurité y compris les militaires et la police, des membres des services de renseignement, des gouverneurs et des gouverneurs de districts, et des autorités municipales, y compris des maires élus. Parmi les 100 000 personnes au moins touchées par ces purges au sein de la fonction publique, plus de 40 000 ont été emprisonnées au motif qu'elles auraient été affiliées au mouvement Gülen ou qu'elles le soutiendraient – le gouvernement tenant ce mouvement pour responsable d'avoir fomenté la tentative de coup d'État.²³

Parmi les personnes en détention préventive sans qu'aucune preuve étaye l'accusation de terrorisme figurent 2 386 juges et procureurs, y compris deux membres de la Cour constitutionnelle turque, 109 membres de la Haute Cour d'appel, 41 membres du Conseil d'État et 5 membres du Conseil supérieur des juges et des procureurs,²⁴ 13 membres du Parlement y compris les deux co-présidents, 89 maires élus et plus de 3 000 membres du Parti démocratique des peuples pro-kurde,²⁵ des hommes d'affaires et plus de 150 journalistes et militants.²⁶ Environ 180 organes de presse²⁷ et plus de 1 500 associations ont été fermés.²⁸ L'état d'urgence déclaré par le gouvernement le 20 juillet en réponse à la tentative de coup d'État a été prolongé à plusieurs reprises et reste en vigueur en janvier 2017. Durant cette période, le gouvernement a géré le pays par décrets exécutifs sans contrôle parlementaire ni contrôle juridictionnel.

Ces évolutions interviennent après des allégations alarmantes relatives à des violations des droits de l'homme commises par les forces de sécurité turques dans la région kurde. Dans le cadre d'une opération qui a été lancée en juillet 2015 et qui se poursuit en 2017, les militaires ont effectué des raids dans des villes densément peuplées en utilisant des milliers d'hommes prêts au combat, des chars, des véhicules blindés et de l'artillerie lourde pour faire disparaître les barricades et les tranchées que le PKK avait construites dans des zones résidentielles; ils ont bombardé et rasé des villes entières sans tenir aucun compte de la présence de civils piégés au milieu de ces opérations. Selon le Haut-Commissariat des Nations unies aux droits de l'homme, quelque 2 000 personnes ont été tuées dans les zones de couvre-feu entre juillet 2015 et décembre 2016, parmi lesquelles 1 200 civils, dont des femmes et des enfants.²⁹ Beaucoup d'entre eux sont morts faute de soins

²³ Ces chiffres se basent sur le rapport publié en mars 2017 par le principal parti d'opposition, le Parti républicain du peuple. Karabağlı, H., «CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kıydı» (Rapport du CHP sur le bilan de l'état d'urgence: plus de 100 000 suspects; au moins 25 suicides), T24, 2 mars 2017, disponible (en turc) sur <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

²⁴ Commission européenne (2016), *Rapport de suivi concernant la Turquie*, Bruxelles, 9 novembre 2016, p. 9.

²⁵ Informations reçues du Parti démocratique des peuples, 4 mars 2016.

²⁶ Karabağlı, H., «CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kıydı» (Rapport du CHP sur le bilan de l'état d'urgence: plus de 100 000 suspects; au moins 25 suicides), T24, 2 mars 2017, disponible (en turc) sur <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

²⁷ Karabağlı, H., «CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kıydı» (Rapport du CHP sur le bilan de l'état d'urgence: plus de 100 000 suspects; au moins 25 suicides), T24, 2 mars 2017, disponible (en turc) sur: <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

²⁸ <http://t24.com.tr/haber/tam-liste-15-temmuzdan-sonra-kac-khk-cikarildi-kac-kurum-kapatildi-hangi-kurumdan-toplam-kac-kisi-ihrac-edildi,374482>.

²⁹ Haut-Commissariat des Nations unies aux droits de l'homme, *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, février 2017, p. 5-7, disponible sur: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

médicaux d'urgence. Plus de 355 000 habitants ont été déplacés et de nombreuses personnes ont disparu et ont été victimes de tortures et d'un usage excessif de la force.³⁰

Le Parlement turc a adopté en janvier 2017 une série d'amendements constitutionnels destinés à modifier le système politique de la Turquie, qui passe d'une démocratie parlementaire à un régime présidentiel «de style turc».³¹ S'ils sont adoptés lors du référendum populaire prévu le 16 avril 2017, ces amendements risquent de compromettre le contrôle sur le pouvoir exécutif et de conduire ainsi la Turquie vers un régime autoritaire.

La Turquie est une société multiethnique, multireligieuse et multilingue. Aucune donnée officielle ne permet de connaître la composition de la population en termes d'origine ethnique, de confession et de langue maternelle, étant donné que le gouvernement s'abstient de poser ces questions dans les recensements depuis les années 1960. Conformément au traité de paix de Lausanne signé avec les alliés en 1923, le gouvernement turc a accordé non sans réticence le statut de minorité aux «non-Musulmans», et limité de facto ensuite cette protection aux Juifs et aux chrétiens orthodoxes arméniens et grecs en excluant d'autres groupes non musulmans tels que les chrétiens syriaques et protestants. En 2013, un tribunal de première instance a contesté pour la première fois cette politique officielle vis-à-vis des minorités en affirmant que le traité de Lausanne accordait le statut de minorité et des droits à tous les citoyens non musulmans.³²

Si la politique de non-reconnaissance des Kurdes, qui forment la minorité la plus importante du pays, évolue depuis quelques années, le gouvernement continue de refuser toute reconnaissance légale ou politique aux Aléviens, principale minorité religieuse dont l'interprétation de l'islam diffère de celle de la majorité sunnite. En dépit des arrêts de la Cour européenne des droits de l'homme (CouEDH) déclarant que la non-reconnaissance des lieux de cultes alévis,³³ les cours de religion obligatoires,³⁴ la mention obligatoire de la religion sur les documents d'identité officiels³⁵ et le refus d'accorder aux Fondations aléviennes l'exonération du paiement des factures d'électricité octroyée aux lieux de cultes sunnites,³⁶ constituent une violation du droit à la liberté religieuse, le gouvernement refuse de mettre fin à sa politique assimilationniste. Cette situation a conduit la Grande chambre de la Cour européenne des droits de l'homme à conclure le 26 avril 2016 que les politiques turques à l'égard des Aléviens dans leur intégralité violent les droits de la minorité alévie en vertu de l'article 9 (liberté de religion) et de l'article 14 (interdiction de discrimination).³⁷ Une autre série d'arrêts de la CouEDH restant sans effet concerne l'objection de conscience,³⁸ que la Turquie ne reconnaît pas; elle est le seul pays du Conseil de l'Europe à ne pas proposer un service civil en remplacement du service militaire. Les témoins de Jéhovah, de même que les objecteurs de conscience ayant une motivation politique (pacifistes et objecteurs absolus), demeurent soumis à un cercle vicieux de poursuites, d'emprisonnement et de recrutement militaire forcé.

³⁰ Haut-Commissariat des Nations unies aux droits de l'homme, *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, février 2017, p. 5-7.

³¹ Bora, B., «Turkey's constitutional reform: All you need to know», Al Jazeera, 17 janvier 2017, disponible sur: <http://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html>.

³² Commission européenne (2013), *Rapport de suivi concernant la Turquie*, Bruxelles, p. 61, disponible sur: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

³³ CouEDH, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı c. Turquie*, requête n° 32093/10, 2 décembre 2014.

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

³⁵ CouEDH, *Sinan Işık c. Turquie*, requête n° 21924/05, 2 février 2010.

³⁶ CouEDH, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı c. Turquie*, requête n° 32093/10, 2 décembre 2014.

³⁷ CouEDH, *affaire İzzettin Doğan et autres c. Turquie*, Grande chambre, requête n° 62649/10, 26 avril 2016.

³⁸ CouEDH, *Buldu et autres c. Turquie*, requête n° 14017/08, 3 juin 2014; CouEDH, *Tarhan c. Turquie*, requête n° 9078/06, 17 juillet 2012; CouEDH, *Savda c. Turquie*, requête n° 42730/05, 12 juin 2012.

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

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

Des représentants du gouvernement, des agents de la fonction publique et des politiciens font régulièrement des déclarations discriminatoires à l'encontre des personnes LGBTI, des non-Musulmans, des Roms et des Kurdes, sans jamais être sanctionnés. La couverture des médias traditionnels est notoirement haineuse envers les minorités. Mais les autorités judiciaires n'appliquent pas les lois interdisant l'incitation à la haine.

2. Législation principale

La Turquie n'étant pas membre de l'Union européenne, les directives 2000/43/CE et 2000/78/CE n'y ont pas été mises en œuvre. Le Parlement turc a adopté le 6 avril 2016 la loi sur l'Autorité turque des droits de l'homme et de l'égalité, première loi nationale de lutte contre la discrimination. Elle interdit la discrimination directe, indirecte et multiple ainsi que les injonctions de discriminer, les discriminations par présomption, la ségrégation, le harcèlement et le harcèlement moral (*mobbing*) sur le lieu de travail. Les rétorsions et la discrimination par association ne sont pas prévues.

Des dispositions antidiscrimination sont contenues en outre dans la Constitution et plusieurs lois. La clause de protection de l'égalité incluse dans la Constitution turque, à savoir son article 10, prévoit une liste non exhaustive de motifs protégés. Parmi les lois contenant des clauses antidiscrimination, il convient de souligner plus particulièrement la loi sur les personnes handicapées, qui peut être considérée comme une loi antidiscrimination. Ceci dit, elle interdit la discrimination fondée sur le motif du handicap uniquement, et son champ d'application matériel est limité. Par ailleurs, diverses lois – loi sur le travail, code pénal et loi sur l'éducation nationale notamment – comportent des dispositions antidiscrimination mais leurs champs d'application matériels sont eux aussi limités. L'orientation sexuelle n'est incluse dans la liste des motifs d'aucune des lois ni de la Constitution.

Si la haine et l'incitation à la haine sont interdites en vertu du Code pénal, la Commission européenne contre le racisme et l'intolérance (ECRI) fait remarquer que «la définition du crime de haine est trop restreinte et le Code pénal ne fait pas expressément de la motivation raciste ou homo/transphobe une circonstance aggravante».³⁹ De surcroît, les motifs du discours de haine sont exhaustifs et n'incluent pas l'appartenance ethnique, l'âge et l'orientation sexuelle. La nouvelle loi antidiscrimination n'interdit pas le discours de haine ou le crime de haine.

En vertu de l'article 90 de la Constitution, les traités internationaux dûment ratifiés ont force de loi. Si le traité est directement applicable, aucune intégration en droit interne n'est requise. En cas de conflit entre les lois nationales et les traités internationaux en matière de droits de l'homme, ces derniers prévalent. La Cour constitutionnelle ne peut donc être saisie pour l'inconstitutionnalité d'un traité international. La Turquie est partie à bon nombre de traités internationaux contenant des dispositions visant à lutter contre la discrimination et à promouvoir l'égalité de traitement, et admet le droit au dépôt d'une plainte individuelle au titre de plusieurs de ces traités, hormis la Convention sur l'élimination de toutes les formes de discrimination raciale. La Turquie n'a pas admis non plus la procédure de recours collectif prévue par la Charte sociale européenne révisée.

3. Principes généraux et définitions

Le seul motif défini par la législation turque est le handicap. La loi sur l'Autorité turque des droits de l'homme et de l'égalité (n° 6701) et la loi sur les personnes handicapées (n° 5378) contiennent des définitions identiques et conformes à la convention des Nations unies relative aux droits des personnes handicapées et à l'arrêt de la Cour de justice de l'UE dans les affaires *Ring et Skouboe Werge*.⁴⁰

Alors que le cadre constitutionnel et législatif turc évite expressément de fournir la moindre définition ou catégorisation basée sur l'appartenance ethnique, la race ou la religion, il existe plusieurs lois et politiques pertinentes dans lesquelles des définitions ou catégorisations équivalentes sont formulées et engendrent une discrimination directe ou indirecte fondée sur la religion. Il existe également une jurisprudence portant sur la définition de la religion en général et de l'islam/des Musulmans en particulier. La Cour de cassation a dit pour droit que certains systèmes de croyance ne peuvent être admis en tant que religion, et en a défini d'autres en contradiction avec les croyants concernés. Dans un cas comme dans l'autre, la Cour a fondé son arrêt sur l'avis consultatif de la Direction des affaires religieuses (*Diyanet İşleri Başkanlığı*, Diyanet), organisme public avalisé par la Constitution qui régit les affaires entre l'État et l'islam.

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

La loi sur l'Autorité turque des droits de l'homme et de l'égalité interdit la discrimination directe et indirecte; la discrimination multiple; la discrimination par présomption; le

³⁹ Commission européenne contre le racisme et l'intolérance (ECRI) (2016), Rapport sur la Turquie (cinquième cycle de monitoring), CRI(2016)37, adopté le 29 juin 2016, Strasbourg, 4 octobre 2016, p. 9, p. 15 et p. 39, disponible sur: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-FRE.pdf>.

⁴⁰ Cour de justice de l'Union européenne (CJUE), n° C-335/11 et C-337/11, *Ring et Skouboe Werge c. Danemark*, 11 avril 2013.

harcèlement; le harcèlement moral (*mobbing*); la ségrégation; l'injonction de discriminer et la soumission à cette injonction; et la non-fourniture d'un aménagement raisonnable. La loi sur le travail, la loi sur les personnes handicapées, le Code pénal, la loi sur l'éducation nationale et la loi sur les fonctionnaires interdisent également une ou plusieurs de ces formes de discrimination, fondée dans chaque cas sur une liste restreinte de motifs. Le cadre juridique turc est muet pour ce qui concerne la discrimination par association et le test de situation. Les rétorsions ne sont interdites que de façon très limitée.

Parmi les cinq motifs visés par les directives 2000/43/CE et 2000/78/CE, la législation nationale turque prévoit une action positive concernant la race/l'appartenance ethnique, la religion/les convictions, l'âge et le handicap. L'action positive en rapport avec l'orientation sexuelle n'est pas autorisée. Sans l'affirmer explicitement en tant que tel, l'article 10 de la Constitution implique le principe de l'action positive, mais uniquement pour ce qui concerne les motifs de l'âge et du handicap. La loi sur l'Autorité turque des droits de l'homme et de l'égalité prévoit une dérogation à l'interdiction de discrimination dans le cas d'un «traitement qui s'avère nécessaire, approprié et proportionné en vue de supprimer des inégalités» fondées sur la race/l'appartenance ethnique, la religion/les convictions, le handicap et l'âge.

Il existe cependant, bien qu'elles ne soient pas désignées en tant que telles par la législation, plusieurs lois et réglementations prévoyant des mesures d'action positive dans les domaines de l'éducation, de l'emploi et d'une série de services (assurances sociales, transports, etc.), y compris des quotas concernant les personnes handicapées. Aucune action positive n'est prévue à l'intention des Roms, bien que le gouvernement se soit engagé, lors du lancement de son initiative en leur faveur, à améliorer leurs conditions d'emploi, d'enseignement et de logement. La situation particulière des groupes non-Musulmans en vertu du traité de Lausanne ne leur confère pas le droit à une discrimination positive fondée sur la religion. À l'inverse, l'État turc continue de limiter le financement public de services religieux à la majorité musulmane sunnite en payant les salaires des prêtres sunnites (*imams*) et en accordant aux mosquées la gratuité de leur approvisionnement en eau et en électricité.

4. Champ d'application matériel

La nouvelle loi sur l'Autorité turque des droits de l'homme et de l'égalité interdit la discrimination en matière d'emploi, d'emploi indépendant, d'accès à l'emploi, d'accès à l'emploi indépendant, y compris les critères de sélection, les conditions de recrutement et la promotion, et de conditions de travail, y compris les licenciements, fondée sur les motifs de la race/l'appartenance ethnique, de la religion/les convictions, d'âge et du handicap seulement (à l'exclusion de l'orientation sexuelle), à la fois dans le secteur privé et dans le secteur public. Elle n'interdit pas la discrimination en matière de rémunération. Elle interdit aussi la discrimination pour ce qui concerne l'orientation professionnelle, la formation et la reconversion professionnelles, y compris l'expérience pratique de travail et la formation en cours d'emploi; l'adhésion et la participation à des «organisations professionnelles»; l'octroi de la sécurité sociale, de soins de santé et d'avantages sociaux; l'éducation; l'accès et la fourniture de biens et de services; et le logement.

La loi s'applique à la fois aux personnes physiques et aux personnes morales, tant dans le secteur public que dans le secteur privé.

5. Mise en application de la loi

En Turquie, les plaintes pour discrimination sont déposées auprès de juridictions civiles, administratives et pénales, ou en recourant à des dispositifs administratifs. Les victimes de discrimination peuvent réclamer devant les tribunaux une indemnisation pour préjudice financier, pour perte de revenus et/ou pour préjudice moral. Des poursuites parallèles sont possibles devant des juridictions pénales, civiles ou administratives.

Il est admis en effet d'introduire une action civile en dommages-intérêts devant une juridiction civile ou du travail, une requête administrative ou une plainte au pénal. Si l'acte ou l'action discriminatoire est de nature administrative, la victime de discrimination est tenue de réclamer, avant de saisir la justice, une indemnisation de la part de l'instance administrative responsable de l'acte ou de l'action. Les décisions judiciaires sont, par définition, exécutoires. L'action en justice est la seule procédure permettant aux victimes d'être indemnisées, mais elle est onéreuse, l'octroi d'une assistance en justice est régi par des critères extrêmement stricts, et les arrêts ne sont pas rendus avant un ou deux ans.

Lorsqu'une victime opte pour un règlement à l'amiable plutôt que pour une action en justice, les méthodes alternatives de règlement des litiges mises à sa disposition par le système juridique turc sont très limitées.

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

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

Une autre option offerte aux victimes de discrimination consiste à s'adresser à des instances non judiciaires telles que les conseils pour les droits de l'homme institués au niveau des provinces et des districts ou à la commission d'enquête sur les droits de l'homme de la Grande assemblée nationale turque – lesquels sont tous habilités à examiner les plaintes pour discrimination en matière d'emploi. Les conseils pour les droits de l'homme ne sont cependant pas indépendants de l'exécutif et ils restent largement sous-utilisés. L'Autorité turque des droits de l'homme et de l'égalité, qui sera mise en place début en vertu de la nouvelle loi pour remplacer l'Institution nationale turque pour les droits de l'homme créée en 2012, sera habilitée à imposer des sanctions administratives (sous la forme d'amendes pécuniaires) à l'encontre de personnes morales et physiques pratiquant une discrimination. Les décisions de ces différentes instances ne sont pas exécutoires et leurs pouvoirs contraignants sont faibles. Des inspecteurs du travail, des inspecteurs d'assurance et des inspecteurs scolaires sont également chargés de contrôler la conformité aux lois pertinentes. Les inspecteurs du travail et scolaires sont habilités à recevoir et à examiner des plaintes individuelles, y compris des allégations de non-respect des dispositions antidiscrimination de la loi sur le travail et de la loi sur l'éducation nationale.

Les associations/organisations/syndicats ne jouissent en Turquie que d'un droit très limité d'agir au nom de victimes de discrimination. Leur droit d'ester en justice au nom de leurs membres est lui aussi limité à certaines circonstances précises. L'ex-Institution nationale pour les droits de l'homme avait habilité les organisations de défense des droits de l'homme et les organisations syndicales à déposer plainte auprès d'elle au nom de victimes d'un non-respect de ces droits. Les réglementations relatives à l'Autorité turque des droits de l'homme et de l'égalité, à mettre en place, n'ont pas encore été publiées.

Les associations/organisations/syndicats ne sont pas habilitées à agir en soutien de victimes de discrimination. Ils peuvent néanmoins inviter les procureurs à intenter des poursuites à l'encontre des auteurs d'infractions et intervenir dans des affaires pénales intentées par des procureurs généraux pour autant qu'ils soient en mesure de démontrer le préjudice causé par l'infraction. Des organisations LGBT demandent avec insistance depuis quelques années à intervenir dans des affaires pénales en cours pour agir au nom des victimes de crimes haineux et de crimes d'honneur. Si de nombreux tribunaux rejettent souvent ces demandes, on a assisté récemment à quelques cas dans lesquels ils ont répondu favorablement. Dans un arrêt marquant prononcé début 2015, la Cour constitutionnelle a autorisé plusieurs ONG à soumettre un mémoire en qualité d'*amicus curiae* dans une affaire en instance de disparition forcée.⁴¹ Bien qu'il ne s'agisse pas d'une affaire de discrimination et que la partie requérante n'ait pas introduit de recours pour discrimination, la décision de la Cour d'accepter l'intervention d'un *amicus curiae* de la société civile crée un précédent majeur sur lequel s'appuieront probablement les organisations de la société civile pour soutenir des victimes de discrimination.

Le droit national turc autorise un renversement de la charge de la preuve de la partie requérante vers la partie défenderesse.

L'article 21 de la loi sur l'Autorité turque des droits de l'homme et de l'égalité (n° 6701) dispose qu'une fois que la partie requérante a fait état d'une présomption de discrimination, la charge de la preuve revient à la partie défenderesse, qui doit prouver qu'il n'y a pas eu de discrimination. Toutefois, cet article «semble être limité aux demandes adressées à l'Autorité des droits de l'homme et de l'égalité et ne s'applique pas aux procédures judiciaires».⁴² La loi sur le travail est la seule dont les dispositions prévoient des règles en matière de charge de la preuve dans des affaires de discrimination: cette charge incombe aux salariés, mais si le salarié expose une situation suggérant une forte probabilité quant à l'existence d'une infraction de ce type, c'est à l'employeur qu'il incombe de prouver que tel n'est pas le cas.

Les sanctions en cas de discrimination varient. En vertu de la nouvelle loi sur l'égalité, l'Autorité turque des droits de l'homme et de l'égalité sera habilitée, lorsqu'elle constate une violation de l'interdiction de discrimination, à appliquer des sanctions sous la forme d'une amende pécuniaire allant de 1 000 à 15 000 TRY (250 à 3 800 euros) selon la gravité de l'impact et des conséquences de l'infraction, la situation financière de l'auteur et l'effet aggravant éventuel d'une discrimination multiple. Lorsque le Conseil, à savoir l'organe décisionnel de l'Autorité, l'estime utile, l'amende peut être convertie en avertissement mais une fois seulement. En cas de récidive, elle sera augmentée de 50 %.

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

⁴¹ Turquie, Cour constitutionnelle (*Anayasa Mahkemesi*), requête n° 2013/2640, 8 avril 2013.

⁴² Commission européenne contre le racisme et l'intolérance (ECRI) (2016), Rapport sur la Turquie (cinquième cycle de monitoring), CRI(2016)37, adopté le 29 juin 2016, Strasbourg, 4 octobre 2016, p. 16, disponible sur: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-FRE.pdf>.

Le gouvernement élabore des politiques, conçoit des lois et adopte des mesures d'exécution en matière de droits de l'homme et de non-discrimination sans consulter d'ONG ou, dans les rares cas où il le fait, sans tenir compte de leurs suggestions ou critiques. Cet état de fait a été illustré récemment encore par l'adoption de la stratégie en faveur des Roms en 2016. Des représentants d'organisations de la société civile ayant participé au processus de délibération au cours de la période 2009-2016 ont critiqué le gouvernement pour avoir considérablement abrégé et dilué le projet de stratégie qui leur avait été présenté en février 2016 et qu'ils avaient commenté.⁴³

6. Organismes de promotion de l'égalité de traitement

En vertu de la nouvelle loi sur l'Autorité des droits de l'homme et de l'égalité, la Turquie sera dotée d'un «organisme spécialisé» pour la promotion de l'égalité de traitement sans distinction de race ou d'origine ethnique, mais celui-ci ne sera pas conforme à l'article 13 de la directive sur l'égalité raciale. Des ONG nationales et internationales, de même que des organes des Nations unies, critiquent son manque d'indépendance ainsi qu'un non-respect des principes de Paris.

L'Autorité aura pour mandat d'entendre les plaintes pour discrimination fondée sur la race/l'appartenance ethnique, la religion/les convictions, l'âge et le handicap. L'orientation sexuelle en est exclue. L'Autorité pourra être saisie par des personnes physiques et des personnes morales. Le dépôt d'une plainte sera gratuit. Les actes liés à l'exercice du pouvoir législatif et judiciaire, les décisions du Conseil supérieur des juges et des procureurs, et les actes exemptés de contrôle juridictionnel en vertu de la Constitution ne peuvent faire l'objet de plaintes auprès de l'Autorité. L'Autorité aura en outre le pouvoir ex officio d'entamer des enquêtes de sa propre initiative concernant des violations des droits de l'homme et de l'interdiction de discrimination. Le statut juridique de l'Autorité lui permettra de porter plainte au nom de victimes identifiées en déposant une plainte au pénal lorsqu'elle constate des violations de l'interdiction de discrimination ou des droits de l'homme constitutives d'une infraction pénale. L'Autorité remplace l'Institution nationale pour les droits de l'homme mise en place en 2012. Le nouvel organisme pour l'égalité n'a pas encore été institué.

Le Bureau du Médiateur, également créé en juin 2012, est chargé pour sa part d'examiner les actes et interventions de l'administration et de formuler des suggestions afin que cette dernière agisse conformément aux principes des droits fondamentaux, de la justice et de la primauté du droit. Le Bureau du Médiateur a commencé de recevoir des plaintes en mars 2013. Alors qu'il pourrait également assumer la fonction d'organisme indépendant en matière de discrimination raciale, le Bureau du Médiateur n'est pas compétent pour mener des enquêtes de sa propre initiative et certaines préoccupations ont été exprimées quant à son impartialité et sa neutralité, comme le constate l'ECRI. Si l'Autorité et le Bureau du Médiateur ne sont pas habilités à aider des victimes à introduire des recours pour discrimination, l'organisme pour l'égalité envisagé dans le cadre du projet de loi antidiscrimination est chargé «d'apporter tout type d'assistance à ceux qui allèguent avoir été victimes de discrimination».⁴⁴

7. Points essentiels

- L'organisme pour l'égalité encore à créer fonctionnera également en tant que mécanisme national de prévention de la torture, ce qui pourrait affaiblir sa force et son efficacité.

⁴³ Foggo, H., «Ulusal Roman Strateji Planı "İzleme Kurulu"na Öneriler-1» (Propositions de plan stratégique national en faveur des Roms «Conseil de suivi»), posté sur Facebook, 23 février 2017, disponible (en turc) sur: <https://www.facebook.com/377799739037919/photos/pcb.783857811765441/783857395098816/?type=3>.

⁴⁴ Turquie, loi sur l'Autorité turque des droits de l'homme et de l'égalité (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), avril 2016, article 6, paragraphe 2 sous c).

- L'indépendance de l'organisme pour l'égalité n'est pas garantie conformément aux principes de Paris et de l'acquis de l'UE.
- Les motifs de non-discrimination visés par la loi sur l'Autorité turque des droits de l'homme et de l'égalité, la Constitution et diverses autres lois n'incluent toujours pas l'orientation sexuelle.
- L'action positive en rapport avec l'orientation sexuelle n'est pas autorisée.
- Plusieurs lois interdisant la discrimination ont un champ matériel et personnel limité.
- Le champ d'application de l'obligation d'aménagement raisonnable est plus restreint que celui de la directive 2000/78/CE relative à l'égalité dans le domaine de l'emploi. Le test en matière d'aménagement raisonnable étant inexistant, aucune orientation n'est fournie aux inspecteurs du travail, aux juges, aux employeurs et aux personnes handicapées.
- Aucune interdiction ne porte spécifiquement sur les rétorsions, la discrimination par association et le discours de haine.
- La loi sur l'Autorité turque des droits de l'homme et de l'égalité et la loi sur les personnes handicapées ne précisent pas ce qui peut être considéré comme un but légitime aux fins d'une justification objective d'une discrimination indirecte.
- Les sanctions ne sont pas expressément mentionnées dans diverses lois comportant des dispositions antidiscrimination. Et, lorsqu'elles sont mentionnées, elles ne sont pas dissuasives. Les violations constituant des délits pénaux sont punissables de courtes peines d'emprisonnement souvent converties en modestes amendes.
- La législation turque ne reconnaît pas explicitement l'habilitation des organisations non gouvernementales à déposer plainte en soutien de victimes de discrimination, hormis les syndicats, les associations de protection des consommateurs et les associations œuvrant à la protection et à la préservation de l'environnement, de la culture et du patrimoine. Par ailleurs, lorsqu'il s'agit d'affaires pénales, toute entité juridique en mesure de démontrer le préjudice est de jure habilitée à ester en justice. La pratique judiciaire varie cependant à cet égard.
- Les mandats des organismes nationaux et locaux de défense des droits de l'homme ainsi que le Bureau du Médiateur ne font pas expressément référence à la protection contre la discrimination et leurs possibilités d'intervention et d'influence sont limitées.
- Les discours et comportements discriminatoires et haineux envers les minorités, et plus particulièrement envers les Roms, les personnes LGBTI, les Kurdes et les non-Musulmans (les Juifs surtout), sont omniprésents dans la vie courante, dans le débat politique et dans les médias.
- Les autorités judiciaires se montrent réticentes à faire appliquer la législation interdisant le discours haineux et la discrimination.
- Les diverses initiatives gouvernementales lancées avec l'objectif déclaré d'améliorer la situation des Kurdes, des Roms et des Aléviens, ne se sont concrétisées par aucun résultat tangible en termes d'actions ou de mesures législatives visant à remédier à la discrimination à laquelle ces groupes se trouvent confrontés dans les domaines de l'éducation, de l'emploi, du logement, de l'accès aux services sociaux et de la liberté de religion.
- Les arrêts de la Cour européenne des droits de l'homme à l'encontre des cours de religion obligatoires, de la non-reconnaissance des lieux de culte alévis et de l'exclusion de ces lieux de culte des avantages sociaux accordés aux mosquées, et de la mention obligatoire de la religion sur les cartes d'identité officielles demeurent sans effet.
- La Turquie reste le seul membre du Conseil de l'Europe à ne pas reconnaître le droit à l'objection de conscience en ce qui concerne le service militaire. Les arrêts prononcés par la CouEDH sur cette question restent sans suite.
- Le gouvernement continue d'élaborer des politiques, de concevoir des lois et d'adopter des mesures exécutives en matière de droits fondamentaux et de non-discrimination sans consulter les ONG ou, dans les rares cas où il le fait, sans prendre leurs suggestions ou critiques en compte.

ZUSAMMENFASSUNG

1. Einleitung

Am 15. Juli 2016 überlebte die türkische Regierung einen Putschversuch, auf den sie mit einem scharfen Vorgehen gegen die demokratische politische Opposition reagierte: Zehntausende von Beamten, darunter Richter, Staatsanwälte, Lehrer, Künstler, Akademiker, Mitglieder des Sicherheitsapparats einschließlich des Militärs und der Polizei, Mitglieder der Nachrichtendienste, Gouverneure und Distrikt-Gouverneure sowie kommunale Amtsträger einschließlich gewählter Bürgermeister wurden entlassen. Von den mehr als 100 000 Personen, die aus dem öffentlichen Dienst entlassen wurden, wurden über 40 000 unter der Anschuldigung inhaftiert, Verbindungen zur Gülen-Bewegung zu unterhalten oder diese zu unterstützen;⁴⁵ die Gülen-Bewegung wird von der Regierung für den Putschversuch verantwortlich gemacht.

Unter den Personen, die ohne entsprechende Beweise unter dem Vorwurf des Terrorismus in Untersuchungshaft gehalten werden, befinden sich 2386 Richter und Staatsanwälte, darunter zwei Mitglieder des türkischen Verfassungsgerichts, 109 Mitglieder des Obersten Berufungsgerichts, 41 Mitglieder des Staatsrats und fünf Mitglieder des Hohen Richter- und Staatsanwältersrats,⁴⁶ 13 Abgeordnete des Parlaments einschließlich der beiden Ko-Vorsitzenden, 89 gewählte Bürgermeister und mehr als 3000 Mitglieder der pro-kurdischen Demokratischen Volkspartei,⁴⁷ Geschäftsleute und über 150 Journalisten und Aktivisten.⁴⁸ Rund 180 Medienunternehmen⁴⁹ und über 1500 Verbände wurden geschlossen.⁵⁰ Der von der Regierung am 20. Juli als Reaktion auf den Putschversuch verhängte Ausnahmezustand wurde mehrfach verlängert und ist auch im Januar 2017 noch in Kraft. In dieser Zeit wurde das Land über Exekutivdekrete regiert, ohne parlamentarische Kontrolle der Regierung oder gerichtliche Überprüfung.

Diese Entwicklungen folgten auf alarmierende Vorwürfe über Menschenrechtsverletzungen durch die türkischen Sicherheitskräfte in der kurdischen Region. In einer Operation, die im Juli 2015 begann und bis ins Jahr 2017 hineinreichte, führte das Militär in dicht besiedelten Städten Razzien mit tausenden von kampfbereiten Truppen, Panzern, gepanzerten Fahrzeugen und schwerer Artillerie durch, um die Barrikaden und Gräben zu entfernen, die die PKK in Wohngebieten errichtet hatte; dabei wurden ganze Städte bombardiert und ausgelöscht, ohne Rücksicht auf die Anwesenheit von Zivilisten, die inmitten der Operationen eingeschlossen waren. Nach Angaben des Büros des UN-Hochkommissars für Menschenrechte wurden zwischen Juli 2015 und Dezember 2016 rund 2000 Menschen in den von Ausgangssperren betroffenen Gebieten getötet; 1200 davon waren Zivilisten,

⁴⁵ Die genannten Zahlen basieren auf einem Bericht, der im März 2017 von der größten Oppositionspartei, der Republikanischen Volkspartei, veröffentlicht wurde: Karabağlı, H., „CHP'den ‚OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kiydi“ (CHP-Bericht zur „Bilanz des Ausnahmezustands“: Die Zahl der Verdächtigen überstieg 100 000; mindestens 25 Menschen begingen Selbstmord), T24, 2. März 2017, abrufbar unter <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

⁴⁶ Europäische Kommission (2016), *Turkey Progress Report*, Brüssel, 9. November 2016, S. 9.

⁴⁷ Informationen der Demokratischen Volkspartei, 4. März 2016.

⁴⁸ Karabağlı, H., „CHP'den ‚OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kiydi“ (CHP-Bericht zur „Bilanz des Ausnahmezustands“: Die Zahl der Verdächtigen überstieg 100 000; mindestens 25 Menschen begingen Selbstmord), T24, 2. März 2017, abrufbar unter <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

⁴⁹ Karabağlı, H., „CHP'den ‚OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kiydi“ (CHP-Bericht zur „Bilanz des Ausnahmezustands“: Die Zahl der Verdächtigen überstieg 100 000; mindestens 25 Menschen begingen Selbstmord), T24, 2. März 2017, abrufbar unter <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

⁵⁰ <http://t24.com.tr/haber/tam-liste-15-temmuzdan-sonra-kac-khk-cikarildi-kac-kurum-kapatildi-hangi-kurumdan-toplam-kac-kisi-ihrac-edildi,374482>.

darunter auch Frauen und Kinder.⁵¹ Viele von ihnen starben aus Mangel an medizinischer Notversorgung. Mehr als 355 000 Einwohner wurden vertrieben, zahlreiche Menschen verschwanden, wurden gefoltert oder exzessiver Gewalt ausgesetzt.⁵²

Im Januar 2017 verabschiedete das türkische Parlament Verfassungsänderungen, deren Ziel es ist, das politische System der Türkei dahingehend zu verändern, dass die parlamentarische Demokratie durch ein Präsidialsystem „türkischer Art“ ersetzt wird.⁵³ Sollten die Änderungen in dem für den 16. April 2017 angesetzten Referendum angenommen werden, drohen sie, die Kontrolle der Exekutive zu untergraben und die Türkei in ein autoritäres Regime zu führen.

Die Türkei ist eine multiethnische, multireligiöse und mehrsprachige Gesellschaft. Es liegen keine offiziellen Daten über die Zusammensetzung der Bevölkerung hinsichtlich der ethnischen Zugehörigkeit, Konfession und Muttersprache vor, da die Regierung seit 1960 im Zuge von Volkszählungen von solchen Fragen absieht. Gemäß des 1923 mit den Alliierten unterzeichneten Friedensvertrags von Lausanne gewährte die türkische Regierung nicht-muslimischen Minderheiten widerwillig den Minderheitenstatus, wobei daraufhin de facto der Schutz auf Juden und armenische sowie griechisch-orthodoxe Christen beschränkt wurde und andere nicht-muslimische Gruppen, wie syrische und evangelische Christen, ausgegrenzt wurden. Im Jahr 2013 wurde diese offizielle Minderheitenpolitik zum ersten Mal von einer Vorinstanz durch die Entscheidung angefochten, dass der Vertrag von Lausanne allen nicht-muslimischen Bürgern den Minderheitenstatus und entsprechende Rechte gewährt.⁵⁴

Während sich die Politik der Nichtanerkennung gegenüber den Kurden, der größten Minderheit im Lande, geändert hat, verweigert die Regierung den Aleviten, der größten religiösen Minderheit, die eine andere Auslegung des Islam als die der sunnitischen Mehrheit praktiziert, nach wie vor die rechtliche bzw. politische Anerkennung. Trotz der Urteile des Europäischen Gerichtshofs für Menschenrechte (EGMR), wonach die Nichtanerkennung alevitischer Gebetsstätten,⁵⁵ obligatorischer Religionsunterricht,⁵⁶ die obligatorische Angabe der Religionszugehörigkeit in offiziellen Ausweisdokumenten⁵⁷ und die Weigerung, alevitischen Stiftungen die sunnitischen Gebetsstätten gewährte Befreiung von Stromzahlungen zu gewähren,⁵⁸ gegen das Recht auf Religionsfreiheit verstoßen, weigert sich die Regierung, ihre assimilationistische Politik zu beenden. Dies führte dazu, dass die Große Kammer des EGMR am 26. April 2016 zu dem Schluss kam, dass die türkische Politik gegenüber den Aleviten in ihrer Gesamtheit die Rechte der alevitischen Minderheit nach Artikel 9 (Religionsfreiheit) und Artikel 14 (Diskriminierungsverbot) verletzt.⁵⁹ Eine Reihe anderer EGMR-Urteile, die bislang nicht umgesetzt wurden, betrifft die Kriegsdienstverweigerung aus Gewissensgründen,⁶⁰ die in der Türkei – einziges Land des Europarats, in dem keine zivile Alternative zum Militärdienst existiert – nicht anerkannt ist. Die Zeugen Jehovas sowie politisch motivierte Kriegsdienstverweigerer (Pazifisten und

⁵¹ Büro des UN-Hochkommissars für Menschenrechte, *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, Februar 2017, S. 5-7, abrufbar unter:

http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

⁵² Büro des UN-Hochkommissars für Menschenrechte, *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, Februar 2017, S. 5-7.

⁵³ Bora, B., „Turkey's constitutional reform: All you need to know“, Al Jazeera, 17. Januar 2017, abrufbar unter: <http://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html>.

⁵⁴ Europäische Kommission (2013), *Turkey Progress Report*, Brüssel, S. 61, verfügbar unter: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

⁵⁵ EGMR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, Bsw. 32093/10, 2. Dezember 2014.

⁵⁶ EGMR, *Mansur Yalçın and Others v. Turkey*, Bsw. 21163/11, 16. September 2014; EGMR, *Hasan and Eylem Zengin*, Bsw. 1448/04, 9. Januar 2007.

⁵⁷ EGMR, *Sinan Işık v. Turkey*, Bsw. 21924/05, 2. Februar 2010.

⁵⁸ EGMR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, Bsw. 32093/10, 2. Dezember 2014.

⁵⁹ EGMR, *İzzettin Doğan and Others v. Turkey*, Große Kammer, Bsw. 62649/10, 26. April 2016.

⁶⁰ EGMR, *Buldu and Others v. Turkey*, Bsw. 14017/08, 3. Juni 2014; EGMR, *Tarhan v. Turkey*, Bsw. 9078/06, 17. Juli 2012; EGMR, *Savda v. Turkey*, Bsw. 42730/05, 12. Juni 2012.

Totalverweigerer) sind nach wie vor einem Teufelskreis aus Verfolgung, Inhaftierung und militärischer Zwangsrekrutierung ausgesetzt.

Nicht-muslimische Minderheiten, auch die offiziell anerkannten, sehen sich mit erheblichen Einschränkungen ihrer Religionsfreiheit konfrontiert. Die wichtigsten Probleme in diesem Zusammenhang bestehen darin, dass aufgrund eines Mangels an theologischen Schulen kein Klerus ausgebildet werden kann und dass sich die Regierung weigert, eine Genehmigung für die Eröffnung neuer Kirchen (für nicht anerkannte christliche Konfessionen) zu gewähren. Obwohl sich die Gesamtzahl der Menschen der verschiedenen nicht-muslimischen Gemeinschaften in einem Land mit einer Bevölkerung von 75 Millionen auf etwa 100 000 beläuft, gibt es in der Gesellschaft weit verbreitete, durch Verschwörungstheorien geschürte, irrationale Ängste vor christlicher Missionstätigkeit und Zionismus, befeuert durch die antisemitische, antiwestliche und antichristliche Rhetorik der Politiker, Regierungsbeamten, Meinungsbildner und Medien. Die Behörden vernachlässigen ihre Pflicht vollkommen, Nicht-Muslime, vor allem Juden, gegen vorherrschende Hassreden, manchmal verbunden mit Hassverbrechen, in den Medien, dem politischen Diskurs und dem täglichen Leben zu schützen.

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

Regierungsvertreter, Beamte und Politiker machen regelmäßig diskriminierende Äußerungen gegen LGBTI-Menschen, Nicht-Muslime, Roma und Kurden, die ungestraft bleiben. Die Berichterstattung in den Massenmedien gegenüber Minderheiten ist notorisch hasserfüllt. Die gesetzlichen Vorschriften gegen die Aufstachelung zum Hass werden von den Justizbehörden jedoch nicht durchgesetzt.

2. Wichtigste Gesetze

Da die Türkei kein Mitglied der Europäischen Union ist, wurden die Richtlinien 2000/43/EG und 2000/78/EG nicht umgesetzt. Am 6. April 2016 verabschiedete das türkische Parlament das Gesetz über die Menschenrechts- und Gleichstellungsinstitution der Türkei, das erste Antidiskriminierungsgesetz der Türkei. Es verbietet unmittelbare, mittelbare und mehrfache Diskriminierung, Anweisung zur Diskriminierung, Diskriminierung durch Vermutung sowie Segregation, Belästigung und Mobbing am Arbeitsplatz. Viktimisierung und Diskriminierung durch Assoziierung sind nicht enthalten.

Darüber hinaus existieren Antidiskriminierungsvorschriften in der Verfassung und in mehreren Gesetzen. Die Klausel über den Gleichheitsschutz in Artikel 10 der türkischen Verfassung enthält eine nicht abschließende Liste von Schutzmerkmalen. Besondere Erwähnung unter den Gesetzen mit Antidiskriminierungsklauseln verdient das Gesetz über Menschen mit Behinderungen, das als ein Antidiskriminierungsgesetz angesehen werden kann. Das Gesetz verbietet Diskriminierung jedoch ausschließlich aufgrund von Behinderung und hat einen begrenzten sachlichen Geltungsbereich.

Antidiskriminierungsklauseln sind darüber hinaus in verschiedenen Gesetzen, insbesondere im Arbeitsgesetz, im Strafgesetzbuch und im Gesetz für Nationale Bildung enthalten, wiederum jedoch mit begrenzten sachlichen Geltungsbereichen. Sexuelle Orientierung wird in keinem der Gesetze und auch nicht in der Verfassung erwähnt.

Während Hass und Aufstachelung zum Hass nach dem Strafgesetzbuch verboten sind, ist, wie die Europäische Kommission gegen Rassismus und Intoleranz (ECRI) feststellt hat, „die Definition von Hasskriminalität zu eng gefasst und sieht das Strafgesetzbuch nicht ausdrücklich vor, dass rassistische und homo-/transphobe Motive einen erschwerenden Umstand darstellen.“⁶¹ Darüber hinaus ist die Auflistung der Merkmale im Zusammenhang mit Hassrede abschließend und schließt weder ethnische Zugehörigkeit noch Alter noch sexuelle Orientierung mit ein. Das neue Antidiskriminierungsgesetz verbietet weder Hassrede noch Hassverbrechen.

Nach Artikel 90 der Verfassung haben ordnungsgemäß ratifizierte internationale Verträge Rechtskraft. Ist ein Vertrag *self-executing*, so ist er unmittelbar anwendbar. Im Fall von Konflikten zwischen innerstaatlichen Gesetzen und internationalen Menschenrechtsabkommen haben letztere Vorrang. Beschwerden beim Verfassungsgericht bezüglich der Verfassungswidrigkeit internationaler Verträge sind nicht möglich. Die Türkei ist Vertragspartner einer Vielzahl internationaler Abkommen, die Bestimmungen zu Antidiskriminierung und Gleichbehandlung enthalten, und hat im Rahmen vieler dieser Verträge das Recht auf Individualbeschwerden anerkannt, mit Ausnahme des Übereinkommens zur Beseitigung jeder Form von Rassendiskriminierung. Auch das Kollektivbeschwerdeverfahren im Rahmen der revidierten Europäischen Sozialcharta wurde von der Türkei bisher nicht akzeptiert.

3. Wichtigste Grundsätze und Begriffe

Der einzige im türkischen Recht definierte Diskriminierungsgrund ist Behinderung. Das Gesetz über die Menschenrechts- und Gleichstellungsinstitution der Türkei (Nr. 6701) und das Gesetz über Menschen mit Behinderungen (Nr. 5378) enthalten identische Definitionen, die mit der UN-Behindertenrechtskonvention und dem Urteil des Europäischen Gerichtshofs in der Rechtssache *Ring und Skouboe Werge* in Einklang stehen.⁶²

Während die Verfassungs- und die Rechtsordnung der Türkei jegliche auf ethnischer Zugehörigkeit, Rasse oder Religion basierende Definition oder Kategorisierung explizit vermeiden, gibt es eine Reihe von einschlägigen Gesetzen und politischen Richtlinien, in denen entsprechende Definitionen und Kategorisierungen vorgenommen werden, die unmittelbare oder mittelbare Diskriminierung aufgrund der Religion begründen. Es existiert auch Rechtsprechung zur Definition von Religion im Allgemeinen und von Islam/Muslimen im Besonderen. Der Kassationshof entschied, dass bestimmte Glaubenssysteme als Religion nicht zulässig sind, und definierte andere in einer Art und Weise, die der von den Anhängern dieser Glaubensrichtungen vertretenen widerspricht. In beiden Fällen stützte sich das Gericht bei seinen Entscheidungen auf die Stellungnahme der Direktion für religiöse Angelegenheiten (*Diyanet İşleri Başkanlığı*, kurz: Diyanet), einer verfassungsmäßig zugelassenen staatlichen Stelle, die Angelegenheiten zwischen Staat und Islam regelt.

Der nationale Rechtsrahmen ignoriert sexuelle Orientierung vollkommen, was auch im Fehlen jeglicher Bestimmungen zutage tritt, die Homosexualität und bisexuelles bzw.

⁶¹ Europäische Kommission gegen Rassismus und Intoleranz (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, verabschiedet am 29. Juni 2016, Straßburg, 4. Oktober 2016, S. 9, S. 15 und S. 39, abrufbar unter: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

⁶² Europäischer Gerichtshof (EuGH), verbundene Rechtssachen C-335/11 und C-337/11, *Ring und Skouboe Werge / Dänemark*, 11. April 2013.

transsexuelles Verhalten kriminalisieren. Allerdings existiert eine weit verbreitete und systematische Diskriminierung von LGBTI-Personen, die entweder von den eklatant diskriminierenden Texten der Rechts- und Verwaltungsvorschriften und/oder deren diskriminierender Auslegung und Anwendung durch die Justiz herrührt. Die diskriminierende Anwendung der Gesetze gegen LGBTI-Personen erfolgt im Wesentlichen über die juristische Auslegung von Begriffen wie „Moral“, „anstößiges Verhalten“ und „unehrenhaftes Verhalten“.

Das Gesetz über die Menschenrechts- und Gleichstellungsinstitution der Türkei verbietet unmittelbare und mittelbare Diskriminierung, Mehrfachdiskriminierung, Diskriminierung durch Vermutung, Belästigung, Mobbing, Segregation, Anweisung zur Diskriminierung und Befolgung einer solcher Anweisung sowie das Nichttreffen angemessener Vorkehrungen. Auch das Arbeitsgesetz, das Behindertengesetz, das Strafgesetzbuch, das Gesetz für Nationale Bildung und das Beamtengesetz verbieten eine oder mehrere dieser Formen von Diskriminierung, jeweils für wenige Gründe. Diskriminierung durch Assoziierung und Testing-Verfahren werden in den türkischen Rechtsvorschriften nicht erwähnt. Viktimisierung ist nur in sehr begrenztem Rahmen verboten.

Unter den fünf von den Richtlinien 2000/43/EG und 2000/78/EG erfassten Gründen sieht das innerstaatliche türkische Recht positive Maßnahmen aufgrund der Rasse/ethnischen Zugehörigkeit, der Religion/Weltanschauung, des Alters und einer Behinderung vor. Positive Maßnahmen in Bezug auf sexuelle Orientierung sind nicht erlaubt. Obwohl nicht ausdrücklich als positive Maßnahmen formuliert ist, beinhaltet Artikel 10 der Verfassung den Grundsatz positiver Maßnahmen, jedoch nur in Bezug auf Alter und Behinderung. Das Gesetz über die türkische Menschenrechts- und Gleichstellungsinstitution sieht eine Ausnahme vom Verbot der Diskriminierung aufgrund der Rasse/ethnischen Zugehörigkeit, der Religion/Weltanschauung, einer Behinderung oder des Alters vor, wenn diese Behandlung „erforderlich, angemessen und verhältnismäßig ist, um Ungleichheiten zu beseitigen“.

Obwohl in den entsprechenden Vorschriften nicht als positive Maßnahmen bezeichnet, existieren mehrere Gesetze und Verordnungen, die positive Maßnahmen in den Bereichen Bildung, Beschäftigung und einer Reihe von Dienstleistungen (Sozialversicherung, Transport usw.) vorsehen, darunter auch Beschäftigungsquoten für Menschen mit Behinderungen. Positive Maßnahmen für die Roma in der Türkei gibt es nicht, obwohl die Regierung ihre Roma-Initiative mit dem Versprechen auf den Weg brachte, die Beschäftigungs-, Bildungs- und Wohnsituation der Roma zu verbessern. Die spezielle Situation nicht-muslimischer Gruppen im Sinne des Vertrags von Lausanne verleiht diesen keinen Anspruch auf positive Diskriminierung aufgrund der Religion. Im Gegenteil: Der türkische Staat beschränkt die staatliche Finanzierung religiöser Dienstleistungen weiterhin auf die Mehrheit der sunnitischen Moslems, indem er die Gehälter der sunnitischen Prediger (Imame) bezahlt und den Moscheen kostenlos Strom und Wasser zur Verfügung stellt.

4. Sachlicher Geltungsbereich

Das neue Gesetz über die Menschenrechts- und Gleichstellungsinstitution der Türkei verbietet Diskriminierung in den Bereichen Beschäftigung, selbstständige Erwerbstätigkeit, Zugang zu Beschäftigung, Zugang zu selbstständiger Erwerbstätigkeit inklusive Auswahlkriterien, Einstellungsbedingungen, Beförderung und Arbeitsbedingungen, einschließlich Entlassungen, nur aufgrund der Rasse/ethnischen Zugehörigkeit, der Religion/Weltanschauung, des Alter oder einer Behinderung (nicht aufgrund der sexuellen Orientierung), und zwar sowohl im privaten als auch im öffentlichen Sektor. Es enthält kein Verbot von Entgeltdiskriminierung. Es verbietet auch Diskriminierung in folgenden Bereichen: Berufsberatung, Berufsausbildung und Umschulung einschließlich Berufspraktika und betriebliche Weiterbildung; Mitgliedschaft in und Mitwirkung an „Berufsbildungsorganisationen“; Bereitstellung von Leistungen in den Bereichen Soziales,

soziale Sicherheit und Gesundheit; Bildung; Zugang zu und Versorgung mit Gütern und Dienstleistungen; Wohnungswesen.

Das Gesetz gilt für natürliche und juristische Personen sowohl im öffentlichen als auch im privaten Sektor.

5. Rechtsdurchsetzung

In der Türkei werden Diskriminierungsklagen von Zivil-, Verwaltungs- und Strafgerichten sowie Verwaltungsmechanismen bearbeitet. Opfer von Diskriminierung können vor Gericht Entschädigungen für Vermögensschäden, entgangenen Gewinn und/oder Schadenersatz und Schmerzensgeld fordern. Parallele Verfahren sind in Straf-, Zivil- oder Verwaltungsgerichten möglich.

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

Für Betroffene, die anstelle einer Klage eine gütliche Beilegung wünschen, sind die alternativen Verfahren der Streitbeilegung, die das türkische Rechtssystem vorsieht, sehr begrenzt.

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

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

Eine weitere Option besteht für Diskriminierungsopfer darin, einen Antrag bei nichtjuristischen Organen zu stellen, etwa bei den Menschenrechtsausschüssen auf Provinz- und Kreisebene oder bei der Kommission zur Untersuchung von Menschenrechtsverletzungen der Großen Nationalversammlung der Türkei, die befugt sind, Beschwerden über Diskriminierung im Beschäftigungsbereich nachzugehen. Allerdings sind Menschenrechtsausschüsse nicht von der Exekutive unabhängig und werden kaum genutzt. Die Menschenrechts- und Gleichstellungsinstitution der Türkei, die Anfang 2017 auf der Grundlage des neuen Gesetzes eingerichtet werden soll und an die Stelle der 2012 geschaffenen Menschenrechtsinstitution der Türkei tritt, wird befugt sein, verwaltungsrechtliche Sanktionen (in Form von Geldstrafen) gegen juristische und

natürliche Personen zu verhängen, die sich diskriminierender Handlungen schuldig machen. Die Entscheidungen all dieser Organe sind unverbindlich und ihre Vollstreckungsbefugnisse gering. Es gibt zudem Arbeitsinspektoren, Versicherungsinspektoren und Schulinspektoren, die mit der Überprüfung der Einhaltung der jeweiligen Gesetze beauftragt sind. Arbeits- und Schulinspektoren verfügen über die Kompetenz, um individuelle Beschwerden zu empfangen und zu überprüfen, auch solche, die einen Verstoß gegen die Antidiskriminierungsbestimmungen des Arbeitsgesetzes und des Gesetzes über die nationale Erziehung darstellen.

Verbände/Organisationen/Gewerkschaften sind in der Türkei nur in sehr begrenztem Umfang befugt, im Namen von Diskriminierungsopfern zu handeln. Sie sind auch nur in begrenztem Maße und unter bestimmten Umständen befugt, im Namen ihrer Mitglieder zu klagen. Die abgeschaffte Menschenrechtsinstitution der Türkei sah eine Beschwerdebefugnis für Menschenrechtsorganisationen und Gewerkschaften vor, die es ihnen erlaubte, im Namen von Opfern von Menschenrechtsverletzungen bei der Menschenrechtsinstitution Beschwerde einzureichen. Die Regularien der noch einzurichtenden Menschenrechts- und Gleichstellungsinstitution der Türkei sind noch nicht veröffentlicht worden.

Verbände/Organisationen/Gewerkschaften sind nicht befugt, Opfer von Diskriminierung zu unterstützen. Sie können jedoch bei der Staatsanwaltschaft beantragen, Täter strafrechtlich zu verfolgen, und sie können Strafverfahren beitreten, die von der Staatsanwaltschaft eingeleitet wurden, sofern ein „durch die Straftat entstandener Schaden“ nachgewiesen werden kann. In den vergangenen Jahren haben LGBTI-Organisationen beharrlich gefordert, in laufende Strafverfahren einbezogen zu werden, um im Namen der Opfer von Hassverbrechen und Ehrenmorden zu intervenieren. Während die Gerichte solche Forderungen in vielen Fällen ablehnen, gab es einige wenige Fälle, in denen die Antwort des Gerichts positiv war. In einer wegweisenden Entscheidung von Anfang 2015 gestattete das Verfassungsgericht mehreren Nichtregierungsorganisationen, in einem laufenden Verfahren wegen Zwangsverschleppung Amicus-Curiae-Schriftsätze vorzulegen.⁶³ Zwar handelt es sich hierbei weder um einen Fall von Diskriminierung noch hat die beschwerdeführende Partei wegen Diskriminierung geklagt, dennoch hat die Entscheidung des Gerichts, Amicus-Curiae-Schriftsätze aus der Zivilgesellschaft zu akzeptieren, einen wichtigen Präzedenzfall geschaffen, der wahrscheinlich von Organisationen der Zivilgesellschaft bei der Unterstützung von Diskriminierungsopfern verwendet werden wird.

Das türkische Recht ermöglicht eine Verlagerung der Beweislast von der Klägerpartei auf die beklagte Partei.

Macht die beschwerdeführende Partei eine Diskriminierung glaubhaft, wird nach Artikel 21 des Gesetzes über die Menschenrechts- und Gleichstellungsinstitution der Türkei (Nr. 6701) die Beweislast auf die beschwerdegegnerische Partei verlagert, die nachweisen muss, dass keine Diskriminierung stattgefunden hat. Diese Bestimmung „scheint sich jedoch auf Beschwerden bei der Menschenrechts- und Gleichstellungsbehörde zu beschränken und gilt nicht für Gerichtsverfahren“.⁶⁴ Die einzigen Bestimmungen, die Regeln zur Beweislast in Diskriminierungsfällen enthalten, sind im Arbeitsgesetz zu finden. Obwohl die Beweislast beim Arbeitnehmer liegt, muss, wenn ein Arbeitnehmer Tatsachen vorbringt, die eine Diskriminierung glaubhaft erscheinen lassen, der Arbeitgeber nachweisen, dass ein solcher Verstoß nicht stattgefunden hat.

Die in Fällen von Diskriminierung verhängten Sanktionen variieren. Nach dem neuen Gleichstellungsgesetz ist die Menschenrechts- und Gleichstellungsinstitution der Türkei

⁶³ Türkei, Verfassungsgericht (*Anayasa Mahkemesi*), Beschwerde Nr. 2013/2640, 8. April 2013.

⁶⁴ Europäische Kommission gegen Rassismus und Intoleranz (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, verabschiedet am 29. Juni 2016, Straßburg, 4. Oktober 2016, S. 16, abrufbar unter: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

befugt, bei Verstößen gegen das Nichtdiskriminierungsgebot verwaltungsrechtliche Sanktionen in Form von Geldstrafen zwischen 1000 und 15 000 TRY (250-3800 Euro) zu verhängen, je nach Schwere der Auswirkungen und Folgen des Verstoßes, der finanziellen Situation des Täters und der strafverschärfenden Wirkung einer eventuellen Mehrfachdiskriminierung. Wenn es der Rat, das Entscheidungsgremium der Institution, für erforderlich hält, kann die Geldstrafe einmalig in eine Verwarnung umgewandelt werden. In Wiederholungsfällen wird die Geldstrafe um 50 % erhöht.

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

Die Regierung entwickelt Strategien, verfasst Gesetze und beschließt Durchführungsmaßnahmen im Bereich Menschenrechte und Antidiskriminierung, ohne NROs zu konsultieren bzw. – in den seltenen Fällen, in denen sie es doch tut – ohne deren Anregungen oder Kritikpunkte zu berücksichtigen. Ein aktuelles Beispiel hierfür war die Verabschiedung der Nationalen Strategie für die Roma im Jahr 2016. Vertreter und Vertreterinnen zivilgesellschaftlicher Organisationen, die an dem Beratungsprozess zwischen 2009 und 2016 teilgenommen hatten, warfen der Regierung vor, den ihnen im Februar 2016 übermittelten Strategieentwurf, zu dem sie entsprechende Kommentare abgegeben hatten, erheblich gekürzt und verwässert zu haben.⁶⁵

6. Gleichbehandlungsstellen

Nach dem neuen Gesetz über die Menschenrechts- und Gleichstellungsinstitution wird die Türkei über eine „Fachstelle“ zur Förderung der Gleichbehandlung ohne Unterschied der Rasse oder der ethnischen Zugehörigkeit verfügen, die jedoch nicht im Einklang mit Artikel 13 der Antirassismusrichtlinie steht. Nationale und internationale NROs sowie UN-Gremien kritisieren die mangelnde Unabhängigkeit der Institution und die Nichteinhaltung der Pariser Prinzipien.

Die Institution hat den Auftrag, Beschwerden wegen Diskriminierung aufgrund der Rasse/ethnischen Zugehörigkeit, der Religion/Weltanschauung, des Alters oder einer Behinderung entgegenzunehmen. Sexuelle Orientierung ist vom Mandat der Institution ausgeschlossen. Die Institution ist befugt, Diskriminierungsbeschwerden von natürlichen und juristischen Personen entgegenzunehmen. Das Einreichen einer Beschwerde ist kostenlos. Handlungen, die die Ausübung legislativer und justizieller Zuständigkeiten betreffen, Entscheidungen des Hohen Richter- und Staatsanwälterats sowie Handlungen, die gemäß der Verfassung von einer gerichtlichen Überprüfung ausgenommen sind, können nicht Gegenstand von Beschwerden sein, die bei der Institution eingereicht werden. Darüber hinaus wird die Institution von Amts wegen befugt sein, bei Verletzungen von Menschenrechten und Verstößen gegen das Nichtdiskriminierungsgebot von sich aus Ermittlungen einzuleiten. Die Institution wird das Recht haben, im Namen von identifizierten Opfern wegen Diskriminierung zu klagen und dafür Strafanzeige zu stellen,

⁶⁵ Foggo, H., „Ulusal Roman Strateji Planı ‚Izleme Kurulu‘ na Öneriler-1“ (Vorschläge für den Nationalen Roma-Strategieplan „Exekutivrat“), Facebook-Eintrag, 23. Februar 2017, abrufbar unter: <https://www.facebook.com/377799739037919/photos/pcb.783857811765441/783857395098816/?type=3>.

wenn sie Verstöße gegen das Nichtdiskriminierungsgebot oder Menschenrechtsverletzungen feststellt, die den Straftatbestand erfüllen. Die Institution tritt an die Stelle der 2012 eingerichteten Nationalen Menschenrechtsinstitution. Die neue Gleichbehandlungsstelle wurde noch nicht eingerichtet.

Die ebenfalls im Juni 2012 geschaffene Ombudsstelle ist mit der Überprüfung der Handlungen und Tätigkeiten von Behörden beauftragt sowie mit der Einreichung von Vorschlägen, um die Einhaltung der Grundsätze der Menschenrechte, Gerechtigkeit und Rechtsstaatlichkeit durch die Behörden zu gewährleisten. Die Ombudsstelle nimmt seit März 2013 Beschwerden entgegen. Die Ombudsstelle kann zwar auch die Funktion einer unabhängigen Stelle im Bereich Rassendiskriminierung übernehmen, sie ist jedoch nicht befugt, auf eigene Initiative Untersuchungen durchzuführen, und es gibt, wie von der ECRI festgestellt, Bedenken hinsichtlich ihrer Unparteilichkeit und Neutralität. Während die Institution und die Ombudsstelle kein Mandat haben, Opfer bei der Einreichung von Diskriminierungsklagen zu unterstützen, hat die im Entwurf des Antidiskriminierungsgesetzes vorgesehene Gleichbehandlungsstelle den Auftrag, „Personen, die sich wegen Diskriminierung für beschwert halten, jede Art von Unterstützung zukommen zu lassen“.⁶⁶

7. Schlüsselprobleme

- Die neu einzurichtende Gleichbehandlungsstelle wird auch als Nationaler Präventionsmechanismus gegen Folter fungieren, was ihre Stärke und Leistungsfähigkeit schwächen könnte.
- Die Unabhängigkeit der Gleichbehandlungsstelle ist nicht entsprechend den Pariser Prinzipien und dem EU-Besitzstand gewährleistet.
- In den im Gesetz über die Menschenrechts- und Gleichstellungsinstitution der Türkei, der Verfassung und verschiedenen Gesetzen geschützten Diskriminierungsgründen ist sexuelle Orientierung nach wie vor nicht enthalten.
- Positive Maßnahmen im Bereich sexuelle Orientierung sind nicht zulässig.
- Verschiedene Gesetze, die Diskriminierung verbieten, haben begrenzte sachliche und persönliche Geltungsbereiche.
- Der Umfang der Verpflichtung, angemessene Vorkehrungen zu treffen, ist beschränkter als in der Rahmenrichtlinie Beschäftigung 2000/78/EG. Der Prüfmaßstab für angemessene Vorkehrungen ist nicht existent; dementsprechend gibt es keine Orientierungshilfen für Arbeitsinspektoren, Richter, Arbeitgeber und Menschen mit Behinderungen.
- Es gibt kein spezifisches Verbot von Viktimisierung, Diskriminierung durch Assoziierung und Hassrede.
- Weder im Gesetz über die Menschenrechts- und Gleichstellungsinstitution der Türkei noch im Behindertengesetz wird dargelegt, was im Hinblick auf die sachliche Rechtfertigung einer mittelbaren Diskriminierung als rechtmäßiges Ziel anzusehen ist.
- In verschiedenen Gesetzen, die Antidiskriminierungsbestimmungen enthalten, werden Sanktionen nicht ausdrücklich erwähnt. Wo sie erwähnt werden, sind sie nicht abschreckend. Verstöße, die Straftatbestände sind, werden mit kurzen Gefängnisstrafen geahndet, die häufig in geringe Geldstrafen umgewandelt werden können.
- Das türkische Recht räumt Nichtregierungsorganisationen nicht ausdrücklich das Recht ein, im Namen von Diskriminierungsopfern zu klagen; davon ausgenommen sind Gewerkschaften, Verbraucherschutzverbände und Verbände, die sich für den Schutz und die Erhaltung von Umwelt, Kultur und Kulturerbe einsetzen. Darüber hinaus ist in Strafsachen jede juristische Person, die einen Schaden nachweisen kann, *de jure* klageberechtigt. Die Praxis der Gerichte variiert jedoch.

⁶⁶ Türkei, Gesetz über die Menschenrechts- und Gleichstellungsinstitution der Türkei (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), April 2016, Art. 6(2)(ç).

- Die Mandate der nationalen und lokalen Menschenrechtsorgane sowie der Ombudsstelle beziehen sich nicht explizit auf den Schutz vor Diskriminierung und haben begrenzte Eingriffs- und Einflussmöglichkeiten.
- Diskriminierende Äußerungen und Hassreden sowie diskriminierendes Verhalten gegenüber Minderheiten, vor allem gegenüber Roma, LGBTI-Personen, Kurden und Nicht-Muslimen (insbesondere Juden), sind im täglichen Leben, im politischen Diskurs und in den Medien weit verbreitet.
- Die Justizbehörden setzen die Rechtsvorschriften zum Verbot von Hassreden und Diskriminierung nur sehr zögerlich durch.
- Die verschiedenen von der Regierung ins Leben gerufenen Initiativen mit dem erklärten Ziel, sich der Probleme der Kurden, Roma und Aleviten anzunehmen, haben zu keinen greifbaren politischen Ergebnissen und legislativen Maßnahmen geführt, um die Diskriminierung dieser Gruppen in den Bereichen Bildung, Beschäftigung, Wohnraum, Zugang zu sozialen Dienstleistungen und Religionsfreiheit anzugehen.
- Die Urteile des EGMR gegen obligatorischen Religionsunterricht, die Nichtanerkennung der Kultstätten der Aleviten und den Ausschluss dieser Kultstätten von sozialen Vergünstigungen, die Moscheen gewährt werden, sowie die verpflichtende Angabe der Religion in amtlichen Ausweisen wurden noch immer nicht umgesetzt.
- Die Türkei ist nach wie vor das einzige Mitglied des Europarates, das das Recht auf Kriegsdienstverweigerung aus Gewissensgründen nicht anerkennt. Die Urteile des EGMR zu diesem Thema wurden nicht umgesetzt.
- Die Regierung entwickelt nach wie vor Strategien, verfasst Gesetze und beschließt Durchführungsmaßnahmen im Bereich Menschenrechte und Antidiskriminierung, ohne NROs zu konsultieren bzw. – in den seltenen Fällen, in denen sie es doch tut – ohne deren Anregungen oder Kritikpunkte zu berücksichtigen.

INTRODUCTION

On 15 July 2016, the Turkish Government survived a coup attempt, in response to which the Government launched a crackdown on democratic political opposition, purging tens of thousands of civil servants, including judges, prosecutors, teachers, artists, academics, members of the security apparatus including the military and the police, members of the intelligence community, governors and district governors, and municipal authorities including elected mayors. Of the more than 100 000 individuals purged from the civil service, over 40 000 have been imprisoned on accusations of being affiliated with or supporting the Gülen movement, which the Government holds responsible for staging the coup attempt.⁶⁷

Among those imprisoned and held in pre-trial detention without any evidence to support the accusation of terrorism are 2 386 judges and prosecutors, including 2 members of the Turkish Constitutional Court, 109 members of the High Court of Appeal, 41 members of the Council of State and 5 members of the High Council of Judges and Prosecutors.⁶⁸ In addition, 13 members of the Parliament including the 2 co-chairs, 89 elected mayors and over 3 000 members of the pro-Kurdish Peoples' Democracy Party have been imprisoned to be kept in detention awaiting trial.⁶⁹ Trustees appointed by the central Government have been appointed to 80 municipalities run by the Peoples' Democracy Party.⁷⁰ In addition to civil servants, hundreds of business people, journalists and activists have been arrested and kept in pre-trial detention. Among them are over 150 journalists.⁷¹ In addition to being purged and in many cases imprisoned without due process, many of the suspects had their entire property confiscated, pension rights revoked and/or passports cancelled, without judicial review. Around 180 media organisations, including newspapers, publishing houses, magazines, radio and TV stations,⁷² and over 1 500 associations have been closed down.⁷³ Among these are dozens of media organisations and NGOs belonging to the Kurdish, Alevi and other minority communities in Turkey. Of the 39 Kurdish-language television and radio stations which had opened during the EU-induced reform process in the 2000s, 23 were closed on charges of terrorist propaganda.⁷⁴ According to the European Commission, the 'broad scale and collective nature of these measures raised a number of very serious questions. There are concerns ... with regard to the vagueness of the criteria applied and evidence used for determining alleged links to the Gülen movement and establishing

⁶⁷ These numbers are based on the report published by the main opposition Republican People's Party in March 2017. Karabağlı, H. (2017), 'CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kiydi' (CHP's report on the 'Balance of the State of Emergency': The number of suspects exceeded 100 000; at least 25 people committed suicide), *T24*, 2 March 2017, available at <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>. All hyperlinks last accessed in October 2017.

⁶⁸ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 9, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

⁶⁹ Information received from the Peoples' Democracy Party, 4 March 2016.

⁷⁰ Information received from the Peoples' Democracy Party, 4 March 2016.

⁷¹ Karabağlı, H. (2017), 'CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kiydi' (CHP's report on the 'Balance of the State of Emergency': The number of suspects exceeded 100 000; at least 25 people committed suicide), *T24*, 2 March 2017, available at <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

⁷² Karabağlı, H. (2017), 'CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kiydi' (CHP's report on the 'Balance of the State of Emergency': The number of suspects exceeded 100 000; at least 25 people committed suicide), *T24*, 2 March 2017, available at <http://t24.com.tr/haber/chpden-ohal-bilancosu-raporu-supheli-sayisi-100-bini-asti-en-az-25-kisi-canina-kiydi,391620>.

⁷³ <http://t24.com.tr/haber/tam-liste-15-temmuzdan-sonra-kac-khk-cikarildi-kac-kurum-kapatildi-hangi-kurumdan-toplam-kac-kisi-ihrac-edildi,374482>.

⁷⁴ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 29, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

individual liability, applied in a non-transparent and indiscriminate manner, leading to a perception of “guilt by association”.⁷⁵

The state of emergency declared by the Government on 20 July, in response to the coup attempt, has been extended several times and remains in force as of April 2017. During this period, the Government ruled the country by executive decrees under the state of emergency, without proper consultation of the Turkish Parliament. The purges, dismissals, property confiscations, closing down of media organisations, dissolution of civil society organisations, and replacement of elected municipal authorities with appointed trustees listed above have been carried out by executive decrees under the state of emergency. While the main opposition Republican People’s Party challenged the constitutionality of some of the emergency decrees on the ground that they were not related to the underlying exigency of the situation, the Turkish Constitutional Court rejected the applications based on a narrow literal reading of Article 148(1) of the Constitution that emergency decrees are not subject to constitutional review.⁷⁶

These developments followed alarming allegations of human rights abuses by the Turkish security forces in the Kurdish region. In an operation launched in July 2015 and continued into 2017, the Turkish military carried out raids into densely populated towns with thousands of combat-ready troops, tanks, armoured vehicles and heavy artillery to remove the barricades and trenches that the PKK had built in residential areas, bombed and razed entire towns, without any regard for the presence of civilians trapped in the midst of the operations. From August 2015 onwards, the Government declared over 60 round-the-clock, open-ended curfews in more than 30 towns and neighbourhoods, which lasted several days, weeks or months, with the stated purpose of combating terrorists and protecting public order and security.⁷⁷ The situation alarmed the non-judicial monitoring mechanisms of both the UN and the CoE. In May 2016, the UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, urged the authorities to give independent investigators access to the curfew areas to verify the ‘extremely alarming’ and ‘extremely serious’ human rights allegations.⁷⁸ Upon a request by the Parliamentary Assembly of the CoE, the European Commission for Democracy through Law (Venice Commission) prepared a report on the legality of the curfews. Published in June 2016, the report concluded that the curfew decisions did not meet the requirement of legality because the Turkish Government did not comply with its own constitutional and legislative framework by not declaring a state of emergency before imposing curfews.⁷⁹ In late 2016, the CoE’s Commissioner for Human Rights issued a detailed memorandum. Agreeing with the Venice

⁷⁵ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 9, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

⁷⁶ Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Judgment, E. 2016/166, K. 2016/159, 12 October 2016; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Judgment, E. 2016/167, K. 2016/160, 12 October 2016; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Judgment, E. 2016/171, K. 2016/164, 2 November 2016; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Judgment, E. 2016/172, K. 2016/165, 2 November 2016.

⁷⁷ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf; Council of Europe Commissioner for Human Rights (2016), *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016.

⁷⁸ Office of the United Nations High Commissioner for Human Rights (2016), ‘Need for transparency, investigations, in light of “alarming” reports of major violations in south-east Turkey - Zeid’, 10 May 2016, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19937&LangID=E>. As of February 2017, Zeid’s requests for unimpeded and full access to the affected areas have not received a formal reply. Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

⁷⁹ European Commission for Democracy through Law (Venice Commission) (2016), *Turkey: Opinion on the Legal Framework Governing Curfews*, Opinion no. 842/2016, CDL-AD(2016)010 Or. Fr., 13 June 2016, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)010-e).

Commission on the lack of legality,⁸⁰ the Commissioner found the curfews and the operations to be disproportionate to their stated aims. Among other factors, he pointed out that in Sur alone '22,000 persons were displaced for 50 terrorists "rendered ineffective",⁸¹ a ratio of 1 to 440.⁸² He characterised as 'tremendous' the extent of urban destruction, where an estimated 50 % of houses in 6 neighbourhoods of Sur had become entirely uninhabitable and another 25 % had been damaged.⁸³ He found open-ended, round-the-clock, uninterrupted curfews which lasted weeks or months to be 'unprecedented' and non-existent in ECtHR case law.⁸⁴ Finally, the UN Human Rights Office of the High Commissioner released its final report in February 2017. According to this report, during the period July 2015-December 2016, some 2 000 people were killed in the curfew areas, of whom 1 200 were civilians, including women and children. Many of them died for lack of urgent health care.⁸⁵ Over 355 000 residents were displaced, and numerous people were tortured, disappeared, and subjected to excessive use of force.⁸⁶

The Turkish Constitutional Court rejected repeated requests for interim measures from civilians trapped in the middle of the security operations and unable to access emergency health services and basic necessities of life such as food and water.⁸⁷ Some of the applicants further petitioned the ECtHR, asking for interim measures.⁸⁸ On 13 January 2016, the Court announced that it had received a number of applications requesting interim measures in connection with the curfew measures, but that it decided not to apply Rule 39 because 'the elements at its disposal were insufficient'.⁸⁹ On 5 February, the Court further announced that it had by then received 20 applications for interim measures and rejected 2 of them concerning the requests made by 14 people. The Court based its decision on that of the Turkish Constitutional Court, which it found 'to be relevant and potentially capable of providing interim relief for the applicants'.⁹⁰ At the same time, the ECtHR

⁸⁰ Council of Europe Commissioner for Human Rights (2016), *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016, para. 23, available at: <https://rm.coe.int/16806db68f>.

⁸¹ Frequently used by the Turkish authorities in reference to counter-terrorism operations, the term is rather ambiguous in that it can refer to the killing, injury or arrest of suspected terrorists.

⁸² Council of Europe Commissioner for Human Rights (2016), *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016, para. 28, available at: <https://rm.coe.int/16806db68f>.

⁸³ Council of Europe Commissioner for Human Rights (2016), *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016, para. 29.

⁸⁴ Council of Europe Commissioner for Human Rights (2016), *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016, para. 43.

⁸⁵ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

⁸⁶ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7.

⁸⁷ See e.g. Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Mehmet Girasun ve Ömer Elçi*, Application no. 2015/15266, Decision on Interim Remedy, 11 September 2015; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Meral Daniş Beştaş*, Application no. 2015/19545, Decision on Interim Remedy, 22 December 2015; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *İrfan Uysal ve Diğerleri*, Application no. 2015/19907, Decision on Interim Remedy, 26 December 2015; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Nuriye Acar*, Application no. 2015/20218, Decision on Interim Remedy, 31 December 2015; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Ayhan Seviktek ve Mehmet Oran*, Application no. 2016/43, Decision on Interim Remedy, 8 January 2016; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Ekrem Şen ve Diğerleri*, Application no. 2015/20376, 20 January 2016; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Mehmet Yavuzel ve Diğerleri*, Application no. 2016/1652, Decision on Interim Remedy, 29 January 2016; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Mehmet Denan Dağlı ve Diğerleri*, Application no. 2016/1905, Decision on Interim Remedy, 3 February 2016; Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), *Ferhat Balcal ve Diğerleri*, Application no. 2016/2602, Decision on Interim Remedy, 12 February 2016.

⁸⁸ Under Rule 39 of its Rules, the ECtHR may indicate interim measures, namely urgent measures which apply only if there is an imminent risk of irreparable harm.

⁸⁹ ECtHR Registrar (2016), 'Requests for lifting of curfew measures in south-eastern Turkey: the Court refuses to indicate interim measures for lack of elements, but is pursuing its examination of applications', Press release, ECHR 016 (2016), 13 January 2016.

⁹⁰ ECtHR Registrar (2016), 'Curfew measures in south-eastern Turkey: Court decides to give priority treatment to a number of complaints', Press release, ECHR 054 (2016), 5 February 2016.

decided to deal with all the applications concerning curfew measures as a matter of priority.⁹¹

Meanwhile, on 10 December 2016, the ruling Justice and Development Party (JDP) and the opposition Nationalist Movement Party submitted to the Turkish Parliament a constitutional amendment package, entailing a set of 18 amendments to the Turkish Constitution, for the purpose of changing Turkey's political system from parliamentary democracy to a 'Turkish-style' presidential system, in the words of the JDP authorities.⁹² The amendments were adopted by the Parliament on 21 January 2017 and signed by the President on 10 February, to be submitted to a popular referendum on 16 April 2017.⁹³ The debates and voting on the amendments took place in the absence of a significant number of MPs from the opposition - at the time, one of the co-chairs and eight MPs of the Peoples' Democracy Party were in pre-trial detention.⁹⁴ Once approved, the amendments will overhaul the constitutional framework in Turkey described below.

The rest of this report should be read against this background of the erosion of democracy and the rule of law in Turkey.

The national legal system

Turkey is a unitary state with a continental legal system. It adheres to the principle of the hierarchy of laws, whereby the Constitution is the supreme law of the country. Legislative power is vested in the Turkish Grand National Assembly and this power cannot be delegated. Regulations which put forth in detail the ways in which laws are to be implemented are adopted by the Government. The executive also issues internal decrees addressed to public institutions. Laws and regulations are published in the Official Gazette. On the other hand, circulars are not systematically published but can be made accessible selectively at the discretion of individual ministries on the relevant ministry's website. Otherwise, access to circulars by citizens and lawyers is not possible, unless obtained through personal connections.

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

According to Article 90 of the Constitution, international treaties which are duly ratified have the force of law.⁹⁵ If the language of the treaty provision is self-executing, it is directly applicable. In cases of conflict between provisions of domestic laws and international treaties on fundamental rights and freedoms duly put into effect, the provisions of international agreements shall prevail. Appeal cannot be made to the Constitutional Court claiming the unconstitutionality of international treaties. Turkey is a party to a considerable

⁹¹ The ECtHR issued a number of partial admissibility decisions on 6 December 2016.

⁹² Bora, B (2017), 'Turkey's constitutional reform: All you need to know', Al Jazeera, 17 January 2017, available at: <http://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html>.

⁹³ Turkey, Law on Amending the Constitution of the Republic of Turkey (*Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun*), no. 6771, 21 January 2017.

⁹⁴ European Commission for Democracy through Law (Venice Commission) (2017), *Turkey: Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017*, Opinion no. 875/2017, CDL-AD(2017)005 Or. Eng., 13 March 2017, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).

⁹⁵ In order for an international treaty to be duly ratified, first the Parliament has to adopt a law approving the ratification of the treaty, then the Committee of Ministers must issue a decree of ratification.

number of international treaties containing provisions on anti-discrimination and equal treatment, though with significant reservations and declarations aimed at precluding the extension of minority protection under the national legal framework (for an overview, see Annex 2: Table of International Instruments). This is the case, for example, with the UN Convention on the Rights of the Child, where Turkey has inserted a reservation with respect to Articles 17, 29 and 30, which concern the linguistic, cultural and religious rights of children in minority groups and the rights of their parents to give their children an education in accordance with their cultural identity and language. When it comes to human rights conventions which do not entail provisions specifically concerning minorities, Turkey does not insert such reservations, as in the case of the UN Convention on the Rights of Persons with Disabilities.

Disputes arising from private law and criminal law, including discrimination cases, are decided by the civil and criminal courts. The judgments given by these first instance courts are reviewed by the Court of Cassation. Administrative cases are decided by the administrative courts, tax courts and regional administrative courts. The Council of State is the high court. The Council of State also acts as a first instance court to deal with some cases prescribed by law.

While court decisions and judgments are in principle available to the public, the judgments and decisions of the Court of Cassation and the Council of State are published selectively on the basis of subjective criteria. Some of the decisions and judgments of these courts are published in the Official Gazette and in their respective legal journals, based on the selection of the editors. Independent legal journals also selectively publish decisions and judgments they obtain directly from the higher courts. For example, the Legal Publishing House runs a website and issues a legal journal, both of which publish decisions and judgments it deems to be innovative, solution-oriented and principled. A third source is the judges and prosecutors of higher courts, who 'publish in their books "interesting" decisions and judgments which they had set aside in order to increase the sales of their books'.⁹⁶ A professor of constitutional law summarised 'the "secret criterion" known to practitioners' as follows. 'The presidents of chambers of the Court of Cassation and the Council of State intentionally prevent the publication of potentially interesting decisions and either use these at later stages in books they publish or privately share them with publishers they reach an agreement with, turning these decisions into "commercial commodities". Decisions published in their own legal journals are those that have no practical use but further existing judicial interpretation or precedents. Important decisions that introduce a change in the case law are published commercially.'⁹⁷

The Constitutional Court's judgments concerning the dissolution of political parties and the constitutionality of laws and decrees are published in the Official Gazette (*Resmi Gazete*), as required under the Constitution. The Court's judgments in cases brought before it by individual claimants under the constitutional complaint mechanism which entered into force in September 2012 are published selectively. The selection criteria are laid out in the Constitutional Court's revised by-laws, which were published in the Official Gazette on 12 July 2012.⁹⁸ Accordingly, judgments on the merits and those admissibility decisions which 'carry importance as a matter of principle' are published on the website of the Court.⁹⁹ Pilot judgments and precedent-setting judgments 'which are important as a matter of principle' are published in the Official Gazette.¹⁰⁰ ¹⁰¹ The cases mostly concern unfair and/or prolonged trials, inadequate compensation or non-compensation for violations of the right to life or property rights. In a precedent-setting judgment dated 25 June 2014, the Constitutional Court issued its first finding of discrimination (on grounds of freedom of

⁹⁶ Mehmet Uçum, human rights lawyer.

⁹⁷ Ozan Erözden, associate professor of constitutional law, Yıldız Technical University.

⁹⁸ Turkey, By-Laws of the Constitutional Court (*Anayasa Mahkemesi İçtüzüğü*), 12 July 2012.

⁹⁹ Turkey, By-Laws of the Constitutional Court (*Anayasa Mahkemesi İçtüzüğü*), 12 July 2012, Article 81(4).

¹⁰⁰ Turkey, By-Laws of the Constitutional Court (*Anayasa Mahkemesi İçtüzüğü*), 12 July 2012, Article 81(5).

¹⁰¹ Turkey, Official Gazette (*Resmi Gazete*), 30 October 2013.

religion) in a case brought through the individual petition mechanism. The Constitutional Court found that a lower court's decision to bar a female lawyer from attending a court hearing on the ground that she wore a headscarf violated the applicant's freedom of religion and conscience. It also held that in allowing lawyers who do not wear the headscarf to attend hearings and solely barring those whose heads are covered from representing their clients in the courtroom, the lower court discriminated against the applicant on the basis of her religious belief.¹⁰² At the same time, the Court has not found discrimination on any of the other relevant grounds under the directives.¹⁰³

On 6 April 2016, the Turkish Parliament adopted the Law on the Human Rights and Equality Institution of Turkey, published in the Official Gazette on 20 April 2016.¹⁰⁴ As announced by the Deputy Prime Minister and government spokesman on 11 January 2016, the Turkish Cabinet adopted the decision to establish the institution in response to the EU's condition for visa liberalisation included in its refugee deal with Turkey. As a government spokesman put it, this was a 'package' law introducing a number of changes at once. The law adopted a revised version of an anti-discrimination law which had been pending at the Ministry of Interior since 2009, and vested in the new equality body an additional function as the National Prevention Mechanism, so as to fulfil Turkey's obligation under the Optional Protocol to the UN Convention against Torture. Thereby, instead of adopting an independent law on anti-discrimination and the equality body, as promised since 2009, the Government merged the existing Human Rights Institution with the equality and anti-discrimination body prescribed in the law of April 2016, with an added mandate of torture prevention. As of the end of 2016, the new Institution had not been established.

In addition to this new law, there are anti-discrimination provisions in the Constitution and several laws. The equality protection clause of the Turkish Constitution, Article 10, provides a non-exhaustive list of protected grounds, allows positive measures for elderly persons and for persons with disabilities and entrusts the state with the task of ensuring equality between men and women. Most notable among the laws with anti-discrimination clauses is the Law on Persons with Disabilities, which could be considered an anti-discrimination law. However, the law prohibits discrimination solely on the ground of disability and has a limited material scope. The Labour Law also has several anti-discrimination clauses, but again with a material scope limited to employment relations.

List of main legislation transposing and implementing the directives

Law on the Human Rights and Equality Institution of Turkey (no. 6701)

Date of adoption: 6 April 2016.

Entry into force: 20 April 2016.

Latest amendments: N/A

Grounds covered: sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age.

Material scope: Employment, social protection, social advantages, access to goods and services, education, housing

Principal content: direct discrimination; indirect discrimination; failure to provide reasonable accommodation; harassment; discrimination by assumption; multiple

¹⁰² Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Application no. 2014/256, 25 June 2014.

¹⁰³ A study of the Constitutional Court's case law on individual complaints until April 2015 found that the applicants raised discrimination or inequality claims in 65 cases. Of these, the Court issued inadmissibility in 31 cases and found a violation of anti-discrimination only in the case discussed above. Ulaş Karan (2015), 'Bireysel Başvuru Kararlarında Ayrımcılık Yasağı ve Eşitlik İlkesi' (The non-discrimination and equality principle in individual petition rulings), *Anayasa Yargısı*, vol. 32 (2015), pp. 235-294, at p. 235. Since then, the Court found a violation in two further cases, neither of which concerned the non-discrimination grounds under the Directives (one was based on gender and the other on political opinion). Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Select Judgments in Individual Petitions (*Bireysel Başvuru Seçme Kararları*), 2016 and 2015, available at: <http://www.anayasa.gov.tr/icsayfalar/yayinlar/secmekararlar.html>.

¹⁰⁴ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), no. 6701, 6 April 2016.

discrimination; mobbing; segregation; instruction to discriminate and compliance with such instruction.

Labour Law (no. 4857)

Date of adoption: 22 May 2003

Entry into force: 10 June 2003

Latest amendments: 4 April 2105

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

Material scope: employment (public and private).

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

Turkish Penal Code (no. 5237)

Date of adoption: 26 September 2004

Entry into force: 1 June 2005

Latest amendments: 12 November 2015

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

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

Principal content: direct discrimination, (sexual) harassment.

Law on Persons with Disabilities (no. 5378)

Date of adoption: 1 July 2005

Entry into force: 7 July 2005

Latest amendments: 18 November 2014

Grounds covered: disability.

Material scope: public and private employment.

Principal content: direct discrimination, reasonable accommodation.

Basic Law on National Education (no. 1739)

Date of adoption: 14 June 1973

Entry into force: 24 June 1973

Latest amendments: 19 November 2014

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

Material scope: education.

Principal content: direct discrimination.

Law on Civil Servants (no. 657)

Date of adoption: 14 July 1965

Entry into force: 23 July 1965

Latest amendments: 27 March 2015

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

Material scope: all acts of civil servants – unlimited material scope (public employment, access to goods or services (including housing) provided by the public sector, social protection, social advantages, public education.

Principal content: direct discrimination.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

Article 10, Equality before the Law, is a general equality clause. It explicitly covers the grounds of language, race, colour, gender, political opinion, philosophical belief, religion and sect and implicitly covers the remaining grounds with reference to 'any such considerations'. This provision applies to all areas covered by the directives and its material scope is broader than those of the directives. However, in not explicitly referring to sexual orientation and ethnic origin among the grounds of equality, the personal scope of the provision is more limited than that of the directives. In several individual petitions, these excluded grounds were unsuccessfully invoked in Article 10 claims.¹⁰⁵ While the Constitutional Court found these cases inadmissible, as one scholar noted, in entertaining the applicants' claims of discrimination, the Court effectively, though not explicitly, accepted that ethnic origin and sexual orientation are among the prohibited grounds.¹⁰⁶

The provision is directly applicable and can be enforced against private actors. While not explicitly stating it as such, Article 10 introduces the principle of positive action to the Constitution. It stipulates that measures to be adopted to ensure equality between men and women as well as measures to be adopted for children, elderly persons, persons with disabilities, widows and orphans of martyrs,¹⁰⁷ ex-soldiers disabled in war and veterans shall not be considered as violations of the principle of equality.

Article 48 is a specific clause which guarantees the freedom to work, conclude contracts and establish private enterprises without referring to any particular ground. It is directly applicable and can be enforced against private actors. Article 50 is a specific clause stating that 'no one shall be required to perform work unsuited to his/her age, gender, and capacity' and entitling persons with physical or mental disabilities to 'special protection with regard to working conditions'. The Constitutional Court interpreted this provision to cover all persons with disabilities.¹⁰⁸ Thus, it can be inferred that reference to 'mental disabilities' covers both intellectual disabilities and psychosocial disabilities. The material scope of these articles is not broader than that of the directives. The articles are directly applicable and can be enforced against private actors.

Article 70 is a specific clause implicitly prohibiting discrimination in entry to public service without explicitly specifying any grounds: 'Every Turk has the right to enter public service. No criteria other than the qualifications for the office concerned shall be taken into

¹⁰⁵ Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Application no. 2013/1948, 23 January 2014 (invoking sexual orientation to argue that the homosexuality of her murdered brother was used as a mitigating factor in the sentencing of the perpetrator, who was more favourably treated than other individuals convicted of homicide); Application no. 2013/1280, 28 May 2015 (invoking ethnic origin to claim that in assessing their compensation claim for the murder of their daughter in a terrorist attack which specifically targeted people of Kurdish origin the lower court awarded them damages lower than those awarded in similar cases of death caused by the negligence of the administration).

¹⁰⁶ Ulaş Karan (2015), 'Bireysel Başvuru Kararlarında Ayrımcılık Yasağı ve Eşitlik İlkesi' (The non-discrimination and equality principle in individual petition rulings), *Anayasa Yargısı*, vol. 32 (2015), pp. 235-294, at p. 249.

¹⁰⁷ Although widely used in Turkey's legal framework and political discourse, a legal definition of the term 'martyr' does not exist. With its roots in a religious notion, it originally referred to individuals killed while defending the nation. In more recent years, it has been used by government officials, political leaders and the media to refer also to civilians killed in terrorism or counter-terrorism activities. On the need for legal clarity of this term, see Ersan Şen (2015), '"Şehit" kime denir?' ('Who should be called a "Martyr"'), *Haber7Com*, 25 October 2015, available at: <http://www.haber7.com/yazarlar/prof-dr-ersan-sen/1620770-sehit-kime-denir>.

¹⁰⁸ Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Judgment, E. 2006/101, K. 2008/126, 19 June 2008.

consideration for recruitment into public service.’ It is directly applicable and can be enforced against private actors.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

After the adoption of the anti-discrimination law in 2016, the only ground of discrimination that is not prohibited under Turkish law is sexual orientation.¹⁰⁹ The following grounds are explicitly prohibited in national law: race,¹¹⁰ language,¹¹¹ colour,¹¹² gender,¹¹³ disability,¹¹⁴

¹⁰⁹ The grounds of 'sexual identity' and 'social status' were included in the 2009 draft law, but were taken out of the final text.

¹¹⁰ Turkey, Constitution (*Türkiye Cumhuriyeti Anayasası*), Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), 6 April 2016, Article 3(2); Turkey, Penal Code (*Türk Ceza Kanunu*), Article 3(2), 26 September 2004; Turkey, Labour Law (*İş Kanunu*), Article 5(1), 22 May 2003; Turkey, Basic Law on National Education (*Milli Eğitim Temel Kanunu*), Article 4, 14 June 1973; Turkey, Law on Civil Servants (*Devlet Memurları Kanunu*), Article 7, 14 July 1965; Turkey, Civil Code (*Medeni Kanun*), Article 68, 22 November 2001; Turkey, Law on Political Parties (*Siyasi Partiler Kanunu*), Article 12, 22 April 1983; Turkey, Law on Social Services (*Sosyal Hizmetler Kanunu*), Article 4(d), 24 May 1983; Turkey, Law on the Execution of Penalties and Security Measures (*Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*), Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution (*Kamu Denetçiliği Kanunu*), Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law (*Türk Silahlı Kuvvetleri Disiplin Kanunu*), Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports (*Sporda Şiddet ve Düzensizliğin Önlenmesine Dair Kanun*), Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage (*Asgari Ücret Yönetmeliği*), Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels (*Radio ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkında Kanun*), Article 8(e), 15 February 2011.

¹¹¹ Turkey, Constitution, Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

¹¹² Turkey, Constitution, Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 18, 29 June 2012; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

¹¹³ Turkey, Constitution, Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004.

¹¹⁴ Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Law on Persons with Disability (*Engelliler Hakkında Kanun*), 1 July 2005; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.

political opinion/thought,¹¹⁵ philosophical belief/opinion,¹¹⁶ religion,¹¹⁷ sect (denomination),¹¹⁸ nationality,¹¹⁹ national origin,¹²⁰ ethnic origin,¹²¹ social origin,¹²² birth,¹²³ economic or other social status,¹²⁴ family,¹²⁵ marital status,¹²⁶ class,¹²⁷

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- ¹¹⁵ Turkey, Constitution, Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.
- ¹¹⁶ Turkey, Constitution, Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 30, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.
- ¹¹⁷ Turkey, Constitution, Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Basic Law on National Education, Article 4, 14 June 1973; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Establishment of the Ombudsman Institution, Article 18, 29 June 2012; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.
- ¹¹⁸ Turkey, Constitution, Article 10, 7 November 1982; Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Labour Law, Article 5(1), 22 May 2003; Turkey, Law on Civil Servants, Article 7, 14 July 1965; Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983; Turkey, Regulation on Minimum Wage, Article 5, 1 August 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Turkish Armed Forces Discipline Law, Article 18, 31 January 2013; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011.
- ¹¹⁹ Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on the Foundation and Broadcasting of Radio and Television Channels, Article 8(e), 15 February 2011.
- ¹²⁰ Turkey, Penal Code, Article 3(2), 26 September 2004.
- ¹²¹ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004; Turkey, Law on Prevention of Violence and Disorder in Sports, Article 14, 14 April 2011.
- ¹²² Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004.
- ¹²³ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016; Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004.
- ¹²⁴ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016 (wealth); Turkey, Penal Code, Article 3(2), 26 September 2004; Turkey, Law on the Execution of Penalties and Security Measures, Article 2(1), 13 December 2004.
- ¹²⁵ Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983.
- ¹²⁶ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016.
- ¹²⁷ Turkey, Civil Code, Article 68, 22 November 2001; Turkey, Law on Political Parties, Article 12, 22 April 1983; Turkey, Law on Social Services, Article 4(d), 24 May 1983.

profession,¹²⁸ regional differences,¹²⁹ health¹³⁰ and age.¹³¹ Discrimination is occasionally prohibited more generally, without enumerating any grounds.¹³²

At the same time, most of the lists, though not that in the anti-discrimination law,¹³³ are open-ended. As mentioned in Section 1, the Constitutional Court has effectively verified the open-ended nature of Article 10 of the Constitution by entertaining discrimination claims on the basis of ethnic origin and sexual orientation.¹³⁴ However, the Court established a hierarchy among the enumerated and non-enumerated grounds by considering only the former as suspect grounds requiring 'very important reasons' for their restriction.¹³⁵ In so doing, the Court thus excluded 'sexual orientation' from the suspect grounds.¹³⁶

In 2008, the Court of Cassation said that Article 5 of the Labour Law prescribes an open-ended prohibition of discrimination and should be interpreted as prohibiting discrimination based on sexual orientation (the term used by the Court is sexual preference) among other grounds.¹³⁷ In a precedent-setting judgment issued on 7 November 2014 and published in March 2015, the Council of State found the Ministry of National Education's dismissal from the profession of a teacher due to his/her sexual orientation to be unconstitutional. While the applicant based his/her claim on the equality and non-discrimination clauses of the Turkish Constitution (Article 10) and the European Convention on Human Rights (ECHR) (Article 8), the Court did not frame the case as an equality issue, but rather restricted its analysis to the right to privacy, finding Article 20(1) of the Turkish Constitution and Article 8 of the ECHR to have been violated.¹³⁸

In addition to constitutional and legislative provisions on anti-discrimination, Articles 216 and 122 of the Penal Code prohibit incitement to hatred and hatred on enumerated grounds.¹³⁹ While hate crime has thus been introduced into the Turkish legal system, amendments introduced in 2015 removed the word 'discrimination' from the text of this provision (though retaining it in its title 'hatred and discrimination') and, most importantly, changed the open-ended nature of the article. While nationality has been added to the enumerated grounds, a flexible judicial interpretation of Article 122 to encompass discrimination based on ethnicity, age and sexual orientation has thus been foreclosed with the abolishment of the open-ended nature of this article. The anti-discrimination law does

¹²⁸ Turkey, Law on Political Parties, Article 12, 22 April 1983.

¹²⁹ Turkey, Law on Social Services, Article 4(d), 24 May 1983.

¹³⁰ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016

¹³¹ Turkey, Law on the Human Rights and Equality Institution of Turkey (*Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu*), Article 3(2), 6 April 2016

¹³² Turkey, Law on the Establishment and Duties of the Turkish Football Federation (*Türkiye Futbol Federasyonu Kuruluş ve Görevleri Hakkında Kanun*), 5 May 2009, Article 3, (prohibiting the Federation from engaging in racism and any kind of discrimination).

¹³³ Under the draft prepared in 2009, the list was open-ended.

¹³⁴ Ulaş Karan (2015), 'Bireysel Başvuru Kararlarında Ayrımcılık Yasağı ve Eşitlik İlkesi' (The non-discrimination and equality principle in individual petition rulings), *Anayasa Yargısı*, vol. 32 (2015), pp. 235-294, at p. 249.

¹³⁵ Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Application no. 2014/256, 25 June 2014, at para. 146.

¹³⁶ Ulaş Karan, 'Bireysel Başvuru Kararlarında Ayrımcılık Yasağı ve Eşitlik İlkesi' (The non-discrimination and equality principle in individual petition rulings), *Anayasa Yargısı*, vol. 32 (2015), pp. 235-294, at p. 261.

¹³⁷ Turkey, Ninth Civil Chamber of the Court of Cassation, E. 2008/27309, K. 2008/22094, 25 July 2008.

¹³⁸ Turkey, 12th Circuit of the Council of State, 7 November 2014, E. 2011/750, K. 2014/7169.

¹³⁹ Article 216 of the Turkish Penal Code criminalises (1) incitement to enmity or hatred on grounds, inter alia, of race, religion or denomination in a manner which may present a clear and imminent danger to public safety, (2) open denigration of a section of the population on grounds, inter alia, of race, religion or denomination, and (3) open denigration of religious values of a part of the population. Article 8(b) of the Law on the Foundation and Broadcasting of Radio and Television Channels prohibits the encouragement of hatred through making distinctions based on race, language, religion, sect and regional differences. Article 8(ğ) bans broadcasts which exploit children, the weak and persons with disabilities and provoke violence against them (material scope limited). Article 122 of the Turkish Penal Code prohibits hatred based on language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect (material scope limited to the sale or transfer of goods, the execution of a service, employment, the provision of food services and the undertaking of economic activity).

not prohibit hate speech or hate crime, although the 2009 draft law it replaced included such a provision, prohibiting hate speech against 'an individual or group'.¹⁴⁰

In its concluding observations on the combined fourth to sixth periodic reports of Turkey, published on 11 January 2016, the Committee on the Elimination of Racial Discrimination (CERD) expressed concern that Article 216 of the Penal Code sets 'a clear and imminent danger to public order' as a condition for the prosecution of acts that incite racial hatred, regretted the absence of racist motive as an aggravating circumstance and expressed concern that Article 216 has been used to curtail free speech and to penalise human rights defenders and those advocating minority rights.¹⁴¹ The Committee expressed concern at incidents of hate speech and discriminatory statements in the public discourse as well as hate crimes, including physical attacks against ethnic minorities and at their inadequate and ineffective investigation.

Similarly, in its fifth monitoring report on Turkey (2016), the European Commission against Racism and Intolerance (ECRI) stated that the 'definition of hate crime is excessively narrow and the Criminal Code does not explicitly provide that racist and homo/transphobic motivation constitutes an aggravating circumstance'.¹⁴² ECRI noted that Article 216 of the Penal Code does not mention incitement to violence and discrimination and does not include the grounds of ethnic origin, sexual orientation and gender identity.¹⁴³ Emphasising that hate crime encompasses not only discrimination but all hate-motivated offences, including racist and homo/transphobic murder and physical attack, ECRI regretted that the 2015 amendments to the Penal Code did not codify hate crimes accordingly. It also noted that the Penal Code 'does not explicitly criminalise racially-motivated threats'.¹⁴⁴

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The only ground defined under the Law on the Human Rights and Equality Institution of Turkey (no. 6701) is disability, although the 2009 draft law it replaced had defined race, ethnic origin, sex and sexual identity (but not age and disability). The definition of a person with disability under Law no. 6701 is identical to that in the Law on Persons with Disabilities (no. 5378): 'an individual who is influenced by attitudes and environmental factors which hinder his/her full and effective participation in social life on an equal basis with others due to loss of physical, mental, psychological or sensory capabilities at various levels'.¹⁴⁵

While Turkey's constitutional and legislative framework explicitly avoids providing any definition or categorisation based on ethnicity, race or religion, Turkey's founding international Treaty of Lausanne (1923) makes a distinction between non-Muslim citizens and the rest, by conferring minority status on the former (without providing a definition for minority). While this distinction de jure refers to categorisation on the basis of religion, since 1925 the Turkish Government has in practice limited the protection of the Lausanne Treaty to Jews, and Armenian and Greek Orthodox Christians, whose identities refer to both a specific religion and a specific ethnic origin. In August 2013, a lower court challenged this policy for the first time by holding that the Treaty of Lausanne granted minority status

¹⁴⁰ Articles 2(1)(g) and 3(8) of the draft law.

¹⁴¹ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2016), *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Turkey*, CERD/C/TUR/CO/4-6, 11 January 2016, p. 3-4, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/003/50/PDF/G1600350.pdf?OpenElement>.

¹⁴² European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 9, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

¹⁴³ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 13, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

¹⁴⁴ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 14, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

¹⁴⁵ Law no. 6701, Article 2(1)(f); Law no. 5378, Article 3(c).

and rights to all non-Muslim citizens, without enumerating any specific group.¹⁴⁶ The decision was given in a case brought by the Syriac community (a group which also has a distinct religious and ethnic identity), whose request for opening a kindergarten where children would also be taught their mother tongue was rejected by the Ministry of National Education.¹⁴⁷ However, due to the broad reasoning of the court, which concluded that all non-Muslim communities are entitled to minority rights under the Treaty of Lausanne, and the fact that the Ministry decided not to appeal the decision, it is likely that the decision will be used by other non-Muslim groups in challenging state policies. Following the court decision, the Syriac community set up a kindergarten, its first educational institution, which started to operate in the 2014-2015 academic year.

Race and Ethnic origin

Racial origin is not defined in any current law.

Ethnic origin is not defined in any current law.

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

Religion

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

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

Pursuant to a 'reform' introduced in 2006, all Turkish citizens, irrespective of religion or denomination, have the right, upon submission of a petition and payment of a small fee, to leave blank the box on their identity card indicating religion.¹⁴⁸ Thus, the choice now is between indication of one of the three religions recognised by the state or leaving the box blank. Other believers are still not allowed to indicate their faiths, religions or denominations on their identity cards. In rare cases where such people have applied for the identification of their true faith, their requests have been denied. In a case concerning a request of this kind by a Bahá'í, whose religion was indicated by the state as Islam, the Court of Cassation, on the basis of the opinion of the Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı*, Diyanet), decided that the Bahá'í faith is not a religion, without defining religion or elaborating any criteria by which it determines a faith as a religion.¹⁴⁹

Another important issue in this regard is the definition of a Muslim. The official identity cards of persons who belong or are assumed to belong to the Muslim faith indicate their religion to be 'Islam', without specifying a denomination. In a country extremely divided along religious/denominational lines, the difference matters, since people belonging to non-Sunni denominations of Islam¹⁵⁰ feel discriminated against by state policies protecting the rights and interests of people believing in the Sunni version of Islam. While the vast majority of Muslims in Turkey belong to the Sunni-Hanefi denomination, there is a significant Alevi community and small Caferi and Nusayri communities, who follow different interpretations and practices of the Muslim faith from those of the Sunni majority. Requests

¹⁴⁶ European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at https://www.ab.gov.tr/files/2013%20ilerleme%20raporu/tr_rapport_2013_en.pdf.

¹⁴⁷ Turkey, Thirteenth Administrative Court of Ankara, E. 2012/1746, K. 2013/952, 18 June 2013.

¹⁴⁸ Turkey, Law on Civil Registry Services (*Nüfus Hizmetleri Kanunu*), 29 April 2006.

¹⁴⁹ See for example: Turkey, Tenth Civil Chamber of the Court of Cassation, E. 1992/3226, K. 1995/4872, 25 October 1995; Third Civil Chamber of the Court of Cassation, E. 1988/8776, K. 1988/9515, 11 November 1988; Sixth Civil Chamber of the Court of Cassation, E. 1974/2007, K. 1974/2242, 7 May 1974.

¹⁵⁰ The majority of Muslims in Turkey belong to the Sunni denomination of Islam.

by Alevis to change the indication on their identity card from Islam to Alevi are declined by the courts and all Alevis are registered as Muslims.

This issue was brought before the European Court of Human Rights (ECtHR or the Court). On 2 February 2010, the Court issued its judgment in the case of *Sinan Işık v. Turkey*, ruling that the indication of religion on the identity card, even where it is no longer obligatory, is a breach of Article 9 of the ECHR.¹⁵¹ The Court held that the new regulation obliged individuals to apply to the authorities in writing for the deletion of religion from their identity cards and disclosed the religious or personal convictions of individuals who chose to have the religion box left blank. The Court found this to be in violation of the negative aspect of Article 9, namely the freedom not to manifest one's religion or belief. Though the judgment is binding on all national authorities in Turkey under Article 90 of the Constitution, it remains unimplemented. There is virtually no debate at national level on the non-implementation of the judgment, with the exception of the Alevi organisations and the media.

The choice between leaving the box blank and being officially identified against their true conviction or faith leaves many individuals in a dilemma. A blank box in official identity cards, which are used on a daily basis in access to public services, serves to detect religious minorities such as Alevis, Protestants, Baha'is and Syriacs, as well as atheists and agnostics, and exposes them to discriminatory treatment. The European Commission reported 'discriminatory practices or harassment by local officials of persons who converted from Islam to another religion and thereafter sought to amend their ID cards'.¹⁵² Therefore, few persons dare to leave the religion section blank for fear of discrimination. As far as Armenian, Greek Orthodox and Jewish people are concerned, choosing not to identify their religion on their identity cards may mean that their children are not exempt from mandatory religion courses (see Section 3.2.8).

Disability

The Law on Persons with Disabilities (no. 5378) defines a person with disability as 'an individual who is influenced by attitudes and environmental factors which hinder his/her full and effective participation in social life on an equal basis with others due to loss of physical, mental, psychological or sensory capabilities at various levels'.¹⁵³ The law defines discrimination based on disability as 'every kind of difference, exclusion or restriction based on disability which hinders the full exercise of human rights and liberties on equal footing with others in political, economic, social, cultural, civil or any other area'. These definitions are in line with the UN Convention on the Rights of Persons with Disabilities and the European Court of Justice's judgment in the case of *Ring and Skouboe Werge*.¹⁵⁴ The anti-discrimination law adopted in 2016 uses the same definition of disability.¹⁵⁵

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

Under Article 3(c) of the Law on Social Services, a person with disability is defined as someone who 'does not adapt to the needs of normal life and is in need of protection, care,

¹⁵¹ ECtHR, *Sinan Işık v. Turkey*, No. 21924/05, 2 February 2010.

¹⁵² European Commission (2012), *Turkey Progress Report*, Brussels, 10 October 2012, p. 25, available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf.

¹⁵³ Law no. 5378, at Article 3(c).

¹⁵⁴ Court of Justice of the European Union (CJEU), No. C-335/11 and C-337/11, *Ring and Skouboe Werge v. Denmark*, 11 April 2013.

¹⁵⁵ Law no. 6701, Article 2(1)(f).

rehabilitation, consulting and support services'. Under Article 3(d), in order to be eligible for disability benefits, the person with disability must receive a disability report from special health boards established pursuant to the Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled.¹⁵⁶ As indicated by its name, the regulation sets out the criteria for the classification of persons with disabilities into various categories based on the percentage of their disability, which determine his/her eligibility to receive special social services provided by the state. Making special social services to be provided by the state conditional on the degree of disability, which is calculated through a technical process and on the basis of mathematical formulations, not only 'ignores the special circumstances of the individual'¹⁵⁷ but also shows that the Turkish state is far from adopting a rights-based perspective on disability.

Disability can also be defined in a negative aspect in disqualifying individuals from certain professions. For example, according to Article 8 Paragraph (g) of the Law on Judges and Prosecutors (no. 2802), in order to be appointed as a candidate judge or prosecutor, a person 'should not have any physical or mental illness or disability that would prevent the person from carrying out his/her responsibilities as a judge or a prosecutor continuously in every part of the country; or any disabilities which cause limitations in controlling the movements of the organs; speech different from that which is customary and would be found odd by people'. Similarly, Article 74(e) of the Law on the Union of Chambers and Commodity Exchanges of Turkey (no. 5174) states that to be eligible to hold the position of general secretary of the Union of Chambers and Commodity Exchanges, a person 'shall not have a physical or mental illness, or physical disability that shall prevent him performing his duties continuously'. In some cases, although the relevant law does not exclude persons with disabilities from entering a certain profession, public institutions can apply the rules in an exclusionary and discriminatory fashion. A case in point is the Ministry of National Education which, on its informative website on professions, introduced an eligibility requirement for the diplomatic profession not contained in any of the relevant laws.¹⁵⁸ The website stated that to be a diplomat a person shall 'not have a physical disability'.¹⁵⁹

A law adopted on 25 April 2013 replaced the terms *özürlü* (handicapped, defective, deficient), *sakat* (crippled, defective) and *çürük* (rotten, unfit) with that of *engelli* (disabled) in a total of 96 laws and decrees with the force of law, including the Civil Code, Anti-Terror Law, Law on Civil Servants, Law on Social Services, Law on Persons with Disabilities, the Penal Code, Law on Social Insurance and General Health Insurance and various laws concerning the families of martyrs, war veterans and retired members of the military.¹⁶⁰ However, the Constitution, various other laws, official documents and government offices continue to use the rather pejorative term *özürlü*.

¹⁵⁶ Turkey, Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled (*Özürlülük Ölçütü, Sınıflandırması ve Özürlülere Verilecek Sağlık Kurulu Raporları Hakkında Yönetmelik*), Official Gazette, 30 March 2013.

¹⁵⁷ Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birer, L., Kara, Ö. (2011), *Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), İstanbul Bilgi Üniversitesi, p. 14.

¹⁵⁸ Eşit Haklar için İzleme Derneği (Association for Monitoring Equal Rights) (2011), *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu* (Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report), p. 44, <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

¹⁵⁹ Eşit Haklar için İzleme Derneği (Association for Monitoring Equal Rights) (2011), *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu* (Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report), p. 44, <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

¹⁶⁰ Turkey, Law on Making Amendments in Various Laws and Decrees with the Force of Law with the Purpose of Changing References to Persons with Disabilities in Laws and Decrees with the Force of Law (*Kanun ve Kanun Hükmünde Kararnamelerde Yer Alan Engelli Bireylere Yönelik İbarelerin Değiştirilmesi Amacıyla Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 25 April 2013, <http://www.resmigazete.gov.tr/eskiler/2013/05/20130503-1.htm>.

Age

Age is not defined in any law in Turkey.

Sexual orientation

Sexual orientation is neither defined nor prohibited in any law in Turkey. While the initial text of the draft anti-discrimination law referred to and defined 'sexual identity', all such references were removed by the Government in 2011. The initial draft shared with civil society provided the definition of 'sexual identity' as covering 'heterosexual, homosexual, bisexual, transsexual, transvestite and similar sexual identities'. The anti-discrimination law eventually adopted in 2016 does not contain a definition either.

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

The principal way in which laws are applied in a discriminatory way against LGBTI people is through the judicial interpretation of terms such as 'morality,' 'indecent behaviour' and 'dishonourable behaviour'. Article 125 (E)(g) of the Law on Civil Servants allows the dismissal of public servants who are found to have acted 'in a shameful and embarrassing way unfit for the position of a civil servant'. This phrase, undefined in the law, has been interpreted by the courts to cover homosexual conduct, as a result of which the dismissal from public service of LGBTI employees has been upheld by the judiciary.¹⁶¹ In 2012, a police officer was dismissed under Article 125 (E)(g) due to his perceived gender identity;¹⁶² his appeal against the dismissal was awaiting a trial date as of January 2017.¹⁶³ While in 2013 the European Commission reported three more ongoing court cases concerning discrimination at the workplace on grounds of sexual orientation, no further information was available on the outcome of these cases.¹⁶⁴ In most cases, individuals dismissed by their employers due to their sexual orientation do not go to courts due to fear of rejection by their families, friends and colleagues and due to negative media attention to such court cases, which leads to further victimisation of victims.¹⁶⁵

¹⁶¹ Amnesty International reported on two cases of sexual orientation discrimination where 'gay men in public sector employment have been dismissed from their jobs for the explicit reason that they are gay'. Amnesty International (2011), *'Not an Illness nor a Crime': Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, London, Amnesty International, p. 23, available at: <http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf>. In one case, on 20 April 2004, the High Discipline Board of the Ministry of Interior dismissed a police officer upon oral evidence that he engaged in anal sex with another man. The decision was upheld by the Council of State on the basis of Article 125 of the Law on Civil Servants, which provides for dismissal of persons who were found 'to act in an immoral and dishonourable way which is not compatible with the position of a civil servant'. The other case concerned the dismissal by the High Discipline Board of the Ministry of National Education of a teacher for having engaged in a 'homosexual relationship'. This dismissal, too, was upheld by the court. While the courts' decisions in these two cases are not publicly available, Amnesty International reported having seen the official court documents.

¹⁶² Kaos GL, LGBTI News Turkey, IGLHRC (2014), *Human Rights Violations of LGBT Individuals in Turkey*, p. 5, available at: <http://iglhrc.org/sites/default/files/uprSubTurkey.pdf>, a joint report submitted by national and international LGBTI NGOs to the UN Human Rights Council Working Group on the Universal Periodic Review, twenty-first session, January-February 2015.

¹⁶³ Information received via email from lawyer Firat Söyle, 20 June 2017.

¹⁶⁴ European Commission (2013), *Turkey Progress Report*, Brussels, p. 59, available at https://www.ab.gov.tr/files/2013%20ilerleme%20raporu/tr_rapport_2013_en.pdf.

¹⁶⁵ Opinion expressed by Firat Söyle and Yasemin Öz, both of whom are leading lawyers in the area of sexual orientation discrimination cases. For an overview of case law concerning dismissal of LGBTI individuals from the civil service, see Öz, Y., *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Turkey*, Danish Institute for Human Rights, p. 19, available at http://www.coe.int/t/commissioner/source/lgbt/turkeylegal_e.pdf.

There are similar provisions in various laws and regulations allowing dismissal from employment of individuals due to their sexual orientation, which are not possible to list in an exhaustive manner. Examples can be found in the Military Penal Code, Law on Military Judges, Law on the Military Court of Cassation, Law on Lawyers, Law on Judges and Prosecutors, Regulation on Health Capability of the Turkish Armed Forces and Regulation on the Selection of Candidates for Military Judges.¹⁶⁶ The Turkish Armed Forces Discipline Law of 2013 despite protests from LGBTI groups added a new discriminatory provision to this list.¹⁶⁷ Article 20 of this law enumerates homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces. According to Article 20 (ğ), 'engaging in unnatural intercourse or voluntarily submitting oneself to such an act' is a ground for dismissal from the army. It is common knowledge in Turkey that the term 'unnatural intercourse' refers to anal intercourse and hence homosexual relationships. There are several cases of dismissal of homosexual men from public service or the military¹⁶⁸ on the basis of oral evidence of their engagement in anal sex with other men.

In a precedent-setting judgment issued on 7 November 2014 and published in March 2015, the Council of State ruled on the issue. The Court found the Ministry of National Education's rejection from the profession of a teacher due to his/her sexual orientation to be in violation of the right to privacy and to the protection of family life protected under Article 20(1) of the Turkish Constitution and Article 8 of the ECHR. It is notable that the Court cited the ECtHR's relevant jurisprudence.¹⁶⁹ This is the first time that the high court found a public institution to have discriminated against its employee on the basis of his/her sexual orientation.

On the other hand, in another significant court ruling in 2015, the Constitutional Court declined the request of a lower court for the annulment of the phrase 'in unnatural ways' from Article 226 of the Turkish Penal Code on the ground that it violated, among others, the constitutional right to privacy. Article 226, titled 'obscenity', criminalises the production, sale, transfer, storage, sharing and ownership of print, audio or visual materials depicting sexual behaviour conducted 'through violence, with animals, on dead human bodies or in unnatural ways'.¹⁷⁰ In a divided opinion released on 1 April 2015, the Constitutional Court upheld the provision on the ground that the prohibition of the storage of materials depicting sexual behaviour in 'unnatural ways' for the purpose of dissemination was proportionate to the legitimate aim of protecting public morality and was in accordance with the ECtHR jurisprudence on obscenity. A minority of 4 dissenting judges raised issues that the majority of 12 judges evaded addressing. They pointed out that the provision was in violation of the principles of equity and proportionality because it penalised equally individuals who produced such materials for commercial purposes and those who owned them for personal use. They also pointed out that in its case law the Court of Cassation had also interpreted the phrase 'unnatural ways' to refer to oral, anal, group sex, lesbian and homosexual relationships, even when such relationships were consensual. Noting that

¹⁶⁶ For a more detailed list of these laws and regulations as well as their relevant provisions, see Güner, U., Kalkan, P., Öz, Y., Özsoy, E.C., Söyle, F. (2011), *Türkiye'de Cinsel Yönelim veya Cinsiyet Kimliği Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Sexual Orientation or Gender Identity in Turkey: 1 January-30 June 2010), pp. 27-28.

¹⁶⁷ Turkey, Turkish Armed Forces Discipline Law, 31 January 2013.

¹⁶⁸ For examples of dismissal of homosexual personnel from the Turkish Armed Forces and the jurisprudence of military courts upholding this practice, see Güner U., Kalkan, P., Öz, Y., Özsoy, E.C., Söyle, F. (2011), *Türkiye'de Cinsel Yönelim veya Cinsiyet Kimliği Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Sexual Orientation or Gender Identity in Turkey: 1 January-30 June 2010), pp. 28-29.

¹⁶⁹ Turkey, 12th Circuit of the Council of State, E. 2011/750, K. 2014/7169, 7.11.2014 (citing ECtHR, *Dudgeon v. UK*, Application no. 7525/76, 22 October 1981; ECtHR, *Smith and Grady v. UK*, Application no. 33985/96, 27 September 1999; ECtHR, *Lustig/Prean and Beckett v. UK*, Application no. 31417/96, 27 September 1999; ECtHR, *Perkins and R. v. UK*, Application no. 43208/98, 22 October 2002; ECtHR, *Beck, Copp and Bazeley v. UK*, Application no. 48535/99, 22 October 2002; ECtHR, *Özpınar v. Turkey*, Application no. 20999/04, 19 October 2010).

¹⁷⁰ Article 226(4) of the Turkish Penal Code, penalising such offences with one to four years of imprisonment.

all kinds of consensual sexual relationships which do not contain violence are protected by the right to privacy, the dissenting judges argued that the Court should have annulled the phrase.¹⁷¹

Authorisation of the dissolution of associations on grounds of 'public morality' under the Civil Code has been frequently resorted to by prosecutors against LGBTI associations. In many cases, the courts ruled against the associations, as in the case of the confiscation by court order of all copies of a magazine published by Kaos GL on the grounds that its content was obscene and against public morality. On 22 November 2016, the ECtHR issued its long-awaited judgment in the case filed by Kaos GL, finding that the confiscation of all copies of volume 28 of the magazine was a disproportionate infringement of freedom of expression which is not necessary in a democratic society.¹⁷² The judgment did not receive any public or government reaction with the exception of LGBT groups.

In rare cases where Turkish courts ruled against the dissolution of LGBTI associations, the reasoning reflected a homophobic mentality which associates homosexuality with morality. For example, in 2008, in overturning the decision of a lower court to dissolve Lambdaistanbul, the Court of Cassation based its decision on the fact that the association did not pursue the goal of 'encouraging others to be an LGBTI person'. The Court reasoned as follows. 'The fact which is deemed to be immoral by society at large is not to be lesbian, gay, bisexual, transvestite or transsexual and the use of these words, but for these individuals to promote and to encourage with their lifestyles others' to follow an LGBTI lifestyle.'¹⁷³

In a similar vein, the authorities interpret the above-mentioned Article 226 of the Penal Code, titled 'obscenity', to unlawfully limit freedom of expression. In August 2013, the Fourteenth Penal Chamber of the Court of Cassation in Istanbul overturned a lower court judgment acquitting the publisher and translator of a French book, on the ground that the book's homosexual content was offensive.¹⁷⁴ The Law on the Foundation and Broadcasting of Radio and Television Channels is also used by the Turkish courts to block gay social networking websites and by the Supreme Board of Radio and Television to fine broadcasters for airing programmes with homosexual content.¹⁷⁵

2.1.2 Multiple discrimination

In Turkey, the prohibition of multiple discrimination is included in the law.¹⁷⁶ The Law on the Human Rights and Equality Institution of Turkey (no. 6701) defines multiple discrimination as 'discriminatory treatment related to more than one discrimination ground'.¹⁷⁷ Under Article 25(1), multiple discrimination is an aggravating factor to be taken account in the determination of the amount of administrative fines (ranging between TRY 1 000 and TRY 15 000 - EUR 250-3 750) imposed on natural or legal persons found to have engaged in discrimination

In Turkey, there is no case law dealing with multiple discrimination.

¹⁷¹ Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), E. 2014/118, K. 2015/35, 1 April 2015.

¹⁷² ECtHR, *KaosGL v. Turkey*, Application no. 4982/07, 22 November 2016.

¹⁷³ Turkey, Seventh Chamber of the Court of Cassation, 2008/4109 E, 2008/5196 K, 25 November 2008.

¹⁷⁴ Radikal (2013), 'Yargıtay Fransızca Kitabı Müstehcen Buldu' ('The Court of Cassation Held the French Book to be Obscene'), 6 August 2013, available at: http://www.radikal.com.tr/turkiye/yargitay_fransizca_kitabi_mustehcen_buldu-1145084.

¹⁷⁵ Kaos GL, LGBTI News Turkey, IGLHRC (2014), *Human Rights Violations of LGBT Individuals in Turkey*, available at: <http://iglhrc.org/sites/default/files/uprSubTurkey.pdf>: a joint report submitted by national and international LGBT NGOs to the UN Human Rights Council Working Group on the Universal Periodic Review, twenty-first session, January-February 2015.

¹⁷⁶ Article 4(1)(c) of Law no. 6701.

¹⁷⁷ Article 2(1)(ç) of Law no. 6701.

No further legal amendment has been made to facilitate the litigation of multiple discrimination claims in the courts.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Turkey, the following national law prohibits discrimination based on assumption of what a person is: Article 4(1)(c) of Law on the Human Rights and Equality Institution of Turkey (no. 6701). The law defines discrimination by assumption as 'the discriminatory treatment of a natural or legal person in the exercise of legal rights and freedoms because it is assumed that s/he/it shares one of the discrimination grounds prohibited under this law, although that is in reality not the case'.¹⁷⁸

b) Discrimination by association

In Turkey, national law (including case law) does not prohibit discrimination by association. The new law on anti-discrimination also does not prohibit discrimination by association.

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

a) Prohibition and definition of direct discrimination

In Turkey, direct discrimination is prohibited in national law. It is defined.

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

Article 2(1)(d) of the Law on the Human Rights and Equality Institution of Turkey defines direct discrimination as 'any differential treatment, based on the grounds enumerated in this law, which prevents or obstructs any natural or legal entity from the enjoyment of legally recognised rights and freedoms on an equal footing with others in comparable situations'. The definition itself is compatible with the directives; however, sexual orientation is excluded from the grounds on the basis of which direct discrimination is prohibited under Article 4(1)(ç).

In addition, Article 10 of the Constitution, Articles 3(2) and 122 of the Penal Code, Article 5(1) of the Labour Law, Article 4 of the Basic Law on National Education, Article 68 of the Civil Code, Article 12 of the Law on Political Parties, Article 8 of the Law on the Foundation and Broadcasting of Radio and Television, Article 4(d) of the Law on Social Services, Article 2(1) of the Law on the Execution of Penalties and Security Measures and Article 7 of the Law on Civil Servants prohibit direct discrimination within their limited material scopes, but do not define direct discrimination.

The Constitutional Court's established definition of equality under Article 10 of the Constitution is as follows:

'The principle of equality, which is among the fundamental principles of law, is enshrined in Article 10 of the Constitution. Equality before the law applies to persons

¹⁷⁸ Article 2(1)(m) of Law no. 6701.

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

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

However, 'public interest' or 'legitimate aim' should be a) clear b) relevant to the aim c) reasonable and just. If the rule adopted does not comply with one of these requirements which complement, support and strengthen each other, then it can be concluded that it is in contradiction to the principle of equality.¹⁷⁹

The Constitutional Court elaborated on the anti-discrimination principle in June 2014, the first time it found the violation of this principle in an individual complaint. Noting that the principle of equal treatment and the prohibition of discrimination are 'concepts used to refer to the same thing' and that the former also entails the latter, the Court said that the principle of non-discrimination

'entails the provision or rejection of opportunities on the basis of grounds such as religion, political opinion, sexual and sex identity which are the elements of the individual's personality and are based on personal choices or personal traits such as gender, race, disability and age which cannot be questions of choice under any circumstance.'¹⁸⁰

The Constitutional Court did not make a distinction between direct or indirect discrimination or say whether the definition only concerned direct discrimination. The Court's consideration of sexual orientation (or, as it characterised, 'sexual and sex identity') as a matter of personal choice is notable.

b) Justification of direct discrimination

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

2.2.1 Situation testing

a) Legal framework

In Turkey, national law is silent on situation testing. The list of evidence is open in procedural laws. Therefore, consideration of evidence obtained through situation testing is left to the discretion of the judge.

b) Practice

¹⁷⁹ Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), E. 2008/95, K. 2010/18, 28 January 2010.

¹⁸⁰ Turkey, Constitutional Court (*Anayasa Mahkemesi Kararı*), Application no. 2014/256, 25 June 2014, at para. 114.

In Turkey, situation testing is not used in practice. Anti-discrimination NGOs are either not knowledgeable about the method¹⁸¹ or do not believe in its effectiveness in the Turkish context, where LGBTI associations do not dare to use this method due to the risk of violence and the ideological stance of the law enforcement authorities and the judiciary.¹⁸² An anti-discrimination lawyer representing an LGBTI association stated that in the only incident he knows – and was a part of – where situation testing was used, a group of transgender individuals were thrown out of a bar. The management justified the act on the ground that ‘women with headscarves and people with uniforms were also not allowed’.¹⁸³

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

a) Prohibition and definition of indirect discrimination

In Turkey, indirect discrimination is prohibited. It is defined.

Article 4(1)(d) of Law on the Human Rights and Equality Institution of Turkey prohibits indirect discrimination on grounds of sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age. Article 4/A of the Law on Persons with Disabilities prohibits indirect discrimination on the basis of disability not only in job applications, hiring processes, working hours and terms (as the pre-amended law) but in all issues relating to employment, including continuity of employment, career development and healthy and safe working conditions (changes made in Article 14).

Article 2(1)(e) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) defines indirect discrimination as: ‘[a] natural or legal person being put in a disadvantageous situation, as a result of any action, procedure or practice which does not appear discriminatory, in exercising his/her legally recognised rights and liberties on the grounds prohibited under this law in such a way that cannot be objectively justified.’ The following additional sentence which existed under the corresponding article of the 2009 draft law has been removed: “In order for an action, procedure or practice to be objectively justified, it must have a legitimate aim and be proportionate.’

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

The definition of indirect discrimination itself is compatible with the directives, but sexual orientation is excluded from the grounds on the basis of which indirect discrimination is prohibited under Law no. 6701.

b) Justification test for indirect discrimination

An objective test must be satisfied to justify indirect justification under Article 2(1)(e) of the Law on the Human Rights and Equality Institution of Turkey and Article 3(b) of the Law on Persons with Disabilities. Neither law elaborates on what can be considered a legitimate

¹⁸¹ In answer to a query, a lawyer representing one of the leading LGBTI associations stated that she is not familiar with situation testing methods. Email correspondence with Yasemin Öz, 23 April 2013.

¹⁸² Email correspondence with Murat Köylü, an anti-discrimination lawyer representing an LGBTI association, 22 April 2013.

¹⁸³ Email correspondence with Murat Köylü, an anti-discrimination lawyer representing an LGBTI association, 22 April 2013.

aim for the purpose of objective justification and there is no case law on this recently introduced concept in Turkish law.

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Turkey, there are (conditional) national rules permitting data collection for the purpose of proving discrimination. In connection with the OSCE's hate crime reporting system, the Government only provides data on incitement to hatred, but not on other forms of criminal hate speech. Furthermore, Turkey only provides judicial, and not police, data. Neither the judiciary nor the police collect data on the ethnic origins of victims. ECRI reported that a unit established within the Ministry of Justice is preparing to include that information in the statistics.¹⁸⁴

The Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides that the Institution that is to be established as the equality body will have the competence to decide, together with the Turkish Statistical Institute and other public bodies, on areas where official statistics are needed for the purpose of combating discrimination. However, the Turkish Statistical Institute is responsible for gathering such statistics.

While there are several institutions conducting public opinion surveys entailing questions about ethnic origin and religious background, their data has not yet been used as statistical evidence for the purpose of proving discrimination in courts of law. A noteworthy civil society initiative, begun in 2009, is the compilation of reports on hate speech in the national and local media by the Hrant Dink Foundation, based on its daily monitoring of over 1 000 news outlets.¹⁸⁵

Article 20(3) of the Constitution reads:

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

In spite of this new constitutional right, an implementing law on data protection is yet to be adopted and an independent supervisory data protection authority is still to be established.¹⁸⁶ The democratisation package announced by the Government on 30 September 2013 contains a commitment to the adoption of such a law, though no timeline has been given for this.

¹⁸⁴ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 18, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

¹⁸⁵ For the website of the Media Watch on Hate Speech project, see <http://hrantdink.org/en/asulis-en/activities/projects/media-watch-on-hate-speech>.

¹⁸⁶ European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 63, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

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

Ethnicity and race

While periodic censuses conducted by the Government previously contained questions regarding ethnic origin, the 1965 census was the last one where people were asked about their mother tongue and ethnicity. Consequently, there is no longer any publicly available official data on the ethnic background of people collected on the basis of their informed consent and the principle of confidentiality. On the contrary, the collection of such data is de jure prohibited by the Government. A circular issued by the Ministry of Interior is cited regularly as an administrative act prohibiting the production of statistical data on race and ethnicity by public institutions. However, this circular is not publicly accessible. Otherwise, there are no specific rules on collection of data and no 'coherent, comprehensive system of data collection ... to assess the situation of the various minority groups or the scale of racism and racial discrimination in Turkey'.¹⁸⁷

The Turkish Government has time and again reiterated to the Committee on the Elimination of Racial Discrimination (CERD) that it does not collect, keep or use qualitative or quantitative data on ethnic backgrounds of its citizens,¹⁸⁸ noting that this is 'a sensitive issue, especially for those nations living in diverse multicultural societies for a long period of time'.¹⁸⁹ In its concluding observations on the combined fourth to sixth periodic reports of Turkey, published on 11 January 2016, CERD regretted that Turkey still has not provided recent, reliable and comprehensive data on economic and social indicators, the use of mother tongues and languages or other indicators of ethnic origin that would enable the Committee to better evaluate the enjoyment of economic, social and cultural rights by various groups, including minorities.¹⁹⁰

At the same time, public authorities in Turkey do collect data on the ethnic and racial origin of citizens, not to use such data in research and litigation but for the purpose of profiling and policing ethnic minorities, particularly Kurds and Roma. A few examples of such practices have been inadvertently made available to the public by government institutions, such as a provincial police department whose website contained information about the ethnic background of residents. The information note stated that 'families of kurdisht¹⁹¹ dissent [sic] who migrated from eastern provinces' resided in neighbourhoods located near the highways while 'gypsies [sic]¹⁹² resided in the neighbourhoods of yeni mahalle and mezbaha.' While 'it was observed that the public residing in areas that fell within [the] responsibility [of the Police Department] do not have a specific political-ideological aim and

¹⁸⁷ European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, 8 February 2011, p. 9, available at <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-CBC-IV-2011-005-ENG.pdf>.

¹⁸⁸ Turkey, *Written replies by the Government of Turkey to the list of issues to be taken up by the Committee on the Elimination of Racial Discrimination in its consideration of the third periodic report of Turkey* (CERD/C/TUR/3), p. 1, available at <http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/WrittenRepliesTurkey74.pdf>.

¹⁸⁹ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

¹⁹⁰ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2016), *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Turkey*, CERD/C/TUR/CO/4-6, 11 January 2016, p. 2-3, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/003/50/PDF/G1600350.pdf?OpenElement>.

¹⁹¹ Spelling mistake in original text, not by author.

¹⁹² Spelling mistake in original text, not by author.

thought', the Police Department had ascertained that residents of certain other neighbourhoods were 'people who came from the east and the southeast', who 'committed crimes such as battery and theft'.¹⁹³

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

A news report published in August 2013 revealed not only that racial profiling of minorities is continuing but also how deeply rooted this discriminatory state practice is. The Armenian-Turkish weekly newspaper *Agos* published official correspondence within the provincial representation of the Ministry of National Education in Istanbul, which revealed that the population registry records contain a confidential 'racial code'.¹⁹⁴ The news concerned the attempts of a parent who had converted from Islam to the Armenian Orthodox religion to register her child at an Armenian kindergarten, for which she needed to receive authorisation from the Ministry of National Education. Upon the parent's application, the provincial representation of the Ministry in Istanbul sent an official letter to its district branch, stating that the parent in question could only be given authorisation if her 'confidential racial code' in her population registry record is 2, which is the racial code given to Armenian citizens.¹⁹⁵ According to the news report, not only Armenian but all citizens in Turkey are racially profiled, and not only for the purpose of identifying the eligibility of students for enrolment in non-Muslim schools. According to an undisclosed source in the population registry services, there are racial codes for Greek Orthodox, for Jews, for Syrians and for 'others.' In his May 2014 response to queries on this issue submitted by a member of the Parliament in August 2013,¹⁹⁶ the Minister of the Interior simply stated that 'procedures concerning registry incidents are being conducted in accordance with the law'.¹⁹⁷ However, in February 2016, in response to another query from an opposition MP belonging to the Armenian ethnic minority, the Minister of the Interior implicitly confirmed the policy, noting that all citizens in Turkey, irrespective of their religion or ethnicity, were coded.¹⁹⁸ In March, the same MP stated, during a speech he made at the Parliament, that he had been verbally informed by a population registry official that the practice had been brought to an end.¹⁹⁹

¹⁹³ Alp, S., Taştan, N. (2011), *Türkiye'de Irk veya Etnik Köken Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-31 Temmuz 2010* (Monitoring Report on Discrimination on Grounds of Race or Ethnic Origin in Turkey: 1 January-31 July 2010), Istanbul, Istanbul Bilgi Üniversitesi, p. 77, citing information available on 11 May 2010 on the website of the Köprübaşı Police Station of the Konya Police Department, which was no longer accessible at the time of the writing of this report.

¹⁹⁴ Balancar, F. (2013) '90 Yıldır "Soy Kodu" ile Fişlemişler' ('They have been branding with the "Race Code" for 90 Years'), *Agos*, 1 August 2013, available at: <http://www.agos.com.tr/tr/yazi/5384/90-yildir-soy-kodu-ile-fislemisler>.

¹⁹⁵ For the official letter from the Istanbul branch of the Ministry of National Education to its district representation in Şişli, see <http://www.agos.com.tr/haber.php?seo=90-yildir-soy-kodu-ile-fislemisler&haberid=5479>.

¹⁹⁶ For the text of the MP's written queries to the Prime Minister, see <http://www2.tbmm.gov.tr/d24/7/7-29686s.pdf> and for the text of the MP's second written query to the Prime Minister, see <http://www2.tbmm.gov.tr/d24/7/7-29694s.pdf>.

¹⁹⁷ For the text of the Minister's written response, see <https://www2.tbmm.gov.tr/d24/7/7-29686sgc.pdf>.

¹⁹⁸ T24 (2016), 'İçişleri Bakanı Efkân Ala 'Soy Kodu'nun Tüm Vatandaşlar İçin Uygulandığını Söyledi' ('Minister of Interior Efkân Ala said the 'Race Code' is applicable to all citizens'), 15 February 2016, available at: <http://t24.com.tr/haber/icisleri-bakani-efkan-ala-soy-kodunun-tum-vatandaslar-icin-uygulandigini-soyledi.328285>.

¹⁹⁹ Cihan (2016), 'Garo Paylan: Soy Kodu Uygulaması Kaldırılmış, Teşekkür Ediyorum' ('Garo Paylan: I have been told that the Race Code Policy had been brought to an end, I thank you'), 2 March 2016, available at: <https://www.cihan.com.tr/tr/hdp-istanbul-milletvekili-garo-paylan-tbmm-genel-kurulu-butce-gorustmeleri-icisleri-bakani-efkan-ala-ermeniler-soy-kodu-2026368.htm>.

Disability

General censuses conducted in 1985 and 2000 contained insufficient information on the quantitative dimension of disability in Turkey.²⁰⁰ In 2002, the Presidency on Disabled People under the auspices of the Prime Ministry commissioned the Turkish Statistical Institute to conduct a survey.²⁰¹ This study, the first statistical research on disability in Turkey, identified the number of persons with disabilities in Turkey to be 8 431 937, which is 12.29 % of the total population. This was the first and last official survey on disability in Turkey and 15 years later, government policies are still developed on the basis of the data generated by this study. In addition, in 2010, the Ministry of Family and Social Policies and the Turkish Statistical Institute conducted a needs assessment survey.²⁰²

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

The Prime Ministry's State Personnel Presidency regularly publishes up-to-date statistics on persons with disabilities employed in the public sector. The data are segregated according to the provinces, sectors, public institutions where persons with disabilities are employed, as well as on the basis of the 'disability levels', education levels and types of disability of these persons. The data include information about vacancies available at each public institution which is legally obliged to fulfil an employment quota of 3 %.²⁰³ In addition, until 2013 the Turkish Statistical Institute released annual data on the number of persons with disabilities employed in both the public and the private sectors and the number of vacancies in both sectors, where there are legal obligations to fulfil employment quotas.²⁰⁴

In Turkey, the national law is silent on the use of statistical evidence in order to establish indirect discrimination. The Law on Civil Procedure (no. 1086), the Law on Administrative Procedure (no. 2577) and the Law on Criminal Procedure (no. 5271) do not contain specific provisions regarding statistical evidence. There is no case law regarding the use of statistical evidence. However, as a general rule, every claim can be proved by all types of evidence (although there are exceptions). Consequently, the courts can consider statistical evidence besides other evidence.

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

b) Practice

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

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

²⁰⁰ Şenyurt Akdağ A., Tanay, G., Özgül, H., Kelleci Birer L., Kara, Ö. (2011), Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010 (*Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010*), İstanbul, İstanbul Bilgi Üniversitesi, p. 13.

²⁰¹ For the results of the 2002 Disability Survey of Turkey, see Tufan, İ., Arun, Ö. (2006), Secondary Data Analysis of Disability Survey of Turkey (*Türkiye Özürlüler Araştırması 2002 İkincil Analizi*), available at: www.dezavantaj.org/files/ilerianaliz.doc.

²⁰² Turkey, Ministry of Family and Social Policies and Turkish Statistical Institute (2011), *Survey on Problems and Expectations of Disabled People 2010*, available at http://www.tuik.gov.tr/Kitap.do?metod=KitapDetay&KT_ID=1&KITAP_ID=244.

²⁰³ <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

²⁰⁴ This information is no longer publicly available on the website of the Turkish Statistical Institute.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Turkey, harassment is prohibited. It is defined.

Article 4(1)(g) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) prohibits harassment on grounds of sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age.

In addition, sexual harassment is prohibited under the Labour Law and the Penal Code.

Article 2(1)(j) of Law on the Human Rights and Equality Institution of Turkey defines harassment as 'intimidating, degrading, humiliating or embarrassing conduct, including psychological and sexual, related to any of the grounds referred to in this Law, which aims or has the effect of violating the dignity of a person'.

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

The definition of harassment under Law no. 6701 is not entirely compatible with the directives because sexual orientation is excluded from the grounds on the basis of which direct discrimination is prohibited under Article 4(1)(ç).

b) Scope of liability for harassment

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

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

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

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Turkey, instructions to discriminate are prohibited in national law. Instructions are defined.

Instructions to discriminate (and to abide by such instruction) constitute discrimination and are prohibited under Article 4(1)(b) of the Law on the Human Rights and Equality

Institution of Turkey (no. 6701) on grounds of sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age.

In addition, Article 10 of the Law on Civil Servants prohibits superiors of civil servants from giving orders to civil servants in violation of the law. When considered together with the prohibition of discrimination under Turkish law, this article can be construed to prohibit instructions to discriminate. There is no case law on the issue.

Article 2(1)(b) of the Law on the Human Rights and Equality Institution of Turkey defines instruction to discriminate as 'the instruction to discriminate given by an individual to others s/he has authorised to engage in actions or procedures in his/her name or behalf or by a public official to other individuals'. This definition is not entirely compatible with the directives, as sexual orientation is excluded from the grounds on the basis of which direct discrimination is prohibited under Article 4(1)(c).

b) Scope of liability for instructions to discriminate

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

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

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

In Turkey, the duty to provide reasonable accommodation is included in the law. It is defined.

Article 5(2) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) entails the duty to provide reasonable accommodation, but only in respect to persons with disabilities. Article 4(1)(f) considers the denial of reasonable accommodation as a form of discrimination. The same duty is also included in the Law on Persons with Disabilities, but again only in respect to persons with disabilities. It is defined, but again only in the context of the employment of persons with disabilities. The denial of reasonable accommodation is not considered to be a form of discrimination under this law.

Article 2(1)(i) of Law no. 6701 defines reasonable accommodation, only in the context of the access of persons with disabilities to employment, education, goods and services, housing, social protection and social advantages, as 'necessary and appropriate changes and precautions, to the extent that financial resources permit, needed in a certain situation in order to ensure that persons with disabilities exercise or benefit from their rights and freedoms fully and on equal footing with others'. Compared to the Law on Persons with Disabilities, which requires reasonable accommodation unless it imposes 'a disproportionate and excessive burden', Law no. 6701 imposes less stringent obligations on employers.

Article 4/A of the Law on Persons with Disabilities stipulates that 'requisite measures for providing the reasonable accommodation of persons with disabilities in order to ensure equality and remove discrimination' be taken and Article 14(4) requires employers as well as relevant government institutions to undertake reasonable accommodation measures in workplaces employing persons with disabilities. Article 3(j) defines reasonable accommodation as 'necessary and appropriate changes and precautions which do not impose a disproportionate and excessive burden and which are needed in a certain situation in order to ensure that the disabled exercise or benefit from their human rights and fundamental freedoms fully and on equal footing with others'. The legal commitment

to reasonable accommodation under Article 4/A is not limited to employment – since the duty of employers to undertake reasonable accommodation is explicitly stated under Article 14(4) – and the reference to ‘the disabled’ in general arguably renders this duty proactive, although the subject of this general duty is left unclear.

A very limited duty of reasonable accommodation for employees with disability is found in the Law on Civil Servants, limited to individuals working in the public sector. Article 53 prescribes a duty limited to the provision of tools which would enable those civil servants to carry out their duties. Noticeably, the limited duty of reasonable accommodation brought upon employers does not rest on a rights-based or anti-discrimination perspective. This is evident, for example, in the fact that disability is not a protected ground under the Law on Civil Servants. Consequently, breaches of the duty of reasonable accommodation are not considered as discrimination. Article 100 of the law authorises public sector employers to adapt the start and end of working hours and the duration of lunch breaks according to the needs of persons with disabilities, the requirements of the job and climate and transportation conditions. However, the article does not impose a *duty* to accommodate, rather than a power to do so and this is left at the discretion of the employers. Thus, failure of employers to take such measures is not necessarily discrimination. Article 101 entails a negative duty, whereby persons with disabilities working in the public sector cannot be forced to work on night shifts or night duty, unless they want to do so.²⁰⁵

There are various constitutional and legal provisions which, while silent on reasonable accommodation, can be interpreted to impose an implicit duty of reasonable accommodation. Article 10 of the Constitution provides for positive discrimination measures on behalf of persons with disabilities, without specifically enumerating the sectors or spheres of life where such measures shall be introduced.

b) Practice

Neither the Law on the Human Rights and Equality Institution of Turkey nor the Law on Persons with Disabilities introduces any criteria for assessing the extent of the duty of reasonable accommodation nor defines ‘reasonable’. They do not define ‘disproportionate burden’ for employers and are silent on the assessment of such burdens.

c) Definition of disability and non-discrimination protection

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

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

Article 5(2) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides a duty of reasonable accommodation of persons with disabilities in the areas of ‘education, judicial, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like’.

²⁰⁵ Turkey, Law on the Restructuring of Certain Debts and on the Amendment of Social Securities and General Health Insurance Law and of Various Other Laws and Decrees with the Force of Law (*Bazı Alacakların Yeniden Yapılandırılması ile Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu ve Diğer Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun*), 13 February 2011.

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

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

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

Under Article 5(1)(f) of the Law on the Human Rights and Equality Institution of Turkey, failure to meet the duty of reasonable accommodation counts as discrimination. As yet there is no case law on this issue.

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

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

In past years, the Parliament adopted a temporary practice of accommodating members of the Parliament belonging to the Alevi religious faith during their fasting period in the month of Muharrem. Upon the petition of an Alevi parliamentarian, the Speaker of the Turkish Parliament authorised the serving of special food in accordance with the dietary restrictions of Alevi deputies in restaurants within the premises of the Parliament during the month of Muharrem in 2012.²⁰⁶ This was the first time ever a public office has accommodated Alevis during their fasting period. The practice was repeated during the Muharrem fast in 2013, but not in subsequent years.

g) Accessibility of services, buildings and infrastructure

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

The concept of accessibility is in line with the UN Convention on the Rights of People with Disabilities. At the same time, the deadline for compliance with these accessibility requirements, already extended until 7 July 2015 through a last-minute legal amendment made on 19 June 2012,²⁰⁷ has been further extended for another 3 years until 7 July 2018, 13 years after the law's adoption. Mass transportation vehicles which have 9 to 16 seats (in addition to the driver's seat), passenger ferries, vehicles used in intercity public and private mass transportation and vehicles providing tourist transportation are also given time until 7 July 2018 to comply with the accessibility requirement. Until then, where they

²⁰⁶ Özel, R (2012), 'TBMM Lokantasında Muharrem Orucu Menüsü' (Muharrem fast menu at the restaurant of the Turkish Parliament), *Hürriyet*, 14 November 2012, available at: <http://www.hurriyet.com.tr/tbmm-lokantasin-da-muharrem-orucu-menu-su-21924575>.

²⁰⁷ Turkey, Law on the Amendment of Various Laws and Decrees with the Force of Law (*Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 4 July 2012.

receive an accessibility demand from a person with disability, providers of these services must comply within 72 hours. Providers of transportation to schools and workplaces which receive accessibility demands are required to meet such demands without waiting for the 2018 deadline. Vehicles with nine or more seats in addition to the driver's seat which are produced more than six months after the amended law enters into force and which do not comply with accessibility requirements will not be given licences to provide urban and intercity transportation services. There is no publicly available information on compliance on this issue.

Despite these legal requirements, neither the private nor the public sector has 'undertaken serious planning based on a calendar and with resources specifically allocated to accessibility'.²⁰⁸ According to a report published by Sabancı University, 66.9 % of persons with disabilities in Turkey cannot access pavements, and 55-60 % cannot access pedestrian crossings, shopping centres, restaurants, public buildings, post offices and banks. The report states that a mere 0.44 % of the GDP is allocated for persons with disabilities, 70 % of which is in the form of cash transfers. According to official figures for 2002, around 12 % of the population is made up of persons with disabilities.²⁰⁹

An executive regulation adopted on 20 July 2013, eight years after the adoption of the Law on Persons with Disabilities, established a mechanism for monitoring and auditing the enforcement of accessibility of goods and services.²¹⁰ The regulation foresees the establishment of provincial commissions which are presided over in every province by the governors or their deputies and are composed of six members. In addition to public servants, there are two representatives of disability NGOs, who preferably have disabilities themselves. Effective immediately, the regulation tasked the commissions with issuing administrative fines in cases of non-compliance. The fines are set to be in the range of around TRY 1 000-5 000 (EUR 250-1 250) per each non-compliant private facility (not to exceed a total of TRY 50 000 (EUR 12 500) per year for each private legal or natural person), and TRY 5 000-25 000 (EUR 1 250-6 250) where the facility belongs to a public institution (not to exceed a total of TRY 500 000 (EUR 125 000) per year for each institution).²¹¹ The funds to be collected will be channelled to the Ministry of Family and Social Policies to be used for accessibility projects. The regulation required governors to establish the provincial commissions within one month (i.e. by 20 August 2013).

The extremely poor awareness of the rights of persons with disabilities on the part of public authorities, coupled hitherto with the lack of effective enforcement mechanisms and sanctions under Law no. 5378, result in an utter disregard of the legal obligations stipulated under the law. Even new public buildings built after the entry into force of this law lack the minimum facilities to enable access for persons with disabilities, preventing persons with disabilities from entering the public sphere.²¹² More than a decade after the entry into force of Law no. 5378, the Government still does not have statistics on the number of public buildings, infrastructure and facilities which are accessible for persons with disabilities.

In cases regarding inaccessibility of services, buildings and infrastructure, and public transportation brought before the courts, prosecutors and judges are reluctant to define

²⁰⁸ Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birir L., Kara, Ö. (2011), *Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), İstanbul, İstanbul Bilgi Üniversitesi, p. 50.

²⁰⁹ Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 22, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

²¹⁰ Turkey, Regulation on the Monitoring and Auditing of Accessibility (*Erişilebilirlik İzleme ve Denetleme Yönetmeliği*), Official Gazette, 20 July 2013.

²¹¹ The EUR amounts indicated in brackets throughout the report are based on the exchange rate as of June 2017, will vary according to the exchange rate at any given time and will not be updated every year.

²¹² Eşit Haklar için İzleme Derneği (Association for Monitoring Equal Rights) (2011), *Türkiye'de Engellilere Yönelik Ayrımcılık ve Hak İhlalleri: 2011 İzleme Raporu* (Discrimination and Rights Violations against Persons with Disability in Turkey: 2011 Monitoring Report), İstanbul, Eşit Haklar için İzleme Derneği, p. 18, <http://www.esithaklar.org/wp-content/uploads/2012/06/ESHID-EngelliRaporu2011.pdf>.

these as discrimination. A rare positive example in this regard was a court judgment delivered in December 2012 against the High Board of Elections for its failure to make election facilities accessible for a person with disability who could not cast his vote in the general elections of June 2011. Though the claimant had registered his disability with the authorities long before the elections, his polling station was situated on the third floor of a building which did not have a lift. The court awarded the claimant around TRY 5 000 (EUR 1 250).²¹³

In most cases, public and private entities are extremely dismissive when handling requests for accessibility. As far as private housing is concerned, tenants are in a particularly vulnerable position. An amendment made to the Apartment Ownership Law through the Law on Persons with Disabilities of 2005 imposes an obligation on private homeowners living in apartment buildings to accommodate accessibility requests brought by a neighbour and a duty on the local government authorities to enforce this obligation.²¹⁴ Where the accessibility request comes from a tenant, this obligation does not apply. Though the Additional Article 1 of the Zoning Law brings a general duty of accessibility, in practice private homeowners living in apartment buildings do not comply. A news article in 2013 describes a case in point. The residents of an apartment building refused to allow the family of a small girl with a physical disability who used a wheelchair to build a ramp to make the main door of the building accessible. The municipal authorities to which the tenant family applied for help agreed to construct a ramp only if the neighbours agreed.²¹⁵

On 26-27 November 2013, the Ministry of Family and Social Policies organised a briefing meeting in Ankara for the purpose of informing the members of the provincial commissions about their tasks, duties and responsibilities. Following up on this meeting, on 27 December 2013, the Ministry sent to the governorships of all 81 provinces its Accessibility Monitoring and Auditing Plan for the year 2013-2014, in accordance with the terms of the executive regulation.²¹⁶ The plan, also uploaded on the Ministry's website,²¹⁷ provides the list of buildings, open areas and mass transportation vehicles which are to be monitored and audited. In 2015, the Ministry released an updated and expanded Accessibility Monitoring and Auditing Plan for the year 2015.²¹⁸ The 2015 plan expanded the list of buildings, open areas and mass transportation vehicles which are to be monitored and audited. The Ministry asked the 81 governorships to prepare provincial monitoring and auditing programmes to comply with the national plan and to submit these to Ministry by 6 March 2015.²¹⁹ Also available on the Ministry's website are application forms for citizens'

²¹³ Bianet (2012), 'Engelli Seçmen YSK'yı Mahkum Etti' ('The Voter with Disability won Judgment against the High Board of Elections'), 4 November 2012, available at <http://www.bianet.org/bianet/ayrimcilik/142560-engelli-secmen-yskyi-mahkum-etti>.

²¹⁴ Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 22, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

²¹⁵ Bianet (2013), 'Rampaya İzin Yok, Kızını Arabasıyla Taşı Dıyorlar' ('No Permission for a Ramp: "Carry your Daughter by Car"'), 26 September 2013, available at <http://www.bianet.org/bianet/toplum/150194-rampaya-izin-yok-kizini-arabasiyla-tasi-diıyorlar>.

²¹⁶ Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2013), http://eyh.aile.gov.tr/data/5511712d369dc57100ffbfb0/eid_plani_ust_yazi.pdf.

²¹⁷ Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2013-2014), http://eyh.aile.gov.tr/data/5511712d369dc57100ffbfb0/eid_plani_2013-2014.pdf.

²¹⁸ Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/yayin-ve-kaynaklar/erisilebilirlik/erisilebilirlik-izleme-ve-denetleme-komisyonlari/eid-plani-ust-yazi-ve-eid-plani-2015>.

²¹⁹ Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/data/552f7cd5369dc5a424235ee9/%C3%BCstyaz%C4%B1.pdf>.

complaints²²⁰ and assessment forms²²¹ to be used by the commissions in their monitoring and auditing activities.

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

The Law on Persons with Disabilities does not require public services other than transportation, information provision and information and communication services to be accessible to persons with disabilities. In this sense, the material scope of the law is more limited than that of the UN Convention, which requires accessibility to both public places and public services.

Until 2013, disability could be explicitly stated as a ground for exclusion from access to social protection. A regulation issued in 1998 by the General Directorate on the Status of Women put forth the criteria for admission to government-run women's shelters (named 'guesthouses' by the Government). According to Article 9(d), (e) and (g) of this regulation, the following women were ineligible: women with 'mental health problems', 'women with mental disabilities', and women with physical disabilities who need care.²²² This regulation was repealed by a new regulation which came into effect on 5 January 2013 and which introduced the principle of non-discrimination in admission to shelters for all women (and their children) who are subjected to or at risk of being subjected to violence. With regard to disability, admission criteria are slightly qualified. Women who have children with disabilities will be placed in private apartments or flats, provided that they are not in a life-threatening situation, and their rent and utility costs will be paid by the shelter. Women with intellectual or psychological disabilities will be placed in appropriate social service institutions. The regulation requires all shelters to be accessible to persons with disabilities.²²³

h) Accessibility of public documents

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

Article 56(2) of the Turkish Code of Criminal Procedure grants persons with hearing or speech disabilities the right to take an oath in court by sign language and with the help of a sign language interpreter, but limits this right to illiterate persons only. Those that are literate are required to take an oath by writing and signing the oath. The provision of an interpreter for persons with hearing or speech disabilities is limited to oath taking and does

²²⁰ Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/yayin-ve-kaynaklar/erisilebilirlik/erisilebilirlik-izleme-ve-denetleme-komisyonlari/erisilebilirlik-izleme-ve-denetleme-komisyonlarina-vatandaslar-tarafindan-yapilacak-basvuruda-kullanilacak-formlar>.

²²¹ Ministry of Family and Social Planning, Directorate General for Persons with Disabilities and Elderly Services (2015), <http://eyh.aile.gov.tr/yayin-ve-kaynaklar/erisilebilirlik/erisilebilirlik-izleme-ve-denetleme-komisyonlari/erisilebilirlik-izleme-ve-denetleme-programi-formati>.

²²² Turkey, Regulation on Women's Guesthouses under the Social Services and Child Protection Agency (*Sosyal Hizmetler ve Çocuk Esirgeme Kurumu'na Bağlı Kadın Konukevleri Yönetmeliği*), Official Gazette, 12 July 1998.

²²³ Turkey, Regulation on the Opening and Management of Women's Guesthouse (*Kadın Konukevlerinin Açılması ve İşletilmesi Hakkında Yönetmelik*), Official Gazette, 5 January 2013.

not extend to the use of sign language in court hearings in general. Instead, Article 150 of the Turkish Code of Criminal Procedure requires courts to appoint a lawyer for persons with hearing or speech difficulties who lack a legal representative.

Additional Article 8, added to the Law on Social Services in 2005, requires the availability at public offices of personnel to provide, where necessary, translation / interpreting services for persons with hearing and visual impairments. The article also requires provision of tutorial courses to teach public personnel sign language. The executive regulation adopted in 2006 to implement this provision requires each provincial representation of the General Directorate for Social Services and Child Protection to hire at least one person qualified as a sign language interpreter.²²⁴ As at December 2013, only 18 of the 81 provinces complied with this requirement.²²⁵

For the standardisation of sign language interpreting services, in 2013, the Ministry of Family and Social Policies and the Ministry of National Education organised the first national examination to determine the personnel eligible to receive the official certificate of qualification; 87 persons were found to qualify as sign language interpreters and they received the first batch of certificates issued by the Government.²²⁶ At the award ceremony, the representative of the General Directorate for Social Services and Child Protection announced that 63 of these persons would be hired to fill the vacant posts in the provincial representations of the Directorate. In 2014, the Ministry organised another national examination to hire a total of 75 sign language interpreters across Turkey.²²⁷ Public information is available for subsequent years.

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

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

²²⁴ Turkey, Regulation on the Training and Working Conditions of Personnel to Provide Sign Language Services (*İşaret Dili Tercümanlığı Hizmeti Verecek Personelin Yetiştirilmesi ile Çalışma Esasları Hakkında Yönetmelik*), Official Gazette, 19 August 2006, Article 6.

²²⁵ Up-to-date information is not available.

²²⁶ Announcement made through the website of the Ministry of Family and Social Policies, 19 December 2013.

²²⁷ <http://pdb.aile.gov.tr/haberler/isaret-dili-tercumani-sinav-i%CC%87lani>.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

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

a) Protection against discrimination

In Turkey, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination. The definitions of direct and indirect discrimination and discrimination by assumption in Article 2(d), (e) and (m) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) explicitly refer to both natural and legal persons as objects of such discrimination. The national provisions partly comply with the directives, as sexual orientation is excluded among the grounds on the basis of which direct discrimination is prohibited under Article 4(1)(ç).

b) Liability for discrimination

In Turkey, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. Article 3(4) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) states that natural and legal persons are under an obligation to 'identify and remove discrimination and ensure equality in areas falling under their scope of authority'. Article 5(1) prohibits natural and legal persons to discriminate in the provision of services in the fields of 'education, justice, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like'. Article 5(3) prohibits natural and legal persons from discriminating in provision of goods for sale, purchase or rent.

The Law on Persons with Disabilities provides protection against discrimination on the exclusive ground of disability. Article 4 of this law, inter alia, bans discrimination against persons with disabilities, and endorses the principles of equal opportunity and accessibility in ensuring their access to all rights and services and their full and effective participation in public life. Articles 13, 14 and 15 of this law express the commitment of the state to taking all necessary measures for the occupational rehabilitation, employment and education of persons with disabilities.

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

Civil law does explicitly refer to the distinction between natural and legal persons. Article 48 of the Civil Code, Article 68 of which prohibits associations from discriminating among its members based on the grounds enumerated, stipulates that legal persons have all the rights and obligations other than those which are tied to qualities which are specific to natural persons (such as birth and age). Criminal law also contains an explicit reference to legal persons, exempting them from criminal liability. According to Article 20(2) of the Turkish Penal Code 'no punitive sanctions may be imposed on legal persons'. However, sanctions in the form of 'security precautions' stipulated in the law are reserved.²²⁸

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.

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

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

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

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

Article 5(1) and (3) of the Law on the Human Rights and Equality Institution (no. 6701) prohibits public bodies from discriminating in the provision of 'education, judicial, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like', and in the sale, purchase and rent of goods, respectively. Article 10(5) of the Constitution obliges public bodies to act in compliance with the principle of equality before the law in all their proceedings. Article 7 of the Civil Servants Law prohibits civil servants from discriminating in the course of their duties on the basis of language, gender, race, political view, philosophical belief, religion or sect. Civil servants engaged in discrimination are subject to disciplinary sanction under Article 125 of the same law. Article 18 of the Turkish Armed Forces Discipline Law subjects members of the organisation engaged in discrimination to disciplinary sanctions. Article 4(d) of the Social Services Law prohibits discrimination in the execution and provision of social services on grounds of class, race, language, religion, sect or religious differences.

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

Article 5(1) and (3) of the Law on the Human Rights and Equality Institution (no. 6701) prohibits public bodies from discriminating in the provision of 'education, judicial, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and the like' and in the sale, purchase

²²⁸ 'Security precautions' are sometimes alternatives to typical criminal sanctions (imprisonment, fine etc.), sometimes complementary to sanctions. 'Security precautions' can be anything from rehab to community service. According to the new Turkish Penal Code, legal persons can also be held responsible for crimes. As imprisonment is not an option for legal persons, the law says security precautions can be imposed by the courts. If the organs or representatives of a legal person are involved in a crime, the court might decide for example that the licence of the legal person is to be suspended, or certain properties which are fruits of the crime are confiscated etc.

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

b) Liability for discrimination

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

Article 6 of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in the private and public employment sectors and self-employment for the grounds of race/ethnicity, religion/belief, age and disability only. Sexual orientation is not included.

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

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

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

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

In Turkey, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for four of the five grounds (excluding sexual orientation), in both private and public sectors, as described in the directives (Article 6 of the Law on the Human Rights and Equality Institution of Turkey).

The Law on Persons with Disabilities prohibits discrimination against persons with disabilities in access to employment, recruitment, professional development and working conditions (Article 14). There is no umbrella legislation regulating self-employment and statutory office, but there are various laws governing recruitment to specific professions, which do not have provisions on discrimination. In such cases, the general constitutional provisions on anti-discrimination apply.

General rules for recruitment of public servants

According to Article 70 of the Constitution, 'every Turk has the right to enter public service and no criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service'. According to Article 48 of the Law on Civil Servants, recruitment as a civil servant is subject to general and special conditions, including citizenship, a minimum age limit of 18 years, minimum level of education (secondary school graduate), exemption from military service and not to have a mental illness which will prevent the person from permanent fulfilment of their duties (subject to Article 58 on the employment of persons with disabilities as civil servants).

There is no provision in the Law on Civil Servants which prohibits discrimination in the selection, recruitment or promotion of civil servants. The Law only prohibits discrimination by civil servants while carrying out their duties (Article 7). In the legislation regarding the selection, recruitment and promotion of public employees, whether they are civil servants or working under various types of contracts, there are limited specific provisions prohibiting discrimination based on grounds covered by the directives. For example, according to the Regulation on the Promotion of Civil Servants, objective criteria such as education, achievement in exams, length of service and positive employment record shall be taken into account in the promotion of civil servants. Public employees are selected by the Public Employee Selection Examination. Those who pass the examination are subject to a trial period, prior to their full appointment. Additional Article 3 of the Regulation on the examinations organised for those to be appointed to public offices for the first time stipulates that, unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an upper age limit for those to be placed through central examinations.

As in the headscarf ban at universities, which was at issue in the ECtHR's judgment in the *Leyla Şahin* case,²²⁹ the headscarf ban in public and private service jobs never had a constitutional or legal ground.²³⁰ And yet, until recent years, there was widespread

²²⁹ ECtHR, *Leyla Şahin v. Turkey*, No. 44774/98, 29 June 2004.

²³⁰ The ECtHR's judgment was limited to the headscarf ban at universities and did not address the ban in employment.

employment discrimination against women who wear the headscarf on the basis of a de facto ban precluding their employment in the public sector. The 'legal' basis of this ban was an executive regulation which was adopted by the military regime in 1982, requiring female employees to have their 'heads uncovered'.²³¹ This stipulation has been relied on by the state in refusing to hire headscarved women in the public sector as well as firing public service employees who wear headscarves in mass numbers at certain moments of high political tension.²³² The ban in the public sector has had a 'spill-over effect' and has spread over time to the private sector.²³³

On 5 November 2012, the Eighth Chamber of the Council of State held that the headscarf ban does not apply to lawyers, who are not public servants although they provide a public service.²³⁴ Delivered in a case brought by a female lawyer against the Union of Turkish Bar Associations, which declined to issue her a new professional identity card on the ground that she submitted a photograph with a headscarf, the judgment drew the boundaries of the ban, restricting it to the public sector. This decision has enabled lawyers who wear a headscarf to enter into court hearings for the first time in decades. Notwithstanding this, there have been attempts by lower courts to bar lawyers wearing headscarves from entering courtrooms. The issue was finally brought to the Constitutional Court. On 25 June 2014, the Court found a lower court's barring of a lawyer from a courtroom on the basis of her headscarf to violate the applicant's freedom of religion and conscience and to constitute discrimination on the basis of religious belief. The Court reversed its prior case law, which had formed the sole juridical basis for the headscarf ban in Turkey. This was also the first time the Court found discrimination in a case brought through the individual petition mechanism, which was introduced by the Turkish Parliament in September 2012.

Political developments followed these court decisions. On 8 October 2013, the Government removed the headscarf ban for those in public office, with the exception of the military, judiciary and police.²³⁵ On 31 October 2013, four members of the Parliament (MPs) from the governing JDP entered the Parliament wearing headscarves, bringing an end to the de facto ban applying to female parliamentarians. In 2015, several political parties nominated female candidates who wear headscarves for the general elections held in June 2015. On 15 November 2013, an anchorwoman wearing a headscarf presented the news on Turkish Radio and Television (TRT), bringing to an end the de facto ban on journalists in public broadcasting wearing the headscarf. In 2015, upon news reports regarding the existence of judges and prosecutors wearing the headscarf, the High Court of Appeals requested an opinion from the High Council of Judges and Prosecutors as to whether there were any regulations barring this.²³⁶ In response, the High Council stated that there were no such internal rules.²³⁷ Thus, the headscarf ban in the judiciary came to an end. In August 2016,

²³¹ Turkey, Regulation Concerning the Attire of Personnel Working at Public Institutions (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetlerine Dair Yönetmelik*), Official Gazette, 25 October 1982.

²³² The dismissal of headscarved women from the public sector has not been a continuous or consistent policy. Rather, it was employed at extraordinary political periods in Turkey's history such as during the military regime of 1980-1983 and the period following the 'soft coup d'état' of 28 February, 1997. NGOs representing headscarved women claim that 5 000 headscarved women were dismissed and another 10 000 were forced to resign between 1998 and 2002. Dilek Cindoğlu (2010), *Headscarf Ban and Discrimination: Professional Headscarved Women in the Labor Market (Başörtüsü Yasağı ve Ayrımcılık: Uzman Meslek Sahibi Başörtülü Kadınlar)*, Istanbul, p. 35.

²³³ Dilek Cindoğlu (2010), *Headscarf Ban and Discrimination: Professional Headscarved Women in the Labor Market (Başörtüsü Yasağı ve Ayrımcılık: Uzman Meslek Sahibi Başörtülü Kadınlar)*, Istanbul.

²³⁴ The unofficial text of the judgment is available at: <http://www.istanbulgercegi.com/danistay-8-dairesinin-turbana-iliskin-kararinin-tam-metni-3143451.html>.

²³⁵ Turkey, Regulation Amending the Regulation Concerning the Attire of Personnel Working at Public Institutions (*Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelikte Değişiklik Yapılmasına İlişkin Yönetmelik*), Official Gazette, 8 October 2013.

²³⁶ The 2013 regulatory amendments had left the regulation of the headscarf ban to the Ministry of Justice and the High Council on Judges and Prosecutors.

²³⁷ Göktaş, K. (2015), 'Hakim ve Savcıya Başörtüsü İzni Çıktı' (Headscarf Authorisation for Judges and Prosecutors), *Milliyet*, 1 June 2015, <http://www.milliyet.com.tr/hakim-ve-savciya-basortusu-izni-qundem-2067366/>.

the Government removed the headscarf ban for members of the police with a regulatory amendment.²³⁸ As of January 2017, the headscarf ban in the military was still in force.

Special rules for recruitment of civil servants for certain professions

Separate examinations are held for recruitment of public employees to certain professions, such as judges and prosecutors. The qualifications required to be appointed as a candidate judge or prosecutor are listed in Article 8 of the Law on Judges and Prosecutors. Two of these requirements are relevant to the directives. According to Paragraph (g) candidates should 'not have any physical and mental illness or disability that would prevent from the conduct of his/her duties as a judge or a prosecutor and in a continuous manner and in every part of the country; not have disabilities such as having difficulties in controlling the movements of the organs, speech different from that which is customary and which would be found odd by people'. The former Paragraph (b), which required candidates not to be older than 35 years of age, was repealed by the Constitutional Court on 14 February 2013 on the ground that it was in violation of Article 91 of the Constitution, which prohibits issues pertaining to fundamental rights and liberties to be regulated by executive decrees with the force of law.²³⁹ The judgment entered into force on 30 September 2014.

In most, if not all, cases, if a separate examination is organised for selection purposes, written examinations are followed by interviews. There are no provisions which guarantee the objectivity of these interviews, nor is there any reference to the duty to provide reasonable accommodation. Judges and prosecutors with at least one year's experience in their current position and who have not been convicted by a final court judgment or who have not been subject to disciplinary measures are eligible for promotion.

Contract-based recruitment to public and private sectors

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

According to Article 71 of the Labour Law, the minimum age for employment is 15 years. However, children who have reached the age of 14 years and have also completed their primary education may be employed on light work which will not hinder their physical, mental and moral development, and for those who continue their education, in jobs that will not prevent their school attendance. There is no general upper age limit for employment.

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

Sectors governed by special labour laws

Under Article 4 of the Labour Law, the following sectors or groups of persons are outside the scope and application of the law: sea and air transport activities; establishments and enterprises employing fewer than 50 employees where agricultural and forestry work is carried out; any construction work related to agriculture which falls within the scope of

²³⁸ Turkey, Regulation Amending the Regulation Concerning the Attire of Personnel Working at Public Institutions (*Emniyet Sınıfı Mensupları Kıyafet Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), Official Gazette, 27 August 2016.

²³⁹ Turkey, Constitutional Court, Judgment E. 2011/89, K. 2013/29, 14 February 2013.

family economy; works and handicrafts performed in the home without any outside help by members of the family or close relatives up to the third degree; domestic services; apprentices; sportsmen and sportswomen; those being treated in physical, drug or alcohol rehabilitation programmes; and establishments with 3 or fewer employees and falling within the definition in the Tradesmen and Small Handicrafts Act. Consequently, the prohibition of discrimination prescribed in Article 5(1) of the Labour Law does not apply to these categories.

Recruitment to the military

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

A long list of laws and regulations within the separate realm of the military legal system explicitly discriminate on the basis of sexual orientation. Article 153 (2) of the Military Penal Code allows the dismissal of military personnel who engage in homosexual conduct, a practice upheld by the High Military Administrative Court.²⁴⁰ Gay military personnel who are found to have engaged in homosexual conduct can be dismissed from graduate education, excluded from promotion to assistant professorship in the Military Medical Academy, and debarred from professional examinations required for entry to various professions. On 31 January 2013, the Turkish Armed Forces Discipline Law was adopted by the Turkish Parliament despite protests from LGBTI groups.²⁴¹ Article 20 of the law enumerates homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces. According to Clause (ğ), 'engaging in unnatural intercourse or voluntarily submitting oneself to such an act' is a ground for dismissal from the army. In the Turkish context, the term 'unnatural intercourse' refers to anal intercourse and hence homosexual relationships. There are several cases of dismissal of homosexual men from public service or the military upon oral evidence of their engagement in anal sex with other men (see Section 3.2.3).

Military regulations governing exemption from mandatory military service result in multiple discrimination against homosexual conscientious objectors, who refuse to serve in the military due to their political beliefs and/or conscience. In *Halil Savda v. Turkey*, the ECtHR held that the absence of any procedure to examine requests for exemption from military service on grounds of conscientious objection constituted an 'insurmountable conflict' between that obligation and an individual's deeply and genuinely held beliefs. A system which did not provide such a procedure or alternative civilian service violated the positive obligations of states to protect freedom of religion under Article 9. The Court also found the applicant's repeated prosecution by military courts for refusing to wear military uniform constituted degrading treatment and violated the applicant's right to fair trial.²⁴² In *Tarhan v. Turkey* issued the following month, on 17 July 2012, the ECtHR found the non-recognition of the applicant's right to conscientious objection and the criminal proceedings launched against him on that basis to violate Article 3 (prohibition of inhuman or degrading treatment) and Article 9.²⁴³ The ECtHR judgment was restricted to Mr Tarhan's political convictions as a conscientious objector and did not address his sexual orientation. Furthermore, the Court did not address the discrimination issues under Article 14 of the Convention which the case raised, arguably due to the applicant's failure to make a discrimination claim.

In assessing eligibility for exemption, the regulations of the Turkish Armed Forces consider homosexuality as a psychosexual disorder and individuals having such a 'condition' to be 'unfit for military service'. To be exempt from military service, gay men were routinely

²⁴⁰ High Military Administrative Court, E. 1998/888, K. 1999/482, 11 May 1999, available at http://www.msb.gov.tr/ayim/Ayim_karar_detay.asp?IDNO=1316&ctg=000002000002000001.

²⁴¹ Turkey, Turkish Armed Forces Discipline Law, 31 January 2013.

²⁴² ECtHR, *Savda v. Turkey*, No. 42730/05, 12 June 2012.

²⁴³ ECtHR, *Tarhan v. Turkey*, No. 9078/06, 17 July 2012.

required to 'prove' their homosexuality by either going through a forced anal examination or providing photographic evidence of being engaged in passive anal sex.²⁴⁴ In recent years, due to wide media coverage and international pressure, this practice seems to have been abandoned. Instead, authorities now subject individuals to psychological tests to test their homosexuality and, where they find the test results unconvincing, request a 'family meeting', forcing individuals to make a choice between coming out to their families or military service. In cases where a family meeting does take place, authorities may still not be convinced, in which case they require the individual to be admitted to the psychiatric wards of military hospitals, known as 'the pink wards'.²⁴⁵ A referee, who was expelled from his profession by the Turkish Football Federation when the 'unfit for military service' report he had received was leaked, had spent a total of 22 days at 3 different hospitals which have such wards before he was provided with the report.²⁴⁶ The process of psychological tests and family meetings typically lasts several days and requires multiple visits to more than one military hospital.²⁴⁷

Mandatory military service also infringes freedom of religion and conscience. As the only country in the Council of Europe which does not allow alternative civilian service, the Turkish legal framework is discriminatory against individuals who refuse to serve in the military due to religious beliefs, namely Jehovah's Witnesses. In June 2014, the ECtHR found the prosecution and sentencing of four Jehovah's Witnesses who refused to serve in the military to be in violation of Articles 3 and 9 of the ECHR.²⁴⁸

Self-employment and statutory office

According to Article 48(1) of the Turkish Constitution, 'Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free.' There is no umbrella legislation regulating self-employment and statutory office.

There are various laws on certain professions, such as the Law on Attorneys (no. 1136), the Law on Pharmacists and Pharmacies (no. 6197) and the Law on Notaries (no. 1512), none of which contain specific provisions on the prohibition of discrimination. These constitutional and legal provisions do not have aspects which constitute direct discrimination in the selection, recruitment and promotion of both public and private sector employees. However, there are also no specific provisions which comprehensively prohibit discrimination based on all of the grounds covered by the directives in access to employment, self-employment and occupation. In the absence of data and case law, it is not possible to assess the current situation.²⁴⁹ In situations where data exist – such as

²⁴⁴ For examples, see Amnesty International (2011), *'Not an Illness nor a Crime: Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality'*, London, Amnesty International, p. 23, available at: <http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf>.

²⁴⁵ Elif İnce, "'Pembe Tezkere"ye Koğuş İşkencesi' ('Ward Torture for "Pink Certificate"'), *Radikal*, 15 April 2012, available at <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1084969&CategoryID=77>.

²⁴⁶ Elif İnce, "'Pembe Tezkere"ye Koğuş İşkencesi' ('Ward Torture for "Pink Certificate"'), *Radikal*, 15 April 2012, available at <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1084969&CategoryID=77>. For more on the ill treatment homosexuals are subjected to at military hospitals, see the website of LGBTI news portal Kaos GL: <http://www.kaosgl.com/anasayfa.php>.

²⁴⁷ For a detailed first-hand account by a transgender person of a six-day process involving multiple visits to four different military hospitals, see <http://www.kaosgl.org/sayfa.php?id=9147>.

²⁴⁸ ECtHR, *Buldu and Others v. Turkey*, No. 14017/08, 3 June 2014.

²⁴⁹ According to the information provided in 2008 by the Turkish authorities in the State report submitted to the United Nations Committee on the Elimination of Racial Discrimination and in the replies to the list of issues, 'the Business Inspection Board of the Ministry of Labour and Social Security is tasked with investigating allegations of discrimination in business relations. To date, the Board has not found any acts of discrimination, including racial discrimination, during its inspections.' See United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention – International Convention on the Elimination of all Forms of Racial Discrimination: 3rd periodic reports of States parties due in 2007: addendum: Turkey*, 13 February 2008, CERD/C/TUR/3, para. 145, available at: <http://www.unhcr.org/refworld/docid/4885cfa60.html>.

data regarding non-compliance with quota requirements for persons with disabilities – they clearly indicate that discrimination exists (see below on quotas).

Another group which suffers employment discrimination through seemingly neutral selection criteria is homosexual men. Many jobs in the public and private sectors require men to have fulfilled their military service duties and provide documentary evidence of either having served in the military or having been lawfully exempted on health grounds. Homosexual men who can 'prove' their homosexuality are exempted for being 'unfit' to serve in the military. This exemption can cause serious impediments to their ability to find employment. In 2011, a homosexual man filed a discrimination claim with the provincial human rights board of Istanbul against a private company which refused to hire him after having found out about his sexual orientation. While the applicant was initially verbally told that he was accepted for the job, the employer changed her mind when the applicant revealed, in answer to a query, that the ground of his exemption from military service was his sexual orientation.²⁵⁰ Homosexual men who are able to hide their sexual orientation in the recruitment phase are always faced with the risk of losing their jobs if and when their employers are informed about health reports exempting them from military service. A case in point is an experienced referee who was dismissed from his profession by the Turkish Football Federation after 14 years of service after the unlawful disclosure of a health report issued by a military hospital certifying his 'unfitness for military service' on the basis of his sexual orientation (see Section 3.2.3).

Roma in Turkey face an 'extremely high' degree of structural unemployment and 'face specific disadvantages and prejudices in employment related to their ethnicity'.²⁵¹ Field research conducted by Roma associations produced empirical evidence of employment discrimination against Roma.²⁵²

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

In Turkey, national legislation prohibits discrimination in the following areas: employment and working conditions, including dismissals, for four of the five grounds (excluding sexual orientation) and for both private and public employment. It does not prohibit discrimination in the following area: pay.

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

Article 6 of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in employment and working conditions, including dismissal, but does not explicitly refer to pay. Moreover, the grounds are limited to race/ethnicity, religion/belief, disability and age, excluding sexual orientation.

The prohibition of discrimination prescribed in Article 122 of the Turkish Penal Code is limited to recruitment and does not cover employment and working conditions. Article 5 of the Labour Law prohibits discrimination in the employment relationship, based on an open-

²⁵⁰ Kaos GL (2011), 'We Need to Revoke the Decision to Hire you due to your Sexual Orientation ('Cinsel Yöneliminizden Dolayı İşe Alımınızı İptal Etmek Zorundayız'), 15 June 2011, <http://www.kaosgl.com/sayfa.php?id=7159>.

²⁵¹ European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, p. 18, available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

²⁵² European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, pp. 18-20, available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

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

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

Civil servants are employed on a permanent basis; unless a concrete reason for termination occurs, their position as a civil servant is secure. According to Article 125 of the Law on Civil Servants, there are enumerated grounds for irreversible dismissal from civil service. The relevant ground for the purposes of this report is in Clause (E)(g), according to which disgraceful and dishonourable acts which are irreconcilable with the title of civil servant are cause for dismissal from the service. This clause is being used for the dismissal of homosexual civil servants. For example, a police officer was dismissed from the Turkish Police Force for having engaged in anal intercourse with another man. The decision of the High Disciplinary Board of the Ministry of Interior was upheld by the courts, including the Council of State, and the case was closed.²⁵³ On the other hand, in 2014, the Council of State changed its jurisprudence on the issue, finding the dismissal from the profession of a teacher due to his/her sexual orientation²⁵⁴ to be in violation of the Turkish Constitution and the ECHR (see section 2.1.1.).

Homosexual individuals are also routinely discriminated against in the private sector. A high-profile case concerning the Turkish Football Federation's (TFF) dismissal from the profession of a referee with 14 years' experience on the basis of his sexual orientation resulted in a precedent-setting, though not entirely satisfactory, judgment by a lower court. On 29 December 2015, the 20th Civil Court of First Instance in Istanbul ordered the Federation to pay the applicant TRY 3 000 (EUR 750) in pecuniary damages and TRY 20 000 (EUR 5 000) in non-pecuniary damages.²⁵⁵ In early February 2016, the Court published the judgment containing its reasoning.²⁵⁶ The Court found the TFF's dismissal of the applicant in accordance with its by-laws, which disqualify individuals who are exempted from military service on health grounds from being a referee, to constitute a subjective decision which did not rest on objective criteria and therefore to be legally invalid. The

²⁵³ Sosyal Politikalar, Cinsiyet Kimliği ve Cinsel Yönelim Çalışmaları Derneği (SPoD) (2012), *LGBT Davaları: AİHM, Yargıtay ve Danıştay İçtihatları* (LGBT Cases: The Jurisprudence of the ECtHR, Court of Cassation and the Council of State), p. 68, available at: http://www.spod.org.tr/turkce/eskisite/wp-content/uploads/2012/12/LGBT_ictihat_kitap_web_son.pdf.

²⁵⁴ The dismissal was based on law no. 4357 governing the recruitment, promotion, punishment and dismissal of elementary school teachers employed in private schools. Article 7(e) of this law requires the dismissal of individuals engaged in behaviours 'lacking chastity and dignity'.

²⁵⁵ The legal basis of the judgment became clear when the Court published the judgment containing its reasoning in early February 2016, where it found the dismissal to be in violation of the equality clause of the Constitution and the by-laws of the Turkish Football Federation.

²⁵⁶ Turkey, 20th Civil Court of First Instance in Istanbul (*Istanbul 20. Asliye Hukuk Mahkemesi*), 29.12.2015 (the date of the decision), 03.02.2016 (the date of the writing of the opinion), E. 2010/399, K. 2015/554.

Court noted that the health report which exempted the applicant from military service diagnosed the applicant with 'psychosocial disorder' and did not refer to a health problem which would ban the applicant from working as a referee. Thus, the Court held, the TFF's conclusion that the applicant was unfit to be a referee was exclusively based on his sexual orientation, which does not constitute a barrier to a person's performance of sport activities. Furthermore, the Court stated that this attitude contrasts with the reality of the industry, where one frequently encounters homosexual referees and athletes. The Court concluded that the TFF's decision violated the Turkish Constitution's anti-discrimination clause as well as the TFF's own by-laws. In assessing the amount of damages to be paid to the applicant, the Court relied on Article 42 of the former text of the Law of Obligations, which was in effect at the time when the applicant had filed the case, which tasks the judge with determining the amount of compensation in cases where the applicant has difficulty in proving the actual pecuniary costs he incurred or where he cannot be reasonably expected to prove such costs. Accordingly, based on the number of games the applicant was precluded from working in during the 2009-2010 football season, the judge awarded him TRY 3 000 (EUR 750) in pecuniary damages. Concluding that the applicant had been subject to discrimination on the basis of his sexual orientation in violation of the equality clause of the Turkish Constitution and the provisions of the ECHR, the Court awarded the applicant an additional TRY 20 000 (EUR 5 000) in non-pecuniary damages.

While this was the first time a Turkish court had awarded compensation to a claimant who made a claim under private law for discrimination based on sexual orientation, the Court awarded the claimant an extremely low amount of compensation compared to the pecuniary and non-pecuniary losses he had suffered during the previous five years. The Court based its calculation of pecuniary damages solely on the one season during which the applicant was not allowed to work as a referee, not taking sufficiently into account the fact that he had been unemployed ever since his dismissal from the profession and had been unable to find new employment due to the media publicity around his sexual orientation. The applicant, who had demanded a total of TRY 110 000 (EUR 27 500) in compensation, is planning to appeal against the decision to the Court of Cassation on the ground of the inadequacy of the amount of the compensation awarded.

The applicant was represented by a lawyer who is known for his legal representation of LGBT people and affiliation with Turkey's leading LGBT NGOs, and the case was followed closely by the human rights and LGBT community. However, it failed to generate public debate or political discussion on discrimination against LGBT persons. No government official has publicly commented on the case.

Article 14 of the Law on Persons with Disabilities prescribes that 'no discriminative practices can be performed against persons with disabilities in any of the stages of employment', including 'job application, hiring, suggested working hours and conditions and the continuity of employment, career development, healthy and safe working conditions'. This provision is clearer than most other legislation. Again, pay is not explicitly mentioned, but as the provision prohibits all unfavourable differential treatment, it is conducive to wider interpretation to also cover pay. The reality, however, is far from the ideal situation this provision aims for.

According to Article 39 of the Labour Law, minimum limits for wages are determined at intervals of no longer than two years by the Ministry of Labour and Social Security through the Minimum Wage Determination Committee for regulating the economic and social conditions of all workers working on labour contracts, whether covered or not by this law. Surprisingly, the Regulation on Minimum Wages has an explicit provision prohibiting discrimination. Article 5 of the Regulation states that 'no discrimination can be made on grounds of language, race, colour, gender, disability, political opinion, philosophical belief, religion and denomination and similar reasons in the determination of a minimum wage'. In 2014, the gross minimum wage was around TRY 1 000 (EUR 250) per month.

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

Statistical data in the field of employment are collected by the Turkish Statistical Institute.²⁵⁷ Employment, unemployment and wage data are collected, but disaggregated only on the basis of gender. Thus, it is not possible to make an evaluation based on facts. However, as a general observation, it can be stated that most vulnerable groups, such as Roma, work in the informal sector and as a rule their earnings are less than the earnings of persons employed in the formal sector. According to the European Commission, Roma are 'employed in mostly unregistered, temporary, low-paid jobs requiring low or unskilled manual labour'.²⁵⁸ The European Network against Racism's 2013 report on Turkey states the unemployment rate among Roma to be 85 %. In its 2016 report, ECRI did not give figures, but stated that unemployment is 'high' and that Roma 'mostly work in unqualified, unstable and insecure jobs'.²⁵⁹

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

In 2013, in response to the refugee crisis following the Syrian civil war, the Turkish Government adopted the Law on Foreigners and International Protection (no. 6458) to establish a framework for integration of migrants and refugees. Under Article 89, applicants and beneficiaries may apply for work permits six months after lodging their applications for international protection. After a long delay, the Government adopted the Regulation on work permits to implement Law no. 6458. As of the end of 2016, the number of work permits issued was only around 10 000,²⁶⁰ prompting most refugees to take up self-employment or illegal work, 'which increased the risks of exploitation and low wages'.²⁶¹

3.2.3.1 Occupational pensions constituting part of pay

Turkey's new Law on the Human Rights and Equality Institution of Turkey (no. 6701) does not address occupational pensions. Whether occupational pensions constitute part of pay is not dealt with in any other legislation.

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

In Turkey, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or on adult lifelong learning courses.

Article 6(2) of the Law on the Human Rights and Equality Institution of Turkey prohibits discrimination in vocational guidance, vocational training and retraining, including practical

²⁵⁷ See www.turkstat.gov.tr.

²⁵⁸ European Commission (2014), *Progress Report on Turkey*, Brussels, October 2014, p. 62, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

²⁵⁹ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 30, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

²⁶⁰ Crisis Group Europe Report (2016), *Turkey's Refugee Crisis: The Politics of Permanence*, Report No 241, 30 November 2016, available at: https://d2071andvip0wj.cloudfront.net/241-turkey-s-refugee-crisis-the-politics-of-permanence-turkish_0.pdf, p. 8.

²⁶¹ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 29, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

work experience and on-the-job training on the grounds of race/ethnicity, religion/belief, age and disability. Sexual orientation is excluded.

İŞKUR (Turkish Employment Agency) organises special training courses exclusively for persons with disabilities. However, these courses suffer from lack of mainstreaming, do not offer a real choice, since they are provided in very limited sectors, and are not designed to take market needs into consideration, resulting in training persons with disabilities in sectors where there is no shortage of employees. The Turkish Government reported that 'due to lack of education materials and physical shortcomings of education environments, the number of students with disabilities that benefit from vocational education in inclusive classes has not reached to the desired level.'²⁶² Since 1991, İŞKUR has also provided vocational and occupational counselling services to persons with disabilities to help them find an occupation fitting their personal abilities and interests. According to the Turkish Government, 44 627 people had received consultancy services of this kind by September 2013.²⁶³

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

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

The general principles of vocational education are prescribed in the Law on Vocational Education (no. 3308). There are no specific provisions prohibiting discrimination. According to Article 10, in order to be an apprentice (*çırak*) a person has to be between 14 and 19 years of age. However, there are exceptions to the upper age limit. According to Article 13, workplaces falling within the scope of this law can only employ apprentices (*çırak*) who are younger than 18 years under an apprenticeship contract. This rule does not apply to persons who are graduates of vocational and technical education schools and to those who have a certificate of assistant mastership (*kalfa*). As stipulated in Article 4 of the Labour Law and Article 13 of the Law on Vocational Education, labour law does not apply to those who work under apprenticeship contracts.²⁶⁴

Age limits apply to apprenticeships. Otherwise, there are no other limitations based on prohibited grounds. However, there are also no specific provisions for protection against discrimination. Although, along with İŞKUR, municipalities also provide vocational training courses, opportunities for vocational training for older persons are still very limited.

²⁶² Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 50, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en, p. 46 (grammatical error in the original).

²⁶³ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 50, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en, p. 46.

²⁶⁴ The phrase 'without prejudice to the provisions on occupational health and safety' in this clause was deleted on 20 June 2012 by Law no. 6331.

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

In Turkey, national legislation prohibits discrimination in the following areas: membership of, and involvement in, 'vocational organisations', without specifying organisations of workers or employers as formulated in the directives, for four of the five grounds (excluding sexual orientation) and for both private and public employment (Article 5(4) of the Law on the Human Rights and Equality Institution of Turkey).

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

In Turkey, national legislation prohibits discrimination in the following areas: social security and healthcare as formulated in the Racial Equality Directive (2000/43/EC).

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) prohibits discrimination in the provision of social security and healthcare. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded.

Constitutional and legal provisions which regulate social protection do not contain a prohibition of discrimination. According to Article 60 of the Constitution, 'everyone has the right to social security'. The Law on Social Insurance and General Health Insurance (no. 5510) and the Law on Individual Pension Savings and Investment System (no. 4632) do not have provisions on any of the prohibited grounds, except for disability. The provisions on disability are on positive measures, such as early retirement (Article 25 of the Law on Social Insurance and General Health Insurance). Persons with disabilities who have never been employed or who cannot work due to disability and children with disabilities whose families are economically deprived receive a disability pension (under Law no. 2022). The amount of disability pension varies in accordance with the degree of disability. The medical treatment costs of persons who receive a disability pension are covered by general health insurance. The number of persons receiving a disability pension increased from 262 378 in 2002 to 540 563 in 2011.²⁶⁵

The Law on Social Insurance and General Health Insurance requires that, apart from the premiums paid, in order to receive health services, out-of-pocket contributions should also be paid. These contributions have become a barrier for people in poor sectors of society. Although in certain cases these contributions are reimbursed, such reimbursements are only made after payment of the contributions, subject to submission of the requisite documents. Persons with low income and education levels often may not know about the possibility of reimbursement and are not equipped with the resources to deal with bureaucracy.

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

Again, Article 7 of the Law on Civil Servants prohibits discrimination on enumerated grounds by civil servants while carrying out their duties. While the provision does not

²⁶⁵ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 50, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en, pp. 48-49.

explicitly mention the provision of social services, since these services are provided by the civil services, this prohibition also covers discrimination in the provision of social services.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

In Turkey, national legislation prohibits discrimination in the following areas: social advantages as formulated in the Racial Equality Directive.

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) prohibits discrimination in the provision of 'social assistance'. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded.

Social advantages are provided generally on the basis of income, old age and disability. Irrespective of income, everyone above the age of 65 years can use public transportation free of charge.²⁶⁶ Persons with disabilities can benefit from free or discounted public transportation provided by various municipalities. Both the national Government and local governments give welfare benefits to poor persons and families. Persons with disabilities and their families can under certain conditions benefit from cash benefits.

A government policy initiated in 2002, with the support of the World Bank, provides conditional child grants to lower-income families which do not have any social security coverage. Known as 'conditional cash transfer', the programme provides monthly stipends per child of both pre-school and school age. Payment is conditional on school enrolment for children of school age and regular health checks for children of pre-school age. The amounts vary, based on the gender of the child (more for girls than boys) and the level of schooling (more for secondary than elementary school).²⁶⁷ Initially introduced as a pilot programme in six provinces, the policy began to be implemented across the country in 2005. A similar social subsidy to increase schooling is the free distribution by the Ministry of Family and Social Policies of school materials and lunch assistance to families in need.

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

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

Until 2013, the Turkish Government provided an exclusive social advantage to mosques, covering their electricity bills from the budget allocated to the Directorate of Religious Affairs (Diyanet), a subsidy denied to other places of worship belonging to the Christian, Jewish and Alevi faiths. Pursuant to an amendment in the Electricity Market Law (no. 6446) on 30 March 2013, electricity bills of all places of worship are now covered by the state. In its report to the UN Human Rights Council's Working Group on the Universal Periodic

²⁶⁶ Turkey, Regulation on Free of Charge or Discounted Travel Cards (*Ücretsiz veya İndirimli Seyahat Kartları Yönetmeliği*), Official Gazette, 4 March 2014.

²⁶⁷ On average, the payments are around TRY 40 (approximately EUR 10) per child.

Review, the Turkish Government reported that 387 churches and synagogues were benefiting from 'this right' at the beginning of 2014.²⁶⁸

However, since definition of what constitutes a 'place of worship' continues to be in the exclusive domain of the Government, only those faiths which are recognised by the Government are entitled to this social advantage. The Alevis, whose religion/denomination is not officially recognised, continue to be excluded from this social advantage, a practice the ECtHR has ruled to be discriminatory in a unanimous judgment issued in 2014 in the case of *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*.²⁶⁹ The ECtHR concluded that *cemevis* were places of worship for the Alevis and that the Turkish Government's exclusion of *cemevis* from a social advantage granted to places of worship under the Turkish law amounted to discrimination. The ECtHR held that the exclusion of *cemevis* from the exemption from paying electricity bills granted to other places of worship violated Article 14 in conjunction with Article 9 of the ECHR.

On 26 April 2016, the Grand Chamber of the ECtHR issued a precedent-setting judgment finding Turkey to have violated the rights of the Alevi minority under Article 9 (freedom of religion) and Article 14 (non-discrimination).²⁷⁰ Building on earlier Chamber judgments which had addressed various individual human rights issues raised by the Alevi minority – such as mandatory religion courses,²⁷¹ the mandatory indication of religion in official identity documents²⁷² and the Government's refusal to grant an Alevi foundation the exemption from paying electricity bills granted to Sunni places of worship,²⁷³ the Grand Chamber addressed Turkey's policies on the Alevis in their entirety. Noting that Alevis face numerous problems with regard to the organisation of their religious life, the right of parents not to have their children attending primary and secondary schools to take mandatory religion classes teaching the Sunni faith and interpretation of Islam, the lack of legal status of their religious leaders (*dedes*) and the absence of any institution to train personnel to deliver their religious services, the Grand Chamber concluded that the Alevi faith was excluded from all benefits enjoyed by the recipients of Sunni religious public services. The non-recognition of the Alevi faith and the absence of a clear legal framework governing such unrecognised religious minorities caused numerous legal, organisational and financial problems for the Alevi community – such as inability to access the courts and inability to receive donations – and subjugated the Alevis to the good will of the authorities, in violation of Article 9. In respect of Article 14, the Grand Chamber concluded that the Alevis received less favourable treatment than the beneficiaries of the religious public services provided by the Diyanet, despite being in a situation comparable with that of the Sunni majority. Pointing out that the religious services provided by the Diyanet to the holders of the Sunni faith were regarded as a public service and received substantial funds from the state budget and indeed were almost entirely subsidised by the state, the Grand Chamber found that depriving the Alevis of comparable status on the ground that their faith was classified as a 'Sufi order' by the authorities constituted differential treatment which lacked an objective and reasonable justification. While the judgment was widely covered in the national media, it did not generate any reaction from the Government.

²⁶⁸ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 7, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>.

²⁶⁹ ECtHR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, application no. 32093/10, 2 December 2014.

²⁷⁰ ECtHR, *Case of İzzettin Doğan and Others v. Turkey*, Grand Chamber, Application no. 62649/10, 26 April 2016.

²⁷¹ ECtHR, *Hasan and Eylem Zengin v. Turkey*, Application no. 1448/04, 9 January 2007; ECtHR, *Mansur Yalcin and Others v. Turkey*, application no. 21163/11, 16 September 2014.

²⁷² ECtHR, *Sinan Işık v. Turkey*, Application no. 21924/05, 2 February 2010.

²⁷³ ECtHR, *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, Application no. 32093/10, 2 December 2014.

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

In Turkey, national legislation prohibits discrimination in the following areas: education as formulated in the Racial Equality Directive.

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) prohibits discrimination in the provision of education. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded. While migrants are not explicitly specified as right-bearers, the law's exceptions clause refers to the conditions imposed on and the treatment of non-nationals for the purpose of their entry into and residence in Turkey but not their access to public services, including education (Article 7(g)). By implication, migrants arguably have the right to be free from discrimination in the field of education.

According to Article 42 of the Constitution, primary education is compulsory and free of charge in public schools, and Turkish is the sole language of instruction in education. Education at various levels is covered by the following legislation: Law on Primary Education (no. 222); Basic Law on National Education (no. 1739); Law on Vocational Training (no. 3308); Higher Education Law (no. 2547); Law on Unification of Education (no. 430); Law on Eight-year Compulsory and Uninterrupted Education (no. 4306); and Law on Private Education Institutions (no. 5580). Prohibition of discrimination in education, however, is only found in Article 4 of the Basic Law on National Education, where the only prohibited grounds are language, race, disability, gender and religion. The mandatory school age is 69 months and the mandatory minimum period of schooling is 12 years.

At the end of the 2000s, the Government started to take minimal steps to educate pupils on anti-discrimination. As reported by ECRI, 'an obligatory anti-discrimination class was taught to all pupils as their first class of the school year' at the start of the 2009-2010 school year.²⁷⁴ The Ministry of National Education also carried out a study to review all textbooks to eliminate discriminatory content, although 'a subsequent study has highlighted the need for further progress in this field'.²⁷⁵ On the other hand, despite some improvements in recent years, the textbooks used in secondary education have discriminatory content against non-Muslim minorities. This is the case, in particular, for the sections in history textbooks on the National Liberation War and the establishment of the Republic of Turkey. While the tenth-grade history textbook was amended in 2013 in response to complaints from the Syriac community,²⁷⁶ discriminatory content about missionaries and minorities remains.²⁷⁷

Article 89 of the Law on Foreigners and International Protection (no. 6458) gives all applicants and beneficiaries of international protection access to primary and secondary education.²⁷⁸ In addition, there are 'temporary education centres', accredited by the Ministry of National Education and staffed with Syrian teachers, using a modified Syrian Arabic curriculum. However, according to the Minister of National Education, only 325 000

²⁷⁴ European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, ECRI, 8 February 2011, p. 7, available at <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-CBC-IV-2011-005-ENG.pdf>.

²⁷⁵ European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, ECRI, 8 February 2011, p. 7, available at <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-CBC-IV-2011-005-ENG.pdf>.

²⁷⁶ European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf.

²⁷⁷ European Commission (2013), *Turkey Progress Report*, Brussels, p. 62, available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf.

²⁷⁸ Turkey, Law on Foreigners and International Protection (*Yabancılar ve Uluslararası Koruma Kanunu*), 4 April 2013.

of the over 756 000 school-age Syrian refugees were attending formal schools and education centres as of September 2016.²⁷⁹

Students belonging to religious minorities

In Turkey, the general approach to education for pupils belonging to religious minorities raises problems, some of which are common to all minorities, while others are specific to certain groups. An example of the former is the mandatory religion courses taught in primary and secondary schools pursuant to Article 42 of the Constitution. While a 1990 decision of the Ministry of National Education exempted Christian and Jewish students from these classes,²⁸⁰ in practice the exemption is limited to the three officially recognised non-Muslim minorities (Jews, Armenian and Greek Orthodox Christians), excluding other Christian groups. Moreover, exemption requests by students belonging to officially recognised minorities may arbitrarily be refused by school administrators, though the Ministry of National Education has taken steps in recent years to counter this.²⁸¹

To be exempted, Armenian, Greek Orthodox and Jewish students are required to submit a request signed by their parents and 'prove' their faith by producing official identity documents where their religion is indicated. This requirement poses a contradiction with a 2006 law which allows citizens to leave – upon paying, as of May 2015, around TRY 7 (EUR 1.75) – the religion section on their identity document blank.²⁸² For non-Muslim parents who want their children to be exempt from religion courses, exercising the right not to identify their religion on their identity documents is practically not an option. In fact, requests submitted by parents who had opted to leave the religion section on their identity documents blank have been rejected.²⁸³ A second issue in respect to exemption concerns the lack of adequate and rights-based arrangements to accommodate students who request to be exempt. Such students are not offered alternative classes and have to spend idle time on school premises during the hours of religion courses. Finally, requesting exemption may cost students exclusion from school, which results in families refraining from filing complaints with the authorities for fear of further stigmatisation of their children.²⁸⁴

The minority group which has been most vocal against mandatory religion classes has been Alevis, who took the issue to the ECtHR. In 2007, the Court found the content of these classes to be in violation of Article 9 of the ECHR,²⁸⁵ on the ground that the textbooks gave disproportionate weight to teaching Islam in relation to other religious and philosophical beliefs. The ECtHR also found the obligation of non-Muslim parents to disclose their identity and religion in order to get an exemption for their children to be in violation of the right to freedom of religion, noting that the absence of a legal basis leaves exemption decisions to the discretion of school administrators, leading to arbitrary rejections. However, the ECtHR did not find the classes as such to be in violation of the ECHR.

²⁷⁹ Human Rights Watch (2016), 'Education for Syrian Refugee Children: What Donors and Host Countries Should Do', 16 September 2016, available at: <https://www.hrw.org/news/2016/09/16/education-syrian-refugee-children-what-donors-and-host-countries-should-do>.

²⁸⁰ Turkey, Ministry of National Education, Religious Education General Directorate for Higher Education and Training Committee decision, 9 July 1990.

²⁸¹ European Commission (2013), *Turkey Progress Report*, Brussels, p. 61, available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf.

²⁸² The ECtHR had, however, found this 'reform' to be inadequate to ensure the protection of freedom of religion. ECtHR, *Sinan Işık v. Turkey*, No. 21924/05, 2 February 2010. This ECtHR judgment remains unimplemented.

²⁸³ Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, p. 10, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf (citing decision: Ankara First Administrative Court, E.2012/1133, K. 2012/2367, 11 October 2012).

²⁸⁴ Norwegian Helsinki Committee (2014), *The Right to Freedom of Religion or Belief in Turkey - Monitoring Report January-June 2013*, p. 45, available at <http://inancozgurlugugirisimi.org/wp-content/uploads/2014/01/NHC-I%CC%87O%CC%88G-FoRB-Report-Eng.pdf>.

²⁸⁵ ECtHR, *Hasan and Eylem Zengin v. Turkey*, No. 1448/04, 9 January 2007.

While the ECtHR did not prescribe a general measure to the Turkish Government, the judgment made clear that authorities were obliged to unconditionally grant exemptions to all students, irrespective of their religion, denomination or belief. Turkey could have chosen any one of the following general measures: making the courses optional, completely revising the content of the courses or taking measures to ensure that parents and students are provided with exemption without having to disclose their faith.²⁸⁶ Opting for the second of these, the Ministry of National Education revised the textbooks, seemingly in accordance with the demands expressed by Alevi representatives within the framework of the 'Alevi opening' (for more on the Alevi opening, see Section 8.1.). The new textbooks were formally adopted on 30 December 2010 and first used during the 2011-2012 school year.²⁸⁷ An expert evaluation found that, notwithstanding a few additions and editorial changes, the general content, values and concepts of the old books were preserved.²⁸⁸ The course continues to teach a particular religion and fails to fulfil the criteria of inclusiveness, impartiality and lack of indoctrination.²⁸⁹

Up until the revision of the textbooks, the administrative courts were favourable to Alevis. Lower courts in several cities had ruled in favour of parents who brought cases for the exemption of their children from these classes and ordered the stay of execution.²⁹⁰ On 28 December 2007, the Eighth Circuit of the Council of State, citing the ECtHR judgment, held that the content of these classes failed to meet the requirements of objectivity, pluralism and respect for the religious and philosophical opinions of parents.²⁹¹ Nevertheless, Alevi children continued to be forced to take religion classes at primary and secondary level. The Government's revision of the textbooks had a reverse effect on the national courts' jurisprudence. The Eighth Circuit of the Council of State reversed its jurisprudence, on the basis that the revisions changed the curricula of the courses from religious education to the teaching of different religions and faiths, including the Alevi faith.²⁹²

In 2014, the ECtHR revisited the issue in the case of *Mansur Yalcin and Others v. Turkey*. It held that the revisions did not introduce a real change in the curriculum, which continued to focus predominantly on the knowledge of Islam as interpreted by the Sunni majority and violated the state's duty of neutrality and impartiality in regulating matters of religion.

²⁸⁶ Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, pp. 3-4, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf.

²⁸⁷ The written response of the Strategic Development Presidency of the Ministry of National Education, no. 337, 17.1. 2012, cited in Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, p. 8, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf.

²⁸⁸ Yıldırım, M. (2012), *2011-2012 Öğretim Yılında Uygulanan Din Kültürü ve Ahlak Bilgisi Dersi Programına İlişkin bir Değerlendirme* (An Evaluation of the Curriculum of the Religious Culture and Ethics Course Instructed during the 2011-2012 Academic Year), available at: <http://www.aihmiz.org.tr/aktarimlar/dosyalar/1349647350.pdf>.

²⁸⁹ Yıldırım, M. (2012), *2011-2012 Öğretim Yılında Uygulanan Din Kültürü ve Ahlak Bilgisi Dersi Programına İlişkin bir Değerlendirme* (An Evaluation of the Curriculum of the Religious Culture and Ethics Course Instructed during the 2011-2012 Academic Year), pp. 7-8, available at: <http://www.aihmiz.org.tr/aktarimlar/dosyalar/1349647350.pdf>.

²⁹⁰ For example, on 30 December 2005, the Fifth Administrative Court in Istanbul approved, on the basis of freedom of religion and conscience, a parent's petition for the exemption of his child from the religion course. Bianet (2006), 'Zorunlu Din Dersi İstemeyen Yargıya Gitmeli' ('Whoever Objects the Compulsory Religion Course should go to Court'), 24 November 2006, <http://www.bianet.org/bianet/insan-haklari/88237-zorunlu-din-dersi-istemeyen-yargiya-gitmeli>. A similar decision was issued in December 2010 by the Regional Administrative Court in İzmir, approving the decision of the First Administrative Court to the same effect. Bianet (2010), 'Zorunlu Din Dersi yine Yargıdan Döndü' ('Another Court Judgment against the Compulsory Religion Course'), 17 December 2010, <http://www.bianet.org/bianet/egitim/126667-zorunlu-din-dersi-yine-mahkemeden-dondu>.

²⁹¹ Turkey, 8th Circuit of the Council of State, 28.12.2007, E. 2006/4107, K. 2007/7481.

²⁹² Turkey, 8th Circuit of the Council of State, 13.7.2010, E. 2009/10610, K. 2010/2413. For a critical and detailed analysis of this and subsequent similar judgments of the 8th Circuit as well as the impact of this new case law on lower courts, see Altıparmak, K. (2013), *Hasan ve Eylem Zengin/Türkiye Kararının Uygulanması: İzleme Raporu* (Implementation of Hasan and Eylem Zengin Judgment: Monitoring Report), Ankara, pp. 13-16, available at: http://aihmiz.org.tr/files/01_Hasan_ve_Eylem_Zengin_Rapor_TR.pdf.

The Court noted that the absence of an appropriate exemption procedure left pupils, including Alevis, caught between the religious instruction given in schools and their parents' religious and philosophical convictions. Noting that the violation had arisen out of a 'structural problem', the ECtHR called on the Government 'to remedy the situation without delay' in particular by introducing a system to allow the exemption of pupils without requiring their parents to disclose their religious or philosophical convictions. The reactions of government officials indicate that this ruling too may face resistance. Prime Minister Ahmet Davutoğlu implied his disagreement with the ruling, stating that his Government 'cannot accept the attempts to reflect [the religion courses] as an instrument of religious pressure'. The President of the Directorate of Religious Affairs (Diyanet) stated that the ECtHR ruling may arise from the conflation of religious education with religious culture classes, arguing that the pupils are not instructed in accordance with any particular religion but taught about the cultural aspects of various religions.

At a time when there was an intense public debate on the teaching of religion at schools and amidst expectations for the abolition of the religion classes altogether, the JDP Government introduced an extremely controversial law on 30 March 2012. This 'education reform bill draft' not only did not abolish the religion classes or make them elective, but introduced new elective courses on religion in secondary schools.²⁹³ The two elective courses explicitly identified in the law are on the Kor'an and the life of the Prophet Mohammed, both concerning the Muslim faith.²⁹⁴ A circular subsequently adopted by the Ministry of National Education²⁹⁵ identified a number of further elective courses to be offered in secondary education, including 'Fundamental Religious Knowledge'. Thus, the law increases from two to eight per week the number of hours of religion courses students can potentially take. From the outset, religious minorities faced difficulties in the implementation of the law. Where non-Muslim students are granted exemption from the mandatory religion course, they may find themselves having to take an elective course on Islam, due to the obligation to obtain a minimum of elective credits and the fact that opening a new elective course requires the written request of at least 10 students. The case of a Protestant student is a telling example. While she was granted an exemption, since only three elective courses were available in her school, she had to choose between the elective courses on the Kor'an, the Prophet Mohammed and Fundamental Religious Knowledge or lose one year's credits. The provincial authorities offered to transfer the student to another school.²⁹⁶ Upon the family's application, the Ministry of National Education intervened and the school provided a special elective course for this student.²⁹⁷

Another disconcerting government practice concerns the centralised competitive examinations for entrance into higher education. The Administration for the Selection and Placement of Students decided to include 13 questions based on the religion courses in the 2013 national examination. Non-Muslims protested against the decision on the ground that it would result in unequal treatment of minority children who had received an exemption. In response, the Ministry of National Education declared that there would be alternative questions for such students.²⁹⁸ The 2014 national examination was the first where students were tested on religion, though the Administration claimed that the questions resembled

²⁹³ Turkey, Law on Amendments in Law on Primary Education and Various Other Laws (*İlköğretim ve Eğitim Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun*), 30 March 2012.

²⁹⁴ Turkey, Law on Amendments in Law on Primary Education and Various Other Laws, Article 9, 30 March 2012.

²⁹⁵ Turkey, Ministry of National Education, Circular no. 2012/37, 31 August 2012, available at http://tegm.meb.gov.tr/meb_iys_dosyalar/2012_08/31022530_semeliders.pdf.

²⁹⁶ Association of Protestant Churches (Turkey) (2013), *2012 Human Rights Violations Report*, Konak, Izmir, Association of Protestant Churches (Turkey), 15 January 2013, p. 6, available at: http://www.iirf.eu/fileadmin/user_upload/PDFs/2012_Rights_Violations_Report.pdf.

²⁹⁷ Norwegian Helsinki Committee (2014), *The Right to Freedom of Religion or Belief in Turkey - Monitoring Report January-June 2013*, p. 44, available at <http://inancozgurlugugirisimi.org/wp-content/uploads/2014/01/NHC-I%CC%87O%CC%88G-FoRB-Report-Eng.pdf>.

²⁹⁸ European Commission (2013), *Turkey Progress Report*, Brussels, p. 54.

the questions on philosophy.²⁹⁹ For 2015, the Administration applied yet another system, whereby students who were not 'legally obliged' to take the religion courses were allowed to answer alternative questions based on the philosophy course, where the rest of the students were tested on religion.³⁰⁰ Thus, students from unrecognised religious minorities continued to be tested on religion.

In addition, non-Muslim minority schools authorised under the Lausanne Treaty face serious and arbitrary limitations, making their management 'very difficult, to the extent of jeopardising the existence of some schools'.³⁰¹ Until 2007, the teachers of 'Turkish culture' classes and the deputy principals of these schools were required to be 'of Turkish origin' (read 'Muslim'), appointed by the Ministry of National Education.³⁰² An amendment to the Law on Private Education Institutions in 2007 removed this restriction, enabling the recruitment of minority teachers to these positions.³⁰³ However, the implementing regulation has not yet been adopted and 'the situation remains the same'.³⁰⁴ Minority schools do not have any say in the selection of these teachers, who are appointed by the Ministry of National Education and are not subject to the supervision of the non-Muslim principal.

Students belonging to ethnic minorities

In Turkey, the general approach to education for pupils belonging to ethnic and linguistic minorities also raises problems. Tens of millions of such students are denied the right to learn and/or receive education in their mother tongue, a right granted on a limited basis to Armenians, Jews and Greek Orthodox communities in accordance with the minority status they were granted on the basis of their religious (but not ethnic) identity. With the initiation of the EU accession process in 1999, a new phase in the state's approach to non-recognised ethnic and linguistic minorities commenced. Permitting the teaching of minority languages in private courses in 2002 was followed by the opening of Kurdish language and literature departments at public universities after 2009 and the introduction of on-demand elective courses in selected minority languages in secondary schools.³⁰⁵ As of the academic year 2012-2013, public secondary schools started to offer elective courses upon demand in selected minority languages (the Kurmanji and Zazaki dialects of Kurdish, the Adige and Abkhaz dialects of Circassian and the Laz language). The various Roma languages were not included among the selected languages. During the academic year 2012-2013, a total of 28 587 students nationwide opted for these elective courses. While 9 714 did not express a demand for a specific language, the rest demanded classes in Kurdish and Caucasian languages.³⁰⁶ The number of students enrolled in Kurdish language courses during the academic year 2012-2013 was 18 847.³⁰⁷ According to the Turkish Government's report to the UN, a total of 23 697 fifth-graders and 19 896 sixth-graders

²⁹⁹ Statement made by the Administration for the Selection and Placement of Students regarding the religion course questions in the 2015 national examination. Statement no longer publicly available on the internet.

³⁰⁰ Statement made by the Administration for the Selection and Placement of Students regarding the religion course questions in the 2015 national examination. Statement no longer publicly available on the internet.

³⁰¹ European Commission against Racism and Intolerance (ECRI) (2011), *Report on Turkey (fourth monitoring cycle)*, CRI 2011 (5), adopted on 10 December 2010, Strasbourg, ECRI, 8 February 2011, p. 33, available at <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-CBC-IV-2011-005-ENG.pdf>.

³⁰² The law required teachers of Turkish culture classes and the deputy principal in schools opened by 'foreigners' to be 'of Turkish origin and a citizen of the Turkish Republic'. Turkey, Law on Private Education Institutions (*Özel Öğretim Kurumları Kanunu*), Article 24, 8 June 1965.

³⁰³ Turkey, Law on Private Education Institutions, 8 February 2007.

³⁰⁴ Kaya, N. (2009), *Forgotten or Assimilated? Minorities in the Education System of Turkey*, Minority Rights Group International, January 2009, p. 17, available at: <http://minorityrights.org/publications/forgotten-or-assimilated-minorities-in-the-education-system-of-turkey-march-2009/>.

³⁰⁵ Turkey, Law on Amendments in Law on Primary Education and Various Other Laws, 30 March 2012.

³⁰⁶ Hürriyet (2013), 'İşte "Seçmeli Kürtçe"nin Türkiye Haritası' ('And here is the Turkey Map of the "Elective Kurdish"'), 6 February 2013, available at <http://www.hurriyet.com.tr/gundem/22534618.asp>.

³⁰⁷ European Commission (2013), *Turkey Progress Report*, Brussels, p. 62, available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf.

enrolled in Kurdish, Circassian and Laz language classes in the academic years 2012-2013 and 2013-2014.³⁰⁸

On 2 March 2014, the Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens was amended to allow the opening of secondary schools providing education in non-official languages.³⁰⁹ However, the scope of this right is limited to private secondary schools and does not extend to elementary schools or to public secondary schools. There is also a content restriction; history, Turkish language and literature, history of the revolution and Atatürkism, geography, social sciences, religion and ethics, and other courses related to the Turkish language can only be taught in Turkish.³¹⁰ The Government's limitation of education in minority languages to private institutions was received with criticism by the pro-Kurdish movement across the political spectrum. Pointing out that the majority of Kurds in the region are very poor, critics find the privatisation of education in the mother tongue to be discriminatory in socio-economic terms. Further, they find the denial to Kurds and other minority groups of a right granted to Turks to constitute ethnic discrimination.

The dispute between the Government and the Kurdish national movement over the issue culminated in a political crisis with the opening of the academic year 2014-2015, when Kurdish civil society commenced a civil disobedience campaign to provide alternative education without authorisation from the central authorities. Three non-governmental organisations established private elementary schools in Turkey's Kurdish region and commenced providing education on 15 September 2014. The schools, each given a Kurdish name, were opened in the predominantly Kurdish-populated provinces of Diyarbakır, Hakkari and Şırnak. Opened, funded and run on the civil initiative of three NGOs, the schools were immediately closed down by the judicial authorities upon the instruction of the Ministry of Interior. Furthermore, criminal investigations were commenced against the school administrators on charges of opening educational institutions without authorisation and committing offences in the name of a terrorist organisation. Defying the court orders, families, Kurdish politicians and civil society broke the seals on the schools and recommenced education provision. The authorities replied by closing down the schools once again. During the one week which had passed since the beginning of the new academic year, the schools were closed down by the Government and reopened by Kurdish society three times. Violent clashes occurred between the security forces and Kurdish youth and a number of public schools in the area were set on fire by Kurdish protestors.³¹¹ The crisis was partially resolved when Ferzad Kemanger Kurdish Elementary School in Diyarbakır recommenced providing education in October after having sought and received authorisation from the Ministry of National Education.³¹² In October 2016, the school was once again closed down by the authorities without explanation. Providing education to around 250 pupils from first to third grades, it was the only Kurdish language school in Turkey.³¹³

³⁰⁸ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 14.

³⁰⁹ Turkey, Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens (*Yabancı Dil Eğitimi ve Öğretimi ile Türk Vatandaşlarının Farklı Dil ve Lehçelerinin Öğrenilmesi Hakkında Kanun*), 2 March 2014.

³¹⁰ Turkey, Regulation on the Amendment of the Regulation on Private Educational Institutions of the Ministry of National Education (*Millî Eğitim Bakanlığı Özel Öğretim Kurumları Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), Official Gazette, 5 July 2014.

³¹¹ Bianet (2014), 'Okullar Yakıldıktan Sonra Kürtçe Okula İzin Sinyali' (Signal of Authorisation for Kurdish School after the Schools were Burned Down), *Bianet*, 19 September 2014, Available at: <https://www.haberler.com/okullar-yakildiktan-sonra-kurtce-okula-izin-6499691-haberi/>.

³¹² Radikal (2014), 'Diyarbakır'da Mühürlenlen Kürtçe Okul Yeniden Açıldı' (The Kurdish School in Diyarbakır re-opened after having been Sealed Off), *Radikal*, 6 November 2014, available at: <http://www.radikal.com.tr/turkiye/diyarbakirda-muhurlenen-kurtce-okul-yeniden-acildi-1225340/>.

³¹³ Kamer, H. (2016), 'Diyarbakır'da Kürtçe Eğitim Veren Ferzad Kemanger Okulu Kapatıldı' (Kurdish Education Providing Ferzad Kemanger School in Diyarbakır was Shut Down), *BBC Türkçe*, 10 October 2016, available at: <http://www.bbc.com/turkce/haberler-turkiye-37608054>.

From the perspective of discrimination against ethnic minority students, the most significant development in recent years has been the removal of the national oath which pupils were required to make every school day. Removed first in secondary schools in 2012, the oath was entirely abolished in 2013.³¹⁴ Introduced in 1933 as mandatory for all primary and secondary students, including non-Muslim pupils in minority schools, the oath was perceived as discriminatory and assimilationist by ethnic minorities.

a) Pupils with disabilities

In Turkey, the general approach to education for pupils with disabilities raises problems. After decades of endorsing the principle of segregation for the education of children with disabilities, which went against its commitments under international human rights norms,³¹⁵ today Turkey formally endorses integrated/mainstream education as the principle and special education as the exception.³¹⁶

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

The principle of mainstream education was introduced for the first time in 1983, with the adoption of the Law on Children in Need of Special Education.³¹⁷ Article 4 on the one hand recognises the right of children with disabilities to special education based on their needs, and on the other tasks the state with the duty to 'take the requisite measures' to enable children with disabilities 'whose conditions and characteristics are appropriate' to attend schools with 'normal children'. A circular adopted in 1988 put forth the conditions for the successful application of the principle of integration.³¹⁸ In 1997, a decree was adopted, establishing the 'Integration Implementation System' and emphasising the individualised education of every child with disability based on their needs and through the use of appropriate techniques and tools.³¹⁹ The Law on Persons with Disabilities of 2005 also endorses the principle of mainstream education. Article 15 recognises the rights of children

³¹⁴ Turkey, Regulation on the Amendment of the Regulation on Institutions of Primary Education of the Ministry of National Education (*Millî Eğitim Bakanlığı İlköğretim Kurumları Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), Official Gazette, 8 September 2013.

³¹⁵ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 20, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

³¹⁶ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

³¹⁷ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

³¹⁸ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

³¹⁹ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 24, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

with disabilities to have access to integrated education on the basis of their special situations. While the provision states that the education of students with disabilities 'cannot be prevented on the basis of any reason', it does not prohibit discrimination. The 2006 Regulation on Special Education Services puts forth the rules and principles to be followed for the establishment of special education schools, but stresses that special education is the exception to mainstream education.³²⁰ The July 2012 amendments made in the Regulation on Special Education Services were largely terminological, with very little potential positive impact in implementation.³²¹

The implementation of these laws and regulations concerning mainstream education lags far behind the legal framework. Mainstream education facilities, transportation to these schools, educative tools (charts, maps etc.) and other education materials are not accessible to most of the children with disabilities. Neither the teachers in mainstream education, nor students without disabilities and their families are trained. Students with disabilities tend to be excluded by their peers, whose families express discomfort regarding the presence of students with disabilities in classrooms. Studies conducted in these schools show that the teachers lack the training and skills to address these problems, feeling very desperate and frustrated as a result. Of the teachers working in integrated schools, 86.4 % felt they lacked sufficient knowledge about mainstream education for students with disabilities, 77.1 % said individualised education programmes were not being prepared for students with disabilities in their classrooms, and 70.9 % said they simply implement the standard curricula for these students.³²²

In response to these problems, the Ministry of National Education conducted limited training for teachers in mainstream education, signed a protocol with the Anatolian University for a 3-month distance learning programme to train special education teachers, and commenced, in cooperation with civil society, pilot projects for the improvement of mainstream education.³²³ However, the scope of these efforts, significant as they are, remains very limited in comparison to the magnitude of the problem.

Although statistics are available on the number of children with disabilities registered, there are no up-to-date data on the number or percentage of students with disabilities who have successfully completed their primary education and have continued their education in secondary schools. The 2002 Disability Survey of Turkey provides the following statistics on the education levels of persons with disabilities: 34.5 % are graduates of elementary school and primary education; 5.4 % have a junior high school diploma; 6.9 % are graduates of a high school or equivalent. The survey results show that the rate of illiteracy among persons with disabilities (36.3 %) is three times that of the general population (12.9 %).³²⁴ In 2015, after four years' delay, the Turkish Government submitted its country report under the UN Convention on Persons with Disabilities. In this report, the Government provided updated statistics based on a 2011 survey on persons with disabilities, which it stated was conducted in accordance with the International Classification of Functioning Disability and Health (ICF), as opposed to the 2002 survey,

³²⁰ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), pp. 21-23, available at:

http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

³²¹ Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 179, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

³²² Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 29, p. 13, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

³²³ For the website of the project, see <https://www.tohumotizm.org.tr/proje/kaynastirma-ve-butunlestirmenin-etkinligini-artirmak-ic-politika-ve-uygulama-onerileri-2010>.

³²⁴ Tufan, İ., Arun, Ö. (2006), Secondary Data Analysis of Disability Survey of Turkey (*Türkiye Özürlüler Araştırması 2002 İkincil Analizi*), p. 21, available at: www.dezavantaj.org/files/ilerianaliz.doc.

which was conducted 'with a medical approach'.³²⁵ According to the 2011 survey, the rate of literacy for persons with disabilities is 76.7 %, compared to 95.5 % for the general population.³²⁶

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

According to government statistics, the number of students with disabilities in mainstream education was 10 156 in the academic year 1997-1998.³²⁷ Since the adoption of the Integration Implementation System in 1997, there has been a sharp increase in the number of students with disabilities receiving formal education. According to the Ministry of National Education's annual report, during the academic year 2015-2016, the total number of students with disabilities receiving integrated or special education was 288 489³²⁸ (compared to 259 282 in the academic year 2014-2015,³²⁹ 261 726 in the academic year 2013-2014,³³⁰ 252 025 in the academic year 2012-2013,³³¹ 238 917 in 2011-2012³³² and 61 801 in 2009-2010).³³³ Despite a sharp increase after 2010, the numbers continue to be extremely low in comparison to the estimated total number of children with disabilities of school age. In 2009-2010, the total number of children with disabilities in the age group 0-19 years who received half- or part-time education at pre-school, primary and secondary levels was 116 031, which fell far below the overall population of children with disabilities in that age group, whose estimated number in 2010 was 1 105 630.³³⁴

The gap between the goals and the situation on the ground is also reflected in the findings of international organisations. In its 2014 Progress Report on Turkey, the European Commission reported that while public schools are legally obliged to accommodate students

³²⁵ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 6, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

³²⁶ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 6, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

³²⁷ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 26, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

³²⁸ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2015-16), p. 34, available at: http://sqb.meb.gov.tr/meb_iys_dosyalar/2016_03/30044345_meb_istatistikleri_orgun_egitim_2015_2016.pdf.

³²⁹ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2014-2015), p. 36, available at: http://sqb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2014_2015.pdf.

³³⁰ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2013-2014), p. 36, available at: http://sqb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2013_2014.pdf.

³³¹ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2012-2013), p. 36, available at: http://sqb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2012_2013.pdf.

³³² Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2011-2012), p. 34, available at: http://sqb.meb.gov.tr/meb_iys_dosyalar/2012_12/06021046_meb_istatistikleri_orgun_egitim_2011_2012.pdf.

³³³ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2013-2014), p. 34, available at: http://sqb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2009_2010.pdf.

³³⁴ Tohum Türkiye Otizm Erken Tanı ve Eğitim Vakfı ve Eğitim Reformu Girişimi (2011), *Türkiye'de Kaynaştırma/Bütünleştirme Yoluyla Eğitimin Durumu* (The Status of Integrated Education in Turkey), p. 26, available at: http://www.sabancivakfi.org/files/html/programlar/tghp/Tohum_Kaynastirma_Durum_Raporu.pdf.

with disabilities, 41 % of persons with disabilities are illiterate and that 'the number and ratio of students with disabilities declined sharply from primary school through to university'.³³⁵ In its 2016 Progress Report on Turkey, the European Commission noted that while the number of pupils with disabilities in primary and secondary education continued to increase, 'access to higher education remained a problem and "lifelong learning" opportunities were limited'.³³⁶ The UN Committee on the Rights of the Child (CRC), noting that a large number of school-age children with disabilities did not enjoy their rights to education, urged the Turkish Government to further encourage the integration of these children in the regular education system.³³⁷ Similarly, UNESCO encouraged Turkey to intensify its efforts towards integration of children with disabilities in the regular education system.³³⁸ In its report to the UN Human Rights Council for the Universal Periodic Review, the Turkish Government stated that '[e]xcept for moderately or severely disabled persons, students with mild disabilities were included in the integration program within the twelve-year compulsory education plan'.³³⁹

Turkish legislation recognises the right of students with disabilities to receive the special education support they need because of their impairments. However, only eight hours of individual special education support or four hours of group special education support monthly is covered financially by the state. This means one or two hours of special education support per week. This support education is provided at private rehabilitation centres for students enrolled in mainstream schools. Students who need more hours of special education support have to cover the costs themselves. However, there is also a scarcity of special education institutions. On 5 May 2012, in response to a parliamentary query, the Ministry of National Education stated that there are 667 special education institutions within the mandate of the Ministry, 38 of which are fully physically accessible for students with disabilities.³⁴⁰ That a mere 5.7 % of educational institutions specially established for students with disability are accessible for them speaks volumes about the state's deliberate neglect of persons with disabilities and the absence of comprehensive planning and coherence in government policies.

An additional problem is the under-representation of girls among the population of students with disabilities.³⁴¹ Of the 288 489 students with disabilities enrolled in integrated or special education institutions in the academic year 2015-2016, the number of female students was 109 002.³⁴² In the 2014-2015 academic year, these numbers were 259 282 and 98 416

³³⁵ European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 58, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

³³⁶ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 76, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

³³⁷ United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 13.

³³⁸ United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 13.

³³⁹ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 14, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/194/36/PDF/G1419436.pdf?OpenElement>.

³⁴⁰ Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 186, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

³⁴¹ No data exist on the proportion of ethnic or religious minority students among the students with disabilities receiving education. As part of its general policy, the Turkish state does not collect data on minorities.

³⁴² Turkey, Ministry of National Education (*Millî Eğitim Bakanlığı*), *National Education Statistics: Formal Education (Millî Eğitim İstatistikleri: Örgün Eğitim)* (2015-16), p. 34, available at: http://sqb.meb.gov.tr/meb_iys_dosyalar/2016_03/30044345_meb_istatistikleri_orgun_egitim_2015_2016.pdf.

respectively,³⁴³ and in the 2013-2014 academic year, 261 726 and 100 733.³⁴⁴ The large difference between these figures not only shows that female children with disabilities are lagging behind male children, but also that the state is failing in the realisation of compulsory education for all. Furthermore, there is a downward trend in the number of girls with disabilities registered in schools.

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

Article 15 of the Law on Persons with Disabilities, adopted in 2005, made a commitment to the development of Turkish Official Sign Language. It took the Government over a decade to take steps in this direction. In June 2015, the Ministry of National Education prepared and published 10 000 copies of the Turkish Sign Language Dictionary.³⁴⁵ It also reported that a training course for trainers of sign language was organised with the participation of 81 persons, but did not give information on the number and level of competence of the trainers.³⁴⁶ In its 2015 report under the UN Convention on the Rights of Persons with Disabilities, the Government reported that work on the preparation of grammar rules for Turkish sign language was 'in progress'.³⁴⁷ In August 2015, the Ministry of National Education published the curriculum for the use of the Turkish sign language for the first year of primary education in special schools for pupils with hearing disabilities. The curriculum was first applied in the academic year 2015-2016.³⁴⁸ In August 2016, the Ministry also published the curriculum for the second and third years.³⁴⁹ In November 2016, the Ministry of National Education published a book for the teaching of Turkish Official Sign Language in the first grades of elementary schools providing education in sign language. The book was first used in the academic year 2016-2017. The Ministry announced that work was in progress on educational material for use in the second and third years of primary education.³⁵⁰

Under the current system, acquisition of the ability to use sign language takes at least 10 years.³⁵¹ At the level of higher education, as of the academic year 2013-2014, sign language was included among elective courses offered at public universities. In the academic year 2014-2015, it was included in the mandatory curriculum for university training for Teaching for Hearing Disability.

While the UN estimates the number of deaf people in Turkey to be 2.5 million, in 1998 the Turkish Ministry of National Education reported this number to be 400 000, of whom

³⁴³ Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2014-2015), p. 36, available at: http://sqb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2014_2015.pdf.

³⁴⁴ Turkey, Ministry of National Education (*Milli Eğitim Bakanlığı*), National Education Statistics: Formal Education (*Milli Eğitim İstatistikleri: Örgün Eğitim*) (2013-2014), p. 36, available at: http://sqb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2013_2014.pdf.

³⁴⁵ <http://www.meb.gov.tr/isitme-engelli-ogrenciler-icin-turk-isaret-dili-sozluqu/haber/9056/tr>.

³⁴⁶ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 34, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

³⁴⁷ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 34, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

³⁴⁸ <http://www.meb.gov.tr/turk-isaret-dili-dersi-ogretim-programi-yayimlandi/haber/9347/tr>.

³⁴⁹ <http://meb.gov.tr/isitme-engelli-ogrencilere-turk-isaret-dili-dersi/haber/11663/tr>.

³⁵⁰ <http://www.meb.gov.tr/turk-isaret-dili-ogretim-materyali-kitabi-tanitildi/haber/12244/tr>.

³⁵¹ Şenyurt Akdağ, A., Tanay, G., Özgül, H., Kelleci Birer, L., Kara, Ö. (2011), *Türkiye'de Engellilik Temelinde Ayrımcılığın İzlenmesi Raporu: 1 Ocak-30 Haziran 2010* (Monitoring Report on Discrimination on Grounds of Disability in Turkey: 1 January-30 June 2010), Istanbul, İstanbul Bilgi Üniversitesi, February 2011, p. 32.

120 000 were reportedly children.³⁵² The current official schooling data of the Ministry indicate the extremely low level of schooling of deaf children. In the academic year 2013-2014, the total number of deaf children in primary and secondary schools, including 'special vocational high schools' was 5 482.³⁵³ This number fell to 5 069 in the academic year 2014-2015³⁵⁴ and fell further to 4 722 in the academic year 2015-2016.³⁵⁵

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. Public training centres under the Ministry of National Education provide vocational courses for persons with disabilities. However, instead of mainstreaming these courses, specific courses are organised for persons with disabilities in limited areas. So persons with disabilities are not free to choose the area in which they want to receive vocational training, but have to make choices within a limited range of options. In addition, literacy courses are opened every year in July and August for illiterate adults with hearing or visual disabilities. Nonetheless, these courses are insufficient to meet the educational needs of adults with disabilities, as evident in the fact that a total of only 509 persons with disabilities attended these literacy courses in the period 2003-2010.³⁵⁶

b) Trends and patterns regarding Roma pupils

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

National legislation prohibits segregation. Article 4(1)(a) of Law on the Human Rights and Equality Institution of Turkey (no. 6701) lists segregation among the enumerated prohibited grounds of discrimination.

The greatest hurdle to access for Roma to education is poverty. Due to their dire socio-economic conditions, exacerbated by the forced displacement generated by urban transformation projects in Roma neighbourhoods (see Section 3.2.10). Roma families are unable to meet the minimum education needs of their children. Textbooks and other course material, school uniforms and clothing are prohibitively expensive for Roma families, causing low schooling levels and high drop-out rates. According to research conducted among Roma communities, high school is the highest level of schooling attained. Roma children face exclusion and widespread discrimination from their teachers and classmates, and are seated separately from other children, often at the back of classrooms. Roma parents who file complaints with school administrators do not receive replies. Parents of non-Roma students often transfer their children to other schools, which results in de facto segregation. There have been reports of collective resignations of teachers from schools where the majority of the student population becomes Roma as a result of the 'white flight' of other students. Some families displaced as a result of the demolition of their houses in gentrified neighbourhoods have reportedly been unable to enrol their children at schools

³⁵² Turkish Sign Language, prepared as part of Dr Asli Ozyurek's research project, information previously available at <http://turkisaret dili.ku.edu.tr/en/tid.aspx>. Website no longer online.

³⁵³ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2013-2014), p. 36, available at: http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2013_2014.pdf.

³⁵⁴ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2014-2015), p. 36, available at: http://sgb.meb.gov.tr/istatistik/meb_istatistikleri_orgun_egitim_2014_2015.pdf.

³⁵⁵ Turkey, Ministry of National Education (Milli Eğitim Bakanlığı), National Education Statistics: Formal Education (Milli Eğitim İstatistikleri: Örgün Eğitim) (2015-16), p. 34, available at: http://sgb.meb.gov.tr/meb_iys_dosyalar/2016_03/30044345_meb_istatistikleri_orgun_egitim_2015_2016.pdf.

³⁵⁶ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 32, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FTUR%2F1&Lang=en.

on the ground that they no longer resided in these neighbourhoods.³⁵⁷ In its 2014 report on Turkey's progress for EU accession, the European Commission reported high school drop-out levels, absenteeism and child labour among Roma children.³⁵⁸ There is no publicly available information on the Roma school-age population. In its 2016 progress report, the European Commission noted that absenteeism of Roma pupils in school 'remained high, including in compulsory primary education'.³⁵⁹

There have been government initiatives at national and local level to meet the educational needs of Roma children. For example, in the province of Edirne, which has a significant Roma population, the British Council, the Ministry of National Education and its provincial representation cooperated during the 2005-2006 school year on a project which sought to improve the situation of Roma children.³⁶⁰ However, these positive examples are the exception rather than the rule, as evident in the fact that the Government's Roma opening initiative has not produced any policy or strategy for enabling equal access to education for Roma (on the Roma opening, see Section 8.1).

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

In Turkey, national legislation prohibits discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive.

Article 5(1) and (3) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) prohibits discrimination in access to services and the access to and supply of goods. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded.

Article 122 of the Turkish Penal Code prohibits discrimination in the provision of services available to the public. It prohibits hatred based on language, race, nationality, colour, gender, disability, political opinion, philosophical belief, religion or sect in the sale or transfer of goods, the execution of a service, employment, provision of food services and undertaking economic activity. Hate offences based on ethnic origin are not included.

According to Article 73 of the Law on Notaries (no. 1512), transactions and signatures of deaf or blind persons shall be carried out in the presence of two witnesses only if the person with disability requests this. Under Article 15 of the Law of Obligations, blind persons cannot be bound by their signatures unless it is proven that they were informed about the content of the text upon signature, or unless the transaction was properly approved.³⁶¹

Article 91 of the Regulation on the Law on Notaries stipulates that notaries can ask for a health report if there is suspicion regarding the legal capacity of the person who requires the services of the notary. A similar rule applies to transactions at land registry offices. Although registrars are not under an obligation to ask for a health report, they are recommended to ask questions in order to test the capacity of the person who is a party

³⁵⁷ Özmen, K. (2006), 'Evsiz Kalan Roman Çocuklar Okula da Alınmıyor' (Displaced Roma pupils are now denied enrolment in school), *Bianet*, 20 September 2006, available at: <http://m.bianet.org/biamag/bianet/85495-evsiz-kalan-roman-cocuklar-okula-da-alinmiyor>.

³⁵⁸ European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

³⁵⁹ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 77, available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf.

³⁶⁰ Edirne Roma Association, European Roma Rights Centre, the Helsinki Citizens' Assembly (*Edirne Roman Derneği, European Roma Rights Centre, Helsinki Yurttaşlar Derneği*) (2008), *We are Here! Discriminatory Exclusion and Struggle for Rights of Roma in Turkey (Biz Buradayız! Türkiye'de Romanlar, Ayrımcı Uygulamalar ve Hak Mücadelesi)*, Istanbul, pp. 92-95, available at: <http://www.hyd.org.tr/tr/yayinlar/30-biz-buradayiz-turkiye-de-romanlar>.

³⁶¹ Turkey, Law of Obligations (*Türk Borçlar Kanunu*), 11 January 2011. The law entered into force on 1 July 2012.

to the transaction. In cases where the registrar is not convinced regarding the capacity of the person, a health report might be required. However, there is no legal basis for this. The practice is based on a general order issued by the General Directorate of Land Registry and Cadastre.³⁶²

3.2.9.1 Distinction between goods and services available publicly or privately

In Turkey, national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

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

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

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

In Turkey, national legislation prohibits discrimination in the following areas: housing as formulated in the Racial Equality Directive.

Article 5(1) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) prohibits discrimination in housing. Under Article 3(2), non-discrimination grounds are limited to race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded. While migrants are not explicitly specified as right-bearers, the law's exceptions clause refers to the conditions imposed on and the treatment of non-nationals for the purpose of their entry into and residence in Turkey but not their access to public services, including education (Article 7(g)). By implication, migrants arguably have the right to be protected against discrimination in the field of education.

While the 2013 Law on Foreigners and International Protection (no. 6458) provides access to education, social services and employment for migrants and refugees, it does not address the field of housing. Around 90 % of the Syrian refugees in Turkey live outside the camps built by the Government and face dire housing problems.³⁶³

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

One major problem regarding housing is the situation of internally displaced persons (IDPs), most of whom are of Kurdish origin and were displaced in the 1990s during the armed conflict between the Turkish military and the PKK. While a government programme entitled Return to Village and Rehabilitation Project, in force since 1999, provides aid in kind to IDPs who wish to return to their homes, the assistance is insufficient for returnees to rebuild their houses and to restart their lives in their villages. There are also other obstacles to the return to the villages, first and foremost the presence of landmines in rural

³⁶² Turkey, General Directorate of Land Registry and Cadastre (*Tapu Kadastro Genel Müdürlüğü*), TKGM no. 074/148-1568, 14 May 2003.

³⁶³ http://ec.europa.eu/echo/files/aid/countries/factsheets/turkey_syrian_crisis_en.pdf.

areas, the continuation of the village guards system, the lack of sufficient economic means for living and the continuance of armed conflict in the Kurdish region.³⁶⁴ While there is a compensation law enacted in 2004 to provide IDPs with compensation for their pecuniary losses, the substance and implementation of the law suffer major setbacks, such as the slow handling of applications, a high rate of rejections (around 30 % nationwide), low amounts of compensation and the high burden of evidentiary proof.³⁶⁵ Housing problems for Kurds are not limited to their status as internally displaced persons. Except for the predominantly Kurdish towns, cities and neighbourhoods, Kurds face difficulties in finding houses to rent.

Since summer 2015, the problem of forced displacement originating from and affecting the Kurdish region has exacerbated. In an operation which started in July 2015 and continued into 2017, the Turkish military raided densely populated towns with thousands of combat-ready troops, tanks, armoured vehicles and heavy artillery to remove the barricades and trenches that the PKK had built in residential areas, bombed and razed entire towns, without any regard to the presence of civilians trapped in the midst of the operations. From August 2015 onwards, the Government declared over 60 round-the-clock, open-ended curfews in more than 30 towns and neighbourhoods, which lasted several days, weeks or months, with the stated purpose of combating terrorists and protecting public order and security.³⁶⁶ Around 1.6 million people were locked up, without access to food supplies, water, electricity, power and emergency health services in the long winter months. No one, including the sick, the wounded, children, elderly and disabled, was allowed to leave without authorisation. Breaching the curfew was not only very risky, but also subject to monetary fine and/or criminal sanctions. Domestic and international humanitarian aid workers, human rights observers and parliamentarians were denied access to the curfew zone.

During this period, over 355 000 Kurdish civilians were displaced.³⁶⁷ Satellite imagery documents the wholesale destruction of entire neighbourhoods, which in most cases were razed to the ground by the authorities in the immediate aftermath of security operations to prevent the return of the displaced inhabitants.³⁶⁸ According to the UN, 'based on satellite image analysis, UNOSAT attributes such damage to the use of heavy weapons and, possibly, air-dropped munitions.'³⁶⁹ The destruction of private property was

³⁶⁴ Kurban, D., Yüksek, D., Çelik, A. B., Ünal, T., Aker, T. (2007), *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey*, available at: <http://tesev.org.tr/wp-content/uploads/2015/11/Coming-To-Terms-With-Forced-Migration-Post-Displacement-Restitution-Of-Citizenship-Rights-In-Turkey.pdf>; Kurdish Human Rights Project, *Submission and List of Issues to be Taken up in Connection with the Consideration of Turkey's Initial Report Concerning the Rights Covered by Articles 1-15 of the International Covenant on Economic, Social and Cultural Rights*, May 2010, available at: http://www2.ohchr.org/english/bodies/cescr/docs/ngos/KurdishHRP_Turkey_44.pdf.

³⁶⁵ For the latest study on the implementation of the law in the province of Van, see Kurban, D., Yeğen, M. (2012), *On the Verge of Justice: The State and the Kurds in the Aftermath of Forced Migration- An Assessment of the Compensation Law no. 5233- The Case of Van (Adaletin Kiyısında: 'Zorunlu' Göç Sonrasında devlet ve Kürtler/ 5233 Sayılı Tazminat Yasası'nın bir Değerlendirmesi- Van Örneği)*, <http://tesev.org.tr/wp-content/uploads/2015/11/Adaletin-Kiyısında-Zorunlu-Goc-Sonrasında-Devlet-Ve-Kürtler-Düzeltilmiş-2-Baskısı.pdf>.

³⁶⁶ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf; Council of Europe Commissioner for Human Rights (2016), *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016.

³⁶⁷ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, pp. 5-7, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

³⁶⁸ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 10, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

³⁶⁹ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 10, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

'systematic'.³⁷⁰ Not only did the authorities fail to open a single investigation into any of the allegations, but accused the deceased of being terrorists and retaliated against their families, charging those demanding accountability with terrorism.³⁷¹ In March 2016, the Turkish Government adopted a decision to expropriate up to 100 % of the plots of land in the historical Sur district of Diyarbakır province, 'which has been largely populated by citizens of Kurdish origin'.³⁷² Residents of the Sur and Diyarbakır Municipalities were reportedly never involved in or informed about the plans. On 4 September 2016, the Government announced a reconstruction and economic development plan for the Kurdish region, including USD 21 billion to be spent in areas 'destroyed by the PKK since July 2015'.³⁷³

Although the Turkish Government claims that racial discrimination 'by those who rent or sell houses or apartments is alien to Turkish society',³⁷⁴ there is widespread discrimination by private individuals.

Housing is a big problem for LGBTI individuals, especially for transgender persons. Many landowners decline to sell or rent houses to transgender individuals. Consequently, they can only rent apartments in certain areas of big cities and often have to pay rent above the market rates. Where they can find housing, they are harassed by other residents of the neighbourhood or by shop owners. In addition, since the areas where transgender individuals live are publicly known, they face physical attacks which aim at their displacement.³⁷⁵

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

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Turkey, there are patterns of housing segregation and discrimination against Roma people.³⁷⁶

The Urban Renewal Law of 2005 had a disparate impact on Roma people, giving impetus to urban transformation projects, most of which resulted in massive destruction and dislocation of Roma neighbourhoods throughout Turkey.³⁷⁷ According to a joint report

³⁷⁰ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 12, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

³⁷¹ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 8, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

³⁷² Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 12, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

³⁷³ Office of the United Nations High Commissioner for Human Rights (2017), *Report on the human rights situation in South-East Turkey: July 2015 to December 2016*, February 2017, p. 13, available at: http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf.

³⁷⁴ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), Consideration of reports submitted by States parties under article 9 of the Convention, *Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, p. 22, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

³⁷⁵ Öz, Y., *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Turkey*, Danish Institute for Human Rights, p. 36, available at http://www.coe.int/t/commissioner/source/lgbt/turkeylegal_e.pdf.

³⁷⁶ Regarding parliamentary discussions in 2015 on the segregation of Roma in housing, see Section 7(h).

³⁷⁷ European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

submitted by the Habitat International Coalition and its national partners for Turkey's Universal Periodic Review by the UN Human Rights Council, the number of Roma displaced due to the Government's urban transformation projects by 2014 was about 10 000.³⁷⁸ In many cases, the displaced Roma had to move to neighbourhoods where rent is several times higher than in their old neighbourhoods or to high-rise buildings constructed by the Housing Development Administration of Turkey (TOKİ) (*Toplu Konut İdaresi Başkanlığı*, TOKİ) in neighbourhoods which are outside city centres, which posed serious problems regarding access to employment. Many families could not afford increases in their rental payments and had to move out from their new apartments to live with their relatives. Homeowners had to sell their houses, but they could not afford to buy houses in other neighbourhoods.

The most high-profile and controversial urban transformation project was carried out in Istanbul's historical Roma neighbourhood of Sulukule. The residents and civil society organisations filed a court case in December 2007, requesting the suspension of the project. Despite appeals from the international community, 'the neighbourhood was razed in 2009 to make way for middle-income housing, its inhabitants displaced far from the centre and some of them compelled into forced nomadism'.³⁷⁹ The demolition of Sulukule and the ensuing resettlement 'caused dislocation and disruption';³⁸⁰ unable to afford life in TOKİ houses outside the city centre, all but three of the families returned³⁸¹ 'to live in much poorer conditions'.³⁸² The court case was finalised in June 2012 with a unanimous judgment ordering the revocation of the project. In the meantime, the project had reached near completion. The mayor of Fatih Municipality declared that they would not abide by the court's judgment, pointing out that 95 % of the construction of houses and shops was completed.³⁸³

On 12 December 2013, Amnesty International issued an urgent action on behalf of around 30 Roma families who were under the threat of forced eviction by municipal authorities to make way for road construction.³⁸⁴ Amnesty called on the authorities to alleviate the living conditions of around 120 people, including 37 children, 2 of whom had disabilities, and prevent their eviction. The group had been living in conditions of extreme poverty since their forced eviction on 19 July 2006 from their homes in the district of Küçükbakkalköy as part of a municipal urban regeneration project. They had been living on vacant land in Pendik since early 2008, without access to electricity, clean water, basic sanitation, health, education and employment. In response to Amnesty's call for action, the authorities informed the Roma families that they would receive fuel and cash assistance during the winter period. In addition, the mayor of Pendik stated that his municipality did not have any plans for eviction.³⁸⁵ In November 2013, officials from the Ministry of Family and Social Policies visited the site to identify the conditions and needs of the Roma families. The delegation found that the vast majority of the children living at the site did not go to school

³⁷⁸ United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Summary prepared in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 9.

³⁷⁹ Council of Europe, Commissioner for Human Rights (2012), *Human Rights of Roma and Travellers in Europe*, Strasbourg, Council of Europe, February 2012, p. 151, available at: https://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf.

³⁸⁰ European Commission (2011), *Turkey Progress Report*, Brussels, 12 October 2011, p. 40, available at http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf.

³⁸¹ Vardar, N. (2011), 'Sulukule Gönüllüleri Romanlara Destek Oluyor' ('Sulukule Volunteers Give a Hand to the Roma'), *Bianet*, 5 May 2011, available at: <http://bianet.org/bianet/toplum/129771-sulukule-gonulluleri-romanlara-destek-oluyor>.

³⁸² European Commission (2011), *Turkey Progress Report*, Brussels, 12 October 2011, p. 40, available at http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf.

³⁸³ Vardar, N. (2013), 'Yeni "Sulukule" Yıkılmayacak' ('The New "Sulukule" will not Come Down'), *Bianet*, 19 June 2013, available at: <http://www.bianet.org/bianet/bianet/139176-yeni-sulukule-yikilmayacak>.

³⁸⁴ Amnesty International, Urgent Action, 'Children, Elderly at Risk of Forced Eviction, Turkey', EUR 44/030/2013, 12 December 2013, available at: <http://ua.amnesty.ch/urgent-actions/2013/12/331-13>.

³⁸⁵ Amnesty International, Urgent Action, 'Roma Families to Receive Winter Aid,' 18 December 2013, available at: <https://www.amnesty.org/en/documents/EUR44/032/2013/en/>.

and half of them were not officially registered. In response to Amnesty's urgent action, the Ministry of Families and Social Policies stated that they were looking into the case.

The Roma evictions drew reaction from the UN treaty bodies. In its feedback for the 2014 Universal Periodic Review of Turkey by the UN Human Rights Council, the Committee on Economic, Social and Cultural Rights 'noted with concern that forced evictions had taken place in Istanbul, without adequate compensation or alternative accommodation' and emphasised their adverse effects on the schooling of children. The Committee urged the Government to review the legal framework governing urbanisation projects 'to ensure those affected received adequate compensation and/or relocation'.³⁸⁶ In its 2016 report, the European Commission noted that urban development projects 'continued to disadvantage the Roma by depriving them of traditional job opportunities and solidarity networks'.³⁸⁷

Hate-driven lynching attempts targeting Roma, Kurds and Alevi deprived them of their houses and living environment and turned them into displaced persons. In all cases, the authorities failed to act effectively and promptly to protect the victims and in most cases asked them to leave the district or provincial borders 'for their own safety'. One such attack took place on 5 January 2010, when a crowd of more than 1 000 locals in the district of Selendi in the province of Manisa attacked Roma residents. The crowd threw stones at and set fire to the houses of Roma and set cars on fire, causing panic and disorder. Slogans such as 'Get the Gypsies out' were chanted in the streets. The local police could not control the situation and sought reinforcements to assist. The pretext for the attack was a fight between a Roma man and the owner of a coffee house on 31 September 2009 over the former's refusal to abide by the smoking ban. However, it became clear after the incidents that the attack was planned, systematic and the outcome of long-term tensions between Roma and other residents of Selendi. Instead of providing the Roma families with protection, the Governor of Manisa forcibly relocated the victims to the district of Gördes and subsequently to the district of Salihli on the ground that local authorities would not be able to ensure their security in Selendi. The displaced Roma continue to live in exile in Salihli. Having lost their houses, furniture, businesses and savings, they live in economic hardship.

After some delay, a criminal case was launched against the perpetrators. On 23 December 2015, five years after the first hearing was held on 16 December 2010, the court delivered its judgment, which was published on 9 May 2016.³⁸⁸ The Court held that defendants were part of a concerted action of around 150 individuals who had raided the Roma neighbourhood with stones, bats and rifles, had thrown a molotov cocktail and tried to burn the Roma's houses, tents and cars. Some of the defendants openly incited the public to hatred and enmity by chanting slogans such as 'they will leave here or else we will do what is necessary', 'Selendi is ours and will remain so', 'the Gypsies are insulting our mosques, religions, wives and daughters', 'we do not want them here', 'let's kill them, let's burn their houses', 'these are Gypsies, let's teach them a lesson', 'we have had enough of the Roma, who are stealing and harassing us'. The Court found that the defendants had also attacked the law enforcement officers who tried to prevent them from burning down the Roma's houses and offices. The Court convicted 38 of the 80 defendants for incitement to enmity or hatred and denigration under Article 216 and for property damage under Articles 151 and 152 of the Turkish Penal Code, sentencing them to terms of imprisonment of between 8 months and 45 years, using its discretion to issue the upper limits of available

³⁸⁶ United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 12.

³⁸⁷ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 77, available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf.

³⁸⁸ Saymaz, I. (2016), 'Selendi Kararı: Saldırı, Romanlara karşı Birlik içinde Yapıldı' (The Selendi Verdict: this was an organised attack against the Roma), *Hürriyet*, 9 May 2016.

sentences.³⁸⁹ The rest of the defendants were acquitted. The defendants appealed to the Court of Cassation, which is expected to issue a judgment sometime in 2017. Pending this decision, the judgment is not final.

The judgment constitutes a very important precedent for the handling of lynch attempts against ethnic and racial minorities by the Turkish courts. This is the first time that a Turkish Court has convicted perpetrators of hate crimes under Article 216 of the Turkish Penal Code, which had so far been used to protect individuals engaged in hate speech or acts against minorities rather than victims who had been subjected to such crimes. Roma face discrimination in access to housing. Private individuals are reported to refuse housing to Roma on the basis of their identity.³⁹⁰

³⁸⁹ Information received from the victims' lawyer Necati Özmedir, 19 January 2016.

³⁹⁰ European Roma Rights Centre and the Edirne Roma Association, *Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session*, p. 18, available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Turkey, national legislation provides for an exception for genuine and determining occupational requirements. Article 7(1)(a) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides that 'any distinctive treatment in respect of employment, self-employment based on the inherent requirements thereof shall not be deemed to be discrimination when the treatment is appropriate and in proportion to the requirement.'

While not providing exceptions for genuine and determining occupational requirements, there are several provisions in various laws which are of relevance. Article 30 (4) of the revised Labour Law stipulates that persons with disabilities cannot be employed in underground and underwater work. According to Article 71 of the Labour Law, children under the age of 15 years cannot be employed. However, children who have reached the age of 14 years and have also completed their primary education may be employed on light work which will not hinder their physical, mental and moral development, and for those who continue their education, in jobs which will not prevent their school attendance. Persons between the ages of 15 and 18 years can only be employed in certain jobs identified by the law.

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

In Turkey, national law provides for an exception for employers with an ethos based on religion or belief. Article 7(1)(d) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides an exception for institutions which provide services, education or teaching on a particular religion, allowing exclusive admission to such institutions to members of the religion concerned. No similar ethos-based exemption is provided for associations working for the preservation of the environmental, historical and cultural heritage. The exemption in the law is limited to admission to religious institutions and is hence narrower than Article 4(2) of the Employment Equality Directive 2000/78/EC. At the same time, there is no allusion in the law that this exception may not amount to discrimination on another ground.

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

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

The Turkish Armed Forces Regulation applies to military students, all civil and military personnel of the Turkish Armed Forces and all persons who are under an obligation to serve in the military.³⁹¹ Decisions regarding these persons depend on the health board reports issued by the Gülhane Military Medical Academy.³⁹² Health board reports are based on the Regulation on the Criteria and Classification of Disability and Health Board Reports to be given to the Disabled.

General and special laws regarding employment in the public sector contain age restrictions: however, these are not limited to the armed forces. The Law on the Personnel

³⁹¹ Military service is obligatory in Turkey.

³⁹² Turkey, Regulation on Health Capability of the Turkish Armed Forces (*Türk Silahlı Kuvvetleri Sağlık Yeteneği Yönetmeliği*), Official Gazette, 24 November 1986.

of the Turkish Armed Forces (no. 926) of 10 August 1967, Law on Commissioned and Non-commissioned Officers to be Recruited under Contracts (no. 4678) of 21 June 2001 and Law on Expert Gendarmerie (no. 3466) of 4 June 1988 provide upper age limits.

There are maximum age limits for many professions, including the police, prison and emergency services. According to Additional Article 24 of the Law on Police Organisation (no. 3201), the maximum age limit for recruitment is 27 years. According to Article 29 of the Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres,³⁹³ in order to be accepted as a candidate student for becoming a prison or detention centre guard, the candidate should not be younger than 18 years of age or older than 30 years of age.

Various laws and regulations pertaining to the armed forces have discriminatory provisions against LGBTI individuals. A 2013 law³⁹⁴ explicitly enumerates homosexuality among the violations of disciplinary rules which require immediate dismissal from the Turkish Armed Forces (see section 2.1.1).

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Turkey, national law includes exceptions relating to difference of treatment based on nationality. Article 7(1)(g) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides an exception for differential treatment arising from the legal status and conditions for entry into Turkey and residence of non-nationals.

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

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

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

There are discriminatory references to race in various laws and regulations. Under Article 3 of the Settlement Law (no. 5543), only individuals 'from the Turkish race and belonging to the Turkish culture' are admitted to Turkey as migrants. An executive regulation dated 23 February 2009 exempts 'foreigners of Turkish race' who live in Turkey from the requirement to obtain work permits and allows them to become members of professional organisations. The case brought by the Chamber of Architects and Engineers of Turkey for the annulment of this exemption was rejected by the Council of State.

³⁹³ Turkey, Regulation on the Establishment, Duties and Functioning of Staff Training Centres for Prison and Detention Centres (*Ceza İnfaz Kurumları ve Tutukevleri Personeli Eğitim Merkezleri Kuruluş, Görev ve Çalışma Yönetmeliği*), Official Gazette, 4 May 2004.

³⁹⁴ Turkey, Turkish Armed Forces Discipline Law (*Türk Silahlı Kuvvetleri Disiplin Kanunu*), 31 January 2013.

Similarly favourable treatment exists in a regulation which exempts foreign students and trainees of Turkish descent from payment for tuition in private education institutions and provides them with scholarships.³⁹⁵

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

a) Benefits for married employees

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

Article 5 of the Labour Law provides open-ended protection against discrimination. While marital status is not listed among the enumerated grounds in the provision, the non-exhaustive nature of the list suggests that employers are also prohibited from discriminating against their employees on the basis of their marital status. In practice, national courts interpret this article in such a way that they do not deem all kinds of differential treatment among employees based on their marital status to constitute discrimination. Rather, courts apply an arbitrariness test to determine whether such differential treatment is discriminatory. For example, where employers provide benefits (such as an annual one-salary bonus) exclusively to married employees whose spouses are unemployed (and does not provide the same benefit to single employees or married employees whose spouses are employed), this is not interpreted to constitute discrimination. Under Turkish law, while marriage is a legal status defined under Civil Law, in practice courts also recognise 'living together' as a lifestyle and grant rights to heterosexual couples who live together, including those who are married by religious ceremony but lack a civil marriage. Thus, employers who provide exclusive benefits to married employees with unemployed spouses are also required to extend these benefits to unmarried employees whose spouses are unemployed, so long as the latter submit proof of living together with their spouses (such as a document of residence). The employer's failure to do so would constitute an arbitrary distinction not justified on objective grounds. Where the employer acts out of moral, religious, or philosophical convictions and categorically excludes all unmarried or divorced employees from benefits provided to married employees, courts find this to be discriminatory.³⁹⁶

b) Benefits for employees with opposite-sex partners

In Turkey, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. Article 5 of the Labour Law provides open-ended protection against discrimination. While sexual orientation is not listed among the enumerated grounds in the provision, the non-exhaustive nature of the list suggests that employers are also prohibited from discriminating between their unmarried homosexual and heterosexual employees. Therefore, in theory, an employment practice of this kind would constitute discrimination. However, there is no case law on the issue.

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

a) Exceptions in relation to disability and health/safety

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

³⁹⁵ Turkey, Regulation on Graduate Education and Exams at Kafkas University (*Kafkas Üniversitesi Lisansüstü Eğitim-Öğretim ve Sınav Yönetmeliği*), Official Gazette, 9 February 2009, at Article 4(1)(g).

³⁹⁶ Opinion expressed through email by Mehmet Uçum, a leading human rights lawyer specialising in employment law.

However, there are certain restrictions regarding persons with disabilities which might be considered as exceptions in relation to health and safety. One of the most controversial restrictions was contained in Article 53/b(4) of the Road Traffic Regulation, which required a special sign on the registration plates of cars used by persons with disabilities. This provision was unsuccessfully challenged in 2009 before the Council of State by an applicant with disabilities.³⁹⁷ In September 2011, Article 53 was revised and the requirement for persons with disabilities to have a special sign on their registration plates was removed for new plates issued after the entry into force of the revised regulation on 9 September 2011.³⁹⁸

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

4.7.1 Direct discrimination

In Turkey, national law provides an exception for direct discrimination on the ground of age.

Article 7(1)(c) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides that any distinction based on age in recruitment and employment processes shall not be deemed to be discrimination when the treatment is appropriate and necessary for the inherent requirements of a job. Article 3(2) of the same law prohibits discrimination on the basis of age.

a) Justification of direct discrimination on the ground of age

In Turkey, national law is silent on direct discrimination on the ground of age. The new law does not address the issue.

b) Permitted differences of treatment based on age

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

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

A government policy initiated in 2002 with the support of the World Bank provides conditional child grants to lower income families who do not have any social security coverage. Known as 'conditional cash transfer', the programme provides monthly stipends per child of both pre-school and school age. Payment is conditional on school enrolment for school-age children and regular health checks for pre-school children. The amounts vary, based on the gender of the child (more for girls than boys) and the level of schooling (more for secondary than elementary school).³⁹⁹ Started as a pilot programme in six provinces, the policy began to be implemented across the country in 2005.

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

³⁹⁷ Turkey, 8th Circuit of the Council of State, 17 March 2009, E. 2007/4208, K. 2009/795.

³⁹⁸ Turkey, Regulation on the Amendment of the Regulation on Traffic on Highways (*Karayolları Trafik Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik*), Official Gazette, 9 September 2011.

³⁹⁹ On average, the payments are TRY 30 (EUR 7.5) per month per child.

In Turkey, there are two mandatory occupational schemes for the armed forces (Turkish Army Members Solidarity Fund - *Ordu Yardımlaşma Kurumu*, OYAK) and for employees of the state-owned coal mining enterprise (Labour Union- *Amele Birliği*). In addition, there are voluntary occupational schemes established by numerous private sector corporations.⁴⁰⁰ In 2014, there were news reports about government preparatory work to introduce an OYAK-inspired occupational pension scheme for retirees of specific sectors, such as steel and automobile manufacturing, which are regarded as sectors with difficult working conditions.⁴⁰¹ There is no public information about the preparatory work done in this regard, neither has there been any development.

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

In Turkey, there are special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection.

Article 13/1(d) of a 2006 regulation regarding persons with disabilities who are in need of care stipulates that relatives/guardians who assume caring responsibilities for persons with disabilities shall be paid a minimum wage by the state.⁴⁰² While home-carers 'have become a major component of Turkey's care system, (...) they lack professional training and incentives to pay social security premiums.'⁴⁰³ No special conditions exist for carers who are employed.

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

4.7.3 Minimum and maximum age requirements

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

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

According to Article 4/1(b) of the Regulation on the conditions and procedure regarding recruitment of workers in public institutions, applicants should not be below the age of 18 years.⁴⁰⁴

There are general and special laws regarding employment in the public sector and different requirements are laid down with regard to age limits. According to Additional Article 3 of the Regulation on the examinations organised for those to be appointed to public offices

⁴⁰⁰ OECD, Private Pensions Outlook 2008, Pension Country Profile: Turkey, at pp. 289-290, available at: <http://www.oecd.org/finance/private-pensions/42575085.pdf>.

⁴⁰¹ Boyacıoğlu, H. (2014), 'OYAK Modeli Mesleki Emeklilik' (OYAK-style occupational pension), *Hürriyet*, 3 September 2014, available at: <http://www.hurriyet.com.tr/oyak-modeli-mesleki-emeklilik-27128112>.

⁴⁰² Turkey, Regulation on the Identification of Persons with Disabilities who are in Need of Care and on the Determination of the Needs for Care Services (*Bakıma Muhtaç Özürlülerin Tesbiti ve Bakım Hizmeti Esaslarının Belirlenmesine İlişkin Yönetmelik*), Official Gazette, 30 July 2006.

⁴⁰³ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 60, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

⁴⁰⁴ Turkey, Regulation on the Conditions and Procedure Regarding Recruitment of Workers in Public Institutions (*Kamu Kurum ve Kuruluşlarına İşçi Alınmasında Uygulanacak Usul ve Esaslar Hakkında Yönetmelik*), Official Gazette, 9 August 2009.

for the first time,⁴⁰⁵ unless explicitly laid down by special provisions in laws, by-laws and regulations, public institutions cannot require an age limit for those who are to be placed through central examinations. According to Article 48 of the Law on Civil Servants, in order to be recruited as a civil servant, a person should not be below the age of 18 years. The Regulation on the examinations organised for those to be appointed to public offices for the first time also refers to Article 48 of the Law on Civil Servants regarding recruitment conditions, including the minimum age limit of 18 years. There are numerous special laws which stipulate minimum and/or maximum age requirements. For example, according to Article 8 of the Law on Judges and Prosecutors (no. 2802) the maximum entry age is 35 years.

Age limits also apply to training.

4.7.4 Retirement

a) State pension age

In Turkey, there is a state pension age, at which persons begin to collect their state pensions. The pension age is stipulated in the Law on Social Insurance and Universal Health Insurance Law (Law no. 5510), adopted on 31 May 2006. Those who became insurance holders after the adoption of the Law shall retire at the age of 58 years (women) and 60 years (men). According to Article 28 of this law, the state pension age will increase gradually and will reach 65 years for both men and women, for the former from 2044 onwards and for the latter from 2048 onwards.

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

A person can collect a pension and continue to work. However, a special premium has to be paid. The premium to be paid varies depending on the date of entry into the work force, the type of retirement pension and the type of occupation. The law in this area is in constant flux.⁴⁰⁶

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

b) Occupational pension schemes

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

⁴⁰⁵ As amended in 2006. The original Regulation was published in the Official Gazette on 3 May 2002. The Regulation was amended many times. The amendment regarding 'age limits' was published in the Official Gazette on 4 March 2006.

⁴⁰⁶ After the cut-off date of this report, changes were introduced to the state pension system whereby individuals who had worked under a service contract in the private or public sectors and who continue to work after retirement have to pay a premium amounting to 32 % of their new salaries. Individuals who were self-employed until their retirement and who continue in self-employed work no longer have to pay the 10 % premium.

c) State imposed mandatory retirement ages

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

d) Retirement ages imposed by employers

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

e) Employment rights applicable to all workers irrespective of age

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

f) Compliance of national law with CJEU case law

In Turkey, national legislation is in line with the CJEU case law on age in regard to compulsory retirement.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Turkey, national law permits age and seniority to be taken into account in selecting workers for redundancy. One of the most established principles of the Labour Law is that, in the selection of the workers for redundancy, the employer should take into account the period the employee has worked for the employer. The shorter the period of work, the bigger the risk of selection for redundancy.

b) Age taken into account for redundancy compensation

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

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

In Turkey, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

4.9 Any other exceptions

In Turkey, other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following: 'situations which oblige the employment of a particular sex', 'special measures and protective precautions towards children or individuals who need to be kept in a special place',⁴⁰⁷ and conditions for membership to associations, foundations, trade unions, political parties and professional organisations (Article 7(1)(b), (ç) and (e) of the Law on the Human Rights and Equality Institution).

⁴⁰⁷ The law does not indicate or define what a 'special place' is.

These broad and vague exception clauses are not compatible with the directives.

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

a) Scope for positive action measures

In Turkey, positive action in respect of racial or ethnic origin, religion or belief, disability or age is permitted in national law. Positive action in respect of sexual orientation is not permitted.

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

Article 7(1)(f) of the Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides an exception to the prohibition of discrimination for 'treatment which is necessary, appropriate and proportional towards eliminating inequalities'. The law prohibits discrimination on grounds of racial or ethnic origin, religion or belief, disability or age.

Although not designated as positive action by the legislation, there are a number of laws and regulations stipulating positive measures in the areas of education, employment and a number of services (social insurance, transportation etc.), including employment quotas, for persons with disabilities. The special situation of non-Muslim groups under the Lausanne Treaty does not confer on them a right to positive discrimination based on religion. On the contrary, the state in Turkey continues to limit the state funding for religious services to the Sunni Muslim majority by paying the salaries of Sunni preachers (*imams*) and providing free electricity and water to mosques.

Discussions regarding discrimination in Turkey are still very new. Legal and political discussions focus more on the existence of discrimination and inequalities in Turkey. In other words, at this point the state and the general public are still not convinced that discrimination and inequalities exist in Turkey and that some groups are more disadvantaged than others. In the past, demands by women's organisations for quotas for women in political participation have been dismissed by the Prime Minister as against international practice.

b) Main positive action measures in place on national level

Among the five grounds covered by Directives 2000/43 and 2000/78, the Turkish Constitution provides for positive action only for persons with disabilities and elderly persons. The Law on the Human Rights and Equality Institution of Turkey (no. 6701) provides for positive action on grounds of race/ethnicity, religion/belief, disability and age. Sexual orientation is excluded.

Other than the positive action measures which existed for employees with disabilities under the Labour Law, no specific measure has been adopted to implement the principle of positive discrimination introduced to the Constitution in 2010. No positive action exists for Roma in Turkey, even after the Government launched the Roma initiative with the promise to enhance employment, education and housing conditions for Roma.

There are no positive action measures related to migrants

Quotas

There is a quota system in both private- and public-sector employment. Article 53(1) of the Law on Civil Servants requires a 3 % quota for civil servants with disabilities working in public institutions. Under Article 30(1) of the Labour Law, the percentage of employees

with disabilities to total number of employees must be 3 % in private sector establishments and 4 % in public enterprises. However, this quota obligation only applies to workplaces where 50 or more persons are employed. If an employer has employed more persons with disabilities than the quota requires, or if an employer who is not under an obligation to do so has employed persons with disabilities, or if an employer has employed a person who is more than 80 % disabled, then half of the insurance premiums which normally have to be paid by the employer shall be paid by the Treasury. According to Article 101, if employers do not employ the number of persons with disabilities necessary to fulfil their quotas, they are penalised with a fine of TRY 1 700 (EUR 425) per month for every person with disability not employed. The same article explicitly prescribes that public employers cannot be exempt from this fine.

The quota regime is favourable, as it guarantees access to employment to a degree. However, the quota system is applied as if it prescribes an upper limit for the employment of persons with disabilities. Employers who are under a quota obligation employ the required number of persons with disabilities on paper and ask them not to come to work. In many cases, workplaces are not accessible or there is no accessible transportation to the workplace. The quota system is also understood as an alternative to prohibition of discrimination. In other words, when employers comply with their quota obligations, they feel that they are no longer under any equal treatment obligation.

According to the Prime Ministry's State Personnel Presidency, as of April 2017, of 2 089 958 persons employed in public institutions, 48 947 are persons with disabilities, 13 965 short of the 62 912 target and disproportionately low when taking into consideration the proportion of persons with disabilities in the general population.⁴⁰⁸

Until 2012, recruitment of persons with disabilities for employment in public institutions was carried out on the basis of special examinations held separately by each institution. This decentralised system had caused major problems when public employers rejected candidates who chose to take the general and centralised examination instead of the special examinations for candidates with disabilities. In response and to strengthen enforcement of the 3 % quota in public service recruitment, the Government amended Article 53(2) of the Law on Civil Servants⁴⁰⁹ and introduced a new system for the recruitment of persons with disabilities, based on a centralised examination. The first such examination was held on 29 April 2012. In addition to recruitment by examination, persons with disabilities who do not have education higher than primary level are employed in public institutions through a lottery system. In 2012 and 2013, 1 579 individuals out of a total of 131 600 applicants were placed for employment in public institutions through the lottery system. As of October 2016, the total number of persons with disabilities placed for employment in public institutions as a result of examination and lottery was 28 830. The total number of persons that the Government is obliged to recruit under the quota system is 32 383.⁴¹⁰

Preferential treatment narrowly tailored

Article 14 of the Law on Persons with Disabilities lays down the legal basis for sheltered workplaces. The Sheltered Workplace Project, developed by the Ministry of Family and Social Policies' General Directorate of Services for Persons with Disabilities and Elderly People and the Turkish Employment Agency (İŞKUR) and prepared by public institutions, universities, trade unions and NGOs, provides financial support to employment projects aimed at employing persons with intellectual, emotional and psychological disabilities. The project provides financial support of up to around TRY 150 000 (EUR 37 500) to sheltered

⁴⁰⁸ See <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

⁴⁰⁹ Turkey, Law on the Restructuring of Certain Debts and on the Amendment of Social Securities and General Health Insurance Law and of Various Other Laws and Decrees with the Force of Law, Article 99, 13 February 2011.

⁴¹⁰ <http://www.dpb.gov.tr/tr-tr/istatistikler/engelli-personel-ve-omss-istatistikleri>.

workplaces to enable their employment of persons with disabilities for one year after their establishment. The project is funded by fines imposed on workplaces violating their quota obligations.⁴¹¹ However, as state support is minimal, only a handful of sheltered workplaces exist. A study conducted with 13 workplaces considered to qualify as sheltered produced the following findings: the vast majority of the employees did not have social security coverage; 70 % of the employees were men; more than half of the employers were paying rent; and employers faced serious financial difficulties due to their inability to participate in public tenders.⁴¹²

On 6 February 2014, legal amendments were introduced to improve access to employment for persons with disabilities, including the introduction of tax incentives and state financial support for sheltered workplaces.⁴¹³ Accordingly, sheltered workplaces which employ persons with intellectual,⁴¹⁴ psychosocial or physical disabilities who find it difficult to be employed on the open labour market will be given a tax discount per employee with disabilities for a maximum of five years. With a provision added to the Labour Law, the Government will refund a minimal percentage (around 20 %) of the costs incurred by employers in order to receive sheltered workplace status.

Another project developed by the Ministry of Family and Social Policies' General Directorate of Services for Persons with Disabilities and Elderly People aims at integrating persons with disabilities into the labour market. The project provides entrepreneurship training, coaching support at the stage of business development and subsidies.⁴¹⁵ Applications which are 'assessed to have the potential of creating a suitable working environment in current labor market conditions will be awarded' a maximum of TRY 30 000 (EUR 7 500).⁴¹⁶

Since 2005, all persons with disabilities who have lost their families and are in need of care and those whose families are socially or economically deprived are provided with care, free of charge, in public or private care centres and their fees are paid by the Government. According to the Government, all eligible persons with disabilities benefit from these services.⁴¹⁷

Broad social policy measures

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

⁴¹¹ Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 9, available at: http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf.

⁴¹² Sabancı University (2013), *Engelsiz Türkiye için: Yolun Neresindeyiz? Mevcut Durum ve Öneriler* (Towards a Barrier-Free Turkey: Where do we Stand? The Status Quo and Proposals), p. 251, available at <http://ciad.sabanciuniv.edu/tr/engelsiz-turkiye-icin-yolun-neresindeyiz>.

⁴¹³ Turkey, Law on Amendments to Decree with the Force of Law concerning the Organisation and Duties of the Ministry of Family and Social Policies and to some Laws and Decrees with the force of Law (*Aile ve Sosyal Politikalar Bakanlığının Teşkilat ve Görevleri Hakkında Kanun Hükmünde Kararname ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*), 6 February 2014.

⁴¹⁴ The legal framework in Turkey employs the term 'mental' disability, which is explained as covering both psychosocial and intellectual disability. See website of the Ministry of National Education, available at: http://nenehatunisokulu.meb.k12.tr/meb_iys_dosyalar/19/09/749106/icerikler/zihinsel-engel-nedir_1008868.html.

⁴¹⁵ Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 10, available at: http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf.

⁴¹⁶ Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 11, available at: http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf.

⁴¹⁷ Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 15, available at: http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf.

with disabilities and measuring up to a maximum of 200 square metres are exempt from property tax. The equipment and software which persons with disabilities use in their daily lives, including in areas of education and employment, are exempt from value added tax. In addition, items imported from abroad and used for enhancing education, employment and personal development of persons with disabilities, as well as adapted motor vehicles, are exempt from customs duties. Such exemptions are valid at the time of purchase. Private cars bought by persons with a degree of disability equal to or above 9 % are exempt from private consumption tax for five years.

Families who provide home care to children with severe disabilities are paid a net minimum wage. Under the Law on Social Services, households where the average monthly income per person is below two thirds of the minimum wage, and where there is at least one person with disabilities who is in need of special care, will be given financial assistance. Such assistance will either be social aid to support home care or direct care services provided by public or private institutions. Persons with disabilities and elderly persons who are in the care of public or quasi-public social services institutions will now be given a monthly 'pocket money' allowance, the amount of which will be determined by a regulation. Furthermore, pursuant to Additional Article 10 of Law on Social Services, persons above the age of 65 years whose average household monthly income is less than one third of the minimum wage are entitled to government assistance for home care.

Article 35 of the Law on Persons with Disabilities provides that the state covers a portion of the costs of students with disabilities who are recommended by the special education assessment boards to attend special education and rehabilitation centres. The General Directorate of Higher Education Credit and Hostels Institution gives priority to university students with disabilities in awarding scholarships. Students with disabilities attending public special education schools are transported to their schools free of charge. In the academic year 2012-2013 a total of 46 095 students benefited from this service.⁴¹⁸ Students with special education needs also receive free lunches, education materials and course books, including in Braille alphabet for students with visual disabilities.

Persons with disabilities benefit from reduced rates in urban and intercity transportation and benefit free of charge from national parks, museums, state theatres, operas and ballet performances. Some municipalities give persons with disabilities reductions on water bills.⁴¹⁹

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

⁴¹⁸ Republic of Turkey Ministry of Family and Social Policy (2014), *Development and Disability in Turkey: A Report of the Last Decade (2002-2013)*, p. 27, available at: http://eyh.aile.gov.tr/data/549d6891369dc5abbc92cc7e/bm_kitapciqi_ingilizce_tumu_23.05.2014.pdf.

⁴¹⁹ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 50, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Turkey, the following procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative).

Discrimination claims are filed through general administrative and legal channels. In the courts, victims of discrimination can claim compensation for pecuniary damages, loss of earnings and/or damages for pain and suffering. Parallel proceedings are possible with regard to criminal, civil or administrative courts. Persons may simultaneously pursue a civil claim for compensation in civil or labour courts, an administrative application or a criminal complaint. If the discriminatory act or action is administrative in nature, before going to court the victim of discrimination has to request compensation from the administrative body responsible for the action. The decisions of the courts are binding by definition.

To obtain a legal remedy, employment-related discrimination claims filed under Article 5 of the Labour Law must be brought before a labour court. There are labour courts which deal with employment-related issues in every province. Upon appeal, employment-related discrimination cases come before the Ninth Civil Chamber of the Court of Cassation. The possible remedies for a termination of a work agreement based on discrimination may be, but are not limited to, an order to continue the employment relationship, payment of lost income, compensation etc. An existing labour relationship is a precondition for bringing a labour lawsuit and those who face discrimination in the recruitment process cannot take this route. Article 5 does not explicitly provide that discriminatory provisions in employment contracts shall be null and void, an issue raised by ECRI in its monitoring reports.⁴²⁰

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

Since 2010, Article 74 of the Constitution guarantees the right of complaint to the Constitutional Court. The right to file a constitutional complaint is limited to Turkish nationals, who are required to exhaust the national judicial remedies prior to filing a petition with the Constitutional Court. The scope of the complaint is limited to those rights and liberties protected under the Constitution which fall within the scope of the ECHR and its additional protocols to which Turkey is party. Persons can file a complaint against infringement of any of these rights by public authorities. Assessment of complaints is subject to a two-tier process: admissibility and substantive review. Persons whose complaints are found inadmissible reserve the right to petition the ECtHR. On 23 September 2012, the Constitutional Court started to receive complaints filed against

⁴²⁰ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 16, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

judicial decisions and actions that have become final (for details on the implementation of the mechanism, see Section 0.1).

There are also non-judicial mechanisms available to victims of discrimination. Human rights boards, established at district and province levels since 2000, accept discrimination complaints from individuals and issue non-binding decisions. The Bureau for Inquiry on Allegations of Human Rights Violations, established within the Ministry of the Interior in 2004, receives complaints concerning human rights violations, including claims of discrimination related to law enforcement officers.⁴²¹

The Human Rights Inquiry Commission of the Turkish Parliament 'functions as a parliamentary monitoring mechanism' and examines the extent to which human rights practices comply with obligations under the Constitution, national legislation and international conventions to which Turkey is party.⁴²² In 2011, the Commission 'gained a status of legislation commission' by being authorised to examine draft laws concerning human rights.⁴²³ It has investigatory powers to request information from the Government, public institutions, local authorities and private establishments. However, there is no corresponding duty and in the past government institutions and the military have often refrained from sharing 'sensitive' information. The Commission has the power to conduct on-site inspections without prior notification in detention centres and prisons. It has the power to establish, on its own motion, ad hoc inquiry commissions on specific issues. Since 2010, the Commission has worked on, among others, racism, labour rights, rights of persons with disabilities, allegations of profiling, and refugee rights. It publishes annual and ad hoc reports, with recommendations to relevant government bodies. However, its recommendations are not binding and often remain unimplemented.

In December 2012, the Commission set up a sub-commission to investigate disability rights and violations of human rights of persons with disabilities, which published its report in 2013.⁴²⁴ The report concluded, inter alia, that: the derogatory term 'özürlü' continued to be used by government agencies and in legislation; both the private and the public sector do not comply with the legal obligation to hire persons with disabilities, warranting criminal sanctions; the payment of a monthly salary to persons with disabilities has served to encourage them not to work and isolated them from social life; reports prepared by labour inspectors do not include any findings regarding physical conditions at workplaces, which prevented the Commission from assessing the accessibility of workplaces for persons with disabilities; measures must be adopted to ensure that individuals with hearing and visual disabilities can use emergency police, ambulance and other hotlines; measures must be adopted to ensure the accessibility of pavements, public institutions and schools for persons with disabilities; and measures must be adopted to ensure the participation of persons with disabilities in public life.

Individuals can also file discrimination complaints with the yet to be established Human Rights and Equality Institution of Turkey (see Section 7(f)).

⁴²¹ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 9, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴²² United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, p. 12, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴²³ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 5.

⁴²⁴ TBMM İnsan Haklarını İnceleme Komisyonu (2013), *Engelli Hakları İnceleme Raporu* (Investigatory Report on the Rights of the Disabled), available at: https://www.tbmm.gov.tr/komisyon/insanhaklari/docs/2013/raporlar/engelli_haklari_inceleme_raporu.pdf.

After local remedies are exhausted, claimants can file a discrimination claim with the ECtHR under Article 14 of the ECHR in conjunction with a substantive right protected under the Convention. Since Turkey has not ratified the optional Protocol 12 to the ECHR, which recognises a free-standing right to non-discrimination, claimants cannot bring a claim against Turkey on the basis of this protocol. Turkey is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) of the United Nations and individual persons can also make an individual complaint to the Human Rights Committee under the anti-discrimination provision of Article 26 of the ICCPR. On 26 March 2015, Turkey ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities, enabling individuals or groups subject to its jurisdiction to file complaints with the UN Committee on the Rights of Persons with Disabilities.⁴²⁵

If the victim seeks an amicable settlement instead of a court action, there are limited alternative dispute settlement methods, such as mediation for disputes in civil matters. There are also labour inspectors, insurance inspectors and school inspectors tasked under the Labour Law, the Social Security Institution Law and the laws governing education respectively with inspecting compliance. Inspection under the Consumer Protection Law is carried out by executive officials at national and local levels (governors and district governors). These inspectors have powers to issue administrative and monetary fines where they identify violations of the respective laws. Labour and school inspectors have competence to receive and review individual complaints, including those alleging violation of the anti-discrimination provisions of the Labour Law and the Law on National Education.

Persons whose requests for reasonable accommodation are denied by their employers can ask labour inspectors to monitor the observance of the Law on Persons with Disabilities. However, the inspectors do not have the power to order employers to provide reasonable accommodation. In cases of a breach of the duty to provide reasonable accommodation, employees in the private sector can go to the labour courts and in the public sector to the administrative courts. However, the labour courts do not have the power to order employers to provide reasonable accommodation or to award compensation in cases of denial of reasonable accommodation.

b) Barriers and other deterrents faced by litigants seeking redress

There are various barriers faced by litigants seeking redress through a court judgment. Except in cases in criminal courts, the litigants themselves have to collect evidence to establish the facts and prove their case, making pursuit of a case without the support of a lawyer extremely difficult. Filing a lawsuit is costly, legal aid is provided under very strict criteria and the assessment of legal aid applications take up to two years.⁴²⁶ Unlike the ECtHR's individual petition, constitutional complaint is not free of charge: in 2016, the fee is TRY 239.50 (EUR 60). Litigants often face lengthy judicial proceedings. As a result, in many cases taking a case to the court does not solve the problem. For example, if a student is expelled from school on the basis of ethnicity, or if an employment contract was terminated because the employer thought that the employee was gay, a court decision given two years after the discriminatory act will have limited effect. Similarly, administrative court cases filed by parents for the exemption of their children from mandatory religion courses last years, and are finalised long after the students concerned complete their secondary school education. In criminal cases brought against civil servants alleged to have engaged in discrimination, their superior's permission to prosecute is required under the Law on the Prosecution of Civil Servants and Other Public Employees and Article 129 of the Constitution. This is one of the major barriers facing the victims of discrimination, as in many cases permission is not given.

⁴²⁵ Turkey had signed the Optional Protocol on 28 September 2009.

⁴²⁶ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 16, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

Finally, there are strict time limits, which vary according to the type of legal remedy sought. Under administrative law, the time limit to repeal regulations and administrative decisions is 60 days after the day of promulgation of the regulation or notification of the decision to the persons concerned. For compensation for damages which are the result of administrative action, applications should be submitted within one year after the victim is informed and in any case within five years of the date of the action causing damage.⁴²⁷ Appeals should be made within 30 days of the notification of lower courts' decisions.⁴²⁸ Under criminal law, time limits depend on the punishment. For offences resulting in less than 5 years' imprisonment, the limit for exercising the right of appeal is 8 years. If the term of imprisonment is 5 to 20 years the limit is 15 years, if the term of imprisonment is more than 20 years, the limit is 20 years and finally, for life imprisonment it is 25 or 30 years, depending on the type of life imprisonment.⁴²⁹ For some offences, investigation and prosecution is bound to a complaint. Unless a complaint is brought within six months after the complainer becomes aware of the malicious act and of the offender, an investigation or prosecution cannot proceed.⁴³⁰ Finally, constitutional complaints must be filed within 30 days after the exhaustion of domestic judicial remedies, or after the occurrence of the alleged human rights violation, where there are no other remedies available.

c) Number of discrimination cases brought to justice

In Turkey, there are no available statistics on the number of cases related to discrimination brought to justice.

The Ministry of Justice does not collect data on the number of the cases brought before civil courts. Statistics on criminal cases are selectively published. In 2016, only 10 cases where defendants had been charged with discrimination in the sale, transfer or rent of goods under Article 122 of the Penal Code resulted in a judgment. Of these, only two resulted in a conviction.⁴³¹ There are no publicly available disaggregated data on the grounds of discrimination in any of these statistics or on the total number of cases opened under Article 122 over the years.

There is better access to data on the use of newly available judicial and non-judicial mechanisms. Between 23 September 2012, when the right of constitutional complaint entered into force, and 2016, the Constitutional Court received a total of 101 536 applications, 80 756 of which were filed in 2016 alone.⁴³² Of the 47 588 applications the Court has concluded since 2012, only 1 712 resulted in a ruling finding a violation. Of these, only four entailed a finding of the violation of non-discrimination.⁴³³ In its 2016 activity report, the Constitutional Court did not provide the number of petitions where the applicants raised a discrimination claim.

The only publicly available statistics on discrimination claims made through the constitutional complaint mechanism have been reported by the Government to the Committee on the Elimination of Racial Discrimination. In its combined fourth to sixth report presented in February 2014, the Government reported that of the more than 10 000 individual complaints filed with the Constitutional Court between September 2012 and December 2013, 48 applications concerned racial discrimination. Of these, seven were

⁴²⁷ Turkey, Law on Administrative Adjudication Procedure, (*İdari Yargılama Usulü Kanunu*), Article 13, 6 January 1982.

⁴²⁸ Turkey, Law on Administrative Adjudication Procedure, Article 46, 6 January 1982.

⁴²⁹ Turkey, Penal Code, Article 66, 26 September 2004.

⁴³⁰ Turkey, Penal Code, Article 73, 26 September 2004.

⁴³¹ <http://www.adlisicil.adalet.gov.tr/Istatistikler/1996/2016karartck.pdf>.

⁴³² Turkey, Anayasa Mahkemesi (Constitutional Court) (2017), *Yıllık Rapor 2016* (Annual Report 2016), p. 290, available at: <http://www.anayasa.gov.tr/icsayfalar/yayinlar/yillikraporlar/2016yillikrapor.pdf>.

⁴³³ Turkey, Anayasa Mahkemesi (Constitutional Court) (2017), *Yıllık Rapor 2016* (Annual Report 2016), p. 294, available at: <http://www.anayasa.gov.tr/icsayfalar/yayinlar/yillikraporlar/2016yillikrapor.pdf>.

found inadmissible, four were refused due to improper application and the rest were under review.⁴³⁴

The Ombudsman Institution began receiving complaints as of 29 March 2013. By the end of 2016, the Ombudsman Institution had received a total of 24 851 complaints, of which 2 248 concerned 'employment and social security', 4 224 concerned 'education, youth and sports', 529 concerned health, 408 concerned 'rights of persons with disabilities', 229 concerned 'social services' and 1 316 concerned 'human rights'.⁴³⁵ Of the 303 complaints filed in 2016 concerning human rights, 8 concerned discrimination claims.⁴³⁶ Of the 23 161 applications resolved by the end of 2016, the Ombudsman issued a recommendation in 275 and a partial recommendation in 95 of these. There is no up-to-date information on the outcome of the eight complaints concerning discrimination. In early 2014, the Turkish Government reported to the Committee on the Elimination of Racial Discrimination that four of the complaints received that year involved discrimination. Of these, one was found inadmissible, one was conveyed to the Ministry of Justice due to non-exhaustion of the administrative remedies available and two were under preliminary review.

In 2015, the now defunct Human Rights Institution received 715 complaints, of which 46 concerned psychological harassment in the workplace (mobbing), 30 concerned disability rights, 2 concerned the prohibition of discrimination, 8 concerned the right to equality and 5 concerned freedom of religion and conscience.⁴³⁷ The Human Rights Institution has so far concentrated on violations of civil and political rights, and released several reports on prison conditions, allegations of torture and ill-treatment, refugees and asylum seekers, freedom of assembly, freedom of expression, the right to life and the use of excessive force by security forces.⁴³⁸ In 2016, the Institution was closed down to be replaced by the Human Rights and Equality Institution of Turkey.

During its lifetime, the Human Rights Institution of Turkey published only one decision, issued on 25 June 2015, in a complaint filed by the Association for Monitoring Equal Rights. The Association alleged that the voter education materials prepared by the High Council on Elections were designed exclusively for people who speak Turkish and are literate and the needs of those who are illiterate and those who do not speak Turkish were disregarded. The NGO filed the complaint on behalf of two Kurdish women and alleged that the non-availability of voter education materials in Kurdish inhibited their right to have equal access to information, prevented their ability to cast their votes freely and constituted discrimination. In a unanimous decision, the Human Rights Institution concluded that there was no reasonable justification for the state's failure to fulfil its positive obligations under the equality clause of the Constitution and recommended that the High Council on Elections also disseminate public information in languages other than Turkish.⁴³⁹ After the complaint was filed and before the Human Rights Institution announced its decision, the High Council on Elections adopted a decision on 27 May 2015 stating that, while it did not engage in voter education, on-demand assistance would be provided to illiterate voters and those

⁴³⁴ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 31, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴³⁵ Türkiye Kamu Denetçiliği Kurumu (The Ombudsman Institution of Turkey) (2017), *2016 Faaliyet Raporu* (2016 Activities Report), p. 87, available at: <https://www.ombudsman.gov.tr/contents/files/KDK-2016-YILLIK-RAPORU.pdf>.

⁴³⁶ Türkiye Kamu Denetçiliği Kurumu (The Ombudsman Institution of Turkey) (2017), *2016 Faaliyet Raporu* (2016 Activities Report), p. 97, available at: <https://www.ombudsman.gov.tr/contents/files/KDK-2016-YILLIK-RAPORU.pdf>.

⁴³⁷ Türkiye İnsan Hakları Kurumu (The Human Rights Institution of Turkey) (2015), *2015 Faaliyet Raporu* (2015 Activity Report), pp. 168-169.

⁴³⁸ The reports are available at: <http://www.tihk.gov.tr/tr/Raporlar-ve-Kararlar#45619-raporlar>.

⁴³⁹ The Human Rights Institution of Turkey, *Eşit Haklar için İzleme Derneği-Yüksek Seçim Kurulu*, Application no. 2015/1344, 25 June 2015, available at: <http://www.tihk.gov.tr/Portals/0/b/13-Temmuz-YSK-karari.pdf?ver=2015-10-01-152336-483>.

who do not speak Turkish in the polling stations on election days. However, the Council did not disseminate its decision, did not publish it on its website, and did not inform the polling station officials: as a result, voters could not benefit from this right in the snap general election in November 2015.⁴⁴⁰

d) Registration of discrimination cases by national courts

In Turkey, discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Turkey, associations/organisations/trade unions are granted very limited entitlement to act on behalf of victims of discrimination. They also have limited legal standing to act on behalf of their members in limited circumstances.

The defunct Human Rights Institution of Turkey had granted human rights organisations and trade unions standing to file complaints with the Institution on behalf of victims of human rights violations. The regulations of the yet to be established Human Rights and Equality Institution of Turkey are still to be published.

According to Article 26(2) of the Law on Unions and Collective Agreements, trade unions have the right to initiate cases and to intervene in ongoing cases on behalf of their members concerning the latter's rights arising from employment contracts and social security rights. Since the Labour Law provides legal protection against discrimination, the legal standing granted to trade unions is arguably also applicable in discrimination cases. However, this requires judicial interpretation.

b) Engaging in support of victims of discrimination

In Turkey, associations/organisations/trade unions may be allowed to act in support of victims of discrimination, depending on judicial interpretation.

Article 237(1) of the Law on Criminal Procedure allows legal personalities 'harmed by the crime' concerned in the case to join already existing proceedings launched by public prosecutors. Since the provision does not explicitly mention discrimination cases and puts forth a requirement of being harmed by the crime, the implementation of this provision in discrimination cases requires judicial interpretation. There are two instances where NGOs are allowed limited legal standing under this provision. The first concerns a standing of general nature restricted to trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and history. There are no membership or permanency requirements imposed on associations which are granted standing, since this right is already very limited and granted under rare circumstances. The second concerns standing in criminal cases for any legal entity which can demonstrate harm from the crime at issue. Associations or organisations cannot act on behalf of victims of discrimination nor can they file cases on their own initiative. However, they can call on prosecutors to act to prosecute perpetrators and they can intervene in criminal cases launched by public prosecutors where they can demonstrate 'harm by the crime'. However, the elements of this concept have not been elaborated by the courts. Thus, this legal standard can be interpreted both widely and narrowly, depending on the discretion of the courts.

⁴⁴⁰ Eşit Haklar için İzleme Derneği (Association for Monitoring Equal Rights), *1 Kasım 2015 Milletvekili Genel Seçimi Gözlem Raporu* (Parliamentary elections of 1 November 2015, Observation Report), available at: <http://www.esithaklar.org/wp-content/uploads/2016/02/1-Kasim-Se%C3%A7im-G%C3%B6zlem-Raporu.pdf>.

Turkish courts are notorious for the way in which they persistently deny requests by human rights organisations to intervene on behalf of or in support of victims of discrimination. The most high-profile example of this phenomenon occurred in a criminal case against a number of police officers in Istanbul who were charged with torture and murder of an African immigrant named Festus Okey, who was killed in police custody. Since the beginning of the case, the Progressive Lawyers Association – as well as hundreds of individual lawyers – have unsuccessfully attempted to intervene under Article 237(1) in the case on behalf of the deceased victim, who is not represented in the case by a lawyer. However, on each occasion, the court has denied such requests on the ground that the association failed to demonstrate harm. On 13 December 2011, the lower court convicted one police officer and sentenced him to 4 years and 2 months imprisonment.⁴⁴¹ The Court of Cassation found the sentence to be too low and overturned the judgment, stating that the prosecutor should ask for 20 years imprisonment. The case was reopened in June 2014 and, as of the end of 2016, has not yet been resolved.

LGBTI organisations started to use Article 237(1) to be involved in criminal cases to act on behalf of victims of hate crime and honour killings. While in many cases courts reject such requests, recently there have been a few instances where courts accepted requests for intervention from LGBTI organisations. In a decision on 26 March 2012, a court in Izmir granted the request of Black Pink Triangle Izmir Association on Sexual Orientation and Sexual Identity Studies and Solidarity against Discrimination to intervene in a criminal case concerning the killing of a transgender woman.⁴⁴² The court did not elaborate on the reasoning for this decision. The contradictory stance of lower courts continued in 2013. On 18 January 2013, a favourable decision was given by a criminal court in Diyarbakır, which accepted the request of the Social Policies, Gender Identity and Sexual Orientation Studies Association (*Sosyal Politikalar, Cinsiyet Kimliği ve Cinsel Yönelim Çalışmaları Derneği*, SpOD), a national LGBTI organisation, to act on behalf of the victim in a case concerning a so-called 'honour killing'.

Soon after this decision, two different courts in Istanbul gave opposite decisions concerning the standing of LGBTI groups. On 25 January 2013, during the twelfth hearing of a criminal case concerning the 'honour killing' of a homosexual man by members of his family,⁴⁴³ and on 13 February 2013, in a criminal case concerning the killing of a transgender woman,⁴⁴⁴ the courts rejected SPoD's request to intervene on the ground that the association did not suffer direct harm from the crimes committed in both cases.⁴⁴⁵

c) Actio popularis

In Turkey, national law does not allow associations / organisations / trade unions to act in the public interest on their own initiative, without a specific victim to support or represent (*actio popularis*).

d) Class action

In Turkey, national law does not allow associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

⁴⁴¹ Istanbul 21st Heavy Penal Court, 13 December 2011.

⁴⁴² İzmir 7th Heavy Penal Court, no. 2010/224, 26 March 2012.

⁴⁴³ Üsküdar 1st Heavy Penal Court, no. 2009/166, 25 January 2013.

⁴⁴⁴ Bakırköy 4th Heavy Penal Court, no. 2012/74, 13 February 2013.

⁴⁴⁵ After the cut-off date of this report, in a landmark decision constituting a first in Turkey, the Constitutional Court granted seven national NGOs and a European NGO leave to submit amicus curiae briefs in an ongoing case. While this is not a discrimination case nor has the applicant made a claim for equal treatment, the decision of the Constitutional Court to accept amicus curiae from civil society has set a significant precedent which is likely to be used by civil society organisations in supporting victims of discrimination.

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

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

Under Article 21 of the Law on the Human Rights and Equality Institution of Turkey (no. 6701), once an applicant establishes a *prima facie* case of discrimination, the burden of proof shifts back to the respondent to prove that discrimination has not occurred. However, as ECRI has pointed out, this provision 'seems to be restricted to applications to HREA [the Human Rights and Equality Authority] and does not apply to court proceedings'.⁴⁴⁶

The Labour Law has the only provisions containing rules on the burden of proof in discrimination cases. According to Article 5, with regard to violations of the principle of equality, the burden of proof rests with employees. However, if an employee puts forward a situation strongly suggesting the probability of such a violation, then the employer is obliged to prove that no such violation exists.

According to Article 20 of the Labour Law, in cases of termination of contract by employers, the employer is under the obligation to prove that the termination is based on a valid reason. If the employee alleges that the termination is based on discrimination, the employee has to prove this allegation. According to Article 18, the following cannot be valid reasons for the termination of an employment relationship: race, colour, sex, civil status, family responsibilities, pregnancy, religion, political opinion and ethnic and social origin. However, under the same article, the obligation to justify dismissal is only binding on employers employing a minimum of 30 employees and only if the dismissed employee has completed a minimum of 6 months' employment. This results in the non-applicability of the reversal of burden of proof under Article 20 in around 80 % of dismissal cases.⁴⁴⁷

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

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

In Turkey, there are limited legal measures of protection against victimisation.

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

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

⁴⁴⁶ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 16, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

⁴⁴⁷ Levent Korkut (2003), *Report on Measures to Combat Discrimination in the 13 Candidate Countries (VT/2002/47)*, Country Report Turkey, May 2003, p. 35, available at <http://www.humanconsultancy.com/project?pid=22>.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

As part of its mediation powers, where it finds discrimination, the Human Rights and Equality Institution of Turkey will be able to recommend the payment of compensation. Under Article 25(1) of the Law on the Human Rights and Equality Institution of Turkey, the amount of the fine ranges between TRY 1 000 and TRY 15 000 (EUR 250-3 750) depending on the gravity of the impact and consequences of the breach, the financial status of the perpetrator and the aggravating effect of multiple discrimination, if any. Where the Council, the Institution's decision-making body, deems it necessary, the fine may be converted into a warning on one occasion only. In cases of repetition, the fine will be increased by 50 %.

If employers violate Article 5 of the Labour Law prohibiting discrimination, employees may demand compensation of up to four months' wages plus other benefits of which they have been deprived. According to Article 99 of the Labour Law, in cases of violation of Article 5, employers shall also be subject to a fine.

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

Individuals who violate the prohibition of hatred and discrimination based on the limited grounds and limited material scope stipulated in Article 122 of the Turkish Penal Code face imprisonment. The criminal penalty for these offences is up to a maximum of three years imprisonment, with no possibility of conversion to a fine.

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

In addition, labour inspectors and school inspectors can issue sanctions for violations of anti-discrimination provisions or positive obligations. In cases of discrimination in violation of Article 5 of the Labour Law, the monetary sanction is TRY 134 (EUR 33.5) per employee who has been proven to have experienced discrimination. Where employers fail to fulfil their obligation to employ persons with disabilities, the sanction is TRY 2 096 (EUR 524) per month per employee with disabilities who is not employed.

b) Ceiling and amount of compensation

Articles 5 and 21 of the Labour Law stipulate an upper limit for compensation. Although employees may claim other benefits of which they have been deprived in addition to compensation of up to four months' wages, these claims are limited to actual damage suffered. For example, if discrimination was suffered regarding wages, only the wage difference can be claimed. Moral damages cannot be claimed.

Under Article 25(1) of the Law on the Human Rights and Equality Institution of Turkey, the yet to be established Human Rights and Equality Institution of Turkey will have power to recommend payment of compensation in amounts ranging between TRY 1 000 and TRY 15 000 (EUR 250-3 750), depending on the gravity of the impact and consequences of the breach, the financial status of the perpetrator and the aggravating effect of multiple

discrimination, if any. Where the Council, the Institution's decision-making body, deems it necessary, the fine may be converted into a warning on one occasion only. In cases of repetition, the fine will increase by 50 %.

There are no other specific provisions regarding compensation in Turkey's legal framework. Thus, the general rules of Turkish law on compensation should apply, the major principle being the prohibition of unjust enrichment.

c) Assessment of the sanctions

Sanctions are not explicitly mentioned in various laws containing anti-discrimination provisions. Where they are mentioned, they are not dissuasive. The number of cases where discrimination is claimed is very small. The court decisions regarding most of these cases are not accessible. Violations which are criminal offences are punishable with short prison sentences which are often convertible to small fines. Information is not available regarding the average amount of compensation provided for victims of compensation. Consequently, it is not possible to provide any information regarding the amount of compensation.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

Pursuant to the Law on the Human Rights and Equality Institution of Turkey, Turkey will have a 'specialised body' for the promotion of equal treatment irrespective of racial or ethnic origin which, however, is not in accordance with Article 13 of the Racial Equality Directive. It is envisaged that the new equality body will be set up in early 2017. The Ombudsman Institution, established in June 2012, partially fulfils the requirements of the Racial Equality Directive.

- b) Status of the designated body/bodies – general independence

As was the case with the Human Rights Institution of Turkey it replaces, the independence of the new Human Rights and Equality Institution of Turkey has been contested from the start – even though it is not yet in place.

The announcement of the new law has been strongly criticised by human rights groups in Turkey for its failure to comply with the UN Paris Principles, which require that civil society participate in the preparatory work for the establishment of national equality bodies and that such bodies be structurally, functionally and financially independent. Under Article 10(2) of Law no. 6701, the decision-making organ of the Human Rights and Equality Institution of Turkey ('the Council') will have 11 members, all of whom will be appointed by the executive (8 by the Cabinet and 3 by the President). The president and the vice-president of the body will be appointed by the Cabinet (Article 10(7)).

Human rights NGOs criticised the Government for drafting the law 'behind closed doors' from an instrumental perspective, 'in exchange for the visa exemption', without the knowledge and participation of civil society.⁴⁴⁸ Upon finalisation of the draft without any consideration of their criticisms, human rights organisations issued a second press release. Recalling that the now defunct Human Rights Institution of Turkey had already been criticised by the European Commission,⁴⁴⁹ the Council of Europe and the United Nations⁴⁵⁰ for its lack of independence from the executive branch, the election procedure of its members and the limitations on civil society involvement, the organisations declared that they saw the Human Rights and Equality Institution of Turkey as a further setback. Human rights groups criticised the Government for not taking into account the internal reform efforts of the Human Rights Institution, made in consultation with and with the involvement of civil society, to enhance the independence of this institution. Entrusting the National

⁴⁴⁸ 'Government Statement regarding the Establishment of the Human Rights and Equality Institution of Turkey: The Issue of the Institutionalisation of Human Rights is Perceived Fully from an Instrumental Perspective', joint statement of the Human Rights Foundation of Turkey, Human Rights Association, Association of Human Rights and Solidarity with the Oppressed, Helsinki Citizens Assembly, Human Rights Agenda Association, Human Rights Studies Association, Amnesty International Turkey Branch, 18 January 2016.

⁴⁴⁹ In its 2015 report, the European Commission had noted that the functional independence of the Human Rights Institution of Turkey needs to be strengthened and its capacity needs to be built further. European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 62, available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf.

⁴⁵⁰ In its submission for Turkey's Universal Periodic Review, the UN Country Team (UNCT) Turkey had pointed out that the Human Rights Institution of Turkey had not requested accreditation from the International Coordinating Committee of National Human Rights Institutions and that the law establishing the Institution falls short of the Paris Principles. The UNCT had also recommended legal amendment 'so as to guarantee the organic and financial independence' of the Institution. United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Compilation prepared in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/210/44/PDF/G1421044.pdf?OpenElement>.

Prevention Mechanism under the Torture Convention to the new equality body has also been criticised as a measure seeking to create an ineffective counter-torture mechanism from the outset.⁴⁵¹

In its Progress Report for 2016, the European Commission concluded that the new equality body's 'functional, structural and financial independence has not been ensured in line with the Paris Principles and the EU *acquis*'.⁴⁵² In addition, ECRI stated that it is 'strongly concerned about the insufficient level of independence' of the Institution, noting that Law no. 6701 provides that the Institution shall be 'associated with the Prime Minister' and that the members of the new body shall be selected by the executive branch, which 'is incompatible with ECRI's standards on independence'.⁴⁵³

International institutions have also expressed concerns regarding the independence of the Ombudsmen. According to ECRI, there are 'concerns regarding the impartiality and neutrality of the Ombudsmen', referring to the members of the Ombudsman Institution.⁴⁵⁴

c) Grounds covered by the designated body/bodies

The new equality body, the Human Rights and Equality Institution of Turkey, will have a mandate to receive discrimination claims on grounds of race/ethnicity, religion/belief, age and disability. Sexual orientation is excluded from the mandate of the Institution. While the Institution is neither explicitly tasked with nor precluded from addressing issues relating to migrants, it is not possible to make any projection in this regard, since the Institution has not yet been set up.

The Ombudsman Institution and the human rights boards do not have an explicit mandate to receive discrimination claims. Their mandate for general human rights protection covers discrimination issues. However, one of the five Ombudsmen is responsible for disability issues.

d) Competences of the designated body/bodies – and their independent exercise

Among other tasks, the Human Rights and Equality Institution of Turkey will be entrusted with: prevention of discrimination and protection of human rights; raising awareness on anti-discrimination; assisting in the preparation of a curriculum on anti-discrimination to be used in secondary education; monitoring and contributing to legislative activities relevant to its mandate; investigating human rights violations and violations of non-discrimination; providing advice and assistance to human rights victims on available administrative and legal remedies; preparing annual reports on anti-discrimination for the Presidency, the Parliament and Prime Ministry as well as special reports on issues falling within its mandate where it deems this necessary; and monitoring implementation of the international conventions that Turkey is a party to and participating in the meetings of relevant treaty bodies where Turkey's official country reports are presented. It will be able to receive complaints against both public and private legal and natural persons and, where it succeeds in reaching a friendly settlement between the parties, to order the party which has committed discrimination to pay compensation.

⁴⁵¹ İnsan Hakları Ortak Platformu (Human Rights Joint Platform) (2016), 'Türkiye İnsan Hakları ve Eşitlik Kurumu Kanunu Tasarısı Hakkındaki Görüşlerimiz' (Our Opinions on the Draft Law on the Human Rights and Equality Institution of Turkey), 18 February 2016.

⁴⁵² European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 69, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

⁴⁵³ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 18, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

⁴⁵⁴ Council of Europe, ECRI (2013), *Conclusions on the implementation of the recommendations in respect of Turkey subject to interim follow-up*, Strasbourg. Council of Europe, p. 7, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-IFU-IV-2014-006-ENG.pdf>.

The Institution will not have an explicit mandate to conduct independent surveys. Under Article 24 of the Law on the Human Rights and Equality Institution of Turkey, the Institution, together with the Turkish Statistical Institute and other public bodies, will be able to decide on areas where official statistics are needed for the purpose of combating discrimination. However, the Turkish Statistical Institute is responsible for gathering such statistics.

The Ombudsman Institution is tasked with reviewing the acts and operations of the administration and making suggestions to ensure the administration's compliance with the principles of human rights, justice and the rule of law. With the adoption of the executive regulation implementing the Ombudsman Law, the Ombudsman Institution started to receive complaints in March 2013 (for more on the Human Rights Institution, see Section 6.1). According to ECRI, the Ombudsman Institution might also take on the function of an independent body on racial discrimination, but it 'lacks the power to carry out investigations on its own initiative'.⁴⁵⁵ The Ombudsman is therefore dependent on information provided to it by third parties (NGOs, Government) to exercise its review powers. National human rights NGOs point out the low level of implementation by the public authorities of the recommendations of the Ombudsman Institution.

The provincial and district human rights boards are not independent from the executive and are extremely underused.

e) Legal standing of the designated body/bodies

In Turkey, the designated body will have legal standing to bring discrimination complaints (on behalf of identified victim(s)), but not to intervene in legal cases concerning discrimination.

Under Article 18(5) of the Law on the Human Rights and Equality Institution of Turkey, the Institution may file criminal complaints with respect to the applications where it finds discrimination. However, the Institution will not be able to initiate or participate in court proceedings on its own initiative. Article 11(1)(d) stipulates that the courts can ask the Institution for opinion.

The Ombudsman does not have any standing to bring discrimination complaints.

f) Quasi-judicial competences

The yet to be established Human Rights and Equality Institution of Turkey, which replaces the Human Rights Institution of Turkey, will have the competence to receive discrimination complaints from natural and legal persons. Filing a complaint will be free of charge. Under Article 17(4) of the new law, acts relating to the exercise of legislative and judicial competences, the decisions of High Council of Prosecutors and Judges and acts that are exempt from judicial review under the Constitution cannot be the subject of complaints filed with the Institution. After receiving the written and, if it sees a need, oral statements of the parties, the Institution will be able to invite the parties to reach a friendly settlement. Where the parties are unwilling or unable to settle their dispute through mediation, the Institution will reach a non-binding decision as to whether there has been discrimination. Where it finds discrimination, the Institution will have the competence to file a criminal complaint.

In addition to its competence to receive individual complaints, the Institution will have some general powers whose nature is rather vague. Under Article 9(1)(f), the Institution has *ex officio* powers to initiate investigations on its own motion into violations of human

⁴⁵⁵ Council of Europe, ECRI (2013), *Conclusions on the implementation of the recommendations in respect of Turkey subject to interim follow-up*, Strasbourg. Council of Europe, p. 7, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/turkey/TUR-IFU-IV-2014-006-ENG.pdf>.

rights and non-discrimination. However, this is not a power to initiate *actio popularis* procedure. As noted by ECRI, the Institution 'can neither initiate nor participate in court proceedings on its own initiative'.⁴⁵⁶ Indeed, under Article 11(d), the Institution can only give opinions to courts when it is asked to do so. Article 11 (1)(c) provides that the Institution can monitor the execution of court judgments regarding human rights breaches and discrimination.

The Ombudsman Institution can also receive complaints from individual persons regarding human rights violations, including discrimination. However, it lacks a mandate to carry out investigations on its own initiative and its reports and recommendations are also not binding.

g) Registration by the body/bodies of complaints and decisions

In Turkey, the Ombudsman Institution apparently registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are not available to the public. What practice the yet to be established Human Rights and Equality Institution of Turkey will adopt remains to be seen.

The Ombudsman Institution provides general statistics about the complaints and decisions in its annual activity reports, but these do not provide a breakdown of the discrimination claims. What practice the yet to be established Human Rights and Equality Institution of Turkey will adopt remains to be seen.

h) Roma and Travellers

On 27 April 2016, the Government adopted the 2016-2021 national strategy for the Roma (see Section 9). The strategy envisages setting up a Monitoring and Evaluation Council, with membership comprised of relevant public institutions (half of the membership) and non-public sector representatives from NGOs, the academic community and professional organisations. The Council will meet annually in February to assess the progress made in the previous calendar year and issue its annual report by the end of May. According to the action plan for 2016-2018, it was intended to set up the Council by 21 June 2016.⁴⁵⁷ Following a long period of uncertainty regarding the start of work on implementation of the strategy and the continuing delay in setting up an evaluation and monitoring system,⁴⁵⁸ the Council had its first meeting on 23 February 2017. The announcement on the website of the Ministry of Family and Social Policies did not disclose the names of the members of the Council. Instead, it referred to certain specific individuals who participated in the meeting. In doing so, while the Ministry listed the names of every government and public official present at the meeting, it did not identify the 'representatives of Roma civil society organisations, academics, and domestic and international observers' who participated.⁴⁵⁹ A Roma activist who had represented both the European Roma Rights Centre and the Turkey Roma Rights Forum in the government-led deliberative process during 2009-2016 (see Section 9) announced to the public that it had been intended that she and other Roma civil society representatives would be Council members but they had been delisted 'for an unknown reason'.⁴⁶⁰

⁴⁵⁶ European Commission against Racism and Intolerance (ECRI) (2016), *Report on Turkey (fifth monitoring cycle)*, CRI(2016)37, adopted on 29 June 2016, Strasbourg, 4 October 2016, p. 17, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Turkey/TUR-CbC-V-2016-037-ENG.pdf>.

⁴⁵⁷ Turkey, Ministry of Development, Strategy Document for the Roma Citizens (2016-2021) and the First Step of Action Plan (2016-2018), no. 93614589-101.00-1726, 27 April 2016.

⁴⁵⁸ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 77, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

⁴⁵⁹ <http://aile.gov.tr/haberler/roman-vatandaslarin-yasam-kosullarinin-iyilestirilmesine-yonelik-calismalar-tum-hiziyila-suruyor>.

⁴⁶⁰ Hacer Foggo, 'Ulusal Roman Strateji Planı "İzleme Kurulu"na Öneriler-1' (Proposals for the National Roma Strategy Plan "Monitoring Council"), Facebook entry, 23 February 2017, available at: <https://www.facebook.com/377799739037919/photos/pcb.783857811765441/783857395098816/?type=3>.

On 7 January 2016, the Turkish Parliament debated the motion submitted by Özcan Purçu, a parliamentarian of Roma ethnic origin, and 22 other deputies from the main opposition Republican People's Party (*Cumhuriyet Halk Partisi*, CHP) for a parliamentary inquiry into the housing conditions of the Roma minority in Turkey to be undertaken.⁴⁶¹ The proposal, submitted to the Parliament on 8 December 2015, was rejected due to the negative votes of the deputies from the governing Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP), who constitute the majority. The AKP deputies did not make a public statement as to the grounds for their negative vote. The motion emphasised the importance of the right to housing as a fundamental human right necessary for the exercise of other fundamental rights. Pointing out the close link between the right to housing and the right to be protected against discrimination, the motion referred to the Roma neighbourhoods in Turkey as 'the personification of discrimination in urban settings'. The motion then problematised ongoing urban renewal projects carried out across Turkey from the perspective of the right to housing of the Roma community. Pointing out that these projects have been carried out in neighbourhoods where Roma and other socially marginalised and impoverished communities lived, the motion laid out the following problems with these projects: lack of information available to the public as to the number, location and nature of urban renewal projects; lack of transparency; the exclusion of Roma residents from the decision-making processes, which are exclusively carried out between private companies and local municipalities; the low amounts of compensation paid to Roma individuals who had been forced to move out of their homes due to urban renewal projects; the lack of affordable, alternative housing for the displaced Roma; the fact that many Roma citizens had become homeless or have to live in poor conditions in their new residences; and that the legal framework in which these projects are carried out virtually deprives the Roma of their right to seek legal remedy in courts and causes their forced displacement. The motion also pointed out there are still Roma neighbourhoods where residents live in tents in extremely poor conditions, without access to water, electricity and sewage. Purçu reacted strongly against the rejection of the proposal, particularly due to the death of a 55-year-old bedridden Roma woman on 2 January 2016 due to cold weather.⁴⁶² Ünzile Türkmen froze to death in the tent she lived in with her husband in the Ezine district of Çanakkale province in north-western Turkey.⁴⁶³ Since the new equality body is not yet operational, it is unclear whether it will deal with the Roma issues.

⁴⁶¹ Motion for the Opening of a Parliamentary Inquiry for the Purpose of Inquiring into the Housing Needs of Roma Citizens and Identifying the Measures that Need to be Taken, no. 10/50, submitted by Izmir deputy Özcan Purçu and his 22 friends, submitted to the Parliament on 8 December 2015.

⁴⁶² Habertürk (2016), 'Çanakkale'de Barakada Yaşayan Kadın Donarak Öldü!' (Woman living in a hut in Çanakkale froze to death), 3 January 2016, <http://www.haberturk.com/gundem/haber/1175781-canakkalede-barakada-yasayan-kadin-donarak-oldu>.

⁴⁶³ See Section 3.2.10 on the trends and patterns regarding housing segregation for Roma.

8 IMPLEMENTATION ISSUES

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

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

As stated earlier, human rights groups in Turkey have strongly criticised the Government for having drafted the Law on the Human Rights and Equality Institution of Turkey 'behind closed doors' without the knowledge and participation of civil society.⁴⁶⁴

In rare cases where NGOs are invited to provide their opinions and proposals on pending legislation, their input is not (fully) taken into consideration at the drafting stage. For example, an initial version of the draft anti-discrimination law was distributed to universities and NGOs for their contributions and was revised on the basis of their feedback. However, the Government subsequently amended the text which had been agreed upon and, despite the protests of the LGBTI movement and the NGOs which had collaborated on the draft, removed 'sexual identity' from the grounds of non-discrimination.

In the late 2000s, the Government organised a number of meetings to discuss, identify and seek solutions to the problems of designated ethnic and religious minorities, i.e. Kurds, Alevis and Roma. The Government dubiously named these initiatives 'opening' (*açılım*), referring to its opening up to these groups or opening their problems and demands to public discussion through a consultation mechanism. Kurdish, Alevi and Roma opinion leaders, civil society representatives and political leaders were invited to a series of group-specific closed workshops, hosted and presided over by a minister of state, to communicate to the Government the opinions expressed. However, whether and how the opinions provided by the NGOs and social partners at these meetings have been used for policy development is very unclear.

The Government issued a final report on its 'Alevi opening',⁴⁶⁵ putting forth general recommendations on the basis of the demands expressed by Alevi representatives. Among the recommendations are: eradication of discrimination against Alevis; constitutional protection of the Alevi identity; rethinking the status and competences of the Directorate of Religious Affairs (Diyanet) to ensure equal access of all religious and faith groups to government services; making the mandatory religion courses optional and redesigning their curriculum; granting legal status to *cem* houses; and expropriation of a hotel where a massacre of Alevi had taken place in 1993 and commemoration of the victims.⁴⁶⁶

Since the release of the report, the Ministry of National Education has included information on the Alevi faith in the religious education textbooks, effective from school year 2011-2012, despite strong protests from Alevi associations on the grounds that they were not consulted on the type of information included and that the classes were still mandatory. The Madımak Hotel, the site of the massacre, was expropriated but not turned into a museum and the bulletin board honouring the victims also included the names of the

⁴⁶⁴ 'Government Statement regarding the Establishment of the Human Rights and Equality Institution of Turkey: The Issue of the Institutionalization of Human Rights is Perceived Fully from an Instrumental Perspective', joint statement of the Human Rights Foundation of Turkey, Human Rights Association, Association of Human Rights and Solidarity with the Oppressed, Helsinki Citizens Assembly, Human Rights Agenda Association, Human Rights Studies Association, Amnesty International Turkey Branch, 18 January 2016.

⁴⁶⁵ Turkey, State Ministry of the Republic of Turkey (*Türkiye Cumhuriyeti Devlet Bakanlığı*) (2010), Final Report of the Alevi Workshops (*Alevi Çalıştayları Nihai Rapor*).

⁴⁶⁶ In the town of Sivas, 34 Alevi poets, writers and singers who were visiting for an annual Alevi festival were burned alive by a mob who besieged the hotel after Friday prayers in 1993. Tuysuz, G. (2013), 'Thousands remember victims on 20th anniversary of Turkish massacre', *CNN*, 3 July 2013, available at: <http://edition.cnn.com/2013/07/03/world/europe/turkey-massacre-anniversary/index.html>.

deceased perpetrators. One positive outcome was the accommodation of the Alevi Muharrem fast in the restaurants of the Turkish Parliament in 2012 and 2013 (see Section 2.6).

However, the Government still refuses to recognise *cem* houses as places of worship and to grant them legal status. The ECtHR's case law on this issue remains unimplemented. While the electricity bills of churches and synagogues are now being paid by the Diyanet, which until recently provided this advantage exclusively to mosques, *cem* houses continue to be excluded, despite a 2014 ECtHR ruling which found this practice to be discriminatory. In 2012, requests from Alevi parliamentarians for a place of worship within the premises of the Parliament were rejected by the Speaker, who reasoned as follows: 'According to the Directorate of Religious Affairs, Alevism is not a separate belief but "a formation within Islam, a richness of Islam which has emerged over historical processes" and "Islam's places of worship are mosques."'

On 2 March 2015, the District Governor (*kaymakam*) of the Maltepe district of Istanbul filed a lawsuit against the decision of the democratically elected Maltepe Municipal Council to grant 'place of worship' status to *cemevis*.⁴⁶⁷ The Maltepe Municipal Council, run by the main opposition Republican People's Party (RPP), had adopted a majority decision on 3 December 2014 to grant place of worship status to all *cemevis* within the district boundaries.⁴⁶⁸ In his application to the Istanbul Regional Administrative Court, the Maltepe District Governor claimed that the decision of the Maltepe Municipal Council posed a threat to the 'unity' of the people and would cause 'irreparable divisions in social life'. The District Governor argued that the Municipal Council lacked the competence to grant place of worship status to *cemevis*, which rested solely with the Turkish Parliament. He also claimed that the decision was against the principle of laicism guaranteed under Article 2 of the Constitution.⁴⁶⁹ The court has not yet issued a ruling.

With regard to the Kurdish question, there were a number of developments: the state-owned Turkish Radio and Television (TRT) launched a new channel, TRT 6 (Şeş), which broadcasts exclusively in Kurdish; the Government approved the establishment of Kurdish institutes and departments at selected public universities; the restriction on the use of Kurdish by prison inmates and the blanket ban on the use of Kurdish in political campaigning were lifted; Kurdish was introduced as an elective class in public secondary schools and private education in Kurdish was allowed in private secondary schools; defendants in criminal cases were allowed to use their mother tongue during oral defence in courts; the national oath of allegiance in schools was abolished; and the restoration of the old (Kurdish and other) names of villages, districts and provinces was allowed. Elective courses in Kurdish and other selected minority languages began to be offered to students of fifth grade and above for two hours per week in the academic year 2012-2013. According to the European Commission's 2015 report, while the Ministry of National Education appointed 28 teachers of the Kurdish language as permanent staff, this number falls far short of the demand.⁴⁷⁰ In September 2013, the Anadolu Agency (Anadolu Ajansı), the official news agency of Turkey, started broadcasting in Kurdish (in addition to Arabic, Bosnian, Croatian, Serbian, Russian and English).⁴⁷¹

⁴⁶⁷ In Turkey, mayors and municipal councils are elected, whereas governors and district governors are appointed by the central Government and adhere to official policies and decisions.

⁴⁶⁸ The Maltepe Municipal Council had adopted the decision upon a written order sent by the RPP to all municipalities it governs across Turkey, asking them to grant place of worship status to *cemevis* in order to comply with the ECtHR's ruling of 2 December 2014 in the case of *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*. Maltepe Municipal Council, decision no. 2014/115, 3 December 2014.

⁴⁶⁹ The lawsuit filed by the District Governor became known to the general public with news reports of 30 April 2015.

⁴⁷⁰ European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 69, available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf.

⁴⁷¹ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 25, available at

Under the 'Roma opening' initiative launched in 2009, the Government has been engaging in dialogue with Roma organisations, organising high-level workshops with the participation of government ministers and key bureaucrats. The highest level gathering of this kind occurred in March 2010, attended by more than 10 000 Roma across the country and presided over by the Prime Minister. In his speech, the Prime Minister said that discrimination against Roma people is unacceptable. Roma representatives expressed their expectations for employment, housing in a healthy environment, access to social programmes and benefits, and high-quality education for their children. They also demanded an end to discrimination, exclusion and stigmatisation by society and the media.

The concrete measures taken by the Government as part of the 'Roma opening' are as follows. In January 2011 a discriminatory clause in the Law on the Movement and Resident of Aliens, which had authorised the Ministry of Interior to 'expel stateless and non-Turkish gypsies and aliens that are not bound to the Turkish culture' was amended; the construction of nearly 9 000 housing units for Roma by TOKİ was announced in March 2011; in April 2011 a Roma Research and Implementation Centre was established at Adnan Menderes University in the province of Aydın, which has, however, never become operational; and finally, the Institute on the Study of Roma Language and Culture at the University of Trakya was opened in 2014.⁴⁷² The Institute is expected to contribute to the development of government policies on the Roma community and has a mandate to conduct academic research and issue publications on Roma, to partner with national and international institutions pursuing similar goals, and to engage in training, consulting, monitoring and data collection activities.⁴⁷³ The Institute is located in the province of Edirne, which hosts one of the largest Roma communities in Turkey. The opening of the Institute was cautiously welcomed by Roma associations, which expect the Institute, as a matter of priority, to collect data on the needs and problems of the Roma community.

Since 2011, the Ministry of Family and Social Policies has been tasked with coordination of all initiatives undertaken by the Government under the 'Roma opening'. On 27 April 2016, the Turkish Government adopted the 2016-2021 national strategy for the Roma and the first stage of an action plan for the period 2016-2018. In accordance with this, a Monitoring and Evaluation Council will be set up, with membership comprised of relevant public institutions (half of the membership) and non-public sector representatives from NGOs, the academic community and professional organisations. The Council will meet annually in February to assess the progress made in the previous calendar year, and issue its annual report by the end of May. According to the Action Plan, it was intended to set up the Council by 21 June 2016.⁴⁷⁴ However, as of January 2017, work on the implementation of the strategy and the setting up of an evaluation and monitoring system had not started.⁴⁷⁵

A contentious aspect of the 'Roma opening' is the involvement of TOKİ, which is associated with the urban renewal projects in Roma neighbourhoods, in government solutions developed for alleviating the housing problems of Roma. Furthermore, the Government's rejection of the Roma community's plea to participate in the 2005-2015 Decade of Roma Inclusion increased doubts about the political will behind the 'Roma opening'. In its 2015 report, the European Commission noted the lack of official statistics on the number of

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴⁷² The announcement on the University of Trakya's website: <http://www.trakya.edu.tr/news/roman-dili-ve-kulturu-arastirmalari-enstitusu-kuruldu>.

⁴⁷³ The decision to open a university institute specialising in Roma was announced as part of the 'democratisation package' launched by the Prime Minister on 30 September 2013. On 5 November 2013, the High Council on Education decided that the Institute should be opened at the University of Trakya. Turkey, Council of Ministers decision no. 2014/6070, Official Gazette, 23 March 2014.

⁴⁷⁴ Turkey, Ministry of Development, Strategy Document for the Roma Citizens (2016-2021) and the First Step of Action Plan (2016-2018), no. 93614589-101.00-1726, 27 April 2016.

⁴⁷⁵ European Commission (2016), *Turkey Progress Report*, Brussels, 9 November 2016, p. 77, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_turkey.pdf.

undocumented Roma, and concluded that 'Roma groups continue to face discrimination in social and economic life and in accessing employment and quality education'.⁴⁷⁶

In terms of NGO participation in legislative processes, the most significant progress has been the invitation to civil society to participate in the process of constitutional revision. Launched in October 2011, the constitutional process was, procedurally speaking, the most democratic and inclusive political process in Turkey. The Parliamentary Commission, made up of equal number of deputies from each of the four political parties represented in the Parliament, invited all NGOs to submit their written proposals and drafts to the Commission, which committed to publishing them on its website. In addition, selected NGOs were invited to present their expectations of a new constitution. Among these were those representing non-Muslim minorities, LGBTI groups, conscientious objectors, Kurds and Alevis. On what was a historic occasion, the Greek Orthodox and Armenian Patriarchs also participated, upon invitation, in the deliberations of the Commission. However, in a fashion characteristic of the political culture in Turkey, which does not fully tolerate diversity, following the reaction caused by the publication of the proposals of an LGBTI group and the Human Rights Association, the Commission removed all NGO proposals from its website.⁴⁷⁷ Furthermore, the 'sensitive' demands of minorities were rejected by the Commission. The Commission refused to include sexual orientation among the protected grounds of anti-discrimination, despite not only the specific demands of LGBTI groups but also the persistent proposals of two of the opposition parties represented on the Commission. The drafting process for the Constitution formally came to an end on 25 December 2013, when the Commission abolished itself, citing as a reason the deadlock in the drafting process due to political divisions among the four parties represented.

Another positive example of cooperation with NGOs was during the drafting of amendments to the Law on Persons with Disabilities in 2013. In a rare demonstration of political will for cooperation with civil society, the Turkish Government shared with NGOs representing persons with disabilities the draft of the first national report which Turkey was to present to the UN Committee on the Rights of Persons with Disabilities and asked for their feedback. The Ministry of Family and Social Policies organised an evaluation meeting to receive in person the opinions and assessments of the relevant NGOs on the draft national report. The Ministry also formed a special section on the official website of its General Directorate of Services for Persons with Disabilities and the Elderly in order to raise awareness on the efforts for the implementation of the UN Convention on the Rights of Persons with Disabilities.⁴⁷⁸

Overall, however, the Turkish Government continues to develop policies, design laws and adopt executive measures in the area of human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does, without taking into account their substantive suggestions or criticisms. A recent example of this was the drafting of the Action Plan for the Prevention of Violations of the European Convention on Human Rights, adopted in March 2014,⁴⁷⁹ without the involvement of civil society.⁴⁸⁰ The Government defines the purpose of the Action Plan as the more effective protection of fundamental

⁴⁷⁶ European Commission (2015), *Turkey Progress Report*, Brussels, 10 November 2015, p. 69, available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf.

⁴⁷⁷ Civil society inputs submitted to the Parliamentary Commission were subsequently published online by the Turkish Economic and Social Studies Foundation (TESEV). For these inputs and comprehensive monitoring of the constitution-making process, see TESEV project website: www.anayasaizleme.org.

⁴⁷⁸ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 14, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUR%2f1&Lang=en.

⁴⁷⁹ Turkey, *Action Plan for the Prevention of Violations of the European Convention on Human Rights (Avrupa İnsan Hakları Sözleşmesi İhlallerinin Önlenmesine İlişkin Eylem Planı)*, Official Gazette, 1 March 2104.

⁴⁸⁰ European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 48, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

rights and liberties and the minimisation of the number of applications against Turkey brought before the ECtHR.⁴⁸¹

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

a) Mechanisms

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

b) Rules contrary to the principle of equality

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

One major example of the violation of the principle of equality is found in Article 42 of the Constitution. According to Paragraph 9 of Article 42, 'No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education.' This provision constitutes discrimination against ethnic and linguistic minorities.

Under Article 3 of the Settlement Law (no. 5543), only individuals 'from the Turkish race and belonging to the Turkish culture' are admitted to Turkey as migrants. Article 81 of the Law on Political Parties prohibits political parties from (a) claiming that 'minorities exist (...) based on national, religious, confessional, racial or language differences', (b) 'protecting, developing or disseminating language or cultures other than the Turkish language and culture' and (c) using languages other than Turkish in their party programmes, meetings, and written and visual propaganda materials.

Some provisions of the legislation are not discriminatory per se. However, they are interpreted and implemented in a discriminatory manner. For example, according to Article 8 paragraph (g) of the Law on Judges and Prosecutors, in order to be appointed as a candidate judge or prosecutor, a person 'should not have any physical or mental illness or disability that would prevent the person from carrying out his/her responsibilities as a judge or a prosecutor continuously in every part of the country; or any disabilities which cause limitations in controlling the movements of the organs; speech different from that which is customary and would be found odd by people'. In practice, this provision leads to the elimination of all candidates with disabilities.

So far, no study which exhaustively identifies discriminatory legislation has been carried out.

⁴⁸¹ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 3.

9 COORDINATION AT NATIONAL LEVEL

Turkey does not have a government department/other authority tasked with dealing with or coordinating issues in regard to anti-discrimination. According to a press statement issued on April 2010 by the Secretariat General for EU Affairs, a task force on anti-discrimination was established to monitor and coordinate the steps to be taken in the fight against discrimination.⁴⁸² The task force was reported to include representatives from the Ministry of Justice, Ministry of Interior, Ministry of Foreign Affairs, Ministry of Labour and Social Security, Human Rights Institution, General Directorate on the Status of Women, Disability Administration and Agency for Social Services and Child Protection. These representatives would be in touch with 81 deputy governors. These efforts would be coordinated by the Secretariat General for EU Affairs.⁴⁸³ No further information is available on this. In 2013, the Disabled Rights Monitoring and Evaluation Board was established to 'carry out necessary administrative and legal arrangements for the protection and promotion of the rights of the disabled'.⁴⁸⁴

Turkey has no anti-racism or anti-discrimination national action plans. Instead, since March 2014, it has had a National Human Rights Action Plan, which was prepared by the Ministry of Justice, in cooperation with the Council of Europe. National human rights organisations criticise the government for not having consulted civil society in drafting the National Human Rights Action Plan and for not having taken account of recommendations it had accepted from the UN in the first Universal Periodic Review.⁴⁸⁵

As far as persons with disabilities are concerned, the General Directorate of Services for Persons with Disabilities and the Elderly within the Ministry of Family and Social Policy is the focal point designated for the implementation of the UN Convention on the Rights of Persons with Disabilities. The Strategy Paper on Accessibility and the National Action Plan (SPANAP), which were adopted in November 2010 pursuant to a government decision which had declared 2010 the year of accessibility for persons with disabilities, exist only on paper.⁴⁸⁶ SPANAP is based on the premise that, despite a number of laws and regulations adopted since the late 1990s, the central Turkish Government and local municipalities fail to work in a holistic and systematic manner, rules concerning accessibility are being implemented in an inadequate and inaccurate fashion and many of the limited measures adopted to ensure accessibility are not usable. To remedy these problems, SPANAP aims for the following three goals: revising the legislative framework, raising societal awareness and ensuring implementation. However, as of the end of 2013, the implementation of SPANAP 'remains limited'.⁴⁸⁷ While a Board on Monitoring and Evaluating the Rights of People with Disabilities was set up to 'promote the implementation and monitoring' of the UN Convention on the Rights of Persons with Disabilities,⁴⁸⁸ a

⁴⁸² Turkey, Republic of Turkey Prime Ministry Secretariat General for EU Affairs (2010), Conclusions of the 20th Reform Monitoring Group Meeting, Konya, Press Statement, 9 April 2010.

⁴⁸³ Müderrisoğlu, O. (2010), 'Ayrımcılık için Özel Görev Gücü Kuruluyor' ('New Task Force to be Established against Discrimination'), *Sabah*, 14 March 2010, http://www.sabah.com.tr/Gundem/2010/03/14/ayrimcilik_in_ozel_gorev_gucu_kuruluyor.

⁴⁸⁴ Turkey (2014), *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 18.

⁴⁸⁵ United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), *Summary prepared in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Turkey*, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 3.

⁴⁸⁶ Turkey, The Strategy Paper on Accessibility Strategy and the National Action Plan (*Ulaşılabilirlik Stratejisi ve Eylem Planı*) (2010-2011), Official Gazette, 12 November 2010.

⁴⁸⁷ European Commission (2013), *Turkey Progress Report*, Brussels, p. 58, available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf.

⁴⁸⁸ Turkey, *Initial Report on the Convention on the Rights of Persons with Disabilities based on Article 35 of the Convention*, 3 August 2015, p. 8, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2FC%2FTUR%2f1&Lang=en.

national monitoring mechanism as required by the Convention has not yet been established.⁴⁸⁹

Since 2011, the Ministry of Family and Social Policies has been tasked with national coordination of all initiatives undertaken by the Government under the 'Roma opening', declared in 2009 'with a view to identifying and seeking solutions for the problems faced by the Roma particularly in the fields of employment, housing, health and education through increasing dialogue between the Roma and relevant Government units'.⁴⁹⁰ To that end, starting from December 2009 a series of workshops and meetings was held between senior government leaders, including the Prime Minister and relevant ministers, and representatives of the Roma community.⁴⁹¹ The tangible outcomes of this deliberative process are as follows. An action plan to detect irregular school attendance and to prevent Roma children dropping out of school among was drafted; the Turkish Employment Agency initiated various programmes to enhance Roma participation in the labour market; all governorates were instructed to issue identity cards to Roma citizens; and housing has been constructed for Roma. On the other hand, despite this recent evidence of political will and the considerable lip service paid to addressing the problems of Roma, the Government did not join the international 2005-2015 Decade of Roma Inclusion initiative.⁴⁹² Neither the now defunct Human Rights Institution nor the Ombudsman Institution have developed a Roma strategy.

The single most important outcome of this process is the adoption on 27 April 2016 of the 2016-2021 national strategy for the Roma and the first stage of the action plan for the period 2016-2018. The strategy addresses key obstacles to the social inclusion of Roma and proposes measures in areas such as housing, education, employment and health. In the education field, the strategy aims to achieve equal opportunity and access to quality education for Roma students and seeks to ensure that Roma young people complete compulsory education at the very least. In the field of employment, the strategic aim is to facilitate the entry of Roma citizens into the job market and to enhance their employment in quality jobs with safe working conditions. In housing, health and social services, the strategic goals are to provide Roma with access to adequate housing and to ensure that they enjoy health and social services more effectively. At the same time, an item on discrimination is notably missing from the national strategy and the action plan. Representatives of international and domestic Roma civil society organisations who had taken part in the deliberative process during 2009-2016 criticised the Government for having significantly shortened and watered down the draft national strategy that the Ministry of Family and Social Policies had shared with them in February 2016, and on which they had provided feedback.⁴⁹³

⁴⁸⁹ European Commission (2013), *Turkey Progress Report*, Brussels p. 58, available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf.

⁴⁹⁰ United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, p. 5, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴⁹¹ For a detailed listing of these events until 2014, see United Nations (UN), Committee on the Elimination of Racial Discrimination (CERD) (2014), *Consideration of reports submitted by States parties under article 9 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, pp. 12-15, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fTUR%2f4-6&Lang=en.

⁴⁹² European Commission (2014), *Turkey Progress Report*, Brussels, October 2014, p. 62, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf.

⁴⁹³ Hacer Foggo, 'Ulusal Roman Strateji Planı "İzleme Kurulu"na Öneriler-1', Facebook entry, 23 February 2017, available at: <https://www.facebook.com/377799739037919/photos/pcb.783857811765441/783857395098816/?type=3>.

10 CURRENT BEST PRACTICES

- Adoption of a national strategy and action plan on the Roma.
- Envisaging the establishment of a specialised body on equality and non-discrimination, the Human Rights and Equality Institution of Turkey, under the anti-discrimination law adopted in 2016.
- The competence of this body not only to receive complaints of discrimination but also to institute *ex officio* investigations into human rights and non-discrimination breaches.
- The power of the new body to issue administrative sanctions.
- The introduction of age and ethnicity as non-discrimination grounds in the Law on the Human Rights and Equality Institution of Turkey.
- The introduction under the Law on the Human Rights and Equality Institution of Turkey of definitions of segregation, direct discrimination, indirect discrimination, multiple discrimination, discrimination by assumption, instructions to discriminate, mobbing in the workplace, harassment, disability and reasonable accommodation (not entirely in accordance with the EU Directives, since the ground of sexual orientation is not covered).
- The competences of the new equality body

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

The directives have not (yet) been transposed to national law.

11.2 Other issues of concern

Although the directives have not (yet) been transposed into national law, the following issues do raise concern.

- While there is finally to be a specialised body for the promotion of equal treatment and prohibition of discrimination, it will also fulfil the function of the National Prevention Mechanism on Torture, which may dilute its strength and effectiveness.
- The equality body's independence has not been ensured in line with the Paris Principles and the EU *acquis*.
- The grounds of anti-discrimination in the Law on the Human Rights and Equality Institution of Turkey, the Constitution and various laws still do not include sexual orientation.
- The scope of the duty to provide reasonable accommodation is more limited than the Employment Equality Directive 2000/78/EC. The test regarding reasonable accommodation is non-existent: consequently, there is no guidance for labour inspectors, judges, employers and persons with disabilities.
- There is no specific prohibition regarding victimisation, discrimination by association and hate speech.
- The Law on the Human Rights and Equality Institution of Turkey and the Law on Disabilities do not elaborate on what can be considered a legitimate aim for the purpose of objective justification of indirect discrimination.
- Sanctions are not explicitly mentioned in various laws containing anti-discrimination provisions. Where they are mentioned, they are not dissuasive. Violations which are criminal offences are punishable with short prison sentences which are often convertible to small fines.
- Turkish law does not explicitly recognise the standing of non-governmental organisations to bring claims in support of victims of discrimination, with the exception of trade unions, consumer protection associations and associations working for the protection and preservation of the environment, culture and heritage. In addition, in criminal cases, any legal entity which can demonstrate harm is de jure entitled to be granted standing. However, court practice varies.
- The mandates of the national and local human rights bodies and the Ombudsman Institution do not explicitly refer to protection from discrimination and offer limited possibilities for intervention and influence.
- Discriminatory and hate speech and conduct against minorities, particularly Roma, LGBTI persons, Kurds and non-Muslims (particularly Jews) is rampant in daily life, political discourse and the media.
- The judicial authorities are reluctant to enforce legislation prohibiting hate speech and discrimination.
- The various government initiatives launched with the stated goal of addressing the problems of Kurds, Roma and Alevis have not produced tangible policy outcomes and legislative measures to address the discrimination these groups face in education, employment, housing, access to social services and freedom of religion.
- The ECtHR's rulings against mandatory religion courses, the non-recognition of Alevi places of worship and the exclusion of these places of worship from social advantages granted to mosques, and the mandatory indication of religion in official identity cards remain unimplemented.
- Turkey is the only member of the Council of Europe which does not recognise the right to conscientious objection to military service. The ECtHR's rulings on this issue remain unimplemented.

- The Government continues to develop policies, design laws and adopt executive measures in the area of human rights and anti-discrimination without consulting NGOs or, in the rare cases where it does, without taking into account their suggestions or criticisms.

12 LATEST DEVELOPMENTS IN 2016

12.1 Legislative amendments

On 6 April 2016, the Turkish Parliament adopted a revised version of the draft law on anti-discrimination, pending since 2009. Turkey's first anti-discrimination law also provides for the establishment of the country's first equality body.

In April 2016, the Turkish Government adopted a 2016-2021 national strategy and 2016-2018 action plan for Roma.

12.2 Case law

Name of the court: European Court of Human Rights

Date of decision: 22 November 2016

Name of the parties: *Kaos GL v. Turkey*

Reference number: Application no. 4982/07

Brief summary: A Turkish court had ordered the confiscation of all copies of an issue on pornography of a magazine published by Kaos GL, an LGBT association, on grounds of public morality. The ECtHR found the measure to be a disproportionate infringement of freedom of expression which is not necessary in a democratic society.

Name of the court: European Court of Human Rights

Date of decision: 26 April 2016

Name of the parties: *Case of İzzettin Doğan and Others v. Turkey*

Reference number: Application no. 62649/10

Brief summary: In a precedent-setting judgment, the Grand Chamber of the ECtHR found Turkey's policies towards the Alevi minority in their entirety to violate the rights of the Alevi minority under Article 9 (freedom of religion) and Article 14 (non-discrimination). Noting that Alevis face numerous problems with regard to the organisation of their religious life, the right of parents not to have their children attending primary and secondary schools to take mandatory religion classes teaching the Sunni faith and interpretation of Islam, the lack of legal status of their religious leaders (*dedes*) and the absence of any institution to train personnel to deliver their religious services, the Grand Chamber concluded that the Alevi faith was excluded from all benefits enjoyed by the recipients of Sunni religious public services. The non-recognition of the Alevi faith and the absence of a clear legal framework governing such unrecognised religious minorities caused numerous legal, organisational and financial problems for the Alevi community – such as inability of access to courts and inability to receive donations – and subjugated the Alevis to the good will of the authorities, in violation of Article 9. With respect to Article 14, the Grand Chamber concluded that the Alevis received less favourable treatment than the beneficiaries of the religious public services provided by the Diyanet, despite being in a situation comparable to that of the Sunni majority. Pointing out that the religious services provided by the Diyanet to the holders of the Sunni faith were regarded as a public service and received substantial funds from the state budget and indeed were almost entirely subsidised by the state, the Grand Chamber found that depriving the Alevis of a comparable status on the ground that their faith was classified as a 'Sufi order' by the authorities constituted differential treatment which lacked an objective and reasonable justification.

Name of the court: European Court of Human Rights

Date of decision: 23 February 2016

Name of the parties: *Çam v. Turkey*

Reference number: Application no. 51500/08

Brief summary: In a petition filed by a young woman with visual disability who had not been admitted to music academy in Turkey because she did not submit a report showing that she could follow the classes without help, the ECtHR found a violation of Article 14 together with Article 2 of Protocol 1. Referring to both Article 14 and the UN Convention

on Disability in its discussion of reasonable accommodation, the Court concluded that the Turkish authorities made no effort whatsoever to identify the needs of the applicant. This was the first time that the Court had started to explain the concept of reasonable accommodation in its jurisprudence.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Turkey
Date: 1 January 2017

Title of legislation (including amending legislation)	Title of the law: Law on the Human Rights and Equality Institution of Turkey (no. 6701) Date of adoption: 6 April 2016. Entry into force: 20 April 2016. Latest amendments: N/A Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6701.pdf Grounds covered: sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age.
	Civil law
	Material scope: Employment, social protection, social advantages, access to goods and services, education, housing (public and private)
	Principal content: direct discrimination; indirect discrimination; failure to provide reasonable accommodation; harassment; discrimination by assumption; multiple discrimination; mobbing; segregation; instruction to discriminate and compliance with such instruction.
Title of legislation (including amending legislation)	Title of the law: Labour Law (no. 4857) Date of adoption: 22 May 2003 Latest amendments: 4 April 2015 Entry into force: 10 June 2003 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf Grounds covered: Language, race, colour, gender, disability, political opinion, philosophical belief, religion and sect or any such considerations
	Civil law
	Material scope: Employment (public and private)
	Principal content: Direct discrimination, indirect discrimination (gender and pregnancy based), (sexual) harassment, Victimization (very limited)
	Principal content: Direct discrimination, (sexual) harassment
Title of legislation (including amending legislation)	Title of the law: Law on Persons with Disabilities (no. 5378) Date of adoption: 01 July 2005 Latest amendments: 18 November 2014 Entry into force: 07 July 2005 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5378.pdf Grounds covered: Disability
	Civil law
	Material scope: Public and private employment
	Principal content: Direct discrimination, reasonable accommodation
Title of legislation (including amending legislation)	Title of the law: Basic Law on National Education (no. 1739) Date of adoption: 14 June 1973 Latest amendments: 19 November 2014 Entry into force: Entry into force: 24 June 1973 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.1739.pdf Grounds covered: Language, race, gender, religion, disability
	Civil law
	Material scope: Education
	Principal content: Direct discrimination
	Title of the law: Law on Civil Servants (no. 657)

Title of legislation (including amending legislation)	Date of adoption: 14 July 1965 Latest amendments: 27 March 2015 Entry into force: 23 July 1965 Web link: http://www.mevzuat.gov.tr/MevzuatMetin/1.5.657.pdf Grounds covered: Language, race, gender, political thought, philosophical belief, religion and sect
	Civil law
	Material scope: All acts of civil servants – unlimited material scope (Public employment, access to goods or services (including housing) provided by the public sector, social protection, social advantages, public education)
	Principal content: Direct discrimination
	Principal content:

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Turkey
Date: 1 January 2017

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4.11.1950	18.05.1954	No	Yes	Yes, particularly in constitutional complaints
Protocol 12, ECHR	18.04.2001	Not ratified	N/A	No	N/A
Revised European Social Charter	16.10.2004	27.06.2007	Article 4 (3), 7(5), 8, 15, 19, 20, 23, 27	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	15.08.2000	23.09.2003	Article 27	Yes	In theory yes, but courts are reluctant to accept
Framework Convention for the Protection of National Minorities	Not signed	N/A	N/A	N/A	N/A
International Covenant on Economic, Social and Cultural Rights	15.08.2000	23.09.2003	Articles 13(3) and 4	N/A	In theory yes, but courts are reluctant to accept
Convention on the Elimination of All Forms of Racial Discrimination	13.10.1972	16.09.2002	No	No	In theory yes, but courts are reluctant to accept
Convention on the Elimination of All Forms of	14.10.1985	19.01.1986	No	No	In theory yes, but courts are reluctant to accept

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	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?
Discrimination Against Women					
ILO Convention No. 111 on Discrimination	13.12.1966	21.09.1967	No	Yes	In theory yes, but courts are reluctant to accept
Convention on the Rights of the Child	14.09.1990	4.04.1995	Articles 29 and 30	N/A	In theory yes, but courts are reluctant to accept
Convention on the Rights of Persons with Disabilities	30.03.2007	28.09.2009	None	No	In theory yes, but courts are reluctant to accept
None	Yes	In theory yes, but courts are reluctant to accept			

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